

What Comes Next for the NCAA Name, Image, and Likeness Rules?

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by Case Collard and Nora Cooke



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There have been massive changes in American collegiate sports since this past summer: On June 30, 2021, the National Collegiate Athletic Association (“NCAA”) radically changed course and announced that it would no longer penalize student athletes who profit off of their name, image, and likeness (“NIL”). As the clock struck midnight on the day the change became official, high profile collegiate stars began announcing sponsorship deals and trademark filings, including debuting personal logos.

“Amateurism” has long been the NCAA’s credo, and it spent decades fighting to ensure that student-athletes received nothing more than the cost of attending college. After a group of athletes sued the NCAA alleging antitrust violations, the Supreme Court ruled in

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June that the NCAA could not prevent student-athletes from receiving some education-related benefits and payments. Although the ruling in *Alston* was relatively modest, some saw the unanimous 9-0 decision and Justice Kavanaugh's "blistering concurring opinion" ("[t]he NCAA is not above the law," and its "business model would be flatly illegal in almost any industry in America") as setting the stage for a much bigger fight to come regarding the NCAA's monopoly power. Although the decision did not directly address payments for NIL, in light of the decision, years of increasing pressure, and a wave of new—and highly variable—state laws permitting payments for NIL, the NCAA adopted its interim NIL policy.

The policy, which applies to Division I, Division II, and Division III schools, allowed athletes immediately to "benefit from their name, image and likeness" and provided that students could engage in NIL activities that are consistent with the law of the state where their school is located. Athletes attending school in a state without a specific NIL law are also allowed to engage in NIL activities without incurring NCAA violations. The policy still prohibits "pay-for-play" and "improper inducements" to attract athletes to a particular school. The interim policy also allows for athletes to receive professional representation in NIL deals.

While the NCAA scrambles to craft a cohesive and permanent solution, schools and their compliance departments have been scrambling to craft their own NIL policies and programs in order to provide clear guidance to their athletes to help them avoid violations while also helping them maximize their potential earnings. A host of potential intellectual property rights issues could be brewing: for example, superstar University of Connecticut basketball player Paige "Buckets" Bueckers, who signed a watershed deal with Gatorade soon after the new policy went into effect, applied to register a trademark in her nickname PAIGE BUCKETS on July 13, 2021. How does her school promote her and avoid infringing on that trademark? Can they license the mark for their own use? If they do, would that qualify as pay-for-play? Do her sponsors risk infringement when using images of her in school apparel (especially if that includes the school's sponsors' logos), or vice versa? What if an athlete signs an endorsement deal that conflicts with a school's official sponsor?

Although highly marketable athletes like Bueckers are smart to move quickly to protect their NIL, athletes will need guidance to ensure they can take advantage of the policy without infringing on intellectual property rights, violating school or NCAA rules, or entering into unfavorable, even exploitative, deals. Especially for athletes making significant sums, education and guidance on tax and other financial planning will be critical as well. While some collegiate stars are cashing in and signing high profile, large-dollar deals, thus far, most deals thus far have been modest, allowing less well-known athletes to make modest sums by hosting clinics or endorsing local businesses. Though the stakes may be smaller, these athletes will also need guidance on how to protect their NIL while avoiding any potential IP rights violations.

At least two schools are already under investigation for potentially violating the policy. BYU partnered with protein bar maker Built in a deal that provided compensation to each

member of its football team, while the University of Miami partnered with a gym that would provide compensation to football team members. Navigating the variety of state laws and the sure-to-be frequently evolving school-specific rules and policies is bound to be complex. Practitioners advising schools and individual athletes should be sure to carefully monitor changing rules and laws, especially as Congress considers wading in, and to advise student athletes on the long-term ramifications of their deals, whether that be IP rights issues, unexpected tax consequences, or ensuring that athletes properly vet both the contracts they are signing and the companies they endorse.