Communication Law & Regulation - Spring 2020

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION V. THE PLAYERS

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Since its conception in 1906, the National Collegiate Athletic Association (hereafter NCAA; the Association) has established and revisited guidelines that institute what legally defines a student-athlete and forms the boundaries between collegiate and professional sports. While the NCAA's formation was based upon good intentions, as it was inaugurated as a health and safety regulatory party after a college football season in which 18 student athletes died and another 150 were severely injured, those good intentions have consistently shifted towards the monetization of college sports and the athletes that participate in them. The player safety organization, which is still registered as a nonprofit organization, has transformed into a multibillion-dollar conglomerate with individual participating universities earning upwards of 200 million dollars per year from college athletics. More recently, former collegiate athletes have filed lawsuits against the NCAA for matters such as violating minimum wage laws and restricting use of image and likeness. For the Association to continue operating in a similar manner, it is crucial that they financially compensate the players from which they profit astronomically every year[1].

As previously mentioned, the NCAA was formed as a player health and safety regulatory organization, a necessary step in ensuring student athletes are capable of maintaining their abilities for at least four years of eligibility. But soon after its conception, the Association began instituting constructs that either prohibited or restricted a student athlete's ability to profit financially from their abilities. The early establishments put into place essentially meant to align student athletes with every other student; no athletes were permitted to receive compensation for their schooling – whether it be in the form of scholarships or room & board assistance – if that

[1] Dick, Randall, et al. "National Collegiate Athletic Association Injury Surveillance System Commentaries: Introduction and Methods." Journal of Athletic Training, National Athletic Trainers Association, 2007, www.ncbi.nlm.nih.gov/pmc/articles/PMC1941300/.

same compensation could not be obtained by other students. Over 40 years after its initiation, the NCAA granted athletes the right to receive scholarships, financial compensation in order to cover their tuition and school fees, solely based on the efforts of Walter Byers, whom had just come into power at the NCAA. The scholarships that student athletes were granted in the late 40's were very different from how they operate now; they essentially acted as financial aid in that a student athlete still had to demonstrate financial need for an athletic scholarship to receive the compensation. Three years later, in 1951, Byers pushed further for student athletes to receive additional financial compensation for their room & board as well as a yearly stipend for "laundry money", but Byers was immediately relieved of his duties at the NCAA[2].

While the NCAA has made changes to allow financial compensation for scholarships, there are still very strict bylaws barring student athlete from benefiting from certain aspects of their athletic abilities. These bylaws are meant to establish a student athlete's "amateur status", restrict them from receiving outside financial compensation, and strip any opportunity for profit from name, image or likeness. NCAA Bylaw 12.1.2 states that "*athletes are stripped of their amateur status and thus their right to participate within NCAA sporting events if they receive payment for their athletic abilities*". This bylaw establishes the line between professional and amateur sports, similar to how professional boxing operates in that once a boxer receives payment in a professional fight, they are no longer able to participate in the Olympics because their amateur status becomes void with the acceptance of payment. The Association grants student athletes four years of eligibility to participate within NCAA-regulated sports, a separate issue that often interferes with a player's growth and safety, but those years of eligibility are immediately stripped if a student athlete is found to have accepted any form of payment either

[2] Berri, David. "Paying NCAA Athletes." HeinOnline, 2015, heinonline.org/HOL/LandingPage?handle=hein.journals%2Fmqslr26&div=29&id=&page=.

before or during their athletic career with their respective universities. This issue is instituted by NCAA Bylaw 12.5.2.1, which states that "*a student athlete will lose their ability to participate in NCAA sporting events if they are discovered to be receiving payment through commercial, promotion, or endorsement*". The four years of a student athlete's eligibility, which are already so often on the verge of languish due to injury or other circumstances, are held against the student athletes with this bylaw. Not only does this bylaw prevent any athlete from receiving donations or gifts from the likes of boosters or other interested parties, it also prevents athletes from obtaining part-time jobs while attending their respective universities. This has the potential to prohibit certain athletes from participating in collegiate sports if they assist in supporting their families with part-time jobs while in school. The NCAA further prohibits student athletes' ability to profit financially with Bylaw 12.5.1.1 that states "*the physical appearance, name, and pictures of a student-athlete can be used by the institution that he/she attends for both charitable and educational purposes. Items that do not single out one particular athlete's name or physical likeness can be sold by the institution or its outlets*". This bylaw allows the NCAA as well as its participating institutions to profit from the image and likeness of its current and former players, but it, along with bylaw 12.5.2.1, prohibits any student-athlete, current or former, to profit from their own image or likeness. Current players would lose their remaining eligibility if found to be profiting from their image or likeness, and the Association collects any financial profit made from former players[3]. The NCAA discovered further streams of revenue in 1981 whenever they secured a broadcasting agreement with NBC – the agreement stated "*the Association shall control all forms of televising of the intercollegiate football games of member institutions during the traditional football season*", eliminating any television profit the universities may have been

[3] NCAA. "Constitution Operating Bylaws." NCAA Publications, NCAA, 1 Aug. 2009, www.ncaapublications.com/productdownloads/D110.pdf.

earing prior the agreement. Furthermore, the NCAA threatened boycotts or membership removal if any universities refused to participate in the agreement. The 1981 agreement continued to grow into what it is today, a 14-year, 19.6-billion-dollar broadcasting rights agreement with CBS signed in 2010[4]. Around the time of the CBS agreement, the NCAA also initiated a partnership with Electronic Arts (EA) and the Collegiate Licensing Company (CLC) to publish multiple video game titles, namely EA NCAA Basketball and EA NCAA Football, all of which utilizing players' image and likeness to profit financially[5]. So, while the NCAA was established to ensure the safety and wellness of its participating student athletes, the laws instituted have instead ensured that players cannot profit financially from their athletic abilities during their collegiate careers, or after for that matter. Meanwhile, the Association collects almost 1 billion dollars every year from their tournaments and other sporting events alone – not including any broadcasting rights agreements.

Beginning with the NBC deal in 1981 and continuing into today, athletes that have previously competed in NCAA competitions have filed lawsuits against the Association in an effort to seek financial compensation for their athletic abilities. The first case witnessed was the NCAA v. Board of Regents of the University of Oklahoma, 468 U.S. 85 (1984), following the television broadcasting rights agreement in 1981. Following the agreement, the University of Oklahoma and the University of Georgia filed an injunction against the NCAA stating that the television plan violated the Sherman and Clayton Antitrust acts, meant to oppose the use of monopolies that harmed free and open trade, as both universities had previously been profiting from their own broadcasting rights deals and disputed the option of participating in a

[4] Parker, Tim. "What Does the NCAA Really Net from March Madness?" Investopedia, Investopedia, 29 Jan. 2020, www.investopedia.com/articles/investing/031516/how-much-does-ncaa-make-march-madness.asp.
[5] Muller, Trudy. "CLC Grants EA Exclusive College Football Videogame License." Business Wire, 11 Apr. 2005, www.businesswire.com/news/home/20050411005378/en/CLC-Grants-EA-Exclusive-College-Football-Videogame.

conglomerate. The NCAA argued that it operated as a voluntary organization, and that participating universities had the option to terminate membership at any time, simultaneously diminishing their access to healthcare and competition against other NCAA member universities. The majority opinion of Justice John Paul Stevens stated "there can be no doubt that the challenged practices of the NCAA constitute a restraint of trade"; the Association was required to structure a new television broadcasting rights deal that allowed universities to seek out their own television rights partnerships, an idea with diminished value as the NCAA essentially controlled the market and no broadcasting companies wanted to strike deals with independent universities when they could have access to multiple universities when securing a deal with NCAA[6].

Another pertinent case in the history of the NCAA was O'Bannon v. NCAA (2009) in U.S. District Court in Northern California. After the release of EA Basketball '09, Ed O'Bannon, a former UCLA basketball player who helped the university achieve a national championship in 1995, filed a lawsuit against the NCAA, EA, and the CLC, stating that they violated the Sherman Antitrust Act and deprived him and other former collegiate athletes of their right to publicity because the videogame featured O'Bannon as well as hundreds of other players' name, image, and likeness without permission from any players. The case concluded in 2014 after 20 other former collegiate athletes, including Oscar Roberson and Bill Russell, joined O'Bannon as plaintiffs. The verdict, issued by District Judge Claudia Wilken, finalized in the form of a 40-million-dollar settlement, with a payout of about 4,000 dollars to around 100,000 current, at the time, and former players for the use of their name and likeness. Wilken furthered her verdict by

[6] Cornell, Law. "NATIONAL COLLEGIATE ATHLETIC ASSOCIATION v. The BOARD OF REGENTS OF the UNIVERSITY OF OKLAHOMA and The University of Georgia Athletic Association No. A-24." Legal Information Institute, Legal Information Institute, 21 July 1984, www.law.cornell.edu/supremecourt/text/463/1311.

expanding upon the current scholarship system, finally requiring the NCAA and affiliate universities to cover room & board costs, as well as a yearly stipend – called "laundry money" by Walter Byers back in 1951 - in full scholarships offered to student athletes. Following the case, the NCAA terminated their partnership with EA and the CLC, eliminating any further EA NCAA sports video games[7].

The most recent lawsuit filed against the NCAA by a former athlete was Johnson v. NCAA, filed in 2019 in Pennsylvania's Eastern District and still active. Former Villanova football player, Trey Johnson, filed a lawsuit in late 2019 stating that the NCAA affiliated schools in Pennsylvania violate the Fair Labor Standards Act and the Pennsylvania Minimum Wage Act. Essentially, the lawsuit is an attempt to secure financial compensation from universities similar to what the likes of work study programs would receive as the amount of work that is conducted by a student athlete compares to, if not surpasses, that of a work study program student. The current case leans on a 1992 case, Vanskike v. Peters, to determine whether or not student athletes should be considered employees of the NCAA and its affiliate universities through the implantation of litmus tests, which check for several markers of an employee, such as whether the person performs work and to what extent the employer controls how the work is completed, such as by setting a schedule. The NCAA argued that the litmus test does not capture the true nature of the relationship, an opinion similar to ruling in the Vanskike v. Peters, meaning the NCAA is comparing its college athletes to prisoners[8]. The case is still currently active, but court documents have revealed that student athletes have been identified as employees based on the litmus tests, so the NCAA would be in violation of the Fair Labor

[7] Streeter, Kurt. "NCAA Is Sued by Former Athletes." Los Angeles Times, Los Angeles Times, 22 July 2009, www.latimes.com/archives/la-xpm-2009-jul-22-sp-videogames-lawsuit22-story.html.
[8] Witz, Billy. "N.C.A.A. Is Sued for Not Paying Athletes as Employees." The New York Times, The New York Times, 7 Nov. 2019, www.nytimes.com/2019/11/06/sports/ncaa-lawsuit.html.

Standards Act and the Pennsylvania Minimum Wage Act if they continue to refuse to compensate their student athletes[9].

In the examined cases, the NCAA was found to be in violation of antitrust laws, rights of publicity, and restraint of trade, and there still seems to be laws they have violated by placing restrictions on collegiate athletes and refusing to compensate them financially. More cases, especially case similar to that of Johnson v. NCAA and O'Bannon v. NCAA, will continue to surface as more of the Association's practices are revealed and student athletes continue to support each other throughout the process. There are currently processes put into place that will eventually ensure a fair and beneficial system for all parties involved. If the recent "Fair Pay to Play" act that was passed in California gathers more traction in other states, or nationwide, and the ongoing case to pay collegiate athletes minimum wage passes in favor of the plaintiff, athletes will be able to profit from their image and likeness while receiving adequate compensation for the work they perform for their respective universities and the NCAA will still be able to profit from substantially from broadcasting rights agreements and tournaments, their largest streams of revenue. This would be a step in the right direction, releasing the monopolistic hold the NCAA holds over universities and their athletes.

[9] Rizzi, Corrado. "NCAA, 22 Division I Universities Hit with Ex-NFL Player's Class Action Over Non-Payment of Student Athletes." ClassAction.org, 8 Nov. 2019, www.classaction.org/news/ncaa-22-division-i-universities-hit-with-ex-nfl-players-class-action-over-non-payment-of-student-athletes.

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