VIRGINIA JOURNAL OF LAW & TECHNOLOGY

FALL 2014 UNIVERSITY OF VIRGINIA VOL. 19, NO. 01

…And Bring Your Playbook: Who Owns the Intellectual Property Created by College Coaches?

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ABSTRACT

The average compensation package for top college coaches exceeds $1 million per year. This Article takes a peek behind the numbers, using examples from actual coaches' employment agreements, to uncover the role that intellectual property plays in generating those salaries.

Despite the potentially enormous value of intellectual property created by college coaches, determining the owner of this intellectual property can be surprisingly difficult. This Article suggests that universities should own intellectual property that is both created in connection with coaches' duties and dependent on university associations for its value. It also suggests that, to the extent that coaches' employment agreements do not address intellectual property ownership issues, university intellectual property policies should be used to fill in the gaps. This Article concludes with a comparative discussion of the intellectual property ownership rights of student–athletes, using the *O'Bannon v. NCAA* case as a benchmark.

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I. INTRODUCTION

"Twenty years ago it was not uncommon to have a coach's employment secured with a handshake."

- Robert Lattinville, Chairman of the Sports Division at Stinson Morrison Hecker LLP, which represents coaches in contractual matters[1]

Who owns the intellectual property created by college coaches? The coaches? Their employers? Unaffiliated third parties? No two college coaching contracts are alike. Therefore, finding the answers to these questions is, at times, remarkably similar to searching for a needle in a haystack.

Head football coach Dabo Swinney's twenty-page, multi-million dollar employment agreement with Clemson University is silent on the issue of who owns the media rights to his coach's show.[2] Coach Frank Beamer's slightly lengthier employment agreement with *Virginia Tech* promises him exclusive ownership of the term "Beamerball"[3] and its

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[1] James K. Gentry & Raquel Meyer Alexander, *From the Sideline to the Bottom Line*, N.Y. TIMES, Dec. 31, 2011, *available at* http://www.nytimes.com/2012/01/01/sports/ncaafootball/contracts-for-top-college-football-coaches-grow-complicated.html?_r=0.

[2] EMPLOYMENT AGREEMENT: CLEMSON UNIVERSITY AND WILLIAM SWINNEY (effective Dec. 1, 2008) [hereinafter SWINNEY AGREEMENT], *available at* http://assets.espn.go.com/i/mag/blog/2010/thefile/coaches/swinney.pdf.

[3] "Beamerball" refers to making game-changing plays on offense, defense, and special teams. Patrick Obley, *It's Not Always Pretty, but Virginia Tech Getting Back to 'Beamer Ball'*, WASH. TIMES, Sept. 22, 2013, *available at* http://www.washingtontimes.com/news/2013/sep/22/its-not-always-pretty-virginia-tech-getting-back-b/?page=all.

"internet and other electronic media rights."[4] Yet, the University of Alabama's employment agreement with head football coach Nick Saban—winner of back-to-back national football championships—offers him no ownership rights "of any kind or nature whatsoever" in any of the media programs that he is contractually obligated to create.[5] The preceding examples appear at different points on the intellectual property ownership spectrum; and still, each one highlights the critical importance of addressing intellectual property ownership issues in college coaches' employment agreements.[6]

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[4] Frank Beamer's employment agreement states: "The parties acknowledge that 'Beamerball' and the internet and other electronic media rights to 'Beamerball' are the sole property of BEAMER and are not subject to the conditions of this paragraph. Further, UNIVERSITY hereby grants 'Beamerball' media credentials during the term of this Contract." EMPLOYMENT CONTRACT: VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNIVERSITY AND FRANK BEAMER art. VI (effective Jan. 1, 2006) [hereinafter BEAMER AGREEMENT], *available at* http://www.coacheshotseat.com/CHSVirginiaTech.pdf.

[5] Saban's Employment Agreement states:

> Employee agrees that Employee shall have no right, title, or interest of any kind or nature whatsoever, including copyright, in or to any of the materials, works, or results of the media programs or non-endorsement activities. . . . To the extent that any such works are not works made for hire, Employee hereby assigns, conveys, and transfers to the University any and all rights of copyright therein or thereto . . . .

HEAD COACH EMPLOYMENT CONTRACT: THE UNIVERSITY OF ALABAMA AND NICK L. SABAN § 4.04(g) (effective Jan. 4, 2007) [hereinafter SABAN AGREEMENT], *available at* http://assets.espn.go.com/i/mag/blog/2010/thefile/coaches/saban.pdf.

[6] The employment agreements quoted in this Article are sourced from public records. *See, e.g.*, Univ. Sys. Of Maryland v. Baltimore Sun Co., 847

Whereas some coaches' employment agreements completely omit issues of intellectual property ownership, others address them in a surprising level of detail. The most sophisticated agreements contain provisions addressing the assignment of intellectual property rights,[7] revenue-sharing,[8] and everything in between. Additionally, a coach's employer may have an intellectual property policy that addresses employees' ownership and revenue-sharing rights, among other things.[9]

The modern day coach's responsibilities involve the creation and management of many different forms of intellectual property, including copyrights,[10] trade secrets,[11] trademarks,[12] and rights of publicity,[13] to name a few. In fact,

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A.2d 427 (Md. 2004) (holding that employment contracts and amendments or documents reflecting the total compensation paid directly by a state university to a coach must be disclosed, along with any third party compensation received by a coach as a result of the coach's position); EMPLOYMENT AGREEMENT: BOARD OF TRUSTEES OF THE UNIVERSITY OF ARKANSAS AND BRET BIELEMA § 35 (effective Dec. 4, 2012) [hereinafter BIELEMA AGREEMENT], *available at* http://www.arkansasbusiness.com/public/ab-Bret-Bielema-Contract.PDF (specifying that the agreement is subject to disclosure under the Arkansas Freedom of Information Act). Due to the frequency of turnover and contract revisions for college coaches, this Article may not contain the latest versions of the cited employment agreements.

[7] *E.g.*, SABAN AGREEMENT, *supra* note 5, § 4.04(g) (requiring the assignment of copyrights from the coach to the university for certain media programs).

[8] *See id.* § 4.05(a) (detailing how sports camp revenues will be shared between the university and the coach).

[9] *See* discussion *infra* Part IV.B.

[10] *See* discussion *infra* Part II.A.

[11] *See* discussion *infra* Part II.B.

[12] *See* discussion *infra* Part II.C.

[13] *See* discussion *infra* Part II.D.

compensation for a coach's involvement in intellectual property-related activities may in some cases account for over seventy-percent of the coach's salary.[14] This considerable financial contribution is made possible by skyrocketing media rights revenues, which have fueled the recent, dramatic rise in coaching salaries.[15]

Skyrocketing revenues also fueled a recent federal district court ruling against the NCAA. In a case widely known as *O'Bannon v. NCAA*, a former student–athlete filed a class action lawsuit against the NCAA seeking relief from the uncompensated commercial use of student–athletes' names, images, and likenesses in some of the same activities in which coaches receive compensation.[16] For instance, coaches—through the National Association of Basketball Coaches[17]—negotiated a licensing agreement with Electronic Arts[18] (EA)

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[14] EMPLOYMENT AGREEMENT: TEXAS A&M UNIVERSITY AND KEVIN SUMLIN §§ 4.1–4.2 (effective Dec. 12, 2011) [hereinafter SUMLIN AGREEMENT], *available at* http://media.ledger-enquirer.com/static/SEC-Coaching-Contracts/Texas-AM/Sumlin-Contract.pdf.

[15] *See infra* notes 75–78 and accompanying text.

[16] Class Action Complaint and Demand for Jury Trial ¶ 7, O'Bannon v. NCAA, No. 4:09-cv-03329-CW (N.D. Cal. July 21, 2009) [hereinafter O'Bannon Complaint]; *see also* Consolidated Amended Class Action Complaint ¶ 18, *In re* Student–Athlete Name & Likeness Litig., No. 4:09-cv-01967-CW, 2010 U.S. Dist. LEXIS 2189 (N.D. Cal. Mar. 10, 2010) [hereinafter Likeness Complaint] (representing the consolidation of multiple lawsuits brought against the NCAA by former student–athletes, including O'Bannon, for use of their images and likenesses).

[17] The National Association of Basketball Coaches (NABC) is a professional organization of college basketball coaches whose stated purpose is to "further the best interests of the game of basketball" and its coaches and players. *What is the NABC and What Does It Do?*, NABC, http://www.nabc.org/about/index (last visited Jan. 26, 2015).

[18] Electronic Arts, which posted $3.8 billion in net revenues in 2013, is an entertainment software company that provides video games and online

that allows their images to appear in EA's NCAA basketball series.[19] Players' images are also featured in the series. However, the players contend that they appear without their consent and, more importantly, without compensation.[20] Stated differently, the players have not licensed their images to EA and have not authorized anyone else to do so.[21] This case is noteworthy for a variety of reasons. First, it brings to the forefront the perceived exploitation of student–athletes in revenue-generating sports who, until the *O'Bannon* ruling,[22] were prohibited from receiving compensation for the commercial use of their names, images, and likenesses.[23]

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services. *About Electronic Arts*, EA, http://www.ea.com/about (last visited Jan. 27, 2015).

[19] Likeness Complaint, *supra* note 16, ¶ 398.

[20] *Id.* ¶ 197.

[21] *Id.*; *see also NCAA Sues EA Sports, CLC*, ESPN (Nov. 21, 2013, 2:18 AM), http://espn.go.com/college-football/story/_/id/10009545/ncaa-sues-ea-sports-collegiate-licensing-company (noting that a settlement agreement was reached whereby EA and CLC agreed to pay $40 million to settle student–athlete image claims, leaving the NCAA as the lone defendant). The NCAA's licensing agreement with EA expired on June 2014. Mike Suszek, *NCAA Won't Renew Contract with EA [Update]*, JOYSTIQ (July 17, 2013), http://www.joystiq.com/2013/07/17/ea-wont-renew-ncaa-license.

[22] O'Bannon v. NCAA, 7 F. Supp. 3d 955 (N.D. Cal. 2014) (holding that the NCAA violated the Sherman Act by prohibiting student–athletes from earning money from their names, images, and likenesses at FBS football and Division I basketball schools).

[23] NAT'L COLLEGIATE ATHLETIC ASS'N, 2013–2014 NCAA DIVISION I MANUAL § 12.4.1 (2013) [hereinafter 2013–2014 DIVISION I MANUAL], *available at* http://www.ncaapublications.com/productdownloads/D114.pdf (allowing student–athletes to receive compensation for employment that does "not include any remuneration for value or utility that the student–athlete may have for the employer because of publicity, reputation, fame or personal following that he or she has obtained because of athletics ability"); *id.* § 12.5.2.1(a)–(b) (prohibiting student–athletes from accepting compensation or allowing the use of their names or pictures "to advertise,

Additionally, it underscores the striking disparity in economic incentives provided to coaches vis-à-vis student–athletes with respect to intellectual property.

This Article explores the substantial role that intellectual property plays in college coaches' employment agreements and suggests that, to the extent that intellectual property ownership issues are not addressed in the agreements, they should be governed by university[24] intellectual property policies. Part II provides an overview of the intellectual property law regimes most applicable to coaches. Part III describes the typical intellectual property produced by college coaches and explores how it is addressed in employment agreements. Part IV addresses how university intellectual property policies can be applied to coaches and examines the consequences of classifying university indicia[25] as a "resource"

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recommend or promote . . . the sale or use of a commercial product or service"); *id.* § 12.5.3(a)–(b) (prohibiting student–athletes from making express or implied endorsements of any commercial product or service).

[24] For purposes of this Article, "college," "university," and "school" will be used synonymously.

[25] The Collegiate Licensing Company's Standard Retail Product License Agreement provides a representative definition of indicia:

> "Licensed Indicia" means the names and identifying indicia of the Collegiate Institutions including, without limitation, the trademarks, service marks, trade dress, team names, nicknames, abbreviations, city/state names in the appropriate context, slogans, designs, colors, uniform and helmet designs, distinctive landmarks, logographics, mascots, seals and other symbols associated with or referring to the respective Collegiate Institutions.

COLLEGIATE LICENSING CO., STANDARD RETAIL PRODUCT LICENSE AGREEMENT 1(b), *available at*

under those policies. This Part argues that universities should own intellectual property that is both created in connection with a coach's duties and dependent upon university associations for its value. Part V compares the coach's intellectual property paradigm to that of the student–athlete in light of current NCAA rules, university intellectual property policies, and the *O'Bannon* case. Likewise, this Part uses coaches' employment agreements as a muse for addressing the details of intellectual property licenses granted by student–athletes. Finally, this Article recommends that universities review their intellectual property policies to determine the policies' applicability to the activities of coaches and student–athletes.

II. THE RULEBOOK: AN INTELLECTUAL PROPERTY LAW OVERVIEW

"Society may give an exclusive right to the profits arising from them, as an encouragement . . . ."

- Thomas Jefferson, 3rd U.S. President, in a letter to Isaac McPherson dated August 13, 1813[26]

Intellectual property is an umbrella term that encompasses copyrights, patents, trademarks, trade secrets, and rights of publicity, including any related licenses. Intellectual property rights stem from the U.S. Constitution, which grants

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http://www.sec.gov/Archives/edgar/data/868756/000105291808000381/ex1019.htm (last visited Jan. 27, 2015).

[26] Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), *available at* http://www.let.rug.nl/usa/presidents/thomas-jefferson/letters-of-thomas-jefferson/jefl220.php.

Congress the power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[27] Congress exercises this power through the Copyright[28] and Patent[29] Acts, respectively.[30] Trademarks, which are also protected under federal law, are governed by the Lanham Act,[31] which receives its authority from the Commerce Clause.[32] Other types of intellectual property, such as trade secrets[33] and publicity rights,[34] are governed by state and to a lesser extent Federal law.

The rights provided for under most intellectual property law regimes are designed to encourage investments of time, energy, and resources in the creation of intellectual property.[35] Trademark protection, by contrast, is designed to protect the public from confusion and deception as to the source or origin of a particular good or service.[36] The general rule regarding intellectual property ownership is that the creator of the

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[27] U.S. CONST. art. I, § 8, cl. 8.
[28] Copyright Act, 17 U.S.C. §§ 101 et seq. (2012).
[29] Patent Act, 35 U.S.C. §§ 1 et seq.
[30] This Article's analysis will largely omit patents, as they are not found in the typical coach's intellectual property portfolio.
[31] 15 U.S.C. § 1051.
[32] ANNE GILSON LALONDE & JEROME GILSON, 1 GILSON ON TRADEMARKS § 1.04[2][b] (2014).
[33] ROGER M. MILGRIM & ERIC BENSEN, 1 MILGRIM ON TRADE SECRETS § 1.01[2] (2014).
[34] LALONDE & GILSON, *supra* note 32, § 2B.03.
[35] ROGER E. SCHECHTER & JOHN R. THOMAS, INTELLECTUAL PROPERTY: THE LAW OF COPYRIGHTS, PATENTS, AND TRADEMARKS § 1.3.1 (2003).
[36] LALONDE & GILSON, *supra* note 32, § 1.03[1].

intellectual property owns it.[37] There are, however, some exceptions that will be discussed in more detail below.

A. Copyrights

Copyright law protects original works of authorship fixed in a "tangible medium of expression."[38] This includes books, articles, music, movies, videos, computer programs, and radio and television broadcasts and rebroadcasts.[39] Copyright law bestows upon the copyright owner the exclusive right to make and distribute copies, prepare derivative works, publicly perform and display, and sell and rent copies of the original work.[40] These rights can be divided and licensed or assigned separately by the copyright owner, who also has the right to control subsequent uses of a protected work.[41]

There are, however, limitations on a creator's right to own intellectual property in an employment setting. That is, in the absence of an express or implied agreement to the contrary, the Copyright Act's "work made for hire" doctrine presumes that the employer is the copyright owner of a work created by an employee within the scope of employment.[42] Similarly, the party for whom the work is created is the owner where there is a written and signed agreement indicating that the work is made for hire.[43] A coach's show required as part of a coach's

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[37] Ernest I. Gifford, *Who's the Owner? Determining Ownership of Intellectual Property*, 83 MICH. B.J. 21, 21 (2004).
[38] 17 U.S.C. § 102(a) (2012).
[39] *See* WALTER T. CHAMPION, JR., SPORTS LAW 403–04 (4th ed. 2009).
[40] 17 U.S.C. §§ 106, 109.
[41] *Id.* § 201(d); *see also* SCHECHTER & THOMAS, *supra* note 35, § 6.4.2.
[42] 17 U.S.C. §§ 101, 201(b).
[43] *Id.*

employment agreement is a representative example of a work made for hire.

B. Trade Secrets

Trade secrets are protected primarily under state law.[44] That is, forty-seven states[45] have adopted the Uniform Trade Secrets Act,[46] which defines trade secrets roughly as information that derives independent economic value from not being generally known or readily ascertainable by proper means and that is the subject of reasonable efforts to preserve its secrecy.[47] One of the primary purposes of trade secret law is to encourage ethical business practices.[48]

Since employees typically have legitimate access to employer trade secrets, trade secret litigation involving current or former employees tends to rely on improper use or

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[44] *See* MILGRIM & BENSEN, *supra* note 33, § 1.01[2] ("The National Conference of Commissioners on Uniform State Laws commissioned a Uniform Trade Secrets Act (the "UTSA"). It was recommended for enactment in all states in 1979, and was approved by the American Bar Association in 1980."); *see also, e.g.*, CAL. CIV. CODE ANN. §§ 3426–3426.10 (2014); OHIO REV. CODE ANN. §§ 1333.61–1333.69 (2014); WASH. REV. CODE ANN. 19.108.010–19.108.940 (2014). *Cf.* Economic Espionage Act of 1996, 18 U.S.C.A. §§ 1831 et seq. (2012) (providing federal protection for trade secrets).

[45] *Legislative Fact Sheet—Trade Secrets Act*, UNIFORM LAW COMMISSION (2014), http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Trade Secrets Act (last visited Jan. 27, 2015). The Massachusetts legislature introduced the Uniform Trade Secrets Act in 2014. *Id.*

[46] NAT'L CONFERENCE OF COMM'RS OF UNIFORM STATE LAWS, UNIFORM TRADE SECRETS ACT WITH 1985 AMENDMENTS (1985), *available at* http://www.uniformlaws.org/shared/docs/trade secrets/utsa_final_85.pdf (last visited Jan. 27, 2015).

[47] MILGRIM & BENSEN, *supra* note 33, § 1.01[2].

[48] *Id.* §13.03[2][b].

disclosure of trade secrets by the employee.[49] Trade secrets belonging to an employer can be protected via confidentiality,[50] non-compete,[51] or non-solicitation[52] clauses or agreements. These agreements are typically required as a condition of employment for certain employees.[53] In the coaching context, a trade secret might include student–athlete and coach contact lists, playbooks, signals, and game plans, among other things.[54] It would not, however, include a coach's general knowledge or professional skills.[55]

C. Trademarks

A trademark is a word, name, symbol, device, or any combination thereof used to identify and distinguish goods and indicate their source.[56] Trademarks can include phrases, names, and drawings, such as team logos.[57] Rights in a mark are established by using the mark in commerce.[58] Trademark law

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[49] *See* ELIZABETH A. ROWE & SHARON K. SANDEEN, TRADE SECRET LAW 249 (2012).
[50] SABAN AGREEMENT, *supra* note 5, § 5.01(k).
[51] BIELEMA AGREEMENT, *supra* note 6, § 19.
[52] *E.g.*, EMPLOYMENT AGREEMENT: THE OHIO STATE UNIVERSITY AND URBAN MEYER §§ 5.3(c), 5.6 (effective Nov. 28, 2011) [hereinafter MEYER AGREEMENT], *available at* http://grfx.cstv.com/photos/schools/osu/sports/m-footbl/auto_pdf/2012-13/misc_non_event/UrbanMeyerContract.pdf.
[53] MILGRIM BENSEN, *supra* note 33, § 4.02.
[54] *See, e.g.*, BIELEMA AGREEMENT, *supra* note 6, § 20.
[55] *See* Great Lakes Carbon Corp. v. Koch Indus., Inc., 497 F. Supp. 462, 471 (S.D.N.Y. 1980).
[56] 15 U.S.C. § 1127 (2012).
[57] *See* PAUL C. WEILER ET AL., SPORTS AND THE LAW: TEXT, CASES AND PROBLEMS 435 (4th ed. 1993).
[58] The Lanham Act, upon which federal trademark law rests, is grounded in the Commerce Clause of the U.S. Constitution. Art. I, § 8, cl. 3. The Commerce Clause gives Congress the power to "regulate Commerce with

allows the owner of a mark to prevent others from using the mark if the use is likely to confuse or deceive consumers about the source, sponsorship, or affiliation of the goods.[59]

Unauthorized use of trademarks can negatively affect the owner's brand and reputation[60] and can also result in cancellation of the mark.[61] For this reason, many employers have policies restricting the use of their trademarks.[62] For instance, the employer may require that the trademark be used in good taste and that it not cast the employer in a negative light.[63]

The most visible trademarks for a university include names, mascots, and logos. College coaches can also own trademarks, and, in fact, the new trend amongst them is to register their names as trademarks.[64]

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foreign Nations, and among the several States, and with the Indian Tribes." *Id.* As such, a trademark must be used in interstate commerce before it may be registered under federal law. 15 U.S.C. § 1051(a)(1)–(2).

[59] *See* 15 U.S.C. § 1051(a)(3)(D).

[60] Deere & Co. v. MTD Prods., Inc., 41 F.3d 39, 43 (2d Cir. 1994).

[61] LALONDE & GILSON, *supra* note 32, § 3.05[9][a].

[62] *E.g.*, *University of Washington Trademark and Licensing Policies: Use of Trademarks*, UNIV. OF WASH., http://depts.washington.edu/uwlogos/uw-resources/policies-procedures (last visited Jan. 28, 2015).

[63] *See id.*; *see also* SABAN AGREEMENT, *supra* note 5, § 4.05(c) ("Employee shall use the University's trademarks and logos only in a manner that will not cause ridicule or embarrassment to the University or be offensive to standards of good taste as reasonably determined by the University.").

[64] Steve Berkowitz, *Latest Trend for College Football Coaches: Trademarked Names*, USA TODAY (Nov. 6, 2013, 4:19 PM), http://www.usatoday.com/story/sports/ncaaf/2013/11/06/college-football-coaches-pay-name-likeness-trademarks/3449829.

D. Rights of Publicity

Rights of publicity are protected under the Lanham Act[65] and state law.[66] The Lanham Act's purpose with respect to publicity rights is to prevent consumer confusion.[67] State rights of publicity, where they exist, protect against unauthorized appropriations of "the commercial value of a person's identity" where the "person's name, likeness, or other indicia of identity" are used for "purposes of trade" without

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[65] *See* 15 U.S.C. § 1125(a)(1)(A) (2012).

[66] *See* Zacchini v. Scripps-Howard Broad Co., 433 U.S. 562, 566 (1977) (holding that an action based on the right of publicity is a state law claim); LALONDE & GILSON, *supra* note 32, § 2B.03 ("The right of publicity is a creature of state law, and the creature takes many forms."); *see also, e.g.*, CAL. CIV. CODE § 3344 (West 2014); FLA. STAT. ANN. § 540.08 (West 2014); N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2014); OHIO REV. CODE ANN. § 2741 (West 2014); TEX. PROP. CODE ANN. §§ 26.003(1), 26.012(d) (West 2014); WASH. REV. CODE ANN. § 63.60 (West 2014).

[67] The relevant language in the Lanham Act states:

> Any person who, or in connection with any goods or services, uses any… false or misleading representation of fact, which…is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person…shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a). Although the right of publicity is not explicitly protected under the Lanham Act, it has been relied upon successfully for false endorsement claims involving the right of publicity. *See* Allen v. Nat'l Video, Inc., 610 F. Supp. 612 (S.D.N.Y. 1985); *see also* Allen v. Men's World Outlet, Inc., 679 F. Supp. 360 (S.D.N.Y. 1988).

consent.[68] Use for "purposes of trade" generally refers to commercial uses of a person's identity.[69]

A coach's right of publicity may be licensed to a university for institutional or commercial purposes.[70] A license from the coach is often necessary for the university to market and promote the coach's sport and also to comply with any contractual obligations involving the coach.[71] For example, the coach's employment agreement may allow the university to use the coach's name, likeness, or image for media guides, sports camps, or product endorsements.[72]

As noted above, the laws of copyrights, trademarks, trade secrets, and rights of publicity can be applied to various aspects of a coach's daily responsibilities. Given the wide variety of intellectual property produced by coaches, it is important to understand these laws so that employment

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[68] RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995). For example, California's right of publicity law states:

> Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof.

CAL. CIV. CODE § 3344(a).
[69] RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47.
[70] *E.g.*, BIELEMA AGREEMENT, *supra* note 6, § 10.
[71] *E.g.*, *id.*
[72] *E.g.*, *id.*

agreements and university policies can be drafted accordingly. This is especially true in those areas of law where the initial allocation of ownership may change based on the parties involved and the scope of the activity.[73]

III. RUNNING UP THE SCORE: THE INTELLECTUAL PROPERTY OF COLLEGE COACHES

"Similar to many auxiliary areas in higher education, professional schools, and medical centers, there is a 'market' for top leadership talent (in our case, coaches) that is extremely competitive. Many of our best leaders are highly compensated because they are highly coveted by peer institutions. Our challenge is to balance the competitive forces of the athletics 'market' with the expense trends in higher education, which rise at a much slower pace."

- Craig K. Littlepage, Director of Athletics at the University of Virginia[74]

A surprising number of college coaches, at both public and private institutions, earn over a million dollars a year.[75] As coaching salaries have escalated over the years,[76] so too has

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[73] *See* sources cited *infra* note 241.
[74] E-mail from Craig K. Littlepage, Dir. of Athletics, Univ. of Va. (July 7, 2014, 10:31 PM) (on file with author).
[75] Steve Berkowitz et al., *2013 NCAAF Coaches Salaries*, USA TODAY http://www.usatoday.com/sports/college/salaries (last visited Jan. 28, 2015) (listing seventy college football coaches earning more than $1 million a year).
[76] Erik Brady et al., *Colorado's MacIntyre Part of College Football Salary Explosion*, USA TODAY (Nov. 6, 2013, 1:42 PM),

public outrage over what many view as the misplaced priorities of institutions of higher education.[77] Interestingly, much of the increase in earnings for college coaches originates from

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http://www.usatoday.com/story/sports/ncaaf/2013/11/06/college-football-coaches-salary-colorado-pay-mike-macintyre/3449695 ("The average compensation package for major-college coaches is $1.81 million, a rise of about $170,000, or 10%, since last season—and more than 90% since 2006, when USA TODAY Sports began tracking coaches' compensation.").

[77] *See* Allie Grasgreen, *Coaches Make More Than You*, INSIDE HIGHER ED (Nov. 7, 2013), http://www.insidehighered.com/news/2013/11/07/football-coach-salaries-10-percent-over-last-year-and-top-5-million - sthash.xnFcexcM.dpbs.

Rank	School	Conference	Head Coach	Total Salary
1	Alabama	SEC	Nick Saban	$5,545,852
5	Oklahoma	Big 12	Bob Stoops	$4,773,167
10	Louisville	AAC	Charlie Strong	$3,738,500
15	Cincinnati	AAC	Tommy Tuberville	$3,143,000
20	Missouri	SEC	Gary Pinkel	$2,800,200
25	Southern California	PAC-12	Lane Kiffin	$2,594,091
30	Georgia Tech	ACC	Paul Johnson	$2,515,500
35	Colorado	PAC-12	Mike MacIntyre	$2,403,500
40	Washington State	PAC-12	Mike Leach	$2,250,000
45	Arizona	PAC-12	Rich Rodriguez	$2,150,000
50	Kentucky	SEC	Mark Stoops	$2,001,250
55	South Florida	AAC	Willie Taggart	$1,807,745
60	Illinois	Big Ten	Tim Beckman	$1,700,000
65	Colorado State	Mt. West	Jim McElwain	$1,350,000
70	Notre Dame	Independent	Brian Kelly	$1,088,179

Berkowitz et al., *supra* note 75 (illustrating the generous salaries paid to top college coaches by using the rank and salary of every fifth coach as an example). The above chart illustrates the generous salaries paid to top college coaches, using the rank and salary of every fifth coach as an example. Due to the frequency of turnover and contract revisions for college coaches, this Article may not contain the latest salary information. *See Methodology for 2013 NCAA Football Head Coaches Salary Database*, USA TODAY (Dec. 11, 2013, 6:45 PM), http://www.usatoday.com/story/sports/ncaaf/2013/11/06/2013-ncaa-football-coaches-salary-database-methodology/3451749.

corresponding increases in the value of college sports related intellectual property, and especially media rights.[78] Because a

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[78] Patrick Rishe, *College Football Coaching Salaries Grow Astronomically Due to Escalating Media Rights Deals*, FORBES (Nov. 20, 2012, 6:40 AM), http://www.forbes.com/sites/prishe/2012/11/20/college-football-coaching-salaries-grow-astronomically-due-to-escalating-media-rights-deals ("[T]he explosion of media rights deals across college sports infuses additional funds into athletic departments that can be used to financially reinvigorate football programs.").

Subdivision	**Avg. Annual Value**	**Contract Term**	**Network(s)**
NCAA (Men's Basketball Championship Only)	$771 million	2011- 2024	CBS and Turner
BCS (Football Playoff Only)	$470 million	2014- 2025	ESPN
Big Ten	$232 million $20 million	2007- 2032 2006- 2016	The Big Ten Network CBS
Pac-12	$250 million	2011- 2023	ESPN and Fox
SEC	$150 million $55 million	2009- 2024 2009- 2024	ESPN/ABC CBS College Sports
ACC	$155 million	2011- 2023	ESPN/ABC
Big 12	$90 million $60 million	2012- 2025 2008- 2016	Fox ESPN/ABC
[Former] Big East	$36 million	2007- 2013	ESPN/ABC
Conference USA	$15.6-16.1 million	2011- 2016	CBS College Sports
Atlantic 10	$5 million	2013- 2021	ESPN/CBS/NBC

ESPN Lands Rights to College Playoff for $470M Per Year Through 2025, CBSSPORTS (Nov. 21, 2012, 2:02 PM), http://www.cbssports.com/collegefootball/story/21083692/espn-lands-rights-to-college-playoff-for-470m-per-year-through-2025 (detailing football playoff media deal); Brian Ewart, *Basketball Isn't Worth Much to TV*, SB NATION (Oct. 3, 2012, 11:42 AM), http://www.vuhoops.com/2012/10/3/3448930/basketball-isnt-worth-much-to-tv (detailing Atlantic 10 media deal); Ben Klayman, *NCAA Signs $10.8 Billion Basketball Tourney TV Deal*, REUTERS (Apr. 22, 2010, 4:12 PM), http://www.reuters.com/article/2010/04/22/us-basketball-ncaa-cbsturner-

coach's intellectual property–based compensation can be paid by the coach's employer or by outside sources,[79] the university's contribution to a coach's bottom line may in reality be just a small fraction of the coach's total salary.[80]

Ultimately, coaches can earn considerable income from intellectual property. The most common scenarios under which a coach generates income from intellectual property include radio and television appearances; athletic shoe, apparel, and equipment endorsements; sports camps and coaches clinics; speaking engagements and personal appearances; licensed merchandise sales; and written materials. These income streams are described in further detail below and, where applicable, provisions from coaches' employment agreements are used to illustrate different universities' approaches to addressing intellectual property issues.

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idUSTRE63L4FP20100422 (detailing the NCAA tournament deal); *see also* John Ourand, *How High Can Rights Fees Go?*, SPORTS BUS. J., June 6, 2011, *available at* http://www.sportsbusinessdaily.com/Journal/Issues/2011/06/06/In-Depth/Rights-Fees.aspx (detailing certain conference media deals).

[79] 2013–2014 DIVISION I MANUAL, *supra* note 23, § 11.2.2 (requiring that a coach's employment agreement include the stipulation that the coach is required to annually provide to the "president or chancellor" a written and detailed account of athletically-related income and benefits from sources outside the institution); *but cf.* NAT'L COLLEGIATE ATHLETIC ASS'N, 2000–2001 NCAA DIVISION I MANUAL § 11.2.2 (2000), *available at* http://www.ncaapublications.com/productdownloads/MAN0001.pdf (mandating that coaches' employment agreements include a stipulation requiring annual prior written approval, as opposed to after-the-fact accountings, of outside income from the chief executive officer).

[80] Mark Yost, *Who Pays the College Coach*, WALL ST. J. (Dec. 6, 2008, 11:59 PM), http://online.wsj.com/news/articles/SB122853304793584959.

A. Radio, Television, and Internet Programs

"For anyone who considers this extravagant, [p]lease refer back to the billions of dollars generated by the tournament and consider that TV viewers do not tune in to watch the NCAA president present the trophy."

- John Calipari, Head Basketball Coach at the University of Kentucky[81]

"The fact is, today, the majority of (a football head coach's) salary comes from the multimedia rights."

- Jay Jacobs, Athletics Director at Auburn University[82]

Coaches' shows featuring game highlights and commentary can be used to satisfy fan and media interest in team news and updates. Coaches with teams that are popular with the media can generate sizeable revenues from sponsors seeking to advertise during games and coaches' shows.[83] Most coaches' employment agreements contain provisions addressing the details of the coach's media responsibilities. These responsibilities can raise various issues regarding copyright ownership, trademark usage, and rights of publicity.

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[81] Nina Mandell, *John Calipari Thinks the Media Should Buy Tickets to the NCAA Tournament*, USA TODAY (Apr. 15, 2014, 5:20 PM), http://ftw.usatoday.com/2014/04/john-calipari-suggests-media-buys-tickets-so-ncaa-can-send-players-families-to-game.

[82] Jodi Upton & Steve Wieberg, *Contracts for College Coaches Cover More Than Salaries*, USA TODAY (Nov. 16, 2006, 4:00 PM), http://usatoday30.usatoday.com/sports/college/football/2006-11-16-coaches-salaries-cover_x.htm.

[83] *See* Martin J. Greenberg, *College Coaching Contracts Revisited: A Practical Perspective*, 12 MARQ. SPORTS L. REV. 127, 201–04 (2001); *see also* JAMES T. GREY, 1 SPORTS LAW PRACTICE § 6.07(7)(a) (3d ed. 2014).

Participation in a coach's show can be a key aspect of a coach's media responsibilities. Coaches' shows may be produced by the university or a third party, with the production agreements for the shows negotiated by either the coach or the university. Where the university negotiates the agreements, the shows may be included as part of a larger agreement for broadcasts of games.[84] The operational details of a coach's show, however, are customarily negotiated directly with the coach,[85] whose employment agreement will specify the frequency, duration, format, ownership rights, and compensation for the show. Below is an excerpt from a very thorough coach's show provision:

> Coach agrees that Ohio State shall own all broadcasting and telecasting rights to all live and recorded coach's shows . . . . Coach agrees to provide his services to, and perform to the best of his ability on, the following Programs: . . . A weekly television show (live or taped) on which Coach personally appears, of up to forty minutes in length. . . . The exact time and location of such show shall be mutually agreed upon between Coach and the producer of the Programs. . . . In exchange for these services, Ohio State guarantees that Coach shall receive

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[84] CHARLES J. RUSSO & RALPH D. MAWDSLEY, 6 EDUCATION LAW § F8.04-1(E) (2014) (illustrating that total compensation from the university's media rights agreements typically consists of either a minimum guaranteed dollar amount or a percentage of gross revenues from advertising sales and other income).
[85] *See id.* § F8.04-1(P).

> compensation . . . at the rate of ($1,850,000) per year.[86]

In the above agreement, the university specifies that it will own the rights to the coach's shows that it either produces or contracts with third parties to produce.[87]

By contrast, in those instances where a coach contracts directly with third party producers, the coach may own the rights to the shows' original content, which the coach can then assign or license to a third party. Dabo Swinney's employment agreement, for example, allows him to contract directly with third party producers:[88]

> Television and Radio Shows – Coach is entitled to receive additional compensation *from sources outside the University* through an arrangement for regular appearances on television and radio programs in connection with the University's intercollegiate football program. Coach shall use his best efforts to promote these shows in a positive manner and will also use his best efforts to create goodwill with the outside sponsors of these shows. The format and content for any such programs are subject to approval of the University. *The parties agree that the University shall own all rights in and to the master game*

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[86] MEYER AGREEMENT, *supra* note 52, § 3.2.
[87] *Id.*
[88] SWINNEY AGREEMENT, *supra* note 2, § 5(K)(2).

> *tapes and highlight tapes produced in connection with Coach's television show.*[89]

In the above excerpt, Clemson explicitly reserves its rights in the "master game tapes and highlight tapes"[90] but fails to reserve or even address its rights, if any, in the shows themselves. Although Swinney's employment agreement is silent on who owns the rights to his coach's shows,[91] there is a provision in the agreement that guarantees him a six-figure income from the shows.[92] That is, Clemson is contractually obligated to pay the difference between the guaranteed amount and Swinney's income from third party sponsors and producers.

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[89] *Id.* (emphasis added). A more general coach's show clause in Carl Pelini's former employment agreement simply provided that "[c]oach shall have the opportunity to implement a radio and/or television show, subject to reasonable University approval and sponsor-related restrictions, and retain revenues in conjunction with the University's athletics' marketing company, as applicable." FLORIDA ATLANTIC UNIVERSITY HEAD COACHING AGREEMENT: FLORIDA ATLANTIC UNIVERSITY BOARD OF TRUSTEES AND CARL PELINI § 6(A) [hereinafter PELINI AGREEMENT] (effective Dec. 5, 2011), *available at* http://www.fau.edu/bot/meetings/12_05_2011_specialfullboardmeeting/pelini_agreement.pdf.

[90] SWINNEY AGREEMENT, *supra* note 2, §5(K)(2).

[91] *See generally id.*

[92] *Id.* § 5(L)(1). The guarantee states in relevant part that "if Coach does not generate a total of . . . ($550,000) . . . , the University will pay to Coach's designated corporation, KATBO, LLC, the difference between the Guaranteed Outside Income Amount and the gross amount Coach or KATBO earned . . . ." *Id.* Outside income guarantees ensure that the coach receives a certain minimum salary while shifting the risk of income fluctuations to the university. *See* Paul Steinbach, *Contract Bonuses Award College Coaches for All Sorts of Achievements*, ATHLETIC BUSINESS (May 2009), *available at* http://www.athleticbusiness.com/Staffing/contract-bonuses-award-college-coaches-for-all-sorts-of-achievements.html.

Clemson's contractual failure to reserve ownership rights in Swinney's shows is significant because ownership includes the right to receive royalties and control future uses of the shows. Therefore, retaining an ownership interest in the shows potentially would allow Clemson to recoup any amounts paid under the guarantee at some point in the future. Part IV of this Article will analyze Clemson's intellectual property policy to determine if it is instructive on the issue of Clemson's rights in the shows.[93] In the interim, an employment agreement that is more transparent with respect to the ownership of media rights will be examined.

The media programs provision in Louisiana State University's employment agreement with its head football coach stands in sharp contrast to Clemson's.[94] It states:

> Radio/Television/Internet Payments . . . The UNIVERSITY shall own all rights to the programs and shall be entitled, at its option, to produce and market the programs or negotiate with third parties for the production and marketing of the programs. The UNIVERSITY shall be entitled to retain all revenue generated by the programs including but not limited to that received from program sponsors for commercial endorsements used during the programs. "Program sponsors" shall include, but not be limited to, those persons or

[93] *See* discussion *infra* Part IV.B.3.
[94] *See* EMPLOYMENT AGREEMENT: BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE AND LES MILES § 7 (effective Jan. 1, 2007), *available at* http://assets.espn.go.com/i/mag/blog/2010/thefile/coaches/miles.pdf.

> companies who make financial contributions supporting, or who pay a fee for, commercial announcements and endorsements used on the programs.[95]

The above agreement does not provide the coach with any ownership or explicit revenue sharing rights but instead promises him payments of nearly $1 million as consideration for his participation in any radio, television and internet programs.[96] This amount presumably compensates the coach for his efforts and also for ceding his intellectual property rights in the programs to the university. Ultimately, this provision is a win-win for both sides in that it handsomely compensates the coach for his services and also provides an opportunity for the university to receive compensation for the resources that it inevitably must contribute to the programs—regardless of who produces them.

B. Product Endorsements

"It would be interesting if Nike were to sign a contract with a college president and Converse were to sign a basketball coach. . . . Where would the ownership lie? I think there ought to be discussion about that."

- David Roselle, Former President of the University of Kentucky[97]

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[95] *Id.*
[96] *Id.*
[97] Mike Jensen, *Coaches' Shoe Contracts Evoke Concern*, THE SEATTLE TIMES, Aug. 5, 1990, *available at* http://community.seattletimes.nwsource.com/archive/?date=19900805&slug=1086162.

Product endorsements involve rights of publicity for the coach—and team members—in addition to the trademarks of the product's provider. In a typical coach's product endorsement arrangement, a company supplies complimentary products for the team and the coach receives a payment for outfitting the team in the company's products during competitions.[98] The coach may also be required to wear the company's products and serve in a consulting role.[99] Endorsement arrangements allow a company to receive product exposure that it might otherwise have to pay considerably more for in a commercial advertisement.[100] Additionally, it allows the coach to exploit his commercial value in addition to that of his players, who under NCAA rules are not entitled to receive endorsement income.[101]

Endorsement contracts negotiated by individual coaches can present conflicts of interest, especially at public universities where the agreements could be viewed as using

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[98] GREY, *supra* note 83, § 6.07(7)(c).
[99] *Id.*
[100] *Id.* To ensure that the bargained for exposure is received, shoe company endorsement agreements often have anti-spatting provisions that restrict student–athletes' ability to tape over shoe logos. Matthew Kish, *Footwear Brands Forbid Athletes from Taping over Shoe Logos*, PORTLAND BUS. J. (Aug. 30, 2013, 3:00 AM), http://www.bizjournals.com/portland/print-edition/2013/08/30/footwear-brands-forbid-athletes-from.html?page=all. "Spatting" is the practice of athletes wrapping tape around their shoes and up their ankles to prevent ankle injuries. *Id.* Coaches' employment agreements can also contain anti-spatting provisions. *E.g.*, SABAN AGREEMENT, *supra* note 5, § 4.04(e) ("In connection with any existing shoe contract, Employee agrees to cooperate with the University by preventing the unnecessary spatting of athletic shoes worn by student–athletes during competition.").
[101] *See* 2013–2014 DIVISION I MANUAL, *supra* note 23, §§ 12.5.3(a)–(b).

one's public position for private gain.[102] To mitigate these types of conflicts, universities can require advance approval of endorsement contracts negotiated by a coach:

> 11.2 Other Activities, Outside Employment and Extra Compensation . . . Coach may pursue and enter into endorsement, consultation or merchandizing contracts with athletic shoe, apparel or equipment manufacturers, provided that such do not conflict with the interests of the University. . . . Prior to entering into such an agreement, Coach shall provide a copy of the proposed endorsement, consultation, or merchandizing contract to the Athletic Director and obtain written approval from the Athletic Director . . . .[103]

The coach in the above excerpt received $10,000 from Nike and $1,000 from Wilson.[104] Coaches at more prominent programs can earn up to six figures from endorsements.[105]

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[102] *See, e.g.*, Va. Op. Att'y Gen., 1983 Va. AG LEXIS 127, at *3 (Apr. 8, 1983).

[103] EMPLOYMENT AGREEMENT BETWEEN RICHARD WILSON STOCKTILL AND MIDDLE TENNESSEE STATE UNIVERSITY § 11.2 (effective Dec. 12, 2005), *available at* http://www.coacheshotseat.com/CHSMiddleTennessee.pdf.

[104] COACHES OUTSIDE INCOME ANNUAL PRIOR APPROVAL FORM: RICHARD WILSON STOCKTILL (signed Aug. 5, 2008), *available at* http://www.coacheshotseat.com/CHSMiddleTennessee.pdf.

[105] GREY, *supra* note 83, § 6.07(7)(c) ("Mark Thomasshaw, corporate counsel for the Nike Shoe Company, stated that the four or five top college basketball coaches in the country could earn as much as $200,000 each from endorsement contracts with shoe companies.").

Where a university, as opposed to a coach, has entered into endorsement agreements with equipment, shoe, and apparel companies, the university may contractually require the coach to endorse the company's products.[106] In that case, a coach may license or assign his right of publicity to the university or to the company for use with product promotions.[107] An example of such a provision is below:

> B. Additional Undertakings. It is contemplated by the parties that in return for consideration paid to Coach by Company under the Services Agreement, Coach shall grant Company the license to use the Coach's endorsement, in connection with the advertisement, promotion and sale of Company's Products.[108]

The university in the above employment agreement guaranteed the coach $500,000 annually for the first two years of the endorsement and $200,000+ annually through the end of the agreement's term.[109]

C. Sports Camps

"[Coach] doesn't keep any money from the camps . . . . He distributes it among the people who work the camps. Last year, he understood that he was supposed to put the gross

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[106] *E.g.*, ACTIVITIES AGREEMENT: THE UNIVERSITY ATHLETIC ASSOCIATION, INC. AND URBAN MEYER § 4(B) (effective Apr. 20, 2005) [hereinafter MEYER ACTIVITIES AGREEMENT], *available at* http://www.coacheshotseat.com/FloridaCoachesHotSeat.pdf.
[107] *E.g.*, *id.*
[108] *Id.*
[109] *Id.* § 4(A); HEAD COACHING AGREEMENT: THE UNIVERSITY ATHLETIC ASSOCIATION AND URBAN MEYER § 4(A) (effective Apr. 20, 2005).

amount [in his outside income report]. This year, he understood he should put the net."

- Doug Walker, Associate Athletics Director for Media Relations at the University of Alabama[110]

Youth sports camps teach young players the fundamentals of a sport[111] and also provide a vehicle for college coaches to earn extra money during the offseason.[112] Additionally, the camps can serve as marketing tools for the universities and coaches that conduct them.[113] Sports camps, typically taught by college coaches and players, may be owned and operated by a coach or by the university.

The licensing of intellectual property, such as trademarks and rights of publicity, for camp operations allows either a university or coach-owned camp to benefit as much as possible from the revenue generating potential of their respective reputations and brands. For example, the website, promotional products, and printed materials used to market a camp may contain the university's marks and logos along with

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[110] Steve Berkowitz & Jodi Upton, *How Alabama's Nick Saban's Pay Figure Fell by $1.1 Million*, USA TODAY (Nov. 17, 2011, 11:49 AM), http://usatoday30.usatoday.com/sports/college/football/sec/story/2011-11-17/alabama-saban-pay-figure-fell/51267314/1.

[111] *See, e.g.*, LSU ATHLETICS YOUTH CAMPS & CLINICS, http://www.lsusports.net/ViewArticle.dbml?ATCLID=177246 (last updated Mar. 17, 2015) (listing the purpose of various LSU youth sports camps).

[112] Dan Fitzgerald, *Camps Bring Additional Income, Legal Issues for College Coaches*, CONN. SPORTS L. (May 18, 2011), *available at* http://ctsportslaw.com/2011/05/18/camps-bring-additional-income-legal-issues-for-coaches.

[113] *See, e.g.*, AUBURN SUMMER CAMP POLICY MANUAL 3, *available at* https://sites.auburn.edu/admin/universitypolicies/Policies/AuburnUniversitySummerCampPolicies.pdf..

the image or likeness of the coach.[114] Instructional materials, such as any films or videos, might contain similar intellectual property from both the coach and university.

Below is an example of the University of Arkansas' trademark licensing language for a coach-owned and operated camp, where the coach is required to purchase a license to use university trademarks:[115]

> Trademarks, Logos and Intellectual Property. Camp acknowledges and agrees that the University is the sole and exclusive owner of all University and Razorback logos, trademarks, service marks, word marks and other indicia of intellectual property identified in Exhibit D. . . . Coach shall have the right to use the Indicia for the Camp provided the Camp fully complies with the Office of Trademark Sports Camp License Policy and pays the required license fees . . . .[116]

In the above example, the coach receives all revenues generated by the camp, which is operated in university facilities.[117] In return, the coach is required to pay a nominal facilities fee and a small licensing fee for the use of university

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[114] *See, e.g.*, DABO SWINNEY FOOTBALL CAMPS, http://www.daboswinneyfootballcamp.com (last visited Jan. 31, 2015) (displaying coach's image and university marks); OKLAHOMA FOOTBALL CAMP, http://www.oklahomafootballcamp.com/02_sessions.htm (last visited Jan. 31, 2015) (displaying coach's image and university marks).
[115] BIELEMA AGREEMENT, *supra* note 6, at Ex. E, § 2(I).
[116] *Id.*
[117] *Id.* at Ex. D.

trademarks.[118] This trademark license benefits the coach's camp tremendously by allowing it to associate itself with the university even though it is not operated by the university.

By contrast, where the university owns and operates the camp, the coach's employment agreement will often require the coach to grant the university a license to use the coach's name and likeness to promote and market the camp,[119] thereby allowing the university to capitalize on the coach's celebrity and reputation:

> 4.05 (a) Sports Camps. It is agreed that the University shall have the exclusive right to operate football camps and clinics for young people during the off-season. Employee agrees to cooperate with the University in the promotion and marketing of such camps and clinics, including the use of Employee's Likeness, and to participate and take an active role in the conduct of such camps or clinics. Each Contract Year for Employee's promotion and participation in the football camps, the University agrees to pay Employee . . . based on the net income generated by the . . . camps . . . .[120]

In the above example, the coach is compensated based on camp revenues[121] for his participation and, presumably, also

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[118] *Id.* at Ex. A of Ex. E (requiring a licensing fee of $60 total for six camp sessions and a facilities fee of $250 or 5 percent per session, whichever is less).
[119] *E.g.*, SABAN AGREEMENT, *supra* note 5, § 4.05(a).
[120] *Id.*
[121] *Id.*

for licensing his publicity rights to the university. Sports camps at athletically-prominent universities can generate six-figure revenues.[122] The "gross amount" of camp revenue referenced in this Section's introductory quote was $643,183.[123]

D. Public Appearances

"One speech closer to vacation."

- Nick Saban, Head Football Coach at the University of Alabama[124]

A coach's employment agreement may require public appearances and speaking engagements for which the coach is specifically compensated. This public relations compensation can add a sum totaling six or seven figures to the salaries of top coaches. The payments may be itemized separately, as in the provision below, or included in the total aggregate of the coach's salary:

> PERSONAL APPEARANCES ON BEHALF OF UNIVERSITY The Coach shall be available for media and other public or private appearances at such times and places as the

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[122] *See* James K. Gentry & Raquel Meyer Alexander, *Pay for Women's Basketball Coaches Lags Far Behind That of Men's Coaches*, N.Y. TIMES, Apr. 3, 2012, at B10, *available at* http://www.nytimes.com/2012/04/03/sports/ncaabasketball/pay-for-womens-basketball-coaches-lags-far-behind-mens-coaches.html?pagewanted=all&_r=0; *see also* Berkowitz Upton, *supra* note 110.

[123] Berkowitz & Upton, *supra* note 110.

[124] Warren St. John, *Nick Saban: Sympathy for the Devil*, GQ, Sept. 2013, *available at* http://www.gq.com/entertainment/sports/201309/coach-nick-saban-alabama-maniac?currentPage=1.

> University, through the Director of Intercollegiate Athletics, may reasonably require and determine to be beneficial to promoting the University and its Intercollegiate Athletic Program.[125]

The coach in the above agreement received an itemized $250,000 solely for appearing on behalf of the university.[126]

Typically, a coach's publicity rights payment will be bundled with payments for media programs. Nick Saban, for example, receives multi-million dollar payments for radio, television, and other mandatory appearances required by his employment agreement.[127] "As additional consideration" for the payment, the university reserves a license to use the coach's "name, biographical material, likeness, recorded voice, statements, drawing, picture, or any combination thereof" in connection with the required appearances.[128]

In addition to addressing personal appearances made on behalf of the university, a coach's employment agreement may also address non-university appearances. However, as in the provision below, the university may choose to limit the coach's ability to associate the university with such endeavors:[129]

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[125] UNIVERSITY OF MARYLAND HEAD COACH AGREEMENT 2004: UNIVERSITY OF MARYLAND COLLEGE PARK AND RALPH FRIEDGEN § 6 (effective July 1, 2004), *available at* http://www.coacheshotseat.com/MarylandCoachesHotSeat.pdf.
[126] *Id.*
[127] SABAN AGREEMENT, *supra* note 5, § 4.04(d)(5)(ii).
[128] *Id.* § 4.04(d)(5)(iii).
[129] *E.g.*, SWINNEY AGREEMENT, *supra* note 2, § 5(K)(6).

> Income from Speeches, Appearances and Written Materials – Coach shall be entitled to deliver, make and grant speeches, appearances, and media interviews and to write and release books and magazines and newspaper articles or columns and to retain any and all income derived there from. Any speech given pursuant to this subparagraph *must be given by Coach in his individual capacity, not in his official capacity as a University employee*. [Furthermore], it is expressly understood and agreed that this subparagraph does not pertain to any speech or appearance at a University-sponsored function . . . .[130]

The above provision limits the coach's ability to capitalize on his university association by requiring the described activities to be conducted by the coach in his individual capacity.**[131]** This would seem to prohibit the coach from using his university association either directly or by implication in conjunction with certain third party activities. Such a limitation could affect the way in which the coach's third party appearances are advertised in addition to their content and subject matter. Appearance fees may be affected as well. Nevertheless, requiring the coach to refrain from associating the university with certain outside activities is entirely appropriate given that the coach in this particular agreement will retain all income generated by the activities.

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[130] *Id.* (emphasis added).
[131] *See id.*

E. Licensed Merchandise

"When he was the interim coach, people started manufacturing T-shirts and things like that, so . . . I made the decision, 'We're going to trademark that name and protect it[.]'"

- Mike Brown, Agent of Clemson University's Head Football Coach, Dabo Swinney[132]

The sale of merchandise or memorabilia containing the coach's name or likeness can present trademark, rights of publicity, and perhaps even patent issues if the coach invents the merchandise. Trademarks, however, are what most often come to mind when licensed merchandise is mentioned. A coach's trademarks are similar to those of the university in that they can be licensed to manufacturers of sports memorabilia. In fact, some enterprising coaches and universities have recently begun to trademark coaches' names and slogans in order to do just that.[133]

Registered trademarks are a new frontier for most coaches and, therefore, it is difficult to find an employment agreement that separately compensates a coach for trademarks. For example, Ohio State requires its head football coach to assign (as opposed to license) any name or related trademarks to the university but the compensation for the assignment is bundled with payments for media programs:[134]

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[132] Berkowitz, *supra* note 64.
[133] *Id.*
[134] MEYER AGREEMENT, *supra* note 52, § 3.2 (stating that the Coach may use the foregoing intellectual property "in activities not associated with the [media] Programs" subject to approval). It does not address the duration or

> Coach also agrees to, and hereby does, assign to Ohio State or its then-current rights holder of one or more of the Programs all right, title and interest in his name, nickname, initials, autograph, facsimile signature, likeness, photograph, and derivatives thereof, and his picture, image and resemblance and other indicia closely identified with Coach. . . . The assignment includes, but is not limited to, intellectual property rights under any and all trademarks and copyrights and any applications therefore which have been obtained or filed, or may be filed in the future . . . .[135]

The assignment of the coach's name to the university allows the university to register the coach's name as a trademark. Ohio State, for instance, has trademarked the name of its current head football coach "Urban Meyer" and the school recently submitted an application to the U.S. Patent and Trademark Office for the catchphrase "Urban Meyer Knows."[136]

By contrast, the head football coach at Virginia Tech has reserved all rights to certain intellectual property bearing his name.[137] Specifically, Frank Beamer's employment agreement states in relevant part:

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scope of the assignment, and specifically whether or not the coach's intellectual property will be reassigned to him upon termination of the agreement. *Id.*

[135] *Id.* § 3.2(g)

[136] Berkowitz, *supra* note 64.

[137] BEAMER AGREEMENT, *supra* note 4, at art. VI.

> The parties acknowledge that "Beamerball" and the internet and other electronic media rights to "Beamerball" are the sole property of BEAMER and are not subject to the conditions of this paragraph.[138]

The phrase "the internet and other electronic media rights"[139] in the above excerpt refers to the beamerball.com website,[140] which sells memorabilia, among other things.

When a coach's name becomes synonymous with a particular university's sports program, it is a tough call as to whether the coach or the university should own the trademark to the coach's name. However, it would seem that as between a coach and a university, a coach would have the more compelling long-term interest in the rights to his name. This is especially true considering that most coaches do not remain at the same employer for any extended period of time.

F. Books, Articles, Blogs, Etc.

"Hopefully I can find somebody interested in publishing it."

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[138] *Id.* The "beamerball" mark was first filed on October 20, 1999 for coaching services but was subsequently abandoned on September 7, 2000. U.S. Trademark Application Serial No. 75,827,087 (filed Oct. 20, 1999) (abandoned Sept. 7, 2000). The term "Beamerball" for clothing was filed on July 19, 2002 but abandoned on March 29, 2005. U.S. Trademark Application Serial No. 78,145,582 (filed July 19, 2002) (abandoned Mar. 29, 2005).

[139] BEAMER AGREEMENT, *supra* note 4, at art. VI.

[140] TEAM BEAMERBALL, http://beamerball.com (last visited Jan. 31, 2015).

- Carl Pelini, Former Head Football Coach at Florida Atlantic University[141]

A coach may also produce written materials that approximate the format of traditional scholarly works. These include books, articles, essays, and blogs that can produce royalties from the licensing or assignment of copyrights, trademarks, and rights of publicity. Books specifically can produce tens of thousands of dollars in royalties.[142] Coaches' employment agreements rarely address ownership issues for written works but the agreements typically will clarify any restrictions on written works:

> Compensation from authoring or co-authoring books or publications. Subject to the prior approval of the Director of Athletics—which shall not be unreasonably withheld—the University acknowledges and agrees that Employee may receive fees, royalty payments, advance payments, or similar compensation as a result of authoring or co-authoring books or other publications in which the primary subject matter is autobiographical in nature . . . or is primarily concerned with coaching theory, strategy, or technique. . . . *Employee may not*

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[141] Rich Kaipust, *Carl Pelini Looks to Get Novel Published, and Keep Studying Football*, OMAHA.COM (Apr. 18, 2014, 12:09 PM), http://www.omaha.com/huskers/blogs/carl-pelini-looking-to-get-novel-published-and-keep-studying/article_14f41c8a-6678-557d-9fdb-ba125414d15e.html.

[142] *See, e.g.*, Times Wires, *Sidelines: Out of Bounds*, ST. PETERSBURG TIMES, July 27, 2006, *available at* http://www.sptimes.com/2006/07/27/news_pf/Sports/Sidelines.shtml (citing lawsuit by Bobby Bowden seeking $45,000 in book royalties).

> *use the marks or intellectual property of the University, including without limitation its logos, . . . without a specific, written licensing agreement related to the same*.[143]

It is not explicitly stated but the above provision leads one to assume that the coach will own the rights to his written works, based on the university's subject matter and trademark restrictions on such works.[144]

Whereas a coach would find it desirable to highlight his university associations, a university might wish to dissociate itself from a coach's outside publications. The latter can be accomplished, as in the above example, by restricting the subject matter to certain topics and by limiting the coach's use of university indicia. Also, advance approval requirements can help to ensure that none of the university's confidential information is disclosed in a coach's written works.

G. Playbooks, Signals, Game Plans, Etc.

"In other words, PepsiCo finds itself in the position of a coach, one of whose players has left, playbook in hand, to join the opposing team before the big game."

- Judge Joel M. Flaum, U.S. Court of Appeals for the 7th Circuit[145]

The activities discussed in the preceding sections involve ancillary, non-coaching and potentially non-university,

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[143] SABAN AGREEMENT, *supra* note 5, § 4.04(c) (emphasis added).
[144] *Id.*
[145] PepsiCo, Inc. v. Redmond, 54 F.3d 1262, 1270 (7th Cir. 1995).

activities in which coaches may produce intellectual property. However, coaches also produce intellectual property in the execution of their core duty: coaching. Coaches are knowledge workers, as are most modern professionals, and, as such, coaching duties will inevitably result in information that the university considers strictly confidential. Although this confidential information may rise to the level of a trade secret, the typical coach's employment agreement does not address trade secrets *per se*. The agreement excerpted below is unique in that it contains very specific trade secret language:

> Covenant Not to Disclose Trade Secrets. By virtue of his position, Coach covenants and agrees that non-public information, which provides a competitive advantage to the Razorback Football Program, will be created, developed and entrusted to him. . . . Coach covenants and agrees that such information includes, but is not limited to . . . methods; processes; operations; recruiting programs; computer and video programs; future plans; prospective student–athlete contact lists; coaching contact lists; current student–athlete contact lists; playbooks; signals; recruiting techniques; . . . in-game, and post-game coaching practices and strategies; training sequences and methodologies; (collectively, "Trade Secrets"). Individually and collectively, Coach acknowledges and agrees that all such information constitutes Trade Secrets under Arkansas law and has an independent economic value to the University's competitors throughout the SEC. Coach agrees that he may create and learn of information constituting Trade Secrets while

> employed and paid as the Head Football Coach of the Razorback Football Program.[146]

The "trade secrets" listed in the above excerpt relate to the core purpose for which the coach is being hired and compensated, thereby making it unlikely that the university would allow the coach to obtain ownership rights in them. In this way, the trade secret provision serves not only to protect the university's trade secrets, but also to inform the coach of what the university does not consider general knowledge that may be transferred to another employer in the university's conference.[147] Other coaches' employment agreements are not

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[146] BIELEMA AGREEMENT, *supra* note 6, § 20. The agreement continues:

> Coach covenants and agrees not to misappropriate, use, share or disclose any . . . Trade Secrets to any other member [of] the SEC . . . for the period of time comprising the Term . . . of this Employment Agreement (regardless of whether Coach remains employed for the length of the Term).

Id.

[147] *Id.* The coach could argue that this provision is an overly broad restrictive covenant and therefore unenforceable. Restrictive covenants are enforceable in Arkansas if (1) the employer has a valid interest to protect and both the (2) geographic restrictions and (3) duration are reasonable. Duffner v. Alberty, 718 S.W.2d 111, 112 (Ark. 1986). The provision seeks to protect the competitive advantage the employer's football program enjoys by virtue of its "trade secrets." *See* BIELEMA AGREEMENT, *supra* note 6, § 20. Trade secrets are a protectable interest. ARK. CODE ANN. § 4-75-601 (2014). Additionally, the provision applies only to schools in the employer's conference and is limited to the term of the employment agreement. *See* BIELEMA AGREEMENT, *supra* note 6, § 20. Therefore, unless the listed information fails to meet one of the definitional requirements of a trade secret under Arkansas law, such as "not being generally known" or "readily ascertainable," the Coach's argument likely would fail. *See* ARK. CODE ANN. § 4-75-601. Playbooks in particular have been the subject of much debate regarding their status as trade secrets. *See. e.g.*, Rice Ferrelle,

as specific in this regard, which could leave room for interpretation as to what would be a permissible disclosure or use of the information at a future employer.[148] Trade secrets are unlike other types of intellectual property in that allowing a coach to retain an ownership interest in them would be undesirable in almost every scenario.

To summarize, coaches can make considerable income from intellectual property rights stemming from media programs, endorsements, sports camps, appearance fees, licensed merchandise, and written materials. It is noteworthy that intellectual property rights often generate more income for coaches than their base salaries.[149] Coach's employment agreements may allow the coach to retain exclusive ownership, joint ownership, or no ownership interest at all in intellectual property created by the coach.[150] Unique amongst this intellectual property are trade secrets because it is almost never in the employer's interest to allow a coach to retain an ownership interest in them. That said, it is critical to address, either by agreement or by policy, who will own the rights to specific types of intellectual property.

Note, *Combating the Lure of Impropriety in Professional Sports Industries: The Desirability of Treating a Playbook as a Legally Enforceable Trade Secret*, 11 J. INTELL. PROP. L. 149 (2003).

[148] *See, e.g.*, PELINI AGREEMENT, *supra* note 89 (omitting any reference to confidential information and trade secrets); SUMLIN AGREEMENT, *supra* note 14 (omitting any reference to confidential information or trade secrets).

[149] *See* GREY, *supra* note 83, § 6.07(7).

[150] *See id.*

IV. MONDAY MORNING QUARTERBACKS: INTELLECTUAL PROPERTY POLICIES

"Universities, like for-profit businesses, have come to realize that intellectual property is a potential source of revenue."

- Jacob Rooksby, Professor of intellectual property law at the Duquesne University School of Law[151]

Employment agreements govern the relationship between coaches and universities. Because there is no standard employment agreement for college coaches, these agreements can vary drastically in substance and form from one coach to the next.[152] Yet, they all have one thing in common—the agreements indicate that coaches are "employees" of the university, as opposed to independent contractors.[153] As a university employee, a coach is subject to the same university policies and procedures as other university employees.[154]

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[151] Lisa Shuchman, *Higher Ed's Trademark Track*, CORPORATE COUNSEL (Apr. 18, 2014), http://www.corpcounsel.com/id=1202650403388/Higher-Eds-Trademark-Track (log-in required) (on file with author).
[152] GREY, *supra* note 83, at § 6.07(1).
[153] *E.g.*, SABAN AGREEMENT, *supra* note 5, § 2.01; SUMLIN AGREEMENT, *supra* note 14, § 2; SWINNEY AGREEMENT, *supra* note 2, § 1.
[154] It is common for university intellectual property policies to be drafted, reviewed, and edited by an Intellectual Property Committee (IPC) consisting of a cross-functional team of university stakeholders. *See, e.g.*, UNIV. OF LOUISVILLE, INTELLECTUAL PROPERTY POLICY § 6 [hereinafter LOUISVILLE POLICY], *available at* http://louisville.edu/research/offices/technology-transfer/ip-policy.html (last visited Jan. 31, 2015). University IPCs typically consist of representatives from both the faculty and the administration, who not only are charged with reviewing and revising the policies but also interpreting the policies and

Most universities have intellectual property policies that address the ownership of intellectual property by staff. In the absence of an agreement to the contrary, faculty and staff intellectual property rights are governed by these policies. Despite the significant and varied amount of valuable intellectual property that coaches create, some universities' intellectual property policies cannot realistically be applied to coaches. This is true even though the coach's intellectual property may be so heavily dependent on university resources that it should logically fall within the university's intellectual property portfolio.

A. Applicability of University Intellectual Property Policies to Coaches

Intellectual property as a whole can generate substantial revenues for a university[155] and, similar to that of revenue-generating sports, there is an inherent tension in university intellectual property policies between supporting the university's academic mission and providing incentives to

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mediating disputes. *See, e.g.*, UNIV. OF ALA. OFFICE FOR ACADEMIC AFFAIRS, THE UNIVERSITY OF ALABAMA FACULTY HANDBOOK APPENDIX H: DETERMINATION OF RIGHTS IN COPYRIGHTABLE MATERIAL AT THE UNIVERSITY OF ALABAMA § C(2) [hereinafter ALABAMA COPYRIGHT POLICY], *available at* http://www.facultyhandbook.ua.edu/appendix-h.html (last visited Jan. 31, 2015). Therefore, it is presumed that the policies are a reflection of common university goals and values with respect to intellectual property.

[155] *See Sortable Table: Universities with the Most Licensing Revenue, FY 2011*, CHRON. OF HIGHER EDUC. (Aug. 30, 2012, 2:19 PM), https://chronicle.com/article/Sortable-Table-Universities/133964; Andrew L. Wang, *Northwestern University Leads Nation in Tech Transfer Revenue*, CRAIN'S CHI. BUS. (Oct. 29, 2012), http://www.chicagobusiness.com/article/20121027/ISSUE01/310279974/northwestern-university-leads-nation-in-tech-transfer-revenue.

those who generate revenues. One of the stated purposes of many university intellectual property policies is to encourage the development of intellectual property.[156] Where the university claims ownership of employee-created intellectual property, this development can be incentivized through revenue sharing. This is accomplished either by the university distributing a share of the proceeds to the creator[157] or by the university taking an ownership interest in a business entity organized by the creator.[158]

Coaches' employment agreements allocate the ownership of intellectual property in various ways. Some universities allow coaches to maintain ownership of certain intellectual property.[159] Other universities require coaches to assign their intellectual property rights to the university in

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[156] UNIV. OF ARK., PATENT AND COPYRIGHT POLICY 210.1 § I(A) (2011) [hereinafter ARKANSAS POLICY], *available at* http://vcfa.uark.edu/Documents/0210_1.PDF] (last visited Jan. 31, 2015); CLEMSON UNIV., CLEMSON UNIVERSITY INTELLECTUAL PROPERTY POLICY § 1(a) (2009) [hereinafter CLEMSON POLICY], *available at* http://media.clemson.edu/research/technology-transfer/ip-policy.pdf (last visited Jan. 31, 2015); UNIV. OF FLA., UNIVERSITY OF FLORIDA INTELLECTUAL PROPERTY POLICY § A (2013) [hereinafter FLORIDA POLICY], *available at* http://www.research.ufl.edu/otl/pdf/ipp.pdf (last visited Jan. 31, 2015); GA. INST. OF TECH., GEORGIA INSTITUTE OF TECHNOLOGY FACULTY HANDBOOK: INTELLECTUAL PROPERTY POLICY § 5.4.1 [hereinafter GEORGIA TECH POLICY], *available at* http://www.policylibrary.gatech.edu/faculty-handbook/5.4-intellectual-property-policy (last visited Jan. 31, 2015); W. VA. UNIV., WEST VIRGINIA UNIVERSITY INTELLECTUAL PROPERTY POLICY PREAMBLE (2006) [hereinafter WEST VIRGINIA POLICY], *available at* http://techtransfer.research.wvu.edu/ip_policy (last visited Jan. 31, 2014).
[157] *E.g.*, WEST VIRGINIA POLICY, *supra* note 157, § 3.
[158] *E.g.*, *id.* § 4.
[159] *E.g.*, BEAMER AGREEMENT, *supra* note 4, at art. VI.

exchange for a negotiated fixed payment.[160] Still others might require joint ownership or a blended approach whereby the university retains all ownership rights to the intellectual property and coaches retain some or all royalty revenues.[161]

Some categories of a coach's intellectual property are more appropriate for university ownership than others. That is, certain intellectual property created by a coach is so heavily dependent on university associations and indicia that it should fall within the university's intellectual property portfolio. For example, the intellectual property rights to a coach's show that utilizes university-owned game highlights, showcases university trademarks, and relies on the coach appearing in his official capacity might be more appropriately owned by the university. As they apply, university intellectual property policies can be used in the absence of an agreement to address these types of situations.

At minimum, university intellectual property policies cover ownership of two types of intellectual property: copyrights and patents.[162] The policies sometimes address ownership of other areas of intellectual property but this is much less common. Prototypical university intellectual property policies detail, among other things, the policy's

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[160] *E.g.*, SABAN AGREEMENT, *supra* note 5, § 4.04(g).
[161] *E.g.*, MEYER ACTIVITIES AGREEMENT, *supra* note 106, §§ 2(C), 2(F), 4(A).
[162] Trademarks are addressed under separate policies. *E.g.*, STANFORD UNIV., 1.5.4 OWNERSHIP AND USE OF STANFORD NAME AND TRADEMARKS (2008), *available at* https://adminguide.stanford.edu/chapter-1/subchapter-5/policy-1-5-4 (last visited Jan. 31, 2015).

purpose and scope,[163] ownership of intellectual property,[164] and revenue sharing.[165]

Ownership and revenue-sharing issues are more likely to arise with copyrights and patents.[166] Universities typically cede to students and employees ownership of traditional scholarly works involving copyrights.[167] Ownership of

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[163] *E.g.*, VA. POLYTECHNIC INST. & STATE UNIV., POLICY AND PROCEDURES: POLICY ON INTELLECTUAL PROPERTY § 1 [hereinafter VIRGINIA TECH POLICY], *available at* http://www.policies.vt.edu/13000.pdf (last visited Jan. 31, 2015).
[164] *E.g.*, *id.* § 2.3(a).
[165] *E.g.*, *id.* § 2.3(c).
[166] *See Intellectual Property Law and Employees*, BLOOMBERG BUS. (Nov. 16, 2010), http://www.businessweek.com/managing/content/nov2010/ca2010112_650227.htm.
[167] *E.g.*, AZ. BOARD OF REGENTS, POLICY NO. 6-908 INTELLECTUAL PROPERTY POLICY § A(2) (2010) [hereinafter ARIZONA STATE POLICY], *available at* http://azregents.asu.edu/rrc/Policy Manual/6-908-Intellectual Property Policy.pdf (last visited Jan. 31, 2015); UNIV. OF CA., COPYRIGHT OWNERSHIP § 1 (1992) [hereinafter CALIFORNIA COPYRIGHT POLICY], *available at* http://policy.ucop.edu/doc/2100003/CopyrightOwnership (last visited Jan. 31, 2015); IND. UNIV., UNIVERSITY POLICIES: INTELLECTUAL PROPERTY POLICY UA-05 § 1(B)(i) (2014) [hereinafter INDIANA POLICY], *available at* http://policies.iu.edu/policies/categories/administration-operations/intellectual-property/intellectual-property.pdf (last visited Jan. 31, 2015); LOUISVILLE POLICY, *supra* note 154, § 3(b)(iii); UNIV. OF NEB.-LINCOLN, INTELLECTUAL PROPERTY POLICY OF THE UNIVERSITY OF NEBRASKA § 4.4.1 (2001), *available at* http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1013&context=ir_information (last visited Jan. 31, 2015); OHIO UNIV., ACADEMIC POLICY & 15.015 COPYRIGHT § II (2013) [hereinafter OHIO UNIVERSITY POLICY], *available at* http://www.ohio.edu/policy/15-015.html (last visited Jan. 31, 2015); UNIV. OF OKLA., UNIVERSITY OF OKLAHOMA INTELLECTUAL PROPERTY POLICY § 3.27.4(C)(1) [hereinafter OKLAHOMA POLICY], *available at*

patentable works, however, typically remains with the university. Copyrights are most applicable to coaches, as they may be relevant to duties such as media programs, product endorsements, sports camps, public appearances, and written materials. Therefore, the analysis below will focus on copyrightable works and applicable policies.

B. A Review of Intellectual Property Policies

This Section demonstrates how university intellectual property policies can be applied to coaches' intellectual property, using policies from the University of Alabama,[168] Virginia Tech,[169] and Clemson[170] as examples. The University of Alabama's intellectual property policies address copyrightable works[171] and inventions and discoveries[172] in general. Virginia Tech's intellectual property policy applies to the "traditional results of academic scholarship" and "the novel results of research."[173] Lastly, Clemson's intellectual property

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http://www.ou.edu/content/dam/otd/docs/otd_Intellectual_Property_Policy.pdf (last visited Jan. 31, 2015); UNIV. OF VA., POLICY: OWNERSHIP RIGHTS IN COPYRIGHTABLE MATERIAL § 2 (2013) [hereinafter VIRGINIA COPYRIGHT POLICY], *available at* https://policy.itc.virginia.edu/policy/policydisplay?id=RES-001 (last visited Jan. 31, 2015); VIRGINIA TECH POLICY, *supra* note 163, § 2.3(A).

[168] ALABAMA COPYRIGHT POLICY, *supra* note 154.

[169] VIRGINIA TECH POLICY, *supra* note 163.

[170] CLEMSON POLICY, *supra* note 156.

[171] ALABAMA COPYRIGHT POLICY, *supra* note 154, § A(2).

[172] UNIV. OF ALA. OFFICE FOR ACADEMIC AFFAIRS, THE UNIVERSITY OF ALABAMA FACULTY HANDBOOK APPENDIX G: THE UNIVERSITY OF ALABAMA PATENT POLICY § 4 [hereinafter ALABAMA PATENT POLICY], *available at* http://facultyhandbook.ua.edu/appendix-g.html (last visited Mar. 11, 2015).

[173] VIRGINIA TECH POLICY, *supra* note 163, § 2.3(A).

policy covers almost every form of intellectual property.[174] The representative aspects of each of these policies are analyzed in further detail below.

1. Example #1: The University of Alabama's Policy

The University of Alabama policy can be used to demonstrate how a coach's employment agreement can be harmonized with university intellectual property policies. Alabama addresses "new discoveries and inventions" [175] and "copyrightable works"[176] in two separate policies. Its patent policy favors university ownership more so than its copyright policy.[177] Alabama's copyright policy will be analyzed below, as its coaches are more apt to produce copyrightable works than discoveries or inventions.

Alabama's copyright policy states that employee authors own the copyright to their works with certain exceptions:[178]

> Except as provided below, faculty and employees of the University who are the authors of copyrightable works shall own the copyrights in those works, regardless of whether those works constitute "works for hire" as defined in the Copyright Act.[179]

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[174] CLEMSON POLICY, *supra* note 156, § 3.
[175] ALABAMA PATENT POLICY, *supra* note 172.
[176] ALABAMA COPYRIGHT POLICY, *supra* note 154, § A(2)
[177] *See* ALABAMA PATENT POLICY, *supra* note 172, §§ 4–5.
[178] ALABAMA COPYRIGHT POLICY, *supra* note 154, § A(1).
[179] *Id.*

This view is consistent with the longstanding academic tradition of allowing faculty members to retain the copyright to works resulting from their scholarly endeavors.[180] Yet despite its general grant of copyright ownership to employees,[181] the policy lists several exceptions that would allow the university to assert ownership over employee-created works.[182] Most of the exceptions are consistent with the Copyright Act's work for hire presumption[183] that the policy purports to waive.[184] An exception of special relevance to coaches covers works "commissioned by the University," where the employee receives "supplemental compensation" to prepare the copyrightable work.[185] The exception states that ownership rights to these commissioned works are subject to negotiated terms that may include "assignment of copyright, license of rights, or division of royalties."[186]

Alabama's copyright policy also has two more exceptions to employee ownership that potentially could be relevant to coaches. One is the "extraordinary resources" exception that applies when the university provides "facilities, equipment, funding, release or re-assigned time or other assistance exceeding the resources normally provided to faculty or employees in a particular department" to facilitate creation of the work.[187] The other exception applies to "institutional works," such as those prepared "at the direction

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[180] *See Statement on Copyright* , AM. ASSOC. OF UNIV. PROFESSORS, http://www.aaup.org/report/statement-copyright (last visited Jan. 31, 2015).
[181] ALABAMA COPYRIGHT POLICY, *supra* note 154, § A(1).
[182] *Id.* § B.
[183] *See supra* notes 42–43 and accompanying text.
[184] *See* ALABAMA COPYRIGHT POLICY, *supra* note 154, § A(1).
[185] *Id.* § B(3).
[186] *Id.*
[187] *Id.* § B(1).

of the University" and those works that "cannot be reasonably attributed to a single author" due to the collective contributions of "numerous faculty members, employees, or students."[188]

a. Nick Saban's Media Programs

In applying Alabama's copyright policy to the media programs clause in Nick Saban's employment agreement, one finds that the university can assert ownership over Saban's copyrightable works under multiple exceptions. Specifically, the agreement provides Saban with over $3 million dollars in annual "additional compensation" for radio and television programs ("media programs") and personal appearances.[189] The multi-million dollar payment for media programs in Saban's employment agreement[190] would seem to constitute "supplemental compensation" under the copyright policy's commissioned works exception.[191] University ownership of the media programs would be an appropriate result here because, although the programs rely on both Saban and the university's reputation for their value, the university has the stronger interest in controlling future uses of media programs containing its employees, students, and background intellectual property.

Consistent with the exceptions in Alabama's copyright policy, Saban's employment agreement requires him to assign

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[188] *Id.* § B(4).
[189] SABAN AGREEMENT, *supra* note 5, § 4.04(d)(5)(ii).
[190] *Id.*
[191] *See* ALABAMA COPYRIGHT POLICY, *supra* note 154, § B(3) ("If a copyrightable work is commissioned by the University, meaning that a faculty member or employee receives supplemental compensation from the University to prepare a specific copyrightable work, rights to that work shall be according to terms negotiated at the time of the commission.").

virtually all of his rights in the media programs to the university:[192]

> Employee agrees that Employee shall have no right, title, or interest of any kind or nature whatsoever, including copyright, in or to any of the materials, works, or results of the media programs or non-endorsement activities . . . and the parties hereto agree that all such works shall be works made for hire for purposes of the U.S. Copyright Act. To the extent that any such works are not works made for hire, Employee hereby assigns, conveys, and transfers to the University any and all rights of copyright therein or thereto . . . .[193]

As stated above, Alabama's copyright policy waives the university's right to own works for hire (unless an exception to employee ownership applies).[194] However, Saban's employment agreement effectively reinstates this right.[195]

As one would expect, the university also claims entitlement to all revenues from media program agreements that the university or its assigns negotiate:[196]

> Employee further agrees that the University . . . shall be entitled to retain all revenues, from all media programs and non-commercial activities that are broadcast, undertaken,

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[192] SABAN AGREEMENT, *supra* note 5, § 4.04(g).
[193] *Id.*
[194] ALABAMA COPYRIGHT POLICY, *supra* note 154, § A(1).
[195] SABAN AGREEMENT, *supra* note 5, § 4.04(g).
[196] *Id.*

> produced, negotiated, created or developed by the University . . . .[197]

This clause is consistent with university ownership under the "extraordinary resources" exception, as the above actions by the university would likely constitute "other assistance exceeding the resources normally provided to faculty or employees in a particular department."[198] Specifically, universities typically do not furnish university counsel to negotiate outside income agreements for employees nor do they produce, create, or develop the subject matter of those agreements on employees' behalf. Lastly, the "institutional works" exception could apply to the media programs based on the collective contributions of student–athletes and staff.

Alabama's copyright policy with its exceptions for commissioned works,[199] works created with "extraordinary resources,"[200] and "institutional works"[201] is representative of the policies found at many universities.[202] As the policy demonstrates, there are several scenarios under which a university can assert ownership over copyrightable works in which an employee might otherwise have an ownership interest. Moreover, the policy is written broadly enough to

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[197] *Id.*
[198] ALABAMA COPYRIGHT POLICY, *supra* note 154, § B(1).
[199] *Id.* § B(3).
[200] *Id.* § B(1).
[201] *Id.* § B(4).
[202] Kathryn Ann Loggie et al., *Intellectual Property and Online Courses: Policies at Major Research Universities*, 8 Q. REV. DISTANCE EDUC. 109, 114–16, 119 (2007) (detailing, in terms of percentages, the common characteristics of intellectual property policies at a stratified random sample of public and private research universities).

cover non-academic works. At least one university's intellectual property policy applies solely to academic works.[203]

2. Example #2: Virginia Tech's Policy

Virginia Tech's intellectual property policy is quite narrow in comparison to typical universities' policies, which tend to cover a broader range of potentially patentable and copyrightable works. As noted above, Alabama's intellectual property policies cover discoveries and inventions[204] and copyrightable works[205] that encompass, but are not limited to, traditional scholarly activities. In contrast, Virginia Tech's intellectual property policy, which consists of a set of guidelines,[206] addresses two very specific categories of intellectual property:[207]

1. The traditional results of academic scholarship, i.e., textbooks, literary works, artistic creations and artifacts.
2. The novel results of research such as products, processes, machines, software, biological technology, etc.[208]

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[203] *See, e.g.*, VIRGINIA TECH POLICY, *supra* note 163, § 2.3(A).
[204] ALABAMA PATENT POLICY, *supra* note 172, §§ 3–5.
[205] ALABAMA COPYRIGHT POLICY, *supra* note 154, § A.
[206] A guideline is a recommendation that is not mandatory. *See, e.g.*, Parinita Bahadur, *Difference Between Guideline, Procedure, Standard and Policy*, HR SUCCESS GUIDE (Jan. 10, 2014, 7:05 AM), http://www.parinita.com/2014/01/Guideline-Procedure-Standard-Policy.html.
[207] VIRGINIA TECH POLICY, *supra* note 163, § 2.3(A).
[208] *Id.*

As is expected in an academic environment, ownership remains with the creator for the first category—with an exception for specifically commissioned works.[209] In the second category, ownership of the intellectual property must be assigned to the university, except where it can be proven that the intellectual property was developed without "the use of university resources."[210] Note that these same exceptions can be found in the University of Alabama's copyright policy.[211]

A less common aspect of Virginia Tech's policy guidelines is that they pertain to scholarly activities exclusively,[212] which as a practical matter seems to limit the scope of the policy to academic employees and students. There is, however, a provision in the policy stating that the guidelines provide only a "general indication of intent and philosophy," which would facilitate "proper interpretation" of the policy by the Intellectual Properties Committee (IPC).[213] Furthermore, a related provision states that the IPC can make recommendations "based on the spirit of the guidelines" to address "special situations" not specifically covered in the policy.[214] Yet, in considering the language of the guidelines as a whole, it can be inferred that the intent or "spirit" of the guidelines is to exclude non-scholarly activities from the policy.

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[209] *Id.*
[210] *Id.*
[211] *See* ALABAMA COPYRIGHT POLICY, *supra* note 154, §§ B(1), (B)(3).
[212] *See* VIRGINIA TECH POLICY, *supra* note 163, § 2.3(A).
[213] *Id.* § 2.3.
[214] *Id.* § 2.3(A).

a. Frank Beamer's beamerball.com

The above description of Virginia Tech's intellectual property policy brings us to the question of whether the policy is applicable to Virginia Tech's coaches, as it does not provide any guidance with respect to the types of intellectual property that would be created by staff outside of traditional academic departments. A review of Frank Beamer's employment agreement is instructive on this issue because it suggests that the policy does in fact apply to coaches—even though it is unclear, as a practical matter, how Virginia Tech's academically-focused policy could be interpreted to apply to coaches. Note how Beamer's employment agreement incorporates the university's intellectual property policy by reference:[215]

> The UNIVERSITY and BEAMER agree that all materials and work product created or developed by BEAMER specifically within the scope of his employment, and all rights of any and every kind that BEAMER may have shall be governed by the UNIVERSITY's Intellectual Property Policy and the applicable laws of the Commonwealth of Virginia.[216]

The agreement goes on to exempt "Beamerball" and its "internet and other electronic media rights" from the university's intellectual property policy.[217] In 2008, Coach Beamer reported $40,000 in outside income[218] from

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[215] BEAMER AGREEMENT, *supra* note 4, at art. VI.
[216] *Id.*
[217] *Id.*
[218] *Id.* at 2008–2009 Athletically-Related Income/Benefits.

beamerball.com, a website that provides "the most accurate information on all matters of Virginia Tech football, not available anywhere else on the Internet."[219]

If Virginia Tech's intellectual property policy were written broadly enough to cover beamerball.com and if the website was not excluded from the policy by Beamer's employment agreement, the university could make a good argument for receiving royalties or licensing fees from the site. The website, which charges a subscription fee for providing the "most up-to-date" information,[220] uses Virginia Tech's color scheme,[221] contains a photo of other Virginia Tech employees,[222] links to content on Virginia Tech's official website,[223] and also sells Virginia Tech memorabilia.[224]

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[219] COACH'S CLUB MEMBERSHIP, http://beamerball.com/free/club.htm (last visited Apr. 11, 2014) (archived from the original on Aug. 24, 2014 at https://web.archive.org/web/20140824192618/http://beamerball.com/free/club.htm).
[220] *Id.*
[221] *Brand Expression: Color Treatment*, VA. POLYTECHNIC INST. AND STATE UNIV., https://www.branding.unirel.vt.edu/brand-expression/color-treatment.html (last visited Jan. 31, 2015).
[222] *Meet the Virginia Tech Football Staff!*, BEAMERBALL, http://beamerball.com/free/meetthefootballdepartment.htm (last visited Apr. 11, 2014) (archived from the original on Aug. 24, 2014 at https://web.archive.org/web/20140824195352/http://beamerball.com/free/meetthefootballdepartment.htm).
[223] *Frank Beamer: Head Football Coach*, HOKIESPORTS.COM, http://www.hokiesports.com/staff/beamer.html (last visited Jan. 31, 2015) (linking to Beamer's professional profile on Virginia Tech's official website).
[224] *BeamerBall.com Online Store*, BEAMERBALL.COM, http://www.emerchant.aciwebs.com/stores/beamerball (last visited Jan. 31, 2015) (offering Virginia Tech memorabilia for sale).

Although the site disclaims any use of Virginia Tech "assets," the veracity of the disclaimer depends on how the word "assets" is defined.[225] Information can be an asset, and it is unclear how the site is able to provide "the best, most up-to-date and accurate information"[226] on Virginia Tech football without using information that is owned by the university. Presumably, Beamer's site is able to provide this type of information because the coach's position at the university provides him with unique access to breaking news and information.

If fans or the media are willing to pay a fee to Coach Beamer for information about Virginia Tech football, one would think that at least a portion of the fee would be remitted to the university, as the coach's employer and the actual owner of the information. In fact, if the university were so inclined, the beamerball.com site could be easily rebranded, upgraded, and operated or licensed by the university to achieve an even greater level of success. As an example of how this could be structured, consider Nick Saban's employment agreement, which requires him to produce "reasonable content for an internet web-site" in exchange for a specified amount of compensation.[227] Saban's agreement further stipulates in no uncertain terms that the university owns the rights to the website and its content.[228]

Very few employers allow employees to personally profit from their positions without running afoul of applicable

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[225] *Copyright and Disclaimer*, BEAMERBALL.COM, http://beamerball.com/free/copyright.htm (last visited Jan. 31, 2015).
[226] *See* COACH'S CLUB MEMBERSHIP, *supra* note 219.
[227] SABAN AGREEMENT, *supra* note 5, § 4.04(d)(3).
[228] *Id.* § 4.04(g).

intellectual property, conflict of interest, or corporate opportunities policies. Beamer's employment agreement requires him to work "with the Sports Information Director" to prepare marketing materials and "press releases in support of the program."[229] Additionally, his job description requires him to direct staff activity related to "public relations and promotions functions" for the football program.[230] Furnishing updates and information about the Virginia Tech football program on the beamerball.com website would seem to fall under responsibilities for which Coach Beamer is already compensated.[231]

Since Beamer's official job responsibilities encompass news and public relations functions, beamerball.com's information service might be more appropriately owned by the university and licensed to beamerball.com, instead of the reverse. Interestingly, Virginia Tech's intellectual property policy, if it applied, would preclude Beamer from sharing in revenues for "activities" that are "specifically and explicitly assigned."[232] This is an appropriate result that is consistent with the state's conflict of interest laws, which would also prevent Beamer from profiting from activities that fall under his official job responsibilities.[233]

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[229] BEAMER AGREEMENT, *supra* note 4, at art. I, ¶ 15.
[230] *Id.* at art. I, ¶ 18.
[231] This potentially could be in conflict with Virginia's State and Local Government Conflict of Interests Act, which states that no employee of a state or local governmental agency shall solicit or accept money for services performed within the scope of his official duties, except the compensation paid by the agency of which he is an employee. VA. CODE ANN. § 2.2-3103(1) (2014).
[232] VIRGINIA TECH POLICY, *supra* note 163, § 2.3(C)(2).
[233] *See* VA. CODE ANN. § 2.2-3103(1).

Beamerball.com provides an example of an intellectual property asset that relies very heavily on the coach's university association.[234] One could imagine that beamerball.com might be substantially less successful financially if it did not contain any university assets. By design, the website leverages Virginia Tech's information, indicia, reputation, and fans in order to attract paying customers. This very well could be considered "a use of university resources" under Virginia Tech's intellectual property policy if the policy's scope was broad enough to encompass such a scenario.[235]

But Virginia Tech's intellectual property policy focuses solely on the university's main purpose: scholarly activity.[236] In doing so, it leaves open the question of whether the policy applies to the work of employees in nonacademic functions, such as coaches. The policy's core focus may reflect a judgment by the university only to assume ownership over intellectual property that is related to the university's main purpose. However, this leaves a vast amount of intellectual property out of scope. Other universities' policies are much broader in scope with respect to the types of intellectual property and employees covered.[237]

3. Example #3: Clemson's Policy

Clemson University claims ownership over a very broad range of employee works. The policy applies to almost

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[234] *See supra* notes 219–226 and accompanying text.
[235] VIRGINIA TECH POLICY, *supra* note 163, § 2.3(A).
[236] *Id.*
[237] *See, e.g.*, CLEMSON POLICY, *supra* note 156, §§ 2–3; GEORGIA TECH POLICY, *supra* note 156, § 5.4.2; WEST VIRGINIA POLICY, *supra* note 156, § 1.

every form of intellectual property[238] and states in pertinent part:

> [T]his policy applies to all types of intellectual property, including, but not limited to, any invention, discovery, creation, know-how, trade secret, technology, scientific or technological development, mask work, trademark, research data, work of authorship, and computer software regardless of whether subject to protection under patent, trademark[,] copyright, or other laws.[239]

The breadth of Clemson's policy is unique in that, as seen with the University of Alabama and Virginia Tech, it is not uncommon for universities to limit their policies' focus to copyrightable and patentable works.

In order for an employee to retain ownership over intellectual property at Clemson, the intellectual property must be:

i. [Developed] [o]n the Creator's own personal, unpaid time; or
ii. Unrelated to the individual's University responsibilities; *and*
iii. [Developed] [w]ithout the use of University resources, including any resources provided through externally

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[238] *Id.* § 3.
[239] *Id.*

> funded programs or contracts (including gifts).[240]

Subsections (i) and (ii) seek to reaffirm the employer's legal rights in certain intellectual property created within the scope of employment.[241] Subsection (iii) is the equivalent of the "university resources" exception to employee ownership found in many universities' intellectual property policies. Additionally, Clemson's policy explicitly states that the university will own all intellectual property created within the scope of employment or an official association or appointment with the university.[242]

a. Dabo Swinney's Coach's Show

To understand how Clemson's intellectual property policy might apply to a coach, Dabo Swinney's employment agreement is examined below. Given the breadth of Clemson's policy, it is difficult to imagine how the university would *not* own intellectual property that involves its athletic teams. In this regard, Coach Swinney's employment agreement is instructive in its omissions.

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[240] CLEMSON POLICY, *supra* note 156, § 5(B)(i)–(iii) (emphasis added).
[241] DONALD S. CHISUM, 8 CHISUM ON PATENTS § 22.03 (2014) (describing when an employer owns an employee's inventions); MILGRIM & BENSEN, *supra* note 33, § 5.02[4] (describing when an employer owns employee discovered trade secrets); MELVILLE B. NIMMER & DAVID NIMMER, 1 NIMMER ON COPYRIGHT § 5.03 (Matthew Bender, rev. ed., 2014) (describing when an employer owns an employee's works of authorship); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 42, cmt. E (1995) (describing when an employer owns information arising from an employee's assigned duties).
[242] CLEMSON POLICY, *supra* note 156, § 5(a)(i).

Swinney's employment agreement is silent with respect to ownership of intellectual property, with the exception of the paragraph below:

> Television and Radio Shows—Coach is entitled to receive additional compensation from sources outside the University through an arrangement for regular appearances on television and radio programs in connection with the University's intercollegiate football program . . . . *The parties agree that the University shall own all rights in and to the master game tapes and highlight tapes produced in connection with Coach's television show*.[243]

Note that in the above provision, the university does not explicitly reserve rights in the entire coach's show. Rather, the university reserves rights in preexisting "master game tapes and highlight tapes" in which it already owns rights.[244] In the absence of a policy or agreement to the contrary, the coach would own all rights to the original content in his coach's shows. However, Clemson's intellectual property policy stipulates that to qualify for employee ownership, the intellectual property must be unrelated to the employee's university responsibilities and created without using university resources.[245] Making "regular appearances on television and radio programs in connection with the University's intercollegiate football program"[246] would be related to Coach Swinney's university responsibilities, and "master game tapes

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[243] SWINNEY AGREEMENT, *supra* note 2, § 5(K)(2) (emphasis added).
[244] *Id.*
[245] CLEMSON POLICY, *supra* note 156, § 5(b).
[246] SWINNEY AGREEMENT, *supra* note 2, § 5(K)(2).

and highlight tapes"[247] owned by the university would qualify as university resources. By extension, the intellectual property rights in Swinney's coach's shows likely would be owned by the university.

Clemson's intellectual property policy is broad enough to cover the university's academic and nonacademic employees.[248] Additionally, the policy covers all types of intellectual property.[249] Clemson, through its "within the scope of . . . employment"[250] and "[u]sing university resources"[251] provisions is able to bring a vast amount of employee-created intellectual property under university ownership. Specifically, intellectual property that is related to a coach's responsibilities and that utilizes university resources would be owned by the university, absent an agreement to the contrary. Overall, it might be easier to determine what types of employee-created intellectual property would *not* be owned by Clemson.

To summarize, college coaches can create valuable intellectual property as part of their roles and responsibilities at a university. Alabama, Virginia Tech, and Clemson each have intellectual property policies that differ in terms of their scope and applicability to the work of college coaches. The policies range from applying to almost all of a coach's intellectual property to applying to none. In those cases where university intellectual property policies give broad ownership rights to creators of intellectual property, exceptions for specially commissioned works, works created with university resources,

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[247] *Id.*
[248] *See* CLEMSON POLICY, *supra* note 156, § 2.
[249] *Id.* § 3.
[250] *Id.* § 5(a)(i).
[251] *Id.* § 5(a)(iv).

and institutional works are used to bring some works back within the realm of university ownership. However, university employees may contract out of university intellectual property policies by mutual agreement.

C. Solutions: Addressing Intellectual Property Ownership Issues in College Coaches' Employment Agreements

"You'd usually be very much on notice that the work that you're doing is going to be owned by your employer."

- Rand Park, Senior lecturer on corporate responsibility and ethics at the Carlson School of Management at the University of Minnesota[252]

1. Best Case Scenarios: Clear and Concise Employment Agreements

Employment agreements with college coaches generally contain provisions either allowing or requiring coaches to carry out duties that will result in the creation of intellectual property. These duties can involve media programs, endorsements, camps, licensed merchandise, and certain public appearances and written materials. While some coaches' employment agreements specify who will own the intellectual property created from these activities, others do not. Further complicating matters is the fact that not all athletically-related intellectual property created by a coach fits neatly into the employer's work-for-hire box or the employee's personal property box. In light of this, coaches' employment agreements

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[252] Nicolas Hallett, *Fighting to Keep Ideas*, MINN. DAILY, Apr. 17, 2014, *available at* http://www.mndaily.com/news/campus/2014/04/17/fighting-keep-ideas.

should clearly and concisely specify the owner of any intellectual property to be created by the coach. Model employment agreements[253] or, at minimum, model intellectual property ownership clauses could be used to assist in this effort.

a. Default Rules: University Intellectual Property Policies

When employment agreements fail to specify who owns the intellectual property created by college coaches, university intellectual property policies should be able to fill in the gaps. To facilitate this, universities should, at a minimum, ensure that their policies are applicable to non-faculty members, such as coaches. This would require that the policies cover far more than the traditional fruits of academic research. To this end, university intellectual property policies should be drafted to cover both academic and non-academic intellectual property. Additionally, coaches' employment agreements should be drafted to incorporate university intellectual property policies by reference to clarify, in uncertain cases, who will retain the ownership rights to intellectual property created by coaches.

In the absence of an agreement, law, or university policy to the contrary, a coach would generally be the first owner of any intellectual property that he created.[254] Therefore, a coach who changes employers frequently could amass quite a

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[253] *See* Edward N. Stoner, II, & Arlie R. Nogay, *The Model University Coaching Contract ("MCC"): A Better Starting Point for Your Next Negotiation*, 16 J. COLL. & UNIV. L. 43 (1989) (proposing a "Model University Coaching Contract" to assist university counsel in drafting college coaching contracts).
[254] Gifford, *supra* note 37, at 21–22.

collection of intellectual property ownership interests from previous positions.

This begs the question of whether it is equitable for a coach to retain ownership interests in intellectual property whose value stems primarily from the coach's association with a particular university. The most justifiable answer is no. As between a coach and a university, it would seem that the university would have the more cognizable interest in owning intellectual property whose value stems primarily from its university association. In all but a few cases, the university creates the environment that makes the commercialization of the coach's intellectual property possible.[255] Additionally, the university has a reputational interest in deciding how intellectual property that bears its marks should be used in the future.

Whereas some members of the university community can commercialize intellectual property related to their positions without necessarily associating it with the university, this typically is not the case for coaches. For example, a professor can publish scholarly articles in his area of expertise without mentioning where he works, and the omission likely would not affect the article's content or context. A coach's publications, on the other hand, are often heavily dependent on the coach's identification with a certain team, and the team is, of course, inseparably associated with the coach's university employer. Thus, when a coach produces intellectual property in his area of expertise, the coach's employer is usually

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[255] *See* KNIGHT FOUND., A CALL TO ACTION: RECONNECTING COLLEGE SPORTS AND HIGHER EDUCATION 27 (2001) ("Outside income should be apportioned in the context of an overriding reality: Advertisers are buying the institution's reputation no less than the coaches.").

implicated, even if not explicitly. To borrow some language from the NCAA's amateurism rules, the "value or utility" of a coach's athletically-related intellectual property is often based on "the publicity, reputation, fame or personal following" of the university that employs the coach.[256] The reverse, however, can be said for only a handful of very prominent coaches.

Most universities have intellectual property policies that address ownership of intellectual property for employees. Almost all of these policies provide for employee ownership of traditional scholarly works.[257] For other types of works, the answer to the ownership question is less clear. Even in the case of scholarly works, some intellectual property policies go on to except from employee ownership intellectual property that is commissioned by the university[258] or created using university resources,[259] among other things.

University policies typically define a "commissioned work" as a work that the university or a third party finances or directs to be created for a specific purpose.[260] These works also may be referred to as "institutional"[261] or "university"[262] works. An example of such a work would be an interactive

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[256] 2013–2014 DIVISION I MANUAL, *supra* note 23, § 12.4.1.1.
[257] *See* sources cited *supra* note 167.
[258] *See, e.g.*, LOUISVILLE POLICY, *supra* note 154, § 3(b)(iii); OKLAHOMA POLICY, *supra* note 167, § 3.27.4(B).
[259] *See, e.g.*, OKLAHOMA POLICY, *supra* note 167, § 3.27.4(B); VIRGINIA COPYRIGHT POLICY, *supra* note 167, § 2.
[260] *See, e.g.*, ALABAMA COPYRIGHT POLICY, *supra* note 154, § B(3); ARKANSAS POLICY, *supra* note 156, § 1(J)(1).
[261] *See, e.g.*, ALABAMA COPYRIGHT POLICY, *supra* note 154, § B(4); OHIO UNIVERSITY POLICY, *supra* note 167, § III.
[262] *See, e.g.*, INDIANA POLICY, *supra* note 167, § 1(C); OKLAHOMA POLICY, *supra* note 167, § C(5).

blog for which a coach is specifically compensated by the university.

The applicability of the exception to employee ownership for works created using "university resources" can vary based on the amount and nature of the use, which can range from "incidental"[263] to "extraordinary" use.[264] "University resources" are typically described in university intellectual property policies as facilities, funds, or staff.[265]

Licensed indicia,[266] such as the name, color scheme, trademarks, slogans, mascots, and logos of a university, are also university "resources" with value[267] that can be quantified. Most university intellectual property policies, however, do not include licensed indicia as a resource contemplated by the policy. This is a significant omission given the huge investments that universities make in creating and establishing goodwill in their indicia. To remedy this, university intellectual property policies should specifically include university indicia as a resource in those parts of the policy that address the effect

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[263] *See, e.g.*, JACKSONVILLE UNIVERSITY, JACKSONVILLE UNIVERSITY INTELLECTUAL PROPERTY POLICY § A(1)(c), *available at* http://www.ju.edu/ctl/Documents/JU_Intellectual_Property_Policy_Final_Draft4.pdf (last visited Feb. 1, 2015).
[264] *See, e.g.*, ALABAMA COPYRIGHT POLICY, *supra* note 154, § B(1).
[265] *See, e.g.*, *id.*; VIRGINIA COPYRIGHT POLICY, *supra* note 167; VIRGINIA TECH POLICY, *supra* note 163, § 2.3(A); UNIV. OF UTAH, POLICY 7-003: OWNERSHIP OF COPYRIGHTABLE WORDS AND RELATED WORKS § III(A), *available at* http://regulations.utah.edu/research/7-003.php (last visited Feb. 1, 2015).
[266] COLLEGIATE LICENSING CO., *supra* note 25.
[267] *See Brand Valuation*, INT'L TRADEMARK ASSOC., http://www.inta.org/TrademarkBasics/FactSheets/Pages/BrandValuation.aspx (last visited Feb. 1, 2015).

that the use of university resources will have on intellectual property ownership rights.

That is, university intellectual property policies should provide for university ownership of intellectual property that is both created in connection with an employee's duties and dependent on university associations or indicia for its value—with revenue sharing as a possibility.[268] Examples of intellectual property *created in connection with a coach's duties* would include any intellectual property that originates from activities mentioned in the coach's employment agreement. Radio, television, and internet programming, endorsements, and written materials are just a few examples that could possibly meet this first criterion.

Intellectual property that is *dependent on university associations or indicia for its value* will necessarily reference, include, or display the university's name or other indicia. This second criterion would be met, for example, where a head coach's non-university, subscription-based website uses the university's logos and color scheme, contains photos of

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[268] This view is in parallel with the Knight Commission recommendation stating:

The Commission believes that in considering non-coaching income for its coaches, universities should follow a well-established practice with all faculty members: If the outside income involves the university's functions, facilities or name, contracts for particular services should be negotiated with the university.

KNIGHT FOUND., KEEPING FAITH WITH THE STUDENT–ATHLETE: A NEW MODEL FOR INTERCOLLEGIATE ATHLETICS IN REPORTS OF KNIGHT FOUNDATION COMMISSION ON INTERCOLLEGIATE ATHLETICS 32 (1999).

university employees, links to content on the university's official website, and sells university memorabilia.[269]

This second criterion also includes any intellectual property created by the coach when acting in his official capacity as an employee of the university. For example, a post-game interview featuring a coach wearing university-branded apparel would meet the *dependent on university associations or indicia* requirement. If identification of the coach's employer is essential to the intellectual property's purpose, then the second criterion is met.

In summary, university intellectual property policies should be drafted in such a way as to make them applicable to non-faculty employees acting within the scope of their employment. The policies should also specify that university indicia are university resources that could subject the intellectual property to university ownership. Operationally, intellectual property that is both created in connection with an employee's duties and dependent on university associations or indicia for its value should fall under university ownership. Lastly, it is important to note that it is not necessary for an employee to own intellectual property in order to benefit from it financially. It is entirely possible for a university to retain sole ownership of intellectual property created by an employee while sharing the resulting revenues.

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[269] *See, e.g.*, *supra* notes 219–226 and accompanying text.

V. REBUILDING: THE INTELLECTUAL PROPERTY OF STUDENT–ATHLETES

"The high coaches' salaries and rapidly increasing spending on training facilities at many schools suggest that these schools would, in fact, be able to afford to offer their student–athletes a limited share of the licensing revenue generated from their use of the student–athletes' own names, images, and likenesses."

- Judge Claudia Wilken, U.S. District Court for the Northern District of California[270]

A discussion of college coaches' intellectual property would be incomplete without a discussion of the individuals who make the coaches' intellectual property possible: student–athletes. NCAA rules, of course, do not prevent college coaches from receiving compensation for their intellectual property. By contrast, NCAA bylaw 12.4.1.1[271] prohibits student–athletes from receiving compensation for the "publicity, reputation, fame or personal following that he or she has obtained because of athletics ability."[272] Additionally, student–athletes must sign Form 13-3a, which authorizes the NCAA or a designated third party to use the athlete's "name or picture to . . . promote NCAA championships or other NCAA events, activities or programs."[273] Lastly, student–athletes must

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[270] O'Bannon v. NCAA, 7 F. Supp. 3d 955, 1004 (N.D. Cal. 2014).
[271] This bylaw was rendered unenforceable in O'Bannon v. NCAA. *See id.*
[272] 2013–2014 DIVISION I MANUAL, *supra* note 23, § 12.4.1.1.
[273] Form 13-3a Academic Year 2013-14: NCAA Student–Athlete Statement—Division I, Nat'l Collegiate Athletic Ass'n (2013), *available at* http://www.ncaa.org/sites/default/files/DI%2BForm%2B13-3a%2B-%2BStudent–Athlete%2BStatement.pdf; 2013–2014 DIVISION I MANUAL, *supra* note 23, §12.5.1.8. Form 08-3a, referred to in the O'Bannon

sign an "Institutional, Charitable, Educational, or Nonprofit Promotions Release Statement" pursuant to NCAA bylaw 12.5.1.1(i), which states in pertinent part:

> The student–athlete and an authorized representative of the charitable, educational or nonprofit agency sign a release statement ensuring that the student–athlete's name, image or appearance is used in a manner consistent with the requirements of this section.[274]

Form 13-3a and the Institutional, Charitable, Educational, or Nonprofit Promotions Release Statement (the "Release Forms") combine to grant the NCAA, its members, and designees the permission to use student–athletes' images for a variety of purposes so long as the student–athletes are not compensated beyond "actual and necessary expenses."[275]

The *O'Bannon* ruling's injunction against the enforcement of certain NCAA amateurism rules[276] opens the door for student–athletes to receive compensation from a variety of intellectual property–based sources. These sources include: media rights for televised games; DVD and online on-demand sales and rentals; video clip sales to advertisers, corporations, and entertainment producers; photos, action figures, trading cards, and posters; video game sales and rentals; rebroadcasts of games; sales of licensed merchandise;

Complaint, *see supra* note 16, is the predecessor to Form 13-3a for the 2013–2014 academic year.

[274] 2013–2014 DIVISION I MANUAL, *supra* note 23, § 12.5.1.1(i).

[275] *Id.* § 12.5.1.1(f).

[276] *See O'Bannon*, 7 F. Supp. 3d at 955; *e.g.*, 2013–2014 DIVISION I MANUAL, *supra* note 23, §§ 12.01–12.6 .

and written materials.[277] As an example of the amount of money involved in student–athlete related media rights alone, one need only look to the NCAA men's basketball tournament and the new college football playoff system. It will be the first college football playoff series ever, and ESPN already has contracted to pay $470 million dollars per year for the TV, radio, mobile, online, and international rights to the playoff.[278] On top of that, CBS and Turner Sports will pay nearly $11 billion for the TV, Internet, and wireless rights to the NCAA men's basketball tournament through 2024.[279] The predecessor to this latest NCAA agreement, signed in 1999, was worth substantially less at a mere $6 billion over 11 years.[280]

The *O'Bannon* ruling,[281] discussed in further detail below, weighs in on a longstanding debate over whether student–athletes should be allowed to share in the intellectual property revenues that they help to generate.[282] The ruling

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[277] O'Bannon Complaint, *supra* note 16, ¶¶ 104–64. The *O'Bannon* ruling specifically allows the NCAA to continue to enforce its rules prohibiting commercial endorsements. *O'Bannon*, 7 F. Supp. 3d at 955, 1008.
[278] *ESPN Lands Rights to College Playoff for $470M Per Year Through 2025*, CBSSPORTS (Nov. 21, 2012, 2:02 PM), http://www.cbssports.com/collegefootball/story/21083692/espn-lands-rights-to-college-playoff-for-470m-per-year-through-2025.
[279] Ben Klayman, *NCAA Signs $10.8 Billion Basketball Tourney TV Deal*, REUTERS (Apr. 22, 2010, 4:12 PM), http://www.reuters.com/article/2010/04/22/us-basketball-ncaa-cbsturner-idUSTRE63L4FP20100422.
[280] *Id.*
[281] *See* discussion *infra* Part V.B.
[282] This particular debate is outside the scope of this article. However, it is a debate the rages on in the media. *See, e.g.*, Stephen Bronars, *Pay College Football Players Rather Than Spending Millions on Coaches*, BRONARS ECON. (Oct. 12, 2012), http://sbronars.wordpress.com/2012/10/12/pay-college-football-players-rather-than-spending-millions-on-college-coaches;

stands for the proposition that student–athletes should be allowed to receive a limited share of the revenue generated from the use of their names, images, and likenesses.[283]

Almost every university has policies governing intellectual property ownership and revenue sharing. Interestingly, university intellectual property policies may limit the revenue sharing potential made possible by *O'Bannon*. That is, under some university intellectual property policies, the university would retain the ownership rights for student–athlete created intellectual property and therefore would own the resulting revenues. In such cases, a university may elect not to share revenues with student–athletes.

A. Applicability of Intellectual Property Policies to Student–Athletes

When speaking of the potential impact of university intellectual property policies on student–athletes, a closer examination of the policies as they apply to university students

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Dan Steinberg, *Harry Reid: 'Of Course' NCAA Athletes Should Have Right to Unionize*, WASH. POST (Mar. 27, 2014) http://www.washingtonpost.com/blogs/dc-sports-bog/wp/2014/03/27/harry-reid-of-course-ncaa-athletes-should-have-right-to-unionize; E.M. Swift, *Paid To Play: The End Of College Sports as We Know It*, COGNOSCENTI (Aug. 14, 2014), http://cognoscenti.wbur.org/2014/08/14/ncaa-athletes-e-m-swift; *Economist: College Football Like NFL— But for No Pay*, USA TODAY (Feb. 14, 2014, 8:51 PM), http://www.usatoday.com/story/sports/ncaaf/2014/02/19/college-football-nfl-player-pay-student–athletes-northwestern/5624651. For a detailed discussion of the practical implications of compensating student–athletes beyond a university's cost of attendance, see Tanyon T. Lynch, *Quid Pro Quo: Restoring Education Primacy to College Basketball*, 12 MARQ. SPORTS L. REV. 595, 616–21 (2002).

[283] O'Bannon v. NCAA, 7 F. Supp. 3d 955, 1007 (N.D. Cal. 2014).

in general is useful. Some university intellectual property policies omit any references to students[284] while others go into great detail about student-created intellectual property.[285] Without a law, agreement, or university policy to the contrary, the student–athlete would be the first owner of any intellectual property that he created.[286] The university intellectual property policies analyzed in Part IV of this Article will be revisited below to illustrate the respective policies' potential impact on student–athletes.

1. Example #1 Revisited: University of Alabama's Policy

The University of Alabama's copyright policy does not mention students at all.[287] As an indication that the omission of students from the policy was not an oversight on the university's part, Alabama's patent policy is instructive. It states in pertinent part that the patent policy is "a condition of enrollment and attendance" for "every student at each campus."[288] This same definitive language is noticeably absent from the corresponding copyright policy, which apparently was not intended to apply to students who are not employees.[289] Therefore, it would seem that Alabama's student–athletes would be able to retain an ownership interest in any copyrightable materials that they help to create, absent an agreement or law to the contrary.

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[284] *See, e.g.*, ALABAMA COPYRIGHT POLICY, *supra* note 154.
[285] *See, e.g.*, CLEMSON POLICY, *supra* note 156; GEORGIA TECH POLICY, *supra* note 156; INDIANA POLICY, *supra* note 167.
[286] Gifford, *supra* note 37, at 21.
[287] ALABAMA COPYRIGHT POLICY, *supra* note 154.
[288] ALABAMA PATENT POLICY, *supra* note 172, § 5.
[289] ALABAMA COPYRIGHT POLICY, *supra* note 154, § A(1).

2. Example #2 Revisited: Virginia Tech's Policy

Virginia Tech's intellectual property policy applies to students, who are referenced in various parts of the policy.[290] However, the focus of Virginia Tech's intellectual property policy is on scholarly activity in the traditional sense.[291] The two specific categories covered by the policy are "the traditional results of academic research" such as "textbooks, literary works, artistic creations and artifacts" and "the novel results of research" such as "products, processes, machines, software, biological technology, etc."[292] With such a narrow focus, Virginia Tech's intellectual property policy would not apply to the vast majority of intellectual property that student–athletes would create in connection with their sports. Consequently, student–athletes at Virginia Tech, like those at Alabama, would also be able to retain an ownership interest in any intellectual property that they help to create.

3. Example #3 Revisited: Clemson's Policy

Clemson's intellectual property policy addresses student-created intellectual property under its "Student Ownership Exception."[293] As the title suggests, students are an exception to the policy's general provisions that provide for creator ownership to, for example, "creative or scholarly works."[294] The applicable part of Clemson's intellectual property policy states:

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[290] VIRGINIA TECH POLICY, *supra* note 163.
[291] *Id.* § 2.3(A).
[292] *Id.*
[293] CLEMSON POLICY, *supra* note 156, § 5(c).
[294] *Id.* § 5(b)(iv)(1).

> In accordance with this policy, student Creators do *not* hold the rights to intellectual property created, developed, or generated:
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> i. In the course of rendering compensated services to the University; or
> ii. As part of sponsored research or projects; or
> iii. Pursuant to an agreement that requires the University and/or student to assign his or her rights either to the University or to a third party; or
> iv. Using pre-existing or background intellectual property belonging to the University or to a third party with whom the University has a contract under which such background intellectual property rights are already allocated.[295]

Several of these provisions could apply to student–athletes depending upon how they are interpreted. Specifically, provisions (i), (iii), and (iv) above might operate to prevent student–athletes from owning the rights to intellectual property that they create either solely or jointly in their roles as student–athletes. Subpart (i) addresses students who, as university employees or contractors, produce intellectual property within the scope of their duties.[296] However, what is not clear from the policy is whether an athletic scholarship or stipend could be interpreted as a form of compensation under the policy. If athletic scholarships and stipends are interpreted as

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[295] *Id.* § 5(c) (emphasis added).
[296] *See id.* §5(c)(i).

compensation,[297] such an interpretation would prohibit a student–athlete from owning intellectual property rights to an in-action game photograph, for example, as it would have been created "in the course of rendering compensated services to the University."[298] Subpart (iii), which addresses the assignment of rights by the student or university, could be applied to the media rights of televised games that are licensed or assigned by the university to the producers of game broadcasts.[299] The university could not license or assign media rights in which it has no authority or ownership interests. Consequently, student–athletes must somehow license or assign their rights, for example via the Release Forms, to the university or to its designee who would then license or assign its rights to the producers of the game broadcasts. Under the policy, such an arrangement would deny student–athletes any ownership rights in the game broadcast.

Finally, subpart (iv) applies to student–athlete intellectual property that uses pre-existing or background intellectual property owned by the university.[300] The policy states that intellectual property can include, but is "not limited to, any . . . creation, know-how, trade secret, technology, scientific or technological development, mask work, trademark, research data, work of authorship, and computer software regardless of whether subject to protection under patent, trademark copyright, or other laws."[301] This broad

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[297] *See* Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student–Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 109–17 (2006) (arguing that athletic scholarships constitute compensation).
[298] CLEMSON POLICY, *supra* note 156, § 5(c)(i).
[299] *Id.* § 5(c).
[300] *Id.* § 5(c)(iv).
[301] *Id.* § 3.

language could be inclusive of everything ranging from the use of the team logo to the use of the team's practice drills. Therefore, if a student–athlete's creation featured either of those items, the resulting intellectual property potentially could be owned by the university.

Clemson's intellectual property policy as a whole has the potential to sweep vast amounts of student–athlete intellectual property within its scope to achieve the same outcome that the policy would achieve for coaches: broad university ownership of intellectual property. In the absence of the "student ownership exception," Clemson's student–athletes would be able to retain an ownership interest in their athletically-related intellectual property. This ownership interest would include the right to control future uses of the intellectual property and the right to receive compensation for such uses. Not surprisingly, these are the rights at issue in the *O'Bannon v. NCAA* case.

B. O'Bannon v. NCAA

The *O'Bannon v. NCAA* class suit[302] is interesting because it highlights the discrepancy between the treatment of

[302] The Antitrust Declaratory and Injunctive Relief Class generally consists of:

> All current and former student–athletes residing in the United States who compete on, or competed on, an NCAA Division I college or university men's basketball team or on an NCAA Football Bowl Subdivision (formerly known as Division I-A until 2006) men's football team and whose images, likenesses and/or names may be, or have been, licensed or sold by Defendants, their co-conspirators, or their licensees after the

college coaches and student–athletes with respect to the rights and rewards that accompany the creation of intellectual property. The lead plaintiff in the case, Ed O'Bannon, is a former University of California, Los Angeles (UCLA) basketball player who competed with the Bruins from 1991 to 1995.[303] In the 1994–1995 season, O'Bannon led his team to a national championship and received the John R. Wooden award for the nation's most outstanding men's basketball player.[304]

A frustrated O'Bannon decided to take legal action after seeing his likeness in a video game for which he received no compensation.[305] In July of 2009, he filed a federal antitrust lawsuit[306] against the NCAA, EA, and the Collegiate Licensing Company (CLC) that was later consolidated and certified as a class action.[307] CLC settled its claims with the plaintiffs for $40 million in September of 2013, leaving the NCAA as the lone defendant in the lawsuit.[308]

Plaintiffs' main argument against the NCAA is that it fixed the price of student–athlete images and likenesses at zero

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> conclusion of the athlete's participation in intercollegiate athletics.

Likeness Complaint, *supra* note 16, ¶ 268.

[303] *Id.* ¶ 45.

[304] *Id.*

[305] Matt Hinton, *Ex-Bruin Hoopster Takes NCAA Players' Video Game Suits to Another Level*, YAHOO! SPORTS (July 22, 2009), http://sports.yahoo.com/ncaa/football/blog/dr_saturday/post/Ex-Bruin-hoopster-takes-NCAA-players-video-game?urn=ncaaf,178069.

[306] O'Bannon Complaint, *supra* note 16.

[307] *In re* Student–Athlete Name & Likeness Licensing Litig., No. C09-1967 CW, 2014 U.S. Dist. LEXIS 50693, at *12–17 (N.D. Cal. Apr. 11, 2014).

[308] *Id.* at *15; *NCAA Sues EA Sports, CLC*, *supra* note 21.

dollars, an unreasonable restraint of trade under the Sherman Act.[309] That is, student–athletes are neither compensated for the use of their images and likenesses while they are eligible to compete, nor are they compensated afterwards when the NCAA's amateurism rules no longer apply to them.[310] This is in stark contrast to the carefully negotiated compensation that coaches receive for licensing the rights to their images.

In August 2014, the U.S. District Court for the Northern District of California decided in favor of the O'Bannon plaintiffs, which resulted in a permanent injunction preventing the NCAA from enforcing any rules that would prohibit class members from receiving compensation for their names, images, and likenesses.[311] The court's order specifically allows, but does not require, modest stipends for student–athletes and trust funds from licensing revenues payable to student–athletes they leave school.[312] The court, however, did not address how student–athlete intellectual property licenses to the NCAA and its member institutions should be effectuated going forward.

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[309] Likeness Complaint, *supra* note 16, ¶ 434. In a strategic pre-trial move, the "[p]laintiffs voluntarily dismissed all of their claims for 'individual damages, disgorgement of profits, and an accounting.' They also dismissed their claims for unjust enrichment. Accordingly, the Court [did] not consider these claims . . . ." O'Bannon v. NCAA, 7 F. Supp. 3d 955, 996 n.12 (N.D. Cal. 2014) (citation omitted); *see also* Steve Berkowitz, *O'Bannon v. NCAA Plaintiffs No Longer Want Jury Trial*, USA TODAY (May 15, 2014, 12:20 PM), http://www.usatoday.com/story/sports/college/2014/05/14/obannon-case-plaintiffs-want-ncaas-mark-emmert-called-as-witness/9107249.

[310] *See* Likeness Complaint, *supra* note 16, ¶ 14.

[311] *O'Bannon*, 7 F. Supp. 3d at 1007.

[312] *Id.* at 1007–08.

C. Solutions: Addressing Intellectual Property Licensing Issues in Student–Athlete Eligibility Agreements

"Many people would say that there ought to be more protection for the employees or students. . . . But in the United States, rightly or wrongly, we leave it up to the individuals to protect themselves."

- Thomas Cotter, Professor of intellectual property law at the University of Minnesota Law School[313]

1. Avoid overreaching: Limit the duration and scope for certain uses of student–athletes' intellectual property

As a practical matter, the Release Forms grant the NCAA and its members a license to use student–athlete images in perpetuity for seemingly unlimited purposes.[314] This effectively prevents former student–athletes from licensing their own images at the conclusion of their NCAA careers.[315]

The *O'Bannon* ruling does not address whether the additional compensation that may be provided to student–athletes would require them to license their names, images, and likenesses to the NCAA and its members in perpetuity for unlimited purposes. The Release Forms could clarify this by specifying a reasonable duration and scope for the license to use student–athlete images. This clarification would allow former student–athletes to license for themselves, individually

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[313] Hallett, *supra* note 252.
[314] *See* Likeness Complaint, *supra* note 16, ¶ 448.
[315] *Id.*

or as a group, images that fall outside of the terms of the Release Forms.

2. Follow the Leader: Use Coaches' Employment Agreements as a Model

Coaches' employment agreements can provide some helpful insights that can be used to address duration and scope issues pertinent to the licensing of student–athlete images. Unlike the Release Forms, coaches' employment agreements address the duration and scope of use for a coach's image and likeness. Some agreements limit the use of the coach's image and likeness to the term of the agreement:

> As additional consideration for the personal service fee payments, . . . Employee grants and assigns to the University . . . the right to use Employee's name, biographical material, likeness . . . or any combination thereof, in connection with any non-endorsement activities and any media programs . . . produced, negotiated, or developed in any media at any time during the term of . . . this Contract.[316]

Others allow perpetual use of products or programming created during the term of the agreement.[317] However, any new uses of the coach's image and likeness after the term of the agreement concludes may be restricted, as in the excerpt below:

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[316] SABAN AGREEMENT, *supra* note 45, § 4.04(d)(5)(iii).
[317] BIELEMA AGREEMENT, *supra* note 6, § 10.

> [T]he scope of the license granted to the University shall include the perpetual right to use Coach's name, likeness and image in all Programming created, in any medium, at any time during the life of this Agreement, including but not limited to, the right to sell game footage or videos containing images of Coach after the expiration or termination of the Agreement for any reason. Except as expressly permitted herein, however, the University shall not have the right to use Coach's name, likeness and image following the expiration or termination of this Agreement for purposes of marketing any new products or items . . . without Coach's prior written approval.[318]

The above examples were taken from employment agreements in which the coaches received millions of dollars for licensing their intellectual property rights to the university.[319] Student–athletes grant similar licenses to universities through the Release Forms; however, historically, their compensation was limited to the value of their scholarships.[320] The *O'Bannon* ruling permits additional

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[318] *Id.*
[319] *Id.* §§ 3, 10; SABAN AGREEMENT, *supra* note 5, §§ 4.04(d)(5)(ii)–(iii).
[320] *See* Jerry Carino, *Athletes, Administrators Debate Scholarship Stipends*, USA TODAY (Sept. 28, 2013, 11:24 PM), http://www.usatoday.com/story/sports/college/2013/09/28/athletes-administrators-debate-ncaa-scholarship-stipends/2890117; Zach Dirlam, *There's No Crying in College: The Case Against Paying College Athletes*, BLEACHER REPORT (Apr. 3, 2013), http://bleacherreport.com/articles/1588301-theres-no-crying-in-college-the-case-against-paying-college-athletes.

compensation to student–athletes but does not place limits on the duration or scope of the license granted by the NCAA's Release Forms.[321] To remedy this, Release Forms should be revised to mirror the way in which duration and scope issues are addressed in coaches' employment agreements.

VI. CONCLUSION

"You've got to know a whole lot more today to understand the economics and operation of a college coach's contract."

- Robert Lattinville, Chairman of the sports division at Stinson Morrison Hecker LLP, which represents coaches in contract matters.[322]

The intellectual property rights resulting from a coach's athletically-related activities can be owned by the coach, his employer, a third party, or jointly. To the extent that a coach's employment agreement does not fully address the allocation of intellectual property rights, university intellectual property policies can be used to fill in the gaps. To ensure that universities are not foregoing valuable rights to university associated intellectual property, university intellectual property policies should be written to provide for university ownership of intellectual property that is both created in connection with an employee's duties and dependent on university associations or indicia for its value. Where this approach results in university ownership, the university should have the option to compensate coaches accordingly for releasing their intellectual property rights.

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[321] *See* O'Bannon v. NCAA, 7 F. Supp. 3d 955 (N.D. Cal. 2014).
[322] Gentry & Alexander, *supra* note 1.

Intercollegiate athletics is a $16 billion business[323] and a substantial portion of that business relies on revenues from the licensing and assignment of intellectual property rights.[324] As the *O'Bannon* ruling demonstrates, it has become increasingly more difficult for universities to justify using intellectual property revenues to generously compensate coaches, while simultaneously denying student–athletes access to intellectual property revenues that they are largely responsible for creating.[325]

As opportunities for coaches and players to create intellectual property multiply, so too will issues of ownership and revenue sharing. As such, universities would be well advised to ensure that coaches' employment agreements address these issues thoroughly. Finally, existing university intellectual property policies should be reviewed to determine if and how they should apply, now and in the future, to coaches as well as student–athletes.

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[323] Mason Levinson, *Northwestern Football Ruling May Change U.S. College Sports*, BLOOMBERG BUSINESSWEEK (May 27, 2014, 12:04 AM), http://www.bloomberg.com/news/2014-03-26/northwestern-players-can-become-first-college-union-nlrb-rules.html.

[324] At top programs, media rights revenues are second only to ticket sales, if at all. *See* Steve Berkowitz et al., *Top School Revenue*, USA TODAY, http://www.usatoday.com/sports/college/schools/finances (last visited Feb. 1, 2015).

[325] *See O'Bannon*, 7 F. Supp. 3d at 1004; DARREN A. HEITNER, HOW TO PLAY THE GAME: WHAT EVERY SPORTS ATTORNEY NEEDS TO KNOW 37–39 (2014).