Sharing Broadcast and Streaming Revenues with College Athletes

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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. The money is distributed to conferences

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and their member schools and is used to fund assorted expenses related to college athletics. 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, forbids such payments. 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. In recent years, judges, politicians, and scholars have sharply rebuked amateurism, characterizing it as circular in definition and exploitative of labor.

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. 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. 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).


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

“fair use” and “no violation of an individual’s rights” to be depicted in “any news, public affairs, or sports broadcast.”

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.”

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. 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. 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.” Kethledge also suggested that if players should be paid for appearing on games, it’s unclear where the limiting principle ought to lay. To that end, the judge wondered if “referees, assistant coaches and perhaps even spectators have the same rights.”

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.” 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.

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10 TENN. CODE ANN. § 47-25-1107(a) (2023).
11 OHIO REV. CODE ANN. § 2741.02(D)(1) (2023).
13 *Id.*
15 *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).”).
16 *Id.*
and colleges also utilized Board of Regents to negotiate higher-value TV and other media rights deals that contemplated players appearing in games.19

The legal status of amateurism would change dramatically in 2021, and the fallout continues to be felt. In NCAA v. Alston,20 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.21 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.22 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.23 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.24

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.25 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.26 They insist that the NCAA and Power Five

22 141 S. Ct. at 2156.
26 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, 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. 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.

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. 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.

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. 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

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27 The Power Five conferences are the Atlantic Coast Conference (“ACC”), Big Ten Conference, Big 12 Conference, Pac-12 Conference, and Southeastern Conference (“SEC”).


29 Id.

30 McCann, Class Status, supra note 26.


interest. That is anecdotally apparent through the famed Harvard-Yale football game, which is played annually and broadcast nationally. 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. Two years later, ESPN signed the Ivy League to a 10-year contract. 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. The rise of legalized sports betting in thirty-seven states and the District of Columbia has also been associated with increased viewer-ship and interest in college sports. 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

occur. As of this writing, college athletes are not recognized as employees of their school, conference, or the NCAA. That means, unlike athletes in the major professional leagues, college athletes cannot form a union under the National Labor Relations Act (“NLRA”) that, in turn, could negotiate a collective bargaining agreement (“CBA”) with a respective professional league. 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. Management, which consists of the teams and the owners, also receive a share. 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.

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. 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

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contributions are not reflected in them receiving in a larger cut of telecast money.\textsuperscript{47}

As players’ attorney Jeffrey Kessler recently stated in a hearing for \textit{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.”\textsuperscript{48} 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.\textsuperscript{49} 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.\textsuperscript{50} 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.\textsuperscript{51} Under the non-statutory labor exemption, which reflects a series of Supreme Court decisions that incentivized management and labor working together,\textsuperscript{52} 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.\textsuperscript{53} 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,\textsuperscript{54} but generally forbids the


\textsuperscript{48} McCann, \textit{NCAA Warns, supra} note 31.

\textsuperscript{49} McCann, \textit{Biggest Takeaways, supra} note 43.


\textsuperscript{54} Wesley Burrow, \textit{I Am He as You Are He as You Are Me: Being Able To Be Yourself, Protecting the Integrity of Identity Online}, 44 \textsc{Loy. L. A. L. Rev.} 705, 714 (2011).
commercial use of another person's identity without their consent. This right is the foundation of NIL and protects and celebrates from the wrongful exploitation of their fame.

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, 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. 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.” Schools that are unable to afford paying their athletes as employees could eliminate varsity teams and replace them with club or intramurals.

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, though some commentators are skeptical of that prospect. Interestingly, In re College Athlete NIL Litigation contemplates the

55 See Holden, Edelman & McCann, supra note 5, at 8–16 (explaining the right of publicity and its role in sports law).
56 Id. at 18–22.
58 See generally McCann, New Amateurism, supra note 7.
62 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/marc edelman/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
employees is a multifaceted issue and how Title IX may not be a barrier to paying those athletes).

63 McCann, Class Status, supra note 26.
64 Petition for Permission to Appeal Class Certification Decision at 17, C.A. No. 23-3607 (9th Cir. Nov. 17, 2023).
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.”68 In one empirical study cited by Stucke, antitrust defendants won 97 percent of the time.69 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.70 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.71 Gorsuch also stressed that “individual conferences remain free to reimpose every single enjoined restraint tomorrow—or more restrictive ones still.”72 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.73 SAG-AFTRA is a labor union that represents approximately 160,000 actors, announcers, broadcast journalists, dancers, DJs, news writers, news editors, program hosts, puppeteers,

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69 Id. at 1423–44.
72 Id.
recording artists, singers, stunt performers, voiceover artists, and other media professionals.74

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.75 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.76 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,77 represents the hosts on reality TV shows but not the contestants.78 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.79

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.”80 “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

76 Id.
79 Id.
80 Robb, supra note 78.
from December 2023 did not address reality TV performers. 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.

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. SAG-AFTRA also charges a national initiation fee of $3,000, a substantial figure that would likely dissuade many college students.

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. 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

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84 Id.
pathway towards cooperation with athletes on broadcasts could go a long way in building goodwill.\textsuperscript{86}

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.