SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 56 | Issue 3 Article 14

2006

Advice for the Next Jeremy Bloom: An Elite Athlete's Guide to NCAA Amateurism Regulations

Christopher A. Callanan

ADVICE FOR THE NEXT JEREMY BLOOM: AN ELITE ATHLETE'S GUIDE TO NCAA AMATEURISM REGULATIONS

Christopher A. Callanan[†]

INTRODUCTION

Jeremy Bloom presented a unique challenge to the National Collegiate Athletic Association (NCAA) regulations on amateurism because, as a world-class freestyle moguls skier and Division I football player, he was a marketable athlete.[1] By declaring Bloom ineligible to compete as an NCAA football player in the event he accepted the customary financial benefits of professional skiing, the NCAA created myriad issues for similarly situated athletes. Although Bloom was among the first athletes to raise the issue, he will be by no means the last. Emerging nontraditional sports, particularly action sports, attract younger athletes. These sports are aggressively marketed to young audiences through the endorsement of young athletes. Thus, more and more athletes at younger ages receive opportunities to participate in activities that, without careful consideration, can jeopardize present and future athletic eligibility at the scholastic and collegiate level.

As a result of Jeremy Bloom's case (*Bloom v. National Collegiate Athletic Association*), individual sport, Olympic, and action sport athletes as well as other talents who also compete (or hope to compete) in scholastic and NCAA sports must exercise particular caution. Given the detail of NCAA Bylaws, it is impossible to cover every

---

† Mr. Callanan is a shareholder with Campbell, Campbell, Edwards & Conroy in Boston, Massachusetts. He represents athletes and sponsors in sponsorship, marketing, endorsement, and licensing agreements and litigates a wide variety of sports related disputes.

1 Bloom v. NCAA, 93 P.3d 621 (Colo. Ct. App. 2004). For instructive discussion of the *Bloom* litigation and controversy, see Christian Dennie, *Amateurism Stifles a Student-Athlete's Dream*, 12 SPORTS LAW. J. 221 (2005); Alain Lapter, Bloom v. NCAA*: A Procedural Due Process Analysis and the Need for Reform*, 12 SPORTS LAW. J. 255 (2005); Gordon E. Gouveia, *Making a Mountain Out of a Mogul:* Jeremy Bloom v. NCAA *and Unjustified Denial of Compensation Under NCAA Amateurism Rules*, 6 VAND. J. ENT. L. & PRAC. 22 (2003).

scenario or exception here. Instead, the following is intended to introduce athletes and their families to common issues that arise and to suggest strategies for informed decision-making in light of the *Bloom* decision.

KNOW THE RULES: THEY APPLY SOONER THAN YOU THINK

Any athlete who is or hopes to be eligible to participate in collegiate athletics is bound by the NCAA Bylaws.[2] Conduct before and during NCAA participation can jeopardize eligibility.[3] In addition, each state regulates scholastic eligibility. Most states follow the NCAA Bylaws as they relate to amateurism, so this discussion focuses on NCAA regulation. However, every pre-high school and high school athlete must consider both state regulations and the NCAA Bylaws.

AGENTS AND LAWYERS: WHAT ADVICE IS PERMITTED?

Bylaws 12.1.1(g)[4] and 12.3[5] declare an athlete ineligible if he or she enters into an agreement with an agent to market his or her reputation or ability in that sport. An agreement that does not limit itself to a particular sport makes an athlete ineligible in all sports.[6] An athlete may secure advice from a lawyer concerning a proposed professional sports contract, so long as the lawyer does not also represent the athlete in negotiations for that contract.[7]

"SALARIED" PROFESSIONAL ATHLETES: PROHIBITIONS AND EXCEPTIONS

Bylaw 12.1.1[8] characterizes the activities that destroy amateur status required for NCAA eligibility. Using skill in a sport for pay (12.1.1.(a)), accepting a promise of pay (12.1.1.(b)), signing a professional contract (12.1.1.(c)), and agreeing with an agent

---

[2] NCAA BYLAWS, *reprinted in* NAT'L COLLEGIATE ATHLETIC ASS'N, 2005–2006 NCAA DIVISION I MANUAL (2005), *available at* http://www.ncaa.org/library/membership/division_i_manual/2005-06/2005-06_d1_manual.pdf [hereinafter NCAA MANUAL].

[3] "Amateurism" states that: "A student-athlete shall not be eligible for participation in an intercollegiate sport if the individual takes *or has taken pay, or has accepted the promise of pay in any form*, for participation in that sport or if the individual has violated any of the other regulations related to amateurism set forth in Bylaw 12." *Id.* § 14.01.3.1 (emphasis added). Bylaw 12.01.3 states that "NCAA amateur status may be lost as a result of activities prior to enrollment in college." *Id.* § 12.01.3.

[4] *Id.* § 12.1.1(g).

[5] *Id.* § 12.3.

[6] *Id.* § 12.3.1.

[7] *Id.* § 12.3.2.

[8] *Id.* § 12.1.1.

(12.1.1.(g)) are among the activities that destroy athletic eligibility. A specific exception to this rule permits many athletes to play minor league baseball while retaining eligibility to play college football.[9] Several well-known athletes have used this exception to their advantage, such as Chris Weinke, Cedric Benson, Drew Henson, and Ricky Williams. Bylaw 12.1.2 permits a professional athlete in one sport to retain eligibility in another sport.[10] However, the athlete cannot receive financial aid in the eligible sport if he or she is still involved with professional athletics, receives any pay from any professional sports organization, or has any active contractual relationship.[11]

NAVIGATING THE MURKY WATERS OF ENDORSEMENT AND PROMOTIONAL INCOME: JEREMY BLOOM'S CHALLENGE TO THE NCAA

Jeremy Bloom argued that the 12.1.2 exception for "professional athletes in another sport" should permit him to accept the customary income of professional skiing—product endorsements and marketing activities—without jeopardizing his eligibility to play NCAA Division I football.[12] Bloom compared the salary paid to a minor league baseball player to the endorsement and marketing income customarily earned by a professional skier.[13] Both are the customary forms of payment in the respective professional sports. In rejecting his claim, the NCAA cited two regulations dealing with commercial activity to distinguish permissible salary income from prohibited marketing income.

Bylaw 12.5.2.1(a) prohibits a college athlete, subsequent to enrollment from accepting pay for or permitting the use of his or her name or picture "to advertise, recommend or promote directly the sale or use of a commercial product."[14] Bylaw 12.5.2.1(b) prohibits receiving pay for endorsing a commercial product or service through the athlete's use of the product or service.[15] These bylaws prohibit any college athlete from endorsing a product or service by using the product or service or lending the athlete's name, image, or likeness to promote the product or service.[16]

---

[9] *Id.* § 12.1.2.
[10] *Id.*
[11] *Id.*
[12] Bloom v. NCAA, 93 P.3d 621, 625 (Colo. Ct. App. 2004).
[13] *Id.* at 625
[14] NCAA BYLAWS § 12.5.2.1(a), *reprinted in* NCAA MANUAL, *supra* note 2.
[15] *Id.* § 12.5.2.1(b).
[16] *Id.*

Bylaw 12.4.1.1, the "Athletics Reputation" rule[17] prohibits a student-athlete from receiving compensation from anyone (not just an advertiser or marketer) in exchange for the value that the student-athlete provides to the employer for the athlete's "publicity, reputation, fame or personal following" obtained because of athletic ability.[18] This rule prohibits commercial activity by a student-athlete even if it does not involve promotion, endorsement, or product use, but exists in part as a result of the athlete's goodwill as an NCAA athlete.

Through these bylaws, the NCAA distinguishes salary income in a sport like baseball or football from endorsement, promotional, or reputation income.[19] In deciding the *Bloom* case, the Colorado Court of Appeals noted that the NCAA Bylaws consistently prohibit student-athletes from engaging in any form of paid endorsement or media activity.[20] The court enforced the bylaws as written because, despite their disproportionate impact on athletes of different sports, the Bylaws are unambiguous and consistent in prohibiting any form of commercial activity by any athlete.[21]

The *Bloom* decision suggests that the NCAA and courts asked to interpret NCAA Bylaws will continue to strictly interpret amateurism regulations to forbid marketing, endorsement, or media-related income (or activity) by student-athletes regardless of the circumstance. The continued prevalence of endorsement and media activity in popular culture is unlikely to generate change in the NCAA system. It will only increase the number of athletes who knowingly or inadvertently face the consequences of strictly interpreted bylaws.

One practical difficulty in likening endorsement income to salary income is that it is impossible to determine the degree to which an athlete's marketability derives from his or her simultaneous status as an NCAA athlete. In his case, Bloom could not show that none of his marketability resulted from his Colorado football career. As a result, he was unable to convince the court that his proposed activity complied with otherwise unambiguous bylaws prohibiting any kind of commercial activity by student-athletes.

Even if the NCAA could measure the source of an athlete's marketability or if it decided to undertake the effort to distinguish permissible kinds of income to be fairer to skiers and other similar athletes, it has no financial incentive to do so. Allowing student-athletes to accept paid endorsement or media income provides marketers an al-

---

[17] *Id.* § 12.4.1.1.
[18] *Id.*
[19] Bloom v. NCAA, 93 P.3d 621, 625-26 (Colo. Ct. App. 2004).
[20] *Id.* at 626.
[21] *Id.*

ternative (and likely cheaper) way to associate with the goodwill of college sports. Given the present system's great financial reward to the NCAA and its institutions, neither is likely to voluntarily change the present system. These realities create great risk for athletes who participate in sports (or other similar activities) where endorsement and media income are customary.

BEWARE THE BREADTH OF COMMERCIAL ACTIVITY

Aaron Adair's story demonstrates the breadth of commercial activity as interpreted by the NCAA.[22] Adair was a Texas high school baseball star and highly touted professional prospect when he was diagnosed with brain cancer.[23] After a successful treatment, rehabilitation and arduous comeback, Adair worked his way back to competitive baseball.[24] He ultimately accepted a scholarship to play Division I baseball at the University of Oklahoma.[25] While he was in college, Adair lost his father to leukemia.[26] Adair authored a book, *You Don't Know Where I've Been*, chronicling his own struggle to overcome cancer and to deal with the loss of his father.[27] While promoting the book throughout Texas and Oklahoma, the University, through its NCAA compliance officer, informed Adair that he was engaging in prohibited commercial activity—the promotion and sale of his book.[28] Adair's book ended his NCAA eligibility and baseball career.

Athletes involved in the performing arts must also be vigilant. Many of the arguments raised by Jeremy Bloom were originally made by Northwestern University football player Darnell Autry. Autry successfully overcame the NCAA's objection to his participation in a feature film, *The Thirteenth Angel*.[29] Autry, a theatre major, obtained an injunction permitting him to act by showing that the opportunity was relevant to his studies and anticipated career, did not result from or relate to his athletic reputation, and would not result in payment

---

[22] *See* Aaron Adair Website, http://www.aaronadair.com (last visited Apr. 23, 2006) (providing an account of Mr. Adair's story); *see also* Dennie, *supra* note 1.

[23] Aaron Adair Website, *supra* note 22.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*; *see also* AARON ADAIR, YOU DON'T KNOW WHERE I'VE BEEN (2003); Description and Reviews of *You Don't Know Where I've Been*, http://www.amazon.com/gp/product/1553955145/qid=1145890634/sr=1-1/ref=sr_1_1/103-2448975-0787006?s=books&v=glance&n=283155 (last visited May 10, 2006).

[28] Dennie, *supra* note 1, at 236-37.

[29] Description of *The Thirteenth Angel*, http://www.imdb.com/title/tt0119055/ (last visited May 10, 2006).

beyond expense reimbursement.[30] Addressing similar issues, bylaw 12.5.1.3 permits an athlete to continue modeling activities unrelated to athletic activity that the athlete participated in prior to enrollment under specific conditions.[31] Similar issues have arisen with athletes who publish local restaurant reviews and participate in music videos. Although each circumstance is different, the degree to which each opportunity relates to athletic ability or to one's student-athlete status is always an important factor in determining permissibility. As athletes continue to participate in various activities that generate commercial and media attention, challenges to traditional definitions of amateurism will continue.

A WARNING TO OLYMPIC ATHLETES

Although most Olympians never sign a single endorsement agreement, those with NCAA eligibility often jeopardize that eligibility when they accept a spot on a National Governing Body (NGB) national team. Most do so without knowing or appreciating the risk. It lies in an agreement that a national team member is typically required to sign as a condition of participation—the team marketing agreement.[32]

Each NGB (USA Hockey, US Ski & Snowboarding, USA Gymnastics, etc.) receives financial benefit from corporate sponsors. NGB sponsors fund NGB activities such as travel, meals, coaching, training, and insurance. In exchange, the NGB offers sponsors the right to associate with the team in an official capacity, access to team events, the right to use NGB logos and often the right to use the names and likeness of team members. To attract sponsorship dollars, it is essential that the NGB have the ability to offer a sufficiently compelling marketing value to its sponsors. An important part of that value for the sponsor is the ability to use images of team members in its advertising and promotion. At the same time, individual Olympic athletes solicit the same sponsors for individual sponsorships. Athletes and

---

[30] Dennie, *supra* note 1, at 233.

[31] NCAA BYLAWS § 12.5.1.3, *reprinted in* NCAA MANUAL, *supra* note 2.

[32] Although team marketing agreements present risks to college eligible Olympians and National Team members, many typical training and fundraising mechanisms are accounted for in the NCAA Regulations. If certain conditions are met, an athlete can lend his or her name or likeness to institutional, charitable, educational, or other nonprofit promotions. *Id.* § 12.5.1.1. Accepting educational expenses from the U.S. Olympic Committee (USOC) or a National Governing Body or an Operation Gold Grant is permitted by the NCAA. *Id.* §§ 12.1.1.1.3.2.1, 12.1.1.1.3.2.2., 12.1.1.1.4.1.2. Expenses or other benefits received by an Olympic Team member are permitted so long as they are the same benefits received by every other team member. *Id.* § 12.1.1.1.4.3.1.

NGBs compete for corporate sponsorship, each offering alternative value.

The tension is typically resolved in the team marketing agreement by group licensing language following the models established in the major professional team sports. Typically, the individual athlete remains free to pursue individual endorsements but agrees to lend his or her name and likeness to the NGB for use in a group of a defined minimum number of other team members. This gives the NGB the ability to promote its athletes as a group and license its sponsors to use a group of team members while leaving individual athletes free to pursue their own individual marketability.[33]

Often, the NGB requires an athlete who makes a National Team to sign the agreement as a condition of participation. The agreements typically include required codes of conduct or other issues relating to team participation, but almost always require the athlete to convey to the NGB the right to use his or her name or likeness in group marketing and advertising. A student-athlete or NCAA hopeful who signs such an agreement potentially violates bylaw 12.5.2.1 by permitting others to use his or her name and likeness—even if the athlete never receives payment or is used in advertising or promotions.[34] The safer solution for the college eligible athlete is to draft a separate agreement that does not convey name and likeness rights. The NGB should then make sure that its sponsors do not use images of college eligible or hopeful athletes in their promotional materials.[35]

EVEN THE COMPLYING ATHLETE MUST REMAIN VIGILANT

Suppose a company without an athlete's knowledge, consent, or participation uses his or her likeness in an advertisement, promotes the fact that a student-athlete uses its product, or simply uses a student-athlete's image in advertising. Bylaw 15.5.2.2 requires that the individual athlete or school to take action to stop the offending use.[36]

---

[33] A sample agreement with US Sailing is available online at http://www.ussailing.org/olympics/PanAm/2007/2006%20YAC%20FINAL%20Athlete%20Agreement%203-21-06.pdf.

[34] NCAA BYLAWS § 12.5.2.1(a), *reprinted in* NCAA MANUAL, *supra* note 2. Bylaw 12.5.1.2 creates a limited exception for participation in Olympic or NGB advertising prior to college enrollment where the USOC or NGB approved the ad and when all funds went to the USOC or NGB for either organizations "general use." *Id.* § 12.5.1.2.

[35] At the 1998 Olympic Winter Games in Nagano, Japan, the United States' women's ice hockey team won the sport's first ever Gold Medal. Predictable commercial activity followed. In the team's photograph on the cover of NGB USA Hockey's sponsor General Mills' Wheaties' box, five NCAA athlete team members were excluded. *See Five College Women from Olympic Hockey Team Won't Be on Wheaties Box*, CANOE.COM, (Feb. 23, 1998), http://www.canoe.ca/SlamNaganoHockeyWomen/feb23_usahockey.html; *see also* NCAA BYLAWS § 12.5.2.2, *reprinted in* NCAA MANUAL, *supra* note 2.

[36] NCAA BYLAWS § 12.5.2.2, *reprinted in* NCAA MANUAL, *supra* note 2.

Such an incident occurred in the 2004 NCAA Frozen Four hockey championship when Easton promoted the fact that one of the players used its equipment.[37] Both the school and the athlete promptly took action to stop the activity because their failure to take action would have jeopardized his eligibility.[38] It is critical for all college eligible or hopeful athletes, even those who consider themselves unmarketable, to make sure no one uses his or her name and to take prompt action in the event it occurs.

CONCLUSION

Given the prevalence of endorsement and marketing activity in today's popular culture and the continued emergence of new sports, more and more athletes have the potential to run afoul of the NCAA's amateurism regulations both before and during their NCAA careers. Athletes need to understand the Bylaws and appreciate the array of activities that potentially jeopardize eligibility. Too often athletes and their families do not know or understand the Bylaws and do not appreciate the way in which their activities will be interpreted and as a result inadvertently jeopardize their NCAA eligibility. The consequences suffered by Jeremy Bloom and Aaron Adair demonstrate that an understanding of NCAA Bylaws can be as important to one's athletic career as competition and training.

---

[37] Mike Eidelbes, et al., *Forward, March: The Pioneer Forwards Showed that There's More to Their Game than Grit vs. Colorado College*, INSIDECOLLEGEHOCKEY.COM, Apr. 7, 2005, http://insidecollegehockey.com/9NCAA/2005/semi1notes_0330.htm.

[38] *Id.*