

# A TROUBLED CARTEL: THE NCAA

JAMES V. KOCH\*

Despite the claims of the National Collegiate Athletic Association (NCAA) that it is a champion of amateur athletics and physical fitness in colleges and universities, the NCAA is in fact a business cartel composed of university-firms which have varying desires to restrict competition and maximize profits in the area of intercollegiate athletics. The aims and activities of the university-firms in the NCAA are extremely diverse, and therein lies the most important cause of both the long-term and the contemporary problems which have confronted the NCAA. This diversity also explains the recent move of the Association to establish a three-division structure in which the schools operating major intercollegiate athletic programs are grouped in Division I and the remaining schools—perhaps two-thirds of the NCAA members—are organized in Divisions II and III.<sup>1</sup> The recent spate of court actions and legal maneuvers by certain individual university-firms in the NCAA against the NCAA itself is further visible evidence of both the unsatisfactory operation of the cartel in the view of some and the heterogeneity of membership in the NCAA. Economic theory in the area of cartelization has proven to be a remarkably accurate predictor of the stresses and strains which have beset the NCAA. That same theory also offers some insights into the recent move to a three-division structure.

## I

### THE NCAA AS A CARTEL

The NCAA is easily the most powerful and the most prestigious organization regulating intercollegiate athletic competition in the United States today.<sup>2</sup> Over 660 colleges and universities are members of the NCAA, and the NCAA will soon be conducting over forty national championships in over twenty sports in addition to the rule-making, record-keeping, and enforcement functions which characterize any cartel.

The rules and regulations of the NCAA are specified in its Constitution, Bylaws, Official Interpretations of the Bylaws, Executive Regulations, Recommended Policies and Practices, and Procedures Concerning Enforcement.<sup>3</sup> While changes in each

\* Professor of Economics, Illinois State University.

<sup>1</sup> See N.Y. Times, Aug. 7, 1973, at 41, col. 6.

<sup>2</sup> A rival organization operating in the intercollegiate athletic arena is the National Association of Intercollegiate Athletics (NAIA). Few, if any, university-firms which operate big-time intercollegiate athletic programs are members of the NAIA, however. NAIA members are typically small colleges operating intercollegiate athletic programs which are relatively inexpensive and which are not primarily based upon recruitment and payment of athletes for their services.

<sup>3</sup> The collected rules and regulations may be found in 1972-73 MANUAL OF THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION (1973) [hereinafter cited as NCAA MANUAL]. For a more detailed discussion of the internal structure of the NCAA, see Koch, *The Economics of "Big-Time" Intercollegiate Athletics*, 52 SOCIAL SCI. Q. 248 (1971).

division's rules and regulations must be ratified by the university-firms assembled in annual convention, the day-to-day governance of the NCAA is carried out by the NCAA Council. The NCAA Council was recently reorganized to give eight representatives to the larger members in Division I, and four each from the smaller Divisions II and III. Prior to this new system of representation, both the Council and the NCAA's myriad of committees had tended to be dominated by university-firms which operate big-time intercollegiate athletic programs predicated upon extensive scholarship aid to their athletes. This did not go unnoticed and was a constant sorepoint with those university-firms with programs operated on a smaller scale. For example, the Eastern Collegiate Athletic Association (ECAC), a loosely-knit group of over 200 NCAA members located in the northeastern part of the United States, had argued strenuously that its members were vastly underrepresented on the NCAA Council and committees.<sup>4</sup> Most ECAC members either do not operate big-time programs or operate such programs in only one sport. This conflict of interests resulted in the ECAC threatening to bring suit against the NCAA in order to correct the alleged imbalance in representation. It remains to be seen if the recent reorganization can relieve this strain.

It is not apparent to some (and particularly to the NCAA itself) that the Association is a cartel which restricts competition in order to further the ends of its members. The NCAA states officially that it is interested only in the "amateur student-athlete . . ."<sup>5</sup> who engages in intercollegiate athletics "for the physical, mental, social and educational benefits he derives therefrom and to whom athletics is an avocation."<sup>6</sup> The NCAA proclaims that its goals are the promotion of "educational leadership, physical fitness, sports participation . . ."<sup>7</sup> Nowhere are goals of profit maximization, cost minimization, or restriction of competition mentioned. However, as we shall see, the actions of the NCAA clearly stamp it as a moderately successful business cartel whose success has been limited primarily by the heterogeneity of its membership. United States Senator Marlow W. Cook, of Kentucky, incisively cut through the maze of slogans and jargon that the NCAA has erected when he stated that "[t]he NCAA is a body primarily designed to protect and defend its member institutions from the professional sports world and to make sure that collegiate sports gets its share of the sports business pie."<sup>8</sup>

A cartel has been defined as an organization of firms which makes agreements concerning such matters as prices, outputs, market areas, the use and construction of productive capacity, and advertising expenditures.<sup>9</sup> The NCAA does all of these in the area of intercollegiate athletics in that it: (a) sets the maximum price that can be paid for intercollegiate athletes; (b) regulates the quantity of athletes

<sup>4</sup> N.Y. Times, Jan. 7, 1973, § 5, at 2, col. 4.

<sup>5</sup> NCAA MANUAL 6.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 5.

<sup>8</sup> Washington Post, Mar. 29, 1973, § C, at 1, col. 2.

<sup>9</sup> J. KOCH, INDUSTRIAL ORGANIZATION AND PRICES 64 (forthcoming 1973).

that can be purchased in a given time period; (c) regulates the duration and intensity of usage of those athletes; (d) occasionally fixes the price at which sports outputs can be sold (for example, the setting of ticket prices at NCAA championship events which are held on the campuses of cartel members); (e) periodically informs cartel members about transactions, costs, market conditions, and sales techniques;<sup>10</sup> (f) occasionally pools and distributes portions of the cartel's profits, particularly those which result from intercollegiate football and basketball; and (g) polices the behavior of the members of the cartel and levies penalties against those members who are deemed to be in violation of cartel rules and regulations.

If the university-firms which are members of the NCAA can be viewed as firms buying inputs and producing outputs,<sup>11</sup> then it is apparent that by far the most detailed restrictions are imposed upon the activities of the firms on the input side of the market. While many different inputs are utilized to produce the output known as intercollegiate sports, the two inputs which are of most interest are the other teams, that is, the competition, and the "student-athletes"<sup>12</sup> purchased by the university-firms.

Competition is an indispensable input to the success of intercollegiate athletics and, when such ingredient is absent, spectators lose interest in the game in question. Only a masochist would have substantial interest in football games between the University of Nebraska and the club team of the University of Chicago. However, a game between the Universities of Nebraska and Oklahoma is a contest and is therefore of great interest to paying spectators. The relevant point here is, of course, that it is in the best interests of the NCAA and its component members to strive by rule, fiat, and enforcement to make competition reasonably equal among members that choose to compete with each other. Cartel limitations upon the number of athletic scholarships that can be granted by a university-firm, the establishment of Division I composed predominantly of universities supporting big-time programs and Divisions II and III composed of universities which maintain more modest goals and expectations, and the division of profits from NCAA activities among members are examples of the NCAA's continual attempt to make the athletic competition among its members strenuous and competitively equal in the sense of the outcome not being predetermined. Tight athletic contests and conference races

---

<sup>10</sup> A major vehicle for such information-spreading is the NCAA News, a newspaper which is published by the NCAA and sent to its members. Another example is a detailed and specialized cost and revenues study which is distributed to members, NCAA, AN ANALYSIS OF REVENUES, EXPENSES, AND MANAGEMENT ACCOUNTING PRACTICES OF INTERCOLLEGIATE ATHLETIC PROGRAMS (1970). This writer knows of no other cartel which provides such mountains of detail on each member's operations to the other members of the cartel.

<sup>11</sup> The outputs of non-collegiate sports have been examined in detail. See Davenport, *Collusive Competition in Major League Baseball*, 13 AM. ECON. 6 (Fall, 1969); Jones, *The Economics of the National Hockey League*, 2 CAN. J. ECON. 1 (1969); Neale, *The Peculiar Economics of Professional Sports*, 78 Q.J. ECON. 1 (1964); Rottenberg, *The Baseball Players' Labor Market*, 64 J. POL. ECON. 242 (1956.) The outputs of collegiate sports have been examined by Koch, *supra* note 3.

<sup>12</sup> This term, frequently a euphemism, is the favored label of the NCAA for the athletes who compete for its member institutions.

fill stadiums. In this regard, athletic conferences such as the Atlantic Coast Conference, the Pacific Eight, or even the obscure Prairie Conference are usefully viewed as subcartels of similar university-firms designed to produce competitive athletic events by grouping together university-firms of similar interests and attitudes. It is ordinarily in the best interests of the NCAA to promote and assist the development of athletic conferences composed of university-firms supporting similar intercollegiate athletic programs.<sup>13</sup>

The most detailed and interesting rules imposed by the cartel occur in the area of student-athletes. NCAA rules limit the number of student-athletes that a given university-firm can purchase, how long these student-athletes may be used, and the prices that may be paid for them. Furthermore, the NCAA has imposed stringent rules limiting the manner in which competing university-firms may bid for the newest crop of prospective student-athletes. Such rules limit the number of visits which a student-athlete may make to a given campus, the amount of his expenses that may be covered by the university-firm, and so forth. The intent, and sometimes also the effect, of such rules is to reduce recruiting and operating costs by restraining competition.

## II

### THE CARTEL'S STRUCTURE AS A SOURCE OF TROUBLE

The most successful business cartels pool and divide profits among the cartel members. Less successful cartels are often limited to dividing prospective sales among members, designating market territories, and reducing costs of competition in whatever manner possible. The curse which ends the existence of most cartels is the practice of chiseling: if one firm can secretly lower prices, steal sales, or evade the rules of the cartel, then the cartel is likely to be ineffective and dissolve.

Successful cartels attain their success by forcing cartel members to obey cartel rules and by making it impossible for new firms to join the cartel except at high cost. The market structure of the cartel is a prime determinant of the cartel's ability to force its members to conform and its ability to keep unwanted members out.

A number of facets of market structure are critically important to a cartel's operation.

(1) *Number of Firms.* Successful cartels seldom have a large number of member firms. When the number of cartel members is small, the behavior of cartel members can more easily be policed. Therein lies a portion of the NCAA's troubles. The NCAA has well over 600 members, and the activities of all of these members are virtually impossible to monitor effectively. While the success of the monitoring effort may increase under the three-division structure, the size of each division is still such as to limit cartel control.

---

<sup>13</sup> Of course, by encouraging the development of conference affiliations, the NCAA also increases the possibility that powerful challenges to its authority can be led by conferences. The recent ECAC challenge, mentioned above, is an example.

(2) *Number of Points of Initiative.* Successful cartels are usually characterized by few points of initiative in the markets the cartel faces. That is, the number of points where competition, purchasing, and selling can take place is limited. A limited number of points of initiative means that it is much easier for the cartel to observe the behavior of its members. Once again, the NCAA falls short here, for the number of points of initiative is almost limitless. A large number of student-athletes exists, to say nothing of the large number of alumni and friends of university-firms that might violate rules. Furthermore, there is no need for the university-firm that wishes to cheat to do so on the university campus. Hence, transactions can take place nearly any place, at any time, and among sometimes unknown individuals.

(3) *Transactions Publicized Internally.* If all transactions made by cartel members are immediately publicized to the remainder of the cartel members, then it is unlikely that effective chiseling can take place. The NCAA, of course, attempts to publicize internal transactions such as the signing of a student-athlete, the payment of a fine, and so forth. Nonetheless, the NCAA is clearly incapable of reporting all transactions because of the large number of points of initiative in the market. Transactions by NCAA members simply are not reported immediately and openly to NCAA members in the fashion of the New York Stock Exchange. This makes chiseling easier and heightens the probability of ineffectiveness on the part of the NCAA.

(4) *Transactions Secret Externally.* A successful cartel ordinarily wishes its own members to be fully informed of transactions by its members, but at the same time wishes to hide its members' actions from outsiders. The cartel does not function effectively when its laundry is in public view. Public reporting of transactions, fines, and profits tends to attract interest, possible competition, and even governmental regulation. The NCAA is clearly deficient as a cartel in this respect. Its actions are reported far and wide in the press and those who dislike its rules and regulations have increasingly been seeking relief in the courts. Legislative investigative panels delve into the NCAA's affairs. Consequently, it is almost impossible for the NCAA to maximize profits and minimize costs blatantly or for the NCAA to chastise severely those who break its rules, because the NCAA is almost regarded as the public domain.

(5) *Existence of Barriers to Entry.* The most successful cartels typically are beneficiaries of substantial barriers to the entry of new firms into the markets where the cartel members operate. That is, it is usually the case with successful cartels that newly entering firms would suffer some cost disadvantage which does not accrue to the firms already in the cartel. The NCAA also falls short here. It is indeed difficult for the NCAA to refuse membership to any university-firm that states that it will abide by the rules of the cartel. The public domain status of the NCAA makes it nearly impossible for the NCAA arbitrarily to state that a school will not be allowed to join the Association. Not only would such an action violate the

slogans of the NCAA concerning the promotion of amateur athletics, but the action also would probably result in legislation or legal action which would force the NCAA's hand. Hence, nearly every university-firm can join the NCAA, and over 600 have.

(6) *Similarity of Member Interests and Costs.* Cartels which contain members who have greatly dissimilar interests and costs generally are not effective because any rule which fits one type of member is often obnoxious to other members. Until recently the NCAA clearly was subject to this failing. University-firms, such as UCLA, which operate gigantic multi-million dollar athletic programs have little or nothing in common with university-firms such as Messiah College, which purchase no student-athletes and often charge no admission to athletic events. Consequently, a rule or regulation which was advocated by UCLA often would have been objected to by Messiah College. When dissimilar interests and costs structures characterize a cartel, that cartel either breaks up or becomes ineffective. The NCAA has been largely characterized by ineffectiveness despite its domination by university-firms operating big-time programs. This situation supplied the major impetus for the recent reorganization of the NCAA into three divisions, which is intended to lessen the extent of dissimilarity within each decision-making body.

(7) *Purchasers Without Monopsony Power.* A frequent characteristic of successful cartels is the fact that they sell their output to customers who are often small in size and have little economic clout or monopsony power. Such is largely the case with the NCAA. The single spectator to whom the NCAA sells its output has little influence over ticket prices or even the number of games played. Reversing the buyer-seller relationship for a moment, when the NCAA is the customer, it once again usually deals with sellers who have relatively little monopoly power. A single high school star may indeed be able to influence the price a university-firm pays him, but that is not the general case. The majority of student-athletes are purchased by university-firms in the NCAA for the standard "full ride" (tuition, room, board, books, and \$15 per month for "laundry money"). Of course, the value of tuition, room, and board is not the same at all university-firms, and this does introduce a permissible element of price competition into the market.

In sum, the characteristics of market structure that most often are associated with successful cartels are frequently absent in the case of the NCAA. For a long time, the NCAA found it almost impossible to reconcile the conflicts inherent within its heterogeneous membership. As Darrell Royal, the well-known football coach of the University of Texas, so aptly put it, "Texas doesn't want Hofstra telling it what to do and vice-versa."<sup>14</sup> The new divisional structure represents an attempt to respond to Royal's concern. But even if Texas and Hofstra belong to different divisions under the recent reorganization, the prevailing market structure makes it highly probable that considerable cheating would occur in any case and that the NCAA would face many of its present problems.

<sup>14</sup> N.Y. Times, Jan. 16, 1973, at 47, col. 1.

## III

RECENT LEGAL CHALLENGES AS A FUNCTION  
OF HETEROGENEOUS MEMBERSHIP

The NCAA has in the very recent past been subjected to a spate of law suits which allege that it has overstepped its powers. These suits typically seek to have a court prevent the NCAA from enforcing one of its rules and from imposing penalties for noncompliance with such rules. Almost without exception, the suits are filed by athletes who attend university-firms which operate big-time athletic programs, for it is these university-firms whose activities are most circumscribed by the cartel as a whole. While the actions against the NCAA have been brought by individuals rather than the university-firms, the latter have been vocal in their support and encouragement of the plaintiffs.

An important example of such a suit is *Curtis v. NCAA*.<sup>15</sup> Isaac Curtis and Larry Brumsey, athletes attending the University of California at Berkeley, were ruled ineligible for intercollegiate athletic competition by the NCAA, because the two athletes did not "predict" a 1.60 grade point average. One of the many rules of the NCAA at the time was one which indicated that a student-athlete could not be given financial aid and considered to be eligible for intercollegiate athletic competition unless his previous academic record indicated that he would be able to achieve at least a 1.60 grade point average on a 4.00 scale. The NCAA allowed its members to use several different tables which incorporated variables such as high school grade point average and standardized national test scores in order to arrive at a determination of whether the student-athlete would predict at least a 1.60. Berkeley was charged by the NCAA with administering special nonscheduled national tests to Curtis and Brumsey in order to enable the two student-athletes to predict the required 1.60. The unauthorized nature of the tests caused the NCAA to declare officially that Curtis and Brumsey had not provided national test scores sufficient to predict the needed 1.60.<sup>16</sup>

As a result of the NCAA's declaration of ineligibility for Curtis and Brumsey, the university appealed the NCAA's original ruling to the NCAA Council. That appeal was denied and the Curtis-Brumsey law suit resulted. The suit was subsequently withdrawn, and Curtis transferred to California State University at San Diego, where he was soon eligible because his academic record was sufficiently strong to enable him to satisfy the NCAA's rules. The NCAA does allow a prospective student-athlete to demonstrate in the classroom that he is worthy of eligibility, and Curtis thus became eligible by this route.

The so-called "predicted 1.60" grade point average rule was also the center of

<sup>15</sup> No. C-71-2088-ACW (N.D. Cal., filed Oct. 29, 1971).

<sup>16</sup> The NCAA acted in a similar fashion against student-athlete James McAlister of UCLA when 63 erasures were found on McAlister's national entrance test after McAlister had taken that test at a special private administration handled by UCLA intercollegiate athletic authorities. The NCAA disallowed the results of this examination and declared that McAlister was ineligible by virtue of not predicting the required 1.60 grade point average. N.Y. Times, Oct. 28, 1971, at 52, col. 1.

attention in a case involving Centenary College and the NCAA. Centenary College granted financial aid to five student-athletes and considered them eligible for intercollegiate competition, despite the NCAA's judgment that they were ineligible for failure to satisfy the predicted 1.60 grade point average rule. As a result, the NCAA sought to apply sanctions to the college and to the five student-athletes. At the same time, the Association also offered to reduce substantially the penalty imposed against the college if the school would agree that the five student-athletes were ineligible. Centenary College was loath to do this because one of the student-athletes, Robert Parish, was a seven-foot basketball center who was apparently the mainstay of the Centenary College team.

The five student-athletes brought suit against the NCAA, charging that they were being subjected to rules and requirements which were not uniformly applied to all students, athlete and non-athlete, alike.<sup>17</sup> A temporary restraining order was issued against the NCAA, prohibiting it from levying any penalties against the student-athletes in question. That temporary order was later dissolved, and an attempt by the student-athletes to obtain a permanent restraining order against the NCAA was in the offing in April, 1973. Ironically, while these legal proceedings were in progress, the NCAA membership itself voted to do away with the predicted 1.60 rule and substitute for it a much more lenient standard for aid and eligibility under which any of the five student-athletes in question would have been eligible. Also, Parish, whose services had been widely sought by hundreds of university-firms, applied to the National Basketball Association for "hardship status" and was therefore likely to be drafted by a professional basketball team. Such a development would further the argument that the case had become moot. The NCAA, however, argued that it fully intended to prosecute Centenary College as if the 1.60 rule still existed on the grounds that to do otherwise would be to invite rule-breaking in anticipation of rule changes.<sup>18</sup>

A third example of resort to the courts to enjoin NCAA enforcement of its regulations resulted from the attempt of the Association to declare ineligible two basketball players at New Mexico State University, Roland "Tree" Grant and John Williamson. The NCAA charged publicly that the two athletes had received substantial monetary payments in excess of those permitted under NCAA rules. Grant and Williamson not only denied the charges, but also filed a \$2.5 million libel suit against the NCAA for its public accusations.<sup>19</sup> A temporary restraining order was obtained by Grant and Williamson, barring the NCAA from acting against them in this matter, and a permanent injunction was later issued which restrained the NCAA from any punitive action against the two athletes. This permanent injunction was dissolved when the NCAA stipulated that it would make no attempt to act against the two student-athletes during the 1972-73 competitive season. That is,

<sup>17</sup> Parish v. NCAA, Civil No. 18733 (W.D. La., filed Feb. 15, 1973).

<sup>18</sup> This opinion was expressed to the author by Mr. David Berst, a member of the NCAA's legal office.

<sup>19</sup> Grant v. NCAA (C.P. Phila. Cty., filed 1973).



the NCAA agreed to stay any actions which would have affected the eligibility of Grant and Williamson during the time period when the two student-athletes wished to exercise their eligibility.

A more complex case which has similarly resulted in a reversion to legal processes external to the NCAA is the case involving the University of Southwestern Louisiana (USL). In early 1973, the NCAA charged USL with more than 120 violations of NCAA rules, including direct payments to student-athletes. The NCAA then sought to take disciplinary action against USL and the student-athletes involved. The USL basketball team, however, was a national "powerhouse" at that time and had strong reason to want any investigation and action concerning it to be delayed until after the end of the 1972-73 basketball season. USL entertained hopes of being invited to national post-season basketball tournaments such as the one operated by the NCAA, and it was expected that the punishment imposed on USL for the alleged violations would include a prohibition against USL entering post-season competition.

The above factors caused USL to react sharply to the NCAA's charges. The school claimed that it was impossible for it to prepare an adequate defense to the more than 120 charges unless substantial time were allowed it. USL also maintained that the NCAA's investigation and charges in this area were politically motivated and were aimed at USL by larger and more established university-firms that felt threatened by USL's meteoric rise to prominence.<sup>20</sup> Furthermore, USL hinted that the large number of black players on the USL basketball team had caused the school to be the target of outraged segregationist sentiment in Louisiana and that such parties were spreading unfounded rumors in an attempt to punish USL.

Vocal protests against NCAA actions are both commonplace and ineffective, however, and have seldom deterred the NCAA from any action. USL therefore sought judicial relief and obtained a restraining order which prevented the NCAA from taking punitive action against USL or its student-athletes prior to August 15, 1973. The effect of this restraining order was not only to enable USL to participate in post-season tournaments, but also to give USL an increased amount of time to reply to the multitude of charges facing it.

The Third Circuit Court of Appeals of Louisiana later overturned the restraining order against the NCAA. USL then carried its case to the Louisiana Supreme Court in an attempt to forestall NCAA action, but its application for a writ of review was subsequently denied.<sup>21</sup> In the midst of these legal maneuvers, the NCAA invited USL's basketball team to the NCAA's prestigious post-season tournament, and USL accepted that invitation and participated.

However, in this dispute the NCAA was to have the final say. On August 5,

---

<sup>20</sup> While never clearly stated, the implication was that university-firms such as Louisiana State University were not interested in the development of a new athletic power in Louisiana and, therefore, were interested in the demise of USL.

<sup>21</sup> Board of Educ. v. NCAA, No. 53,909 (La. 15th Dist. Ct., Jan. 11, 1973), *rev'd*, 273 So. 2d 912 (La. App. 1973), *writ denied* (La. Sup. Ct., May 17, 1973).

1973, the NCAA Council imposed upon USL the harshest sanctions ever meted out to a member. Citing some 125 infractions, it banned the school from any participation in intercollegiate basketball for two years, and barred USL's other athletic teams from participating in NCAA post-season championships and national television broadcasts for a similar period. In addition, it said that the school must return all trophies and receipts obtained as a result of participation in NCAA basketball tournaments for the past three seasons, and that all placings in such tournaments must be vacated. Further, the Council recommended that USL be expelled from the NCAA altogether (an extremely severe penalty). A vote is to be taken on this recommendation in January, 1974.<sup>22</sup> Following closely on the heels of this action, the Southland Conference (of which USL is a member) on August 20, 1973, placed the school on indefinite probation and stripped it of all honors earned during the past two years.<sup>23</sup>

The legal actions discussed in this section reveal that the NCAA has usually been unsuccessful in preventing individual university-firms from seeking external legal redress and that the individual university-firm has usually been successful in obtaining restraining orders and injunctions which have had the effect of delaying punitive action by the NCAA against alleged violators of the cartel's rules. However, the failures of the NCAA have not been total since the legal actions of the university-firms have only postponed rather than prevented NCAA enforcement and action. The NCAA and its constituent conferences have won external legal battles when they could demonstrate to the satisfaction of the court that immediate, irreparable harm and injury would result from its actions not being upheld. In *Behagen v. Intercollegiate Conference of Faculty Representatives*,<sup>24</sup> the decision of the court was that the Big Ten Conference could temporarily suspend a student-athlete pending a hearing. Therefore, temporary suspension of Ronald Behagen, a University of Minnesota basketball player who was involved in a fight during a basketball game between the University of Minnesota and Ohio State University, was upheld. At the same time, the court warned that neither the NCAA nor particular athletic conferences and university-firms can impair a student-athlete's right to engage in intercollegiate athletic competition which might bring great rewards, without first according the student-athlete minimum standards of due process.

All of the legal actions referred to in this section were promoted by individual NCAA members against the NCAA or its constituent conferences, despite the fact that membership in the NCAA is conditional on the individual university-firm's prior agreement that it will heed the NCAA's rules, regulations, and procedures. That is, the university-firms agreed in joining the NCAA that they would abide by the NCAA's rules and enforcement procedures. The NCAA, however, has not been responsive to the desires of certain university-firms, which therefore have open-

<sup>22</sup> Washington Post, Aug. 8, 1973, § E, at 6, col. 5.

<sup>23</sup> N.Y. Times, Aug. 21, 1973, at 34, col. 2.

<sup>24</sup> 346 F. Supp. 602 (D. Minn. 1972).

ly encouraged individual student-athletes, state boards of education, and others to attempt to quash NCAA actions by use of the external judicial system.

The recent suits against the NCAA are far more costly to the NCAA than the dollars spent in fighting them in the courts. The suits are properly interpreted as a sign that many university-firms have found the NCAA incompatible with their interests and unresponsive to their needs. It is primarily the university-firms operating big-time programs which have been most dissatisfied. The establishment of the three-division structure is an attempt to respond to this dissatisfaction and open rebellion. Without such accommodations, the NCAA itself would likely rupture and possibly dissolve.

#### IV

##### INTERNAL ADJUSTMENTS BY THE NCAA

It would be quite incorrect to imply that the NCAA has not made some attempts to lessen the stresses which are evident within it. Over 100 new rules and amendments were proposed at the January, 1973, NCAA meetings. A major concession was made to big-time university-firms in the form of the abolition of the predicted 1.60 grade point average rule. In its place was substituted what has been described as a "2.00 grade point average" rule. However, the 2.00 rule limits financial aid to athletes in their first year of college to those who have graduated from an accredited high school with a minimum grade point average of 2.00, certified officially by the high school. As Walter Byers, the Executive Secretary of the NCAA stated, "[i]t is considerably easier to score a 2.00 in high school than to predict a 1.60 for your freshman year in college."<sup>25</sup> In point of fact, this change effectively opened the doors to NCAA scholarship aid to nearly all high school graduates and also eliminated a large source of contention between the NCAA and certain university-firms. The same convention also reduced academic requirements for financial aid to junior college students.<sup>26</sup>

A major attempt has been made at recent NCAA conventions to pass legislation which would reduce the costs associated with recruiting and maintaining student-athletes. For example, the 1972 NCAA Convention extended eligibility in all sports to college freshmen. Prior to that time, first year college students were not eligible for varsity competition in football and basketball.<sup>27</sup> The effect of this move was to reduce the costs of running a big-time intercollegiate athletic program, par-

<sup>25</sup> Quoted in *SPORTS ILLUSTRATED*, Jan. 22, 1973, at 57.

<sup>26</sup> The rule change also altered the NCAA's rules such that immediate aid and eligibility could be extended to: (1) a graduate of a junior college; (2) a junior college student who has achieved 48 semester hours of junior college credit with a grade point average of at least 1.60; or (3) a junior college student who has achieved 24 semester hours of credit with a grade point average of at least 2.50.

<sup>27</sup> The NCAA's College Division, which is primarily composed of university-firms operating athletic programs which do not emphasize financial aid to student-athletes, had taken this step previously. The College Division university-firms were therefore able to recruit some athletes at the expense of the schools operating big-time programs (the so-called University Division), because they were able to promise the prospective student-athlete that he would not be forced to wait one year for varsity eligibility.

ticularly in the sport of basketball, where a significant number of student-athletes can step directly from high school play into collegiate competition. Fordham University basketball coach Hal Wissel indicated that he had notified his administration that he would need fewer "full ride" athletic scholarships as a result, because he would now be able to utilize the talents of each scholarship recipient for one extra year and would not have to recruit an entire freshman team each year.<sup>28</sup> Further benefits might be realized if recruiting expenditures reflected the reduced number of student-athletes that are needed when freshmen have eligibility.<sup>29</sup> External observers who misunderstand the basic motivation of the NCAA decried the action. *The New York Times* editorialized that freshman eligibility was "merely the latest in a long string of surrenders to professionalism and commercialism in college sports."<sup>30</sup> Such commentaries, however, have typically had little effect upon the NCAA when financial savings have been involved.

The most important readjustment of the NCAA occurred at a special convention of the Association on August 6, 1973. The member colleges and universities subdivided the NCAA into three divisions, each of which will legislate its own rules of conduct relative to factors such as the number of scholarships, freshman eligibility, and the like. This proposal was successful even though an earlier proposal involving separation into two divisions was defeated at the January, 1973, Convention.<sup>31</sup>

There are several reasons why the three-division plan was ultimately approved despite earlier opposition. First, the plan allows each university-firm to select freely the division in which it wishes to participate, with the exception of the 126 colleges rated major football institutions, which must join Division I.<sup>32</sup> Second, each division will be able to write its own rules and will have only limited obligations to university-firms not in the same division. Third, and possibly most important, a number of large university-firms operating big-time programs have threatened to leave the NCAA and construct an organization which would negotiate with national television networks for the sole benefit of these university-firms. It is estimated that a television contract between a national television network and the fifty most prestigious football teams might be worth twenty-five million

<sup>28</sup> N.Y. Times, Jan. 11, 1972, at 46, col. 4.

<sup>29</sup> Some university-firms which operate big-time football programs were not in favor of the freshman eligibility rule because they realized that it would be a rare freshman football player who could step immediately into varsity football competition straight from high school. Such schools often "red shirt" student-athletes by withholding them from competition for a year in order to increase the student-athletes' maturity and skills as well as to spread the student-athletes' academic work over a period of five years. Hence, it is not common for a high school graduate to play varsity football as a freshman at the big-time university-firms. This fact, argued such university-firms, placed them at a competitive disadvantage in recruiting.

<sup>30</sup> N.Y. Times, Jan. 12, 1972, at 42, col. 1.

<sup>31</sup> Keith, *They Were Unable to Reach Agreement on Divorce*, SPORTS ILLUSTRATED, Jan. 22, 1973, at 57-58, provides an entertaining report of the politics internal to the NCAA at the January, 1973, Convention.

<sup>32</sup> University-firms are free to select the division appropriate to their own purposes in all sports except football, where the strength of the university-firm's schedule is the determining factor.

dollars.<sup>33</sup> The current television contract which the NCAA has with the ABC network is for a lesser amount of money, primarily because ABC is forced to televise many games that it would not show if allowed to make the choices. Should the ABC television network be guaranteed, through a contract with a group of university-firms similar to the top fifty football schools mentioned above, that it could televise the most interesting contests without regard to regional considerations and NCAA politics,<sup>34</sup> it would be willing to pay increased amounts of money for such a contract because of the high viewer ratings that would result. Furthermore, the university-firms involved would be more satisfied because they would not be forced to split lucrative television revenues with the remainder of the NCAA membership.

The three-division structure represents a major step toward reducing the heterogeneity of university-firms which has plagued the NCAA. University-firms will be able to select their own level of participation and, to paraphrase Darrell Royal, Texas will no longer be bound by the actions and desires of Hofstra. The NCAA anticipates that about 225 to 250 of its members will choose to enter Division I in the three-division arrangement. Division I will consist of those university-firms that are truly operating big-time programs and which approach intercollegiate athletics in a semi-professional or outright professional fashion.

One of the first rules that will probably be changed in Division I is the newly voted NCAA limitation upon the number of athletic scholarships that can be granted by any given university-firm. At its January, 1973, Convention, the NCAA voted to limit the overall number of athletic scholarships that can be in effect at a single university-firm to 229, with 75 scholarships being the limitation in football, and 13 scholarships being the limitation in basketball. Some university-firms currently have as many as 150 scholarships in effect in football, and the 75 scholarship limitation was passed over their protests. At the same time, the Division I members are likely to maintain scholarship limitations in the so-called minor sports, such as fencing and golf, in order to reduce costs of competition. In general, one can readily predict that those sports which generate spectator interest and revenues will be the least likely to have meaningful numerical scholarship limitations.

## V

### PREDICTED FUTURE BEHAVIOR

The reorganization eliminated a major source of discontent within the NCAA. Those university-firms which join Division I, however, will still face the perennial problem of matching expenditures to revenues. The analysis of revenues and expenses of NCAA members carried out in 1970 revealed that about two-thirds of all university-firms lost money operating their intercollegiate athletic programs. During

<sup>33</sup> This estimate was provided by Dr. Milton Weisbecker, Director of Intercollegiate Athletics at Illinois State University.

<sup>34</sup> It is also likely that university-firms would begin to schedule contests on weekday evenings in order to maximize both the television audience and the number of interesting contests that could be televised.

the 1961-1971 period, 42 schools dropped intercollegiate football from their programs.<sup>35</sup> The increase in expenditures for a university-firm supporting a big-time intercollegiate athletic program was over 100 per cent during the decade of the 1960's, and the typical big-time intercollegiate athletic program cost almost \$700,000 in the year 1969.<sup>36</sup> A major attempt will be made by all divisions of the NCAA to reduce intercollegiate athletic costs, with the third division attracting the most budget-minded schools. But even Divisions I and II university-firms will strive in whatever way possible to reduce costs and to increase revenues.

The major area where expenses might be reduced is in expenditures made in order to recruit and maintain student-athletes. The NCAA currently has no rule allowing one university-firm to sign a prospective student-athlete to a binding contract that prevents other NCAA members from negotiating with or utilizing him. What does exist currently is a non-NCAA-sponsored "national letter of intent" which, when signed by a prospective student-athlete, binds him to a given university-firm while preventing other university-firms from using that student-athlete.<sup>37</sup> This national letter of intent is subscribed to by all major athletic conferences and nearly all important independent university-firms. A national letter of intent relating to enrollment and competition for fall, 1973, could not be signed by a prospective student-athlete until April 4, 1973. This date was almost five months after the end of the high school football season. Hence, the competition for high school football players is long and expensive. Division I of the NCAA is likely to create its own national letter of intent for each sport and, in addition, designate a different signing date for each sport in order to reduce the time and expense incurred when the recruiting season is overly long.

There has also been talk in the NCAA of establishing a draft system for high school athletes similar to that carried out by admittedly professional leagues. Such a system is likely first to be established on a conference basis. The University of Michigan, for example, might obtain the right to negotiate with a given high school prospect, and no other Big Ten university-firm could compete with the University of Michigan for that individual's athletic services.<sup>38</sup> A draft system would reduce recruiting costs and could lead to a conference-wide or nation-wide agreement concerning a reduction in the financial aid given student-athletes. The current free-wheeling competition among university-firms allows a prospective student-athlete to whipsaw one university-firm against another in order to obtain the most attractive terms.

The university-firms of the NCAA are often referred to as training grounds

<sup>35</sup> Ryan, *A Grim Run to Fiscal Daylight*, SPORTS ILLUSTRATED, Feb. 1, 1971, at 34.

<sup>36</sup> *Id.*

<sup>37</sup> If a prospective student-athlete enrolls in a university-firm other than the one for which he has signed a national letter of intent, he loses two years of eligibility unless the first university-firm releases him from his obligation. Once a student-athlete has attended one university-firm for at least one year, however, he may transfer to another university-firm and will lose only one year of eligibility unless the student-athlete is transferring from a junior college.

<sup>38</sup> Conference letters of intent already exist and are a step in this direction.

for admittedly professional athletics. The essence of this view is that the NCAA university-firms bear the cost of training prospective professional athletes and receive little in return from professional sports. This has led to the suggestion that the NCAA university-firm should be allowed to sign their student-athletes to long-term contracts for their services.<sup>39</sup> Professional leagues or teams would then be compelled to purchase the contract of the student-athlete from the university-firms and would, as a result, be forced to assume a major portion of the costs of training him. This suggestion actually represents the imposition of a type of reserve clause in intercollegiate athletics.

The NCAA members can also attempt to increase revenues obtained from intercollegiate athletics by such ploys as renting their facilities and stadiums to professional teams<sup>40</sup> and increasing the number of competitive contests that might be scheduled by big-time university-firms.<sup>41</sup> The NCAA might well learn a lesson from the National Basketball Association, which profitably deluges basketball fans with a series of playoffs that do not terminate until the middle of May.

The NCAA must also in the near future come to terms with the Amateur Athletic Union (AAU), an organization of amateur athletes at all levels. The NCAA and the AAU have long clashed over issues such as who shall be primarily responsible for the selection of Olympic athletes and who will control international amateur competition, where many NCAA athletes ordinarily compete.<sup>42</sup> The inability of the NCAA and the AAU to agree on such subjects has resulted in the NCAA declaring ineligible athletes who participate in AAU-sanctioned international competition (for example, track contests with the Soviet Union's National Team) and the AAU refusing to allow its minions to participate in NCAA-sponsored activities. Several bills have been introduced in the United States Congress which have the intent of taking the eligibility question in international meets out of the hands of the NCAA and the AAU. Both athletes and coaches would be free to participate in international athletic contests without fear of reprisal. One particular proposed piece of legislation, introduced by Representative Peter A. Peyser of New York, would establish a Federal Scholastic and Amateur Sports Commission to oversee international athletic competition by Americans.<sup>43</sup>

#### CONCLUSION

Despite its protestations, the NCAA does act as a cartel. The success of the cartel has been limited by the market structure of intercollegiate athletics, but there

<sup>39</sup> Koch, *supra* note 3, at 260.

<sup>40</sup> It is obvious that football stadiums which seat 80,000 or more spectators are unused most of the year. Certain intercollegiate athletic conferences actually prohibit their members from renting their facilities to professional teams. One may expect such rules to be eventually abolished.

<sup>41</sup> The recent move by the NCAA to allow its members to schedule eleven football games rather than ten is a first step in this direction.

<sup>42</sup> See A. FLATH, *A HISTORY OF RELATIONS BETWEEN THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION AND THE AMATEUR ATHLETIC UNION OF THE UNITED STATES, 1905-1963* (1964).

<sup>43</sup> H.R. 5624, 93d Cong., 1st Sess. (1973).

are signs that the restructuring of the NCAA will increase the effectiveness of its cartel. The stimulation for restructuring the NCAA has come from a host of legal actions taken against the Association, by its own members and by the athletes that it regulates, and from the threat of some members of the cartel to leave the NCAA and to construct their own organization which would be responsive to their needs and desires.