

Student-Athletes & NIL: Best Practices for Brand Protection

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The topic of student-athlete name, image and likeness (NIL) has commanded national attention and has been the topic of much heated debates in recent months, everywhere from local college campuses to Capitol Hill. Over the next several months, college sports leaders — to include former and current student-athletes — will determine what changes the NCAA can and should make to better support today's student-athletes by allowing them to monetarily benefit from their NIL, currently prohibited by the NCAA.

This discussion was accelerated, when California legislators proposed a state bill that would enable California student-athletes to profit from their NIL — through avenues such as third-party endorsement deals and marketing promotions — without regulation, beginning January 1, 2023. And, California is not alone. There are approximately 13 states, to include Florida, whose law goes into effect January 1, 2021, considering similar Fair Pay-to-Play legislation.

Given the need for consistent and fair rules among all NCAA institutions, the association formed a working group and directed the NCAA's three divisions to pursue rule changes around name, image and likeness, which are to be submitted no later than January 1, 2021.

While we wait for details from the NCAA and potentially Congress, one critical legal issue student-athletes need to consider is the importance of protecting their intellectual property early in their athletic careers. In the past, student-athletes did not think much about their brands until they declared to go pro. However, with the pending changes to NCAA rules, now is the time for student-athletes and their families to focus on brand protection and how they intend to control the direction and commercialization of their brand and image.

In a series of articles, I'll outline five (5) brand protection strategies for student-athletes, which are: Business Entity Formation, Endorsement/Licensing Agreement Considerations, Trademark and Copyright

Protection, Domain Name Ownership, and Social Media Endorsement Guideline Compliance.

Forming a Business Entity

Student-athletes that begin to engage in licensing, endorsement, and sponsorship deals, should view themselves as an entrepreneur and consider forming an appropriate business entity (limited liability company, etc.) to mitigate their brand risk profile. There are a number of benefits but the two main benefits are:

- (1) limited personal liability; and
- (2) tax advantages relative to earned income.

Each state governs the requirements of business entity formation. For example, in North Carolina, each member (or owner) of an LLC must be at least 18 years of age. If you're not 18 years of age, then there are other options to be explored with legal counsel.

Once the business entity is registered, an Employer Identification Number (EIN) will need to be secured so that they'll be able to open a business bank account. Again, if the student-athlete is a minor, there are other legal considerations that will need to be flushed out

Brand and Image Protection via Contractual Agreements

Let's talk contracts. As brands and agencies identify student-athletes they'd like to engage to help promote their products and services, student-athletes need to understand that part of their brand protection strategy is having fair and equitable contractual agreements. It's likely that a brand will present a student-athlete with an "endorsement" agreement, amongst others form agreements. Simply put, in exchange for something of value – i.e., money, free products, etc., an endorsement agreement allows a brand to use someone's name, likeness, and image to promote a service or product. But, if the agreement is not carefully drafted and reviewed, the student-athlete could sign up for a campaign with unclear expectations and end up facing a breach of contract claim.

There are a number of provisions that a student-athlete should have an awareness of and the first being compensation. Compensation will be huge, as there are not many benchmarks to gauge fair compensation for student-athletes. Based on research conducted by AthleticDirectorU, when applied to Instagram followers for college athletes from the 2019-2020 school year, annual endorsement revenue estimates would be \$700,000 for LSU's Joe Burrow, \$440,000 for Alabama's Tua Tagovailoa, \$390,000 for Oklahoma's Jalen Hurts.

Besides compensation, other specific contractual issues student-athletes should consider are:

- Scope of Services
- Moral/Social Responsibility Clauses
- IP Ownership

- Exclusivity Windows / Scope of Exclusivity
- Confidentiality
- Approval Rights / Creative Control
- FTC Social Media Endorsement Guideline Compliance

These and other provisions are heavily negotiated in licensing and endorsement agreements and student-athletes need to have an appreciation of what these provisions mean when engaging with brands and agencies to confidently evaluate a deal that works for them.

Trademark and Copyright Protection

Here's where student-athletes get to play offense and defense: intellectual property is the play. As an overview, there are five (5) types of intellectual property (IP): (1) copyrights, (2) trademarks, (3) patents, (4) trade secrets, and (5) right of publicity (or name, image, and likeness). As athletes build their brand, they need to understand what type of IP they are creating when working with these brands. But, for the purpose of this article, we'll focus on the importance of copyright and trademark protection as a necessity. For starters, a trademark can range from a player's own name, brand name, distinctive logo or hashtag, or even a slogan or phrase that they have used (e.g. NFL's Tom Brady has a registered trademark for "TB12") to promote his health and wellness company, TB12 Sports. For student-athletes who have a name, attribute or phrase they want to commercialize, a trademark filing by licensing or other deal structures will be important.

One of the many benefits of IP is: exclusive ownership, and if 3rd parties want to use it, they'll need the athlete's permission to do. And, if someone does not receive permission and infringes on the student-athletes trademark or right of publicity, they may find themselves being the recipient of a cease and desist letter. In 2019, after ignoring a cease and desist letter, NBA star, Giannis Antetokounmpo aka the "Greek Freak," settled a \$2M case with a company for "designing, selling and distributing various products, including tees, hoodies and T-shirts, under the GREEK FREAK and GREEK FR34K marks and by using the GREEK FREAK and GREEK FR34K brand as the name of their clothing collection.

Thus, when a student-athlete protects his or her brand by filing for a trademark registration, it allows the athlete to be in good position to defend and recover any damages from the infringement and impact to their brand. So, it's one thing to create the brand, but it's another to understand how best to protect it.

And, the same is true for copyrighted content. Student-athletes are unique content creators and need to understand the role of registering copyrights in protecting photos, vlogs, and other creative content posted and shared via social media to deter improper use and infringement.

Domain Name Ownership

Student-athletes get a ton of training, and media training is one of them. They learn about controlling the message, and then owning their own website and domain name is a great start. Domain name registration

plays a critical role in their brand protection strategy. With simple platforms such as Wordpress, Wix, Squarespace and others, a student-athlete can begin to generate brand awareness with a website – overnight - where they can tell their story and allow brands to get to know them, personally. An athlete can reserve their own domain name for a minimal amount, typically \$10 – \$80 per year. When thinking about how to show up as a brand on the web, student-athletes should visit the sites of some of their favorite players that have established global brands (e.g., LeBron James, Megan Rapinoe, David Beckham, Venus Williams, etc) and get inspired.

As the stock value of the student-athlete increases, the domain name of that athlete becomes valuable and highly sought after property. However, if student-athletes wait too long, they may find the domain name has been reserved by someone else. Some athletes have had their own domain name reserved by someone else and when trying to secure that name, the site owner tries to sell it to the athlete for tens of thousands of dollars. In 2009, former NBA star and 2x NBA champion, Chris Bosh won a federal case against an individual that reserved www.ChrisBosh.com and many other athlete domain names (somewhere in the neighborhood of 800 domain names of top athletes).

The Anti-Cybersquatting Consumer Protection Act (ACPA), prevents cybersquatters from registering domain names containing trademarks for the purpose of selling the domain name back to the trademark owner. If a student-athlete has a registered trademark, there may be a cause of action for someone registering or using a domain name confusingly similar to the trademark or personal name of the student-athlete.

While the law provides this protection, an athlete may not want to allot the time and financial resources to fight for the domain name. The lesson here is that athletes, at all levels (to include middle & high-school students), should register their domain name as soon as possible in order to avoid these issues, as they grow and scale their brands.

Social Media Endorsement Guideline Compliance

As student-athletes emerge as the next rising class of social media influencers, they should understand the rules of this game when promoting and endorsing products and services on various social media platforms. The issues raised by social media influencer marketing campaigns include compliance with endorsement regulations and disclosure guidance by the Federal Trade Commission (FTC), as well as social media platform guidelines for branded content. When engaged by brands to endorse a product or service, most brands will provide a copy or link to the FTC's Social Media Endorsement Guidelines but it's on the athlete to know how to interpret those guidelines to ensure they're not unintentionally exposing their brand to potential liability.

An endorser (e.g., student-athlete) cannot make claims about a product that does not reflect their honest opinion and belief, nor one that cannot be substantiated by the brand. For example, a track star has been engaged to promote a new sports drink and claims the beverage is delicious, the best sports drink on the market, and has helped with increasing his/her speed in the 100-meter dash. All of which is untrue – the athlete does not like the drink and its unproven if the drink plays any role in his/her athletic performance. Thus, this claim would be in violation of FTC rules and would pose significant financial and reputational risk to the brand and athlete.

Over the next year, student-athletes will be bombarded with opportunities to endorse products and services and should start thinking now about putting the right corporate and social media legal team together to protect themselves and their intellectual property.

Bobby focuses his practice in the areas of corporate and intellectual property law. He assists clients in a wide range of business and IP matters, including business formations, commercial agreements, mergers and acquisitions, trademark, copyright, social media and FTC endorsement/ disclosure regulatory compliance, as well as serving as outside general counsel.