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Amateur sport: image rights litigation and potential impact

A number of cases regarding the use of the use of amateur athletes' images in computer games are currently pending in the US legal system. Anastasios Kaburakis, an Attorney-at-law at Southern Illinois University, Edwardsville, discusses the detrimental impact on the amateur status of the National Collegiate Athletic Association that the cases could have.

US sport is unlike most of contemporary world sport. The demarcation between professional and amateur sport, on which the National Collegiate Athletic Association (NCAA or the 'Association') is built, is expressed by both major revenue producing sports at the highest level (Division I football and men's basketball), and most other college sports programs that nowadays are facing severe budget cuts and downsizing. The NCAA remains the largest non-profit, tax exempt, education-based, sport association in America. One thousand, two hundred and eighty eight¹ member institutions and conferences over three divisions provide what is generally admired both in the US and overseas as a wonderful opportunity for talented athletes to pursue their education and athletic excellence. At the same time, apparent inequities among the membership, inherent conflicts between the Association's cornerstone principles and the need for long-term financial well-being leading to increased commercialization, have been loathed by many. Critics desire protection of the student-athletes, fair treatment considering the revenue these athletes generate, and call for a mass overhaul of the intercollegiate athletics system. This is the environment in which

the current legal battles are taking place.

Chronologically, it has been *Oliver v. NCAA* that first captured the attention of legal scholars in the US. In brief, Judge Tone of the Common Pleas Court in Erie County, Ohio, ruled in favor of the Plaintiff, holding that the 'no-agent' rule the NCAA was trying to uphold was capricious and arbitrary. Under this rule, a student-athlete can retain an attorney, but can not have the attorney serve as an agent in direct negotiations with a professional sport organization. Thus, the aforementioned line of demarcation is maintained. Moreover, the Judge held that an often contested rule (Bylaw 19.7), which refers to institutional restitution (i.e. pay back TV revenue, forfeit wins, etc.) in the case where a court decision or judicial order negating a policy or decision by the NCAA would be reversed in the appellate levels of adjudication, is overreaching and interferes with the judicial power of the US court system. Elsewhere² it has been argued³ that such decisions⁴ do not withstand appellate review and serve as local or regional exceptions where dissatisfaction with the way the NCAA works infiltrates into the halls of justice and chambers of politics. Truth is that in cases where bedrock principles of the Association are questioned, settlements serve parties well and over the past few years, it is one of the main reasons⁵ shrewd colleagues and firms wishing to expand their practice and billable hours' totals would take a case challenging a private Association policy or decision. Plaintiffs⁷ (and defendants⁸) lawyers receive considerable sums⁶, plaintiffs feel vindicated⁷ and proclaim that they beat the system or changed it to a more fair and just one for the

student-athletes to follow, and the Association is allowed to uphold the rules that a judge or jury may find incomprehensible or offensive to the public's intelligence, which of course does not encompass all the intricacies of such rules and underpinning rationale of collective decisions. Hence, it is presumed by many observers that *Oliver* will settle as well.

Keller v. Electronic Arts, NCAA, and CLC (and its little spin-off, *Hart v. Electronic Arts et al.*) and *O'Bannon v. NCAA and CLC* are the two major prongs as of the end of Summer 2009 in the legal blitzkrieg, against which the NCAA has to defend itself and its bedrock principles. For various reasons, these two cases are particularly stimulating and invite scholarship and legal commentary. The *Keller* class action mainly involves the alleged intellectual property and rights of publicity violations via the use of student-athletes' images in the (immensely popular in the US) college football and men's basketball EA Sports video games. The class action encapsulates Division I football and men's basketball student-athletes whose teams and jersey numbers were included in the video games. In contrast, the *O'Bannon* class action is much broader, encompassing both current and former football and men's basketball student-athletes whose images have been licensed or sold by the NCAA, member institutions, and business partners. The *O'Bannon* complaint is an antitrust suit, containing the usual unjust enrichment and accounting claims as well. The fact the *O'Bannon* class action is so broad in scope, focuses on the Sherman Antitrust Act (SAA) 15 USC § 1 - claiming an unreasonable restraint of trade and raising group boycott allegations, considering damages are trebled - and the fact the most significant

financial settlements (as well as the two major defeats for the NCAA in Board of Regents and Law, below) have come in the field of antitrust litigation, render this as the most interesting of the pending cases. Furthermore, the fact the list of attorneys representing O'Bannon and the class is three pages long, featuring very successful firms politically and in business litigation (Hausfeld and Boies Schiller of Gore v. Bush fame) confirms that this is a very serious threat to NCAA's traditional business practices and bedrock principle of amateurism; indeed, it is treated as such a serious complaint it warrants 73 pages, carefully drafted, and features the frequently elusive references from the NCAA's own administration, governance system, and documenting allegations grounded on particular sections of the NCAA Manual juxtaposed with basic antitrust analysis.

Keller has been forecasted and extensively analyzed elsewhere⁸. It is useful to point out some basic elements of the case and reiterate some conclusions in view of pending adjudication and/or an expected settlement:

- student-athletes possess a right of publicity which they can uphold;
- even without the use of players' names (which actually is gaming practice through interactive means available both by the game manufacturer and from third parties), the identities of the student-athletes are clearly established;
- NCAA Division I Amateurism policy has undergone a few modifications in application and interpretation; as a matter of fact, there were proposals that were tabled (after some controversy) that would have allowed further commercial use of student-athletes' images in conjunction with

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advertised products, short of direct endorsements;

- current amateurism policy does not treat contemporary use of players' likenesses and identities in video games, as argued in Keller and O'Bannon;
- importantly, the nature of student-athletes' participation in college athletics contains express waivers from federal laws (Family Educational Rights and Privacy Act, Health Insurance Portability and Accountability Act, 4th Amendment via drug testing consent forms, etc.) for the Association and member institutions; there is, however, no express consent provided for the current use of the players' intellectual property and rights of publicity use; one may only posit that there is an implied consent for such use in the form of the general compliance provisions, containing the implicit acknowledgment of abiding by amateurism standards as defined by the Association;
- evolution of right of publicity theory and litigation, especially in California and the Ninth Circuit, where both Keller and O'Bannon may proceed barring settlements, demonstrate that there is a broad scope of protection for personalities' identities when used without permission for commercial purposes;
- conversely, other US jurisdictions and federal circuits (e.g. Eighth Circuit) restrict the scope of such protection, as in the case recently with combined names and statistics used (freely, as the courts confirmed) by fantasy sports providers;
- there are important issues of federal preemption of state claims, as rights of publicity claims are state-based. Scholars may theorize in the near future that the contemporary relationship between student-athletes and their schools providing them with

athletic scholarships creates a 'quasi employee', and a 'quasi work-for-hire' doctrine, in which case the student-athletes would yield any related intellectual property rights to the institution's federal copyright;

- there may be further federal cases filed, on Trademark Law grounds, which have heretofore not been raised.

O'Bannon, is another matter. Very rarely has the Association lost a battle on the antitrust field. Defeats came in the 1984 US Supreme Court decision in NCAA v. Board of Regents of the University of Oklahoma and the 1998 US Court of Appeals for the Tenth Circuit decision in Law v. NCAA. In the former case, the NCAA TV football package limiting the freedom of member institutions to broadcast their games was found to be in violation of the SAA §1, per restraint of trade. Nevertheless, the US Supreme Court acknowledged that 'in such an industry...horizontal restraints are essential'. In the latter case, 'Restricted Earnings Coaches' class members sued successfully (under SAA §1), challenging the limitations on earnings particular coaches might receive by NCAA member institutions. Every other case brought against the Association did not establish a SAA violation, i.e. Justice v. NCAA, AIAW v. NCAA, Smith v. NCAA, Adidas America, Inc. v. NCAA, Pocono Invit. Sports Camp, Inc. v. NCAA, Worldwide Basketball & Sports Tours v. NCAA, while in MIBA v. NCAA the parties settled, with the NCAA purchasing the rights to organize the NIT post-season basketball tournament. Wishing to avoid similar challenges, the NCAA settled the antitrust challenge of its policies in regard to setting financial aid limits, in White v. NCAA. What NCAA antitrust litigation history

has been able to successfully counter related claims, yet the claims brought forth by the O'Bannon class are different, in that former student-athletes (no longer 'amateurs' per complaint's § 184) claim damages due to the use of their images and related rights, instead of currently enrolled students and third parties - such as coaches, event organizers, or business competitors. O'Bannon representatives have definitely studied the recent White antitrust settlement, and possibly can use part of the settlement's consideration⁹ in an impending settlement negotiation strategy.

What is perhaps more intriguing to discuss in academic and practitioners' circles is the potential impact of either the NCAA losing some of these cases, or settling via burdensome conditions for its membership. Both Keller and O'Bannon have the potential of delivering a major blow to the Association's principle of amateurism, which has been one of its major lines of defense before courts and Congressional hearings questioning its practices' alignment with its proclaimed mission, boosted by popular political demand to revisit its tax-exempt status. In today's US sports business reality, such an advent is probably difficult to attain. On the contrary, it is imperative for the Association and its membership to protect the cornerstone principles of 'amateur' sport in the US, during times of economic hardship and sport programs being discontinued all across America. The revenue generated by any means possible - indeed upheld by NCAA's traditional defenses of

amateurism and its educational mission - is crucial to preserve, so as to continue to afford opportunities for the financially struggling institutions' sports programs, and so as to maintain some level of competitiveness for US Olympic and international sports' programs. Considering other federal mandates (i.e. Title IX promoting gender equity in education, which would not allow significant reductions in opportunities for female sports, without the concurrent reduction - in most cases necessarily more grave - in male sports), any settlement or court order that would compromise member institutions' ability to offer the opportunities they currently provide would be truly unfortunate and perhaps one that class members in the long run would not be proud of.

There is indeed a need for practical and just reform in many areas of NCAA policy. This will hopefully come from its benevolent and informed membership and governance structure, which surely would not wish to risk external policy-making developments that would shake the foundation of this remarkable institution that is admired and envied across the world of sport.

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