A Proposal for Group Licensing of College Athlete NILs

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Abstract

Recent litigation has clarified rules governing the right to publicity and in some cases has expanded opportunities for NCAA college athletes to commercialize their NILs. Those opportunities will likely increase as state and federal legislation allows compensation for NIL-related activities. Drawing from the experience of patent pools and performing rights organizations, this article discusses the economic efficiencies of group licensing and advances a proposal for future licensing of college athlete NILs. A group licensing entity for NILs would serve the dual purposes of enabling college athlete compensation for NIL-related activities while complying with NCAA rules related to competition in college athletics. The NIL licensing entity would be created by Congress as a non-profit, quasi-governmental membership organization operating on behalf of college athletes and perform many pro-competitive functions.

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Table of Contents

I. Introduction

Staring down the barrel of a mostly canceled football season, colleges face an apocalyptic threat to their athletic programs. Even prior to the cancellation of the Big Ten football season, legendary University of Wisconsin Badger football coach Barry Alvarez estimated a loss of $60-$70 million if football was played with no fans.[1] The losses will surpass $100 million if the games are canceled in their entirety. It is not hyperbolic to predict many sports are in danger of cancellation with the loss of any significant portion of football revenue, the oxygen that powers major athletic programs. Colleges will need to make devastating cuts under even the best-case scenario. The National Collegiate Athletic Association (NCAA) at the same time remains mired in a long and, many would say, damaging legal battle over the rights of college athletes to exploit and profit from their name, image and likeness (NIL).

State legislatures and Congress are busy trying to find ways to solve the long-running dispute by mandating often conflicting mechanisms for athletes to be compensated while maintaining their NCAA amateur status. The NCAA has offered preliminary recommendations attempting to draw boundaries around the newly formed NIL playing field. Under these recommendations, however, hundreds of millions of dollars of revenue – that could go to athletes and to colleges facing financial ruin in their athletic departments – will go unearned. With Congress the likely final arbiter of conflicting state laws and NCAA guidelines, this article proposes a framework wherein the NCAA could earn substantially more revenues in a dire economic crisis, athletes could earn increased funds from commercializing their NILs and consumers could obtain the products they want such as NCAA football and basketball video games and jerseys of their favorite college players.

The NCAA reacted to the changing legal environment with a series of proposals regarding the commercial use of college athlete NILs. In April 2020 it released the final report of its working group (the "NCAA Report"), which recommends changes that could allow college athletes to receive NIL-related compensation from third-party endorsements and from college athlete work product or business activities.[2] The NCAA report emphasizes that any activities should maintain distinctions between collegiate and professional athletics and between the business activities of college athletes and those of NCAA-affiliated institutions. For example, the NCAA report states that "[o]utside the context of providing financial aid up to cost of attendance as allowed by prevailing law, schools, conferences and the NCAA should play no role" in college athletes NIL activities, and forbids college

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1 Mark Schlabach, *Barry Alvarez Warns Wisconsin Athletics 'At Risk' If Football Season Canceled*, ESPN (July 23, 2020), https://www.espn.com/college-football/story/_/id/29526443/barry-alvarez-warns-wisconsin-athletics-risk-football-season-canceled (last visited July 27, 2020).

2 NCAA Board of Governors, Federal and State Legislation Working Group Final Report and Recommendations 22-23 (April 17, 2020), https://ncaaorg.s3.amazonaws.com/committees/ncaa/wrkgrps/fslwg/Apr2020FSLWG_Report.pdf (last visited July 15, 2020) [hereinafter referred to as "NCAA Report"].

athletes from using their facilities, uniforms, trademarks or other intellectual property.[3] The report also emphasizes the need to regulate NIL activities by college athletes in the following areas:

- "The compensation earned by student athletes for NIL activities should represent genuine payments for use of their NIL independent of, rather than payment for, athletics participation or performance."[4]
- "NIL activities must not be contingent on a prospective student-athlete's enrollment at a particular school or group of schools, nor otherwise used as an inducement by a school or booster."[5] The report also recommends safeguards to ensure that "newly permitted activities are not utilized by boosters in a manner that circumvents the divisions' amateurism rules. This should include consideration of the disclosure and enforcement mechanisms that may be necessary to monitor the new NIL activities and payments."[6]
- "The use of agents, advisors and professional services by student-athletes in connection with the NIL activities must be regulated."[7]
- "NIL activities must not interfere with NCAA member institutions' efforts in the areas of diversity, inclusion or gender equity."[8]

The NCAA report makes a related distinction between commerce involving individual athlete NILs and team-based products that rely on group licenses to the NILs of many players. The NCAA report recommends no change to its prohibition on activities involving group licensing, based on its position that 1) athlete NILs are not legally required in those settings; and 2) group licensing could be difficult because college athletes currently lack a legal structure (e.g., a player's association) similar to those used to negotiate group licenses in professional sports leagues. The NCAA report also recommends that the NCAA continue to explore whether those legal hurdles can be overcome so that the group licensing issue can be revisited in 2021 or later.[9]

This article responds to the NCAA report recommendation by proposing a Congressionally created, quasi-governmental entity responsible for facilitating the group licensing of college athlete NILs. Following the executive summary, Section III summarizes recent litigation concerning college athlete compensation and the state of related legislation at the state and federal levels. Section IV describes the economic efficiencies of group licensing, drawing from the experience of patent pools and

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3 *Id.* at 20.

4 *Id.*

5 *Id.*

6 *Id.* at 25.

7 *Id.* at 20.

8 *Id.*

9 *Id.* at 24.

performing rights organizations (PROs) responsible for group licensing of copyrighted music. Those entities have faced significant antitrust scrutiny, like the NCAA, and have evolved to generate significant benefits for their members and for consumers. Section V discusses specific characteristics of the proposed group licensing entity.

II. Executive summary

Athletes and other celebrities often assert a right of publicity to use their NIL in a variety of commercial activities. Their right to publicity is governed by state law, which typically prevents unauthorized use of the relevant NILs by third parties. The protection of NIL rights factors heavily in the recent debate over compensation for collegiate college athletes. With limited exceptions, the National Collegiate Athletic Association NCAA currently prohibits college athletes from commercializing their NILs via promotions or product endorsements.

Recent litigation has clarified rules governing the right to publicity and in some cases has expanded opportunities for college athletes to commercialize their NILs. For example, in *O'Bannon v. National Collegiate Athletic Association*, the Ninth Circuit Court of Appeals ruled against NCAA restrictions on college athlete compensation for their NILs beyond grants in aid (tuition, fees, required books, etc.) and ordered the NCAA to allow colleges to offer athletic scholarships to athletes up to the full cost of their attendance (grants in aid plus travel expenses, supplies, etc.).[10] *O'Bannon* and other cases increased public attention to college athlete compensation for NIL-related activities, and soon resulted in state-level reform. The first change occurred in September 2019 with California's SB 206 (The Fair Pay to Play Act, taking effect in 2023), which prohibits universities from preventing college athletes from earning compensation from their NILs.[11] Similar provisions appear in laws passed in Florida and Colorado and bills under consideration in many other states and in Congress.

Group licensing is one of many ways in which college athletes could commercialize their NILs to create team-based products. Two notable examples of group licensing entities – patent pools and performing rights organizations (PROs) – each illustrate the potential economic efficiencies of a group licensing solution for college athlete NILs. Patent pools encourage market adoption by making it easier to license patented technologies. By aggregating patents into a portfolio, a pro-competitive pool combines complementary inputs, negotiates fair and reasonable royalties, and lowers

[10] 802 F.3d 1049, 1074–76 (9th Cir. 2015).

[11] S.B. 206, 2019-2020 Reg. Sess. (Cal. 2019) <https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB206>

transactions costs by reducing the need for individual licensing agreements. Patent pools may also enable creation of new products and promote innovation.

PROs generate similar efficiencies via group licensing of copyrighted music. Without a PRO, individual musicians would need to locate each music consumer, negotiate a licensing agreement, and administer royalty payments. PROs reduce the musicians' burden by aggregating music copyrights into a portfolio, negotiating a portfolio license, collecting royalties from licensees, and distributing royalties to musicians. PROs also play an enforcement role by monitoring consumer use of copyrighted music and resolving disputes via negotiation or litigation.

The history and experience of patent pools and PROs informs the structure and operations of a group licensing entity for college athlete NILs. An independent, non-profit NIL licensing entity could serve the dual purposes of enabling college athlete compensation for NIL activities while complying with NCAA rules related to payments by NCAA members, employee status, the role of boosters and agents, and other concerns described above. The NCAA and Congress should consider the likely pro-competitive benefits of an NIL licensing entity as an alternative to the antitrust exemptions discussed in the NCAA Report and in some legislative proposals. The NIL group licensing entity would have the following roles and responsibilities:

- **Legal structure and safeguards**. The entity would be created by Congress as a non-profit, quasi-governmental membership organization operating on behalf of college athletes. Joining would be optional except in the case of team group licensing opportunities where an entire team was necessary for the licensing.[12] The entity would not be a union nor would it serve as a generalized negotiating body for college athletes other than in the context of NIL activities. In the context of NILs, however, the entity would seek to expand the market for licensed products and prevent anticompetitive conduct with antitrust safeguards. As an organized and regulated body, it would reduce the chaos of thousands of athletes, hundreds of agents and managers acting to secure thousands of deals for athletes with no central organization, compliance mechanism or rules and regulations. Putting this regulatory power on the current NCAA compliance regime would likely create an adversarial and potentially more litigious relationship between athletes and the NCAA.
- **Licensing and royalty administration**. The entity would negotiate licenses via market-based transactions, determine royalties based on factors other than athletic success, and distribute royalties to college athletes with no administrative support from the NCAA or its members. This layer of removal from the NCAA would allow the NCAA to focus on the rules around competition and the amateur student athlete. The licensing entity would serve both as a resource

[12] To avoid costly holdouts, each athlete would be enlisted solely for those activities wherein the entire team needed to consent. Any athlete would still be free to negotiate their own NIL opportunities outside those situations wherein an entire team was needed for the end product.

for athletes and as a regulator of their NIL-related activities. As a nonprofit entity, there would be little incentive other than to protect the athlete and maximize licensing revenue, which could be shared by the NCAA and member universities if joint use of intellectual property were allowed. The entity would also be responsible for enforcing guardrails to prevent abuses by external agencies, managers and licensees.

- **Compliance and dispute resolution**. The entity would monitor NIL activities for compliance with NCAA rules and applicable laws. It would seek to resolve disputes among college athletes, licensees, the NCAA and other interested parties through private litigation, arbitration or an alternative dispute resolution forum created by Congress.
- **Information collection and reporting.** The entity would create and maintain a database of college athletes, NIL activities, licensing agreements, royalties and other relevant information. As a central clearinghouse, the entity could help identify deals that appeared out of the ordinary and might reflect disguised recruitment.

III. Relevant litigation and legislation

III.A. O'Bannon, Keller and the modern birth of college athlete NIL rights

The beginnings of sea change in college athlete compensation started with a slow ripple on July 21, 2009 when Ed O'Bannon sued the NCAA and Electronic Arts in the Northern District of California.[13] Change would not come quickly. The first wave came when Judge Claudia Wilken denied the defendants' motion to dismiss, opening up discovery.[14] The case was combined with another suit brought by former college quarterback Sam Keller, and expanded to include (at-the-time) current players.[15] Discovery revealed several key facts. First, an Electronic Arts deponent revealed that the avatars in its NCAA video game were tied to specific players and their biographical information.[16] Second, plaintiffs obtained the terms of the NCAA's broadcast agreements showing the then Pac-12 receiving $185 million in fees in 2013, with expected increases pushing the totals to over $300 million by 2024.[17]

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13 O'Bannon, 802 F.3d at 1055.

14 O'Bannon v. National College Athletic Association, 2010 WL 445190 (N.D. Cal. Feb. 8, 2010); *see also* Jon Solomon, *Timeline: Ed O'Bannon vs. NCAA*, CBS Sports (June 6, 2014, 5:58 AM), https://www.cbssports.com/college-basketball/news/timeline-ed-obannon-vs-ncaa/ (last visited July 16, 2020) [hereinafter referred to as "Timeline: Ed O'Bannon vs. NCAA"].

15 *Id. See also* O'Bannon, 802 F.3d at 1055.

16 Timeline: Ed O'Bannon vs. NCAA, *supra* note 14.

17 *Id.*

In 2014, EA settled the case against it for $40 million.[18] The case against the NCAA proceeded to a bench trial, with O'Bannon seeking an injunction to enjoin the NCAA from enforcing regulations that prevent Division I football and men's basketball college athletes from receiving compensation for use of their NILs.[19] O'Bannon prevailed. Judge Wilken ruled that the NCAA's restrictions on college athlete compensation violated Section 1 of the Sherman Act.[20] Specifically, she ordered that NCAA must allow colleges to offer full cost-of-attendance scholarships and that colleges must hold up to $5,000 per year in trust for the college athlete upon graduation. On appeal, the Ninth Circuit upheld Wilken's ruling that the NCAA violated the Sherman Act by limiting compensation to college athletes and suggested that "[a]bsent the NCAA's compensation rules, video game makers would negotiate with student athletes for the right to use their NILs."[21] The Ninth Circuit also agreed that schools must allow for compensation for the full cost of attendance, but, in a win for the NCAA, it rejected the creation of trusts for the athletes.[22] The *O'Bannon* decision focused increasing attention on college athlete compensation, including payments for rights to college athlete NILs. Finally, in 2014, the NCAA settled the *Keller* litigation.[23] The settlement awarded $20 million to Division I men's basketball and Division I Bowl Subdivision football college athletes who attended certain institutions during the years the video games were sold.[24]

III.B. Unionization and employee status

The NCAA faced a new legal challenge in 2014 when football players at Northwestern attempted to unionize. After an early win for the players at the regional level of the National Labor Relations Board, the full NLRB reversed, declining to assert jurisdiction over the matter stating that a ruling was not likely to further "stability in labor relations."[25] Notably, the NLRB limited the precedential effect of the ruling, only to the Northwestern case.[26] While unsuccessful, the Northwestern unionization attempt raised a concern for the NCAA that persists today – that payment of athletes could result in those athletes being classified as employees.

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18 *Id. See also* O'Bannon, 802 F.3d at 1056.

19 Timeline: Ed O'Bannon vs. NCAA, *supra* note 14. *See also* O'Bannon, 802 F.3d at 1056.

20 O'Bannon, 802 F.3d at 1056.

21 *Id.* at 1067.

22 *Id.* at 1079.

23 NCAA, *NCAA Reaches Settlement in EA Video Game Lawsuit*, NCAA (June 9, 2014, 10:53 AM), http://www.ncaa.org/about/resources/media-center/press-releases/ncaa-reaches-settlement-ea-video-game-lawsuit (last visited July 27, 2020).

24 *Id.*

25 Nw. Univ., 362 NLRB 1350, 1350 (2015).

26 *Id.*

The seminal case relied upon by the NCAA in opposing the recognition of athletes as employees is *Vansike v. Peters,* 974 F.2d 806 (7th Cir. 1992). *Vansike* involved a challenge by a prisoner to denial of minimum wage for prison employment. In *Vansike*, the Seventh Circuit determined that the 'economic reality' of a prisoner's work for the state's Department of Corrections for penological purposes was that he was not an "employee" under the Fair Labor Standards act." [27] With the NLRB demurring on the opportunity in 2015 to examine the "economic reality" of the NCAA athlete in the Northwestern case, the question of whether the athletes constitute employees remains an open question. Since the Northwestern decision, there have been at least two more challenges seeking a ruling that NCAA athletes constitute employees. In 2019, the Ninth Circuit Court of Appeals rejected a claim by former USC football player Lamar Dawson that alleged the NCAA and Pac 12 qualified as his employer.[28] The Court's opinion, however, was limited to the NCAA and Pac 12 and did not reach the issue of whether USC qualified as an employer because that issue was not before the Court. In November 2019, Trey Johnson, a former Villanova football player sued the NCAA for violation of minimum wage laws based on the failure to pay football players.[29] The suit contrasts the players with the other student employees who work the football games in various capacities such as ticket takers and receive compensation while the players receive no direct compensation.[30]

III.C. Alston v. NCAA and direct consideration of "Pay for Play"

In *Alston v. NCAA* (filed in 2014), the athlete plaintiffs sued the NCAA and eleven conferences challenging the core amateurism rules of the NCAA as violative of the antitrust laws.[31] The suit sought nothing less than to "dismantle the NCAA's entire compensation framework."[32] Part of the case settled prior to trial when the NCAA agreed to pay more than $200 million to a group of 40,000 former football, men's basketball, and women's basketball players who did not receive compensation for the full cost of attendance before NCAA rules changed in 2015.[33] After a ten day bench trial in 2019, Judge Wilken applied the rule of reason and found that the NCAA's limits on non-cash

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27 Vansike v. Peters, 974 F.2d 806, 808 (7th Cir. 1992).

28 Dawson v. National Collegiate Athletic Association, 932 F.3d 905 (2019); *see also* Dan Eaton, *9th Circuit: College football players not NCAA employees,* THE SAN DIEGO UNION TRIBUNE (Sep. 2, 2019), https://www.sandiegouniontribune.com/business/story/2019-08-30/9th-circuit-college-football-players-not-ncaa-employees (last visited, Aug. 17, 2020).

29 Johnson v. Nat'l Collegiate Athletic Ass'n, No. 2:19-cv-05230 (E.D. Pa. Nov. 6, 2019).

30 The Johnson case follows a similar case brought in the same court by a Villanova teammate but ultimately was voluntarily dismissed. *See* Livers v. NCAA, No. 2:17-cv-04271, 2018 U.S. Dist. LEXIS 83655 (E.D. Pa. Nov. 9, 2018).

31 In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1061-62 (N.D. Cal. 2019), *aff'd*, 958 F.3d 1239 (9th Cir. 2020).

32 In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1247 (9th Cir. 2020).

33 Alex Kirshner, *The NCAA's Scholarship Rules Are Now Illegal, But Players Still Won't Get Paid*, SB NATION (Mar. 9, 2019, 9:32 AM), https://www.sbnation.com/2018/9/18/17872150/ncaa-case-verdict-ruling-explained (last visited, July 16, 2020).

educational aid violated Section 1 of the Sherman Act. She enjoined further application of those limits. In a critical victory for the NCAA, Judge Wilken found that the NCAA's limits on compensation (not tied to education) did not violate Section 1. The ruling, which was stayed on appeal, allows colleges to grant additional educational aid (such as computers or musical instruments) but rejects attempts to create an open market compensation system for the athletes. The district court significantly credited the NCAA's core argument that consumers value amateurism and this provides a pro-competitive justification for the limits on non-education related cash benefits. In May 2020, the Ninth Circuit Court of Appeals upheld Judge Wilken's ruling opening up expanded education related benefits and preserving the NCAA's caps on non-education related payment.[34]

III.D. State and federal legislation

While the *O'Bannon, Keller* and *Alston* cases fundamentally broke barriers for college athlete compensation, the pace of change has accelerated to a sprint as states began to take up the athletes' cause. California was first with a law that as of January 2023, will allow college athletes to hire agents and be paid for endorsements.[35] The law makes it illegal for California colleges to deny compensation to college athletes for the use of their NILs. Specifically, the law permits college athletes to negotiate an endorsement deal with a clothing manufacturer, work a camp or appear as an avatar in a video game. The law also prohibits retaliation against college athletes for NIL-related activities. The legislation fundamentally accomplished what the O'Bannon suit sought to achieve in 2009 in allowing athletes to commercialize their NILs while in college.

Colorado and Florida recently passed similar laws allowing college athlete compensation for NIL activities. Florida's law goes into effect in July 2021[36], and Colorado's in 2023[37]. These and other state efforts have heightened NCAA concerns that a fragmented set of state laws will undermine competition in college athletics by steering college athletes towards states offering the most lucrative NIL opportunities. Commissioners of the five largest conferences in college sports echoed those concerns, and called on Congress to establish a "single, national standard for NIL."[38] The NCAA report discussed in Section I recommends that the NCAA engage Congress to ensure federal preemption over state NIL laws; establish an antitrust exemption for the Association; safeguard the nonemployment status of college athletes; maintain the distinction between student athletes and

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34 In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d at 1265–66.

35 S.B. 206, 2019-2020 Reg. Sess. (Cal. 2019).

36 S.B. 646, One Hundred Twenty-Second Regular Session (Fl. 2020).

37 S.B. 123, Seventy-Second General Assembly, Second Regular Session (Col. 2020).

38 Ryan Kartje, *Power Five Conferences Reportedly Ask Congress to Enact Name, Image and Likeness Policy*, LA TIMES (May 29, 2020, 1:25 PM), https://www.latimes.com/sports/story/2020-05-29/power-5-conferences-ask-congress-policy-name-image-likeness-nil (last visited July 16, 2020).

professional athletes; and uphold the NCAA's values including diversity, inclusion and gender equity.[39]

Congress is currently considering at least three proposals related to college athlete NILs. First, Senators Cory Booker (D-NJ) and Richard Blumenthal (D-CT) recently proposed an athlete "Bill of Rights," which would allow college athletes to monetize their NIL rights "both individually and on a group basis;" allow them to negotiate revenue- sharing agreements; and give athletes a voice in the regulation of NIL deals.[40] The Bill of Rights proposal includes requirements that schools provide "essential health and safety measures with real enforcement mechanisms."[41] Second, Senator Marco Rubio (R-FL) in June 2020 introduced the "Fairness in Collegiate Athletics Act" (S. 4004).[42] Sen. Rubio's proposal sets out "[t]o ensure that college athletes, and not institutions of higher education, are able to profit from their name, image, and likeness . . . ."[43] If the bill were to become law, then the NCAA would have until June 30, 2021 to establish a policy permitting college athletes to receive compensation for their NILs from people or entities outside of their own universities while ensuring "appropriate recruitment." Any such policy must "preserve the amateur status of college athletes" and require college athletes to report any compensation from their NILs to their universities.[44] Moreover, the Act would shield the NCAA and universities from private lawsuits based on their adoption or enforcement of a compliant NIL policy and preempt state laws on the matter.[45] The NCAA "commend[ed] Senator Rubio for introducing this critical piece of federal legislation to support student athletes."[46]

Representative Anthony Gonzalez (R-OH) plans to introduce a third bill. Though he has not yet issued a final version, Rep. Gonzalez's intends to create a uniform standard for NIL rights which 1) "permits student athletes to capitalize on their NIL rights . . ."; 2) "protects student athletes' status as amateur, ensuring with legal clarity they are not to be considered employees of an institution"; and 3) "provides sufficient guardrails to protect student athletes from bad actors during the recruiting and transfer process."[47] Each of the three legislative proposals thus seek to balance the interests of

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39 NCAA Report, *supra* note 2, at 27.

40 Zachary Zaggar, *Sens. Call For NCAA Athlete 'Bill Of Rights' Amid Pay Debate*, Law360 (July 23, 2020).

41 *Id.*

42 Fairness in College Athletics Act, S.B. 4004, 116th Cong., 2nd Sess. (2019-2020).

43 *Id.*

44 *Id.* § 3.

45 *Id.* at §§ 4–5.

46 NCAA, *NCAA Statement on Sen. Marco Rubio Bill* (June 18, 2020, 2:33 PM), http://www.ncaa.org/about/resources/media-center/news/ncaa-statement-sen-marco-rubio-bill (last visited Jul. 16, 2020).

47 Anthony Gonzalez, *Name, Image, and Likeness for College Athletes*, Anthony Gonzalez 16th District of Ohio Fact Sheet (February 6, 2020), https://anthonygonzalez.house.gov/uploadedfiles/final_nil_fact_sheet.pdf (last visited Jul. 16, 2020).

allowing college athletes to commercialize their NILs while maintaining appropriate compliance mechanisms.

IV. Economic efficiencies of group licensing

Analyzing the competitive effects of group licensing raises several issues at the intersection of IP and antitrust. Group (or package) licensing involves bundling of individual IP rights to realize several economic efficiencies. According to the latest DOJ Antitrust Guidelines for Licensing IP, pooling arrangements, "may provide pro-competitive benefits by integrating complementary technologies, reducing transaction costs, clearing blocking positions, and avoiding costly infringement litigation."[48] The Guidelines also warn against potential anticompetitive effects of group licensing – e.g., "collective price or output restraints in pooling arrangements, such as the joint marketing of pooled intellectual property rights with collective price setting or coordinated output restrictions . . . if they do not contribute to an efficiency-enhancing integration of economic activity . . . ."[49]

Group licensing leads to efficient royalties by addressing two well-known economic problems. First, it solves the complements problem arising when two (or more) holders of complementary IP set royalties independently; in that case, a single royalty for the IP bundle is less than the combined royalties that would be set by the individual IP holders.[50] Second, group licensing reduces the potential for individual IP holders to exploit bargaining power advantages in licensing negotiations. If licensing negotiations for necessary IP rights occur long after manufacturers have developed an infringing product, then the licensor gains a negotiating advantage arising from its ability to shut down production via an injunction. In that case, royalties may exceed the amounts that would have been negotiated earlier, when licensors had a choice of which IP to adopt. Group licensing reduces such "hold up" opportunities by bundling and negotiating IP rights with licensors before production begins.[51] By combining complementary inputs with efficient royalties, group licensing may also enable creation of new products and encourage innovation.

Group licensing may also generate substantial efficiencies derived from scale economies in which a single entity performs administrative services for group members. Regardless of whether individual IP right are complements or substitutes, group licensing enables efficiencies in activities such as 1)

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48 U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidelines for the Licensing of Intellectual Property* 30 (2017), https://www.justice.gov/atr/IPguidelines/download.

49 *Id.*

50 Carl Shapiro, *Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard Setting*, NATIONAL BUREAU OF ECONOMIC RESEARCH, January, 2001, at 123.

51 *Id.* at 124-26.

licensing and royalty administration; 2) compliance and dispute resolution; and 3) information collection and reporting.

This section considers the economic efficiencies of group licensing in two specific settings – patent licensing by patent pools and copyright licensing by PROs. Neither patent pools nor PROs provide a perfect template for group licensing of NILs, especially in light of evolving legislation and NCAA rules. However, the lessons learned from the patent and copyright settings provide useful guidelines for the NIL licensing entity proposed in Section V.

IV.A. Group patent licensing – Patent pools

Patent pools operate as a group licensing entity for licensors of patents related to a given technology.[52] In many cases, the pool forms around a technology standard, or set of procedures defining a solution to a given technological problem. For example, MPEG-LA operates a patent pool related to the technologies used for charging electric vehicles (EV). According to MPEG-LA: "[w]ithout easy, affordable access to these important technologies, EV charging suppliers face risk, uncertainty and potential for conflict that will delay market adoption."[53]

Patent pools encourage market adoption by making it easier to license patented technologies. Licensors hold patents required to implement the standard, and typically license their patents to the pool (and often to each other via cross-licenses) on a non-exclusive basis. The pool collects those patents into a portfolio license offered to manufacturers of standard-compliant products. By aggregating patents into a portfolio, the pool combines complementary inputs and lowers transactions costs by reducing the need for individual licensing agreements. Transaction costs savings can be significant, especially in situations with large numbers of licensors when the pool can negotiate on their behalf. Prior studies suggest a cost of $50,000 to negotiate a single patent license, and estimated transactions cost savings of approximately $400 million for the MPEG patent pool and $600 million for the HVEC patent pool.[54] Patent pools also enable efficiencies in royalty collection from portfolio licensees and in royalty distribution to pool members.

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[52] See Robert P. Merges, *Institutions for Intellectual Property Transactions: The Case of Patent Pools, in Expanding the Boundaries of Intellectual Property,* Aug. 1999, at 10-11, https://www.researchgate.net/publication/246482548_Institutions_for_Intellectual_Property_Transactions_The_Case_of_Patent_Pools/link/542c3b730cf277d58e8c5169/download (last visited July 22, 2020); Shapiro, *supra* note 49, at 127; Josh Lerner & Jean Tirole. *Efficient Patent Pool*s, 94 AMERICAN ECON. REV. 691–711 (Jun. 3, 2004); and U.S. Dep't of Justice & Federal Trade Commission, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* 64 (2007) [hereinafter referred to as "*Antitrust Enforcement and Intellectual Property Rights*"].

[53] MPEGLA, *EV Charging Patent Portfolio License Briefing* 2 (Feb. 3, 2020), https://www.mpegla.com/wp-content/uploads/EVCHARGINGWEB.pdf (last visited July 22, 2020).

[54] Mark A. Lemley, *Rational Ignorance at the Patent Office*, 95 NW. U. L. Rev. 1495, 1507 (2001); Robert P. Merges &

Coordinated activities by patent pools naturally raise concerns about competitive effects. In the late 1990s the DOJ evaluated those concerns in Business Review Letters to the MPEG-2 patent pool and to two patent pools for DVD technology.[55] The DOJ concluded that each pool would "create substantial integrative efficiencies" and warned against potential restraints on competition within the pool itself or among downstream products practicing the pooled patents.[56] The FTC found evidence of such restraints in its investigation of the Summit-VISX pool, which was disbanded following a consent decree.[57]

In 2007, the DOJ and FTC published a joint report concerning antitrust enforcement and IP rights. That report indicated the Agencies would analyze patent pools under the rule of reason and apply the following guidelines:[58]

- Combining complementary patents within a pool is generally pro-competitive, while including substitute patents in a pool does not make the pool presumptively anticompetitive.
- The Agencies will not generally assess the reasonableness of royalties set by a pool. The focus of the Agencies' analysis is on the pool's formation and whether its structure would likely enable pool participants to impair competition.
- Pool licensing provisions that require the licensing of all (not just some) of the pool's intellectual property do not generally raise competitive concerns if the licensors retain the ability to license their patents individually and the pool's design is otherwise pro-competitive.

Patent pools are typically responsible for negotiating license agreements, as well as collecting royalties from licensees and distributing them to patent holders. In many cases, those activities are performed by a licensing administrator acting on behalf of pool members. For example, the MPEG-2 patent pool licensors "will combine their Essential Patents into a single portfolio in the hands of a common licensing administrator that would grant licenses under the portfolio on a non-discriminatory basis, collect royalties, and distribute them among the licensors" based on each licensor's proportionate share of patents in each country where licensed products are sold.[59] The terms of

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Michael Mattioli, *Measuring the Costs and Benefits of Patent Pools*, 77 Ohio St. L.J. 281, 324 (2017).

55 Letter from Joel I. Klein, Assistant Att'y Gen., Antitrust Division, Dep't of Justice, to Carey R. Ramos (Jun. 10, 1999), at 12, *available at* https://www.justice.gov/atr/response-hitachi-ltds-matsushita-electric-industrial-co-ltds-mitsubishi-electric-corporations [hereinafter referred to as "DVD2 Business Review Letter"]; Letter from Joel I. Klein, Assistant Att'y Gen. Antitrust Division, Dep't of Justice, to Garrard R. Beeney (Dec. 16, 1998), *available at* https://www.justice.gov/atr/response-koninklijke-philips-electronics-nvs-sony-corporation-japans-and-pioneer-electronic [hereinafter referred to as "DVD1 Business Review Letter"].

56 *Antitrust Enforcement and Intellectual Property Rights*, *supra* note 51, at 71.

57 *Id.* at 73-74.

58 *Id.* at 9, 85.

59 Letter from Joel I. Klein, Assistant Att'y Gen. Antitrust Division, Dep't of Justice, to Garrard R. Beeney (Jun. 26, 1997), *available at* https://www.justice.gov/atr/response-trustees-columbia-university-fujitsu-limited-general-instrument-corp-

licensing agreement must follow guidelines set by the relevant standard-setting organization (SSO). Notably, many SSOs require licensors to offer fair, reasonable and non-discriminatory (FRAND) royalties. Patent pools often adopt various forms of the FRAND commitment – e.g., the DVD pool administered by Phillips requires licensors to license on reasonable terms and conditions.[60]

Royalty distribution by patent pools depends on rules governing the royalty share of each licensed patent. A recent study of nine patent pools suggests that the pro rata approach used by the MPEG-2 pool is the most common framework; six of the nine pools assign an equal share of royalties to each patent.[61] The authors also find that among firms that join a pool, those with relatively symmetric patent contributions appear more likely to agree to divide royalties in proportion to the number of patents. By comparison, the two patent pools formed around DVD technology divide royalties according to the perceived value of the patents. The DVD pool administered by Toshiba estimates patent value based on 1) how often the patents are infringed by licensed products; 2) the age of the patents; and 3) in the case of patents for DVD disc standards, whether the patents cover optional or mandatory features of the standard.[62] The DVD patent pools are also notable for their disclosure of aggregate royalty rates. The pool administered by Phillips charges 3.5% of the net selling price for each DVD player (and $0.05 per disc), while the pool administered by Toshiba charges 4% of the net selling price of DVD players (and $0.075 per disc).[63] The patent pools administered by MPEG-LA express royalties as a fixed amount per licensed device, with protections such as MFN provisions and caps on royalty increases when licensing agreements are renewed.[64]

Patent pools also provide compliance and dispute resolution services to their members. For example, the two DVD patent pools both retain an independent expert to review the designated patents and determine whether they are essential to practice the relevant standard. The patent pools administered by MPEG-LA define a similar role for an independent expert to determine patent essentiality.[65] The DVD pools also manage royalty disputes with an independent auditor, who reviews information submitted by licensees for compliance with royalty obligations. The DVD pools rely on private litigation to resolve infringement disputes. Licensors in the pools have the option to litigate against

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lucent [hereinafter referred to as "MPEG-LA Business Review Letter"].

60 DVD1 Business Review Letter, *supra* note 54.

61 Anne Layne-Farrar & Josh Lerner, *To Join or Not to Join: Examining Patent Pool Participation and Rent Sharing Rules*, 29 INT'L. J. INDUSTRIAL ORG. 294–303 (2011).

62 DVD2 Business Review Letter, *supra* note 54.

63 DVD1 Business Review Letter, *supra* note 54.

64 MPEGLA, https://www.mpegla.com/, (last visited July 31, 2020).

65 *Id.*

potential infringers, with provisions to disclose the litigation to other licensors and provide for sharing of joint litigation expenses.[66]

Patent pools often collect information relevant to the operation of the pool and report information regarding its patents and license agreements. For example, the license administrator of the RFID Consortium is required to disclose a list of the pool's licensees, and also reports a list of the 37 patents in the pool on its website.[67] Licensees are required to submit quarterly reports listing the sales of licensed products and the corresponding royalty calculation. To avoid the use of information to facilitate collusion, the Consortium is prohibited from disclosing the confidential information of its members, except as required by the license administrator. In its Business Review Letter to the RFID Consortium, the DOJ approved of the role of an independent license administrator for preventing anticompetitive conduct.[68] The patent pools administered by MPEG-LA follow many of the same reporting guidelines as the RFID Consortium – each pool publicly reports lists of its patents, licensors, and licensees, and forbids disclosure of confidential licensee information.[69]

IV.B. Group copyright licensing – Performing rights organizations

PROs operate as group licensing entities for copyright holders in the music industry.[70] The most prominent PROs for public performance of musical works include the American Society of Composers, Authors and Publishers (ASCAP, organized in 1915), the Society of European Stage Authors and Composers (SESAC, organized in 1930 to help European musicians collect royalties from U.S. licensees) and Broadcast Music Inc. (BMI, organized in 1939). ASCAP is a non-profit organization with 750,000 members, with equal representation of songwriters and music publishers;

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66 DVD2 Business Review Letter, *supra* note 54; DVD1 Business Review Letter, *supra* note 54.

67 The RFID Consortium, *Portfolio Patents*, https://www.rfidlicensing.com/index.php/patents (last visited July 22, 2020); The RFID Consortium, *List of Licensees*, https://www.rfidlicensing.com/index.php/list-of-licensees (last visited July 22, 2020).

68 Letter from Thomas O. Barnett, Assistant Att'y Gen., Antitrust Division, U.S. Dep't. of Justice, to William F. Dolan & Geoffrey Oliver, Jones Day, (Oct. 21, 2008), *available at* https://www.justice.gov/atr/response-rfid-consortium-llcs-request-business-review-letter. ("If the Consortium engages an independent license administrator, as proposed, it is unlikely that the pool will facilitate anticompetitive harm from collusion among pool licensors. We understand that the prospective administrator will aggregate licensee information, which is limited to the quantity, type, and place of manufacture and sale of products sold, before providing it to the Consortium, preventing its members from directly accessing individual licensees' sensitive business information.")

69 *Supra* note 66; *see also* MPEGLA, *EV Charging Patent List*, https://www.mpegla.com/programs/ev-charging/patent-list/, (last visited July 30, 2020).

70 *See, e.g.*, Stanley M. Besen et al., *An Economic Analysis of Copyright Collectives*, 78 Va. L. Rev. 383, 383-411 (1992); Robert Merges, *Contracting into liability rules: intellectual property rights and collective rights organizations*, 84 Cal. L. Rev. 1293, 1293–1393 (1996); U.S. Copyright Office, *Copyright and the Music Marketplace* (Feb. 2015), https://www.copyright.gov/docs/musiclicensingstudy/copyright-and-the-music-marketplace.pdf (last visited July 22, 2020) [hereinafter referred to as "Copyright and the Music Marketplace"]; and Dana A. Scherer, *Money for Something: Music Licensing in the 21st Century*, CONGRESSIONAL RESEARCH SERVICE (June 7, 2018), https://fas.org/sgp/crs/misc/R43984.pdf (last visited July 22, 2020).

ASCAP members elect 12 songwriters and 12 publishers to the ASCAP Board of Directors.[71] BMI is also non-profit entity, with over 1,000,000 members as of 2019.[72] Unlike ASCAP, BMI includes representatives of music broadcasters on its Board of Directors.[73] Global Music Rights (GMR) entered as a for-profit PRO in 2013, and currently licenses over 50,000 musical works.

Group licensing also occurs for copyrights for the public performance of sound recordings. In 2000, the RIAA created SoundExchange to collect and distribute royalties to record labels. SoundExchange became an independent entity in 2003, and in 2006 was designated as the entity for administering statutory licenses determined by the Copyright Royalty Board (CRB) for sound recordings. The CRB renewed that designation in 2016, and SoundExchange currently operates as "the sole collective for purposes of collecting, monitoring, managing, and distributing sound recording royalties . . . ."[74] In 2018 SoundExchange distributed $953 million in royalties to over 200,000 members.

The economic efficiencies of PROs arise from the difficulty of monitoring the use of copyrighted music and administering royalty payments to copyright holders. Without a PRO, individual musicians would need to locate each music consumer, negotiate a licensing agreement, and administer royalty payments. PROs reduce the musicians' burden by aggregating music copyrights into a portfolio, negotiating a portfolio (or "blanket") license, collecting royalties from licensees, and distributing royalties to musicians. PROs also play an enforcement role, in terms of monitoring consumer use of copyrighted music and resolving disputes via negotiation or litigation. The DOJ recently stated that ASCAP and BMI "fill important and pro-competitive roles in the music industry" and "provide a valuable service to both music users and PRO members."[75] The CRB reached a similar conclusion regarding SoundExchange, citing the sole collective entity as "the most economically and administratively efficient system for collecting royalties under the statutory licenses' blanket licensing framework."[76]

As with patent pools, the collective action and joint pricing of IP by PROs raises concerns about competitive effects. In 1940, the DOJ sued ASCAP for collusive conduct, alleging that ASCAP and its members had coordinated efforts to 1) license performance rights exclusively through ASCAP and

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71 ASCAP, ABOUT US, https://www.ascap.com/about-us (last visited July 22, 2020).

72 Broadcast Music Group, Inc,, *BMI Sets Revenue Records With $1.283 Billion,* PR NEWSWIRE, (Sep 9, 2019), https://www.prnewswire.com/news-releases/bmi-sets-revenue-records-with-1-283-billion-300914136.html (last visited July 23, 2020).

73 BMI, *BMI Re-Elects Six Members to Board of Directors, (Sept. 26, 2018),* https://www.bmi.com/news/entry/bmi-re-elects-six-members-to-board-of-directors (last visited July 24. 2020).

74 Copyright Royalty Board, Library of Congress, *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, 80 Federal Register 26316, 26400 (May 2, 2016).

75 U.S. Dep't of Justice, Antitrust Division, Statement of the Dep't of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees 10 (Aug. 2016), https://www.justice.gov/atr/file/882101/download (last visited July 23, 2020) [hereinafter referred to as "Statement of the Dep't of Justice"].

76 *See* Scherer, *supra* note 69, at 26.

thereby eliminate competition among members; 2) require music users to take a blanket license covering all of the compositions in ASCAP's repertory; 3) refuse to grant licenses to music users that had protested the fees demanded by ASCAP; and 4) allow large publisher members to control the Society and the distribution of its revenues to the detriment of ASCAP's other members.[77] The DOJ settled the ASCAP case (and a similar one against BMI) with consent decrees issued in 1941. The ASCAP consent decree contains the following key provisions:

- **Non-exclusivity**. ASCAP must not interfere with members ability to grant non-exclusive license to music users.[78] By allowing members the option to negotiate direct licenses outside the PRO, this provision is viewed as important for preventing anticompetitive effects from blanket licenses.
- **Non-discrimination**. ASCAP must use its best efforts to avoid discrimination among the various types of licenses offered to any group of similarly situated music users.[79]
- **Reasonable royalties**. ASCAP shall advise the music user of the fee that it deems reasonable for the license.[80] If the parties are unable to reach agreement within 60 days, the music user may apply to the Court for a determination of a reasonable fee.

In 2014 DOJ investigated the operation and effectiveness of its consent decrees with ASCAP (last amended in 2001) and with BMI (last amended in 1994).[81] In 2016 DOJ announced it would not seek further modifications to either agreement, citing the benefits industry participants have received from access to the musical works the PROs make available.[82] Since that announcement, ASCAP and BMI have managed a growing repertory of musical works. ASCAP and BMI currently license over 11.5 million and 15 million musical works, respectively (see Figure 1).

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77 Memorandum from the U.S. Dep't of Justice in Support of the Joint Motion to Enter Second Amended Final Judgment, (Sep. 5, 2000), at 10, https://www.justice.gov/atr/case-document/file/485996/download.

78 United States v. Am. Soc'y of Composers, Authors, Publishers, No. 41-1395(WCC), 2001 WL 1589999, at *3 (S.D.N.Y. June 11, 2001).

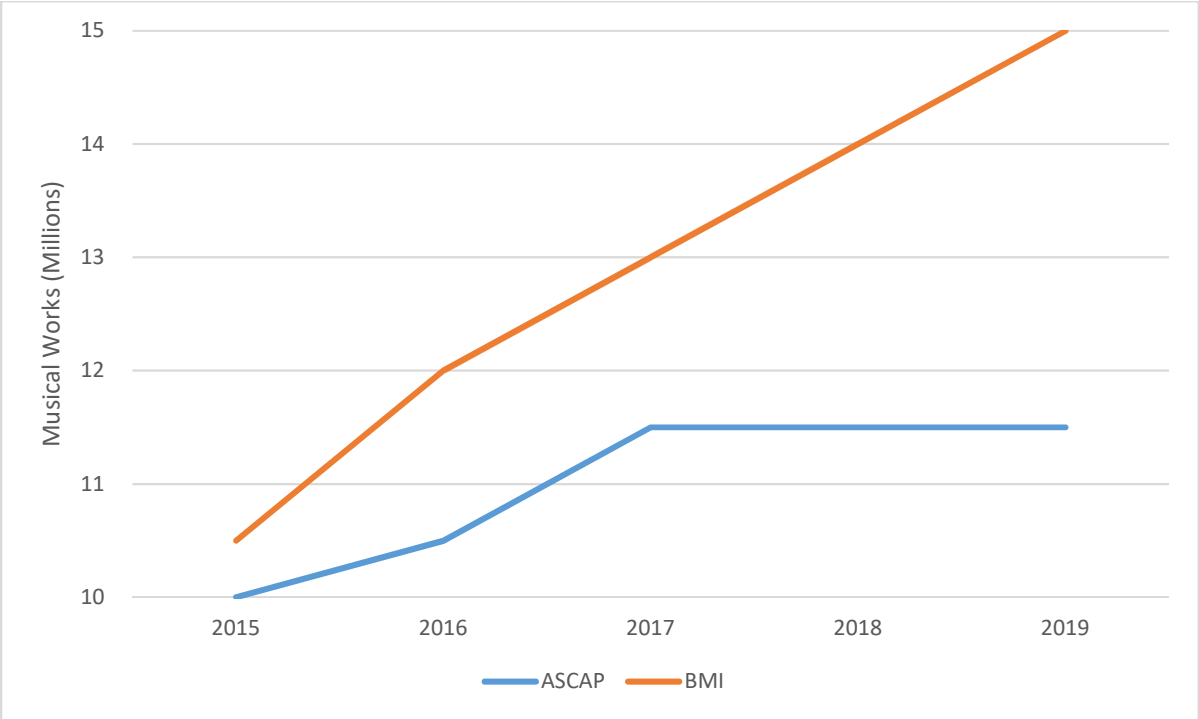
79 *Id.* at *5.

80 *Id.* at *6.

81 In 2019 DOJ announced another review of the consent decrees. *See* Press Release, Dep't of Justice, Dep't of Justice Opens Review of ASCAP and BMI Consent Decrees (Jun. 5, 2019), *available at* https://www.justice.gov/opa/pr/department-justice-opens-review-ascap-and-bmi-consent-decrees.

82 Statement of the Dep't of Justice, *supra* note 74, at 2.

Figure 1. Number of musical works licensed by ASCAP and BMI, 2015-2019



Sources: ASCAP and BMI annual reports

PROs negotiate royalties with music users in a complex system involving market-based transactions for musical works and a statutory licensing framework for sound recordings. For musical works, ASCAP and BMI negotiate licenses with a wide variety of businesses, including restaurants, concert venues, hotels and universities. ASCAP offers over one hundred different licenses, each with a different rate schedule.[83] Royalties depend on factors such as how the music is performed and the size of the establishment or potential audience for the music. For example, royalties for restaurants vary according to whether the music is live or recorded, and royalties for concert venues depend on ticket revenue and the capacity of the facility. ASCAP and BMI negotiate licenses subject to the DOJ consent decrees. Similar to the FRAND requirement for standard-essential patents, the consent decrees specify that royalties must be reasonable and not discriminate among similarly situated licensees.

PROs are also responsible for royalty collection and distribution. ASCAP and BMI both monitor use of musical works via sampling and census-based methods and use that information to determine

[83] ASCAP Licensing, FREQUENTLY ASKED QUESTIONS, https://www.ascap.com/help (last visited July 22, 2020).

royalty obligations from licensees. For each musical work, ASCAP and BMI distribute 50% of royalties to publishers and 50% to composers.[84]

The CRB establishes statutory licenses for sound recordings and determines royalty rates and other terms "that would have been negotiated in the marketplace between a willing buyer and a willing seller."[85] The CRB's rate-setting role means that in most cases SoundExchange does not negotiate directly with licensees.[86] However, SoundExchange does perform many of the same royalty collection and distribution services as ASCAP and BMI. The CRB requires statutory licensees to submit usage reports, which contain information regarding the performance and audience details of each sound recording. SoundExchange uses those reports to determine royalty obligations. For each sound recording, SoundExchange distributes 50% of the collected royalties to the copyright owner, 45% to the performing artist, and 2.5% each to the agents of nonfeatured musicians and vocalists.[87] Since its founding in 2003, SoundExchange has collected and distributed an increasing volume of royalties (see Figure 2).

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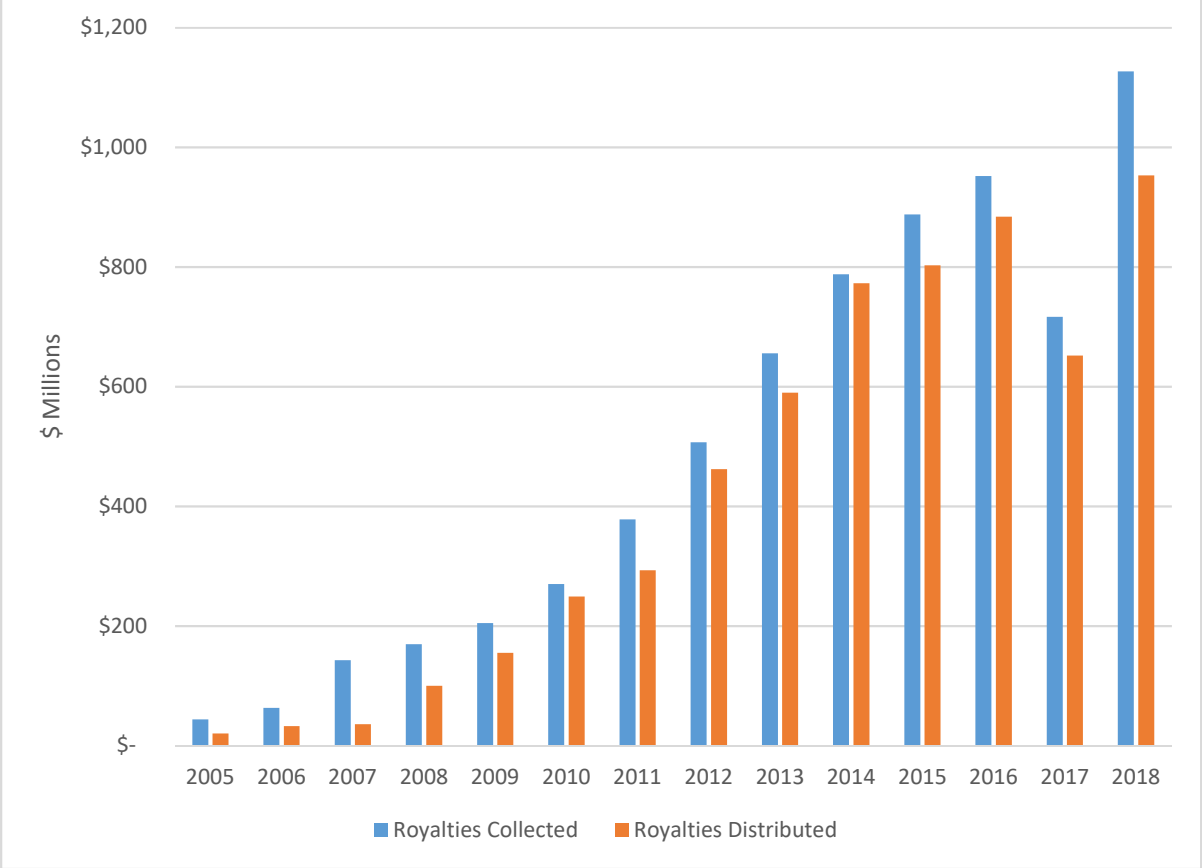
84 Scherer, *supra* note 69, at 6.

85 17 U.S.C. § 114(f)(B) (2011).

86 Sound Exchange, LICENSING 101, https://www.soundexchange.com/service-provider/licensing-101/ (last visited July 20, 2020), (noting an exception for negotiating royalties).

87 Scherer, *supra* note 69, at 21.

Figure 2. Royalties collected and distributed by SoundExchange 2005-2018



Sources: SoundExchange annual reports

ASCAP and BMI are also responsible for enforcing compliance with copyright law and resolving disputes under the terms of their DOJ consent decrees. A recent case study arises from political campaigns, which may be required to have a license from the appropriate PRO for music played at campaign events. Once the campaign obtains a license from ASCAP, for example, ASCAP members may ask to have specific songs excluded from the license; in that case, ASCAP will notify the campaign of the excluded works. Disputes between PROs and licensees are heard by federal district judges in the Southern District of New York. In these "rate court" proceedings, the PRO has the burden of proving that its rates are reasonable, and if the court finds otherwise it may establish a rate itself. When the rate court determines a reasonable fee, ASCAP must offer a license at a comparable fee to all similarly situated music users.[88]

[88] United States v. Am. Soc'y of Composers, Authors, Publishers, No. 41-1395(WCC), 2001 WL 1589999, at *7 (S.D.N.Y. June 11, 2001).

SoundExchange operates under similar compliance and enforcement provisions governed by the statutory licensing framework for sound recordings. For example, SoundExchange is responsible for monitoring use of sound recordings and collecting the usage reports from licensees. Its monitoring activities can be challenging, judging from evidence of frequent noncompliance with licensing requirements.[89] Licensing disputes are resolved by the CRB, which encourages settlements via a three-month negotiation period at the start of each proceeding. The CRB may adopt the settlements as a basis for the terms and rates offered to all parties under the statutory license.

The information collected and reported by PROs helps to monitor and enforce compliance with licensing agreements. A 2015 report by the Copyright Office emphasized the value of publicly available information for increasing the efficiency and transparency of licensing in the music industry.[90] ASCAP and BMI include searchable databases of licensed musical works on their websites, and are required by the DOJ consent decrees to maintain an updated system for tracking music use.[91] In 2017, ASCAP and BMI announced a joint effort to create a comprehensive musical works database to increase ownership transparency.[92] SoundExchange also maintains a searchable database of sound recordings, which includes information identifying the corresponding recording artists and record labels.[93]

V. Characteristics of a group licensing entity for college athlete NILs

The experience of patent pools and PROs described above has many implications for the design and operation of a group licensing entity for NILs. This section discusses the proposed structure and specific characteristics of the licensing entity.

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89 According to SoundExchange, in 2013 "approximately a quarter of royalty payments were not made on time; two-thirds of licensees required to deliver reports of the recordings they used have not delivered at least one required report; and at least one quarter of such licensees have not delivered any such reports." Copyright and the Music Marketplace, *supra* note 69, at 181.

90 Copyright and the Music Marketplace, *supra* note 69, at 8-9.

91 Am. Soc'y of Composers, Authors, Publishers, No. 41-1395(WCC) at *6.

92 ASCAP, *ASCAP & BMI Announce Creation of a New Comprehensive Musical Works Database to Increase Ownership Transparency in Performing Rights Licensing* (Jul. 26, 2017), https://www.ascap.com/press/2017/07-26-ascap-bmi-database (last visited July 23, 2020).

93 Press Release, SoundExchange, *SoundExchange Launches Public Search Website with Access to Industry's Best ISRC Data,* (Mar. 8, 2016), https://www.soundexchange.com/news/soundexchange-launches-public-search-website-with-access-to-industrys-best-isrc-data/.

V.A. Legal structure and safeguards

Among many possible governing structures, an NIL licensing entity created by Congress as a non-profit membership organization operating on behalf of college athletes strikes an optimal balance of advocating for the athlete, protecting the NCAA and the member institutions, and facilitating and regulating new products and services. Precedent for a congressionally sanctioned body responsible for group licensing exists in the form of the CRB which, under the Copyright Royalty and Distribution Reform Act of 2004, is tasked with (1) determining the terms and rates of royalty payments; (2) authorizing the distribution of those royalty fees collected; and (3) hearing disputes over royalty rates or payments.[94] Congress could establish an entity that would play an active role in negotiating NIL agreements with third-party licensees on a per-deal basis, thus overcoming the collective action problem and avoiding the pay-for-play concerns of private negotiation. The entity would not be a union nor would it serve as a generalized negotiating body for college athletes other than in the context of NIL activities.

Regardless of its governing structure, the NIL licensing entity would serve to expand the business opportunities and licensing revenue for the NCAA and college athletes. The NCAA already has a well-developed licensing program. In 2005 NCAA members in the FBS category reported $202.7 million in revenue from corporate sponsorships, advertising, and licensing, which increased to $761 million in 2018.[95] However, that revenue is limited by NCAA rules preventing commerce in products combining college athlete NILs with trademarks and other IP held by the NCAA and its members. If those rules were relaxed, the NIL licensing entity would play an important role to increase output of licensed goods and services, thereby providing the NCAA with additional revenue opportunities.[96] Similar to the market-enhancing role of patent pools, the NIL licensing entity would bundle college athlete NIL rights and negotiate licenses for products and endorsement activities currently prohibited by the NCAA.

Licensing could occur at the desired level of aggregation – for individual college athletes, teams, conferences, or divisions – and negotiations could be conducted separately from those for other IP (e.g., trademarks for the NCAA and its members) the product(s) may require. Group licensing to video game manufacturers provides the most notable example. Electronic Arts (EA) once developed and sold popular video games simulating NCAA Basketball and NCAA Football contests. EA

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94 *See* 17 U.S.C. § 801(b); *see also Johnson v. Copyright Royalty Bd.*, No. 19-1028, 2020 WL 4596810, at *3 (D.C. Cir. Aug. 7, 2020) (summarizing the CRB's ratemaking process).

95 Knight Commission on Intercollegiate Athletics, *Football Bowl Subdivision*, COLLEGE ATHLETICS FINANCIAL INFORMATION (CAFI) DATABASE, http://cafidatabase.knightcommission.org/fbs#!quicktabs-tab-where_the_money-1 (last visited July 22, 2020).

96 For example, the licensing entity could license university trademarks for use in products or promotions where NILs and trademarks are complementary. Certain restrictions on the use of university trademarks may be appropriate if NIL-related activities conflict with the university's existing trademark licenses.

discontinued its NCAA Basketball video game in 2010 and its NCAA Football game in 2013, citing legal uncertainties arising from the use of college athlete NILs.[97] If those legal uncertainties can be resolved, then the NIL licensing entity could bring those (and perhaps other) video game products back to the market and provide incremental licensing revenue to the NCAA and to college athletes.[98]

The NIL licensing entity could also negotiate licenses with manufacturers of products such as jerseys, sports equipment, and trading cards. Many of those products already feature the NILs of professional athletes, along with league trademarks and team logos. For example, the group licensing entities for the NFL and NBA report numerous agreements with consumer product manufacturers (see Figure 3), who may also be interested in developing products based on college athlete NILs. Such products may require licenses to the NILs of individual college athletes, which could be also be negotiated and managed by the NIL licensing entity. Alternatively, those licenses could be negotiated independently by the college athlete herself or by her agent or representative.

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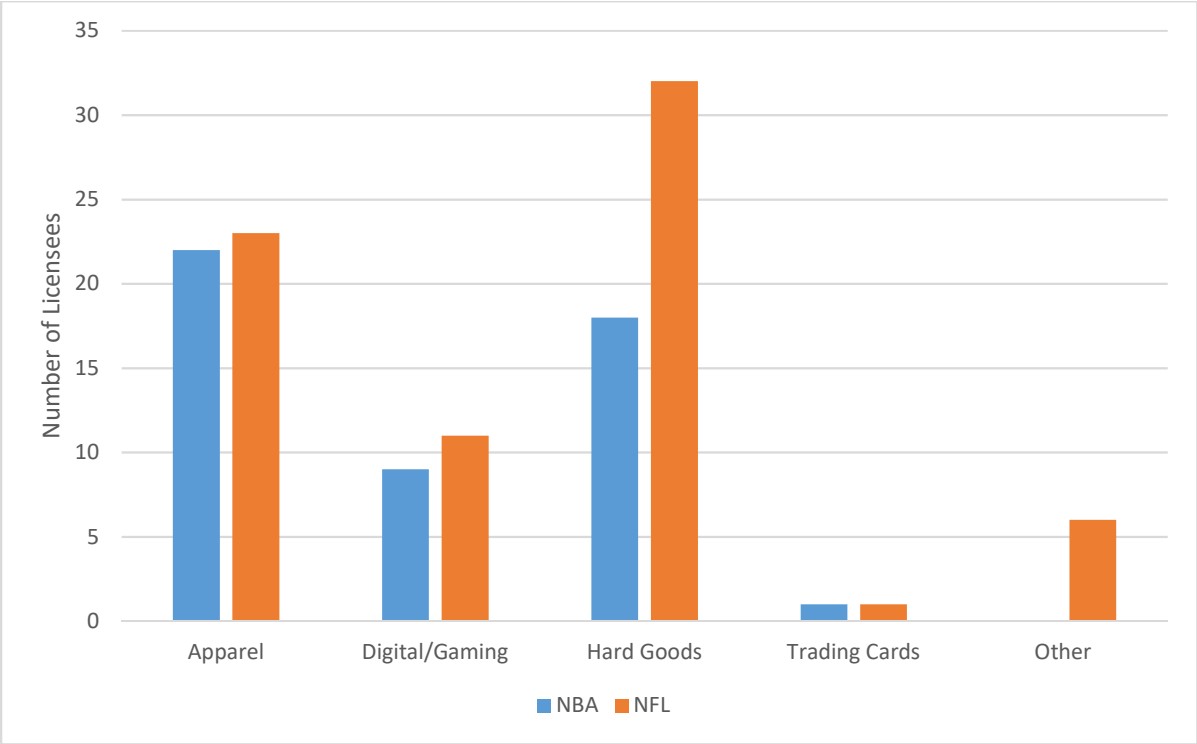
97 *See* Tony Manfred, *EA Sports Cancels Its College Football Video Game Amid A Wave of Lawsuits,* BUSINESS INSIDER (Sep. 26, 2013), https://www.businessinsider.com/ea-sports-cancels-ncaa-football-videogame-2013-9 (last visited July 23, 2020).

98 *See* Ross Dellenger, *Group Licensing Is the Key to the Return of NCAA Video Games – So What's the Holdup?*, SPORTS ILLUSTRATED (May 5, 2020), https://www.si.com/college/2020/05/05/ncaa-football-video-game-return-group-licensing (last visited July 23, 2020).

Figure 3. Licensees reported by NBA and NFL group licensing entities



Sources: https://nflpa.com/partners/licensing; https://think450.com/licensing

Licenses to individual athlete NILs may also be important for product endorsements and marketing via social media. For example, the NCAA report recommends that "in appropriate circumstances," athletes should be allowed to be compensated for social media "influencer" activities, in which athletes promote products on social media platforms such as Instagram or YouTube. Recent studies suggest that social media opportunities would be valuable especially for popular college athletes, and that many of the most popular female athletes "would likely be able to generate as much – if not more – endorsement revenue than their male counterparts based on social reach."[99]

The structure of an NIL licensing entity would be compatible with many of the legislative reforms recommended by the NCAA and included in Congressional proposals. First, it would be straightforward for the entity to operate under a single national standard for NIL activities instead of the growing list of competing state laws. Relative to system of state-level rules, a single standard would likely simplify the administrative and compliance-related demands of group licensing. Second, Congress could legislate that college athletes do not qualify as employees of the NCAA or its

[99] *See* AJ Maestas and Jason Belzer, *How Much Is NIL Worth To Student Athletes?* AthleticDirectorU, https://athleticdirectoru.com/articles/how-much-is-nil-really-worth-to-student-athletes/ (last visited July 23, 2020).

members under any federal or state law, and preempt any law to the contrary.[100] Third, Congress could legislate that college athletes are not entitled to "pay-for-play" outside of their statutorily endorsed NIL rights. Congress could also address the question of whether college athlete NIL rights extend to their participation in live athletic competitions, and if so whether college athletes should receive a fraction of revenue from television broadcasting or from tickets sales.[101] Allowing athletes robust avenues for NIL commercialization while settling questions of unionization, pay-for-play, and TV broadcasting could be a reasonable compromise to the decade-long legal battle that continues in courts around the country. If Congress can forge such a legislative compromise, the federal antitrust exemption recommended by the NCAA may not be necessary given the pro-competitive and output-expanding benefits of the newly created NIL licensing entity.

Antitrust exemptions for the NCAA may also be unnecessary if the licensing entity adopts safeguards similar to those governing patent pools and PROs. As discussed in Section IV, the competitive effects of group licensing often depend on whether the licensed bundle includes complementary or substitutable IP. For team-based products such as video games, NILs would likely be seen as complements and group licensing would enhance team-based competition by combining team member NILs and lowering transactions costs. In those cases, DOJ guidelines for patent pools suggest that group licensing of NILs would be pro-competitive, especially if individual college athletes retained the option of licensing outside of the group entity. That option would likely be important to the most prominent college athletes in team sports, who may have valuable endorsement opportunities as individuals (and could hire a separate agent to negotiate them) in addition to their value as a team member. While the top athletes may opt for individually negotiated deals outside the entity, the entity nevertheless would provide a regulated structure in which these transactions could be monitored. For the less high-profile athletes, the entity would provide a turn-key framework for NIL commercialization.

Drawing from the experience of PROs, the NIL licensing entity could draw antitrust scrutiny if it coordinated licensing by college athletes who would otherwise compete for endorsements. For example, royalty competition could be suppressed if college athletes used the NIL licensing entity to collude or if a single entity monopolized the market for college athlete NILs. The PRO practice of blanket licensing could also be a concern if the NIL entity refused to offer subsets of NILs to potential licensees. The NIL entity could likely avoid future consent decrees and rate-setting regulation by obtaining college athlete NILs on a non-exclusive basis (thereby preserving their ability

[100] *See, e.g.*, 5 U.S.C. § 5541 (defining employee in Title V); 29 U.S.C. § 203 (defining employee in Fair Labor Standards Act); 42 U.S.C. § 2000 (defining employee in Title VII of the Civil Rights Act of 1964).

[101] For example, California's right of publicity statute - Civil Code Section 3344(d) - exempts TV broadcasting from activities in which publicity rights are protected.

to license independently) and allowing licensing of NIL sub-groups (e.g., by team, university or conference).

V.B. Licensing and royalty administration

The NIL licensing entity would be responsible for negotiation, collection and distribution of royalties. Its negotiating role would be similar to that of a patent pool, with a focus on conducting market-based transactions with NIL licensees. The terms of license agreements would include language regarding compliance with NCAA regulations and enforcement provisions (see Section V.C), and perhaps language (similar to the FRAND commitment for patents or the terms of the ASCAP and BMI consent decrees) in which the NIL entity agrees to offer licenses according to a fair value standard for royalties. The experience of the Collegiate Licensing Company (CLC) provides a relevant comparison. CLC is a licensing agency used by numerous colleges, universities, athletic conferences, and the NCAA to negotiate and enforce trademark licenses.[102] Royalties in those licenses are typically expressed as a percentage of licensed product sales, and range from 3 to 12 percent.[103] For product endorsements via social media, royalties could be based on the number of followers or similar metrics correlated with the value of college athlete NILs.

Similar to most licensing relationships, royalty collection by the NIL licensing entity would require coordination with licensees. As in the patent pool and PRO examples, licensees would report sales of licensed products along with their royalty payments, which could then be subject to periodic audits. Audits by the NIL licensing entity could also involve monitoring of licensees for compliance with NCAA rules.

Royalty distribution would be straightforward when the licensed product involves the NIL of a single college athlete. In those cases, the NIL licensing entity would deduct its fee from the royalties it collects and distribute the net payment to the college athlete. The NIL licensing entity faces a greater challenge when dividing royalties among many college athletes in group settings. In principle, aligning royalties with the contribution of individual IP rights can be difficult, especially when IP right are highly complementary.[104] That situation poses a practical problem for the licensing entity, because the contributions of individual college athletes or teams to a group-based product like a video game are both complementary and difficult to measure; any royalty-sharing metric could be challenged as unfair to certain college athletes or teams. The NIL licensing entity would be responsible for determining a mutually acceptable royalty-sharing framework. The framework could

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[102] Collegiate Licensing Company, *About*, https://clc.com/institution-search/ (last visited July 23, 2020).

[103] Kevin R. Casey, *University Trademarks: Lets Get Down to Business!* STRADLEY RONON EDUCATION PRACTICE GROUP, (Apr. 8, 2019), at 5, https://www.stradley.com/-/media/files/publications/2019/04/education_alert_april_2019.pdf.

[104] Shapiro, *supra* note 49.

be as simple as equal weighting of all college athlete NILs (similar to the numeric proportion rule used by the MPEG-2 patent pool[105] and to the equal-weighting framework recommended by the Knight Commission[106]) or as complex as the value-based formulas used by PROs. In light of NCAA recommendations against pay for performance, the metric for distributing royalties should not be explicitly based on athletic success.

Regardless of the royalty-sharing framework, the NIL licensing entity should account for NCAA rules limiting payments by its members to the cost of attendance and its recommendation that NCAA members play no part in NIL activities by college athletes. To satisfy those constraints, the group licensing entity should distribute royalties directly to college athletes, with no administrative support from the NCAA or its members.

V.C. Compliance and dispute resolution

The NIL licensing entity would also be responsible for monitoring compliance with NCAA rules regarding NIL activities. Judging from the recommendations in the NCAA report, the entity would be especially concerned with enforcing rules in three main categories. First, royalty distributions to college athletes should reflect payment for NILs only, and not a disguised payment for athletic participation or for recruiting purposes. As discussed above, the NIL licensing entity would be involved in negotiating college athlete NILs, and thus in a good position to refuse payment for considerations other than NIL rights. Second, the entity could monitor the relationship between NCAA members and the NIL activities of college athletes, both in terms of operations (the NCAA currently recommends that its members play no part in NILs activities and forbids college athletes from using their trademarks) and of financing (NCAA rules currently limit payment by its members to student–athletes to their cost of attendance). Here, the entity could serve as a liaison between college athletes and the compliance office at each NCAA member institution, thus preserving the recommended separation between NCAA member activities and NIL activities by college athletes. The NCAA envisions that role in its working group report, which mentions the "assistance of third-party entities . . . in part to help relieve the burden that campus compliance personnel may face attempting to monitor the newly permitted activities."[107]

The NIL licensing entity could also satisfy NCAA regulations involving the participation of third parties in NIL activities by college athletes. The NCAA appears most concerned with the role of

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[105] Letter from Garrard R. Beeney, Sullivan & Cromwell, Patents for MPEG-2 Business Review Letter, to Joel I. Klein (Apr. 28, 1997), *available at* https://www.justice.gov/sites/default/files/atr/legacy/2014/02/18/302637.pdf.

[106] Knight Commission on Intercollegiate Athletics, *NIL FAQs: GROUP LICENSING*, https://www.knightcommission.org/nil-faqs-group-licensing/ (last visited July 22, 2020).

[107] NCAA Report, *supra* note 2, at 25.

boosters, who may disguise payments for recruiting or athletic performance as NIL royalties. A similar concern arises with the role of agents, who historically have represented professional athletes and may steer NIL negotiations towards payments for athletic performance or as advances against future professional salaries. The NCAA already has explicit rules and a history of enforcement regarding boosters[108] and agents,[109] and thus the NIL licensing entity could provide complementary enforcement and conduct independent investigations similar to those performed by the MPEG and DVD patent pools.

The NIL licensing entity would help to resolve disputes in many of the same ways as patent pools and PROs. Royalty disputes could involve the use of independent auditors, who would have access to relevant information collected by the licensing entity (see Section V.D). The licensing entity could also participate in contractual and/or compliance disputes among college athletes, licensees, the NCAA, and other interested parties. Those disputes could be adjudicated via private litigation or arbitration (often used by patent pools), or Congress could create a more centralized venue similar to the SDNY rate court or the CRB.[110] For example, Congress could designate an alternative dispute resolution regime wherein disputes are mediated in the first instance and then assigned to a designated team of arbitrators. That regime would enable designated arbitrators to develop expertise on issues such as determining fair market value for NILs, complying with NCAA rules, and enforcing federal laws.[111] Arbitration may also encourage confidential resolution of disputes. Regardless of whether disputes are heard in a private or public venue, the group licensing entity would participate and provide relevant information.

V.D. Information collection and reporting

The NIL licensing entity would be responsible for creating and maintaining a database of NIL activities, license agreements and royalties. Similar to the databases maintained by PROs, the NIL database would serve several purposes. The information could be shared with the NCAA and its members to facilitate disclosure and enforcement of NCAA rules. The information in an NIL database

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[108] NCAA, *Role of Boosters*, http://www.ncaa.org/enforcement/role-boosters (last visited July 21, 2020).

[109] NCAA, *Agents and Amateurism*, http://www.ncaa.org/enforcement/agents-and-amateurism (last visited July 21, 2020). For example, in 2018 the NCAA launched a certification program for agents representing college basketball players considering whether to enter the NBA draft. The NCAA reports a list of certified agents at https://web3.ncaa.org/AgentCertification/#/AgentDirectory.

[110] For example, the Drake Group recently asked Congress to create an independent non-governmental agency responsible for setting policies and standards governing NIL agreements and for resolving related disputes. *See* Position Statement, *College Athletes Should Give U.S. Senate NIL Bill a Failing Grade: Criticism of the Fairness in Collegiate Athletics Act*, THE DRAKE GROUP (June 24, 2020), https://www.thedrakegroup.org/wp-content/uploads/2020/06/Drake-Position-on-Rubio-NIL-Bill-FINAL.pdf.

[111] For example, the arbitrators could participate in the system envisioned in comments to the NCAA Report, "in which payments from third parties to student-athletes were compared, and perhaps limited, to a fair market value standard, while noting the difficulty in creating and maintaining such a system." NCAA Report, *supra* note 2, at 7.

would also be useful for resolving disputes (see Section V.C). For example, royalties contained in an NIL royalty database could be available to courts and arbitrators to determine a fair value for NIL rights or to settle payment disputes between college athletes and licensees. From an administrative perspective, the NIL database would also contain the information necessary for the college athlete financial reporting (including taxes) and for the accounting requirements of the NIL licensing entity.

VI. Conclusion

Today, we are witnessing a collision of (1) over a decade of hard-fought antitrust litigation; (2) the evolution of NCAA and public opinion on the propriety of college athlete compensation; (3) conflicting state legislation allowing athlete compensation for NIL activities; and (4) Congressional legislation to unify the new rules. That collision is happening in the midst of a global pandemic that poses existential threats to college athletic departments (and to some colleges themselves). With any crisis comes opportunity.

The opportunity here is for Congress to create a nonprofit quasi-governmental entity that would serve as a mechanism wherein athletes receive compensation for NIL activities connected with their athletic participation, schools can increase their licensing revenue, and consumers can access products that have been kept from the marketplace as a result of the legal disputes. A group licensing entity that functions in a similar way to performing rights organizations or patent pools potentially solves this problem. With Congress currently drafting the next set of rules for college athletics and compensation, the roadblocks that previously existed (such as employee status, antitrust liability, or slippery slope concerns of threats to broadcast and ticket revenue) can be removed through a national legislative solution.

From an economic perspective, the likely reform will increase licensing opportunities for a property right – NILs – that college athletes have not yet been allowed to commercialize. Current NCAA recommendations focus on opportunities for individual college athletes to receive compensation for use of their NIL in third-party endorsements, promotions on social media, and other business activities. But additional athlete, college and consumer economic benefits remain untapped under the current NCAA proposal. Creation of a group licensing entity for college athletes, informed by the efficiencies generated by patent pools and PROs, seems to have little economic downside if properly created under the imminent Congressional legislation. Pro-competitive patent pools bundle complementary inputs and set royalties that encourage adoption of new products. PROs administer complex royalty systems, enforce compliance with licensing agreements, and maintain databases of relevant information. Patent pools and PROs both operate in regulated environments similar to the one that may emerge for college athlete NILs.

Congressional legislation that does not solve the group licensing problem ultimately will deny all the major stakeholders substantial benefits. With the precedents identified herein, Congress has the roadmap to bring athletes, colleges and the consumer to a solution that has proven elusive to date.