The Potential Title IX Implications of Division I Men's Basketball & FBS Football Players Being Awarded a Share of Revenues for Their Use of Their Names, Likenesses, and Images Pursuant to the Holding of O'Bannon v. NCAA

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I. Introduction

A recent decision handed down from the Northern District of California and currently on appeal to the Ninth Circuit, O'Bannon v. NCAA\(^1\), has sparked great debate in the sports and legal community. O'Bannon, a matter of first impression, addressed whether current and former Division I men's basketball and Football Bowl Series ("FBS") football players should be compensated for the use of their names, likenesses, and images. The Court held, after a trial, that current National Collegiate Athletic Association ("NCAA") rules that restrict student athletes from receiving a portion of the revenue generated from the use of their name, likeness, and image unreasonably restrains trade in violation of the Sherman Act.\(^2\) The Court found that, although there were some procompetitive\(^3\) justifications for the rules, the plaintiffs had met their burden of establishing less restrictive alternatives, namely: (1) an allowance of up to $5000 to be put in a trust for an athlete that would be made available to them upon graduation; and (2) the allowance for schools to award up to the cost of attendance.\(^4\) The District Court also issued a permanent injunction ensuring that the NCAA would not enforce any practices that would proscribe the implementation of the less restrictive alternatives.\(^5\)

The O'Bannon decision was issued in the midst of an extensive national debate as to whether amateur student-athletes should receive compensation or revenue for their participation in college athletics. While O'Bannon has sparked much debate in the sports and legal

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\(^1\) 7 F. Supp. 3d 955 (N.D. Cal. 2014).
\(^2\) Id. at 1007-08.
\(^3\) "Under the Rule of Reason, a restraint will pass muster under section 1 of the Sherman Act if its procompetitive effects outweigh its anticompetitive effects. This formulation raises the obvious issue of the meaning of 'competition.' .... the... definition of competition is aggregate net output of goods and services. Thus, if a restraint does not negatively impact net output, it does not adversely affect competition. Conversely, if a restraint enhances output, it is procompetitive." HARRY S. GERLA, ARTICLE, Federal Antitrust Law And Trade And Professional Association Standards And Certification, 19 Dayton L. Rev. 471, 474 (1994).
\(^4\) O'Bannon, F. Supp. 3d at 1008.
\(^5\) Id. at 1007-08.
community in relation to anti-trust law, the decision has also created controversy regarding how the ruling will affect other government or NCAA regulations that universities must comply with. The effect on the rulings application of Title IX, a federal statute that requires substantial equality between men’s and women’s sports, is among those concerns.

Title IX, enacted by Congress in 1972, was created to prevent discrimination and promote equality between men and women in America’s learning institutions. Since its enactment Title IX has helped facilitate many improvements in women’s sports, especially at the collegiate level. Title IX’s policy guidelines which require substantial equality between men and women in scholarship, other costs and benefits provided, and opportunities to participate are largely responsible for these advances. O’Bannon has caused concern in relation to Title IX because it is unclear if the remedy awarded to the Plaintiffs constitutes an award or benefit that would require institutions to grant those same awards to women under Title IX. If the remedy is required to be extended to women’s sports the potential financial, legal, and participation consequences are vast.

This Comment discusses the potential ramifications O’Bannon may have on the application of Title IX and possible outcomes. Part II gives a brief overview of the origin and legislative text of Title IX. Part III outlines the O’Bannon decision. Part IV details the application of Title IX and its requirements for college athletic departments. Finally, Part V addresses potential problems O’Bannon may present if the remedy awarded in the holding falls within Title IX; such as, schools choosing to cut non-revenue generating sports. Part V also proposes remedies for these potential problems; such as, litigation, Congressional action, or

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7 Id. at 2.
shifting costs to consumers. Ultimately, this Comment proposes that schools should shift costs to consumers by nominally increasing ticket and merchandise prices. Shifting costs to consumers is the most logical and time efficient remedy to any additional costs athletic departments may experience due to *O’Bannon*.

II. Title IX: Origins

Beginning in 1971 and lasting until 1972, Congress heard testimony about the widespread discriminatory practices against women by academic institutions.\(^8\) Title IX, which Congress passed on June 23, 1972, was enacted as a response.\(^9\) Title IX states in relevant part that, barring few exceptions: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance....”\(^10\) Title IX also

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\(^8\) *Id.* at 49.

\(^9\) *Id.* at 50.

\(^10\) The full text of the statute, 20 U.S.C. § 1681(a) (2014), reads as follows:

- (a) Prohibition against discrimination; exceptions. No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:
  - (1) Classes of educational institutions subject to prohibition. In regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;
  - (2) Educational institutions commencing planned change in admissions. In regard to admissions to educational institutions, this section shall not apply (A) for one year from the date of enactment of this Act [enacted June 23, 1972], nor for six years after such date in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education, whichever is the later;
  - (3) Educational institutions of religious organizations with contrary religious tenets. This section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;
allows agencies who are empowered to award federal financial assistance to create and enforce

- (4) Educational institutions training individuals for military services or merchant marine. This section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;
- (5) Public educational institutions with traditional and continuing admissions policy. In regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;
- (6) Social fraternities or sororities; voluntary youth service organizations. This section shall not apply to membership practices--
  - (A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of the Internal Revenue Code of 1954 [1986] [26 USCS § 501(a)], the active membership of which consists primarily of students in attendance at an institution of higher education, or
  - (B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;
- (7) Boy or Girl conferences. This section shall not apply to--
  - (A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or
  - (B) any program or activity of any secondary school or educational institution specifically for--
    - (i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or
    - (ii) the selection of students to attend any such conference;
- (8) Father-son or mother-daughter activities at educational institutions. This section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and
- (9) Institution of higher education scholarship awards in "beauty" pageants. This section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

- (b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance. Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: Provided. That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this title of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.
- (c) "Educational institution" defined. For purposes of this title an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.”
policies in order to carry out the law. In addition, Title IX empowers courts to determine the legality of the policies these agencies create. One of the purposes of Title IX is to protect the equality of both men’s and women’s athletic opportunities in the education system. Title IX applies to, intercollegiate, intramural, club, and interscholastic athletic programs. While Title IX is meant to prevent discrimination for both men and women in athletics, Title IX is most widely known for its strides in the equalization of women in athletics.

11 20 U.S.C. § 1682 (2014) provides that:
Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 901 [20 USCS § 1681] with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

12 20 U.S.C. § 1683 (2014) “Any department or agency action taken pursuant to section 1002 [section 902] shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 902 [20 USCS § 1682], any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of title 5, United States Code [5 USCS §§ 701 et seq.], and such action shall not be deemed committed to unreviewable agency discretion within the meaning of section 701 of that title.”

13 HOGSHEAD-MAKER & ZIMBALIST, supra note 2, at 1.


After the enactment of Title IX in 1972 Congress spent much of the decade debating the parameters of the law.\textsuperscript{17} Ultimately, in 1975, the Department of Health, Education and Welfare ("HEW") issued regulations pertaining to Title IX's implementation.\textsuperscript{18} These regulations helped define what Title IX regulated such as: equipment, travel, dining, and housing among many other things.\textsuperscript{19} Colleges and universities were required to comply with the new regulations by 1978.\textsuperscript{20}

\textsuperscript{17} Opponents of the law, including the NCAA, attempted to completely bar application to intercollegiate athletics, and several United States Senators, tried to water down the law by excluding revenue producing sports from its authority. Notably, the Tower Amendment, proposed by United States Senator John Tower tried to exclude revenue generating sports and sports that created donations for the school, namely football, from Title IX compliance. 120 Cong. Rec. 15,322-15,323 (1974) (the amendment was rejected). NANCY HOGSHEAD-MAKER & ANDREW ZIMBALIST, \textit{EQUAL PLAY TITLE IX AND SOCIAL CHANGE}, supra, at 50.

\textsuperscript{18} 34 C.F.R. § 106.41 (2014)

\textsuperscript{19} 34 C.F.R. § 106.41 (2014) provides that:

(a) General. No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) Separate teams. Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex that are based on competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(c) Equal opportunity. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

1. Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
2. The provision of equipment and supplies;
3. Scheduling of games and practice time;
4. Travel and per diem allowance;
5. Opportunity to receive coaching and academic tutoring;
6. Assignment and compensation of coaches and tutors;
7. Provision of locker rooms, practice and competitive facilities;
8. Provision of medical and training facilities and services;
9. Provision of housing and dining facilities and services;
10. Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) Adjustment period. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the secondary or post-secondary school level shall
In 1987, Congress defined the scope of Title IX in the Civil Rights Restoration Act of 1987.\textsuperscript{21} Congress determined that Title IX applied to \textit{any} school that received federal funding in \textit{any} comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.


\textsuperscript{21} The Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988), was enacted to restore the broad scope of coverage and to clarify the application of Title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title VI of the Civil Rights Act of 1964. The Act, codified as amended in various sections, provided that:

\textbf{FINDINGS OF CONGRESS}

SEC. 2. The Congress finds that --

(1) certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and title VI of the Civil Rights Act of 1964; and

(2) legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered.

\textbf{EDUCATION AMENDMENTS AMENDMENT}

SEC. 3. (a) Title IX of the Education Amendments of 1972 is amended by adding at the end the following new sections:

"INTERPRETATION OF 'PROGRAM OR ACTIVITY"

"SEC. 908. For the purposes of this title, the term 'program or activity' and 'program' mean all of the operations of --"

"(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or"

"(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;"

"(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or"

"(B) a local educational agency (as defined in section 198(a)(10) of the Elementary and Secondary Education Act of 1965), system of vocational education, or other school system;"

"(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship --"

"(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or"

"(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or"

"(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or"

"(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3); any part of which is extended Federal financial assistance, except that such term does not include any operation of an entity which is controlled by a religious organization if the application of section 901 to such operation would not be consistent with the religious tenets of such organization.".

(b) Notwithstanding any provision of this Act or any amendment adopted thereto:

"NEUTRALITY WITH RESPECT TO ABORTION"

"SEC. 909. Nothing in this title shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion. Nothing in this section shall be construed to permit a penalty to be imposed on any person or individual because such person or individual is seeking or has received any benefit or service related to a legal abortion.".

\textbf{REHABILITATION ACT AMENDMENT}

SEC. 4. Section 504 of the Rehabilitation Act of 1973 is amended --

(1) by inserting "(a)" after "SEC. 504."; and

(2) by adding at the end the following new subsections:
"(b) For the purposes of this section, the term 'program or activity' means all of the operations of --
"(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or
"(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;
"(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or
"(B) a local educational agency (as defined in section 198(a)(10) of the Elementary and Secondary Education Act of 1965), system of vocational education, or other school system;
"(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship --
"(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or
"(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

[Rest of the text is not fully visible due to the page constraints provided.]
department.\textsuperscript{22} Thus, the Civil Rights Restoration Act of 1987, clarified that Title IX did not merely just apply to institutions whose sports programs received federal funding.\textsuperscript{23} The momentum from the Congressional enactment in the late 1980s carried over into the subsequent decade creating a renaissance period for gender equity in athletics.\textsuperscript{24} Although, Title IX has been successful in creating equality, the law does have its opponents.\textsuperscript{25} While these opponents have not been successful, challengers have often sought to weaken or limit the application of Title IX.\textsuperscript{26} Whereas Title IX has historically triumphed over its adversaries; \textit{O'Bannon} may disturb that. \textit{O'Bannon} has created a need to reexamine the original purpose of Title IX and whether this purpose is still applicable to the changing climate of college sports.

\begin{quote}
of 1965), system of vocational education, or other school system;

"(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship --

"(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

"(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

"(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

"(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3); any part of which is extended Federal financial assistance.".

\end{quote}

\textbf{RULE OF CONSTRUCTION}

\textbf{SEC. 7.} Nothing in the amendments made by this Act shall be construed to extend the application of the Acts so amended to ultimate beneficiaries of Federal financial assistance excluded from coverage before the enactment of this Act.

\textbf{ABORTION NEUTRALITY}

\textbf{SEC. 8.} No provision of this Act or any amendment made by this Act shall be construed to force or require any individual or hospital or any other institution, program, or activity receiving Federal Funds to perform or pay for an abortion.

\textbf{CLARIFICATION OF INDIVIDUALS WITH HANDICAPS IN THE EMPLOYMENT CONTEXT (Previous) SEC. 9.} Section 7(8) of the Rehabilitation Act of 1973 is amended by adding after subparagraph (B) the following:

"(C) For the purpose of sections 503 and 504, as such sections relate to employment, such term does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job."

\textsuperscript{22} \textit{CIVIL RIGHTS RESTORATION ACT OF 1987, 1988 Enacted S. 557, 100 Enacted S. 557, 102 Stat. 28.}
\textsuperscript{23} \textit{Id.}
\textsuperscript{24} Nancy Hogshead-Maker & Andrew Zimbalist, \textit{Equal Play Title IX and Social Change}, supra, at 129.
\textsuperscript{25} In the 1980s the Reagan administration attempted to weaken Title IX by severely cutting funding to the department responsible for implementation and enforcement of Title IX, the Department of Education. \textit{Id. at} 99. Similarly, during the second Bush administration insiders attempted a full out assault on Title IX. \textit{Id. at} 180.
\textsuperscript{26} \textit{Id.}
III. *O'Bannon v. NCAA*

A. Edward O'Bannon And Class Argue For The Right To Compensation For Use Of Their Names, Likenesses, And Images

*O'Bannon v. NCAA,*\textsuperscript{27} recently decided in the Northern District of California and currently on appeal to the Ninth Circuit, has, if upheld, far reaching implications, particularly with regard to Title IX. The case was brought by former UCLA basketball star Edward O'Bannon against the NCAA and co-conspirators on behalf of himself and a class made up of former NCAA athletes who competed on men's Division I basketball teams or FBS teams.\textsuperscript{28} The class also includes current student athletes competing in men's Division I basketball and FBS football, and those whose “names, images, and likenesses in videogames, live game telecasts, and other footage” have been or will be in the future sold for revenue, without informed consent or compensation,\textsuperscript{29} by the NCAA or its member schools.\textsuperscript{30} Plaintiffs claim that the NCAA has restrained trade in violation of Section 1 of the Sherman Act and that the NCAA has been unjustly enriched by disallowing student athletes to exploit their own names, likenesses, and images as they see fit.\textsuperscript{31} The markets that Plaintiffs argue have been restrained are known as the “college education market” and the “group licensing market.”\textsuperscript{32} Plaintiffs further assert that there are three submarkets under the group licensing market: (1) group licenses for the use of the name, likeness and images of athletes during live broadcasts of men's basketball and football

\textsuperscript{28} See *O'Bannon*, 7 F. Supp. at 965.
\textsuperscript{29} *O'Bannon*, 7 F. Supp. at 963.
\textsuperscript{30} Id.
\textsuperscript{31} Id. at 985.
\textsuperscript{32} *O'Bannon*, 7 F. Supp. at 965.
games; (2) group licenses for videogames; and (3) group licenses for re-broadcasts, advertisements, and archival footage.\textsuperscript{33} Plaintiffs contend that the college education market is restrained by the NCAA through its control of intercollegiate athletics, and due to disparity in bargaining power.\textsuperscript{34} One example of the disparity is Plaintiffs argument that the college education market is unreasonably restrained due to the fact that there is no reasonable substitute for which elite college athletes could both play for and receive a college education.\textsuperscript{35} Plaintiffs argue that absent the current restraints placed on them by the NCAA that they would be able to sell the use of their name, likeness, and images.\textsuperscript{36}

Plaintiffs point out that as of the time that their complaint was filed in 2009; the total retail market for college athletic related products was four billion dollars annually, and growing.\textsuperscript{37} In addition, the known royalty rates and revenue from sales and services received by the NCAA in 2007-08 totaled $37.5 million, this number does not include additional revenue the NCAA received from licensing sales, nor does it capture the sale of goods by member conferences and schools.\textsuperscript{38} The Plaintiffs’ Post Trial Brief outlines the numerous items that Plaintiffs argue the NCAA is using in its commercial exploitation of names, likenesses, and images of the class.\textsuperscript{39} The areas of exploitation include media rights for televising games, DVD and On-Demand sales and rentals, video-clips sales to corporate advertisers and others, photos, action-figures, trading cards, posters, video games, rebroadcasts of classic games, and jerseys, t-

\textsuperscript{33} \textit{Id.} at 968.
\textsuperscript{34} \textit{See} PIs’ Post Trial Br. at 17, (July 2, 2014).
\textsuperscript{35} \textit{O’Bannon,} 7 F. Supp. at 967-68.
\textsuperscript{36} \textit{Id.} at 968.
\textsuperscript{38} \textit{Id.}
\textsuperscript{39} \textit{See} PIs’ Post Trial Br. at 12-13, (July 2, 2014).
shirts and other apparel.\textsuperscript{40} Plaintiffs seek an order granting injunctive relief against the NCAA's unreasonable restraints on trade. \textsuperscript{41}

B. NCAA Contends College Sports Depend on Amateurism for Their Popularity

The NCAA argues that "the challenged restrictions on student-athlete compensation are reasonable because they are necessary to preserve its tradition of amateurism, maintain competitive balance among FBS football and Division I basketball teams, promote the integration of academics and athletics, and increase the total output of its product."\textsuperscript{42} First, the NCAA asserts that the popularity of college sports is directly linked to its tradition of amateurism\textsuperscript{43} and that preserving amateurism is essential to the NCAA's product.\textsuperscript{44} The NCAA offers evidence that popularity in college sports would decrease if college athletes were paid for use of their names, likenesses, and image.\textsuperscript{45} The NCAA also hotly contests the notion that the commercialism of student athletes violates its own amateurism rules and guidelines.\textsuperscript{46} They point to the testimony of the Plaintiffs' expert Dr. Staurowsky who characterized "commercialism and professionalism [as] analytically distinct" and stated that "a sport [may] be commercialized and still be amateur."\textsuperscript{47}

Second, the NCAA argues that the challenged restrictions promote competitive balance among Division I basketball and FBS football teams.\textsuperscript{48} The NCAA contends that just as

\textsuperscript{40} See O'Bannon, 7 F. Supp. at 962-63.
\textsuperscript{41} Pls' Post Trial Br. at 25, (July 2, 2014).
\textsuperscript{42} O'Bannon, 7 F. Supp. at 973.
\textsuperscript{43} Id.
\textsuperscript{44} Id.
\textsuperscript{45} Def's Post Trial Br. at 13, (July 8, 2014).
\textsuperscript{46} Id. at 12.
\textsuperscript{47} Id.
\textsuperscript{48} Id. at 15.
amateurism is linked to the popularity of college sports so too is competitive balance. In order to achieve competitive balance, the NCAA argues that not compensating players for their commercial use is essential. The NCAA also offers testimony by experts that have determined compensating student athletes for use of their likeness and image would result in a tilting of the playing field; a situation where schools with the best TV contracts and licensing deals would be at a disproportionate advantage to pay the best athletes to attend their school.

Next, the NCAA asserts that the challenged restrictions are procompetitive because they encourage the integration of athletics and academics. The NCAA argues that academic success among Division I FBS and men's basketball players exists, and that data suggests that these players are more successful than their counterparts who do not play sports but are similarly situated to them in all other ways. Further, the NCAA asserts that compensating student athletes would create a wedge between athletes and the rest of the student body, detracting from their experience as students. Similarly, they state that paying student athletes would result in the diminishing of the importance of the educational aspect of the student athlete's education;

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49 Id. at 13.
50 Id. at 15.
51 Def's Post Trial Br. at 15, (July 8, 2014).
52 Id. at 15.
53 Id.
54 "The most accurate way to measure this is a regression analysis, which compares students who played college football or basketball with students who did not play these sports but are otherwise similar in all relevant respects. Nobel Prize-winning economist James Heckman performed such a regression using the leading source of government data on educational outcomes. He found that participation in football and basketball has no negative effects on SAs' overall graduation rates, and that among children from single-parent households, such participation results in a 38 percentage point higher chance of graduation. Tr. 1509:5-1510:5. Dr. Heckman's regression also showed that participation in college football and basketball improves post-graduation wages and white-collar status, especially for disadvantaged SAs. For example, there is a 23.5 percent increase in post-college wages for African-American students who played college football or basketball, and these students are 27.5 percent more likely to have white-collar jobs after college. Tr. 1510:14-1514:25. Contrary to APs' claims, Dr. Heckman considered these effects just within Division I and reached conclusions that are identical or stronger among students at those schools. Tr. 1525:22-1526:5, 1558:4-9." Id. at 16.
55 Id. at 17.
ultimately the athletic portion would trump academics, thus seriously disturbing one of the core principles and goals of the NCAA. 56

Finally, the NCAA argues that the challenged rules meet the essential question in antitrust issues—output. 57 The NCAA insist that the restrictions they put in place on compensation in relation to commercialism of its member athletes increases output because it makes it possible to organize more games against more teams. The NCAA also contends that its amateurism rules are a major factor in increases in output and that without them some institutions that have philosophical commitments to amateurism would refuse to play schools that paid their athletes some form of compensation. 58 The NCAA also asserts that other Division 1 schools may be unable to afford the costs associated with paying players revenues from use of their names, likenesses, and images and would be forced to leave the Division which would lessen the number of available scholarships and athletic opportunities for student athletes. 59 Lastly, they argue that amateurism rules protect output by protecting the popularity of the men’s basketball tournament. 60

C. District Court Ruling and Current Appeal

1. Holding and Remedy

Section 1 of the Sherman Act provides that to form any ""contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States... is hereby declared to be illegal."" 61 A Plaintiff bringing a claim of this type must show:

56 Id.
57 Def's Post Trial Br. at 13, (July 8, 2014).
58 Id. at 14.
59 Id.
60 Id. at 15.
"(1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and (3) that the restraint affected interstate commerce." The Court found, after a trial, that the NCAA had conceded elements (1) and (3) and therefore the Court need only decide the second element—whether the agreement had unreasonably restrained trade. The judge chose to apply the default rule, the rule of reason, to decide the matter. The rule of reason analysis requires the court to consider whether the "restraint's harm to competition outweighs its procompetitive effects." The judge used a balancing framework where the "plaintiff bears the initial burden of showing that the restraint produces 'significant anticompetitive effects' within a 'relevant market.'" If the plaintiff satisfies this initial burden, "the NCAA must come forward with evidence of the restraint's procompetitive effects." Finally, if the NCAA meets this burden, the plaintiff must "show that 'any legitimate objectives can be achieved in a substantially less restrictive manner.'" Lastly, the Court must determine whether the "NCAA's activities had an impact upon competition in the relevant market.

In O'Bannon, the District Court found that the only area that the NCAA was able to successfully show evidence of their restraints' procompetitive effects was in regard to integration of athletics and academics. The Court held that the only viable evidence that the NCAA presented which showed a relationship between the challenged rules and integration of academics was in relation to the effect that compensating athletes might cause between the

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62 O'Bannon, 7 F. Supp. at 984.
63 Id. at 985.
64 Id.
65 Id.
66 Id.
67 Id.
68 O'Bannon, 7 F. Supp. at 985.
student-athletes and other non-athletes or professors.\textsuperscript{69} The NCAA showed that a "wedge" may be created between the athletes and these other groups, thus detracting from their academic experience.\textsuperscript{70} However, the Court found that this evidence only serves to justify a small limitation on the amount of compensation student-athletes could be paid, and was not enough to justify a sweeping prohibition of compensation altogether.\textsuperscript{71}

Since the NCAA was able to come up with some limited procompetitive effects, the Plaintiffs were required to present evidence that there were less restrictive restraints that could be used as an alternative. Plaintiffs presented three alternatives which the Court ruled on:

(1) raise the grant-in-aid limit to allow schools to award stipends, derived from specified sources of licensing revenue, to student-athletes; (2) allow schools to deposit a share of licensing revenue into a trust fund for student-athletes which could be paid after the student-athletes graduate or leave school for other reasons; or (3) permit student-athletes to receive limited compensation for third-party endorsements approved by their schools.\textsuperscript{72}

The Court found that the first proposal would be able to limit anticompetitive effects of the NCAA's restraint as long as the stipends do not surpass cost of attendance.\textsuperscript{73} The Court next considered the second suggestion made by the Plaintiffs and found that limited payments made to student-athletes by schools kept in trust would be an acceptable alternative.\textsuperscript{74} However, the Court found that the final proposal, allowing student-athletes to receive compensation for endorsements, was not an acceptable alternative as it would fail to meet a core NCAA goal of protecting student-athletes against commercial exploitation.\textsuperscript{75} Lastly, the Court issued an injunction prohibiting the NCAA from enforcing any rules that would prevent member schools

\textsuperscript{69} Id. at 980.
\textsuperscript{70} Id.
\textsuperscript{71} Id. at 1003.
\textsuperscript{72} Id. at 982.
\textsuperscript{73} Id.
\textsuperscript{74} Id. at 983.
\textsuperscript{75} O'Bannon, 7 F. Supp. at 984.
from depositing money of no more than $5,000 into a trust, to be awarded to the student-athlete at the time of graduation. The injunction is scheduled to take effect beginning with the next Division I men’s basketball and FBS football recruiting cycle.

2. Appeal

The NCAA filed a timely appeal of the remedy granted by the District Court to Plaintiffs to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit granted the joint motion to expedite the appeals process. Both parties have submitted their briefs, and oral argument was held on March 17, 2015. Currently, the decision by the District Court is set to take effect in August 2015, the District Court refused to stay the injunction pending any appeal to the order.

IV. Title IX: The Law & Its Requirements

Title IX regulates equality between men and women in college athletics with regard to: scholarships, others costs and benefits, and participation opportunities. Title IX requires compliance with a three part policy test, under which various forms of aid and benefits must be allocated equally. The holding in O’Bannon, which pertained narrowly to Division I men’s basketball and FBS football teams, has created a controversy about whether the trust and, or, the increase in financial aid to include cost of attendance, would be considered benefits that Title IX

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76 Id. at 1008.
77 Id.
79 Id.
80 Id.
81 O’Bannon, 7 F. Supp. at 1008.
83 Id.
regulates. If Title IX does not apply to the additional funds eligible to be awarded to division I men’s basketball and FBS football players then no change to the current allocation of funding or participation opportunities should be expected. On the other hand, if Title IX is applicable then: (1) Schools may be able to afford the increase in athletic expenses and carry on as normal; or (2) Schools may not be able to afford the financial increase and may be forced to cut athletic programs.

In response to the latter possibility some universities may: (1) undertake litigation to determine the applicability of Title IX in light of *O’Bannon*; (2) petition Congress to make a narrow exception to Title IX that allows the remedy awarded in *O’Bannon* to apply only to Division I men’s basketball and FBS football teams without running afoul of Title IX; or (3) shift the cost to consumers. It is important to note that universities could choose not to include cost of attendance in scholarships nor create a trust, thus avoiding the Title IX issue all together; however that is highly unlikely given the competitive climate at Division I schools for the best athletes. Therefore, if Title IX is applicable to the proscribed remedy in *O’Bannon* many college athletic departments will face a tough decision about finances unless a viable solution is found.

A. The Three Part Test

Title IX is regulated through the “Three Part Test” created by the Policy Interpretation of 1979 and clarified by the Office for Civil Rights (“OCR”). The three areas that determine compliance with Title IX are: (1) “Compliance in Financial Assistance (Scholarships) Based on Athletic Ability;” (2) “Compliance in Other Program Areas;” and (3) “Compliance in Meeting the Interests and Abilities of Male and Female Students.” The third section has a separate three

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84 *Id.*
85 *Id.*
prong test to determine compliance with student athletes' interests and abilities.\textsuperscript{86} Three separate ORC clarifications are essential to understanding these Title IX regulations. The clarifications are the: 1979 Policy Interpretation; 1996 Clarification of Intercollegiate Athletics and Policy Guidance; and the Bowling Green Letter on Scholarships.\textsuperscript{87}

1. A Policy Interpretation: Title IX and Intercollegiate Athletics

The scope of the 1979 policy interpretation published by the OCR is as follows:

This Policy Interpretation is designed specifically for intercollegiate athletics. However, its general principles will often apply to club, intramural, and interscholastic athletic programs, which are also covered by regulation. Accordingly, the Policy Interpretation may be used for guidance by the administrators of such programs when appropriate. This policy interpretation applies to any public or private institution, person or other entity that operates an educational program or activity which receives or benefits from financial assistance authorized or extended under a law administered by the Department. This includes educational institutions whose students participate in HEW funded or guaranteed student loan or assistance programs. For further information see definition of "recipient" in Section 86.2 of the Title IX regulation.\textsuperscript{88}

The relevant policy interpretation introduced three major areas of compliance that the OCR would use to determine whether an institution is in compliance with Title IX:

[(1)] Compliance in Financial Assistance (Scholarships) Based on Athletic Ability: Pursuant to the regulation, the governing principle in this area is that all such assistance should be available on a substantially proportional basis to the number of male and female participants in the institution's athletic program.

[(2)] Compliance in Other Program Areas (Equipment and supplies; games and practice times; travel and per diem, coaching and academic tutoring; assignment and compensation of coaches

\textsuperscript{86} Id. at 159-62.
\textsuperscript{87} Id. at 134.
\textsuperscript{88} Title IX of the Education Amendment of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 45 C.F.R. Part 86 (1979).
and tutors; locker rooms, and practice and competitive facilities; medical and training facilities; housing and dining facilities; publicity; recruitment; and support services): Pursuant to the regulation, the governing principle is that male and female athletes should receive equivalent treatment, benefits, and opportunities. [(3)] Compliance in Meeting the Interests and Abilities of Male and Female Students: Pursuant to the regulation, the governing principle in this area is that the athletic interests and abilities of male and female students must be equally effectively accommodated.⁸⁹

These three sections are separated into two larger compliance areas the first and second sections, Scholarship and Compliance in Other Program areas, are considered Part I.

Part I addressed equal opportunity for participants in athletic programs. It required the elimination of discrimination in financial support and other benefits and opportunities in an institution's existing athletic program. Institutions could establish a presumption of compliance if they could demonstrate that:

- ‘Average per capita’ expenditures for male and female athletes were substantially equal in the area of "readily financially measurable" benefits and opportunities or, if not, that any disparities were the result of nondiscriminatory factors, and
- Benefits and opportunities for male and female athletes, in areas which are not financially measurable, "were comparable."⁹⁰

Part II, includes only the third section relating to universities duties to effectively accommodate the “interests and abilities of women as well as men on a continuing basis. It requires an institution either:”

- To follow a policy of development of its women's athletic program to provide the participation and competition opportunities needed to accommodate the growing interests and abilities of women, or
- To demonstrate that it was effectively (and equally) accommodating the athletic interests and abilities of students, particularly as the interests and abilities of women students developed.⁹¹

⁸⁹ Id.
⁹⁰ Id.
⁹¹ Id.
In order to comply with Part II an institution must show that they meet one of three standards, known as the three part test:

1. Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
2. Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; or
3. Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a history and continuing practice of program expansion, as described above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program. 92

2. 1996 Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test

The 1996 Clarification was issued in order to create a better understanding of the Three Part Test issued to determine compliance with Section III, “interests and abilities.” 93 The first prong of the three part test, “whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments.” looks at the number of participation opportunities awarded to each sex at the institution. 94 Participants are defined by OCR as those:

a. Who are receiving the institutionally-sponsored support normally provided to athletes competing at the institution involved, e.g., coaching, equipment, medical and training room services, on a regular basis during a sport’s season; and

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92 Id.
94 Id.
b. Who are participating in organized practice sessions and other
team meetings and activities on a regular basis during a sport's
season; and
c. Who are listed on the eligibility or squad lists maintained for
each sport, or
d. Who, because of injury, cannot meet a, b, or c above but
continue to receive financial aid on the basis of athletic ability.\textsuperscript{95}

Based on this definition, OCR assesses if the athletic opportunities for both sexes are
substantially proportionate.\textsuperscript{96} It is important to note that participation numbers do not need to be
\textit{exactly} equivalent between male and females but \textit{substantially} equivalent; this leaves room for
disparity.\textsuperscript{97} There is no exact figure institutions must meet; therefore, determination of
compliance is done on a case by case basis.\textsuperscript{98} An example of perfect compliance as it pertains to
prong one would be if an institution that had 100 students of which 50 were women and the
remaining 50 were men; a perfect ratio of participation opportunities would be 50\% for women
and 50\% for men. Therefore, depending on a given institutions' individual situation, to be
evaluated by OCR, the institution would want to aim as close to 50\% as possible in participation
opportunities, barring room for disparity.

The second prong of the three prong test is: Where the members of one sex have been
and are underrepresented among intercollegiate athletes, whether the institution can show a
history and continuing practice of program expansion which is demonstrably responsive to the
developing interests and abilities of the members of that sex[].\textsuperscript{99} The main focus of this prong
is to look at whether an institution was responsive to student interest and abilities in a particular

\textsuperscript{95} \textit{Id.}
\textsuperscript{96} \textit{Id.}
\textsuperscript{97} Letter from Norma V. Cantu, Assistant Secretary for Civil Rights, Office of Civil Rights, Clarification of
Intercollegiate Athletics Policy Guidance: The Three-Part Test (January 16, 1996) (on file with U.S. Department of
Education).
\textsuperscript{98} \textit{Id.}
\textsuperscript{99} \textit{Id.}
sport for the underrepresented sex.\textsuperscript{100} The institution must also show a continuous dedication to expanding athletic opportunities for the underrepresented sex, to the extent that interest and ability call for.\textsuperscript{101} OCR considers the following factors in determining whether an institution has a history of expansion:

- an institution's record of adding intercollegiate teams, or upgrading teams to intercollegiate status, for the underrepresented sex;
- an institution's record of increasing the numbers of participants in intercollegiate athletics who are members of the underrepresented sex; and
- an institution's affirmative responses to requests by students or others for addition or elevation of sports.\textsuperscript{102}

Likewise, OCR will consider these factors as evidence of a continuing practice of expansion:

- an institution's current implementation of a nondiscriminatory policy or procedure for requesting the addition of sports (including the elevation of club or intramural teams) and the effective communication of the policy or procedure to students; and
- an institution's current implementation of a plan of program expansion that is responsive to developing interests and abilities.\textsuperscript{103}

It is important to note that OCR will not “find a history and continuing practice of program expansion where an institution increases the proportional participation opportunities for the underrepresented sex by reducing opportunities for the overrepresented sex alone or by reducing participation opportunities for the overrepresented sex to a proportionately greater degree than for the underrepresented sex.”\textsuperscript{104} Similarly, if an institution eliminates opportunities

\textsuperscript{100} \textit{Id.}
\textsuperscript{101} \textit{Id.}
\textsuperscript{102} \textit{Id.}
\textsuperscript{103} Letter from Norma V. Cantu, Assistant Secretary for Civil Rights, Office of Civil Rights, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (January 16, 1996) (on file with U.S. Department of Education).
\textsuperscript{104} \textit{Id.}
for the underrepresented sex it is unlikely they can comply with this prong unless they show a continuous practice of expansion with the previous additions of other sports for that sex.\textsuperscript{105}

Finally, the third prong is: “Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a history and continuing practice of program expansion, as described above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.”\textsuperscript{106} This assessment looks at both currently enrolled students and admitted students who are not yet enrolled.\textsuperscript{107} An institution can be in compliance with the this prong where despite there being disproportionate number of participation opportunities for one sex that they can show that the underrepresented sex’s interest and abilities are nonetheless being fully and adequately met.\textsuperscript{108}

In making this determination, OCR will consider whether there is (a) unmet interest in a particular sport; (b) sufficient ability to sustain a team in the sport; and (c) a reasonable expectation of competition for the team. If all three conditions are present OCR will find that an institution has not fully and effectively accommodated the interests and abilities of the underrepresented sex.\textsuperscript{109}

In cases where an institution has recently eliminated a team, OCR will assume that student interest is not being met unless the institution can prove that they can no longer support a

\textsuperscript{105} \textit{Id.}
\textsuperscript{106} \textit{Id.}
\textsuperscript{107} \textit{Id.}
\textsuperscript{108} \textit{Id.}
viable team, or interest and ability are no longer present.\textsuperscript{110} Factors considered in assessing part (a) unmet interest are:

- requests by students and admitted students that a particular sport be added;
- requests that an existing club sport be elevated to intercollegiate team status;
- participation in particular club or intramural sports;
- interviews with students, admitted students, coaches, administrators and others regarding interest in particular sports;
- results of questionnaires of students and admitted students regarding interests in particular sports; and
- participation in particular in interscholastic sports by admitted students.\textsuperscript{111}

Factors considered in assessing part (b) sustainability of a team include:

- the athletic experience and accomplishments—in interscholastic, club or intramural competition—of students and admitted students interested in playing the sport;
- opinions of coaches, administrators, and athletes at the institution regarding whether interested students and admitted students have the potential to sustain a varsity team; and
- if the team has previously competed at the club or intramural level, whether the competitive experience of the team indicates that it has the potential to sustain an intercollegiate team.\textsuperscript{112}

Lastly, factors considered in assessing part (c) reasonable expectation of competition are:

- competitive opportunities offered by other schools against which the institution competes; and
- competitive opportunities offered by other schools in the institution's geographic area, including those offered by schools against which the institution does not now compete.\textsuperscript{113}

\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} Id.
\textsuperscript{113} Id.
As of 2015 a majority of institutions supporting intercollegiate athletic programs chose to meet the three part test by complying with this third prong, full and effective accommodation of interest and ability.\textsuperscript{114}

3. The Bowling Green Letter: Part I Scholarship Clarification

The 1998 the Bowling Green Letter further clarified the 1996 Policy Interpretation as it pertained to equity in athletic scholarships. The letter specifically focused on the meaning of "substantially proportional.\textsuperscript{115}" The OCR made clear that scholarship money allocated to men and women did not have to be equal dollar for dollar.\textsuperscript{116} On the contrary, if a universities percentage of scholarship aid was within +/-1\% of the total percent of participating athletes in a particular sex then the slight disparity would be presumed reasonable.\textsuperscript{117} The converse would be true if the disparity were greater than +/- 1\%.\textsuperscript{118} However, even if the presumption is met any evidence of discriminatory intent could result in a finding of discrimination.\textsuperscript{119}

V. The Potential Effects \textit{O'Bannon} Will Have in Regard to Title IX

The preeminent question in an analysis of \textit{O'Bannon} and Title IX is whether the holding in \textit{O'Bannon}, prohibiting the NCAA from barring increases in scholarships to include cost of attendance and awarding the ability to pay into a trust up to $5,000, are benefits or scholarships that Title IX regulates. In \textit{O'Bannon}, the court discussed cost of attendance in terms of an increase in the scholarship cap.\textsuperscript{120} Therefore, given this language of the Court, it is highly likely

\textsuperscript{114} \textit{Id.}
\textsuperscript{116} \textit{Id.}
\textsuperscript{117} \textit{Id.}
\textsuperscript{118} \textit{Id.}
\textsuperscript{119} \textit{Id.}
\textsuperscript{120} \textit{O'Bannon}, 7 F. Supp. at 972.

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that any increase to Division I men's basketball or FBS football players scholarships to include cost of attendance would be considered scholarship money as defined in the "scholarship" portion of Title IX's requirements.

However, the Trust, under which a maximum of $5,000 can be held annually for student athletes and to be made available upon graduation, is a more complex inquiry. The Trust is a more difficult question because the money in the Trust would not be awarded to athletes while they are students and because the money would come directly from revenue generated from use of division I men's basketball and FBS football players names, likenesses, and images. While there is nothing in Title IX that regulates awards given by institutions after school, as there are no known practices of doing so, there is an area of regulation that the Trust can be paralleled. Currently, athletic departments that use revenue generated from athlete's names, likenesses, and images for their athletic departments must split that money so that substantially equal budgets are sustained between men's and women's sports. One could argue that because current practice dictates the money earned from revenue generated sports must be apportioned between men and women evenly, and among sports that do not produce revenue, that the Trust is no different and it merely apportions that same money at a later date and therefore should not be considered exempt from Title IX.

In all likelihood the Trust will be deemed to be a monetary award that is regulated by Title IX. Essentially the Trust is a form of deferred compensation or scholarship awarded to certain athletes. If the Trust was not deemed to fall under Title IX then the possibilities of what could be offered to athletes after graduation would be endless. There would be nothing to stop schools from pushing for extra benefits for student athletes post-graduation by relying on the same logic that the Plaintiffs in O'Bannon do. These extra benefits available after graduation
would act as incentives to bring student athletes to certain schools. These types of awards or benefits would directly go against the underlying purpose of Title IX, preserving equality, making it virtually useless. Therefore, because a finding that declared the Trust outside the scope of Title IX would directly contradict the very policies and purpose at the heart of Title IX the Trust will more than likely be considered a monetary award under the statute.

One overarching issue pertaining to both cost of attendance and the Trust is that the O'Bannon ruling only bars the NCAA from enforcing policies that would interfere with the remedy awarded from being made available to Division I men’s basketball and FBS football teams; it does not pertain to any other college athletic teams or divisions.\(^\text{121}\) Therefore, the NCAA is still allowed to enforce its rules that prohibit increase in cost of attendance and the Trust from being awarded to all other student athletes on non-revenue generating sports teams. If the NCAA continues to enforce these rules in relation to the teams that the O'Bannon ruling does not cover the NCAA will create a situation where institutions would not be able to simultaneously comply with Title IX and the NCAA. Although, universities would be able to comply with both Title IX and NCAA regulations as they pertain to the Trust, by simply putting the equivalent money awarded to Division I men’s basketball and FBS football teams under the Trust into the women’s athletic budget. But, universities would not be able to comply with Title IX scholarship requirements when it came to cost of attendance without directly violating NCAA rules. If O'Bannon stands universities may find themselves in a legal conundrum with questions of whether federal law preempts NCAA regulations. Assuming the NCAA would allow this and that Title IX applied to the remedy in O'Bannon, the Title IX regulations that would be applicable to regulating increased cost of attendance and the Trust would be “Compliance in

\(^{121}\) O'Bannon, 7 F. Supp. at 1007-08.
Financial Assistance (Scholarships) Based on Athletic Ability” and “Compliance in Other Program Areas.”

An analysis of the potential costs associated with the O'Bannon ruling is necessary to understand the financial implications the decision would have on college athletic departments. First, in order to pay student athletes on Division I men’s basketball and FBS football teams the maximum amount allowed under the Trust, $5,000, for all 98 scholarship athletes (13 men’s basketball players and 85 FBS football players)122 it would total $490,000.123 The Bowling Green Letter stipulates that in order to be awarded the presumption of compliance within the scholarship requirements the disparity between the percentage of aid awarded to men and that awarded to women must be within plus or minus 1% of the percent of athletes that participate in sports for each sex.124 The opposite would be true if the disparity was greater than 1%. This is not a bright line rule, as each financial assistance program is looked at on a case-by-case basis. There is room within and slightly beyond a 1% disparity for such legitimate non-discriminatory reasons for a fluctuation such as: “in-state and out-of-state tuition rates provided the differences are not the product of discriminatory recruitment practices, unexpected fluctuation rates in athletic participation, a phase-in scholarship plan for a newly added sport program, dollars awarded to promote program development or last minute decisions by student-athletes not to attend an institution.”125 For example, if 60% of the athletic participants at a university were male and 40% were female and the school gave out one million dollars in scholarship money to

123 This figure is derived by multiplying 5,000 by 98.
athletes each year a perfect ratio would be $600,000 to the men and $400,000 to the women. In this case, the university would still be awarded the presumption if the men got 61% of the budget, $610,000, or if they got 59%, $590,000.

If, in order to comply with Title IX’s “financial assistance” and “other athletic benefits and opportunities” requirements institutions had to pay an equal amount to women’s athletic departments it would cost schools $980,000. If the cost of attendance is also included, the price would rise even higher. The University of Texas, which has the nation’s leading revenue generating athletic department as of 2013, estimates the increased cost of attendance not currently covered under scholarships as defined by the NCAA would total $4,270 a year. The University of Texas would have to pay $836,920 if it wanted to increase financial assistance to cover the full cost-of-attendance rather than merely grant-in-aid for those 98 players including the cost to match the amount given to those players to the women’s athletic department. Of course, the requirements under Title IX do not require dollar for dollar equality but in order to remain within the area of presumptive compliance, plus or minus 1%, in many instances there would have to be a significant increase to the women’s athletic budget.

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127 Id.
128 Double the figure $490,000, which is the cost necessary to award the maximum $5,000 to all 98 scholarship men’s basketball and FBS football players.
129 Office of Student Financial Services the University of Texas At Austin, http://finaid.utexas.edu/costs.html (last visited March 21, 2015).
130 This figure is the sum of 4,270 multiplied by the number of scholarships for men’s basketball and FBS football, 98, multiplied by two, the equivalent amount needed for women.
131 Supra n. 126
For example, between 2013 and 2014 the University of Texas awarded $9,658,662 in scholarship money to varsity athletes.\textsuperscript{132} The University allocated $5,551,381 to men and $4,107,281 to women.\textsuperscript{133} Therefore, men received 57% of the scholarship money and women received 43%.\textsuperscript{134} Male athletes make up 53% of the total varsity participants and women make up 47%.\textsuperscript{135} If the University of Texas allocated cost of attendance and the Trust money to the Division I men's basketball and FBS football players, it would total an additional $908,460 awarded to the men.\textsuperscript{136} The University would see a spike in the disparity in the percent of financial aid awarded to men as opposed to women of 4%, rising from 57% to 61%—a sizable increase when equality is the ultimate goal. In order to remain within plus or minus 1% of the universities current numbers the University would have to minimally increase the women's athletic budget by $570,578, bringing the total overall increase to $1,479,038. For a school like the University of Texas, whose athletic department generated over $18.8 million in profits in 2013, this increase would not be significant, but many schools fear this type of increase or even a marginal increase (the amount will vary based on each institution's estimated cost of attendance and how much they pay into the Trust) might be financially crippling. This concern is likely

\textsuperscript{133} Id.
\textsuperscript{134} Id.
\textsuperscript{135} The University of Texas' present numbers do not support a presumption of compliance; however, this may be due to a number of disparity causing factors such as: "in-state and out-of-state tuition rates provided the differences are not the product of discriminatory recruitment practices, unexpected fluctuation rates in athletic participation, a phase-in scholarship plan for a newly added sport program, dollars awarded to promote program development or last minute decisions by student-athletes not to attend an institution." For the purpose of this comment I will not address the Universities current compliance, instead this comment will focus on the University maintaining its current ratio of compliance within +/- 1%.
\textsuperscript{136} This figure was reached by adding the $490,000 maximum of the Trust to the $418, 460 it would cost to increase cost of attendance based on the 2013 figures.
based on the fact that currently only twenty universities' athletic departments generate revenue annually, with many athletic departments finishing each calendar year in debt.\textsuperscript{137}

If Universities found these financial increases to be too costly especially for the many programs that are already operating at a deficit, the effect may be to cut teams. The University of North Carolina at Chapel Hill has already expressed concern that the recent \textit{O'Bannon} ruling would result in "spend[ing] more money on fewer kids."\textsuperscript{138} The possibility of sports being cut to comply with Title IX and the affect the \textit{O'Bannon} decision may have on its application is not an unfounded fear. Throughout the life of Title IX many instances of teams being cut in order to comply with the law have been recorded, and many have also been litigated.\textsuperscript{139} Men overwhelmingly face cuts due to budgetary and Title IX concerns.\textsuperscript{140} Over the years countless non-revenue generating men's sports have been cut from schools athletic budgets; men's swimming and wrestling are among the highest rate of teams to be cut.\textsuperscript{141} Case law has supported the removal of men's sports and precedent states that the removal of these sports does not constitute a violation of Title IX.\textsuperscript{142}

The \textit{O'Bannon} decision has created a buzz amongst college athletic departments and the media about whether \textit{O'Bannon} may diminish opportunities for student-athletes due to the premium schools will have to pay to female athletes if they choose to pay division I men's


\textsuperscript{139} See Kelly v. Bd. Of Trustees of Univ. of Ill., 802 F. Supp. 737 (N.D.N.Y. 1992), vacated as moot, 992 F.2d 17 (2d Cir. 1993); Equity in Ath.Inc.v. Dep't of Educ., 639 F.3d 91, (4th Cir. 2011); Equity in Ath.Inc.v. Dep't of Educ., 291 Fed. Appx. 517, (4th Cir. 2008); Miami Univ. Wrestling Club v. Miami Univ., 302 F.3d 608 (6th Cir. 2002); Chalenor v.Univ. of N.D., 291 F.2d 1042 (8th Cir. 2002); Pederson v. La. State Univ., 213 F.3d 858 (5th Cir. 2000); Boulahanis v. Bd. of Regents, 198 F.3d 633 (7th Cir. 1999); Neal v. Bd. of Trs. Of the Ca. State Univrs., 198 F.3d 763 (9th Cir. 1999).

\textsuperscript{140} Nancy Hogshead-Maker & Andrew Zimbalist, \textit{Equal Play: Title IX and Social Change} 135 (2007).

\textsuperscript{141} Id. at 50.

\textsuperscript{142} Id.
basketball and FBS football players what is allowed under *O'Bannon*. But, alternatives exist, rather than cut sports, universities and administrative agencies such as OCR and the NCAA could partake in one of three options. First, universities could choose to award the Trust and cost of attendance only to the narrow group of athletes that the ruling applied to, and wait to be sued by students who believe Title IX applies to them and let the courts decide. Second, Congress could intervene and create a narrow exception to Title IX, which would exclude the Trust and cost of attendance awarded to Division I men’s basketball and FBS football teams from the amount calculated. The proposed amendment would be similar to the Tower Amendment which was proposed in 1974 but was ultimately not approved.\(^{143}\) Lastly, schools could offset the financial increases by shifting costs to consumers through ticket sales, contracts with sports networks, and merchandise.

A. **PROPOSED SOLUTIONS**

1. **Litigation**

The *O'Bannon* decision is novel but not the first of its kind, a similar case dealing with compensation of college athletes as employees reached the National Relation Board in *Northwestern*.\(^{144}\) *O'Bannon*, is merely one example of what is sure to be an onslaught of cases that decide whether college athletes should be paid wages, receive compensation from their likeness and image being used, and other benefits associated with financial gains these athletes make for their schools. The fact that *O'Bannon* deals with a matter of first impression makes the

\(^{143}\) *Id.*  
findings in the case as they apply and affect other laws, such as Title IX, ripe for further litigation.

Colleges and universities may choose to wait-and-see what a court will decide before they declare that the trust of up to $5000 and the cost-of-attendance money deemed available to Division I men’s basketball players and FBS players comes within the purview of Title IX. As in the past, student athletes may sue under Title IX for damages and declaratory relief\(^{145}\), claiming that the remedies awarded under \textit{O’Bannon} should be considered items that Title IX regulates and demand that the court order compliance. Litigation would thus necessitate a court to decide whether Title IX applies to the cost of attendance and the Trust. This may become a lengthy process with an unknown number of schools dragged into litigation. It may also prove to be quite costly. In the end, this approach would like be a costly way to prolong the inevitable, as both the cost of attendance and the Trust have characteristics that weigh strongly in favor of areas to be regulated by Title IX. It would be more cost effective and more image conscious for universities to assume Title IX applies when it comes to \textit{O’Bannon} rather than fight a losing battle.

2. \textit{Congress}

Second, Congress might remedy the potential Title IX effects that \textit{O’Bannon} may have by adopting an amendment that allows for the trust money and cost-of-attendance to be received only by the Division I men’s basketball and FBS football team members. A similar amendment to Title IX was suggested in 1974, known as the Tower Amendment.\(^{146}\) The Tower Amendment called for revenue-producing sports and sports that produced donations to its school to be


excluded from Title IX. The Tower Amendment was highly controversial and although it passed the Senate, the amendment was ultimately defeated. The Tower Amendment may have been too broad and extreme to pass Congress, but a more moderate bill may have a better chance of success.

For example, an amendment that excluded from Title IX’s “financial assistance” and “other benefits” requirements the amount put into a trust of up to $5000 per year and the cost of attendance to be awarded to Division I men’s basketball and FBS football players may be an appropriate compromise. The amendment could allow for all other current “financial assistance” and “other benefits” such as scholarships to remain applicable to these teams in relation to Title IX calculations for fairness between men’s and women’s sports. Additionally, the amendment would still allow those 98 players to be counted towards “Adequate Accommodation” proportionality, ensuring that women get a truly fair proportionate share of athletic opportunities. Therefore, the only money that would be excluded would be the award given to men’s basketball and FBS football teams under the O’Bannon ruling. Title IX proponents might consider this to be a serious setback to women’s sports, but instead it should be looked at as a necessary compromise in order to preserve the hard fought advances that have been made. An amendment of this nature could preserve teams while still meeting the needs of athletes in revenue generating sports who feel that they are being taken advantage of. In many ways, although a law like this may not seem fair to the members of other non-revenue generating sports, and to some like an affront to amateurism, the fact is that the tide of popular opinion and case law is quickly moving towards compensating these student athletes. In order to remain in the game, members of non-

147 id.
148 id.
revenue generating sports should support an amendment such as the one proposed so that everyone can continue to play. Ultimately, this option, although sensible, would likely meet extreme opposition due to its controversial nature and would not pass into law because of the efforts of its opponents and the current gridlock in Congress.

3. Shift Cost to Consumers

Lastly, a third option available to NCAA member schools would be to comply with Title IX at the onset and pay for any additional costs associated with the O'Bannon ruling by increasing prices for tickets, merchandise, and the amount they receive for broadcast contracts. The schools could overcome the added financial responsibilities that O'Bannon may impart on them, in regard to Title IX, by simply shifting the cost to consumers. If the University of Texas increased ticket prices by just five dollars they would stand to make $500,000 more a game at the current football stadium they play in. The University of Texas could pay for the $1,479,038 they would need to comply with Title IX, if they chose to award the maximum allowed under O'Bannon, for cost of attendance and the Trust in just three football games. While this would not be the case for every school, it is likely that schools with fewer fans would also be the schools that are not paying out the maximum amounts allowed under O'Bannon. Increases to tickets and merchandise across the board would be nominal to fans and it would benefit the schools by taking the burden off already debt ridden athletic departments. The benefits of shifting costs to consumers would allow universities to uphold the status quo, without any sports needing to be cut to make ends meet.

150 The Darrell K. Royal Memorial Stadium can officially seat 100,119 people. Although the University of Texas has reported numbers as high as 101,851 in attendance. Texasports.com, http://www.texassports.com/sports/2013/7/24/facilities_0724133148.aspx (last viewed on May 31, 2015).
VI. CONCLUSION

The *O’Bannon* decision only pertains to a narrow issue, but it may prove to have far reaching repercussions if it is upheld by the Ninth Circuit. But, at least as those repercussions pertain to Title IX the status quo can largely be preserved. While the decision to spend the money remains with the school, it is clear that in order to compete with other top programs; universities will have to pay some portion of the allowed compensation in order to vie for the best players. It would only take a few schools that have the means to finance the Trust and cost of attendance to create a snowball effect. While some schools may fear that *O’Bannon* will force them to cut non-revenue generating sports there is a simple solution to both avoid this type of negative consequence and fairly compensate the student athletes who generate millions of dollars for their universities each year.

While litigation and lobbying Congress are options they are not truly viable and cost effective. Rather, the most logical and simple solution would be to shift costs to consumers. This could be implemented immediately so that schools would never feel the added financial pressure *O’Bannon* may have otherwise imposed on some of the less financially strong institutions. Therefore, schools can feel confident that they will not have to make hard decisions like cutting non-revenue generating sports. As long as, increases to tickets and merchandise are nominal fans who have a deep affection for their alma mater will continue to patronize games and buy jersey’s, leaving schools, student athletes, and fans alike in largely the same position they were in prior to *O’Bannon*; with the added benefit that now student athletes on revenue generating teams are being fairly compensated.