

September 2018

Compensation is All-American: Former College Football Star Chris Spielman's Case Against His Alma Mater and How it Could Affect the NCAA's Amateurism Rules

Jason McIntyre
Elisabeth Haub School of Law at Pace University

Follow this and additional works at: <https://digitalcommons.pace.edu/plr>

 Part of the [Antitrust and Trade Regulation Commons](#), [Entertainment, Arts, and Sports Law Commons](#), [Intellectual Property Law Commons](#), [Labor and Employment Law Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Jason McIntyre, *Compensation is All-American: Former College Football Star Chris Spielman's Case Against His Alma Mater and How it Could Affect the NCAA's Amateurism Rules*, 39 Pace L. Rev. 481 (2018)

DOI: <https://doi.org/10.58948/2331-3528.1993>

Available at: <https://digitalcommons.pace.edu/plr/vol39/iss1/9>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

**Compensation is All-American: Former College Football
Star Chris Spielman’s Case Against His Alma Mater and
How it Could Affect the NCAA’s Amateurism Rules**

Jason McIntyre*

I. Introduction.....	481
II. Background.....	483
III. Jurisdictional Issues	486
IV. Analysis	487
A. The NCAA and its Amateurism Rules.....	487
B. The Sherman Act.....	488
C. <i>NCAA v. Board of Regents</i> and the Sherman Act’s Effect on the NCAA	490
D. The <i>O’Bannon</i> Decision.....	494
E. The Lanham Act § 43(a).....	498
F. Deceptive Trade Practices	503
G. Right of Publicity	503
V. Discussion: The Possible Impact of a Favorable Decision for Spielman.....	505
VI. Conclusion	507

I. Introduction

A former National Collegiate Athletic Association (“NCAA”) athlete has filed a class action lawsuit on behalf of past and current NCAA athletes against their former universities and those universities’ sports marketing agencies, for injunctive relief and damages arising from alleged violations of federal antitrust and state labor and industry laws.

* J.D. Candidate, May 2019. Jason is a Case Note and Comment Editor for Pace Law Review and an Associate at Messner Reeves, LLP, pending Bar admission. Jason has close ties with college athletics—growing up on West Point, New York, his father was employed as an athletic administrator for the United States Military Academy. He was also a student-athlete at Marist College. Jason would like to thank his family for all of their encouragement and support.

The lawsuit, *Spielman v. IMG College*, arose when Ohio State University (“OSU”) entered into a marketing deal through their marketing agency, IMG College (“IMG”), with corporations Honda Motor Co. (“Honda”) and Nike USA Inc. (“Nike”), to hang banners depicting images of former college athletes at school sporting events. Charles “Chris” Spielman, the named Plaintiff and former NCAA football player at OSU, brought this lawsuit because he claims that OSU and IMG unreasonably and illegally restrained trade by denying him the right to profit from his name, image, and likeness.¹

This case plays a role in the ongoing conversation of whether NCAA athletes should be able to receive monetary compensation for their contributions to amateur athletics. Spielman alleges in his Complaint that the actions of OSU and IMG are contrary to a decision in the Ninth Circuit Court of Appeals, which held that the NCAA’s compensation rules were subject to antitrust scrutiny.² A decision in this case has the potential to have a major effect on the current form of the NCAA.

Spielman has filed in the District Court of Ohio, which falls under the jurisdiction of the Sixth Circuit Court of Appeals. Spielman cites a decision made in the Ninth Circuit stemming from a case in which former NCAA basketball player, Ed O’Bannon, sued the NCAA, saying that its amateurism rules were an illegal restraint of trade under the Sherman Act because they prevented NCAA athletes from being compensated for the use of their name, image, and likeness.³ The Sherman Act declares illegal any conspiracy which operates to force unreasonable terms and conditions upon independent traders and unduly limits their liberty to do business in interstate markets.⁴ O’Bannon brought his case after he saw his own personal features being used in a video game. He was not compensated for, nor did he authorize the use of these characteristics in the game.

1. Class Action Complaint at 3, *Spielman et al. v. IMG College, LLC et al.*, No. 2:17-CV-00612, 2017 WL 3015658 (S.D. Ohio July 14, 2017).

2. *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049 (9th Cir. 2015).

3. *Id.*

4. Sherman Act, 15 U.S.C. § 1 (2004).

The conversation regarding compensation of the collegiate athletes has extended to whether current NCAA athletes can form a players' union. This has been addressed directly by the NCAA⁵ after football players attempted to organize at Northwestern University.⁶ Spielman's lawsuit gains more significance as this conversation continues. It is likely that, as more people consider this issue, duplicative lawsuits may be filed in the future by former NCAA athletes who find themselves position comparable to Spielman and O'Bannon. In a statement, Spielman has expressed his concern regarding "the exploitation of all former players."⁷ If the case is brought before the Sixth Circuit Court of Appeals and there is a decision adverse to Spielman, there is the potential for a circuit split, which may compel the Supreme Court of the United States to grant certiorari if requested. This case may result in a decision that will open the door for former, and perhaps even current, college athletes to receive compensation for their contributions to NCAA athletics.

II. Background

Chris Spielman has achieved celebrity status because of his prowess as an NCAA athlete. His unique talents and ability on the football field at OSU led to a career as a professional athlete and television personality.⁸ Spielman played for twelve years in

5. Donald Remy, *NCAA Responds to Union Proposal*, NAT'L COLLEGIATE ATHLETIC ASS'N, <http://www.ncaa.org/about/resources/media-center/press-releases/ncaa-responds-union-proposal> (last visited Feb. 15, 2019).

6. Loretta8, *Friendly Reminder: The NCAA Invented the Term "Student-Athlete to Get Out of Paying Worker's Comp"*, SB NATION: INSIDE NU (Jan. 28, 2014, 8:57 PM), <https://www.insidenu.com/2014/1/28/5355988/ncaa-student-athlete-kain-colter-union-workers-comp>.

7. Athletic Staff, *Spielman Sues OSU Over Use of Athletes' Image*, ATHLETIC (July 7, 2017), <https://theathletic.com/76313/2017/07/17/spielman-sues-osu-over-use-of-athletes-image/> (stating "[m]y concern is about the exploitation of all former players across this nation who do not have the platform to stand up for themselves while universities and corporations benefit financially by selling their name and likenesses without their individual consent. . . . My hope is that this litigation will level the playing field for those affected players, and that they too can benefit from the dollars flowing into collegiate athletics.").

8. Class Action Complaint, *supra* note 1, at 8.

the National Football League (“NFL”)⁹ and is now employed as an analyst for FOX NFL.¹⁰ He was able to maintain a valuable reputation while he was at OSU, yet he was not able to profit from it while he was a student at OSU because of NCAA rules against compensation.¹¹ He decided to file this lawsuit after his image, and the images of other prominent former players, were used on corporate sponsored banners that were hung at football games in OSU’s stadium. The banners were a way for the OSU athletic association to generate revenue, as OSU entered into deals with Honda and Nike to sponsor the banners in exchange for advertising space at OSU sporting events.¹² Spielman argues that if OSU seeks corporate sponsorships, they should engage the person whose name, image, and likeness they seek to use in the negotiations. Clearly, Spielman’s and other athletes’ reputations are valuable—as evidenced by licensing deals between OSU, IMG, Honda, and Nike—so it is likely that Spielman would be able to profit if he was party to the licensing deal. Because Spielman is no longer under the restraints of NCAA amateurism rules, he, and others in the proposed class, would be allowed to seek compensation for the use of his NIL if there is a decision in his favor.

While not yet a federal class action, Spielman seeks class action status so that others similarly situated will be able to join the lawsuit.¹³ Sixty-three other former players, including Archie Griffin, another prominent former OSU football player, were also featured on the banners.¹⁴ Celebrities such as Spielman and Griffin may be considered among the most recognizable names and people associated with NCAA football because of their achievements on the field.

9. *Id.*

10. *Chris Spielman*, FOX SPORTS: PRESS PASS, <http://www.foxsports.com/presspass/bios/on-air/chris-spielman> (last visited Feb. 15, 2019).

11. *Amateurism*, NAT’L COLLEGIATE ATHLETIC ASS’N, <http://www.ncaa.org/student-athletes/future/amateurism> (last visited Feb. 15, 2019) (exhibiting NCAA amateurism rules prohibiting student athletes from entering into contracts with agencies).

12. Class Action Complaint, *supra* note 1, at 1–2 (showing that, while Honda and Nike are not named Defendants, they have been listed as co-conspirators).

13. Athletic Staff, *supra* note 7.

14. *Id.*

OSU enjoys immense popularity across the nation, and its fan base is among the largest for collegiate athletics.¹⁵ It is not difficult to surmise why major corporations like Honda or Nike would seek advertising space in OSU's sports facilities. With the outstanding attendance¹⁶ at OSU football games and other sporting events, and through the various television deals that OSU has through their athletic conference, The Big Ten,¹⁷ corporations are able to reach their target audience. The advertising is not only effective,¹⁸ but also cost-efficient, considering that, as Spielman alleges, major parties are left out the negotiations completely, and do not have to be compensated if the current model is allowed to continue.

Spielman and Griffin's images are valuable because of the fame and celebrity that they enjoy, which is a product of their exemplary skill and hard work portrayed while playing football. OSU seeks to use these images to attract fans to their stadiums, so these fans can be accosted by the advertisements of major corporations. In short, the corporations want to advertise in OSU stadiums using images of people like Spielman because his reputation is valuable. However, the images that make the banners valuable can be acquired by OSU without compensating the person who owns it because of NCAA rules that promote amateurism. Nevertheless, these rules shouldn't even apply to Spielman because he is no longer a NCAA athlete and, therefore, is not subject to NCAA regulations.

The revenue that the NCAA generates through amateur competition is astronomical: \$871.6 million of reported revenue from 2011 to 2012, while the 231 NCAA Division I schools (with data available) generated a total of \$9.15 billion during the 2015

15. Class Action Complaint, *supra* note 1, at 12.

16. *Id.*

17. Ryan Connors, *Big Ten Confirms TV Deals With CBS, ESPN, FOX*, LAND 10 (July 24, 2017, 1:08 PM), <https://www.landof10.com/big-ten/big-ten-tv-contract-cbs-espn-fox>.

18. Rich Exner, *Ohio State Buckeyes Sports Money by the Numbers*, CLEVELAND.COM (Mar. 25, 2017, 11:33 PM), http://www.cleveland.com/data-central/index.ssf/2017/03/ohio_state_buckeyes_sports_mon.html (stating "royalties licensing, advertisements and sponsorships brought in \$17.2 million").

fiscal year.¹⁹ OSU accounted for \$170.8 million of that total.²⁰ Spielman argues that the former NCAA athletes who are unable to profit from the reputation they created while in school should be allowed to do so once they are no longer under the jurisdiction of the NCAA regulations, and that excluding them from the negotiations is an unreasonable restraint on trade.²¹

III. Jurisdictional Issues

OSU is a state university funded by the public, so it is an extension of the state of Ohio. In *Hans v. Louisiana*, the Supreme Court held that each state enjoys sovereign immunity and, therefore, cannot be sued in federal court without consent.²² Because of this, the doctrine of sovereign immunity applies to OSU. Spielman has filed this lawsuit in the Southern District of Ohio, claiming jurisdiction on the ground that this is a violation of a federal law. Ohio has partially waived its sovereign immunity, which means that all claims against the state of Ohio must be brought in the Ohio Court of Claims.²³

As mentioned, Spielman seeks class action status so all similarly affected plaintiffs can join the lawsuit. It can take a long time to convince a federal judge to allow this case to proceed as a class action because he or she must consider and decide whether all of the plaintiffs are similarly affected.²⁴ In the *O'Bannon* decision, it took four and one-half years before O'Bannon was able to obtain class action status. However, there were over 10,000 plaintiffs in that case.²⁵

19. PETER SMOLIANOV, *SPORT DEVELOPMENT IN THE UNITED STATES: HIGH PERFORMANCE AND MASS PARTICIPATION* 42 (Routledge 2014); *Where Does the Money Go?*, NAT'L COLLEGIATE ATHLETIC ASS'N, <http://www.ncaa.org/about/resources/finances/revenue> (last visited Feb. 15, 2019); see also Cork Gaines, *The Difference in How Much Money Schools Make off of College Sports Is Jarring, and It Is the Biggest Obstacle to Paying Athletes*, BUS. INSIDER (Oct. 14, 2016, 12:00 PM), <http://www.businessinsider.com/ncaa-schools-college-sports-revenue-2016-10>.

20. Exner, *supra* note 18.

21. See generally Class Action Complaint, *supra* note 1.

22. 134 U.S. 1, 13 (1890).

23. OHIO REV. CODE ANN. § 2743.02 (LexisNexis 2012).

24. FED. R. CIV. P. 23(a)(2).

25. Jon Solomon, *Inside College Sports: Here's What's Next for NCAA After O'Bannon Ruling*, CBS SPORTS (Oct. 2, 2015, 1:28 AM), <https://www.cbs>

Spielman has amended his original complaint and expanded the number of defendants to include every school that has used IMG as a sports marketing agency—a total of eighty-nine schools, including OSU.²⁶ Spielman says that he amended his complaint so all former players, and all those who will become former players, will be protected.²⁷ However, this also plays a significant part in deciding if this case should be heard in federal court.

This case isn't just about suing schools and allowing the class to collect damages.²⁸ By expanding the class in such a way, Spielman may increase his chance to have the case heard in federal court. If the case is heard in federal court, rather than the Ohio Court of Claims, there will be federal precedence which will likely dictate policy on how to compensate former players for the use of their name, image, and likeness.

IV. Analysis

A. The NCAA and its Amateurism Rules

The NCAA was founded in 1906 because of a desire and need to reform college football in order to make it safer and more regulated.²⁹ It started as a discussion group and rules-making body for football, and then was expanded to other sports as more rule committees were formed. The Sanity Code was the NCAA's first attempt to establish guidelines for recruiting and financial aid. Eventually, the current structure of the NCAA began to take shape. An executive director was appointed in 1951, and a

sports.com/college-football/news/inside-college-sports-heres-whats-next-for-ncaa-after-obannon-ruling/.

26. Laura Newpoff, *Chris Spielman Lawsuit Against Ohio State, IMG Expands to 89 Colleges, Impacts Thousands of Players*, COLUMBUS BUS. FIRST (Nov. 29, 2017, 11:02 AM), <https://www.bizjournals.com/columbus/news/2017/11/28/chris-spielman-lawsuit-against-ohio-state-expands.html>.

27. *Id.*

28. Class Action Complaint, *supra* note 1, at 17 (stating that he has demanded the minimum amount of relief allowable in federal court (\$75,000) and that he will donate all money to the OSU athletic department); Athletic Staff, *supra* note 7.

29. *Concussion Timeline*, NAT'L COLLEGIATE ATHLETIC ASS'N, <http://www.ncaa.org/sport-science-institute/concussion-timeline> (last visited Feb. 15, 2019).

national headquarters was established in 1952. Walter Byers, the first executive director, has been credited with inventing the term *student-athlete* in 1964 to use as a defense during litigation when the NCAA successfully avoided paying workers compensation benefits to athletes.³⁰

The NCAA defines an amateur as someone who has not profited above his/her actual and necessary expenses or gained a competitive advantage in his/her sport.³¹ Amateurism was adopted as a bedrock principle in order to ensure that NCAA athletes place first priority on obtaining a quality educational experience and they are all in equal competition.³² In general, the amateurism rule prohibits NCAA athletes from: entering contracts with professional teams, or any sort of agreement to be represented by an agent; receiving a salary for participating in athletics, prize money above actual and necessary expenses, or benefits from an agent or prospective agent; and playing, practicing or otherwise competing with a professional or professional team.³³

B. The Sherman Act

When it was codified in 1890, the Sherman Act's primary purpose was to promote and maintain competition between businesses in the marketplace.³⁴ In short, the Sherman Act prohibits the formation and exercise of unreasonable monopolies. The Rule of Reason analysis was established in the Supreme Court's decision in *Standard Oil Co. v. United States*.³⁵ In that case, it was alleged that Defendant oil companies from various states and other corporations restrained trade and created monopolies through a deal made in 1870 by John. D.

30. Jon Solomon, 'Schooled: The Price of College Sports' Is a Movie Worth the NCAA History Lesson (Review), AL.COM (Oct. 17, 2013, 6:26 PM), http://www.al.com/sports/index.ssf/2013/10/schooled_the_price_of_college.html; see also Loretta8, *supra* note 6.

31. *Amateurism*, *supra* note 11.

32. *Id.*

33. *Id.*

34. Christian Dennie, *He Shoots, He Scores: An Analysis of O'Bannon v. NCAA on Appeal and the Future of Intercollegiate Athletics*, 93 N.C.L. REV. ADDENDUM 90, 96 (2015).

35. 221 U.S. 1 (1911).

Rockefeller and others. The Court held that the deal fixed prices, limited production, and controlled transportation of goods when about 90% of the oil business in Ohio was controlled by Rockefeller and his associates.³⁶ With that kind of control, the Defendants were able to force their competitors out of the market by giving preferential rates and rebates to customers.³⁷ The Court was tasked with interpreting the Sherman Act because the statute itself does not specifically enumerate or define a restraint of trade and therefore each case that claims a violation of the Sherman Act must be decided individually.³⁸ In his opinion, Chief Justice White established that the Rule of Reason is, therefore, the standard intended by the statute—that only monopolies and restraints of trade that are decided to be *unreasonable* are illegal.³⁹ In *Board of Trade et al. v. United States*, Justice Brandeis articulated how the rule should be applied.⁴⁰

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.⁴¹

36. *Id.* at 32–33.

37. *Id.* at 33.

38. *Id.* at 63.

39. *Id.* (emphasis added).

40. 246 U.S. 231, 238 (1918).

41. *Id.*

This decision established the principle that if a defendant can show that his alleged violations actually promote competition, then those actions are not unreasonable, and thus do not violate the Sherman Act.⁴²

C. *NCAA v. Board of Regents* and the Sherman Act's Effect on the NCAA

The Supreme Court, in its seminal decision *National Collegiate Athletic Ass'n v. Board of Regents*, held that the NCAA is by no means exempt from these restraints and can be subjected to scrutiny under the Sherman Act.⁴³ *Board of Regents* involved the rights of universities that were members of the NCAA and their ability to independently negotiate deals with television networks to broadcast football games on television. In order to combat the adverse effect that television was having on live attendance of college football games, the NCAA created a plan that only permitted one game per week to be broadcast in any given area and limited each member-university to two television appearances per season. Originally, the NCAA had a deal with the American Broadcasting Company ("ABC") for the exclusive right to broadcast these games. In response to these limitations, the College Football Association ("CFA") was formed to promote the interests of major football-playing schools within the NCAA structure.⁴⁴ Later on, the NCAA entered into agreements with ABC and the former Columbia Broadcasting System (now CBS)⁴⁵ allowing each network to broadcast fourteen games per season.⁴⁶ Other restrictions included "appearance requirements" and "appearance limitations" which imposed requirements on what the networks could broadcast and how many times they were able to broadcast certain schools.⁴⁷ The NCAA created a rule that "[n]o member . . . is

42. 1 JOSEPH P. BAUER, WILLIAM H. PAGE & EARL W. KINTNER, FEDERAL ANTITRUST LAWS § 8.2 (Matthew Bender & Co. 2018) (citing *Board of Trade*, 246 U.S. at 240–41).

43. *See generally* 468 U.S. 85 (1984).

44. *Id.* at 89.

45. Harold L. Erickson, *CBS Corporation*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/CBS-Corporation> (last visited Feb. 16, 2019).

46. *Nat'l Collegiate Athletic Ass'n*, 468 U.S. at 92–93.

47. *Id.* at 94.

permitted to make any sale of television rights except in accordance with the basic plan.”⁴⁸ Displeased with this arrangement, the Universities of Oklahoma and Georgia, as well as other members of the CFA, negotiated a different contract with National Broadcasting Company (“NBC”) which provided more television appearances and more money.⁴⁹ The NCAA publicly threatened to take disciplinary action against any CFA member that complied with the CFA-NBC contract.⁵⁰

Horizontal price-fixing, or the artificial setting or maintenance of prices at a certain level, is contrary to the workings of a free market among competitors on the same level, such as retailers throughout an industry.⁵¹ Naturally, NCAA members compete with each other for viewers, making each of them competitors on the same level. Because the NCAA’s plan operated to preclude any price negotiations between broadcasters and member-institutions, the District Court held, and the Supreme Court agreed, that the NCAA participated in horizontal price-fixing, and because the NCAA’s plan restrained the quantity of television rights available for sale, the plan created a limitation on output.⁵² The Court opined that these two practices together is “the paradigm of an unreasonable restraint of trade.”⁵³ Ordinarily, horizontal price-fixing and output limitation are *per se* illegal restraints on trade, so no further analysis would need to be done in order for a court to decide that these actions are in violation of the Sherman Act.⁵⁴ However, the Court found that deciding this case on such grounds would not be appropriate because the NCAA provided sufficient procompetitive arguments for these price-fixing and output limitations that, by their very nature, appear to be distinctly anti-competition.⁵⁵

48. *Id.*

49. *Id.* at 94–95.

50. *Id.* at 95.

51. *Price-fixing*, BLACK’S LAW DICTIONARY (10th ed. 2014).

52. Nat’l Collegiate Athletic Ass’n v. Board of Regents, 468 U.S. 85, 99 (1984).

53. *Id.* at 100 (citing Arizona v. Maricopa Cty. Med. Soc’y, 457 U.S. 332, 344–48 (1982)).

54. *Id.*, 468 U.S. at 100.

55. *Id.* at 103 (finding that, “despite the fact that this case involves restraints on the ability of member institutions to compete in terms of price

It would be difficult for sports leagues to exist without a unifying body such as the NCAA. What they are essentially marketing is competition itself by creating a forum for contests between competing institutions.⁵⁶ In order to protect the integrity of the product, certain rules must be followed, and following those rules must be a mutual agreement by all participating institutions.⁵⁷ The NCAA is pro-competitive because it plays a vital role in enabling college football to “preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable.”⁵⁸ Therefore, the Rule of Reason analysis was the appropriate standard in this case.⁵⁹

When employing the Rule of Reason analysis, Justice Stevens relied on a conclusion made in *National Society of Professional Engineers v. United States*, which held:

[T]hat a restraint of trade is unreasonable may be . . . based either (1) on the nature or character of the contracts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices. Under either branch of the test, the inquiry is confined to a consideration of impact on competitive conditions.⁶⁰

The NCAA argued that the television plan did not have an anti-competitive effect by asserting that it did not have the ability to alter the interaction of supply and demand in the market, and thus did not have market power. The Court found that it did not matter whether it had market power because the absence of market power does not justify a naked restriction on price or output. Regardless, it found that the NCAA did, in fact,

and output, a fair evaluation of their competitive character requires consideration of the NCAA’s justifications for the restraints.”).

56. *Id.* at 101.

57. *Id.* at 102.

58. *Nat’l Collegiate Athletic Ass’n v. Board of Regents*, 468 U.S. 85, 102 (1984).

59. *Id.* at 103.

60. *Id.* at 103 (citing *Nat’l Soc’y Prof’l Eng’rs v. United States* 435 U.S. 679, 690 (1978)).

have market power.⁶¹ The Court determined that NCAA's goal of protecting fan attendance at live football games was not effectively accomplished by limiting how many games were shown on television. More significantly, the Court found that because the NCAA was attempting to "insulate live ticket sales from the full spectrum of competition because of the [NCAA's] assumption that the product itself is insufficiently attractive to [consumers,]" they are in conflict with the Sherman Act.⁶² It was eventually decided that, even though the NCAA's goal is to preserve the integrity of amateur athletics, it went too far when it imposed the restrictions on a member-school's ability to independently negotiate television deals with broadcasters.⁶³

The decision in *National Collegiate Athletic Ass'n* makes it clear that, not only is the NCAA not immune from scrutiny under the Sherman Act, but also the impact of the limitations imposed will be considered in determining whether it is in violation of the Sherman Act.⁶⁴ In his complaint, Spielman alleges the NCAA has engaged in *per se* violations of the Sherman Act by alleging IMG and its co-conspirators Honda and Nike have engaged in an unreasonable restraint of trade through price-fixing and a group boycott or refusal to deal.⁶⁵ By alleging *per se* violations, Spielman is asserting that the NCAA cannot make a valid argument that its practices are justified by being pro-competitive. Even if a court decides that these are not *per se* violations and the Rule of Reason analysis is applied, it is unlikely the NCAA would be able to overcome the precedent set in *Board of Regents* because the impact of the limitation imposed would be considered. The impact in Spielman's case is that he does not have the opportunity to negotiate licensing deals for the name, image, and likeness he created, even though he is not

61. *Id.* at 111.

62. *Id.* at 117 ("[T]he Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable" (alteration in original) (quoting *National Soc'y of Prof'l Eng'rs*, 435 U.S. at 696)).

63. *Id.* at 121.

64. *Nat'l Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 121 (1984); *see also* *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1063 (9th Cir. 2015) (stating "but the NCAA is not asking us to find merely that its amateurism rules are procompetitive; rather, it asks us to hold that those rules are essentially exempt from antitrust scrutiny" (footnote omitted)).

65. Class Action Complaint, *supra* note 1, at 2.

currently an NCAA athlete and is not bound by the pro-competitive amateurism and compensation rules; this impact appears to be significant.

D. The *O'Bannon* Decision

In *O'Bannon v. National Collegiate Athletic Ass'n*, the Ninth Circuit Court of Appeals affirmed that the NCAA's rules prohibiting NCAA athletes from receiving compensation for their name, image, and likeness violated the Sherman Act.⁶⁶ Spielman bases his Sherman Act claims on this decision,⁶⁷ but a Ninth Circuit precedent is not binding in the Sixth Circuit, where his case would be heard on appeal. What makes Spielman's case more intriguing is the potential for a circuit split should the Sixth Circuit decide his case differently than the Ninth did in *O'Bannon*. A circuit split on an issue that is likely to be raised again in other jurisdictions may compel the Supreme Court of the United States to weigh in.

From the late 1990's until about 2013, Electronic Arts ("EA"), a software company, produced video games based on NCAA football and men's basketball. These games would depict virtual images of collegiate athletes and allow users to play as their favorite college teams and players in their respective sports.⁶⁸ In 2008, Ed O'Bannon, a former All-American basketball player at UCLA, was told by his friend's son that his persona was being used in one of these video games.⁶⁹ A virtual representation of O'Bannon, as indicated by its physical likeness, and other demonstrative features, such as his former jersey number, were among the features in the game.⁷⁰ Consequently, O'Bannon initiated a lawsuit against the NCAA and the company used to license trademarks, Collegiate Licensing Company, because he had not consented to and had not been compensated for the use of his likeness in the game.⁷¹

Eventually, O'Bannon's motion for class certification under

66. 802 F.3d at 1056.

67. Class Action Complaint, *supra* note 1, at 4.

68. *O'Bannon*, 802 F.3d at 1055.

69. *Id.*

70. *Id.*

71. *Id.*

rule 23 of the Federal Rules of Civil Procedure⁷² for injunctive and declaratory relief was granted.⁷³ The class was defined as:

All current and former student-athletes residing in the United States who compete on, or competed on, an NCAA Division I . . . college or university men's basketball team or on an NCAA Football Bowl Subdivision . . . men's football team and whose images, likenesses and/or names may be, or have been, included or could have been included (by virtue of their appearance in a team roster) in game footage or in videogames licensed or sold by Defendants, their co-conspirators, or their licensees.⁷⁴

The District Court began their analysis by identifying the markets in which the NCAA allegedly restrained trade.⁷⁵ The schools that compete with each other to recruit the best high school athletes do so, not only by offering scholarships, but also promoting their coaching expertise, athletic facilities, and the potential opportunity to face high-quality athletic competition. These schools compete in what the Court called the "college education market."⁷⁶ The Court found that this market is cognizable under the antitrust laws because there is simply no substitute market that would be able to provide this unique bundle of goods services.⁷⁷ After applying the Rule of Reason

72. FED. R. CIV. P. 23(b)(2).

73. *O'Bannon*, 802 F.3d at 1055.

74. *Id.* at 1055–56 (quoting *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 965 (N.D. Cal. 2014)).

75. *O'Bannon*, 802 F.3d at 1056.

76. *Id.* at 1056–57. The Court also found that there was a "group licensing market," in which athletes would be able to sell group licenses for the use of their name, image, and likeness if not for the NCAA's compensation rules. However, it was eventually decided that the NCAA's rules do not have an anticompetitive effect on this market. *Id.* at 1057.

77. *Id.* at 1056. The Court made this decision after it was determined that "athletes talented enough to play FBS football or Division I basketball opt not to attend an FBS/Division I school; hardly any choose to attend an FCS, Division II, or Division III school or to compete in minor or foreign professional sports leagues, and athletes are not allowed to join either the [National Football League] or the [National Basketball Association] directly from high

analysis, the Court determined that the NCAA's rules have anti-competitive effect on the college education market, but that these rules serve a pro-competitive purpose. However, these pro-competitive purposes could be achieved by using less restrictive and alternative restraints and that the rules were, therefore, unlawful.⁷⁸ The result of this case was that schools were now allowed to compensate NCAA athletes on FBS football and Division I men's basketball teams with grants-in-aid that totaled up to the full cost of attendance.⁷⁹

The NCAA argued that its rule prohibiting NCAA athletes from receiving compensation for their name, image, and likeness is pro-competitive because the rule preserves amateurism, promotes a competitive balance between participating schools, integrates academics and athletics, and increases output in the college education market.⁸⁰ The Court agreed that amateurism "helps preserve consumer demand for college sports"⁸¹ and that integrating academics and athletics is a viable pro-competitive justification for the NCAA's regulation of the college education market,⁸² but rejected the NCAA's other arguments.

Eventually a settlement was reached, and somewhere between 200,000 and 300,000 former college football players whose likenesses were used in the game were compensated with "something substantive."⁸³ Also, EA stopped producing the college football game altogether.⁸⁴

school." *Id.*

78. *Id.* at 1057.

79. *Id.* at 1061. The District Court also held that NCAA member-schools could pay student-athletes up to \$5,000 per year and that these funds would be held in trust and distributed after the student-athlete leaves school. However, this holding was eventually overturned on appeal by the Ninth Circuit because it found that paying student-athletes in this way does not promote amateurism and, therefore, has a procompetitive effect. *Id.* at 1076.

80. *Id.* at 1058.

81. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1059 (9th Cir. 2015).

82. *Id.* at 1059–60. However, the Court found that the benefits which arise from integrating athletics and academics are not the result of the NCAA's rules restricting compensation, but rather other rules such as requiring student-athletes to attend class. *Id.* at 1060.

83. Darren Rovell, *EA Sports Settles with Ex-Players*, ESPN (Sept. 26, 2013), http://www.espn.com/college-football/story/_/id/9728042/ea-sports-stop-producing-college-football-game.

84. *Id.*

The lower Court that decided this case raised an interesting point that should be considered in Spielman's lawsuit and in the greater conversation about whether college athletes should be compensated.

[T]he college education market can be thought of as a market in which student-athletes are sellers rather than buyers and the schools are purchasers of athletic services . . . the college education market is a monopsony—a market in which there is only one buyer (the NCAA schools, acting collectively) for a particular good or service (the labor and [name, image, and likeness] rights of student-athletes), and the colleges' agreement not to pay anything to purchase recruits' [name, image, and likeness] causes harm to competition.⁸⁵

This case is significant to Spielman because there is a precedent, though not binding, for a federal court to hold that the NCAA's rules prohibiting NCAA athletes from receiving compensation for their name, image, and likeness violates the Sherman Act.⁸⁶ The District Court of Ohio and, if the case is appealed, the Sixth Circuit is likely to consider this decision when adjudicating Spielman's claims. The District Court's statement is potentially influential to the trending culture shift that is taking place in which more people are starting to agree that not just former, but current, college athletes deserve some of the wealth generated in NCAA athletics. If the view of the District Court—that students are sellers and schools are buyers—becomes a mainstream idea, then a change in the way college athletics are viewed by the public and governing bodies may develop, which could result in an opportunity for college athletes to receive monetary compensation.

85. *O'Bannon*, 802 F.3d at 1058 (citing *O'Bannon*, 7 F. Supp. 3d at 973).

86. *O'Bannon*, 802 F.3d at 1056.

E. The Lanham Act § 43(a)

The Lanham Act allows civil remedies when someone is harmed by an unfair competition in a business transaction.⁸⁷ Unfair competition is defined as: “[d]ishonest or fraudulent rivalry in trade and commerce; [especially] the practice of endeavoring to substitute one’s own goods or products in the markets for those of another . . . by means of imitating or counterfeiting the name, title, size, shape, or distinctive peculiarities of the article . . . or general appearance of the package.”⁸⁸ The Lanham Act allows a plaintiff to bring a federal civil action against any person who, in a commercial setting, deceives others in a way that creates confusion as to who the plaintiff is affiliated with.⁸⁹ The element that must be shown in order to succeed on a claim brought under Section 43(a) is that the actions of the defendant are likely to cause confusion as to who the plaintiff is actually affiliated with commercially.⁹⁰ Courts have held that Section 43(a) should be broadly construed. In *BBB of Metropolitan Houston, Inc. v. Medical Directors, Inc.*, the Court stated that “[l]iability under Section 43(a) is not restricted to literal falsehoods, but extends as well to misleading impressions created by the clever use of innuendo, indirect intimations and ambiguous suggestions.”⁹¹

Spielman alleges that OSU used his professional accomplishments and goodwill to sell the merchandise of corporate sponsors Honda and Nike. The Complaint specifically alleges that the inference which consumers were supposed to draw from the banners depicting Spielman’s picture was that, much like Spielman, the products of the corporate sponsors “perform at a high level.”⁹² Spielman makes a claim under the Lanham Act because he asserts that the use of his name, image, and likeness on a corporate-sponsored banner is likely to deceive people and consumers into thinking that Spielman is associated

87. CHRISTOPHER M. ERNST, *BALDWIN’S OHIO PRACTICE: OHIO TORT LAW* § 56:2 (West 2d ed. 2017).

88. *Unfair Competition*, BLACK’S LAW DICTIONARY (2d ed. 2017).

89. Lanham Act, 15 U.S.C. § 1125(a)(1)(A) (2012).

90. ERNST, *supra* note 87.

91. *Id.* (quoting 509 F. Supp. 811, 814 (S.D. Tex. 1981)).

92. Class Action Complaint, *supra* note 1 at 22.

with or sponsored by Honda and/or Nike. Ultimately, Spielman wants the Court to permanently enjoin the Defendants from using his name, image, and likeness because it amounts to unfair competition, as well as the minimal amount of damages that can be pursued in federal court—\$75,000.

Courts have applied an eight-step inquiry, known as the *Frisch Test*, in order to determine whether confusion was caused.⁹³ The Frisch Test comes from a case in which the name of a restaurant was in dispute—a local restaurant owner wanted to use the same name as a corporate chain in its advertisements.⁹⁴ The Ninth Circuit held that eight factors would be considered when determining if the action of the Defendant would likely cause confusion among consumers. Those eight factors are: (1) strength of the plaintiff's mark; (2) relatedness of the goods; (3) similarity of the marks; (4) evidence of actual confusion; (5) marketing channels used; (6) likely degree of purchaser care; (7) defendant's intent in selecting the mark; (8) likelihood of expansion of the product lines.⁹⁵ It should be noted that, as a trier of fact makes this analysis, it is not necessary for it to find that actual consumer confusion was present—imminence or threat of confusion is enough.⁹⁶ Similarly, if the trier of fact finds that the representation made by the defendant is precise or substantially similar then that is enough to presume confusion.⁹⁷ When such confusion is present, a person may bring about a cause of action for unfair competition under the Lanham Act.⁹⁸

In light of this analysis, it is likely that a court would determine that the representation of Spielman produced by the Defendants on the banners without his consent would cause confusion among consumers. Spielman alleges a violation of the Lanham Act because these corporate-sponsored banners with pictures of Spielman playing football at Ohio State were hung in

93. ERNST, *supra* note 87.

94. *Frisch's Rests., Inc. v. Elby's Big Boy of Steubenville, Inc.*, 670 F.2d 642, 644 (6th Cir. 1982).

95. *Id.* at 648 (citing *Toho Co. v. Sears, Roebuck & Co.*, 645 F.2d 788, 790 (9th Cir. 1981)) (quoting *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348 (9th Cir. 1979)).

96. ERNST, *supra* note 87 at § 56:34.

97. *Id.*

98. *Id.*

the football stadium without his permission. The presumption of confusion would, therefore, be present because the representation of Spielman is precise—it is actually him pictured on the banners.

Around the same time that O'Bannon was bringing his claims under the Sherman Act against EA, a video game developer, another former football player was bringing claims under the Lanham Act for similar conduct against the same Defendant. Jim Brown, widely regarded as one of the best football players of all time,⁹⁹ sued EA for using his name, image, and likeness in a video game. O'Bannon brought his claims against EA for using these features in a video game that depicted college players, while Brown took issue with EA's video game that depicted professional players. EA's *Madden NFL* series allows users to play as NFL players; some versions of the game allow players to play as former NFL players, such as Jim Brown. The NFL and the NFL Players' Association ("NFLPA") entered into licensing deals with EA to use the names, images, and likenesses of NFL players for their game. Brown took issue with the representations of himself in the game because he was no longer in the NFL or the NFLPA, did not consent to the use of his name, image, or likeness, and was not compensated.

On appeal, the Ninth Circuit found that the appropriate framework to apply in this case, rather than the *likelihood of confusion* test employed in *Frisch*, would be the *Rogers* test.¹⁰⁰ The Court maintained that the *Madden NFL* series constituted artistic expression which is protected under the First Amendment, and there was precedent in the Ninth Circuit which held that the method for balancing rights under the Lanham Act and rights under the First Amendment in cases involving expressive works is the *Rogers* test.¹⁰¹ The Ninth Circuit noted the Supreme Court's precedent that video games are expressive works and deserve the same protection as more traditional forms of expression.¹⁰²

99. *Brown v. Electronic Arts, Inc.*, 724 F.3d 1235, 1239–40 (9th Cir. 2011).

100. *Id.* at 1241–1242.

101. *Id.* (citing *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 901–02 (9th Cir. 2002)).

102. *Id.* at 1241 (citing *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786 (2011)).

In *Rogers v. Grimaldi*, Ginger Rogers sued producers and distributors of a movie for the use of a movie title that obliquely related to her and a deceased entertainment partner, Fred Astaire.¹⁰³ Rogers and Astaire are among the most famous duos in show business history.¹⁰⁴ The Defendants in this case used their names for the title of a fictional movie, which they contended they were allowed to do because prohibiting them to do so would be a violation of their right to express themselves freely in their own artistic work.¹⁰⁵ The Second Circuit introduced a two-pronged test which determines whether the Lanham Act should or should not be applied to expressive works. “[U]nless the [use of the trademark or other identifying material] has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the [trademark or other identifying material] explicitly misleads as to the source or the content of the work.”¹⁰⁶ With this test, the Court held that the Defendants had not violated Rogers’ rights under the Lanham Act because it did not explicitly mislead consumers.¹⁰⁷

In a similar case, the Ninth Circuit held that “the level of [artistic] relevance [of the trademark or other identifying material to the work] merely must be above zero’ for the trademark or other identifying material to be deemed artistically relevant.”¹⁰⁸ In *Brown*, the Court determined that without the use of Brown’s name, image, and likeness, users would not have been able to immerse themselves in the experience of playing the game with the virtual depictions of the 1965 Cleveland Browns, of which Brown was a member. In order to satisfy the *Rogers* test and apply the Lanham Act, Brown would have had to have shown that the use of his name, image, and likeness had no artistic relevance to the underlying work whatsoever. The Court felt that the use of Brown’s characteristics had some artistic relevance to the Defendant’s

103. 875 F.2d 994, 996 (2d Cir. 1989).

104. *Id.*

105. *Id.* at 996–997 (noting the title of the movie was *Ginger and Fred*).

106. *Brown*, 724 F.3d at 1242 (quoting *Rogers*, 875 F.2d at 999).

107. *Rogers*, 875 F.2d at 1001–02.

108. *Brown*, 724 F.3d at 1243 (alterations in original) (quoting *E.S.S. Entm’t v. Rock Star Videos, Inc.* 547 F.3d 1095, 1100 (9th Cir. 2008)).

video games.¹⁰⁹

In Spielman's case, he must also show that the use of his name, image, and likeness has no artistic relevance. This will be a difficult argument for Spielman to make. It seems that OSU would be able to easily assert the defense that Spielman's image has artistic relevance much the same way that Brown's did. By hanging the banners of former players, OSU could say they were trying to create a certain atmosphere in their sporting facilities, and that the images they used offered a certain degree of artistic expression that helped in creating this atmosphere. If OSU was using the name, image, and likeness of former players in a way that was more clearly commercial, then Spielman may have a better chance of arguing that there is no artistic relevance, but that does not appear to be the case.

The second prong of the *Rogers* test requires that the creator use the material to "explicitly mislead[consumers] as to the source or content of the work."¹¹⁰ The appropriate inquiry made in *Brown*, as applied to Spielman, would be: whether the use of Spielman's likeness would confuse people who attend football games at OSU into thinking that Spielman is somehow involved in the corporate sponsored banners, or that he endorses Honda or Nike's products, and whether there was an explicit misstatement that causes the consumer confusion.¹¹¹ The distinction that the material must explicitly mislead is *crucial* to the analysis. In order to prevail under the Lanham Act, Spielman must show that OSU and IMG used his name, image, and likeness in a way that showed consumers that Spielman unequivocally endorsed the corporate sponsored banners. It is not enough to show that consumers may draw an incorrect inference as to Spielman's endorsement.¹¹² For example, the Court in *Brown* determined that EA did not explicitly mislead consumers, despite productions of evidence that consumers were actually misled. Under this analysis, Spielman's claim under the Lanham Act is not likely to prevail. The banners in question depict an image of Spielman while he was playing football for OSU. The Defendants will likely be able to successfully defend

109. *Id.* at 1245 (citing *Rogers*, 875 F.2d at 999).

110. *Brown*, 724 F.3d at 1245 (quoting *Rogers*, 875 F.2d at 999).

111. *Id.*

112. *Id.* at 1246.

these claims by asserting the position that they did not explicitly mislead consumers as to Spielman's affiliation with Honda or Nike by hanging a large picture of Spielman in a stadium in which he used to play, and that the banners amount to artistic expression.

F. Deceptive Trade Practices

The Ohio Deceptive Trade Practices Act is essentially the State's version of the Lanham Act. In *Chandler & Associates, Inc. v. America's Healthcare Alliance, Inc.* the Court stated that "[w]hen adjudicating claims under the Ohio Deceptive Trade Practices Act, Ohio courts shall apply the same analysis applicable to claims commenced under analogous federal law."¹¹³ However, being found liable for violations of the Lanham Act does not necessarily mean that the defendant would be held liable under Ohio law, unless the case involves a trademark.¹¹⁴ Spielman's Complaint does not claim that his name, injury, and likeness is trademarked.¹¹⁵ The Ohio law and the Lanham Act are similar in that they both prohibit behavior that causes the likelihood of confusion as to the affiliation of one person or entity with another.¹¹⁶

G. Right of Publicity

The philosophy behind Right of Publicity or Personality Rights is the idea that "it is the inherent right of every human being to control the commercial use of his or her identity."¹¹⁷ In the state of Ohio, any person who owns all of their rights of publicity may bring a civil action to enforce those rights.¹¹⁸ A person would not be able to sue if the entity using their identity

113. ERNST, *supra* note 87, at § 56:16 (quoting 709 N.E.2d 190, 195 (Ohio Ct. App. 1997)).

114. *Id.*

115. *See generally* Class Action Complaint, *supra* note 1.

116. OHIO REV. CODE ANN. § 4165.02 (West 2018); *see also* Lanham Act, 15 U.S.C. § 1125 (2012).

117. J. THOMAS MCCARTHY, RIGHTS OF PUBLICITY AND PRIVACY § 1:3 (2d ed. Westlaw 2018).

118. OHIO REV. CODE ANN. § 2741.06 (West 2018).

is authorized to do so. The action brought would be a commercial tort of unfair competition,¹¹⁹ so the Ohio law imitates the Lanham Act in this way.

In *Vinci v. American Can Co.*, an Olympic weight lifter and a class of other Olympic athletes brought an action for invasion of privacy for the use of name, image, and likeness on a series of promotional drinking cups.¹²⁰ The Ohio Court of Appeals stated in its opinion that “[n]o one has the right to [sue] merely because his name or his appearance is brought before the public, since neither is in any way a private matter and both are open to public observation.”¹²¹ When the defendant uses the plaintiff’s name, image, and likeness, and the value of that therein, and appropriates the value for its own commercial benefit, then the plaintiff’s rights are invaded.

In an interview regarding this lawsuit, Spielman clarified his position by saying, “Ohio State is more than welcome to use my name and image in any way they want to use it. The problem is when they slap a corporate sponsor on it.”¹²² With this statement, Spielman addresses the issue the Court is likely to consider when analyzing his state law claims. It is no secret that Spielman played for OSU, so there is no harm done when OSU, or anyone for that matter, hangs his picture up somewhere. A situation such as this is no different than printing his name, image, and likeness in a newspaper, as the *Vinci* Court commented.¹²³ However, Spielman’s reputation has value, and he is entitled to profit from that value. When another entity appropriates that value for its own commercial benefit, in this case through corporate sponsorships, *then* harm is done. If OSU had simply hung his picture up to improve the aesthetic of the

119. MCCARTHY, *supra* note 119.

120. 591 N.E.2d 793 (Ohio Ct. App.1990).

121. *Id.* at 794 (quoting *Zacchini v. Scripps-Howard Broad. Co.*, 351 N.E.2d 454, 458 n.4 (Ohio 1976)).

122. *Chris Spielman Files Lawsuit Against Ohio State to Block Use of Player Images*, FREE REPUBLIC (July 15, 2017, 5:51 AM), <http://www.free-republic.com/focus/f-chat/3569383/posts>.

123. *Vinci*, 591 N.E.2d at 794 (stating “[t]he fact that the defendant is engaged in the business of publication, for example of a newspaper, out of which he makes or seeks to make a profit, is not enough to make the incidental publication a commercial use of the name or likeness.” (internal quotation marks omitted) (quoting *Zacchini*, 351 N.E.2d at 458 n.4)).

stadium, which in turn would likely draw more fans to the game, it would seem that OSU is deriving a commercial benefit from the use of his name, image, and likeness; however, that is not necessarily prohibited. Because OSU profited from the banners through the corporate sponsorships of Honda and Nike, the necessary appropriation of value required to be held liable under this law seems to be present.

V. Discussion: The Possible Impact of a Favorable Decision for Spielman

It is important to remember how Spielman's and O'Bannon's cases are different—the biggest difference being the Defendants; O'Bannon sued the NCAA, while Spielman is suing OSU and IMG. The NCAA refused to settle with O'Bannon, and the case was brought all the way to the Ninth Circuit Court of Appeals. OSU might be more willing to settle this case before it gets that far. However, judging from the comments Spielman has made regarding his goals in pursuing this lawsuit,¹²⁴ it is likely that Spielman will forego the opportunity to settle in order to have the case litigated in federal court.

In light of that consideration, if this case is brought before the Sixth Circuit Court of Appeals, then there would be two Circuit Courts that agree that former college athletes should be able to negotiate compensation for the use of their name, image, and likeness. The Supreme Court of the United States declined to grant certiorari to the defendants in *O'Bannon*. Should the Ninth and Sixth Circuits agree, then the Supreme Court would likely decline to hear Spielman's case as well. A favorable decision may encourage other similarly situated people not named in Spielman's class to pursue claims such as this in other jurisdictions. A favorable decision for Spielman creates more precedent that is likely to weigh heavily in favor of those possible plaintiffs. Schools across the country and their licensing agents may be subject to duplicative lawsuits that they would have difficulty defending based on that precedent. A victory for

124. Athletic Staff, *supra* note 7. (noting that Spielman's stated concern is the exploitation of all former players, and that he does not have a financial interest in the outcome).

Spielman in this case will likely continue to change the landscape of how college athletes are, or are not, compensated for the use of their name, image, and likeness much like *O'Bannon* has done.

If former players are given this firm footing to stand on when making these claims, it may open the door for current players to negotiate compensation for use of their name, image, and likeness. If that happens, then the NCAA's rules against compensation could be in jeopardy. If current players are allowed to be compensated for the use of their personal features, then this could potentially lead to them being compensated for other purposes, such as for their athletic abilities.

Allowing current players to receive compensation at the very least could affect the NCAA's ability to prohibit athletes from organizing a union. With union representation, college athletes may be able to negotiate benefits much the same way that the players' unions in professional sports have done. The goal of the fairly recent attempt to organize by college football players at Northwestern University was to prevent players from having to pay the bills for injuries they received while playing college sports.¹²⁵ With all of the discussions regarding how dangerous head injuries are, especially in the NFL,¹²⁶ this could be a huge financial burden for the NCAA and participating schools.¹²⁷

In this way, Spielman's case represents something so much larger than his ability to profit from his reputation. It represents an idea that is so uniquely American—that people should be paid for the value they hold in the market and for what they contribute and sacrifice for the sake of commerce. If a favorable decision in Spielman's case follows the trajectory of the argument put forth, then college athletics will experience such a significant change that it may form a totally different market from what the NCAA is today. The usual path of athletes going

125. Loretta8, *supra* note 6.

126. Brian Resnick, *What a Lifetime of Playing Football Can Do to the Human Brain*, VOX (Feb. 3, 2019, 10:40 PM), <https://www.vox.com/science-and-health/2018/2/2/16956440/super-bowl-2018-concussion-cte-nfl-brain-damage>.

127. Ken Belson, *N.F.L. Agrees to Settle Concussion Suit for \$765 Million*, N.Y. TIMES (Aug. 29, 2013), <https://www.nytimes.com/2013/08/30/sports/football/judge-announces-settlement-in-nfl-concussion-suit.html>.

from high school to college and then to professional leagues could become a thing of the past in lieu of some other alternative, such as new leagues where up-and-coming athletes can compete in a league similar to the NCAA without having to simultaneously attend school.

VI. Conclusion

Assuming that Spielman is able to achieve class action status on his federal claims and the judge in the District Court of Ohio rules that the case should be heard in federal court rather than the Ohio Court of Claims, there is an opportunity to have the case brought before the Sixth Circuit Court of Appeals. This is significant because there was already a similar case brought before the Ninth Circuit.¹²⁸ If Spielman's case gets that far, it will be significant regardless of the outcome. If the Sixth Circuit makes a decision that is different from the Ninth Circuit's, then there will be a circuit split, and the Supreme Court of the United States may decide to grant certiorari. If the Sixth Circuit decides to follow the precedent set in the Ninth Circuit, then similar lawsuits may be filed in the future with the jurisprudence of two circuit courts weighing heavily in favor of the plaintiffs.

The NCAA's rules against compensation state that no college player can receive payment for their contributions to athletics—they may not enter into licensing deals or contracts with agencies and they may not be associated with any professional team in any way.¹²⁹ The Supreme Court has held that the NCAA is a market because the goods and services that they offer cannot be found elsewhere.¹³⁰ College athletes are participants in this market. Because of the rules against compensation, these market participants can argue that the NCAA rules unreasonably restrain trade.

The Sherman Act is a federal statute that promotes and maintains the free market that is inherent to the American

128. *See generally* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049 (9th Cir. 2015).

129. *Amateurism*, *supra* note 11.

130. *See generally* Nat'l Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85 (1984).

economy. The free market relies on competition between businesses, and any attempt to restrain trade through monopolies and trusts is prohibited.¹³¹ The Supreme Court has held that the NCAA is subject to anti-trust scrutiny under the Sherman Act.¹³² Unless the NCAA can provide sufficient arguments that their compensation rules promote a pro-competitive purpose, then its compensation rules may be in jeopardy.

The banners that depict Spielman's image, which are the subject of his lawsuit, are an infringement of his rights of publicity under the Lanham Act and Ohio State law because they are likely to cause confusion as to who Spielman is affiliated with. It is reasonable to assume that someone seeing Spielman on these corporate-sponsored banners would believe that Spielman is in some way associated with those corporations; however, he is not.

Whether Spielman is successful in these claims largely depends on the analysis that the Court uses. Depending on the analysis, the issue becomes one of the following: whether the use of Spielman's name, image, and likeness is likely to cause confusion as to his affiliations, whether the banners have artistic relevance, and whether OSU explicitly misled consumers as to Spielman's affiliations.¹³³ If the Court decides that consumers were misled by OSU, Spielman will have more difficulty succeeding in his claims under the Lanham Act. In order to succeed in his state law right of publicity claim, Spielman will have to show that the value of his name, image, and likeness was appropriated to another entity by OSU.¹³⁴ Because the banners were sponsored and the resulting revenue went to OSU, rather than Spielman, it is likely he will be able to succeed in this claim.

Spielman's best argument is that he is no longer subject to NCAA regulations because he is no longer a collegiate athlete. Therefore, the NCAA's rules against compensation should not apply to him despite the fact that the name, image, and likeness

131. Sherman Act, 15 U.S.C. § 1 (2004).

132. *See Nat'l Collegiate Athletic Ass'n*, 468 U.S. 85.

133. *See generally* *Frisch's Rests., Inc. v. Elby's Big Boy of Steubenville, Inc.*, 670 F.2d 642 (6th Cir. 1982); *see also* *Rogers v. Grimaldi*, 875 F.2d 994, 996 (2d Cir. 1989).

134. OHIO REV. CODE ANN. § 4165.02 (West 2018).

2018

NCAA AMATEURISM RULES

509

in question came from a time when he was subject to NCAA regulations. The fact that Spielman maintained a valuable reputation while he was a member of the NCAA should not bar him from profiting from that reputation after his membership ended. It is also important to note that the NCAA is not a party in this lawsuit, as Spielman is suing OSU and IMG.¹³⁵

Regardless of how this case is decided, it will be significant to current and former NCAA athletes. Success for Spielman could mean sweeping changes to form and execution of amateur athletics as we know it.

135. Class Action Complaint, *supra* note 1.