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The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism

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The Emperor's New Clothes: Lifting the NCAA's Veil of Amateurism

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TABLE OF CONTENTS

I.	INTRODUCTION	496
II.	LABOR, ANTITRUST, AND TAX LAWS ALL APPLY DIFFERENTLY IN COMMERCIAL, AS DISTINCT FROM AMATEUR, SETTINGS	498
	<i>A. Labor Law</i>	499
	<i>B. Antitrust Law</i>	500
	<i>C. Tax Law</i>	501
III.	COLLEGE SPORTS ARE FAR FROM AMATEUR—THEY FORM A THOROUGHLY COMMERCIAL ENTERPRISE.	505
	<i>A. The NCAA</i>	509
	<i>B. Conferences</i>	511
	<i>C. Bowl Games</i>	513
	<i>D. March Madness</i>	518
	<i>E. Colleges and Universities</i>	520
	1. <i>Direct Financial Benefits from Successful Athletic Programs</i>	520
	2. <i>Indirect Benefits from Successful Athletic Programs</i>	524

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F. Coaches and Other Individuals.....	527
G. Corporate Sponsorships and Advertising.....	536
H. Commercial Use of Athletes' Image.....	540
IV. CONCLUSION.....	544

*As they passed through the streets, all the people shouted,
 "See the emperor's new clothes. Never has he had such a
 fine suit. How rich the cloth; how bright the jewels!"
 "But," said a little child, "he has nothing on!"¹*

I. INTRODUCTION

College and university athletic programs across America enjoy the astonishing pecuniary fruits of a legal myth—that the sports in those programs are amateur. Indeed, while many college sports may genuinely be amateur,² others—most especially football and men's basketball at major NCAA institutions—plainly are not. As we will demonstrate in this Article, and as few thoughtful observers doubt, these college sports are fantastically commercial and decidedly not amateur.

Nevertheless, the myth of amateurism is stubborn, and for a powerful reason. It supports the significant economic and legal interests of important institutions in America. An enormous cast of participants harvests a wealth of riches from major college sports. Universities derive enormous revenues and other indirect, but vital, benefits from successful athletic programs.³ Corporations that sponsor athletic contests gain valuable exposure for their products and services.⁴ The NCAA supports itself entirely by revenues generated from selling broadcasting rights of its members' games.⁵ Many coaches are compensated lavishly for producing successful programs.⁶ Media enterprises generate rich advertising revenues by airing college athletic events.⁷ Indeed, college sports constitute a \$60

1. Hans Christian Andersen, *The Emperor's New Clothes*, in *THE MAGIC REALM OF FAIRY TALES* 62, 68 (W. Publ'g Co. 1968).

2. Among the sports that are, in fact, amateur are the non-revenue-generating sports. Swimming, track and field, baseball, softball, gymnastics, and wrestling are examples.

3. See Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 *WASH. L. REV.* 71, 75 (2006).

4. See *id.* at 75–76.

5. *Id.* at 76.

6. *Id.*

7. *Id.*

billion industry.⁸ Given the collective power of those whose interests this myth advances, it is little wonder it persists. One role of the law, however, is to distinguish myth from reality and thereby to eschew a “tyranny of labels.”⁹ The idea that major college sports are amateur is demonstrably false, and that fallacy has improperly sheltered college sports from the application of a variety of laws.

We identify here three areas of law—specifically labor, antitrust, and taxation—in which the myth of amateurism has served to shield university athletic programs and the NCAA from regulation. These areas are hardly exclusive,¹⁰ but they provide eloquent witness to the fact that the myth of amateurism provides unwarranted and improper exemption from the law at the expense of the athletes, the public, and justice itself.¹¹

The purpose of this Article is to lift the veil of amateurism from the face of the college sports industry and to document its deeply commercial character. Because the college sports industry is thoroughly commercial and not, as the NCAA contends, an amateur enterprise, NCAA Division I college athletic programs should be subject to laws that apply to other commercial activities.

The consequences of the proper legal characterization of major college sports would be many. For example, properly considered as employees, the players would be entitled under labor law to wages as well as to a range of statutory protections accorded all U.S. employees.¹² The NCAA

8. *The NewsHour with Jim Lehrer: Dollars, Dunks and Diplomas* (PBS television broadcast July 9, 2001), available at http://www.pbs.org/newshour/bb/education/july-dec01/ncaa_07-09.html.

9. *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696, 705 (7th Cir. 2002) (Posner, J.).

10. See *infra* note 16.

11. Perhaps the most pernicious effect of the perpetuation of the myth of amateurism is the grossly disproportionate burden it places on African-American athletes in major college athletic programs. Put plainly, NCAA universities reap vast fortunes from their football and men's basketball programs, predominantly manned by African-Americans, while simultaneously limiting the compensation these athletes may receive to the cost of an education. In so doing, they foster a modern system of apartheid where the majority exploits racial minorities. We examine this issue more fully in a forthcoming article.

12. See *infra* Part I.A. These protections would include not only compensation for work-related injuries, see *infra* note 16, but also the right to be free from discrimination on the basis of race and other protected classifications, see Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e–2000e-15 (2006), the right to have limited the number of hours worked, see Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (2006), and, as described in this Article, the right to join a union, to engage in concerted activity, and to bargain collectively.

rule limiting the level of athlete compensation to the cost of tuition, books, room, and board at the athlete's institution¹³ would be rightly viewed as a form of price fixing, punishable under the antitrust laws.¹⁴ And lastly, colleges would no longer reap enormous athletic revenues on a tax-free basis, but instead would compete evenly with others in the entertainment industry by paying taxes, thereby also bearing their proper share of the costs of society.¹⁵

Part I of this Article will identify three areas of law—labor, antitrust, and tax—in which regulation depends upon the characterization of an activity as commercial rather than amateur. Part II will document the thoroughly commercial nature of major college athletics, thereby lifting the veil of amateurism in which the NCAA seeks to enshroud itself. The Article concludes that because major college sports enterprises are not amateur, they should be subject to the application and scrutiny of the laws we examine here, and, no doubt, to others as well.

II. LABOR, ANTITRUST, AND TAX LAWS ALL APPLY DIFFERENTLY IN COMMERCIAL, AS DISTINCT FROM AMATEUR, SETTINGS

In various areas of the law, vastly different rules apply to commercial, as distinct from amateur, enterprises, with commercial enterprises bearing greater regulation than do amateur activities. We focus on three such areas of law which observe this dichotomy and are especially relevant to major college sports: labor, antitrust, and tax.¹⁶

13. See NCAA, 2007–08 NCAA DIVISION I MANUAL arts. 15.1, 15.2.1–15.2.4 (2007), available at http://www.ncaa.org/library/membership/division_i_manual/2007-08/2007-08_d1_manual.pdf [hereinafter DIV. I MANUAL].

14. See *infra* Part I.B.

15. See *infra* Part I.C.

16. Although we focus on only three areas of law, distinctions between the regulation of commercial, as distinct from amateur, activities may be found in other areas of law as well. For example, nonprofit organizations are subject to a less vigorous regulatory enforcement regime than are for-profit enterprises. See generally Lumen N. Mulligan, *What's Good for the Goose Is Not Good for the Gander: Sarbanes-Oxley-Style Nonprofit Reforms*, 105 MICH. L. REV. 1981, 1984–92 (2007) (discussing board of director, third-party, and government oversight of nonprofit corporations). Workers' compensation cases also differentiate between commercial and noncommercial activities, declining to extend the statutes to university athletes because of their amateur status, among other reasons. While early workers' compensation decisions held that athletes were covered by such laws, that view has since been uniformly rejected. Compare *Univ. of Denver v. Nemeth*, 257 P.2d 423, 425–30 (Colo. 1953) (allowing application of workers' compensation claims for football-related injuries and death), and *Van Horn v. Indus. Accident Comm'n*, 33 Cal. Rptr. 169, 172–73 (Cal. Dist. Ct. App. 1963) (same), superseded by statute, CAL. LAB. CODE § 3352(k) (West 2005) (excluding from the definition of employee “[a]ny student participating as an athlete in amateur sporting events”), with *Rensing v. Ind. State Univ. Bd. Trs.*, 444 N.E.2d 1170, 1173–75 (Ind. 1983) (holding that college athletes are not employees under state workers' compensation

A. Labor Law

University athletes are not currently extended the rights and protections of labor and employment laws because, in major part, case law differentiates between amateur and commercial enterprises. In its 2004 *Brown University* decision, the National Labor Relations Board (NLRB) examined whether graduate student assistants were employees with organizing rights under the National Labor Relations Act.¹⁷ Like NCAA Division I athletes, those graduate assistants were enrolled as students, received scholarships, and provided valuable services for their university.¹⁸ In that case, the NLRB acknowledged the traditional common law “right of control” test for employee status,¹⁹ but required an additional showing if the putative employee was also a student.²⁰ Under that circumstance, the Board held that the question of their employee status also depended upon whether the student-university relationship was primarily academic or commercial and held they were not employees because they were “primarily students [with] a primarily educational, not economic, relationship with their university.”²¹ Put differently, the NLRB concluded “that the overall relationship between the graduate student assistants and Brown [was] primarily an educational one, rather than an economic one.”²²

Under this analysis, then, whether NCAA Division I athletes, especially football and men’s basketball players, are within the protection of labor law depends upon whether their relationships with their universities are

laws because they are students and not employees, and therefore are not entitled to workers’ compensation for athletics-related injuries), and *Coleman v. W. Mich. Univ.*, 336 N.W.2d 224, 226–28 (Mich. Ct. App. 1983) (same).

It is noteworthy in this regard that the NCAA reacted to the earlier workers’ compensation cases by coining the very term “student-athlete” and incorporating it in their rules and communications in an effort to emphasize the educational, and to deemphasize the commercial, functions of athletes. See WALTER BYERS WITH CHARLES HAMMER, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 69–76 (1995); MURRAY SPERBER, ONWARD TO VICTORY 445–57 (1998); Murray Sperber, *In Praise of ‘Student-Athletes’: The NCAA Is Haunted by Its Past*, CHRON. HIGHER EDUC., Jan. 8, 1999, at A76.

17. *Brown Univ.*, 342 N.L.R.B. 483, 483 (2004).

18. *Id.* at 484–85.

19. See *id.* at 483 & n.3 (returning to prior precedent that included the common law test); see also *id.* at 491 (declining to abandon the common law test by indicating that common law concepts could be considered in part).

20. See *id.* at 483, 487.

21. *Id.* at 487.

22. *Id.* at 489.

primarily academic or, as we argue here, principally commercial.²³ Because the athlete-university relationship is primarily commercial, not academic,²⁴ the athletes should be considered employees under *Brown University*, not amateurs or “student-athletes” as the NCAA incessantly asserts. The overwhelmingly commercial nature of major college athletics means that labor law must apply to those college athletics.

B. Antitrust Law

The myth of amateurism is likewise at the heart of the NCAA’s insulation from the antitrust laws, and any antitrust challenge to NCAA rules governing players will encounter the Association’s amateurism defense. This defense has been variously formulated, but essentially provides that the NCAA produces a singular product, one that is by its nature amateur, and that the NCAA must be accorded broad latitude to administer and regulate college sports for the preservation of that product.²⁵

The United States Supreme Court embraced this reasoning in *NCAA v. Board of Regents*,²⁶ when it wrote, “the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate

23. See *infra* Part II.

24. That the athlete’s relationship to his university is not primarily academic has been demonstrated elsewhere. See, e.g., McCormick & McCormick, *supra* note 3, at 135–55 (describing NCAA-sanctioned special admissions policies, eligibility for freshmen athletes, grueling and time-consuming practice and playing schedules, sham curricula, substandard academic performances, institutional academic fraud, insufficient NCAA academic progress requirements, and NCAA-sanctioned low graduation rates for athletes, all of which promote NCAA member institutions’ commercial interests, not athletes’ academic interests).

25. See Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play?*, 65 NOTRE DAME L. REV. 206, 213–18 (1990); Chad W. Pekron, *The Professional Student-Athlete: Undermining Amateurism as an Antitrust Defense in NCAA Compensation Challenges*, 24 HAMLINE L. REV. 24, 28 (2000); Kenneth L. Shropshire, *The Erosion of the NCAA Amateurism Model*, ANTITRUST, Spring 2000, at 46, 49; Note, *Sherman Act Invalidation of the NCAA Amateurism Rules*, 105 HARV. L. REV. 1299, 1299–1301 (1992).

26. *NCAA v. Bd. of Regents*, 468 U.S. 85 (1984) (scrutinizing NCAA plan limiting live broadcasting of college football games). In that case, the University of Oklahoma challenged the NCAA’s television plan as violating Sherman Act prohibitions against price fixing and output restrictions. See *id.* at 88. The plan “limit[ed] the total amount of televised intercollegiate football and the number of games that any one team [could] televise. No member [of the NCAA was] permitted to make any sale of television rights except in accordance with the basic plan.” *Id.* at 94. Using a rule of reason analysis, the Court held that “by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the Nation’s life[.]” in violation of the antitrust laws. See *id.* at 117, 120.

athletics and is entirely consistent with the goals of the Sherman Act.”²⁷ There, the Court distinguished between the NCAA’s commercial business activities, like the television marketing plan under examination, and its so-called noncommercial activities, which the Court characterized as necessary to protect amateurism and to preserve the college football product, rendering those noncommercial activities outside the reach of the Sherman Act.²⁸ The Court wrote, “[i]t is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics.”²⁹ Indeed, a primary reason NCAA rules forbidding athlete compensation beyond a certain level—an act of naked price fixing among commercial competitors—have not been condemned “is the belief that the restrictions somehow preserve an amateur tradition.”³⁰

The foundation for the NCAA’s immunity from antitrust law rests upon the false premise that its activities promote and preserve an amateur, noncommercial product. If the NCAA’s activities were viewed as commercial, they would not merit exemption through the amateurism defense to the antitrust laws.

C. Tax Law

Commercial enterprises are subject to income tax.³¹ For example, professional sports leagues, like the National Football League, National Basketball Association, and National Hockey League, pay income taxes

27. *Id.* at 120.

28. *See id.* at 117 (“The specific restraints on football telecasts that are challenged in this case do not . . . fit into the same mold as do rules defining the conditions of the contest”); Pekron, *supra* note 25, at 38.

29. Pekron, *supra* note 25, at 38 (quoting *Bd. of Regents*, 468 U.S. at 117).

30. *Id.* at 28; *see also* McCormack v. NCAA, 845 F.2d 1338, 1344–45 (5th Cir. 1988) (upholding NCAA restraints on athlete compensation as reasonable because “[t]he NCAA markets college football as a product distinct from professional football. The eligibility rules [regarding compensation] create the product and allow [for] its survival in the face of commercializing pressures. The goal of the NCAA is to integrate athletics with academics. Its requirements reasonably further this goal”); Pekron, *supra* note 25, at 37 (“No antitrust lawsuit directly challenging any NCAA restrictions on athletes has ever succeeded. Courts have deferred to the NCAA’s claim that it needs to impose anticompetitive restrictions on college athletes in order for college sports to exist at all.”).

31. *See, e.g.*, I.R.C. §§ 11, 501(c) (2006) (imposing income tax on corporations but not including commercial entities among list of those exempt from income tax).

because they are considered commercial enterprises dedicated to the production of profit.³² By contrast, other organizations, including many which are purportedly amateur in nature like the NCAA and its member universities, pay no income taxes provided they meet the federal income tax requirements for tax-exempt status³³ and are not subject to the Unrelated Business Income Tax (UBIT).³⁴

To enjoy tax-exempt status, an entity must be “organized and operated exclusively for” a tax-exempt purpose, such as education.³⁵ It must also ensure that “no part of [its] net earnings . . . inures to the benefit of any private shareholder or individual. . . .”³⁶ Even if an entity has achieved tax-exempt status, it will nevertheless be subject to income tax under UBIT to the extent its net income results from the regular conduct of a trade or business which is not substantially related to its exempt purpose.³⁷ Therefore, to avoid income taxation completely, an entity must be both tax exempt and fall outside the application of UBIT.

To gain tax-exempt status, an entity must be operated exclusively for a tax-exempt purpose. So, for example, an educational organization’s activities must further an educational purpose.³⁸ In addition, its revenues

32. See Letter from Bill Thomas, Chairman, House Comm. on Ways and Means, to Myles Brand, Executive Director, NCAA 2 ¶ 2 (Oct. 2, 2006) (on file with author) (describing fact that tax exemption for college sports is a difference between college and professional sports enterprises).

33. See I.R.C. § 501(a), (c) (2000).

34. See I.R.C. §§ 501(b), 511–514 (2000).

35. I.R.C § 501(c)(3) (2000) (setting forth the organizational and operational tests for tax-exempt status as well as listing exempt purposes, such as education).

36. *Id.* Additionally, the entity may neither engage to a substantial degree in “carrying on propaganda . . . to influence legislation,” nor “participate . . . [n]or intervene in . . . any political campaign . . . [for or against a] candidate for public office.” *Id.*

37. §§ 501(b), 511–513; Treas. Reg. § 1.501(a)–1(a)(1) (as amended in 1982). Congress enacted the UBIT in 1950, see Revenue Act of 1950, Pub. L. No. 81–814, §§ 301, 331, 64 Stat. 906, 947, 957 (1950), in response to concerns that some tax-exempt entities engaging in commercial activities were using their exempt status to shelter profits and were thereby competing unfairly against commercial entities subject to tax. In support of the UBIT, President Truman stated in 1950: “[A]n exemption intended to protect educational activities has been misused in a few instances to gain competitive advantage over private enterprise through the conduct of business and industrial operations entirely unrelated to educational activities.” James L. Musselman, *Recent Federal Income Tax Issues Regarding Professional and Amateur Sports*, 13 MARQ. SPORTS L. REV. 195, 204 n.64 (2003). He was referring to the New York University School of Law’s ownership of the macaroni company, C.F. Mueller Co. NYU received the macaroni profits on a tax-exempt basis because of its exempt status as an educational organization, allowing it an unfair advantage over for-profit pasta manufacturers. See *C.F. Mueller Co. v. Comm’r*, 190 F.2d 120, 121 (3d Cir. 1951), *rev’g*, 14 T.C. 922 (1950). The purpose of the UBIT, therefore, “was to eliminate a source of unfair competition by placing the unrelated business activities of certain exempt organizations upon the same tax basis as the nonexempt business endeavors with which they compete[d].” Treas. Reg. § 1.513–1(b) (as amended in 1975).

38. Treas. Reg. §§ 1.501(c)(3)–1(d)(1)(i)(f), 1.501(c)(3)–1(d)(3).

must be used for education, the public or an exempt purpose, not for the private financial benefit of individuals.³⁹ If the organization's activities substantially further a non-exempt purpose, then tax-exempt status is lost even if the organization also seeks to fulfill important exempt purposes.⁴⁰

To avoid taxation under UBIT, a tax-exempt educational organization that regularly operates a trade or business must ensure that the trade or business substantially furthers and contributes importantly to education other than through producing income to fund educational activities.⁴¹ That is, the mere production of income by the trade or business to finance other educational activities does not satisfy this test if the activities of the trade or business are not themselves directly and substantially educational.⁴² Income exceeding the reasonable needs of the educational purpose is considered unrelated business income and is taxed.⁴³ The larger the profits from an exempt organization's trade or business, the more likely the activity will be deemed unrelated to the exempt purpose and, therefore, subject to tax.⁴⁴

These elements together demonstrate that whether an entity is free from or subject to income taxation depends upon how much it furthers tax-exempt or public objectives, like education, as opposed to commercial objectives, like revenue enhancement and private financial benefit. In short, commercial activities are subject to income taxation while amateur activities that promote a public purpose like education are generally tax exempt.

The NCAA has long been treated as a tax-exempt educational organization.⁴⁵ Universities are also tax exempt as educational organizations, and even their revenues related to major college sports have been exempted

39. Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii).

40. *E.g.*, Treas. Reg. § 1.501(c)(3)-1(c)(1); *see also* Church by Mail, Inc. v. Comm'r, 765 F.2d 1387, 1391 (9th Cir. 1985).

41. Treas. Reg. §§ 1.513-1(a), 1.513-1(d)(1)-(2); *Indep. Ins. Agents of Huntsville, Inc. v. Comm'r*, 998 F.2d 898, 901 (11th Cir. 1993).

42. Treas. Reg. §§ 1.513-1(a), 1.513-1(d)(1)-(2); *Indep. Ins. Agents of Huntsville, Inc.*, 998 F.2d at 901.

43. Treas. Reg. § 1.513-1(d)(3).

44. Treas. Reg. § 1.513-1(d)(3)-(4); Musselman, *supra* note 37, at 206.

45. *See* 2006 NCAA MEMBERSHIP REPORT 52, available at http://www.ncaa.org/library/membership/membership_report/2006/2006_ncaa_membership_report.pdf [hereinafter 2006 MEMBERSHIP REPORT] (noting NCAA's tax-exempt status under I.R.C. § 501(c)(3)); Erin Guruli, *Commerciality of Collegiate Sports: Should the IRS Intercept?*, 12 SPORTS LAW. J. 43, 58 (2005).

from UBIT.⁴⁶ The vastly increased commercial nature of college athletics, however, requires that the earnings associated with it be taxed.⁴⁷

The NCAA's tax-exempt status should be re-examined. NCAA football and men's basketball do not promote education. On the contrary, NCAA academic rules are designed to promote commercial, not academic, values.⁴⁸ The proliferation of corporate sponsorships and television revenues has introduced powerful commercial, profit-based incentives into NCAA and university athletics decisions.⁴⁹ Excessive and ever-escalating salaries for coaches, conference commissioners, and NCAA executives indisputably constitute the use of athletic revenues for private financial benefit, not for an educational, public purpose.⁵⁰

Because universities do otherwise serve important educational purposes, we do not argue here that they should lose their tax-exempt status, but only that their revenues from football and men's basketball should be taxed under the UBIT. Division I-A football and men's basketball are major businesses in which universities regularly engage. Those businesses do not substantially further or contribute importantly to education, and should therefore be deemed unrelated businesses subject to taxation. Revenues generated in these two sports are phenomenally high and substantially exceed reasonable needs for promoting education.⁵¹ Aware of the ever-increasing commercialization of major college sports, Congress has recently questioned whether they should remain sheltered from the income tax.⁵²

As with labor law and antitrust, the tax exemption enjoyed by major college sports is founded upon the false premise that they serve the public purpose of education when, as we will next document, some of those sports are fantastically commercial and bear not at all upon the university's educational mission. In this way, the spectacle of major college sports, so dazzling and entertaining, parades before us clad in the emperor's new clothes, a veil of amateurism. In reality, however, Division I

46. See H.R. REP. NO. 81-2319, at 37 (1950), *reprinted in* 1950-2 C.B. 380, 409; S. REP. NO. 81-2375, at 29 (1950), *reprinted in* 1950 U.S.C.C.A.N. 3053, 3082 and *in* 1950-2 C.B. 483, 505 (cursorily concluding that “[a]thletic activities of schools are substantially related to their educational functions”); Rev. Rul. 80-296, 1980-2 C.B. 195; Musselman, *supra* note 37, at 207-08.

47. See Guruli, *supra* note 45, at 58; Richard L. Kaplan, *Intercollegiate Athletics and the Unrelated Business Income Tax*, 80 COLUM. L. REV. 1430, 1455-60 (1980); Frank G. Splitt, *The U.S. Congress: New Hope for Constructive Engagement with the NCAA and Intercollegiate Athletics*, THE MONT. PROFESSOR, Spring 2007, at 18, 18-25, available at <http://mtprof.msun.edu/Spr2007/splitt.html>.

48. See *supra* note 24.

49. See *infra* Parts II.A-E, G.

50. See *infra* Part II.F.

51. See *infra* Part II.

52. See Thomas, *supra* note 32.

NCAA revenue-generating athletics programs of football and men's basketball are not amateur, but highly commercial. Big-time college sports do not further the educational mission of universities, but instead, are highly lucrative businesses. They generate enormous sums of money for the NCAA, for conferences, for Bowl Championship Series participants, for universities, and for each of these organizations' various leaders and officials, including head coaches. The relationship between athletes and their universities is permeated with commercial concerns and too often lacks educational content. As commercial enterprises, Division I college athletics should be subject to the various laws that apply to other commercial entities and should not find shelter in the false claim that they are amateur. For these reasons, athletes should be considered employees of their respective universities, antitrust laws should apply to prevent wage fixing among universities for the labor of athletes, and revenues generated from the NCAA Division I sports of football and men's basketball should be subject to federal income tax.

III. COLLEGE SPORTS ARE FAR FROM AMATEUR—THEY FORM A THOROUGHLY COMMERCIAL ENTERPRISE

*Let's recognize that most of it is professional anyway. Coaches are paid millions of dollars a year, like professional coaches. It's marketed very much like a professional entertainment activity. The only thing that's missing is the payment for the players.*⁵³

The NCAA's founding purpose was to rein in violence, injury, and death in college football.⁵⁴ Its primary focus on player safety, however,

53. *60 Minutes: Where's Ours?* (CBS television broadcast Jan. 6, 2002), transcript at 16 (quoting James Duderstadt, former President of the University of Michigan and former college football player). "We in Division I are in an entertainment business, and we can't fool ourselves." RICK TELANDER, *THE HUNDRED YARD LIE: THE CORRUPTION OF COLLEGE FOOTBALL AND WHAT WE CAN DO TO STOP IT* 191 (1989), reprinted in Rick Telander, *Something Must Be Done*, *SPORTS ILLUSTRATED*, Oct. 2, 1989, at 92, 105 [hereinafter Telander, *Something Must Be Done*] (quoting former University of Minnesota president Kenneth Keller's speech to a special NCAA convention in 1987).

54. See generally HOWARD J. SAVAGE, *AMERICAN COLLEGE ATHLETICS* 13–29 (1929) (discussing how violence in college athletics during the late 19th and early 20th centuries led to the NCAA's formation). In 1905, college football experienced eighteen deaths and 149 serious injuries. Frank W. Carsonie, Comment, *Educational Values: A Necessity for Reform of Big-Time Intercollegiate Athletics*, 20 *CAP. U. L. REV.* 661, 667 (1991). That year the Intercollegiate Athletic Association of the United States was

has changed significantly since its inception. The NCAA now serves as a powerfully profitable economic engine,⁵⁵ commercial clearinghouse, and advocate for its members' financial interests.⁵⁶ It "has essentially become an economic regulator and promoter of college athletics, in addition to its stated function of supervising the integrity of its member institutions."⁵⁷ Many NCAA rules, including those shaping academic requirements and the grant-in-aid, are structured to further universities' commercial interests by enabling them to field talented teams rather than by promoting the players' academic concerns and are bald evidence of the commercial nature of Division I college sports.⁵⁸ Plainly, the relationship between universities and many athletes is primarily an economic one, not an academic one.

In spite of its obviously commercial nature, however, the NCAA "clings to the ideal of the 'amateur' student-athlete"⁵⁹ to avoid paying

formed, becoming the NCAA in 1910. Note, *Tackling Intercollegiate Athletics: An Antitrust Analysis*, 87 YALE L.J. 655, 656 n.5 (1978).

55. See *infra* Part II.A.

56. For example, the NCAA administers the rules its members enact and negotiates contracts. In this manner, the NCAA "act[s] as a cartel for bargaining purposes with entities like TV networks . . ." Telander, *Something Must Be Done*, *supra* note 53, at 110; see also Tanyon T. Lynch, *Quid Pro Quo: Restoring Educational Primacy to College Basketball*, 12 MARQ. SPORTS L. REV. 595, 612 (2002) ("[P]romotion and economic regulation . . . are the NCAA's dominant functions."); Stefan Fatsis, *Money Drives March Madness*, CINCINNATI POST, Mar. 16, 2004, at C1 (interviewing Terry Holland, former University of Virginia basketball coach and athletic director who characterizes the system as emphasizing only two things: "winning games and making money").

57. Stephen M. Schott, *Give Them What They Deserve: Compensating the Student-Athlete for Participation in Intercollegiate Athletics*, 3 SPORTS LAW. J. 25, 31 n.28 (1996); see also John C. Weistart, *Legal Accountability and the NCAA*, 10 J.C. & U.L. 167, 175 (1983) (discussing the NCAA's role as an economic regulator and promoter); Christopher L. Chin, Comment, *Illegal Procedures: The NCAA's Unlawful Restraint of the Student-Athlete*, 26 LOY. L.A. L. REV. 1213, 1217 (1993) (same).

58. See McCormick & McCormick, *supra* note 3, at 135–55 (demonstrating how NCAA academic requirements are often structured to advance the commercial interests of the university membership more than academic concerns of athletes); *id.* at 108–17 (demonstrating how NCAA rules regarding the grant-in-aid are structured more to further the members' commercial interests than the athletes' academic needs). If an athlete's relationship with his university were truly academic, and not commercial, then should his studies and athletic obligations conflict, he could withdraw from the team. First, however, Division I athletes rarely quit their sports to devote their energies towards their educations, and second, even if this were to occur, there would be economic consequences for the athlete's elevation of academics over athletics—he would immediately lose his grant-in-aid. Both facts undermine athletes' identities as students. See Lynch, *supra* note 56, at 608–09 (arguing that the compensatory function of the grant-in-aid undermines athletes' roles as students, subverting "educational primacy," and that the commercial nature of college sports prevents an athlete's status as a student from taking precedence over his role as an athlete).

59. Chin, *supra* note 57, at 1214.

wages to college players.⁶⁰ By limiting athletes' compensation to the cost of attending a university rather than to a competitive market wage, the NCAA has enabled its member institutions to limit their labor costs significantly. And while the NCAA and its members reap billions of dollars in revenues, the average "student-athlete" earns less than the federal minimum wage.⁶¹ In fact, many such athletes live below the poverty line.⁶²

The NCAA's Division I Manual is peppered with references to amateurism. Its first stated purpose is "to promote and develop . . . athletics participation as a recreational pursuit,"⁶³ while another is "[t]o encourage its members to adopt eligibility rules to comply with satisfactory standards of . . . amateurism."⁶⁴ As elaborated in its first fundamental policy, "[a]

60. As described above, *see supra* Part I, the NCAA derives two significant financial benefits from promoting the façade of amateurism—it minimizes its labor costs by avoiding the obligation to pay its athletes a competitive wage, *see supra* Parts I.A–B, and it strengthens its tax-exempt status, *see supra* Part I.C, for the college sports entertainment industry. *See* ANDREW ZIMBALIST, UNPAID PROFESSIONALS 4–5 (1999); Brian L. Porto, *Completing the Revolution: Title IX as Catalyst for an Alternative Model of College Sports*, 8 SETON HALL J. SPORT L. 351, 413 n.353 (1998) (discussing tax exemption of college sport revenues generally); Brian L. Porto, *The Legal Challenges to "Big-Time" College Sports: Are They Threats or Opportunities for Reform?*, VT. B.J., June 2001, at 41, 41; D. Stanley Eitzen, *Slaves of Big-Time College Sports*, USA TODAY, Sept. 1, 2000, (Magazine), at 26; 2006 MEMBERSHIP REPORT, *supra* note 45, at 52 (noting NCAA's tax-exempt status under I.R.C. § 501(c)(3)).

61. "When the value of their scholarships are computed on an hourly basis, the result is that the average student athlete does not even make minimum wage." Orion Riggs, Note, *The Facade of Amateurism: The Inequities of Major-College Athletics*, KAN. J.L. & PUB. POL'Y, Spring 1996, at 137, 143 (citing DICK DEVENZIO, RIP-OFF U. 160 (1986)); *see also* Bryan Jurewicz, *Opinions: Pay-for-Play*, NCAA NEWS, Jan. 6, 1997 (on file with author) (computing value received at the University of Wisconsin at \$1.35 per hour for 20 hours a week of mandatory workouts); *UCLA Football Players Hope to Spur NCAA Reforms*, SPORTING NEWS, Jan. 18, 2001 (on file with author). In the early 1980s it was estimated that through their athletic scholarships, student-athletes made as little as sixty cents an hour. *See* Riggs, *supra*, at 143 (citing DEVENZIO, *supra*, at 160).

62. *See* Collegiate Athletes Coalition, *Living Below the Poverty Line . . .*, <http://www.studentgroups.ucla.edu/cac/povertyline.htm> (last visited Mar. 2, 2008); 60 *Minutes, supra* note 53, at 15 (quoting Ramogi Huma, former UCLA linebacker). Some athletes have so few resources they sometimes lack money for food. *See UCLA Football Players Hope to Spur NCAA Reforms, supra* note 61 (describing players who must "scrimp on food" and "pay attention to those cheeseburger deal days at McDonald's" because of financial constraints); *id.* at 16 (describing case of Donnie Edwards, former UCLA football player who was suspended by the NCAA after accepting groceries from an anonymous donor); *id.* (describing NCAA admission "that a scholarship falls \$2,000 a year short of what it really costs to get by").

63. DIV. I MANUAL, *supra* note 13, art. 1.2(a) (emphasis added).

64. *Id.* art. 1.2(c).

basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body⁶⁵ and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.”⁶⁶ In limiting athletes’ permissible compensation to financial aid covering the cost of attendance, the Manual prohibits “[a]ny other financial assistance,”⁶⁷ reinforcing the notion that the athletes are amateurs. The NCAA’s general principle of amateurism states “[o]nly an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport,”⁶⁸ and finally, in case the notion was not already clear, the Manual asserts “[s]tudent-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.”⁶⁹ This professed ideology of amateurism evokes Shakespeare’s incisive admonition, “The lady doth protest too much, methinks.”⁷⁰

The reality of major college sports could hardly be more different from the dreamy, wish-filled, innocent ideals the NCAA claims to espouse. While college athletes are held in servitude by NCAA amateurism requirements,⁷¹ college sports have become a fabulously profitable commercial enterprise and an important component of the sports entertainment industry. Billions of dollars are generated annually in this industry.⁷² Simultaneously, the NCAA desperately and continuously attempts to transform its athletes into mere students, mere amateurs, through the repetition of its “student-athlete” label.⁷³ It does so because amateurism

65. See JAMES L. SHULMAN & WILLIAM G. BOWEN, *THE GAME OF LIFE* 78–79 (2001) for a discussion of the consequences of college sports participation, and that college athletes are often isolated within their groups and are not an integral part of the student body as the NCAA suggests.

66. DIV. I MANUAL, *supra* note 13, art. 1.3.1.

67. *Id.* art. 2.13.

68. *Id.* art. 12.01.1.

69. *Id.* art. 2.9.

70. WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 2 (G.R. Hibbard ed., Oxford Univ. Press 1987) (n.d.).

71. See DIV. I MANUAL, *supra* note 13, arts. 15.1, 15.2.1–15.2.4.

72. See Tom Farrey, *Play-for-Pay: Not Yet, but Soon?*, ESPN.COM, Mar. 28, 2001, <http://espn.go.com/ncb/ncaatourney01/s/2001/0326/1162258.html> (describing how “the money flowing through college basketball makes the sport look less like an amateur event each year”).

73. See *supra* note 16 (describing NCAA’s motive for creating the “student-athlete” term).

is the myth⁷⁴ that richly serves its financial interests and those of its member institutions.⁷⁵ The actions of all involved in college sports and the pecuniary results to the contrary, however, speak decibels louder. Indeed, as we will now detail,⁷⁶ every party in the industry, other than the athletes themselves—those most immediately responsible for the product⁷⁷—enjoys bounteous financial benefit from the college sports enterprise.⁷⁸

A. *The NCAA*

The NCAA generates enormous revenue each year from college sports,⁷⁹ as a brief review of its annual report reveals. It most recently

74. See Lynch, *supra* note 56, at 612 (describing NCAA's declarations of support for educational primacy to be at odds with its real objective); Chin, *supra* note 57, at 1235; Riggs, *supra* note 61.

75. See *supra* note 60 and accompanying text.

76. The remainder of this Article will demonstrate in detail the financial benefit various actors procure from the enterprise of college sports. Although these numbers can be numbing in their magnitude and breadth, they are necessary to our case that the enterprise of Division I-A football and men's basketball is commercial, not amateur. The commercialism of college athletics can be demonstrated in other ways which are beyond the scope of this paper. For example, athletic departments operate as separate units in universities, distinct from the academic parts of the institution, and with separate administrative structures. They also use employment rules not common in universities. For example, university athletic departments do not make coaches eligible for tenure. See McCormick & McCormick, *supra* note 3, at 125 n.233. Another employment rule commonly found outside, but not within, the academy is the noncompete agreement. NCAA rules prevent the free movement of players to compete at other universities in an arrangement analogous to these agreements. See DIV. I MANUAL, *supra* note 13, arts. 14.2, 14.2.1, 14.2.1.1, 14.5.1 (eliminating one year of a player's four years of eligibility for transferring to another university).

77. See McCormick & McCormick, *supra* note 3, at 76 & n.24 (describing numerous examples of and ways in which universities have packaged players as entertainment products); Chin, *supra* note 57, at 1214 (observing the athlete is the main producer of revenue).

78. A great many individuals are employed in the major college sports industry. For example, the 2004 football program at Michigan State University employed some seventy people within its football coaching staff, support staff, strength and conditioning staff, medical staff, and athletic equipment staff. This figure does not include forty-one additional administrators and staff employed in the MSU Athletic Department or twenty-one other head coaches and an unspecified number of non-football assistant coaches and staff. MICHIGAN STATE UNIVERSITY, SPARTAN SPORTSZONE MAG. 16, 38, 40, 82, 136 (Oct. 9, 2004).

79. "It's a very, very rich corporation now that's bringing in billions upon billions of dollars. And what we're saying is, 'Lookit, let's do something to improve the lot of the athletes that are generating this for us.'" 60 Minutes, *supra* note 53, at 20 (quoting Leo Gerard, President, United Steelworkers of America regarding the NCAA).

reported revenues for 2005–2006 of almost \$558.2 million.⁸⁰ Over four-fifths of that revenue, almost \$471 million,⁸¹ came from selling rights to televise games, primarily the men’s annual NCAA basketball tournament.⁸² The other significant source of NCAA revenue in 2005–2006, championships and NIT tournaments, generated more than \$57.2 million.⁸³

Most NCAA revenues are apportioned among Division I member conferences and universities, and in 2005–2006, Division I universities received NCAA distributions totaling more than \$307.6 million.⁸⁴ NCAA expenses are also substantial. Costs associated with running NCAA championship tournaments exceeded \$74 million.⁸⁵ In that same year, the NCAA used \$96.4 million for expenditures benefiting the entire association⁸⁶ and incurred management and general operational expenses of over \$26.5 million.⁸⁷ In the end, however, the NCAA was highly profitable, having earned \$31.4 million of revenues in excess of total expenses.⁸⁸

The NCAA anticipates even greater income in coming years.⁸⁹ Overall NCAA revenues are projected to be over \$560.5 million in 2006–2007, more than \$602 million in 2007–2008, and over \$647 million in 2008–2009.⁹⁰ This projected income will derive largely from television revenues,

80. 2006 MEMBERSHIP REPORT, *supra* note 45, at 18.

81. *Id.*; see also Welch Suggs, *Big Money in College Sports Flows to the Few*, CHRON. HIGHER EDUC., Oct. 29, 2004, at A46, available at <http://chronicle.com/weekly/v51/i10/10a04601.htm> (describing how most NCAA revenue from 2003–2004 was also generated by selling the right to broadcast the men’s annual basketball tournament).

82. Most NCAA revenue is generated from the men’s basketball tournament. See BYERS, *supra* note 16, at 261; Riggs, *supra* note 61, at 138. For more detailed information about how revenues from the NCAA’s men’s basketball tournament are distributed to colleges and universities, see *infra* Part II.D. The 2005–2006 television and marketing rights revenues of \$471 million include royalty revenues. 2006 MEMBERSHIP REPORT, *supra* note 45, at 18 (describing how royalties, now designated “marketing rights fees,” were included in “television revenue” in and after 2002–2003, but were reported separately as royalties before that). Royalties are derived from the NCAA’s active marketing of thousands of products bearing its name and logo as well as its licensing of athlete likenesses to video game companies. See Kristine Mueller, *No Control Over Their Rights of Publicity: College Athletes Left Sitting the Bench*, 2 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 70, 81–83 (2004); Schott, *supra* note 57, at 31.

83. 2006 MEMBERSHIP REPORT, *supra* note 45, at 18.

84. *Id.* at 19.

85. *Id.* at 19, 22. This amount includes championship costs for all three NCAA divisions. See *id.* at 19.

86. *Id.* at 19.

87. *Id.*

88. *Id.* at 18–19. The NCAA normally enjoys a multimillion-dollar surplus each year. See BYERS, *supra* note 16, at 370.

89. See 2004 NCAA MEMBERSHIP REPORT 44, available at http://www.ncaa.org/library/membership/membership_report/2004/2004_ncaa_membership_report.pdf [hereinafter 2004 MEMBERSHIP REPORT].

90. *Id.*

ranging from \$503.8 million in 2006–2007 to \$783.1 million in 2012–2013.⁹¹

Beginning with the 2003 men's basketball tournament, the NCAA began enjoying the fruits of its fantastically lucrative broadcasting-rights contract with CBS television.⁹² Under that agreement, CBS pays the NCAA *6 billion dollars* over eleven years for the right to broadcast March Madness, the NCAA men's basketball tournament.⁹³ Amounting, on average, to *545 million dollars each year*, these funds will for the most part be distributed to the NCAA's member institutions, further enriching their coffers.⁹⁴ The NCAA will profit handsomely as well.⁹⁵

B. Conferences

The conferences into which the universities group themselves, originally representing regional ties and historic rivalries, also profit greatly from college sports. Like the NCAA, conferences also sell the right to broadcast their members' football and basketball games.⁹⁶

In doing so, they make a great deal of money. The Atlantic Coast Conference (ACC), for example, generated \$148.9 million in 2005–2006, with most of that income arising from football television contracts (\$35.8 million), basketball television contracts (\$33.3 million), football bowl games (\$25.6 million), and NCAA basketball tournament distributions (\$13.1 million).⁹⁷ Other revenue came from the ACC basketball tournament (\$7.6 million), from the ACC football championship (\$5.7 million), and from other football and basketball revenue (\$7.3 million and \$2.9 million,

91. *Id.*

92. See Tim Martin, *Cash Up for Grabs*, LANSING ST. J., Mar. 9, 2003, at A1.

93. *Id.*; see also Suggs, *supra* note 81; Welch Suggs, *CBS to Pay \$6-Billion for TV Rights to NCAA Basketball Championships*, CHRON. HIGHER EDUC., Dec. 3, 1999, at A54 [hereinafter Suggs, *TV Rights*]; Farrey, *supra* note 72; *60 Minutes*, *supra* note 53, at 14.

94. See BYERS, *supra* note 16, at 79 (asserting most of the television revenues the NCAA negotiates are eventually distributed to member institutions). The \$545 million average per-year cost to broadcast March Madness is more than networks pay annually to televise NASCAR (\$400 million) and more than CBS pays each year to televise NFL games (\$512.5 million). See Suggs, *TV Rights*, *supra* note 93.

95. BYERS, *supra* note 16, at 90 (stating the NCAA generally receives a percentage of the television rights contracts it negotiates).

96. See Riggs, *supra* note 61, at 138. A few universities, like Notre Dame, have remained independent, opting not to join a conference, but, instead, to reserve for themselves the economic value of their television rights. See *id.*

97. Atlantic Coast Conference, IRS Form 990, EIN 56-0599082, FYE June 30, 2006 (on file with author).

respectively).⁹⁸ XM Satellite Radio fees for the year amounted to \$1.6 million.⁹⁹

That same year, the ACC distributed \$130.2 million to its twelve member universities, ranging from a low of \$8.45 million to Virginia Tech University to a high of \$12.47 million to Florida State University.¹⁰⁰ The average payment per university was over \$10.8 million.¹⁰¹

The Southeastern Conference (SEC) also generated significant revenue, earning \$138.7 million in 2005–2006.¹⁰² Most of this income was derived from the televising of and other earnings from regular season football games (\$51.2 million), post-season bowl games (\$23.0 million), post-season basketball games (\$27.0 million), and regular season basketball games (\$13.1 million).¹⁰³

Conferences also often hold lucrative post-season basketball tournaments. Through its first five years, for example, the Big Ten basketball tournament netted \$21.9 million from the sale of broadcasting rights and tickets as well as from corporate sponsorships.¹⁰⁴ These profits, in turn, increase the distributions to member universities.

Conferences with at least twelve members, like the SEC, are permitted under NCAA rules to hold a conference championship in football as well.¹⁰⁵ Such additional games bring in still more revenue for conferences

98. *Id.*

99. *Id.*

100. *Id.*

101. *See id.* Other significant conference expenses included the cost of running athletic events, nearly \$6.9 million, staff salaries and benefits, \$3.4 million, conferences, conventions, and meeting costs, nearly \$735,000, media and external relations costs, almost \$500,000, conference basketball tournament expenses, over \$1.8 million, football championship expenses, over \$1.2 million, and conference bowl expenses, over \$561,000. *Id.*

102. Southeastern Conference, IRS Form 990, EIN 63-0377461, FYE Aug. 31, 2006 (on file with author).

103. *Id.*

104. *See* Joe Rexrode, *Success Story: Big Ten Event Has Made Money, Helped Teams Get Prepared for NCAA Tourney*, LANSING ST. J., Mar. 12, 2003, at C1 (on file with author).

105. *See* DIV. I MANUAL, *supra* note 13, art. 17.11.5.2(c). This rule has given conferences a powerful financial incentive to add members to meet the dozen-team requirement. *See* BYERS, *supra* note 16, at 349–50; ZIMBALIST, *supra* note 60, ch. 5; Riggs, *supra* note 61, at 138. In the summer of 2003, the ACC raided the Big East Conference, acquiring Virginia Tech and the University of Miami, thereby increasing its membership to eleven universities. *See* Joe Drape, *Wall Street Now Runs Through Campus*, N.Y. TIMES, June 26, 2003, at D1; Bill Finley, *Dollars Are Driving A.C.C. Dispute*, N.Y. TIMES, June 28, 2003, at D1; Atlantic Coast Conference, The ACC.com, About the ACC, <http://www.theacc.com/this-is/acc-this-is.html> (last visited Mar. 2, 2008); Lynch, *supra* note 56, at 611 n.108 (describing addition of Florida State University to the ACC and of Pennsylvania State University to the Big Ten Conference). In 2006, Boston College also joined the ACC, bringing membership to twelve and enabling the conference, for the first time, to hold a profitable conference football championship. *Sports Briefs*, DETROIT FREE PRESS, Oct. 13, 2003, at 2D.

and their members. In the case of the SEC, revenue from conference football championships was an additional \$15.9 million in 2005–2006.¹⁰⁶ The SEC earned another \$1.9 million from sponsorship royalties that year.¹⁰⁷

In the same year, the SEC distributed more than \$122 million to its twelve member universities, ranging from a low of \$9.8 million to Mississippi State University to a high of \$10.7 million to Louisiana State University.¹⁰⁸ The average payout per conference member was \$10.2 million. Other important conference expenses included the cost of running an SEC basketball tournament (\$1.5 million), costs associated with running SEC football championships (\$2.0 million), staff salaries and benefits aggregating \$2.8 million, and travel, occupancy, conference, convention, and meeting costs totaling over \$1 million.¹⁰⁹

Sizeable conference revenues, most of which are distributed to member universities, are not uncommon. The Big Twelve Conference earned total revenues in 2005–2006 of more than \$113.4 million, paying staff salaries and benefits of over \$3.3 million and distributing more than \$90.1 million to its twelve member universities.¹¹⁰ The Big Ten Conference earned almost \$127 million in 2005–2006, had a total payroll of over \$3.1 million, and distributed over \$117.8 million to its eleven university members.¹¹¹ Like the NCAA, the major conferences are themselves powerful commercial entities that earn and distribute hundreds of millions of dollars annually and together constitute an important economic actor in the college sports business.

C. Bowl Games

Not surprisingly, successful athletic programs generate the most income, and the greatest revenue follows particularly successful seasons.¹¹²

106. Southeastern Conference, IRS Form 990, EIN 63-0377461, FYE Aug. 31, 2006 (on file with author).

107. *Id.*

108. *Id.*

109. *Id.*

110. Big Twelve Conference, Inc., IRS Form 990, EIN 75-2604555, FYE June 30, 2006 (on file with author).

111. The Big Ten Conference, Inc., IRS Form 990, EIN 36-3640583, FYE June 30, 2006 (on file with author).

112. See ROBERT H. FRANK, CHALLENGING THE MYTH: A REVIEW OF THE LINKS AMONG COLLEGE ATHLETIC SUCCESS, STUDENT QUALITY, AND DONATIONS 3 (May, 2004), http://www.knightcommission.org/images/uploads/KCIA_Frank_report_2004.pdf;

Conferences make money when their universities win or even attend bowl games or tournaments.¹¹³ At the end of the 2006–2007 college football season, all college bowl games generated more than \$217.6 million in additional revenue for the conferences of participating universities.¹¹⁴

Major NCAA Division I football programs with the most successful seasons may be eligible to compete in the Bowl Championship Series (BCS), comprised of the five most prestigious bowls: the Rose Bowl, Tostitos Fiesta Bowl, Allstate Sugar Bowl, FedEx Orange Bowl, and BCS National Championship Game,¹¹⁵ the site for which rotates among the locations of the four other BCS bowls.¹¹⁶ Historically, the University of Notre Dame and six member conferences, the Atlantic Coast Conference, the Big East, the Big Ten, the Big 12, the Pacific 10, and the SEC, made up the BCS.¹¹⁷ Recently, five other conferences joined the arrangement.¹¹⁸ Currently, the two teams highest in the BCS standings play in the National

Telander, *Something Must Be Done*, *supra* note 53, at 97; Martin, *supra* note 92; Dennis Dodd, *Notebook: Price Tags for Top Coaches Reaching Stratosphere*, CBS Sports Line.com, Jan. 25, 2005, <http://www.sportsline.com/collegefootball/story/8133032/1>.

113. See *60 Minutes*, *supra* note 53, at 14.

114. NCAA, 2006–2007 POSTSEASON FOOTBALL ANALYSIS OF EXCESS BOWL REVENUE AND EXPENSE BY CONFERENCE (Apr. 11, 2007), http://www1.ncaa.org/membership/postseason_football/2006-07/Excess_Bowl_Rev-Exp.pdf; NCAA, FINANCIAL REVIEW OF 2006–2007 POSTSEASON BOWLS 5-YEAR SUMMARY OF INSTITUTIONAL EXPENSES (Apr. 11, 2007), http://www1.ncaa.org/membership/postseason_football/2006-07/5_yr_summary_inst_exp.pdf [hereinafter NCAA, POSTSEASON BOWLS, INSTITUTIONAL EXPENSES]. Total gross receipts from all revenue sources for the 2006–2007 football postseason were \$313,877,694, but \$96,276,977 was retained by sponsoring agencies, leaving a total of \$217,600,717 for distribution to conferences and participating teams. NCAA, FINANCIAL REVIEW OF 2006–2007 POSTSEASON BOWLS 5-YEAR SUMMARY OF GROSS RECEIPTS, http://www1.ncaa.org/membership/postseason_football/2006-07/5_yr_summary_GR.pdf (Apr. 11, 2007); NCAA, POSTSEASON BOWLS, INSTITUTIONAL EXPENSES, *supra*.

Lower-tier bowls frequently distribute as little as \$750,000 to the conferences of each participating team. See Paul Pedersen, *College Bowl Games Spread the Wealth*, TREASURE COAST BUS. J., Jan. 15, 2005, at A1; Brent Schrottenboer, *Bowls Gone Wild! Just 10 Years Ago, There Were 18 Bowl Games. This Season, There Are a Record 32. Have We Reached the Limit? Maybe Not, Because TV Networks, Sponsors and Schools Are Enjoying the Ride*, SAN DIEGO UNION TRIB., Dec. 17, 2006, at C1. In January, 2007, the Toyota Gator Bowl paid \$2.5 million to each participant. *Id.* The Outback Bowl paid \$3 million per team, and the Capital One Bowl paid \$4.25 million per team. *Id.*

115. Fox Sports on MSN, Bowl Championship Series, BCS Bowl Facts, <http://www.bcsfootball.org/bcsfb/facts> (last visited Mar. 3, 2008) [hereinafter BCS, Bowl Facts].

116. See Wendell Barnhouse, *Double Dip, Revamped BCS: One Site Hosts Two Games, the Second for a Title*, FORT WORTH STAR-TELEGRAM, Jan. 1, 2007, at D10.

117. See Fox Sports on MSN, Bowl Championship Series, Bowl Championship Series FAQ, available at <http://www.bcsfootball.org/bcsfb/faq> [hereinafter BCS, FAQ] (last visited Mar. 3, 2008). These six conferences and Notre Dame were the participants in the BCS arrangement. See *id.*

118. “In 2004, Conference USA, Sun Belt, Mid-American, Mountain West and Western Athletic conferences joined the BCS.” *Id.*

Championship Game.¹¹⁹ Champions of the original six BCS-member conferences are guaranteed spots in BCS bowl games.¹²⁰ The champions of the five more recent conferences to join the BCS automatically qualify to play in a BCS bowl game only if they rank high enough in the BCS Standings.¹²¹ Any slots remaining open among the five BCS bowl games are then allocated among at-large teams.¹²²

The BCS has estimated that its five bowl games generate more than \$1.2 billion in annual economic impact in host cities.¹²³ Of the total BCS revenue from the 2006–2007 championship series, over \$142.5 million was distributed to member conferences.¹²⁴ Conferences of participating teams receive this revenue from two sources: payments from the bowl organizations themselves, such as the Sugar Bowl or Rose Bowl (largely funded with corporate sponsorships¹²⁵ and ticket revenues); and payments from Fox Broadcasting Company and ABC Sports.¹²⁶ Conferences then allocate this money between the conference itself and its member universities according to their own internal agreements.¹²⁷ The BCS projects that

119. See Fox Sports on MSN, Bowl Championship Series, BCS Selection Policies and Procedures, <http://www.bcsfootball.org/bcsfb/eligibility> (last visited Mar. 3, 2008).

120. See *id.*

121. See *id.*

122. See *id.*

123. See Fox Sports on MSN, Bowl Championship Series, The BCS is . . . , <http://www.bcsfootball.org/bcsfb/definition> [hereinafter BCS, Definition] (last visited Mar. 3, 2008).

124. NCAA, BOWL CHAMPIONSHIP SERIES FIVE YEAR SUMMARY OF REVENUE DISTRIBUTION 2002–2006, http://www1.ncaa.org/membership/postseason_football/2006-07/5_yr_summary_rev_dist.pdf (on file with author). At the culmination of the 2006–2007 football season, each team participating in a BCS bowl game was projected to earn for its conference between \$14 million and \$17 million. See BCS, Bowl Facts, *supra* note 115.

125. See *infra* Part II.G.

126. Fox has agreed to pay \$320 million to televise the Fiesta, Orange, and Sugar Bowls for four years as well as the National Championship Game when hosted at those bowl sites. See Barnhouse, *supra* note 116; Schrottenboer, *supra* note 114; Fox Sports on MSN, Bowl Championship Series, BCS Conferences, <http://www.bcsfootball.org/bcsfb/conferences> (last visited Mar. 3, 2008); BCS, Definition, *supra* note 123; BCS, FAQ, *supra* note 117. ABC is paying about \$30 million annually through 2014 to retain the right to broadcast the Rose Bowl and the National Championship Game when played in Pasadena (2010 and 2014). See Schrottenboer, *supra* note 114; BCS, Definition, *supra* note 123.

127. See Tim Martin, *Big Ten's Share of NCAA Pot May Dwindle*, CENTRE TIMES DAILY, Mar. 16, 2004, at B1 [hereinafter Martin, *Big Ten's Share*]; Martin, *supra* note 92.

over the next decade, it will distribute \$2.1 billion to conferences and universities.¹²⁸

That the BCS is a device created and operated primarily to generate financial gain is undeniable. For example, the BCS organization emphasizes increases in TV viewership¹²⁹ and devotes a full page of its website to bowl game Nielsen television ratings.¹³⁰ Prominently featuring these ratings is, of course, a means by which the BCS advertises its product—the bowl games themselves—to prospective corporate sponsors and other advertisers. The higher the ratings, the more valuable the bowl games are to prospective advertisers, the more advertisers will be willing to pay broadcasters, and the more a broadcaster will pay the BCS for broadcasting rights. In addition, the higher the Nielsen ratings, the more revenue the BCS will generate directly from its own set of competing corporate sponsors.

Ironically, and despite the NCAA's claim that college athletics is an amateur enterprise, the January 2003 BCS national championship football game enjoyed significantly higher Nielsen ratings, and thus much greater commercial value, than the NFL playoff games aired in the same week.¹³¹ The BCS website prominently displays this fact. It also proudly announces the phenomenal 21.7 Nielsen rating for the 2006 National Championship Rose Bowl between Southern California and Texas, the highest rated BCS game ever.¹³²

The revenues earned from the five BCS bowl games are only part of the money generated in post-season play. The twenty-seven non-BCS

128. Fox Sports on MSN, Bowl Championship Series, Bowl Background, <http://www.bcsfootball.org/bcsfb/background> (last visited Mar. 3, 2008) [hereinafter BCS, Bowl Background]. See generally ZIMBALIST, *supra* note 60, at chapter 5 for a discussion of the enormous financial impact of the Bowl Championship Series.

129. See BCS, Bowl Background, *supra* note 128; Fox Sports on MSN, Bowl Championship Series, TV Ratings, <http://www.bcsfootball.org/bcsfb/tvratings> (last visited Mar. 3, 2008) [hereinafter BCS, TV Ratings] (noting for 2005–2006 that television ratings for BCS bowl games increased an average of 29.6 percent, that the overall average rating for all college football bowl games increased by 15 percent, and that the ratings for 16 bowl games increased from the previous year).

130. See BCS, TV Ratings, *supra* note 129. Ratings for BCS bowl games are also reported under BCS, Bowl Facts, *supra* note 115. See also Football Bowl Association, 2006–2007 Post-Season Bowl Results, <http://www.footballbowlassociation.com/documents/2006-07/BowlAttendance-Ratings.pdf> (last visited Mar. 3, 2008).

131. The January 2003 Tostitos Fiesta Bowl, that year's national championship game, earned a Nielsen rating of 17.2. BCS, TV Ratings, *supra* note 129. That is, 17.2% of all U.S. households with television sets, or 18,168,000 households, watched that game. *Id.* An average prime-time program on one of the broadcast networks, by contrast, rates 8.8, or 9,279,070 households. *Id.* Two professional football playoff games, aired the same week as the Fiesta Bowl, earned lower ratings. The Atlanta-Green Bay game garnered a rating of only 16.0, and the New York Giants-San Francisco game earned a rating of only 13.5. *Id.*

132. *Id.*

bowl games¹³³ and various post-season conference championships¹³⁴ also generate wealth for the conferences of the schools that participate. For example, at the end of the 2006–2007 football season, non-BCS bowl games generated over \$75 million for conferences of participating teams.¹³⁵

That the entire BCS enterprise is commercial is laid bare by the fact that four of the five BCS bowls have sold their very identities to corporations. The Orange Bowl is now the FedEx Orange Bowl. The Sugar Bowl is now the Allstate Sugar Bowl. The Fiesta Bowl has become the Tostitos Fiesta Bowl.¹³⁶ As the BCS National Championship Bowl Game rotates among the four existing BCS bowl sites, it will carry the corporate name of the sponsoring host bowl.¹³⁷ This corporate branding of these athletic events highlights the fundamentally commercial character of so-called amateur college athletics. To say that major college football is a highly commercial, richly successful industry is a sublime understatement. Moreover, the experience in football is replicated in the other revenue-generating sport, men's basketball.

133. See Schrottenboer, *supra* note 114, at C1. Among the non-BCS bowls are the Capital One Bowl, the Cotton Bowl, the Chick-fil-A Peach Bowl, and the Outback Bowl. *See id.*

134. Under NCAA rules, a conference with at least twelve member schools may hold a lucrative conference championship game. *See supra* note 105 and accompanying text.

135. NCAA, 2006–2007 Postseason Football Non-BCS Revenue Distribution, http://www1.ncaa.org/membership/postseason_football/2006-07/Non-BCS_rev_dist.pdf (last visited Mar. 3, 2008).

136. *See* BCS, Bowl Facts, *supra* note 115. While the Rose Bowl has not renamed itself for a corporate sponsor, it has, in part, joined this commercial trend by allowing Citicorp to associate itself with this oldest of college bowls. *See id.* (displaying the Rose Bowl logo as “Rose Bowl Game presented by Citi”). Even the minor bowls have adopted this profitable practice of corporate sponsorship. The following is a partial list of obvious examples: the GMAC Bowl, the MPC Computers Bowl, the MasterCard Alamo Bowl, the Continental Tire Bowl, the EVI.net Houston Bowl, the Pacific Life Holiday Bowl, the Gaylord Hotels Music City Bowl, the Vitalis Sun Bowl, the AutoZone Liberty Bowl, the SBC Cotton Bowl Classic, the Toyota Gator Bowl, the Capital One Bowl, and our favorite, the Chick-fil-A Peach Bowl. *See* MICHIGAN STATE UNIVERSITY, *supra* note 78, at 64; *infra* Part II.G. Other examples include: the Papa John's Bowl, the Insight Bowl, the Meineke Bowl, the Outback Bowl, and the Capital One Bowl. *See* Schrottenboer, *supra* note 114, at C10.

137. For example, in 2007 when the BCS National Championship Game was played in Glendale, Arizona, a week after the Tostitos Fiesta Bowl, it was called the Tostitos BCS National Championship Game. *See* Barnhouse, *supra* note 116, at D10; BOWL CHAMPIONSHIP SERIES, 2007–2008 MEDIA GUIDE 10, 14, http://www.bcsfootball.org/id/7212064_37_1.pdf.

D. March Madness

As noted above, a major portion of the NCAA's annual revenues, usually at least three-quarters, is derived from its men's basketball tournament, known affectionately by basketball fans as March Madness or the Big Dance.¹³⁸ Additional tournament income is derived from corporate sponsors and ticket sales.¹³⁹ For the most part and as in football, this revenue is then distributed to NCAA member conferences, colleges, and universities.¹⁴⁰ Under the NCAA's distribution formula, the better a conference's members perform in the men's basketball tournament, the more revenue is distributed to that conference to be shared among conference members according to the conference's own internal arrangements.¹⁴¹

Over \$307.6 million in NCAA revenues from men's basketball were distributed among member conferences in 2006.¹⁴² The bulk of this money was earned through the NCAA's eleven-year, \$6 billion contract to allow CBS to broadcast the annual men's basketball tournament.¹⁴³ Of total distributions, approximately \$147.4 million was divided among conferences based upon the number of sports their member schools sponsored and the number of scholarship athletes.¹⁴⁴ Another \$122.8 million was divided among the conferences based upon the teams' tournament performances.¹⁴⁵ In 2006, each conference was paid approximately \$164,000 for each game a conference member played in the preceding six tournaments other than the championship game.¹⁴⁶ Thus, as a general

138. See *supra* Part II.A.

139. Total attendance at the 2006 men's basketball tournament was 670,254. NCAA, OFFICIAL 2007 NCAA MEN'S BASKETBALL RECORDS BOOK 234, http://www.ncaa.org/library/records/basketball/m_basketball_records_book/2007/2007_m_basketball_records.pdf [hereinafter BASKETBALL RECORDS]; see also Martin, *supra* note 92 (noting attendance at tournament games has nearly tripled since 1979).

140. See *supra* Part II.A.

141. See Fatsis, *supra* note 56; Martin, *Big Ten's Share*, *supra* note 127; Martin, *supra* note 92.

142. 2006 MEMBERSHIP REPORT, *supra* note 45, at 20.

143. See *id.* at 18; Suggs, *supra* note 81, at A46.

144. 2006 MEMBERSHIP REPORT, *supra* note 45, at 20 (sum of Total Sports Sponsorship Fund, Total Grants-in-Aid Fund, and Total Student-Athlete Opportunity Fund); Fatsis, *supra* note 56 (referring to same figures in 2004 MEMBERSHIP REPORT, *supra* note 89, at 24); Suggs, *supra* note 81, at A46; NCAA, 2006-2007 Revenue Distribution Plan, 4. Broad-Based Distribution & 6. Student-Athlete Opportunity Fund, http://www1.ncaa.org/finance/revenue_distribution_plan (last visited Mar. 3, 2008) (describing NCAA funds divided among member conferences).

145. See 2006 MEMBERSHIP REPORT, *supra* note 45, at 20; NCAA, 2006-2007 Revenue Distribution Plan, 5. Basketball Fund, http://www1.ncaa.org/finance/revenue_distribution_plan [hereinafter NCAA; Revenue Distribution Plan, Basketball Fund] (last visited Mar. 3, 2008); Fatsis, *supra* note 56 (referring to figures in 2004 MEMBERSHIP REPORT, *supra* note 89, at 24).

146. NCAA, Revenue Distribution Plan, Basketball Fund, *supra* note 145; Thomas George, *March Madness: Cash Cow Bone Dry for Athletes*, DENV. POST, Apr. 3, 2006, at

rule, the more teams from a given conference participate in the tournament and the further they advance, the more money is distributed from the NCAA to that conference.¹⁴⁷ Of the \$307.6 million available for distribution, the remaining \$37.4 million was divided among the 326 Division I institutions and the 31 Division I conferences.¹⁴⁸ In 2007, estimates indicate conferences received about \$177,000 for each tournament game, other than the championship game, that a conference member played in the preceding six tournaments,¹⁴⁹ for total distributions to all conferences based on tournament play aggregating approximately \$132.6 million.¹⁵⁰

Selection of tournament participants is accomplished by awarding thirty-one of the sixty-four or sixty-five available slots to conference champions.¹⁵¹ The other thirty-three or thirty-four available slots are awarded to schools on the basis of their demonstrated and perceived basketball talent. And it is not uncommon for most of these remaining at-large slots to be filled by teams from the major basketball conferences: the Big Ten, ACC, SEC, Big 12, Pacific 10, Big East, and Conference USA.¹⁵² The system by which teams are selected to compete in the NCAA men's basketball tournament thus not only rewards financially those programs that succeed in any given year, it also rewards those that succeed over

D-01; see also Tom Lambert, *Spartan Fever: March Madness is Sweeping East Lansing as MSU Basketball Takes Center Stage at the Final Four: Fans Revel in Men's, Women's Success*, LANSING ST. J., Mar. 31, 2005, at 1A (confirming also for prior years that payment is awarded for each game a conference member played in preceding six tournaments other than the championship game); Martin, *Big Ten's Share*, *supra* note 127 (same); Suggs, *supra* note 81 (same).

147. See Martin, *Big Ten's Share*, *supra* note 127; Martin, *supra* note 92. Conferences have their own internal agreements governing the distribution of tournament revenues among their members. The Big Ten, for example, divides NCAA tournament receipts evenly among its eleven member schools after participating schools' expenses are paid. See *id.*

148. 2006 MEMBERSHIP REPORT, *supra* note 45, at 19–20, 35.

149. NCAA, Revenue Distribution Plan, Basketball Fund, *supra* note 145; NCAA, Distribution of Basketball-Related Funds According to Number of Units by Conference, 2001–2006, available at http://www1.ncaa.org/finance/bkb_dist.html [hereinafter NCAA, Distribution Units by Conference] (last visited July 19, 2007) (on file with author); see also Lambert, *supra* note 146, at 1A (indicating each conference receives multiple payments, one for each game any conference member played in the last six tournaments other than for the championship games); Suggs, *supra* note 81 (same).

150. NCAA, Revenue Distribution Plan, Basketball Fund, *supra* note 145; NCAA, Distribution Units by Conference, *supra* note 149.

151. See Martin, *supra* note 92.

152. See *id.*

time, providing significant additional incentive to build and maintain winning basketball programs.

Plainly, the successful programs in the best conferences have the greatest opportunity to profit from tournament play. Michigan State University was estimated to have received \$2 million from the 2003 tournament. This amount constituted one quarter of the team's annual revenue of \$8 million.¹⁵³

E. Colleges and Universities

1. Direct Financial Benefits from Successful Athletic Programs

In addition to harvesting the financial benefit of distributions from the NCAA and conferences, colleges and universities with successful athletic programs also generate significant revenue directly from their operations. The University of Wisconsin's annual athletic department budget approximates \$76 million.¹⁵⁴ The University of Florida budgets approximately \$78 million for annual spending on athletics.¹⁵⁵ The University of Michigan's annual athletics budget approaches \$78.4 million,¹⁵⁶ while those at Ohio State University and the University of Texas each approximate an astounding \$90 million.¹⁵⁷ Not only are college athletic revenues and spending enormous, but they are escalating rapidly.¹⁵⁸ For example, from 1995 through 2001, athletic budgets at Division I schools increased by twenty-five percent while overall spending at those institutions rose by only ten percent.¹⁵⁹

Ticket sales alone generate substantial revenue for universities. For the fall 2006 season, more than 3.6 million fans attended football games at the top-five-attended schools.¹⁶⁰ The University of Michigan enjoyed

153. *Id.* In 2003–2004, the men's basketball team at Michigan State University generated more than \$8.4 million in total revenue. U.S. Department of Education, Office of Postsecondary Education, 2003–2004 Report on Revenues and Expenses for Michigan State University, <http://www.ope.ed.gov/athletics/InstDetail.asp?CRITERIA=3> (last visited Mar. 28, 2005) (on file with author) (showing men's basketball revenues for Michigan State University upon search).

154. Charles Elmore, *Gator Nation It's Not Just a Place; It's a State of Mind*, PALM BEACH POST, Jan. 7, 2007, at 1A.

155. *Id.*

156. *Id.*

157. *Id.*

158. See Frank, *supra* note 112, at 3.

159. See *id.*; Mary Jo Sylwester & Thomas Witosky, *Athletic Spending Grows as Academic Funds Dry Up*, USA TODAY, Feb. 18, 2004, available at http://www.usatoday.com/sports/college/2004-02-18-athletic-spending-cover_x.htm (last visited Mar. 3, 2008).

160. NCAA, 2006 National College Football Attendance, http://www.ncaa.org/stats/football/attendance/2006/2006_football_attendance.pdf (last visited Mar. 3, 2008). The top five attended football programs were Michigan, Penn State, Tennessee, Ohio State, and Georgia. *Id.*

the largest per game attendance in the nation with an average in 2006 of 110,026 fans.¹⁶¹ In fall 2007, football tickets there cost \$400 per seat for the season.¹⁶² Ticket revenues alone could therefore exceed \$44 million for the year.

Michigan State University's Spartan Stadium, a moderately sized football stadium by Big Ten standards, seated 75,000 beginning in the 2005–2006 season.¹⁶³ Ticket prices have been increasing steadily in recent years.¹⁶⁴ For the 2005–2006 season, the most recent year for which data were available, total football ticket revenue exceeded \$12.4 million.¹⁶⁵

In 2006, Division I college basketball games drew more than 25.8 million attendees.¹⁶⁶ At the five universities with the highest average attendance per basketball game, over 1.7 million fans attended home games,¹⁶⁷ an average of almost 20,100 per game.¹⁶⁸ The University of Kentucky enjoyed the largest average per game attendance. In the 2007–2008 season, ticket prices at Kentucky will range from \$28 to \$33

161. *Id.*

162. Telephone Interview with Univ. of Mich. Athletics Ticket Office, in Ann Arbor, Mich. (Aug. 20, 2007).

163. Joe Rexrode, *MSU Boosts Cost of Football Tickets: Biggest Price Hike will be for 'Premium Games'*, LANSING ST. J., Feb. 9, 2005, at C1.

164. Individual MSU football tickets will cost \$46 each during the 2007–2008 season. See Michigan State University, 2007 Michigan State Football tickets (on file with author).

Tickets for one “premium game” against University of Michigan, will cost \$70 each in the fall 2007 season. *Id.* During the 2004–2005 season of six home games, individual tickets for four games were \$42 each, but for two “premium games,” those against Notre Dame and Ohio State, tickets were \$52 per game. Michigan State University, 2004 Michigan State Football tickets (on file with author); Barbara Wieland, *Spartan-Irish Game a Win for Business*, LANSING ST. J., Sept. 15, 2004, at 1A. Thus, when pricing tickets, the University took advantage of higher market demand for the more popular games, availing itself of the free market, while the NCAA prohibits athletes themselves from enjoying that free market. Premium pricing is used at other universities as well. Tickets for the Oklahoma-Texas contest in 2004 cost \$85 each and for the Miami-Florida State game \$75. Rexrode, *supra* note 163.

165. Michigan State University, Financial Report 2005–2006, Supplement: Other Financial Information 36, <http://ctrl.msu.edu/download/fa/financialstatements/OFI20052006.pdf> [hereinafter MSU Financial Report 2005–2006] (last visited Mar. 3, 2008). Ticket revenue is shared with visiting teams, but the University recoups payments by receiving a share of their hosts' revenues at away games. This figure represents ticket revenues only, and does not include any revenue Michigan State University receives from the sale of television broadcasting rights. See *id.*

166. BASKETBALL RECORDS, *supra* note 139, at 234.

167. *Id.* at 235. The top five programs in per game attendance were Kentucky, Syracuse, North Carolina, Louisville, and Tennessee. *Id.*

168. See *id.*

per seat.¹⁶⁹ With an average per game attendance at Kentucky of 22,763,¹⁷⁰ ticket sales will generate between \$637,364 and \$751,179 per game, for a sum of between \$11.47 million and \$13.52 million for the season.¹⁷¹

These football and basketball ticket revenue figures do not include seat license fees. At many schools, fans are required to make an additional “donation” each year to the university to be eligible to purchase season tickets.¹⁷² At the University of Kentucky, for example, basketball fans in 2006–2007 were required to donate an additional \$200 to \$1250 per seat, each season, to be eligible to buy lower-bowl season tickets.¹⁷³ “Premium seating” charges at the most successful football programs are much greater, amounting to as much as \$25,000 at the University of Southern California, and up to \$15,000 at the University of Miami.¹⁷⁴ At the University of Michigan, the per seat surcharge is expected to produce

169. University of Kentucky Athletic Department, Men’s Basketball Ticket Information, http://www.ukathletics.com/index.php?s=&change_well_id=2&url_article_id=11359 [hereinafter Kentucky Ticket Information] (last visited Mar. 3, 2008).

170. BASKETBALL RECORDS, *supra* note 139, at 235.

171. See Kentucky Ticket Information, *supra* note 169 (providing University of Kentucky 2007–2008 home schedule of eighteen games).

172. The \$46 or \$70 price of each individual fall 2007 football ticket at Michigan State University, see 2007 Michigan State Football tickets, *supra* note 164, does not include the mandatory donation required of season ticket holders who purchase seats in prime locations. At Spartan Stadium, those charges range from \$200 to \$500 per seat per year for approximately 15,474 seats. Michigan State University, Frequently Asked Questions, <http://msuspartans.cstv.com/tickets/msu-fb-faq.html> (last visited on Aug. 20, 2007) (on file with author) (providing 2007–2008 prices for premium seats); see also Todd Schulz, *MSU Fans Prove Loyalty, Deserve More*, LANSING ST. J., Sept. 11, 2004, at 1W (indicating number of seats in premium seating zones). At the University of Michigan, premium seating fees range from \$50 per seat in the endzone to \$500 per seat near the 50-yard line. University of Michigan, Victors Club—Preferred Seat Donation Program, http://www.mgoblue.com/document_display.cfm?document_id=19797 (last visited Aug. 20, 2007) (on file with author). At the University of Notre Dame, they range from \$500 for an endzone seat to \$1,000 for a sideline seat. Margaret Fosmoe, *Season Tickets Fee Takes a Jump; ND Raising the Mandatory Donation Amount for Right to Buy*, S. BEND TRIB., Nov. 10, 2006, at A1.

173. University of Kentucky Athletic Department, K-Fund Priority Seating Levels/Seating Charts, Chart for Men’s Basketball, Minimum Donation Requirements, http://ukathletics.com/index.php?s=&url_channel_id=&url_subchannel_id=&url_article_id=11372&change_well_id=7 (last visited Aug. 20, 2007) (on file with author) (showing per seat donations required for different areas in the lower bowl of Rupp Arena); see also University of Kentucky Athletic Department, K Fund Frequently Asked Questions, http://ukathletics.com/index.php?s=&url_channel_id=&url_subchannel_id=&url_article_id=11376&change_well_id=7 (last visited Mar. 3, 2008) (explaining that per seat donations are mandatory and payable each year). In 2003–2004, Michigan State University earned \$225,000 from extra seat license fees for the thirty-eight court-side seats in its basketball arena. Joe Rexrode, *MSU Sports Budget Back in the Black: Athletic Office Reports \$600K Profit for '03–'04*, LANSING ST. J., Jan. 20, 2005, at 1A.

174. Douglas Lederman, *Schools Making Fans Give More to Keep Best Seats; Colleges say Donations Needed to Meet Costs*, USA TODAY, Aug. 25, 2004, at A.01.

no less than \$9.5 million in additional annual revenue.¹⁷⁵ And new stadium construction projects include luxury suites sold each season for tens of thousands of dollars.¹⁷⁶

Ticket revenues are hardly the only means, however, by which colleges profit directly from successful athletic programs. Other direct and important sources of revenue include the sale of television rights which the universities and colleges receive through the NCAA and their conferences,¹⁷⁷ the sale of food and drink, athletic apparel and other merchandise bearing the logo of the school or the number of a star player,¹⁷⁸ parking fees, and, of course, advertising revenues from the schools' corporate sponsors or "partners."¹⁷⁹

175. *Id.* The University of Kansas will produce some \$7 million annually through premium seating. *Id.*

176. A 2005 stadium expansion at Michigan State University included twenty-four suites, each of which were offered for between \$35,000 and \$80,000 annually, and 862 comfortable "club seats" selling for \$4500 to \$6500 annually. Tim Martin & Sharon Terlep, *MSU Approves \$61M Stadium Improvements: 3,000 New Seats, 24 Club Suites to be Added* by '05, LANSING ST. J., Sept. 13, 2003, at 1A. Corporations regularly rent luxury suites to entertain clients and prospects. *See id.* MSU's "profit goal" from seating surcharges, suites, and club seats in Spartan Stadium is \$3.5 million annually. *See* Rexrode, *supra* note 173.

177. In 2005–2006, Division I universities received distributions of over \$307.6 million from the NCAA. 2006 MEMBERSHIP REPORT, *supra* note 45, at 19. Most of these funds derived from the NCAA's sale of television broadcasting rights to CBS. *See id.* at 18. An example of conference distribution of revenues to its members is the Southeastern Conference which distributed over \$122 million to its twelve member universities in 2005–2006. Southeastern Conference, IRS Form 990, EIN 63-0377461, FYE Aug. 31, 2006 (on file with author). Much of this revenue came from lucrative multi-year broadcasting contracts. *See id.*

178. *See* Eitzen, *supra* note 60, at 27 (estimating \$2.5 billion in annual sales of licensed college merchandise, generating \$100 million for universities annually); *id.* (noting the University of Michigan earns approximately \$6 million annually from sales of merchandise); Elmore, *supra* note 154 (describing sudden jumps in apparel sales at the University of Florida—\$3.2 million—and Ohio State University following major athletic victories); George, *supra* note 146 (asserting that the NCAA and its member universities make "a few . . . hundred million" dollars annually "from ticket sales, endorsement deals, jersey sales and radio broadcasting deals"); Tim Martin, *The Green Machine*, LANSING ST. J., Dec. 16, 2001, at 1A (noting how MSU's licensing revenue reached a record \$1.7 million for the first time following its NCAA men's basketball title in 2000).

179. Corporate sponsor Comcast Cable, for example, paid the University of Maryland \$25 million for naming rights to that school's basketball arena. *See* Editorial, *Student-Athletes*, BALT. SUN, May 5, 2004, at 18A. Value City is paying \$12.5 million over several years for such rights at Ohio State University. *See* Tim Martin, *Corporate Sponsorships Net Millions for Ohio St.*, LANSING ST. J., Dec. 16, 2001, at 6A. At Michigan State University, sponsors donated over \$2.3 million in 2005–2006 alone for the privileges of being recognized and advertising their logos on the scoreboard during

2. Indirect Benefits from Successful Athletic Programs

The financial gains for NCAA institutions from their football and basketball programs are not limited to revenues arising directly from their athletic-department operations. Universities with successful athletic programs also derive the ancillary financial benefit of “millions of dollars of indirect revenue from alumni donations and increased enrollment.”¹⁸⁰ Laura Freedman’s case study of the University of Maryland demonstrates the correlation between success on the playing field and subsequent

games. MSU Financial Report 2005–2006, *supra* note 165, at 36; *see also* Martin, *supra* note 178.

180. Schott, *supra* note 57, at 27; *see also* JAMES J. DUDERSTADT, INTERCOLLEGIATE ATHLETICS AND THE AMERICAN UNIVERSITY: A UNIVERSITY PRESIDENT’S PERSPECTIVE 9 (2000) (noting every time the University of Michigan appears in the Rose Bowl or the Final Four, admissions applications soar); DALE HOFMANN & MARTIN J. GREENBERG, SPORTSBIZ xiv (1989) (noting that when Oklahoma won a national football title in 1985, donations to the university rose \$2.4 million); Robert A. Baade & Jeffrey O. Sundberg, *Fourth Down and Gold to Go? Assessing the Link between Athletics and Alumni Giving*, 77 SOC. SCI. Q. 789 (1996) (finding Bowl Game appearances and participation in the NCAA basketball tournament each result in significantly higher alumni gifts); Cletus C. Coughlin & O. Homer Erekson, *An Examination of Contributions to Support Intercollegiate Athletics*, 51 S. ECON. J. 180, 194 (1984) (reporting positive relationship between athletic success and alumni giving); Brian Goff, *Effects of University Athletics on the University: A Review and Extension of Empirical Assessment*, 14 J. OF SPORT MGMT. 85, 101 (2000) (reporting positive relationship between athletic success and alumni giving); Goldman, *supra* note 25, at 206, 212 n.57 (postulating that star athletes indirectly increase revenues by creating positive exposure for the school that increases applications and alumni contributions); Erik M. Jensen, *Taxation, the Student Athlete, and the Professionalization of College Athletics*, 1987 UTAH L. REV. 35, 44 n.39 (concluding that successful athletics programs benefit universities in terms of exposure and increased donations); Lee Siegelman & Samuel Brookheimer, *Is It Whether You Win or Lose? Monetary Contributions to Big-Time College Athletic Programs*, 64 SOC. SCI. Q. 347, 355 (1983) (finding donations to university athletic programs increase by \$125,000 in 1983 dollars following a ten percent increase in football winning percentage over a four-year period); Peter Alfano, *Academic Elite Using Sports Too*, N.Y. TIMES, Feb. 15, 1989, at D25–26; Martin, *supra* note 92; Tim Martin, *Spartan Football Program Boosts Visibility for MSU*, LANSING ST. J., Aug. 30, 2003, at 1A (describing increases in student applications following athletic success at numerous universities); Joe Rexrode, *Double Threat: MSU Men’s and Women’s Basketball Teams Pack One-Two Punch Rarely Seen on Court*, LANSING ST. J., Mar. 13, 2005, at 1A; Dodd, *supra* note 112. *But see* SHULMAN & BOWEN, *supra* note 65, at 255 (describing lack of evidence supporting increases in alumni giving following athletic success); Frank, *supra* note 112, at 33 (arguing “[a]lumni donations and applications for admission sometimes rise in the wake of conspicuously successful seasons at a small number of institutions, but such increases are likely to be both small and transitory”); Telander, *Something Must Be Done*, *supra* note 53, at 103–04 (reviewing studies suggesting donations to academic programs do not always result from success in athletic programs); *cf.* ROBERT E. LITAN ET AL., THE EMPIRICAL EFFECTS OF COLLEGIATE ATHLETICS: AN INTERIM REPORT, COMMISSIONED BY THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION 5–6 (2003), <http://www.ncaa.org/databases/baselineStudy/baseline.pdf> (finding in the medium term no positive or negative relationship between changes in football and basketball spending and incoming student-body SAT scores; also finding no robust relationship between changes in football and basketball spending and alumni giving).

growth in the number of student applications, consequent improvements in the quality of students admitted,¹⁸¹ and increases in alumni donations. Freedman tracked enrollment applications, the quality of entering students, and general revenues at the University of Maryland, a large Division I school, and correlated them to periods of particular success in football and men's basketball.¹⁸²

Following several mediocre seasons,¹⁸³ the Maryland football team excelled in its 2001–2002 season and received a coveted Orange Bowl invitation.¹⁸⁴ The following season was also successful and culminated in the team's victory in the Peach Bowl.¹⁸⁵ “During the same time period, the [men's] basketball team dramatically improved, . . . made Maryland's first appearance in the NCAA National Tournament Final Four, and won [its] . . . first national basketball championship.”¹⁸⁶ Simultaneously, the university experienced a thirty-eight percent increase in its total revenues.¹⁸⁷ “In particular, the categories of revenue representing sales of Maryland memorabilia and licensing, and private donations [grew by] . . . \$10,004,293 and \$11,481,954, respectively, between the 1999 and 2003 fiscal years,”¹⁸⁸ representing a 7.2% growth in memorabilia sales¹⁸⁹ and a 27.8% increase in private donations.¹⁹⁰

Freedman also documented improvement in the student body's academic quality during and following the period of athletic success resulting from

181. See Laura Freedman, Note, *Pay or Play? The Jeremy Bloom Decision and NCAA Amateurism Rules*, 13 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 673, 699–702 (2003); see also PAUL C. WEILER & GARY R. ROBERTS, *SPORTS AND THE LAW* 796 (2d ed. 1998) (asserting that Patrick Ewing's performance at Georgetown University for four years helped generate a forty-seven percent increase in the number of applications and a forty-point increase in its freshman SAT scores); Martin, *supra* note 92 (noting that Michigan State University applications rose seven percent the year after the men's basketball team won a national championship).

182. See Freedman, *supra* note 181, at 699–702.

183. See *id.* at 700 (noting the record for the Maryland football team in 1998–1999 was 3–8, and that in 1999–2000 and again in 2000–2001, it was 5–6).

184. The Maryland Terrapins lost to Florida in that game. See Fox Sports on MSN, Bowl Championship Series, BCS, Alliance & Coalition Games Year-By-Year, available at <http://www.bcsfootball.org/bcsfb/timeline> (last visited Mar. 3, 2008).

185. ESPN, Peach Bowl History, available at http://sports.espn.go.com/ncf/bowls04/story?page=peach_history (last visited Mar. 3, 2008).

186. Freedman, *supra* note 181, at 702.

187. *Id.* at 700. Revenues for 2003 were \$1,155,364,083 and for 1999 were \$836,612,738. *Id.*

188. *Id.* at 702.

189. See *id.* at 700.

190. See *id.*

an increase in the number of student applications:¹⁹¹ high school grade point averages and SAT scores of entering students were significantly higher.¹⁹² Under such circumstances, universities may elect to enroll either the same number of students and thus become more selective, or more students thereby enhancing tuition revenue. Either choice is highly desirable to any institution.

Other universities have also enjoyed increases in donations and applications following successful athletic seasons. Gifts to Michigan State University doubled after its Spartan basketball program became a regular contender for the national championship title.¹⁹³ In 2000, the year MSU won that honor, the university raised a record-breaking \$202 million in donations, student applications grew by seven percent, and licensing revenue exceeded \$1 million for the first time in university history.¹⁹⁴ Similarly, Boston College enjoyed a remarkable twelve percent increase in applications in the year following Doug Flutie's memorable forty-eight yard touchdown pass to defeat the University of Miami as time expired in the game.¹⁹⁵

The revenues universities enjoy from their sports programs are created largely by the efforts of individual players. "Top college football players can generate more than \$500,000 in annual revenues for their universities"¹⁹⁶ and "top men's basketball players . . . more than a million dollars each year."¹⁹⁷ "[I]t has been estimated that Patrick Ewing generated \$12.3 million for Georgetown University through increased attendance, television, and NCAA tournament revenues during his four years on the Hoya basketball team."¹⁹⁸

In major professional sports, players' financial worth to the enterprise, namely their combined salaries, are usually measured at slightly more than half of league revenues.¹⁹⁹ The NBA salary cap, for example, has

191. See *id.* at 703. The quality of the student body improves, it is thought, because athletic success generates more interest in the school among potential applicants. The number of applications increases, and the university may admit a smaller percentage, and more highly credentialed group, of applicants.

192. See *id.*

193. See Martin, *supra* note 92.

194. *Id.*; Rexrode, *supra* note 180. Although University officials "are hesitant to attribute all the growth to sports success, . . . they know it helps." Martin, *supra* note 92.

195. FRANK, *supra* note 112, at 25.

196. Riggs, *supra* note 61, at 142 (citing Jonathan Marshall, *Studies Say that Colleges Exploit Athletes*, S. F. CHRON., Nov. 12, 1993, at E1); see also Farrey, *supra* note 72 (acknowledging the athlete helps to generate the revenues enjoyed by universities).

197. Riggs, *supra* note 61, at 142 (citing Marshall, *supra* note 196); see also Lynch, *supra* note 56, at 617-18.

198. Riggs, *supra* note 61, at 142 (citing *Pat Ewing Made Money for His College Team Too*, JET, Jan. 20, 1986, at 49).

199. See Farrey, *supra* note 72.

recently been set at sixty-one percent of league revenues.²⁰⁰ Using this measure, Syracuse University's twelve scholarship basketball players would each have been worth \$488,000 during the 2002–2003 season, roughly \$458,543 more than their annual scholarship.²⁰¹ Over a four-year college athletic career, each Syracuse scholarship player would have earned approximately \$1.8 million more than the value of his scholarship.²⁰² Under this same formula, basketball players at Michigan State University were worth, on average, \$345,666 in 2002–2003, or \$1.3 million over a four-year period,²⁰³ while at Duke University, each player's annual worth would have been \$396,500, or \$1.5 million over four years; at the University of Maryland, \$376,166, or \$1.4 million over the four-year period of eligibility; and at the University of Arizona, \$508,333, or \$2 million over a four-year college career.²⁰⁴

Of course, by focusing solely upon the “student” in student-athlete rather than the financial value each player brings, the NCAA has succeeded in maintaining a regime in which players can be paid no more than scholarships, thus reserving the vast remaining wealth for itself and its member institutions. Not only do these institutions take for themselves the wealth their athletes generate, but they do so free of taxation.

F. Coaches and Other Individuals

While colleges and universities reap fabulous profits from their athletics businesses, a great many individuals, although not the players themselves,²⁰⁵ also gain from this munificent enterprise. Coaches' salaries

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*; see Roger G. Noll, *The Economics of Intercollegiate Sports*, in *RETHINKING COLLEGE ATHLETICS* 197, 205–06 (Judith Andre & David N. James eds., 1991) (estimating one player's annual worth to a university at \$200,000 and the average profit to universities from “good” players to be about \$150,000 per year); Robert W. Brown, *An Estimate of the Rent Generated by a Premium College Football Player*, 31 *ECON. INQUIRY* 671, 679 (1993) (estimating value generated by a top-level football athlete to a university at \$2 million over a four-year period).

205. Of course, grant-in-aid athletes obtain financial benefit through their scholarships, but this source of compensation is limited arbitrarily by agreement among the colleges and universities, is often lower than a fair market wage, and bears no relation to the athletic abilities of any given player. See *DIV. I MANUAL*, *supra* note 13, arts. 12.1.1, 15.01.2, 15.1. Were college athletics properly considered to be a commercial, rather than amateur, activity, this form of price fixing would be subject to antitrust scrutiny. See *supra* Part II.B. Not only the amount of compensation, but its form—the grant-in-aid—

and those of other administrators have become professionalized. College coaches are now regularly represented by professional agents who negotiate lucrative financial agreements, both from universities and through sponsorship arrangements.²⁰⁶

A recent example of this extravagant trend is that of Tubby Smith, former University of Kentucky head basketball coach.²⁰⁷ In 2003, Coach Smith signed an eight-year contract extension.²⁰⁸ Under the agreement, he earned a base annual salary of \$200,000.²⁰⁹ Had he stayed at Kentucky through 2007, he would have received a \$1.5 million bonus,²¹⁰ and remaining through 2011 would have entitled him to an additional \$2.5 million.²¹¹ More lucrative for Coach Smith, however, was the income he enjoyed from television, shoe, and apparel deals, beginning at \$1.55 million for the 2003–2004 season and set to increase to \$2.175 million by 2010–2011.²¹² Of course, these amounts were in addition to his University of Kentucky salary and bonuses, so his total minimum earnings over the eight-year period would have been \$20,250,000²¹³—an average of more than \$2.53 million each year.

In addition to this compensation, Coach Smith was also entitled to a country club membership,²¹⁴ two cars,²¹⁵ and substantial additional bonuses and benefits. He was to earn \$50,000 for each NCAA Final Four appearance,²¹⁶ another \$50,000 each year the team met certain academic

is dictated by agreement among NCAA members. See DIV. I MANUAL, *supra* note 13, arts. 2.9, 12.1.2.

206. See, e.g., Riggs, *supra* note 61, at 139.

207. Coach Smith left Kentucky in 2007 and is currently the head basketball coach at the University of Minnesota. Steve Lannen & Delano Massey, *Gillispie Calls His New Gig at Kentucky the 'Best Job'*, CHI. TRIB., Apr. 7, 2007, at 6.

208. See Mike Fish, *Sweet Deals: More and More College Coaches are Making CEO Money*, SI.COM, June 2, 2003, available at http://sportsillustrated.cnn.com/basketball/college/news/2003/05/30/bkb_coaching_salaries/ and at <http://sportsillustrated.cnn.com/basketball/college/news/2003/06/02/contracts/#kentucky> (last visited Mar. 4, 2008).

209. *Id.*

210. *Id.*

211. *Id.*

212. Over the eight-year period, Coach Smith would have received: \$1.55 million in 2003–2004; \$1.625 million in 2004–2005; \$1.7 million in 2005–2006; \$1.775 million in 2006–2007; \$1.85 million in 2007–2008; \$1.925 million in 2008–2009; \$2.05 million in 2009–2010; and \$2.175 million in 2010–2011. *Id.*

Under shoe and apparel deals, the manufacturer compensates the coach through his university and provides the team with its uniforms and shoes. These items include the manufacturer's logo, and in this regard, the apparel maker pays the coach to transform the athlete into "a walking billboard." See Nike Scores: 'Swoosh' Gets Too Much Play, LANSING ST. J., Mar. 22, 2002, at 6A.

213. Fish, *supra* note 208.

214. See *id.*

215. See *id.*

216. *Id.*

goals,²¹⁷ a \$15,000 bonus for winning the SEC championship,²¹⁸ and another \$15,000 for qualifying for the NCAA basketball tournament.²¹⁹ At the same time, he was not required to compensate the university for leaving before the end of his contract.²²⁰ Had the university terminated his services, however, he would have received a \$1 million buyout payment.²²¹ Finally, all salary and benefits were to be provided even if Coach Smith had become disabled or died.²²²

217. This bonus would have been earned if the team GPA was at least 3.0 and if at least ninety percent of players met NCAA satisfactory progress requirements. *See id.*

218. *Id.*

219. *Id.* Coach Smith also received: "20 prime, lower level basketball tickets and 8 football tickets; 4 weeks paid vacation; [u]se of facilities to conduct basketball camps; . . . \$50,000 from his basketball camp [for one] year; \$15,000 to appear at Michael Jordan's basketball camp; [and] \$5,000 for a speaking appearance by the U.S. Navy and Department of Defense." *Id.*

220. *See id.*

221. *Id.*

222. *See id.* While Coach Smith's Kentucky contract is a brilliant example of lucrative coaching salaries, it is hardly the only such arrangement. For example, former Iowa State basketball coach, Larry Eustachy, earned \$1.1 million in 2003, four times the salary of the university president, making him the highest paid public employee in the state of Iowa. *Id.* It is typical for head coaches at public universities to earn more than the governors of their states. *See Study Shows It Pays Better to Be Izzo and Carr than Governor Granholm*, DETROIT FREE PRESS, Aug. 30, 2007, <http://www.freep.com/apps/pbcs.dll/article?AID=/20070830/SPORTS/70830010/1055> (on file with author) (citing study stating this pattern exists in every state except Alaska where college football is not played).

Other examples of lucrative contract provisions in college basketball abound. The University of Kansas paid men's basketball coach Bill Self's buyout obligation of \$500,000 to the University of Illinois, his former employer. *See Fish, supra* note 208. Kansas currently pays him \$1.64 million annually, exclusive of compensation he receives through shoe contracts and summer camps. *See Kirk Bohls, Arms Race is Escalating in College Hoops*, AUSTIN AM.-STATESMAN, Mar. 31, 2007, at B01.

The most lucrative component of the above-described compensation tends to be the benefits coaches earn from television and apparel arrangements with sporting goods manufacturers. *See Fish, supra* note 208. For coaches at elite programs, these arrangements often dwarf their base university salaries. *See id.*

The figures provided above do not include other generous fringe benefits typical in such contracts. These benefits include use of campus facilities for profitable summer athletic camps, courtesy cars, country club memberships, expense accounts, premium tickets to basketball and football games, travel for spouse and family members, and lucrative bonuses for succeeding, or even participating, in tournaments. *See id.*

MSU basketball coach, Tom Izzo, was the beneficiary of a privately funded \$4.9 million bonus when he remained at MSU through the 2005–2006 season. National Association of Basketball Coaches, *Michigan State Moves to Keep Izzo*, Nov. 8, 2001, available at <http://nabc.ocsn.com/sports/m-baskbl/spec-rel/110801acc.html> (last visited Oct. 6, 2003) (on file with author). This amount was in addition to his annual salary of more than \$1.6 million under a 2004 contract which included revenue from "a sneaker

Since 2003, the salaries of college basketball coaches have only continued to increase. Currently, at least twenty Division I-A basketball coaches make at least \$1 million annually.²²³ The average salary, excluding benefits, incentives, and other perquisites, for those in the elite basketball conferences—the ACC, Big 12, Big East, Big Ten, Pacific 10, and SEC—is \$1.2 million per year.²²⁴ Billie Gillispie, the current head basketball coach at the University of Kentucky, earns over \$2 million annually.²²⁵ The University of Louisville pays Rick Pitino from \$2.25 to \$2.5 million in annual compensation in addition to loyalty bonuses for remaining at the school.²²⁶ His total annual compensation, including estimated shoe, apparel, and other outside income of \$1.5 million, is approximately \$4 million.²²⁷ Roy Williams earns an average of \$2.6 million annually at the University of North Carolina,²²⁸ and Billy Donovan recently signed a six-year contract, with a seventh-year option at the University of Florida for \$3.5 million per year.²²⁹

Football coaches, too, garner immense profits from the industry of college sports. In 2002, the average annual compensation for head football coaches at BCS conference universities approximated \$1 million.²³⁰ By 2005, at least nine Division I-A football coaches earned more than \$2 million annually, and some thirty-five made at least \$1 million.²³¹ The next year, 2006–2007, at least forty-two Division I-A coaches made at least \$1 million.²³²

deal, media appearances, and running basketball camps.” Lambert, *supra* note 146. By taking his 2004–2005 basketball team to the Final Four, Coach Izzo earned a \$96,000 bonus. *Id.* His bonuses in 2006 amounted to \$5.8 million for total compensation that year of over \$7 million. Steve Wieberg & Jodi Upton, *Tournament Success Brings Financial Windfall for Coaches*, USA TODAY, Mar. 8, 2007, at 1A. Izzo will earn another \$4 million bonus if he stays at MSU through April of 2010. *Id.*

223. Wieberg & Upton, *supra* note 222.

224. *Compensation for Division I Men’s Basketball Coaches; What the Coaches Earn at the 65 Schools that Played in the 2006 NCAA Tournament*, USA TODAY, Mar. 8, 2007, at C8.

225. Robbi Pickeral, *Heels Reward Williams; Roy Williams’ Four-Year Extension Through 2014–15 Ups His Salary to About \$2.6 Million a Year*, THE NEWS & OBSERVER, May 18, 2007, at C1.

226. *The Highlights*, THE YORK DISPATCH, May 4, 2007. Pitino received a loyalty bonus of \$1.75 million on July 1, 2007, and will receive additional bonuses of \$3.6 million if he stays at the University of Louisville through 2010 and 2013. *Id.*

227. Wieberg & Upton, *supra* note 222.

228. Pickeral, *supra* note 225.

229. Andy Staples, *Coaches Agree to New Contracts*, TAMPA TRIB., June 8, 2007, at 4.

230. Randy Peterson, *McCarney’s Boss Says: Increase Would Match Average Salary for Coaches in BCS Conferences*, DES MOINES REG., Nov. 6, 2002, at 4C. This figure included base salary and other compensation from media and apparel contracts. See FRANK, *supra* note 112, at 11.

231. Dodd, *supra* note 112.

232. Wieberg & Upton, *supra* note 222.

William “Mack” Brown’s 2004–2014 contract to coach football at the University of Texas will bring him \$26 million over its ten-year life.²³³ Coach Brown’s contract includes a \$60,000 “personal allowance,” a \$300,000 special annual payment, \$80,000 from a summer camp, and a one-time birthday bonus of \$1.6 million.²³⁴ In 2007, the university agreed to extend this contract through 2016, increasing Brown’s annual salary to more than \$3 million by 2008 and promising him bonuses totaling \$3 million for staying through January 1, 2010.²³⁵

A growing number of college football coaches now earn in excess of \$3 million annually. For example, Urban Meyer recently signed a six-year contract with a seventh-year option paying \$3.25 million a year at the University of Florida.²³⁶ University of Oklahoma football coach, Bob Stoops, earned \$3.45 million in the 2006–2007 season.²³⁷ Charlie Weis, at the University of Notre Dame, is reportedly being paid approximately \$3.5 million annually under his ten-year contract.²³⁸ These salary and benefit packages for college football and basketball coaches are CEO-like in their magnitude. Indeed, they exceed the annual salaries of the CEO’s of major corporations such as Navistar International, Mellon Financial, Ebay, Goodrich, Rite Aid, Office Depot, Delphi, and The Gap.²³⁹

Incredibly, college coaches sometimes make as much as or even more than their professional counterparts. In 2002, Marvin Lewis turned down an

233. Dodd, *supra* note 112.

234. Mike Fish, *Sign of the Times: College Football Coaching Contracts Filled with Lucrative Incentives*, insert on Coaching Contracts, *SI.COM*, Dec. 23, 2003, available at http://sportsillustrated.cnn.com/2003/writers/mike_fish/12/19/coaching.contracts/index.html (last visited Mar. 4, 2008).

235. *Texas Gives Mack Brown Raise, Extension*, *WASH. POST*, Aug. 28, 2007, at D1.

236. Staples, *supra* note 229.

237. Greg Johnson, *Coaches' Pay Puts Colleges to the Test*, *L.A. TIMES*, Jan. 16, 2007, at A1; Erik Spanberg, *Meet the Millionaire Next Door: Coach*, *CHRISTIAN SCI. MONITOR*, Jan. 26, 2007, at 11.

238. Johnson, *supra* note 237. At Louisiana State University, football coach Les Miles negotiated a contract provision that could make him one of the highest paid coaches in the country. Under his contract, if he wins ten games in a season, LSU must pay him at a level high enough to ensure him the fifth-highest salary in the SEC. Jodi Upton, *Contract Could Bring Congressional Inquiry; Administrators Worried about Rollover Effect*, *USA TODAY*, Jan. 4, 2007, at 9C. If he wins a national championship, he is guaranteed the salary required to make him the country’s third-highest-paid coach. *Id.*

239. See SPECIAL REPORT: CEO COMPENSATION, *FORBES.COM* (Scott DeCarlo ed., 2005), <http://www.forbes.com/2005/04/20/05ceoland.html> (follow “total compensation” hyperlink under “Sort List By”) (revealing companies compensating CEOs at less than \$3 million annually); accord Tim Wendel, *Pay the Players*, *USA TODAY*, Mar. 21, 2005, at 23A (describing head coaches’ salaries as “CEO-like”).

offer of \$1.5 million to be the head football coach at Michigan State University, opting instead to accept a five-year position with the Cincinnati Bengals for the same annual salary.²⁴⁰ Shortly thereafter, Michigan State reached a six-year agreement with John L. Smith to coach the team for \$1.625 million annually.²⁴¹ Most famously, in 2007 the University of Alabama lured football coach Nick Saban with an offer worth as much as \$4.8 million per year, including bonuses, from the NFL where he had earned only \$4.5 million a year.²⁴² The eight-year, \$32 million compensation arrangement at the university also gave Coach Saban a variety of bonuses, the use of a skybox at Bryant-Denny Stadium, twelve general admission tickets, two cars, a country club membership, and the use of a private plane for vacations with up to twenty-five hours of flight time per year.²⁴³

Given the increase in college coaching salaries toward and sometimes beyond NFL levels, the purported distinction between so-called amateur sports at the college level and post-college professional sports has become blurred and of little meaning except that players in professional sports are acknowledged to be employees and are paid,²⁴⁴ while players in the university setting are denied the financial fruits of their labors.²⁴⁵ In all other respects, college athletics is as professionalized as its counterpart, the professional leagues.

Coaches are not the only individuals in the college sports industry whose remuneration has risen meteorically. In 1990–1991, the Division I-A conference commissioners earned an average base salary of \$133,000,²⁴⁶

240. See Kevin Goheen, *It's Lewis*, CINCINNATI POST, Jan. 15, 2003, at A1 (noting Lewis' annual salary with the Bengals would be \$1.5 million); Ken Murray, *Bengals Give Lewis Call He's Awaited; Onetime Ravens Architect Takes Over 2-14 Cincinnati, Ends Wait to be Head Coach—"There Is No Perfect Situation" Third Black Coach in NFL, He Gets Five-Year Contract*, BALT. SUN, Jan. 15, 2003, at 1C (noting Lewis turned down a \$1.5 million offer from Michigan State University).

241. See Jack Ebling, *Smith's Deal at \$9.75M*, LANSING ST. J., Dec. 24, 2002, at 1C.

242. See Spanberg, *supra* note 237; Andrew Zimbalist, *Looks Like a Business; Should Be Taxed Like One*, N.Y. TIMES, Jan. 7, 2007, at 9.

243. See Robyn Norwood, *Morning Briefing: Can All This Money Turn the Tide?*, L.A. TIMES, June 16, 2007, at D2. The contract included \$700,000 in bonuses, including a \$400,000 bonus for winning a national championship. *Id.* Under the contract, Saban may leave the University of Alabama without incurring a financial penalty. *See id.*

244. The average NFL player earned nearly \$1,400,000 in 2005. Michael J. Duberstein, NFLPA Research Department, *Omnibus NFL 2005 Mid-Season Salary Averages & Signing Trends 1* (Nov. 2005), available at http://www.nflpa.org/pdfs/shared/2005_Mid-Season_Omnibus_Salary_Averages_&_Signing_Trends_November_2005.pdf (last visited Mar. 6, 2008).

245. See Tim Martin & Todd Schulz, *Replacing Williams Could Cost MSU \$1M*, LANSING ST. J., Nov. 17, 2002, at 1A (quoting Richard Sheehan, Notre Dame University economist: "You can't pay players, . . . [s]o you pay for a coach who can attract the players.").

246. BYERS, *supra* note 16, at 366.

ranging from a low of \$95,000 to a high of \$170,000,²⁴⁷ with additional benefits typically including new cars, memberships at private clubs, low-cost and interest-free home loans, and generous contributions to annuity pensions.²⁴⁸ After the commissioners learned the 1992–1993 NCAA Executive Director’s salary was \$461,202,²⁴⁹ they negotiated increases for themselves.²⁵⁰ In 1993–1994, “Jim Delany of the Big Ten Conference, was receiving a base salary of \$230,000, a generous retirement contribution, a \$15,000 housing supplement, a \$250,000 life insurance policy, a free automobile, . . . athletics and private social club memberships, . . . [and] [f]ree spouse travel to several events.”²⁵¹ By 2005–2006, however, Delany earned almost \$1 million annually.²⁵² In that same year, ACC Commissioner John Swofford earned almost \$760,000.²⁵³

NCAA executives are also compensated handsomely. In 2004–2005, the most recent year for which NCAA salary data are available, the four NCAA officers and directors in paid positions earned a combined total of almost \$2.2 million.²⁵⁴ Executive Director Myles Brand, alone, earned in excess of \$870,000 that year.²⁵⁵ Moreover, the top-five-paid employees other than officers and directors earned combined total compensation that year in excess of \$1.53 million,²⁵⁶ an average of almost \$307,000 per person.

Likewise, in the early 1990s, staff sizes increased in Division I-A athletics departments, conferences, and the NCAA.²⁵⁷ This growth reflected increased revenues available to expand operations and hire additional staff. From 1986 to 1990, the number of staff positions at the Southeastern

247. *Id.*

248. *See id.*

249. *Id.*

250. *See Suggs, supra* note 81 (noting most conference commissioners earn large salaries).

251. BYERS, *supra* note 16, at 367.

252. The Big Ten Conference, Inc., IRS Form 990, EIN 36-3640583, FYE June 30, 2006 (on file with author). These earnings were comprised of: a base salary of \$906,156, employee benefit plan contributions of \$29,650, as well as an expense account of another \$23,430. *Id.*

253. Atlantic Coast Conference, IRS Form 990, EIN 56-0599082, FYE June 30, 2006 (on file with author). His earnings included: \$473,519 in base salary; \$240,958 in employee-benefit-plan contributions; and a \$45,494 expense account. *Id.*

254. National Collegiate Athletic Association, IRS Form 990, EIN 44-0567264, FYE Aug. 31, 2005 (on file with author).

255. *Id.*

256. *Id.*

257. *See BYERS, supra* note 16, at 367.

Conference, for example, increased by fifty-four percent.²⁵⁸ From 1987 to the mid 1990s, the number of full-time salaried staff positions at the NCAA grew by eighty percent.²⁵⁹ At Division I-A schools, the number of staff positions in athletic departments increased from the late 1980s to the early 1990s by thirty percent or more.²⁶⁰ A truly amateur enterprise could never afford such rapid expansion.

The college sports industry is sufficiently profitable not only to provide exorbitant salaries to coaches, conference commissioners, NCAA executives, and university athletic directors, but also to employ large staffs. This industry financially supports tens of thousands of people and their families. It does not, however, similarly benefit the players themselves, many of whom have families of their own. In case after case, a gross imbalance exists between athletic staff compensation and athlete compensation as measured by financial aid.²⁶¹ For example, “[f]or the fiscal year ended June 30, 1992, Oklahoma Sooner sports expenditures totaled \$20.6 million. Of that amount, thirty-eight percent (\$7.5 million) went for salaries, wages, and benefits while only nine percent (\$1.9 million)²⁶² was spent on athletes’ financial aid.”²⁶³ At “[o]ne of the richest . . . Big Eight [football] teams[,] . . . Nebraska[,] . . . [f]inancial aid to athletes (\$2.4 million) [in 1990–1991] accounted for only 15.0 percent of expenditures while staff salaries, wages, and benefits amounted to \$6.0 million or 38.5 percent.”²⁶⁴ At Michigan State University in 2005–2006, financial aid awarded to football players, \$2.01 million, was less than a quarter of total football expenditures of \$8.62 million, while staff salaries and

258. *Id.*

259. *Id.*; 2 ROBERT C. BERRY & GLENN M. WONG, *LAW AND BUSINESS OF THE SPORTS INDUSTRIES* 67 (1986); Goldman, *supra* note 25, at 211 n.56 (noting large increase in size of NCAA enforcement staff during 1980s).

260. BYERS, *supra* note 16, at 367. In 2002, the Ohio State University Athletic Department had 220 full-time employees. Welch Suggs, *How Gears Turn at a Sports Factory*, *CHRON. HIGHER EDUC.*, Nov. 29, 2002, at A32. In 2003–2004, the University of Tennessee Athletic Department had 255 full-time employees. WILLIAM F. FOX & BRIAN C. HILL, *CENTER FOR BUSINESS AND ECONOMIC RESEARCH, UNIVERSITY OF TENNESSEE, KNOXVILLE, ECONOMIC EFFECTS OF THE UNIVERSITY OF TENNESSEE, KNOXVILLE, ATHLETIC DEPARTMENT 9* (2004), available at <http://www.cber.utk.edu/pubs/utkadimp04.pdf>.

261. In the mid-1990s it was reported that “only eighteen percent of athletic expenses represent[ed] scholarships; whereas thirty-one percent [was] spent on employee benefits and salaries.” Riggs, *supra* note 61, at 139 (citing Matt Schultz, *College Sports Reap Profits*, *HOUS. CHRON.*, Sept. 1, 1994, at 4); see BYERS, *supra* note 16, at 224–25 (reporting the University of Michigan spent only nineteen percent of its athletic budget in 1988 on grants-in-aid).

262. This scholarship figure is based on tuition levels, not on the university’s actual cost of enrolling the athlete. The true cost to the college of providing an extra seat in the classroom is much lower than tuition. Therefore, the actual costs universities incur in compensating athletes are even lower than the amounts these tuition figures represent.

263. BYERS, *supra* note 16, at 367.

264. *Id.* at 367–68.

fringe benefits, \$4.44 million, accounted for more than half of total costs.²⁶⁵ In the same year, MSU's basketball allocation for athletes was \$282,048, a mere 7.1% of total expenditures of \$3,922,708, while staff salaries and benefits approximated \$2.71 million, a staggering sixty-nine percent of total expenses.²⁶⁶ In each case, the acknowledged employees, the athletic department staff, receive significantly more aggregate remuneration than do the players themselves—those who most directly create the product being sold.²⁶⁷

265. MSU Financial Report 2005–2006, *supra* note 165, at 36.

266. *Id.*

267. By contrast, in professional sports the opposite is true. Professional player salaries are commonly capped at over half of total revenues. See Farrey, *supra* note 72. This means that in the aggregate, professional athletes earn significantly more than do professional leagues' coaches, administrators, and staff.

Even when college coaches or athletic directors flout the rules they promise to uphold, they nevertheless continue to reap financial rewards. For example, in the mid-1980s after numerous NCAA rules violations were discovered at Southern Methodist University, ultimately leading to the NCAA's imposition of "the death penalty," disgraced athletic director Hitch resigned his position on the condition that his contract be honored in full. See BYERS, *supra* note 16, at 32. Hitch was paid despite clauses in his contract requiring him "to comply with regulations of the NCAA, the Southwest Conference, and SMU." *Id.* Hitch's termination payments two decades ago amounted to \$246,442. *Id.* SMU head football coach Collins received more than double that, \$556,272, and even assistant coach Parker was paid \$60,299. *Id.* In 2003, when University of Georgia coach Jim Harrick resigned amid scandal, he received more than \$254,000 under a resignation agreement. *Harrick Steps Down as Coach of Georgia*, ST. LOUIS POST-DISPATCH, Mar. 28, 2003, at D3.

By contrast, if athletes violate NCAA rules, they can be banished through loss of eligibility to play at any university and through revocation of their scholarships. While players can thus be fired for violating NCAA or school rules, their coaches' contracts are often honored when they violate such requirements. Moreover, while coaching contracts commonly contain buyout clauses, the athletes' grant-in-aid forms cannot. See DIV. I MANUAL, *supra* note 13, arts. 12.1.2, 12.1.2.1 (prohibiting athlete "pay" and imposing loss of amateur status for violation of that rule). In fact, if an athlete transfers to another university, he loses at least one year of his four years of playing eligibility, *see id.* arts. 14.2, 14.2.1, 14.2.1.1, 14.5.1, in a form of noncompete arrangement that is never imposed on coaches.

Other perquisites of employment commonly enjoyed by coaches and others in the college sports industry, *see* BYERS, *supra* note 16, at 128, would violate NCAA rules if provided to the athletes themselves.

No-cost autos still are unacceptable as perks for grant-in-aid athletes but they are regularly accepted for advertising or prime ticket trade-outs by today's college managers. Free cars are considered an extra employee benefit for coaches, athletics department employees, conference officials, and NCAA staffers. For example, . . . [the estimated value of cars dealers donated to] University of Kansas athletics department personnel [in 1990–1991 was] . . . \$175,100.

Id. at 128–29 (citing Schehrer, Bennett and Lowenthal, CPA, memorandum to Dr. Gene A. Budig, as part of the 1990–1991 audit of the University of Kansas Athletic Corporation

By themselves, the remarkable sums of money being earned by coaches and others show the commercial character of major college sports. Contrasting these expenditures with those made for athletes reveals that college sports are not only commercial, but their profits are enhanced at the expense of the athletes whose interests they claim to protect. Moreover, funds which could otherwise have been used for the tax-exempt, public purpose of education are instead furthering the private, non-exempt interests of coaches and athletic industry executives. Their excessive salaries constitute prohibited private inurement, suggesting that university athletic revenues should be subject to taxation.

G. Corporate Sponsorships and Advertising

The proliferation of corporate sponsors is another important way in which college sports have become nakedly commercialized. Such corporations make donations to teams, universities, conferences, tournaments, and bowl game committees in exchange for recognition during athletic events as corporate sponsors or corporate “partners” of the institution.²⁶⁸ In doing so, they enjoy promotional association with a favorite university, bowl game, or conference, and simultaneously advertise their product to a loyal fan base.²⁶⁹ The NCAA, for example, received many millions of dollars in the mid-1990s from each of twenty “official N.C.A.A. corporate partners.”²⁷⁰ In 1997, General Motors negotiated a sponsorship arrangement

statement of revenues and expenditures for the year ended June 30, 1991). If a player accepted such benefits, it would render him ineligible to play for having violated the NCAA’s rules on amateurism. See DIV. I MANUAL, *supra* note 13, art. 12.1.2; BYERS, *supra* note 16, at 124–28 (discussing NCAA suspicions that Wilt Chamberlain had been impermissibly paid for his services as a college athlete with two new Oldsmobiles); *id.* at 171–72 (discussing common practice of cars being provided to recruited athletes); Mike Freeman, *Buckeyes Suspend Clarett for Year*, N.Y. TIMES, Sept. 11, 2003, at D1 (describing Maurice Clarett’s suspension from the Ohio State University football team when allegations surfaced that he had been given special treatment in classes, misstated the value of property stolen from his borrowed car, and had been improperly granted the use of that vehicle by a local car dealer).

268. See ZIMBALIST, *supra* note 60, at 126–48; Andrew F. Hamm, *HP Kicks in Big Bucks for Bowl*, SILICON VALLEY/SAN JOSE BUS. J., Dec. 12, 2003, at 3; Jennifer Lee, *MasterCard Finds an Opportunity Deep in the Heart of Texas*, STREET & SMITH’S SPORTSBUSINESS J., Nov. 24–30, 2003, at 22; Pedersen, *supra* note 114; Tony Quesada, *Toyota Sponsorship Shifted Gator Bowl into High Gear*, JACKSONVILLE BUS. J., Dec. 24, 2004, at 11, available at <http://jacksonville.bizjournals.com/jacksonville/stories/2004/12/27/focus1.html>. As long ago as the late 1980s, Georgia Tech sold corporate sponsorships for its home games ranging from \$75,000 to \$175,000 per game. See Telander, *Something Must Be Done*, *supra* note 53, at 105.

269. See Hamm, *supra* note 268; Lee, *supra* note 268, at 22; Quesada, *supra* note 268.

270. Stuart Elliott, *The N.C.A.A. Basketball Tourney Has Graduated to the Ranks of Major Sports-Marketing Events*, N.Y. TIMES, Mar. 13, 1996, at D7. Sponsors included General Mills, Gillette, Hershey Foods, Pepsico, Sprint, General Motors, Ford Motor, Microsoft, AT&T, Anheuser-Busch, Nike, and Penzoil. See *id.*

under which it would pay the NCAA \$20 million over five years.²⁷¹ Athletic conferences have also reported significant revenues from sponsors, with the Southeastern Conference receiving more than \$1.9 million in sponsorship royalties in 2005–2006²⁷² and the Big East Conference earning corporate sponsorships of almost \$1.5 million that same year.²⁷³

The athletic department of the University of Colorado has fifty corporate sponsors, including Coors Brewing Company which provides \$300,000 for scoreboard, radio, and television advertising as well as for displaying its logo on the mascot's trailer.²⁷⁴ The basketball arena was named the Coors Event Center for a \$5 million donation to the university.²⁷⁵ The University of Minnesota accepted \$35 million to name its new football stadium, expected to open in 2009, the TCF Bank Stadium.²⁷⁶ As part of this sponsorship arrangement, TCF Bank acquired "access to [the] names and addresses of hundreds of thousands of alumni and season-ticket holders for marketing purposes."²⁷⁷ Some universities even "endow" positions on the football team, as they do with some chaired faculty positions. For example, a private donor has endowed the middle linebacker position on the Penn State University football team, and at least twenty other athletic positions, mostly on that team, are also endowed.²⁷⁸

Like universities, bowl game entities also enjoy revenue from corporate sponsorships, earning most from "title sponsors" who pay for their corporate name to become part of the bowl game's title.²⁷⁹ The FedEx Orange Bowl

271. See Terry Lefton, *Big Wheel on Campus: NCAA Continues its Win Streak with \$20M GM Pact*, BRANDWEEK, Dec. 15, 1997, at 1.

272. Southeastern Conference, IRS Form 990, EIN 63-0377461, FYE Aug. 31, 2006 (on file with author).

273. Big East Conference, IRS Form 990, EIN 51-0244593, FYE June, 30, 2006 (on file with author).

274. See Eitzen, *supra* note 60.

275. *Id.* That universities accept financing from beer producers and permit those products to be advertised on campus while simultaneously professing concern about alcohol abuse among their underage students illustrates the tremendous allure of corporate funding.

276. Bill Ordine, *Field of Green: Maryland's Sale of Naming Rights at Byrd Stadium is Part of Growing Practice as Athletic Programs Strive to Compete*, BALTIMORE SUN, Aug. 25, 2006, at 1F.

277. *Id.*

278. See Martin, *supra* note 179.

279. See Lee, *supra* note 268, at 22 (describing significant increase in sponsorship payment from MasterCard when it went from "presenting" to "title" sponsor of the Alamo Bowl); Quesada, *supra* note 268 (noting that a "title sponsorship is a bowl game's most valuable commodity"). Twenty-six out of the thirty-two bowl games played at the end of the 2006–2007 season had a title sponsor. See Schrotenboer, *supra* note 114114. That year, title sponsors paid as little as \$400,000 to name a lower-tier

is one example. Short of selling title sponsorships, some bowls earn revenue from “presenting sponsors.” The “Rose Bowl Game, presented by Citi” illustrates this trend.²⁸⁰ At least one bowl, the Music City Bowl, has had both title and presenting sponsors simultaneously: “Gaylord Hotels Music City Bowl Presented By Bridgestone.”²⁸¹ In addition to title and presenting sponsors, smaller sponsors provide money or in-kind goods and services for association with a particular bowl game.²⁸²

Corporate sponsorship has been a natural outgrowth of the huge increase in the popularity of college sports. Over the years, college football attendance has skyrocketed, demonstrating the heightened popularity and commercialism of the enterprise. From 1965 to 1975, attendance rose 28.4%. From 1975 to 1980, it increased from 31.7 million to 35.5 million, a forty-four percent jump since 1965.²⁸³ College basketball, too, has enjoyed huge increases in popularity. Since Magic Johnson of MSU and Larry Bird of Indiana State battled for the national championship title in 1979, interest in the NCAA basketball tournament has boomed with attendance nearly tripling to more than 720,000 fans.²⁸⁴ Simultaneously, television revenue has grown eightfold,²⁸⁵ and nearly 20 million U.S. households now watch the tournament’s biggest games.²⁸⁶ This popularity corresponds to a Nielsen rating of 18.9, even higher than that for the 2003 National Championship Tostitos Fiesta Bowl football game of 17.2.²⁸⁷

As the popularity of college athletic events has soared, corporations have vied to sponsor games and to purchase advertising time at ever-increasing rates. The great numbers of loyal spectators provide a perfect opportunity for corporations to advertise their commercial products, and their eagerness to pay premium amounts to do so demonstrates the effectiveness of this advertising venue.²⁸⁸ Referring to his company’s

bowl game and as much as \$10 million to name a BCS bowl game. *Id.* For a partial list of bowl games and their title sponsors, see *supra* note 136.

280. Quesada, *supra* note 268.

281. *Id.*

282. See Hamm, *supra* note 268; Quesada, *supra* note 268.

283. BYERS, *supra* note 16, at 149.

284. Martin, *supra* note 92.

285. *Id.*

286. *Id.* Nielsen Media Research estimated that 132.7 million viewers watched all or part of the 2007 NCAA Basketball Tournament on CBS and 40.3 million viewers tuned in for the final championship game. See CBS Sports, Ratings for '07 NCAA Men's National Championship Game Up 9 Percent, <http://www.sportsline.com/cbssports/story/10106567> (last visited Mar. 5, 2008).

287. See BCS, TV Ratings, *supra* note 129.

288. While broadcasters pay enormous sums to the NCAA and conferences for the right to televise college basketball and football games, they earn even larger amounts by selling advertising time during those events. The following chart shows the sums major college sports broadcasters paid in 2001–2002 for the right to broadcast football and

decision to pay the NCAA six billion dollars over eleven years for rights to broadcast the annual men's basketball tournament and thereby generate even more in advertising revenue, CBS Vice President Michael Aresco said, "It's one of the few platinum events out there, . . . It's well worth it to us."²⁸⁹

Corporations are deeply involved in major college sports, investing in them through sponsorships and other means so as to advertise their products and enhance their corporate images. In this way, too, college sports have abandoned any realistic claim to amateurism and have instead become thoroughly commercial.

men's basketball games, together with the advertising revenue those networks earned for ads aired during those games:

COLLEGE BASKETBALL AND FOOTBALL: 2001–2002			
	Amounts Paid for Broadcasting Rights (in millions)	Amounts Received in Advertising (in millions)	Profit (in millions)
ABC	\$91	\$145	\$54
ESPN	\$140	\$115	(\$25)
NBC	\$12	\$16	\$4
CBS	\$236	\$340	\$104
Total	\$479	\$616	\$137

Penelope Patsuris, *A Wider World of TV Sports*, FORBES.COM, Dec. 12, 2002, available at http://www.forbes.com/2002/12/12/cx_pp_1212sports.html (Tables—Sports Rights Versus Revenue, 2001–2002). While broadcasters paid a total of \$479 million in 2001–2002 for the right to televise college football and men's basketball games, they received \$616 million from selling advertising time during those games, harvesting a combined \$137 million profit for that year. *Id.*; accord Lee, *supra* note 268, at 22 (describing marketing study findings that MasterCard would reap \$2.7 million to \$3.5 million in exposure value from being a presenting or a title sponsor, respectively, of the Alamo Bowl versus the \$1 million to \$1.5 million cost per year of doing so); Schrotenboer, *supra* note 114 (indicating title sponsors of the January 2006 BCS Bowl games paid approximately \$10 million for that status, but received at least \$106 million in value from the resulting visibility of logos during the games).

289. Martin, *supra* note 92 (quoting CBS vice president Aresco).

A different example of the increasing commercialization of college sports lies in the cost of advertising college football games on television. By the late 1970s and early 1980s, the cost to advertise college football was nearing the expense of advertising NFL games. See BYERS, *supra* note 16, at 146. The more popular college games became, the more conferences became willing to pay broadcasters to advertise their games. Over time, the advertising charge for college games approached that for professional games, and, once again, the line of demarcation between professional and amateur sports faded.

H. Commercial Use of Athlete's Image

Another particularly pernicious way in which universities have grown crassly and indeed abusively commercial is in their taking of their athletes' images for "commercial enhancement."²⁹⁰ Universities have long profited from selling jerseys and other apparel bearing the number of a star athlete.²⁹¹ More recently, they have begun earning fees from licensing star athletes' images to video game manufacturers who use the players as characters in their products.²⁹² The athlete himself, however, is forbidden any of those profits by NCAA rule which prohibits him from using his own image for profit by sponsoring or endorsing a product.²⁹³ In precluding such action, the NCAA and its member institutions reserve for themselves all profits to be derived from the commercial use of the athlete's image.²⁹⁴ This source of revenue is not incidental.²⁹⁵ Collegiate

290. BYERS, *supra* note 16, at 346.

291. See Marcia Chambers, *Men's Final 4: Sales of College Stars' Jerseys Raise Ethics Concerns*, N.Y. TIMES, Mar. 31, 2004, at D1.

292. See Matthew G. Matzkin, *Gettin' Played: How the Video Game Industry Violates College Athletes' Rights of Publicity By Not Paying for Their Likenesses*, 21 LOY. L.A. ENT. L. REV. 227, 239-44 (2001) (describing realistic features of computerized video games); Mueller, *supra* note 82, at 83 (describing NCAA practice of allowing video game creators to use schools' fight songs and uniforms as well as jersey numbers, but not the names, of star athletes); Chambers, *supra* note 291. Because individual athletes can be identified by number and image however, reviews of the video games refer to athletes by name. See Matzkin, *supra*, at 240-41; Scott Rabalais, *NCAA and ABC Gain Yardage with Computer College Football*, BATON ROUGE ADVOC., Jan. 16, 1998, at Fun 32.

293. See DIV. I MANUAL, *supra* note 13, arts. 2.9, 12.5.2.1. Specifically, an individual cannot be a college athlete if, once in school, he

[a]ccepts any remuneration for or permits the use of his or her name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind, or . . . [r]eceives remuneration for endorsing a commercial product or service through the individual's use of such product or service.

Id. art. 12.5.2.1(a), (b). This rule prevented Shaun Jordan, a championship swimmer for the University of Texas, from engaging in a custom T-shirt business during his undergraduate career. It was a violation for him to sell T-shirts emblazoned with the motto "Don't Mess with Texas Swimming." BYERS, *supra* note 16, at 380; see Freedman, *supra* note 181, at 679; Robert Lipsyte, *A Year at School: On Pay for Play*, N.Y. TIMES, Apr. 7, 2002, at H11; Kay Hawes, *Debate on Amateurism Has Evolved Over Time*, NCAA NEWS, Jan. 3, 2000, available at <http://www.ncaa.org/wps/portal> (follow "Library" hyperlink; then "NCAA News Archive" hyperlink; then "2000" hyperlink; then "Association-wide" hyperlink) (last visited Mar. 18, 2008).

294. See DIV. I MANUAL, *supra* note 13, art. 12.5.1.1(h) (allowing NCAA member schools to sell for profit to support educational activities and activities related to intercollegiate athletics commercial items containing the names, likenesses, or pictures of multiple athletes from that university); *id.* at art. 12.5.1.1.1 (allowing the NCAA or its third party representative to use the name or picture of an enrolled student-athlete to promote NCAA championships and other NCAA events, activities, and programs); BYERS, *supra* note 16, at 371; Schott, *supra* note 57, at 46 (citing Kenneth L. Shropshire,

licensing has recently been estimated to generate \$2.8 billion in retail sales annually.²⁹⁶

In addition to apparel and other goods bearing the names of universities, video games featuring college football and basketball have become a significant source of revenue. EA Sports, for example, expects to sell three million copies, at sixty dollars each, of its "NCAA Football 2008" video game, for estimated gross revenue from that product of \$180 million.²⁹⁷ Video game manufacturers, in turn, pay royalties to the NCAA, which distributes those funds to its member universities on the basis of a variety of factors including each university's recent athletic success.²⁹⁸ In 2006–2007, Arizona State University received \$102,482 from royalties for video games.²⁹⁹ In 2005–2006, Ohio State University and Florida State University each received royalties of \$130,500 due to sales by EA Sports of its "NCAA Football" video game.³⁰⁰

The notorious case of Jeremy Bloom provides a stunning example of how the NCAA, but not the athlete, may profit from the athlete's image. Bloom is a remarkable athlete, having excelled in both downhill skiing and football. Not only was he a member of the 2002 U.S. Olympic Team, he also won the U.S. National and World Cup championships in freestyle skiing that same year.³⁰¹ Bloom obtained numerous endorsement and sponsorship opportunities following his Olympic experience, including

Legislation for the Glory of Sport: Amateuism and Compensation, 1 SETON HALL J. SPORTS L. 7, 25 (1991)).

295. See Chambers, *supra* note 291 (reporting NCAA estimates from the early 2000s that Division I universities selling T-shirts and other team apparel each generate approximately \$6 million to \$7 million a year and that approximately six percent of those revenues, or perhaps \$360,000, is for the sale of replica jerseys).

296. Tom Sosnowski, *On Campus: College a Big Sell in Licensing Biz*, PLAYTHINGS, Oct. 1, 2005, at 28.

297. See Ryan Finley, *They're in the Game: Popular Sports Titles Put Fans under Center, Cash in School Coffers*, ARIZ. DAILY STAR, Aug. 12, 2007.

298. See Andy Latack, *Quarterback Sneak: With Its College Football Video Game, EA Sports is Making an End Run Around the NCAA's Rules*, LEGAL AFF., Feb. 2006, at 69; Rachel Bachman, *A Piece of the Pixels*, OREGONIAN, July 20, 2007, at E1; Andrew Carter, *Colleges Profit from Video Game's Success*, ORLANDO SENTINEL, Aug. 7, 2006, at D1; Finley, *supra* note 297; John Maher, *Video Game = \$ for UT*, AUSTIN AM. STATESMAN, July 18, 2006, at C1.

299. Finley, *supra* note 297.

300. Bachman, *supra* note 298.

301. See Freedman, *supra* note 181, at 674; Mueller, *supra* note 8282, at 74; Jeremy Bloom, *Educating Jeremy*, SPORTING NEWS, Aug. 30, 2004, at 52.

a valuable modeling contract with clothier Tommy Hilfiger.³⁰² Proceeds from these arrangements were all used to fund his continuing ski training.³⁰³

After his Olympic achievements, Bloom enrolled at the University of Colorado where his talents as a football player had earned him a scholarship to play football.³⁰⁴ Having capitalized on his handsome looks and on his fame as a U.S. Olympic downhill skier, Bloom was later held to have violated NCAA amateurism rules³⁰⁵ rendering him ineligible to play football for the Buffaloes.³⁰⁶ Astonishingly, the University of Colorado, an NCAA institution, was permitted under NCAA rules to profit off the licensing of the images of football players,³⁰⁷ but Jeremy Bloom could not similarly profit without foregoing his ability to participate in college football.

Normally, an individual owns his own image and can enjoy profits therefrom if valuable.³⁰⁸ In the world of college sports, however, the

302. See Freedman, *supra* note 181, at 674; Mueller, *supra* note 82, at 74.

303. See Mueller, *supra* note 82, at 75; Bloom, *supra* note 301.

304. See Freedman, *supra* note 181, at 674.

305. The rule in question was NCAA Bylaw 12.5.2.1, which prohibited athletes from using their name or likeness to promote a commercial product. See DIV. I MANUAL, *supra* note 13, art. 12.5.2.1. The university requested, but the NCAA denied, a waiver of the bylaw. See Adam Thompson, *Bloom Sues NCAA; Skier Wants to Play for Buffs*, DENV. POST, July 26, 2002, at D02. Judge Hale of the Boulder County District Court rejected Bloom's ensuing motion for injunctive relief and upheld the NCAA's ruling. See *Bloom v. Nat'l Collegiate Athletic Ass'n*, No. 02-CV-1249, slip op. at 7 (20th Dist. Ct. Colo. Aug. 15, 2002) ("Although the administrative process relating to this rule could have, and I think should have, allowed an accommodation to be reached as to Mr. Bloom's interest and the interest of the NCAA, the failure to do so was not arbitrary and capricious."); Freedman, *supra* note 181, at 683-84.

306. The issue was not whether Mr. Bloom's modeling contract should make him ineligible for an athletic scholarship. When informed his modeling contract had violated NCAA rules, he declined his football scholarship and requested the NCAA merely grant him permission to play intercollegiate football without a scholarship. See Verified Complaint for Declaratory and Injunctive Relief ¶ 17, *Bloom v. Nat'l Collegiate Athletic Ass'n*, No. 02-CV-1249 (20th Dist. Ct. Colo. Aug. 15, 2002); Thompson, *supra* note 305. NCAA rules, however, made Mr. Bloom ineligible *even to participate* in college football. See DIV. I MANUAL, *supra* note 13, art. 12.5.2.1 (stating that the athlete "shall not be eligible for participation"). The NCAA rules operated thusly even though Mr. Bloom's modeling contract resulted from *skiing* fame arising *prior to his involvement* in college football.

307. See DIV. I MANUAL, *supra* note 13, art. 12.5.1.1, 12.5.1.1(h) (permitting the athlete's university to sell items containing multiple athletes' names, pictures, or likenesses); cf. DIV. I MANUAL, *supra* note 13, art. 12.5.1.1.1 (permitting NCAA and its agents to use the name or picture of an enrolled student-athlete to promote NCAA championships, events, activities, and other programs).

308. The right of publicity protects individuals, primarily celebrities, against the unauthorized commercial use of their names, likenesses, and personal identities. See Mueller, *supra* note 82, at 70-73 (describing application of the right of publicity to athletes). For a discussion of the right of publicity, see generally 1 J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* (2d ed. 2008); Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199 (1986); Melville B. Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954).

member institutions of the NCAA take for themselves value from a group it claims are their students.³⁰⁹ As former NCAA Executive Director

309. “The encroachment of commercialization on educational values is particularly unfortunate because it depends, at bottom, on a willingness to take unfair advantage of students.” Derek Bok, *The Purely Pragmatic University: The Costs of Commercializing the Academy*, HARV. MAG., May–June 2003, at 28, 30.

Following Jeremy Bloom’s banishment from the University of Colorado football program, he authored an incisive editorial, providing in part:

Two years ago, I became a proud member of the 2002 Winter Olympics team and then won the World Cup overall title as a freestyle skier. Then, a few weeks later, the NCAA informed me that if it were to allow me to continue my financial means of paying for my trainer, nutritionist, physical therapist and agent for skiing, I would be endangering the core principle of amateurism as a college football player. Although at the time it seemed silly, looking back I believe they made the right call. It is true my relationship with those people would have been more damaging to the spirit of amateurism than, say, the University of Miami’s relationship with star football recruit Willie Williams, who has been arrested 11 times since 1999.

So I took their advice and dropped all my legitimate ski-related sponsors and enrolled at the University of Colorado, where I became a proud member of the football program and the social science department.

... [T]he NCAA denied multiple waivers to let me play football. . . .

... [T]he NCAA holds a tight monopoly on the “rental business.” In fact, it rents out college athletes every year. While I was in college, the NCAA rented me out to many different corporations and allowed me to play in endorsement-filled stadiums every week. The NCAA even allowed the university to sell a jersey with my school and my number on it in stores all over Colorado.

I didn’t get any of the money that was generated by this service, but at least the NCAA paid for my schooling, right? Well, no. Actually, the NCAA didn’t pay a penny of my scholarship, and the university only paid half. The other half came from my “personal scholarship donor,” a private citizen who donates money to Colorado to fund student-athlete scholarships. Now that the NCAA is finished with me, it simply will dismiss me, just like it does with thousands of student-athletes every year. And why wouldn’t it, when it has thousands of fresh-faced, new student-athletes every year who are eager to join the cycle?

... Aaron Adair was a young man who battled brain cancer for a long portion of his life. He not only had enough heart to become part of the select few in the country to overcome the unthinkable disease, but he also possessed enough to make the University of Oklahoma’s varsity baseball team.

Aaron wrote his own book while he was in college, intending to give other cancer patients hope they too could win their battles with the disease. After his book was published, the compassionate and understanding folks at the NCAA ended Aaron’s dream of playing baseball because his name was attached to a “corporate product.”

...
All of the lessons I learned from this organization will make me a rich man. Eventually, I think I’ll start my own amateur business. I not only will provide housing and a positive working environment, I also will teach my employees the benefits of working as a team. And though I’ll be making millions running

Walter Byers observed, NCAA rules prevent “direct dealings between the commercial, for-profit world and the athlete. This is not about amateurism. This has to do with who controls the negotiations and gets the money.”³¹⁰ The regime by which NCAA universities, but not an athlete himself, may profit off the athlete’s likeness or number, itself an exquisite illustration of exploitation, unequivocally demonstrates that the relationship between universities and their athletes has become intensely commercial. The NCAA’s activities in this area can hardly be said to further the tax-exempt, public purpose of education. Instead, commercial motives dominate.

IV. CONCLUSION

Fables endure because they reveal truth. Among the most classic and lasting is Hans Christian Andersen’s “The Emperor’s New Clothes.”³¹¹ There, an emperor cared more about his clothing than anything else. Two rogues devised a plan to set themselves up as weavers, claiming “they could weave beautiful and rare cloth,” but that if a fool or person unfit to do his work viewed it, “he would see nothing.” Neither the emperor, nor his ministers, wishing to be either fool or unfit, would acknowledge seeing nothing, but instead proclaimed the beauty and wondrousness of the new garments. It was not until the emperor paraded through the town in his new finery that a child was heard to say, “[H]e has nothing on!” The child’s father said, “Listen to the innocent; he says the emperor has nothing on.” Shortly, “the whole crowd shouted, ‘The emperor has nothing on!’” And although the emperor heard them, “he only held his head higher and walked more stiffly than ever, and behind him the two chamberlains carried the invisible train.”

There are truths we wish not to know, and therefore do not see. Having once viewed them, however, they can no longer be denied. Like the emperor’s clothes, the notion that major college sports are amateur is also a fairy tale. The truth is that they are profoundly and increasingly commercial and plainly not amateur at all. If the law is to eschew a

this business, I will sympathetically tell my employees that paying them would corrupt the purity of my business and their learning experience. If they try to support themselves in other ways I find inappropriate, I’ll dismiss them.

Bloom, *supra* note 301.

310. BYERS, *supra* note 16, at 346; *see also id.* at 376, 388; Mueller, *supra* note 82, at 80–84 (describing university commercial exploitation of athletes through trading cards, jerseys, and video games); Arthur Kempton, *Native Sons*, N.Y. REV. BOOKS, Apr. 11, 1991, at 55, 57–59 (describing system whereby athletic shoe manufacturers contract with college coaches, not the players themselves, for use and advertisement of their products).

311. Andersen, *supra* note 1, at 62–68.

“tyranny of labels,” then it must revisit the broad exemptions accorded major college sports from the laws we describe—labor law, antitrust, and tax—and from all laws exempting amateur enterprises from their reach.

The NCAA is the nation’s college sports emperor. It parades through the land wrapped in the veil of amateurism. Until a child—“the innocent”—speaks the truth: “[H]e has nothing on!”

