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When the Sanity Code Becomes the Insanity Code: Following O'Bannon's Lead is the Key to Solving Group Licensing for NCAA Student-Athletes

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WHEN THE SANITY CODE BECOMES THE INSANITY CODE: FOLLOWING *O'BANNON*'S LEAD IS THE KEY TO SOLVING GROUP LICENSING FOR NCAA STUDENT-ATHLETES

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"*Many times when you lose, it's the greatest opportunity to improve. You have this unique opportunity to make dramatic change that you probably couldn't make when things seem to be going right.*"[1]

A YouTube channel titled "Deestroying" displays unique talents of a Costa Rican immigrant named Donald De La Haye ("De La Haye").[2] De La Haye has a second channel, "KD Family," and together, the channels have a combined 486 million views and more than three million subscribers.[3] De La Haye majored in marketing at the University of Central Florida ("UCF"), but creates content for his YouTube channels as his full-time job."[4] While this may sound like a typical American success story of someone who immigrated to the United States, realized

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1. *Coach K Backs NCAA Changes*, ESPN (Oct. 3, 2013), [https://perma.cc/F7K8-NWSZ].

2. Robert Henneke & Jon Riches, *Attorneys: UCF's De La Haye Settles for a Bright Future off the Field*, ORLANDO SENTINEL (Nov. 16, 2018), [https://perma.cc/QD7A-ZVUK].

3. *See Deestroying*, YOUTUBE, [https://perma.cc/6N43-35WL] (last visited Feb. 5, 2021); *KD Family*, YOUTUBE, [https://perma.cc/6TS5-Q785] (last visited Feb. 5, 2021).

4. Associated Press, *Ex-UCF Kicker Says There Was No Compromise as He Defends Choice to Give up Eligibility*, ESPN (Aug. 1, 2017), [https://perma.cc/W4JW-7A7Q]; James Hale, *YouTube Millionaires: NFL Hopeful Donald De La Haye Was Forced to Choose Between YouTube and Football — but Now He Aims for Both*, TUBEFILTER (Jan. 31, 2019), [https://perma.cc/FH26-BK5S].

his dream, and capitalized on an opportunity, there's only one glitch—the National Collegiate Athletic Association ("NCAA").

One of De La Haye's unique talents displayed in his YouTube videos is kicking a football.[5] He was a member of UCF's football team in 2015 and 2016.[6] De La Haye's videos showed off his unique skillset, but most videos did not mention UCF or the NCAA.[7] Instead, De La Haye used his YouTube channel to further his academic and professional career in marketing.[8] In 2017, UCF's Compliance Office delivered an ultimatum: demonetize your YouTube channel or be banned from NCAA competition.[9] Because De La Haye was an amateur student-athlete at UCF, he was not allowed to earn compensation.[10] De La Haye chose YouTube.[11]

But student-athletes are seemingly the only people not allowed to profit from their talent. While at UCF, De La Haye played under Head Coach Scott Frost, who signed a five-year, $8.5 million contract prior to the 2016 season.[12] If the school terminated Frost before his contract expired, he would still receive $850,000 for each year remaining on the agreement.[13] However, Frost parlayed UCF's success into a seven-year, $35 million contract with the University of Nebraska following the 2017 season.[14]

During that same timeframe, schools and conferences across the country signed exorbitant contracts with apparel suppliers and multimedia rights holders. While UCF does not release the

5. *See* Steven Ruiz, *A College Football Player Has a Hit YouTube Channel. He Might Have to Give It up To Remain Eligible.*, USA TODAY SPORTS: FOR THE WIN (June 12, 2017), [https://perma.cc/X79P-KAZC].

6. *2016 Football Roster*, UCF, [https://perma.cc/J22Q-URK3] (last visited Feb. 5, 2020).

7. Steven Ruiz, *supra* note 5.

8. *Id.*

9. *Id.*

10. *See* NCAA, DIVISION I MANUAL § 12 (2020) [hereinafter MANUAL].

11. Associated Press, *supra* note 4.

12. Jeff Sharon, *Here Are Scott Frost's Contract Terms at UCF*, BLACK & GOLD BANNERET (Dec. 3, 2015), [https://perma.cc/H5XT-9FW3].

13. *Id.*

14. Rebecca S. Gratz, *Scott Frost's Contract with Nebraska Makes Him Highest-Paid Coach in School History*, OMAHA WORLD HERALD (Dec. 2, 2017), [https://perma.cc/TM48-FWR7].

details of its apparel agreement with Nike,[15] the American Athletic Conference[16] (the "AAC") leads all Group of Five conferences[17] with an average apparel deal of nearly $2.8 million per year per school.[18] Meanwhile, the Power Five conferences[19] boast an average apparel contract worth almost $4.5 million per year[20] with at least three universities that secured apparel deals worth more than a quarter of a billion dollars.[21] On top of their apparel agreements, schools also receive a share of their respective conferences' multi-media rights deals.[22] The AAC's latest media rights deal is worth $1 billion over twelve years with ESPN.[23] Under that agreement, each of the AAC's member schools will receive nearly $7 million annually.[24] Power Five schools are also enjoying the fruits of outrageous media rights deals.[25] In 2018, the Big Ten Conference distributed $54 million to its member schools.[26] Other distributions included $43.7 million to each Southeastern Conference school, $34.7 million to each Big 12 school, and $29.5 million to each Pac-12 and Atlantic Coast Conference school.[27]

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15. Iliana Limón Romero, *UCF Inks Two-Year Extension, Expanded Deal with Nike*, ORLANDO SENTINEL, (April 26, 2016), [https://perma.cc/U29H-BHTN].

16. UCF is one of twelve teams that make up the AAC. *About,* AMERICAN ATHLETIC CONF., [https://perma.cc/W5AN-258F] (last visited Jan. 23, 2021).

17. Group of Five Conferences include the AAC, Mountain West Conference, Conference USA, Mid-American Conference, and Sun Belt Conference. Dennis Dodd, *Majority of Power Five Schools Favor Breaking Away to Form Own Division within NCAA, Survey Shows*, CBS (Oct. 13, 2020), [https://perma.cc/NK8W-NCW9].

18. JONATHAN A. JENSEN & TYLER WISNIEWSKI, CTR. FOR RESEARCH IN INTERCOLLEGIATE ATHLETICS, INTERCOLLEGIATE APPAREL AGREEMENT REPORT 3 (2017), [https://perma.cc/3EZA-NN5X].

19. Power Five Conferences include the Big 12 Conference, Pac-12 Conference, Big Ten Conference, Southeastern Conference, and Atlantic Coast Conference. Dodd, *supra* note 17.

20. JENSEN & WISNIEWSKI, *supra* note 18, at 3.

21. *Breaking Down College Shoe and Apparel Deals*, ESPN, (Sept. 27, 2017) [https://perma.cc/Y9Y6-8XXR].

22. *See* David Ching, *Big Ten's Rights Deal Threatens to Widen Financial Gap Between Even the Biggest Conferences*, FORBES, (April 27, 2018), [https://perma.cc/U637-FX5W].

23. Michael Smith & John Ourand, *AAC, ESPN Agree To 12-Year Media-Rights Deal Worth $1B*, SBJ DAILY (Mar. 19, 2019), [https://perma.cc/XLL7-BLLZ].

24. *Id.*

25. Steve Berkowtiz (@ByBerkowitz), TWITTER (May 24, 2019, 1:12 PM), [https://perma.cc/64X2-9MKB].

26. *Id.*

27. *Id.*

On October 29, 2019, the NCAA's Board of Governors decided enough is enough and finally directed its three Divisions to begin the process of "modernizing"[28] its bylaws to enhance name, image, and likeness opportunities for student-athletes.[29] The NCAA planned to implement new rules that allow student-athletes to benefit from their names, images, and likenesses "in a manner consistent with the collegiate model" by January 2021, but the NCAA failed to meet that deadline.[30] The Board of Governors outlined eight requirements for the new rules: (1) "[a]ssure student-athletes are treated similarly to non-athlete students unless a compelling reason exists to differentiate;" (2) "[m]aintain the priorities of education and the collegiate experience to provide opportunities for student-athlete success;" (3) "[e]nsure rules are transparent, focused and enforceable and facilitate fair and balanced competition;" (4) "[m]ake clear the distinction between collegiate and professional opportunities; (5) "[m]ake clear that compensation for athletics performance or participation is impermissible;" (6) "[r]eaffirm that student-athletes are students first and not employees of the university;" (7) "[e]nhance principles of diversity, inclusion and gender equity;" and (8) "[p]rotect the recruiting environment and prohibit inducements to select, remain at, or transfer to a specific institution."[31]

The NCAA reluctantly approved legislation that allowed student-athletes to use their names, images, and likenesses on an individual level.[32] However, it fell short of allowing student-athletes to engage in group licensing deals similar to the exorbitant deals that have made NCAA institutions exorbitantly wealthy.[33]

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28. *Board of Governors Starts Process to Enhance Name, Image and Likeness Opportunities*, NCAA (Oct. 29, 2019), [https://perma.cc/JF35-RHYR] [hereinafter NCAA].

29. *Id.*

30. *Id.*; Michelle Brutlag Hosick, *Division I Council Tables Proposals on Name, Image, Likeness, and Transfers*, NCAA (Jan. 11, 2021), [https://perma.cc/6TJM-Q2Q5]; *see also infra* Section III.

31. NCAA, *supra* note 28.

32. *See infra* Section III.

33. *See generally* Kristi Dosh, *Comparing Apparel and Licensing Contracts in College Sports*, BUS. OF COLL. SPORTS (July 9, 2015), [https://perma.cc/5SDD-8FQG]; *CLC Names Top Selling Universities*, LICENSE GLOBAL (Apr. 6, 2018), [https://perma.cc/VZ3U-D8EG].

This Comment will first trace the origins of amateurism and its ever-evolving definition by the International Olympic Committee ("IOC") in Part I. Part II will discuss the evolution of amateurism in the NCAA, the NCAA's previous amateurism framework, and recent challenges to the NCAA's amateurism model. In Part III, this Comment will outline the NCAA's response to pressure surrounding name, image, and likeness. Finally, in Part IV, this Comment will provide an avenue for the NCAA to adapt its current framework to allow student-athletes to monetize their names, images, and likenesses for group licensing deals, while preserving the NCAA's goal of prioritizing education and preventing the commercial exploitation of student-athletes.

I. THE HISTORY OF AMATEURISM

The only constant with the definition of "amateur" throughout history is that it is constantly changing. Although some trace the origins of amateurism to ancient Greece, amateurism first rose to prominence in Great Britain during the late nineteenth century, loosely based on the notion that one should "do[] things for the love of them, do[] them without reward or material gain or do[] them unprofessionally."[34] As the popularity of sports grew so did the amount of spectators, and by the late 1800s the commercialization of sports began.[35] Until then, the definition of an "amateur" remained an amorphous concept loosely centered around athletes participating in sports for the sake of competition.[36] As Great Britain's conquests around the world expanded, so did the concept and definition of amateurism—to Cape Town, Sydney, Toronto, and other British outposts in sub-Sharan Africa, the Caribbean, and Southeast Asia.[37]

The first significant attempt to formally define amateurism came with the resurgence of the Olympic Games (the "Games").[38]

34. MATTHEW P. LLEWELLYN & JOHN GLEAVES, THE RISE AND FALL OF OLYMPIC AMATEURISM 12 (Randy Roberts & Aram Goudsouzian eds., 2016).

35. *Id.* at 13-14.

36. *Id.* at 13-16.

37. *Id.* at 19.

38. *Id.* at 29.

In 1894, the International Athletic Congress (the "Congress") convened in Paris for what many attendees believed to establish a definition of amateur.[39] However, because amateurism had been defined so differently across the globe based on socio-cultural notions, the Congress struggled to come to a consensus.[40] After four days of debate, the Congress finally settled on a definition of an amateur:

> Any individual who has never participated in a competition open to all comers, nor competed for a cash prize, or for a prize of any amount of money regardless of its source, specifically from admissions to the field—or with professionals—and who has never been, at any time in his life, a teacher or paid instructor in physical education.[41]

The Congress allowed many exceptions to this definition and conceded that it could not apply to all sports.[42] The IOC introduced its first amateur code in 1896, but the code began eroding almost as soon as it was implemented.[43] Because the IOC lacked jurisdiction in some cases and local officials influenced other decisions, the definition of amateur remained as amorphous as before.[44] The first three Olympic Games after its revival were marred with lack of popularity and a governing body unable to apply its own rules—to the point that professional cyclists openly competed in the 1900 Paris Games and 1904 St. Louis Games.[45]

In 1905, the IOC "revived a resolution passed . . . eleven years earlier that prohibited Olympic amateurs from competing with or against known professionals, competing for prize money, or serving as teachers or professors in their chosen specialty."[46] This definition of amateurism held true through the next half-century.[47] Although the early version of the modern Olympics were not overly popular, the post-World War II era increased a

39. LLEWELLYN & GLEAVES, *supra* note 34, at 26.
40. *Id.*
41. *Id.* at 27.
42. *Id.*
43. *Id.* at 27-29.
44. *See* LLEWELLYN & GLEAVES, *supra* note 34, at 29.
45. *Id.* at 30.
46. *Id.* at 34.
47. Ross Andrews, *Push to Allow Professional Athletes Took Hold in 1968 Olympic Games*, GLOBAL SPORT MATTERS (Oct. 15, 2018), [https://perma.cc/3YJ4-5JLX].

sense of nationalism and pride in representing one's country for athletes and spectators.[48] Because of its renewed popularity, the 1968 Games in Mexico City proved to be a turning point for the IOC.[49]

The Mexico City Games were the first to be broadcasted worldwide in color with state-of-the-art technology and commentary.[50] As the world watched, a clash between amateurism and commercialization brewed.[51] Numerous countries behind the Iron Curtain treated their Olympic athletes as professionals, which eventually forced the IOC's hand.[52] By 1984, some professional hockey players were allowed to compete in the Olympics.[53] Soon thereafter, the IOC relinquished control of defining amateurism, and bestowed the power to the international federation for each sport.[54] Today, only one of the Olympics' thirty-three sports still prevents professionals from competing.[55]

When the IOC allowed professional athletes to compete in the Olympics, it provided great entertainment from the 1992 Dream Team, but the shift still lacked enough bite to cover all compensation for athletes—like endorsement deals.[56] Rule 40 and Rule 50 of the Olympic Charter govern athletes' use of their names, images, and likenesses during competition.[57] Bylaw 40.3 exempts compensation for the use of an athlete's "person, name, picture or sports performances" for advertising purposes by the IOC in connection with the Olympics.[58] While athletes are

48. *Id.*
49. *Id.*
50. *Id.*
51. *See id.*
52. Andrews, *supra* note 47.
53. *Id.*
54. *Id.*
55. Victor Mather, *Olympics Is Opening Its Rings to Professional Boxers*, N.Y. TIMES (Mar. 1, 2016), [https://perma.cc/W6S9-KYZR] (explaining that the Olympics began accepting professional boxers in 2016); *Sports*, OLYMPICS, [https://perma.cc/3D55-XAZD]; Raisa Bruner, *Everything You Need to Know About the 2020 Summer Olympics*, TIME (Mar. 24, 2020), [https://perma.cc/NQ4Z-6L72]; *Can Professional Athletes Compete in the Olympics?*, RULES OF SPORT.COM, [https://perma.cc/2TL5-AZMP].
56. Andrews, *supra* note 47.
57. INT'L OLYMPIC COMM., OLYMPIC CHARTER §§ 40, 50 (2020), [https://perma.cc/S4VT-3RPR] [hereinafter OLYMPIC CHARTER].
58. *Id.* at § 40.3.

generally free to pursue endorsements deals outside of the Olympic competition period, provided that they do not use the Olympic rings or other Olympics trademarks, Rule 50 generally governs an athlete's endorsements during the Olympics.[59] Athletes are typically prohibited from endorsing or advertising products during competition or Olympic ceremonies.[60] General exceptions are included for logos on athletic equipment and apparel.[61] However, guidance handed down by the IOC prior to the 2020 Tokyo Games indicates that athletes will now be able to thank personal sponsors during the Games.[62] The guidance also provides that personal sponsors will be able to publish "congratulatory messages" and engage in "generic advertising during the Games."[63]

II. AMATEURISM AND THE NCAA

While the IOC adapted its definition of amateurism and allowed mechanisms for its athletes to earn compensation, the NCAA remained steadfast and has only changed with legal and political pressures. The one constant with the NCAA's definition of an "amateur" is that it has constantly changed since the organization's beginning in 1906.[64] At its inception, the NCAA did not allow a college athlete to receive any renumeration for playing a sport, including a prohibition on financial aid.[65] Some forty years later in 1948, the NCAA introduced a new set of rules inaptly named the "Sanity Code."[66] The Sanity Code introduced the notion that collegiate athletes may only receive financial aid available to the general student body, including tuition and fees,

59. *Id.* at § 50.

60. *Id.*

61. *Id.*

62. Ed Dixon, *US Olympians Able to Promote Personal Sponsors as Rule 40 Is Relaxed,* SPORTSPRO (Oct. 9, 2019), [https://perma.cc/ZW4A-Z4C4].

63. *Id.*

64. *See generally* Kristin R. Muenzen, *Weakening Its Own Defense? The NCAA's Version of Amateurism*, 13 MARQ. SPORTS L. REV. 257 (2003).

65. *Id.* at 260.

66. David F. Gaona, *The National Collegiate Athletic Association: Fundamental Fairness and the Enforcement Program*, 23 ARIZ. L. REV. 1065, 1070 (1981).

but not room and board.[67] In order to receive any financial aid, the student-athlete must have demonstrated a financial need.[68]

"In 1951, Walter Byers was named the first-ever executive director of the NCAA."[69] Although his thirty-six-year tenure as head of the organization began with the coining of the term "*student-athlete*" to emphasize the importance of "student" among amateur athletes, Byers would quickly become one of the NCAA's biggest critics, calling the organization a "nationwide money-laundering scheme."[70] Before Byers was forced out as head of the NCAA, the organization once again changed its rule to allow the now "student-athletes" to receive financial aid for their room, board, and laundry money.[71]

Changes to the NCAA's amateurism definition then fell dormant until 2014 when it was forced to reconsider its rules after a former UCLA student-athlete, Ed O'Bannon, sued the NCAA and Electronic Arts Sports for using his name, image, and likeness in video games.[72] Soon thereafter, Shawne Alston, a former West Virginia University running back, filed a class action lawsuit on behalf of current and former football players in five of the top athletic conferences in the NCAA (the Big 12, Big Ten, Pac-12, ACC, and SEC).[73] Martin Jenkins, a former defensive back for Clemson University, and two other athletes also filed a class action stating that financial aid awards and potential compensation should be determined by an open market and not regulated by the NCAA.[74] These cases were consolidated in *In re*

67. Wes Gerrie, *More Than Just the Game: How Colleges and the NCAA Are Violating Their Student-Athletes' Rights of Publicity*, 18 TEX. REV. ENT. & SPORTS L. 111, 115 (2018); Arash Afshar, *Collegiate Athletes: The Conflict Between NCAA Amateurism and a Student Athlete's Right of Publicity*, 51 WILLAMETTE L. REV. 101, 109 (2014).

68. Afshar, *supra* note 67, at 109.

69. *Id.* at 121.

70. WALTER BYERS & CHARLES HAMMER, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 69, 73, 369 (1995).

71. Afshar, *supra* note 67, at 109.

72. Joe Nocera, *What Tournament? N.C.A.A.'s Biggest Event May Be at a Higher Court*, N.Y. TIMES (March 22, 2016), [https://perma.cc/2P63-NRBH].

73. *See* Complaint at 5, 11, 110, Alston v. NCAA, No. 3:14-cv-01011 (N.D. Cal. dismissed Aug. 19, 2018).

74. *See* Complaint and Jury Demand – Class Action Seeking Injunction and Individual Damages at 5, 6, 35, 40, Jenkins v. NCAA, No. 4:14-cv-02758 (D.N.J. filed Mar. 17, 2014) [hereinafter Jenkins Complaint].

NCAA Grant-in-Aid Cap Antitrust Litigation.[75] Then, in late 2019, a flurry of states began legislative efforts to bar the NCAA from prohibiting its student-athletes from monetizing their names, images, and likenesses.[76]

A. NCAA Framework Prior to Name, Image, and Likeness Changes

The NCAA governs more than 1,200 institutions across three divisions: Division I Division II, and Division III.[77] Division I is often considered the "highest level of competition" and is the only division that allows for full scholarships, including cost-of-attendance stipends.[78] While the college sports industry recently topped $16 billion in revenue, the NCAA limited its Division I student-athletes to only grant-in-aid scholarships that cover "tuition and fees, room and board, books and other expenses related to attendance."[79] Any financial aid or compensation from the school or a third-party may risk the student-athlete's amateur status under those NCAA rules.[80]

> Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected

75. Consolidated Amended Complaint at 1, *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Lit., No. 4:14-md-02541-CW (N.D. Cal. July 11, 2014).

76. H.B. 251, 2020 Leg. (Fl. 2020); H.B. 3904, 101st Gen. Assemb. (Il. 2020); S.B. 6722, Reg. Sess. (N.Y. 2019).

77. *Membership*, NCAA, [https://perma.cc/YEM5-23XH] (last visited Jan. 23, 2021). *But see The Difference in the College Division Levels*, NCSA, [https://perma.cc/H9T2-XZ7V] (last visited Jan. 23, 2021) (stating that there are only 1,102 total member schools across all the NCAA divisions).

78. MATTHEW J. MITTEN ET AL., SPORTS LAW AND REGULATION 103 (5th ed. 2019); *Division II Partial-Scholarship Model*, NCAA, [https://perma.cc/3B8R-75JH] (last visited Jan. 23, 2021).

79. Paul M. Barrett, *In Fake Classes Scandal, UNC Fails Its Athletes—and Whistle-Blower,* BLOOMBERG BUSINESSWEEK (Feb. 27, 2014) [https://perma.cc/JV7J-ANDK]; MANUAL, *supra* note 10, at §15.2.6.

80. *See generally* MANUAL, *supra* note 10, at § 12.

> from exploitation by professional and commercial enterprises.[81]

Prior to recent name, image, and likeness legislation, Bylaw 12 in the NCAA framework for Division I institutions governed amateurism and agents.[82] The NCAA dictated that a student-athlete forfeited eligibility if he or she "[u]se[d] his or her athletics skill (directly or indirectly) for pay in any form in that sport," or "[e]nter[ed] into an agreement with an agent."[83] Bylaw 12 also denied student-athletes the right to use "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 to receive compensation for endorsing a product through that student-athlete's use of a product or service.[84] Bylaw 12 also prohibited a student-athlete from hiring an agent "for the purpose of marketing his or her athletics ability or reputation in that sport."[85]

B. Recent Challenges

Since 2014, the NCAA has faced constant pressure from lawsuits and legislation to adapt its prohibition on compensation for student-athletes.[86] With those challenges, the NCAA has taken incremental steps to merely satisfy court judgments while maintaining its view of amateurism.[87]

i. NCAA v. O'Bannon *and the Trust Account Model*

A common refrain from detractors of compensating athletes is that compensation threatens the spirit of amateurism and the

81. This statement is the NCAA's explanation of its "Principle of Amateurism." *Id*. at § 2.9.

82. *Id*. at § 12.

83. *Id*. at § 12.1.2.

84. *Id.* at § 12.5.2.1.

85. MANUAL, *supra* note 79, at § 12.3.1.

86. *See generally* O'Bannon v. NCAA, 7 F. Supp. 3d 955, 972 (N.D. Cal. 2014); Consolidated Amended Complaint, *supra* note 75, at 71-72, 85; H.B. 251, 2020 Leg. (Fl. 2020); H.B. 3904, 101st Gen. Assemb. (Ill. 2020); S.B. 6722, Reg. Sess. (N.Y. 2019).

87. *See generally O'Bannon*, 7 F. Supp. 3d at 972; Consolidated Amended Complaint, *supra* note 75, at 6.

role of student-athletes.[88] The most common solution to preserve amateurism comes from Judge Claudia Wilken's opinion in *O'Bannon*: trust accounts.[89] Before being overturned by the Ninth Circuit, Judge Wilken granted an injunction that allowed schools and conferences to establish a trust account for athletes, payable upon graduation or expiration of eligibility, in which the school would deposit a share of licensing revenue earned by the school.[90] The NCAA could set a cap on the amount of money held in trust for each athlete, but the cap could be no less than $5,000 for every year that the student-athlete maintained academic eligibility.[91]

O'Bannon marked a noticeable change in courts' treatment of antitrust claims against the NCAA, as the amateurism justification typically defeated any challenges to the NCAA's trade restrictions.[92] When the District Court for the Northern District of California rebuked this justification, it applied the rule of reason test articulated by the Supreme Court in *Board of Regents v. Univ. of Oklahoma*, which required (1) the plaintiff's showing that the restraint produces substantial "adverse, anti-competitive effects within the relevant product and geographic markets;" (2) the defendant's demonstration that the restraint promotes "a sufficiently pro-competitive objective;" and (3) the plaintiff's proof "that the restraint is not reasonably necessary to achieve the stated objective."[93] Judge Wilken determined that the NCAA's restraint on compensation violated antitrust law because it did not reasonably support a competitive purpose.[94] The court noted that in a "college education market," NCAA compensation

88. Patrick Hruby, *The NCAA Says Paying Athletes Hurts Their Education. That's Laughable*., WASH. POST (Sept. 20, 2018), [https://perma.cc/XV7S-XGXU].

89. *See O'Bannon*, 7 F. Supp. 3d at 982.

90. *Id*. at 1008.

91. *Id*.

92. Brian Welch, Comment, *Unconscionable Amateurism: How the NCAA Violates Antitrust by Forcing Athletes to Sign Away Their Image Rights*, 44 J. MARSHALL L. REV. 533, 539-41 (2011).

93. NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 103 (1984); *see also* Schering-Plough Corp. v. FTC, 402 F.3d 1056, 1065 (11th Cir. 2005).

94. *O'Bannon*, 7 F. Supp. 3d at 985 (citing American Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 203 (2010)) (stating that "[t]he Supreme Court . . . specifically held that concerted actions undertaken by joint ventures should be analyzed under the rule of reason").

regulations have a significant anticompetitive effect because they fix the price that schools pay to secure college athletes' services.[95] Next, the court individually addressed each of the NCAA's justifications for its restriction on compensation of student-athletes,[96] and acknowledged that the NCAA's rules serve two pro-competitive purposes—the promotion of amateurism and the integration of academics with athletics—because both increase consumer demand for college sports.[97] In the third step of the analysis, the court considered whether there were any "substantially less restrictive" alternatives to the NCAA's current rules.[98]

The court issued an injunction against the NCAA requiring that it permit schools to offer student-athletes scholarships equal to the full cost of attendance.[99] Additionally, the District Court adopted one of O'Bannon's suggested alternatives, which would permit schools to hold payments in trust for student-athletes.[100] The court held that member schools could set aside $5,000 per year in deferred compensation that would be distributed after a student-athlete's graduation.[101] This was the first time a federal court found that the NCAA's amateurism regulations violated antitrust laws, let alone issued an injunction requiring changes to the bylaws.[102]

The District Court suggested that holding a limited amount of money in a trust until after the student-athletes leave school would compensate them for the use of their names, images, and likenesses while still "integrating academics and athletics."[103] According to Judge Wilken, the NCAA failed to provide enough evidence that paying players would affect the competitive balance.[104] Most importantly, the District Court noted that while amateurism could justify limited restrictions on student-athlete

95. *Id.* at 972-73.
96. *Id.* at 999-1004.
97. *Id.* at 973.
98. *Id.* at 1005.
99. *O'Bannon*, 7 F. Supp. 3d at 1007-08.
100. *Id.* at 1008.
101. *Id.*
102. O'Bannon v. NCAA, 802 F.3d 1049, 1053 (9th Cir. 2015).
103. *O'Bannon*, 7 F. Supp. 3d at 1008.
104. *Id.* at 1002.

compensation, it could not justify the particular restrictions on receiving compensation for the use of the student-athlete's name, image, and likeness.[105] The District Court also found that O'Bannon presented "ample evidence . . . to show that the college sports industry has changed substantially in the thirty years since *Board of Regents* was decided."[106] Therefore, the values served by upholding amateurism "do not justify the rigid prohibition on compensating . . . [for] the use of [players'] names, images, and likenesses."[107] The District Court determined that the NCAA's blanket restraints on compensation violated antitrust law and held that less restrictive alternatives were available.[108] The court issued an injunction requiring the NCAA to alter its bylaws to (1) permit its member institutions to issue scholarships up to full cost of attendance and (2) allow its members to hold a maximum of $5,000 annually in a trust for each student-athlete.[109]

Even though the Ninth Circuit ultimately reversed the District Court and upheld the NCAA's prohibition against schools and conferences establishing trust accounts for its players,[110] former University of North Carolina basketball coach Dean Smith created a trust that paid $200 to every letterman that played for him.[111] The NCAA ruled that the disbursements from the trust account did not violate NCAA pay-for-play rules without any explanation as to why this particular compensation was allowed.[112] How far the NCAA will stretch its approval of similar trust accounts remains to be seen.

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105. *Id.* at 1001.

106. *Id.* at 1000.

107. *Id*. at 1001; *see also* Steve Berkowitz, *Oliver Luck Brings Own Perspective to NCAA on O'Bannon Name and Likeness Issue*, USA TODAY (Jan. 16, 2015), [https://perma.cc/Z8R8-ETC8].

108. *O'Bannon*, 7 F. Supp. 3d at 1008-09.

109. *Id.* at 1008.

110. O'Bannon v. NCAA, 802 F.3d 1049, 1079 (9th Cir. 2015).

111. Darren Rovell, *Dean Smith Remembers Players in Will*, ESPN (Mar. 26, 2015), [https://perma.cc/Q8GJ-3EAP].

112. Chip Patterson, *NCAA Responds to Inquiries Regarding Dean Smith's $200 Gift to Players*, CBSSPORTS.COM (Mar. 28, 2015), [https://perma.cc/7WTQ-YRZA].

ii. In re NCAA Grant-in-Aid Cap Antitrust Litigation *and the Pay-for-Play Model*

While awaiting the *O'Bannon* decision, in March 2014, Shawne Alston, a former West Virginia University running back, filed a class action lawsuit on behalf of current and former football players in five of the top athletic conferences in the NCAA.[113] Martin Jenkins, a former defensive back for Clemson University, and three other Division I student-athletes also filed a class action stating that financial aid awards and potential compensation should be determined by an open market and not regulated by the NCAA.[114] These cases were consolidated in *In re NCAA Grant-in-Aid Cap Antitrust Litigation*,[115] to be tried before Judge Wilken, who also presided over *O'Bannon*.[116]

The plaintiffs sought an injunction prohibiting the NCAA and five of the top athletic conferences from adopting any limitations on the amount of compensation that may be paid to student-athletes while in school.[117] The complaint argued that the NCAA cannot limit financial aid to tuition, room and board, and books, while excluding incidentals.[118] The plaintiffs argued that former athletes should be awarded damages for incidentals like travel and other costs associated with being student-athletes.[119]

The complaint also alleged that there is an inequality between the grant-in-aid cap and the actual cost of attendance, resulting in student-athletes receiving less each year than they would in a competitive market.[120] The complaint stated that denying players the benefits of economic assistance has imposed significant hardships on these athletes as their lives are much different from the average student.[121] Student-athletes (1) "have

113. *See* Complaint, *supra* note 73, at 1, 5, 11.

114. *See* Jenkins Complaint, *supra* note 74, at 5-7, 35, 39-40.

115. *In re* NCAA Grant-in-Aid Cap Antitrust Litig., 24 F. Supp. 3d 1366-68 (J.P.M.L. 2014).

116. *Id*. at 1367-68; O'Bannon v. NCAA, 7 F. Supp. 3d 955, 955 (N.D. Cal. 2014).

117. Consolidated Amended Complaint, *supra* note 75, at 1, 4.

118. *Id.* at 1 (accusing the NCAA and its members of unlawfully agreeing to set the grant-in-aid value that schools pay their athletes to not compensate for the full cost of attendance).

119. *Id*. at 4.

120. *Id*. at 1-2, 4.

121. *Id*. at 2, 6.

much less time and ability to earn money through part-time jobs than do other students;" (2) "are more likely to come from low-income households;" and (3) "are more likely to incur substantial travel costs to attend school."[122] Judge Wilken issued an injunction that barred the NCAA from limiting student athletes' compensation for anything that would contribute to their studies, such as computers, postgraduate scholarships, tutoring, study abroad expenses, or paid internships.[123] However, her injunction stopped short of allowing compensation not related to education.[124]

In May 2020, the Ninth Circuit ruled that the NCAA violated the Sherman Antitrust Act when the NCAA limited schools from offering certain education-related benefits to student-athletes, and affirmed Judge Wilken's injunction.[125] The United States Supreme Court is set to hear arguments in the 2021 Spring Term, and will issue a decision before the term ends in June.[126] This will be the first time in more than thirty-five years that the Supreme Court has addressed compensation of NCAA student-athletes.[127]

iii. Name, Image, and Likeness Statutes

In September 2019, California passed the first legislation of its kind to allow collegiate student-athletes to profit from their names, images, and likenesses.[128] Soon thereafter, Florida, Illinois, and New York introduced bills similar to California's.[129] By the end of 2020, five states had passed name, image, and

122. Consolidated Amended Complaint, *supra* note 75, at 6.

123. *In re* NCAA Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1072, 1109-10 (N.D. Cal. 2019).

124. *Id*. at 1109-10.

125. *In re* NCAA Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1265 (9th Cir. 2020).

126. NCAA v. Alston, No. 20-512, 2020 WL 7366281 (U.S. Dec. 16, 2020).

127. Ngoc Pham Hulbig & Joel Mitnick, *Supreme Court to Weigh in College Sports: The Intersection of Antitrust and "Amateurism,"* JDSUPRA (Dec. 21, 2020), [https://perma.cc/S8UY-AVKE]

128. S.B 206, 2019 Leg. (Ca. 2019).

129. H.B. 251, 2020 Leg. (Fl. 2020); H.B. 3904, 101st Gen. Assemb. (Ill. 2020); S.B. 6722, 2019 Leg., Reg. Sess. (N.Y. 2019).

likeness statutes,[130] and thirty-five states had pending name, image, and likeness legislation.[131]

Each state's bill has its own nuances and creates a complex weave of legislation that the NCAA, institutions, and student-athletes would have to navigate. While the California bill addresses rights and restrictions of postsecondary institutions, athletic associations (e.g. the NCAA), and student-athletes, it generally provides that student-athletes may receive compensation for their names, images, and likenesses.[132] The bill also allows student-athletes to be represented by agents, but does not limit that representation to name, image, and likeness agreements so long as the agent is registered with the State of California.[133] The legislation does require a student-athletes to disclose any agreement for his or her name, image, and likeness to his or her institution, and the institution has the ability to bar the student-athlete's deal if it conflicts with the school's sponsorship agreements.[134]

The California bill also restricts postsecondary institutions and athletic associations from enacting or enforcing any rule that restricts a student-athlete's ability to earn compensation for his or her name, image, and likeness.[135] Postsecondary institutions and athletic associations also cannot compensate student-athletes for their names, images, and likenesses.[136] Postsecondary institutions are prohibited from altering a student-athlete's scholarship eligibility for receiving compensation from name, image, and likeness, and athletic associations may not bar a

130. California (CAL. EDUC. CODE § 67456 (West 2020)), Colorado (COLO. REV. STAT. § 23-16-301 (2020)), Florida (FLA. STAT. § 1006.74 (2020)), Nebraska (NEB. REV. STAT. § 48-3603 (2020)), and New Jersey (N.J. STAT. ANN. § 18A:3B-87 (West 2020)).

131. *Name, Image, Likeness (NIL) Rights Legislation Tracker*, VELA | WOOD, [https://perma.cc/T8VP-AV5A] (Nov. 10, 2020) (Alabama, Arizona, Connecticut, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, and Wisconsin).

132. CAL. EDUC. CODE § 67456.

133. CAL. EDUC. CODE § 67456.

134. CAL. EDUC. CODE § 67456.

135. CAL. EDUC. CODE § 67456.

136. CAL. EDUC. CODE § 67456.

student-athlete from participating in sports based on receiving compensation for his or her name, image and likeness.[137]

Colorado's bill includes many similar provisions as California's bill, such as allowing student-athletes to receive compensation for their names, images, and likenesses, and hire agents to represent them.[138] The bill also explicitly prohibits schools from compensating its student-athletes and allows schools to bar a student-athlete from signing a deal that would conflict with the school's agreements.[139]

Likewise, Nebraska's bill (1) permits student-athletes to be compensated for the use of their names, images, and likenesses, (2) permits student-athletes to hire representatives, and (3) prevents student-athletes from being required to surrender these rights.[140] Any agreement for representation of a student-athlete must specify the amount and method of calculating consideration paid for such services and the names of individuals compensated under the terms of the agreement, and must include a description of expenses reimbursed by the student-athlete, a description of the services provided to the student-athlete, the duration of the agreement, and the date of execution.[141]

Like the other bills, Florida's bill grants student-athletes the ability to use their names, images, and likenesses for compensation.[142] Any compensation must be commensurate with the market value of the authorized use and cannot be based on athletic performance or attendance at a particular institution.[143] The compensation must also be provided by a third-party that is unaffiliated with the student-athlete's institution; the institution may not compensate or cause compensation to be directed at a current or prospective athlete; and the institution may not adopt any regulation that unduly restricts or prevents compensation for the athlete's name, image, and likeness.[144]

137. CAL. EDUC. CODE § 67456.
138. COLO. REV. STAT. § 23-16-301 (2020).
139. COLO. REV. STAT. § 23-16-301.
140. NEB. REV. STAT. §§ 48-3603 to -3604 (2020).
141. NEB. REV. STAT. § 48-2610 (2020).
142. FLA. STAT. § 1006.74 (2020).
143. FLA. STAT. § 1006.74.
144. FLA. STAT. § 1006.74.

Florida is also requiring its institutions to provide financial literacy and life skills workshop training for a minimum of five hours at the beginning of the student-athlete's first and third academic years.[145] This training must include training on financial aid, debt management, and budgeting.[146] Most notably, though, Florida's bill will be effective on July 1, 2021—the earliest of all the states' bills.[147]

With the hodgepodge of state statutes, the NCAA is again forced to scramble to find a response before Florida's bill becomes effective. A state-by-state approach to name, image, and likeness legislation would render the NCAA's legislation impossible to apply, and could create a competitive disadvantage for institutions in states without name, image, and likeness bills.[148] The NCAA has lobbied for federal legislation to preempt all the variations of state legislation,[149] but, like the states' legislation initiatives, multiple variations of federal legislation have been proposed.[150]

The first federal proposal came from Representative Mark Walker of North Carolina.[151] His bill, the "Student-Athlete Equity Act," conditions the NCAA's tax-exempt status on permitting or not substantially restricting a student-athlete's ability to receive compensation for his or her name, image, or likeness.[152] Senator Marco Rubio proposed the second piece of federal legislation—the "Fairness in Collegiate Athletics Act."[153] Senator Rubio's bill would allow student-athletes to profit from their names, images, and likenesses.[154] However, the bill provides the NCAA significant ability to limit what opportunities

145. FLA. STAT. § 1006.74.

146. FLA. STAT. § 1006.74.

147. FLA. STAT. § 1006.74.

148. Justin Sievert, *The Name, Image, and Likeness Legal and NCAA Regulatory Landscape*, VELA | WOOD: VW BLOG, [https://perma.cc/5QLA-PQLU] (last visited Jan. 29, 2021).

149. Andy Staples & Nicole Auerbach, *Which Bill to Compensate College Athletes Will Win Out, and Which One Should?*, ATHLETIC (Dec. 28, 2020), [https://perma.cc/2RTM-DSSL].

150. *See id.*

151. Sievert, *supra* note 148.

152. Student-Athlete Equity Act, H.R. 1804, 116th Cong. (2019).

153. Sievert, *supra* note 148.

154. Fairness in Collegiate Athletics Act, S. 4004, 116th Cong. (2020).

would be available to student-athletes, including the ability to enact rules and programs needed to preserve the amateur status of student-athletes, ensure appropriate recruitment, and prevent deals with third parties offered to recruit or retain a student-athlete at a particular institution.[155]

Representative Anthony Gonzalez introduced the "Student Athlete Level Playing Field Act" in September 2020.[156] His bill explicitly preempts the states' legislation, restricts agreements with certain industries (i.e., involving tobacco or vaping, alcohol, controlled substances, adult entertainment, or gambling), prevents athletes from using the logo of a third-party at any event sponsored by their institution, and revises the Sports Agency Responsibility and Trust Act to prevent institutional boosters from providing or offering to provide compensation to induce an athlete to attend a particular institution.[157] The bill would allow student-athletes to endorse products that conflict with their institution and would permit representation if the athlete notifies the institution of the relationship.[158]

A unique feature to the Student Athlete Level Playing Field Act is that it grants enforcement oversight to the Federal Trade Commission ("FTC").[159] The bill charges the FTC with bringing unfair or deceptive trade practice claims should violations of the bill occur.[160] Additionally, the bill creates a "Covered Athletic Organization Commission," which would comprise of thirteen members tasked with recommending potential legislative changes, regulating agents, and providing a resolution process for disputes between athletes and their institutions.[161]

Senator Cory Booker of New Jersey also proposed a bill that has been dubbed a "Bill of Rights" for student-athletes.[162] His bill does not explicitly preempt the state statutes, but it does include an avenue for student-athletes to participate in group

155. *Id.*
156. Staples & Auerbach, *supra* note 149.
157. Student Athlete Level Playing Field Act, H.R. 8382, 116th Cong. (2020).
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. Staples & Auerbach, *supra* note 149.

licensing and revenue sharing.[163] Senator Roger Wicker of Mississippi introduced his own bill in December 2020.[164] His bill requires student-athletes to pass at least twelve percent of that student-athlete's credits toward graduation before he or she can pursue name, image, and likeness opportunities.[165]

III. NCAA'S NAME, IMAGE, AND LIKENESS SOLUTION

In October 2020, in response to many of the state's legislative proposals, the NCAA Division I Council published its proposed changes to the NCAA Bylaws in response to name, image, and likeness.[166] Under the new rules, student-athletes would be able to use their names, images, and likenesses to promote camps and clinics, private lessons, their own products and services, and commercial products and services.[167] Student-athletes may also receive compensation for their autographs and personal appearances.[168] Student-athletes may "crowdfund for nonprofits or charitable organizations, catastrophic events and family hardships, as well as for educational expenses not covered by cost of attendance."[169]

Under the new rules, student-athletes will now be able "to use professional advice and marketing assistance regarding name, image and likeness activities" and to consult "professional representation in contract negotiations related to name, image and likeness."[170]

The NCAA Division I Council's proposal explicitly "[p]rohibit[s] schools from being involved in the development, operation or promotion of a student-athlete's business

163. *Id.*
164. *Id.*
165. *Id.*
166. *DI Council Introduces Name, Image and Likeness Concepts into Legislative Cycle*, NCAA (Oct. 14, 2020), [https://perma.cc/3KSX-GLRK] [hereinafter *DI Council*].
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*

activity."[171] The prohibition includes "arranging or securing endorsement opportunities for student-athletes."[172]

Student-athletes are prohibited from using their school's logos in advertisements, endorsements, personal appearances, or promotions.[173] Additionally, student-athletes are prohibited from "activities involving a commercial product or service that conflicts with NCAA legislation (such as sports wagering or banned substances)."[174] Schools may also prohibit additional "activities that conflict with school values or existing sponsorship arrangements."[175]

The Division I Council tabled its proposed rules at the 2021 NCAA Convention in January 2021.[176] However, the NCAA's new legislation will be subordinate to any state or federal legislation.[177]

IV. FOLLOWING *O'BANNON*'S LEAD TO BENEFIT THE MODERN AMATEUR STUDENT-ATHLETE

Opinions on the best model and proposed legislation for compensating student-athletes based on name, image, and likeness vary greatly.[178] All of the state and federal statutes and the NCAA allow student-athletes to profit from their individual name, image, and likeness.[179] However, student-athletes should be able to negotiate and sign group licensing agreements—the same type of agreements that have created vast wealth for their institutions.

By adopting the trust fund model accepted by the Northern District of California in the *O'Bannon* opinion, the NCAA can meet the eight requirements outlined by its Board of Governors and still allow student-athletes to engage in group licensing

171. *DI Council*, *supra* note 166.
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. Hosick, *supra* note 30.
177. *See* Staples & Auerbach, *supra* note 149.
178. *See generally What Do Athletic Directors Think About Name, Image and Likeness?*, ADU, [https://perma.cc/ZU4K-52G8] (last visited Jan. 25, 2021).
179. Staples & Auerbach, *supra* note 149.

agreements.[180] Even though the Ninth Circuit ultimately determined that the creation of a trust was an erroneous remedy,[181] the NCAA should still adopt a trust fund system through its bylaws to permit student-athletes to negotiate group licensing deals.

Trust funds can take many forms and are highly adaptable to certain situations.[182] A trust fund is a legal entity used to hold assets for a party, and those assets are managed by a third-party trustee.[183] Trusts are governed by agreements that stipulate under what circumstances and how frequently trustees may distribute the trust's assets.[184] By implementing a trust system, student-athletes would have control to monetize their names, images, and likenesses as a group, but the NCAA could retain a substantial level of control over how and when student-athletes are compensated in order to ensure its mission of amateurism is met.[185]

Under this system, a student-athletes would still be able to monetize his or her name, image, and likeness on an individual level as proposed by all the state statutes, federal legislation, and updated NCAA Bylaws. However, a trust fund would be created by a designated entity for group licensing agreements.[186] This trust fund would house a portion of the revenue derived from institutions' apparel and media rights agreements as well as other group licensing deals like video games or trading cards.[187] Funds would be held in trust until the specific student-athlete exhausted his or her eligibility and graduated from his or her institution, and

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180. *See* NCAA, *supra* note 28.

181. O'Bannon v. NCAA, 802 F.3d 1049, 1079 (9th Cir. 2015).

182. *See* Danielle Klimashousky, *What Is a Trust Fund?*, SMARTASSET (July 18, 2019), [https://perma.cc/HWP5-PXSK].

183. *Id.*

184. *Id.*

185. Jonathan Strom, *Putting Our Trust in the National Collegiate Athletic Association (NCAA): How Creating Trusts for Student-Athletes Can Save the NCAA from Itself*, 6 EST. PLAN. & CMTY. PROP. L.J. 423, 438 (2014).

186. *See id.* at 438; Leslie E. Wong, *Our Blood, Our Sweat, Their Profit: Ed O'Bannon Takes on the NCAA for Infringing on the Former Student-Athlete's Right of Publicity*, 42 TEX. TECH L. REV. 1069, 1103-04 (2010).

187. Wong, *supra* note 186, at 1103; Strom, *supra* note 185, at 438.

at that time, the student-athlete would be entitled to his or her portion of the funds in trust.[188]

However, student-athletes could access these funds for necessaries, such as food, housing, and incidentals related to competition.[189] Permitting student-athletes to access their trusts only for necessary expenses prior to graduation would allow them to pay for incidentals that may not be covered by tuition and the full cost-of-attendance stipend.[190] Additional restrictions could be placed on disbursements for necessaries that incentivize satisfactory academic progress.[191] This model would also benefit all student-athletes in revenue and non-revenue sports[192] equally.[193]

In fact, this trust concept is not new to amateur athletics. The IOC already implemented a similar trust system for athletes during the Olympic Games.[194] Under the IOC's trust model, athletes may receive distributions from the trust during competition only for necessary expenses, such as food and incidentals related to competition.[195] After the Games, however, the athlete may withdraw all the funds remaining in the trust.[196]

This model also meets the constraints outlined by the NCAA's Board of Governors. First, the Board of Governors aims to "[a]ssure student-athletes are treated similarly to non-athlete students unless a compelling reason exists to differentiate."[197] The trust fund model allows student-athletes to earn

188. Under *O'Bannon*, student-athletes could only access funds held in trust after graduation or if they otherwise left school. *See* O'Bannon v. NCAA, 7 F. Supp. 3d 955, 982 (N.D. Cal. 2014). This proposal falls within student-athletes that otherwise leave school.

189. Wong, *supra* note 186, at 1105; Strom, *supra* note 185, at 438.

190. MITTEN ET AL., *supra* note 78, at 109; *Division II Partial-Scholarship Model*, *supra* note 78.

191. Strom, *supra* note 185, at 442.

192. Revenue sports are those that generate revenue, and non-revenue sports do not generate revenue. Because each school's fanbase and market is different, each school's revenue and non-revenue sports can differ. Generally, football and men's basketball are considered revenue sports at the majority of schools. *See* Steve Berkowitz et al., *NCAA's Power 5 Schools See Steep Raise in Pay for Non-Revenue Coaches*, USA TODAY (Aug. 13, 2019), [https://perma.cc/KMF9-6Y55].

193. Wong, *supra* note 186, at 1105.

194. *Id.* at 1104-05.

195. *Id.* at 1105.

196. *Id.*

197. NCAA, *supra* note 28.

compensation for their names, images, and likenesses exactly like non-student athletes.[198] The trust fund merely allows student-athletes to earn compensation as a group.[199] However, it provides additional safeguards that protect both the student-athlete and the NCAA's amateurism and educational mission.[200]

Next, the Board of Governors seeks to "[m]aintain the priorities of education and the collegiate experience to provide opportunities for student-athlete success."[201] To this end, the trust fund model meets the Board of Governors' second objective because it restricts a student-athlete's ability to receive funds from group-licensing agreements until he or she successfully completes his or her degree.[202]

To ensure the Board of Governors' third objective of transparent, focused, and enforceable guidelines and to "facilitate fair and balanced competition,"[203] agreements dictating precisely when and how trustees can disburse funds creates a transparent and enforceable method of governing the trusts.[204]

The Board of Governors' fourth and fifth objectives aim to "[m]ake clear the distinction between collegiate and professional opportunities" and "[m]ake clear that compensation for athletics performance or participation is impermissible."[205] With a trust fund system, a clear distinction remains in place because student-athletes will only have limited access to funds for necessities prior to their eligibility exhaustion or graduation.[206] This clear line maintains the traditions of amateurism but allows student-athletes to rightfully secure finances for the future. Additionally, because each trust is derived from the use of a student-athlete's name, image, and likeness, and not for the student-athlete's competitive performances, the NCAA's insistence against pay-for-play remains intact.[207]

198. *See id.*; *see also* O'Bannon v. NCAA, 7 F. Supp. 3d 955, 1008 (N.D. Cal. 2014).
199. *See O'Bannon*, 7 F. Supp. 3d at 1008.
200. *See id*.
201. NCAA, *supra* note 28.
202. *See O'Bannon*, 7 F. Supp. 3d at 982.
203. NCAA, *supra* note 28.
204. *See O'Bannon*, 7 F. Supp. 3d at 1008.
205. NCAA, *supra* note 28.
206. *See O'Bannon*, 7 F. Supp. 3d at 1008.
207. *See id*. at 983.

The Board of Governors aims to "[r]eaffirm that student-athletes are students first and not employees of the university."[208] The trust model also creates an unequivocal delineation that student-athletes are only beneficiaries of the trusts and not employees of the school. Under this model, the school is never compensating a student-athlete; all funds in the trust are from rights holders of the student-athletes' names, images, and likenesses.[209]

The Board of Governors seventh objective is to "[e]nhance principles of diversity, inclusion and gender equity."[210] Moreover, by applying the trust fund model to all student-athletes and sports equally, the NCAA's objectives of inclusion and gender equity are met because each student-athlete shares in the successes of the athletic department as a whole.[211]

The Board of Governors' final objective is to "[p]rotect the recruiting environment and prohibit inducements to select, remain at, or transfer to a specific institution."[212] By implementing a trust system, current recruiting restrictions remain in place, and the existing framework for monitoring recruiting is not disrupted.

The financial gap between the haves and have-nots in college athletics is growing and shows no signs of slowing down.[213] This proposal does not pretend to reduce the economic gap between the Power Five conferences and the Group of Five conferences; it only proposes rewarding the student-athletes for their contributions to this $16 billion industry.[214] Furthermore, this proposal acknowledges, but does not fully address, other issues presented by trust funds administered by schools, such as Title IX of the Education Amendments of 1972,[215] tax implications, or the Sherman Anti-Trust Act.[216]

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208. NCAA, *supra* note 28.

209. *See O'Bannon*, 7 F. Supp. 3d at 1005.

210. NCAA, *supra* note 28.

211. *See O'Bannon*, 7 F. Supp. 3d at 983.

212. NCAA, *supra* note 28.

213. Associated Press, *Getting By with Less: Gap Grows Between FBS Have, Have Nots*, USA TODAY (Dec. 19, 2017), [https://perma.cc/RQ3N-3F7N].

214. Barrett, *supra* note 79.

215. 45 C.F.R. § 86.41(a) (1975).

216. 15 U.S.C. §§ 1-38.

V. DE LA HAYE UNDER THE MODERN MODEL

Had the NCAA adopted this two-prong model while De La Haye still played at UCF, he—and thousands of other student-athletes—would have enjoyed the fruits of their labors on and off the field. De La Haye could have immediately capitalized on his more than 486 million views on YouTube.[217] He also would not have been forced to forego his athletic career and could have potentially participated in UCF's magical undefeated 2017 season that culminated with a self-proclaimed National Championship.[218] Additionally, De La Haye would have had the opportunity to remain at UCF and finish his marketing degree which would have given him access to the second-prong of the model—the trust fund—with an untold amount of additional funds. Instead, the NCAA chose to banish De La Haye from collegiate athletics.[219]

VI. CONCLUSION

The NCAA has taken incremental steps throughout its history to grant additional rights to student-athletes. Allowing student-athletes to profit from their names, images, and likenesses is a step in the right direction but falls short of allowing student-athletes to fully benefit from their contributions to amateur athletics. Much like *O'Bannon* and *In re NCAA Grant-in-Aid Cap Antitrust Litigation* did not spell the end of amateurism, it is unlikely that fully preserving student-athletes' right to license their names, images, and likenesses will thwart the NCAA's amateurism model. However, the recent public pressure and legislation forced the NCAA to act on a problem it has set aside for decades. For an organization that has historically resisted change and pushed for antiquated systems of amateurism, the

217. De La Haye's current YouTube channels have more than 486 million views combined. *See Deestroying*, *supra* note 3; *KD Family*, *supra* note 3.

218. Jordan McPherson, *Is Florida Home to the College Football Champs? One School Thinks So — and Others Agree*, MIA. HERALD (Jan. 4, 2018), [https://perma.cc/XH4T-UNV3].

219. Henneke & Riches, *supra* note 2.

NCAA has a chance to establish a dynamic system that benefits student-athletes and college athletics for decades to come.