

# State of the Association 2009: The Challenges of Commercial Activity

*By Dr. Myles Brand, NCAA President*

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## Introduction

Sports are deeply embedded in the American culture – indeed, in cultures worldwide. Every newspaper and evening news broadcast has a section devoted to sports. Our language is filled with sports metaphors, and our casual conversation often begins with opinions about the home team. It is a mark of the times that China chose the Olympics to announce to the world that it has arrived.

While professional sports certainly draws our interest, college sports occupies a special place. Intercollegiate athletics has become integral to many of our universities and colleges, institutions that are the guardians of our traditions and histories and the harbingers of our futures.

Most importantly, college sports positively affects the lives of young women and men who participate. We should feel good in knowing that college sports empowers these young people to become contributing members of their communities and country. College sports relies on the hard and good work of many, and we do not take the time we should to praise those who coach and administer intercollegiate athletics. They deserve significant recognition for the truly outstanding jobs they do in working with student-athletes.

I could easily spend my time today citing the successes of intercollegiate athletics. There are innumerable and wonderful stories that need to be told. Rather, I want to discuss some of the challenges we face. We live in a time when we are surrounded by rapid change, some of which creates problems for intercollegiate athletics. Make no mistake about it: college sports are very, very good! Nonetheless, they can still be better. After introducing some ongoing challenges, I want to turn to the major issue of the proper role for commercial activity within intercollegiate athletics.

## I. Some Current Challenges

For the past several years, Division III has been dealing with issues presented by divisional membership growth. From 1990 to 2008, membership increased from 304 to 429. In itself, growth is good. It shows the attraction of Division III's philosophy, that student-athletes are to be integrated into the general student body and that there should not be any financial aid specifically dedicated to athletes.

But this growth also creates some problems. It stretches the infrastructure support for the divisional membership, including access to national championships. Some new members, moreover, differ in perspective from those who have long histories with the division, thus creating some potential dividing lines.

The division tried to step back and evaluate this issue through a temporary moratorium on new members. When

that time period elapsed, a serious discussion about the structure of the division was undertaken. At last year's NCAA Convention, the debate about splitting the division into two subdivisions, or creating a new division, was intense. The good news is that there was strong presidential engagement.

This debate reached a climax when a survey was sent in February and March to the presidents in order to ascertain their views on the future of the division. The response was broad, with 96 percent of Division III institutions replying.

The answer that came back on the survey was clear. Over 85 percent of the members like the current structure and they do not want to change it at this time. That ends the current debate about splitting the division. But the survey also showed that there are key differences in perspective within the division about the best ways to conduct intercollegiate athletics.

The Division III Presidents Council is continuing the conversation through a series of white papers on key topics. These articulations of the issues are the catalysts for further debate at this Convention, and possibly action in the future.

The issues under consideration go to the core of divisional philosophy. I commend the presidents and athletics administrators for their willingness to address the future of the division in progressive ways. The challenge, of course, is to exit this exercise with clear and concrete directions for the future, and not permit the differences in opinion on some specific issues to result in gridlock. Indecision may be the easiest approach with which to live in the short run, but in the long run, that approach would be harmful to the success of the division and its members.

Several years ago, Division II struggled to find its identity. Some of its members felt that their only choice was to align with Division I, even if it was not a good fit with their missions.

With superb presidential leadership, that has changed dramatically. The division emerged from a planning process with a better understanding of what it stands for. Division II is committed to balancing its strong academics with competitive athletics and to engaging through athletics with its local communities. Its signature sports festivals are Olympic-style, multiple-championship events that provide memorable experiences for student-athletes. The division's leadership in charitable activities is exemplary, including its student-run Make-A-Wish philanthropy and, following Hurricane Katrina, its support of Habitat for Humanity builds. Membership in the division is increasing and satisfaction is high.

Of course, there are other challenges for these two divisions. To mention one, there is a lack of diversity in athletics administration and coaching. There is a paucity of women and persons of color in senior athletics administration and head coaches positions. For example, there are only three African-American head football coaches in Division II – when Historically Black Colleges and Universities are excluded – and five in Division III. Media conversation usually focuses on issues concerning diversity and inclusion in Division I. There are problems to be solved there, but the fact of the matter is that, as judged by the data, there are also difficulties in Divisions II and III.

The good news is that Division II presidential leadership is again rising to the task, and taking steps to address this challenge directly. Good efforts are underway, as well, in Division III. The NCAA, through the national office of diversity and inclusion, is fully supportive of these efforts.

One central challenge that has occupied Division I for the past half-dozen years is academic reform. It is perfectly acceptable for Division I institutions to strive to be athletically successful, and for Division I student-athletes to want to excel athletically. But these same teams and student-athletes should also succeed academically. The goal of the current academic reform initiative in Division I is to assure that every student-athlete has the genuine opportunity to have a meaningful academic experience and to graduate.

The good news in Division I is that after several years of effort, measurable progress is being made. Improved metrics for graduation and real-time progress, the Graduation Success Rate and the Academic Progress Rate, are firmly in place. Overall, student-athletes have improved on average in every category. Those sports that traditionally have had the most difficulty academically – football, baseball and men’s basketball – are in fact improving.

The improvement in football and baseball is substantial over the past several years. Men’s basketball has improved modestly this past year, and we are hopeful that progress will continue. We have learned that academic success in each sport has specific barriers, and thus efforts are underway for sports-specific initiatives to address poor academic performance. Baseball has led the way here, to the credit of the college baseball community.

However, this academic reform initiative is not complete. There remain pockets of poor performance that must be overcome. This reform initiative is to be distinguished from others in past generations in that it is highly comprehensive, from enhanced admission standards to required progress toward degrees. Critically important, too, is that sanctions attach to inadequate academic performance. As data were initially being collected, those sanctions were restricted to scholarship losses. For chronic underachievers, the sanctions are now becoming more telling, including loss of access to postseason play and team decertification.

The objective, of course, is not to punish teams, but rather to change behavior and expectations. Sanctions are being administered judiciously in order to take into account extenuating circumstances and the demonstration of genuine improvement. Some among our critics would like

to see greater numbers and severity of sanctions. It is a matter of judgment as to whether that more strident attitude would bring about more academic improvement more quickly. The Committee on Academic Performance (CAP) and the national office have taken the approach that serious sanctions are to be applied when good-faith efforts prove ineffectual. Lasting academic change requires new habits and new attitudes, not merely the fear of sanctions.

The challenge facing Division I in academic reform is two-fold. On the negative side, it is necessary to sustain the serious sanctions for poor academic performance. There will be pressure, which will ultimately be directed to institutional presidents, to relinquish on this issue. I strongly advise against back-tracking, and I do not expect it. The presidents have proven their resolve to stay the course. On the positive side, the challenge will be to continue to press for changes in individual sports and in our rules that motivate academic success. For example, changes in playing and practice time limitations, summer academic programs, and staffing of academic advisors and tutors should be considered.

Turning now to the major challenge on which I want to focus: What is the proper role for commercial activity within intercollegiate athletics? This challenge primarily concerns Division I, but it has substantial consequences for Divisions II and III.

## **II. The Challenge of Commercial Activity**

The issue of commercial activity has become prominent in recent years. If the issue has not already reached crisis, it is certainly approaching it. There are several reasons for that.

First, universities are accelerating their spending on intercollegiate athletics. For more than a decade, the rate of increase in athletics’ expenditures in Division I has exceeded the rate of increase in the general university budget by a factor of three to four. While revenues for athletics tend to increase faster than the general university budget, they have not, on average, kept pace with expenditures. As a result, just six athletics programs in Division I have been in the black for each of the past five years. In any given year, only five percent of the Football Bowl Subdivision (FBS) programs operate in the black.

Where do the funds come from in order to meet the increased expenditures? There are basically three potential categories: increased philanthropy, that is, donor contributions; increased subsidy from the university general fund; and increased commercial activity. There is no question that Division I athletics directors have had to increase their efforts in fundraising. True, they have had some success. But there are natural limits, especially in times of an economic downturn. Moreover, the successes of athletics departments in fundraising are beginning to have consequences for the rest of the university; while philanthropy is not a zero-sum game, funds raised for athletics in some instances are coming from those that in the past went to other parts of the university. There is nothing wrong with universities subsidizing athletics. Almost every institution does so. The issue is, rather, whether the subsidy so burdens the rest of the university that there are adverse academic consequences. Given the budgetary difficulties for many institutions, most especially those highly dependent on state allocations and tuition, continued large increases in subsidy for athletics are

proving problematic with the recent economic downturn. Endorsement payouts have decreased, thereby again, making it difficult for institutions to increase their subsidies to athletics programs. That, then, leaves increases in commercial activity to fund increased expenses in athletics.

Second, there have been dramatic changes in the media, including especially the sports media, that have generated new and more opportunities for commercial activity associated with athletics. Nearly three decades ago, ESPN began solely featuring sports on TV. There is no doubt that ESPN has been highly successful. Its signature television outlet has not only turned into an entire network of cable platforms, but it now includes print magazines, radio and importantly new media configurations. It is not an exaggeration to say that ESPN has shaped an entire generation in how sports are consumed.

Media presentation of sports is big – very big – business. That pertains not only to professional sports, but also to college sports. The desire of media outlets to obtain college sports content and to use it as a platform to sell advertising sometimes seems limitless. Media companies are quite willing to pay universities, conferences and the NCAA to present this content in ways that are attractive to audiences. The more attractive it is, the more they are willing to pay for it.

Actually, the issue goes beyond increased revenue. The broadcast presentation and distribution of a school's athletics events can increase its visibility and name recognition. Athletics is one good way to market the university. Such successful marketing can result in higher application rates for the general student body, as well as campus morale and community building.

The third reason for increased commercial activity is related to the expansion of the sports media. We are in the midst of a media revolution in which there are rapid changes in the modes of presentation and in how audiences consume media. It was not that long ago when sports were featured only in the print media and three TV networks. Now there are three types of screens to watch: TV, which contains many networks, local as well as national, and more and more on-demand opportunities; computer screens, which not only include live Internet presentations, but also fictitious sporting events through video games; and hand-held devices that permit mobile viewing tailored to the audience's taste and convenience. The intermingling of real sporting events and digitally-produced fictitious ones is expected to increase dramatically. There is also an enormous increase in text and commentators about sports, including blogs and radio with provocative rant shows.

There are expanding opportunities for universities to generate revenue by selling the rights to present and distribute their sporting events to these new media outlets. But the new media environment is highly competitive, and so expanded access becomes a condition for the sale of these rights. Examples of expanded access include moving the day of the week and the time to accommodate broadcast schedules. Access includes live interactions with coaches and student-athletes in order to bring the viewer "into" the game.

These three primary reasons explain why there is increased commercial activity in college sports and why, at this time, the challenge to finding the right balance for commercial

activity is critical. On the one hand, in the current environment, competitive Division I athletics programs are possible only if there is revenue from commercial activity. But on the other hand, commercial activity if not appropriately managed can abridge the values and mission of higher education institutions.

The central questions then become: What is the balance point between too much and too little commercial activity and how do we adhere to it?

### III. A Balanced Approach

Aristotle argued for the doctrine of the Golden Mean. The virtuous path is one that avoids the excesses of the extremes. One of his examples is that courage is a virtue, in that it strikes a balance between cowardice and being foolhardy. Aristotle is not claiming that the right path is always the middle one. But he warns us to avoid the ends of the spectrum.

In the case of commercial activity, the extremes of unrealistic idealism and crass commercialism are not the right causes of action, but between them – somewhere – there is an acceptable balance point.

Some believe that intercollegiate athletics should be totally devoid of commercial interests. They believe that college sports should be "pure," that only the competition between student-athletes is relevant. Advertising and other commercial activities sully the contests and the contestants.

This idealistic approach may work in the cases of recreational and club sports, but not for competitive, organized sports, including intercollegiate athletics. Training, coaching and competition are not free in the collegiate environment. Coaches work for salaries, equipment must be purchased, and travel to the competition and conducting the events can be costly. Championship competitions, in which the best compete against their peers, are a key part of the collegiate athletics experience, and championships certainly are not free to produce.

There is no university known to me that has the resources for everything its faculty, students and staff want to do. Thus, it is necessary to allocate resources according to the institution's priorities, to use its resources well and to supplement its resources when possible. That is true in athletics for all institutions in all three divisions.

Division III institutions seek to conduct their athletics programs efficiently while being competitive. There is little revenue generated by these athletics events, such as ticket and media rights sales, and there is, on average, modest philanthropic funding. By and large, Division III institutions subsidize their athletics programs.

It would seem, then, that Division III is not engaged in commercial activity in support of its athletics programs. But that is not the case. Division III conducts its championships mostly through the support it receives from the national NCAA media rights contracts. The NCAA is in the middle of a major contract with CBS for the media rights primarily for the Division I men's basketball tournament. Revenue from that contract each year is allocated to Division III, and much of that funding is used for the championships in the division. CBS, a for-profit corporation, sells advertising time during the men's

Division I basketball tournament in order to generate its revenue. Thus, indirectly at least, Division III athletics programs are dependent on commercial activity.

Division III could reject the funds generated by the media rights sales of the Division I men's basketball tournament, and substitute additional campus-generated subsidies. It would then come closer to idealistic puritism. But that would be a bad idea. Those campus funds are better used to support the academic mission of Division III institutions. The use of funds generated by commercial activity is acceptable, as long as it occurs within the overall context of the values and mission of higher education.

Pure idealism, that no funding for intercollegiate athletics is derivative of commercial activity, is unrealistic and unsustainable. The only way to operate athletics on campuses without the revenues from commercial activity is to reduce it to recreational or club sports, without paid coaches or good equipment and facilities. That, of course, is always an option, but the benefits of student participation in high-level, organized athletics, the branding and marketing of the institution through athletics, and the value to the community, including economic development, would all be lost. The loss of these benefits to gain pure idealism is unwarranted. The higher education community has understood this equation for over one hundred years.

Of course, commercial activity can go too far and it can subvert the values and mission of higher education. Crass commercialism is no better than unrealistic idealism. Both are unacceptable extremes.

Some of the critics of contemporary intercollegiate athletics argue that the problem is not the commercial activity itself, but rather the artificial limits placed on that activity by the higher education community. Competitive success, they argue, is the goal of athletics programs. The reason we play the games is to win. Such success is costly, and becoming more so over time. Since there are limitations to institutional subsidy, athletics programs should pursue commercialism, no matter its form, to pay the bills. Intercollegiate athletics should do all that it can to generate revenues.

Surely, this extreme position is mistaken. There are commercial activities in which universities should not engage even if they generate substantial revenues for athletics. A clear example is that student-athletes should not be commercially exploited. These young men and women are students, and students first. They are not paid professional athletes under contract to play for the institution. No doubt, an athletics department can generate revenue by having its star players point to a product or service and say "Buy this." But direct endorsements by student-athletes are not in keeping with their amateur status, and that status is a key element of the value system of higher education. Students participate in intercollegiate athletics as part of their overall education, not as professionals.

#### **IV. The Parameters for a Solution**

There are several orthogonal parameters that must be understood in order to find the balance point for commercial activity. These parameters include the locus of responsibility for controlling commercial activity, the underlying types of commercial activity relevant to

intercollegiate athletics, and the potential for diminishing or eliminating cases of over-commercialism.

There must be shared responsibility in the oversight of commercial activity. In particular, there are critical roles for the NCAA national office and there are critical roles for the individual campuses. Without the complementary exercise of control, there is little opportunity to contain over-commercialism.

The role of the NCAA national office is to work with the membership to articulate the core principles that are to govern commercial activity, and to disseminate these principles widely so that they are well understood within the college sports community and among the media and corporate sponsors. The NCAA national office has responsibility for conducting and managing the media rights for championship events (except BCS football). It likewise has the responsibility for implementing the principles governing commercial activity in these championship events. The most visible of these events is the Division I men's basketball tournament.

The role of the NCAA members is to oversee their athletics programs and the events in which their teams participate, so that the core principles concerning commercial activity are followed. That includes educating their athletics communities, including those off-campus, about the nature and limits of commercial activity in intercollegiate athletics. There are approximately 770 national championship events under the direction of the national office; but there are over 100,000 intercollegiate athletics contests, meets and tournaments each year under the direction of the member institutions. Cumulatively, then, a great deal of the responsibility for oversight of commercial activity falls to the campuses.

Conferences have a role to play. They oversee conference championships, and they negotiate media and corporate contracts on behalf of their conference members. In some cases, conferences combine their efforts to create multi-conference events. These events include football bowl games in Division I.

Conferences consist of eight or more member institutions; conference officers report to the member institutional presidents. It is the institutions that bear the responsibility for assuring that the conference offices, in acting on their behalf, adhere to the principles governing commercial activity.

That is, generally speaking, the national office is responsible for postseason national contests, with the exception of FBS football, and the individual campuses have responsibility for all the other intercollegiate contests, including those conducted by their conferences. This is the system of shared responsibility.

Some may believe that the NCAA national office should have oversight for commercial activity for all intercollegiate athletics contests. Universities and colleges conduct regular-season athletics contests and they themselves, or through their conferences, contract for media coverage, for the sale of merchandise, and indeed for all nonchampionship commercial activity. It would not be a good idea for the national office to exercise campus-based control of commercialism for all its members. Local control of commercial activity permits the campus to best

take advantage of its opportunities and to market and depict itself in the manner it judges most appropriate. The development, advancement and protection of an individual institution's brand ought to be within its purview. If the NCAA national office were to assume this responsibility, it would need to become dramatically larger and more intrusive into the affairs of its member institutions. I certainly do not recommend that course of action.

There is, moreover, the possibility of institutional neglect of responsibility if the focus is placed entirely on the national office. Since it is impossible in practice for the national office to oversee the entirety of commercial activity for intercollegiate athletics, the view that the national office bears this full responsibility is tantamount to advocating for an unworkable approach that will increase over-commercialization. Without shared responsibility to implement the core principles, there will be commercial activity that is outside the value structure of higher education.

Turning to the types of commercial activity relevant to intercollegiate athletics, the key distinction is between those activities that directly involve student-athletes and those that do not. A central element – arguably, the central element – of intercollegiate athletics is that those who participate are students, and not professional athletes.

The bylaws and regulations in the enormous NCAA manuals, except those that address competitive equity, pertain to student-athletes. In general, the NCAA does little to regulate athletics departments or institutions; rather, the NCAA rules are mostly designed to regulate student-athletes.

A corollary of this focus on the amateur status of student-athletes is that they should not be commercially exploited. In that they are compensated, the commercial exploitation of their skills and reputation by professional athletes is often a good thing, from the perspective of those in the business of sports and the athlete himself or herself. But commercial exploitation of student-athletes is anathema. It is contrary to the essential core of intercollegiate athletics. Thus, any adequate policy of commercial activity within intercollegiate athletics must ensure that student-athletes are not commercially exploited. The NCAA rules, which must apply universally to intercollegiate activities and contests involving student-athletes, must reflect this key point.

When we say “student-athlete exploitation in commercial activity,” we should have a specific definition in mind. Student-athletes are amateurs, not paid professionals. That implies that they cannot accept payment for endorsing or advertising any commercial product or service. It also means they should not be put in a position in which the natural interpretation by a reasonable person is that they are endorsing or advertising a commercial product or service.

Students participate in intercollegiate athletics as a privilege, not a right. In their roles as student-athletes, they are required to follow NCAA rules. They are also expected, by their coaches and other athletics and academic administrators, to act in ways that benefit their teams and universities. In the real world, the fact of the matter is that it is almost impossible for a young man or woman to resist doing something that his or her coach or athletics administrator says that they should do. If a person of

authority asks a student-athlete to pose for pictures which, either intentionally or not, are endorsing a product or service, it is almost impossible for the student-athlete to resist that request. The student-athlete, in reality, lacks the freedom to resist the request. In these types of cases, it is exploitation.

Most cases of exploitation are more subtle and indirect. Instead of posed scenes, the marketing can include game pictures, films, audio or video of student-athletes that make it appear to a reasonable person that that student-athlete is endorsing a specific commercial product or service. The student-athlete may well have no knowledge or awareness that his or her reputation, image or name is being used for these commercial purposes. If the student-athlete were asked for permission to use his or her image or reputation for this commercial purpose, he or she would be compelled by NCAA rules to deny granting permission. But in the cases imagined, a request for permission to use his or her reputation, image or name is not even requested. These cases may also be instances of exploitation. That is, a student-athlete is exploited in a commercial activity if a reasonable person would interpret the association of the student-athlete with a commercial product or service as an endorsement of that product or service. It is not necessary that the student-athlete be aware of the commercial activity for it to be an endorsement. Moreover, it is exploitation even if the student-athlete gives permission, since he or she is not in a position to give that endorsement. Student-athletes cannot give such permission by NCAA rules if they are to retain their eligibility to participate.

It is critical to note that this definition of student-athlete exploitation does not include the promotion of most college athletics by institutions or charitable events. Using pictures of student-athletes by athletics programs to promote the upcoming big game or to promote literacy by showing the athlete reading to young children should be acceptable. The reason that these cases are acceptable is that these are not commercial, for-profit based activities. There is a difference between charitable and university activities, on the one hand, and commercial, for-profit activities on the other hand. An adequate definition of “student-athlete exploitation” must recognize this distinction.

The other type of commercial activity in intercollegiate athletics pertains to instances not directly involving student-athletes. There are numerous examples of this type. For example, there can be the sale of merchandise, such as clothing, that uses the athletics department logo; or a coach might endorse a commercial product or service; or the institution might sell signage within its athletics facilities, including scoreboard signs, in order to advertise a commercial product or service; or an institution or athletics department might adopt a certain commercial product for a fee, say a brand of athletics shoes or soft drink.

This type of commercial activity does not exploit student-athletes, or at most, it does so only indirectly and marginally. The NCAA does not regulate this type of activity. It may be that it should be regulated, since it can reflect on the overall public impression of higher education. But, presently, the NCAA does not regulate it because that would intrude on institutional autonomy. We permit institutions and conferences to decide what instances of commercial activity not involving student-athletes are acceptable and tasteful.

Some who are uncomfortable with the growth of commercial activity within intercollegiate athletics focus on the tastelessness of some of these activities. They may find the quantity of institutional commercial activity within athletics venues overwhelming, noisy or inappropriate; or they may find the products or services advertised unbecoming for higher education. In the latter case, the NCAA does have rules stating that advertising that is degrading of race or gender is impermissible. But not all advertising that some find unacceptable is degrading.

For the two types of commercial activity, that which directly involves student-athletes and that which does not, should there be consistency among those who have responsibility for oversight? The answer is: yes and no.

With respect to the involvement of student-athletes, there should be consistency across national, conference and institutional commercial activities. There should not be, in any instance, exploitation of student-athletes. It is our job, as athletics administrators and coaches, as faculty representatives and academic officers, to assure that student-athletes are not subjected to exploitative practices for institutional or personal gain.

Thus, there should be universal rules that apply to all who have oversight responsibility prohibiting student-athlete exploitation. These rules are not easy to formulate correctly. Indeed, over the past several years the NCAA governance structure has tried and failed to do so. I will shortly recommend an alternative approach to formulating such rules.

Rules only make sense in this context if they are enforceable and there are sanctions for noncompliance. If we are serious about protecting student-athletes from commercial exploitation, and it is not merely rhetoric, then we must have enforceable rules and meaningful sanctions. Be assured that I am serious about it!

By contrast, the question of consistency in oversight for commercial activity not directly involving student-athletes has a different answer. Namely, there need not be consistency at the national, conference and institutional levels in commercial activity. To require such consistency is to try to legislate taste, and trying to do so is at best foolish. The reason is that, except in the extreme, it is impossible to establish widespread intersubjective agreement. By its nature, matters of taste are highly dependent on culture and experience. True, not every ad or marketing ploy is acceptable. We want institutions of higher education to use good judgment and not succumb to temptations for the outrageous or the overly provocative. But within these boundaries, there is a great deal of room for disagreement.

The NCAA national office takes a conservative approach to its oversight responsibilities for the championships. The national office has and will continue to eschew advertising and other commercial activity that can be reasonably interpreted as offensive. Championships, including the highly visible men's basketball tournament, are conducted in "clean" venues, in that advertising and signage are kept at a minimum and the highest standards of propriety are practiced.

In the case of venues and media presentation under the control of individual institutions and conferences, it is their

taste that is controlling. Sometimes the venues are clean, but at other times they are "busy" and tend to resemble those of professional athletics events. Some alumni and fans enjoy the simplicity of the traditional college venue; others enjoy the noise and flash of the contemporary entertainment medium. So be it.

Rules governing commercial activity not directly involving student-athletes, therefore, are to be kept at a minimum. Enforcement and sanctions in this area should not be needed. We already have rules about treating all people with respect, and against racism and sexism. Nothing more may be needed.

Nonetheless, there are better and worse ways to conduct commercial activity on campuses, and on conference and national platforms. Some ways better represent higher education than others. It is understood that commercial activity is undertaken to generate revenue. But it does not follow that the greater the flurry, the greater the revenue stream. Good judgment and sound contract negotiations with the media and corporate sponsors is the key to revenue generation. Focusing on the special features of college sports is more effective than emulating professional sports, with its strong entertainment focus.

While rules are inappropriate, guidelines based on best practices make good sense in bringing order and propriety to commercial activity. These guidelines should be in the form of recommendations to institutions and conferences, not enforceable requirements. These best practices should both specify which approaches to commercial activity are appropriate and which are untoward.

This solution is likely to be unsatisfying to some. They would like to have rules and accompanying sanctions for all commercial activity, whether or not it directly involves student-athletes. However, a balanced approach to commercial activity in intercollegiate athletics recognizes the differences in regulatory conditions when student-athletes are and when they are not directly involved, and it takes into account differences in matter of taste.

## V. The Centrality of Student-Athletes

The framework for commercial activity I just described is based on a key premise: namely, issues surrounding student-athletes are central to any adequate policy for commercial activity in intercollegiate athletics. What is the justification for this premise?

To answer that question, we must go back to basics. And the most basic question is: Why do universities support intercollegiate athletics activities at all? On the face of it, the support of athletics events appears anomalous. Universities are academic institutions, and athletics participation is not academic. Or, so it seems at first glance. But a deeper understanding of the nature of a university education in contemporary America yields a different answer.

The primary role of a university education is to create learning opportunities in academic disciplines, such as physics, psychology and philosophy. It is also designed for certain skill development, such as computer literacy and cultural understanding. But a complete university education goes beyond these areas; it also includes the development of character that enables one to be a

successful adult, someone who is capable of having a good family life, who is a contributor to his or her community, and who is a productive citizen. These developmental aspects of character are taught through participation in athletics. There are, of course, other ways to learn character at the university. But, I contend, there is no better way than through athletics participation.

That is, the underlying reason why universities support intercollegiate athletics is that it provides educational value for those students who participate. There are other reasons why universities sponsor intercollegiate athletics, such as morale building for the campus community, and contributing to local economic development. But, in the end, the baseline reason for intercollegiate athletics is the value it brings to the education of student-athletes.

For the present discussion about commercial activity, this point is important because it provides the touchstone to finding the right balance point. That balance point must be understood in how student-athletes are affected by commercial activity. Without commercial activity, intercollegiate athletics as we know it could not exist. There would be fewer scholarship funds available in Divisions I and II, including funds for young men and women who otherwise would not have the resources to attend college. But even so, the wrong kind of commercial activity results in the exploitation of student-athletes. We can – and we should – debate the nature of proper commercial conduct of intercollegiate athletics. However, one principle is not subject to debate: commercial exploitation of student-athletes is not permissible. Period!

Again, a necessary condition for the balance point is this: engagement in commercial activity in intercollegiate athletics is permitted only if that activity does not exploit student-athletes. Call this the condition of nonexploitation.

Our interest in athletics competition certainly depends on team success. We root for the home team and we follow its progress during the season and through the years. But we also follow – often with great enthusiasm – the progress and success of athletics stars. These young men and women personalize the game for us; they give sports its human face. These young persons also become, at least locally and sometimes nationally, celebrities. That's true not only for professional athletes, but also for college athletes. This notoriety, in turn, makes college athletics stars attractive to corporations in advertising their products and services.

It is exploitation when student-athletes endorse commercial products or services because student-athletes are amateurs. If and when they become professional athletes, then they can endorse a product or service as they wish. But it is inappropriate – indeed, wholly unacceptable – for them to do so as a student-athlete.

It is critical to be clear what the term “amateur” means in this context, especially so because there is more than one meaning of the term. Sometimes the word “amateur” is used to denote a person of limited skill, who may be new to playing the sport. Clearly that is not the meaning of “amateur” at issue here. Student-athletes may well be highly proficient in their sport and they may have been practicing and playing it for a good number of years.

There is another meaning of “amateur” that is derivative of usage from 19th-century England. An amateur in this sense was someone from the upper class who played the game for recreational reasons, as opposed to those of the lower classes who played it for compensation. Amateurs and professionals were to be kept separate. When America imported sports from England, it left behind these distinctions based on class. Contemporary American student-athletes obviously can come from any economic or social class.

Rather, the meaning of “amateur” in college sports pertains only to student-athletes. They are students, and students first. Even if their personal interest in a sport may outweigh their interest in academic achievement, their status is that of a student. In order to participate in NCAA intercollegiate athletics, they must be properly enrolled and academically-eligible students. Some may have ambitions to become professional athletes, but their status while in college is that of an amateur, nonprofessional, student-athlete.

As students, they are not paid to participate in intercollegiate athletics. Some who participate in college sports, no doubt, would like to receive a salary and to endorse products. But they will need to change their status and become professionals if they are to be remunerated.

The specific sense of “amateur” relevant to college sports applies, strictly speaking, only to the student-athletes. In other ways, intercollegiate athletics is similar to professional sports. In both cases, the coaches are paid, there is a fee for tickets, media rights are sold, and so on. But the participants in college sports are college students.

Of course, there may be a difference in the look-and-feel of the two games. Professional sporting events may focus more on entertainment than college events – though that is not true in all cases. Coaches may be paid more in professional sports than in college – though that is not true in all cases. Media rights may be more expensive in professional sports and the broadcast audience larger – though that also is not universally true. Indeed, once the status of the participants is bracketed, the differences between professional sports and intercollegiate athletics tend to be one of degree, not kind.

## VI. Judgments about Student-Athlete Exploitation

Leaving aside radical critics of one orientation or another, I expect that there is widespread agreement with the condition of nonexploitation of student-athletes. But I also know that there is lack of agreement on how to apply this condition in particular cases.

Can we solve the problem of determining when student-athletes are exploited? Not easily, I suspect. The first inclination is to try to develop an algorithm or mechanical rule that automatically gives the right answer. That approach seems doomed to failure. For almost three years, on two separate occasions, the NCAA Division I governance structure tried and failed to reach consensus on such mechanical rules. Obviously, a student-athlete cannot be depicted holding a product and saying “Buy this.” But there is a great deal of gray area. One attempt was to specify the percentage of space that can be devoted to advertising when a student-athlete is in the frame. But there are multiple factors that make it appear that the

student-athlete is endorsing a product beyond the percentage of space devoted to it. No matter how carefully such mechanical rules are crafted, wily advertisers would likely find a way within the rules to give the appearance of product endorsement. That would lead to revising the rules, and then new attempts to push the boundaries. I can already see the NCAA rulebook getting fatter.

The point is that this type of regulation cannot be mechanical. Rather, what is required is the exercise of good judgment by sensible people who understand the rationale and purpose of the condition of nonexploitation. This is the only reasonable way, I believe, to proceed. Even so, we will not achieve full agreement on every case. There will be borderline instances in which persons of good will, knowledge and experience will disagree.

We need, in particular, a systematic approach to adjudicate cases in which it is alleged that there is student-athlete commercial exploitation. We need an objective perspective by those practiced and expert. In other cases, when good judgment is required to apply NCAA rules, such as student-athlete eligibility, we depend on trained, national office staff. I recommend that we do so here as well. Moreover, as we do in other cases, there should be an appeals process involving NCAA members that would review staff decisions.

In addition, there may also be the need for an oversight committee of membership peers that will review the landscape of commercial activity in intercollegiate athletics, make binding determinations of instances in which there is student-athlete exploitation even if NCAA amateurism rules are not violated, and evaluate trends in commercial activity to ensure that the values of higher education and the best interests of the “collegiate model” are not abridged. Actions of the oversight committee would both guide decisions of the staff and appeals body directly with regard to student-athlete exploitation and inform the membership when trends appear to be compromising the values of higher education and the collegiate model.

Marketing expertise and new media technologies have changed the landscape in which student-athlete images and names are used. We can expect those factors to continue to reshape the landscape. Thus, our process of adjudicating the claim of student-athletic exploitation must be sufficiently forward-looking and flexible to take into account these factors. It is incumbent on all to ensure that the national office staff and any oversight committee charged with undertaking decisions about student-athlete exploitation in commercial activity are knowledgeable and objective.

In the legal system, judges are expected to be disinterested. That is, they are interested third parties who use their knowledge and experience to render objective judgments. That is the way in which NCAA staff and oversight membership committees rendering judgments about student-athlete exploitation must be made. This point should be obvious, but I make it because the issue of student-athlete exploitation is highly charged. Both those seeking almost unlimited access to student-athletes for commercial reasons and those wanting to almost entirely prohibit student-athletes argue their cases strongly. We require disinterested persons to make the correct judgments.

## VII. Principles and Conclusions

At the highest level, there are two key principles that govern commercial activity in intercollegiate athletics. They are:

(P1) Student-athletes are not to be exploited in commercial activity;

and

(P2) All commercial activity in intercollegiate athletics undertaken by universities and colleges, conferences and the NCAA national office must be consistent with the values and mission of higher education.

These two high-level principles must be translated into more specific NCAA legislative rules, as well as guides for best practices. That detailed, careful work is necessary to assist athletics and university administrators in conducting commercial activity properly within athletics departments. There is no question that commercial activity is necessary for mounting intercollegiate athletics programs, certainly in Division I, but also in Divisions II and III. But that commercial activity must be undertaken within the context of higher education. It must be done the right way.

Contemporary marketing practices of college sports by the media and by corporations can unintentionally, and sometimes intentionally, abridge these two principles. Intercollegiate athletics exudes enthusiasm; it represents the excitement and commitment of youth. It is attractive to a wide spectrum of the American population, including younger demographic groups with discretionary income. Thus, it is not unexpected that marketers would like to use an association with college sports to sell their products and services.

It is not easy for the college community to protect intercollegiate athletics. The pull of revenues from those who want to use college sports for purely commercial reasons can be strong, especially when the revenues that result are perceived by athletics programs to be necessary to mount competitive teams. The courts, moreover, have sometimes sided with those who want nearly unfettered access to college sports for commercialization. The recent decision of the federal court permitting fantasy games to use student-athlete statistics and names is a case in point.

For the past several years, the NCAA has worked to translate these two principles into more specific rules. A number of persons on a number of NCAA committees struggled to develop such formulations. But they did not succeed. Achieving the right balance between permitting commercial activity that generates revenue and forbidding commercial activity that is contrary to these two principles proved elusive.

As a result, a task force of university presidents, assisted by several knowledgeable athletics administrators, focused their attention on the issues. The goal of the task force was to provide guidance to the Division I Board of Directors, and through it, the Leadership Council, in identifying the balance points.

This is a difficult task. There are some differences of perspective within the NCAA membership on where precisely to locate the balance point. In addition, the desire to use college sports in advertising is changing rapidly



because of a creative and aggressive marketing profession, because of a changing legal environment, and especially because of rapidly evolving technology in media.

However the fruits of the task force's work are realized through our governance system, I believe that we must remain flexible and monitor the ongoing changes in approach to commercial activity. It is highly unlikely that we will be able to set in Indiana limestone the perfect guidelines and rules for the use of commercial activity. Indeed, the reason why our membership felt discomfort these past few years in dealing with commercial activity was that we were using NCAA legislation that had been overwhelmed by the changing media and legal environment.

The key element in any specific rules and guidelines we now adopt must include an element of judgment in deciding when certain instances of advertising are acceptable and when they are not acceptable. Most of the hard decisions we will need to make pertain to principle (P1), forestalling exploitation of student-athletes. It is here that we must make our stand. But even so, there will be borderline cases that will need adjudication. Algorithmic solutions are not workable, since they merely present a puzzle to be solved by those who want to take unfair advantage of student-athletes. Rather, there needs to be a process by which experienced, objective and careful judgment resolves the issues.

The NCAA staff should play that role in interpreting these rules pertaining to student-athlete exploitation. But, as we also do in other cases, there also needs to be an appropriate appeals process and oversight of staff decisions. Here the membership, operating through an appointed committee, would both deliberate about appeals and provide appropriate oversight of staff decisions.

Any such approach must also recognize the need for timeliness. Corporate sponsors should be able to receive a response quickly to queries about whether their commercial activities are consistent with NCAA principles and rules. We must respect their business concerns and practices, even as we delimit advertising according to our principles.

College sports are incredibly popular among fans and within the higher education community. And for good reasons. It consists of athletics contests among earnest young men and young women, who are students representing their colleges and universities. There is a sense of exuberance, as well as high-quality performance, that is characteristic of this level of sports. Done in the right way, college sports illustrate in action the pride we take in our fine institutions of higher learning. We should do everything we can to protect this significant enterprise, intercollegiate athletics.

But reality imposes itself. Almost every university and college must provide financial subsidy to conduct intercollegiate athletics. To help meet these costs, revenues from commercial activity are required. And for those few institutions who manage to conduct intercollegiate athletics without subsidy, revenue from commercial activity, especially through media rights sales, is essential.

The objective, then, is to determine the balance point, all factors considered, between crass over-commercialism and unrealistic idealism. The two principles – (P1) and (P2) – articulate that balance. These principles, in turn, must be translated into rules and practices, with appropriate sanctions. Once that occurs, we will be able to move forward in the conduct of intercollegiate athletics with a clear conscience. Intercollegiate athletics has become an integral part of college life and culture. We must do it right.

*The NCAA State of the Association speech presented January 15, 2009, in Washington D.C. was developed from this paper.*