

# Key cases could shatter sports traditions, while another preserves TV tradition (for now)

## What the Northwestern football, O'Bannon and Aereo cases mean for entertainment attorneys going forward

By **James L. Johnston**

**2**014 began with college athletics under assault, as two cases threatened to alter the collegiate sports landscape forever. On January 28, Northwestern scholarship football players filed a petition with the National Labor Relations Board, seeking an election to determine whether a union could act as their bargaining representative. The premise underlying this petition ran counter to decades of conventional wisdom, alleging that student athletes were employees of the university.

In March, the regional director of the National Labor Relations Board for Region 13 agreed with this premise and found that scholarship football players at Northwestern University were employees under the National Labor Relations Act and authorized a vote to unionize the players. Specifically, the regional director found that the scholarship athletes were compensated in the form of grants, stipends and other reimbursements. They were subject to numerous and significant rules not applicable to the general student population, such as restrictions on where they can live, restrictions on outside employment, agreement to permit university personnel to access and monitor social media accounts, prohibitions against media interviews without university permission, prohibitions against profiting from their image or reputation

and stringent drug testing. The regional director also found that the scholarship athletes were required to devote substantial time to football-related activities by the university—40 to 50 hours per week during the season—and described in detail the overwhelming control that the university maintained over virtually every waking hour of a scholarship athlete's schedule. On this basis, the regional director determined that these scholarship athletes fell squarely within the definition of an employee.

Then, in August, a federal district court in California ruled in favor of athletes in an antitrust class action lawsuit led by former college basketball player Ed O'Bannon, paving the way for college athletes to receive a share of the revenues generated from the use of their names, images and likenesses (whether in video games, on apparel or otherwise). In a case that has been gestating for more than five years, the plaintiffs alleged that the NCAA and its marketing partners (including Electronic Arts and Collegiate Licensing Company) deprived the athletes of their rights of publicity. While Electronic Arts and Collegiate Licensing Company reached a financial settlement with the plaintiffs in 2011, the NCAA continued to dispute the allegations. The district court's ruling, however, went beyond merely determining that an antitrust violation had occurred. Judge Claudia Wilken's ruling established a formula that would cap the amount that universities could

pay student athletes at \$5,000 per year of player eligibility for the use of their name, image and likeness by the university and its partners.

If these two rulings are upheld, the core relationship between universities and athletes will be fundamentally changed. These changes likely will impact the economic models of revenue and non-revenue sports and the relationships between universities and their sponsors and licensees.

While the NCAA was engaged in a battle on two fronts, the television industry was facing its own challenges. In markets along the U.S. East Coast, Aereo, Inc. had launched a service using dime-sized digital antennas to allow users to stream and record the signals of broadcast stations and networks to their computers, tablets and connected devices, including televisions. On the West Coast, a copycat service known creatively as AereoKiller was offering a similar service.

Although users paid Aereo for the service, Aereo did not pay broadcasters, arguing that it was merely enabling consumers to do what they had done since the inception of television: receive an over-the-air broadcast with an antenna.

After a legal battle lasting over two years, the U.S. Supreme Court ruled in June that Aereo (and, by extension, similar services launched around the country) publicly performed or transmitted the signals of the copyright owners without permission in violation

of the copyright owners' exclusive rights. Broadcasters hailed the decision as essential to preserving the economic model for broadcast television, where billions of dollars in retransmission fees are used for high quality entertainment programming, premiere sports events and global news coverage. Aereo ultimately filed for bankruptcy in November and is in the process of liquidating its assets. This victory may be short-lived, however, as technological advances and changing viewing habits will continue to put pressure on traditional broadcasters. In fact, before 2014 came to a close, CBS itself announced the coming launch of an internet-based, direct-to-consumer subscription service, reinforcing the notion that while the rules of the game may be changing, familiar players will remain in the game.

#### Looking Ahead:

- The Northwestern case has been appealed by Northwestern University and is awaiting determination from the

National Labor Relations Board. The delay by the NLRB in issuing a ruling has frustrated many and everyone involved will be anxiously waiting to see if a decision will come in 2015.

- The O'Bannon case is on appeal before the 9th Circuit and oral arguments were presented on March 17 (the first day of the 2015 NCAA Men's Basketball Tournament). The appellate decision could dramatically impact how collegiate sports marketers engage with the NCAA, universities and individual athletes.
- Regardless of outcome of these decisions, the importance of sports and live event programming likely will continue its acceleration, and the increased availability of live sports programming on mobile devices will offer new platforms to reach sports fans in real time. Marketers will need to be agile to quickly adapt to the changes in the collegiate sports model

as well as changes in sports media technology.

- New opportunities and challenges for marketers will be created as the content distribution model continues to evolve. Moves by Netflix and Amazon in 2014 beyond original television-style programming into feature film-style programming are just two examples of this continuing evolution. The launch of additional over-the-top content services by CBS, HBO and others will accelerate an already rapidly changing landscape for the delivery of entertainment content to audiences worldwide.

#### Contributing Author



##### James L. Johnston

James L. Johnston is a partner in the Entertainment, Media & Sports practice group at Davis & Gilbert LLP.  
jjohnsonedglaw.com  
212-468-4867