

PUBLICATION

Trading Amateurism for Assets: NCAA to Allow Student Athletes to "Benefit" from Personal Intellectual Property

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The National Collegiate Athletic Association (NCAA) – after California Governor Gavin Newsom signed into law a Fair Pay to Play Act allowing collegiate athletes in the Golden State to accept endorsement deals once the law takes effect in January 2023 – took a step toward letting student athletes "benefit" from use of their name, image, and likeness.

On Tuesday, October 29, 2019, the NCAA's Board of Governors voted "unanimously to permit students participating in athletics the opportunity to benefit from the use of their name, image, and likeness in a manner consistent with the collegiate model." The key phrase here is "in a manner consistent with the collegiate model," which invokes the NCAA's commitment to the nebulous tenet of "amateurism."

Pragmatically, this vote amounts to two things for student athletes. First, this process will not happen immediately: the Board set a deadline of January 2021 for changing the rules. Second, and most notably, the Board carefully refused to acknowledge or confirm that student athletes would actually be paid. In other words, this vote is merely a shuffle in the direction of college athlete compensation by way of their "right of publicity."

The Right of Publicity:

Though similar to the legal concept of trademark, an athlete's right of publicity is distinguishable and one of the most publicized legal issues in sports law. The right of publicity is an intellectual property right born from state law with the goal of protecting the commercial interests of public figures. Tennessee, for example, provides a statutory right of publicity under its Personal Rights Protection Act of 1984.¹ The Act provides "property in the use" of one's "name, photograph, or likeness." The rights are considered "freely assignable and licensable." The statute also provides post-mortem rights. The right is violated when an "individual's name, photograph, or likeness" is used "as an item of commerce for purposes of advertising products, merchandise, goods, or services, or for purposes of fund raising, [or] solicitation of donations."

Trademark Law:

While the Board did not expressly address trademark law, it is necessarily implicated by this recent policy change. Prior to this recent rule change, student athletes were not prohibited from registering trademarks, but were not permitted to profit from the use of their nicknames or marks through the sale of branded merchandise. To obtain a federal trademark registration, however, an applicant must show "use in commerce" or a bona fide "intent to use" the mark. Student athletes' inability to use their trademarks in commerce thus hindered their ability to obtain trademark registrations. Now permitted to benefit from their name, image, and likeness, student athletes will have increased opportunities to obtain trademarks to protect their brands.

Action Steps and Takeaways:

With this vote, the door to full college athlete compensation is cracked. While some are excited about the prospect of more detailed college sports videogames, others worry that this monetization may hurt the very teamwork culture that makes college sports great. Regardless, prospective student athletes and schools should begin preparing for this landmark shift, which is sure to dramatically alter the economics of college sports. To this end, some action steps and takeaways include:

- Universities must develop internal rules and protocols to regulate the manner in which their student athletes can profit from their personal brands.
- Universities should protect their own brands and trademarks by ensuring that no student athlete uses a school uniform or mascot in their individual sponsorships or, alternatively, develop airtight licensing agreements licensing their marks to their student athletes for use in their individual sponsorships.
- Universities should also consider whether this new policy will implicate any existing or future university sponsorship deals as they will likely be obligated to compensate individual student athletes for the use of their name, image, or likeness in connection with such endorsements.
- Student athletes should seek to register any trademarks associated with their brands sooner since the policy change suggests that they may be able to profit from those marks prior to the professional ranks. Student athletes should self-impose quality standards and exercise discretion in licensing publicity rights.
- Businesses seeking to license publicity rights from student athletes should be cognizant that the NCAA has not clarified what would render a license agreement "consistent with the collegiate model" and permissible.

For more information, please contact any member of the [Intellectual Property Team](#).

¹Tenn. Code Ann. § 47-25-1101 et seq.