

## Sharing Broadcast and Streaming Revenues with College Athletes

Michael A. McCann\*

### ABSTRACT

This Article examines the prospect of college athletes being paid for their appearances on television, streaming video, and related services. It explores the different vehicles of payment, including litigation, collective bargaining, and representation by SAG-AFTRA. The Article recommends the NCAA and member institutions collaborate with athletes on solutions instead of waiting for a judicial order that would command a change.

College sports generate billions of dollars a year through television broadcasts and streaming content.<sup>1</sup> The money is distributed to conferences

---

\* Visiting Professor of Law, Harvard Law School; Professor of Law; Founding Director of the Sports and Entertainment Law Institute, University of New Hampshire School of Law; and Legal Analyst and Senior Sports Legal Reporter, *Sportico*. This article expands on Michael McCann, *College Athlete Pay Push Looks to SAG-AFTRA Reality TV Rules*, *SPORTICO* (Sept. 18, 2023), <https://www.sportico.com/law/analysis/2023/college-athlete-union-reality-tv-1234738888/> [<https://perma.cc/26KF-EW37>]. The author thanks Michael Dube and Warren Zola for their insightful comments, and Kara McCann and Willa McCann for their love and inspiration.

<sup>1</sup> See Alan Blinder, *College Football Playoff Will Expand to 12 Teams*, *N.Y. TIMES*, Sept. 2, 2023, at B11 (noting the NCAA's annual basketball tournament alone is expected to generate \$1.1 billion in the coming years); see also Timothy Davis, *Assessing the Racial Implications of NCAA Academic Measures*, 29 *WM. & MARY J. RACE, GENDER & SOC. JUST.* 1, 39 (2022) (discussing television contracts for conferences); Eben Novy-Williams, *March Madness 2023: Can The NCAA Diversify Beyond Its Cash Cow?*, *SPORTICO* (Mar. 14, 2023), <https://www.sportico.com/leagues/college-sports/2023/march-madness-2023-ncaa-tournament-revenue-1234715794/>

and their member schools<sup>2</sup> and is used to fund assorted expenses related to college athletics.<sup>3</sup> The athletes who appear on fans' television screens, laptops, computers, tablets, and other devices are not paid for their appearances. The National Collegiate Athletic Association ("NCAA"), which represents about 1,100 colleges and universities,<sup>4</sup> forbids such payments.<sup>5</sup> It does so on account of "amateurism," a set of rules that attempts to distinguish college athletes as amateurs by denying them opportunities for compensation.<sup>6</sup> In recent years, judges, politicians, and scholars have sharply rebuked amateurism, characterizing it as circular in definition and exploitative of labor.<sup>7</sup>

At the same time, no court, federal law, or state law has compelled colleges, conferences, the NCAA, television networks, or streaming services to pay college athletes for their appearances, or for their labor.<sup>8</sup> In fact, some state statutes expressly deny right-of-publicity claims, which protect against the misappropriation of a person's identifying traits, for sports broadcasts on grounds that those broadcasts are protected by First Amendment principles protecting news and related content.<sup>9</sup> In Tennessee, for example, it is

---

[<https://perma.cc/52CS-F7AP>] (detailing how the annual men's basketball tournament generates more than 85% of the NCAA's \$1.1 billion annual revenue).

<sup>2</sup> David Ingold & Adam Pearce, *March Madness Makers and Takers*, BLOOMBERG (Mar. 18, 2015), <https://www.bloomberg.com/graphics/2015-march-madness-basketball-fund/> [<https://perma.cc/U3S2-79BF>].

<sup>3</sup> *Where Does the Money Go?*, NCAA (May 13, 2016), <https://www.ncaa.org/sports/2016/5/13/where-does-the-money-go.aspx> [<https://perma.cc/CJ7J-VHG4>].

<sup>4</sup> Andrew Zimbalist, *Analysis: Who Is Winning In The High-Revenue World Of College Sports?*, PBS NEWSHOUR (Mar. 18, 2023), <https://www.pbs.org/newshour/economy/analysis-who-is-winning-in-the-high-revenue-world-of-college-sports> [<https://perma.cc/AQ5M-Y8DT>].

<sup>5</sup> See John T. Holden, Marc Edelman & Michael A. McCann, *A Short Treatise on College-Athlete Name, Image, and Likeness Rights: How America Regulates College Sports' New Economic Frontier*, 57 GA. L. REV. 1, 44 (2022); see also Warren K. Zola, *College Athletics: The Growing Tension Between Amateurism and Commercialism*, in THE OXFORD HANDBOOK OF AMERICAN SPORTS LAW 209 (Michael A. McCann ed., 2018) (supplying a broader and historical context on commercial issues in amateurism).

<sup>6</sup> *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1249 (9th Cir. 2020), *aff'd sub nom.* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021)).

<sup>7</sup> See generally Michael A. McCann, *New Amateurism*, 11 TEXAS A&M L. REV. (forthcoming 2024), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4603249](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4603249) [<https://perma.cc/29L7-8QFK>].

<sup>8</sup> *Id.* (this statement is subject to change due to multiple legal efforts involving the compensation of college athletes).

<sup>9</sup> Frank Ryan & Matt Ganas, *Rights of Publicity in Sports-Media*, 67 SYRACUSE L. REV. 421, 422–23 (2020).

“fair use” and “no violation of an individual’s rights” to be depicted in “any news, public affairs, or sports broadcast.”<sup>10</sup> Similarly, in Ohio, the use of an individual’s person “in connection with any news, public affairs [or] sports broadcast” does “not constitute a use for which consent is required.”<sup>11</sup>

Furthermore, in *Marshall v. ESPN*, where college athletes sued TV networks over alleged violations of their right of publicity, the U.S. Court of Appeals for the Sixth Circuit affirmed the complaint’s dismissal.<sup>12</sup> In 2014, former Vanderbilt safety Javon Marshall and other players accused ESPN, ABC, CBS, NBC, Fox, and conferences of misappropriating a property interest the players held in their names and images appearing in television game broadcasts.<sup>13</sup> Judge Raymond Kethledge shelved the players’ argument as “meritless” and found no legal support for what he portrayed as an unwieldy proposition—that “broadcasts are illegal unless licensed by every player on each team.”<sup>14</sup> Kethledge also suggested that if players should be paid for appearing on games, it’s unclear where the limiting principle ought to lay.<sup>15</sup> To that end, the judge wondered if “referees, assistant coaches and perhaps even spectators have the same rights.”<sup>16</sup>

But for the NCAA and the various companies that profit from college sports, 2014 was emblematic of a far more deferential era of jurisprudence. Back then, the NCAA often invoked Justice John Paul Stevens’ opinion in *NCAA v. Board of Regents*, wherein he expressed that because the NCAA “plays a critical role in the maintenance of a revered tradition of amateurism in college sports . . . there can be no question but that it needs ample latitude to play that role.”<sup>17</sup> Although that sentimentalized language didn’t furnish the NCAA with an exemption from antitrust law or from other laws, the NCAA would treat it as a shield from ordinary legal scrutiny.<sup>18</sup> Conferences

<sup>10</sup> TENN. CODE ANN. § 47-25-1107(a) (2023).

<sup>11</sup> OHIO REV. CODE ANN. § 2741.02(D)(1) (2023).

<sup>12</sup> 111 F. Supp. 3d 815, 826 (M.D. Tenn. 2015), *aff’d*, 668 Fed. Appx. 155, 157 (6th Cir. 2016).

<sup>13</sup> *Id.*

<sup>14</sup> *Marshall v. ESPN*, 668 Fed. Appx. 155, 156 (6th Cir. 2016).

<sup>15</sup> *Id.* at 156 (“Whether referees, assistant coaches, and perhaps even spectators have the same rights as putative licensors is unclear from the plaintiffs’ briefs (and, by all appearances, to the plaintiffs themselves).”).

<sup>16</sup> *Id.*

<sup>17</sup> 468 U.S. 85, 120 (1984).

<sup>18</sup> Sam C. Ehrlich, *A Three-Tiered Circuit Split: Why the Supreme Court Was Right to Hear NCAA v. Alston*, 32 J. LEGAL ASPECTS SPORT 1, 9–17 (2022).

and colleges also utilized *Board of Regents* to negotiate higher-value TV and other media rights deals that contemplated players appearing in games.<sup>19</sup>

The legal status of amateurism would change dramatically in 2021, and the fallout continues to be felt. In *NCAA v. Alston*,<sup>20</sup> the U.S. Supreme Court unanimously held against the NCAA in an antitrust case concerning how member schools restrain each school's capacity to compensate college athletes for their education-related expenses.<sup>21</sup> Although *Alston* was not about paying athletes for their athletic contributions or for their name, image, and likeness ("NIL"), it ended the deference provided by *Board of Regents* and clarified that ordinary antitrust scrutiny applies to amateurism rules.<sup>22</sup> That same year the NCAA adopted an interim NIL policy allowing college athletes to earn money from endorsements, sponsorships, influencing, and related commercial arrangements with third parties.<sup>23</sup> The NCAA took this step only after states adopted NIL statutes that made it illegal for the NCAA, conferences, and schools to deny athletic eligibility for an athlete using their right of publicity.<sup>24</sup>

The exclusion of college athletes from revenues generated through telecast, media, and other licensing rights arrangements is central to the ongoing antitrust class action, *In re College Athlete NIL Litigation*.<sup>25</sup> The case is brought by Arizona State swimmer Grant House, former Oregon and current TCU basketball player Sedona Prince, and former Illinois football player Tymir Oliver, a trio who now lead a case on behalf of roughly 14,500 current and former college athletes.<sup>26</sup> They insist that the NCAA and Power Five

---

<sup>19</sup> Andrew Zimbalist, *Reforming College Sports and a Constrained, Conditional Antitrust Exemption*, 38 *MANAGE. DECIS. ECON.* 634, 634–35 (2016).

<sup>20</sup> 141 S. Ct. 2141, 2166 (2021).

<sup>21</sup> John T. Holden, Marc Edelman, Thomas A. Baker III & Andrew G. Shuman, *Reimagining the Governance of College Sports After Alston*, 74 *FLA. L. REV.* 427, 463 (2022).

<sup>22</sup> 141 S. Ct. at 2156.

<sup>23</sup> Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (June 30, 2021), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx> [<https://perma.cc/UR45-JBEF>].

<sup>24</sup> Michael McCann, Eben Novy-Williams & Emily Caron, *Name, Image and Likeness: A Guide to College Athlete NIL Deals, Compensation*, SPORTICO (Mar. 7, 2023), <https://www.sportico.com/feature/college-athletes-paid-name-image-likeness-deals-nils-1234616329/> [<https://perma.cc/9CMA-P73F>].

<sup>25</sup> Amended Complaint & Demand for Jury Trial Consol. at 35–38, *In re College Athlete NIL Litig.*, No. 4:20-cv-03919 (N.D. Cal. July 26, 2021).

<sup>26</sup> Michael McCann, *Athletes Get Class Status as NCAA Faces Billions in Damages*, SPORTICO (Nov. 4, 2023), <https://www.sportico.com/law/analysis/2023/>

conferences, which are the most prominent and lucrative conferences and collectively include sixty-nine member colleges,<sup>27</sup> have unlawfully conspired under Section 1 of the Sherman Act to deny football, men's basketball, and women's basketball players of NIL opportunities until 2021. The defendants are also accused of unlawfully denying players of broadcast NIL or "BNIL" compensation.<sup>28</sup> As defined by the plaintiffs, BNIL contemplates broadcast revenue for televised college games and forgone appearances in college sports video games that were never made.<sup>29</sup>

If successful, *In re College Athlete NIL Litigation* would compel the NCAA to allow the Power Five conferences to share broadcast, video game, and other licensing revenue with college athletes and pay them monetary damages for past and current appearances.<sup>30</sup> Indeed, in a court filing in November 2023, the NCAA and Power Five estimated their potential damages could exceed \$4 billion, a figure so large it represents a "death knell situation" that may necessitate a settlement.<sup>31</sup>

The prospect of conferences and colleges paying college athletes for appearing on television or streamed games is not limited to Power Five members. Other conferences' athletes could similarly demand payment and pursue their own litigation.

Take athletes in the Ivy League Conference, where the eight member schools have a combined endowment worth more than \$170 billion.<sup>32</sup> While they attract less fanfare than athletes in more renowned athletic conferences and usually have limited prospects for joining a professional league, Ivy League athletes, along with their games and brands, still draw considerable

---

college-athletes-get-class-status-as-ncaa-faces-billions-in-damage-1234744655/ [https://perma.cc/56CJ-3FVZ] [hereinafter McCann, *Class Status*].

<sup>27</sup> The Power Five conferences are the Atlantic Coast Conference ("ACC"), Big Ten Conference, Big 12 Conference, Pac-12 Conference, and Southeastern Conference ("SEC").

<sup>28</sup> Michael McCann & Daniel Libit, *NCAA NIL Arguments in Key Athlete Pay Hearing Grilled by Judge*, SPORTICO (Sept. 21, 2023), <https://www.sportico.com/law/analysis/2023/judge-unpersuaded-ncaa-legal-class-certification-1234739397/> [https://perma.cc/R2KD-VN7Z].

<sup>29</sup> *Id.*

<sup>30</sup> McCann, *Class Status*, *supra* note 26.

<sup>31</sup> Michael McCann, *NCAA Warns of \$4B 'Death Knell' in NIL Class Action Appeal*, SPORTICO (Nov. 27, 2023), <https://www.sportico.com/law/analysis/2023/ncaa-nil-class-action-appeal-1234747910/> [https://perma.cc/WSQ5-TFAW] [hereinafter McCann, *NCAA Warns*].

<sup>32</sup> See Class Action Complaint & Demand for Jury Trial Compl. at 3, *Choh & Kirk v. Brown Univ.*, No. 3:23-cv-003050030 (D. Conn. Mar. 7, 2023).

interest.<sup>33</sup> That is anecdotally apparent through the famed Harvard-Yale football game, which is played annually and broadcast nationally.<sup>34</sup> It is more systematically detectable by lucrative business arrangements tied to Ivy League schools and the conference. In 2016, Yale University signed a 10-year, \$16.5 million branding rights deal with Under Armour.<sup>35</sup> Two years later, ESPN signed the Ivy League to a 10-year contract.<sup>36</sup> Ivy League athletes are also routinely used to fundraise for their schools, such as Dartmouth men's basketball players assisting in securing a \$50 million donation to improve their gymnasium.<sup>37</sup> The rise of legalized sports betting in thirty-seven states and the District of Columbia<sup>38</sup> has also been associated with increased viewership and interest in college sports.<sup>39</sup> The larger point is that if the Power Five must pay college athletes for their BNIL, the same principle would likely apply for other conferences and their athletes.

The potential distribution of revenue generated by telecast and media rights to college athletes begs the question of *how* such distribution would

---

<sup>33</sup> Craig Lambert, *The Professionalization of Ivy League Sports*, HARV. MAG. (June 28, 2019), <https://www.harvardmagazine.com/2019/06/professionalism-ivy-league-sports> [<https://perma.cc/68UY-U7QQ>].

<sup>34</sup> Jon Lewis, *Ratings Roundup: CFB on ESPN, Harvard/Yale, EPL on NBC*, SPORTS MEDIA WATCH (Nov. 2014), <https://www.sportsmediawatch.com/2014/11/sports-tv-ratings-college-football-espn-big-ten-sec-harvard-yale-nbc-esp-nbc/> [<https://perma.cc/FZ2C-GSZ4>]; Elizabeth Roosevelt, *A Quick History of "The Game,"* HARV. CRIMSON (Nov. 17, 2022), <https://www.thecrimson.com/flyby/article/2022/11/17/history-of-hy/> [<https://perma.cc/CMJ9-KX5E>].

<sup>35</sup> Daniela Brighenti, *Under Armour Deal Historic for Ivy League*, YALE DAILY NEWS (Jan. 20, 2016), <https://yaledailynews.com/blog/2016/01/20/under-armour-deal-historic-for-ivy-league/> [<https://perma.cc/5D3J-M435>].

<sup>36</sup> *ESPN, Ivy League Announce 10-Year Deal to Air Games on New ESPN+*, ESPN (Apr. 4, 2018), [https://www.espn.com/college-sports/story/\\_/id/23030560/ivy-league-espn-announce-10-year-deal-network-air-sporting-events-espn+](https://www.espn.com/college-sports/story/_/id/23030560/ivy-league-espn-announce-10-year-deal-network-air-sporting-events-espn+) [<https://perma.cc/3ZSY-K97X>]. The Ivy League on TV has had historical significance as well. In 1939, Columbia University and Princeton Universities played the first athletic event to be shown on TV. See Stuart J. Riemer, *Albert Pujols: Major League Baseball Salary Arbitration from a Unique Perspective*, 22 CARDOZO ARTS & ENT L.J. 219, 219 n.4 (2004).

<sup>37</sup> Michael McCann, *Dartmouth Men's Basketball Makes Employment Case at NLRB*, SPORTICO (Oct. 5, 2023), <https://www.sportico.com/law/analysis/2023/dartmouth-mens-basketball-employees-nlr-1234741295/> [<https://perma.cc/695F-SMG8>].

<sup>38</sup> *Interactive U.S. Map: Sports Betting*, AM. GAMING ASS'N, <https://www.americangaming.org/research/state-gaming-map/> [<https://perma.cc/QZU9-P6CW>] (last visited Jan. 7, 2024).

<sup>39</sup> John Holden & Mike Schuster, *The Sham of Integrity Fees in Sports Betting*, 16 N.Y.U. J.L. & BUS. 31, 73 (2019).

occur. As of this writing, college athletes are not recognized as employees of their school, conference, or the NCAA.<sup>40</sup> That means, unlike athletes in the major professional leagues, college athletes cannot form a union under the National Labor Relations Act (“NLRA”)<sup>41</sup> that, in turn, could negotiate a collective bargaining agreement (“CBA”) with a respective professional league.<sup>42</sup> In major professional leagues, unions negotiate a share of income, which includes revenue from television broadcasts, apparel sales, arena signage, and products and services that generate revenue.<sup>43</sup> Management, which consists of the teams and the owners, also receive a share.<sup>44</sup> Although the categories of shareable and calculation methods vary by league, players in the National Football League (“NFL”), National Basketball Association (“NBA”), Major League Baseball (“MLB”), and the National Hockey League (“NHL”) receive approximately 48 to 50 percent of their league revenues.<sup>45</sup>

Players in those professional leagues are not paid individually for their BNIL, as their appearances on game broadcasts and other media are governed by contractual arrangements in their employment contracts and in group licensing procedures determined by their union and league. A model NFL player’s contract, for example, expresses the player grants to his club and league the capacity to use his right of publicity as part of an NFL-NFL Player Association group licensing program.<sup>46</sup> As a result, even though Los Angeles Dodgers pitcher/designated hitter Shohei Ohtani, Milwaukee Bucks forward Giannis Antetokounmpo, and other global superstars drive viewership ratings more than their teammates and opponents, their disproportionate

---

<sup>40</sup> See, e.g., Marc Edelman, Michael A. McCann & John Holden, *The Collegiate Employee-Athlete*, 2024 UNIV. ILL. L. REV. 1 (2024).

<sup>41</sup> See 29 U.S.C. § 157 (collective bargaining right).

<sup>42</sup> Rohith A. Parasuraman, *Unionizing NCAA Division I Athletics: A Viable Solution?*, 57 DUKE L.J. 727, 728–729 (2007).

<sup>43</sup> Michael McCann, *Biggest Takeaways: The NBA’s New CBA Deal*, SPORTS ILLUSTRATED (Dec. 15, 2016), <https://www.si.com/nba/2016/12/15/nba-cba-details-takeaways-adam-silver-michele-roberts> [<https://perma.cc/K6Y5-C4AL>] [hereinafter McCann, *Biggest Takeaways*].

<sup>44</sup> See Christopher C. Kendall, *Circumventing the NBA’s Salary Cap: The “Summer of Dwigth”*, 15 U. DENV. SPORTS & ENT. LAW J. 73, 74 (2013).

<sup>45</sup> Michael McCann, *UFC Fighters Land a Blow with Judge’s Order in Class Action Pay Fight*, SPORTICO (Aug. 14, 2023), <https://www.sportico.com/law/analysis/2023/ufc-class-action-antitrust-1234734126/> [<https://perma.cc/9PH4-LCX4>].

<sup>46</sup> NFL COLLECTIVE BARGAINING AGREEMENT, App. A, § 4 (2020), [https://nfl-paweb.blob.core.windows.net/media/Default/NFLPA/CBA2020/NFL-NFLPA\\_CBA\\_March\\_5\\_2020.pdf](https://nfl-paweb.blob.core.windows.net/media/Default/NFLPA/CBA2020/NFL-NFLPA_CBA_March_5_2020.pdf) [<https://perma.cc/9XQB-5XPC>] (last visited Feb. 3, 2024).

contributions are not reflected in them receiving in a larger cut of telecast money.<sup>47</sup>

As players' attorney Jeffrey Kessler recently stated in a hearing for *In re College Athlete NIL Litigation*, "[y]ou can be Tom Brady or the lowest player in the NFL" and that player will still get an "equal share."<sup>48</sup> Brady, in other words, was not paid more for appearing in New England Patriots broadcasts than his teammates whose on-field contributions and fame were comparatively meager. Instead of pay-to-individual-player, the more money generated via game broadcasts, licensing, and other revenue inputs that draw from players' labor or appearances, the more money teams can spend on players.<sup>49</sup> Salary floors and salary caps, which together reflect the least and most a team can spend on players' collective salaries, are generally a function of revenue.<sup>50</sup> In other words, as revenue for games rises or falls, the amount of revenue collectively pocketed by players and owners rises and falls.

Such an arrangement, like other bargained terms impacting the hours, wages, and other working conditions of players, is exempt from relevant antitrust scrutiny.<sup>51</sup> Under the non-statutory labor exemption, which reflects a series of Supreme Court decisions that incentivized management and labor working together,<sup>52</sup> a bargained rule that primarily affects the owners and players and concerns a mandatory subject of bargaining is not subject to Section 1 of the Sherman Act.<sup>53</sup> Such an arrangement is also compatible with athletes enjoying individualized opportunities to promote their brand, endorse products, and influence broader social and cultural issues. Athletes, like other Americans, enjoy a right of publicity, which varies by state in terms of which aspects of one's identity it covers,<sup>54</sup> but generally forbids the

---

<sup>47</sup> Rory Carroll, *NBA: European Talent Powers Overseas Ratings Boom*, REUTERS (Feb. 19, 2021), <https://www.reuters.com/article/us-basketball-nba/nba-european-talent-powers-overseas-ratings-boom-idUSKBN2AJ2LA/> [<https://perma.cc/9MRY-DBHR>] (noting how superstar players drive television ratings).

<sup>48</sup> McCann, *NCAA Warns*, *supra* note 31.

<sup>49</sup> McCann, *Biggest Takeaways*, *supra* note 43.

<sup>50</sup> Stephen F. Ross, *The Misunderstood Alliance Between Sports Fans, Players, and the Antitrust Laws*, 1997 U. ILL. L. REV. 519, 521 n.4 (1997).

<sup>51</sup> Alan C. Milstein, *The Maurice Clarett Story: A Justice System Failure*, 20 ROGER WILLIAMS U. L. REV. 221–22 (2015).

<sup>52</sup> See *Loc. Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 689 (1965); *United Mine Workers v. Pennington*, 381 U.S. 657, 664–65 (1965).

<sup>53</sup> See *Mackey v. Nat'l Football League*, 543 F.2d 606, 623 (8th Cir. 1976).

<sup>54</sup> Wesley Burrow, *I Am He as You Are He as You Are Me: Being Able To Be Yourself, Protecting the Integrity of Identity Online*, 44 LOY. L.A. L. REV. 705, 714 (2011).



commercial use of another person's identity without their consent.<sup>55</sup> This right is the foundation of NIL and protects and celebrates from the wrongful exploitation of their fame.<sup>56</sup>

The NCAA and colleges are firmly against the recognition of college athletes as employees, be they minimum wage workers who are paid like work-study classmates, at-will employees, contracted employees, or unionized employees. This opposition has been apparent in the bevy of legal initiatives that would lead to employee recognition, such as in *Johnson v. NCAA*,<sup>57</sup> National Labor Relations Board petitions regarding football and basketball players at the University of Southern California and men's basketball players at Dartmouth College, and in legislative debates at federal and state levels.<sup>58</sup> Advocacy groups on behalf of colleges have insisted only about two percent of NCAA member schools feature athletic departments generating "enough revenue to cover operating costs."<sup>59</sup> Schools that are unable to afford paying their athletes as employees could eliminate varsity teams and replace them with club or intramurals.<sup>60</sup>

Meanwhile, colleges that pay athletes on men's teams more than athletes on women's teams as employees could run afoul of Title IX, a federal law that commands gender equity in collegiate athletics and other components of higher education,<sup>61</sup> though some commentators are skeptical of that prospect.<sup>62</sup> Interestingly, *In re College Athlete NIL Litigation* contemplates the

---

<sup>55</sup> See Holden, Edelman & McCann, *supra* note 5, at 8–16 (explaining the right of publicity and its role in sports law).

<sup>56</sup> *Id.* at 18–22.

<sup>57</sup> *Johnson v. Nat'l Collegiate Athletic Ass'n*, 561 F. Supp. 3d 490, 507–08 (E.D. Pa. 2021).

<sup>58</sup> See generally McCann, *New Amateurism*, *supra* note 7.

<sup>59</sup> Michael McCann, *SEC Fears of Johnson v. NCAA Labor Case Laid Out in Amicus Brief*, SPORTICO (June 20, 2022), <https://www.sportico.com/law/analysis/2022/southeastern-conference-amicus-1234679127/> [<https://perma.cc/V52J-GUYQ>] (quoting and discussing amicus brief filed in *Johnson v. NCAA*).

<sup>60</sup> See Darren A. Heitner, *Economic Realities of Being an Athlete*, 8 DEPAUL J. SPORTS L. CONTEMP. PROBS. 161, 167 (2012).

<sup>61</sup> See 20 U.S.C. §§ 1681–1688; see also Ray Yasser & Carter Fox, *Third-Party Payments: A Reasonable Solution to the Legal Quandary Surrounding Paying College Athletes*, 12 HARV. J. SPORTS & ENT. L. 175, 192 (2021) (discussing the application of Title IX in higher education).

<sup>62</sup> See, e.g., Marc Edelman, *When It Comes to Paying College Athletes, Title IX Is Just a Red Herring*, FORBES (Feb. 4, 2014), <https://www.forbes.com/sites/marcedelman/2014/02/04/when-it-comes-to-paying-college-athletes-is-title-ix-more-of-a-red-herring-than-a-pink-elephant/?sh=7c13f5cb1bde/> [<https://perma.cc/DP67-64N2>] (discussing how Title IX's application to college athletes who are also

conference, not a member school, paying the athletes. Conferences are not subject to Title IX obligations.<sup>63</sup> The NCAA argues the conference as the payer is a nonsensical design given “abundant evidence that schools within a conference would never cede such authority to a conference.”<sup>64</sup> Regardless, colleges must figure out how to comply with all laws, and suggesting they must violate employment and labor laws to comply with Title IX and other equity laws is unlikely to persuade courts.<sup>65</sup>

While the NCAA, conferences, and colleges have assorted reasons to oppose college athletes’ recognition as employees and unionization, this opposition comes with a cost. It deprives college athletes of capitalizing on the collective bargaining structure, through which the non-statutory labor exemption would eliminate the risk of antitrust claims over methods for distributing pay as well as any maximum salaries, salary caps, and other restraints on trade.<sup>66</sup> A lack of a collective bargaining relationship also denies them a chance to draw from decades of successful bargaining between leagues and players’ associations where orderly negotiations have contributed to economic growth for both players and owners.<sup>67</sup>

By resisting voluntary change, the NCAA and colleges could see change thrust upon them in a court order. If the plaintiffs prevail, *In re College Athlete NIL Litigation* would necessitate the NCAA alter its rules to allow Power Five conferences to pay the players for their broadcasting rights without running afoul of amateurism requirements. Whether the NCAA would allow conferences discretion in determining allowable levels of payments is uncertain, but any restrictions would be subject to antitrust scrutiny. Remember, there is no union for conferences to negotiate rules that would be exempt from antitrust scrutiny under the non-statutory labor exemption devised by the Supreme Court.

---

employees is a multifaceted issue and how Title IX may not be a barrier to paying those athletes).

<sup>63</sup> McCann, *Class Status*, *supra* note 26.

<sup>64</sup> Petition for Permission to Appeal Class Certification Decision at 17, C.A. No. 23-3607 (9th Cir. Nov. 17, 2023).

<sup>65</sup> Michael McCann, *An Open Letter to Incoming NCAA President Charlie Baker*, SPORTICO (Feb. 23, 2023), <https://www.sportico.com/law/analysis/2023/charlie-baker-ncaa-president-open-letter-1234710521/> [<https://perma.cc/C4L9-DJ6Q>].

<sup>66</sup> See Robert A. McCormick, *Interference on Both Sides: The Case Against the NFL-NFLPA Contract*, 53 WASH & LEE L. REV. 397, 409–10 (1996).

<sup>67</sup> See, e.g., Krystle Dodge, *Sports Salary Inflation: What Decades of Data Reveal*, EXPENSIVITY (Dec. 22, 2023), <https://www.expensivity.com/sports-salary-inflation-what-decades-of-data-reveal/> [<https://perma.cc/Q7GW-ZY6L>] (discussing rise in professional athletes’ salaries).

Yet the application of antitrust scrutiny to a rule doesn't mean a rule will be deemed unlawful. According to Professor Maurice Stucke, "most (and in some surveys nearly all) antitrust plaintiffs lose."<sup>68</sup> In one empirical study cited by Stucke, antitrust defendants won 97 percent of the time.<sup>69</sup> NCAA rules restricting how conferences (and/or schools) pay would satisfy legal scrutiny if they satisfied the antitrust Rule of Reason, where the court evaluates the facts and balances the pro-competitive and anti-competitive aspects of a restraint.<sup>70</sup> Although the NCAA decisively lost *Alston*, Justice Neil Gorsuch carefully cautioned the NCAA and members can still adopt reasonable restrictions on athlete compensation. He wrote that a "no Lamborghini rule" would be reasonable since it would be consistent with the larger educational goals of member institutions.<sup>71</sup> Gorsuch also stressed that "individual conferences remain free to reimpose every single enjoined restraint tomorrow—or more restrictive ones still."<sup>72</sup> Taken together, while *Alston* is sometimes portrayed as preventing the NCAA and its members from restricting athlete compensation, the reality is quite different. The case concerned compensation for education—not athletics or NIL—and the Court repeatedly signaled the NCAA and its members adopting reasonable rules would easily satisfy legal scrutiny.

In addition to the litigations and NLRB matters discussed above, there remains another vehicle that could lead to college athletes gaining a right to be paid for their appearances. In 2023, Michael Hsu, a management consultant who leads the College Basketball Players Association and who has filed NLRB charges seeking to establish college athlete employment rights, organized an effort to persuade the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA) to represent college athletes who appear on game broadcasts and video games.<sup>73</sup> SAG-AFTRA is a labor union that represents approximately 160,000 actors, announcers, broadcast journalists, dancers, DJs, news writers, news editors, program hosts, puppeteers,

---

<sup>68</sup> Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1425 (2009).

<sup>69</sup> *Id.* at 1423–44.

<sup>70</sup> See Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 829 (2009) (detailing and explaining Rule of Reason).

<sup>71</sup> *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2142, 2164 (2021).

<sup>72</sup> *Id.*

<sup>73</sup> Michael McCann, *College Athlete Pay Push Looks to SAG-AFTRA Reality TV Rules*, SPORTICO (Sept. 18, 2023), <https://www.sportico.com/law/analysis/2023/college-athlete-union-reality-tv-1234738888/> [<https://perma.cc/2TLZ-36P8>].

recording artists, singers, stunt performers, voiceover artists, and other media professionals.<sup>74</sup>

Hsu said he was inspired by reality TV star Bethenny Frankel, who starred on *The Real Housewives of New York City*, after she advocated for the unionization of reality TV contestants.<sup>75</sup> Frankel, who was paid \$7,250 to appear in Season One of the show, contends that studios and streamers exploit the labor performing on reality shows by not offering residuals when their appearances become hits and when those appearances are replayed across platforms.<sup>76</sup> SAG-AFTRA, which in November 2023 resolved a labor dispute with the Alliance of Motion Picture and Television Producers that will carry pay increases and protections for actors against artificial intelligence,<sup>77</sup> represents the hosts on reality TV shows but not the contestants.<sup>78</sup> Those hosts are covered by the National Code of Fair Practice for Network Television Broadcasting (“Network Code”), a contract regarding variety shows, soap operas, talk shows, game shows, and unscripted reality/competition shows.<sup>79</sup>

SAG-AFTRA publicly indicated in August 2023 that it seeks to “engage in a new path to union coverage” for reality TV performers and that it is “tired of studios and production companies trying to circumvent the union in order to exploit the talent that they rely upon to make their product.”<sup>80</sup> The details of that “new path” remain to be seen. A memorandum of agreement between SAG-AFTRA and the Alliance of Motion Picture and Television Producers

---

<sup>74</sup> See *About*, SAG-AFTRA, <https://www.sagaftra.org/about> [https://perma.cc/M43J-BDAR] (last visited Dec. 1, 2023).

<sup>75</sup> Marc Malkin, *Bethenny Frankel Calls for Reality Stars Union: ‘Networks and Streamers Have Been Exploiting People for Too Long,’* VARIETY (July 20, 2023), <https://variety.com/2023/tv/news/bethenny-frankel-reality-union-strike-1235674531/> [https://perma.cc/SUL6-KZSD].

<sup>76</sup> *Id.*

<sup>77</sup> Gene Maddaus, *SAG-AFTRA Approves Deal to End Historic Strike*, VARIETY (Nov. 8, 2023), <https://variety.com/2023/biz/news/sag-aftra-tentative-deal-historic-strike-1235771894/> [https://perma.cc/B6T8-AWKE].

<sup>78</sup> David Robb, *SAG-AFTRA Takes Up Bethenny Frankel’s Fight To Unionize Reality Show Contestants & End “Exploitative Practices,”* DEADLINE (Aug. 10, 2023), <https://deadline.com/2023/08/sag-aftra-bethenny-frankel-reality-tv-contestants-union-1235459562/> [https://perma.cc/3CAK-N2RQ]; see also Henna Choi, *White Men Still Dominate Reality Television: Discriminatory Casting and the Need for Regulation*, 37 HASTINGS COMM. & ENT. L.J. 163, 171–72 (2015) (explaining how as contestants, reality TV performers are classified as independent contractors and denied legal protections).

<sup>79</sup> *Id.*

<sup>80</sup> Robb, *supra* note 78.

from December 2023 did not address reality TV performers.<sup>81</sup> However, the Network Code is set to expire in June 2024 and related negotiations could provide a chance to draw new policies regarding those performers.<sup>82</sup>

As SAG-AFTRA engages in discussions with studios and streamers, it's possible that reality TV performers would be included in the bargaining unit. If so, college athletes could argue that they, like reality TV stars, partake in live and unscripted performances and thus ought to be included as well. Even then, there would be obstacles for college athletes joining the union. SAG-AFTRA eligibility requires paycheck stubs as proof of employment, a performer contract, or payroll printout—items college athletes would presumably not have unless they are recognized as employees.<sup>83</sup> SAG-AFTRA also charges a national initiation fee of \$3,000, a substantial figure that would likely dissuade many college students.<sup>84</sup>

When considering the different paths to paying college players for appearing on television broadcasts and streaming content, the most likely approach to succeed is one akin to that used by the professional leagues and their players' associations: a partnership borne through bargaining. This would allow athletes to have a seat at the table in negotiating broadcasts deals. Negotiations in which athletes have a say would show them the respect they have earned and acknowledge *they* are the talent—the main stars—of the broadcast. Labor law scholars have stressed the importance “voice” or direct communication channels for employees to express their views on desired employment conditions.<sup>85</sup> A credible voice can serve as an incentive for workers to not quit or take other actions adverse to an employer. Given the myriad and tectonic legal challenges facing the NCAA and its member schools, a

---

<sup>81</sup> 2023 Memorandum of Agreement Between the Screen Actors Guild-American Federation of Television And Radio Artists and the Alliance Of Motion Picture and Television Producers (Dec. 6, 2023), [https://www.sagaftra.org/files/2023\\_Theatrical\\_Television\\_MOA.pdf](https://www.sagaftra.org/files/2023_Theatrical_Television_MOA.pdf) [<https://perma.cc/592J-N5K8?type=standard>].

<sup>82</sup> Rick Porter, *SAG-AFTRA Strike: What Actors Can Still Work on Without Violating Union Rules*, HOLLYWOOD REPORTER (July 17, 2023), <https://www.hollywoodreporter.com/business/business-news/sag-aftra-strike-what-actors-can-still-do-1235538181/> [<https://perma.cc/V6ZQ-XJQN>].

<sup>83</sup> *See Steps to Join*, SAG-AFTRA, <https://www.sagaftra.org/membership-benefits/steps-join> [<https://perma.cc/2DV7-X3ZL>] (last visited Dec. 1, 2023).

<sup>84</sup> *Id.*

<sup>85</sup> *See, e.g.*, RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* 7–9 (1984).

pathway towards cooperation with athletes on broadcasts could go a long way in building goodwill.<sup>86</sup>

There are, of course, practical barriers to implementing such a model. Formal bargaining between management and a union that produces a group licensing distribution might not be possible in college sports for several years, if ever. It will depend on the outcomes of legal efforts for the recognition of college athletes as employees and the potential unionization of collegiate-employee athletes. That is, ironically, problematic for the NCAA and member institutions since while they oppose employee recognition (and unionization) of college athletes, they would benefit by being able to draw on the non-statutory labor exemption to evade antitrust scrutiny.

Alternatively, the NCAA and members could negotiate with trade associations and advocacy groups to determine sensible distribution rules for revenue. Even if college athletes are not recognized as employees or members of a union, they could hire an association to advocate for their interests and stress they are stakeholders. Several entities, including the College Athletes Players Association, the National College Players Association, and the College Football Players Association already have formed and could play that role. Those rules would not be bargained with a labor organization and could thus be challenged under antitrust law, but reasonable restrictions usually pass such scrutiny. The more input athletes could provide, either directly or through advocacy organizations, the more likely the distributions would seem acceptable to courts, too. If the last fifteen years have taught the NCAA nothing else, it's that the legal system is no longer a fan. The organization and its members would be wise to strike deals with players and their advocates before judges redesign college sports for them.

---

<sup>86</sup> Michael McCann, *Year In Sports Law: The NCAA Amateurism Meltdown*, SPORTICO (Dec. 27, 2023), <https://www.sportico.com/law/analysis/2023/biggest-sports-law-controversies-2023-ncaa-amateurism-1234760591/> [https://perma.cc/WE4C-XG4X].