

NCAA, Amateurism,
and Student-Athlete
Use of Name, Image
and Likeness:
It's Complicated

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The Game Plan

- Evolution of Name, Image and Likeness Rights
- Relevant NCAA Amateurism Rules and Litigation
- California Fair Pay to Play Act and subsequent state legislation
- Current Events
- Potential Solutions

Evolution of Name, Image, and Likeness Rights

Right of Privacy

- ▶ Louis Brandeis and Samuel Warren, *The Right to Privacy*, *Harvard Law Review* (1890).
- ▶ Unsuccessfully used in *O'Brien v. Pabst Sales Co.* (1941)

Privacy Torts (Prosser, 1960)

- ▶ Four invasion of privacy torts:
 - ▶ intrusion upon the plaintiff's seclusion or solitude, or into his private affairs;
 - ▶ public disclosure of embarrassing private facts about the plaintiff;
 - ▶ publicity which places the plaintiff in a false light in the public eye;
 - ▶ appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

US Constitution, Implied Right of Privacy

- ▶ *Griswold v. Connecticut* (1965)

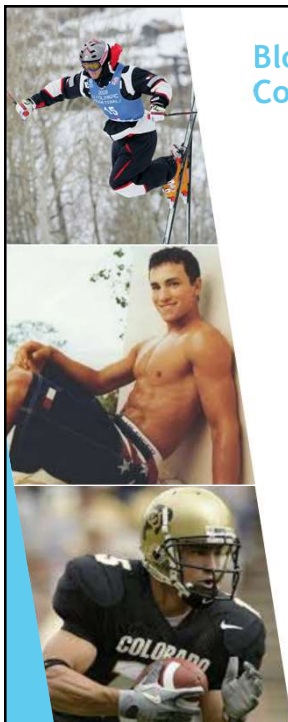
History of the Right of Publicity

- ▶ “Right of Publicity” first used in *Haelan Labs, Inc. v. Topps Chewing Gum, Inc.*, 1953.
 - ▶ the right to grant the exclusive privilege of publishing his picture
- ▶ Unauthorized use of professional athletes’ likenesses in a game, *Palmer v. Schonhorn Enterprises, Inc.*, 1967.
- ▶ Right of publicity vs. First Amendment, *Zacchini v. Scripps-Howard Broadcasting Company*, 1977.
- ▶ One’s likeness extended to include a phrase, *Carson v. Here’s Johnny Portable Toilets*, 1983.
- ▶ One’s likeness includes a factual statement, *Abdul-Jabbar v. GMC*, 1996.
- ▶ Right of publicity vs. commercial parody, *Cardtoons, L.C. v. Major League Baseball Players Association*, 1996.
- ▶ No right of publicity in retired players images and statistics, *Gionfriddo v. MLB*, 2001.
- ▶ Right of publicity or misappropriation of name? *Doe v. TCI Cablevision*, 2003.
- ▶ No right of publicity for facts in the public domain, *CBC v. MLBAM*, 2006.

Summary of State Laws and Litigation related to the Right of Publicity

- ▶ 24 states with statutes related to Right of Publicity
- ▶ 40 states with common law recognizing misappropriation of likeness
- ▶ 21 states with common law recognizing right of publicity
- ▶ Only Wyoming has no legislation or case law recognizing a right of publicity or misappropriation of likeness





Bloom v. NCAA and Regents of the U of Colorado, 93 P.3d 621 (Colo. App. 2004).

- ▶ NCAA refused waiver of rules prohibiting athlete sponsorships or endorsements
- ▶ Bloom sued claiming rules were arbitrary and capricious
- ▶ Holding:
 - ▶ Student-athletes are third-party beneficiaries to the contractual relationship between member institutions and the NCAA and therefore have standing to challenge NCAA rules directly
 - ▶ NCAA amateurism rules are reasonable and no evidence the enforcement of the rules were arbitrary and capricious

The Video Game Cases

- ▶ *Hart v. Electronic Arts Inc.*, 717 F.3d 141 (3rd Cir. 2013).
- ▶ *Keller v. Electronic Arts, NCAA, and CLC*, 2010 U.S. Dist. LEXIS 10719 (U.S.D.C. N. Dist. Cal., 2010).
- ▶ *In Re: NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013).



O'Bannon v. NCAA, 802 F.3d. 1049 (9th Cir. 2015).

- ▶ Transformed right of publicity into antitrust claims
 - ▶ Bylaw 12.5.2.1 (2008) student-athletes were ineligible if they were compensated for the use of their name image and likeness to advertise or endorse a product
 - ▶ Bylaw 12.5.1.1 (2008) allowed the NCAA, conferences or member institutions to use the student-athlete's name, image and likeness for publicity and/or charitable purposes
- ▶ Holding: the NCAA's rules were anti-competitive, however, there were some procompetitive justifications for the rules such as the promotion of amateurism through the integration of athletes into the student body.
 - ▶ Overturned district court remedy of creating a trust to pay players for the use of their NIL, stating that the payment would be a threat to the NCAA's amateurism model
 - ▶ Upheld district court decision to expand scholarship to include cost of attendance.



Current NCAA Rules



- ▶ **1.3.1 Basic Purpose.** The competitive athletics programs of member institutions are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.
- ▶ **2.9 The Principle of Amateurism.** Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.

Current NCAA Rules Article 12 Amateurism and Athletics Eligibility

Cannot

- Use athletics skill (directly or indirectly) for pay in any form in that sport
- Accept promise for pay after completion of athletics participation
- Player trading cards

Can

- Participate in institutional, charitable, educational, or non-profit promotions (including NCAA championships, events, activities, and programs).
- Continue modeling or other activities if initiated prior to enrollment, is independent of athletics ability, and is paid market rate

California Fair Pay to Play Act



Permits student-athletes (SAs) to earn compensation for their name, image, or likeness (NIL) notwithstanding NCAA rules to the contrary

- ▶ Post-secondary institution shall not uphold any rule that prevents a student from earning compensation from their NIL
- ▶ Receipt of NIL shall not affect SA's eligibility for a scholarship
- ▶ NCAA/Conference shall not prevent SA from receiving NIL compensation
- ▶ NCAA/Conference shall not prevent a SA receiving NIL compensation from competing in intercollegiate athletics
- ▶ Institution/NCAA/Conference shall not provide SA compensation for NIL
- ▶ SA cannot be prevented from getting professional representation for contracts/legal matters from an athlete agent or legal representation
- ▶ NIL contract cannot be in conflict with a provision of the SA's team contract
- ▶ SA shall disclose NIL contract to the institution
- ▶ Institution's team contract cannot prevent SA from using NIL when not engaged in official team activities
- ▶ Effective date: January 1, 2023

NCAA Working Group

Any proposals to modernize the NIL bylaws must include “guardrails”:

- ✓ Compensation must be genuine market payment and not pay for play
- ✓ Schools cannot play any role in the student-athletes’ NIL activities
- ✓ Student-athletes cannot be compensated for uses of their NIL where they have no legal right to demand compensation
- ✓ Schools or boosters cannot use NIL as a recruiting inducement
- ✓ Role of third parties in student-athlete NIL activities must be regulated
- ✓ New NIL rules cannot interfere with diversity, inclusion, or gender equity.

Modernization is necessary:

- ✓ S-A should be able to pursue opportunities available to all students
- ✓ Abuse is better addressed through regulation than prohibition



State Legislation

Enacted

- ▶ California SB 206 (July 1, 2023)
- ▶ Colorado SB 123 (January 1, 2023)
- ▶ Florida SB 646 (July 1, 2021)

Proposed

- ▶ Georgia
- ▶ Hawaii
- ▶ Illinois
- ▶ Iowa
- ▶ Louisiana
- ▶ Michigan
- ▶ Mississippi
- ▶ Missouri
- ▶ Nebraska
- ▶ New Hampshire
- ▶ New Jersey
- ▶ New York
- ▶ North Carolina
- ▶ Oklahoma
- ▶ Rhode Island

▶ South Carolina


- ▶ Tennessee
- ▶ Vermont
- ▶ Wisconsin (resolution)

Failed (no action)

- ▶ Alabama
- ▶ Arizona
- ▶ Connecticut
- ▶ Kansas
- ▶ Kentucky
- ▶ Maryland
- ▶ Minnesota
- ▶ New Mexico
- ▶ Oregon
- ▶ Virginia
- ▶ Washington
- ▶ West Virginia

What's Next?

- ▶ Federal Legislation?
 - ▶ Student-Athlete Bill of Rights
 - ▶ Antitrust exemption?
- ▶ NCAA lawsuit against state legislation?
- ▶ New NCAA rules expanding SA NIL opportunities?
 - ▶ Allowed to promote own business
 - ▶ Social media “influencer” and marketing
 - ▶ Digital content creation and distribution
 - ▶ Own trademarks
 - ▶ Autograph signings
- ▶ Group licensing
 - ▶ Broadcast Rights
 - ▶ Video Games
 - ▶ Merchandise sales



QUESTIONS

thank
YOU
SO MUCH

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