CAMPUS UNION ED O'BANNON

O'Bannon v. NCAA, day four: Broadcast contracts become focal points of trial

By **STEWART MANDEL** June 12, 2014

Television broadcast contracts became points of contention during the O'Bannon trial on Thursday. (Bob Rosato/SI)

OAKLAND, Calif. -- Day four of the *O'Bannon v. NCAA* trial began about television contracts. The plaintiffs called Ed Desser, a sports TV consultant who has negotiated "hundreds" of deals between teams or leagues and networks, as a witness.

Regarding one of the key issues of the entire case, Desser stated emphatically that broadcasters' contracts *do* include the rights to the use of players' names, images and likenesses. The plaintiffs are seeking the right for student-athletes to negotiate a license for use of their NILs. "No television network wants to show an empty arena or blur out the players taking part in it," Desser said.{C}

The plaintiffs entered as exhibits a series of actual contracts -- between the Big 12 and Fox, between the BCS and Fox (2007-11) and two old CBS deals for the NCAA tournament -- that are normally kept confidential. The contract between the Big 12 and Fox contained specific language pertaining to NILs. "The conference shall be solely responsible for securing all clearances with respect to all [participants] connected with each event, and such clearances shall include Fox having … all name and likeness rights of all participants …"

This seems particularly damning to the NCAA, which contends that the players hold no such rights.

Similarly, Seth Rosenthal, an attorney for the plaintiffs, asked Desser multiple times whether the contracts include "any mention of access to facilities" hosting the events. Desser said they did not. The NCAA has contended that broadcasters pay not for the rights to show games, but rather for exclusive access to the arenas and stadiums where games are being played.

Some rare courtroom drama occurred when the plaintiffs tried to introduce the NCAA's current contract with CBS and Turner for the men's basketball tournament. CBS had filed a motion

seeking to keep the contents sealed, and when the moment arrived, an attorney for CBS popped up from the back of room to approach the bench. He said the parties had reached a settlement, so Desser was allowed to read from and testify about the contract, but its contents were not revealed on the TV screens pointed at the gallery. Desser said the deal includes language confirming that the networks' use of images "doesn't violate any statutes of the rights of participants."

"Is there anything in the contract that leads CBS and Turner to believe they didn't have the rights of the participants in the game?" Rosenthal asked. Desser said no.

On cross-examination by NCAA attorney Kelly Klaus, Desser agreed that in 37 years of negotiating contracts, he could not recall an instance when a broadcaster asked about permission for use of the participants' NIL rights. The NCAA's counter-strategy appeared to hone in on several technicalities. For one, Klaus showed a form student-athletes sign granting their NIL rights for use in promotional materials of various NCAA events -- noting that no mention is made of actual game broadcasts. So, theoretically, the NCAA couldn't transfer those rights to broadcasters. Klaus also insinuated that the Big 12's NIL clause was not "typical" of other college contracts, as Desser suggested. "Sometimes those specific string of words do not appear in a contract," Desser said.

Klaus tried to draw a distinction between "securing" players' NIL rights and "transferring" those rights to another party. All in all, however, Desser's testimony seemed to pretty clearly bolster the plaintiffs' case.

Following a break, the NCAA called former CBS Sports President turned consultant Neal Pilson. (Normally the plaintiffs would call all of their witnesses first, but Pilson had a scheduling conflict.) In a nutshell, Pilson took on the same

subject as Desser and offered diametrically opposite opinions and analysis. “In all my years at CBS and as a negotiator, there's never been a discussion of transference of NIL 'rights'" he said. Noting he’s negotiated in the neighborhood of 500 sports TV deals, “I don’t recall any negotiation or any discussion of granting or licensing or transferring NIL rights.” It’s the NCAA’s contention that these specific rights don’t exist and thus can’t be transferred.

Pilson said he reviewed “50 to 70” TV sports contracts for this case and while “the overwhelming number” contained language in reference to the use of NILs, but for promotional purposes, not game broadcasts. Klaus showed Pilson the same Big 12 contract clause used in Desser’s testimony. “Yes, it is language that appears in many agreements of this type, but I don’t agree it conveys a transference of NIL rights.” Over and over, Pilson asserted that broadcasters don’t negotiate for NIL rights because they’re paying for the games themselves.

Finally, Klaus questioned Pilson about the topic of amateurism, noting other events (the U.S. Open, the Olympics, the Little League World Series) in which amateurs compete. In none of those do participants share in TV revenue. Pilson said he has “substantial concern” that paying college athletes will “change the fabric of the sport” and that a significant portion of the viewing public who sees them as “students playing for the love of the game” will be turned off. Perhaps his most salient point was that in college, unlike the pros, players sometimes appear for only one or two years and thus, ”the loyalty of the audience is not to the players, but the schools.”

On cross examination, plaintiffs’ attorney Bill Isaacson spent considerable time challenging Pilson’s perceptions about public perceptions of college athletics. “Let’s say the Boston College basketball team will share revenues from TV and lo and behold, each member of basketball team is entitled to

$200,000. I just think that's a negative for the public." Asked if there's a lower threshold with which he'd be comfortable, Pilson squirmed. "I'd tell you $1 million would trouble me and $5,000 wouldn't."

Isaacson broke out an old Bear Bryant book quote that, "at the level we play at, the boy is really an athlete first and a student second." Did that negatively impact interest in Alabama football? "I think University of Alabama football [fans] follow their team win or lose, pay them or not," said Pilson. "That's not the audience I'm talking about." Isaacson followed that with surveys indicating much of the public already views big-time college athletics as closer to professionalism than amateurism, yet interest hasn't slipped. And then quotes from NCAA officials conceding college sports are commercialized.

Clearly, the plaintiffs want to debunk any notion that sharing TV revenue with the athletes would negatively impact the market for college sports.

Isaacson briefly questioned Pilson's distinction between NILs and NIL "rights" in television contracts -- noting the aforementioned Big 12 contract specifically uses the word "rights" -- as well as his insistence that broadcasters pay for "exclusive access" to stadiums, noting that visiting teams hold certain TV rights, too. Finally, on the point of players' value, Isaacson showed an ad for the Pac-12 tournament featuring players from each team. "Every one of those players is wearing the uniform of their schools," said Pilson. "Take the uniforms off the players, you have a very ineffective ad." Countered Isaacson: "How does it look if it's a picture of empty uniforms?"

It will be interesting to see how Wilken weighs Desser's and Pilson's contrasting opinions about the NIL issue, as it's one of the most important in the entire case. Pilson's views on

amateurism, while valid, were entirely subjective and easily debunked.

For more analysis of O'Bannon v. NCAA, check out SI.com's complete coverage hub.