THE UNIVERSITY OF TENNESSEE KNOXVILLE

Journal of Applied Sport Management

Volume 13
Issue 2 *Thoughts on the NIL Era*

Article 6

12-1-2021

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Recommended Citation

Rodenberg, Ryan (2021) "College Athletics and Disseminating Sports Betting Data," *Journal of Applied Sport Management*: Vol. 13 : Iss. 2.
https://doi.org/10.7290/jasm13emko
Available at: https://trace.tennessee.edu/jasm/vol13/iss2/6

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Vol. 13, No. 2
https://trace.tennessee.edu/jasm/vol13/iss2/6

College Athletics and Disseminating Sports Betting Data

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May 14, 2018 was a pivotal day for college athletics on two fronts.

First, at about 8:00am Eastern, the National Collegiate Athletic Association (NCAA) issued a press release announcing a "landmark 10-year technology agreement with Genius Sports to modernize collection and distribution of intercollegiate sports data." (NCAA, 2018). The NCAA posited that the long-term deal would "revolutionize how real-time data and statistics are captured, managed, and distributed." (NCAA, 2018). The NCAA's partner in the deal is, among other things, in the business of brokering the sale of news and information (often called 'data') used by sports betting operators.

Second, a few hours later, the U.S. Supreme Court ruled that individual states could move to legalize sports betting given the lack of direct regulation by Congress. The ruling—captioned *Governor Murphy, et al. v. NCAA, et al.*—represented a definitive loss for lead plaintiff NCAA and four other sports leagues who failed to enforce the Professional and Amateur Sports Protection Act's restriction on state-level oversight of sports wagering. According to the Supreme Court, "Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own" (Murphy v. NCAA, 2018). With the decree, the NCAA and other sports leagues lost the ability to control sports gambling expansion nationwide via offensive litigation against states.

In its May 14, 2018 press release, the NCAA described itself as a "diverse association of more than 1,100 member colleges and universities that prioritize academics, well-being and fairness to create greater opportunities for nearly half a million student-athletes each year." (NCAA, 2018). The NCAA's press release noted that "Genius Sports will serve as the NCAA's exclusive agent in licensing real-time official data from championship events (including NCAA March Madness) to media platforms and other companies" (NCAA, 2018). Such exclusivity and licensing activities have strong commercial elements, but the NCAA-Genius Sports announcement made no mention of if, or how, the pecuniary elements would flow to the individuals actually partaking in the sports contests.

To establish standing at the outset of the Supreme Court sports gambling case, the NCAA and its co-plaintiffs argued that they were injured and irreparably harmed by legalized sports betting. In an easy-to-predict reversal, individual universities, college athletic conferences, and the NCAA are now seeking to monetize sports wagering in ways analogous to revenue-generating ventures such as broadcasting and sponsorships. This monetization can take many forms, with a grant of 'rights' tethered to sports gambling data dissemination being one of the most common mechanisms. For example, a college conference could seek to partner with a middleman who purchases purported 'exclusive data rights' from the conference and then seeks to sell news and information to sportsbook operators.

The focus of this article is the interplay between college athletics and sports betting data dissemination, a near-future friction poised for litigation given concurrent issues involving name-image-likeness (NIL) rights and concentration of college sports via mega-conferences.

Antitrust and Labor Law Attention

In 2021, the Supreme Court—in *NCAA, et al. v. Alston, et al.*—ruled that the NCAA and a host of athletic conferences were definitively subject to antitrust scrutiny, rejecting the argument furthered by the NCAA and its co-petitioner conferences that they deserved "immunity from the normal operation of the antitrust laws" (NCAA v. Alston, 2021). Acknowledging that "American colleges and universities have had a complicated relationship with sports and money," the Supreme Court, in a unanimous ruling penned by Justice Gorsuch, found that the "NCAA accepts that its members collectively enjoy monopsony power in the market for student-athlete services" (NCAA v. Alston, 2021). Such power has a direct impact in the sports betting data market, where the NCAA has not shared revenue from its decade-long Genius deal with the college athletes competing in the underlying sports. Likewise, imminent data-related partnerships by individual colleges and conferences will almost surely not involve any direct revenue share with the participating athletes.

Justice Kavanaugh, concurring in *NCAA, et al. v. Alston, et al.*, keyed in on this gap and provided a roadmap: "colleges and student athletes could potentially engage in collective bargaining (or seek some other negotiated agreement) to provide student athletes a fairer share of the revenues that they generate for their colleges" (NCAA v. Alston, 2021). According to Justice Kavanaugh, "the student athletes who generate the revenues, many of whom are African American and from lower-income backgrounds, end up with little or nothing" (NCAA v. Alston, 2021). Following *NCAA, et al. v. Alston, et al.*, it is a near-certainty that moves by individual universities, athletic conferences, and/or the NCAA to monetize the sale of news and information fueling sports wagering markets would result in antitrust review if a plaintiff class of college athletes were to sue under the Sherman Act.

Justice Kavanaugh's pathway received a boost a few months later too.

On September 29, 2021, National Labor Relations Board (NLRB) attorney Jennifer Abruzzo released a nine-page memo in support of "a finding that scholarship football players at Division I FBS private colleges and universities, and other similarly situated Players at Academic Institutions, are employees under the [National Labor Relations Act] NLRA. Indeed, Players at Academic Institutions perform services for their colleges and the NCAA, in return for compensation, and subject to their control" (Abruzzo, 2021). NLRB general counsel Abruzzo cited *NCAA, et al. v. Alston, et al.* in support of her finding, quoting Justice Kavanaugh on the collective bargaining front. Relatedly, Abruzzo highlighted a bill introduced in the United States Senate that "would amend the NLRA's definition of 'employee' to expressly include certain college athletes, including those attending public institutions, and to give them collective bargaining rights" (Abruzzo, 2021). Abruzzo concluded her memo by positing that "I will consider pursuing charges against an athletic conference or association even if some member schools are state institutions" (Abruzzo, 2021).

Hints about how college athletes could move to stake their claim for a share of sports betting data revenue abound, with numerous contemporary examples from professional sport. In the United Kingdom, a group of professional soccer players have formally notified 17 data firms that the players "want compensation and an annual fee for the use of their data" (Hartley, 2021). When Congress held hearings about sports wagering in 2018, a quintet of sports labor unions told lawmakers that player-level data should not be sold "without the express written authorization of the player" and "[a] player's right to privacy should not be trumped by a league or club's interest in selling personal health information to gamblers" (National Football League Players Association, et al., 2018). Also, a group of seven athlete labor groups filed an Indiana Supreme Court amicus brief positing that fantasy sports betting infringed upon "players' statutory publicity rights" and did not qualify for any exemption (Major League Baseball Players Association, et al., 2018).

A Percolating Legal Case

The NCAA and certain conferences may be torpedoing their own ability to grant—on an exclusive basis—'rights' pertaining to sports betting data dissemination. An on-going case in U.S. District Court for the Northern District of California involves a group of plaintiff college athletes suing the NCAA and five conferences on antitrust grounds alleging that "absent the challenged rules, 'Division I conferences and schools would compete amongst each other by allowing their athletes to…share in the conferences' and schools' commercial benefits received from exploiting student-athletes names, images, and likenesses,' which include broadcasting revenue." (House v. NCAA, 2021). In finding for the plaintiffs on defendants' motion to dismiss, Judge Claudia Wilken rejected the suggestion that college athletes do not have a "legal entitlement to broadcasts." (House v. NCAA, 2021).

Judge Wilken's June 24, 2021 ruling came after substantial briefing by the NCAA and its co-defendant conferences positing that college athletes have no 'rights' tethered to broadcast revenue. For example, the NCAA and the conferences argued that the plaintiffs "have no right of publicity in game broadcasts, and therefore no right to recover damages under the Sherman Act…a plaintiff cannot use the antitrust laws to vindicate a nonexistent right." (House v. NCAA, 2020b). Citing precedent in the professional sports context, the NCAA/conference defendants described broadcasted sporting events as "matters of public interest" (House v. NCAA, 2020b).

The plaintiffs rebutted these claims by pointing out a key difference: the cases cited by the NCAA and the conferences involved athletes who were paid. Specifically, "those performers were compensated professionals who had contracts with the organizer of the event giving the organizer the right to license their NILs. This is a critical distinction. Unlike the 'producers' in these cases, defendants here do not compensate Plaintiffs for the use of their NILs in any context." (House v. NCAA, 2020a). Whether involving real-time game scores or player-level data critical for in-game prop bets, college athletes can plausibly make the argument any commercial dissemination agreement that forecloses them from revenue could violate antitrust laws. This is where professional sports and college sports diverge. Executives of professional leagues have lobbied for state law data mandates on the premise that sports betting would not exist but for the efforts of the leagues and players, who are unionized and share in the data-related revenue. But no such revenue share mechanism exists in the college sports context.

Such gap reveals the analogy between sports betting data dissemination deals and television broadcasts agreements. The latter was the focus of a crystal ball-esque academic article by Professor Rick Karcher, who put forth the blueprint for how college athletes could claim a percentage of broadcast revenue enjoyed by colleges under an unjust enrichment theory of recovery. Specifically, Professor Karcher argued that "universities obtain an unjust benefit at student-athletes' expense by retaining for themselves the portion of the increasing rights fees that would normally and equitably be paid to the players for their substantial contribution in creating the broadcast" (Karcher, 2012).

Next Steps

College athletics vis-à-vis sports betting data dissemination partnerships is full of ironies and contradictions on at least three levels. First, for the entire duration of Supreme Court sports betting case, the NCAA and its member schools repeatedly claimed to be injured and irreparably harmed by legalized sports betting. Now the same entities are pursuing sports wagering revenue options. For example, the University of Colorado and Louisiana State University have already entered into sponsorship agreements with licensed sportsbook operators.

Second, the NCAA signed an 'exclusive' 10-year data distribution deal in 2018 with a company in

the sports gambling business. Now, in pending litigation, the NCAA and five conferences are claiming that the underlying sporting events in broadcast agreements—a close cousin to sports betting data dissemination deals—are merely "matters of public interest." Such a characterization triggers First Amendment coverage that would seemingly trump any monopoly-granting exclusive deal, especially when the sporting event is held in a public venue.

Third, the NCAA has spent decades claiming that college athletes are not employees and, in turn, cannot be paid. Now, the NLRB general counsel has issued advice to the contrary. In so doing, a twisted blueprint is available to the NCAA, conferences, and universities. Namely, recognizing college athletes as employees eligible for collective bargaining may be the best (or only) path forward to keep sports betting data dissemination deals insulated from antitrust scrutiny.

Such a triumvirate of ironies and contradictions invites lawsuits, of course. Any move by the NCAA, college conferences, or individual universities to disseminate sports wagering news and information via quasi-monopoly distribution channels could be met with multi-faceted litigation. Federal prosecutors or regulators could target the commercial ventures, especially if the sports wagering data transmission run afoul of criminal statutes such as the Wire Act. Likewise, private litigation from excluded data disseminators or aggrieved sports betting operators could be viable under a First Amendment free speech claim. Finally, a class of college athletes could sue the NCAA, conferences, and/or colleges directly seeking a share of sports betting data distribution agreements under antitrust law or via an unjust enrichment theory.

Transmitting sports betting news and information—especially in-game data with only (micro-) seconds of latency—strives to be fast and smooth. In contrast, upcoming litigation at the intersection of college athletics and sports betting data dissemination will be slow and bumpy.

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