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Accomplishing Equity Under Amateurism: The Name, Image, and Likeness Stipend

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ABSTRACT

There are approximately 160,000 student-athletes participating in NCAA-sanctioned sports. In order to preserve their status as amateurs, the NCAA has historically prohibited student-athletes from earning certain forms of compensation during college. Demand for college sports has grown exponentially over the last fifty years, and it has become a billion-dollar industry. Despite large revenues, student-athletes still face industry-wide limits on compensation. Considering recent precedent and the NCAA's Interim Name, Image, and Likeness Policy of 2021, this Comment proposes a rule change permitting a college to provide student-athletes a stipend for its use of their name, image, and likeness in sports broadcasts. This would create a more equitable revenue distribution system while maintaining the amateurism principle that the NCAA was founded on.

"The NCAA couches its arguments for not paying student athletes in innocuous labels. But the labels cannot disguise the reality: The NCAA's business model would be flatly illegal in almost any other industry in America."[1]

INTRODUCTION

A Division I athlete spends approximately forty hours per week developing his or her skills, athleticism, and knowledge of the game.[2] And because of their commitment to being student-athletes, they sacrifice valuable time that could be used exploring other interests and developing relationships outside the world of sports. In return for their sacrifice, successful student-athletes balance an education with athletics and can earn glory, stardom, and recognition on a national platform for their athletic talent and success. Between those long hours of preparation and the final seconds of a particular game, a product is created: sports broadcasts. College-athletic conferences license the broadcast rights of their games to television networks in exchange for financial compensation. Broadcasts help to generate new and fuel existing interest in colleges and student-athletes, contributing to the lucrative viewership market for college sports.

This Comment addresses the often-questioned practice of the National Collegiate Athletic Association (NCAA)[3] in denying student-athletes direct compensation for its member-schools' use of student-athletes' name, image, and likeness in sports broadcasts. The NCAA's bylaws purport to "retain a clear line of demarcation between intercollegiate athletics and professional sports."[4] In serving this purpose, it limits financial aid to

1. NCAA v. Alston, 141 S. Ct. 2141, 2167 (2021) (Kavanaugh, J., concurring).

2. *See* Kerry Regan, *Are College Athletes Overworked?*, SITES AT PENN STATE (Oct. 23, 2018), https://sites.psu.edu/cas137passionblog/2018/10/23/are-college-athletes-overworked/ [https://perma.cc/YU5J-J92L].

3. *See NCAA and the Movement to Reform College Football: Topics in Chronicling America*, LIBR. OF CONG., https://guides.loc.gov/chronicling-america-ncaa-college-football-reform [https://perma.cc/ULV2-8AR4].

4. NAT'L COLLEGIATE ATHLETIC ASS'N, 2021–2022 DIVISION I MANUAL art. 1.3.1 (2021) (hereinafter, "NCAA Manual").

the student-athlete's cost of attendance,[5] thereby barring a student-athlete from receiving payment from a college for its use of their name, image, and likeness. The NCAA recently released new compensation rules in July 2021.[6] These rules allow student-athletes to enter into endorsement deals with third parties, thereby profiting from their name, image, and likeness.[7] Since then, states and governors have passed legislation and executive orders, respectively, which reinforce the NCAA's position that colleges remain prohibited from compensating student-athletes for their name, image, and likeness.[8]

A student-athlete's name, image, and likeness can be understood as his or her legal property, and this property can have substantial value.[9] It is an essential component of the licensing packages organizations provide to television networks. The revenue generated through these licensing deals dwarfs what a team full of student-athletes receiving the highest level of financial aid can receive. Direct compensation to all student-athletes who appear in these lucrative broadcasts would alleviate some of this disproportion.

This Comment will briefly explore the history of the amateurism and the right to publicity, comprising name, image, and likeness; then it will brief the two most recent federal court decisions pertaining to the NCAA's financial-aid restrictions: *O'Bannon v. NCAA*[10] and *NCAA v. Alston*.[11] After setting the background, this Comment will consider the NCAA's current interim policy and analyze issues it creates. Finally, a subsequent proposal will be made that, if adopted, would (1) compensate student-athletes for use of their name, image, and likeness during broadcasts and (2) alleviate harmful effects caused by the NCAA's current name, image, and likeness policy.

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5. *Id.* art. 15.1.

6. *See* Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image, and Likeness Policy*, NCAA (June 30, 2021), https://www.ncaa.org/about/resources/media-center/news/ncaa-adopts-interim-name-image-and-likeness-policy [https://perma.cc/57K2-4GTW].

7. *Id.*

8. *See* Kristi Dosh, *Tracker: Name, Image, and Likeness Legislation by State*, BUS. OF COLL. SPORTS. (Sep. 21, 2021), https://businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state/ [https://perma.cc/879A-UMJY].

9. MICHAEL D. MURRAY, RIGHT OF PUBLICITY IN A NUTSHELL 21 (2018) ("Publicity claims are property claims, and the complaint of the celebrity [or athlete] often comes down to money: 'The celebrity[or athlete] should have been paid for the use of her name, image, or likeness.'" (citation omitted) (quoting another source)).

10. 7 F. Supp. 3d 955 (N.D. Cal. 2014).

11. 141 S. Ct. 2141 (2021) (*previously heard as In re* NCAA Athletic Grant-In-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058 (N.D. Cal. 2019)).

I. BACKGROUND OF AMATEURISM AND PUBLICITY RIGHTS

A. Historical Development

An amateur athlete is one who participates in athletic competition for reasons other than pecuniary gain.[12] The preservation of amateurism is one of the NCAA's most cited arguments against the proposition that student-athletes should receive compensation beyond their cost of attendance.[13] NCAA Rule 12.01.1 maintains that only amateur student-athletes are permitted to participate in college athletics at its member schools.[14] However, the rules do not define amateurism.

Historically, colleges did not require student-athletes to be amateurs. Colleges often provided financial payments and other benefits to student-athletes in exchange for their participation in college sports.[15] Given the excessive entanglement between money and college sports, as well as the dangers associated with college football, President Theodore Roosevelt convened a meeting in 1905 between Harvard, Princeton, and Yale to establish a regulatory body over college sports.[16] That regulatory body came to be known as the NCAA.[17] Today, the NCAA limits compensation a student-athlete may receive, including compensation for appearing in sports broadcasts.

Publicity rights are a fairly recent legal recognition, existing in America for a little more than a century. Samuel Warren, then Dean of Harvard Law School, and Louis Brandeis, then law professor and future Supreme Court Justice, took the first stab at articulating these rights.[18] In 1890, the pair published *The Right to Privacy* in the fourth edition of the Harvard Law Journal. Their article proposed that a person's right to privacy should protect the use of their name and private affairs from intrusive journalists.[19] Though the article focused on a person's right to restrict the use of their own name and affairs, an existence of that right inherently carries with it a right to permit others to use that person's name and affairs.

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12. *See* NCAA Manual *supra* note 4, art. 2.9.

13. *See Alston*, 141 S. Ct. at 2152; *O'Bannon*, 7 F. Supp. 3d at 973.

14. NCAA Manual *supra* note 4, art. 12.01.1.

15. *See* ANDREW ZIMBALIST, UNPAID PROFESSIONALS, COMMERCIALISM AND CONFLICT IN BIG-TIME COLLEGE SPORTS 37–38 (2001) (describing common benefits that student-athletes typically receive in exchange for their participation in athletic programs).

16. *Id.* at 8.

17. *Id.*

18. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

19. *Id.* at 199.

A little over a decade later and following subsequent litigation[20] based upon Warren and Brandeis' theory, the first codification of the right to privacy was passed. In 1903, New York passed legislation to "regulate the unconsented commercial use of a living person's name, portrait, or picture."[21] Two years later, the Georgia Supreme Court acknowledged a person's right to privacy regarding their image or likeness through common law.[22] The court was "thoroughly satisfied . . . that the publication of one's picture without his consent by another as an advertisement, for the mere purpose of increasing the profits and gains of the advertiser, is an invasion of [the right of privacy] . . . ."[23] Today, Alaska, North Dakota, and Wyoming are the only states that have failed to recognize similar rights of privacy regarding unauthorized use of a person's name, image, and likeness either statutorily or through common law.[24]

From 130-year-old roots, publicity rights have grown into a prominent force in the American sports, entertainment, and advertising industries. And predictably, litigation involving athletes and corporate misappropriation of their names, images, and likenesses has followed.[25] The following section discusses two cases highlighting the current struggle of collegiate athletes in asserting their name, image, and likeness rights.

B. Contemporary Application to College Athletics

O'Bannon v. NCAA and *NCAA v. Alston* are two cases that address the issue of whether the NCAA's current substantive rules violate the Sherman Antitrust Act. These cases contributed to the NCAA's passing of

20. *See* Roberson v. Rochester Folding Box Co., 64 N.E. 442, 447 (N.Y. 1902) (rejecting Abigail Roberson's claim that she had a right to privacy regarding the use of her portrait).

21. *See* MURRAY, *supra* note 9, at 15–16 (discussing N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 1903)).

22. *See* Pavesich v. New England Life Ins. Co., 50 S.E. 68, 81 (Ga. 1905) (recognizing that the right to privacy is a right in tort law).

23. *Id.* at 80–81.

24. MURRAY, *supra* note 9, at III.

25. *See, e.g.*, Brown v. Elec. Arts, Inc., 724 F.3d 1235, 1248 (9th Cir. 2013) (concluding that James Brown, who was a star football player for the Cleveland Browns, did not have a Lanham Act claim against the defendant, a videogame designer who appropriated Brown's likeness and used it to create a videogame character specifically based around his athletic ability); *In re* NCAA Student-Athlete Name & Likeness Licensing Ass'n v. Elec. Arts, Inc., 724 F.3d 1268, 1284 (9th Cir. 2013) (holding that EA's videogame recreation of Keller's likeness in the context of the game of football was not sufficiently transformative to insulate EA from liability for violating Keller's publicity rights).

its interim name, image, and likeness policy (Interim NIL Policy) issued on July 1, 2021.[26]

1. O'Bannon v. NCAA

In *O'Bannon*, a group of twenty then-current and former student-athletes who participated in FBS football[27] and Division I men's basketball brought a class-action suit against the NCAA alleging antitrust violations.[28] *Inter alia*, they challenged NCAA rules prohibiting student-athletes from receiving a share of broadcast revenues that organizations earn through the licensing of their names, images, and likenesses.[29] The student-athletes argued that they should be permitted to receive financial compensation (including financial aid) in an amount that covers their full "cost of attendance[,]"[30] which the NCAA defines as "the total cost of tuition and fees, room and board, books and supplies, transportation, and other expenses related to attendance at the institution."[31] In order to support their theory of antitrust violation, the plaintiffs needed to show that the challenged rules (1) restrained trade (2) in a relevant market, and (3) that the restraints were unreasonable. A restraint is unreasonable if its "harm to competition outweighs its procompetitive effects."[32]

During a two-week bench trial, the U.S. District Court for the Northern District of California heard testimonial evidence from both sides. The evidence demonstrated that licensing contracts between the NCAA and broadcast companies were valuable, highly sought after, and expressly permitted the use of any participating student-athlete's name, image, and likeness.[33] The evidence tended to show that a "submarket for group licenses to use student-athletes' names, images, and likenesses in live . . . game telecasts" existed, and that the challenged restraints restricted student-athletes from participating in that submarket.[34] Further, the district court reasoned that by limiting the financial benefit a student-athlete can receive to the cost-of-tuition, the NCAA and its member schools "val-

26. *See* NAT'L COLLEGIATE ATHLETIC ASS'N, INTERIM NIL POLICY (2021) (hereinafter, "INTERIM NIL POLICY").

27. "FBS" stands for the NCAA's Division 1 "Football Bowl Subdivision." This division is the highest level of college football in the United States. *See* O'Bannon v. NCAA, 7 F. Supp. 3d 955, 964 (N.D. Cal. 2014).

28. *Id.* 962–65.

29. *Id.* at 962–63.

30. *Id.* at 971.

31. NCAA Manual *supra* note 4, art. 15.02.2.

32. *See* Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001).

33. *See O'Bannon*, 7 F. Supp. 3d at 969.

34. *Id.* at 968.

ue the [name, image, and likeness] at zero by agreeing not to compete with each other to credit any other value to the recruit in the exchange."[35] Considering these factual findings, the district court concluded that the challenged rules (1) restrained trade (2) in a relevant market.[36]

Having found that the NCAA had restrained trade, the district court next analyzed whether that restraint was reasonable. The Northern District of California applied the same reasonableness analysis as appears in the next case, *NCAA v. Alston. Alston*, which is the most recent authority on this issue, was affirmed by both the Ninth Circuit Court of Appeals and the United States Supreme Court.[37]

2. NCAA v. Alston (In re NCAA Athletic Grant-In-Aid Cap Antitrust Litigation)

O'Bannon's role was significant because it gave the judiciary a chance to become familiar with NCAA restraints, identify particular markets, and begin evaluating the concerns of student-athletes. The student-athletes' concerns differed between *O'Bannon* and *Alston* mainly in terms of degree. In *O'Bannon*, the student-athletes successfully captured compensation for their name, image, and likeness up to their "cost of attendance[.]"[38] In *Alston*, student-athletes sought to invalidate NCAA rules that place *any* limit on their name, image, and likeness compensation.[39]

Four years after the *O'Bannon* decision, Shawne Alston and other student-athletes filed their class action in the Northern District of California.[40] Judge Claudia Wilken, the same judge who presided over *O'Bannon*, heard *Alston*.[41] The parties in both cases agreed to bench trials. In *Alston*, the plaintiffs were current and former student-athletes (from 2014 forward) in Division I FBS football and men's and women's' Division I basketball.[42] Just like in *O'Bannon*, the plaintiffs alleged that the NCAA's rules violated antitrust laws.

35. *Id.* at 973.

36. *Id.*

37. *See In re* NCAA Athletic Grant-In-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058 (N.D. Cal. 2019); *In re* NCAA Athletic Grant-In-Aid Cap Antitrust Litig., 958 F.3d 1239 (9th Cir. 2020); NCAA v. Alston, 141 S. Ct. 2141 (2021).

38. *See O'Bannon*, 7 F. Supp. 3d at 1007–08.

39. *See In re NCAA Athletic Grant-In-Aid*, 375 F. Supp. 3d at 1062.

40. *Id.* at 1061–62.

41. *Id.* at 1061; *O'Bannon*, 7 F. Supp. 3d at 962.

42. *See In re NCAA Athletic Grant-In-Aid*, 375 F. Supp. 3d at 1061.

The Sherman Antitrust Act does not require that all restraints on trade be struck down, but only "undue restraint[s.]"[43] To identify whether the NCAA's challenged restraints were undue, the district court applied a "rule of reason analysis[.]"[44] This analysis involves a "three-step, burden-shifting framework[.]"[45] First, the plaintiff must show "that the challenged restraint has a substantial anticompetitive effect" in a relevant market.[46] If the plaintiff succeeds, then the burden shifts to the defendant to "show a procompetitive rationale for the restraint."[47] If the defendant meets this burden, the plaintiff has the final onus "to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means."[48]

The district court adopted the same "relevant market" definition that it established in *O'Bannon* .[49] The district court found the plaintiffs had met their burden of proving substantial anticompetitive effects in the relevant market.[50] It reasoned that "the existence of an agreement among Defendants that is intended to, and does, limit student-athlete compensation in the relevant market, is in and of itself sufficient to find . . . significant anticompetitive effects."[51] In other words, limiting the amount colleges could compensate student-athletes harmed competition. Therefore, the plaintiffs met their initial burden.

In analyzing the second part of the rule-of-reason test, the district court considered the NCAA's argument that the preservation of amateurism was a sufficiently procompetitive purpose. Crediting certain expert testimony, the district court accepted the theory that college sports have a different appearance from professional sports, and that difference in appearance contributes to the popularity of college sports.[52] From there, the court held that rules serving to solidify the boundary between college

43. Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 59–60 (1911).

44. Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006); *see Standard Oil Co.*, 221 U.S. at 60–62.

45. Ohio v. Am. Express Co., 585 U.S. 1, 9 (2018).

46. *Id.*

47. *Id.*

48. *Id.* at 9–10.

49. *In re* NCAA Athletic Grant-In-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1097 (N.D. Cal. 2019); *see* O'Bannon v. NCAA, 7 F. Supp. 3d 955, 996 (N.D. Cal. 2014) (defining the relevant market as "the college education market" or the "market for recruits' athletic services and licensing rights").

50. *See In re NCAA Athletic Grant-In-Aid*, 375 F. Supp. 3d at 1067.

51. *Id.*

52. *See id.* at 1082.

sports and professional sports are procompetitive and thus reasonable.[53] Applying this rule, the court concluded "[r]ules that prevent unlimited [athletic-related] payments such as those observed in professional sports leagues" were procompetitive.[54] The NCAA met its burden, so the analysis moved forward.

The plaintiffs proposed three less-restrictive alternatives that could allegedly achieve the procompetitive efficiency (a differentiation between college and professional sports). The court rejected the first two proposals because each allowed for *unlimited* compensation, blurring the line between amateur and professional sports.[55] The plaintiff's third proposal referred only to education-related benefits.[56] Since the plaintiffs were unable to make a less-restrictive proposal that would continue to differentiate college and professional sports, the district court stetted the NCAA's limits on athletic-based compensation.[57]

There is an important takeaway from *Alston*. The district court's opinion distinguishes unlimited payments from limited payments and held that rules prohibiting *unlimited* athletic-based payments are procompetitive.[58] Thus, it is possible that a *limited* athletic-based benefit could be a permissible alternative to the current rule scheme. Following this logic, this Comment will propose that a percentage-based stipend could satisfy the court's desire for a limited payment.

The plaintiffs appealed the district court's decision upholding limits on athletic-based benefits to the Ninth Circuit but lost on their claims.[59] The plaintiffs did not petition the Supreme Court for review of the Ninth Circuit's decision. Thus, the Supreme Court considered only those NCAA rules limiting education-related benefits such as internship opportunities and rewards for academic achievement—the rules the district court struck down.[60]

However, Associate Justice Brett Kavanaugh wrote a concurring opinion to, in his words, "underscore that the NCAA's remaining compensation rules also raise serious questions under the antitrust laws."[61] Justice

53. *See id.* at 1082–83.

54. *Id.* at 1083.

55. *See id.* at 1087.

56. *See id.*

57. *Id.*

58. *Id.*

59. *See In re* NCAA Athletic Grant-In-Aid Cap Antitrust Litig., 958 F.3d 1239, 1270 (9th Cir. 2020).

60. *See* NCAA v. Alston, 141 S.Ct. 2141, 2164 (2021). The education-related benefits considered by the Court are not the focus of this comment.

61. *Id.* at 2166–67 (Kavanaugh, J., concurring).

Kavanaugh was referring to rules limiting the athletic-based benefits that the plaintiffs did not appeal beyond the Ninth Circuit. Slamming the NCAA's current model, Justice Kavanaugh wrote:

> The NCAA couches its arguments for not paying student athletes in innocuous labels. But the labels cannot disguise the reality: The NCAA's business model would be flatly illegal in almost any other industry in America. All of the restaurants in a region cannot come together to cut cooks' wages on the theory that "customers prefer" to eat food from low-paid cooks. Law firms cannot conspire to cabin lawyers' salaries in the name of providing legal services out of a "love of the law." Hospitals cannot agree to cap nurses' income in order to create a "purer" form of helping the sick. News organizations cannot join forces to curtail pay to reporters to preserve a "tradition of public-minded journalism." Movie studios cannot collude to slash benefits to camera crews to kindle "a spirit of amateurism" in Hollywood.[62]

The majority opinion, coupled with Justice Kavanaugh's concurrence, was a major blow to the NCAA's once-seemingly unimpeachable regulatory model. The Court's opinion was issued on June 21, 2021, and almost immediately thereafter, state legislatures and executive offices were knocking at the NCAA's door. In response, and in only a matter of days after the opinion was issued, the NCAA released its Interim NIL Policy.[63]

II. CURRENT STATE OF THE NCAA'S RULES

The NCAA's Interim NIL Policy went into effect on July 1, 2021. This policy permits student-athletes to enter licensing deals with third parties to monetize their name, image, and likeness.[64] For example, a basketball player may now sign a "shoe deal" with Nike, whereby Nike will compensate that student-athlete for the use of the student-athlete's name, image, and likeness in commercials or other promotional advertisements for their footwear products.

But the NCAA only provided cursory guidance as to how a student-athlete should go about engaging in this entirely new process and has provided little explanation about the role a college can play in these ex-

62. *Id.* at 2167.

63. INTERIM NIL POLICY, *supra* note 26.

64. *See id.*

changes.[65] Instead, the NCAA encouraged state legislatures to implement their own policies and procedures until federal legislation can be enacted. And on or around the day the Interim NIL Policy was enacted, several states passed executive orders or legislative actions codifying their own rules.[66]

The current policy places three limits on a student-athlete's right to enter into name, image, and likeness deals. First, student-athletes are only permitted to enter deals with third parties.[67] This means that colleges themselves may not compensate players for use of their name, image, and likeness. Second, the NCAA emphasizes that "pay-for-play" is not permissible.[68] This concern was referenced in both *O'Bannon* and *Alston*. Although the NCAA has failed to actually define what "pay-for-play" means,[69] a reasonable interpretation of the term is that the NCAA does not want colleges or other organizations to compensate student-athletes directly, based on their performance. Third, the NCAA prohibits all "improper recruiting inducements" that may take the form of a name, image, and likeness deal.[70] This restriction serves to maintain fair recruitment practices and ensure that students evaluate potential schools for reasons other than immediate pecuniary gain. Barring pay-for-play and improper inducements is necessary to maintain competition in college sports.

The NCAA's Interim NIL Policy raises two problems. First, the interim policy only permits student-athletes to license deals with third parties. The policy still prohibits colleges from compensating a student-athlete in exchange for their name, image, and likeness in sports, which it uses in sports broadcasts. The interim policy does not squarely address the industry-wide problem identified in Justice Kavanaugh's concurrence in *Alston*.[71] The NCAA is merely permitting student-athletes to monetize their publicity rights on their own behalf while at the same time protecting the pockets of the supervising organizations by excluding the

65. NAT'L COLLEGIATE ATHLETIC ASS'N, CYCLE OF INDIVIDUAL ENGAGED IN NIL ACTIVITIES (2021); *see* Hosick, *supra* note 6.

66. *See* Dosh, *supra* note 8.

67. *See* INTERIM NIL POLICY, *supra* note 26.

68. *Id.*

69. *See id.*; *In re* NCAA Athletic Grant-In-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1071 (N.D. Cal. 2019).

70. *See* INTERIM NIL POLICY, *supra* note 26.

71. A concurrence is not law, but the limits-on-athletic-based-compensation issue was not even before the Supreme Court in *Alston*. Justice Kavanaugh's concurrence took issue with the NCAA's scheme as a whole, including limits on athletic-based compensation. *See* NCAA v. Alston, 141 S. Ct. 2141, 2166–69 (2021) (Kavanaugh, J., concurring).

student-athletes from participating in the sports-broadcast market identified in *O'Bannon* and *Alston*.

Second, the single avenue by which a student-athlete may now capture value for their publicity rights is a risky one. Many student-athletes may be unaware of the true value of their name, image, and likeness. Student-athletes may also lack the ability to recognize harmful contract clauses proposed by deceitful companies.[72] These two assumptions coupled together can be detrimental to the rights of the student-athlete. In response, the interim policy allows for a student-athlete to retain professional services in navigating potential third-party licensing deals.[73] This provision is undoubtedly beneficial but does not serve the interests of a student-athlete who is unable to retain representation. Either financial insecurity or lack of public recognition may limit a student-athlete's ability to hire professional services to protect them from potentially exploitive contracts. This risk goes directly against the NCAA's belief that "student-athletes should be protected from exploitation by professional and commercial enterprises."[74]

Given the inequity of excluding student-athletes from the sports-broadcast market and the unique risks created by the NCAA's Interim NIL Policy, a more effective strategy should be implemented.

III. PROPOSAL

Instead of shifting the burden of capturing the value of their publicity rights upon student-athletes, the NCAA should allow colleges to provide stipends to student-athletes for the college's use of their name, image, and likeness in television broadcasts. The amount of each stipend would be formulated by calculating a percentage of a school's broadcast revenues for the regular season[75] and dividing that amount by the number of players

72. For example, several University of Iowa football players provided YOKE, a videogame company, use of their name, image and likeness in perpetuity, royalty free, and without an option to revoke. In exchange, the players received $20. *See* Leah Vann, *One Week Into NIL, Lawyers Caution Athletes on Barstool, YOKE Gaming and Misinformation that Could Affect Iowa Athletes*, THE GAZETTE (Aug. 27, 2021, 1:24 PM), https://www.thegazette.com/iowa-hawkeyes/one-week-into-nil-lawyers-caution-athletes-on-barstool-yoke-gaming-and-misinformation-that-could-a/ [https://perma.cc/NL6F-MDR4].

73. *Id.*; *see* INTERIM NIL POLICY, *supra* note 26.

74. NCAA Manual *supra* note 4, art. 2.9.

75. There are several sporting events that take place beyond the regular season, such as post-season playoffs, bowl games, tournaments, etc. These events attract a large number of viewers and sponsors, raising the value of the broadcast rights. Given the unique nature of non-regular season play, the stipend amount should be re-determined after the conclusion of a team's regular season.

on the team. Each college would be required to select a percentage point from a standard percentage range set by the NCAA. The stipend should be equally distributed among all players participating on a particular team. Therefore, the NCAA's rules should be amended (1) to allow for a name, image, and likeness stipend, (2) to establish an acceptable percentage range that the stipend must be within, and (3) to exclude this stipend from the cost of attendance limit.[76]

A. Formulating the Stipend

1. Percentage-Based Calculation

Because student-athletes' publicity rights generate revenue predominately through game broadcasts, it is appropriate to base the amount of the stipend off of a percentage of a college's broadcast revenue. Broadcast rights are purchased because a television network anticipates that the schools will recruit the most talented and successful, and thus the most valuable, student-athletes. Better athletes win more games, and winning more games tends to command higher viewership.[77] This creates value for the network. Therefore, the college receives compensation-based value driven by the student-athlete's performance and appearance—name, image, and likeness—on the broadcast. Since there is a direct correlation between the use of the student-athletes name, image, and likeness and the high revenues of sports broadcasts, the student-athletes should receive a percentage of the revenue.

To demonstrate, consider the Big Ten's[78] college football broadcast deal with Fox and ESPN. As of this publication, this deal nets roughly $440 million per year, which is divided among its fourteen member

76. *Contra* NCAA Manual *supra* note 4, arts. 15.02.2, 15.1.2.

77. For viewership data relating specifically to college football broadcasts, *see 2019–20 Report: Amazing College Football Popularity Highlighted by Impressive Ratings and Attendance Data*, NAT'L FOOTBALL FOUND. (May 28, 2020, 9:00 AM), https://footballfoundation.org/news/2020/5/27/2019_Attendance_and_Ratings.aspx [https://perma.cc/5UXJ-3FCS].

78. The Big Ten is a college athletic conference in the Midwest. It is comprised of fourteen teams: University of Illinois, Indiana University, University of Iowa, University of Maryland, University of Michigan, Michigan State University, University of Minnesota, University of Nebraska-Lincoln, Northwestern University, Ohio State University, Pennsylvania State University, Purdue University, Rutgers University-New Brunswick, and University of Wisconsin-Madison. *See About the Conference*, BIG TEN CONF. (Oct. 1, 2022, 12:50 PM), https://bigten.org/sports/2018/6/6/school-bio-big10-school-bio-html.aspx [https://perma.cc/9ZF4-N3EZ].

schools.[79] Each school receives roughly $31.4 million. Each player on the team would receive an equal share of a selected percentage of the revenue. If the NCAA permitted colleges to pay between 3% and 7% of broadcast revenue to players, each football player at a Big Ten school would receive between $8,971.50 and $20,933.50 each year, depending on what revenue percentage the school chose.

The percentage range should be uniform for all NCAA member schools and sports. This proposal does not suggest what an acceptable percentage range would be. To do so would require a conclusion on a predominately economic question that is based on data to which this author does not have access. This proposal aims merely to recognize the student-athlete's interest in being compensated for the use of their publicity rights, as well as to offer an idea on how to redistribute a piece of large broadcast revenues.

2. Equally Divided Among Team Members

There are two reasons why every player should receive the same stipend amount. First, it is impossible to determine how much draw-power an individual player's appearance has on viewership. While it is logical to assume that superstar players in high-profile positions will create more viewership interest, the degree of their individual contribution is not readily, if at all, ascertainable in such a large consumer market. Since individual value cannot be determined, all players participating in game-broadcasts should receive an equal stipend. Second, a particular student-athlete's actual minutes played fluctuate from week to week. If the stipend was not uniform among all teammates, the formula would require a continuous process of balancing and re-balancing each student-athletes stipend amount based on minutes actually played. Given the mix of viewer's subjective motivations and fluctuating participation in games, all team members should be given an equal stipend in exchange for the college's use of their name, image, and likeness.

B. NCAA Rule Changes

To implement this proposal, the NCAA bylaws would need to be amended.

79. *See* Mike Ozanian, *Here's The College Football TV Money at Stake for Each Conference and Network*, FORBES (June 8, 2020, 6:07 PM), https://www.forbes.com/sites/mikeozanian/2020/06/08/heres-the-college-football-tv-money-at-stake-for-each-conference-and-network/?sh=7d70df097dc9 [https://perma.cc/NY82-2PUJ].

Rule 15.01.6 states: "An institution shall not award financial aid to a student-athlete that exceeds the cost of attendance that normally is incurred by students enrolled in a comparable program at that institution[.]"[80] The "cost of attendance" is determined by the particular college and "consists of tuition and fees, room and board, books and other expenses related to attendance[.]"[81] Rule 15.1.3 requires that the institution reduce the financial aid award of any student who exceeds the cost of attendance.[82] However, the NCAA makes an exemption to this policy in Rule 15.1.1 for students who receive a Pell Grant.[83] These students are allowed to receive financial aid up to the cost of attendance plus the Pell Grant. A similar exception should be made for name, image, and likeness compensation.

Excepting the name, image, and likeness stipend from the overall limit on financial aid would be the most efficient way to implement this proposal into the NCAA's current rules. By providing a general exception for paying student-athletes a percentage of broadcast revenue, the scholarship limit would be unaffected. Colleges would still be able to provide full-rides to their preferred student-athletes, while not having to worry about downsizing the financial aid package that the college offers.

C. "Substantially Less Anti-Competitive Means"

As described in Section II(b), the judiciary applied the "rule of reason analysis" to antitrust challenges against NCAA by-laws.[84] This is a three-part burden-shifting framework.[85] In *Alston*, the parties met their burdens in parts one and two of the test.[86] But the plaintiffs failed to carry their burden as to the third and final part of the analysis: demonstration that the procompetitive efficiencies could be reasonably achieved through substantially less anti-competitive means.[87] This Comment's proposal aims to satisfy part three of the rule-of-reason test.

80. NCAA Manual *supra* note 4, art. 15.01.6 (citation omitted).

81. *Id.* art. 15.02.6.

82. *Id.* art. 15.1.3.

83. *Id.* art. 15.1.1.

84. Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006); Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 60–62 (1911).

85. Ohio v. Am. Express Co., 585 U.S. 1, 9 (2018).

86. *In re* NCAA Athletic Grand-In-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1065, 1083 (N.D. Cal. 2019).

87. *See id.* at 1086.

The NCAA's "procompetitive efficiency" is amateurism, which results in a differentiation of college sports from professional sports.[88] The proposed stipend will continue to promote amateurism because it is not akin to salaries in professional sports. The stipend is unlike compensation in professional sports because it is limited in nature in two distinct ways. First, its amount is limited to a percentage of revenue chosen from within a fixed range. This limit ensures that student-athletes are rewarded the same, *pro rata* slice of their team's respective pie. Second, the stipend is limited because it may only be distributed in a uniform manner. Colleges are not permitted to pay star players more or otherwise condition the payment of funds on performance. This makes the stipend inherently different from professional athletes, whose salaries are based on an individual's talent and demonstrated success.[89] It also eradicates the NCAA's concern that certain players will receive "unlimited payments such as those observed in professional sports leagues."[90]

The proposal is also a substantially less anti-competitive means of achieving that goal. This can be demonstrated simply by comparing the NCAA's current policy to the proposal. The NCAA and its member schools "agree[d] to value the [name, image, and likeness] at zero[.]"[91] The current scheme mandates an agreement that no college will compete against another in terms of name, image, and likeness compensation. This proposal eliminates that agreement. Competition would be increased through allowing colleges to establish their own valuation of a student-athlete's name, image, and likeness, up to the percentage limit discussed in section IV(a)(i). Replacing the current scheme that allows for no competition with a competitive policy meets the rule-o f-reason's requirement that the alternative be "substantially less anti-competitive."

This proposal will continue to serve the procompetitive interests of the NCAA by maintaining the crucial distinction between professional sports and college sports.[92] The proposal is a less restrictive alternative

88. *Id.* at 1082.

89. In professional sports, a contract between a player and a counterparty typically grants the counterparty the right to use that player's name, image, and likeness. Those rights, along with athletic performance, serve as consideration for the player's financial salary. In other words, while professional athletes are paid for their rights, student-athletes in college sports are not, because colleges are expressly prohibited from compensating student-athletes for the use of their name, image, and likeness.

90. *In re* NCAA Athletic Grant-In-Aid, 375 F. Supp. 3d at 1083.

91. O'Bannon v. NCAA, 7 F. Supp. 3d 955, 973 (N.D. Cal. 2014).

92. The question in introducing a new source of financial compensation to student-athletes is where to draw a principled line. Given the increase in money involved in college sports, *see* n.79 and accompanying text, revenue distribution is becoming more of a concern. It is clear that introducing unlimited payments to student-athletes would eviscer-

compared to the current NCAA scheme and will promote competition among colleges. Therefore, this proposal is a strong candidate to withstand the third prong of the rule-of-reason test applied in *O'Bannon* and *Alston*.

D. Benefits of Direct Subsidy

There are two categorical benefits of allowing colleges to compensate student-athletes for use of their name, image, and likeness: protection and sustainability. The proposed stipend would provide more protection to a student-athlete's legal interests than individualized third-party endorsements. Simultaneously, the stipend will help sustain student-athletes financially in several ways. The stipend will reach student-athletes who may otherwise receive no financial aid or third-party deals in relation to athletics. Also, the stipend will counteract a student-athlete's limited ability to earn an income, allowing those who come from lower socio-economic classes to contribute to their family's financial wellbeing.[93] Finally, this stipend (by not restricting its use to cost-of-attendance) will alleviate financial pressures that can cause a student-athlete to leave school before earning their degree.

1. Student-Athlete Protection

This proposal would help to prevent abuse of student-athletes in their name, image, and likeness deals with third parties. Under the Interim NIL Policy, it is the student-athlete's responsibility to capture any value their name, image, and likeness might possess. While cautious student-athletes will consult with a reputable lawyer or agent before signing deals, many may not. Before they know it, they may have signed over the right to use their image in perpetuity for sneakers and a cash signing bonus.[94] The direct subsidy would help to alleviate contract uncertainty that student-athletes may currently be facing. By receiving a name, image, and

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ate amateurism. This proposal, while not the only imaginable revenue distribution method, is a worthy candidate for implementation because it is limited: it does not allow for arbitrary payments or negotiated contracts. For other proposals, *see* WHITNEY K. NOVAK, CONG. RSCH. SERV., RL46828, STUDENT ATHLETE NAME, IMAGE, AND LIKENESS LEGISLATION: CONSIDERATIONS FOR THE 117TH CONGRESS 22 (2021).

93. *See* N.C. Exec. Order No. 223, 36 N.C. Reg. 152–54 (Aug. 2, 2021) (noting that "student-athletes of color, who are more likely to come from lower-income backgrounds, are leading competitors in [basketball and football]" and "it is therefore likely that allowing student-athletes to receive compensation for their name, image, and likeness will be particularly beneficial to student-athletes of color and may help alleviate racial inequity in intercollegiate sports").

94. *See* Vann, *supra* note 72.

likeness stipend, the student-athletes may feel less pressure to venture into unknown contractual territories attempting to earn some value for any newfound publicity.

As an aside, the freedom to contract is important in American society, regardless of age or profession.[95] Under this proposal, student-athletes would retain their right to capitalize on their valuable name, image, and likeness from third parties. However, this proposal would alleviate pressure on the student-athlete to enter into questionable contracts, a pressure attributable to the fear that he or she is otherwise wasting a potentially short window for capitalizing on their publicity rights.

2. Financial Sustainability

The NCAA sets a limit on the number of athletic scholarships a school can provide per sport.[96] The NCAA counts any student-athlete against the total number of scholarships allotted.[97] Recipient student-athletes are known as "counters."[98] The maximum number of counters allowed is less than the total number of players permitted on most teams.[99] Full athletic scholarships are highly coveted. This is one of the most popular goals for young student-athletes who are still in primary school.[100] The finite number promotes competition among young athletes, which is beneficial. On the other hand, those who do not receive athletic scholarships are stuck with the extreme time commitment of college sports as well as significant student loans. The stipend would compensate these student-athletes and offset the financial opportunities forgone by choosing to play college sports. By maintaining the same limit on the full grant-in-aid scholarships distributable by the college, the student-athlete's

95. *See* Frisbie v. United States, 157 U.S. 160, 165 (1895).

96. *See* NCAA Manual *supra* note 4, art. 15.5.

97. *Id.* art. 15.5.1(a).

98. *See* NCAA Manual *supra* note 4, art. 15.5.1. Also, the method the NCAA uses in calculating "counters" differs depending upon the sport (or subdivision of the sport). The NCAA utilizes a "head-count" method for certain sports, *see id.* art. 15.5.2, and an "equivalency" method for other sports. *See id.* art. 15.5.3. The main difference is that, under the head-count method, the limit on full grant-in-aid scholarships can be rationed among players. For example, swimming is allowed 9.9 equivalencies of grant-in-aid scholarships. The college could divide that scholarship however they desire over their participating swimmers, so long as no one swimmer received more than one whole grant-in-aid scholarship.

99. *See* NCAA Manual *supra* note 4, art. 15.5.

100. *See* Sarah Daren, *The Importance of Athletic Scholarships*, COACH'S CLIPBOARD, https://www.coachesclipboard.net/athletic-scholarships.html [https://perma.cc/4UZF-494D].

motivation to earn a full scholarship would not be significantly diminished, thereby preserving the competitive motivation.

E. Answering "Amateurism"

The district court in *Alston* accepted the NCAA's argument that amateurism promotes competition in the marketplace because amateur sports are distinguishable products from professional sports.[101] The NCAA has codified its goal of "maintaining a clear line of demarcation between college athletics and professional sports" under its General Principles.[102] Despite the importance of maintaining a "clear line," the amount of financial compensation a player may receive has historically trended upward over roughly the last seventy years.

In 1906, the organization's inaugural by-laws stated that "[n]o student shall represent a College or University in an intercollegiate game . . . who is paid or receives, directly or indirectly, any money or financial . . . compensation as . . . consideration or inducement to play in . . . any athletic contest[.]"[103] Under this regime, players received zero compensation.

In 1948, the NCAA passed its "'Sanity Code'" which permitted schools to pay tuition to student-athletes but "'without consideration of athletics ability[.]'"[104]

In 1956, the NCAA enacted new amateurism rules that allowed schools to award scholarships to student-athletes based solely upon athletic ability. The limit was set to full grant-in-aid which included tuition plus "'commonly accepted educational expenses[.]'"[105]

In 2004, the NCAA once again increased the amount of financial compensation a student could receive. It permitted student-athletes who receive a Pell Grant to receive financial aid equivalent to the value of a full grant-in-aid *plus* the Pell Grant.[106]

In 2014, the NCAA increased its financial-aid limit from the "grant-in-aid" to the full cost of attendance.[107] This change occurred in response to the district court's decision in *O'Bannon*.

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101. *See In re* NCAA Athletic Grant-In-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1082 (N.D. Cal. 2019).

102. NCAA Manual *supra* note 4, art. 12.01.2.

103. CONSTITUTION AND BY-LAWS art. VII, § 3 (Intercollegiate Athletic Ass'n of the U.S. 1906).

104. O'Bannon v. NCAA, 7 F. Supp. 3d 955, 974 (N.D. Cal. 2014)

105. *Id.*

106. NCAA Manual *supra* note 4, art. 15.1.1.

107. *Id.* art. 15.02.6.

In 2015, the NCAA created the Student Assistance Fund and Academic Enhancement Fund.[108] These funds are payable by a college directly to the student-athlete. Benefits include postgraduate scholarships and benefits wholly unrelated to education, including: loss-of-value insurance premiums, travel expenses, clothing, and magazine subscriptions.[109] The funds may be provided in cash or kind, and there is no limit as to the amount a particular player may receive.[110]

Most recently, in 2021, the NCAA has allowed for student-athletes to broker their own name, image, and likeness deals with third parties. But student-athletes are still not permitted to be compensated by their school for its use of their name, image, and likeness in a broadcast.

Despite all these increases in student-athlete financial aid, the NCAA's annual revenue has continued to steadily increase.[111] Thus, the NCAA's reasoning that fans prefer student-athletes not to be paid has been largely obviated, and its position rests solely on a historical belief that colleges should not provide further compensation to student-athletes.

F. The Rich-Getting-Richer Dilemma

Implementing this Comment's proposal raises the possibility of widening the gap between top-tier athletic schools and everyone else. The theory is as follows. As an athletic program becomes more reputable, it tends to earn more viewership, higher broadcast revenues, better recruits, and state-of-the-art facilities. These benefits compound, and the athletic program becomes more successful, eventually reaching a level of unmatched talent and ability. In college football, The University of Alabama has reached this level, causing the public to experience Alabama "fatigue."[112] As conferences realign in order to optimize broadcast revenues, fans have also started to experience conference-wide fatigues.[113]

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108. *Id.* art. 15.01.6.1.

109. *In re* NCAA Athletic Grant-In-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1072 n.15 (N.D. Cal. 2019).

110. *Id.* at 1073.

111. Christina Gough, *Revenue of the NCAA by Segment from 2012 to 2020*, STATISTA (Mar. 1, 2021), https://www.statista.com/statistics/219605/ncaa-revenue-breakdown/ [https://perma.cc/F6XW-XKS4].

112. *See* Edwin Stanton, *Tired and Bored of Alabama Dynasty? It's Not Going Away*, SPORTS ILLUSTRATED FANNATION (Aug. 3, 2021, 10:00 AM), https://www.si.com/college/alabama/bamacentral/tired-and-bored-of-the-alabama-dynasty-its-not-going-away [https://perma.cc/XDM5-8ZGZ].

113. Barrett Sallee, *The Secret Formula to Ending the SEC's Dominance in College Football*, BLEACHER REP. (Sept. 28, 2012), https://bleacherreport.com/articles/

This dilemma applies to this Comment's proposal as well. Since dominant conferences have higher broadcast revenues, student-athletes would receive a larger stipend in these conferences than others. This would attribute to the compounding success already experienced by dominant schools, furthering the gap between top-tier athletic schools and everyone else. This is obviously a foreseeable effect. However, a college would only experience an increase in revenue as an indirect result of better players choosing to attend the college, and in turn winning more games. But if top-tier schools are already acquiring the top one percent of recruits, then they already are receiving the best recruits available and performing to the best of their ability. Therefore, this proposal's impact on the widening success disparity among schools may be less significant than appears at first sight.

CONCLUSION

Longstanding practices employed by the NCAA to preserve amateurism in college sports have come under judicial scrutiny in the last decade. The NCAA's response was to issue the Interim NIL Policy on July 1, 2021. While this was a significant first step towards recognition of student-athletes' publicity rights, further change is warranted. This Comment's proposal offers a more equitable distribution of the broadcast revenues generated in the now-billion-dollar industry of college sports by allowing a percentage of broadcast revenues to flow to student-athletes.

This ensures their valuable publicity rights are recognized while the dangers of exploitation posed by the current interim policy are alleviated. And importantly, the proposal maintains the procompetitive distinction between college and professional sports that distinguishes amateurism.

1351127-the-secret-formula-to-ending-the-secs-dominance-in-college-football [https://perma.cc/FA4A-JN8C].

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[*] J.D. Candidate 2023, Campbell University Norman Adrian Wiggins School of Law. It is unmistakably clear I would not be where I am today without the endless support I have received from Kylie and the rest of my family. Thank you. Further, many thanks to Professor Lucas Osborne for his college-football expertise and the time spent editing my work. Last but not least, thank you to my Campbell Law Review colleagues who are responsible for this Comment seeing the light of day.