A SOLUTION FOR THE PAY FOR PLAY DELEMMMA OF COLLEGE ATHLETES:

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Over 80 percent of the total revenue received by the NCAA each year comes from television media rights agreements, which take advantage of the names, images and likeness of those who play the game as student-athletes. Yet there are NCAA rules that prohibit scholarship athletes from receiving as much as a dime from their own name ever. Despite several challenges by plaintiff players, the most recent federal case, O’Bannon v. NCAA rejected those claims, and holds that the NCAA rule that values student-athlete NIL as worthless does not violate antitrust law.

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A NOVEL COMPENSATION STRUCTURE TEHTERED TO AMATEURISM AND EDUCATION

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ROGER M. GROVES*1

Assume that a football team was so collectively incensed by the inaction of the university president that they vowed not to play again for the university until the president resigned or was fired by the university’s governing body. Indeed the president resigned and the events became a national story.

What if certain players or the team collectively then wrote a book, or created a TV documentary or recorded a song about their stand against the president? Should they be allowed to put the profits from the use of their own name, image and likeness into a trust fund to be paid out after they can no longer play for the university?2

TABLE OF CONTENTS

I. ................................................................................................................................................. 1
II. INTRODUCTION .......................................................................................................................... 4
III. CLARIFICATION OF LEGAL THEORIES IN OVERALL PAY FOR PLAY LITIGATION ...... 7
    A. Pay for Performance (i.e. the Scholarship) ............................................................................. 7
    B. Student-Athlete NIL .......................................................................................................... 9
    C. Distinguishing the Antitrust Claims from Right of Publicity Claims .............................. 11
IV. THE O’BANNON CASE SUMMARY ...................................................................................... 12
    A. Facts of Decisional Significance ....................................................................................... 12
    B. Affirmance of District Court on All but One Issue ........................................................... 13
(C) The Failed Alternative Is the Failure to Pass the “Virtually As Effective” Test ................. 14
V. THE CLARIFYING BASIS OF THE 9TH CIRCUIT DECISION AND DISPELLING POTENTIAL RELATED FALSE NARATIVES .............................................................................. 15
    A. Curing the Factual Inadequacy .......................................................................................... 16
    B. Eliminating Secondary Rationale .................................................................................... 17

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2 These athletes may seek to protect their product through common law and statutory intellectual property law, (e.g. copyrights and trademarks), or even through the creation of separate business entities as owners of that intellectual property. The NCCA rules, however, prohibit scholarship athletes from receiving any remuneration from their own name, image, and likeness. The issue would likely therefore be the same. See NCAA Bylaw 12.5.2.1.
C. Correcting the Impression that Cash Compensation is Inherently Fatal to an Antitrust Alternative to the NCAA Rule ................................................................. 17
   1. False Inherent Difference between Cash and Scholarships ........................................ 18
   2. Clarifying that the Foundation of the Decision is the Lack of a Cash Tether Link to Education Not the Pure Existence of Cash Itself ........................................................................ 19
D. The Slippery Slope ........................................................................................................... 20
E. The 9TH Circuit’s Limited Scope Provides Opportunities to Structure Conforming Alternative.... 21
VI. CREATING A RULE THAT COMPLIES WITH THE TETHERED “VIRTUALY AS EFFECTIVE” TEST ........................................................................................................ 21
   A. Threshold Eligibility for NIL Compensation during Undergraduate School .................. 22
      1. The Analogous Education Link VIA Northwestern University .................................... 22
      2. Continuing the Link to Amateurism Beyond Undergraduate School ......................... 24
VII. THE TETHER: POST-UNDERGRADUATE RECEIPT OF NIL BENEFITS WITH EDUCATIONAL LINKAGE ..................................................................................... 27
   A. What Constitutes Education-Related Expenses? .............................................................. 27
   B. The Proposed Rule ............................................................................................................ 29
VIII. PROPOSED RULE COMPLIANCE WITH THE “VIRTUALY AS EFFECTIVE” TEST ...... 30
      A. No Significant Increase in Cost to NCAA Member Institutions ..................................... 30
         1. Small vs. Large Payments ......................................................................................... 30
         [A Less Desirable Standard than the Proposed Rule Alternative] ..................................... 30
      B. Substantially Requirement ............................................................................................ 32
IX. METHOD OF NIL DISBURSEMENT ............................................................................... 33
   A. Options .......................................................................................................................... 33
   B. Pooled Funds through a Nonprofit Clearinghouse .......................................................... 34
   C. Direct Disbursement ....................................................................................................... 36
   D. NCAA Enforcement ......................................................................................................... 36
   E. Limitations on Endorsement and IP Development Activity ........................................... 37
X. NIL DENIAL THROUGH CLAWBACK PROVISIONS ....................................................... 37
   A. Holdbacks ....................................................................................................................... 38
   B. Clawbacks ...................................................................................................................... 38
      1. Rule and Statutory Models for NIL Clawback Provisions ............................................ 38
      2. Correlation with the SEC Proposed Rules ................................................................... 39
   C. Detailed Analysis of Clawback Factors ........................................................................... 40
      1. The Triggering Event ................................................................................................. 41
2. The Reporting Requirement ........................................................................................................... 41
3. The Scope of Persons Covered ................................................................................................... 43
4. Types of Compensation – Audit Determinations to Avoid Mischaracterizations ................. 44
5. Method of Recovery ..................................................................................................................... 45
6. Penalties ..................................................................................................................................... 46
7. Statute of Limitations .................................................................................................................. 46
D. Clawback Policy Considerations ............................................................................................... 47
E. NIL Income Includes Income From Other Intangible Assets. ...................................................... 48
XI. Rule Application ......................................................................................................................... 49
   A. The Braxton Miller Endorsement Illustration ........................................................................ 49
XII. CONCLUSION ............................................................................................................................... 50
II. INTRODUCTION

The above scenario is already partly true. The University of Missouri football team so vowed. The president did in fact resign. What is not yet a fact is whether the team or players will attempt to profit from the use of their own names, images in likeness (“NIL”) in telling their story.

In the above scenario, this author claims the answer depends on how those profits would be used. If the profits the players receive can be used for any purpose, the most recent case in America on this issue says “No”. If, however, the funds are to be used solely for educational purposes, this author says, “Yes”.

No case has faced the proposed trust fund use that will be detailed in this article. It is one level of solution to the pay for play conundrum that haunts college sports at the highest level and the court system at the federal level.

Another example based in reality and embellished by the not-yet-reality involves football players at The Ohio State University football (“OSU”). OSU won the National Championship in football for the 2014 season in dramatic story-book fashion. With 16-returning players for the 2015 season, OSU entered the 2015 season with more hype than any other Division-1 school in America. OSU was first unanimous preseason number 1 team in history.

With team accolades came high-octane publicity for its players. One such player was Braxton Miller. He had already been voted the Big Ten Player of the Year for two consecutive years in the position with the highest profile in the sport - quarterback. The first game of the 2015 season was the much anticipated rematch of OSU and Virginia Tech (because Tech beat OSU 35-21 the prior year).

In that nationally televised game, Miller evaded an opposing group of defenders with an eye-popping 360-degree spin. That spin move was repeatedly replayed on national networks, and was even the subject of an ESPN/YouTube video entitled “Sports Science: Braxton Miller’s Spin

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3 On or about November 7, 2015 the Missouri football team announced that they would not continue to practice or play football for the university unless the president of the university was terminated or resigned. See Roger M. Groves, The Missouri Football Team Standoff Is Why Athletics Is More Than A Game, Forbes’ SportsMoney, [http://onforb.es/1PkNwyx](http://onforb.es/1PkNwyx) November 9, 2015 (last visited November10, 2015).

4 The president, Tim Wolfe, announced his retirement within hours of the highly publicized boycott. The issue was a major news story across the nation. See Groves, November 9, 2015, Historic Resignation of University of Missouri President Sends A Signal to University Boards, [http://onforb.es/1GTUyra](http://onforb.es/1GTUyra) (last visited November 10, 2015)


Move.” In fact, the ESPN voice over stated Miller had “video game moves.” In scientifically describing the angular and linear velocity displayed by Miller in that run, the spin move was stated to have “a peak angular velocity of 676 degrees per second.” The announcer further stated: “That’s nearly fifty percent faster... than 2015 Top 10 draft pick Kevin White.” One can reasonably label that acrobatic maneuver as a “signature” move, attributable specifically to Miller; not for the science per se but because of the notoriety attributable to his skill and creativity.

Another OSU player of great notoriety entering the 2015 season was Ezekiel Elliott. He was a high school 110 meter high hurdle champion in the state of Missouri. As just a sophomore at Ohio State, he became the primary running back on the 2014 national championship team. Elliott entered the 2015 season as a preseason first-team All-American. During several games during the 2015 season, Elliott used his track skills to hurdle would-be defenders. His hurdling exploits came in nationally televised games, and produced at least 10 YouTube video clips of him topping bewildered opponents. Like Miller’s spin move, the hurdles could be directly identifiable with and attributable to “Zeke” Elliott.

Now imagine an entrepreneurial video game maker that develops sports video game that includes the Miller spin and the Elliott hurdle. The game has those acts performed by players with the same complexion, height, weight, body type and mannerisms of the real Miller and Elliott. Assume as fact that a video gamer would consider the depictions to be replicas of Miller and Elliott, with jerseys much like the OSU jerseys they wore in games. Assume as well that players Miller and Elliott are on scholarship to play football at OSU, and signed agreements with OSU to abide by rules established by the NCAA and incorporated by reference into their contractual

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8 The video was part of ESPN regular programming and included an analysis of Miller’s angular and linear velocity while running that play. See YouTube video: [http://youtu.be/b-h1g0CG8qI](http://youtu.be/b-h1g0CG8qI) (last visited October 27, 2015).

9 See YouTube video: [http://youtu.be/b-h1g0CG8qI](http://youtu.be/b-h1g0CG8qI) (last visited October 27, 2015).

10 See YouTube video: [http://youtu.be/b-h1g0CG8qI](http://youtu.be/b-h1g0CG8qI) (last visited October 27, 2015).

11 See video of the Missouri State Track and Field Finals, Stacie Elliott-Mohammad [https://www.youtube.com/watch?v=O9ScEY00w8](https://www.youtube.com/watch?v=O9ScEY00w8), August 25, 2013 (last visited November 14, 2015).


13 See one of the highlight films at YouTube [https://www.youtube.com/watch?v=xfKd_tWxg0w](https://www.youtube.com/watch?v=xfKd_tWxg0w) (last visited October 27, 2015. The hurdling notoriety did not lessen throughout the year. Many OSU games were nationally televised. This author still heard television commentators note the Elliott hurdles during a replay of an impressive Elliott run against Rutgers on October 24, 2015. OSU won the game 49-7.

14 Other collegiate athletes have also taken to hurdling, so arguably the Elliott hurdle may not be sufficiently distinctive to make a right of publicity claim solely because of the hurdle. This author’s facts included other identifiable attributes such as height, weight, jersey, physical appearance, completion. Video game makers purposefully made virtual identical depictions of the players in order to simulate the real game setting. See facts of Hart and Keller cases. The totality of those facts for Elliott to aligned with the Hart and Keller finding that the athlete had rights of publicity associated with the actions in the video game. The distinction between cases rooted in antitrust law (the O’Bannon line of cases) and the publicity rights cases (Hart and Keller) will be discussed in greater detail in Section II below.
relationship with OSU. Those rules prohibit a scholarship athlete from receiving compensation from his name, image and likeness (“NIL”).

This is comparable to the circumstances that gave rise to a lawsuit by a former scholarship athlete, Ed O’Bannon against the National Collegiate Athletic Association (“NCAA”) and business partner the Collegiate Licensing Company (“CLC”) among other lawsuits by other former scholarship athletes at NCAA institutions. The claim of those players was that their name, image and likeness (“NIL”) was usurped by the defendant NCAA and video game manufacturers without the permission of or compensation to the athletes.

What if Miller and Elliott wanted to either prevent the NCAA and the manufacturer from using their NIL without compensation at an agreed upon price? Would they lose their scholarship if they were paid “any” sum of money from the video games?

That is essentially the issue facing the federal courts in America. The most recent decision has come from the 9th Circuit Court of Appeals. In that case, O’Bannon v. NCAA, the Court rejected plaintiff’s entitlement to a payment of up to $5,000 for others’ use of the student athletes’ NIL.

But the 9th Circuit left some questions unanswered, and provided potential means for scholarship athletes to receive compensation from their own NIL. Those nuances for the subject matter of this article. The intent is to set forth circumstances where former NCAA scholarship athletes could actually prevail and be compensated for the use of their NIL under the rule of law established by the 9th Circuit. This author’s method includes the creation of new NCAA rules that are consistent with the 9th Circuit’s holding and directives, while still providing the opposite result for the plaintiffs.

The proposed scheme however has multi-layered safeguards against a player’s abuse of the NIL to be received. It is a scheme therefore designed to cure the most fundamental ill discovered by the 9th circuit. As stated by the Court:

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15 NCAA Bylaw 12.5.2.1.


20 The opinion identifies several factual deficiencies in the plaintiff’s proofs. Those will be discussed with particularity in the body of this article. The article will then introduce facts that may cause the 9th circuit to reach the opposite conclusion – allowing the player to retain NIL compensation. O’Bannon, 802 F. 3d 1049 (2015) 2015 U.S. App. LEXIS 17193, at *71-79.
“The difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap.”

Accordingly, the proposed scheme is designed to tether the receipt of NIL to amateurism and education.

III. CLARIFICATION OF LEGAL THEORIES IN OVERALL PAY FOR PLAY LITIGATION

There is a need to clarify issues when examining whether scholarship athletes should be paid by the school for which they perform athletic services. There are two forms of compensation at issue. And there are two primary legal theories in play. Both the forms of compensation and the legal theories are interrelated, yet distinct.

A. Pay for Performance (i.e. the Scholarship)

The legal terms are now settled in some respects regarding the relationship of student-athletes to their respective schools. A student athlete who receives a scholarship is now described in recent case law as receiving “compensation” in exchange for his services of playing the sport at the Division 1 level. In O’Bannon v. Nat’l Collegiate Athletic Assoc. the NCAA argued that antitrust law does not apply to NCAA affairs because the Sherman Act only applies to “restraint[s] of trade or commerce”; and that NCAA’s rules regarding scholarships are merely “eligibility rules” that are not designed to regulate commercial activity.

The Court devoted several pages of the opinion to emphatically conclude otherwise, calling the NCAA’s argument “not credible.” In the Court’s view, the relationship between student-athletes and the NCAA and member-institutions is “commerce”; and is not otherwise exempt by virtue of being part of higher education. In the Court’s words, “…the modern legal understanding of ‘commerce’ is broad ‘including almost every activity from which the actor anticipates economic gain.’” [citation omitted] (emphasis supplied)

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22 O’Bannon, 802 F. 3d 1049 (2015) 2015 U.S. App. LEXIS 17193, at *74. Division 1 is the highest level of the college sports based primarily on size.


The Court then clarified the term “actor” for the purpose of the above relationship.

That definition surely encompasses the transaction in which an athletic recruit exchanges his labor and NIL rights for the scholarship at a Division 1 school because it is undeniable that both parties to that exchange anticipate economic gain from it. (emphasis added). 28

The Court then distinguished cases that opined that certain NCAA rules were not commercial in nature. The basis of distinction was that some NCAA rules do not directly involve payments to players (e.g. credit hour requirements). The rules at issue concern actual “payments to athletic recruits.” 29 The Court then concluded that regardless of the amateurism foundation for the NCAA rules as whole,

“The intent behind the NCAA’s compensation rules does not change the fact that the exchange they regulate – labor for in-kind compensation – is the quintessentially commercial transaction.” 30

The Court’s repeated refrain that the student-athlete relationship with the NCAA institution is an exchange of labor for what it terms “in-kind compensation” leaves little doubt that scholarships are financial vehicles for schools to “pay for play”. The court’s careful distinction is that while some NCAA rules are not commercial in nature, the scholarships are just that – a means of exchanging economic gain.

This aspect of commercial activity is not to be conflated with the overall goal of maintaining and promoting amateurism. Many other NCAA rules are designed to that end, which the Court endorses as having a procompetitive effect and authorized under antitrust law. 31

It is important to clarify that while many rules promote amateurism, rules specifically relating to scholarships are fundamentally still an economic relationship of labor for compensation. It is therefore legally accurate to view the student-athlete’s receipt of a scholarship as “compensation” in a “commercial transaction” for antitrust purposes. 32

There could be a retort that scholarships only provide an opportunity to play without guarantees, and only after several other academic conditions are met. The conclusion then could be that scholarships there are something less than an actual right to play and be paid.

I suspect the 9th Circuit would echo its earlier statement that “the substance of the compensation rules matters far more than how they are styled.” 33 For the purpose of determining whether the NCAA “compensation rules” are going to be exempt from antitrust law, the Court would likely determine that even if scholarships only provide a conditional opportunity to play, that

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31 O’Bannon, at *37-38. The discussion of procompetitive effects such as the promotion of amateurism will be discussed below as part of the case summary.
opportunity is still borne out of the economic gain both parties seek from the relationship – that the scholarship is the economic exchange regardless of whether the student actually plays at some future time.

The intent of this section is to clarify that scholarship rules and the relationship of student-athlete to the institution is fundamentally and legally a pay-for-play scenario. The purpose of section (b) below is to separate the above type of compensation from the other type – income flowing from a student-athlete’s NIL.

B. Student-Athlete NIL

While the scholarship represents compensation for playing the sport, the athletes assert that they are owed compensation from another source. Money obviously is made from the sale of merchandise, from video games, from endorsements by advertisers and sponsors.\(^{34}\) That revenue is not from playing the sport but from the residual marketing of the sport. This leads to the less obvious legal question of whether student athletes should be entitled to that secondary source of income.

The NCAA certainly cannot credibly claim that a student-athlete does not have a name, image or likeness. Rather, the NCAA has asserted throughout the O’Bannon cases that the student-athlete’s NIL is to be valued at zero.\(^{35}\) The NCAA argument has been that the athlete cannot be rewarded economically from his NIL because the NCAA terminated its contracts with the video game maker. Accordingly, it argues, there is no lost income because the income source (the video game maker) was already cut off from generating the income.\(^{36}\) Similarly, the NCAA argues that its rules no longer permit video games to be created that use the athlete’s NIL, so there in effect is no value to that NIL.\(^{37}\)

The 9\(^{th}\) Circuit, and the lower federal district court rejected both of those contentions. As to the first claim, the Court noted that but for the NCAA’s rules, the video game manufacturers would be negotiating directly with student athletes.\(^{38}\) The court made the obvious observation that the student-athletes have NIL rights. If the NCAA rules did not exist, the implicit assumption is that the students could be paid by the manufacturer of videos who desired to use the NIL in its products.


The Court had a much easier time dismissing the other primary NCAA claim. The Court opined that just as the NCAA decided to sever the relationship with the video game manufacturer, it could renew those relationships. Impliedly, the Court realizes there is value in the player’s NIL that would provide compensation to those athletes if the NCAA rule did not exist.

Those Court findings are highlighted at this point in the article to establish the point that the NIL is a separate and distinct type of compensation from the scholarships. The scholarships are in payment for the chance to play the sport. The NIL rights are a reward for the value added to products. The NIL therefore is only a residual and accumulated value with compensation paid on that accumulated value. That is very different from being paid as you go for playing the sport.

This distinction is relevant to this article because the proposed rules asserted herein focus only on the NIL compensation, severed from the scholarship pay-for-play scheme. That distinction is also valuable because from a policy standpoint, the NCAA decision makers and public sentiment has been resistant to the pay-for-play concept. Even without empirical evidence or sophisticated surveys it appears to this author that the NCAA or legislators would more readily accept a new form of payment (NILs after the eligibility expired) than an increase in the pay-as-you-go scheme via scholarships.

The chart below summarizes simplistically these two types of compensation for scholarship athletes, the reason or basis for the compensation and the differences in when the compensation is received by the athlete.

<table>
<thead>
<tr>
<th>COMPENSATION TYPE</th>
<th>BASIS</th>
<th>RECEIPT TIMING</th>
</tr>
</thead>
<tbody>
<tr>
<td>Scholarship</td>
<td>Pay for Play</td>
<td>During College During Eligibility</td>
</tr>
<tr>
<td>Royalties, License Agreement Income</td>
<td>Pay For NIL</td>
<td>After College After Eligibility Expires</td>
</tr>
</tbody>
</table>
C. Distinguishing the Antitrust Claims from Right of Publicity Claims

Within the above NIL compensation claims, as opposed to the scholarship play-for-pay basis, there are two distinct legal theories utilized to justify the ability of a student athlete to receive NIL compensation and prevent others from using said NIL without his permission: Antitrust Claims and Right of Publicity claims.

Two primary federal cases involved claims of former collegiate athletes that they have a common law a right of publicity that trumps the First Amendment rights of video game makers; and that the right of publicity can prevent the video manufacturers from profiting from their NIL without permission.\(^{42}\)

The definition of the “right of publicity”, its legal source and purpose is very different from the antitrust claim, though they both were part of the athletes’ arsenal in protecting and asserting the right to profit from their NILs. The right of publicity is borne out of a “right to exploit commercially one’s celebrity is primarily an economic right.”\(^{43}\) Conversely, the antitrust lawsuits focus not on the individual’s rights but on prohibiting agreements that create an unreasonable restraint on trade, including price-fixing. \(O’Bannon\) primarily concerns the antitrust claims, specifically whether agreements between the NCAA and its member-institutions that deny student-athletes any of their own NIL is price fixing in violation of antitrust law.\(^{44}\)

The prior compensation chart is therefore supplemented below to reflect these two theories of the cases and how they fit within the overall structure of the athletes’ claims.

<table>
<thead>
<tr>
<th>COMPENSATION TYPE</th>
<th>BASIS</th>
<th>RECEIPT TIMING</th>
<th>LEGAL THEORY</th>
</tr>
</thead>
<tbody>
<tr>
<td>Scholarship</td>
<td>Pay for Play</td>
<td>During College During Eligibility</td>
<td>Antitrust</td>
</tr>
</tbody>
</table>


\(^{44}\) On August 8, 2014, Federal District Court Judge Claudia Wilken issued a ninety-nine page opinion holding that the NCAA cannot form agreements with its member institutions to prohibit players from receiving any money from their NILs while playing for the school. \(O’Bannon\) v. Nat’l Collegiate Athletic Assoc., No. C 09-3329 CW (N.D. Cal. Aug. 8, 2014), available at http://i.usatoday.net/sports//Investigations-and-enterprise/OBANNONRULING.pdf, archived at http://perma.cc/HA63-PKYE. This opinion was appealed to the 9th Circuit Court of Appeals. That court issued an opinion that is the primary case analyzed in this article.
These distinctions help explain why this loosely termed “pay for play” issue really is not so simplistic. The distinctions also aid in understanding the strategy of this author’s proposed solution to the problem of revenue sharing between student athletes and the institutions for whom they exchange labor for economic benefits. The strategy is to focus on the NIL, not the scholarship aspect of overall compensation. The above discussion is designed to clarify the difference both in the type of compensation and the legal theories associated therewith. The 9th Circuit decision in O’Bannon is most recent and provides a workable framework for the solution proposed herein.

IV. THE O’BANNON CASE SUMMARY

A. Facts of Decisional Significance

Ed O’Bannon is a former All-American Basketball player at UCLA who observed a replica of himself playing basketball in a video game produced by Electronic Arts (EA). Though EA’s depiction of O’Bannon closely resembled his physical and immutable attributes, jersey colors and number, O’Bannon neither consented to nor was compensated for EA’s use of his NIL. O’Bannon sued the NCAA and its licensing arm in federal district court. His claim was that the agreement between the NCAA and its member institutions preventing student-athletes from receiving any compensation from their own NIL was an unreasonable restraint of trade or commerce in violation of Section 1 of the Sherman Antitrust Act.

One of the preliminary rulings by the federal district court is particularly relevant to sports law jurisprudence and litigants in this area. The Court granted the plaintiffs’ motion for class action certification for all of the following categories of student-athletes:

(1) all current and former student-athletes

(2) who are competing on or have competed on D-1 men’s basketball or football teams

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45 O’Bannon, 2015 U.S. App. LEXIS 17193, at *14. EA is a very profitable software company that produced video games of near-identical recreations of well-known football and basketball players from the late 1990s until approximately 2013 when O’Bannon and similar litigation challenged the right of EA and the NCAA to profit without consent from the athletes’ NIL. O’Bannon, at 14.


(3) with NIL that “may be, or have been, included or could have been included…in game footage or in videogames licensed or sold by Defendants, or their co-conspirators or their licensees.” 48

Therefore, a final decision in O’Bannon could establish a new legal and economic relationship for the two most dominant collegiate sports, D-1 football and basketball. The proposed rules in this article are accordingly designed to be of practical value to current student athletes.

To avoid duplicative discussion, the federal district court holding and rationale will be discussed below as part of the Court of Appeals review. As will be explained below, the Court of Appeals decision mirrored the district court opinion on each of the issues and rulings with only one notable exception.

B. Affirmance of District Court on All but One Issue.

The 9th Circuit affirmed the District Court on the four following major legal principles:

- Antitrust laws apply to the NCAA.49
- The Rule of Reason is the standard for the antitrust analysis.50
- Under the Rule of Reason, the NCAA player compensation rules had:
  - significant anticompetitive effects within the college education market (fixing the price recruits pay for college), 51 but also
  - served procompetitive purposes of integrating academics with athletics by promoting amateurism. 52

49 The NCAA argued that its amateurism laws are valid “as a matter of law” since they do not regulate “commercial activity” as the antitrust laws are designed to regulate. O’Bannon, at 25-26. If that were the case, NCAA rules would be effectively exempt from antitrust laws. The court stated that argument “is not credible”. O’Bannon, 2015 U.S. App. LEXIS 17193, at *41. Rather, commerce for antitrust purposes includes “almost every activity from which the actor anticipates economic gain...[including] the transaction in which an athletic recruit exchanges his labor and NIL rights for a scholarship...because it is undeniable that both parties to that exchange anticipate economic from it.” Id. at 41. Since there is an economic exchange between the student-athlete and the school, commerce is involved which the antitrust laws regulate. The NCAA rules that limit that scholarship and NIL therefore are not exempt from antitrust law.
50 The Court admitted that the NCAA player compensation rule effectively sets the value of the student-athletes’ NIL at zero, which “in another context” would clearly be price fixing that violates a per se standard under Section 1 of the Sherman Act. Id at 43. The per se standard is used when the outcome is so obviously a violation no further analysis is required. BLACK’S LAW, CITE. In this case, the court stated that because “certain degree of cooperation is necessary” to amateur athletics, including rules that restrain commerce – i.e. regulating scholarships. Id. at 43. Accordingly the Court decided to use the in-depth analysis of the benefits and burdens of the NCAA rule. That standard is known as the Rule of Reason. Id. at 43.
51 The party challenging the rule, plaintiff O’Bannon in this case, has the burden of proof to establish the adverse effect of the rule, termed “anticompetitive effects”. Id at 43. The Court reached the rather obvious conclusion that a rule that treats a student-athlete’s NIL is “worth nothing” causes harm to the athlete’s economic gain that is part of antitrust “commerce”; as such the rule has an anticompetitive effect on commerce. Id. at 46-48.
52 When anticompetitive effects are established by the plaintiff, the burden shifts to the defendant to prove positive impacts of the disputed rule on commerce, termed “procompetitive effects.” Id. at 43-44. In this case, the
• One of the less restrictive alternatives to the harshness of the NCAA player compensation rule is to provide scholarships up to the full cost of attendance.\(^{53}\)

The District Court endorsed a second less-restrictive-alternative. The 9\(^{th}\) Circuit, however, disagreed. The discussion of that alternative is central to the thesis of this article. This author asserts that the plaintiffs’ fatal flaw in that second alternative can be cured by a new rule and facts consistent with that new rule. The flawed alternative is immediately below, followed by the proposed cure.

(C) The Failed Alternative Is the Failure to Pass the “Virtually As Effective” Test

The District Court faced the question of whether there is any other less restrictive alternative to NCAA rules that create a zero-value for student-athlete NIL. That Court’s answer was “yes” in the form of a $5,000 payment. The rationale leading to that conclusion starts with the plaintiff’s proposal, which the Court summarized as the following:

“The NCAA could permit its schools to hold in trust limited and equal shares of its licensing revenue to be distributed to its student-athletes after they leave college or their eligibility expires.”\(^{54}\)

The court took note of the failure of the NCAA and its key witnesses to reject or even discuss “a system of holding payments in trust…”\(^{55}\) The Court concluded that “none of these witnesses provided a persuasive explanation as to why the NCAA could not implement a trust payment system like the one Plaintiffs propose.”\(^{56}\)

The Court was also convinced that the plaintiffs’ alternative trust payment system was “narrowly tailored” since the trust would only be funded by NIL revenue. So presumably no other types of revenue could create an unearned windfall to the student-athlete. Under the Plaintiffs’ plan each student would have “equal shares.”\(^{57}\)

In essence, the District Court’s view was that the only narrow tailoring required was the assurance of only NIL revenue would enter the trust, only that NIL revenue would be disbursed to the student-athletes. The “link” was between the trust and the student-athletes.

\(^{53}\) Once the defendant proves procompetitive effects, the burden shifts back to the plaintiff to establish that there are alternatives to the rule that are substantially less restrictive and that still promote the same legitimate objectives of the rule. \textit{id.} at 44. The Court agreed with the District Court on one of two alternatives. The 9\(^{th}\) Circuit accepted the District Court finding that scholarships often did not cover the full cost of attendance, and that a rule increasing the institution’s payment to cover those costs furthers the legitimate objective of promoting amateurism. The Court said increasing the scholarship cap to cover the cost of attendance “would have virtually no impact on amateurism...[since it] “would be only going to cover their legitimate costs to attend school.” \textit{id.} at 54.

\(^{54}\) O’Bannon \textit{v.} NCAA, 7 F. Supp 3d 955, 1005 (2014)

\(^{55}\) The NCAA witness was Dr. Noll. O’Bannon \textit{v.} NCAA, 7 F. Supp 3d 955, 1006 (2014)


Upon review, the 9th Circuit Court of Appeals found that the “narrow tailored” plan instead lacked the necessary link between the NIL revenue received by the student-athletes and the way in which that revenue would be used. The 9th Circuit required that the use of the NIL revenue must be linked, or “tethered” to education-related amateurism. As most succinctly stated by the Court:

In our judgment…the district court clearly erred in finding it a viable alternative to allow students to receive NIL cash payments untethered to their education expenses.”

The graphic illustration of this difference is noted below:

<table>
<thead>
<tr>
<th>DISTRICT COURT LINK</th>
<th>COURT OF APPEALS LINK</th>
</tr>
</thead>
<tbody>
<tr>
<td>CORPUS</td>
<td>Revenue From Player NIL Only</td>
</tr>
<tr>
<td>Linked To</td>
<td>Athlete For Any Purpose</td>
</tr>
</tbody>
</table>

Linked to Athlete For Educational Purposes Only (i.e. Amateurism)

V. THE CLARIFYING BASIS OF THE 9TH CIRCUIT DECISION AND DISPELLING POTENTIAL RELATED FALSE NARRATIVES

In this author’s view, it defies common sense to conclude that the name, image, and likeness of nationally admired athletes have zero value when that NIL helps generate billions of dollars to the college sports market, the NCAA and the schools for which the players perform.

The current media rights agreement illustrates the vast sums accruing to the NCAA. The NCAA receives $10.8 billion from CBS Sports and Turner Broadcasting over a 14-year term. Two compelling facts underscore the value of student-athlete generated NIL.

- That $10.8 billion in revenue to the NCAA is for the rights to broadcast one event – The Division 1 Men’s Basketball Tournament.


59 O’Bannon, 802 F.3d 1049 (2015)

60 See the NCAA Official Website, finance/revenue page, http://www.ncaa.org/about/resources/finances/revenue (last visited November 15, 2015).
That the above media revenue has represented over 80% of all NCAA revenue each year since 2006.\textsuperscript{61}

The student-athletes that are most responsible for success of the tournament are a few star players on scholarship. Their signature moves, likeness, and names is part of the very NIL that the NCAA considers worthless.

The 9\textsuperscript{th} Circuit opinion allows that reality-defying finding of NIL worthlessness, albeit by default of an acceptable alternative.\textsuperscript{62} So importantly, the 9\textsuperscript{th} Circuit did not hold that it is legally impossible for student-athletes to ever receive NIL compensation. Rather, the Court was confined to the facts and legal theories presented to it. Those facts did not contain a link between the proposed alternative of paying athletes $5,000 to approximate the value of the NIL and amateurism. Instead, the 9\textsuperscript{th} Circuit only saw a “no-strings-attached” payment, with no link to education.

\textbf{A. Curing the Factual Inadequacy}

The 9\textsuperscript{th} Circuit found a number of fatal flaws in the evidence relied upon by the District Court. Of course, the District Court relied upon evidence submitted by the Plaintiffs. The 9\textsuperscript{th} Circuit’s factual failings are most apparent in the Court’s consideration of NCAA’s key expert witness, Neal Pilson.\textsuperscript{63} Pilson testified about when paying players “crosses the line” from amateurism to professional status. The Pilson response in part was that it was a matter of degree. In his words, “I haven’t thought about the line…I tell you that a million dollars would trouble me and $5,000 wouldn’t.”\textsuperscript{64}

It is no coincidence that the District Court concluded a $5,000 payment would qualify as a less restrictive alternative to a rule that valued the NIL at zero. The District Court found Pilson’s testimony key to selecting that particular sum.

The Court of Appeals, however, found Pilson’s testimony as factually insufficient to support the $5,000 payment. The 9\textsuperscript{th} Circuit characterized Pilson’s $5,000 declaration to be nothing more than a “casual comment” from Pilson.\textsuperscript{65} The Court then noted Pilson was not asked specifically to render an opinion on a particular sum as adequate compensation for student-athlete NIL.\textsuperscript{66}

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\textsuperscript{61} See the NCAA Official Website, finance/revenue page, http://www.ncaa.org/about/resources/finances/revenue (last visited November 15, 2015).

\textsuperscript{62} That is the effect of the Court’s rejection of the District Court’s allowance of up to $5,000 to compensate student-athletes for their NIL, the rejection being due to the lack of evidentiary support for that figure. O’Bannon, 802 F. 3d 1049 (2015) 2015 U.S. App. LEXIS 17193, at *81.


Accordingly, the 9th Circuit concluded Pilson’s proofs did not justify the District Court’s $5,000 NIL conclusion:

“…that he [Pilson] would not be troubled by $5,000 payments is simply not enough to support the district court’s far-reaching conclusion that paying students $5,000 per year will be as effective in preserving amateurism as the NCAA’s current policy.”

Since the 9th Circuit viewed the $5,000 figure as being based in a casual comment that was not the issue the key witness was called upon to decide, the Court characterized the Pilson testimony as “meager evidence in the record” and an “arbitrary limit imposed by the district court.”

The lack of evidentiary proofs was a point of emphasis. The 9th Circuit again chastised the district court for relying on “threadbare evidence” to find “that small payments of cash compensation will preserve amateurism as well as the NCAA’s rule forbidding such payments.”

This author envisions a time when the evidentiary proofs and facts add what O’Bannon lacked. Rather than an arbitrary basis for a fixed payment amount, this author’s plan does not attempt to fix a particular amount. The amount would be determined by the NIL generated. As long as the sums are linked to educational use, the antitrust requirements are satisfied – i.e. the education-linked NIL is an alternative that meets the procompetitive purpose of amateurism. That futuristic time is described in the next section.

B. Eliminating Secondary Rationale

A careful examination of the 9th Circuit opinion in O’Bannon reveals that the untethered nature of the NIL is the foundational rule that drives the conclusion. Many of these other points are built on the failure to link NIL income promoting amateurism. The author therefore groups those subsidiary aspects of the rationale together and addresses them below.

C. Correcting the Impression that Cash Compensation is Inherently Fatal to an Antitrust Alternative to the NCAA Rule

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69 O’Bannon, 802 F. 3d 1049 (2015) 2015 U.S. App. LEXIS 17193, at *76. The dissent vigorously disputed these characterizations of the sufficiency of evidence relied upon by the district court. O’Bannon, 802 F. 3d 1049 (2015) 2015 U.S. App. LEXIS 17193, at *86. The dissent was by the Chief Judge of the Court of Appeals. Judge Thomas stated the district court relied on four experts. Some of the facts elicited from their testimony included the fact that Division I tennis recruits are allowed to earn up to $10,000 per year in prize money from their sports performances prior to matriculation to the school. That money does not jeopardize the ability to receive scholarships. O’Bannon, 802 F. 3d 1049 (2015) 2015 U.S. App. LEXIS 17193, at *86-87.
The literal language of the 9th Circuit’s opinion appears to establish a bright line rule that *cash* compensation to student-athletes cannot be part of amateur athletics.\(^70\) The Court’s analysis of the district court error includes this passage:

> But in finding that paying students cash compensation would promote amateurism as effectively as not paying them, the district court ignored that not paying student-athletes is precisely what makes them amateurs.”(emphasis original).\(^71\)

In a companion footnote, the 9th Circuit highlighted a particular sentence from the extensive testimony of Neal Pilson. When discussing the difference between amateurs and professionals, the sentence was presumably powerful in its simplicity: “…if you’re paid for performance, you’re not an amateur.”\(^72\)

The 9th Circuit has one final statement that suggests an inimical relationship between cash compensation and amateur status. As a preface to discussing the insufficiency of evidence for the District Court’s acceptance of the $5,000 cash compensation, the 9th Circuit said, “Aside from the self-evident fact that paying students for their NIL rights will vitiolate their amateur status as collegiate athletes, the court relied upon threadbare evidence…”\(^73\)

This author’s response is two-fold. First, the court unwittingly created a false dichotomy. The context here involves whether an antitrust remedy exists to an NCAA rule. Specifically the question is whether eventual cash payments for appreciated value in one’s name, image and likeness is inherently illegal as a type of alternative to an NCAA rule that considers the NIL worthless. More importantly, does the cash remedy fail simply because it comes in the form of cash? The 9th Circuit, if its language is taken literally, says “yes”. This author respectfully disagrees, and asserts that the district court got it right. The reasons are noted below.

1. **False Inherent Difference between Cash and Scholarships**

In the above context, the author asserts that the 9th Circuit unwittingly failed to distinguish cash from *all* sources from cash solely from a student athlete’s NIL. The student-athlete NIL compensation is not from pay for play. It is not a quid pro quo payment for services as an exchange of value on a real time basis. Rather, it is a payout of an accumulated value, created over time based on one’s own name, image and likeness. Cash from scholarships is a pay-as-you-go form of cash. NIL is instead an asset from accumulated value. That is why the author spent significant time making distinctions in the form of compensation at the outset of this

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\(^70\) The author italicized “cash” to distinguish NIL cash payments from scholarships, a non-cash form of compensation for playing the sport. At this point in the opinion, the 9th Circuit had already agreed that an increase in scholarships up to the full cost of attendance was an acceptable alternative to the NCAA compensation rules under the Rule of Reason. In the Court’s words” “We hold that the district court did not clearly err in finding that raising the grant-in-aid cap would be a substantially less restrictive alternative...” O’Bannon, 802 F. 3d 1049 (2015) 2015 U.S. App. LEXIS 17193, at *69-70.


article. The 9th Circuit abhorrence to paying for performance is actually what the scholarship does, not what NIL payments do once the player is no longer on scholarship. 74

There is another reason why an emphasis on “cash” in a problematic basis for decision-making. Should the difference between “cash” as a form of payment for athletic services be so different than another form of payment for athletic services like, say, a scholarship? Both are tangible pieces of paper. Both entitle the recipient of the paper to benefits. In the case of a scholarship, the benefit is the ability to play for the school that year. Enter a third type of cash equivalence: an NIL payment. In that case, the benefit is the right to collect on accumulated value of intellectual property rights associated with appreciation in the athlete’s name, image and likeness.

If the Court therefore had just made the distinction between a pay-for-play type of cash and an accumulated NIL payment that is not pay-for-play, it could have easily concluded that an entire analysis should not hinge on whether a payment was a simply cash. Not all cash payments are invidiously cancer to amateurism. The scholarship is in direct exchange for actually playing the game in that year. That is much closer to being a pay-for-play circumstance amateurism abhors than an eventual payment for intellectual property appreciation over several years. A pay-for-play is antithetical to amateurism. An accumulated asset indirectly developed from playing does not interfere with the educational pursuit, and therefore is not inimical to amateurism.

2. Clarifying that the Foundation of the Decision is the Lack of a Cash Tether Link to Education Not the Pure Existence of Cash Itself

There are ample evidence from the 9th Circuit opinion that the underlying reason for rejecting the plaintiffs’ cash alternative was not just because it was cash, but rather because the cash was “untethered” to promoting amateurism. As noted earlier, the Court repeatedly noted that the plaintiffs’ alternative allowed the NIL cash to be used for any purpose, without being linked to amateurism. Like many cases, the structure of the opinion leaves the most important part of the rationale for last, and reiterates the underlying basis for the conclusion. At the end of 9th Circuit analysis, the court made its signature rule statement:

The difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap. [Citation omitted]. Once that line is crossed, we see no basis for returning to a rule of amateurism and no defined stopping point.75

74 The author realizes that at first blush article would appear to have contradictory discussions of the distinction between scholarships as compensation and NIL income as compensation. The early discussion focused on the difference between the two. This section concerns the commonality of the two. The reason these narratives are harmonious is because of context. It is important to separate the types of compensation to understand why there is acceptance of one form, but not necessary the other. They have different purposes and different rules apply. On the other hand, it is necessary to see the common elements of cash and scholarships to expose the fallacy of a claim that just because compensation is “cash” it can eliminate all antitrust remedies, especially when juxtaposed against the NCAA’s harsh price fixing rule that treats NIL as worthless.

The court therefore has two elements to the rule that created the fatal flaw. It was not just that cash was the method of compensation. It was also because that cash was untethered, without a link, to amateurism. That passage was reiterating the same point made at the beginning of the 9th Circuit’s analysis of this precise issue. The Court started that section with the same dual-basis for rejection: “In our judgement...the district court clearly erred in finding it a viable alternative to allow students to receive NIL cash payments untethered to their educational expenses.”

The continual use of this “cash-plus-untethered” rule as a guidepost for the overall discussion of this precise issue leads this author to conclude that the Court intended this two-pronged rule statement to be the controlling factor. The dual-pronged rule is the most accurate reading of the Court’s decision. It would be too shallow an analysis to simply pick out the literal statement out of context that “cash” is inherently inimical to amateurism. Indeed it would be a disservice to the otherwise thoughtful and analytically precise opinion to simply state that no remedy could ever exist to an admittedly harsh NCAA rule just because the remedy involved “cash”.

D. The Slippery Slope

The 9th Circuit states that a student-athlete’s receipt of “cash sums untethered to educational expenses” means amateurism ends and professionalism begins. The Court then stated: “Once that line is crossed, we see no basis for returning to a rule of amateurism and no defined stopping point.” (emphasis supplied).

In other words, where there are no strings attached to the NIL revenue, there is no way to keep the NIL payments tied to amateurism. That is restating the obvious. An athlete’s free to use funds for any purpose means the funds have no required nexus to educational expenses. Therefore, there is nothing stopping the student athlete from using the money to buy a house or car, just like any professional athlete uses money gained from his athletic services to buy a house or car.

This author’s proposal is that if the athlete can only receive the NIL with strings attached to education-related expenses, then the rest of the analysis performed by the 9th Circuit is unnecessary. There is no slippery slope because the tethered nature of the payments cabins in the NIL revenue so that it is only connected to amateurism.

The Court then forecasts the slippery slope in a follow-up sentence. Once payments start to be paid, “we have little doubt that plaintiffs will continue to challenge the arbitrary limit imposed by the district court until they have captured the full value of their NIL.”

The 9th Circuit recognizes that student-athlete NIL exists and that it has value. But it cannot be disbursed because of the arbitrariness of the $5,000 limit. That limit is deemed arbitrary the

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proofs did not support a link to amateurism. Again, the Court viewed Pilson’s testimony as “simply not enough” to show that a $5,000 payment “will be as effective in preserving amateurism as the NCAA’s current policy.”

This author’s proposal does not need to assert a particular sum to preserve amateurism. The link is not based on a small or large amount of funds. The important link is between the funds and a required use for education-related expenses. The proposed model rule accomplishes that link both at the time of receipt and upon any finding of improper use.

E. The 9th Circuit’s Limited Scope Provides Opportunities to Structure Conforming Alternative

The Court’s summation gave the leeway to create a better balance. The balance between promoting amateurism and meeting the requirements of antitrust law not to make agreements that unreasonably retain commerce. The court invites future parties to continue that quest in the summary paragraph’s first sentence: “By way of summation, we wish to emphasize the limited scope of the decision…and the remedy we have approved.” (emphasis supplied). The Court then reminded us that antitrust laws apply to the NCAA, and while the court has an obligation to endorse procompetitive effects, it also has the obligation “not [to] shy away from requiring the NCAA to play by the Sherman Act’s rules.”

If a future Court faced a truly educationally-tethered form of deferred compensation, the 9th Circuit’s admonition would likely lead that future court to authorize the less restrictive alternative rather than “shy away” from its antitrust obligation.

VI. Creating a Rule That Complies with the Tethered “Virtually As Effective” Test

The proposal generated in this article has three tiers: (1) a threshold eligibility for NIL compensation based on compliance with NCAA eligibility rules to receive and maintain a scholarship during the student-athlete’s playing days at the university. This is not an entitlement to receive NIL funds during undergraduate school. It is only a minimum standard with conditions to follow. (2) post-graduate entitlement to NIL funds based on certain contractual promises to only use the funds for educational expenses consistent with the 9th Circuit opinion; (3) after receipt of NIL compensation, the rule would authorize a recapture (i.e. clawback) of any NIL

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83 A forthcoming article by this author will focus on another alternative to the harsh NCAA rule of zero value. That alternative will detail a model rule for the Power 5 conferences, allowing them to compete with each other for the services of recruits using NIL compensation as a carrot in certain circumstances.
funds found to have been used for unauthorized non-educational purposes. Those aspects of the proposal will be discussed in detail below.

A. Threshold Eligibility for NIL Compensation during Undergraduate School

The first level of this author’s three-tiered model is to set a standard by which student athletes initially qualify for future NIL payments. In the author’s view, the NCAA’s rules for eligibility for scholarships already provide the requisite link between student-athletes and amateurism. It has been evolving its eligibility rules for scholarships on that basis since its inception in 1910.84

There is no need to reinvent the amateurism wheel now. A recent and insightful representation of those rules was on display when Northwestern University defended those rules against student-athletes who sought “employee” status before the National Labor Relations Board (“NLRB”).85 Although the plaintiffs’ request a different form of relief, both that case and the current scenario seek relief from NCAA amateurism rules and the defendants in both instances assert that those rules are the appropriate test for determining what students qualify as amateurs in athletics.

The discussion below therefore highlights the university’s arguments as to why those rules provide the test for amateurism while performing athletic services for the school. That is the threshold a student-athlete must meet before reaching level two entitlement to NIL funds after his playing career is over.

1. The Analogous Education Link VIA Northwestern University

Scholarship athletes at Northwestern brought the action before the NLRB seeking the right to be declared “employees” under the relevant Act governing private employers.86 Part of the test to make that determination includes whether the activities in question are predominately for educational purposes, or rather a primarily economic relationship.

Northwestern asserted that the relationship between student-athletes and the university was primarily educational. To support that conclusion, Northwestern made several arguments discussed below.

84 The NCAA was actually founded a few years earlier under the name of a 62-member Intercollegiate Athletic Association by educators and President Roosevelt to reform intercollegiate football rules and curb the spat of athletic-related deaths. 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).

85 The initial filing was heard by an administrative law judge, Regional Director Peter Sung Ohr. The case is Northwestern University v. College Athletes Players Association (CAPA), Case 13-RC-121359, March 26, 2014.

The university argued that eligibility rules justify the way to establish and maintain amateur status of the student athletes. The ALJ in the preliminary hearing cited many of those rules, including the following requirements in order to be eligible to play football at Northwestern:

1) Full-time student status
2) Make adequate progress toward a degree, with a growing percentage of completed credits each year toward the degree (e.g. 40% of degree credits entering the third year)
3) Maintain threshold grade point averages for each of those years.\(^87\)

At the NLRB hearing, the university also emphasized that the Student-Athlete Handbook stated that academics were to be prioritized over athletes, and consistent therewith, study tables, tutorial programs, prohibitions against missing more than five classes per quarter were instituted.\(^88\) The football players are also prohibited from being off campus 48 hours prior to final exams.

These eligibility related rules are acceptable to the NCAA and Northwestern University. In their collective view, a student-athlete who abides by these rules and others can retain his scholarship and maintain a preeminence of academics over athletics.\(^89\)

This author views those same assertions justify the claim that NIL compensation should be allowed as a threshold entitlement to NIL compensation. This author asserts that Northwestern, the NCAA and its other member-institutions cannot have it both ways, claiming the player relationship is predominately educational when fighting employee claims, while denying the link to education when trying to refuse the NIL rights that flow from the very same activity – playing football. Rather, if the eligibility rules determine amateurism during his playing days, the same rules are sufficient to establish amateurism for the same period for the purpose of a future entitlement to NIL compensation.

Stated differently, if the athlete complied with eligibility rules that were guideposts of amateurism while in school, then compliance with those rules at the successful completion of his amateur career ought to be enough for initial eligibility. The student has paid in full as he would for a certificate of deposit or savings bond. Once paid for in total, he is entitled to an accumulated appreciated sum upon maturity of the note subject to further conditions imposed on the student after undergraduate school. Those conditions will be discussed in Section XIII below.\(^90\)

\(^87\) Northwestern University and College Athletes Players Association (CAPA), 362 NLRB No. 167 (August 17, 2015), Appendix, p. 12. The full Board appended the hearing officer’s opinion to the end of its final decision. So the citation is to the Appendix of the final reported NLRB decision entered by the full Board, which is the appellate level within the NLRB. The full Board appended the hearing officer’s opinion to the end of its final decision.

\(^88\) Northwestern University and College Athletes Players Association (CAPA), 362 NLRB No. 167 (August 17, 2015), Appendix, p. 13.

\(^89\) There were many other facts elicited at hearing that shed doubt on the university’s claim that academics was prioritized over athletics. The students for example had 50-60 weeks of football during the season, beyond a typical 40-hour week by other university staff that were already clearly “employees”.

\(^90\) The NLRB adjudication is not directly relevant to this antitrust case. It was asked to determine whether the student-athletes qualify as “employees” under the National Labor Relations Act (“Act”), which has no impact on
2. **Continuing the Link to Amateurism Beyond Undergraduate School**

While this section concerns a link to amateurism while the student-athlete is playing for the school, this author’s theory is about a continuation of the link between athletics and amateurism beyond the playing career of the athlete. The theory is further discussed below.

To the credit of the university and the NCAA, there are several well-designed rules that on balance have achieved a high level of success in keeping student-athletes within an educationally-focused regimen. As established above, if the student-athlete did all that was required of him to maintain his eligibility while playing under scholarship, the link with amateurism is already there. He should have to do no more to also be in the initial pool of athletes that are eligible to receive NIL income after he no longer plays for the school.

Thus, after the athlete is no longer on scholarship, his right to receive NIL income should continue and only be discontinued if he fails to use NIL income in furtherance of educational purposes. Only then is the link to amateurism severed. And consequently only then would the former scholarship athlete lose his NIL income.

The 9th Circuit ruled that a less restrictive alternative to the NCAA compensation rule must promote education-related amateurism. It held that providing a $5,000 payment with no strings attached is not sufficiently linked to amateurism. In other words, though the plaintiff athlete maintained eligibility to receive his scholarship throughout his playing days at UCLA, he did not advocate a continued link of income to amateurism after his college tenure expired. It was only that lack of continued linkage that the 9th Circuit found fatal to his claim for NIL income.

The chart below is the simplistic illustration of this theory.

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whether an alternative to an NCAA rule prohibiting NIL compensation is permitted under antitrust law. The final decision of the NLRB was that it did not retain jurisdiction over the subject matter, since it was unconvinced that Congress intended to have the NLRB decide whether scholarship football players were employees of a university. Northwestern University and College Athletes Players Association (CAPA), 362 NLRB No. 167, p. 6 (August 17, 2015).

Northwestern University has already provided certain facts and arguments that evidence a linkage between athletics and education, albeit viewed through a different lens.\(^2\) Those facts and arguments can be summarized as follows:

This author’s assertion should not be confused with claims made by athletes in prior cases that a scholarship is a constitutionally protected “property right”. Several cases have rejected that claim and need not be reasserted here.\(^3\) Rather, this author merely adds facts that would change the result using the very same standard used by the 9\(^{th}\) Circuit Court of Appeals. This is therefore still an antitrust case, interpreting the NCAA rules as applied to NIL rights of student athletes.

Conversely stated, compliance with the NCAA eligibility rules should afford scholarship student athletes an initial eligibility, a threshold authorization to their NIL benefits. Failure to comply with eligibility rules while still in school would operate to deny those athletes the opportunity to receive NIL income.\(^4\)

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\(^2\) The issue in the Northwestern case was whether scholarship athletes in football met the requirements to be legally declared “employees” of the university, and therefore entitled to employee benefits associated with collective bargaining. One such benefit could be a right to receive NIL income. The issue posed in this article is whether those athletes can receive NIL income based not upon employment law, but through antitrust law. The O’Bannon opinion from the 9\(^{th}\) Circuit would be the gateway for the authorization. The required tethering of the sport to education could be an approved alternative to the existing NCAA rule.

receive the benefits of their NIL at a later time. The chart below provides the overview of the linkage from that vantage point.

The reason for this threshold requirement is that there must be compliance with the 9th Circuit’s holding that no NIL compensation is authorized if it is not linked (i.e. tethered to education-related amateurism). The requirement that a student-athlete maintain eligibility is wholly consistent with that opinion.

Such a threshold is also wholly consistent with the 9th Circuit’s rule that student athletes have the burden to establish that there is reasonable alternative to the harshness of the capped benefits at the cost of a scholarship, and zero value for NIL rights. The alternative is to use the existing eligibility rules as the requisite link to amateurism.

![Chart showing the linkage from Student-Athlete Non-Compliance to NCAA Eligibility Rules to Student-Athlete Compliance, leading to NIL Rights Denied and NIL Rights Maintained]

In sum, the athlete should be able to retain NIL income if he continues the link to amateurism both during and after he played for the school. The link to amateurism and education is maintained during this school tenure by maintaining his eligibility. The link is maintained after he leaves the school by fulfilling the new commitment to only use the NIL income for educational, and thus amateurism purposes. Nothing else should be required of him. The income would be sufficiently “tethered” to amateurism.

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96 It is worth reiterating that no viable distinction should be made between advancing “amateurism” and advancing the educational goals of the NCAA member institution. No party in any of the primary cases has advocated such a distinction and this author sees no reason create one.
VII. THE TETHER: POST-UNDERGRADUATE RECEIPT OF NIL BENEFITS WITH EDUCATIONAL LINKAGE

This article proposes a way to meet the requirements of the 9th Circuit opinion in O’Bannon. The article therefore does not discuss contentions that the 9th Circuit erred.97 The 9th Circuit clearly required that NIL compensation must be linked, i.e. tethered to “education expenses.”98 That begs the question: “What falls within the definition of education-related expenses? Once defined, the article suggests an NCAA rule that codifies that term. The resultant rule, in this author’s view, creates alternative to the current NCAA rule that meets the 9th Circuit’s requirements under the antitrust law’s Rule of Reason analysis.

We start with the definition of education expenses.

A. What Constitutes Education-Related Expenses?

As noted above, any alternative to the NCAA compensation rule must be “virtually as effective” as the existing NCAA rule at promoting amateurism. Therefore any payment of NIL must also promote amateurism as effectively as a rule that does not pay any NIL because currently no NIL income is distributed.

The author contends that payments made only for education-related expenses promote amateurism. The 9th Circuit said as much when announcing the need to “tether” the NIL payments to “their education expenses.”99

a. The following are representative examples of qualifying uses of NIL compensation for education expenses: (1) to complete undergraduate education, (2) to pursue post-undergraduate education, (3) to pursue trade schools, e.g. coding, paralegal institutions that are accredited within an industry, and (4) to pay off pre-existing student loan debts.

Beyond these traditionally acceptable education expenses, there are qualitative policy reasons why a liberal definition should be used. It is good public policy to allow the person who earned the income for education to share it with those he loves for the same purposes. The link to amateurism is preserved whether the former student-athlete is learning in academia or his spouse

97 One argument is that there is no need for a link to amateurism once the athlete is no longer an amateur. In some future case, I suspect there will be surveys admitted into evidence asserting that fans of college football will not lose interest in the sport just because a former player received money after playing for school. The 9th Circuit was not convinced based on the proofs on this occasion. But the quality of proofs may improve. Alternatively, another circuit may conclude that the 9th Circuit amateurism link post-amateur status was simply wrong; that post-amateur status receipt of NIL compensation does not harm to amateurism, and is therefore an acceptable alternative to the harshness of the NCAA rule.
or children are gaining that benefit. This society values the effort to pay for the education of others. Parents are allowed to borrow money for their children’s education consistent with that value.\textsuperscript{100} So “education expenses” should be broad enough to allow a player’s immediate family to benefit from the NIL compensation.

The expanded list should therefore include the following:

- Injury then loss of scholarship that creates a gap in payment for the remainder of undergraduate education.
- Application fees for scholarships and grants.
- Money beyond the school’s determination of the “full cost of attendance” if reasonably incurred or arising out of extraordinary circumstances (e.g., temporary transportation due to stolen vehicle, or housing due to fire or other Act of God, even mental health counseling if family tragedies that affect ability to remain in school or to function.
- Opportunity cost recapture. For example,
  - The school is put on probation and penalized severely without any wrongdoing by the NIL-requesting student-athletes, causing an involuntary loss of scholarship or other increased educational expense arising from or related to that circumstance.
  - A head coach leaves the program despite promises he would stay, and the athlete establishes detrimental reliance on those representations coupled with a lost scholarship by action of a new coach or other increases educational expenses arising or related to that circumstance.
- Repayment to third parties outside of the institution who provided loans or other educational benefits authorized by NCAA rules that assisted the student-athlete’s education while under scholarship at the institution.

Admittedly, the expanded list is subject to potential abuse. That potential could be minimized by inserting a cap on sums used for this purpose. There are also clawback provisions built into the rule, as will be discussed in Section IX (B) of this article.

Those expenses should include payments to cover the full cost of attendance just as the 9\textsuperscript{th} Circuit affirmed in O’Bannon.\textsuperscript{101} That covers therefore the expenses incidental to actual tuition, room and board, books and university fees.

Finally, the rule should address which entities have decision making authority. The NCAA is composed of its member-institutions. The internal decision may be that each individual D-1 institution has that authority, without a uniform NCAA rule. Or there could be some combination of authority based on certain stipulated factors. Certainly the severed Power 6 Conferences have an interest in maintaining their homogeneity without compromising their interests for the benefit of other D-1 institutions.


B. The Proposed Rule

Assuming that NIL compensation must be linked to amateurism, an NCAA rule could be established to do just that. Former scholarship athletes could be required, for example, to use those NIL funds to complete their education if they did not gain an undergraduate degree once their scholarship expired. That often occurs when the player is injured or misses too many practices, and the one-year scholarship is not renewed.102

The existing NCAA rules could be revised to establish clear linkage between receipt of post-play NIL and amateurism through education-related expenses. The amended rule could essentially state the following:

“Scholarship student athletes with no remaining eligibility, and who otherwise do not violate the clawback and recapture provisions of this agreement,103 will be eligible to receive their allocated portion of compensation from the use of their own name, image and likeness (“NIL”) only upon compliance with the following conditions:

2. That the student athlete remained in compliance with NCAA, conference, and institution rules regarding eligibility for grant-in-aid scholarships, as determined and certified by the scholarship-granting institution.
3. That the student athlete hereby agrees to receive NIL only if it uses that NIL for one or more of the qualifying purposes [noted above]:
4. That if the student athlete seeks to use its NIL funds for educational purposes not described in Section 2, a waiver may be requested under reasonable conditions established by the institution.
5. That the institution may establish reasonable annual audits of used funds, and that any misuse of said funds shall subject the former student-athlete to the clawback and recapture provisions of this agreement.

In sum, this proposed provision only authorized NIL compensation to former scholarship student-athletes if they complied with two requirements. First, they must have maintained eligibility for educational purposes during their amateur career. Second, they must thereafter use the NIL only for education-related purposes. A failure to do either means the former student-athlete is ineligible to receive NIL compensation.

A third aspect of the rule is that even upon initial eligibility or receipt of NIL compensation, the institution would be able to recapture any erroneous payment through clawback provisions. Those provisions are discussed in Section IX below.

102 See NCAA Bylaw, Article 15 at 2012-2013 NCAA Division I Manual §15.02.7 allowing one or multi-year renewable scholarships up to five years at the sole discretion of that institution. While injury alone is not a basis to deny the renewal of a scholarship, there are several other reasons that could easily be a pretext for injury-related denials. Northwestern players in the NLRB case provided several chilling examples. See Northwestern University v. College Athletes Players Association (CAPA), Case 13-RC-121359, March 26, 2014, p. 11-12.
103 This author’s proposed clawback and recapture provisions are discussed in detail in Section IX.
VIII. PROPOSED RULE COMPLIANCE WITH THE “VIRTUALLY AS EFFECTIVE” TEST

A. No Significant Increase in Cost to NCAA Member Institutions

The 9th Circuit has clearly required that NIL compensation alternatives to existing NCAA compensation rules must be “virtually as effective” at maintaining amateurism as the disputed NCAA rule to pass antitrust scrutiny.\(^{104}\) Any “significant” increase in cost would not be virtually as effective.\(^{105}\) The court did not provide any other parameters or subsidiary tests to determine what constitutes a “significant” added cost. Nor did the court articulate the appropriate method to use to make that determination. In a footnote, the court only states that the plaintiffs have the burden to prove the rule alternative does not significantly increase cost to the institution.\(^{106}\) As part of that same footnote the 9th Circuit reiterated that the plaintiffs’ failure, and the District Court’s error, was in the inadequacy of proofs. The 9th Circuit said, “…the district court here failed to make any findings about whether allowing schools to pay students NIL cash compensation will significantly increase costs to the NCAA and its member institutions.”\(^{107}\)

First, the author questions the underlying premise. Why should a right so fairly based in equity — allowing a person to profit from their own name — be limited or eliminated just because the exploiter may have to pay for the use? One of the core purposes of the law, in this author’s view, is to protect people’s interest in what they own.\(^{108}\) A rule that protects the user more than the owner of that right should be void as a matter of public policy. At least, the court’s equitable powers ought to be fully invoked and actively used in making these determinations.

1. Small vs. Large Payments
   [A Less Desirable Standard than the Proposed Rule Alternative]

Part of the District Court’s support for the plaintiffs’ $5,000 payment alternative was because it was a small payment. On review, the 9th Circuit focused on the testimony of Mr. Pilson. Particular attention was placed on his testimony about whether small sums received would be harmonious with amateurism where large sums would not. The 9th Circuit’s codification of that testimony was that Pilson “was asked only whether big payments would be worse than small

\(^{108}\) That is the underlying premise for why the related rights of publicity protect the NIL of student athletes against the First Amendment rights of NIL users. See Keller v. Electr. Arts, Inc., 724 F.3d 1268 (9th Cir. 2013) and Hart v. Electr. Arts, Inc., 717F.3d 141 (3d Cir. 2013).
payments [i.e. not when do small payments become large payments that cross the line of amateurism].”

Even in the 9th Circuit summation on this issue, the smallness of the payments was noted as a contributing factor of its rationale: “…it is clear the district court erred in concluding that small payments in deferred compensation are a substantially less restrictive alternative.”

The small vs large distinction is a false dichotomy. If there is adequate linkage between receipt of NIL and education-related amateurism there is no need to analyze whether the NIL compensation is large versus small.

The difficulty of creating a standard that uses the size of the payments to determine when amateurism ends and when professionalism begins becomes apparent when noting the 9th Circuit focus on “whether making small payments to student-athletes served the same procompetitive purposes as making no payments.” More particularly stated the issue as “whether paying these student-athletes will preserve amateurism and consumer demand.” (emphasis supplied).

With that codification of the issue, it is difficult to avoid having to answer the following question: “What amount of NIL compensation received after a player no longer plays for the university will cause consumers of D-1 college football to view the event as professional not amateur sport?

That inquiry would require attorneys on both sides of the issue to elicit evidentiary proofs about public perceptions. That, in turn, would inalterably force savvy lawyers to engage experts to use artificial intelligence to predict human behavior, also termed predictive analytics. The attempt would be to measure the intensity of emotion, sentiments, and attitudes among the vast array of fandom for the college education market.

Such evidence is indeed possible. A study to ascertain sentiments about tobacco relied upon 7362 tobacco-related Twitter posts. That study was admitted in court. As stated in a related article, “If words and Twitter posts can be analyzed for emotion and be accepted by a court as

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113 For discussion of predictive analytics to flag board of director behaviors that may lead to a breach of fiduciary duties, see Roger M. Groves, The Implications of a Jeopardy! Computer Named Watson: Beating Corporate Boards of Directors at Fiduciary Duties, 45 Creighton L. Rev, 377, 387 -394 (2012).
114 Roger M. Groves, Can I Profit From My Own Name And Likeness As A College Athlete?” The Predictive Legal Analytics Of A College Player’s Publicity Rights vs. First Amendment Rights Of Others, 48 Indiana L. Rev. 369, 407 (2015).
115 Roger M. Groves, Can I Profit From My Own Name And Likeness As A College Athlete?” The Predictive Legal Analytics Of A College Player’s Publicity Rights vs. First Amendment Rights Of Others, 48 Indiana L. Rev. 369, 407 (2015).
relevant evidence, then written surveys can be evidence of consumers’ emotions about an athlete.  

But what is possible is not always practical or workable as a standard for application in real cases. The context for this discussion is whether antitrust law should allow NIL compensation, and if so, under what circumstances. For that question, it is more workable to simply view whether the payments are used for educational purposes than to ascertain the sentiments of a broad college football market.

B. Substantially Requirement.

The 9th Circuit established one additional required element that must be met if a purported less restrictive alternative is to pass antitrust scrutiny under the Rule of Reason. The alternative must not only be less restrictive, it must be substantially less restrictive than the disputed restraint. The 9th Circuit concluded, “…we think it is clear the district court erred in concluding that small payments in deferred compensation are a substantially less restrictive alternative restraint.  

In noting this substantiality requirement, the Court was guided by two factors: (1) there was only “meager” evidence in the record supporting the $5,000 NIL compensation package and (2) the court should leave “ample latitude” to the NCAA to oversee the student-athletes.  

The author is not confined to the plaintiffs’ proofs. The testimony of experts before the O’Bannon district court brought the $5,000 guesstimate of an NIL payment that could still preserve amateurism in the mind of the college football fan base. The district court selected that figure only because what the testimony and evidence provided. That appears as the only reason why “small payments” were part of the alternative restraint.

This author envisions evidence from experts in future cases showing the consumer market for college football or basketball will be just as inclined to watch games if the players receive say $100,000 or higher figure as long as the receipt was still used for educational purposes and was only received after the college playing days are over.

If convincing evidence exists for large sums of NIL compensation with predictive analytics stating the intensity of the consumer market is unaffected, then the difference between the alternative (i.e. a large NIL payment) and the disputed NCAA rule, (zero payment) would indeed be substantial.

116 Roger M. Groves, Can I Profit From My Own Name And Likeness As A College Athlete? The Predictive Legal Analytics Of A College Player’s Publicity Rights vs. First Amendment Rights Of Others, 48 Indiana L. Rev. 369, 407 (2015).
119 O’Bannon, 802 F. 3d 1049 (2015) 2015 U.S. App. LEXIS 17193, at * 82. Language to that effect was indeed the precursor to the substantiality rule statement.
Additionally, a standard that is based on large or small characterizations without methods of computation is ambiguous and vague at best. Courts in many areas have refused to endorse rules that are vague or unworkable.\(^{120}\)

Instead, this author does not hinge the acceptance or rejection of a proposed alternative on the basis of smallness of the payments. It is a far more tangible evidence base to simply view whether the NIL compensation is used for educational purposes. This article suggests this approach, and views it as a more practical means to ascertain whether an NIL compensation alternative can be accepted under the Rule of Reason.

IX. METHOD OF NIL DISBURSEMENT

A. Options

The District Court endorsed plaintiff’s plan that the trust have equal shares for all the scholarship students. The 9\(^{th}\) Circuit rejected the plan, but not because of any inherent problem with a trust as a vehicle to deliver NIL compensation. The error, in the 9\(^{th}\) Circuit’s view, was the failure to link the NIL pay to amateurism.\(^{121}\)

There are other possibilities that were not proposed to the court, and therefore not ruled upon by the court. There are essentially three options subject to variations on the themes: (1) equal distributions to the entire team, scholarship and non-scholarship players included; (2) equal distributions to just scholarship student-athletes; (3) equal distributions to either scholarship athletes or jointly with non-scholarship athletes with some form of bonus for individual student athletes, or (4) only individual allocations of NIL.

In O’Bannon, the non-scholarship players were not included as plaintiffs because they were not subject to the disputed NCAA rule. The alleged illegal agreement prevents only scholarship players from the full economic benefit of the exchange of their labor for the scholarship. Without the scholarship there is no exchange value. An institution could nonetheless allocate funds to non-scholarship athletes. But the school would not be compelled to do so through antitrust law. This article therefore only addresses NIL compensation of scholarship athletes.

Under any of the options noted above, there will be NIL funds from numerous transactions. There are schemes utilized in analogous circumstances with far more transactions to account for than would be required in the college football market. Two of those schemes are discussed below.

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\(^{120}\) An obscure yet profound example is in the manner in which the United States Supreme Court decided how to best allow states to tax companies with business in more than one state without authorizing an unconstitutional tax on interstate commerce under the Commerce Clause. The court ultimately determined that a former standard should be overruled in part because it “has been stripped of any practical significance.” Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 288 (1977).

B. Pooled Funds through a Nonprofit Clearinghouse

As noted above, an institution has could distribute NIL compensation in any variety of ways. Under any of those schemes, this author would follow the model for collection and disbursement of income for another group of performers in the entertainment industry – musicians. The process used to collect performance royalties for millions of musical artists is an international clearinghouse.

The clearinghouse model is chosen because of its analogous purposes. It bears repeating that both athletes and musicians are performers. For those who doubt the connectivity of musical artists and athletes, consider the fact that rap mogul Jay Z has an entity that represents athletes and connects professional athletes with NIL opportunities. ESPN College Game Day regularly invites various musical artists, like highly successful hip-hop artist Rick Ross, and comedian Baylor grad Jeff Dunham to pick winning college teams for their fanatical sports viewership. Musicians already receive royalty income from other entities who take advantage of their talents. The athletes would collect NIL royalty payments as well. Given legal authorization, college student-athletes would do the same.

In the music industry there are two primary clearinghouses, American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music, Inc. (“BMI”). They are termed professional rights organizations. They are well-established and successful at revenue sharing, allocating song rights between copyright owners and performer royalties. The United States Supreme Court succinctly stated why ASCAP and BMI were created:

“[they] originated to make possible and to facilitate dealings between copyright owners and those who desire to use their music. Both organizations plainly involve concerted action in a large and active line of commerce…”

Saliently, both organizations were formed as clearinghouses for the same reasons that student-athletes would need such an entity – practical necessity.

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123 On November 7, 2015, Ross, one of the most business savvy and profitable rappers in modern years made his Alabama selection over LSU. http://www.sbnation.com/college-football/2015/11/7/9687984/rick-ross-college-gameday-alabama (last visited November 14, 2015). On November 14, 2015, Dunham’s ventriloquist “Walter” roasted each announcer on set and everyone else in sight and half the teams in the games he had to select – and was a big hit. https://twitter.com/CollegeGameDay (last visited November 14, 2015).

124 ASCAP and BMI are performing rights organizations the collect royalties for musicians, and are even working on establishing license agreements for internet music. See David Balaban, Music in the Digital Millennium: The Effects of Digital Millennium Copyright Act of 1998, 7 UCLA Ent. L. Rev. 311, 312 (1999-200)


In 1914, Victor Herbert and a handful of other composers organized ASCAP because those who performed copyrighted music for profit were so numerous and widespread, and most performances so fleeting, that as a practical matter it was impossible for the many individual copyright owners to negotiate with and license the users and to detect unauthorized uses. ASCAP was organized as a 'clearing-house' for copyright owners and users to solve these problems” associated with the licensing of music. [Citation Omitted] (emphasis supplied). 127

Student athletes are NIL owners akin to musicians as copyright owners. The clearinghouse would also license users and detect unauthorized uses, and structure payments.

Scale is important in any business plan. ASCAP alone handles licensing and distribution of royalties for 22,000 copyright owners, tracking the type of performance royalties and the amounts of use for their music.128 Even more impressive is the fact that “almost every domestic copyrighted composition is in the repertory either of ASCAP, with a total of three million compositions, or of BMI, with one million.”129

The scale of the collegiate athletic system is much smaller. Despite 115 D-1 programs, there are only about 250 student-athletes drafted in the NFL each year, about 7 percent of all the players.130 Since there is no historical data about NIL activity for student-athletes, presumably those with NFL potential are the most likely candidates for NIL value and compensation. A system of national royalty distribution involving college athletes would also be simpler than what already exists in the music industry.

Under the musical clearinghouse system, the user of the performance is required to report its use to the clearinghouse, and the clearinghouse thereafter makes payments to the musicians. That system has worked for over a century in the music industry. Ironically, they too have survived claims that they engaged in price-fixing agreements in violation of antitrust law.131

The fundamental relationships are sufficiently similar in the sports industry to make it a viable and tweakable method for athletes. The NIL clearinghouse would have sufficient independence from the institutions and the athletes. They would extract a fee from the transactions, not directly from just one of the parties.

There could be efficiency and audit-flags build into this structure. The entity would gain expertise in the types of NIL income, the forms uniformly used by the NCAA and member institutions.

ASCAP sends a royalty check to musicians. The NIL entity equivalent would do the same for athletes. They would issue appropriate tax statements for both the athletes and the institution, just as they do for the musician currently.

**C. Direct Disbursement**

A secondary process would essentially be an exemption for small de minimis payments. The intent is to allow small profit and not-for-profit entities to avoid unduly burdensome administrative costs and resources. The entity would just play the former student-athlete would directly.

There are two circumstances that necessitate a secondary method of NIL disbursement. First, the reality is that every user of the athlete’s NIL will not always comply with an NCAA-imposed requirement to report the athlete’s name, type of transaction and amount of income due the athlete in every instance.

Second, there would be a de minimis exception for smaller entities with minimal volume and amount of NIL transactions with former collegiate athletes. Similar to Securities and Exchange Commission rules that recognize the expensive and time consuming reporting requirements for the sale of securities is overly burdensome on small issuers, the clearinghouse administrative tasks should allow exemptions from reporting as well.

Accordingly, there should be a catch-all backup method for athletes to directly collect NIL from entities that either inadvertently forgot to connect with the clearinghouse, and from entities that fall within the exemption from clearinghouse registration.

**D. NCAA Enforcement**

For uniformity and consistency purposes, the NCAA would have to pass a rule to make each D-1 member institution contract with the clearinghouse. The clearinghouse would be contractually obligated to provide the collection and distribution services to each of the institutions on a uniform basis, with the same forms and process.

As will be discussed below, the athlete only receives a disbursement if he agrees to use those funds for educational-related purposes. The Clearinghouse would catalog the athlete contracts, with each member institution. This dual system of reporting would provide greater accountability and efficiency.

The clearinghouse would also facilitate the reimbursement of funds back to the university if the athlete failed to comply with the various educational uses for that income. That reimbursement scheme is detailed in Section IX that involves holdbacks and clawbacks to recapture NIL.
E. Limitations on Endorsement and IP Development Activity

The NCAA has another important role to play if an NIL system is to be effective. The NCAA has many gatekeeping roles, where rules are established to keep the athlete within appropriate parameters of amateurism.

Obviously, a rule does not promote education-related amateurism if it allows a player to spend more time in a recording studio or on a television commercial set than he does in school. The O’Bannon court also affirmed that a procompetitive effect is the goal of integrating the athlete into the greater academic environment. So a rule that allowed endorsements or other NIL and intellectual property pursuits for athletes must be placed in that context. That means the NIL must be compatible with the athletic-academic integration.

Based on the significant discretion given the NCAA in prior cases, it is likely the courts would allow the NCAA to decide with particularity the extent of the limitation on NIL activity. The O’Bannon case protects the NCAA promotion of amateurism from an antitrust challenge. The Courts have not spoken directly to whether the rights of publicity as a matter of law are free from major restriction. But it is already well established that student-athletes do not have a constitutional right to a scholarship. So a school would likely be able to withdraw a scholarship for a student-athlete’s failure to abide by the limits set on NIL development.

X. NIL DENIAL THROUGH CLAWBACK PROVISIONS

The macro view of NIL compensation is that the NCAA, its member institutions, and the video game manufacturers that profit from the players’ NIL are not all philosophically opposed to some form of revenue sharing with players. That is evidenced from the fact that video game makers have publicly admitted that but for the NCAA compensation preclusion, they would negotiate directly with the student athletes.

The NCAA has also capitulated at a level. It agreed to allow the Power 5 top level football conferences, termed Power 5, to engage in a form of quasi-free market economics. They have greater independence from other schools to decide how they will compete amongst themselves and possibly offer recruits compensation, even a share of NIL if they are so inclined, beyond a set amount of scholarship funds.

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133 See NCAA v. Yeo, 171 S.W.3d 863, 869 (2005) where the court rejected the claim that a student-athlete’s had a property interest in her reputation as a world-class athlete.
134 The D-1 Board of Directors adopted this restructuring by a 16-2 vote, headlined by the comment of its Chair, Nathan Hatch that the new structure will allow the power conferences to “focus more intently on the well-being of our student-athletes.” See Michelle Brutlag Hosick, Board Adopts New Division I Structure, August 7, 2014, NCAA
Perhaps all of those entities would be even more inclined to share if they had assurance that the NIL form of revenue sharing would open the door to rampart abuse. To avoid a slippery slope the model rule includes safeguards, known in the business sector as “holdbacks” and “clawbacks”. Holdbacks are preconditions before receipt by the intended recipient.\footnote{\textit{A holdback has been “an amount withheld from the full payment of a contract pending the other party’s completion of some obligation... BLACK’S LAW, p. 848. (10\textsuperscript{th} ed. 2004).}} Clawbacks, to the contrary, involves recovery or recapture of revenue or benefits already received by the intended recipient.\footnote{\textit{Clawback options are also defined as “The right to require repayment of funds earmarked for a specific purpose if the funds are disbursed...in a manner inconsistent with the document governing the specific purpose.” BLACK’S LAW, P. 306, (10\textsuperscript{th} ed. 2014). As will be discussed below, clawbacks are more extensively used in the securities arena.}}

The new standard would have provisions to prevent rewarding those who lost scholarships due to criminal activity or other violations of law, ethics, or policies of the university. The “clawback” or recapture provision is designed to prevent any form of unjust enrichment by a player.\footnote{\textit{Unjust enrichment is “A benefit obtained from another, not intended as a gift and not legally justifiable, for which the beneficiary must make restitution or recompense.” BLACK’S LAW, p. 1771. (10\textsuperscript{th} ed. 2014).}} Similar to other equity principles in the law, institutions should have flexible means to prevent rewarding those who do not deserve a benefit.\footnote{\textit{Equitable estoppel, for example, is a remedy “preventing one party from taking unfair advantage of another when, through false language or conduct, the person to be estopped has induced another person to act in a certain way, with the result that the other person has been injured in some way” BLACK’S LAW DICTIONARY p. 668 (10\textsuperscript{th} ed. 2004) [hereinafter BLACK’S LAW].}} The holdback and clawback/recapture provisions are discussed below.

\textbf{A. Holdbacks.}

The holdbacks in the model rule are the NCAA eligibility rules. A student-athlete must comply with those rules during undergraduate school in order to be eligible later for NIL compensation after he no longer plays for the school.

\textbf{B. Clawbacks}

There is a final assurance that the NIL would remain linked to education. Under this model rule, a former student-athlete who uses the NIL for any non-education purpose would have to return those funds to the scholarship-granting institution. This clawback scheme is the subject of this section

\textbf{1. Rule and Statutory Models for NIL Clawback Provisions}

There is a Securities and Exchange Commission proposed rule and three primary federal statutes that provide an ample basis for modeling an appropriate clawback provision. Those clawback model authorities (“CMAs”) are noted below:

\begin{footnotes}

\item[135] A holdback has been “an amount withheld from the full payment of a contract pending the other party’s completion of some obligation... BLACK’S LAW, p. 848. (10\textsuperscript{th} ed. 2004).
\item[136] Clawback options are also defined as “The right to require repayment of funds earmarked for a specific purpose if the funds are disbursed...in a manner inconsistent with the document governing the specific purpose.” BLACK’S LAW, P. 306, (10\textsuperscript{th} ed. 2014). As will be discussed below, clawbacks are more extensively used in the securities arena.
\item[137] Unjust enrichment is “A benefit obtained from another, not intended as a gift and not legally justifiable, for which the beneficiary must make restitution or recompense.” BLACK’S LAW, p. 1771. (10\textsuperscript{th} ed. 2014).
\item[138] Equitable estoppel, for example, is a remedy “preventing one party from taking unfair advantage of another when, through false language or conduct, the person to be estopped has induced another person to act in a certain way, with the result that the other person has been injured in some way” BLACK’S LAW DICTIONARY p. 668 (10\textsuperscript{th} ed. 2004) [hereinafter BLACK’S LAW].
\end{footnotes}
• Securities and Exchange Commission Proposed Rule 10D-1 (“Rule 10D-1”) \(^{139}\)
• Sarbanes-Oxley Act of 2002 (“SOA”) \(^{140}\)
• Dodd-Frank Wall Street Reform and Consumer Protection Act (“DFA”) \(^{141}\)
• Emergency Economic Stabilization Act of 2008 (“EESA”) \(^{142}\)

These CMAs have specific provisions that, when viewed in their entirety, address the primary issues that arise in any qualitative compensation recovery scheme. This author asserts that these federal authorities will foster the most comprehensive model rule for NIL compensation recapture to be published to date.

2. Correlation with the SEC Proposed Rules

Among the CMAs, SEC’s proposed rule 10D-1 illustrates as much as any other source the requisite correlation for modelling purposes. The Rule is a clawback method to curb unwarranted excess compensation. In this context, we are also dealing with potential excess compensation, only by athletes rather than corporate executives.

The SEC proposed rules, dated July 1, 2015, are designed to require companies to establish policies that “require executive officers to pay back incentive-based compensation that they were awarded erroneously.” \(^{143}\) This author views payments that athletes can receive after their playing days as also incentive-based as the more productive and popular they are during their career the more valuable their NIL. The incentive to play well and gain goodwill and a “brand” with the public translates into a greater NIL allocation. \(^{144}\) Obviously, the parallel too is that NIL

\(^{139}\) The proposed rules were released July 1, 2015 as 2015-136, and were designed to comply with the requirements of Section 954 the Dodd-Frank Wall Street Reform and Consumer Protection Act.

\(^{140}\) Section 304 (a) in total states: (a) Additional compensation prior to noncompliance with Commission financial reporting requirements. If an issuer is required to prepare an accounting restatement due to the material noncompliance of the issuer, as a result of misconduct, with any financial reporting requirement under the securities laws, the chief executive officer and chief financial officer of the issuer shall reimburse the issuer for—(1) any bonus or other incentive-based or equity-based compensation received by that person from the issuer during the 12-month period following the first public issuance or filing with the Commission (whichever first occurs) of the financial document embodying such financial reporting requirement; and(2) any profits realized from the sale of securities of the issuer during that 12-month period. Public Law 110-343, 12 USC 5201, at 122 STAT. 3765 (2008)


\(^{144}\) The question of just how to monetize NIL “value” and then allocate that value is beyond the scope of this article. There could be an equally shared allocation among all scholarship athletes, all athletes regardless of scholarships, or gradations based on performance criteria. Under all models there is an incentive to play well, gain notoriety and establish an individual brand. Even without a granular allocation among individual players, there is vitality in the old axiom that “a rising tide floats all boats”. More wins brings more value-added notoriety to the
awards, like executive compensation can be erroneously awarded and would need to be recaptured. The cycle of NIL payments is graphically illustrated below.

C. Detailed Analysis of Clawback Factors

The above four sources lead this author to incorporate the following factors in creating a clawback scheme:145

- A Triggering Event
- Scope of Persons Covered
- Types of Compensation
- Method of Recovery
- Penalties
- Statute of Limitations

Each of these factors will be customized for an NIL clawback provision. That provision is envisioned to be incorporated into NCAA rules, and incorporated by reference into each NCAA member-institution. The narrative discussion below will be followed by a chart comparison of the proposed model rule.

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145 Some of these factors were used in analyzing the same federal statutes by Joseph Bachelder, as modified by the same author in an online publication of Harvard Law School, Clawbacks Under Dodd-Frank and Other Federal Statutes, http://corpgov.law.harvard.edu/2011/06/09 (last visited October 23, 2015).
1. The Triggering Event

Obviously, there must be some act by the recipient of compensation that authorizes (i.e. “triggers”) the recapture of that compensation by the institution.

The CMAs all have substantially similar terms to describe the error that would trigger the clawback. The SEC’s Proposed Rule 10D-1 activates the clawback recovery upon a “material error” by current and former executive officers of public corporations. The SOA requires “misconduct [leading to] material noncompliance of the issue...with any financial reporting requirement under the securities laws...” Under the EESA, the clawback is triggered by “materially inaccurate” statements “of earnings, revenues, gains or other criteria.

The CMAs all have a dual requirements: a term for the transgression (e.g. material error, misconduct, or material inaccuracy) and a document to which the transgression relates. The corporate executives and their public corporations have financial reporting requirements imposed by the SEC and enforced through various securities laws.

Regarding terms that define a triggering event, the substance rather than the label is most important. So to minimize any unintended loopholes the trigger can include all of those terms. A former student-athlete’s act can be any of the above, i.e. a material error, misconduct, or material inaccuracy in the reporting of NIL income.

2. The Reporting Requirement

As detailed above the model’s primary collection process is to establish a clearinghouse. That clearinghouse would collect NIL compensation from users of the NIL much like ASCAP and BMI collect sums from users of musicians and distributes performance royalties to the musicians or copyright owners.

The secondary collection method is to have small scale entities pay NIL compensation directly to the athlete. In the college NIL context, corporate-styled financial reporting requirements would likely be unduly burdensome for former college athletes. Most of them would be 21 to 22 years old.

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146 80 FR 41144, at *1446. See also 17 CFR Parts 229, 240, 249, and 274 (Vol 80, No. 134 (July 14, 2015) and page 2 of public release 2015-136.
147 §304 (a) of the SOA states in its entirety: “If an issuer is required to prepare an accounting restatement due to the material noncompliance of the issuer, as a result of misconduct, with any financial reporting requirement under the securities laws, the chief executive officer and chief financial officer of the issuer shall reimburse the issuer for— (1) any bonus or other incentive-based or equity-based compensation received by that person from the issuer during the 12-month period following the first public issuance or filing with the Commission (whichever first occurs) of the financial document embodying such financial reporting requirement; and (2) any profits realized from the sale of securities of the issuer during that 12-month period. 15 U.S. Code § 7243 (a)(1).
old with no practical financial reporting experience or the financial acumen to comply with documents that comply with Generally Accepted Accounting Principles (“GAAP”). It would therefore be disingenuous to impose requirements on all of the athlete that may be beyond their general capability to meet. Nor would it be wise to assume that most have the acumen to hire competent experts, though a few professional athletes may have the money to do so.

There is a better solution for the majority of the NIL fund recipients. The following items provide a more appropriate reporting obligation.

- the athlete’s individual federal income tax returns (1040 plus Schedule C if appropriate),
- any business entity tax return, and
- a separate document with categories for types of compensation, the sources of the NIL income, the amount and date received or earned (e.g. commercials showing a video clips of a signature move from which payments are received by the athlete from the advertiser).

The items should be reported to the institution, and provide enough information for audits and record keeping for the institution and the athlete.

The third item requires more discussion.

a) Federal Tax Form Cognate with Institution Form

As noted above the transgression or error relates to an error in filing accurate NIL income. If the amount was from a royalty payment from the institution(s), the institution would have already sent a tax statement to the athlete as with Form 1099-MISC just like any entity would send that form to non-employees such as independent contractors. And like other recipients of 1099 income, the player would be required to report that income on the applicable federal income tax return.

And just as already exists in our federal tax system, the 1099 process allows a method for the IRS, and in this case the NCAA and its member institutions to track the failure to declare or the underreporting of that income. Obviously, the IRS could perform its own audits and be a source for the institution to discover failure to report or underreport NIL income.

A former scholarship student-athlete would be required to report to the IRS any NIL income as would any other taxpayer receiving royalties. The current definition of “gross income” is certainly a broad umbrella and the former student athlete recipient of NIL fits comfortably under it. There is no current exemption or exclusion for NIL income. The trigger as proposed in this

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150 Section 61(a) of the internal revenue code defines “gross income” as all income from whatever source derived, including but not limited to…(1) compensation for services, including fees, gross income…income derived from business; royalties…” I.R.C. § 61(a)(1)(2)(6). There are no exclusions from gross income specifically for NIL of
article does not advocate amending the internal revenue code to make post-playing NIL income exempt from taxation or excluded from the definition of taxable gross income.\footnote{There are no exclusions from gross income specifically for NIL of former student athletes. There are specific exclusions for such items as income from the discharge of indebtedness. See I.R.C. § 108 (a). NIL income is not included. If the IRS has intended the exemption or exclusion for NIL income it would have already so stated.}

The filing of a separate document with the institution whenever institution-sourced NIL revenue is generated is an extra administration burden. But if a form is well-drafted and avoids unnecessary clutter, it can be just a few pages and not overly burdensome.

In the same interest of administrative ease and uniformity, the NCAA could generate and distribute this form to all of its member institutions, based upon a vote of those member-institutions. Since the NIL compensation is likely to be generated from the Power 5 Conference schools, the roll out of the forms and scheme would logically be to those schools. The amounts may be so de minimis at any other level that the effort may not be worth the cost.

\section*{3. The Scope of Persons Covered}

A well-drafted clawback rule should clearly identify those who are covered by the rule. The obvious parties are the former student athlete who receives NIL compensation and the institution that granted the scholarship. Less obvious are several other entities. Some are potential recipients of the athlete’s NIL income. Others are potential recipients of the recovered or recaptured clawback NIL.

Those less obvious entities are noted below categorized in the same matter as described above.

<table>
<thead>
<tr>
<th>Entity</th>
<th>NIL Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agent or Assigns of the Athlete on Athlete’s Behalf</td>
<td>NIL Income Recipient</td>
</tr>
<tr>
<td>Company of which Athlete has a “Substantial” Financial Interest</td>
<td>NIL Income Recipient</td>
</tr>
<tr>
<td>Video Game Manufacturers or other Content Creators Generating Revenue From Athlete’s NIL</td>
<td>NIL Income Recipient</td>
</tr>
<tr>
<td>NCAA</td>
<td>NIL Clawback Recipient</td>
</tr>
<tr>
<td>Top 5 Conference in which Athlete Played</td>
<td>NIL Clawback Recipient</td>
</tr>
</tbody>
</table>

A well-drafted rule minimizes loopholes that can generate unintended consequences. A former student athlete should not be able to avoid reporting NIL income by simply transferring the income to any of the above NIL Income Recipients. Without such a broad scope of covered entities, a player could simply agree with a video game maker, orally or in writing, to allow the

\begin{footnotesize}
\footnotetext{There are specific exclusions for such items as income from the discharge of indebtedness. See I.R.C. § 108 (a). NIL income is not included. If the IRS has intended the exemption or exclusion for NIL income it would have already so stated.}
\end{footnotesize}
entity to report the income and then have a side contract to deliver equivalent goods or services to the athlete as a bartered exchange of value without the former player reporting any NIL to the institution. The model rule includes such service providers within the reporting structure. As a result a loophole is closed. Similarly, of course, any entity that fraudulently transfers NIL income to avoid clawback recapture would be covered and subject to whatever penalties imposed under the rule. 152

Clawback case law already supports piercing the entity labels to avoid artificial loopholes. In SEC v. Jenkins, the court analyzed whether clawback provisions can apply to the issuer of securities even without “misconduct” of the corporate executives. 153 The court held that “text and structure of Section 304 require only the misconduct of the issuer, but do not necessarily require the specific misconduct of the issuer's CEO or CFO”. 154 In noting the “text and structure” of the clawback provision, the court was mindful not to create an unwitting exemption due to a lack of misconduct by the CEO or CFO.

The court again applied this principle when it rejected the argument that the formation of a wholly-owned subsidiary to alter the obligation. That would have allowed a subsidiary to essentially exempt itself from the clawback provisions simply by changing its corporate organizational structure. 155 The specific argument was that the clawback provision applies only to an “issuer”, of the securities and that the new entity (the subsidiary) is not currently an issuer. 156 The court noted that the original entity was still an issuer at the time the misstated financial statements were filed. The court required the application of clawback provisions despite the creation of a new entity subsequent to the misconduct.

Similarly, the athlete will not be able to hide the NIL income through cleverly disguised shell games with other entities. If the misconduct or material reporting error is performed by or in conjunction with business entities that effect clawback avoidance, the model’s definitions are sufficiently broad to enforce the clawback reimbursement. Instead of the target being the executives of a company that issues securities, the target is the former athlete or any entities he creates or partners with to avoid a recapture of unwarranted NIL.

4. Types of Compensation – Audit Determinations to Avoid Mischaracterizations

If history teaches us anything about human nature, it is that some of us will attempt to re-characterize income to avoid losing it, be it through taxes, or in this case, a reimbursement or recapture through clawback provisions. For example, taxpayers and the internal revenue service (“IRS”) have long-standing disputes about what shall be characterized as “ordinary income” with

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152 Penalties are discussed below in section IX (C).
higher tax rates or “capital gains” with lower tax rates.\textsuperscript{157} Obviously, taxpayers seek creative ways to choose the latter.

Former athletes are not genetically immune from the same temptations to creatively claim that his compensation is somehow not NIL income. For some athletes, as with any other taxpayer the moral and ethical obligation to tell the truth may not be enough. A former student-athlete may claim, for example, that certain income was from services or a gift, not sourced in his NIL when in fact is was NIL income. There may be an unemployed or underemployed former athlete who does not resist the temptation to claim that the money he received was from his uncle’s janitorial company when in fact the income was from sweatshirts with his name on it. And of course there are the unintentional errors with no intent to avoid or evade the recapture of NIL compensation.

Income characterizations are relatively sophisticated matters often discovered only upon audit of the books and records of the suspect. So, like the IRS, the institutions or the NCAA should be provided audit options. The model rule would so provide.

5. Method of Recovery

The author provided a two-tiered method for disbursements to the former collegiate athlete. Threshold eligibility to receive NIL compensation only occurs if eligibility was maintained during his amateur playing days in undergraduate school (i.e. holdback). The full entitlement does not occur until the athlete also agrees to use, and in fact uses the NIL only for educational purposes (i.e. clawback). If the athlete fails either test he would fail to receive the income.

This section details the second tier clawback recovery. After the athlete receives NIL income in what appeared to be consistent with the educational conditions, the clearinghouse, the NCAA or the institution may discover noncompliance with those educational requirements. The circumstance is akin to the IRS performing an audit after the taxpayer filed and received a refund. The clearinghouse and institutional clawback discussed here is akin to the IRS recapturing the previously granted refund and demanding more taxes based on subsequently discovered facts.

The clearinghouse is in the better position than the NCAA or the schools to oversee collection. This would be its only business. It should therefore be more skilled and focused than the institutions or the NCAA, which have a myriad of other priorities and a plethora of other functions in the education of all students. The clearinghouse would only function to handle collection and disbursements of NIL income.

\textsuperscript{157} See I.R.C. § 64 for the definition of “ordinary income” and I.R.C. § 1222 for capital gains tax on the profit from a sale of a capital asset. For the characterization battle see WILLIAM A. KLEIN, ET AL, FEDERAL INCOME TAXATION, 665, (Aspen, 14\textsuperscript{th} ed. 2006). Neither type of income is relevant for this article. Those terms are only used to demonstrate that recharacterizations are engrained in the psychic of American taxpayers. We should not expect a different mindset from some former student athletes.
The clearinghouse, at a minimum, would have the following:

- A record of each institution, and each entity that provided NIL income to the athlete.
- Designated employees with the sole or primary function of reviewing transactional detail to see if the payments were indeed NIL income, as opposed to a gift or fee for services unrelated to an athlete’s name, image or likeness (e.g. fee for painting houses with no connection with his fame).
- Investigative team, much like the NCAA has for the discovery and enforcement of athlete violations.
- A process to make recommendations for action by the NCAA, or the independent power to make findings of fact and conclusions of law with due process safeguards to any athlete subject to the loss of NIL income.

The exact working relationship between the clearinghouse, the NCAA, the member-institutions and the athlete would be established through a series of contracts. This contractarian model is preferred over a heavily regulated approach through state of federal entities. State or federal legislation introduces a mix of political and bureaucratic obstacles that are unnecessary. This can be performed by private market players. Only if the privatized system appears to materially harm the public should there be oversight of governmental regulators.

6. Penalties

Penalties in this model would be used as a deterrent. The size of the “stick” should be sufficient to cause of change of behavior by a recalcitrant or evasive athlete or party acting on his behalf. Studies should be conducted of comparable circumstances to see what amounts or percentages have been effective in changing behavior from bad to good.

Comparable circumstances may again be the four clawback statutory authorities discussed above. And of course, since this involves the recapture or forfeiture of income, the IRS experience in imposing penalties would need to be explored.

7. Statute of Limitations

American jurisprudence appropriately limits the ability of an entity to assert claims against another. There are of course exceptions for such extreme matters as murder or certain sex-related felonies. But the pursuit of NIL income transgressions does not rise to that level. A reasonable period of time for discovery of ill-gotten gains can be sourced in the general limitations periods for the analogous circumstance of federal income tax collection, where there is no statutory limit.

on civil penalties for failing to file an income tax return, but a six-year limitation on criminal prosecutions. The taxpayers subject to the limitations period include the athletes that would be entitled to NIL income and subject to conditions of recapture.

D. Clawback Policy Considerations

This model NIL scheme pays significant attention to allowing institutions or NIL users the opportunity to recapture NIL compensation. The proposed holdback and clawback provisions are points of emphasis for several reasons.

First, these methods are medicinal efforts to cure the college sports industry’s discomfort with the entire concept of revenue sharing with college athletes. When faced with a strong adverse impression of a fundamental change in the legal relationship, it is wise to have a poison pill against overzealous plaintiffs. In this case, those holdbacks and clawbacks provide safeguards against abuse, and ways to ameliorate the extent of lost NIL to the institutions.

Second, the reality D-1 football is that it subsidizes most of the other sports programs at the institution. In light of that fact, there is even more economic pressure and more of a policy imperative that institutions retain the revenues generated from the football program. Several of the top D-1 football programs generate millions in royalties and fees from the use of intellectual property. Revenue sharing with former student-athletes diminishes the institution’s share that is used to subsidize those programs. So any revenue sharing model should provide assurances against abuse for that reason as well.

Third, there is a need for stability and consistency in any regulatory scheme. Certainty and stability leads to acceptance by all stakeholders, particularly the institutions. The NCAA and institutions already have the NIL benefits, and are logically most resistant to change to their collective detriment. Those particular stakeholders now have enough federal court holdings, rules, and even dicta as discussed above to know that NIL revenue sharing is inevitable. It is just a matter of how much and on what terms.

Fourth, there needs to be a system that is understandable and workable for all parties to regulation or transaction. In the case of NIL revenue sharing, the NCAA, the member institutions and the athletes are all stakeholders. If the scheme has gaps in procedures or does not cover certain scenarios, or has loopholes that swallow the rule, there is a likelihood of inconsistent application or unintended consequences or awards. Thus, the NIL revenue sharing scheme has the greatest chance of acceptance by all stakeholders if there is clarity and workability on key

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159 See I.R.C. § 6501 (c) (3) for civil limitations on IRS action, and I.R.C. § 6531 the limitation on criminal prosecutions.
160 For a breakdown of profits for D-1 football and basketball programs compared to deficit operations for other programs, see Kristi Dosh, Does Football Fund Other Sports At College Level?, Forbes SportsMoney (May 5, 2011). (last visited November 15, 2015).
elements of the plan, including but not limited to (1) NIL definitions (2) the formula for valuing the NIL, and (3) the scope and methods of holdbacks and clawbacks to retain the NIL.

E. **NIL Income Includes Income From Other Intangible Assets.**

A fair system of recapture should first give appropriate notice of what constitutes NIL income so it can be equally clear when there is a mischaracterization of it. Only then will the student athletes know what is required to be claimed, and what other income is outside the definition.

The NCAA bylaws broadly state that a scholarship is lost if a student athlete receives *any* remuneration from commercial endorsements or commercial products. The relevant bylaw states:

Subsequent to becoming a student-athlete, an individual shall not be eligible for participation in intercollegiate athletics if the individual (a) accepts any remuneration for or permits the *use of his or her name or picture* to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind, or (b) Receives remuneration for endorsing a commercial product or service through the individual’s use of such product or service.\(^{161}\)

The italicized portion of the bylaw reveals a clear intent to address the players NIL rights, since both involve the “use of his or her name or picture”. Thus the rule certainly prohibits actual receipt of NIL compensation while still on scholarship. That bylaw does not address the receipt of NIL after the player is no longer on scholarship.

This rule was established prior to the O’Bannon case and prior to the refined claims of several plaintiffs who are current and former student athletes. Those claims involve the compensation to be received after the player is no longer on scholarship. The case law now establishes that those athletes have NIL rights. As stated by the 9th Circuit, the athlete exchanges “his labor and NIL rights for a scholarship…”\(^{162}\)

The athlete’s post-participation receipt is also possible. The 9th Circuit case does not expressly prohibit a possible receipt of NIL by former athletes. The only prohibition was against NIL compensation that was “untethered” from amateurism.\(^{163}\)

Having established the possibility of post-participation receipt of NIL compensation, it is necessary to define NIL itself before it is proper to state what income is derived from it. NIL is rooted in the common law definition of publicity rights.\(^{164}\) Publicity rights have been used to prevent others from profiting from the use of a player’s NIL without his permission. The permission could presumably be granted through a license agreement with payments made to the athlete for said use. That is a privately negotiated determination of value between the user of the

\(^{161}\) NCAA Bylaw 12.5.2.1.


\(^{164}\) See discussion of publicity rights as a property interest, ROGER M. GROVES, 48 Indiana L. Rev. 369, 376-380 (2015).
NIL and the owner of it. As noted by the 9th Circuit in O’Bannon, video game manufacturers would be negotiating directly with the student-athletes if it were not for the NCAA.\footnote{O’Bannon, 802 F. 3d 1049 (2015) 2015 U.S. App. LEXIS 17193, at *19.}

An athlete’s ownership of publicity rights is therefore distinguishable from the same athlete’s ownership of intangible assets such as copyrights, trademarks and patents. Those intangible assets are primarily protected under statutory protections in federal law.\footnote{See Copyright registration at 17 U.S. Code § 408.} The NCAA compensation rules provide little guidance on (1) whether the student athlete has the right to own intangible assets (e.g. copyrights and trademarks) and saliently, (2) whether the income received from other intellectual property rights and owned intangible assets is prohibited under NCAA rules.

The above discussion establishes that no NCAA rule directly prohibits a current student athlete from creating intangible assets related to his sport. Accordingly a student-athlete could conceivably own assets protected through copyrights, trademarks, and patents without violation of NCAA rules.\footnote{A copyright is a “property right in an original work of authorship…fixed in any tangible medium of expression, giving the holder the exclusive right to reproduce, adapt, distribute, perform, and display the work.” BLACK’S LAW, at 411, (10th ed. 2014). A trademark is “a word, phrase, logo, or other sensory symbol used by a manufacturer or seller to distinguish its products or services from those of others.” BLACK’S LAW, at 1721 (10th ed., 2014). A detailed analysis of the application of these intellectual property protections to collegiate athletes is beyond the scope of this article. College coaches have taken advantage of the legal protection for such intangible assets. Ohio State football coach Urban Meyer gave his permission to The Ohio State University to trademark his name. I fully expect the university paid him for that permission. The “Urban Meyer” mark was issued on July 7, 2015 for “clothing items for men, women, and children, namely, hats, caps, shirts, and T-shirts”. See Jess Collen, Why On Earth Did Ohio State’s Urban Meyer Have To Register His Name With The Trademark Office? Forbes/Entrepreneurs, http://www.forbes.com/sites/jesscollen/2015/08/03/why-on-earth-did-ohio-states-urban-meyer-have-to-register-his-name-with-the-trademark-office/ (August 3, 2015) (last visited November 15, 2015).}

As also noted above, however, no income can be derived from his own NIL while he is a scholarship athlete (even if he does own assets). Those conclusions then support this author’s thesis: that a student athletes may legally receive post-scholarship NIL of both types of NIL (from right of publicity and from owned intangible assets). The crux of the matter is how the NIL compensation is used. If used for educational expenses, the model rule would pass the standards of the 9th Circuit in O’Bannon.

XI. Rule Application

A. The Braxton Miller Endorsement Illustration

High profile football player Braxton Miller endorsed AdvoCare, a nutritional product on his Instagram post.\footnote{The NCAA reinstated Miller after Ohio State self-reported the violation, deemed minor. See http://sports.yahoo.com/blogs/ncaaf-dr-saturday/ohio-state-self-reports-6-minor-violations--including-braxton-miller-instagram-post-181630126.html (October 29, 2015) (last visited November 15, 2015).} The post was quickly removed. The Ohio State Athletic department issued a statement that the post was an NCAA violation, but was deemed to minor. Neither OSU nor the
NCAA penalized Miller, and there were no adverse consequences to Miller’s eligibility. Thus, Braxton Miller was prohibited from endorsing a product, even if he had not profited from it. Of course the scope of this article is confined to the receipt of NIL income after the student is no longer actually or eligible for a scholarship. If the model rule and scheme was in force, Miller would have been able to endorse the product, provide notice to OSU and the NCAA of his claim to future NIL. He would agree to use any future NIL compensation solely for the prescribed educational purposes. Upon receipt of that compensation after his eligibility expires, Miller would also be obligated to submit the forms acknowledging said receipt, subject to audit by the NCAA or the institution.

Unless subject to a small business reporting exemption, the entity using Miller’s NIL would be required to report the transaction to a nonprofit clearinghouse. This would be akin to how bars and restaurants must report use of copyrighted music to ASCAP or BMI, the licensed clearinghouse for royalties in the music industry.

XII. CONCLUSION

This author first asserts that there needs to be a middle ground between disbursing nothing to student athletes based the NCAA’s hypothetical zero valuation of that NIL and the millions annually that are made from the real NIL of student-athletes.

The O’Bannon courts were not given a full range of options for judicial determination. They only faced with the following proposition: Should student-athletes be able to receive NIL compensation with no strings attached to amateurism as an alternative to the NCAA rule that values the NIL as worthless.

The federal district court said “Yes”. The 9th Circuit Court of Appeals said “No”.

The result then of the 9th Circuit decision is that the NCAA rule is allowed to stand for the nonsensical notion that the NIL can only be valued at zero when we all know the NIL is indeed very valuable and used to generate billions of dollars in the college football market.

The 9th Circuit was not called upon to decide the following issue:

“Does an NCAA rule authorizing NIL benefits to former scholarship student-athletes conditioned on solely educational uses upon receipt provide a less restrictive means of promoting amateurism than the current NCAA rule that values the student NIL at zero and prevents any NIL benefits even after the student is no longer on scholarship at the institution?”

Yet the positive answer to this precise issue is indeed a middle ground solution to the conundrum.

\[169\] Id.
But beyond solving for the legal issue is the need to have a workable alternative to the current NCAA rule. After dispelling the false narrative that NIL payments are part of pay-for-play, this article offers a middle ground. The model rule and scheme meets each element of the multi-layered standard established by the 9th Circuit. Saliently, it creates the tether between the NIL payments and amateurism so that the payments have the true character as “education-related expenses.”

This model goes beyond the technical requirements of the 9th Circuit standard. Cognizant of the reticence that exists to paying college student-athletes in the broad sense, this proposal provides additional safeguards against abuse so NIL payments would not be used for non-educational purposes and not be recharacterized as another form of income without a remedy for the institutions.

The protections are multi-layered. First, the method of collection and disbursement of NIL compensation is based on a system that already works in an analogous circumstance – the performing rights clearinghouse system to collect and disburse performance royalties for music performers.

Second, the model rule includes clawback provisions crafted from securities law sources. The customized scheme should provide more sophistication against abuse than any payment schemes existing in college sports.

Third, the model rule protects against a slippery slope of invidious or unwitting NIL-creep. This is accomplished in part by clarity of terms, thus reducing ambiguity, imposing penalties to deter intentional mischaracterizations of NIL income or intentional or negligent non-reporting of NIL compensation.

In sum, the model rule’s combination of factors should pass the 9th Circuit’s standard for a less restrictive alternative to the existing zero value attributable to student-athletes’ NIL. It also has moderating aspects to appease those uncomfortable with student-athlete revenue sharing. More importantly, the law would be applied in a way that those who deserve a return on the accumulated value of their own name, image, and likeness actually and eventually receive it.