Chicago-Kent Journal of Intellectual Property

Volume 16 | Issue 2 Article 1

4-26-2017

Modifying Amateurism: A Performance-Based Solution to Compensating Student–Athletes for Licensing Their Names, Images, and Likenesses

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MODIFYING AMATEURISM: A PERFORMANCE-BASED SOLUTION TO COMPENSATING STUDENT–ATHLETES FOR LICENSING THEIR NAMES, IMAGES, AND LIKENESSES

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ABSTRACT

Amateurism is evolving and the NCAA is paying for it. With the NCAA's focus set on preserving amateurism, it prohibited student–athlete compensation for any activity related to sports. However, college athletics are a lucrative business that generates its primary revenue from licensing Division I men's basketball and FBS football players' names, images, and likenesses. After years of criticism for its rules and regulations, the NCAA faced antitrust scrutiny from both former and current student–athletes. In 2015, the U.S. Court of Appeals for the Ninth Circuit held that the NCAA's restrictions on student–athlete compensation violated the Sherman Antitrust Act. While the Court affirmed the decision to allow the NCAA to increase scholarships up to the full cost of attendance, it denied forcing the NCAA to allow student–athletes to receive cash payments.

The Ninth Circuit's decision created a dilemma for the NCAA. Since the NCAA may no longer restrict student–athletes from receiving compensation for the use of their names, images, and likenesses, it must determine how to compensate student–athletes while maintaining amateurism. Along with compensation, the NCAA faces issues with Title IX because the Court's decision only allowed compensation for Division I men's basketball and FBS football players. Further, when determining how to compensate student–athletes, the NCAA could face tax implications. Considering the O'Bannon decision along with the possible Title IX and tax consequences, the NCAA should incorporate performance-based scholarships to compensate student–athletes and preserve amateurism.

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INTRODUCTION

Picture the star basketball player on one of the University of California, Los Angeles's historic teams.[1] The team has just won the 1995 National Collegiate Athletic Association (NCAA) national championship, and the athlete is a consensus All-American and has been voted the most outstanding player in the tournament.[2] A couple months later, the athlete is selected ninth overall in the National Basketball Association (NBA) draft and is destined for stardom.[3] Fast-forward nearly twenty years later: The fame and fortune has deteriorated, and the former star is now just a six-foot-eight salesman at a Toyota dealership in Henderson, Nevada.[4] After a long day at work, the former collegiate star decides to visit his friend.[5] While at his friend's home, he comes across his friend's child playing a college basketball video game that displayed a playable avatar of the former star's younger self.[6] The avatar depicted his same position, jersey number, uniform accessories, home state, height, weight, handedness, and skin color.[7] The former athlete is perplexed that his likeness is being used without his approval or compensation.[8] This is the life of Edward O'Bannon, who receives questions from fans every year during the NCAA tournament about how much he receives in royalties for his old games that are replayed on television.[9] The answer is always the same: nothing.[10]

In August 2014, the Northern California United States District Court decided *O'Bannon v. National Collegiate Athletic Ass'n*, holding that the NCAA violated the Sherman Antitrust Act by restraining trade through

* Notes Editor, *Michigan State Law Review*; J.D. 2017, Michigan State University College of Law; B.S. 2012, Hampton University. The author would like to thank Marie Rauschenberger, Herman Hofman, and Professor Bruce W. Bean for their feedback, time, and guidance throughout the Note-writing process, as well as the staff of the *Chicago-Kent Journal of Intellectual Property* for preparing this Note for publication. Further, the author would like to thank the MSU Legal Education Opportunity Program, the MSU Black Law Students Association, the *Michigan State Law Review*, and his family and friends for their support and encouragement. Last, but certainly not least, the author dedicates this Note to his parents, Glenda and William, for their unwavering love and support.

1. *See* Kurt Streeter, *Former UCLA Star Ed O'Bannon Leads Suit Against NCAA Over Use of Images*, L.A. TIMES (July 22, 2009), http://articles.latimes.com/2009/jul/22/sports/sp-videogames-lawsuit22.
2. *See* Steve Eder & Ben Strauss, *Understanding Ed O'Bannon's Suit Against the N.C.A.A.*, N.Y. TIMES (June 9, 2014), http://www.nytimes.com/2014/06/10/sports/ncaabasketball/understanding-ed-obannons-suit-against-the-ncaa.html.
3. *See id.*
4. *See id.*
5. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1055 (9th Cir. 2015).
6. *See id.*
7. O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 970 (N.D. Cal. 2014).
8. *See* Eder & Strauss, *supra* note 2.
9. *See* Streeter, *supra* note 1.
10. *See generally id.*

price fixing in the relevant markets for collegiate athletics.[11] The NCAA prohibited Division I men's college basketball and Football Bowl Subdivision[12] (FBS) football players from receiving any compensation for the use of their names, images, and likenesses in videogames, live-game telecasts, and other footage.[13] This decision marked a major change in college sports, allowing Division I male college basketball and FBS football players to receive compensation for the use of their names, images, and likenesses in different media platforms.[14] While some believe that this opinion does not protect the amateurism of college sports and shifts the focus away from education,[15] others believe that it rightfully compensates exploited student–athletes.[16]

However, in March 2015, the NCAA appealed the district court's decision.[17] While the U.S. Court of Appeals for the Ninth Circuit largely affirmed the district court's holding, it vacated the district court's decision to allow students to receive cash payments separate from their educational expenses for the use of their names, images, and likenesses.[18] This decision places a burden on the NCAA to determine a feasible solution to compensate student–athletes for the use of their names, images, and likenesses while maintaining its focus on amateurism and preservation of consumer demand.[19] In addition to preserving amateurism and consumer

11. *O'Bannon*, 7 F. Supp. 3d at 1009.

12. *See* David Albright, *NCAA Misses the Mark in Division I-AA Name Change*, ESPN (Dec. 15, 2006), http://www.espn.com/college-football/columns/story?id=2697774 (stating that the Football Bowl Subdivision was previously known as Division I-A football, which consists of the higher revenue-generating programs "that offer a maximum of 85 scholarships and play most of their games on [television] in front of large crowds.").

13. *O'Bannon*, 7 F. Supp. 3d at 1009.

14. *Id.* at 1005.

15. *See* James A. Johnson, *It Is Not Time to Pay College Athletes*, 25 NYSBA ENT., ARTS AND SPORTS L.J. 80, 80 (2014) ("The student–athlete's mind-set and purpose could become distorted. The players could become more interested in making money than learning skills and information that will assist them after their playing days are over[.]").

16. *See* Robert A. McCormick & Amy C. McCormick, *A Trail of Tears: The Exploitation of the College Athlete*, 11 FLA. COASTAL L. REV. 639, 645 (2010) [hereinafter *Trail of Tears*] ("Although the NCAA asserts college sports are amateur and uses this argument to justify not paying its players, college sports have become a highly commercial enterprise.").

17. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1049 (9th Cir. 2015).

18. *See id.* at 1079; Steve Berkowitz, *NCAA Increases Value of Scholarships in Historic Vote*, USA TODAY SPORTS (Jan. 17, 2015, 4:31 PM), http://www.usatoday.com/story/sports/college/2015/01/17/ncaa-convention-cost-of-attendance-student–athletes-scholarships/21921073/ (stating that prior to the court of appeals decision, the NCAA's representatives voted to increase the amount of expenses that are covered under athletic scholarships).

19. *See* Jon Solomon, *Court Shuts Down Plan to Pay Athletes, Says NCAA Violated Antitrust Law*, CBS SPORTS (Sept. 30, 2015), http://www.cbssports.com/collegefootball/writer/jon-solomon/25322621/appeals-court-agrees-ncaa-violates-antitrust-law ("[T]he US Ninth Circuit Court of

demand, other potential problems, such as tax and Title IX[20] implications, may arise because the *O'Bannon* decision only allows for the compensation of male college football and basketball athletes rather than all college athletes.[21]

This Note proposes a solution to the amateurism with compensation problem, suggesting that the NCAA allow conferences, colleges, and universities to award student–athletes with performance-based scholarships for both academic and athletic achievements.[22] This proposal allows (1) collegiate athletic programs to provide compensation to student–athletes in all sports based on the school's revenue from the use of students' names, images, and likenesses; (2) athletic departments to structure the amount of money that is awarded to student–athletes in a way that prevents possible tax implications and maintains the student–athletes' amateur statuses;[23] and (3) the NCAA to reopen the market for video game development to increase revenue and consumer demand.[24]

Part I discusses the NCAA's restrictions on student–athlete compensation, particularly its definition of "amateurism" and the scope of athletic scholarship coverage; further, it reviews antitrust law and examines the legal history of student–athletes' attempts to receive compensation for the use of their names, images, and likenesses.[25] Part II introduces the current state of student–athlete compensation with the *O'Bannon* trial and appellate decisions, including the correlation between amateurism and the relevant markets for licensing names, images, and likenesses.[26] Part III briefly identifies the possible Title IX and tax complications that may arise

Appeals upheld a lower court's decision that NCAA rules restricting payment to college athletes violate antitrust laws, but also determined that a federal judge erroneously allowed players to be paid up to $5,000 per year in deferred compensation.").

20. 20 U.S.C. §§ 1681-1688 (2015).

21. *See* Erin E. Buzuvis, *Athletic Compensation for Women Too? Title IX Implications of Northwestern and O'Bannon*, 41 J. C. & U. L. 297, 298 (2015) ("The NCAA faces public criticism and legal action over its policies that prohibit compensation for college athletes, it has taken to using Title IX as a defensive shield.").

22. *See* discussion *infra* Part IV (providing a solution that would allow the NCAA to preserve amateurism and compensate student–athletes for the use of their names, images, and likenesses).

23. *See* Kathryn Kisska-Schulze & Adam Epstein, *"Show Me the Money!" – Analyzing the Potential State Tax Implications of Paying Student–Athletes*, 14 VA. SPORTS & ENT. L.J. 13, 27 (2014).

24. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1067 (9th Cir. 2015).

25. *See* NCAA, 2015-16 GUIDE FOR THE COLLEGE-BOUND STUDENT–ATHLETE 20, 24 (2015), https://www.ncaapublications.com/productdownloads/CBSA16.pdf [hereinafter NCAA 2015-16 GUIDE]; In re NCAA Student-Athlete Name & Likeness Licensing Litigation, 724 F.3d 1268 (9th Cir. 2013); Hart v. Elec. Arts, Inc., 717 F.3d 141 (3d Cir. 2013).

26. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 993-98 (N.D. Cal. 2014).

because of *O'Bannon*.[27] Part IV builds upon the analysis in *O'Bannon* to develop a formula for implementing student–athlete compensation, maintaining amateurism, and preventing Title IX and tax implications.[28]

I. NCAA RESTRICTIONS ON STUDENT–ATHLETE COMPENSATION

For over 100 years, the NCAA, as a self-governing entity, has regulated and influenced amateurism in college sports, specifically for its member schools.[29] Since its inception, the NCAA has prohibited students from receiving compensation for their participation in collegiate athletics.[30] In the mid-1950s, the NCAA developed the term "student–athletes"[31] in response to a Colorado State Supreme Court decision[32] that an injured college football player is considered an employee and therefore entitled to workers' compensation.[33] The NCAA's purpose was to change the public perception of college athletes, while preventing further litigation and mischaracterization of the athletes as employees.[34] Shortly thereafter, the NCAA enacted rules allowing its member schools to award athletic scholarships to student–athletes.[35] Although the NCAA has made several revisions to its rules over the years, the NCAA has consistently prohibited student–athletes from receiving any compensation outside of scholarships or grants for their athletic ability, including the revenue generated from the use of their names, images, and likenesses.[36] The NCAA's rules and

27. *See* Marc Edelman, *The District Court Decision in O'Bannon v. National Collegiate Athletic Association: A Small Step Forward for College-Athletic Rights, and a Gateway for Far Grander Change*, 71 WASH. & LEE L. REV. 2319, 2347 (2014).

28. *See generally* Michael A. Carrier & Christopher L. Sagers, *O'Bannon v. National Collegiate Athletic Association: Why the Ninth Circuit Should Not Block the Floodgates of Change in College Athletics*, 71 WASH. & LEE L. REV. ONLINE 299, 308 (2015).

29. *O'Bannon*, 7 F. Supp. 3d at 973.

30. *Id*. at 973-74.

31. *See* NCAA, 2015-16 NCAA DIVISION I MANUAL 60, art. 12.02.13 (2015), https://www.ncaapublications.com/p-4388-2015-2016-ncaa-division-i-manual-august-version-available-august-2015.aspx [hereinafter NCAA 2015-16 MANUAL] (defining "student–athlete" as "a student whose enrollment was solicited by a member of the athletics staff or other representative of athletics interests with a view toward the student's ultimate participation in the intercollegiate athletics program. Any other student becomes a student–athlete only when the student reports for an intercollegiate squad that is under the jurisdiction of the athletics department, as specified in Constitution 3.2.4.5. A student is not deemed a student–athlete solely on the basis of prior high school athletics participation.").

32. *See* Univ. of Denver v. Nemeth, 257 P.2d 423, 429-30 (Colo. 1953).

33. *See Trail of Tears*, *supra* note 16, at 664.

34. *See id*.

35. *See O'Bannon*, 7 F. Supp. 3d at 974.

36. *See id.* at 974-76.

restrictions have been the subject of several lawsuits, the most prominent and recent being the antitrust scrutiny in the *O'Bannon* case.[37]

A. NCAA Regulations and Antitrust Law

The NCAA has strict rules regarding students competing in athletics.[38] In order to compete in NCAA Division I or II athletics, one must be certified as an amateur student–athlete.[39] The NCAA Eligibility Center determines amateur certification of all potential student–athletes for Division I and II colleges and universities.[40] There are eight categories of pre-NCAA enrollment activities that student–athletes may not participate in to become certified as an amateur, including accepting payments or preferential benefits for playing sports, accepting prize money above your expenses, and accepting benefits from an agent or prospective agent.[41] Prior to the *O'Bannon* decision, that list contained receiving a salary for participating in athletics.[42] After student–athletes receive their amateur certification, Division I and Division II schools are permitted to provide athletic scholarships that cover tuition and fees, room, board, and required course-related books.[43] In addition, student–athletes may qualify for nonathletic financial aid such as merit academic scholarships and financial hardship-based aid such as federal Pell Grants.[44] Although athletic scholarships may be awarded, the scholarships for Division I men's basketball and FBS football do not always cover the full grant-in-aid,[45] which consists of tuition and all other expenses related to the cost of attendance.[46] The cost of attendance differs from the grant-in-aid because it

37. *See id.* at 963; Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 120 (1984).

38. *See* NCAA 2015-16 GUIDE, *supra* note 25, at 24.

39. *See id.*

40. *See id.*

41. *See id.* ("The following activities may impact your amateur status: signing a contract with a professional team; playing with professionals; participating in tryouts or practices with a professional team; accepting payments or preferential benefits for playing sports; accepting prize money above your expenses; accepting benefits from an agent or prospective agent; agreeing to be represented by an agent; or delaying your full-time college enrollment to play in organized sports competitions.").

42. *See* NCAA, 2014-15 GUIDE FOR THE COLLEGE-BOUND STUDENT–ATHLETE, 20 (2014), http://www.ncaapublications.com/productdownloads/CBSA15.pdf [hereinafter NCAA 2014-15 GUIDE].

43. *See id.* at 27; Schools in the NCAA are separated in divisions based on the size of the athletic program particularly the amount of men's and women's sports teams.

44. *Id.*

45. *See* NCAA 2015-16 MANUAL, *supra* note 31, at 189, art. 15.02.5 ("Financial aid that consists of tuition and fees, room and board, books, and other expenses related to attendance at the institution up to the cost of attendance established pursuant to Bylaws 15.02.2.").

46. *See id.* at 188, art. 15.02.2 ("The 'cost of attendance' is an amount calculated by an institutional financial aid office, using federal regulations, that includes the total cost of tuition and fees,

encompasses the transportation expenses needed to attend an institution.[47] Since athletic scholarships did not cover the full cost of attending college, and student–athletes were not able to receive compensation for the use of their names, images, and likenesses, Edward O'Bannon challenged the NCAA's rules under the Sherman Antitrust Act.[48]

Under the Sherman Antitrust Act, it is illegal to form any "contract, combination in the form of trust or otherwise, or conspiracy, in the restraint of trade or commerce among the several States."[49] In order to prove a violation under § 1 of the Sherman Antitrust Act, there must have been a contract, combination, or conspiracy that unreasonably restrained trade under either a rule of illegality or a rule of reason analysis and affected interstate commerce.[50] The rule of reason[51] is often the presumptive standard and used instead of the rule of illegality in situations where the restraint on competition is essential to the product's availability.[52] A restraint violates the rule of reason when the harm it places on competition outweighs its procompetitive effects.[53] Initially, the burden is on the plaintiff to show that the restraint creates significant anticompetitive effects within the relevant market.[54] Next, the burden shifts to the defendant to provide evidence of the restraint's procompetitive effects.[55] If the defendant satisfies this burden, then the plaintiff must provide less restrictive alternatives that can achieve the same objectives as the restraint.[56] The NCAA has faced several antitrust challenges to its rules and regulations over the years.[57]

room and board, books and supplies, transportation, and other expenses related to attendance at the institution.").

47. *Id.*

48. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 970 (N.D. Cal. 2014).

49. *See* 15 U.S.C. § 1 (2015).

50. *See* Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1062 (9th Cir. 2001) (citing Hairston v. Pacific 10 Conference, 101 F.3d 1315, 1318 (9th Cir. 1996)).

51. *See* Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield, 552 F.3d 430, 436 (6th Cir. 2008) ("The rule-of-reason test requires the court to analyze the actual effect on competition in a relevant market to determine whether the conduct unreasonably restrains trade.").

52. *See* Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 203 (2010) (citing Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101 (1984)).

53. *See Tanaka*, 252 F.3d at 1063.

54. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 985 (N.D. Cal. 2014).

55. *Id.*

56. *Id.*

57. *See, e.g.*, Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 120; In re NCAA Student–Athlete Name & Likeness Licensing Litig., 724 F.3d 1268, 1271 (9th Cir. 2013); In re NCAA I-A Walk-On Football Players Litig., 398 F. Supp. 2d 1144, 1147-48 (W.D. Wash. 2005).

B. Past Challenges to the NCAA Regulations

In 1984, the Board of Regents of the University of Oklahoma brought an antitrust action against the NCAA challenging its plan to govern the televising of college football games.[58] This case was the NCAA's first attempt at using its preservation of amateurism as a defense for regulating college sports in an anticompetitive manner.[59] Although the Supreme Court ultimately ruled against the NCAA, it supported the NCAA's role in maintaining the tradition of amateurism in college sports.[60]

Between 2008 and 2013, there were several cases involving former college athletes suing the NCAA, as well as Electronic Arts, Inc., for using the former athletes' names, images, and likenesses in video games.[61] Several former student–athletes brought suits for right of publicity, but received mixed results against Electronic Arts, Inc. and were dismissed against the NCAA.[62] As a result of the dismissals, the parties consolidated claims in the antitrust suit against the NCAA in the *O'Bannon* case.[63] With both former and current athletes believing that the NCAA exploits their publicity rights, the overall purpose of the lawsuit was to abolish the NCAA's rules prohibiting student–athlete compensation.[64]

II. *O'BANNON* AND THE CURRENT STATE OF COLLEGIATE SPORTS

For years, paying college athletes for licensing rights has been a topic of debate among sports analysts, professionals, and scholars, and even President Obama.[65] The *O'Bannon* decision attempted to settle the debate,

58. *See Bd. of Regents of Univ. of Okla.*, 468 U.S. at 120 (holding that the NCAA actions created a monopoly in college football, but the rules were not illegal because it created competition in other sports).

59. *See id.* at 101 (stating that the NCAA has a historic role in preserving and encouraging intercollegiate amateur athletics).

60. *See id.* at 120.

61. *See* In re NCAA Student–Athlete Name & Likeness Licensing Litig., 724 F.3d 1268, 1272 (9th Cir. 2013) (holding that Electronic Arts violated the plaintiff's right of publicity for the use of his likeness in a video game); Hart v. Elec. Arts, Inc., 717 F.3d 141, 170 (3d Cir. 2013) (holding that a former student–athlete did not qualify for right of publicity protection for use of his likeness as a photograph in a video game).

62. *See In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d at 1272; *see also Hart*, 717 F.3d at 175-76.

63. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 962-63 (N.D. Cal. 2014).

64. *See id.* at 963.

65. *See* Dave Jamieson, *Obama Calls On NCAA To Rethink The Way It Protects And Punishes Athletes*, HUFFINGTON POST, (Mar. 21, 2015), http://www.huffingtonpost.com/2015/03/21/obama-ncaa-scholarships_n_6911804.html (quoting President Obama, "What does frustrate me is where I see coaches getting paid millions of dollars, athletic directors getting paid millions of dollars, the NCAA making huge amounts of money, and then some kid gets a tattoo or gets a free use of a car and suddenly they're banished . . . [t]hat's not fair").

stating that the NCAA may not prohibit student–athlete compensation; however, it did not state that the NCAA had to compensate student–athletes, which led to the NCAA simply removing licensing rights.[66] Although the Ninth Circuit affirmed the decision to allow student–athletes to receive compensation for the use of their names, images, and likenesses, it vacated the district court's suggested method for compensation.[67] Along with this decision, the NCAA must consider the possibility of Title IX and tax problems when determining how to compensate student–athletes and maintain the amateurism of college sports.[68]

A. O'Bannon v. NCAA: The District Court Decision

In 2014, Edward O'Bannon led a group of former and current college student–athletes in an antitrust suit against the NCAA, challenging its restrictions on student–athlete compensation, specifically for Division I men's basketball and FBS football players.[69] The NCAA's rules prohibited student–athletes from receiving compensation for the revenue generated through the NCAA and its member schools' licensing of the rights to use student–athletes' names, images, and likenesses in live game telecasts, videogames, and other archival footage such as highlights and rebroadcasts.[70] The plaintiffs' contention was that the restraint caused anticompetitive effects on the college-education and group-licensing markets.[71]

1. Price Fixing in the College Education Market

The college-education market is where colleges and universities compete for student–athletes to play FBS football or Division I men's basketball.[72] Each school offers higher education and athletic opportunities to recruits in exchange for their services and consent to use their names, images, and likenesses while enrolled; however, the athletes are responsible

66. *See O'Bannon*, 7 F. Supp. 3d at 1007-08; Johnson, *supra* note 15, at 81 (quoting NCAA general counsel, Donald Remy, "We're prepared to take this all the way to the Supreme Court if we have to").

67. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1079 (9th Cir. 2015).

68. *See* Buzuvis, *supra* note 21, at 298.

69. *See O'Bannon*, 7 F. Supp. 3d at 963.

70. *See id.*; NCAA 2015-16 GUIDE, *supra* note 25, at 24 (stating that student–athletes may not receive payments or preferential benefits for playing sports).

71. *See O'Bannon*, 7 F. Supp. 3d at 963 ("Plaintiffs contend that these rules violate the Sherman Antitrust Act.").

72. *See id.* at 965 ("[S]chools compete to sell unique bundles of goods and services to elite football and basketball recruits.").

for any cost of attendance that is not covered in the scholarship.[73] Price fixing occurs when the NCAA requires its schools to charge every recruit the same amount for this opportunity and prohibits schools from offering a lower cost and cash rebate.[74] The NCAA contended that FBS football and Division I men's basketball programs compete with programs from other divisions as well as minor leagues and foreign professional leagues,[75] which prevents them from price fixing in this market.[76]

However, the plaintiffs argued that non-Division I colleges and universities generally offer lower levels of athletic competition, training facilities, and coaches.[77] Additionally, Division II schools offer partial athletic scholarships, while Division III schools do not offer athletic scholarships at all, making the cost of attendance higher than FBS football and Division I basketball schools.[78] Moreover, foreign professional and minor league[79] opportunities do not offer the opportunity to earn a higher education.[80] Therefore, the court held that Division I schools are in an exclusive market where the NCAA's rules place a cap on the value of grant-in-aid that is offered to potential student–athletes and prevents student–athletes from receiving compensation for the use of their names, images, and likenesses.[81]

73. *See id.* at 966; Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student–Athlete: the College Athlete as Employee*, 81 WASH. L. REV. 71, 118 (2006) [hereinafter *Myth of the Student–Athlete*] ("NCAA rules forbid players from accepting cash or other gifts from non-family members, and even gifts from family and guardians are limited to an amount which, when combined with any grant-in-aid, covers only the cost of attendance.").

74. *See O'Bannon*, 7 F. Supp. 3d at 988 ("[I]n absence of this agreement, certain schools would compete for recruits by offering them a lower price for the opportunity to play FBS football or Division I basketball while they attend college.").

75. *See* Chris Broussard, *Exchange Student*, ESPN, (May 19, 2009), http://www.espn.com/espnmag/story?id=3715746&section=magazine (stating that current NBA player Brandon Jennings elected to play and focus on the game of basketball in Italy because he did not reach the required minimum standardized test score to qualify for an NCAA scholarship).

76. *See O'Bannon*, 7 F. Supp. 3d at 987.

77. *See id.*

78. *See id.*; NCAA 2015-16 GUIDE, *supra* note 25, at 31 ("NCAA Divisions I and II schools provide more than $2.7 billion in athletics scholarships annually to more than 150,000 student–athletes. Division III schools do not offer athletics scholarships.").

79. *See* Pete Thamel, *D-League Graduate Sets New Course to the N.B.A. Draft*, N.Y. TIMES, (June 22, 2010), http://www.nytimes.com/2010/06/23/sports/basketball/23draft.html (identifying Latavious Williams as the first American high school player to choose to play in the NBA Development League instead of attending college).

80. *See O'Bannon*, 7 F. Supp. 3d at 987 (stating that professional leagues, like arena football, NBA developmental league, and foreign basketball and football, do not offer the same opportunities for higher education and national exposure as FBS football and Division I basketball).

81. *See id.* at 988-89 (citing White v. Nat'l Collegiate Athletic Ass'n, No. CV 06-999-RGK MANX, 2006 WL 8066802 (C.D. Cal. Sept. 21, 2006)).

2. Price Fixing in the Group Licensing Market

Within the group-licensing market are television networks, video-game developers, and other third parties.[82] These entities compete within their respective submarkets for group licenses to use the names, images, and likenesses of FBS football and Division I men's basketball players in live telecasts, video games, and highlight clips.[83] These entities are the primary users of student–athletes' names, images, and likenesses, and are often very influential in determining which schools the athletes choose to attend because of the opportunities for exposure.[84]

a. Live Game Telecasts

Television networks negotiate deals exclusively with the universities and conferences to acquire student–athletes' rights because the NCAA prohibits student–athletes from licensing the rights to their names, images, and likenesses.[85] However, the court noted that even without the NCAA's restrictions, it is not certain that there would be competition between groups of student–athletes to sell the rights for the use of their names, images, and likenesses.[86] Furthermore, competition is unlikely because a television network would have to obtain licenses from every team that could potentially participate in a particular athletic event such as a playoff, bowl, or championship game.[87] Since there was not a direct restraint on competition in this particular market, the court held that the NCAA rules did not harm competition under the Sherman Antitrust Act.[88]

b. Video Games

Videogame developers and intermediate buyers compete for group licenses to use student–athletes' names, images, and likenesses.[89] The NCAA contended that this market would not exist even if student–athletes were permitted to sell their rights because some conferences recently

82. *See id.* at 993.

83. *See id.*

84. *See id.* (stating that television networks compete for the rights to telecast lives games); Ahmed E. Taha, *Are College Athletes Economically Exploited?*, 2 WAKE FOREST J.L. & POL'Y 69, 87 (2012) ("Successful, popular teams appear often on national television, giving media exposure to the student–athletes on the team.").

85. *See O'Bannon*, 7 F. Supp. 3d at 993-94.

86. *See id.* at 995.

87. *See id.* ("For instance, a network seeking to telecast a conference basketball tournament would have to obtain group licenses from all of the teams in that conference.").

88. *See id.*

89. *See id.* at 997 (describing intermediate buyers as those who bundle student–athletes' rights with others' rights to sell them to video game developers).

decided to stop licensing their intellectual property for use in video games.[90] However, the court noted that developers do not need all NCAA schools and conferences to create a video game.[91] As long as there are a sufficient number of schools, there is competition in this market, and student–athletes' group licenses could possibly exist.[92] Even though competition could exist in this market, the court held that it is unlikely because past video games often included almost every FBS football and Division I men's basketball school and conference.[93] Moreover, the challenged NCAA rules do not affect competition because trade within this market has stopped due to lawsuits against videogame developers such as Electronic Arts, Inc.[94]

c. Game Rebroadcasts, Highlight Clips, and Other Archival Footage

The NCAA uses a third-party agent, T3Media, which is assigned to negotiate and manage all licensing related to archival footage.[95] T3Media is prohibited from licensing any current student–athletes' footage and is required to obtain the right to use the names, images, and likenesses of any former student–athlete that appears in licensed footage.[96] Under these arrangements, no current or former student–athletes are deprived of compensation for the use of their names, images, and likenesses in rebroadcasted games.[97] As a result, the court held that there is no opportunity for competition in this market for any former student–athlete that decides not to relinquish the rights to use his name, image, or likeness in the rebroadcast of archival footage because a license is needed from every team that has ever competed in order to license all of the NCAA's

90. *See id.* (stating that without the NCAA and its conferences' intellectual property, the video game developers would not be able to produce a marketable product).

91. *See id.*

92. *See id.* ("Mr. Linzner specifically testified at trial that [Electronic Arts, Inc.] remains interested in acquiring the rights to use student–athletes' names, images, and likenesses and would seek to acquire them if not for the NCAA's challenged rules . . . .").

93. *See id.* at 998.

94. *See id.*

95. *See id.* (defining archival footage as game rebroadcasts, highlight clips, and other footage for entertainment and advertisement).

96. *See id.*; NCAA, *Digital Highlight and Footage Use Policy for Participating Member Institutions and Conferences*, NCAA DIGITAL http://i.turner.ncaa.com/sites/default/files/images/2015/04/28/2014-15_ncaa_champs_digital_highlights_policy_-_schools_-_version_2.pdf ("For the NCAA Division I Championships . . . [d]igital [h]ighlights may be used from NCAA.com or they must be licensed from T3 Media.").

97. *See O'Bannon*, 7 F. Supp. 3d at 998.

footage.[98] Therefore, the NCAA's restrictions have not restrained trade for student–athletes in the group licensing market.[99]

3. NCAA's Procompetitive Justifications for Restraint

As stated in the *National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma*, the alleged purpose of the NCAA's restrictions was to preserve amateurism in college sports.[100] The idea is that preserving amateurism helps the NCAA maintain competition among universities, integrate academics and athletics, and increase the national exposure of college sports.[101] While the NCAA contended that amateurism has always been focused on the student–athlete receiving an education, history shows that the amateurism rules have not remained consistent.[102]

a. Preserving Amateurism

Throughout the years, the NCAA has made crucial changes to its amateurism rules.[103] Initially, amateurism began with participation in sports solely for pleasure and prohibited student–athlete recruitment using illicit payments.[104] However, many schools ignored these rules, leading to the development of the Sanity Code, which provided enforcement in awarding financial aid without considering athletic ability.[105] Just a few years after implementing the Sanity Code, the NCAA again changed its rules, allowing schools to award athletic scholarships.[106] The court stated that with the current restrictions on student–athlete compensation, it is difficult for the NCAA to use amateurism as a legal justification because the cap that is placed on athletic-based financial aid does not support a focus toward higher education for student–athletes.[107] Rather, the cap on athletic-

98. *See id.* (stating that a group of student–athletes would not have an incentive to compete).

99. *See id.*

100. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 120 (1984) ("The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports.").

101. *See O'Bannon*, 7 F. Supp. 3d at 999-1004.

102. *See id.* at 973 ("The historical evidence presented at trial, however, demonstrates that the association's amateurism rules have not been nearly as consistent as Dr. Emmert represents.").

103. *See id.* at 974.

104. *See id.* ("[T]he association adopted a new rule stating that an amateur was 'one who participates in competitive physical sports only for pleasure, and the physical, mental, moral, and social benefits directly derived therefrom.'").

105. *Id.* ("The Sanity Code required that financial aid be awarded without consideration of [athletic] ability.").

106. *See id.* ("In 1956, the NCAA enacted a new set of amateurism rules permitting schools to award athletic scholarships to student–athletes.").

107. *See id.* at 975.

based financial aid is more likely to entice men's basketball and football student–athletes, who have the opportunity, to focus more on their athletic endeavors because of the possibility of becoming professional athletes.[108]

b. Maintaining Competition Among Universities

The NCAA introduced the idea of competitive balance as a reason for its compensation restraints.[109] The NCAA's view was that maintaining a certain level of competitive balance is necessary to create and sustain consumer demand for Division I men's basketball and FBS football.[110] However, the court stated that the restrictions have not shown any impact on competition.[111] Rather than compensating student–athletes, schools merely spend more money on coaches and personnel, recruiting trips, and training facilities.[112] The current situation would be no different than a scenario where student–athletes were compensated because the schools with the largest budgets would always attract the cream of the crop.[113]

c. Integrating Academics and Athletics

The NCAA claims that its restrictions promote the integration of education and athletics.[114] In particular, the NCAA stated that student–athletes generally have better academic and employment opportunities than other people from their socioeconomic backgrounds.[115] However, the

108. *See* Jeffery L. Harrison & Casey C. Harrison, *The Law and Economics of the NCAA's Claim to Monopsony Rights*, 54 ANTITRUST BULL. 923, 948 (2009) (stating that athletes would be more likely to stay in college longer if they were earning some income for the use of their names, images, and likenesses).

109. *See O'Bannon*, 7 F. Supp. 3d at 978.

110. *See id.*

111. *Id.* (relying Dr. Noll's testimony, which presented studies from numerous sports economists showing that the NCAA's amateurism rules do not have a substantial effect on its desired level of competitive balance).

112. *See id.*; Chris Isidore, *College Coaches Make More Money Than Players Get in Scholarships*, CNNMONEY, (Jan. 11, 2016), http://money.cnn.com/2016/01/11/news/companies/college-coaches-pay-players-scholarships/ (stating that during the 2014–2015 school year, 535 coaches in men's college sports earned a total of $440 million, while a total of $426 million was spent on male student–athlete scholarships).

113. *See O'Bannon*, 7 F. Supp. 3d at 979; Matthew J. Parlow, *The Potential Unintended Consequences of the O'Bannon Decision*, 71 WASH. & LEE L. REV. ONLINE 203, 208 (2014) ("[A] dramatic increase in college athletic compensation could create a tale of two universities—that is, a small group of well-funded colleges and universities that would able to pay the elite high school athletes to matriculate on the one hand and the vast majority of other schools that would be unable to compete for elite talent on the other hand.").

114. *See O'Bannon*, 7 F. Supp. 3d at 979; Taha, *supra* note 84, at 83 ("As a group, football and men's basketball players enter college with lesser academic skills and aptitudes than do other students at their colleges.").

115. *See O'Bannon*, 7 F. Supp. 3d at 980 ("Dr. Heckman found that these benefits are particularly pronounced for student–athletes from disadvantaged backgrounds.").

NCAA's claim failed to consider college athletes from socioeconomic backgrounds with higher incomes who could afford to attend college without an athletic scholarship.[116] Although student–athletes tend to have employment and academic benefits, the NCAA did not provide evidence that its restrictions on student–athlete compensation are the specific reason for these benefits.[117]

However, one the NCAA's experts made a plausible argument that compensating college athletes with large sums of money could cause a separation between the student–athletes and the rest of the student body on campus.[118] With such a large income from their success, student–athletes may be more inclined to socialize off-campus and become sidetracked from their academic endeavors.[119] Even with these possible hindrances to student–athletes' academic and educational values, the court held that the NCAA's restraints on student–athlete compensation did not serve to enhance academic success for college athletes.[120]

d. Increasing Exposure

The NCAA believes its regulations on amateurism increase the number of opportunities that schools and student–athletes have to compete on a national level.[121] The NCAA and its conference officials' claim is that the upward trend in participation in FBS football and Division I men's basketball is because of the commitment to amateurism as opposed to the increased revenue and televised exposure.[122] Moreover, because of the restrictions, lower income schools can afford to participate in Division I competition.[123] Yet, some schools in major conferences have expressed desire to change the restrictions on amateurism.[124] In addition, there was no

116. *See id.*

117. *See id.* (stating that student–athletes enjoy long-term benefits from "their increased access to financial aid, tutoring, academic support, mentorship, structured schedules, and other educational services that are unrelated to the challenged rules in this case").

118. *See id.* (presenting testimony from university administrators stating, "depending on how much compensation [is] ultimately awarded, some student–athletes [may] receive more money from the school than their professors"); Johnson, *supra* note 15 and accompanying text.

119. *See* Johnson, *supra* note 15 ("The bottom line is that the focus should be and remain on higher education.").

120. *See O'Bannon*, 7 F. Supp. 3d at 1003 ("As with the NCAA's amateurism justification, however, the NCAA may not use this goal to justify its sweeping prohibition on any student–athlete compensation, paid now or in the future, from licensing revenue generated from the use of student–athletes' names, images, and likenesses.").

121. *See id.* at 1003-04.

122. *See id.* at 1004 (stating that the NCAA attracts schools with its commitment to amateurism).

123. *See id.*

124. *See id.* ("[S]ome Division I conferences have sought greater autonomy from the NCAA specifically so that they could enact their own rules, including new scholarship rules.").

evidence showing that allowing compensation would prevent low-income school participation.[125] This led the district court to believe that allowing student–athletes to receive compensation could not only increase participation in Division I athletics, but also create more opportunities for national exposure to college sports in general.[126]

4. Alternative Restrictions and Remedies

The district court proposed several alternative restrictions and remedies that would allow the NCAA to comply with fair competition.[127] First, the court stated that the NCAA could allow Division I men's basketball and FBS football student–athletes to receive stipends from schools up to the full cost of attendance with funds generated from licensing revenues.[128] Alternatively, the court stated that the NCAA could permit schools to have a trust holding limited and equal shares of their respective licensing revenues to be distributed to the student–athletes after they leave college or their eligibility has expired.[129]

After exploring possible alternative restrictions and remedies to the NCAA's rules against compensation, the district court concluded that the NCAA's challenged rules unreasonably restrained trade and violated the Sherman Antitrust Act.[130] The court specified that prohibiting student–athletes from ever receiving any compensation for the use of their names, images, and likenesses restrains price competition among Division I schools as suppliers of an unique combination of academic and athletic opportunities.[131] This decision ultimately led to an appeal as well as the NCAA increasing the value of athletic scholarships to cover the full cost of attendance and allowing its member schools to grant deferred cash payments up to $5,000 per year.[132]

125. *See id.* ("[T]here is no evidence that those cost savings are being used to fund additional teams or scholarships.").

126. *See id.*

127. *See id.* at 982.

128. *See id.* at 1005; Edelman, *supra* note 27, at 2335 ("[R]aising the permissible grant-in-aid limit that schools may award to their athletes in stipends.").

129. *See O'Bannon*, 7 F. Supp. 3d at 1005 (stating that NCAA could limit compensation to only the revenue generated from the licensing of student–athletes' names, images, and likenesses).

130. *See id.* at 1007 ("The challenged rules do not promote competitive balance among FBS football and Division I basketball teams, let alone produce a level of competitive balance necessary to sustain existing consumer demand for the NCAA's FBS football and Division I basketball-related products.").

131. *See id.* ("The challenged rules do not promote competitive balance among FBS football and Division I basketball teams, let alone produce a level of competitive balance necessary to sustain existing consumer demand for the NCAA's FBS football and Division I basketball-related products.").

132. *See* Berkowitz, *supra* note 18 and accompanying text.

B. The NCAA Appeals to the Ninth Circuit

On appeal, the Ninth Circuit affirmed the district court's decision that the NCAA's rules against compensating student–athletes for the use of their names, images, and likenesses violated the Sherman Antitrust Act.[133] Furthermore, the Court affirmed the district court's decision that student–athletes were injured as a result of the NCAA's compensation rules because such rules have closed the market for using the students' names, images, and likenesses in video games.[134] While the Court reaffirmed the decision to allow NCAA member schools to award grants-in-aid up to the full cost of attendance, it vacated the decision to allow students to receive cash payments for the use of their names, images, and likenesses.[135] The Court reasoned that neither a rule against nor a rule permitting compensating student–athletes for their names, images, and likenesses would be effective in promoting amateurism and preserving the consumer demand.[136] Even though the NCAA's restrictions violated the Sherman Antitrust Act, the Court stated that providing students with cash compensation would deprive the NCAA of its core value of amateurism.[137] Likewise, compensating students with yearly cash payments would convert college athletics from an amateur league to a minor league.[138] Further, the majority noted that the district court incorrectly reasoned that allowing smaller cash payments as opposed to larger payments would preserve amateurism.[139] The Court believed the problem is that offering student–athletes compensation unrelated to educational expenses erases the rule of amateurism.[140]

However, the dissent stated that based on the experts' testimony, allowing students to receive small payments would not have a significant effect on consumer demand.[141] In fact, one of the experts established that consumer interest rose in professional sports when salaries increased, but this analogy conflicts with collegiate athletics because the focus is toward

133. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1053 (9th Cir. 2015).

134. *See id.* at 1067 ("[Electronic Arts, Inc.'s] inability to use college athletes' [names, images, and likenesses] was the 'number one factor holding back NCAA video game growth.'").

135. *See id.* at 1075-77.

136. *See id.* at 1076.

137. *See id.* (stating that "amateurism is an integral part to the NCAA's market").

138. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 102 (1984) (stating that college sports must be differentiated from professional sports unless they become minor leagues).

139. *See O'Bannon*, 802 F.3d at 1077 (stating that the district court should have addressed the effectiveness of smaller cash payments in promoting amateurism).

140. *See id.* at 1078.

141. *See id.* at 1080 (basing its argument on the fact that FBS football players can receive Pell grants in excess of the cost of attendance and tennis players may receive prize money up to $10,000 prior to enrolling in school).

amateurism.[142] The primary distinction between the majority and dissenting opinions is whether the antitrust analysis should be focused toward amateurism or consumer demand.[143]

While maintaining both amateurism and consumer demand are essential to resolving this dispute, other legal problems may arise.[144] The NCAA faces Title IX issues when considering compensating only men's basketball and football players.[145] Further, the NCAA faces the possibility of income taxes, which is contrary to its amateurism policy.[146]

III. POTENTIAL CONSEQUENCES OF THE *O'BANNON* DECISION

The central dispute throughout *O'Bannon* was compensating Division I men's basketball and FBS football student–athletes for the revenue generated from licensing their names, images, and likeness.[147] While the NCAA's concern was maintaining the amateurism and consumer demand of college sports, the decision nonetheless brought about other potential legal problems.[148] In addition to determining the best approach to compensating student–athletes, the NCAA faces a Title IX obstacle and possible problems with income taxes for the money it could potentially provide to the student–athletes.[149]

A. Drop a Dime for Title IX

Educational institutions, particularly their athletic departments, are constantly monitoring their activities to ensure that they are in compliance with Title IX.[150] Title IX is a civil rights law commonly known for

142. *See id.* at 1081 (stating that the popularity of major league baseball increased when players' salaries rose).

143. *See id.* (Thomas, C.J., dissenting) (stating that the difference in opinion refers to the procompetitive interest at stake and whether the alternative of compensating student–athletes is as effective in preserving amateurism).

144. *See id.*; Parlow, *supra* note 113, at 212 ("Just as importantly, there will almost certainly be Title IX implications and effects based on the *O'Bannon* decision and potential changes in the collegiate athletic system.").

145. *See* Buzuvis, *supra* note 21 ("[T]he NCAA argues that paying athletes in revenue sports, coupled with the commensurate obligation under Title IX to pay female athletes, would be prohibitively expensive for college athletics as we know it.").

146. *See* Kissa-Schulze, *supra* note 23.

147. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 963 (N.D. Cal. 2014).

148. *See* Buzuvis, *supra* note 21 and accompanying text; Kissa-Schulze, *supra* note 23.

149. *See* Buzuvis, *supra* note 21 and accompanying text; Kissa-Schulze, *supra* note 23.

150. *See* 20 U.S.C. § 1681(c) (2014) ("Any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.").

prohibiting discrimination against women in programs or activities that receive federal financial assistance such as college sports.[151] The primary concern is preferential treatment with the imbalance in participation or receipt of federal benefits such as financial assistance to members of one sex.[152]

In order to comply with Title IX, colleges and universities must offer an equal amount of funds to women's athletics as they do to men's athletics.[153] Unfortunately, female college athletic programs typically do not generate the same amount of revenue as male college athletic programs.[154] As shown in the figures below, which provide the revenues, expenses, and profits of the University of Florida's men and women's athletic programs, usually only the men's basketball and football programs generate a profit for the athletic department.[155]

FIGURE 1: Men's Sports

	Revenue	**Expense**	**Profit**
Football	$63,951,571.00	$19,707,442.00	$44,244,129.00
Basketball	$9,464,520.00	$6,866,541.00	$2,597,979.00
Baseball	$541,073.00	$1,678,780.00	-$1,137,707.00
Tennis	$9,867.00	$507,705.00	-$497,838.00
Golf	$14,400.00	$375,499.00	-$361,099.00
		Total	$44,845,464.00

151. *See* 20 U.S.C. § 1681(a) (2014) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal financial assistance.").

152. *See* 20 U.S.C. § 1681(b) (2014) ("Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.").

153. *See* Buzuvis, *supra* note 21 and accompanying text.

154. *See id.* at 320; Kristi Dosh, *Which Sports Turn A Profit?*, THE BUSINESS OF COLLEGE SPORTS, (July 19, 2011), http://businessofcollegesports.com/2011/07/19/which-sports-turn-a-profit/.

155. *See infra* Figures 1-2; Dosh, *supra* note 154 (showing the profits from the University of Florida's men's and women's athletic programs).

FIGURE 2: Women's Sports

	Revenue	Expense	Profit
Golf	$4,932.00	$314,413.00	-$309,481.00
Basketball	$45,361.00	$2,182,324.00	-$2,135,963.00
Tennis	$0.00	$516,992.00	-$516,992.00
Soccer	$0.00	$757,538.00	-$757,538.00
Volleyball	$78,418.00	$1,008,438.00	-$930,020.00
Softball	$39,655.00	$908,338.00	-$868,683.00
Gymnastics	$236,819.00	$1,063,242.00	-$826,423.00
Lacrosse	$0.00	$600,624.00	-$600,624.00
		Total	-$6,946,724.00

This dynamic is the same for schools across the country; therefore, many believe that providing an equal amount of funds to women's athletics will decrease the amount of money that each university is willing to provide to their student–athletes.[156] Since college sports is a multibillion-dollar growth industry,[157] it is hard to believe that schools would reserve the amount of money they are willing to provide for student–athletes and pass up the opportunity to enroll the top recruits in college sports.[158]

In determining how to distribute funds, schools weigh the college "educational athletic programs"[159] versus "commercial athletic programs."[160] Education-based athletic programs would allow schools to evenly distribute funds throughout the athletic department to women's sports because less money spent on recruiting football and basketball prospects would alleviate the pressure to generate revenue from those

156. *See* Marc Edelman, *The Future of Amateurism After Antitrust Scrutiny: Why a Win for the Plaintiffs in the NCAA Student–athlete Name & Likeness Licensing Litigation Will Not Lead to the Demise of College Sports*, 92 OREGON L. REV. 1019, 1047 (2014).

157. *See* Will Hobson & Steven Rich, *Playing in The Red*, WASHINGTON POST, (Nov. 23, 2015), http://www.washingtonpost.com/sf/sports/wp/2015/11/23/running-up-the-bills/.

158. *See Trail of Tears*, *supra* note 16, at 646.

159. *See* Buzuvis, *supra* note 21, at 336 ("[A] system like that of the Ivy League and Division III, in which financial aid is awarded based in need rather than athletic participation.").

160. *See id.* at 335 (referring to schools that generate the majority of their money from revenue sports such as football and men's basketball).

sports.[161] Furthermore, the idea is that educational programs save money from electing not to give athletic scholarships and only competing with regional schools.[162] However, a commercial athletic program has the ability to generate money outside of its affiliation with the academic institution.[163] These programs are largely more successful in maximizing profits from recruiting the top athletes and competing against other major programs across the country, but are constantly determining how to distribute funds to less profitable women's athletics.[164] Consequently, if the NCAA decides that it will compensate Division I men's basketball and FBS football student–athletes, it must determine how to factor in compensating women's athletes as well as the possibility of income taxes.[165]

B. Taxation Without Representation

While the tax issue as a whole is beyond the scope of this note, it is important to briefly identify the ramifications when considering the idea of compensating student–athletes for the use of their names, images, and likenesses.[166] Since states have a constitutional right to tax, paid student–athletes would be subject to federal and state income taxation.[167] Such a situation would ultimately make student–athletes employees of their respective schools, which is a contradiction of the NCAA's focus toward amateurism.[168] Additionally, the big-name college athletic programs within the top five conferences[169] would have a competitive advantage as well as the power to control where all of the best recruits go to school.[170] Even though schools within the top five conferences already control a large portion of the recruiting market, their power would increase because of the amount of money they have to offer in compensation.[171]

161. *See id.* at 338.

162. *See id.*

163. *See id.* at 339.

164. *See id.*

165. *See* 20 U.S.C. § 1681(a)-(b) (2014); 26 U.S.C. § 61 (2012).

166. *See* 26 U.S.C. § 61 (defining gross income as all income from whatever source derived, including but not limited to: compensation for services and income from business).

167. *See* U.S. CONST. art. 1, § 8.

168. *See* Kisska-Schulze & Epstein, *supra* note 23, at 32.

169. *See* WIKIPEDIA, *Power Five conferences*, https://en.wikipedia.org/wiki/Power_Five_conferences (the top five conferences are the Atlantic Coast Conference (ACC), Southeastern Conference (SEC), Pacific 12 (Pac-12), Big 12, Big Ten) (last updated Feb. 15, 2017, at 19:27).

170. *See* Kisska-Schulze & Epstein, *supra* note 23, at 36.

171. *See id.* ("The influence of the jock tax could also impact the entirety of college athletics should student–athletes be paid.").

Depending upon how much money the student–athlete receives and the state in which he chooses to attend school, he may be subject to state income taxes.[172] Most states have a different income-tax percentage, while some do not have an income tax at all, which may affect where potential student–athletes choose to attend school.[173] Schools with more money will still have the power to entice potential student–athletes to enroll at their university because the earning opportunities are high regardless of the state income-tax percentage.[174] However, schools in states with no income tax could begin to dominate the recruiting market.[175] Since schools often solicit athletes to transfer with opportunities for more playing time, the additional incentive of lower or non-taxable income could increase student–athlete transferring across the nation.[176] A situation like this could disrupt the competitive balance among college sports and certainly redirect a student–athlete's emphasis toward monetary goals instead of academics.[177]

While *O'Bannon* precludes the NCAA from prohibiting student–athlete compensation, the NCAA intends to maintain an emphasis on academics.[178] Furthermore, with Title IX and tax implications lingering as potential obstacles, it could be difficult for the NCAA to compensate athletes and maintain its core values.[179] However, a viable solution is to allow schools to compensate student–athletes with merit–based scholarships.[180]

IV. SHOW THEM THE MONEY: HOW TO COMPENSATE ALL STUDENT–ATHLETES

The major economic advancement that *O'Bannon* has provided to college athletes is a well-deserved victory.[181] For years, student–athletes have increased the demand and revenue for their respective colleges and

172. *See id.* at 31-32.

173. *See id.*

174. *See id.*; Parlow, *supra* note 113 and accompanying text.

175. *See* Kisska-Schulze & Epstein, *supra* note 23, at 31-32.

176. *See id.* (stating that there could be an increase in transfer requests for athletic programs located in no-income-tax states).

177. *See id.* at 30 (recognizing that top athletic programs in Florida and Texas would benefit from having greater national interest from elite student–athletes).

178. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1053 (9th Cir. 2015).

179. *See* Kisska-Schulze & Epstein, *supra* note 23; Buzuvis, *supra* note 21 and accompanying text.

180. *See* discussion *infra* Part IV (providing a solution to compensating student–athletes that complies with Title IX and prevents students from paying taxes); IRS, PUBLICATION 970 TAX BENEFITS FOR EDUCATION 1, 5 (2016), https://www.irs.gov/pub/irs-pdf/p970.pdf ("A scholarship . . . is tax free (excludable from gross income) only if you are a candidate for a degree at an eligible educational institution.").

181. *See* Jamieson, *supra* note 65 and accompanying text.

universities, the NCAA, and collegiate sports in general, but have not received any compensation.[182] Nonetheless, this remedy provides other legal questions, some of which are not as easy to answer.[183] Title IX may be an easy problem to solve, but allowing student–athletes to receive compensation for the use of their names, images, and likenesses while maintaining the amateurism of college athletics is more of a daunting task, especially when coupled with tax implications.[184] After the Court of Appeals decided that the NCAA did not have to compensate student–athletes with yearly deferred cash payments in excess of the cost of attendance, there seemed to be no reasonable alternative to provide payments to college athletes while maintaining the NCAA's amateur status.[185]

However, a viable solution to this dilemma is for the NCAA to allow schools to use the revenue generated from licensing student–athletes' names, images, and likenesses to create performance-based scholarships.[186] The scholarships would be granted from both schools and conferences to the student–athletes that excel in both academic and athletic endeavors.[187] The scholarships would be awarded at the end of each semester so that students' grades are factored in to determining the eligibility of the potential recipients.[188] Moreover, the performance-based scholarship opportunities would be available in every NCAA sport at each respective school like the NCAA All-American and All-Conference awards.[189] Those who support paying student–athletes may argue that this solution is not a plausible remedy because it does not fully compensate all revenue-generating athletes.[190] While this solution does not compensate all Division I men's basketball and FBS football student–athletes, it does create an additional remedy to the *O'Bannon* decision since there is a void of direction for the NCAA.[191] Moreover, the scholarship amounts could be

182. *See Trail of Tears*, *supra* note 16 and accompanying text.

183. *See* discussion *supra* Part III (identifying potential Title IX and income tax consequences of the *O'Bannon* decision).

184. *See* 20 U.S.C. § 1681(a)-(c); U.S. CONST. art. 1, § 8.

185. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1079 (9th Cir. 2015); NCAA 2015-16 GUIDE, *supra* note 25, at 24 and text accompanying notes 39-41.

186. *See O'Bannon*, 802 F.3d at 1075-77 (stating the NCAA did not have to allow schools to provide students with cash payments).

187. *See* Johnson, *supra* note 15; Taha, *supra* note 84, at 87.

188. *See* discussion *supra* Subsection II.A.3.c. (discussing the NCAA's promotion of integrating education and athletics).

189. *See* Harrison, *supra* note 108 and accompanying text.

190. *See* Dosh, *supra* note 154.

191. *See* Solomon, *supra* note 19; *O'Bannon*, 802 F.3d at 1075-77 (stating that the NCAA may not prohibit student–athlete compensation, but does not say it must compensate student–athletes).

structured relative to the popularity of the sport, meaning that the Division I men's basketball and FBS football scholarships would be more lucrative than all of the nonrevenue-generating sports like tennis or golf.[192]

On the other hand, those against paying student–athletes may argue that awards of large amounts could take away from the amateur aspect of the NCAA and change the focus toward a monetary goal.[193] Yet, any award amount under $10,000 could be considered within the scope of amateurism.[194] For example, college tennis players are allowed to gain amateur status even if they have received up to $10,000 in prize money prior to enrolling in college.[195] To ensure that the awards are not too large, the cap on the scholarships would be set to $5,000, which was the same amount proposed for the deferred cash payments.[196] However, unlike the deferred cash payments, performance-based scholarships allow student–athletes to maintain their amateur status because the awards are tied to education: These awards are based upon the merit of their academic achievements in addition to athletics.[197]

This solution, in addition to the Court of Appeals authorizing the NCAA to allow schools to award athletic scholarships up to the full cost of attendance, would compensate male and female student–athletes in both revenue and nonrevenue generating sports.[198] Moreover, this solution would provide future college athletes with the opportunity to consent to licensing their names, images, and likenesses in the live telecast, video game, and archival footage markets.[199] Lastly, this solution allows the NCAA to maintain its core value of amateurism in college sports while preventing student–athletes from becoming employees and subjecting themselves to income taxes.[200] Overall, merit-based academic and athletic scholarships are the most reasonable solution to compensating student–athletes for the revenue generated from licensing their names, images, and likenesses without jeopardizing amateurism.[201]

192. *See supra* Figures 1-2; Dosh, *supra* note 154.

193. *See* Johnson, *supra* note 15 and accompanying text.

194. *See O'Bannon*, 802 F.3d at 1080.

195. *See id.*

196. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 1008 (N.D. Cal. 2014).

197. *See O'Bannon*, 802 F.3d at 1077 (stating that the district court erred in allowing cash payments untethered to education expenses).

198. *See id.* at 1075-76; Buzuvis, *supra* note 21; Edelman, *supra* note 156.

199. *See* discussion *supra* Subsection II.A.2. (identifying the markets where student–athletes' names, images, and likenesses gain revenue).

200. *See* NCAA 2015-16 GUIDE, *supra* note 25, at 20.

201. *See O'Bannon*, 802 F.3d at 1077.

A. Compensating Male and Female Student–athletes

Title IX is an obstacle that all colleges and universities will need to comply with even though *O'Bannon* only requires paying Division I men's basketball and FBS football student–athletes.[202] Although women's college sports programs typically do not generate as much revenue as their male counterparts, it is essential that women's athletics receive an equal amount of funding to prevent discrimination scrutiny under Title IX.[203] While some may argue that paying both male and female student–athletes limits the amount of funds that are available because the funds will be split in half, it is the only way for schools to avoid a potential lawsuit from any female college athlete.[204]

The solution to this problem is not only providing performance-based scholarships to women's basketball and softball players, who are usually the most popular among women's college athletics, but also providing merit scholarships to all student–athletes.[205] Even though FBS football and Division I men's basketball are the bread winners in collegiate athletics, nonrevenue-generating sports programs should also be entitled to the opportunity to receive performance-based scholarships.[206] Since it is likely that only revenue-generating athletes will be allowed to receive athletic scholarships up to the full cost of attendance, providing merit-based scholarships to nonrevenue-generating athletes as well creates a balance among collegiate athletics.[207] In terms of public policy, creating a balance among the various college sports is essential to promoting fairness, which would help prevent lawsuits against the NCAA for only accommodating FBS football and Division I men's basketball players.[208]

The rebuttal to any solution involving paying student–athletes is the question of where the money will come from.[209] However, the excess money from the years of limited grant-in-aid to student–athletes may be used to distribute funds throughout college athletics.[210] Moreover, another source of funding would be the portion of revenue, generated from licensing student–athletes' names, images, and likenesses, that was

202. *See* 20 U.S.C. § 1681(a)-(c) (2014); Parlow, *supra* note 113, at 211; Buzuvis, *supra* note 21.
203. *See* Dosh, *supra* note 154; 20 U.S.C. § 1681(a).
204. *See* Buzuvis, *supra* note 21 and accompanying text.
205. *See* discussion *supra* Section III.A.
206. *See* Dosh, *supra* note 154.
207. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1075 (9th Cir. 2015).
208. *See id.*
209. *See* Buzuvis, *supra* note 21; *Trail of Tears*, *supra* note 16.
210. *See* discussion *supra* Part I (providing a brief history of the NCAA's restrictions on student–athlete compensation).

previously used to consistently update training facilities and overpay coaches and training staff.[211] Because the NCAA was concerned that money would separate student–athletes from the rest of the college student body, one would believe that the NCAA wants to maintain equality throughout collegiate athletics.[212] Therefore, this solution to compensate both male and female student–athletes in all sports through performance-based scholarships would coincide with the NCAA's vision of promoting fairness and equality.[213]

B. Student–athlete Consent Options

The next dilemma is slightly more difficult than the Title IX problem.[214] Because the NCAA can no longer prevent student–athletes from receiving compensation for licensing their names, images, and likenesses, the task is determining how to allow compensation without destroying the amateurism of collegiate athletics.[215] The proposal is to modify the amateur status requirements and provide student–athletes with the opportunity to consent to the use of their names, images, and likenesses.[216] A consent form would be presented upon the student–athlete's acceptance to enrolling at the university.[217] With this form, the student–athlete may either consent to the use of his or her name, image, and likeness in live game broadcast, video games, and highlight clips, or merely choose to not be identified in such media markets.[218] While consent to this form does waive the student–athlete's right to bring action on that matter, it prevents him from destroying his amateur certification.[219] However, when the student–athlete consents to the NCAA licensing on his behalf, he will be eligible to receive a portion of the revenue through the performance-based scholarships.[220] Moreover, this option would allow the NCAA to reopen the college video game market that has been shut down due to cases like *Keller v. Electronic Arts, Inc.* and *Hart v. Electronic Arts, Inc.*, both of

211. *See* Jamieson, *supra* note 65 and accompanying text; Isidore, *supra* note 112 and accompanying text.

212. *See* discussion *supra* Subsection II.A.3.c.

213. *See id.*

214. *See* Parlow, *supra* note 144 and accompanying text.

215. *See* discussion *supra* Subsection II.A.3.a; NCAA 2015-16 GUIDE, *supra* note 25.

216. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 993 (N.D. Cal. 2014); NCAA 2015-16 GUIDE, *supra* note 38 and text accompanying note 41.

217. *See* discussion *supra* Part II; NCAA 2015-16 GUIDE, *supra* note 25.

218. *See* discussion *supra* Subsection II.A.2.

219. *See* NCAA 2015-16 GUIDE, *supra* note 25 (stating that student–athletes must be certified as amateurs).

220. *See* discussion *supra* Section II.A.

which involved students suing for right to publicity and later joining the *O'Bannon* case.[221]

It is arguable that this option is no different from the NCAA's current restrictions because it does not guarantee that student–athletes will receive a portion of the revenue that they generate.[222] However, with the consent option the result is that the athlete is able to remain an amateur instead of having to consider the foreign professional or minor league opportunities that some athletes have chosen due to their academic issues.[223] Furthermore, without consenting to allow the NCAA to control licensing, the student–athlete not only passes on an opportunity to possibly receive more compensation, but he also passes on the chance for exposure through each of the relevant media markets.[224]

Conversely, there is the possibility that some incoming student–athletes may choose to opt out of licensing their names, images, and likenesses through the NCAA.[225] In this situation, each of those students may attempt to license their names, images, and likenesses directly in each market, which could start a trend of students contracting their own licensing agreements.[226] However, it is more likely that student–athletes would be unsuccessful in that attempt because the media markets would prefer to have group licensing contracts rather than individual licensing contracts.[227] Additionally, television networks and third-party agents such as T3Media only contract licensing deals exclusively with the NCAA or its member conferences and schools.[228] Thus, providing a licensing consent option for incoming student–athletes, would allow the NCAA to minimize future legal issues involving compensation.[229] Likewise, student–athletes could maximize their compensation opportunities with consent to the NCAA licensing option.[230]

221. *See* Keller v. Elec. Arts, Inc., 724 F.3d 1268, 1272 (9th Cir. 2013).

222. *See* Edelman, *supra* note 27 (analyzing the district court's proposed alternatives to the NCAA's wage restraints on college athletics).

223. *See* NCAA 2015-16 GUIDE, *supra* note 38; Broussard, *supra* note 75 (identifying a basketball player that chose to sign with a foreign professional team rather than join the NCAA); Thamel, *supra* note 79 (identifying a basketball player that chose to play in the NBA's minor league rather than the NCAA).

224. *See* Taha, *supra* note 84 and accompanying text.

225. *See* discussion *supra* Subsection II.A.2.

226. *See* discussion *supra* Subsection II.A.2.

227. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 995 (N.D. Cal. 2014).

228. *See id.* at 994.

229. *See id.*

230. *See id.*; Taha, *supra* note 84; Berkowitz, *supra* note 18.

C. Paying Student–athletes Without Taxation

The final issue, and arguably the most difficult of the three, is developing a means of compensating student–athletes while avoiding state and federal tax implications.[231] Student–athletes may not necessarily be subject to state taxes, depending on the state they attend school, but would certainly be subject to federal income taxes.[232] The problem is allowing the athletes to receive the money they deserve, while preventing them from reaching employee status.[233] Making student–athletes into employees would certainly defeat any purpose of having the "student" part of "student–athletes" because the free education is supposed to be their compensation.[234] In addition, many student–athletes already focus heavily on preparing for competition at both the collegiate and professional level, but never apply the same amount of effort in the classroom.[235]

However, with the amount of revenue that the NCAA's schools generate from student–athletes through the licensing of their names, images, and likenesses, many believe college athletes are entitled to more compensation.[236] Those who are against paying student–athletes consider the tax issue a major problem because of the effects it could have on the recruiting aspect of college sports.[237] The belief is that certain states will have an advantage because of their lower income tax rates, which would ultimately disrupt the competitive balance.[238] While this stance opposing compensation may be valid, rewarding athletes through performance-based scholarships would solve the tax dilemma.[239]

Scholarships based on performance in the classroom and on the playing field would provide compensation while preventing student–athletes from subjecting themselves to income taxes.[240] The Internal Revenue Service allows tax-free scholarships for students at eligible educational institutions so long as it does not exceed the individual's qualified educational expenses, meaning expenses needed for attendance or

231. *See* discussion *supra* Section III.B. (examining the possible income tax implications from the *O'Bannon* decision).

232. *See* U.S. CONST. art. 1, § 8.

233. *See* discussion *supra* Subsection II.A.3.a. (explaining the NCAA's focus on preserving amateurism of college athletics).

234. *See* NCAA 2015-16 MANUAL, *supra* note 31 and accompanying text.

235. *See* Johnson, *supra* note 15 and accompanying text.

236. *See* Jamieson, *supra* note 65 and accompanying text.

237. *See* discussion *supra* Section III.B.

238. *See* Kissa-Schulze, *supra* note 176 and accompanying text.

239. *See* Kissa-Schulze, *supra* note 23.

240. *See id.*

enrollment.[241] Some may argue that scholarships based on athletic performance would entice students to direct even more attention to their athletic endeavors.[242] However, the scholarships would also be geared toward educational values because academic achievement in addition to athletic performance would be necessary to qualify for the awards.[243] Therefore, linking academic achievement with athletic success, will provide student–athletes with the opportunity to gain compensation without taxation.[244]

D. The Benefits of Performance-Based Scholarships

Performance-based scholarships provide the NCAA with the same amount of benefits as each of its alleged procompetitive justifications for restricting student–athlete compensation.[245] Although they are not necessary, performance scholarships would be a reasonable alternative to the NCAA's restriction on compensation from revenue generated through the licensing of student–athletes' names, images, and likenesses.[246] With proper implementation, the NCAA would be able to preserve amateurism, maintain competition among its member schools, and integrate academics and athletics—all while increasing its national exposure.[247]

Throughout its history, the NCAA has maintained an emphasis on preserving amateurism in college sports.[248] While the rules against compensation functioned to prevent the NCAA from becoming a minor league system to professional leagues such as the National Basketball Association and National Football League, the rules also exploited college athletes.[249] *O'Bannon* exposed the flaws in the NCAA's technique to preserving amateurism, but failed to completely resolve the student–athlete compensation issue.[250] Nonetheless, through performance-based scholarships, the NCAA could compensate student–athletes without

241. *See* IRS, *supra* note 180 (stating that the scholarship may not restrict use for qualified educational expenses and may not represent payment for teaching, research, or other similar required services).

242. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 980 (N.D. Cal. 2014).

243. *See* Harrison, *supra* note 108 and accompanying text.

244. *See id*.; Kissa-Schulze, *supra* note 23.

245. *See* discussion *supra* Subsection II.A.3. (stating that the NCAA's procompetitive justifications for restraint were preserving amateurism, maintaining competition among universities, integrating academics and athletics, and increasing exposure).

246. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1053 (9th Cir. 2015).

247. *See* discussion *supra* Subsection II.A.3.

248. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 973 (N.D. Cal. 2014).

249. *See Trail of Tears*, *supra* note 16 and accompanying text.

250. *See O'Bannon*, 802 F.3d at 1081.

providing it in a manner that would transform college sports into a minor-league system and ruin its amateur status.[251] Furthermore, since the scholarships would only go to the top-performing student–athletes, competition among players and schools would increase.[252]

The NCAA believes that its restrictions on student–athlete compensation allow it to maintain competition among its member schools.[253] However, performance-based scholarships would also maintain competition among NCAA schools provided that the conferences are allowed to award them to student–athletes.[254] With conferences providing scholarships to the top-performing student–athletes from schools within their respective conferences, schools with the most scholarship-winning students are now able to pitch another benefit when recruiting future athletes.[255] Although the NCAA will always have disparity among schools because of size and revenue, competition among schools to recruit the best athletes would increase because the schools with more successful students would develop a reputation for exceling in both academics and athletics.[256] While performance scholarships would maintain and even increase competition among schools, it would also further the integration of education and athletics.[257]

Implementing performance-based scholarships would contribute to the integration of academics and athletics.[258] Although those who oppose compensating student–athletes believe it would create a distinct separation between education and sports, it would actually tie both together and promote achievement in each endeavor.[259] Since eligibility for the scholarships would be based on athletic performance as well as academic achievement, student–athletes are encouraged to excel in academics.[260] This would motivate student–athletes to excel in other endeavors besides sports and appreciate the importance of education, thus integrating both academics and athletics.[261]

251. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 102 (1984) (differentiating collegiate athletics from professional minor league sports).

252. *See* discussion *supra* Subsection II.A.3.c. (showing the NCAA's focus on promoting the integration of education and sports).

253. *See O'Bannon*, 7 F. Supp. 3d at 978.

254. *See* discussion *supra* Subsection II.A.3.b.

255. *See* Harrison, *supra* note 108 and accompanying text.

256. *See generally* Taha, *supra* note 84.

257. *See* discussion *supra* Subsection II.A.3.c.

258. *See* Taha, *supra* note 84, at 113 (stating that generally college football and basketball players have lower academic achievement than other college students).

259. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 980 (N.D. Cal. 2014).

260. *See id.*

261. *See* discussion *supra* Subsection II.A.3.c.

With the possibility of increasing its national exposure, the NCAA would more than likely have an interest in performance-based scholarships.[262] The NCAA could face the hurdles of determining when to implement the scholarships and providing a framework for the amount of revenue that needs to go toward funding the scholarships.[263] Yet, because performance-based scholarships would increase competition among schools and conferences, the NCAA as a whole would benefit financially from elite performances from its student–athletes.[264] Moreover, the NCAA would gain more opportunities for televised games, thus increasing its exposure to fans across the nation.[265]

CONCLUSION

The *O'Bannon* decision was a major event in collegiate athletics.[266] As a result of this decision, student–athletes are finally able to reap the benefits of their labor on the playing field.[267] In order to satisfy the holding in *O'Bannon*, the NCAA must allow Division I men's basketball and FBS football student–athletes to receive compensation for the use of their names, images, and likenesses in live game broadcasts, video games, highlight clips, and other archival footage.[268] However, in order to comply with Title IX, it is necessary for the NCAA also to provide an equal amount of funds to women student–athletes, which means doubling the amount of compensation.[269] Although compensating both men and women may cause colleges and universities to offer less money to Division I men's basketball and FBS football student–athletes, it is the only way for the NCAA to comply with both the Sherman Antitrust Act and Title IX.[270] With regard to the possible tax implications, if the NCAA compensates student–athletes through performance-based scholarships for academic and athletic achievements, then it would prevent the income tax that students would face as employees.[271]

262. *See* discussion *supra* Subsection II.A.3.d.

263. *See generally supra* Figures 1-2 (showing an athletic department's financial breakdown of revenue, expenses, and profit).

264. *See* discussion *supra* Subsection II.A.3.d.

265. *See O'Bannon*, 7 F. Supp. 3d at 993.

266. *See* Berkowitz, *supra* note 18 and accompanying text.

267. *See* Jamieson, *supra* note 65 and accompanying text.

268. *See* Berkowitz, *supra* note 18 and accompanying text; Solomon, *supra* note 19 and accompanying text.

269. *See* Buzuvis, *supra* note 21; Parlow, *supra* note 144.

270. *See* Buzuvis, *supra* note 21 and accompanying text.

271. *See* discussion *supra* Section III.B. (discussing the possible tax implications when providing student–athletes with income).

Performance-based scholarships are a simple solution to the Title IX problem because it provides not only an equal share of revenue to women's college athletics, but to all sports programs—even the nonrevenue-generating programs.[272] These scholarships would maintain balance within student athletics, while fairly providing compensation for the use of student–athletes' names, images, and likenesses in live game broadcast and highlight clips.[273] Moreover, the idea to provide incoming student–athletes with consent forms to allow their schools and conferences to sell the rights of their names, images, and likenesses on their behalf maintains the amateurism that the NCAA is so adamant about preserving in college sports.[274] Also, the performance-based scholarships solved the complex issue of paying student–athletes for the use of their names, images, and likenesses while maintaining their amateur status and avoiding income taxes.[275] Overall, performance-based scholarships would conform to the *O'Bannon* decision because it would provide an opportunity to compensate Division I men's basketball and FBS football student–athletes for licensing their names, images, and likenesses.[276]

272. *See* discussion *supra* Section III.A. (discussing the Title IX effects in college athletics).

273. *See* Dosh, *supra* note 154 (discussing revenue and nonrevenue sports in both men's and women's athletics).

274. *See* discussion *supra* Part I (providing the NCAA's history of amateurism).

275. *See* discussion *supra* Section III.B.

276. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1053 (9th Cir. 2015) (stating that the NCAA may not restrict Division I men's basketball and FBS football student–athlete compensation for the use of their names, images, and likenesses, but did not have to provide compensation).