

SELECTED LEGAL ISSUES IN COLLEGE SPORTS

North Carolina Superior Court Judges

October 16, 2018

Sherman Act Rule of Reason Analysis

- Is there a restraint?
- Is there a procompetitive justification for the restraint?
- Is there a substantially less restrictive alternative that is virtually as effective without significantly increased costs?
- Balancing????

NCAA v. Board of Regents (U.S. Sup. Ct. 1984)

Moreover, the NCAA seeks to market a particular brand of football—college football. The identification of this “**product**” with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the “**product**,” athletes must not be paid, must be required to attend class, and the like. And the integrity of the “**product**” cannot be preserved except by mutual agreement.

Subsequent NCAA Cases

- NCAA has been largely successful in litigation concerning eligibility rules. Cases have upheld, for example:
 - Capping scholarships at the cost of attendance and prohibiting third party NIL payments (O'Bannon v. NCAA, 9th Cir. 2015).
 - NCAA transfer rules (Deppe v. NCAA, 7th Cir. 2018).
 - Loss of eligibility when enter pro draft or hire an agent (Banks v. NCAA, 7th Cir. 1992); Gaines v. NCAA, M.D. Tn. 1990)
 - Graduate student eligibility rules (NCAA v. Smith, 3rd Cir. 1999)
- NCAA has been less successful in other areas (such as the “restricted earnings rule” case – Law v. NCAA, 10th Cir. 1998).

Myths about the NCAA

- “Profitability” of college sports
 - 30-50 of 351 D-1 institutions realize positive net revenues from college sports.
 - Only football and men’s basketball (and baseball in a few places) are net revenue positive.
- Graduation rates of college athletes
 - Steadily increased in past 20 years
 - Plaintiffs’ counsel often compares FGR of athletes to student-body as a whole
 - Using the more accurate GSR and comparing to similarly situated non-athletes reveals significantly different picture
- Educational opportunities and success

Basic Right of Publicity

- The North Carolina Supreme Court, in *Flake v. Greensboro News*, 212 N.C. 780 (1938) held that “the unauthorized publication of plaintiff’s photograph in connection with an advertising enterprise gives rise to a cause of action.”
- Annotation – 17 ALR7th, Art. 2.
- Restatement (Third) of Unfair Competition §§ 46-49.
- At least 22 states have statutes governing rights of publicity.

Television Broadcasts Marshall v. ESPN (6th Cir. 2016)



Broadcast Rights

“[T]he producer of entertainment is entitled to charge a fee in exchange for consent to broadcast; the First Amendment does not give the media the right to appropriate, without consent or remuneration, the products of others.”

Marshall, 111 F. Supp.3d at 829 (quoting *Wisconsin Interscholastic Athl. Ass’n v. Gannett Co., Inc.*, 658 F.3d 614 (7th Cir.2011)); see also *Dora v. Frontline Video, Inc.*, 15 Cal. App. 4th 536 (Cal. App. 2 Dist. 1993) (surfing documentary case; producer could use video for “noncommercial” purposes without surfer’s permission).

Speilman v. Ohio State University



Fantasy Sports and the First Amendment

“Because we hold that CBC’s first amendment rights in offering its fantasy baseball products supersede the players’ rights of publicity, we need not reach CBC’s alternative argument that federal copyright law preempts the players’ state law rights of publicity.”

C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 505 F.3d 818, 821 (8th Cir. 2007).

NIL Cases Summary

Plaintiff Wins

- Any product endorsement case
- Michael Jordan v. Chicago Steakhouse
- EA Video Games (O’Bannon; Keller; Hart)
- Arnold Palmer Board Game) (questionable logic)
- Girls Gone Wild (sunbather)
- Zacchini (human cannonball)

Defendant Wins

- Television broadcasts (Marshall)
- Fantasy Sports (CBC/CBS)
- FanDuel (Daniels)
- Sports statistics
- Joe Montana Plaque
- Tiger Woods Print
- Surfing video (Dora)
- World Guide to Nude Beaches (sunbather)
- Parody cards
- Movie (Hurt Locker)

Title IX – Athletics Aid

Athletics aid must be proportional to participation, so

- If 53% of student-athletes are women, then
- 53% of athletics aid (within 1%) must go to women, after “apples to apples” adjustments for in-state/out-of-state tuition variances

Title IX -- Participation

Schools must either:

- Provide participation opportunities for women and men that are substantially proportionate to their respective rates of enrollment of full-time undergraduate students; or
- Demonstrate a history and continuing practice of program expansion for the underrepresented sex; or
- Fully and effectively accommodate the interests and abilities of the underrepresented sex.

Title IX – Eleven Equal Treatment Requirements

- Equipment and supplies
- Scheduling of games and practice times
- Travel and daily allowance/per diem
- Access to tutoring
- Coaching
- Locker rooms, practice and competitive facilities
- Medical and training facilities and services
- Housing and dining facilities and services
- Publicity and promotions
- Support services
- Recruitment of student-athletes.