
PLAYING FOR PEANUTS: DETERMINING FAIR COMPENSATION FOR NCAA STUDENT-ATHLETES

ABSTRACT

After student-athletes' athletic careers end, they walk off the playing field into the rest of their lives. For their blood, sweat, and tears, the National Collegiate Athletic Association (NCAA) provides them with year-to-year scholarships and a skill set geared more toward athletics than academics. The NCAA has constructed a commercial enterprise to suppress student-athlete compensation and increase its total revenue. To vindicate their rights, student-athletes should bring right of publicity and antitrust claims. If successful, courts will impose less restrictive alternatives to the NCAA's current compensation restrictions. This Note discusses two alternatives: multiyear scholarships and percentage-based trust funds. These alternatives reestablish the NCAA's commitment to education and allow student-athletes to control their right of publicity. Student-athletes are no longer being fairly compensated, and a change needs to occur to prevent the NCAA from continuing to exploit them.

TABLE OF CONTENTS

I. Introduction	256
II. How Far We Have Come: A Look at the NCAA Landscape and the Evolution of Amateurism	257
A. The NCAA's Creation of Terms.....	258
B. Entitled to Something	260
III. The Right of Publicity: The NCAA's Appropriation of Student-Athletes' NILs	261
A. The NCAA's Use of Student-Athletes' NILs.....	262
1. First Amendment Protection	262
2. The <i>Rogers</i> Test.....	263
3. The Transformative Use Test.....	264
B. The Commercial Value of Student-Athletes' NILs	265
C. Appropriated for Commercial Gain.....	266
D. Lack of Consent	267
1. Ambiguous Contract	267
2. Unconscionable Contract.....	268
E. Commercial Injury.....	271
IV. NCAA Compensation Restrictions: Restraining Trade Under the Sherman Act.....	273
A. Agreement to Restrain Trade	274

B.	Interstate Commerce	275
C.	Unreasonable Restraints of Trade.....	275
1.	The Per Se Rule	276
2.	The Rule of Reason	276
a.	Adverse effects	277
b.	Procompetitive justification.....	278
c.	Less restrictive means.....	282
V.	Conclusion: Dividing Up The Revenue.....	283
A.	Multiyear Scholarships.....	283
B.	Percentage-Based Trust Funds.....	287
C.	Final Takeaways.....	290

I. INTRODUCTION

As the National Collegiate Athletic Association (NCAA) has transformed into an organization that runs a billion dollar industry, a debate has begun about whether student-athletes should be entitled to greater compensation than a one-year renewable athletic scholarship.¹ Ed O'Bannon has elevated this argument for giving student athletes greater compensation from a mere possibility to a potential reality.² O'Bannon played college basketball at the University of California Los Angeles (UCLA).³ During the 1995 season, his senior year, he was the most valuable player of the NCAA men's basketball tournament and led UCLA to a NCAA championship.⁴ Thirteen years later, O'Bannon discovered he was featured in a college basketball video game manufactured by EA Sports.⁵

1. See Jon Solomon, *O'Bannon vs. NCAA: A Cheat Sheet for NCAA's Appeal of Paying Players*, CBSSPORTS.COM (Mar. 13, 2015), <http://www.cbssports.com/college-football/writer/jon-solomon/25106422/obannon-vs-ncaa-a-cheat-sheet-for-ncaas-appeal-of-paying-players> [hereinafter Solomon, *A Cheat Sheet*].

2. See Steve Berkowitz, *O'Bannon Plaintiffs Ask Supreme Court to Take Case*, USA TODAY (Mar. 15, 2016), <http://www.usatoday.com/story/sports/college/2016/03/15/obannon-plaintiffs-ask-supreme-court-antitrust-case/81803668/> (discussing O'Bannon's lawsuit on antitrust laws and student-athletes' compensation).

3. Nabeel Gadit, Note, *An End to the NCAA's Exploitation of Former Student-Athletes: How O'Bannon v. NCAA Highlights the Need for an Inalienable Reversionary Interest in the Right of Publicity for Former Student-Athletes*, 30 CARDOZO ARTS & ENT. L.J. 347, 351 (2012).

4. *Id.*

5. *Id.* at 352; Lee Romney & David Wharton, *Ex-UCLA Star Ed O'Bannon Takes Stand in Antitrust Suit Against NCAA*, L.A. TIMES (June 9, 2014),

The avatar in the game replicated O'Bannon's physical characteristics, wore his collegiate jersey number, and mimicked his left-handed shot.⁶ O'Bannon could not believe this was legal, let alone rationalize why he was not being paid for his appearance in the video game.⁷ In 2009, O'Bannon brought suit against the NCAA and Collegiate Licensing Company.⁸ He alleged the NCAA's amateurism rules unlawfully prevented him from being compensated—during and after his collegiate career—for the sale of his name, image, and likeness (NIL).⁹ After evaluating O'Bannon's case, *O'Bannon v. NCAA*, the United States Court of Appeals for the Ninth Circuit held that the NCAA's amateurism rules unreasonably restrained the opportunities offered by Division I schools in the college education market.¹⁰ This ruling could change the landscape of college athletics and provide an opportunity for student-athletes to receive greater compensation.¹¹

This Note explores the evolution of college athletics and amateurism from a legal perspective.¹² It focuses on the student-athletes' right of publicity¹³ and the anticompetitive effects of the current NCAA system.¹⁴ Lastly, it discusses the Ninth Circuit's holding in *O'Bannon* and offers better alternative forms of compensation for student-athletes.¹⁵

II. HOW FAR WE HAVE COME: A LOOK AT THE NCAA LANDSCAPE AND THE EVOLUTION OF AMATEURISM

College athletics were first implemented into academic institutions by the elite schools of Great Britain.¹⁶ This model of education made its way

<http://www.latimes.com/local/la-me-obannon-trial-20140610-story.html>.

6. Gadit, *supra* note 3, at 352; Steve Fainaru & Tom Farrey, *Game Changer*, ESPN NEWS (July 27, 2014), http://espn.go.com/espn/otl/story/_id/11255945/washington-attorney-michael-hausfeld-most-powerful-man-sports.

7. Matthew J. Gustin, *The O'Bannon Court Got It Wrong: The Case Against Paying NCAA Student-Athletes*, 42 W. ST. L. REV. 137, 152 (2015).

8. *See O'Bannon v. NCAA*, 802 F.3d 1049, 1055 (9th Cir. 2015).

9. *Id.*

10. *See id.* at 1070–71.

11. *See id.* at 1053 (noting that the district court opinion is the first decision by a federal court to hold that the NCAA violated antitrust laws).

12. *See infra* Part II.

13. *See infra* Part III.

14. *See infra* Part IV.

15. *See infra* Part V.

16. Laura Freedman, Note, *Pay or Play? The Jeremy Bloom Decision and NCAA Amateurism Rules*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 673, 676 (2003).

across the Atlantic and took root in U.S. universities around 1869.¹⁷ Soon after, universities realized their reputations were tied to the success of their athletic programs¹⁸ and that winning programs increased the university's visibility and prestige.¹⁹ At the turn of the twentieth century, the public was growing concerned about the numerous injuries occurring in college sports.²⁰ For this reason, 62 universities decided to form a governing body of college athletics.²¹ It was originally named the Intercollegiate Athletic Association before changing its name to the NCAA.²² The universities received membership to the NCAA and determined the NCAA's primary purposes would be to: (1) develop standardized rules to improve student-athlete safety²³ and (2) ensure only amateurs participate in college athletics.²⁴

A. The NCAA's Creation of Terms

The NCAA created the term *student-athlete* to further its concept of amateurism.²⁵ Former NCAA executive director Walter Byers said he constructed the term *student-athlete* to be deliberately ambiguous; his goal was for the NCAA not to be required to provide students workers' compensation benefits, as they were not employees, or to pay them directly as athletes because they were not professionals.²⁶ After the careful creation of the term *student-athlete*, the NCAA fashioned its own definition of *amateurism*.²⁷ The historic definition of "amateurism" is "[a]ny gentleman who has never competed in an open competition nor for public payment nor

17. O'Bannon v. NCAA, 802 F.3d 1049, 1053 (9th Cir. 2015).

18. Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 16 (2000).

19. Robert John Givens, Comment, "*Capitamateurism*": *An Examination of the Economic Exploitation of Student-Athletes by the National Collegiate Athletic Association*, 82 UMKC L. REV. 205, 207-08 (2013).

20. Smith, *supra* note 18, at 12.

21. O'Bannon, 802 F.3d at 1053.

22. *Id.*

23. Ryan Vanderford, Note, *Pay-for-Play: An Age-Old Struggle for Appropriate Reform in a Changing Landscape Between Employer and Employee*, 24 S. CAL. INTERDISC. L.J. 805, 807 (2015).

24. *Id.*

25. *Id.* at 808; Taylor Branch, *The Shame of College Sports*, ATLANTIC (Oct. 2011), <http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/>.

26. Vanderford, *supra* note 23, at 808.

27. *See id.* at 809.

admission money”²⁸ Evidently, when the NCAA decided to allow student-athletes to receive athletic scholarships based on their athletic abilities, it contradicted the historic meaning of *amateurism*.²⁹ The NCAA manipulated “amateurism” to mean a student-athlete who does not receive compensation in excess of an athletic scholarship.³⁰ If a student-athlete violates the NCAA’s definition of *amateurism*, he or she will be deemed ineligible to participate in NCAA collegiate athletic events.³¹ Thus, the formation of amateurism was designed to protect the NCAA’s profits generated from its student-athletes.³²

The majority of the scholarships student-athletes receive are one-year renewable scholarships.³³ If student-athletes are injured, unsuccessful, or do not fit the coach’s scheme, they can lose their anticipated free education, regardless of how they perform in the classroom.³⁴ In 2012, the NCAA began allowing universities to offer multiyear scholarships to student-athletes.³⁵ However, 62.12 percent of the 330 NCAA schools were opposed to this change, and only five universities provided multiyear scholarships to 10 percent or more of their student-athletes during the 2013–2014 season.³⁶ Coaches prefer one-year renewable scholarships because it allows them the flexibility to cancel or reduce student-athletes’ scholarships at their discretion.³⁷ In addition to being able to be revoked at will, athletic

28. John Anderson, *The Amateur Status*, in 15 THE GOLFING ANNUAL 10, 13 (David Scott Duncan ed., 1902).

29. See Andrew Zimbalist, *The Cost of Paying Athletes Would Be Far Too High*, U.S. NEWS (Apr. 1, 2013), <http://www.usnews.com/debate-club/should-ncaa-athletes-be-paid/the-cost-of-paying-athletes-would-be-far-too-high>.

30. *O’Bannon v. NCAA*, 802 F.3d 1049, 1054 (9th Cir. 2015); see *Amateurism, NCAA*, <http://www.ncaa.org/amateurism> (last visited Sept. 10, 2016).

31. *O’Bannon*, 802 F.3d at 1054.

32. See Branch, *supra* note 25.

33. Jon Solomon, *Schools Can Give Out 4-Year Athletic Scholarships, but Many Don’t*, CBSSPORTS.COM (Sept. 16, 2014), <http://www.cbssports.com/collegefootball/writer/jon-solomon/24711067/schools-can-give-out-4-year-scholarships-to-athletes-but-many-dont> [hereinafter Solomon, *4-Year Athletic Scholarships*].

34. See Brian Frederick, *Fans Must Understand That College Sports Is Big Business*, U.S. NEWS (Apr. 1, 2013), <http://www.usnews.com/debate-club/should-ncaa-athletes-be-paid/fans-must-understand-that-college-sports-is-big-business>; Solomon, *4-Year Athletic Scholarships*, *supra* note 33. During the 2008–2009 season, 22 percent of student-athlete basketball players’ scholarships were not renewed. Branch, *supra* note 25.

35. Solomon, *4-Year Athletic Scholarships*, *supra* note 33.

36. *Id.*

37. Erin Cronk, Note, *Unlawful Encroachment: Why the NCAA Must Compensate*

scholarships are not required to cover the cost of attendance.³⁸ If a student-athlete receives a scholarship for the cost of tuition, rather than a cost-of-attendance scholarship, the scholarship amount does not account for additional college expenses like school supplies, transportation, and housing.³⁹ Therefore, even if student-athletes' scholarships are renewed, they can still be left several thousand dollars short of the cost of attendance.⁴⁰

B. *Entitled to Something*

In 1984—in *NCAA v. Board of Regents of the University of Oklahoma*—the U.S. Supreme Court upheld the NCAA's compensation restraints to preserve the NCAA's definition of amateurism and to protect student-athletes from commercial exploitation.⁴¹ However, the industry of college athletics has substantially changed in the past 30 years.⁴² The NCAA has increased Division I membership to include approximately 350 universities⁴³ and has a yearly revenue just shy of \$1 billion.⁴⁴ Universities generate \$8 billion per year from their athletic programs.⁴⁵ Forty-nine million fans attend NCAA athletic events every year, and three-quarters of a billion more watch on television from the comforts of their own homes.⁴⁶ These same fans show their support by purchasing collegiate merchandise, which has resulted in the college licensing market growing into a \$4.6 billion industry.⁴⁷ Today it seems everyone involved in college sports is able to profit

Student-Athletes for the Use of Their Names, Images, and Likenesses, 34 U. LA VERNE L. REV. 135, 140–41 (2013).

38. See *Cost of Attendance Q&A*, NCAA, <http://www.ncaa.com/news/ncaa/article/2015-09-03/cost-attendance-qa> (last updated Sept. 3, 2015); Jon Solomon, *Cost of Attendance Results: The Chase to Pay College Players*, CBSSPORTS.COM (Aug. 20, 2015), <http://www.cbssports.com/college-football/news/cost-of-attendance-results-the-chase-to-pay-college-players/> [hereinafter Solomon, *Cost of Attendance*].

39. See *Cost of Attendance Q&A*, *supra* note 38; Solomon, *Cost of Attendance*, *supra* note 38.

40. Gustin, *supra* note 7, at 147.

41. See *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 101, 120 (1984); see also Gadit, *supra* note 3.

42. Solomon, *A Cheat Sheet*, *supra* note 1. Compare *Bd. of Regents*, 468 U.S. at 120, with *O'Bannon v. NCAA*, 802 F.3d 1049, 1053 (9th Cir. 2015).

43. *O'Bannon*, 802 F.3d at 1053.

44. Solomon, *A Cheat Sheet*, *supra* note 1.

45. Gustin, *supra* note 7, at 144.

46. Cronk, *supra* note 37, at 148 (discussing data taken from 2010).

47. See John A. Maghamez, Comment, *An All-Encompassing Primer on Student-Athlete Name, Image, and Likeness Rights and How O'Bannon v. NCAA and Keller v.*

from college athletics except the student-athlete.⁴⁸

“[T]he NCAA [has] erected a ‘nationwide money-laundering scheme’ that enriches conferences, schools, coaches and TV networks on the backs of unpaid athletes.”⁴⁹ When the NCAA enacted its rules, the “economic disparity between the value of a [year-to-year] scholarship and the amount of money generated by student-athletes did not exist.”⁵⁰ Although the NCAA argues its amateurism principles have not been hurt, college sports’ growth into a multibillion dollar industry indicates otherwise.⁵¹ The NCAA was designed to be an educational nonprofit organization, not a commercially driven enterprise.⁵² When *Board of Regents* was decided, amateurism was a reality; however, today it is nothing more than an ideal.⁵³ The NCAA should no longer be able to continue to oppress student-athlete compensation for its own benefit; therefore, a change to the current system is necessary.⁵⁴

III. THE RIGHT OF PUBLICITY: THE NCAA’S APPROPRIATION OF STUDENT-ATHLETES’ NILS

Student-athletes can attack the NCAA’s compensation restrictions through right of publicity claims.⁵⁵ *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.* was the first case to distinguish the right of publicity from the right of privacy.⁵⁶ A right of publicity is a property interest in one’s name, image, and likeness (NIL),⁵⁷ acquired through labor and effort, which society

NCAA *Forever Changed College Athletics*, 9 LIBERTY U. L. REV. 313, 316 (2015) (citing *About CLC*, COLLEGIATE LICENSING CO., <http://www.clc.com/About-CLC.aspx> (last visited Dec. 20, 2014)).

48. *Id.* at 321.

49. Fainaru & Farrey, *supra* note 6.

50. Givens, *supra* note 19, at 224 (quoting Michael P. Acain, Comment, *Revenue Sharing: A Simple Cure for the Exploitation of College Athletes*, 18 LOY. L.A. ENT. L.J. 307, 314 (1998)).

51. *See* Gadit, *supra* note 3, at 350–51.

52. Gustin, *supra* note 7, at 140.

53. *See* O’Bannon v. NCAA, 802 F.3d 1049, 1063–64 (9th Cir. 2015).

54. *See* Marc Edelman, *A Short Treatise on Amateurism and Antitrust Law: Why the NCAA’s No-Pay Rules Violate Section 1 of the Sherman Act*, 64 CASE W. RES. L. REV. 61, 63 (2013).

55. Cronk, *supra* note 37, at 152.

56. *See* *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953).

57. J. Alexander Johnson, *Identity Crisis*, 77 TEX. B.J. 30, 31 (2014).

deems to have social utility.⁵⁸ Thus, third-parties cannot create products containing the individual's NIL without permission.⁵⁹ A right of publicity claim is governed by the substantive law of the plaintiff's domicile.⁶⁰ It is a statutory right in 19 states and a common law right in 28 others.⁶¹ To bring a successful right of publicity claim, the plaintiff must prove: (1) the defendant used the plaintiff's NIL; (2) the plaintiff's NIL had commercial value; (3) the defendant appropriated that commercial value for the purpose of trade; (4) it was done without the plaintiff's consent; and (5) as a result, the plaintiff sustained a commercial injury.⁶²

A. The NCAA's Use of Student-Athletes' NILs

1. First Amendment Protection

The NCAA licenses student-athletes' NILs to third parties for the sale of merchandise.⁶³ However, the NCAA will argue its use is protected by the First Amendment.⁶⁴ The First Amendment encourages freedom of expression and creativity without government interference.⁶⁵ Thus, works of artistic expression and newsworthy publications that use one's NIL regularly receive First Amendment protection, even if done for profit.⁶⁶ For instance, in *ETW Corp. v. Jireh Publishing, Inc.*, a collage of pictures depicting Tiger Woods's achievements was afforded First Amendment protection because it was a form of artistic expression.⁶⁷ Similarly, in *Montana v. San Jose Mercury*

58. See *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1280 (9th Cir. 2013); *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 151 (3d Cir. 2013).

59. See *Rogers v. Grimaldi*, 875 F.2d 994, 1003–04 (2d Cir. 1989) (citing *Bi-Rite Enters., Inc. v. Button Master*, 555 F. Supp. 1188, 1198–99 (S.D.N.Y. 1983)).

60. *Rogers*, 875 F.2d at 1002 (citing *Se. Bank, N.A. v. Lawrence*, 489 N.E.2d 744, 745 (N.Y. 1985) (per curiam)).

61. Cronk, *supra* note 37, at 152 (quoting Kendall K. Johnson, Article, *Enforceable Fair and Square: The Right of Publicity, Unconscionability, and NCAA Student-Athlete Contracts*, 19 SPORTS LAW. J. 1, 9 (2012)); see Johnson, *supra* note 57, at 32.

62. RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 46–49 (AM. LAW INST. 1995); Cronk, *supra* note 37, at 151.

63. Gadit, *supra* note 3, at 347–48.

64. See *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1271 (9th Cir. 2013).

65. See U.S. CONST. amend. I.

66. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 802 (Cal. 2001) (citing *Guglielmi v. Spelling-Goldberg Prods.*, 603 P.2d 454, 459 (Cal. 1979) (in bank) (Bird, C.J., concurring)); see Johnson, *supra* note 57, at 32.

67. See *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 938 (6th Cir. 2003).

News, Inc., reproduced newspaper articles that covered Joe Montana's four National Football League Championships were considered newsworthy, and accordingly safeguarded by the First Amendment.⁶⁸ Both cases involved the addition of new elements that altered the original work's meaning and message.⁶⁹

"[W]hen a work contains significant transformative elements, it is not only especially worthy of First Amendment protection, but it is also less likely to interfere with the economic interest protected by the right of publicity."⁷⁰ However, mere reproductions of an individual's NIL, without creative or newsworthy elements, violate the right of publicity and will not receive First Amendment protection.⁷¹ In *Carson v. Here's Johnny Portable Toilets, Inc.*, the court held the catch phrase "Here's Johnny" was a violation of Johnny Carson's right of publicity because the defendant plainly took the catch-phrase associated with Carson for its own use.⁷² Likewise, in *Zacchini v. Scripps-Howard Broadcasting Co.*, the Supreme Court held, "No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay."⁷³ Therefore, the First Amendment is not absolute, and courts will balance the student-athletes' right of publicity against the NCAA's First Amendment right.⁷⁴ The most commonly used tests to balance these rights are the *Rogers* test and the "transformative use" test.⁷⁵

2. The Rogers Test

The *Rogers* test derives from *Rogers v. Grimaldi*; it analyzes the relationship between a defendant's use of a plaintiff's NIL and the work as a whole to determine if First Amendment protection should be awarded.⁷⁶

68. See *Montana v. San Jose Mercury News, Inc.*, 40 Cal. Rptr. 2d 639, 640–41 (Ct. App. 1995).

69. See *ETW Corp.*, 332 F.3d at 938; *Montana*, 40 Cal. Rptr. 2d at 640–41.

70. *Comedy III Prods.*, 21 P.3d at 808.

71. See *id.* at 810; Cronk, *supra* note 37, at 151 (noting instances in which courts have held First Amendment protection does not apply).

72. See *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 837 (6th Cir. 1983).

73. See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977).

74. See *Comedy III Prods.*, 21 P.3d at 802.

75. *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 153 (3d Cir. 2013); see Steve S. Chang, *Face Value Where's My NCAA Football Game?*, LANDSLIDE, Mar./Apr. 2015, at 8, 10.

76. *Hart*, 717 F.3d at 154.

Under the *Rogers* test, a defendant will be able to use a plaintiff's NIL unless the defendant explicitly intended to deceive consumers as to the source of the artistic expression.⁷⁷ A slight risk of consumers being misled is not enough for a plaintiff to overcome the presumption of First Amendment protection.⁷⁸ If a student-athlete's right of publicity claim were analyzed under the *Rogers* test, the NCAA would likely be able to continue licensing the student-athlete's NIL.⁷⁹ However, the *Rogers* test is arguably reserved only for celebrities and trademark issues.⁸⁰ Moreover, in *Hart v. Electronic Arts, Inc.*, the Third Circuit refused to apply the *Rogers* test because it did not feel that the test could properly balance the NCAA's First Amendment right against the student-athlete's right to control, manage, and profit from his or her own identity.⁸¹

3. The Transformative Use Test

The transformative use test, established in *Comedy III Products, Inc. v. Gary Saderup, Inc.*, weighs the right of publicity against the creative elements of the work to determine if it has been transformed into the defendant's own expression.⁸² The Third and Ninth Circuits applied the transformative use test—instead of the *Rogers* test—when balancing student-athletes' right of publicity against the NCAA's First Amendment rights.⁸³ Both cases involved video games manufactured by EA Sports that featured student-athletes.⁸⁴ The video games were made as realistic as possible and allowed users to play collegiate games as avatars that were exact replicas of real student-athletes.⁸⁵ During the design process of the video game, EA Sports used the student-athletes' real names to calculate the

77. *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1245 (9th Cir. 2013) (citing *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989)).

78. *See id.*

79. *See Hart*, 717 F.3d at 158.

80. Maghamez, *supra* note 47, at 327–28.

81. *See Hart*, 717 F.3d at 157.

82. *See id.* at 158; *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808 (Cal. 2001); *Kirby v. Sega of Am., Inc.*, 50 Cal. Rptr. 3d 607, 615 (Ct. App. 2006).

83. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1280–82 (9th Cir. 2013); *Hart*, 717 F.3d at 157, 165–67.

84. *In re NCAA Litig.*, 724 F.3d at 1271–72; *Hart*, 717 F.3d at 146.

85. *In re NCAA Litig.*, 724 F.3d at 1271–72; Maghamez, *supra* note 47, at 329; *see Tom Farrey, Players, Game Makers Settle for \$40M*, ESPN (May 31, 2014), http://espn.go.com/espn/otl/story/_/id/11010455/college-athletes-reach-40-million-settlement-ea-sports-ncaa-licensing-arm.

avatars' statistics correctly.⁸⁶ In an attempt to transform the work into its own expression, EA Sports deleted the student-athletes' names and assigned them random hometowns before releasing the video game.⁸⁷ However, the goal of the video game was to deliver consumers a product that contained precise detail, and it recreated the very setting in which student-athletes had achieved their prominence.⁸⁸ Thus, both courts held the EA Sports video games were nothing more than a digital reproduction of the student-athletes participating in their respective sports and did not contain significant creative elements to transform the student-athletes' NILs into EA Sports's own expressive work.⁸⁹

After these rulings, EA Sports stopped manufacturing college video games.⁹⁰ Nevertheless, the rationale behind these rulings can be applied to other forms of NCAA merchandise.⁹¹ One of the clearest examples is in the sale of student-athletes' jerseys.⁹² Although the backs of the jerseys do not contain the players' names, the numbers are an extension of the student-athletes' NILs.⁹³ For example, only numbers of the team's most popular players are sold because consumers associate the numbers with the student-athletes' identities.⁹⁴ Therefore, NCAA merchandise that does not sufficiently transform the student-athletes' NILs will be undeserving of First Amendment protection under the transformative use test.⁹⁵

B. The Commercial Value of Student-Athletes' NILs

After finding the NCAA did not convert a student-athlete's NIL into its own expression, a court will examine if the NCAA's merchandise derives its value from the student-athlete's NIL.⁹⁶ Studies have shown that a college

86. Cronk, *supra* note 37, at 148–49.

87. *In re NCAA Litig.*, 724 F.3d at 1271.

88. *See* *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576 (1977).

89. *In re NCAA Litig.*, 724 F.3d at 1276; *Hart*, 717 F.3d at 166.

90. Maghamez, *supra* note 47, at 332.

91. *See* Cronk, *supra* note 37, at 152–53.

92. *Id.* at 145.

93. *Id.*

94. *Id.*; Maghamez, *supra* note 47, at 333. At the University of Southern California, the top-selling jerseys were numbers two and seven—the numbers of offensive stars Robert Woods and Matt Barkley—while lesser-known student-athletes' jerseys were not made available for purchase. Cronk, *supra* note 37, at 145–46.

95. Maghamez, *supra* note 47, at 334.

96. *Id.* at 328–29.

basketball player at Louisville University has a fair market value of more than \$1.5 million,⁹⁷ and the average University of Texas football player is worth \$564,000.⁹⁸ Furthermore, the use of student-athletes' NILs has created a \$4.6 billion collegiate licensing market and an \$11 billion college sports broadcasting market.⁹⁹ Accordingly, it is undeniable that student-athletes' NILs contribute to the economic value of the products that the NCAA sells.¹⁰⁰

C. Appropriated for Commercial Gain

The NCAA takes the value of the student-athletes' NILs with the intent of increasing its total revenue.¹⁰¹ For instance, the NCAA actively licenses the student-athletes' NILs to third parties.¹⁰² EA Sports entered into a licensing agreement with the NCAA for the student-athletes' NILs.¹⁰³ As a result, EA Sports was able to sell 2.5 million copies of its college football and basketball video games in 2008.¹⁰⁴ Even though these video games did not use the student-athletes' actual names, they sold exceptionally well because they appropriated the student-athletes' NILs.¹⁰⁵ As recently as 2013, Internet searches of real student-athletes' names—on the NCAA's official team shop no less—would result in a page of the student-athletes' jerseys for

97. Cork Gaines, *The Average University of Louisville Basketball Player Is Worth \$1.5 Million per Year*, BUS. INSIDER (Dec. 16, 2014), http://www.businessinsider.com/louisville-ncaa-basketball-player-value-2014-12?utm_content=buffer25560&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer; see Alec Nathan, *Louisville, Kansas Top Wall Street Journal's Most Valuable CBB Programs*, BLEACHER REP. (Apr. 1, 2016), <http://bleacherreport.com/articles/2629492-louisville-kansas-top-wall-street-journals-most-valuable-cbb-programs>.

98. Gaines, *supra* note 97.

99. Maghamez, *supra* note 47, at 315, 316. The NCAA reached a 14-year, \$10.8 billion agreement with CBS and Turner Sports for the television rights to the NCAA men's basketball. *Id.* at 315. In 2016, the contract was extended for an additional eight years and \$8.8 billion. *Turner, CBS and the NCAA Reach Long-Term Multimedia Rights Extension for NCAA Division I Men's Basketball Championship*, NCAA (Apr. 12, 2016), <http://www.ncaa.com/news/basketball-men/article/2016-04-12/turner-cbs-and-ncaa-reach-long-term-multimedia-rights>.

100. See Solomon, *A Cheat Sheet*, *supra* note 1 (noting NIL provisions in television contracts have economic value to television networks).

101. See Gadit, *supra* note 3, at 356–57.

102. *Id.*

103. Branch, *supra* note 25.

104. *Id.*

105. See *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1271–72 (9th Cir. 2013); *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 146 (3d Cir. 2013).

sale.¹⁰⁶ Clearly, the NCAA seeks to appropriate the value of the student-athletes' NILs for its own commercial gain.¹⁰⁷

D. *Lack of Consent*

In order to receive an athletic scholarship, NCAA student-athletes must sign Form 15-3a (student-athlete statement).¹⁰⁸ The terms of this seven-page agreement are referred to within the 420-page NCAA Division I Manual.¹⁰⁹ When student-athletes sign the student-athlete statement, they agree to the NCAA principles of amateurism and forfeit any compensation in relation to their student-athlete personas.¹¹⁰ Section 12.5.1.1.1 of the Division I Manual allows the NCAA, or a third-party licensing company acting on behalf of the NCAA, perpetually to use the student-athletes' NILs to "promote NCAA championships or other NCAA events, activities or programs."¹¹¹ Hence, the NCAA will argue it does not violate the student-athletes' right of publicity because the student-athletes consented to the NCAA's use of their NILs when they signed the student-athlete statement.¹¹² In order to succeed on their right of publicity claim, student-athletes must prove the student-athlete statement is an invalid contract; they can do this by showing it is ambiguous or unconscionable.¹¹³

1. *Ambiguous Contract*

A contract is ambiguous when its terms are subject to more than one

106. See Gary Parrish, *ESPN's Jay Bilas Spent Tuesday Afternoon Embarrassing the NCAA*, CBSSPORTS.COM (Aug. 6, 2013), <http://www.cbssports.com/collegebasketball/eye-on-college-basketball/23040941/did-you-see-what-jay-bilas-did-to-the-shopncaasportscom-search-engine>.

107. See Maghamez, *supra* note 47, at 336.

108. See NCAA, FORM 15-3A STUDENT-ATHLETE STATEMENT – NCAA DIVISION I, at 2 (2015–16 Academic Year), <https://web.archive.org/web/20160510190631/http://www.ncaa.org/sites/default/files/Form%2015-3a%20-%20Student-Athlete%20Statement.pdf>.

109. NCAA, 2015-16 NCAA DIVISION I MANUAL 76 (2015), http://grfx.cstv.com/photos/schools/usc/genrel/auto_pdf/2015-16/misc_non_event/NCAA_Division_I_Manual.pdf [hereinafter DIVISION I MANUAL].

110. See *id.* at 60, 61–64.

111. *Id.* at 71.

112. Givens, *supra* note 19, at 218.

113. See *id.* (noting licensing of student-athlete identities cannot be justified by the student-athlete statement when the statement is considered an unconscionable contract).

reasonable interpretation.¹¹⁴ If ambiguous, a contract will be construed against the drafting party.¹¹⁵ The student-athlete statement is intended to prevent commercial exploitation of college athletes and to distinguish amateur sports from professional sports.¹¹⁶ However, the NCAA's actions are contrary to this objective, as it sells the student-athletes' NILs for its own monetary gain.¹¹⁷ In effect, the NCAA has used the student-athlete statement to build a \$4.6 billion collegiate merchandise market, while concurrently preventing student-athletes from receiving compensation for their NILs.¹¹⁸ Thus, the purpose and application of the student-athlete statement is ambiguous and should be construed against the NCAA.¹¹⁹

The student-athlete statement consists of student-athletes giving rights to their NILs to the NCAA in exchange for amateur status.¹²⁰ A court could reasonably find that the NCAA contradicted its principle of amateurism when it licensed student-athletes' NILs to third-party, for-profit companies.¹²¹ If found to invalidate amateurism, the student-athlete statement would be void as a matter of law because it lacks consideration.¹²²

2. Unconscionable Contract

If a court determines a contract does not lack consideration, student-athletes can still prove lack of consent by showing the student-athlete statement was unconscionable.¹²³ Unconscionable contracts are one-sided agreements that contain oppressive terms due to unequal bargaining power.¹²⁴ A contract is because of to unconscionability when procedural and

114. See *Sligo, Inc. v. Nevois*, 84 F.3d 1014, 1019 (8th Cir. 1996) (quoting *CIT Group Sales Fin. Inc. v. Lark*, 906 S.W.2d 865, 868 (Mo. Ct. App. 1995); cf. *State v. Williams*, 313 P.3d 470, 473 (Wash. Ct. App. 2013) (noting statutes with two or more reasonable interpretations are ambiguous).

115. See, e.g., *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 54 U.S. 52, 62 (1995).

116. DIVISION I MANUAL, *supra* note 109, at 4.

117. See, e.g., Branch, *supra* note 25.

118. See Cronk, *supra* note 37, at 152–53; Givens, *supra* note 19, at 218 (citing Matthew G. Matzkin, *Gettin' Played: How the Video Game Industry Violates College Athletes' Rights of Publicity by Not Paying for Their Likenesses*, 21 LOY. L.A. ENT. L.J. 227, 250 (2001)).

119. Maghamez, *supra* note 47, at 341, 345.

120. See Branch, *supra* note 25.

121. See Maghamez, *supra* note 47, at 339–40.

122. See *id.* at 340.

123. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 340 (2011).

124. *Id.*

substantive unconscionability are present at the formation of the contract.¹²⁵ Courts apply a sliding scale of unconscionability when determining if the contract is unenforceable; for instance, if there is more procedural unconscionability in the contract, less substantive unconscionability needs to be shown, and vice versa.¹²⁶

Procedural unconscionability consists of unequal bargaining power, which overly disadvantages one party.¹²⁷ Unequal bargaining power occurs when there is an absence of meaningful choice by one of the parties.¹²⁸ The parties must have had a reasonable opportunity to understand the terms of the contract based on their education, age, and business experience.¹²⁹ A party has a greater bargaining position when it has the advantage of time and receives advice from experts to structure the terms in its favor.¹³⁰ Hence, standardized agreements, like the student-athlete statement, which prevent meaningful bargaining, are more likely to be procedurally unconscionable.¹³¹

The student-athlete statement is procedurally unconscionable because the NCAA has used the same form for years and has made the necessary amendments to protect its interests better.¹³² Moreover, the opportunity for student-athletes to read the student-athlete statement is greatly diminished by the use of fine print and convoluted clauses.¹³³ The NCAA executives understand every detail of the contract, whereas the student-athlete—a high-school graduate—unknowingly signs away his or her right of publicity without realizing the consequences of the terms concealed in the student-athlete statement.¹³⁴

Further pointing to the NCAA's unequal bargaining power is the fact that it is mandatory for student-athletes to sign the student-athlete statement in order to compete in college athletics.¹³⁵ After high school, student-athletes

125. See *Wheaton v. Sexton's Lessee*, 17 U.S. (4 Wheat.) 503, 507 (1819); RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW INST. 1981).

126. Maghamez, *supra* note 47, at 341–42 (citing *Grayiel v. Appalachian Energy Partners 2001-D, LLP*, 736 S.E.2d 91, 102 (W. Va. 2012)).

127. Givens, *supra* note 19, at 219; Maghamez, *supra* note 47, at 342.

128. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

129. Cronk, *supra* note 37, at 155–56.

130. See Maghamez, *supra* note 47, at 347.

131. Cronk, *supra* note 37, at 153–54.

132. Maghamez, *supra* note 47, at 347.

133. See *id.*

134. See Cronk, *supra* note 37, at 159; Maghamez, *supra* note 47, at 347.

135. Maghamez, *supra* note 47, at 342.

are not permitted to join the National Basketball Association (NBA) or the National Football League.¹³⁶ Their best chance to play professionally is through playing against the most competitive opponents, which is in the NCAA.¹³⁷ Therefore, high school athletes essentially have to waive their right of publicity in order to have an opportunity to chase their professional dreams.¹³⁸ The NCAA uses its expertise and bargaining position to create procedurally unconscionable contracts.¹³⁹

Once procedural unconscionability is established, student-athletes must prove substantive unconscionability.¹⁴⁰ Courts determine substantive unconscionability by the “inequities, improprieties, or unfairness in the bargaining process and the formation of the contract, inadequacies that suggest a lack of a real and voluntary meeting of the minds.”¹⁴¹ Substantive unconscionability voids a contract when an outcome is unjust because of the contract’s terms being overly harsh or one-sided.¹⁴²

The NCAA uses its unequal bargaining power to enforce substantially unconscionable terms in the student-athlete statement.¹⁴³ The NCAA is only required to honor the student-athletes’ scholarships for one year and is given the ability to profit off the student-athletes’ NILs in perpetuity.¹⁴⁴ Since student-athletes have limited knowledge of the terms of the student-athlete statement and little bargaining power, it is unlikely they adequately consent to all of the terms.¹⁴⁵ A rational individual would not relinquish his or her ability to license his or her NIL in perpetuity—especially considering this right is tied to a billion-dollar collegiate licensing industry—unless he or she had little real choice in the matter.¹⁴⁶ Since the terms of the student-athlete statement are unreasonably oppressive, they will likely be found to be substantively unconscionable.

For centuries, courts have struck down otherwise valid agreements

136. O’Bannon v. NCAA, 802 F.3d 1049, 1056 (9th Cir. 2015).

137. *Id.*

138. Maghamez, *supra* note 47, at 343.

139. *Id.*

140. *Id.* at 347.

141. Dan Ryan Builders, Inc. v. Nelson, 737 S.E.2d 550, 558 (W. Va. 2012).

142. Cronk, *supra* note 37, at 156.

143. *See* Maghamez, *supra* note 47, at 343.

144. *See id.* at 345.

145. *See* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965); Maghamez, *supra* note 47, at 345–46.

146. *See* Cronk, *supra* note 37, at 160–61.

based on the doctrine of unconscionability, and the student-athlete statement should not be treated any differently.¹⁴⁷ The NCAA forces student-athletes to sign away their NILs—in perpetuity—to have the opportunity to play Division I athletics.¹⁴⁸ Furthermore, the NCAA retains all the revenue gained through commercialization of student-athletes' NILs and does not share its profits with the student-athletes, even after they have graduated or left the university.¹⁴⁹ In having a court determine the student-athlete statement is an unconscionable contract, fundamental fairness would be restored in contractual relations between the student-athletes and the NCAA.¹⁵⁰

E. *Commercial Injury*

The final element that student-athletes must prove is that they have been commercially injured by the NCAA's behavior.¹⁵¹ The NCAA acts to the detriment of student-athletes as it actively seeks licensing agreements through the Collegiate Licensing Company and restrains student-athlete compensation in order to maximize its revenue.¹⁵² The NCAA restricts the student-athletes' access to the commercial marketplace¹⁵³ but allows college coaches to enter into equipment contracts worth as much as \$400,000 a year.¹⁵⁴ Furthermore, the money generated from the student-athletes' NILs is used to build new stadiums and increase coaches' salaries, rather than for educational endeavors for the student-athletes.¹⁵⁵ If student-athletes attempt

147. Givens, *supra* note 19, at 219.

148. See Dan Wetzel, *Robertson Joins Suit vs. NCAA*, YAHOO SPORTS (Jan. 26, 2011), <https://sports.yahoo.com/news/robertson-joins-suit-vs-ncaa-000000932--spt.html>.

149. See *id.*

150. Cronk, *supra* note 37, at 158.

151. See Gadit, *supra* note 3, at 355 (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. c (AM. LAW INST. 1995)).

152. See *id.* at 356.

153. See *Former NCAA Head Byers Says Athletes Should Be Paid*, L.A. TIMES (Jan. 5, 1995), http://articles.latimes.com/1995-01-05/sports/sp-16613_1_college-athletics.

154. Michigan State University basketball coach Tom Izzo receives \$400,000 a year for his shoe and apparel contract with Nike. Vanderford, *supra* note 23, at 806.

155. Ramogi Huma, Opinion, *A Fair Day's Pay for a Fair Day's Work*, U.S. NEWS & WORLD REP. (Apr. 1, 2013), <http://www.usnews.com/debate-club/should-ncaa-athletes-be-paid/a-fair-days-pay-for-a-fair-days-work>.

to sell their autographs¹⁵⁶ or jerseys, they are punished by the NCAA.¹⁵⁷ However, the NCAA sells replicas of the student-athletes' jerseys and also allows sponsors to place corporate logos on their jerseys.¹⁵⁸ Additionally, the student-athlete statement harms former student-athletes because the NCAA holds their NILs in perpetuity.¹⁵⁹ It is illogical for the NCAA to have the right to continue to profit off the student-athlete after he or she has left school simply because he or she participated in college athletics.¹⁶⁰ Student-athletes create the economic value of college athletics, but in accepting an opportunity to play college sports, they are deprived from competing in the marketplace.¹⁶¹ Since the NCAA denies student-athletes all possible revenue derived from their college NILs, the student-athletes undoubtedly suffer a commercial injury.¹⁶²

The NCAA infringes on the student-athletes' right of publicity because it appropriates the value of the student-athletes' NIL for the purpose of trade.¹⁶³ Since the student-athlete statement is likely an unconscionable contract, the student-athletes have never consented to the NCAA's use of their NILs in this manner.¹⁶⁴ In order to prevent the continuance of a commercial injury, the right of publicity should revert back to the student-athlete.¹⁶⁵ The student-athletes likely can satisfy all the elements of a right of publicity claim and will be entitled to "any profits from the unauthorized use" of their NILs,¹⁶⁶ as well as injunctive relief to prevent the NCAA from

156. The NCAA suspended Texas A&M University quarterback Johnny Manziel and University of Georgia running back Todd Gurley for selling their autographs. Maghamez, *supra* note 47, at 314.

157. Ohio State University quarterback Terrelle Pryor and University of Georgia wide receiver A.J. Green were suspended for multiple games by the NCAA for selling their own jerseys. Branch, *supra* note 25.

158. *Id.*

159. *See* Maghamez, *supra* note 47, at 322.

160. *See id.*

161. *See* Charles P. Pierce, *The O'Bannon Decision*, GRANTLAND (Feb. 6, 2013), <https://grantland.com/features/ed-obannon-vs-ncaa/>.

162. *See* Maghamez, *supra* note 47, at 336.

163. Cronk, *supra* note 37, at 149.

164. *See* Gadit, *supra* note 3, at 355.

165. *Id.*

166. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 800 (Cal. 2001) (quoting CAL. CIV. CODE § 990(a) (1998) (current version at CAL. CIV. CODE § 3344.1(a)(1) (West 2016))); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 49 (AM. LAW INST. 1995).

continuing to appropriate the commercial value of their NILs.¹⁶⁷

IV. NCAA COMPENSATION RESTRICTIONS: RESTRAINING TRADE UNDER THE SHERMAN ACT

Although a right of publicity claim is an effective way for student-athletes to receive compensation, it presents difficulties as it is not recognized in every state.¹⁶⁸ Furthermore, even if student-athletes get past the First Amendment and consent issues, the right of publicity is limited to specific products that appropriate the student-athletes' NILs.¹⁶⁹ Some universities have recognized this potential problem and have stopped selling merchandise containing student-athletes' NILs altogether.¹⁷⁰ Therefore, to vindicate a broader set of rights, student-athletes should also bring a claim under § 1 of the Sherman Antitrust Act (Sherman Act).¹⁷¹

For student-athletes to be able to receive compensation under the Sherman Act, they must show that the NCAA's compensation restraints amount to anticompetitive behavior.¹⁷² In 1890, Congress enacted the Sherman Act to combat market manipulation that unreasonably restrained trade and competition.¹⁷³ Section 1 of the Sherman Act states, "Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal."¹⁷⁴ Taken literally, all trade would be illegal; thus, courts have interpreted the Sherman Act to prohibit only agreements that unreasonably restrain trade.¹⁷⁵ A restraint is unreasonable when the harm to competition outweighs the

167. Cronk, *supra* note 37, at 151, 161–62 (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 48 (AM. LAW INST. 1995)).

168. *See id.* at 152.

169. *See id.*

170. *See* Marc Tracy, *Days of Selling Popular College Players' Jerseys Seem Numbered*, N.Y. TIMES (Aug. 5, 2015), http://www.nytimes.com/2015/08/06/sports/ncaafootball/days-of-selling-popular-college-players-jerseys-seem-numbered.html?_r=0.

171. *See* Joseph Ax & Ben Klayman, *College Athletes Look to Antitrust Case as Best Hope for Payday*, REUTERS (Aug. 18, 2015), <http://www.reuters.com/article/us-usa-football-college-idUSKCN0QN2CB20150819>.

172. *See* Gadit, *supra* note 3, at 352.

173. Gustin, *supra* note 7, at 147.

174. Sherman Act, 15 U.S.C. § 1 (2012).

175. *See, e.g.*, NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 98 (1984); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 687–88 (1978).

restraint's procompetitive benefits.¹⁷⁶ The Sherman Act encourages free competition to allocate resources at the highest quality and lowest possible price.¹⁷⁷ Under § 1 of the Sherman Act, the NCAA's compensation restraints will be considered anticompetitive if student-athletes can show: (1) an agreement was made to restrain trade through a contract, combination, or conspiracy; (2) the restraint affects interstate commerce; and (3) the agreement unreasonably restrains trade under the per se rule or the rule of reason.¹⁷⁸

A. Agreement to Restrain Trade

"[W]hen there is an agreement not to compete in terms of price or output, 'no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.'"¹⁷⁹ The student-athlete statement is an agreement, made through a contract, intended to "deprive[] the marketplace of independent centers of decisionmaking,' . . . and thus of actual and potential competition."¹⁸⁰ The NCAA restrains trade by punishing student-athletes that collect compensation in excess of their athletic scholarships.¹⁸¹ If the student-athletes were permitted to negotiate their own licensing deals, a more competitive market for those licenses would result.¹⁸² Moreover, without the student-athlete statement imposing compensation limitations, universities would likely compete for potential recruits by offering them more inclusive scholarships.¹⁸³ Subsequently, the student-athlete statement is an agreement to restrain trade as it limits the amount of compensation student-athletes can acquire.¹⁸⁴

176. 117 AM. JUR. PROOF OF FACTS 3D 391, § 11 (2010).

177. *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 695; Edelman, *supra* note 54, at 70.

178. *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1062 (9th Cir. 2001) (citations omitted).

179. *See Bd. of Regents*, 468 U.S. at 109 (quoting *Nat'l Soc'y of Pro'l Eng'rs*, 435 U.S. at 692).

180. *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 195 (2010) (quoting *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 769 (1984)).

181. Michael T. Jones, Comment, *Real Accountability: The NCAA Can No Longer Evade Antitrust Liability Through Amateurism After O'Bannon v. NCAA*, 56 B.C. L. REV. E. SUPP. 79, 81 (2015), http://bclawreview.org/files/2015/05/06_jones.pdf.

182. *See Johnson*, *supra* note 57; *The NCAA Lawsuit*, FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/money-and-march-madness/ncaa-lawsuit/> (last visited Sept. 14, 2016).

183. *See* 117 AM. JUR. PROOF OF FACTS 3D 391, § 6 (2010).

184. *See* Edelman, *supra* note 54, at 67.

B. *Interstate Commerce*

The next element student-athletes must prove is that the student-athlete statement restrains trade amongst several states.¹⁸⁵ The NCAA will argue the student-athlete statement does not affect interstate commerce because it is used for the regulation of eligibility and is not a commercial activity.¹⁸⁶ However, commerce is interpreted broadly and includes “almost every activity from which the actor anticipates economic gain.”¹⁸⁷

Since a student-athlete must sign the student-athlete statement in order to receive a scholarship, the student-athlete statement is directly connected to the issuance of a scholarship and “anticipate[d] economic gain” for both parties.¹⁸⁸ Scholarships are a form of interstate commerce because student-athletes are recruited and compete nationally.¹⁸⁹ Likewise, scholarships are a form of trade because the NCAA gives them to student-athletes in exchange for their athletic services and NIL rights.¹⁹⁰ Courts have also held that scholarships are a form of interstate commerce.¹⁹¹ Therefore, the fighting issue will be if the NCAA’s limit on compensation unreasonably restrains trade.¹⁹²

C. *Unreasonable Restraints of Trade*

“[C]ourts . . . determine on a case-by-case[] basis whether a restraint on trade is ‘unreasonable’”¹⁹³ The two most prevalent tests used to determine a restraint’s anticompetitive effects are the “per se rule” and the “rule of reason.”¹⁹⁴

185. *Id.* at 71.

186. *O’Bannon v. NCAA*, 802 F.3d 1049, 1064–65 (9th Cir. 2015).

187. *Id.* at 1065 (quoting PHILLIP AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* § 260b, at 170 (Wolters Kluwer Law & Bus. 4th ed. 2013)).

188. *See id.*

189. David Watson Hughes, Article, *O’Bannon v. NCAA: Say Goodbye to the Cinderella Story*, 22 *SPORTS L.J.* 261, 262 (2015).

190. *See Agnew v. NCAA*, 683 F.3d 328, 340 (7th Cir. 2012) (holding the scholarships are not noncommercial).

191. *See* 17 *AM. JUR. PROOF OF FACTS* 3D 391, § 22 (2010).

192. Maghamez, *supra* note 47, at 348.

193. *Jones*, *supra* note 181, at 83 (citing *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.* 551 U.S. 877, 889 (2007)).

194. Edelman, *supra* note 54, at 73.

1. *The Per Se Rule*

A per se agreement is illegal on its face because it harms competition within the market without any significant benefits.¹⁹⁵ The per se rule is used only when “courts have had considerable experience with the type of restraint at issue, . . . and only if [the court] can predict with confidence that the restraint would be invalidated in all or almost all instances under the rule of reason.”¹⁹⁶ The NCAA’s compensation restraint is not obviously restrictive as it may be essential for its product to exist.¹⁹⁷ Therefore, the per se rule is inapplicable here and courts will analyze the NCAA’s compensation restrictions under the rule of reason.¹⁹⁸

2. *The Rule of Reason*

Unlike the per se rule, the rule of reason considers every aspect of the restriction¹⁹⁹ and “focuses directly on the challenged restraint’s impact on competitive conditions.”²⁰⁰ The rule of reason evaluates the significance of the restriction by determining the particular reasons for and history of the implementation of the restraint.²⁰¹ Under the rule of reason, courts have adopted a three-step burden-shifting analysis to determine if a restriction unreasonably restrains trade; the test is as follows: (1) the plaintiff must prove the defendant’s restraint has an adverse effect on competition in a relevant market; (2) the defendant must demonstrate the adverse effects are justified by procompetitive purposes; and (3) if shown, the plaintiff must prove there are less restrictive alternatives available that achieve the same procompetitive justifications for the restraint.²⁰² In order for student-athletes to be successful in their antitrust claims, they must prove the NCAA’s compensation restraints—imposed by the student-athlete statement—adversely affect a particular market and, if found to be warranted by a procompetitive justification, that a complete compensation ban is not the

195. *Arizona v. Maricopa Cty. Med. Soc’y*, 457 U.S. 332, 351 (1982) (4–3 decision) (citing *N. Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958)).

196. *Leegin Creative Leather Prods., Inc.*, 551 U.S. at 886–87.

197. *O’Bannon v. NCAA*, 802 F.3d 1049, 1062 (9th Cir. 2015) (citing *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 100–01 (1984)).

198. *Id.*

199. Edelman, *supra* note 54, at 74.

200. *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 688 (1978).

201. *Id.* at 692.

202. *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001) (citing *Hairston v. Pac. 10 Conference*, 101 F.3d 1315, 1319 (9th Cir. 1996)).

least restrictive way to achieve this purpose.²⁰³

a. Adverse effects. To survive a motion for summary judgment, student-athletes have the burden of defining a relevant market in which the NCAA has engaged in anticompetitive behavior.²⁰⁴ A relevant market is an “‘area of effective competition’ . . . where buyers can turn for alternative sources of supply.”²⁰⁵ In *O’Bannon*, the student-athletes alleged the group licensing and college education markets were adversely affected by the NCAA’s compensation restraints.²⁰⁶

The court in *O’Bannon* recognized a market existed where student-athletes would be able to sell their NILs.²⁰⁷ However, student-athletes—the potential sellers of group licenses—would not have an incentive to compete against one another because the value of a group license relies on the purchaser being able to secure every student-athlete’s license.²⁰⁸ Since competition would not exist if the compensation ban were lifted, the court held that the student-athlete statement does not harm competition in the group licensing market.²⁰⁹

However, the scholarships offered to student-athletes make college education a distinct market.²¹⁰ Division I scholarships are unmatched in their ability to provide student-athletes with advanced training facilities, coaching, competition, and educational opportunities.²¹¹ There are no other professional or collegiate alternatives that are capable of supplying an adequate substitute for the bundle of goods and services that NCAA schools offer.²¹² Accordingly, a student-athlete who wants access to these amenities

203. *See id.*; *O’Bannon v. NCAA*, Nos. C 09-1967 CW, C 09-3329 CW, C 09-4882 CW, 2010 WL 445190, at *4 (N.D. Cal. Feb. 8, 2010) (citing *Tanaka*, 252 F.3d at 1063), *aff’d in part*, 802 F.3d 1049.

204. 117 AM. JUR. PROOF OF FACTS 3D 391, § 12 (2010).

205. *Tanaka*, 252 F.3d at 1063 (quoting *Oltz v. St. Peter’s Cmty. Hosp.*, 861 F.2d 1440, 1446 (9th Cir. 1988)).

206. *O’Bannon*, 802 F.3d at 1057.

207. *See id.*

208. *O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 995 (N.D. Cal. 2014), *aff’d in part*, 802 F.3d 1049.

209. *See O’Bannon*, 802 F.3d at 1058, 1072; 117 AM. JUR. PROOF OF FACTS 3D 391, § 13 (2010).

210. *O’Bannon*, 802 F.3d at 1056; Jones, *supra* note 181, at 84–85.

211. Hughes, *supra* note 189, at 269.

212. *O’Bannon*, 802 F.3d at 1056.

must sign the NCAA's student-athlete statement.²¹³

The student-athlete statement adversely affects the college education market because student-athletes are unable to obtain more than an athletic scholarship.²¹⁴ Moreover, the individual licensing market is tied to the college education market because the NCAA's compensation restrictions prevent universities from engaging in competitive bidding when recruiting student-athletes.²¹⁵ In *National Society of Professional Engineers v. United States*, the U.S. Supreme Court held restraints on competitive bidding were unreasonable.²¹⁶ Thus, the NCAA uses its position—as the only supplier of college education that offers premier athletic services—to adversely affect the price of the market.²¹⁷ The NCAA limits the value of scholarships and precludes student-athletes from receiving revenue related to their NILs.²¹⁸ The current compensation limit protects the NCAA's profits²¹⁹ and impedes the universities' abilities to compete for the student-athletes' services during the recruitment process.²²⁰ Without the NCAA's compensation restrictions, universities could offer student-athletes more inclusive scholarships or a percentage of the licensing revenue generated from their NILs.²²¹ Consequently, the NCAA's compensation ceiling has sufficient anticompetitive effects that adversely affect the college education market.²²²

b. *Procompetitive justification.* After the student-athletes establish that the NCAA adversely affects the college education market, the burden shifts to the NCAA to provide procompetitive reasons for deviating from a free market.²²³ In *O'Bannon*, the NCAA's procompetitive justifications for restricting student-athlete compensation were to: (1) preserve amateurism; (2) promote a competitive balance amongst universities; (3) integrate academics and athletics; and (4) increase the output of the college education

213. See Hughes, *supra* note 189, at 269.

214. *O'Bannon*, 802 F.3d at 1056.

215. See *id.* at 1058; Edelman, *supra* note 54, at 82.

216. See *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978).

217. Hughes, *supra* note 189, at 264, 269.

218. See *id.* at 270.

219. See Jones, *supra* note 181, at 84–85.

220. Hughes, *supra* note 189, at 264.

221. *Id.*; Jones, *supra* note 181, at 84–85.

222. See Hughes, *supra* note 189, at 269.

223. See *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 113 (1984); 117 AM. JUR. PROOF OF FACTS 3D 319, § 11 (2010).

market.²²⁴ In order for the NCAA's justifications to be procompetitive, they must increase consumer demand for college athletics.²²⁵

In 1984, the Court in *Board of Regents* held, "The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role . . ." ²²⁶ Since *Board of Regents*, the NCAA has enjoyed judicial deference and has been able to implement anticompetitive rules to preserve amateurism.²²⁷ However, when *Board of Regents* was decided, college athletics were not commercialized to the point they are today.²²⁸ The recruitment of student-athletes is now viewed as a financial investment that generates millions of dollars in revenue for universities.²²⁹ Therefore, the NCAA—in an attempt to capture all potential revenue—has created a system that enables it to obtain all of the student-athletes' value, while depriving them of fair compensation.²³⁰

The NCAA claims its compensation regulations are an attempt "to keep university athletics from becoming professionalized to the extent that profit making objectives would overshadow educational objectives."²³¹ However, the NCAA's educational aspirations are already overshadowed by its own revenue-oriented goals, and the only difference between the NCAA and professional sports is who makes the money.²³² The NCAA is no longer a regulator of amateurism but rather a seller of a lucrative product at the expense of student-athletes.²³³ "Anyone who doesn't think [college sports are] a business isn't keeping up with reality."²³⁴

Courts have taken notice and have begun deviating from the judicial deference given to amateurism by the *Board of Regents* decision.²³⁵ "An ongoing [Sherman Act] § 1 violation cannot evade § 1 scrutiny simply by

224. See *O'Bannon v. NCAA*, 802 F.3d 1049, 1058 (9th Cir. 2015).

225. See *id.* at 1072–73.

226. See *Bd. of Regents*, 468 U.S. at 120.

227. *O'Bannon*, 802 F.3d at 1063–64.

228. See Cronk, *supra* note 37, at 137.

229. Jones, *supra* note 181, at 88. In 2013, the University of Alabama's athletic department made \$143.4 million in revenue. Vanderford, *supra* note 23, at 805.

230. Jones, *supra* note 181, at 88–89.

231. *Kupec v. Atl. Coast Conference*, 399 F. Supp. 1377, 1380 (M.D.N.C. 1975).

232. See Gadit, *supra* note 3; Frederick, *supra* note 34.

233. Jones, *supra* note 181, at 89.

234. Ax & Klayman, *supra* note 171.

235. See *O'Bannon v. NCAA*, 802 F.3d 1049, 1063–64 (9th Cir. 2015).

giving the ongoing violation a name and label.”²³⁶ This is exactly what the NCAA has attempted to do with the term *amateurism*.²³⁷ However, despite the NCAA’s many significant and contradictory changes to the meaning of *amateurism*,²³⁸ it still plays a role in preserving the popularity of college athletics.²³⁹ Since the concept of amateurism has the potential to increase consumer demand, it will likely be found to be a procompetitive justification.²⁴⁰

The second procompetitive justification the NCAA offers for its compensation restraints is that the restraints maintain a competitive balance between the universities’ athletic programs.²⁴¹ However, numerous economists have shown that compensation restrictions are not correlated to a competitive balance because universities spend unequal amounts on athletic amenities.²⁴² Universities that generate more revenue are able to spend more on coaches’ salaries and athletic facilities, which gives them a recruiting advantage over universities that cannot afford to spend as much on college athletics.²⁴³ Accordingly, consumer demand would not decrease if the NCAA lifted its compensation regulations because it would have little to no impact on the competitive balance between universities’ athletic programs.²⁴⁴

The NCAA’s third procompetitive justification for its compensation ceiling is that it integrates academics and athletics.²⁴⁵ The NCAA believes that if universities are required to compensate student-athletes more than the cost of tuition, their ability to integrate student-athletes into the academic community will decrease.²⁴⁶ The NCAA alleges universities will no

236. *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 197 (2010).

237. *See Hughes, supra* note 189, at 266.

238. Collegiate tennis players are permitted to accept up to \$10,000 in prize money before being admitted to college, and student-athletes on teams that reach the postseason receive gifts worth close to a thousand dollars. *O’Bannon*, 802 F.3d at 1058–59; *Zimbalist, supra* note 29.

239. *See O’Bannon*, 802 F.3d at 1059. Although it could be argued consumer demand is driven more by loyalty and geography than by amateurism. *Id.* at 1082 (Thomas, C.J., concurring in part and dissenting in part).

240. *Id.* at 1059 (majority opinion).

241. *Id.*

242. *Id.*

243. *Hughes, supra* note 189, at 272.

244. *See O’Bannon*, 802 F.3d at 1072.

245. *Id.* at 1059.

246. *Maghamez, supra* note 47, at 359.

longer be able to provide tutoring, academic support, and mentorship for student-athletes.²⁴⁷ However, these benefits are not mandated by the NCAA and are implemented independently by the universities.²⁴⁸ Furthermore, student-athletes would be able to receive greater compensation and still comply with the NCAA's academic regulations.²⁴⁹ The student-athletes would still be required to attend classes and meet their academic obligations in order to be able to compete.²⁵⁰ Conversely, the NCAA's product is unique in the fact that it features athletes who are also students.²⁵¹ This gives college sports consumer appeal and in turn increases consumer demand.²⁵² For that reason, the NCAA will likely be able to show that integrating academics and athletics is a procompetitive justification for restraining student-athlete compensation.²⁵³

The NCAA's final procompetitive justification for restricting student-athlete compensation is that it increases the output of the college education market.²⁵⁴ The NCAA asserts its compensation restraint enables it to increase educational opportunities for student-athletes because it attracts universities committed to amateurism.²⁵⁵ However, there is no evidence that the schools that compete at the Division I level joined the NCAA because of their commitment to amateurism.²⁵⁶ Rather, competing at the Division I level allows universities to raise their public profiles and generate additional revenue.²⁵⁷ If the universities were not motivated by revenue, they could have joined other NCAA leagues, such as Division II or III which have the same commitment to amateurism but produce less revenue than Division I athletic programs.²⁵⁸

The NCAA also alleges its compensation constraints allow it to subsidize the athletic programs of universities that otherwise would be

247. *Id.*

248. *See O'Bannon*, 802 F.3d at 1059–60.

249. *Id.* at 1060.

250. Hughes, *supra* note 189, at 272–73.

251. *See O'Bannon*, 802 F.3d at 1059–60.

252. *See* Daniel Crane, *The NCAA and College Athlete Amateurism*, JURIST (Nov. 4, 2015, 12:48 PM), <http://www.jurist.org/forum/2015/11/daniel-crane-ncaa-athlete.php>.

253. *O'Bannon*, 802 F.3d at 1060.

254. *Id.*

255. *See* DIVISION I MANUAL, *supra* note 109, at 1.

256. Hughes, *supra* note 189, at 273.

257. Maghamez, *supra* note 47, at 360.

258. *See O'Bannon*, 802 F.3d at 1060.

unable to compete, thus increasing college educational opportunities.²⁵⁹ However, “cost-cutting by itself is not a valid procompetitive justification.”²⁶⁰ If entities were allowed to restrain trade as a way to save money, this defense would apply to almost every situation, and the Sherman Act would be useless.²⁶¹ “[A] producer’s loss is no concern of the antitrust laws” as they are intended to “protect consumers from suppliers rather than suppliers from each other.”²⁶² Therefore, increasing the output of the college education is unlikely to be a procompetitive justification for depriving student-athletes of additional compensation.²⁶³

c. Less restrictive means. The NCAA is likely to establish two possible procompetitive justifications for its compensation restrictions: (1) the preservation of amateurism and (2) the integration of academics and athletics.²⁶⁴ Therefore, the burden shifts back to the student-athletes to prove there is a less restrictive way for the NCAA to achieve its procompetitive purposes.²⁶⁵ If student-athletes are able to show a less restrictive alternative, courts will find the current NCAA restrictions invalid and order the implementation of the less restrictive means.²⁶⁶

In *O’Bannon*, the court held student-athlete compensation could only be limited to the point which maximizes consumer demand and a complete ban on compensation was not necessary for the NCAA to be able to preserve amateurism and integrate academics and athletics.²⁶⁷ Unlike large sums of compensation, limited compensation would not likely diminish consumer demand.²⁶⁸ The district court in *O’Bannon* found that allowing student-athletes to receive cost-of-attendance scholarships and limited compensation, held in a trust, would be a less restrictive alternative to the NCAA’s current compensation ceiling.²⁶⁹ The Ninth Circuit affirmed the

259. *Id.*

260. Edelman, *supra* note 54, at 77.

261. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940).

262. *Stamatakis Indus., Inc. v. King*, 965 F.2d 469, 471 (7th Cir. 1992).

263. *See* Hughes, *supra* note 189, at 273–74.

264. *O’Bannon*, 802 F.3d at 1060, 1072.

265. *Id.* at 1074 (citing *Cty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1159 (9th Cir. 2001)).

266. *See id.*

267. *See id.* at 1072–73; Gustin, *supra* note 7, at 153.

268. *O’Bannon*, 802 F.3d at 1077.

269. *See id.* at 1074–75.

district court's ruling on cost-of-attendance scholarships but reversed its decision on the use of trusts.²⁷⁰ The Ninth Circuit held student-athletes should not receive compensation untethered to their educational expenses.²⁷¹ However, the Ninth Circuit erred in both rulings. The cost-of-attendance scholarships insufficiently address the overarching educational problems in the NCAA, and a proper trust system would prevent the NCAA from appropriating the student-athletes' right of publicity.

V. CONCLUSION: DIVIDING UP THE REVENUE

Student-athletes should not be paid direct compensation for playing college sports. However, they should be compensated in ways that further their education and protect their right of publicity. To accomplish this, the Ninth Circuit should have provided student-athletes with guaranteed multiyear scholarships and trust funds—available after their eligibility expires—containing a percentage of their publicity rights.²⁷²

A. Multiyear Scholarships

The NCAA's current model emphasizes student-athlete performance on the field rather than in the classroom.²⁷³ Half a million men and women compete in intercollegiate athletics each year, and only 1.7 percent of senior student-athletes go on to play professionally.²⁷⁴ Even if the student-athlete goes on to play professionally, there is no assurance of sustaining a prosperous career.²⁷⁵ O'Bannon, a highly successful NCAA basketball player, was one of the 1.7 percent lucky enough to play professionally.²⁷⁶ However, he only played two years in the NBA, and after his basketball career ended, he began working at a Toyota dealership.²⁷⁷ Although he

270. *Id.* at 1075–76; Maghamez, *supra* note 47, at 362.

271. *O'Bannon*, 802 F.3d at 1076.

272. This Note carefully refines the typical multiyear scholarship and trust fund arguments in a manner that would permit student-athletes to receive additional compensation while still achieving the NCAA's procompetitive purposes.

273. See Jeff Woody, *Woody: 'Rest in Peace, Tyler Sash. Every Piece of You.'* DES MOINES REG. (Sept. 9, 2015), <http://www.desmoinesregister.com/story/sports/college/iowa/2015/09/09/woody-rest-peace-tyler-sash-every-piece-you/71937872/>.

274. Branch, *supra* note 25; Solomon, *A Cheat Sheet*, *supra* note 1.

275. See Branch, *supra* note 25.

276. Gadit, *supra* note 3.

277. Dave Sheinin, *Ed O'Bannon Has Gone from the Hardwood to the Sales Floor*, WASH. POST (June 14, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/>

attended UCLA for four years, he did not graduate while playing basketball²⁷⁸ and had to start his career as a commission-based salesman because he lacked the qualifications for a management position.²⁷⁹

O'Bannon is just one example of many student-athletes whom the NCAA did not set up for professional success after their athletic careers have ended.²⁸⁰ A 2010 study revealed that only 54.8 percent of Division I football players and 44.6 percent of Division I basketball players graduated college within six years; compared to 73.7 percent and 75.7 percent, respectively, of the general student body during the same time frame.²⁸¹ Furthermore, many of the classes in which the student-athletes enroll are only intended to keep them eligible.²⁸² For instance, the University of North Carolina created a fake class to inflate their student-athletes' grades artificially.²⁸³ Not only was this fake class offered, student-athletes were encouraged to enroll in it so more time could be devoted to their collegiate

2009/06/11/AR2009061103332.html.

278. Paul M. Barrett, *Ed O'Bannon's Strange, Sad Testimony Against the NCAA*, BLOOMBERGBUSINESSWEEK (June 10, 2014), <http://www.bloomberg.com/news/articles/2014-06-10/ed-obannons-sad-testimony-in-the-ncaa-antitrust-suit>.

279. See Sheinin, *supra* note 277.

280. See, e.g., *id.*

281. Alan Scher Zagier, *Study: NCAA Graduation Rate Comparisons Flawed*, VICTORIA ADVOC. (Apr. 20, 2010), <https://www.victoriaadvocate.com/news/2010/apr/20/bc-ncaa-graduation-rates/> (noting that the NCAA relied on a statistical flaw in determining college football and basketball graduation rates). The statistical flaw alleged is that the NCAA's graduation reports include students who initially were full-time students and later became part-time students; however, since student-athletes are required to be full-time students, this study removes these part-time students to reflect a more realistic comparison of the graduation rates between student-athletes and full-time students. See RICHARD M. SOUTHWALL, COLL. SPORT RESEARCH INST., ADJUSTED GRADUATION GAP: NCAA DIVISION-I FOOTBALL 1-8 (2010), http://www.unc.edu/depts/exercise/csri/PDF/CSRI_2010%20Adjusted%20Graduation%20Gap_NCAA_D-I%20Football-8-2010.pdf; RICHARD M. SOUTHWALL, COLL. SPORT RESEARCH INST., ADJUSTED GRADUATION GAP: NCAA DIVISION-I MEN'S AND WOMEN'S BASKETBALL 1-12 (2010), http://www.unc.edu/depts/exercise/csri/PDF/CSRI_2010%20Adjusted%20Graduation%20Gap_NCAA_D-I%20Men's%20and%20Women's%20Basketball.pdf. But see NCAA, *Graduation Rates*, NCAA, <http://www.ncaa.org/about/resources/research/graduation-rates>.

282. See Sara Ganim & Devon Sayers, *UNC Report Finds 18 Years of Academic Fraud to Keep Athletes Playing*, CNN, <http://www.cnn.com/2014/10/22/us/unc-report-academic-fraud/> (last updated Oct. 23, 2014).

283. *Id.*

athletic careers.²⁸⁴ It is unrealistic to expect an 18-year-old student to ignore teachers, coaches, and academic counselors' suggestions and take classes that will better prepare him or her for life after athletics.

The time requirements of college athletics also play a role in the student-athletes' less-than-impressive graduation rates.²⁸⁵ A student-athlete's workload consists of a four to five month season, traveling, and training year-round.²⁸⁶ NCAA football players dedicate an average of 43.3 hours per week to their sport.²⁸⁷ Shane Battier, a former Duke University basketball player, told a congressional committee his college athletic schedule was more demanding than his schedule as a professional basketball player in the NBA.²⁸⁸ Therefore, "[w]hat athletes really receive in exchange for their efforts is merely the cost of tuition, not the value of an education."²⁸⁹ Student-athletes are brought to universities "more as performers than aspiring undergraduates,"²⁹⁰ and it is fair to ask "whether the letters B.A. stand more for Bachelor of Arts or Bachelor of Athletics."²⁹¹

In 2014, the NCAA approved legislation that allowed scholarships to cover the full cost of attendance.²⁹² Although a step in the right direction, more needs to be done to ensure the student-athletes have the same opportunity as other students to receive a college degree.²⁹³ A year-to-year scholarship allows too many coaches to discard student-athletes for reasons

284. *Id.*

285. Givens, *supra* note 19, at 221–22.

286. Gustin, *supra* note 7, at 145.

287. Vanderford, *supra* note 23, at 830.

288. Cronk, *supra* note 37, at 139.

289. Givens, *supra* note 19, at 222 (quoting Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play?*, 65 NOTRE DAME L. REV. 206, 257 (1990)).

290. Christopher M. Parent, *Forward Progress? An Analysis of Whether Student-Athletes Should Be Paid*, 3 VA. SPORTS & ENT. L.J. 226, 254 (2004) (quoting KNIGHT FOUND. COMM'N ON INTERCOLLEGIATE ATHLETICS, A CALL TO ACTION: RECONNECTING COLLEGE SPORTS AND HIGHER EDUCATION 16 (2001), http://www.knightcommission.org/images/pdfs/2001_knight_report.pdf).

291. Smith, *supra* note 18, at 11 (quoting Rodney K. Smith, *Little Ado About Something: Playing Games with the Reform of Big-Time Intercollegiate Athletics*, 20 CAP. U. L. REV. 567, 570 (1991) (quoting Francis A. Walker, President, Mass. Inst. of Tech., Oration Delivered Before the Phi Beta Kappa Society: College Athletics (June 29, 1893), in HARV. GRADUATES' MAG., Sept. 1893, at 1, 1, <https://babel.hathitrust.org/cgi/pt?id=hvd.32044107292807;view=1up;seq=15>)).

292. Maghamez, *supra* note 47, at 368; *Cost of Attendance Q&A*, *supra* note 38.

293. Maghamez, *supra* note 47, at 368.

beyond the student-athletes' control.²⁹⁴ Therefore, student-athletes should receive multiyear scholarships.

A multiyear scholarship—as referred to in this Note—is a nonrevocable cost-of-attendance scholarship with a duration related to the student-athlete's remaining years of eligibility.²⁹⁵ For instance, if a student-athlete has four years of eligibility remaining, his or her multiyear scholarship is valid for four years. Moreover, the multiyear scholarship can only be revoked for actions within the student-athlete's control, such as: quitting the team, committing a felony or multiple misdemeanors, violating team rules, failing to meet academic requirements, or not complying with the university's standards.²⁹⁶ In the case of a student-athlete suffering a career-ending injury, the university has the option to buy out the student-athlete's scholarship, but the university must replace it with an academic scholarship containing the same terms previously discussed²⁹⁷—essentially trading out his or her athletic scholarship for an academic scholarship, for the duration of the student-athlete's eligibility. A multiyear scholarship would prevent coaches from revoking scholarships at their discretion and give student-athletes a better opportunity to obtain a college degree.²⁹⁸

Critics contend a year-to-year scholarship is fair compensation,²⁹⁹ but the emphasis universities have placed on athletics—while simultaneously dismissing academics—contradicts this argument. Multiyear scholarships would not cost universities a greater amount than they are already spending on scholarships, unless they decide to buy out an injured student-athlete's scholarship.³⁰⁰ Moreover, multiyear scholarships would not negatively affect consumer demand, as the student-athletes would maintain their amateur status.³⁰¹ The integration of academics and athletics would also be furthered

294. See Maghamez, *supra* note 47, at 370.

295. See Solomon, *4-Year Athletic Scholarships*, *supra* note 33.

296. See *id.*

297. See Meghan Walsh, "I Trusted 'Em': When NCAA Schools Abandon Their Injured Athletes," *ATLANTIC* (May 1, 2013), <http://www.theatlantic.com/entertainment/archive/2013/05/i-trusted-em-when-ncaa-schools-abandon-their-injured-athletes/275407/>; see also Solomon, *4-Year Athletic Scholarships*, *supra* note 33 (not listing injury among the reasons for revocation of a typical multiyear scholarship).

298. Maghamez, *supra* note 47, at 371–72; see Branch, *supra* note 25.

299. See Gustin, *supra* note 7, at 155.

300. See *O'Bannon v. NCAA*, 802 F.3d 1049, 1075–76 (9th Cir. 2015).

301. See Maghamez, *supra* note 47, at 361.

because a greater emphasis would be placed on education.³⁰² Having a guaranteed multiyear scholarship would increase graduation rates as student-athletes would no longer be dismissed for not performing athletically and would be encouraged to stay in school.³⁰³ The NCAA manual states its purpose “is to maintain intercollegiate athletics as an integral part of the educational program”³⁰⁴ Therefore, it is time for the actions of the NCAA to start reflecting this alleged commitment.

B. *Percentage-Based Trust Funds*

The Ninth Circuit ruled against student-athletes receiving deferred compensation because it feared that would cause the NCAA to surrender its amateurism principles and transform the NCAA into a minor league for professional sports.³⁰⁵ However, the Ninth Circuit was too narrow in its analysis and turned a blind eye to the fundamental unfairness which is occurring under the current system.³⁰⁶ Trust funds—held until the student-athlete’s eligibility expires—are beneficial to both the NCAA and student-athletes. If student-athletes were able to bring a successful right of publicity claim, they could prevent the NCAA from continuing to license products containing their NILs and would be entitled to the revenue generated from it.³⁰⁷ Alternatively, the NCAA could discontinue selling all products that feature student-athletes’ NILs.³⁰⁸ However, this model would hurt the NCAA, as it would be unable to sell merchandise that has specific consumer appeal.³⁰⁹ Rather than eliminating the market completely, a better alternative for both sides would be to establish a percentage-based trust fund system.

A percentage-based trust fund—as referred to in this Note—allocates student-athletes a direct percentage of the NCAA’s revenue from

302. *See id.*

303. *See id.*; Huma, *supra* note 155.

304. *See* DIVISION I MANUAL, *supra* note 109, at 1.

305. *See O’Bannon*, 802 F.3d at 1053, 1079 (citing *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 101–02, 104 (1984)).

306. *See id.* at 1082 (Thomas, C.J., concurring in part and dissenting in part).

307. Cronk, *supra* note 37, at 151, 161–62.

308. *See* Tracy, *supra* note 170 (noting that the NCAA discontinued its partnership with EA sports amid a flurry of lawsuits).

309. *See* Maghamez, *supra* note 47, at 367 (noting that if the NCAA did not have the right to publicity, student-athletes would be free to contract for their NILs themselves).

merchandise sales which contain their NILs.³¹⁰ The percentage the student-athlete receives is negotiated during the recruiting process.³¹¹ After negotiations have taken place and a percentage has been agreed upon, an NCAA representative confirms the percentage with both parties.³¹² The NCAA then monitors the student-athletes trust accounts to ensure no misappropriated funds are transferred during the student-athletes' collegiate career.³¹³ Most importantly, student-athletes would not have access to the trust fund until they have exhausted their NCAA eligibility.³¹⁴ After their eligibility expires, the right of publicity automatically reverts back to the student-athletes.

Critics believe trust fund systems would destroy amateurism and that college athletics would no longer be unique or separate from professional sports.³¹⁵ However, a percentage-based trust fund would not raise either of those issues. Under a percentage-based trust fund system, student-athletes would still be amateurs because they would not receive the money while in college.³¹⁶ For example, the Olympic Committee implemented a less stringent trust fund plan and has been able to maintain amateurism.³¹⁷ Furthermore, student-athletes are not being paid to play but rather to be compensated for the NCAA's use of their NILs.³¹⁸ The NCAA would be able to keep its current licensing structure in place, as it is designed to protect student-athletes from commercial exploitation by third parties.³¹⁹ The only difference would be that the student-athletes would receive a percentage of the revenue made from specific merchandise containing their NILs.³²⁰ Therefore, the NCAA would not be considered a minor league for professional sports any more than it currently is, and making the student-

310. Cronk, *supra* note 37, at 146; *see* Givens, *supra* note 19, at 225–26.

311. *See* Givens, *supra* note 19, at 229–30. This would form a valid contract for the NCAA to be able to license products containing the student-athletes' NILs. *See id.* at 218–19.

312. *Id.* at 229–30.

313. *See id.* at 230.

314. *See* Hughes, *supra* note 189, at 274.

315. *See* Gustin, *supra* note 7, at 158.

316. Maghamez, *supra* note 47, at 362; *see* Hughes, *supra* note 189, at 274.

317. Cronk, *supra* note 37, at 162.

318. *See* Ben Strauss & Marc Tracy, *N.C.A.A. Must Allow Colleges to Pay Athletes, Judge Rules*, N.Y. TIMES (Aug. 8, 2014), <http://www.nytimes.com/2014/08/09/sports/federal-judge-rules-against-ncaa-in-obannon-case.html>.

319. *See* Cronk, *supra* note 37, at 163.

320. *See* Maghamez, *supra* note 47, at 362.

athletes wait until graduation to have access to their funds would minimize any negative effects on consumer demand.³²¹

A percentage-based trust fund system would allow schools to sell products without violating the student-athletes' right of publicity and maintain a competitive balance between the universities.³²² The percentage-based trust fund is affordable for every university because the student-athletes' compensation is correlated to the university's revenue.³²³ For example, if a student-athlete's negotiated percentage is higher than his or her fair market value it will have little effect on the school's ability to pay student-athletes, as consumers will not purchase items containing that student-athlete's NIL as frequently. However, if the student-athlete's percentage is lower than his or her fair market value, the cost will be easily affordable, regardless of the university's size. This allows universities to generate revenue in ways that are currently unavailable due to possible right of publicity claims and the NCAA's restrictions.³²⁴ Moreover, the NCAA's competitive balance will not be affected because student-athletes may find it more lucrative to attend smaller universities where they can be the "face" of the team.³²⁵ This would allow smaller schools to offer more athletically gifted student-athletes a higher percentage of the revenue produced from their NILs in anticipation of putting a better team on the playing field.³²⁶

Critics also suggest that a trust fund system would violate Title IX because women would not have the same opportunities as men.³²⁷ However, this is only true if student-athletes receive direct compensation.³²⁸ A percentage-based trust fund system would not violate Title IX because the student-athletes would receive compensation in relation to their own NILs, and it does not limit educational access or opportunity.³²⁹ Therefore, if universities continue to offer the same number of scholarship opportunities for men and women, they will comply with Title IX.³³⁰

321. *See id.*

322. *See id.* at 361–62.

323. *See id.* at 362.

324. *See id.*

325. *Id.* at 371–72.

326. *See id.*

327. *See* 20 U.S.C. § 1681(a) (2012).

328. Maghamez, *supra* note 47, at 365.

329. *See id.*

330. *See* 20 U.S.C. § 1681(a); Maghamez, *supra* note 47, at 365.

If a percentage-based trust fund is implemented, the NCAA would need to change Rule 12.1.2, which states student-athletes become ineligible if they “[a]ccept[] a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation.”³³¹ The NCAA would also need to provide an exception for percentage-based trust funds so student-athletes can avoid violating the current standards.³³² Further, the student-athlete statement would need to be rewritten to reflect the percentage agreed upon by the university and student-athlete.³³³ This would give the NCAA a binding contract in which it could legally obtain the student-athletes’ right of publicity.³³⁴

A percentage-based trust is “‘virtually as effective’ in preserving *popular demand for college sports* as not allowing compensation.”³³⁵ It does not affect amateurism because the student-athletes are not receiving compensation until their eligibility expires, and it helps integrate student-athletes into the academic community, as the student-athletes are not involved with the licensing of their NILs.³³⁶ Therefore, the Ninth Circuit should have formed a percentage-based trust fund system because it gives student-athletes back their right of publicity and is a less restrictive alternative to the NCAA’s compensation restrictions.

C. Final Takeaways

The NCAA’s student-athlete statement and Division I Manual violate the student-athletes’ right of publicity and impose anticompetitive restrictions.³³⁷ The money the NCAA generates from the work of student-athletes should be distributed in a way that preserves amateurism without exploiting the student-athletes.³³⁸ The multiyear scholarship and percentage-based trust fund achieve this by avoiding a “pay for play” model, instead

331. *Amateur Status*, NCAA.ORG, https://web3.ncaa.org/lstdbi/reports/pdf/searchPdfView?id=24816&businessCode=BYLAW_SEARCH_VIEW (last updated Apr. 29, 2010).

332. See Givens, *supra* note 19, at 227.

333. See *id.*

334. See *id.* at 218–19.

335. See O’Bannon v. NCAA, 802 F.3d 1049, 1081 (9th Cir. 2015) (Thomas, J., concurring in part and dissenting in part) (disagreeing with the majority’s view on the procompetitive interest at stake, stating preserving amateurism is only relevant to the extent it relates to consumer interest).

336. Cronk, *supra* note 37, at 162.

337. See Maghamez, *supra* note 47, at 366.

338. See Cronk, *supra* note 37, at 162–64.

maintaining the principles of amateurism, and in placing an emphasis on education, integrating academics and athletics.³³⁹ Moreover, loosening compensation restrictions will encourage student-athletes to stay in school, as they can earn revenue attributable to a trust and are guaranteed an education.³⁴⁰

On March 15, 2016, Ed O'Bannon filed a writ of certiorari with the Supreme Court seeking to overturn a portion of the Ninth Circuit ruling.³⁴¹ Although the Supreme Court denied certiorari on October 3, 2015,³⁴² this issue is likely to come before the Court in the near future as the NCAA injures a new class of student-athletes every year with its right of publicity and antitrust violations.³⁴³ Moving forward, courts at all levels should impose multiyear scholarships and percentage-based trust funds because student-athletes are no longer receiving fair compensation.³⁴⁴ In doing so, less restrictive alternatives to the NCAA's current compensation restrictions would be established while still maximizing consumer demand. Accordingly, the time has come for student-athletes to receive their fair share of the billions of dollars they have generated for the NCAA through their blood, sweat, and tears.

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339. *See supra* Part V.B.

340. *See O'Bannon*, 802 F.3d at 1073 (majority opinion) (citing Jeffrey L. Harrison & Casey C. Harrison, *The Law and Economics of the NCAA's Claim to Monopsony Rights*, 54 ANTITRUST BULL. 923, 948 (2009)).

341. Berkowitz, *supra* note 2.

342. Steve Berkowitz & A.J. Perez, *Supreme Court Will Not Consider the Ed O'Bannon Antitrust Case Against NCAA*, USA TODAY (Oct. 3, 2016), <http://www.usatoday.com/story/sports/college/2016/10/03/supreme-court-ed-obannon-ncaa-antitrust-case/91462090/>.

343. *See id.* Currently, "a number of courts are considering cases that seek damages against the NCAA for capping athlete's compensation . . . and suppressing economic competition for college athletes' services." Brian C. Mahoney & Michelle K. Piasecki, *Supreme Court Refuses to Hear O'Bannon Antitrust Case Against NCAA*, USA COLLEGIATE SPORTS BLOG (Oct. 3, 2016), <http://blog.harrisbeach.com/sports/tag/antitrust/>.

344. *See Givens*, *supra* note 19, at 230; Zimbalist, *supra* note 29.

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