American Indian Law Review

Volume 31 | Number 1

1-1-2006

Is the NCAA Prohibition of Native American Mascots from Championship Play a Violation of the Sherman Antitrust Act

Ryan Fulda

Follow this and additional works at: <https://digitalcommons.law.ou.edu/ailr>

Part of the [Antitrust and Trade Regulation Commons](#), [Entertainment, Arts, and Sports Law Commons](#), and the [Indigenous, Indian, and Aboriginal Law Commons](#)

Recommended Citation

Ryan Fulda, *Is the NCAA Prohibition of Native American Mascots from Championship Play a Violation of the Sherman Antitrust Act*, 31 AM. INDIAN L. REV. 163 (2006), <https://digitalcommons.law.ou.edu/ailr/vol31/iss1/7>

This Special Feature is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in American Indian Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact Law-LibraryDigitalCommons@ou.edu.

SPECIAL FEATURES

IS THE NCAA PROHIBITION OF NATIVE AMERICAN MASCOTS FROM CHAMPIONSHIP PLAY A VIOLATION OF THE SHERMAN ANTITRUST ACT?

Ryan Fulda*

Introduction

Tens of thousands of fans scream as Chief Osceola rides his horse onto the football field at Florida State University.¹ With his “flaming spear” in hand, the school mascot leads university fans in cheers before the football game begins.² At a season-opening football game at the University of Illinois, Chief Illiniwek, a school mascot wearing a costume actually made by Native Americans, performs his “fancy dance,” a tradition over three-quarters of a century old.³ What both of these traditions have in common is that they involve Native American symbolism and imagery. They differ, however, in the significant point that as of August 1, 2008,⁴ only the Florida State Mascot will be permitted to perform at post-season events sponsored by the National Collegiate Athletic Association.⁵ After this date, the University of Illinois will not be allowed to display Chief Illiniwek at NCAA-sponsored post-season events; the university will either have to leave the Chief at home, or choose not to participate in the event at all.⁶

---

* J.D., 2006, University of Oklahoma College of Law.

1. Daryl Fears, *Indian Mascots: Pride or Prejudice? Even Tribes Are Divided as NCAA Issues Edict*, WASHINGTON POST, Aug. 14, 2005, at A3.

2. *Id.*

3. Louis B. Garippo, *The Chief Illiniwek Dialogue: Intent and Tradition vs. Reaction and History: A Report to the Board of Trustees of the University of Illinois pt. IV(D)* (2000), available at http://www.uillinois.edu/trustees/dialogue/report_files/toc.html.

4. Press Release, NCAA, NCAA Executive Committee Issues Guidelines for Use of Native American Mascots at Championship Events (Aug. 5, 2005), available at http://www2.ncaa.org/media_and_events/press_room/2005/august/20050805_exec_comm_rls.html [hereinafter Press Release, NCAA Guidelines].

5. Press Release, NCAA, Statement by NCAA Senior Vice-President for Governance and Membership Bernard Franklin on Florida State University Review (Aug. 23, 2005), available at http://www2.ncaa.org/media_and_events/press_room/2005/August/20050823_franklinstmt_appeal.html [hereinafter Press Release, NCAA Statement].

6. See Press Release, NCAA Guidelines, *supra* note 4.

For better, or for worse, this note will not focus on the moral and ethical implications of the collegiate use of Native American imagery. Instead, this note will focus on whether the NCAA's prohibition of Native American mascots and images (hereinafter referred to as the "NCAA mascot ban") from NCAA-sponsored championship play violates section one of the Sherman Act. This paper will demonstrate how a controversial issue implicates a sometimes over-looked area of the law. Part I will provide the necessary background information for an understanding of the subject matter. Part II will explain how the Supreme Court has applied antitrust law to the NCAA. It will examine a major Supreme Court decision, *NCAA v. Board of Regents of The University of Oklahoma*,⁷ and subsequent cases applying antitrust law to NCAA conduct. Part III will apply antitrust law to the conduct at issue in an effort to determine whether the NCAA regulation violates section one of the Sherman Act. Part IV will conclude the paper with an opinion as to why the NCAA's regulation does not violate section one of the Sherman Act.

I. Background

A. An Illustrative Example

In March 2000, the Board of Trustees of the University of Illinois commissioned a senior legal professional to compile a report for the Board of Trustees detailing the dialogue concerning Chief Illiniwek,⁸ the school's seventy-four-year-old mascot.⁹ The non-partisan report, entitled *The Chief Illiniwek Dialogue*, provided the Board of Trustees with a history of the Illini tribe, a history of Chief Illiniwek, and a history of the controversy surrounding the use of Chief Illiniwek as the University of Illinois mascot.¹⁰

Beginning with the history of the Illini tribe, the report explains that "the Illini were a loose association or confederation of several tribes all speaking the Algonquin language. Those tribes included, among others, the Kaskaskia, Cahokia, Peoria, Tamaroa, and Metchigamea."¹¹ Each of these tribes was located in a region near the Illinois-Wisconsin border.¹² The report goes on to

---

7. *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984).

8. Garippo, *supra* note 3, at pt. I.

9. *Id.* at pt. II.

10. See Garippo, *supra* note 3.

11. *Id.* at pt. III.

12. *Id.*

explain how the United States Government's policy of removal forced the Illini Southwest, until they finally settled in Oklahoma.¹³

The report also outlined the history of the University of Illinois mascot, Chief Illiniwek. The tradition began in 1926, when Ray Dvorak, assistant band director, "conceived the idea of having a Native American war dance performed at halftime at the Illinois-Pennsylvania [football] game."¹⁴ The report describes Lester Leutwiler, the first student to portray Chief Illiniwek:

Leutwiler, a student with a keen interest in native lore, was picked to dance. Relying on knowledge gained as an Eagle Scout, he prepared a homemade costume complete with a war bonnet made of turkey feathers. The halftime performance was a big hit. For the rest of the 1926 season and again for the 1927 season, Leutwiler continued his Chief performances.¹⁵

The report also provides the source of inspiration for the name "Chief Illiniwek:"

The expression "Illiniwek" was first used in conjunction with the University of Illinois by football coach Bob Zuppke in the mid 1920's. Zup was a philosopher and historian by training and inclination, and he was intrigued by the concept the Illini peoples held about their identity and aspirations. They spoke a dialect of the Algonquin language and used the term "Illiniwek" to refer to the complete human being - the strong, agile human body; the unfettered human intellect; the indomitable human spirit.¹⁶

The University of Illinois continued to use Chief Illiniwek for the 1929 football season.¹⁷

By 1930, the Chief Illiniwek character had gained so much support that A. Webber Borchers, the student who portrayed Chief Illiniwek at the time, took the initiative to visit the Pine Ridge Reservation in Kadota, South Dakota, in an attempt to obtain an authentic mascot costume.¹⁸ The report cites Borchers' recollection of his meeting with Mr. W.W. Jermark, the Superintendent of Indian Affairs at the Pine Ridge Reservation: "[Jermark] called in an old

---

13. *Id.*

14. *Id.* at pt. IV(A).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at pt. IV(B).

Indian woman and explained to her what I wanted. I wanted the war suit to be made in the old original way. She agreed to undertake the project.”¹⁹

The current Chief Illiniwek costume “was sewn by the wife of Frank Fools Crow, the elderly chief of the Ogala Sioux tribe of South Dakota.”²⁰ Fool’s Crow presented the outfit to the university in 1982 “at halftime of a football game, after having been flown in from South Dakota on the private plane of a local businessman.”²¹

Chief Illiniwek has played a prominent role in University of Illinois tradition. In 1957, Chief Illiniwek participated in the second inauguration of President Dwight D. Eisenhower.²² The University of Illinois has interwoven the Chief theme into academic and alumni matters, and the Chief logo appeared on all sorts of university memorabilia.²³ Despite the prominent role the Chief played in each of these areas, the report notes that “a serious controversy regarding the Chief began in 1989,” and since that time “appearances of the Chief have been curtailed gradually.”²⁴ “Currently he only performs at football, basketball, and volleyball games.”²⁵

In 1995, in response to the growing controversy surrounding the University of Illinois’ use of Chief Illiniwek, “the Peoria Tribe, direct descendants of the Illini tribe, approved the use of Chief Illiniwek by the University.”²⁶ The tribe released a statement explaining:

To say that we are anything but proud to have these portrayals would be completely wrong. We’re proud that the University of Illinois is the major institution in the state, a state of learning, and they are drawing on that background of our having been there. And what more honor could they pay us?²⁷

At this time, the Peoria tribe seemingly expressed enthusiastic and unconditional support for Chief Illiniwek. Five years later, however, the Peoria Tribe changed its position on the Chief Illiniwek mascot; the tribe “passed a

---

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at pt. IV(E).

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at pt. V.

27. *Id.*

resolution by a vote of 3 to 2 requesting that the University cease the use of Chief Illiniwek.”²⁸

The Board of Trustees of the University of Illinois has not followed the Peoria Tribe’s request.²⁹ In 2005, the NCAA adopted a policy that will require the University of Illinois to either abstain from NCAA post-season play, or remove the Native American references during NCAA sponsored events.³⁰

The preceding story of the University of Illinois is in some ways typical of the growing controversy in the last quarter century surrounding the use of Native American mascots and symbols by universities. Proponents of the NCAA regulation have argued that the use of Native American imagery and symbols in college sports is a “mockery not only of Indian customs but also of white people’s culture,” reasoning that the inappropriate use of Native American imagery “degrades the Indian and disgraces the white race by revealing an ignorance of tribal cultures.”³¹ In an attempt to place the imagery in context, one critic explained, “The Illiniwek exhibition is tantamount to someone putting on a parody of a Catholic Mass.”³² Despite the outspoken proponents of the NCAA regulation, opponents contend that the various university traditions honor Native Americans by portraying them in a brave and courageous light, “as they would want to be portrayed.”³³

This growing controversy prompted the NCAA to take action in August of 2005 -- passing a resolution that prohibited “NCAA colleges and universities from displaying hostile and abusive racial/ethnic/national origin mascots, nicknames or imagery at any of the 88 NCAA Championships.”³⁴

B. NCAA Background

The NCAA began in 1905,³⁵ and it is currently an association of 1024 colleges and universities,³⁶ and in 2001 included over 355,000 men and women participating in intercollegiate athletics.³⁷ These active member

---

28. *Id.*

29. See Press Release, NCAA Guidelines, *supra* note 4.

30. *Id.*

31. Garippo, *supra* note 3, at pt. V.

32. *Id.*

33. *Id.*

34. See Press Release, NCAA Guidelines, *supra* note 4.

35. NCAA.org, History of the NCAA, <http://www.ncaa.org/about/history.html> (last visited Oct. 17, 2006).

36. NCAA.org, About the NCAA: Membership, http://www2.ncaa.org/portal/about_ncaa/membership/ (last visited Oct. 17, 2006).

37. NCAA, Fact Sheet (Mar. 4, 2002), available at http://www.ncaa.org/about/fact_sheet.

schools are divided into three different categories: Division I, Division II, and Division III.³⁸ The NCAA's website provides this brief overview of the organization: "The 1,024 active member schools self-determine which of three divisions they will be classified in and must annually meet membership criteria for that division. The active member institutions and voting conferences are the ultimate voice in all Association decisions."³⁹ One of the NCAA's basic purposes is: "To initiate, stimulate and improve intercollegiate athletics programs for student-athletes and to promote and develop educational leadership, physical fitness, athletics excellence and athletics participation as a recreational pursuit."⁴⁰ The NCAA describes its "Core Values" as follows:

The Association - through its member institutions, conferences and national office staff - shares a belief in and commitment to:

- >> The collegiate model of athletics in which students participate as an avocation, balancing their academic, social and athletics experiences.
- >> The highest levels of integrity and sportsmanship.
- >> The pursuit of excellence in both academics and athletics.
- >> The supporting role that intercollegiate athletics plays in the higher education mission and in enhancing the sense of community and strengthening the identity of member institutions.
- >> An inclusive culture that fosters equitable participation for student-athletes and career opportunities for coaches and administrators from diverse backgrounds.
- >> Respect for institutional autonomy and philosophical differences.

---

pdf.

38. NCAA, NCAA Division I, II and III Membership Criteria, http://www.ncaa.org/about/div_criteria.html (last visited Oct. 17, 2006). The main distinguishing characteristic of each division is that Division I schools have more teams that compete in varsity sports than Division II teams, and Division II schools have more competing varsity teams than Division III schools.

39. *Id.*

40. NCAA, 2005-2006 NCAA DIVISION I MANUAL: CONSTITUTION, OPERATING BYLAWS, ADMINISTRATIVE BYLAWS 1 (2005), available at http://www.ncaa.org/library/membership/division_i_manual/2005-06/2005-06_d1_manual.pdf [hereinafter NCAA DIVISION I MANUAL].

>> Presidential leadership of intercollegiate athletics at the campus, conference and national levels.⁴¹

The NCAA's purpose and goals are not directly related to economics; however, the economic consequences of NCAA regulations cannot be ignored. Take, for example, Division I-A schools, the highest revenue producing division in the NCAA.⁴² In 2003, the average revenue derived from college athletics for Division I-A schools was \$29.4 million, and average expenses were \$27.2 million.⁴³ The most lucrative athletic department took in revenues of \$87.8 million.⁴⁴ These same schools had an average of 324 participating male student athletes and spent an average of \$39,000 per male athlete in 2003.⁴⁵ In addition, twenty-five percent of Division I-A schools lost money and were unable to turn a profit.⁴⁶ A report by Sports Illustrated also reveals the economic implications of college athletics.⁴⁷ The report details revenues for major college sports conferences. According to the report, in 2000, the Southeastern Conference had total revenue of over \$94 million, while the Big 12 had total revenue of over \$85 million.⁴⁸

As the above figures indicate, economics permeate college athletics, affecting areas including ticket sales, merchandising, television contracts, alumni fundraising, sponsorship agreements, and providing scholarships for student athletes. Many of the aforementioned are inextricably tied to an athletic department's ability to market its program. Therefore, it is understandable that an NCAA regulation that directly affects a university's ability to market its product may have a direct or indirect effect upon the revenue a university derives from its athletic department.

Throughout its existence, the NCAA "has adopted and promulgated playing rules, standards of amateurism, standards for academic eligibility, regulations concerning recruitment of athletes, and rules governing the size of athletic

---

41. NCAA, Core Values for NCAA, http://www2.ncaa.org/about_ncaa/overview/mission.html (last visited Oct. 17, 2006).

42. DANIEL L. FULKS, NCAA, 2002-2003 NCAA REVENUES AND EXPENSES OF DIVISIONS I AND II INTERCOLLEGIATE ATHLETICS PROGRAMS REPORT 23 (2005), available at http://www.ncaa.org/library/research/i_ii_rev_exp/2003/2002-03_d1_d2_rev_exp.pdf.

43. *Id.*

44. *Id.* at 24.

45. *Id.* at 19.

46. *See id.* at 25.

47. *Financial Lowdown: Full Reports by Conference*, CNN.SI.COM, Mar. 15, 2002, at http://sportsillustrated.cnn.com/si_online/news/2002/03/15/conference_reports/#big12.

48. *Id.*

coaching staffs.”⁴⁹ In each of these instances the NCAA has promulgated rules necessary for the existence of a product -- college athletics. During its life, however, the NCAA has also wandered out of bounds and imposed regulations not necessary for the existence of its product and unrelated to its purpose.⁵⁰ In 1984, the Supreme Court found the NCAA in violation of the Sherman Act for placing output and price limitations on television contracts.⁵¹ This demonstrates an important point: many NCAA regulations are legally valid and necessary for a product to exist, but nevertheless, the NCAA is not beyond the law and can violate the Sherman Act.

C. Background of NCAA Regulation Prohibiting the Use of Native American Mascots in Post-Season Play

A skimming of the almost 500-page 2005-2006 NCAA Division I Manual reveals the breadth and diversity of the regulations that the NCAA imposes upon its member institutions.⁵² These regulations include academic requirements for college athletes, financial aid, rules regulating playing and practice seasons, procedures for drug testing, guidelines for team uniforms, and literally thousands of other regulations.⁵³

On August 5, 2005, the NCAA “adopted a new policy to prohibit NCAA colleges and universities from displaying hostile and abusive racial/ethnic/national origin mascots, nicknames or imagery at any of the 88 NCAA Championships.”⁵⁴ At the time, the mandate essentially prohibited eighteen NCAA teams from hosting any NCAA championship event, effective as of February 1, 2006.⁵⁵ It also prohibited those same teams from wearing material with such hostile or abusive references at any NCAA championship, effective August 1, 2008.⁵⁶ The NCAA press statement went on to explain, “[The NCAA believes] that mascots, nicknames or images deemed hostile or

---

49. NCAA v. Bd. of Regents of the Univ. Of Okla., 468 U.S. 85, 88 (1984).

50. *Id.* at 120 (finding the NCAA television contract plan violated section one of Sherman Act).

51. *Id.* at 113, 120.

52. See generally NCAA DIVISION I MANUAL, *supra* note 40.

53. *Id.* Article 14 is titled, “Eligibility: Academic and General Requirements”; Article 15 is titled “Financial Aid”; Article 17 is titled “Playing and Practice Season”; Article 30.5 is titled “Drug Testing Program”.

54. Press Release, NCAA Guidelines, *supra* note 4.

55. See *id.*

56. *Id.*

abusive in terms of race, ethnicity or national origin should not be visible at the championship events that we control.”⁵⁷

In addition to banning the listed teams from participating in championship play, the press statement went on to encourage all NCAA members to adopt policies discouraging the use of offensive Native American symbols: “Model institutions include the University of Iowa and University of Wisconsin, who have practices of not scheduling athletic competitions with schools who use Native American nicknames, imagery or mascots.”⁵⁸ The statement stressed that “institutions affected by the new policy can seek further review of the matter through the NCAA governing structure.”⁵⁹

Fourteen days later, the NCAA Executive Committee released a press statement outlining the appeal process for universities to seek approval of their use of Native American mascots, names and imagery at NCAA championships.⁶⁰ The statement explained that appeals would be handled on a case-by-case basis and would consider “the unique aspects and circumstances as it relates to the specific use and practice at that college or university.”⁶¹ It emphasized: “One primary factor that will be considered in the review is if documentation exists that a ‘namesake’ tribe has formally approved of the use of the mascot, name and imagery by the institution.”⁶²

In the weeks following the implementation of these new guidelines, Florida State, Central Michigan, and Utah were each granted exemptions from the regulation.⁶³ In each case, the NCAA Executive Committee noted the relationship between the university and the affected tribes, describing these relationships as a “significant factor” in making the decision to exempt the institution from the regulation.⁶⁴

---

57. *Id.*

58. *Id.*

59. *Id.*

60. Press Release, NCAA, NCAA Executive Comm. Approves Native American Mascot Review Process (Aug. 19, 2005), *available at* http://www2.ncaa.org/media_and_events/press_room/2005/august/20050819_mascotappeal.html.

61. *Id.*

62. *Id.*

63. Press Release, NCAA Statement, *supra* note 5; Press Release, NCAA, Statement by NCAA Senior Vice-President for Governance and Membership Bernard Franklin on Central Michigan and University of Utah Reviews (Sept. 2, 2005), http://www2.ncaa.org/media_and_events/press_room/2005/september/20050902_cmu_utah_franklinstmt.html [hereinafter Press Release, Statement by NCAA Senior Vice-President].

64. Press Release, NCAA Statement, *supra* note 5; Press Release, Statement by NCAA Senior Vice-President, *supra* note 63.

In contrast, during this same time period, the NCAA Executive Committee “retained the University of North Dakota on the list of colleges and universities subject to restrictions on the use of Native American mascots, names and imagery at NCAA championships.”⁶⁵ In the press release outlining this decision, the NCAA explained: “Information the NCAA received from the Standing Rock Sioux Tribe and the Sisseton-Wahpeton Sioux Tribe clearly indicates both tribes oppose the university’s use of the ‘Fighting Sioux’ nickname and imagery.”⁶⁶ The Committee went on to explain, “The decision of a namesake sovereign tribe, regarding when and how its name and imagery can be used, must be respected even when others may not agree.”⁶⁷

The NCAA also retained the University of Illinois, Champaign, on the list, citing in a press release that it “found no new information relative to the mascot known as ‘Chief Illiniwek’ or the logo mark used by some athletics teams that depicts a Native American in feathered headdress, to remove the university from the list.”⁶⁸ The press release went on to explain:

The staff review committee found that over the last decade, the volume and frequency of contentiousness around Chief Illiniwek has increased. Those who oppose continued use of Chief Illiniwek have grown in number and have found national platforms for their argument that the broad range of Native Americans perceive the Chief’s “fancy dance” a demeaning interpretation of their own customs and traditions.⁶⁹

The press release concluded with a reminder that, the university could file an appeal with the NCAA Executive Committee.⁷⁰

---

65. Press Release, NCAA, Statement by NCAA Senior Vice-President for Governance and Membership Bernard Franklin on University of North Dakota Review (Sept. 28, 2005), available at http://www2ncaa.org/media_and_events/press_room/2005/september/20050928_franklin_stmnt_und.html.

66. *Id.*

67. *Id.*

68. Press Release, NCAA, Statement by NCAA Senior Vice-President for Governance and Membership Bernard Franklin on University of Illinois, Champaign Review (Nov. 11, 2005), available at http://www2.ncaa.org/media_and_events/press_room/2005/november/20051111_illinois_mascot_stmnt.html.

69. *Id.*

70. *Id.*

D. Background of Antitrust Law

Section one of the Sherman Act reads: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."⁷¹

The first prima facie element of section one is simple: a contract, combination, or conspiracy – some form of an agreement. The second prima facie element is more problematic: an agreement in restraint of trade. The difficulty in applying this element lies in the word "restraint." As Justice Harlan noted in his partial concurrence in *Standard Oil Co. v. United States*: "Is it confined to a contract or combination which is only in unreasonable restraint of trade or commerce, or does it include what the language of the act plainly and in terms covers, -all contracts of that nature?"⁷² The Supreme Court also addressed the issue in *Chicago Board of Trade v. United States*: "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence."⁷³ In both of these instances, the Court was pointing out that, when read literally, every commercial agreement in some way restrains trade. For example, by selling goods to Acme, the seller is restrained from selling those identical goods to another buyer. In light of this absurd literal translation, the Supreme Court has interpreted the Sherman Act to prohibit only "unreasonable" restraints of trade.⁷⁴

Around this time, the Supreme Court also began to apply the "rule of reason" as a method of analyzing conduct. In early cases the rule of reason was applied inconsistently. However, the general test was "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."⁷⁵ More recently, the Supreme Court described the test in *State Oil Co. v. Khan*:

[M]ost antitrust claims are analyzed under a "rule of reason," according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition

---

71. 15 U.S.C. § 1 (2000).

72. *Standard Oil Co. v. United States*, 221 U.S. 1, 87 (1912) (Harlan, J., concurring in part and dissenting in part).

73. *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

74. See STEPHEN F. ROSS, *PRINCIPLES OF ANTITRUST LAW* 127 (1993).

75. *Id.* at 123-25.

before and after the restraint was imposed, and the restraint's history, nature, and effect.⁷⁶

After developing the rule of reason, the Supreme Court set about "creating a category of restraints so likely to suppress competition that they can be condemned without full consideration of their history, purpose, and effect (the so-called 'per se' rule)."⁷⁷ Under the *per se* rule, however, "[t]he plaintiff need only prove that the practice occurred and is not required to affirmatively demonstrate its competitive unreasonableness, while the defendants are precluded from attempting to justify the restraint as being reasonable."⁷⁸ In comparing the two approaches, it is important to note that a plaintiff would rather the court apply the *per se* rule because the elements will be easier to show. A defendant, however, would rather the court apply the rule of reason because the plaintiff will then have to show an "unreasonable restraint on competition."⁷⁹

II. Antitrust Law as Applied to the NCAA

The NCAA is an anomaly of antitrust law because courts will rarely find it permissible for competitors to join together and regulate competition with one another.⁸⁰ Nevertheless, in *NCAA v. Board of Regents*, the Supreme Court did just this, finding that regulation "was essential if the product is to be available at all."⁸¹

In *Board of Regents*, the University of Oklahoma and the University of Georgia sued the NCAA, alleging that the NCAA's conduct violated section one of the Sherman Act.⁸² The conduct at issue was a television licensing agreement between the NCAA and two major television channels lasting from 1981 through 1985.⁸³ The central part of the agreement, and the part to which Oklahoma and Georgia objected, was that it regulated price and output of "all forms of television of the football games of NCAA member institutions."⁸⁴ The NCAA regulation provided the two television channels with the

---

76. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (citing *Ariz. v. Maricopa Co. Med. Soc'y*, 457 U.S. 332, 343 (1982)).

77. ROSS, *supra* note 74, at 127-28.

78. WILLIAM C. HOLMES, ANTITRUST LAW HANDBOOK § 2.9 (1994).

79. *State Oil*, 522 U.S. at 10.

80. *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 99-100 (1984).

81. *Id.* at 101.

82. *Id.* at 88.

83. *Id.* at 91-92.

84. *Id.*

alternating right to “submit a bid at an essentially fixed price to the institutions involved.”⁸⁵

The NCAA television licensing agreement had the practical effect of setting the price that the television channel paid to the member institutions.⁸⁶ “A fee of \$600,000 was paid for each of the 12 national games telecast by ABC during the regular fall season and \$426,779 was paid for each of the 46 regional telecasts in 1980.”⁸⁷ The plan also contained “appearance requirements” and “appearance limitations” requiring that each of the two networks schedule appearances for at least eighty-two different member institutions during a two-year period.⁸⁸ The plan “[limited] the total amount of televised intercollegiate football and the number of games that any one team may televise. No member [was] permitted to make any sale of television rights except in accordance with the basic plan.”⁸⁹

The Supreme Court held that the NCAA’s television licensing agreement violated section one of the Sherman Act.⁹⁰ The Court found, “The NCAA television plan on its face constitutes a restraint upon the operation of a free market, and the findings of the District Court establish that it has operated to raise prices and reduce output.”⁹¹ The Court explained that the Sherman Act rule of reason analysis “place[s] upon petitioner a heavy burden of establishing an affirmative defense which competitively justifies this apparent deviation from the operations of a free market.”⁹² The district court had concluded the restraint was not necessary to market product, that the contract was unresponsive to consumer preferences, and that the restraint limited price and output without any pro-competitive justifications.⁹³ The Supreme Court further remarked, “A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with [the] fundamental goal of antitrust law.”⁹⁴

The practical result of *Board of Regents* is that the Court applied the rule of reason to conduct – a price fixing and output restriction – that it would normally find *per se* unreasonable. The Court applied the rule of reason

---

85. *Id.* at 93.

86. *Id.* at 106 n.30.

87. *Id.* at 93 n.10.

88. *Id.* at 94.

89. *Id.*

90. *Id.* at 120.

91. *Id.* at 113.

92. *Id.*

93. *Id.* at 106-07.

94. *Id.* at 107.

instead of the *per se* approach because it found that the agreement was necessary, explaining, "Our decision not to apply a *per se* rule to this case rests in large part on our recognition that a certain degree of cooperation is necessary if the type of competition that petitioner and its member institutions seek to market is to be preserved."⁹⁵

Following *Board of Regents*, other NCAA conduct has been examined for violating the Sherman Act. In several instances, courts have been presented with the issue of whether NCAA student athlete eligibility requirements violate section one of the Sherman Act. In each of these cases the courts have found that the eligibility requirements do not violate the Sherman Act.⁹⁶

In *Banks v. NCAA*, University of Notre Dame college football player Braxton Banks previously declared himself eligible for the NFL draft.⁹⁷ The United States District Court for the Northern District of Indiana opinion explains: "By placing his name in the 1990 NFL draft, Mr. Banks lost his amateur status for football and, hence, became ineligible to play intercollegiate football by virtue of NCAA Bylaw 12.2.4, the 'no-draft' rule."⁹⁸ After Banks was not selected in the draft, nor picked up as a free agent, he petitioned the NCAA to be allowed to re-enter college football and use his one remaining year of eligibility.⁹⁹ The NCAA denied this request because the "NCAA rules deem a person who has [entered the NFL draft and hired an agent] a professional and ineligible to play amateur intercollegiate football."¹⁰⁰ Banks then sought "injunctive relief against the [NCAA] and the University of Notre Dame to restore his eligibility to play intercollegiate football for Notre Dame during the 1990 season."¹⁰¹ Banks argued that the NCAA eligibility rule was an unreasonable restraint of trade and violated section one of the Sherman

---

95. *Id.* at 117.

96. *Smith v. NCAA*, 139 F.3d 180 (3d Cir. 1998) (rejecting student athlete's argument that NCAA bylaw prohibiting her from participating in sports while a graduate student at a different institution than that which she attended for her undergraduate studies was a violation of the Sherman Act); *see also Banks v. NCAA*, 746 F. Supp. 850 (N.D. Ind. 1990) (rejecting former college football player's argument that NCAA eligibility guidelines prohibiting player from participating in college sports after declaring for draft violates section one of Sherman Act); *see also Gaines v. NCAA*, 746 F. Supp. 738 (M.D. Tenn. 1990) (finding NCAA eligibility rule that prohibited player who had entered National Football League draft from reentering college football was not subject to antitrust analysis).

97. *See Banks*, 746 F. Supp. at 851.

98. *Id.* at 853.

99. *Id.* at 854-55.

100. *Id.* at 851.

101. *Id.*

Act.¹⁰² The district court rejected Banks' argument because the NCAA policy did not violate antitrust laws.¹⁰³

The NCAA has articulated procompetitive effects of its 'no-draft' rule. NCAA regulations are designed to preserve amateurism and to prevent the professionalization of college sports to the extent educational objectives would be overshadowed. If college football players could shuttle between the professional draft and their college teams, the NCAA argues, the players' profit-making objectives soon would overshadow educational objectives, blur the line between college and professional football, and create a number of potential problems for the effective management of teams engaged in college football.¹⁰⁴

In *Gaines v. NCAA*, the United States District Court for the Middle District of Tennessee also considered the issue of whether the NCAA "no-draft" rule violates the Sherman Act.¹⁰⁵ The facts in *Gaines* are similar to those in *Banks*. Gaines chose to forego his final year of college football and entered the draft for the National Football League.¹⁰⁶ When Gaines was not picked up by an NFL team, he sought an injunction requiring the NCAA to allow him to participate in the 1990-1991 college football season.¹⁰⁷ Gaines argued that the NCAA, "by preventing college football players like himself from returning to college play for which they are otherwise eligible after an unsuccessful bid in the NFL draft, have engaged in an unlawful exercise of monopoly power in violation of 15 U.S.C § 2."¹⁰⁸ While the court in *Gaines* only addressed a section two claim, the court's rationale is informative as to how other courts may apply antitrust law to NCAA conduct. The court emphasized this important distinction: "[There] is a clear difference between the NCAA's efforts to restrict the televising of college football games and the NCAA's efforts to maintain a discernible line between amateurism and professionalism and protect the amateur objectives of NCAA college football by enforcing the eligibility rules."¹⁰⁹ The *Gaines* court later cited the *Banks* opinion with approval, explaining: "This court agrees with the findings of the *Banks* court

---

102. *Id.*

103. *Id.* at 863.

104. *Id.* at 860-61.

105. *Gaines v. NCAA*, 746 F. Supp. 738, 741 (M.D. Tenn. 1990).

106. *Id.* at 740.

107. *Id.* at 741.

108. *Id.*

109. *Id.* at 746.

that the 'no-agent' and 'no-draft' Rules have primarily procompetitive effects in that they promote the integrity and quality of college football and preserve the distinct 'product' of major college football as an amateur sport."¹¹⁰

The *Gaines* court also noted that while the Supreme Court has not held that NCAA eligibility requirements are not subject to antitrust scrutiny, "it [has] cited a case with approval . . . which stated exactly that."¹¹¹ This fact, along with the *Banks* and *Gaines* opinions, suggests that most courts will find that NCAA eligibility rules such as "no-draft" and "no-agent" regulations do not violate section one of the Sherman Act. However, these cases have somewhat limited application to the NCAA's mascot ban because this prohibition does not deal with the eligibility of student athletes. Other cases may offer better insight as to how a court would examine the NCAA mascot regulation.

In *Adidas v. NCAA*, the U.S. District Court of Kansas examined whether an NCAA bylaw regulating team uniforms violated section one of the Sherman Act.¹¹² College uniform manufacturer Adidas objected to an NCAA regulation that stated: "a student-athlete's uniform and other items of apparel "shall bear only a single manufacturer's or distributor's normal label or trademark . . . , not to exceed 2 1/4 square inches in area . . . ."¹¹³

The court explained that before determining whether to apply the *per se* rule or the rule of reason, "the court must first determine the threshold issue of whether Bylaw 12.5.5 is properly the subject of antitrust law."¹¹⁴ The court pointed out, "a number of federal circuit courts have recognized that the noncommercial activities of certain organizations are outside the scope of the antitrust laws."¹¹⁵ The court then explained, "To determine whether Bylaw 12.5.5 is commercial, the court must look to the underlying purposes of the bylaw, the NCAA's reasons for creating the advertising regulation, and whether the bylaw confers a direct economic benefit on the NCAA."¹¹⁶ Below is the analysis of the NCAA's purpose for enacting Bylaw 12.5.5.

First, Bylaw 12.5.5 is designed to accomplish the NCAA's principle of maintaining amateurism by protecting student-athletes from commercial exploitation. Second, Bylaw 12.5.5 attempts to

---

110. *Id.*

111. *Id.* at 743 (citations omitted) (referring to *Jones v. NCAA*, 392 F. Supp. 295 (D. Mass. 1975)).

112. *Adidas v. NCAA*, 40 F. Supp. 2d 1275 (D. Kan. 1999).

113. *Id.* at 1285.

114. *Id.* at 1283.

115. *Id.*

116. *Id.* at 1285.

preserve the integrity and uniqueness of intercollegiate sports by preventing member schools from turning their student-athletes into billboards in the pursuit of advertising revenues. Third, the bylaw is designed to avoid excessive advertising that could potentially interfere with the basic function of the student-athletes' uniforms, which is to provide immediate identification of the athlete's number and team to his or her teammates and to the referee or umpire officiating the contest. There is no evidence before the court to suggest that the purpose of Bylaw 12.5.5 is to provide the NCAA or its member institutions with any commercial or economic advantage. The court concludes that Bylaw 12.5.5 has noncommercial purposes and objectives.¹¹⁷

After finding the bylaw noncommercial in nature, the court went on to "determine if the contested activity, despite its noncommercial nature and purposes, is objectively noncompetitive."¹¹⁸ The court inquired into "whether the NCAA or its member institutions receive a direct economic or competitive benefit from the enforcement of Bylaw 12.5.5."¹¹⁹ The court reasoned: "[T]he NCAA and its member institutions are not competitors of Adidas and do not realize any financial or competitive advantage by limiting the amount of advertising allowed on the backs of student-athletes."¹²⁰ It concluded by saying: "Bylaw 12.5.5 is noncommercial in nature and purpose, and that the NCAA's enforcement of the bylaw is a noncommercial activity not subject to the antitrust laws. Adidas, therefore, has failed to show a likelihood of success on the merits of its antitrust claims."¹²¹

As these cases indicate, several courts have examined NCAA conduct and found that it does not violate section one of the Sherman Act. However, there is one case in addition to *Board of Regents* in which a court has found that an NCAA regulation violates section one of the Sherman Act. This case was *Law v. NCAA*.¹²²

In *Law*, a group of collegiate assistant basketball coaches sought an injunction to prohibit the NCAA from enforcing a "rule limiting annual compensation of certain Division I entry-level coaches to \$16,000."¹²³ This

---

117. *Id.* at 1286.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 1287.

122. *Law v. NCAA*, 134 F.3d 1010, 1012 (10th Cir. 1998).

123. *Id.*

rule was commonly referred to as the "REC Rule," or restricted-earnings coach rule.¹²⁴ The plaintiffs, restricted-earnings men's basketball coaches, "challenged the REC Rule's limitation on compensation under section one of the Sherman Antitrust Act as an unlawful 'contract, combination . . . or conspiracy, in restraint of trade.'"¹²⁵

The court chose not to apply the rule of reason or the *per se* approach to the conduct, but instead adopted "a 'quick look' rule of reason."¹²⁶ The court explained the unique aspects of the quick look rule:

Under a quick look rule of reason analysis, anticompetitive effect is established, even without a determination of the relevant market, where the plaintiff shows that a horizontal agreement to fix prices exists, that the agreement is effective, and that the price set by such an agreement is more favorable to the defendant than otherwise would have resulted from the operation of market forces.¹²⁷

Applying this "quick look" analysis to the case, the court concluded:

In our analysis, the plaintiff only has the burden of establishing the anticompetitive effect of the restraint at issue. Once the plaintiff meets that burden, which the coaches have done in this case by showing the naked and effective price-fixing character of the agreement, the burden shifts to the defendant to justify the restraint as a "reasonable" one.¹²⁸

The court then concluded that the defendant's propounded reasons for the restraint (retention of entry-level positions, cost reduction, maintaining competition) were not enough to justify the price-fixing arrangement as reasonable.¹²⁹

The above cases provide various examples of courts applying antitrust law to NCAA conduct. The analysis used by these courts is useful in trying to determine whether a court would find that the NCAA mascot-ban violates section one of the Sherman Act.

---

124. *Id.* at 1014.

125. *Id.* at 1015 (citations omitted).

126. *Id.* at 1020.

127. *Id.*

128. *Id.* at 1021.

129. *Id.* at 1024 (affirming the district court's order "granting a permanent injunction barring the NCAA from reenacting compensation limits such as those contained in the REC Rule.").

III. Application of Antitrust Law to the Mascot-Ban

It is impossible to know exactly how a court would apply antitrust law to the NCAA mascot-ban, but the mentioned cases do provide valuable insight into what a court's analysis would likely involve.

A. Is the NCAA Mascot-Ban Subject to the Sherman Act?

Like the *Adidas* court, a court might first consider whether the NCAA mascot-ban is "properly the subject of antitrust law."¹³⁰ The court would probably ask the same questions the court in *Adidas* asked: Is the bylaw commercial? What was "the NCAA's reason for creating the advertising regulation?" Does "the bylaw [confer] a direct economic benefit on the NCAA[?]"¹³¹

In a press release concerning the mascot ban, the NCAA commented on its purpose for adopting the policy. "[A]s a national association, we believe that mascots, nicknames or images deemed hostile or abusive in terms of race, ethnicity or national origin should not be visible at the championship events that we control."¹³² The press release goes on to explain three significant factors that prompted the association's decision to regulate the use of Native American mascots: "membership feedback; ongoing issues surrounding the Confederate Battle Flag; and the U.S. Commission on Civil Rights' statement on the use of American Indian imagery as sports symbols."¹³³

According to the *Adidas* analysis, even if a court were to conclude that the NCAA regulation is noncommercial, the court could still search to "determine if the contested activity, despite its noncommercial nature and purposes, is objectively noncompetitive. . . . [and] . . . determine whether the NCAA or its member institutions receive a direct economic or competitive benefit from the enforcement" of the regulation.¹³⁴ In examining these issues, a court could conclude that the NCAA mascot ban is not properly the subject of antitrust law. This will be a tough issue to resolve because there are reasons for and reasons against finding that antitrust law should apply to this regulation. The NCAA would probably argue that there is no commercial purpose for this regulation and therefore it should not be the subject of antitrust law. However,

---

130. *Adidas v. NCAA*, 40 F. Supp. 2d 1275, 1283 (D. Kan. 1999).

131. *Id.* at 1285.

132. Press Release, NCAA Guidelines, *supra* note 4.

133. *Id.*

134. *Adidas*, 40 F. Supp. 2d at 1286.

a plaintiff would likely argue that the regulation affects competition by forcing universities to either abstain from NCAA-sponsored post-season play or change the way in which they market their program.

If a court were to conclude that the NCAA's mascot ban is subject to antitrust law, then the court would proceed to consider whether the act violates section one of the Sherman Act. As previously discussed, a violation of section one of the Sherman Act has two *prima facie* elements: 1) A contract, combination or conspiracy – some form of an agreement, 2) In unreasonable restraint of trade.¹³⁵ Furthermore, a court would probably follow *Board of Regents* and apply the rule of reason, because the NCAA is an organization that requires some form of cooperation in order for the product to be in existence at all.¹³⁶

B. Is There a Contract, Combination or Conspiracy – Some Form of an Agreement?

Petitioner must first show some type of agreement. However, this element will be easy to demonstrate because the Supreme Court has already answered this question. In *NCAA v. Board of Regents*, the Supreme Court stated that the NCAA member institutions created “an agreement among competitors on the way in which they will compete with one another.”¹³⁷ Therefore, this first element has already been decided. The real obstacle that any petitioner will face will be demonstrating the second *prima facie* element, that the NCAA's regulation is an unreasonable restraint of trade. This second *prima facie* element can best be examined by first analyzing whether the regulation restrains trade and then analyzing whether the restraint is unreasonable.

C. Is There a Restraint of Trade?

In order to demonstrate the second *prima facie* element, a petitioner must show that the NCAA regulation restrains trade. One example of this is that the NCAA regulation forces teams to choose between one of three options: 1) Change those symbols, images, and mascots, including team names; 2) Remove or cover those symbols when competing in and/or hosting NCAA championship events, or 3) Do not compete in or host NCAA championship events.¹³⁸ Forcing a team to choose among these three options restrains the team from operating as it otherwise would but for the regulation.

---

135. 15 U.S.C. § 1 (2000).

136. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101 (1984).

137. *Id.* at 99.

138. See Press Release, NCAA Guidelines, *supra* note 4.

In order to be successful, a petitioner will also want to argue that the regulation restrains trade because it affects price and output. While this regulation does not directly or explicitly limit price or output, it arguably has this indirect effect. A petitioner could argue that if a targeted university chooses to comply with the regulation by opting to not compete in NCAA championship events, then output has been affected because the team will compete in one less game that season. Accordingly, under classic economics principles, as output is decreased, price will therefore increase. The price of a ticket for the team's remaining games will then increase because supply would decrease. While the regulation does not seek to regulate output or price on its face, one can see how it could clearly affect both in a way that competition is worse off.

The regulation is effectively an ultimatum, forcing NCAA members to make a decision that those members would not normally make. It restrains members from making independent decisions regarding the symbols and imagery that represent the universities. These aspects are inextricably linked with a university's ability to market itself. The NCAA could argue that the effect upon the university's marketing ability is *de minimis*; a university is only prevented from displaying mascots and imagery at post-season play, is free to display the imagery at all other games, and is not restrained from marketing the merchandise that displays such imagery. The problem with this argument is that it is defeated by reality. If university mascots and images are so unimportant, then why do universities go to such great lengths to present unique and memorable mascots at sporting events? The University of Illinois, a school currently subject to the NCAA's regulation, played in the NCAA Men's Basketball Championship game in 2005. If this regulation had been in place last year during the 2005 NCAA Basketball Tournament, the University of Illinois would have been prohibited from displaying its mascot or other related imagery at any of the tournament games, including the nationally televised National Championship game against the University of North Carolina.¹³⁹

The regulation has varying impacts upon each of the schools. While the University of Illinois is now prevented from displaying its eighty-year-old mascot, Chief Illiniwek, at NCAA sponsored post-season games, other targeted universities have been, or will be, affected differently. In order to comply with the NCAA regulation, Midwestern State University agreed to

---

139. Rick Telander, *Orange Surprisingly Still Perfect Color*, CHICAGO SUN TIMES, Jan. 6, 2006, at 111.

remove the name 'Indians' from its basketball court.¹⁴⁰ The point of emphasis here is that those schools subject to the regulation will be forced to change their behavior in some form, whether it be the way a school markets its product, or the games in which it chooses to participate. This fact demonstrates that the regulation restrains trade.

D. Is the Restraint of Trade Unreasonable?

In *Board of Regents*, the Supreme Court applied the rule of reason because college football is an "industry in which horizontal restraints on competition are essential if the product is to be available at all."¹⁴¹ The practical effect of applying the rule of reason is that the plaintiff will bear the burden of demonstrating that the regulation is one that unreasonably restrains trade.¹⁴² In order to determine whether this NCAA regulation is unreasonable, one must look to *Board of Regents* and the line of cases that follow.

The Court in *Board of Regents* found the NCAA's conduct, a television licensing agreement, to be an unreasonable restraint of trade.¹⁴³ The Supreme Court particularly emphasized that the television licensing agreement had anti-competitive consequences: it reduced output, increased price, and was unresponsive to consumer demand.¹⁴⁴ The Court also noted that the restraint had no pro-competitive justifications and was not necessary in order to market the product.¹⁴⁵

A petitioner seeking to challenge the NCAA regulation at issue will want to make the same previously made arguments that the regulation affects price and output. Just as importantly, the petitioner could point out that the regulation is not responsive to consumer preferences because it forces universities to choose between championship play and continuing century-old traditions. No evidence indicates that a majority of consumers, or even a substantial minority of consumers, favor this regulation. Of course, this analysis depends entirely upon how one defines the class of consumers for college football; however, even a favorable definition of the group suggests that consumers do not oppose the use of Native American mascots or imagery

---

140. Press Release, NCAA, Statement by NCAA Senior Vice-President for Government and Membership Bernard Franklin on Carthage College and Midwestern State University (Nov. 9, 2005), available at http://www2.ncaa.org/media_and_events/press_room/2005/november/20051109_carthage_midwestern_stmt.html.

141. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101 (1984).

142. *See Banks v. NCAA*, 746 F. Supp. 850, 858 n.7 (N.D. Ind. 1990).

143. *Bd. of Regents*, 468 U.S. at 99-100.

144. *Id.* at 107.

145. *See id.* at 110 n.39.

in college athletics. "In 2002 *Sports Illustrated* published a poll of 351 Native Americans, 217 living on reservations, 134 living off. Eighty-one percent said high school and college teams should *not* stop using Indian nicknames."¹⁴⁶

A petitioner will also want to argue that the NCAA mascot ban, like the television licensing agreement in *Board of Regents*, does not "fit into the same mold as do rules defining the conditions of the contest, the eligibility of participants, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture."¹⁴⁷ While organized competition requires rules defining the condition of the contest, who may play and who may not, and how the costs of the agreement will be borne, it is not necessary for the existence of the endeavor to regulate the names of athletic teams and how a program chooses to market its team.

IV. Conclusion

A reading of Supreme Court cases dealing with section one of the Sherman Act presents the same familiar tests for whether the conduct is unreasonable and therefore illegal. The cases consistently apply the same questions for analysis. Is the regulation responsive to consumer preferences? Is there a pro-competitive justification for the restraint of trade? Are price and output unaffected by the regulation? Applying these questions to the regulation at issue presents the consistent answer to each: "No." Nevertheless, these typical questions are not as relevant to the NCAA mascot ban because, as *Banks*, *Gaines*, and *Adidas* all demonstrate, courts have given deference to the NCAA's implementation of the rules necessary for the organization.

Following *Adidas*, a court reviewing the NCAA mascot ban will first consider whether the regulation is even subject to antitrust laws at all. A court could very well determine that the regulation is not subject to antitrust law. The regulation does not appear commercial on its face -- it appears to regulate appropriate names and imagery for membership schools. Nevertheless, there are certainly good arguments that the regulation should be the subject of antitrust law. The regulation will restrain trade by prohibiting teams from using century-old mascots, logos, and nicknames in post-season play. The regulation certainly could affect output; if schools chose to not change their mascot or school name then they will be required to abstain from NCAA sponsored championships. This will result in fewer games played by that team

---

146. George F. Will, Editorial, *Chief Among the Silliness*, WASHINGTON POST, Jan. 5, 2006, at A15.

147. NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 117 (1984).

for the particular year. Furthermore, the regulation will certainly affect the way some institutions market their program. In addition, the regulation is arguably unresponsive to consumer preferences; consumers may prefer that their team maintain its name and school history.

Even if a court were to decide that this regulation is the subject of antitrust law, it would still likely find that the regulation does not violate section one because it is a reasonable restraint. It seems that the regulation is neither procompetitive nor anticompetitive, but unconcerned with competition altogether. An NCAA press statement contends that the regulation serves the core values of the NCAA's constitution pertaining to cultural diversity, ethical sportsmanship and nondiscrimination.¹⁴⁸ These seem like ethical justifications unrelated to competition. While there may be an incidental effect on competition, it seems impossible to determine whether this effect will be procompetitive or anticompetitive. Most importantly, an organization must be given some latitude to maintain its brand integrity by regulating how it is represented. The purpose of the NCAA regulation is unrelated to competition, but it will certainly have incidental effects on competition. Despite the regulation's possible indirect impact on output and the way a school markets itself, the courts should look past these incidental effects and allow the NCAA room to regulate a culturally sensitive area.

---

148. See Press Release, NCAA Guidelines, *supra* note 4.