

Ed O'Bannon vs. NCAA

*An examination of O'Bannon's legal claim that the
NCAA illegally uses the likeness and image of former student-athletes.*

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Presented to
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Business Law 205

December 1, 2009

Should athletes whose playing days are far behind them be compensated when the NCAA licenses their likeness and image for commercial use? Should those same athletes be able to negotiate their own deals with TV networks and video game makers who want to use those same images and likenesses?

Ed O'Bannon thinks so.

On July 21, 2009, O'Bannon, a former UCLA basketball star, filed a class action complaint against the National Collegiate Athletic Association ("NCAA") seeking remedy for the NCAA's use of former student-athletes likeness and image. The class action lawsuit was filed on behalf of O'Bannon himself, former student-athletes who competed in Men's Basketball and Football at NCAA Division 1 institutions ("Damages Class"), and current student-athletes competing in Men's Basketball and Football at NCAA Division 1 institutions ("Declaratory and Injunctive Relief Class"). In the complaint, O'Bannon contends that the NCAA has violated his Right of Privacy, as well as the Right of Publicity of the Classes by licensing their likeness and image, without permission and for profit, and that the NCAA has not shared that revenue with the Classes. (Edward C. O'Bannon v. National Collegiate Athletics Association, 2009).

The NCAA asserts that they have the right to license said likeness and image of O'Bannon and the Classes because (NCAA Manual) (NCAA Manual) (NCAA Manual) they signed "Form 08-3a" in which student-athletes authorize the NCAA to use their

“name or picture to generally promote NCAA championships or other NCAA events, activities or programs” (Addendum A)

O’Bannon counters saying “Form 08-3a” is illegal because it is vague and ambiguous, was signed by student-athletes without representation, and was coerced from student-athletes in exchange for their eligibility to practice and compete in their sport.

This paper will examine O’Bannon’s claim that his Right to Publicity has been violated, with specific focus on “Form 08-3a” and its legality.

Background and Facts of the Case

The plaintiff, Edward O’Bannon, competed on the UCLA Men’s Basketball team during the 1991-1995 seasons. During the 1994-95 season, Mr. O’Bannon lead his team to the National Championship, scoring 30 points and had 17 rebounds in the championship game. Also during the 1994-95 season Mr. O’Bannon received the John R. Wooden award as the nation’s most outstanding men’s basketball player. Ed O’Bannon is arguably one of the most recognized collegiate athletes of the last 30 years.

There are numerous examples of commercial products that specifically use the likeness and image of Mr. O’Bannon for promotional purposes, including but not limited to, commemorative DVD box sets from the 1994-95 season offered for \$39.95, Final Four Highlight Video DVD offered for \$24.95, NCAA On-Demand video footage available at various rates, the NCAA Basketball 09 video game produced by Electronic Arts, Inc. “Classic Games” feature where game players can select Mr. O’Bannon’s 1995 UCLA

team, and the NCAA on-line photo store where images of Mr. O'Bannon are offered for sale. (Edward C. O'Bannon v. National Collegiate Athletics Association, 2009)

The Defendant, NCAA, is an unincorporated association. Its members are the colleges, universities, and conferences that make up the NCAA. The members appoint volunteer representatives that serve on committees that introduce and vote on rules called bylaws. The members also establish programs to govern, promote and further the purposes and goals of intercollegiate athletics. (NCAA Manual)

The NCAA requires that every student-athlete complete the NCAA's "Form 08-3a", also known as the Student-Athlete Statement, every year. In question is "Part IV: Promotion of NCAA Championships, Events, Activities or Programs" (About Us) which states, "You authorize the NCAA [or a third party acting on behalf of the NCAA (e.g., host institution, conference, local organizing committee)] to use your name or picture to generally promote NCAA championships or other NCAA events, activities or programs" (Addendum A). If student-athletes do not sign this form, they are deemed ineligible for practice and competition until the Student-Athlete Statement is signed and completed. This is the form that the NCAA references in their claim that they have the right to license the likeness and image of former student-athletes.

The NCAA and its for-profit business partners, license the likeness and image of former student-athletes and collect billions of dollars through television contracts, rebroadcasts of "classic" games, DVD game and highlight film sales and rentals, "stock footage" sales

to corporate advertisers, photograph sales, video game sales, jersey and other apparel sales.

Thought Equity Motion, a business partner of the NCAA and self-described as the world's largest provider of online motion content, most of which is royalty-free, describes the NCAA's video content archive as "one of the most unique and valuable content collections in the world" (About Us) and the annual market for collegiate licensed merchandise is projected to be \$4.0 billion (Collegiate Licensing Company). The former student-athletes, whose likeness and image are used as part of this collection, receive no compensation.

An Examination of O'Bannon's Argument

At the root of the issue regarding ownership of the student-athletes image and likeness lies the former student-athlete's Right of Publicity and the NCAA's "Form 08-3a." The NCAA claims that student-athletes have authorized the NCAA to use said likeness and image by signing "Form 08-3a" and therefore have not violated their Right of Publicity.

However, O'Bannon has a strong argument that "Form 08-3a" is illegal. The actual language of "Form 08-3a, Part IV" is vague and ambiguous. It does not provide any information on when, where, and how the NCAA may "generally promote" events or activities. Furthermore, it's reasonable for a student-athlete to assume that "Part IV" refers to the given academic year during which they sign "Form 08-3a" and other required paperwork. This assumption comes from the fact that a student-athletes actual

scholarship – the very thing they worked so hard to earn – is in fact a one-year deal. Yes, the scholarship paperwork (officially referred to as “Grant In Aid”) is part of the required paperwork package that also includes “Form 08-3a.”

At least that’s the assumption that one student-athlete made. Doug Szymul, former star football player at Northwestern University confirms: “Yes, I actually read the forms that we had to fill out...I just figured that it was for that year only, just like the scholarship, because we had to do it every year. But (the form) didn’t really say, and I didn’t ask because it didn’t matter; I had to sign it to be able to play, so it’s not like I’m going to argue about it.” (Szymul, 2009)

Mr. Szymul’s comment also brings up another point. Young adults, usually not much older than 18, are signing these forms without representation. Not only is representation not provided, the NCAA nor member institutions advise student-athletes that they can seek legal advice in connection with NCAA-required paperwork. This policy is exploitative, especially given the lack of life experience.

The balance of power may slowly, very slowly, be starting to shift. In February, an Ohio court ruled in *Oliver v. NCAA*, and found in favor of an Oklahoma State baseball player, Andrew Oliver, who was suspended from an important playoff game for hiring a lawyer/agent to assist in his contract negotiations with a Major League Baseball team. The NCAA argued that legal representation resulted in Oliver becoming a professional – a strict violation of the NCAA’s amateurism bylaws – thus resulting in the suspension.

Judge Tone's opinion in *Oliver v. NCAA* clearly states a student-athlete is a third party beneficiary of the contract between the NCAA and a member institution, and as such is entitled to a "covenant of good faith and fair dealing" and that disallowing legal representation is a violation of that fiduciary relationship. (Tone, 2009)

This case is currently under appeal. If it is upheld, the NCAA may be required to educate all student-athletes of their right to representation during the signing of these documents. Furthermore, the NCAA may also be required to alter some of their policies so that representation may be sought without penalty. For example, if a student-athlete chooses to obtain representation before signing documents, the NCAA should not be allowed to penalize this decision with suspension, or missed practice or game time. Additionally, if a student-athlete chooses representation but is not of financial means to pay for it, look for the NCAA to provide a way for the student-athlete to obtain necessary representation, as to avoid the look that a more financially stable athlete and their family have an advantage over a student-athlete of lesser means. It would be imperative that all student-athletes not only know about representation, but also have access to it, to avoid any impropriety by the NCAA.

Additionally, student-athletes feel pressured to sign these forms regardless of their content, as evidenced by Mr. Szymul's previous remark, lest they give up their eligibility. As the NCAA's policy stands currently, a student-athlete will not be cleared to practice or play games with their team until "Form 08-3a" is completed, signed and confirmed by

the member institution's compliance office. In essence, the student-athletes are coerced into signing this form, with their eligibility as leverage.

Student-athletes would be hesitant to contest "Form 08-3a" for one reason: playing time. By contesting "Form 08-3a" an athlete would be going against the grain of athletic culture by willingly removing themselves from the team training thus jeopardizing their teammates and coaches trust in them, and altering the team atmosphere and chemistry; something that is so hard to achieve yet so fragile. Coaches are not lenient with athletes who are viewed as selfish, and who put themselves before the goals and betterment of the team. Even if the eligibility concerns surrounding "Form 08-3a" were quickly resolved, the lasting impact of a defection from the team identity can take a very long time to improve, if it's able to be improved at all. If a student-athlete chose to attend an NCAA member institution with their goal to be a successful athlete, why would they endanger that opportunity just to squabble over a few words that they probably don't understand anyway?

O'Bannon has a very strong argument as to the illegality of "Form 08-3a" which in turn resulted in a violation of O'Bannon's Right of Publicity. It is a basic right of an individual to own their name, voice, signature, photograph or likeness, and the individual has the authority to provide consent for its use. California's Right of Publicity Statute, states that "any person who knowingly uses another's name, voice, signature, photograph or likeness in any manner on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of products, merchandise, goods or services,

without such person's prior consent, shall be liable for any damages sustained by the person or persons injured as a result thereof” (California Civil Code 3344).

Recent case law also supports O’Bannon’s claim that his Right of Publicity was violated. Ironically, one of the cases involves another UCLA basketball great, Kareem Abdul-Jabbar, formerly known as Lew Alcindor. Abdul-Jabbar sued General Motors and its advertising agency based on an Oldsmobile’s TV commercial that aired during the NCAA basketball tournament. In the commercial, Oldsmobile referred, in the format of a trivia quiz, to an NCAA record: Lew Alcindor’s selection as Most Outstanding Player in three NCAA tournaments. Central District of California Court granted a summary judgment to General Motors on the grounds that Abdul-Jabbar abandoned his rights by legally changing his name and abandoning all use of his birth name. The Ninth Circuit court reversed the judgment, remanded, and opined, “We hold that Abdul-Jabbar has alleged sufficient facts to state a claim under both California common law and section 3344. The statute's reference to 'name or likeness' is not limited to present or current use. To the extent GMC's use of the plaintiff's birth name attracted television viewers' attention, GMC gained a commercial advantage” (Kareem Abdul-Jabbar vs. General Motors, 1993). Here, the court found that even though Abdul-Jabbar no longer used his birth name, it was still recognizable and attractive, thus a commercial advantage to General Motors; much in the same way Ed O’Bannon’s name is still recognizable and attractive, thus a commercial advantage to the NCAA and all of their business partners.

Waits v. Frito-Lay, had a similar result. In this case, singer Tom Waites sued Frito-Lay claiming false endorsement and misappropriation of his voice in a Frito-Lay commercial. The jury return a \$2.5 million dollar verdict in Waits favor and the Ninth Circuit Court affirmed: “when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs and have committed a tort in California” (Tom Waites vs. Frito Lay, 1992). Here, a distinctive characteristic of Mr. Waites was misappropriated, much in the same way that distinctive characteristics of Ed O’Bannon (his name, likeness and image) have been misappropriated.

Where Do We Go From Here?

Though O’Bannon does not specify damages in his complaint, a reasonable person can expect the NCAA to pay out big money if they are found liable for O’Bannon’s violation of his Right of Publicity. That money will go not only to O’Bannon, but also to the Classes. It will be incredibly difficult to sort through all of the individual athletes who have been violated and determine how much each of them might be due.

It’s for that reason that I would like to see the NCAA use this revenue stream to set up a pension fund for all former student-athletes. Pension funds would only be accessible to student-athletes who have completed their four years of eligibility and successfully completed their degree at their home school. By paying a student-athlete a portion of the money that they helped earn for their school, conference and the NCAA you are allowing them to share in their own success. But by paying this money as a pension, upon

completion of certain criteria and after the student-athlete no longer has eligibility remaining; you are adhering to the NCAA's sacred "amateurism" standard. There is nothing in existence like this, and I believe that this is a modern, pro-active way to use this revenue stream positively and to great benefit.

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Addendum A



Form 08-3a Academic Year 2008-09

Student-Athlete Statement – Division I

- For:** Student-athletes.
Action: Sign and return to your director of athletics.
Due date: Before you first compete each year.
Required by: NCAA Constitution 3.2.4.6 and NCAA Bylaws 14.1.3.1 and 30.12.
Purpose: To assist in certifying eligibility.
Effective Date: This NCAA Division I statement/consent form shall be in effect from the date this document is signed and shall remain in effect until a subsequent Division I Student-Athlete Statement/Drug-Testing Consent form is executed.
-

Student-Athlete: _____
(Please Print Name)

Name of your institution: University of Kentucky

This form has seven parts:

- A statement concerning eligibility;
- A Buckley Amendment consent;
- An affirmation of status as an amateur athlete;
- A statement concerning the promotion of NCAA championships and other NCAA events;
- Results of drug tests;
- Previous involvement in NCAA rules violation(s); and
- An affirmation of valid and accurate information provided to the NCAA Eligibility Center and admissions office, including ACT or SAT scores, high school attendance, completion of coursework and high school grades.

If you are an incoming freshman, you must complete and sign Parts I, II, III, IV, V and VII to participate in intercollegiate competition. If you are an incoming transfer student or a continuing student, you must complete and sign Parts I, II, III, IV, V and VI to participate in intercollegiate competition.

Before you sign this form, you should read the Summary of NCAA Regulations provided by your director of athletics or his or her designee or read the bylaws of the NCAA Division I Manual that deal with your eligibility. If you have any questions, you should discuss them with your director of athletics or your institution's compliance officer, or you may contact the NCAA at 317/917-6222.

The conditions that you must meet to be eligible and the requirement that you sign this form are indicated in the following bylaws of the Division I Manual:

- Bylaws 10, 12, 13, 14, 15 and 16
 - Bylaws 14.1.3.1, 18.4 and 31.2.3
-

Part I: Statement Concerning Eligibility.

By signing this part of the form, you affirm that, to the best of your knowledge, you are eligible to compete in intercollegiate competition.

You affirm that your institution has provided you a copy of the Summary of NCAA Regulations or the relevant sections of the Division I Manual and that your director of athletics (or his or her designee) gave you the opportunity to ask questions about them.

You affirm that you meet the NCAA regulations for student-athletes regarding eligibility, recruitment, financial aid, amateur status and involvement in gambling activities.

You affirm that all information provided to the NCAA, the Eligibility Center and the institution's admissions office is accurate and valid, including ACT or SAT scores, high school attendance, completion of coursework and high school grades, as well as the student-athlete's amateur status.

You affirm that you have reported to the director of athletics or his or her designee of your institution any violations of NCAA regulations involving you and your institution.

You affirm that you understand that if you sign this statement falsely or erroneously, you violate NCAA legislation on ethical conduct and you will further jeopardize your eligibility.

Name (Please Print)

Date of Birth

Age

Signature of Student-Athlete

Home Address (Street or P.O. Box)

Date

Home City, State, and Zip Code

Sport(s)

Part II: Buckley Amendment Consent.

By signing this part of the form, you certify that you agree to disclose your educational records.

You understand that this entire form and the results of any NCAA drug test you may take are part of your educational records. These records are protected by the Family Educational Rights and Privacy Act of 1974 and they may not be disclosed without your consent.

You give your consent to disclose only to authorized representatives of this institution, its athletics conference (if any) and the NCAA, except as permitted in the Drug-Testing Consent form, the following documents:

- This form;
- Results of NCAA drug tests and related information and correspondence;
- Results of positive drug tests done by non-NCAA national or international athletics organizations;
- Any transcript from your high school, this institution, or any junior college or any other four-year institutions you have attended;
- Precollege test scores, appropriately related information and correspondence (e.g., testing sites, dates and letters of test-score certification or appeal), and where applicable, information relating to eligibility for or conduct of nonstandard testing;
- Graduation status;
- Your social security number and/or student identification number;
- Race and gender identification;
- Diagnosis of any education-impact disabilities;
- Accommodations provided or approved and other information related to any education-impact disabilities in all secondary and postsecondary schools;
- Records concerning your financial aid; and
- Any other papers or information pertaining to your NCAA eligibility.

You agree to disclose these records only to determine your eligibility for intercollegiate athletics, your eligibility for athletically related financial aid, for evaluation of school and team academic success, for awards and recognition programs highlighting student-athlete academic success, for purposes of inclusion in summary institutional information reported to the NCAA (and which may be publicly released by it), for NCAA longitudinal research studies and for activities related to NCAA compliance reviews and athletics certification. You will not be identified by name by the NCAA in any such published or distributed information. This consent shall remain in effect as long as any issues regarding the purposes listed above exist.

You also agree that information regarding any infractions matter in which you may be involved may be published or distributed to third parties as required by NCAA policies, bylaws or procedures.

Date

Signature of Student-Athlete

Part III: Affirmation of Status as an Amateur Athlete.

You affirm that you have read and understand the NCAA amateurism rules.

By signing this part of the form, you affirm that, to the best of your knowledge, you have not violated any amateurism rules since you requested a final certification from the NCAA Eligibility Center or since the last time you signed a Division I student-athlete statement, whichever occurred later.

You affirm that since requesting a final certification from the Eligibility Center, you have not provided false or misleading information concerning your amateur status to the NCAA, the NCAA clearinghouse and the institution's athletics department, including administrative personnel and the coaching staff.

Name (Please Print)

Date

Signature of Student-Athlete

Part IV: Promotion of NCAA Championships, Events, Activities or Programs.

You authorize the NCAA [or a third party acting on behalf of the NCAA (e.g., host institution, conference, local organizing committee)] to use your name or picture to generally promote NCAA championships or other NCAA events, activities or programs.

Name (Please Print)

Signature of Student-Athlete

Date

Part V: Results of Drug Tests.

If you have not tested positive for a banned substance by the NCAA and/or by a non-NCAA national or international athletics organization, sign A and C. If you have tested positive, complete B and C.

A. No positive drug test.

You affirm that you have never tested positive by the NCAA and/or by a non-NCAA national or international athletics organization for a banned substance; violated drug-testing protocol; or failed to show for a drug test.

Name (Please Print)

Signature of Student-Athlete

Date

B. Positive drug test.

If you have ever tested positive for a substance banned by the NCAA and/or by a non-NCAA national or international athletics organization; violated drug-testing protocol; or failed to show for a drug test, the results must be declared here. The results of a non-NCAA national or international athletics organization positive drug test must be reported by your director of athletics to NCAA Education Services. Should you consequently transfer, you are obligated to report NCAA positive drug-test results to the respective institution.

Date of test

Organization conducting test

Substance

Are you currently under such a drug-testing suspension? Yes _____ No _____

C. Future positive test.

Should you test positive for a substance banned by the NCAA and/or by a non-NCAA national or international athletics organization; violate drug-testing protocol; or fail to show for a drug test, at any time after you sign this statement, as described in the above paragraph, you must report the results to your director of athletics, who must then report the results to the NCAA.

Name (Please Print)

Date

Signature of Student-Athlete

Part VI: Incoming Transfers – Previous Involvement in NCAA Rules Violation(s).

Have you previously attended a four-year NCAA Division I, II or III institution?

Yes _____ No _____

If yes, what is the name(s) of the institution(s)?

Are you aware of any NCAA violations you were involved in while previously attending an NCAA institution?

Yes _____ No _____

If yes, did this violation result in your being withheld from competition while attending your previous institution?

Yes _____ No _____

If you answered yes to either of the above questions, please provide an explanation.

Part VII: Incoming Freshmen – Affirmation of Valid ACT or SAT Score.

You affirm that, to the best of your knowledge, you have received a validated ACT and/or SAT score. You agree that, in the event you are or have been notified by ACT or SAT of the possibility of an invalidated test score, you will immediately notify the director of athletics of your institution. You affirm that all information provided to the NCAA, the Eligibility Center and institution's admissions office is valid and accurate, including high school attendance, completion of coursework and high school grades. You affirm that you did not fraudulently earn your qualifying ACT or SAT score by having someone else take the test for you, copying answers from another person taking the test, etc.

Name (Please Print)

Date

Signature of Student-Athlete

What to do with this form: Sign and return it to your director of athletics or his or her designee before you first compete. This form is to be kept in the director of athletics' office for **six years**.

Any questions regarding this form should be referred to your director of athletics or your institution's NCAA compliance staff, or you may contact the NCAA at 317/917-6222.