How College eSports Changes the NCAA’s Amateurism Model

Thomas Baker, University of Georgia
John Holden, Florida State University

Law - Law (College Sport)                    Friday, June 8, 2018
20-minute oral presentation (including questions)              3:50 PM
Abstract 2018-249                                                   Room: Sable C

The National Collegiate Athletic Association (NCAA) wants to be in the business of esports (Darcy, 2017). On August 25, 2017, the NCAA issued a request for proposals (RFP) that solicited help for evaluating a possible role for exports within the organization for the NCAA’s board of governors. News of the NCAA’s interests in developing a college segment of esports (collegiate esports) may seem like good news for esports enthusiasts, players, and other key stakeholders within esports. After all, the NCAA is the mechanism that regulates the multi-billion dollar business of bigtime intercollegiate athletics in the United States (Baker & Brison, 2015). The NCAA’s move into the emerging phenomenon of college esports would be a rising tide that lifts all boats; well, almost all boats because collegiate esports players would likely end up on a sinking ship. In the RFP, the NCAA made clear that any movement into collegiate esports would be done in a way that aligns with its organizational values. The problem for players is that the NCAA’s “values” include an amateurism model for intercollegiate athletics that has been described as the “shame of college sports” (sic) based on how unfairly athletes are treated under the model (Branch, 2011).

For example, take the case of Donald De La Haye, a former varsity football player at the University of Central Florida (UCF). De La Haye is a former football player because he lost his scholarship after being declared ineligible by UCF based on the school’s interpretation of an NCAA amateurism policy that restricts the use of athlete names, images, and likenesses (NILs) for commercial purposes (Garland, 2017). De La Haye has the dream of being a videograher and in pursuit of that dream he created a YouTube channel that he called Deestroying; a channel that now has more than 117,000 followers. De La Haye responded to UCF’s decision with a broadcast on his channel that he aptly titled, “I lost my full D1 scholarship because of my YouTube channel… In his video response, De La Haye took issue with demands that he demonetize his videos in order to retain his scholarship to play football at UCF. In an interview for Forbes, De La Haye later added that he thinks it’s “idiotic, stupid, preposterous” that the NCAA permits his coach to make $2 million off of his name while De La Haye is unable to make “a couple thousand bucks” off of his YouTube channel (Heitner, 2017).

Yet, if De La Haye had played varsity esports rather than NCAA-regulated football, he would have been able to keep his channel and his scholarship. In fact, it’s common for esports players to have their own YouTube or Twitch channels and there is no prohibition in college esport against the monetization of student-athlete NILs (M. Deepe, personal communication, May 15, 2017). Furthermore, former professional esport players who have profited off of esports in the past are permitted to leave the pro ranks and pursue educations by accepting scholarships to play varsity esports. Former professional athletes are unable to compete in the same NCAA-sanctioned sports for which they were compensated, and this means that athletes must choose to either pursue professional careers in sports or funding their education by playing intercollegiate athletics. Those examples represent just two of many instances in which student-athletes on varsity esport teams currently enjoy greater choice and financial freedom in comparison to student-athletes on NCAA-sanctioned teams. So rather than absorbing college esports into its amateurism model for intercollegiate athletics, we suggest that the NCAA should instead adapt to more like college esports. For this to happen, the NCAA would need to relax its adherence to the “revered tradition” of amateurism, a concept that conceals the NCAA’s anticompetitive cost control mechanisms under a cloud of sport ideology.

It is doubtful that the NCAA, a profit-maximizing collection of non-profit institutions, would want to voluntarily discard a concept that justifies the suppression of labor costs and restricts athlete liberty to the benefit of its members. To the contrary, the NCAA has spent countless amounts in defending amateurism against legal challenges brought by the same athletes the NCAA purports to protect from commercial exploitation (Edelman, 2016). Thus far, courts of law have justified the NCAA’s version of amateurism based on the dubious position that doing so is necessary to the preservation of consumer interest in the NCAA’s “products” (Baker & Brison, 2015). Nevertheless, college athletes continue to challenge the NCAA’s amateurism model in court and, in fact, there are multiple actions pending against the NCAA that threaten the legality of amateurism (e.g. Jenkins v. NCAA and Alston v. NCAA).
Some esports stakeholders have taken notice of the legal problems with the NCAA’s amateurism model and have worked to keep the more controversial constraints imposed on athletes by that model out of college esports. For instance, the National Association of College Esports (NACE), the current governing body for college esports, has intentionally left amateurism out of its league rules and regulations. “The majority of varsity programs have been built intentionally to stay separate of the NCAA’s bylaws,” said NACE Director Michael Brooks (M. Brooks, personal communication, August 2, 2017). Brooks added that barring some “pretty dramatic exceptions” for college esports, the NCAA would not succeed in absorbing esports “under its banner.”

Whether or not the NCAA attempts and succeeds in absorbing college esports does not change the fact that the future shape and structure of college esports remains uncertain. Collegiate esports is in its infancy in terms of development with more than half of the current varsity programs having formed within the past two years (nacesports.org). From a list of 40 esport programs that currently provide scholarships to varsity esport players, 15 were housed within NCAA member institutions and those schools will have a say in the development of college esport regulation. Thus, the possibility exists that the NCAA could influence the future direction of college esport regulation without ever moving into the space and taking over the reins of regulatory control.

Uncertainty over the future of college esports fuels the need for research that can help interested parties develop appropriate college esports governance that is specifically tailored to meet the unique demands inherent to college esports. Unfortunately, a review of the relevant literature on college esport revealed a dearth of legal research on college esports in general. This presentation fills these gaps in the literature by being the first to reveal information on current and future regulation within collegiate esports. The research findings in this presentation also add to the literature by providing new insights on the need for reform within the NCAA and how the success of college esports could lead to that reform.