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## Amateurism and the NCAA: The Controversy (a Legal Review)

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# **Amateurism and the NCAA: The Controversy (a Legal Review)**



Honors Thesis

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Department: Health and Sport Science

Advisor: Corinne Daprano, Ph.D.

April 2017

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## Abstract

*The NCAA has experienced controversy for many years now, but it may have another issue to grapple with because of their “amateurism” clause. Many student-athletes are concerned about the NCAA amateur clause and its impact on their “right of publicity”. The NCAA has consistently argued that athletes should not be paid because they are in fact students and are most likely on scholarship, either academic or athletic. Additionally, student-athletes are claiming that their intellectual property rights are being violated in “fair trade” and the unfair use of “image likeness” in the NCAA video game issue brought forward in the Ed O’Bannon case. This case is potentially the turning point in this dispute, which has been defended by the NCAA and their use of amateurism clause. With that, the amateurism clause and intellectual property rights are all integral facets of this research project.*

*The issue with intellectual property has been increasing in the recent history of the NCAA. Lawsuits such as the Jeremy Bloom and Ed O’Bannon cases have been troublesome for the national governing body of college athletics. Athletes claim that the NCAA is breaking antitrust laws because the organization is using their images and likeness’ for commercial use. Section one and two of the Sherman Antitrust Act prohibits action restraining trade in a relevant market and prohibits conduct enabling an organization to hold a monopoly over the relevant market. The NCAA prohibits student-athletes from receiving any money from their image or likeness because of the amateur clause.*

*The cases of Bloom v NCAA and O'Bannon v. NCAA are two essential resources for this research project because both are important when discussing the issue of intellectual property rights and the amateurism clause. Bloom v. NCAA is a case that involves a University of Colorado football player who also skied. To support his skiing career, Jeremy Bloom received endorsements, modeled, and participated in social activities that brought in money. Ed O'Bannon sued the NCAA for using his name and likeness in a video game. He argued that upon graduation the NCAA should be compensating athletes for using their image and image "likeness" for commercial use. While this research project will discuss a small piece of the intellectual property puzzle, it will provide insight into the amateurism clause and attempt to answer to whether athletes should be paid for their intellectual property and image likeness.*

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## Introduction

The NCAA, or National Collegiate Athletic Association, is the governing body of college athletics in the United States. This governing body regulates a total of more than 1,200 Division I, II, and III member institutions and approximately 450,000 athletes across the nation. Its main purpose is to regulate college athletics and foster competition. The NCAA is a non-profit organization, but when the governing body of college athletics receives almost one billion dollars in revenue, fans of college athletics are skeptical of the “non-profit” classification. The NCAA’s status as a non-profit, although important to the understanding of the overall issue covered, is not the purpose of this paper.

The focus of this paper is the amateurism clause, which generally states that no student-athlete shall receive improper benefits because it would jeopardize their amateur status. The NCAA views student-athletes as amateurs, not professionals, denying them any compensation outside of that which is handed to them via athletic or academic scholarships.

Jeremy Bloom and Ed O’Bannon brought different but legally significant cases against the NCAA to challenge the amateurism clause. Bloom, a University of Colorado football player, was receiving compensation from modeling agencies and advertisement deals due to his popularity in professional skiing. Ed O’Bannon, a former member of the UCLA basketball team, argued that images of himself used in NCAA advertisements violated his intellectual property rights via image likeness. From both cases, it can be determined that amateurism is a troublesome regulation that, if not fixed now, will continue to be a problem for the NCAA in the future.

This paper documents the history of the NCAA, what has already been brought to court in terms of litigation surrounding the amateurism clause, and how it affects the intellectual property rights of student-athletes. While this paper will provide descriptive explanations of legal theories that stem from the Bloom and O'Bannon cases, it will also include insight into what the NCAA could do to avoid future litigation.

## **The NCAA**

The formation of the NCAA is crucial in understanding why the issue of amateurism is important today. In the mid-1800's, college athletics began with competitions between *intra*-collegiate clubs. The popularity of these competitions grew. The first inter-collegiate competition occurred between Yale and Harvard in 1852, and it a student-organized rowing competition (ASHE, 2015). Events such as these continued to grow in frequency and President Roosevelt became involved due to several deaths and excessive brutality in college football games (ASHE, 2015).

President Theodore Roosevelt was instrumental in asking Harvard, Yale, and Princeton to meet with him at the White House to develop a plan to reform college football (ASHE, 2015). President Roosevelt had no enforcement powers over colleges, but it was evident from this meeting and subsequent meetings, that player safety and a recognizable chain of order needed to be an integral part of intercollegiate athletics (ASHE, 2015). These meetings resulted initially in the creation of the IAAUS, or the Intercollegiate Athletic Association of the United States in March of 1906. The organization would later be renamed the National Collegiate Athletic Association in 1910 (ASHE, 2015).

The NCAA's first constitution included player safety and administrative language, as well as the amateur clause. The amateur clause states that “an amateur sportsman is one who engages in sports for the physical, mental, or social benefits he derives therefrom, and to whom the sport is an avocation. Any college athlete who takes pay for participation in athletics does not meet this definition of amateurism” (ASHE, 2015). This was the first codified definition of the word amateurism by the NCAA.

As soon as the NCAA had a constitution, a well-defined definition of amateurism, and an organized team of administrative personnel, the “notions of amateurism and grant-in-aid created a powerful philosophical divide between the northern and southern regions of the United States” (ASHE, 2015). The split became more prominent when World War II veterans came back from the war and wanted to participate in college athletics. The soldiers were more experienced athletes because of the athletic teams they formed in the armed services (ASHE, 2015). This became an unfair advantage for schools that could recruit these soldiers from across the country (ASHE, 2015).

As a result of these advantages, the NCAA created the Sanity Code in 1948. This litigation gave NCAA members rules on the “allowable amount of financial aid that could be given to intercollegiate athletes” (ASHE, 2015). There was a major dispute over this code though because southern universities were not as established as ones in the north at the time of the code's creation. The Big Ten and the Ivy League had the financial resources to recruit players because they were more established. For example, this enticed many student-athletes from the south to move north in order to participate in intercollegiate athletics (ASHE, 2015). Since these recruits were not allowed to be paid, they became students on campus, and the term “student-athlete” was born.

Walter Byers, the first executive director of the NCAA in 1951, created the term student-athlete in response to the “fallout [from] the Sanity Code and the popularity of the grant-in-aid [idea]” (ASHE, 2015). Byers wanted to ensure student-athletes were not considered employees of a school. Because Byers saw the potential for college athletics to become more commercialized, he “knew that classifying college athletes as employees could crumble the financial structure of the NCAA itself” (ASHE, 2015). If student-athletes were considered employees, the NCAA member schools would expose themselves to increased expenditures for athlete salaries and be subject to federal labor law.

### **Amateurism and the Student-Athlete**

Because of Byers’ prescient decision not to classify student-athletes as employees of the university, several new regulations were created to assure the NCAA could enforce the amateurism clause. In the mid 1950’s, the NCAA created regulations and changed bylaws to give schools the opportunity to award athletic scholarships to their student-athletes (Sheetz, 2016). Enticing college athletes with scholarship dollars not based on academic merit or need-based criteria became rampant after this, and the NCAA added more regulations to try and control the rapid growth of these financial packages.

Commercialization and amateurism competed against financial aid, and to gain better control of the distinction between them, the NCAA strengthened the amateurism clause. The NCAA “gained better control over its member institutions by establishing enforcement authority over the amateurism provisions” (Sheetz, 2016). Provisions

included student-athlete eligibility, financial inducement cutbacks, improper payments, and the NCAA abolished all pay-for-play models (Sheetz, 2016).

In 1948, the NCAA permitted student-athletes to receive any type of scholarship, such as merit or need-based, but there were still instances of cheating and unethical behavior when boosters and alumni began making illegal payments to student-athletes (Afshar, 2014). To make it more difficult to receive these illegal payments, the NCAA established full grant-in-aid scholarships. These grant-in-aid scholarships were intended to pay for “tuition, fees, room and board, books and monthly laundry money stipend” (Afshar, 2014). In 2011, Mark Emmert, the current president of the NCAA created a new rule that gave Division I-A and I-AA schools the ability to pay student-athletes a \$2,000 stipend (Afshar, 2014). This, in addition to the previous regulations, further blurred the definition of amateurism.

The amateurism clause allowed the NCAA to draw a distinction between collegiate and professional athletes (Sheetz, 2016). Today the NCAA bylaws clearly state that college athletics “are designed to be an integral part of the educational program, and therefore it is necessary to ‘maintain a clear line of demarcation between college athletics and professional sports’” (Sheetz, 2016). In Section 12.1.2 of the NCAA bylaws, an athlete can lose his or her amateur status by,

*“(a) Using his or her athletics skill (directly or indirectly) for pay in any form in that sport; (b) accepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation; (c) signs a contract or commitment of any kind to play professional athletics, regardless of its legal enforceability or any consideration received...; (d) receives directly or*

*indirectly, a salary, reimbursement or expenses or any other form of financial assistance from a professional organization based on athletics skills or participation, except as permitted by NCAA rules and regulations; (e) competes on any professional athletics team...even if no pay or remuneration for expenses was received...; (f) after initial full-time collegiate enrollment, enters into professional draft...[;or] (g) enters into an agreement with and agent”(Sheetz, 2016).*

These regulations are intended to prevent student-athletes from receiving compensation for their athletic talent.

Despite this NCAA definition, student-athletes often “view themselves first as an athlete for their respective sports, and second as a student of the university” (Afshar, 2014). Yet, since the student-athletes are not defined as employees of their respective universities, they do not have the same rights under labor law as professional athletes. Professional athletes have the right to organize as a union and collectively bargain for issues such as player salaries, free agency, and disciplinary rules. NCAA student-athletes do not have the right to organize a union and no voice in NCAA regulations that govern their eligibility, transfer rights, and how many hours they can spend in practice per week.

This paper will focus on two significant court cases that challenged the amateurism clause and what impact these court cases have had on NCAA amateur regulations. Jeremy Bloom was a professional skier who received endorsement money, but had his compensation rights revoked when he enrolled at the University of Colorado to play football. Ed O’Bannon was a UCLA basketball player who filed an antitrust lawsuit claiming that the NCAA was violating his intellectual property rights. Following is an analysis of these cases.

**Bloom v. NCAA (2004)****Facts of the Case**

Jeremy Bloom was a football player at the University of Colorado. He was also an Olympic and World Cup skier. He appeared in television advertisements and received endorsement deals for his skiing success. In a case decided on appeal in 2004, Bloom fought for his right to earn endorsement money from a commercially directed ski equipment company and modeling compensation for Tommy Hilfiger, Oakley, Dynastar, and Under Armour in order to support his aspirations to compete in the 2000 Winter Olympics (Bloom v. NCAA, 2004) Bloom played football for two years on the University of Colorado football team. After losing his legal battle against the NCAA, he was ruled ineligible to compete in NCAA football and resumed his skiing career.

**Bloom's Argument**

On behalf of Jeremy Bloom, the University of Colorado “requested waivers of NCAA rules restricting student-athlete endorsement and media activities, and then, a favorable interpretation of the NCAA rule restricting media activities” (Bloom v. NCAA, 2004). The NCAA denied the University of Colorado’s waiver because of bylaws 12.4.1, 12.5.1.3, and 12.5.2.1 (NCAA Division I Manual, 2015). Bylaw 12.4.1 states “compensation paid to student-athletes ‘must be consistent with the limitations on financial aid set forth in Bylaw 15. Compensation may be paid to a student-athlete: (a) Only for work actually performed; and (b) At a rate commensurate with the going rate in the locality for similar services’” (NCAA Division I Manual, 2015). In other words,

money given to a student-athlete for actual work performed should be at a rate that is equal to similar services provided by others. Bloom argued that this Bylaw did not apply to him because football was not a similar service to skiing. He argued that he should be able to keep receiving endorsement money through his professional skiing career.

Additionally, Bloom argued that he owned his own intellectual creations, such as advertisements and other sponsored media. The NCAA disagreed and stated that his creations were not his because of his enrollment at an NCAA governed school. According to bylaw 12.5.1.3 at the time of this case, if a student-athlete recommissions the use of his likeness in images that promote a commercial product prior to his or her enrollment in a NCAA-governed institution, they cannot be in jeopardy of losing eligibility if:

*“the individual's involvement in this type of activity was initiated prior to his or her enrollment in a member institution; the individual became involved in such activities for reason independent of athletics ability; no reference is made in these activities to the individual's name or involvement in intercollegiate athletics; the individual does not endorse the commercial product; any compensation received by the individual is consistent with applicable limitations on a student-athlete's maximum amount of financial aid; and the individual's remuneration under such circumstances is at a rate commensurate with the individual's skills and experience as a model or performer and is not based in any way upon the individual's athletics ability or reputation” (NCAA Division I Manual, 2015)*

In addition, NCAA bylaw 12.5.2.1 states that “subsequent to becoming a student-athlete, an individual [will be ineligible] for participation in intercollegiate athletics if the individual: accepts any remuneration for or permits the use of his or her name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind, or receives remuneration for endorsing a commercial product or service through the individual’s use of such product or service” (NCAA Division I Manual, 2015). These bylaws bar a student-athlete from accepting any compensation for their own intellectual creations, which typically come in the form of endorsements. For example, the part “if the remuneration for or permits the use of his or her name or picture to advertise” explicitly states that a student-athlete cannot permit the use of their own name or images in a commercially labeled product for which they receive compensation.

### **NCAA’s Argument**

During the trial, the NCAA argued five factors: legally gathering all of the information given to them by Bloom, protecting student-athletes from exploitation, the possibility of competitive or recruiting advantages, the intent of the applicable bylaw, and case precedent arising in similar situations (Bloom v. NCAA, 2004).

Information provided by Bloom, his agent, and attorney portrayed him as a multi-sport athlete. The NCAA argued that this notion alone created confusion. The NCAA does not allow athletes to create commercial products for compensation related to their athletic ability. The NCAA argued that it would be highly unlikely they could determine which commercial products were a result of Bloom’s football ability or his skiing ability (Bloom v. NCAA, 2004). During the trial, the NCAA was asked to resolve the confusion

with an explanation of rules regarding media-related activities, and how it affected Bloom's eligibility. The confusion created by Bloom's legal team did not allow the NCAA to effectively decipher which media produced by Bloom was because of his athletic ability or from his physique. Because of this confusion, the NCAA successfully created doubt regarding this issue. In addition, it is quite ironic for the NCAA to care about Bloom enough to protect him from commercial exploitation. The NCAA voiced "its concern that its duty to protect student-athletes from exploitation calls it to prohibit such activities" (Bloom v NCAA, 2004).

The NCAA also tried to use an association tactic to describe the possible competitive and recruiting advantages that would occur if they were to allow Bloom to receive compensation from commercial products. If Bloom was permitted to engage in these media related activities then the NCAA would have to permit every athlete in the same or similar situation to do likewise. The argument of competitive and recruiting advantages was puzzling because Bloom has nothing to gain from earning a small amount of money from his skiing career to help pay for his education. Nonetheless, the NCAA made the point that being paid revokes a student athlete's eligibility.

The NCAA because of the amateurism bylaws also denied Bloom's waiver. As previously stated, the NCAA maintains "a clear line of demarcation between college athletics and professional sports" (Tulsa Law Review, 2003). The NCAA is focused on student-athletes growing as human beings emotionally, intellectually, socially, and athletically. Their mission is to provide a quality education to all student athletes. Thus, the NCAA used several cases such as *Cole v. NCAA* (2000) and *NCAA v. Lasege* (2001) to support other aspects of their argument in this case. In *Cole v. NCAA* (2000), Cole

was a partial qualifier, and was ineligible because of his academic standing in high school. The NCAA denied Bloom's request to be eligible because they simply did not have enough information to declare whether the compensation that he was receiving was not because of his athletic ability.

In *NCAA v. Lasege* (2001), Lasege attempted to compete in NCAA basketball after he signed a contract overseas to play professionally, jeopardizing his amateur status in basketball. Critics of this case and the NCAA argued that Lasege (2001) had nothing to do with Bloom because Bloom was "not seeking to compete on the ski team at CU, nor did he sign a professional contract to play football (Tulsa Law Review, 2003). However, the NCAA was able to use these cases to demonstrate that they did not arbitrarily or capriciously apply the amateurism bylaws. The NCAA was successful in demonstrating to the court that they had not capriciously denied his request for a waiver.

### **The Court's Decision and Rationale**

Because Bloom was unable to successfully argue that the NCAA's enforcement of its amateurism policy was "arbitrary or capricious", the court ruled in the NCAA's favor. Bloom argued that "the NCAA is arbitrary in the way it applied its bylaws among individual students", but the court ruled that procedural due process given to student athletes under the governance of the NCAA was followed. (*Bloom v. NCAA*, 2004). Bloom was "correct that he was not permitted to personally petition the NCAA, so he effectively submitted three petitions to the NCAA with the full assistance and support of the University of Colorado" (*Bloom v. NCAA*, 2004). The NCAA requested more information stemming from these petitions, and the Court found that this was not a

malicious act against Bloom, rather it was a reaction to a myriad of waivers that were already coming in by Bloom. The administrative review process of the NCAA did not give Bloom's waiver "any less consideration" and according to the court, it was "reasonable in general and that it was reasonably applied in this case" (Bloom v. NCAA, 2004).

### **O'Bannon v. NCAA (2014)**

#### **Facts of the Case**

The plaintiffs in this case included twenty student-athletes who played for Division I men's basketball teams or in the FBS football division. These athletes played from 1956 to 2009, and some went on to play professionally after college (O'Bannon v. NCAA, 2014). Ed O'Bannon, the lead plaintiff, played college basketball at UCLA from 1991-1995. He was concerned with the NCAA's use of footage of him in television advertisements. O'Bannon brought this case to the court to argue that the NCAA was restricting trade by preventing student-athletes from being compensated for the use of their images and likenesses on licensed products. Section 1 of the Sherman Antitrust Act "makes it illegal to form any contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce [...]. To prevail on a claim under this section, a plaintiff must show that 'there was a contract, combination, or conspiracy; that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and that the restraint affected interstate commerce'" (O'Bannon

v. NCAA, 2014). The District Court ruled in favor of the plaintiff. It was appealed by the NCAA and partly affirmed by the Ninth Circuit Court of Appeals.

### **Ed O'Bannon's Argument**

The athletes, led by O'Bannon, filed suit against the NCAA for restriction of trade and stated that the NCAA's rules on athletic compensation "violate(d) the Sherman Antitrust Act" in two national markets: college education and group licensing (O'Bannon v. NCAA, 2014).

The college education market for NCAA Football Bowl Subdivision [FBS] and Division I basketball created unfair recruiting advantages for these schools and athletic departments. The facilities offered by top-tier schools in college athletics were used to entice high school athletes to choose those schools instead of the Football Championships Series [FCS], Divisions II and III schools. The plaintiffs argued that the total "bundle of goods" was larger in the FBS and Division I basketball schools because they could provide unique "access to high-quality coaching, medical treatment, state-of-the-art athletic facilities, and opportunities to compete at the highest level of college sports (O'Bannon v. NCAA, 2014). These schools had a greater allocation of resources giving them the ability to provide these opportunities. Governing associations such as the National Intercollegiate Athletic Association, National Junior College Athletic Association, National Christian College Athletic Association, and the United States Collegiate Athletic Association were unable to compete with the NCAA because they provided less scholarship dollars (O'Bannon v. NCAA, 2014). O'Bannon argued that the

NCAA created a “one-track” system for high school athletes to play professionally after college, thus restricting trade.

In addition to college education, O’Bannon’s second claim was that there was a group licensing market. The group licensing market brought the amateurism clause into conflict with intellectual property rights. O’Bannon claimed that ““in the absence of the NCAA’s [compensation rules], FBS football and Division I basketball players would also be able to sell group licenses for the use of their names, images, and likenesses”” (O’Bannon v. NCAA, 2014). O’Bannon requested that, on behalf of student-athletes, licenses could be sold to companies that create media content for NCAA member institutions. This was O’Bannon’s attempt to stop the ongoing infringement of the student-athletes’ intellectual property rights by the NCAA. Intellectual property rights reside only where markets are found. O’Bannon had to establish a market for live game telecast production, video game production, and re-broadcasts, advertisements, and other archival footage (O’Bannon v. NCAA, 2014).

Television networks regularly sign licensing agreements to use the “intellectual property of schools, conferences, and event organizers (O’Bannon v. NCAA, 2014). Networks do this to obtain the rights to display institutional intellectual property [logos, players, etc.] on television screens. When signing these contracts, consent is given by the NCAA. This was proven through broadcast expert Edwin Desser, an expert witness for the plaintiff. Desser made it clear that provisions for licensing names, images, and likenesses are common, and they have some monetary value for television networks (O’Bannon v. NCAA, 2014). He also stated, ““If you’re running a business like a television network, a broadcast station, you would prefer to have consent, and you would

like to have somebody stand behind these consents so that you don't have to worry about somebody coming after you later with a claim'" (O'Bannon v. NCAA, 2014). The NCAA did not ask its student-athletes for consent because the student-athletes could not receive any of the benefits from the licensing agreement.

The idea of group licensing agreements caught the attention of video game developers. EA [Electronic Arts] created collegiate sport games using each Division I-A school in the NCAA, the games were meant to be authentic representation of NCAA sports (O'Bannon v. NCAA 2014). In addition, Electronic Arts worked out licensing deals and formed agreements with "professional sports leagues and teams to use their trademarks, logos, and other intellectual property in videogames" (O'Bannon v. NCAA, 2014). They also negotiated deals to use the names, images, and likenesses of individual professional athletes (O'Bannon v. NCAA, 2014). The cycle of yearly production and consumer purchase of the EA video games was grounds for a group licensing market being established outside of collegiate sports.

O'Bannon showed that there was a market for this type of product through playable avatars that were replications of student-athletes, and the constant renewal of the licensing agreement showed that revenue was the motive. If a company, such as the NCAA, renews a product license, it is reasonable to infer that you enjoy this product. Ironically, the NCAA did not renew its license with Electronic Arts because it's "worried about how much it is racking up in legal fees dealing with [O'Bannon v. NCAA]" (Legal Monitor, 2013). It can be said that this is an excuse to cover up the fact that exploitation of a niche market might have occurred.

In addition to game broadcast agreements with television networks and video game licensing agreements with EA, the NCAA also had agreements with the television networks that allowed the networks to use archival footage of NCAA games and tournaments. These licensing agreements concerning re-broadcasts, advertisements, and other archival footage were completed when the plaintiffs were still in school (O'Bannon v. NCAA, 2014). The NCAA licensed this intellectual property to a third-party company named T3Media (O'Bannon v. NCAA, 2014). T3Media was not allowed to license footage of student-athletes while they were in school. The agreement between the NCAA and T3Media showed a market demand among “television networks, third party licensing companies, and advertisers for group licenses to use student-athletes in game re-broadcasts, advertisements, and other archival footage” (O'Bannon v. NCAA, 2014). Thus, O'Bannon argued that there is a market for licensed college products, even after the student-athlete has graduated.

### **The NCAA's Argument**

The NCAA's argument was focused on amateurism, competition among FBS football and Division I basketball teams, and maintaining a combination of academics and athletics for student-athletes while increasing the total output, or opportunities to participate in Division I athletics of its product (O'Bannon v. NCAA, 2014).

Amateurism preserves the NCAA's principle of first and foremost providing a college education to its student-athletes. During testimony, Dr. Emmert stated that “the rules over the hundred-year history of the NCAA around amateurism have focused on [...], making sure that any resources that are provided to a student-athlete are only those

that are focused on his or her [education]” (O’Bannon v. NCAA, 2014). The emphasis on amateurism was important to the NCAA and the NCAA argued that education was not just important to them but to student-athletes as well.

During trial proceedings, Dr. J. Michael Dennis, who had conducted a survey of almost 2,500 respondents for the NCAA, concluded that a majority of [the respondents] did not approve of the idea that student-athletes should be paid (O’Bannon v. NCAA, 2014). However, the court did not find this survey provided an accurate public perception on the matter. The questions prompted certain responses such as an open-ended question at the beginning of the survey asking, ““What [respondents] had heard about student athletes being paid?”” (O’Bannon v. NCAA, 2014). Manipulative questions gave faulty information on consumer demand of college athletics, and Walter Byers states that consumer demand was not factored into defending amateurism.

In a deposition given by Walter Byers, this claim was contradicted. Byers said that the NCAA’s decision in 1975 to remove incidental expenses from grant-in-aid was not motivated by consumer demand (O’Bannon v. NCAA, 2014). Byers specifically noted that during the years of 1956 and 1975, the NCAA grew in popularity (O’Bannon v. NCAA, 2014). Stating that the NCAA experienced growth during the years before the change in 1975 provided evidence against that claim. Consumer demand was on the rise, and consumer interests did not influence their final decision to remove incidental expenses from grant-in-aid.

From this, the Court “found that the NCAA’s restrictions on student-athlete compensation are not the driving force behind consumer demand for FBS football and Division I basketball-related products” (O’Bannon v. NCAA, 2014). Experiencing

growth and creating change that made it increasingly difficult for student-athletes to obtain more compensation due to the reversal of incidental expenses being discarded from grant-in-aid did not show that consumer demand was supporting the preservation of amateurism.

Additionally, the NCAA countered O'Bannon's expert witness Mr. Desser with their own broadcasting expert Neal Pilson, who stated "sport broadcasters need not acquire the rights to use student-athletes' names, images, and likenesses and that the primary reason they enter into licensing agreements with event organizers is to gain exclusive access to the facility where the event will occur" (O'Bannon v. NCAA, 2014). The court found this testimony lacked standing because Mr. Pilson also stated that sometimes these agreements include the transfer of intellectual property rights. The court found that there is room for athletes to "create and sell group licenses for the use of their names, images, and likenesses in live game telecasts" (O'Bannon v. NCAA, 2014).

To O'Bannon's claim that the NCAA found a group licensing market in video games, the NCAA argued that "such demand would not exist because it has ceased licensing its intellectual property for [the NCAA] in video games, making it unlikely that any developer would seek to develop a videogame using the names, images, and likenesses of student-athletes (O'Bannon v. NCAA, 2014). The Court ruled that this was not supported because of the NCAA's inability to prove that they would never go back to conversing with Electronic Arts or any other video game developer about group licensing agreements. There weren't any current bylaws at the time of this case that forbade such future agreements (O'Bannon v. NCAA, 2014). The NCAA also found it to be beneficial, and profitable, for them to enter agreements with EA, which was demonstrated during the

trial by the continued renewal of the agreements concerning image likenesses and intellectual property (O'Bannon v. NCAA, 2014).

Other than the preservation of amateurism, the NCAA's defense to O'Bannon also consisted of assertions that its restrictions on student-athletes were put in place to maintain the current level of competitive balance, highlight the integration of academics and athletics, and to increase the number of opportunities for schools to participate in FBS football and Division I basketball (O'Bannon v. NCAA, 2014).

The NCAA argued that the current restrictions on student-athletes were in place to maintain a competitive balance between NCAA schools. The Court found this absurd because of the NCAA's willingness to let schools, especially those with large amounts of money flowing into the athletic programs, spend enormous amounts of money on "coaching, recruiting, and training facilities" (O'Bannon v. NCAA, 2014). During the trial, Dr. Emmert revealed that it "is not the mission of the association to [...] try and take away the advantages of a university that's made significant commitment[s] to facilities and tradition and all of the things that go along with building a program" (O'Bannon v. NCAA, 2014). If it is the job of the NCAA to focus on creating a competitive balance, then it is also their job to control the amount of spending that goes into recruiting, coaching, and training facilities. Over time, schools with larger budgets have been undeterred from spending large amounts of money to gain a competitive advantage.

One of the core principles of the NCAA is for student athletes to earn an education while they play a sport. The NCAA believes that "the integration of academics and athletics increases the quality of the educational services its member schools provide

to student-athletes in the college education market [...]” (O’Bannon v. NCAA, 2014). The benefits of being a student-athlete are increased access “to financial aid, tutoring, academic support, mentorship, structured schedules, and other education services [...]” (O’Bannon v. NCAA, 2014). The NCAA provided only one piece of evidence regarding this core principle, which were the testimonies of university administrators who “asserted that paying student-athletes large sums of money would potentially ‘create a wedge’ between student-athletes and others on campus (O’Bannon v. NCAA, 2014). O’Bannon claimed that he “felt ‘like an athlete masquerading as a student’ during his college years” (O’Bannon v. NCAA, 2014). The Court found that the link between “student” and “athlete” seemed to be missing or distorted.

The NCAA also stated that amateurism regulations are “reasonable” with regards to the “increase [in] the number of opportunities available to schools and student-athletes to participate in FBS football and Division I basketball, which ultimately increases the number of games that can be played” (O’Bannon v. NCAA, 2014). The NCAA claimed its compensation restrictions on student-athletes increased the amount of schools participating in FBS football and Division I basketball. The number of schools “participating in FBS football and Division I basketball has increased steadily over time and continues to increase today” (O’Bannon v. NCAA, 2014). Dr. Emmert stated that this increase was due to the philosophical commitment to amateurism, rather than increased revenues (O’Bannon v. NCAA, 2014). The Court found this argument unconvincing, and presented evidence on why increased output was not the result of the NCAA’s philosophical defense of preserving amateurism.

The Court stated the increase in schools participating in Division I athletics was not because of the NCAA's philosophical commitment to amateurism, but rather due to the enticing opportunities presented in the form of increased "school profile and increased athletics-based revenue" (O'Bannon v. NCAA, 2014). This is evident in the fact that most schools would rather be in NCAA's Division I and not Division II or III. If the compensation restraints were lifted, it would not be plausible to think that schools would leave because of financial reasons; Division I schools provide overwhelmingly more opportunities for revenue related events compared to schools in the two lower divisions.

### **Court's Decision, Rationale, and Solution Analysis**

The Court ruled in favor of the plaintiff, Ed O'Bannon because he proved that markets existed in college education and group licensing. The NCAA did not prove to the Court that the preservation of amateurism was a viable regulation to protect student-athletes from exploitation. The provision of a college education should be the primary objective of the NCAA, but because of its lucrative business dealings with licensing companies, the NCAA and its member schools sometimes fail to provide the standard of extraordinary education it tries to achieve. This case was eventually appealed by the NCAA and upheld in part by the Ninth Circuit Court of Appeals.

During the trial, O'Bannon presented three alternatives to the NCAA restrictions concerning student-athletes' amateur status. These alternatives included: 1) raising the NCAA grant-in-aid limit to allow schools to award stipends derived from specified sources of licensing revenue; 2) to allow schools to deposit a share of licensing revenue

into a trust fund for student athletes which could be paid after the student athletes graduated or left school for other reasons; or, 3) permit student athletes to receive limited compensation for third-party endorsements approved by their schools (O'Bannon v. NCAA, 2014).

The first proposal, the Court found, was a way to increase grant-in-aid and provide stipends to student-athletes. This stipulation would not break any NCAA bylaws if the grant-in-aid did not go above the cost of attendance (O'Bannon v. NCAA, 2014). This solution seemed plausible because it eliminated the discrepancy between the cost of attendance and grant-in-aid amount provided to student athletes. However, student-athletes would only be able to use the increased grant-in-aid stipend towards the completion of their education.

The second proposal was to allow universities to create trusts for student-athletes. The money deposited into the trust for a student-athlete would be held until graduation or they left the university for other reasons. This would not violate NCAA bylaws given that the money was equally spread out between individuals and limited (O'Bannon v. NCAA, 2014). The NCAA was worried about consumer demand concerning this provision, but the Court found that providing trusts for student-athletes would further "minimize any potential impact on consumer demand" (O'Bannon v. NCAA, 2014).

The question stemming from this proposal was how much money should each student-athlete receive as part of their trust fund. The NCAA argued that this compensation must be based on licensing and intellectual property rights only and not on the athletic abilities of an individual athlete (O'Bannon v. NCAA, 2014). Further considerations regarding the reasons a student-athlete might leave the university before

graduating (i.e. suspension, dismissal, or transfer), and whether they would still be entitled to a trust was a complex matter the court felt should be determined by the NCAA or its member institutions.

The third proposal allowing student athletes to receive money for endorsements, “doesn’t offer a less restrictive way for the NCAA to achieve its purposes” (O’Bannon v. NCAA, 2014). Allowing students-athletes to receive money for endorsements, would completely undermine the NCAA’s principle of amateurism. Although Dr. Emmert conceded that “commercial exploitation” had slipped through the cracks periodically, he could not come to terms with this proposal because it would destroy amateurism. (O’Bannon v. NCAA, 2014). The Court found that this provision provided by the plaintiff was not a “viable” solution to the problem (O’Bannon v. NCAA, 2014).

### **What Did These Historic Cases Prove?**

Jeremy Bloom’s case against the NCAA was crucial in understanding the amateurism clause and its application to student-athletes who are professional athletes prior to enrolling at a NCAA member institution. Bloom’s case also provided insight into the lengths the NCAA will go to protect the amateurism clause. For example, it is permissible for student-athletes to be a professional athlete in one sport but participate in a different sport as an NCAA student-athlete. Bloom was a world-class Olympic and professional skier as well as an NCAA collegiate football player. The NCAA was unwilling to grant Bloom a waiver because they do not permit student-athletes to capitalize on their athletic skills for compensation in any form.

O'Bannon's case against the NCAA highlighted the markets present in college athletics (Steele, 2015). The landscape of college athletics is rapidly changing, and the amateurism clause has not kept pace with these changes. Commercially speaking, the value of college athletics has grown exponentially with technology developments making collegiate athletic contests and tournaments more accessible to the average fan. The O'Bannon case demonstrated that there is a market for NCAA collegiate athletics and athlete compensation. e "The purposes the NCAA purports for its amateurism rules are no longer a part of today's big-time college athletics marketplace, and there is not procompetitive economic evidence for restricting this market" (Steele, 2015).

These two different but in some ways similar court cases illuminate a myriad of issues with the NCAA's amateurism clause. These issues are not going to disappear and will continue to challenge the NCAA to re-define its amateurism clause. As collegiate athletics become a more lucrative business the line between professionalism and amateurism will continue to be blurred.

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