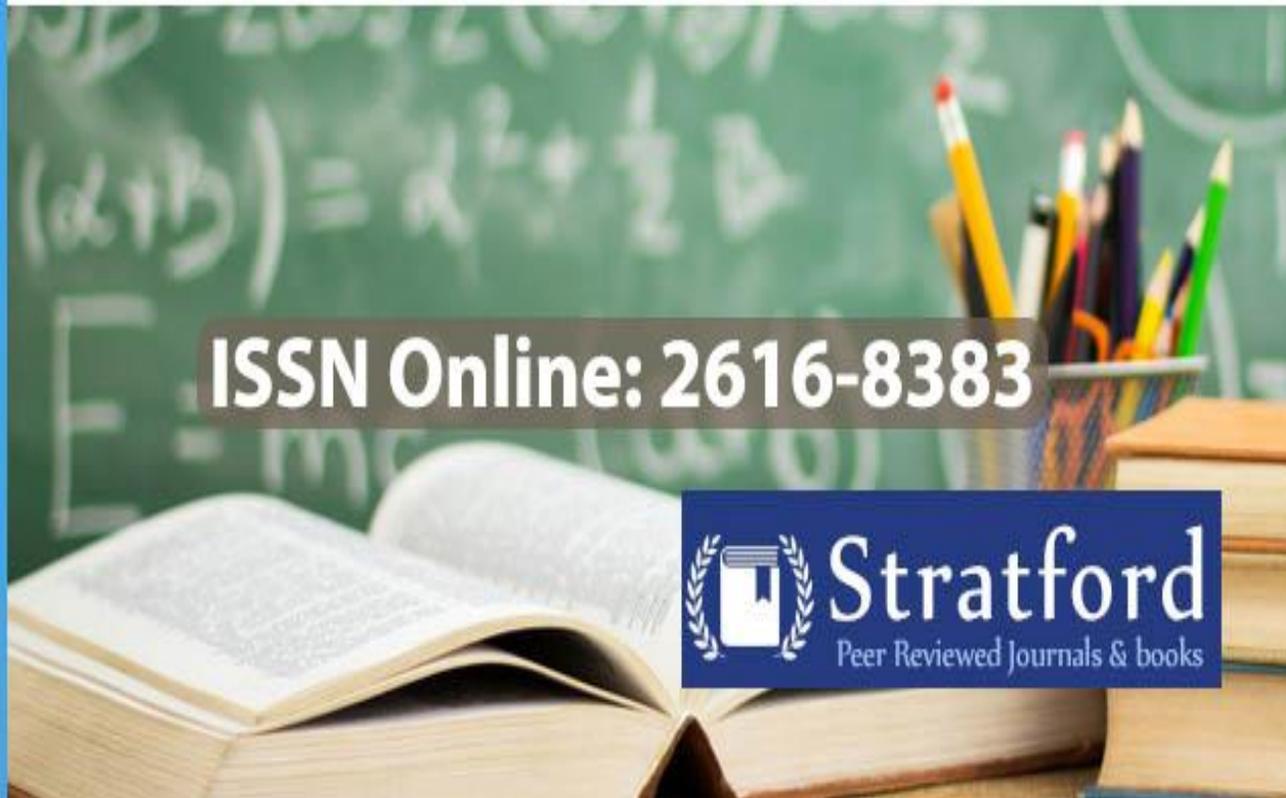


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The Dynamics in Student-Athletes Compensation in the United States of America

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Abstract

The issue surrounding the compensation of college athletes has been surrounded by a lot of controversies due to the fact that these athletes have to balance grueling workouts, practices, and games with a rigorous college curriculum and yet make no money despite collegiate football being a multi-billion-dollar industry. This is based on the National Collegiate Athletic Association (NCAA) stipulation that student-athletes can only be compensated through a scholarship even though college football brings in millions of dollars for universities. This paper presents a review on the dynamics in student-athletes compensation in the United States of America where case studies are also presented.

Keywords: *Student-Athletes, Compensation & United States of America*

1.1 Introduction

The issue surrounding the compensation of college athletes has been surrounded by a lot of controversies due to the fact that these athletes have to balance grueling workouts, practices, and games with a rigorous college curriculum and yet make no money despite collegiate football being a multi-billion-dollar industry. This is because the National Collegiate Athletic Association (NCAA) stipulates that student-athletes can only be compensated through a scholarship even though college football brings in millions of dollars for universities. The universities, therefore, profit off college athletes at very little expense (Johnson, 2012). The problem with this state of affairs is that the scholarship awarded to student-athletes are not even enough to cover college expenses. Those opposed to paying college athlete claim that university athlete departments would

accumulate a lot of debt if they started paying college athletes, especially in the smaller less profitable programs which operate on a small budget. This could potentially interfere with their ability to sign better athletes, and college completion could be worsened by paying these athletes since most of the talented players would flock to the big teams that are able to offer the best remuneration packages. The other argument claims that paying college athletes would lead to increased corruption and injustice, especially considering strict laws would need to be enacted to govern how athletes are paid (Johnson, 2012). Corruption would increase due to extreme competition that is likely, especially during the recruiting process. Injustice, on the other hand, is likely since it may be difficult to set a fair pay scale for all athletes especially considering the fact that only the basketball and football team bring in substantial profits to the university; other athletes are therefore likely not to be paid equally. If all athletes are paid the same wage, costs are likely to add up and hence bring about financial distress to the universities. Those in support of compensation for athletes, however, claim that current practices are both exploitative and unfair since even though most of the expenses are covered, actual living costs extend beyond \$1500 of what is covered by the athletic scholarships (Johnson, 2012). Due to the fact that most college players never end up playing professionally, they end up accumulating a lot of debt. More so, most of these students come from poor backgrounds, and since they are not allowed to even work, they are forced to choose between taking money illegally or accumulating debt while in school. What's more is that despite the fact that the scholarships awarded prioritize education, most college athletes care more about sports than their education, as such some of them do not graduate, and as such, the scholarship may be useless and only serves the function of driving them into debt and possibly ruining their financial futures.

1.2 Formation and Purpose of the NCAA

The NCAA was formed in 1906 with the objective of protecting student-athletes from dangerous and exploitative athletic practices that were practiced at the time that resulted in deaths and serious injuries due to the fact that college sporting rules had not been codified. The organization was hence charged with the responsibility of creating a clear line between intercollegiate athletics and professional sports while still ensuring that college sports are carried out in a fair and safe manner. It is, therefore, the governing body of college sports. The NCAA contains over 1200 educational institutions, athletic conferences, and related organizations. It is able to make upwards of \$1 billion a year largely due to TV rights and marketing rights that come from popular sporting events such as the division 1 basketball tournament (Brackpool & Neil, 2017).

The NCAA has been able to stay so long without paying college athletes due to the concept of amateurism, which ultimately defines college football. An amateur within this context refers to an individual who participates in competitive sports for the sake of pleasure as well as the physical, social, and moral benefits derived from engaging in the sport.

1.3 The Collegiate Licensing Company

The Collegiate Licensing Company (CLC), on the other hand, is responsible for licensing NCAA events. The CLC protects the amateur standing of its members as well as obtains the most lucrative deals possible for its members. The CLC is a one-stop-shop marketing and licensing shop for all NCAA products that are sold to third-party companies through exclusive licensing deals (Johnson, 2012).

1.4 Entertainment Arts Inc. (EA) Sports Contracts

Video games based on college teams are a recent development. EA Sports released the first basketball game, “*Dr. J and Larry Bird Go One on One*,” in 1983, which essentially launched professional licensing in the sports video game market. One example of an early video game is the XOR’s corporation’s “*Basketball Challenge*,” which was released in 1988 to be used on DOS computers. The text-based coaching simulation used the names and likeness of the top 20 college teams; they, however, changed the names of team members to protect themselves from lawsuits from these universities (Kaburakis, Pierce, Fleming & Clavio, 2009). Over the next decade, game developers continued to use college teams and players and the most successful of these ventures was EA Sports’ “*Bill Walsh College Football series*.” Even though the game did not feature any names, it contained 24 teams with rosters that were similar to real word teams based on the jersey numbers. After the development of the Sony PlayStation in 1996, the Bill Walsh series morphed to become EA Sports’ NCAA Football series (Kaburakis et al., 2009). The number of teams increased from 24 to include the whole Division I-A and several teams from Division 1-AA. Accurate team logos, jerseys, mascots, and suitable anthems were also added. The series would become incredibly successful, even selling over 1 million copies in 2004.

EA Sports has also been accused of engaging in monopolistic behavior since it has made it a trend to sign exclusive licensing deals with sports entities, which has essentially pushed all competitors out of the market. This has occurred with the NFL and the NFL Players Association, and in 2005, EA Sports added the NCAA to the list holding exclusive rights to the NCAA basketball and football teams after signing a deal with the CLC. The company holds the rights for all teams, stadiums, and schools for all video game consoles (Kaburakis et al., 2009). Due to these monopolistic tendencies has been able to have control over the video game market controlling over half the market share.

1.5 The NCAA Amateurism Policy

The NCAA amateurism policy severely restricts how much student-athletes can earn as such; EA Sports is able to profit from student likeness without proper compensation. The issue of consent when student-athletes join the NCAA is also quite controversial due to the fact that these students are present with a standard legal document that they are required to sign or forfeit the chance to compete in the NCAA events and programs for the stipulated duration. During the signing of these documents, they do not have legal representation, and as such, there is no room for negotiations. This is problematic due to the fact that the contracts these students sign (some still being minors) extend beyond a simple athletic-based academic scholarship since they release important commercial rights such as the right of publicity in their names and their likeness for perpetuity (Brackpool & Neil, 2017).. Some of these terms are also buried within the legal documents, while others presented in the document while referencing NCAA rules and regulations. Students are, therefore, essentially offered take it or leave it contracts with unclear or hidden terms and conditions. Universities, therefore, enjoy a great advantage in bargaining power, which allows them to dictate terms and conditions to student-athletes who have no real voice in the negotiation process (Brackpool & Neil, 2017).. Students not only lack bargaining power but also lack meaningful choice since failure to agree to these terms means they won’t be allowed to participate

in college sports events sanctioned by the NCAA. As such, there seems to be a lack of free exercise of will or volition, which is the essence of any contract.

Furthermore, the use of image and likeness has evolved from simple promotional uses such as jerseys to include commercialization in fantasy sports and video games, most notably being EA Sports. Even though EA Sports uses the image and likeness of the student-athletes, the company purposefully avoids using their names to avoid legal. These students are also bound by NCAA's constitution by laws and regulations, which form a contract between the NCAA, member schools, and the student-athletes (Brackpool & Neil, 2017). Even though the contract is mainly between the NCAA and member institutions, a contractual relationship is formed due to the fact that student-athletes are the intended third-party beneficiaries and, as such, acquires the rights under the contract as well as the right to enforce the contract once the rights have been vested. The athletic scholarship, on the other hand, constitutes a contract between the student-athletes and their respective college institutions. There, therefore, exist contracts between the NCAA, the college institution, and the student-athletes. Part 1V of form 11-3a requires student-athletes to authorize the NCAA or a third party acting on behalf of the NCAA to use the student's name or image to promote NCAA championships or any other events or programs related to the NCAA (Baker III, Grady & Rappole, 2011). In this specific part, student-athletes' waiver their right of publicity for perpetuity. Under this clause, student-athletes simultaneously assign the rights to use their names and likeness to their respective colleges, who can then proceed to license the rights to others for arguably promotional purposes. Due to the fact that these contracts are not negotiated, student-athletes do not have the choice to opt-out of certain promotional or commercial activities. They, as a result, have no meaningful choice in the type of commercial or promotional materials that their names, images, and likeness are used since they assign these rights to their respective universities. Students may not even be aware that their names, images, and likeness are being used for commercial purposes.

1.6 The Right of Publicity

The right of publicity is a common law doctrine focusing on the economic interest of an individual's name and likeness. The primary concern of the doctrine is the right of an individual to control the commercial use of their name and likeness. These individuals are usually public figures. The four elements that are considered by courts to determine a violation of this right are:

- The defendant's use of the plaintiff's identity
- The appropriation of the plaintiff's name or likeness to the defendant's commercial advantage or otherwise
- The lack of consent
- A resulting injury (Baker III et al., 2011)

The key to this violation is proving that one's image or likeness was used for commercial purposes without their consent. The difference between professional sports and amateur athletes is the fact that professional players are able to leverage their publicity in order to obtain huge salaries and endorsement deals. This, however, is not possible for college athletes; while professional athletes can leverage their name and celebrity to receive compensation, NCAA rules restrict college athletes from doing the same, which highly restricts their earning power. In *Parrish V NFL Players*

Association, 2000, retired players from the NFL sued the National Football Players Association for using their image and likeness to create the popular video game Madden. The likeness of the characters in the video game matched those of the professional athletes, which promoted the retired athletes to claim their right of publicity. They won the case and were awarded 28.1 million in damages for the misappropriation of their rights. Student-athletes, however, do not get to benefit from this due to the concept of amateurism that defines college athletics. Amateurism severely limits student-athletes' ability to exercise their right of publicity since they do not receive any compensation for their participation in college sports, and video game creators are even permitted to use their image and likeness in the development of their games so long as they do not use their names.

1.6 The Fight for Students Athletes Rights

Ryan Hart V Entertainment Arts Inc.

In 2009, Ryan Hart, a former quarterback from the University of Rutgers, sued EA for violating his right of publicity. Hart claimed that EA misappropriated his likeness in its NCAA college football video game with the goal of increasing its commercial value. The character in the game had very similar characteristics to Hart; he, for instance, wore the same jersey number, had the act same weight and height, as well as accurate biographical information and athletic statistics. Even though the player had not been assigned a name, it was quite evident that the player was meant to represent the quarterback of the Rutgers football team. After reviewing the case, the third circuit court found that EA had not adequately transformed the character to escape liability under the right of publicity claim. This case would serve to open the door to future litigation in the issue of publicity (Afshar, 2014).

O'Bannon V NCAA

In this case, former basketball star Ed O'Bannon from UCLA filed a case against the NCAA, EA, and the CLC in 2009. The claim specifically stated that NCAA and EA misappropriated his likeness without any compensation. O'Bannon did not, however, rely solely on the right of publicity; he pointed out the use of his image and likeness in reruns of basketball games on TV networks (Afshar, 2014). The class-action, therefore, focused on the rights of former college athletes. He pointed that while they are in school, the student-athletes are required to live up to the terms of their athletic scholarship; however, as soon as they leave the college environment, the use of their image and likeness should not be used by both the university and the NCAA. In 2013 EA and the CLC settled for 40 million, leaving the NCAA as the only defendant (Afshar, 2014). O'Bannon proceeded to attack the forms students sign upon their admittance that relinquishes them of their right of publicity for perpetuity, arguing that the form is a contract of adhesion and is therefore unconscionable; the court has the right to refuse to enforce a contract if the terms of the contract are unconscionable at the time of execution. The unconscionable claim is based on:

- An inequality in barraging power between college institutions and student-athletes
- A lack of meaningful choice for the student-athlete
- Supposedly agreed-upon terms that are hidden within the contract
- Terms that unreasonably favor the institution (Afshar, 2014)

The judge would rule in favor of O'Bannon, pointing out that the NCAA restrictions act as a violation of anti-trust laws, and college students could profit off the name, image, and likeness. The judge proceeded to issue an injunction that prohibited the NCAA from enforcing laws that would restrict college institutions from offering football and basketball recruits a share of revenue derived from the use of their name, image, or likeness. The NCAA would, however, be responsible for placing a cap on compensation to players that cannot go below a student-athletes' costs of attending schools, which was approximated to be \$5000. The NCAA appealed, and the Supreme Court refused the appeal. The Supreme Court, however, upheld amateurism, pointing out that all compensation received had to be education related. Shortly after this case, the NCAA announced that it would not renew its licensing deal with EA due to legal and business reasons. Soon after, EA discontinued NCAA football. The O'Bannon case, therefore, made it almost impossible for EA to continue using the image and likeness of athletes without fair compensation. NCAA football is, however, slated to make a return, and the NCAA has approved the compensation of student-athletes (Afshar, 2014). The timeline and the exact nature of the remuneration structure is, however, still unclear.

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