

Should College Athletes Be Paid?

A Discussion Forum

Institute of Sports Law and Ethics, Santa Clara University

Preface

The Institute of Sports Law and Ethics (ISLE) has a strong focus on the ethical aspects of sports. In September, 2012, ISLE presented its third annual symposium, “The Role of Sports in Higher Education” (see <http://law.scu.edu/sportslaw/>). Widely divergent views on this controversial subject were voiced at the Symposium, from op-ed columnist Joe Nocera of the *New York Times* (a vociferous critic of NCAA policies) to Wallace Renfro (an NCAA Senior Vice President responsible for NCAA policies), and all points in-between.

There was a particular focus on the issue of whether college athletes should be paid. For example, the *Selected Proceedings*, which can be found at <http://law.scu.edu/sportslaw/>, include articles in favor of paying college athletes* and arguments against.†

There was also, however, one suggestion of a new way to look at this issue. That came in the lunchtime remarks of David Drummond, a senior vice-president at Google and a former varsity football player at Santa Clara University. His remarks, which are available at the link in the paragraph above, suggested that similar issues have been successfully addressed by universities that license technology created by students. His own company, Google, started with such licenses from Stanford University’s Office of Technology Licensing, licenses for which student inventors received payment.

His remarks recounted the initial criticisms of payment of students for university technology transfer, primarily how payment was, or easily could become, inconsistent with a university’s academic mission. He also recounted how these criticisms have been overcome in a way consistent with the academic mission. That consistency was facilitated by a paper, *Nine Points to Consider in Licensing University Technology*, issued in 2007 by eleven distinguished institutions: California Institute of Technology; Cornell University; Harvard University; Massachusetts Institute of Technology; Stanford University; University of Illinois, Chicago; University of Illinois, Urbana-Champaign; University of Washington; Wisconsin Alumni Research Foundation; Yale University; and Association of American Medical Colleges (<http://otl.stanford.edu/documents/whitepaper-10.pdf>). Since 2007, over 90 additional institutions have adopted the *Nine Points*. Most of these are universities or colleges that are also members of the NCAA.

* “National Letter of Indenture: How College Athletes are similar to, and in many ways worse off than, the indentured servants of colonial times,” by Andy Schwarz and Jason Belzer; “The Price of Poverty in Big Time College Sport,” by Ramogi Huma and Ellen Staurowsky.

† “Amateurism, Professionalism, Commercial Creativity and Intercollegiate Athletics: Ambivalence about Principles,” by Wallace Renfro; “Don’t Allow Pay-for-Play to Fool You,” by Linda Robertson.

The *Nine Points* approach seemed worth following up, particularly because of ISLE's location in Silicon Valley, where much technology licensing occurs. Also, as with technology transfer, criticism of payment of college athletes focuses on the alleged inconsistency of such payment with a university's academic mission.

Therefore, ISLE's Chairman (Ron Katz, a sports and intellectual property lawyer who works in the technology licensing field), Vice-Chairman (Issac Vaughn, a technology lawyer and former varsity college quarterback) and Executive Director (Mike Gilleran, who was Commissioner of the West Coast Conference for 24 years) decided to co-author a follow-up to David Drummond's paper in the format of the *Nine Points*. That paper, *Nine Points to Consider Regarding the Payment of College Athletes*, is attached. Like the predecessor Nine Points regarding technology licensing, some of the authors of which were interviewed for the new Nine Points, the authors hope that, along with the other materials about the pros and cons of paying college athletes, the new Nine Points will stimulate further discussion on this issue.

Comments and questions should be directed to Mike Gilleran at mgilleran@scu.edu. They will be posted on the ISLE website, <http://law.scu.edu/sportslaw>.

NINE POINTS TO CONSIDER REGARDING THE PAYMENT OF COLLEGE ATHLETES

By Ron Katz, Issac Vaughn, and Mike Gilleran

1. The concept of amateurism can and should be re-assessed so that it does not become obsolete in light of changed circumstances, such as the amount of money generated by some college sports and the level of commitment many of today's student-athletes must make in order to succeed.

President Teddy Roosevelt formed the NCAA in 1906 in order to implement needed safety measures in the sport of college football. At that time, it was impermissible to recruit individuals on the basis of athletic ability, much less to offer athletic scholarships. The athletic scholarship was introduced in the 1950s, when an institution's revenue in athletics was based primarily on ticket sales to home games.

In contrast, today's lucrative television contracts have become the driving revenue force behind an institution's ability to thrive in college athletics. Recently, for example, numerous universities have changed their athletic conference affiliation for well-publicized financial reasons.

It is interesting to compare, on the one hand, the NCAA of Teddy Roosevelt's time and the not dissimilar NCAA of the 1950s with, on the other hand, the NCAA 100 years after its formation. In that 100th year, 2006, NCAA President Myles Brand addressed the delegates at the NCAA Convention and noted that although the participants in college athletics should remain amateurs, the enterprise itself clearly is commercial in nature: "'Amateur' defines the participants," Brand said, "not the enterprise."¹

Since the 1950's, the NCAA has utilized the term "student-athlete," a term that long-time NCAA President Walter Byers created, as he has explained, to avoid "... the dreaded notion that NCAA athletes could be indentified as employees by state industrial commissions and the courts."² Identification as employees would, of course, give NCAA athletes rights such as workers' compensation, unionization and wages.

Athletic scholarships, however, have represented a form of pay-for-play that has avoided unionization, workers' compensation and wages for college athletes. Although this scholarship-only situation may have made sense in the 1950s, when college athletics generated relatively little revenue and required much less effort from athletes than is required today, it makes sense to re-examine this subject in light of the significant revenues generated today and the year-round efforts currently required of athletes. As the *New York Times* recently stated about workers' compensation for college athletes, the nationally televised, dramatic injury of Kevin Ware, a University of Louisville basketball player, has "...inflamed the debate about the treatment and care of unpaid college athletes who help generate hundreds of millions of dollars for their universities"³

The limits to what an athlete could receive for participation in college sports were appropriate in 1906 and arguably through 1984, when the U.S. Supreme Court decided *NCAA v. Board of Regents of the University of Oklahoma*,⁴ but those limits raise issues today for many institutions. The institutions reaping significant television revenue and BCS (Bowl Championship Series) revenue could now devise a process of compensation to their athletes that comports with traditional American notions of fairness in the marketplace, just as they have adjusted to comply with the gender equity provisions of Title IX, which was implemented in 1972.⁵ The process of complying with Title IX has occurred despite the fact that it presented a financial challenge for many institutions, particularly those without significant television revenue streams.

In the 1984 *Board of Regents* case referenced above, the Supreme Court of the United States held that the NCAA could no longer limit telecasts of college sporting events. There was little television revenue for institutions and conferences prior to the court taking control of football television from the NCAA in 1984. However, once the NCAA could no longer limit its members from maximizing their television revenues, those revenues increased exponentially and changed the landscape of college sports.

Justice Byron White, who was a college football All-American, dissented in the *Board of Regents* case and warned of problems from vastly increased revenues flowing to college sports as a result of the Supreme Court ruling that the NCAA could no longer limit football TV revenues:

By mitigating what appears to be a clear failure of the free market to serve the ends and goals of higher education, the NCAA ensures the continued availability of a unique and valuable product, the very existence of which might well be threatened by unbridled competition in the economic sphere.⁶

The unbridled competition to which Justice White referred has now come to pass, bringing with it numerous scandals like those at Penn State and the University of Miami.

The concept of amateurism at American universities that started with the creation of the NCAA in 1906 was based on the model used by elite English universities, *i.e.*, participation in amateur athletics was limited to those who could afford it, the upper class. Money was therefore foreign to amateur athletics at first. That was appropriate because, among other reasons, athletics consumed little of the athletes' time, unlike today when college athletes must train year around.

Now, however, that billions of dollars are flowing to amateur athletics, a more basic American tradition is appropriate to consider: one who creates value should share proportionally in that value. Some athletes in some sports produce a great deal of revenue for their college or university, and it is appropriate to examine potential models that would allow those athletes to reap the benefits of the substantial value they create.

2. There is a consensus that some college sports (football and men's basketball) are businesses generating hundreds of millions of dollars for a few dozen schools, primarily from television contracts.

As noted earlier, the new world of football television was ushered in by the decision of the U.S. Supreme Court in the 1984 *Board of Regents* case. When the NCAA controlled football television rights, it received annual rights fees that were very low as a result of the NCAA policy limiting telecasts to a few per week. Now that institutions and conferences control their football television rights, the payments have risen by several orders of magnitude. However, the participants who, in large part, generate this significantly enhanced revenue (the student-athletes) have not participated in this extremely rapid growth of rights fees.

The combination of football and basketball television rights fees for the Big Six conferences as of May 2012 is as follows:⁷

Pac 12 Conference: \$3 billion, 12-year deal with ESPN and Fox. The Pac 12 also has started its own cable network.

Big 12 Conference: Combined \$2.5 billion, 13-year deal with Fox and ESPN/ABC. Also, the Big 12 has a \$78 million, four-year deal with FSN.

Atlantic Coast Conference: \$3.6 billion, 15-year deal with ESPN/ABC.

Southeastern Conference: \$2.25 billion, 15-year deal with ESPN/ABC, and \$825 million, 15-year deal with CBS College Sports.

Big Ten Conference: \$1 billion, 10-year deal with ESPN/ABC, and a \$72 million, six-year deal with CBS for basketball only. Also, the Big Ten Network has a \$2.8 million, 25-year deal with News Corp.

Big East Conference: \$200 million, six-year deal with ESPN/ABC.

The NCAA basketball tournament generated \$9 million per year in 1981, \$215 million per year in 1997 and generates approximately \$750 million per year now.⁸ Although this financial picture is far different from what it was in the early 20th century, the athletes who now generate this substantial revenue are still unpaid or, if one considers scholarships as pay, underpaid in proportion to what they generate. In professional football and basketball, for example, players are paid approximately one-half of the revenues generated.

3. There is also a consensus that there are many athletic programs other than those mentioned above that are not businesses.

For example, women's sports are similar to all men's sports (except football and basketball) in that they generally do not generate a profit for their institutions. There is therefore no direct market reward in which the athletes could participate. The old/current model of amateurism

probably makes sense in these cases, with one exception: any new model of amateurism must comply with Title IX.

Therefore, whatever monies are directed to men's sports must be directed equally to women's sports. If, for example, football and men's basketball generated \$1,000,000 that should go to athletes, one-half of that would have to go to female athletes in a way that complies with Title IX.

4. It is important to recognize the distinctions between Points 2 and 3 above so that business norms can be observed in the context of Point 2.

The time for a one-size-fits-all approach appears to have passed. In earlier times, for example, it would have been unheard of that a university's head football coach was the highest paid state employee, surpassing substantially what is paid to the president of his university or the governor of his state. Now, however, that situation is not rare. *USA Today* has reported that the average annual salary for head football coaches at FBS (Football Bowl Subdivision) schools is \$1.64 million.⁹ According to a recent book:

Between 1985-1986 and 2009-2010 at 44 universities in one of the five major conferences, average compensation expressed in 2009-2010 dollars increased for full professors from \$107,400 to \$141,600, for presidents from \$294,400 to \$559,700, and for head football coaches from \$273,300 to \$2,054,700.¹⁰

For example, Alabama head football coach Nick Saban's contract extension calls for him to make \$45 million over the next eight years. His players, on the other hand, receive only an NCAA scholarship that does not even cover their basic living expenses.¹¹

The situation is similar for men's basketball. *USA Today* reported that the average salary for head coaches in the NCAA Division I Basketball Tournament is \$1.47 million.¹²

There is acceptance that market forces have shaped the current reality for seven-figure coaching salaries. As will be discussed below, it has also been accepted that student inventors (like the founders of Google, who were Stanford students when they came up with the ideas that created Google), should be compensated by their universities for student inventions that generate revenue. Is, however, there any meaningful distinction between student inventors and student athletes?

5. Business norms include compensating contributors in a way that is rationally related to their contribution.

Successful coaches and administrators reap the benefits of the marketplace, as is customary and appropriate in a capitalist system. Regarding student inventors, as will be discussed below, the Bayh-Dole Act of 1980¹³ *requires* that they receive a share of royalties from their inventions. It is not illogical to suggest that inventors, who are college students, and athletes, who are college students, should be treated the same, *i.e.*, each should share in the value they create for their institutions without being penalized. Stanford, for example, paid, not penalized, the founders of

Google for their inventions while they were students. Why should a student-athlete be penalized if he or she is paid for his or her contributions?

6. Business norms include insuring contributors from injuries that may last beyond their college careers.

Such insurance is simply a recognition that an individual who suffers an injury while working to benefit the institution should not suffer economically as a result of that injury. In this regard, California recently implemented the Student-Athlete Bill of Rights,¹⁴ which includes expanded rights to insurance coverage. The *New York Times* recently quoted a Northwestern University Business School professor as follows on workers' compensation for student-athletes:

American labor law created decades ago established that workers exposed to injuries in the normal course of their jobs should not be expected to pay because of those injuries. The NCAA is 100 years behind the rest of the country.¹⁵

7. Compensation for athletes is no different in principle from compensating computer science students in accord with their financial contributions to their department and to their school.

The fact that computer science students receive compensation under carefully considered programs makes them no less students and no less in accord with their school's academic mission. Indeed, they enhance that mission,¹⁶ and, as noted above, U.S. law (the Bayh-Dole Act; see fn. 13) requires student inventors to be compensated.

Just as the academic missions of colleges and universities have not been compromised by the efforts of students who were compensated for inventing, it is arguable that institutions' academic missions would not be compromised by permitting athletes to participate in market benefits. David Drummond, Google Senior Vice President and Chief Legal Officer, was a varsity football player in college and is very familiar with university technology transfer programs. He has noted that "...while architects and managers of technology transfer recognize that they run a business that must be balanced with the American social, economic and academic norms, the folks who run big time college sports have chosen to operate outside those norms under the increasingly bizarre banner of amateurism."¹⁷

8. For college sports that are not multi-million dollar businesses, different norms should apply, perhaps similar to those that existed before certain college sports became multi-million dollar businesses.

There are clearly different market forces acting differently on different sports. Therefore, the cookie-cutter approach that was implemented by the NCAA decades ago may now serve as a model for only some, but not all, sports.

The amateur sports world that early twentieth-century fictional icon Frank Merriwell of Yale dominated has little in common with contemporary football and men's basketball. That bygone world, however, is not unlike other sports, in which it can be said that the coaches and

participants are primarily motivated by love of the sport with no expectation of substantial market rewards. In the absence of significant market forces such as those in football and men's basketball, the traditional model of NCAA amateurism seems to work well.

It used to be the case that NCAA schools could choose to be in Division I for some sports and in Division II for others. This practice appears to make eminently good sense. The result of the rule change requiring schools to choose one Division for all their sports resulted in a number of schools dropping football.

9. Colleges should be able to choose on a sport-by-sport basis whether they opt for the business model or not.

Of course, some will argue that an institution that decides not to participate in a market-driven model will not be able to recruit successfully against an institution that agrees to participate in a market-driven model. Recruiting advantages, however, have always existed, and will continue to exist, no matter what model is utilized. The fact of the matter is that many Division I schools are not now, nor will they ever likely be, competitive with the few dozen schools that generate significant revenue from football and men's basketball. Perhaps these few dozen schools should operate in a Division of their own. Indeed, in football the BCS already is, in effect, such a Division.

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¹ <http://fs.ncaa.org/Docs/NCAANewsArchive/2006/Association-wide/brand%2Bcharts%2Bcourse%2Bfor%2Bcollegiate%2Bmodels%2Bnext%2Bcentury%2B-%2B1-16-06%2Bncaa%2Bnews.html>

² Byers, Walter Unsportsmanlike Conduct; Exploiting College Athletes, p. 69 (University of Michigan: 1995).

³ New York Times, "In a Moment, It Can All Be Gone," April 5, 2013, p. B11.

⁴ 468 U.S. 85 (1984).

⁵ 20 U.S.C. 1681-1688.

⁶ 468 U.S. at 122.

⁷ See Richard T. Karcher, "Broadcast Rights, Unjust Enrichment, and the Student-Athlete," 34 Cardozo Law Review 107 at p.142.

⁸ Paul C. Weiler, Gary R. Roberts, Roger I. Abrams, and Stephen F. Ross, Sports and The Law, pp. 888-889 (West Publishing Co.: 2011).

⁹ USA Today, "Special Report: NCAA Football Coaches' Compensation," November 20, 2012, p. A1.

¹⁰ Clotfelter, Charles T., Big-Time Sports in American Universities, p. 266 (Cambridge University Press: 2011).

¹¹ The California Assembly is considering a bill (AB 475) that would require certain universities to cover all the costs of athletes attending their institution.

¹² USA Today, “USA Today Special Report: Coaches’ Compensation,” April 4, 2013, p. A1.

¹³ 35 U.S.C. 202(c)(7)(B).

¹⁴ California Education Code, Section 67450 *et seq.*

¹⁵ New York Times, “In a Moment, It Can All Be Gone,” April 5, 2013, p. B15, quoting David Dranove.

¹⁶ See “In the Public Interest: Nine Points to Consider in Licensing University Technology,” issued March 6, 2007, by California Institute of Technology, Cornell University, Harvard University, Massachusetts Institute of Technology, Stanford University, University of California, University of Illinois, Chicago, University of Illinois, Urbana-Champaign, University of Washington, Wisconsin Alumni Research Foundation, Yale University, and Association of American Medical Colleges (AAMC). Since 2007, over ninety other institutions of higher learning have endorsed this document, which can be found at <http://otl.stanford.edu/documents/whitepaper-10.pdf>.

¹⁷ See <http://law.scu.edu/sportslaw/>