BRING YOUR OWN TRADEMARK: COMPENSATING COLLEGE FOOTBALL PLAYERS THROUGH TRADEMARK ROYALTIES

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Abstract: College football players deserve compensation for the value they create in the sport. The National Collegiate Athletic Association (“NCAA”) Amateurism Rule, however, prohibits paying student-athletes, while coaches earn millions of dollars per year. A potential solution to combat this inequality is for universities to collect intellectual property licensing royalties from coaches and use that money toward compensating players. Additionally, college athletes should be informed about their right to trademark and should collect their own trademark licensing royalties in accordance with the United States Court of Appeals for the Ninth Circuit’s decision in O’Bannon v. NCAA in 2015.

I. INTRODUCTION

College athletes generate a significant amount of revenue to their schools and the National Collegiate Athletic Association (“NCAA”).¹ In fact, the College Football Playoff alone generates roughly $600 million per year.² Under the current NCAA Amateurism Model, student-athletes are prohibited from being paid.³ However, most college football players are paid indirectly through scholarships, meals, lodging, team-issued gear, and access to amenities.⁴ Scholars have argued that compensating players beyond these

benefits—benefits that could total up to $125,000 per year—is highly unreasonable.\textsuperscript{5} Additionally, the NCAA cites a desire to preserve the integrity and appeal of college sports, which would be tarnished by paying athletes.\textsuperscript{6} This argument exemplifies the exploitative nature of college sports.\textsuperscript{7} In terms of a fair market, college athletes deserve to be compensated.\textsuperscript{8}

II. THE PROBLEM

College athletes essentially work full-time jobs in addition to fulfilling their educational requirements.\textsuperscript{9} Though the NCAA has a regulation designed to limit players to practicing 20 hours per week, Division I football players actually spend approximately 43

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University’s $55 million-dollar football facility includes a basketball court, putting green, sand volleyball court, bowling lanes, barber shop, shoe-shine area, and pool).

\textsuperscript{5} Jeffrey Dorfman, \textit{Pay College Athletes? They're Already Paid Up To $125,000 Per Year}, FORBES (Aug. 29, 2013, 8:00 AM), https://www.forbes.com/sites/jeffreydorfman/2013/08/29/pay-college-athletes-theyre-already-paid-up-to-125000year/#2e069c942b82.

\textsuperscript{6} See NAT’L COLLEGIATE ATHLETIC ASSN’N, \textit{supra} note 3, at xii (describing the NCAA’s commitment to promote the integrity of intercollegiate athletics and amateurism in order to “maintain a line of demarcation between student-athletes . . . and [professional] athletes”).


\textsuperscript{8} See id. (noting that it costs the richest schools “between half a million dollars and $1.5 million” to cover the full cost of attendance, which is a “drop in the bucket” compared to their “combined revenues [which] are upward of $100 million”).

\textsuperscript{9} See Patrick F. McDevitt, \textit{The NCAA’s Amateurism Rules are Indeed Madness}, HUFFINGTON POST (Mar. 02, 2018, 5:47 AM), https://www.huffingtonpost.com/entry/opinion-mcdevitt-ncaa-amateurism_us_5a987314e4b0479c0250a58d (explaining that the NCAA’s twenty hour per-week mandate doesn’t include “traveling . . ., weight lifting, training . . ., tutoring, compliance meetings, training table meals, hosting recruits, getting to and from practice, pre-practice activities, or post-practice showering and recovery,” which can “quickly turn 20 hours a week into a 50-hour weekly commitment”).
hours per week training. Further, many of the football players come from low-income households and often declare for the NFL draft prior to graduating college due to financial hardship and pressure to support their families. Paying student athletes would encourage players to finish their degrees before declaring for the draft. It would also work to combat corruption within the sport, as many players have accepted bribes or extra benefits. Thus, paying athletes would preserve the integrity of college sports by reducing opportunities for corruption.

Additionally, racial prejudice could play a role as to why college athletes are not currently being paid. Though most Americans oppose paying college athletes, there is a big racial divide. In fact, 53 percent of African Americans support paying college athletes compared to the 22 percent support by whites. Moreover, the racial makeup on the field

10 Id.
12 Id.
13 See e.g., Aaron Beard, Corruption Scandal Threatens Eligibility For College Players, USA TODAY, Sept. 28, 2017, 6:40 PM, https://www.usatoday.com/story/sports/ncaab/2017/09/28/corruption-scandal-threatens-eligibility-for-college-players/106087980/ (noting that at least three top high school recruits were promised payments of as much as $150,000 from an account executive at Adidas and college coaches to attend two universities sponsored by the company).
14 See Marc Edelman, Corruption Will Continue In NCAA College Basketball Until Schools Can Openly Pay Their Players, FORBES (Sept. 27, 2017, 9:01 AM), https://www.forbes.com/sites/marcedelman/2017/09/27/corruption-will-continue-in-ncaa-college-basketball/#7ff6a3043315 (proposing that the “only way to truly stamp out bribery and corruption . . . would be to overturn the [Ameturism] rule[] as a restraint of trade under Section 1 of the Sherman Act”).
16 See id. (providing that 65 percent of Americans do not think college athletes should be paid).
17 Id.
does not mirror that in the classroom: 55 percent of the football players at schools in the Power Five conferences are black, but only 2.4 percent of the students at these schools are black men.\textsuperscript{18} The NCAA insists that “amateurism” is an integral part of the college sports model—a model that generates nearly $3.5 billion dollars per year in football alone.\textsuperscript{19} Interestingly, only 16.9 percent of executives at the NCAA headquarters are black.\textsuperscript{20}

Further, it is no surprise that the coaches—91.2 percent of whom are white—are paid exorbitant salaries.\textsuperscript{21} In fact, in the vast majority of states, college football and basketball coaches are the highest paid public employees.\textsuperscript{22} Economists theorize that coaches are being overcompensated because college players are not being paid in a manner consistent with a normal labor market.\textsuperscript{23} As such, coaches’ wages are artificially inflated because the salaries that players would otherwise be making are being absorbed by the coaches.\textsuperscript{24} This disparity is an unfortunate overpower of student-athletes who create value


\textsuperscript{23}McLaughlin, \textit{supra} note 21.

\textsuperscript{24} \textit{Id.}
in the sport.\textsuperscript{25} Even John Oliver, on HBO’s \textit{Last Week Tonight}, stated that “there is something … troubling about a billion-dollar sports enterprise where the athletes are not paid a penny.”\textsuperscript{26} Allocating coaches’ trademark royalties and encouraging college athletes to register marks are two ways to circumvent the NCAA Amateurism Rule to compensate players and help combat the racial inequality in the sport.\textsuperscript{27}

\textbf{III. LOOKING TO TRADEMARK LAW FOR A SOLUTION}

Though trademarking has always been a major part of the professional sports market, it has become popular in college sports only recently.\textsuperscript{28} The purpose of a trademark is to prevent unfair competition and to avoid consumer confusion.\textsuperscript{29} College football coaches are trademarking their names and catchphrases to recognize their substantial, protectable value in the market.\textsuperscript{30} Meanwhile, college athletes could be losing out on millions of dollars by failing to protect their brands while in college.\textsuperscript{31}

\begin{itemize}
  \item \textsuperscript{25} \textit{Id.}
  \item \textsuperscript{26} \textit{LastWeekTonight, The NCAA: Last Week Tonight With John Oliver (HBO), YOUTUBE} (Mar. 15, 2015), https://www.youtube.com/watch?v=pX8BXH3SJn0.
  \item \textsuperscript{27} \textit{See Victoria Roessler, Note, College Athlete Rights After O’Bannon: Where Do College Athlete Intellectual Property Rights Go From Here?, 18 VAND. J. ENT. & TECH. L. 935, 961 (2016) (identifying the uncertainty in the future of student-athletes’ intellectual property rights and proposing a fifty-fifty split of royalties between the athlete and the institution).}
  \item \textsuperscript{29} Kathleen B. McCabe, Note, \textit{Dilution-By-Blurring: A Theory Caught in the Shadow of Trademark Infringement}, 68 FORDHAM L. REV. 1827, 1835 (2000); see 15 U.S.C. § 1125(a)(1) (2012) (defining a trademark as “any word, term, name, symbol, or device, or any combination thereof” used in commerce in connection with any goods or services and defining trademark infringement as a use of a trademark in commerce that is likely to confuse consumers).
  \item \textsuperscript{30} Berkowitz, \textit{supra} note 28.
  \item \textsuperscript{31} Roessler, \textit{supra} note 27, at 954.
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A. Universities Should Collect Intellectual Property Royalties Of College Coaches: Clemson University As A Case Study

In 2009, Dabo Swinney capitalized on his position as head football coach at Clemson University by trademarking his own name.\(^\text{32}\) Three months before he led the Tigers to a football national championship, he created a cash cow in fifteen seconds.\(^\text{33}\) After a 24-22 win over Notre Dame, Swinney addressed a national television audience describing what he tells his players: “listen, we give you scholarships, we give you stipends and meals and a place to live. We give you nice uniforms. I can’t give you guts! And I can’t give you heart! And tonight, it was BYOG. Bring Your Own Guts!”\(^\text{34}\) Six days after this statement, Swinney’s company, KATBO, filed trademark applications for “BYOG” and “Bring Your Own Guts.”\(^\text{35}\) So, on top of Swinney’s $6.75 million per year income, he receives 10% of the wholesale price from products that use “BYOG” or “Bring Your Own Guts” as a result of a licensing deal.\(^\text{36}\) He also receives 10% from products with his name on them.\(^\text{37}\) Interestingly, Swinney vehemently opposes paying college athletes, stating that “there’s enough entitlement in this world as it is.”\(^\text{38}\)

Clemson contractually pays Swinney $500,000 for the rights to market his name, image, and likeness for three years, and Clemson’s policy claims ownership for employee-

\(^{34}\) Id.
\(^{35}\) Gregory, *supra* note 32.
\(^{37}\) Id.
\(^{38}\) Gregory, *supra* note 32.
created intellectual property.\textsuperscript{39} So, it is surprising that Swinney’s company would be allowed to own the rights to these trademarks.\textsuperscript{40} Nonetheless, Swinney is using Clemson’s national platform to voice his trademark and capitalize on the players’ guts.\textsuperscript{41} As an employee at an educational institution, he should not be allowed to keep the profits from his trademark.\textsuperscript{42} Rather, Swinney’s employment contract should be tightened whereby Swinney’s intellectual property royalties get paid to Clemson.\textsuperscript{43} The football players should then be compensated using that money for the guts they bring.\textsuperscript{44}

\textbf{B. Universities Should Encourage College Athletes to Register Trademarks}

In \textit{O’Bannon v. NCAA}, a former student-athlete filed a class action lawsuit against the NCAA regarding Electronic Arts’ (“EA”) basketball video game.\textsuperscript{45} Both college basketball players and their coaches appeared in the video game.\textsuperscript{46} While the coaches negotiated a licensing agreement, the players did not provide consent or receive compensation for the use of their likenesses in the game.\textsuperscript{47} In 2014, the United States District Court for the Northern District of California held that the athletes should be

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\item \textsuperscript{39} \textsc{Clemson Univ.}, \textsc{Clemson University Intellectual Property Policy} 1 (2016) [hereinafter \textsc{Clemson IP Policy}], \textit{available at} \url{http://media.clemson.edu/research/technology-transfer/ip-policy.pdf}; \textsc{Gregory}, \textit{supra} note 32.
\item \textsuperscript{40} \textsc{See Clemson IP Policy, supra} note 39, at 1–2 (claiming rights to “intellectual property conceived, created, developed, fixed, or first actually reduced to practice by . . . all persons employed by the university unless expressly exempted by contract”).
\item \textsuperscript{41} \textsc{Gregory, supra} note 32.
\item \textsuperscript{42} \textsc{See id.} (describing the terms of Swinney’s employment contract).
\item \textsuperscript{43} \textsc{See id.} (describing the terms of Swinney’s employment contract).
\item \textsuperscript{44} \textsc{See id.} (describing the terms of Swinney’s employment contract).
\item \textsuperscript{45} \textsc{O’Bannon v. NCAA}, 802 F.3d 1049, 1055 (9th Cir. 2015), \textit{cert. denied}, 137 S. Ct. 277 (2016).
\item \textsuperscript{46} \textit{Id.}
\item \textsuperscript{47} \textit{Id.}
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allowed to share in intellectual property revenues that they help generate.\(^{48}\) In order to do so, the district court ruled that colleges could put aside up to $5,000 per player per year in a trust fund to compensate players, which would be accessed when the student left the institution.\(^{49}\) However, in 2015, the United States Court of Appeals for the Ninth Circuit reversed that portion of the district court’s decision while upholding the rest.\(^{50}\) Following the Ninth Circuit’s decision, EA stopped producing college sports video games, and the Supreme Court denied certiorari.\(^{51}\) Though the Supreme Court declined to decide the issue now, \textit{O’Bannon} has effectively opened the door for college athletes to trademark their own names and be compensated accordingly, but the case has left unknown how this compensation would work.\(^{52}\)

Regardless of an established compensation structure, however, it is unlikely that college athletes currently understand their right to trademark, and it is further unlikely that colleges are persuading student-athletes to pursue their trademark rights.\(^{53}\) College players should cash in on their college brands while they have marketable value.\(^{54}\) But in order to do so, colleges must educate the players on their rights.\(^{55}\) Not every brand-worthy player

\(^{48}\) \textit{O’Bannon} v. NCAA, 7 F. Supp. 3d 955, 1009 (N.D. Cal. 2014).
\(^{49}\) \textit{Id.} at 1008.
\(^{50}\) \textit{O’Bannon}, 802 F.3d at 1055.
\(^{51}\) Mandel, \textit{supra} note 19.
\(^{52}\) \textit{See id.} (discussing the resiliency of the Amateurism Rule while noting that the O’Bannon decision left the NCAA vulnerable to further litigation).
\(^{53}\) \textit{See Joseph Clemente, Comment, Collegiate Athletes and the Right to Their Marks,} 20 MARQ. INTELL. PROP. L. REV. 157, 159 (2016) (positing that athletes do not apply for trademark registration “due to a lack of knowledge about trademark law, fear that filing an application will result in ineligibility or sanctions . . . confusion about the NCAA’s stance, or shortsightedness”).
\(^{54}\) \textit{See id.} (noting that some collegiate athletes can become high-profile public figures and household names).
\(^{55}\) \textit{See id.} (proposing the creation of a NCAA body to help athletes promote their trademarks because they “presumably do not understand their intellectual property rights”).
makes it to the NFL, especially those who become injured prior to the draft. For the ones that do go to the NFL, their brand may be much less marketable at that time, compared to its marketability during their college career. For these reasons, college athletes should be able to license their trademark rights until their eligibility expires. For instance, in 2013, Johnny Manziel filed an application to trademark “Johnny Football” with the help of Texas A&M. However, the NCAA prohibited Texas A&M and Manziel from directly profiting off of the trademark while Manziel remained in college. Despite this, college athletes can license marks to third-parties for the duration of their time in college, as long they do not collect royalties until after they graduate. Additionally, after filing an application for “Johnny Football,” Manziel filed, and ultimately settled, lawsuits for trademark infringement. Notably, the NCAA ruled that Manziel could keep financial earnings from the lawsuits while still in college, which effectively created a loophole to the Amateurism

58 Clemente, supra note 53.
60 Id. at 68.
62 Hyland, supra note 61.
Rule. For example, after a college athlete files for a trademark, he could pursue trademark infringement settlements in order to collect money while still in college.

Alternatively, college athletes should be encouraged to file trademark applications on an intent-to-use (“ITU”) basis while in college and wait to use the marks until after college. An ITU trademark application requires that a person has not yet used their mark in commerce but has a good faith intention to so in the future. Though not officially sanctioned by the NCAA, an ITU mark probably does not violate the NCAA bylaws because the athlete is not receiving any immediate financial benefit.

Trademarking while in college offers an additional benefit for athletes besides compensation: it helps to avoid costly litigation battles and ensures that trademarks belong to their rightful owners. For example, after Vince Young lead his team to a national football championship in 2006, third parties filed applications to use his initials and nickname, “INVinceAble,” to sell products without his permission. Young continued his football career in the NFL but spent two years and attorney’s fees to receive the rights to his initials and nickname.

63 Id.
64 See id. (describing how Manziel collected money while still in college as a result of his trademark infringement settlements).
65 See Clemente, supra note 53 (noting that an intent-to-use trademark gives the owner three years to use the mark in commerce).
67 See Cho, supra note 59 (noting that an applicant has up to thirty-six months to demonstrate actual use of a trademark, allowing a college athlete to wait until NCAA eligibility expires to use the mark in commerce).
68 Clemente, supra note 53.
69 Id.
70 Id.

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Unfortunately, any immediate financial benefit the players could obtain through intellectual property royalties would violate the Amateurism Rule. Regardless, intellectual property can be a workaround if players are able to negotiate licensing agreements that will result in benefits once their NCAA eligibility expires. Though not an immediate fix, collecting on trademark royalties can benefit players once they graduate and protect against future litigation. Perhaps, knowing that there will be some sort of guaranteed compensation after graduation would deter players from declaring early for the draft or accepting bribes.

CONCLUSION

The best solution to combat the gross inequities between college football coaches and their players is to eliminate the NCAA Amateurism Rule altogether. Such a change, however, is highly unlikely. This is especially true due to the Supreme Court denying certiorari in O'Bannon. However, a pending class-action suit by a former Clemson football player, Martin Jenkins, has the potential to inch the NCAA closer to paying

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71 See NAT'L COLLEGIATE ATHLETIC ASS'N, supra note 3, at 63 (noting that a college athlete is prohibited from receiving money as a result of his or her athletic ability).
72 See Hyland, supra note 61 (describing Johnny Manziel’s licensing agreement whereby he collected royalties once he graduated).
73 See Clemente, supra note 53 (illustrating Vince Young’s litigation battles as a result of his failure to trademark).
74 See Marc Edelman, 9 Reasons to Allow College Athletes to License Their Names, Images, and Likenesses, FORBES (May. 11, 2018, 8:59 AM), https://www.forbes.com/sites/marcedelman/2018/05/11/9-reasons-to-allow-college-athletes-to-license-their-names-images-and-likenesses/#d13a8d5488b6 (providing that “the best way to quash [] bribery and corruption is to bring the market for college athletes’ services into the public”).
75 See McDevitt, supra note 9 (noting that everyone would be better off if athletes were allowed to receive pay for their services because “[s]chools could compete honestly for the nation’s best talent [and] [a]thletes would be fairly compensated alongside their coaches”).
76 Id.
77 Mandel, supra note 19.
athletes. Jenkins seeks to end the NCAA’s wage restrictions and allow athletic conferences to determine how players should be paid. The trial is set for December 2018 in the United States District Court for the Northern District of California, before Judge Wilken, who decided O’Bannon.

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79 Id.