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## College Athlete Rights After O'Bannon: Where Do College Athlete Intellectual Property Rights Go From Here?

Victoria Roessler

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# College Athlete Rights After O'Bannon: Where Do College Athlete Intellectual Property Rights Go From Here?

## ABSTRACT

*The recent O'Bannon v. NCAA decision, which gave student athletes a right in products that exploit their image and likeness, will have a profound impact on college athlete rights. This giant step forward will propel student athletes to fight for more intellectual property rights. Following the footsteps of professional athletes, these rights will likely include copyrighting sports moves, touchdown celebrations, and signature phrases as well as trademarking nicknames and touchdown dances. This Note encourages the adoption of a program giving student athletes these rights and allowing them to receive compensation, uncapped, that they would split evenly with his or her university. This solution will simultaneously expand student athlete rights and allow the universities to receive extra money to reinvest into their athletic programs.*

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Long before the first snap, pitch, or jump ball, student athletes sign away many of their legal rights, including the right to be compensated for their own image and likeness.<sup>1</sup> The recent case *O'Bannon vs. NCAA*, which challenged the long-time amateurism model of the National Collegiate Athletic Association (NCAA), established that student athletes have group rights<sup>2</sup> in products that exploit their names, images, and likenesses, a groundbreaking decision expected to bolster other efforts to give players more money and power within college athletics.<sup>3</sup> After the historic ruling rejected the NCAA's amateurism model, Ed O'Bannon, former University of California Los Angeles (UCLA) basketball star and head plaintiff stated, "This is just the tip of the iceberg."<sup>4</sup> Professional athletes are

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1. John Keilman & Jared S. Hopkins, *College Athletes Routinely Sign Away Rights to Be Paid for Names, Images*, CHI. TRIB. (Mar. 26, 2015, 8:23 PM), <http://www.chicagotribune.com/sports/college/ct-ncaa-waivers-met-20150326-story.html> [https://perma.cc/GP8G-G72R].

2. *Group Rights*, STANFORD ENCYC. OF PHILOSOPHY, <http://plato.stanford.edu/entries/rights-group/> [https://perma.cc/K9PH-DWJD] ("A group right is a right held by a group as a group rather than by its members severally. The 'group' in 'group right' describes the nature of the right-holder; it does not describe the mere fact that the right is confined to the members of a group rather than possessed by all members of a society or by humanity at large.")

3. *Id.*

4. Tom Farrey, *Ed O'Bannon: Ruling Is Tip of Iceberg*, ESPN (Aug. 10, 2014, 10:09 AM), [http://espn.go.com/espn/ot/story/\\_/id/11332816/ed-obannon-says-antitrust-ruling-only-beginning-change](http://espn.go.com/espn/ot/story/_/id/11332816/ed-obannon-says-antitrust-ruling-only-beginning-change) [https://perma.cc/8TJ2-XY2N]; see also *Amateurism*, NAT'L COLLEGIATE ATHLETICS ASS'N, <http://www.ncaa.org/amateurism> [https://perma.cc/R5JH-4RFA] ("Amateur competition is a bedrock principle of college athletics and the NCAA. Maintaining amateurism is

quickly filing for trademark rights in their nicknames and celebrations,<sup>5</sup> and the ability to copyright sports moves is quickly becoming a hot button topic.<sup>6</sup> Therefore, it would not be surprising if student athletes began to fight for these rights in the next few years.<sup>7</sup> However, it is unclear how to compensate student athletes without college athletics becoming a junior version of professional sports in terms of monetary rights. In addition, it is unclear how to get schools to agree to grant student athletes more rights (and thus give up rights of their own) without giving the school something in return.

Former Duke basketball star Jay Williams said, "If you're an agent, I can't you let you take me to a \$40 dinner, but then the NCAA can sell the rights of the (basketball) tournament for the \$11 billion? Come on. The system is broken."<sup>8</sup> The fight for student athlete rights is anything but new.<sup>9</sup> Unsurprisingly, the leading fighters are former student athletes, but lawyers and the National Collegiate Players Association have recently entered the fray.<sup>10</sup> In the past few years, there have been several cases battling for rights brought by former

crucial to preserving an academic environment in which acquiring a quality education is the first priority. In the collegiate model of sports, the young men and women competing on the field or court are students first, athletes second."). This philosophy that student athletes are students first, athletes second was later affirmed when the National Labor Relations Board (NLRB) denied Northwestern University football players' request to form a union. See Northwestern Univ., 362 NLRB No. 167 (2015). Tom Farrey, *Northwestern Players Denied Right to Form First Union for Athletes*, ESPN (Aug. 17, 2015), [http://espn.go.com/college-football/story/\\_id/13455477/nlrbsays-northwestern-players-cannot-unionize](http://espn.go.com/college-football/story/_id/13455477/nlrbsays-northwestern-players-cannot-unionize) [<https://perma.cc/B5Y6-65DF>].

5. See Ryan S. Hilbert, *Maintaining the Balance: Whether a Collegiate Athlete's Filing of a Federal Trademark Application Violates NCAA Bylaws*, 2 BERKELEY J. ENT. & SPORTS L. 120, 120–21 (2013), <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1029&context=bjesl> [<https://perma.cc/37L2-5SC6>] (giving examples such as National Basketball Association (NBA) player Jeremy Lin ("LINSANITY"), NBA legend Shaquille O'Neal ("SHAQTACULAR"), and former National Football League (NFL) quarterback Tim Tebow ("TEBOWING")).

6. See Loren J. Weber, *Something in the Way She Moves: The Case for Applying Copyright Protection to Sports Moves*, 23 COLUM.-VLA J.L. & ARTS 317, 318 (2000).

7. See *id.*

8. Jon Solomon, *College Athletes' Rights: Who Fights for the College Athlete?*, AL.COM (Apr. 3, 2011, 9:06 AM), [http://www.al.com/sports/index.ssf/2011/04/college\\_athletes\\_rights\\_who\\_fi.html](http://www.al.com/sports/index.ssf/2011/04/college_athletes_rights_who_fi.html) [<https://perma.cc/Y2RB-C9K4>] ("Charges of exploitation aren't new to the NCAA, which for years has defended its record on assisting athletes and considers access to education as a fair exchange"); see also Michael Moschel et al., *NLRB's Expansive View: The Northwestern "Football" Ruling and Why Inside Counsel Should Care*, INSIDE COUNSEL (Nov. 13, 2014), <http://www.insidecounsel.com/2014/11/13/nlrbs-expansive-view-the-northwestern-football-rul> [<https://perma.cc/K7WA-2LLC>] (explaining the ruling of the Northwestern University case, where the NLRB found that Northwestern University scholarship football players were employees of the university and thus had the right to unionize).

9. Solomon, *supra* note 8.

10. *Id.*

student athletes.<sup>11</sup> These past cases, including the recent *O'Bannon* decision, will likely help motivate student athletes to fight for even more rights—such as intellectual property rights—in the near future.

This Note examines the changing landscape of intellectual property rights in college athletics. As the *O'Bannon* case mainly concerned NCAA football and NCAA basketball, this Note takes a similar focus. Part I provides a description of the *O'Bannon* case and a brief history of relevant copyright and trademark law. Part II examines how these copyright and trademark laws are used in professional sports, such as figure skating, gymnastics, and the National Football League (NFL). Part II also discusses the pros and cons of allowing college athletes to apply for intellectual property rights similar to those currently utilized by professional athletes. Finally, Part III suggests a solution where any compensation from these intellectual property rights will be split evenly between the student athlete and his or her school. This solution will simultaneously help combat the problems of student athletes leaving school early (lured by the promise of lucrative contracts from the world of professional sports) and the schools' continuous opposition of granting student athletes more intellectual property rights. The NCAA could also mandate that this deferred compensation fund be conditioned on good behavior and good grades, which would give universities an easy way to incentivize positive behavior from their student athletes. Finally, this will also allow student athletes to have a bit of start-up cash upon graduation and help NCAA schools raise money to continue to improve their athletic programs and the experience for fans.

## I. THE *O'BANNON* CASE AND THE CURRENT STATE OF INTELLECTUAL PROPERTY LAW: INTRODUCING STUDENT ATHLETES TO INTELLECTUAL PROPERTY RIGHTS

### A. *The National Collegiate Athletic Association*

The NCAA was founded because, at the time of its creation, football was deemed too dangerous a sport and was on the verge of extinction.<sup>12</sup> This danger received national attention when President

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11. See, e.g., *Oliver v. Nat'l Collegiate Athletic Ass'n*, 920 N.E.2d 203 (Ohio Ct. Com. Pl. 2009) (arguing that student athletes had a right to legal counsel when considering pro options); *Former Football Players Sue NCAA over Concussions*, USA TODAY (Sept. 4, 2013, 12:10 PM), <http://www.usatoday.com/story/sports/ncaaf/2013/09/04/former-football-players-sue-ncaa-over-concussions/2762575/> [https://perma.cc/Z5TH-J4JD].

12. See Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 12 (2000),

Roosevelt called for an official White House conference to review football rules.<sup>13</sup> When deaths and injuries still persisted, Chancellor Henry MacCracken of New York University called for a national meeting of representatives from the nation's major programs to determine whether intercollegiate football could be saved.<sup>14</sup> This invitation ultimately resulted in the formation of a Rules Committee, which then met with the participants of the White House conference.<sup>15</sup> This concerted effort led to the formation of the Intercollegiate Athletic Association (IAA), later renamed the NCAA.<sup>16</sup>

In the early years of the NCAA, the Association focused solely on rulemaking.<sup>17</sup> However, in the late 1920s, with the public's ever-growing interest in intercollegiate sports and its increase in commercialization, it soon became paramount to diminish the commercialism in college athletics.<sup>18</sup> In response to this rise in popularity, and the boom of television and radio, many colleges and universities started athletic programs or expanded existing ones.<sup>19</sup> These factors, along with a series of gambling scandals and recruiting incidents, caused the NCAA to enact the "Sanity Code," designed to cut back the exploitive practices in recruiting college athletes.<sup>20</sup> Before the Sanity Code was enacted, it was common to pay an intercollegiate football player \$10,000 (almost \$90,000 in today's dollars) and to give packages involving spending money, board, and tuition.<sup>21</sup> Post-Sanity Code student athletes could be provided with free tuition and one free meal per day while in season.<sup>22</sup> However, after realizing that the code was not being enforced, the NCAA

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<http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1393&context=sportslaw> [<https://perma.cc/FXN2-JK9H>] ("[I]n 1905 alone, there were over eighteen deaths and over one hundred major injuries in intercollegiate football."); Dan Treadway, *Why Does the NCAA Exist?*, HUFFINGTON POST (Aug. 6, 2013 1:39 PM), [http://www.huffingtonpost.com/daniel-treadway/johnny-manzel-ncaa-eligibility\\_b\\_3020985.html](http://www.huffingtonpost.com/daniel-treadway/johnny-manzel-ncaa-eligibility_b_3020985.html) [<https://perma.cc/MZW8-LF5E>].

13. Smith, *supra* note 12, at 12.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 13; Treadway, *supra* note 12 ("[T]he NCAA was hardly founded by a bunch of people who thought maintaining the arbitrary notion of amateurism was paramount.").

18. Smith, *supra* note 12, at 13 ("[A] change of values is needed in a field that is sodden with the commercial and the material and the vested interests that these forces have created. Commercialism in college athletics must be diminished and college sport must rise to a point where it is esteemed primarily and sincerely for the opportunities it affords to mature youth.").

19. *Id.* at 14.

20. *Id.*

21. Brian Ewart, *History: The Sinful Seven*, SB NATION (Aug. 22, 2011, 3:16 AM), <http://www.vuhoops.com/2011/08/22/history-the-sinful-seven> [<https://perma.cc/VK93-F39W>].

22. *Id.*

repealed the Sanity Code and replaced it with the Committee on Infractions, which was given broader sanctioning authority.<sup>23</sup>

The NCAA has gradually moved further and further away from its original purpose of enacting safety standards for the sport of football.<sup>24</sup> Instead, the NCAA of today focuses on policing college athletics to ensure that college athletics do not become a pay-for-play system.<sup>25</sup>

### *B. The O'Bannon Case: Shining a National Spotlight on Student Athlete Rights*

The defendant, the NCAA, described above, issues and enforces rules governing athletics among its member schools.<sup>26</sup> The plaintiffs in this case are a group of current and former college student athletes.<sup>27</sup> They argued that several of the NCAA's rules violate the Sherman Antitrust Act.<sup>28</sup> Specifically, the plaintiffs challenged the set of rules that bar student athletes from receiving a share of the revenue that the NCAA and its schools earn from the use of student athletes' names, images, and likenesses in videogames, live game telecasts, and other video footage.<sup>29</sup> The NCAA defended its restrictions on student athlete compensation by asserting these rules are necessary to uphold its educational mission and to protect the popularity of college sports.<sup>30</sup> Plaintiffs contended that the NCAA has restrained trade in two markets: the college education market and the group licensing market.<sup>31</sup>

#### 1. The College Education Market

The United States District Court for the Northern District of California found that the NCAA rules unreasonably restrain trade in the college education market.<sup>32</sup> That is, Football Bowl Subdivision

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23. Smith, *supra* note 12, at 15 (stating that the NCAA found the "Sanity Code" to be unsuccessful because the only possible sanction, expulsion, was so severe that it rendered the Committee ineffectual).

24. *Id.* at 21.

25. *Id.*

26. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 963 (N.D. Cal. 2014).

27. *Id.* at 962.

28. *See id.* at 963; *see also* 15 U.S.C. § 1 (2012) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.").

29. *O'Bannon*, 7 F. Supp. 3d at 963.

30. *Id.*

31. *Id.* at 965.

32. *See id.* at 967.

(FBS) football and Division I basketball schools are the only suppliers of several services including, but not limited to, scholarships, tutoring, and high-quality coaching.<sup>33</sup> These schools have chosen to promote this exclusivity by forming an agreement to charge each recruit the same price for their bundle of athletic and educational opportunities.<sup>34</sup> If any of these member schools decided to offer to lower the price of admission—by offering, for example, a form of direct compensation—the school would likely be subject to sanctions by the NCAA.<sup>35</sup> High school athletes who are skilled enough to play in either of these leagues do not typically pursue other options—such as Football Championship Subdivision (FCS), Division II, or Division III schools—for continuing their athletic careers.<sup>36</sup> Simply put, FCS, Division II, or Division III schools do not have the same resources to be able to compete with Division I schools for these athletes.<sup>37</sup> Therefore, the bundles of goods and services offered by FCS, Division II, and Division III schools are not substitutes for the goods and services offered by FBS and Division I schools.<sup>38</sup> Even professional sports lack one main service that FBS and Division I schools offer—the opportunity to obtain a college education.<sup>39</sup> Therefore, the court found the NCAA regulation prohibiting players from receiving a share of the revenue earned from the sale of their images and likenesses unreasonably restrained trade in the college education market.<sup>40</sup>

## 2. The Group Licensing Market

Similarly, the court found that the NCAA rules restrain trade in the group licensing market, as there is a demand for the use of college athletes' images and likenesses within this market.<sup>41</sup> These

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33. *See id.*

34. *Id.* at 988.

35. *Id.*

36. *Id.* (citing research that neither the National Football League nor the National Basketball Association permits players to enter the league immediately after high school and although other professional leagues, such as the NBA Development League and the Arena Football League, permit players to join immediately after high school, recruits do not typically pursue careers in those leagues).

37. *See id.* at 966 (stating that none of the five-star recruits and only 0.2 percent of four-star recruits chose to play football at an FCS school and none chose to play at a Division II or III school between 2007 and 2011).

38. *Id.* at 967.

39. *Id.* at 968.

40. *Id.* at 990 (finding that the agreement among FBS football and Division I basketball schools not to offer recruits a share of their licensing revenue eliminates one form of price competition).

41. *Id.* at 968.



submarkets include group licenses to use student-athlete names, images, and likenesses in live game telecasts, videogames, and re-broadcasts.<sup>42</sup> Television networks often enter into licensing agreements for live telecasts of football and basketball games.<sup>43</sup> In these agreements, the networks often seek to obtain the right to use the names, images, and likenesses of the participating student athletes.<sup>44</sup> However, because student athletes are not permitted to license the rights to use their names, images, and likenesses, the networks deal exclusively with schools and conferences when acquiring the student athletes' rights.<sup>45</sup> For example, a 1999 agreement between the NCAA and CBS for the rights to telecast Division I basketball games contains a "Name & Likeness" provision that states:

The Network, its sponsors, their advertising representatives and the stations carrying the telecasts of the games will have the right to make appropriate references (including without limitation, use of pictures) to NCAA and the universities and colleges of the teams, the sites, the games and the *participants in and others identified with the games* and telecasting thereof, provided that the same do not constitute endorsements of a commercial product.<sup>46</sup>

These contracts alone demonstrate that there is a steady demand for student athletes' rights among television networks within this submarket.<sup>47</sup>

Similarly, the court found that a demand exists for the use of college athletes' images and likenesses within the remaining two submarkets.<sup>48</sup> For the videogame submarket, Electric Arts (EA)—the maker of several NCAA-themed video games—has stated that it would be interested in acquiring the same rights from student athletes in order to produce college sports-themed videogames if they were allowed to do so.<sup>49</sup> Lastly, in the submarket for rebroadcasting, commercials, and other products, the NCAA has already licensed all of its archival footage from past NCAA championships to a third-party licensing company for use in game rebroadcasts and advertisements.<sup>50</sup> This alone is enough to show that demand for this footage exists.<sup>51</sup>

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42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 993–94.

46. *Id.* at 968–69 (emphasis added).

47. *Id.* at 969.

48. *Id.* at 970–71.

49. *Id.* at 997.

50. *Id.* at 971.

51. *Id.*

### 3. Fruitless NCAA Defenses

The NCAA asserted several timeworn defenses for the reasonableness of their rules.<sup>52</sup> The first was the necessity of preserving its tradition of amateurism in college athletics.<sup>53</sup> Although the NCAA attempted to assert that the restrictions on student athlete compensation have significantly contributed to the popularity of these sports, the court found this to be incorrect.<sup>54</sup> Instead, the court found that consumers are interested in college sports for other reasons, such as loyalty to the school itself.<sup>55</sup> The court also rejected the NCAA's second defense—that these rules are necessary to promote the competitive balance between the schools.<sup>56</sup> The court similarly rejected the third defense—that these restrictions help education student athletes and integrate them into their schools' academic communities.<sup>57</sup> In fact, the court suggested that if the schools were to make high academic performance a condition for receiving compensation for the use of their names, images, and likenesses, student athletes would have a greater incentive to do well in school.<sup>58</sup> Lastly, the NCAA argued that the challenged restraint increases the output of its product by increasing the number of opportunities for schools and student athletes to participate, which increases the number of games played.<sup>59</sup> However, the court suggested that because of high coaching salaries and increased spending on training facilities, schools could afford to offer their student athletes a share of the licensing revenue from the use of their image and likeness.<sup>60</sup> Therefore, the NCAA may not rely on increased output as a justification for the challenged restraint here.<sup>61</sup>

### 4. The Ruling

For the reasons above, the court concluded that the NCAA's challenged rules unreasonably restrained trade in violation of

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52. *Id.* at 973.

53. *Id.*

54. *Id.* at 1000.

55. *See id.* at 1001 (“I would venture to say that if we [UT] offered a tiddlywinks team, that would somehow be popular with some segment of whoever loves our university.”).

56. *Id.*

57. *Id.* at 1003.

58. *Id.*

59. *Id.* at 1003–04 (suggesting that many current Division I schools are committed neither to the NCAA's current restrictions on student athlete compensation nor to the idea that all Division I schools must award scholarships of the same value).

60. *Id.* at 1004.

61. *Id.*

Section 1 of the Sherman Act.<sup>62</sup> Specifically, the court found that the rules restrained price competition among FBS football and Division I basketball schools as suppliers of the educational and athletic opportunities that recruits seek.<sup>63</sup> The court entered an injunction to remove any unreasonable elements of the restraint found in this case.<sup>64</sup> In addition, the injunction also served to prohibit the NCAA from enforcing any rules to prevent its schools from offering to deposit a limited share of licensing revenue in trust for their student athletes.<sup>65</sup> This trust would be payable when the student athlete left school or when his or her eligibility expired.<sup>66</sup> However, the NCAA is allowed to cap the compensation at \$5,000 per year above the value of a full college scholarship.<sup>67</sup> The court did not touch the NCAA rules prohibiting student athletes from endorsing commercial products, setting academic eligibility requirements, prohibiting schools from creating athlete-only dorms, and setting limits on practice hours.<sup>68</sup> The court also allowed the NCAA to continue enforcing its current rules regarding the limit of the total number of football and basketball scholarships each school may award, as this rule went unchallenged here.<sup>69</sup> However this ruling, along with the court's reluctance to change other NCAA rules regarding its precompetitive goals, is expected to strengthen other efforts to give players more money and power within college sports.<sup>70</sup>

### C. *The Current State of Copyright and Trademark Law in Athletics*

One area of law where there could be significant changes for college athletes in the near future is within the world of intellectual property rights. One such change could be the right to copyright specific athletic performances, a debate that has recently been brought up in the intellectual property world.<sup>71</sup> Another change could be the

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62. *Id.* at 1007.

63. *Id.*

64. *Id.*

65. *Id.* at 1008.

66. *Id.*

67. Farrey, *supra* note 4.

68. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 1008 (N.D. Cal. 2014).

69. *Id.*

70. Farrey, *supra* note 4.

71. See Giuliana R. Garcia, *He Shoots, He Scores . . . and Receives Copyright Protection? How the Current State of Intellectual Property Law Fumbles with Sports*, 11 DENV. U. SPORTS & ENT. L.J. 81, 83 (2011) (stating that another question for the rapidly developing athletic industry is whether these plays should be afforded intellectual property protection); Weber, *supra* note 6, at 318 (stating that conditions and circumstances in today's sports world now make such a

expansion of rights afforded to college athletics in terms of trademarks.<sup>72</sup> Professional athletes have recently begun trademarking their celebration moves, touchdown dances, and signature phrases.<sup>73</sup> While college athletes currently do not have the same options as professional athletes, they are already able to file an intent-to-use trademark application or license the rights in their trademark to another individual while they are still in school, the *O'Bannon* ruling may expand these rights for college athletes.<sup>74</sup>

### 1. Copyright Law

Copyright law creates a system of property rights for creative productions that qualify under the statute.<sup>75</sup> Subject to certain limitations, a copyright owner has the exclusive right to reproduce the work in copies, to prepare derivative works, to distribute copies, or to perform or display the work publicly.<sup>76</sup> Copyright protection is only given to works that are original, fixed in a tangible medium of expression, and fit within the proper subject matter.<sup>77</sup> In defining "original work," the Supreme Court held that there must be some degree of creativity, however small.<sup>78</sup> In order to have the proper subject matter, the work must qualify as one of the eight subject matter categories provided by the Copyright Act: (1) literary works;

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protection a desirable addition to the bundle of valuable rights athletes have secured in their own performances over the years).

72. See Mit Winter, *College Athletes and Trademark Rights: Will Others Follow Johnny Football's Playbook*, THE BUS. OF COLL. SPORTS (Mar. 6, 2013), <http://businessofcollegesports.com/2013/03/06/college-athletes-and-trademark-rights-will-others-follow-johnny-footballs-playbook/> [<https://perma.cc/QE9W-6HBG>].

73. See, e.g., Joshua A. Crawford, Trademark Rights for Signature Touchdown Dances (May 2014) (Unpublished submission to Va. State Bar Intell. Prop. Student Writing Competition), [http://www.vsb.org/docs/sections/intellect/Joshua\\_A\\_Crawford\\_-\\_Trademark\\_Rights\\_for\\_Signature\\_Touchdown\\_Dances.pdf](http://www.vsb.org/docs/sections/intellect/Joshua_A_Crawford_-_Trademark_Rights_for_Signature_Touchdown_Dances.pdf) [<https://perma.cc/64AG-JVJ5>]; Doug Farrar, *Bart Scott Trademarks the Phrase, "Can't Wait!"*, YAHOO SPORTS (Mar. 6, 2011), [http://sports.yahoo.com/nfl/blog/shutdown\\_corner/post/Bart-Scott-trademarks-the-phrase-Can-t-Wait-?urn=nfl-330407](http://sports.yahoo.com/nfl/blog/shutdown_corner/post/Bart-Scott-trademarks-the-phrase-Can-t-Wait-?urn=nfl-330407) [<https://perma.cc/PJL8-HENW>]; Kevin Patra, *Marshawn Lynch Applies for "I'm Just Here" Trademark*, NFL (Feb. 24, 2015, 7:35 AM), <http://www.nfl.com/news/story/0ap3000000473718/article/marshawn-lynch-applies-for-im-just-here-trademark> [<https://perma.cc/8NYG-RUSJ>]; Katie Thomas, *Sports Stars Seek Profit in Catchphrases*, N.Y. TIMES (Dec. 9, 2010), [http://www.nytimes.com/2010/12/10/sports/10trademark.html?\\_r=0](http://www.nytimes.com/2010/12/10/sports/10trademark.html?_r=0) [<https://perma.cc/5B5H-VNMR>] (giving examples such as "I Love Me Some Me," registered by Cincinnati Bengals wide receiver Terrell Owens, "Manny Being Manny," claimed and later abandoned by Manny Ramirez, and "Got Strange?" registered by Minnesota Vikings defensive end Jared Allen).

74. See Hilbert, *supra* note 5; Winter, *supra* note 72.

75. 17 U.S.C. § 106 (2012).

76. *Id.*

77. See 17 U.S.C. § 102(a) (2012).

78. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

(2) musical works; (3) dramatic works; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.<sup>79</sup> However, these categories are purely instructive, rather than limitative, in terms of what types of works are copyrightable.<sup>80</sup>

One of the first cases to discuss intellectual property rights in the world of sports was *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*.<sup>81</sup> The court here was asked whether Major League Baseball (MLB) clubs owned exclusive rights to the televised performances of players during games.<sup>82</sup> In the court's discussion of whether the telecasts of MLB games constitute copyrighted works made for hire, it found that the telecasts themselves constituted copyrighted works.<sup>83</sup> The court, in dicta, went on to suggest that the athletes' performances should qualify as copyrightable subject matter.<sup>84</sup> In doing so, the court rejected an argument that the players' performances are not copyrightable works because they lack sufficient artistic merit, as only a minimum amount of creativity is required for a work to be copyrightable.<sup>85</sup>

However, ten years later, the Second Circuit found that basketball games did not merit copyright protection in *National Basketball Association v. Motorola*.<sup>86</sup> The National Basketball Association (NBA) sued Motorola for manufacturing a paging device that transmits real time game information to its holders.<sup>87</sup> This information included: the teams playing, score changes, the team in possession of the ball, whether the team is in the free-throw bonus, the quarter of the game, and the time remaining in the quarter.<sup>88</sup> Specifically, the NBA alleged that Motorola infringed on their

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79. 17 U.S.C. § 102(a).

80. See 17 U.S.C. § 101 (2012) ("The terms 'including' and 'such as' are illustrative and not limitative.")

81. See generally *Balt. Orioles, Inc., v. Major League Baseball Players Ass'n*, 805 F.2d 663 (7th Cir. 1986).

82. *Id.* at 665.

83. *Id.* at 669 (finding that telecasts of MLB games to be fixed in a tangible form and an original work of authorship).

84. *Id.* at 675 ("Thus, if a baseball game were not broadcast or were telecast without being recorded, the Players' performances similarly would not be fixed in tangible form and their rights of publicity would not be subject to preemption. . . . By virtue of being videotaped, however, the Players' performances are fixed in tangible form, and any rights of publicity in their performances that are equivalent to the rights contained in the copyright of the telecast are preempted.")

85. See *id.* at 669 n.7.

86. *Nat'l Basketball Ass'n, v. Motorola, Inc.*, 105 F.3d 841, 847 (2d Cir. 1997).

87. *Id.* at 843.

88. *Id.* at 844.

copyright to the underlying games and broadcasts.<sup>89</sup> However, the court took the view that because Congress extended copyright protection to broadcasts of live performances such as sporting events and not to the underlying event itself, Congress did not intend for the underlying sporting event to be copyrightable.<sup>90</sup> In addition, the House Report also made clear that the broadcast, rather than the underlying game, is the subject of copyright protection.<sup>91</sup> The court went on to say that affording copyright protection to the underlying sport could impair competition in the future.<sup>92</sup>

## 2. Trademark Law

Federal trademark law is one of the most commonly used forms of protection for sports organizations, athletes, and merchandise.<sup>93</sup> The Lanham Act provides various advantages for registered, as well as unregistered, common law trademarks.<sup>94</sup> These advantages remain for the duration of the owner's continued use of the mark in commerce.<sup>95</sup>

Under the Lanham Act, protectable trademarks are defined as "any word, name, symbol, or device, or any combination thereof . . . used by a person . . . to identify and distinguish his or her goods . . . from those manufactured or sold by others . . ." <sup>96</sup> A trademark can include any word, name, symbol, device, or any combination thereof that is either used by a person or which a person has a bona fide intention to use in commerce and applies to register on the principal register that the Lanham Act established.<sup>97</sup> The Supreme Court has stated that the language of the Lanham Act is not restrictive and,

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89. *Id.* at 845.

90. *Id.* at 847.

91. *Id.* at 847 ("[W]hen a football game is being covered by four television cameras, with a director guiding the activities of the four cameramen and choosing which of their electronic images are sent out to the public and in what order, there is little doubt that what the cameramen and the director are doing constitutes 'authorship.'").

92. *Id.* at 846 ("If the inventor of the T-formation in football had been able to copyright it, the sport might have come to an end instead of prospering. Even where athletic preparation most resembles authorship—figure skating, gymnastics, and, some would uncharitably say, professional wrestling—a performer who conceives and executes a particularly graceful and difficult . . . acrobatic feat cannot copyright it without impairing the underlying competition in the future. A claim of being the only athlete to perform a feat doesn't mean much if no one else is allowed to try.").

93. Avi Friedman, Comment, *Protection of Sports Trademarks*, 15 LOY. L.A. ENT. L.J. 689, 690 (1995).

94. *Id.*

95. *Id.*

96. 15 U.S.C. § 1127 (2012).

97. *Id.*

therefore, the breadth of trademark subject matter is very expansive.<sup>98</sup> As a result, what can be trademarked today has greatly expanded beyond the typical word, phrase, or unique design that comprises most trademarks.<sup>99</sup>

Although athletes just recently began filing for their own trademarks, athletic organizations and merchandising companies have been doing so for decades.<sup>100</sup> As these cases demonstrate, sports teams can rely on federal protection for their trademarks and logos.<sup>101</sup> A trademark owner is entitled to control the use of a trademark against an unauthorized third party use that is likely to cause confusion.<sup>102</sup> This requirement can be met by showing that the public believed the trademark owner sponsored or approved the use of the infringing trademark or logo.<sup>103</sup> Violation of the trademark owner's rights can result in monetary damages or injunctive relief (and, more often than not, both).<sup>104</sup> However, the fair use doctrine provides essential limitations on the property rights associated with a trademark.<sup>105</sup>

## II. GAINING GROUND: A GLIMPSE INTO POSSIBLE INTELLECTUAL PROPERTY RIGHTS FOR STUDENT ATHLETES

### *A. Copyright Protection for Sports Moves*

Although copyright protection for college athletics has not been discussed in great detail, there have been several suggestions for copyright protection in the world of professional sports. Many scholars believe that routine-oriented sports, such as figure skating or

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98. Garcia, *supra* note 71, at 107.

99. Andrew Beckerman-Rodau, *The Problem with Intellectual Property Rights: Subject Matter Expansion*, 13 YALE J.L. & TECH. 35, 69 (2011).

100. See Friedman, *supra* note 93, at 692; see generally Dall. Cowboys Cheerleaders, Inc. v. Pussycat Cinema, 604 F.2d 200 (2d Cir. 1979) (finding that the Dallas Cowboys Cheerleaders had established a likelihood of confusion when defendants had used copies of their uniform in the movie "Debbie Does Dallas"); Bos. Prof'l Hockey Ass'n. v. Dall. Cap & Emblem Mfg., 510 F.2d 1004 (5th Cir. 1975) (finding that a team has an interest in its own individualized symbol and is entitled to legal protection against unauthorized duplication); Nat'l Football League Props., Inc. v. Wichita Falls Sportswear, Inc., 532 F. Supp. 651 (W.D. Wash. 1982) (finding that the defendant deliberately intended to manufacture its product to resemble official replicas, therefore intending to confuse the public); Nat'l Football League Props. v. Consumer Enters., Inc., 327 N.E.2d 242 (Ill. App. Ct. 1975) (finding that the duplication of the trademarks would cause consumer to associate the patches with the NFL and its teams because the NFL teams and their symbols had acquired such notoriety).

101. Friedman, *supra* note 93, at 696.

102. Beckerman-Rodau, *supra* note 99, at 69.

103. Friedman, *supra* note 93, at 696.

104. See Beckerman-Rodau, *supra* note 99, at 69.

105. See *id.* at 70-71.

gymnastics, should be copyrightable as “choreographic works,”<sup>106</sup> similar to theater or dance. Whether this opinion could expand to team-oriented sports has generated much discussion. Although this debate does not concern players specifically, scholars have also questioned whether groundbreaking plays—plays and formations, such as the T-formation, that alter the sport at hand completely—developed by coaches and other staff members could qualify for copyright protection. If groundbreaking plays developed by coaches could eventually qualify, this may open the door to groundbreaking plays made by players. Finally, some believe that athletes should be allowed to copyright celebrations and pre-game rituals. As these do not hinder competition and involve the requisite amount of creativity, it seems that this field will rapidly expand in the future.

### 1. Routine-Oriented Sports

While there have been a plethora of cases involving copyright of live telecasts of games or events, team logos, and merchandising, copyright protection for sports moves has seen little action.<sup>107</sup> However, several articles propose that routine-oriented athletic performances deserve copyright protection as a “pantomime and choreographic work,” as described in the Copyright Act.<sup>108</sup> Like a choreographic work, a routine-oriented athletic performance exhibits a planned and prepared routine, entertains an audience, and displays athletic abilities.<sup>109</sup>

There are several ways that this type of performance could be fixed in accordance with the requirements of the Copyright Act. The performance could be fixed on paper by notation, by videotape, by performing the dance itself, or by any combination of these.<sup>110</sup> In addition, a routine-oriented athletic performance would clear the “original work” hurdle quite easily.<sup>111</sup> A work is original if it possesses at least some minimal degree of creativity.<sup>112</sup> As stated in *Bleistein v. Donald Lithographing Co.*, “[I]f they command the interest of any public, they have a commercial value, [sic]—it would be bold to say

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106. 107 U.S.C. § 102(a)(4) (2012).

107. Wm. Tucker Griffith & Ekaterina Gordeeva, Note & Comment, *Beyond the Perfect Score: Protecting Routine-Oriented Athletic Performance with Copyright Law*, 30 CONN. L. REV. 675, 697 (1998).

108. See *id.* at 698; Weber, *supra* note 6, at 354–57.

109. Griffith & Gordeeva, *supra* note 107, at 698.

110. *Id.* at 710–11.

111. *Id.* at 711–12.

112. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).



that they have not an aesthetic and educational value, [sic]—and the taste of any public is not to be treated with contempt.”<sup>113</sup> It would be a hard argument to say that routine-oriented athletic performances do not command the interest of the public.<sup>114</sup> Two of the most popular routine-oriented sports, figure skating and gymnastics, have consistently generated substantial revenue and television broadcast ratings.<sup>115</sup> Finally, as previously stated, routine-oriented athletic performances seem to easily qualify as copyrightable subject matter as a choreographic work.<sup>116</sup>

Although several articles condone the use of copyright protection in routine-oriented athletic performances, these articles do not recommend extending copyright protection to team sports, such as soccer, basketball, baseball, hockey, and football.<sup>117</sup> These sports do not possess the essential creative and artistic processes often found in individual sports, such as figure skating, gymnastics, diving, and synchronized swimming.<sup>118</sup> Although it was suggested in *Baltimore Orioles* that the underlying sporting event could qualify for copyright protection, it seems unlikely that Congress considered individual athletic performance protectable under the Copyright Act.<sup>119</sup> In addition, Melville and David Nimmer’s treatise on copyright alluded to several problematic consequences of awarding copyright protection to team sport athletic events.<sup>120</sup> However, these criticisms do not apply to routine-oriented athletic performances.<sup>121</sup> This suggests that, although there are numerous criticisms about granting copyright

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113. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 252 (1903).

114. *See* Griffith & Gordeeva, *supra* note 107, at 712.

115. *See id.*; *see also* Neil Best, *NBC Releases Winter Olympics Ratings Data*, *NEWSDAY* (Feb. 25, 2014, 4:42 PM), <http://www.newsday.com/sports/olympics/nbc-releases-sochi-winter-olympics-ratings-data-1.7204742> [<https://perma.cc/697E-WTPR>] (stating that the telecast of Americans winning the ice dancing gold medal averaged 23.5 million viewers in the 2014 Sochi Winter Olympics); Keith Weir, *Figure Skating: Women’s Final to Prove TV Ratings Winner*, *REUTERS* (Feb. 17, 2014, 10:28 AM), <http://www.reuters.com/article/2014/02/17/us-olympics-figureskating-women-media-idUSBREA1G0WD20140217> [<https://perma.cc/MQ6N-6GX9>] (explaining that the two nights of the figure skating competition in the 1994 Winter Olympics rank among the twenty most watched sporting events in history and that the rest of the list consists of various Super Bowls throughout the years).

116. Griffith & Gordeeva, *supra* note 107, at 714.

117. *See id.* at 677.

118. *Id.* at 717–18.

119. *Id.* at 718.

120. *See id.* at 717–18; *see also* 1 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 2.09F (1996) (citing to the lack of authority when dealing with athletic events and copyright protection, the strained nature of categorizing team sport athletic events to a choreographic work, and the questionable lack of creativity found in team sports, such as baseball, as reasons that granting copyright protection for team sports would not be a recommended course of action).

121. Griffith & Gordeeva, *supra* note 107, at 719.

protection to team sports, copyright protection for routine-oriented individual sports would not only be permissible, but welcomed in the sports world.

Copyright protection for routine-oriented sports would not be without its faults, however. One potential problem would be identifying the author of an athletic performance. Because the Copyright Act does not define "author," this task would quickly become an issue when more than one person is involved in the creation of a work.<sup>122</sup> Because of the popularity of hiring coaches for routine oriented sports, it is unlikely that the athlete would create his or her entire performance by him or herself. He or she would most likely have outside assistance, whether from a coach or a partner. A second potential problem would be hindering competition. The owner of a copyright in a sports move would have considerable control over the use of the protected move.<sup>123</sup> For example, if a figure skater had previously copyrighted the triple axel, no other figure skater would have been able to use it in their performances. This would not only hinder competition, it would also lead to a decrease in the popularity of the sport, such as in the above example where the rest of the figure skating world would be prohibited from using the triple axel in the future.

## 2. Groundbreaking Moves and Plays: The T-Formation Story

Although most scholars believe that individual plays in team sports should not receive copyright protection, several scholars have stated that groundbreaking moves and plays, developed by coaches or other staff members, could qualify for copyright protection.<sup>124</sup> One commentator on the subject stated that scripted sports plays should receive intellectual property protection because they are "no different than other protected works such as theatrical plays, musical songs, or architectural blueprints."<sup>125</sup> While comparing a defensive formation to a theatrical play may be a stretch, affording copyright protection to scripted plays seems plausible. Several formations or strategies in football, both college and professional, have become so popular and so well known that even fans of the game know and understand them.<sup>126</sup>

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122. See 17 U.S.C. § 101.

123. Weber, *supra* note 6, at 331.

124. See Garcia, *supra* note 71, at 83; F. Scott Keiff et al., *It's Your Turn, But It's My Move: Intellectual Property Protection for Sports "Moves,"* 25 SANTA CLARA COMPUTER & HIGH TECH L.J. 765, 766 (2009).

125. Garcia, *supra* note 71, at 84.

126. See Michael Cassagrande, *How the No-Huddle Offense Changes the Way Alabama Communicates, Read the Opposition*, AL.COM (Sept. 28, 2014, 8:55 AM), <http://www.al.com/>

Awarding copyright protection to these moves would incentivize coaches and players to think of even more innovative and groundbreaking plays.<sup>127</sup>

Opponents argue that these plays do little to benefit our society, proving infringement would be difficult and costly, and these copyrights would greatly impair underlying competition in the future.<sup>128</sup> For example, if Clark Shaughnessy had copyrighted the “T Formation” that led Stanford to a 1941 Rose Bowl victory, it is likely that Stanford would have went on to win dozens of national championships, having a distinct advantage over other teams. Allowing copyright protection for groundbreaking plays and strategies would likely cause significant tension with the underlying goal of the Copyright Act—namely, to “Promote the progress of Science and the useful Arts.”<sup>129</sup>

### 3. Celebration Moves

While there has been little commentary regarding whether sports moves and plays can be copyrighted, there has been much talk concerning whether athletes could copyright their famous celebration moves. These celebrations are more similar to choreographed works than basic sports moves, such as jumping or catching.<sup>130</sup> In addition, like choreographed works, these celebrations possess the requisite amount of creativity and can be easily fixed (especially now that almost every major sporting event is televised).<sup>131</sup>

One convincing argument for allowing sports celebration moves to be copyrighted is their potential economic impact.<sup>132</sup> As evidenced through the market today, fans spend a large amount of money in an

alabamafootball/index.ssf/2014/09/how\_the\_no-huddle\_offenses\_cha.html [https://perma.cc/N4MN-YPHX] (explaining how the Alabama Crimson Tide uses the hurry up, no huddle offense that has taken over college football); Jon Johnston, *Football History: Clark Shaughnessy and the T Formation*, SB NATION (Apr. 12, 2007, 11:09 AM), <http://www.cornnation.com/2007/4/12/115720/782> [https://perma.cc/3G99-W9HD] (explaining the history and formation of the popular “T Formation” by then Stanford coach Clark Shaughnessy that changed football); WarRoom Eagle, *Gus Malzahn’s Hurry-Up, No-Huddle*, SB NATION (July 29, 2014, 12:00PM), <http://www.collegeandmagnolia.com/2014/7/29/5932783/hurry-up-no-huddle-gus-malzahn-auburn> [https://perma.cc/QD5M-4VPB] (explaining the underlying philosophy of Auburn’s hurry up, no huddle offense).

127. Garcia, *supra* note 71, at 84.

128. *Id.* at 85.

129. U.S. CONST. art. I, § 8, cl. 8 (“[Congress shall have the power] to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).

130. See Henry M. Abromson, Comment, *The Copyrightability of Sports Celebration Moves: Dance Fever or Just Plain Sick?*, 14 MARQ. SPORTS L. REV. 571, 572 (2004).

131. *Id.*

132. *Id.* at 574.

attempt to witness, and identify with, the moves of their favorite athlete.<sup>133</sup> As evidenced by this extravagant spending, there is a massive audience for marketing products associated with an athlete's on-field success and charisma.<sup>134</sup> Going hand-in-hand with this argument, obtaining a copyright on sports celebration moves gives athletes much-needed financial protection.<sup>135</sup> Because athletes' careers are normally quite short due to injuries or age, it is crucial that each athlete maximize his earning potential while he or she is still playing.<sup>136</sup> This newfound focus on an individual athlete's off-field success and personal branding leads to a unique opportunity for athletes to gain fame and financial security during their playing careers.<sup>137</sup>

Finally, allowing celebration moves to be copyrighted does not inhibit competition. While this is a concern for moves used in the course of the game,<sup>138</sup> celebration moves serve only as a tangential element to the game.<sup>139</sup> If several different football players use the same touchdown celebration, that would not impact the outcome of the game in the slightest. Therefore, the biggest issue with copyrighting sports moves—conflicting with the Copyright Act's underlying goal to promote the progress of science and useful arts—is not present when dealing with sports celebration moves.

### B. *"I'm Just Here So I Won't Get Fined": Trademark Protection for Professional Athlete Branding*

Professional athletes seem to understand the importance of protecting their brand.<sup>140</sup> By failing to take the proper steps necessary

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133. See *id.*; Melanie Hicken, *The High Cost of Being a Football Fan*, CNN MONEY (Sept. 7, 2013, 7:37 AM), <http://money.cnn.com/2013/09/07/pf/football-prices/> [https://perma.cc/J32Q-EQDG] (stating that an average couple attending a game as season ticket holders during 2013 football season spent roughly \$209—accounting for tickets, parking, and refreshments); Matt Yoder, *NFL Has 10 Most-Watched Sporting Events of 2013*, HUFFINGTON POST (July 22, 2013, 11:11 AM), [http://www.huffingtonpost.com/2013/07/22/nfl-tv-ratings-10-most-watched-2013\\_n\\_3634774.html](http://www.huffingtonpost.com/2013/07/22/nfl-tv-ratings-10-most-watched-2013_n_3634774.html) [https://perma.cc/7FZW-WC28] (explaining that every single one of the NFL playoff games from early 2013 made the cut of the top ten most watched sporting events of that year); *NFL Jacking Up Prices on Super Bowl Tickets*, USA TODAY (Sept. 17, 2013, 5:15 PM), <http://www.usatoday.com/story/sports/nfl/2013/09/17/super-bowl-tickets-price-increase/2828229/> [https://perma.cc/7C9A-CX7S] (stating that the most expensive tickets to the 2014 Super Bowl would be about \$2,600 each).

134. Abromson, *supra* note 130, at 575.

135. *Id.* at 575–76.

136. *Id.*

137. *Id.* at 589.

138. See *supra* notes 108–110, 123 and accompanying text.

139. Abromson, *supra* note 130, at 592.

140. See Darren Heitner, *Should Current NCAA Student Athletes File for Federal Trademark Protection?*, FORBES (Dec. 9, 2013 3:35PM), <http://www.forbes.com/sites/>

to protect his or her brand, an athlete, amateur or professional, could potentially lose out on millions of dollars.<sup>141</sup> Although the NCAA does not allow student athletes to use his or her name or likeness to promote any commercial product or service,<sup>142</sup> student athletes could attempt to open up more possibilities for trademarking their brand while they are in college. There has been much discussion concerning whether intent-to-use marks violate NCAA bylaws. Especially post-*O'Bannon*, it seems as if this avenue of intellectual property rights will soon expand for college athletes. In addition, trademarking touchdown dance celebrations is quickly becoming popular in the NFL and may soon trickle down to the college level.

### 1. Intent-to-Use Marks

Professional athletes can, and often do, obtain federally registered trademarks for those words or phrases they have coined or with which they are associated.<sup>143</sup> However, several college athletes have recently jumped on the trademark bandwagon using intent-to-use trademarks.<sup>144</sup> Under this type of trademark, the owner need not actually be using the mark.<sup>145</sup> The owner need only state that he or she has a bone fide intention to use the mark in commerce.<sup>146</sup> There are compelling reasons why the filing of an intent-to-use trademark application does not violate the current version of the NCAA bylaws.<sup>147</sup> These bylaws preclude a student athlete from using his or her name or likeness to promote any commercial product or service.<sup>148</sup> However, intending to do something in the future is not the same thing as actually doing that something.<sup>149</sup> Many people intend to do some physical activity each day, but often do not end up doing so. With an intent-to-use mark, the athlete would not *currently* be doing anything that would violate the NCAA bylaws.<sup>150</sup> In addition, the

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darrenheitner/2013/12/09/should-current-ncaa-student-athletes-file-for-federal-trademark-protection/ [https://perma.cc/V7SS-XS6K].

141. *Id.*

142. NAT'L COLLEGIATE ATHLETIC ASS'N, 2011-12 NCAA DIVISION I MANUAL 75 (2011) [hereinafter NCAA MANUAL].

143. Hilbert, *supra* note 5, at 120-21 (giving examples such as NBA player Jeremy Lin ("LINSANITY"), former NFL quarterback Tim Tebow ("TEBOWING"), and NBA legend Shaquille O'Neal ("SHAQTACULAR")).

144. *Id.* at 121.

145. *Id.* at 125.

146. *Id.*

147. *Id.* at 127

148. See NCAA MANUAL, *supra* note 142, at 75.

149. Hilbert, *supra* note 5, at 127.

150. *Id.* at 128.

college athlete would not be receiving a direct financial benefit by filing this application.<sup>151</sup> There would be no financial benefit until the mark is actually used in commerce.<sup>152</sup> Not only would the athlete not be receiving financial benefit, they would actually incur financial losses from filing fees and legal expenses.<sup>153</sup> Finally, an applicant receives no immediate benefit by simply filing an application.<sup>154</sup> Because an applicant has at least three years to use an intent-to-use mark in commerce, it is likely that the athlete's college career would be over due to graduating or turning professional.<sup>155</sup> Therefore, by filing an intent-to-use mark and waiting until his or her college career is over to use the mark, the student athlete would not be violating any NCAA bylaws.

Further, there can be dire consequences if athletes fail to register their trademark until they turn professional. For example, Anthony Davis, current basketball player for the New Orleans Pelicans, failed to file an intent-to-use trademark application for his mark, "FEAR THE BROW," until after his college career was over.<sup>156</sup> As a result, someone else filed an application for FEAR THE BROW before Davis had a chance.<sup>157</sup> Compare this with former University of North Carolina basketball star Harrison Barnes, who filed a trademark application for his nickname, "THE BLACK FALCON," almost a year before being selected in the NBA draft.<sup>158</sup> Once he obtains a federal trademark registration, he will enjoy trademark rights dating back to the date the application was filed.<sup>159</sup> Thus, allowing student athletes to file intent-to-use marks while still in college would minimize legal issues and help ensure that trademarks belong to their rightful owners.

Another option for protecting student athletes' brands would be to license the rights in his or her trademark to another individual until their eligibility expires.<sup>160</sup> Perhaps the most famous trademark in college football over the last few years, "Johnny Football," created

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151. *Id.* at 127.

152. *Id.* at 128.

153. *Trademarks*, U.S. PATENT & TRADEMARK OFFICE, <http://www.uspto.gov/inventors/trademarks.jsp#heading-5> [<https://perma.cc/A4V6-9DGN>] (explaining that a trademark application can cost anywhere between \$275 and \$375).

154. Hilbert, *supra* note 5, at 128.

155. *Id.*

156. *Id.* at 122–23.

157. *Id.*

158. *Id.*

159. *Id.*

160. *See* Winter, *supra* note 72.

quite a controversy.<sup>161</sup> In 2012, Johnny Manziel, former quarterback for the Texas A&M Aggies, licensed the “Johnny Football” nickname to a third party.<sup>162</sup> Under US law, qualifying “use” of a trademark may also be made by someone related to the owner, such as the owner’s licensee.<sup>163</sup> However, there is concern that this will open a loophole allowing student athletes to profit off their image and likeness during their college careers.<sup>164</sup> But, especially with the *O’Bannon* ruling opening up more rights for student athletes, it is likely that more college athletes will follow Manziel’s lead and attempt to claim trademark rights in their nicknames.<sup>165</sup>

## 2. The Superman and the Gronkowski Spike: Protecting Signature Touchdown Dances

Although touchdown dances seem trivial when looking at the big picture, they have become an integral part of professional football games. In the height of the era of marketing athletes as a brand, it is not surprising that athletes have already sought legal protection for this aspect of their brand.<sup>166</sup> Even if athletes have not already sought protection for their dance, the growing popularity of these dances may lead them to do so.<sup>167</sup>

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161. See *id.* (stating that the NCAA ruling allowing Johnny Manziel to keep damages in his trademark infringement lawsuit prompted a wave of commentary about this ruling creating a loophole that allows college athletes to profit off of their names and likenesses).

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. Crawford, *supra* note 73; Doug Farrar, *Tim Tebow Trademarks “Tebowing,”* YAHOO SPORTS (Oct. 20, 2012), <http://sports.yahoo.com/blogs/shutdown-corner/tim-tebow-patents-tebowing-162924518--nfl.html> [<https://perma.cc/9PTC-RU4R>] (commenting that this is the first time that a player in any sport has looked to trademark an on-field celebration); Glen Levy, *Colin Kaepernick is Trying to Trademark “Kaepernicking,”* TIME (Jan. 28, 2013), <http://newsfeed.time.com/2013/01/28/colin-kaepernick-would-like-to-trademark-kaepernicking/> [<https://perma.cc/8BAM-E79Z>] (stating that Colin Kaepernick, quarterback of the San Francisco 49ers, filed an intent-to-use mark concerning his touchdown dance celebration, which consists of kissing one’s own bicep).

167. See Avinash Kunnath, *Aaron Rodgers Best Touchdown Celebration: Championship Belt, Super Mario Jump, or Shoryuken?*, SB NATION (Feb. 17, 2011, 2:07 AM), <http://bayarea.sbnation.com/california-golden-bears/2011/2/17/1998750/aaron-rodders-best-touchdown-celebration-championship-belt-super-mario-jump-shoryuken> [<https://perma.cc/5BMA-N4EP>]; Jordan Schultz, *Rob Gronkowski and the NFL’s Best Touchdown Celebration*, HUFFINGTON POST (Aug. 19, 2013, 11:25 AM), [http://www.huffingtonpost.com/2013/08/15/rob-gronkowski\\_n\\_3498727.html](http://www.huffingtonpost.com/2013/08/15/rob-gronkowski_n_3498727.html) [<https://perma.cc/SX44-9AB4>] (explaining New England Patriots tight end Rob Gronkowski’s famous touchdown celebration, which entails him spiking the ball towards the ground); Ohm Youngmisuk, *Victor Cruz Considers Dance Sacred*, ESPN (Oct. 10, 2012, 9:11 PM), [http://espn.go.com/new-york/nfl/story/\\_/id/8487589/victor-cruz-new-york-giants-says-salsa-dance-imitation-insult](http://espn.go.com/new-york/nfl/story/_/id/8487589/victor-cruz-new-york-giants-says-salsa-dance-imitation-insult) [<https://perma.cc/6U7Q-PUZM>] (“Victor Cruz said if Carlos Rogers plans to do another salsa imitation dance, he will consider it an insult.”).

Although the possibility of trademark protection for dances has not been widely accepted, it seems as if “fanciful or suggestive dimensions of sporting behavior” should technically be eligible for trademark protection.<sup>168</sup> It is likely that dancing falls within the modern, broad understanding of Lanham Act trademark-eligible subject matter, and many NFL players could likely establish distinctiveness through showing secondary meaning and non-functionality.<sup>169</sup> In addition, it is likely that the player will be able to prove use in interstate commerce (especially if they have used the mark during a road game) and that there was a bona fide commercial use of the mark (if the player performed his dance in front of fans who paid for a ticket to the football game).<sup>170</sup>

Although there may be an issue with infringement if signature touchdown dances qualify for trademark protection,<sup>171</sup> there is an easy solution—permissible parody.<sup>172</sup> While there have been very few cases of athletes taking another player’s touchdown dance and using it as their own, it is quite common for athletes to use other players’ touchdown dances as a form of mocking them.<sup>173</sup> While not the most sportsman-like behavior, this would be easily excusable as a permissible parody.<sup>174</sup> NFL fans and owners understand and expect

168. Keiff et al., *supra* note 124, at 781–84.

169. Crawford, *supra* note 73, at 15–18.

170. *Id.* at 24–28.

171. See Chris Chase, *Colin Kaepernick Stole Cam Newton’s Touchdown Celebration, FOR THE WIN, USA TODAY* (Jan. 12, 2014, 3:16PM), <http://ftw.usatoday.com/2014/01/colin-kaepernick-superman-cam-newton> [<https://perma.cc/VE7X-GTFM>] (explaining how Colin Kaepernick stole Cam Newton’s famous Superman touchdown celebration); Brooke McLeod, *Could Tim Tebow Make you Pay to Pray?*, VAND. J. ENT. & TECH. L. (Oct. 30, 2012), <http://www.jetlaw.org/2012/10/30/could-tim-tebow-make-you-pay-to-pray/> [<https://perma.cc/HZT4-G7ZK>] (explaining that Tim Tebow’s trademark rights in “Tebowing” could set an interesting precedent in terms of religious expression).

172. Crawford, *supra* note 73, at 34 (“Trademark parody is an infringement defense that channels First Amendment norms and implicates the requirement of consumer confusion to bring an action under the Lanham Act.”).

173. See, e.g., Will Brinson, *Aaron Rodgers Pokes Fun at Stephen Tulloch’s Season-Ending Celebration*, CBS SPORTS (Dec. 10, 2014, 12:50 PM), <http://www.cbssports.com/nfl/eye-on-football/24878537/aaron-rodgers-pokes-fun-at-stephen-tullochs-season-ending-celebration> [<https://perma.cc/4XC2-LUCE>] (explaining how Detroit Lions linebacker Stephen Tulloch celebrated sacking Green Bay Packers quarterback Aaron Rodgers by doing Rodgers’ famous championship belt move); Scott Fowler, *Cam Newton Says He Will Respond to Kaepernick Mocking his Superman Celebration*, CHARLOTTE OBSERVER (Jan. 30, 2014), <http://scottfowlerobs.blogspot.com/2014/01/cam-newton-says-he-will-respond-to.html> [<https://perma.cc/QXE6-GU2J>]; Roger Sherman, *Emmanuel Sanders Mocks Ray Lewis’ Dance After Touchdown in Steelers-Ravens*, SB NATION (Nov. 28, 2013), <http://www.sbnation.com/nfl/2013/11/28/5156088/emmanuel-sanders-mocks-ray-lewis-dance-after-touchdown-in-steelers> [<https://perma.cc/2BMV-DDZ2>].

174. Crawford, *supra* note 73, at 34.



this form of smack talk; therefore, they understand the intention of the parody.<sup>175</sup>

Although the practice of trademarking touchdown dances and signature nicknames has already taken off in the NFL, it is unclear how this would work in the NCAA. For example, before becoming an NFL quarterback, Manziel used his famous money sign as a celebration at Texas A&M.<sup>176</sup> The sign became so famous that even now, with Manziel no longer on the team, the Texas A&M Aggies are taunted by the symbol.<sup>177</sup> Although Manziel did not trademark the symbol while in college, and the taunting would be allowed as a permissible parody, it will be interesting to see whether college athletes attempt to trademark their own signature dances. As another example, former LSU cornerback Tyrann Mathieu was dubbed the "Honey Badger" by the media.<sup>178</sup> However, the nickname almost caused Mathieu and LSU to land in hot water with the NCAA.<sup>179</sup> Soon after the nickname became popular, fans began selling items bearing the terms "Honey Badger," "TM7," Mathieu's name or image, and LSU indicia.<sup>180</sup> In order to not compromise Mathieu's eligibility, the LSU Compliance Officer issued cease and desist notices and published an advisory regarding Honey Badger paraphernalia.<sup>181</sup> If Mathieu had filed a trademark for his signature nickname, the sellers would have had to receive permission from Mathieu to use his phrase and the NCAA would not have needed to get involved.

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175. *Id.* at 36.

176. Rodger Sherman, *Explaining the Johnny Manziel Hand Sign Texas A&M's President Used*, SB NATION (Sept. 6, 2013, 9:00 AM), <http://www.sbnation.com/college-football/2013/9/6/4700258/johnny-manziel-texas-am-president-drake-ovo-hand-signal> [<https://perma.cc/4KY8-7P9F>].

177. Bill Hanstock, *West Virginia's QB Taunts Texas A&M with Johnny Manziel "Cashin' Out" Fingers*, SB NATION (Dec. 29, 2014, 2:59PM), <http://www.sbnation.com/2014/12/29/7463999/west-virginia-quarterback-johnny-manziel-money-fingers-liberty-bowl> [<https://perma.cc/VFT3-EGH8>].

178. Frank Schwab, *Tyrann Mathieu Discusses Reviving 'Honey Badger' Nickname, Whatever That Means*, YAHOO SPORTS (June 30, 2013, 10:59 AM), <http://sports.yahoo.com/blogs/nfl-shutdown-corner/tyrann-mathieu-discusses-reviving-honey-badger-nickname-whatever-145907461.html> [<https://perma.cc/5LBN-J9H6>].

179. Robyn Hagan Cain, *Honey Badger Does Care About a Cease and Desist Notice*, FINDLAW (Dec. 13, 2011 3:02PM), [http://blogs.findlaw.com/fifth\\_circuit/2011/12/honey-badger-does-care-about-a-cess-and-desist-notice.html](http://blogs.findlaw.com/fifth_circuit/2011/12/honey-badger-does-care-about-a-cess-and-desist-notice.html) [<https://perma.cc/QZ4Q-M2ZM>].

180. *Id.*

181. *Id.*

### III. GIVING CREDIT WHERE CREDIT IS DUE: HOW TO INCORPORATE INTELLECTUAL PROPERTY RIGHTS FOR STUDENT ATHLETES WITHIN THE NCAA'S CURRENT FRAMEWORK

In line with the result from the O'Bannon decision,<sup>182</sup> student athletes should be allowed to receive deferred compensation for copyrighted moves, trademarked names or celebrations, or any new developments in this area. This could be easily implemented within the NCAA bylaws, as this rule would benefit the NCAA as well as the student athlete. While the current ruling allows the schools to cap payments to athletes at a maximum of \$5,000 for each year of eligibility, the next logical step in the legal pipeline for Mr. O'Bannon is a separate lawsuit challenging this capping policy.<sup>183</sup> Based on this, this Note proposes a solution that divides the compensation earned by the athlete in half—half of the proceeds would be held in a deferred compensation account that the student athlete would obtain when he or she graduates or when his or her eligibility is completed (whichever occurs first), and half of the proceeds would go back to his or her school. While the student athlete would hold all ownership of the intellectual property right at issue—as to not complicate the impending transfer upon graduation—their status as a student athlete would require them to split all proceeds received, while in school, with their specific institution.

This solution would simultaneously benefit both the student athlete and the NCAA member school. Compensating the student athlete would promote growth in intellectual property rights for college athletics. It would also encourage players to stay in school until graduation and not be swayed by the promise of lucrative compensation from professional sports. In addition, many successful student athletes never turn professional.<sup>184</sup> This deferred compensation would allow them to have some funds to help them get on their feet, especially because, being a student athlete, it is unlikely they had time to get a part-time job in college. Finally, compensating

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182. Farrey, *supra* note 4 (“[E]stablishing that players have group rights in products that exploit their names, images and likenesses (NILs)—is expected to bolster other efforts to give players more money and power within the college sports structure.”).

183. *Id.*

184. See *Probability of Competing Beyond High School*, NCAA, <http://www.ncaa.org/about/resources/research/probability-competing-beyond-high-school> [<https://perma.cc/UJM9-UUN4>] (stating that, while there are more than 460,000 NCAA student athletes, fewer than 2 percent will go professional in their sports); see also Tony Manfred, *Here Are the Odds That Your Kid Becomes a Professional Athlete (Hint: They're Small)*, BUS. INSIDER (Feb. 10, 2012, 4:21 PM), <http://www.businessinsider.com/odds-college-athletes-become-professionals-2012-2> [<https://perma.cc/6GWN-J5GA>] (stating that only one sport, baseball, had more than 2 percent of NCAA players go pro).

the school would allow the school to use these funds to enhance their athletic programs and improve the overall game experience for fans. Although many schools still undertake these massive projects, this system would only encourage more of these developments to take place.<sup>185</sup>

Due to the recent ruling in *O'Bannon*, it is only a matter of time before student athletes begin asking for more rights currently available to professional athletes. In keeping with a deferred compensation system, student athletes can earn money while in school to be used after they graduate or after their eligibility expires. If desired, the NCAA can place restrictions on this money, whether those restrictions include penalties for less than ideal behavior or for poor grades. This would incentivize the athletes to be on their best behavior while, at the same time, giving the school a means to enforce and encourage good behavior. In a time where student athletes often get into trouble,<sup>186</sup> this would be a welcomed tool for coaches and

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185. See, e.g., Bob Ferrante, *Florida State Football: Plan in Place to Improve Doak Campbell Stadium*, BLEACHER REP. (Jun. 6, 2014), <http://bleacherreport.com/articles/2088369-florida-state-football-plan-in-place-to-improve-doak-campbell-stadium> [<https://perma.cc/3EGJ-5CH5>] (stating that Florida State University (FSU) administrators are working to fund a plan that will improve the look of FSU football, including dorms, locker rooms, coaches' offices, and Doak Campbell Stadium); Don Kausler, Jr., *Less Sunlight, Air in Bryant-Denny Stadium a Challenge for the Tide's Groundskeeper*, AL.COM (Aug. 29, 2010, 9:00 AM), [http://www.al.com/sports/index.ssf/2010/08/less\\_sunlight\\_air\\_in\\_bryant-de.html](http://www.al.com/sports/index.ssf/2010/08/less_sunlight_air_in_bryant-de.html) [<https://perma.cc/X9T6-DKLU>] (explaining that the latest expansion at Bryant-Denny Stadium has added room for 9,683 more fans at Alabama football games); Brandon Marcello, *Auburn Planning Jordan-Hare Stadium Upgrades, Largest Video Scoreboard in College Football*, AL.COM (Feb. 2, 2015, 1:47 PM), [http://www.al.com/auburnfootball/index.ssf/2015/02/auburn\\_planning\\_jordan-hare\\_st.html](http://www.al.com/auburnfootball/index.ssf/2015/02/auburn_planning_jordan-hare_st.html) (stating that Auburn University's Board of Trustees are debating construction of a 200-foot wide scoreboard, which is expected to cost an estimated \$13.9 million); Don Muret, *Kyle Field Renovation Jumps to \$485 million*, SPORTING NEWS (Dec. 26, 2014, 12:12 PM), <http://www.sportingnews.com/ncaa-football/story/2014-12-26/texas-am-kyle-field-demolition-video-stadium-renovation-populous-sec> [<https://perma.cc/4DN4-YBNR>] (stating that the total cost for the redevelopment of Texas A&M's Kyle Field has increased to \$485 million).

186. See Bryan Fischer, *Todd Gurley Suspended Indefinitely After Alleged Rules Violation*, NFL (Oct. 10, 2014, 6:20 PM), <http://www.nfl.com/news/story/0ap3000000408153/article/todd-gurley-suspended-indefinitely-after-alleged-rules-violation> [<https://perma.cc/Q2NS-83BA>]; Sam Kahn Jr., *Kenny Hill Suspended Two Games*, ESPN (Nov. 1, 2014, 6:19 PM), [http://espn.go.com/college-football/story/\\_/id/11800829/kenny-hill-texas-aggies-quarterback-suspended-two-games-violation-team-rules-athletic-department-policies](http://espn.go.com/college-football/story/_/id/11800829/kenny-hill-texas-aggies-quarterback-suspended-two-games-violation-team-rules-athletic-department-policies) [<https://perma.cc/68V7-QRS5>] (explaining how Texas A&M's quarterback was suspended for two games for an unspecified violation of team rules and athletic department policies); Kevin McGuire, *Florida QB Treon Harris Accused of Sexual Assault of Female*, COLLEGE FOOTBALL TALK (Oct. 6, 2014, 1:16 PM), <http://collegefootballtalk.nbcsports.com/2014/10/06/florida-qb-treon-harris-accused-of-sexual-assault-of-female/> [<https://perma.cc/3X5M-QJEF>]; Jared Shanker, *FSU to Sit Jameis Winston for Half*, ESPN (Sept. 18, 2014, 10:23 AM), [http://espn.go.com/college-football/story/\\_/id/11542412/florida-state-seminoles-qb-jameis-winston-suspended-first-half-game-clemson-tigers-shouting-obscene-phrase-public](http://espn.go.com/college-football/story/_/id/11542412/florida-state-seminoles-qb-jameis-winston-suspended-first-half-game-clemson-tigers-shouting-obscene-phrase-public) (explaining that Florida State University quarterback Jameis Winston would be suspended for the first half of the Clemson game for shouting an obscene sexual phrase on campus).

athletic directors to help discipline their players. This deferred compensation system also works in tandem with intent-to-use trademarks, which, as previously discussed, do not violate any NCAA bylaws.<sup>187</sup> For example, the intent-to-use mark filed by Harrison Barnes<sup>188</sup> uses the same deferred compensation system that was given the go ahead by District Judge Wilken in *O'Bannon*. Using the same system of deferred compensation would motivate the student athletes to remain in school and would also keep everyone on the same page regarding student athlete rights.

It is crucial that the compensation received is split between the student athlete and the school. Ed O'Bannon himself has suggested a similar compensation system for any trusts formed for compensation from images and likenesses.<sup>189</sup> NCAA member schools are consistently one of the main opponents in lawsuits involving student athlete rights.<sup>190</sup> Granting half of student athlete compensation for copyrighted moves or dances and trademarked names or celebrations would allow the school to truly see the benefit that would come with granting these rights to student athletes. In the ever-expanding business of college athletics,<sup>191</sup> it has become increasingly important for teams to be on the cutting edge of stadium development, team facilities, and fan experience.<sup>192</sup> With this extra money, schools will be able to implement these developments and changes more quickly and without as much help from their boosters. In addition, splitting the

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187. See *supra* Part II.B.1.

188. See Hilbert, *supra* note 5, at 122–23.

189. Caitlin Buckstaff, *Old Issue with a New Twist: Alternative to Compensating Athletes Through Player Trusts*, VAND. J. ENT. & TECH. L. (Sept. 5, 2012), <http://www.jetlaw.org/2012/09/05/old-issue-with-a-new-twist-alternative-to-compensating-collegiate-athletes-through-player-trusts/> [https://perma.cc/M4S5-D4LT] (“O'Bannon suggests a formula for distributing the player-generated NCAA revenue: (i) players receive up to half of the NCAA's broadcasting revenue and one-third of the NCAA video game revenue, and (ii) the remaining revenue after satisfying part (i) would be dispersed between the NCAA, conferences and universities.”).

190. See, e.g., Northwestern Univ., 362 NLRB No. 167 (2015).

191. Ted Miller, *College Athletics All Business Now*, ESPN (Apr. 3, 2014), [http://espn.go.com/college-football/story/\\_/id/10721331/college-athletics-now-business-tradition](http://espn.go.com/college-football/story/_/id/10721331/college-athletics-now-business-tradition) [https://perma.cc/J83V-WDNG] (“College football is now more about branding and business models and expanding a market.”); see also Alicia Jessop, *The Economics of College Football: A Look at the Top-25 Teams' Revenues and Expenses*, FORBES (Aug. 31, 2013, 10:32 AM), <http://www.forbes.com/sites/aliciajessop/2013/08/31/the-economics-of-college-football-a-look-at-the-top-25-teams-revenues-and-expenses/> [https://perma.cc/BTZ8-4JFN] (finding the total expenses and revenues of then number one ranked Alabama Crimson Tide football to be about \$37 million and \$82 million, respectively); NCAA Finances, USA TODAY (2014), <http://www.usatoday.com/sports/college/schools/finances/> [https://perma.cc/4CA2-3MRV] (finding University of Texas Athletics to have the highest total revenue, totaling almost \$166 million).

192. See Karen Weaver, *A Game Change: Paying for Big-Time College Sports*, CHANGE (Jan. 2011) <http://www.changemag.org/archives/back%20issues/2011/january-february%202011/game-change-full.html> [https://perma.cc/UC8S-86X4].

proceeds would allow the NCAA to keep their amateurism model intact, as the student athletes would still have fewer rights than professional athletes. This solution will allow the schools to benefit from these possible new student athlete rights and, therefore, will be much more amenable to allowing the expansion of student athlete rights.

Lastly, although the deferred compensation system stated in *O'Bannon* allows the NCAA to cap payments to student athletes at a minimum of \$5,000 per year of eligibility,<sup>193</sup> this Note proposes that this cap will only complicate the problem. With this compensation cap, the NCAA is essentially ensuring subsequent lawsuits.<sup>194</sup> By allowing unlimited compensation and distributing half to the student athlete's school, the NCAA will ensure fewer lawsuits concerning the matter and less opposition from schools concerning student athlete rights.

The NCAA should implement a deferred compensation system regarding student athlete intellectual property rights that splits the earnings fifty/fifty with the student athlete and the NCAA member school. This would allow the student athletes to receive some of the previously waived legal rights, while at the same time allowing the NCAA to keep its amateurism model intact by requiring the athlete to split any compensation received with their school.

## VI. CONCLUSION

Rights for student athletes have been rapidly expanding over the past few years and will continue to do so in the near future. As the *O'Bannon* decision expanded the rights of student athletes in regard to their image and likeness,<sup>195</sup> it is likely that student athletes will next challenge their lack of copyright or trademark rights. This would come in the form of seeking copyright protection for athletic moves and plays or celebrations and trademark protection for nicknames and signature touchdown dances. The intellectual property world and the NCAA should be prepared for what is about to come their way. Having an attainable solution in mind, one that

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193. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 1006 (N.D. Cal. 2014); see also Farrey, *supra* note 4.

194. See *id.*; see also Tom Farrey, *Jeffrey Kessler Files Against NCAA*, ESPN (Mar. 18, 2014, 6:09 PM), [http://espn.go.com/college-sports/story/\\_/id/10620388/anti-trust-claim-filed-jeffrey-kessler-challenges-ncaa-amateur-model](http://espn.go.com/college-sports/story/_/id/10620388/anti-trust-claim-filed-jeffrey-kessler-challenges-ncaa-amateur-model) [<https://perma.cc/H4MP-EQZL>] ("America is a capitalist nation with laws to protect the free market. We've fought wars and lost soldiers to defend our economic system. The NCAA's cap on players' compensation is both un-American and illegal.").

195. See *supra* Part II.

allows student athletes to obtain and be compensated for these intellectual property rights, but splits the earnings between the student athlete themselves (in a deferred compensation fund available after eligibility expires or after graduation, whichever occurs first) and the student athlete's school, will help these two parties reach an agreement that benefits both of them.

*Victoria Roessler\**

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