

UNIVERSITIES & SPORTS BETTING

ALERT

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Intellectual Property and Licensing Issues

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Colleges and universities have increasingly invested in intellectual property licensing to protect their images and brands. The robust athletics market is an integral part of the collegiate merchandising revenue stream. Sports betting raises issues that complicate these branding concerns, but may create other opportunities.

Trademark Issues

The current trademark licensing landscape for college team sports apparel and other commercial items that use the team's name and logos will likely be relatively unaffected in the short term by legalizing sports betting. That said, it is anticipated that the additional interest in collegiate games generated by sportsbooks will boost viewership of college games. Increased viewership may lead to growth in sale of the team's licensed merchandise. Universities may also look at how greater viewership may positively affect their ability to negotiate better broadcasting license rates and fees for collegiate games.

Given the increased focus and visibility on college sports betting, universities should not only continue to police the use of their trademarks and logos, they should consider training and monitoring student athletes' compliance with the institution's rules regarding gambling to avoid a scandal that may negatively impact the institution's brand. Vigilance may be especially important to avoid any perceived affiliation with organizations promoting gambling.

Universities should also keep in mind that NCAA rules generally prohibit the sale of any commercial items that include a student athlete's name or likeness (other than informational items like media guides,

schedule cards, or institutional publications). There are also rules against the use of the players' names and likeness in sponsorship activities.

Copyright Issues

The data that is generated by collegiate sports teams represents another intellectual property asset. There seems to be an unending appetite for more data, and the sports wagering market is no different. If the sports betting markets in other countries are an example, there will be an increased demand for data, particularly when sportsbooks offer in-play betting. This will in turn drive data analytics companies to seek licensing relationships with universities for sports data and may represent an additional licensing revenue stream for the data that is collected and analyzed during practice and game play.

A key question involves the ownership of copyright to this data. It is important to keep in mind that U.S. copyright law does not protect the practice or the game play itself because it is not a work of authorship or a scripted performance as contemplated under the Copyright Act. Copyright law also does not extend protection to a simple recitation of facts, so a plain list of statistics of player performance, without more, is not entitled to copyright protection. Facts are only entitled to protection if they are selected, coordinated, or arranged in a way so that the resulting work as a whole has enough original creativity in it to constitute a work of authorship. However, if the data points are collected, analyzed, and presented in an arrangement for particularized presentation, that result is entitled to copyright protection.

To protect their intellectual property rights, universities should consider keeping the factual data points confidential, putting in place procedures to protect those data points as trade secrets, and seeking copyright protections for the resulting analysis. If the university enters into a data licensing agreement with a data analytics company to collect and analyze the data, the agreement could require the company to keep the data confidential. Universities may also negotiate for the ownership or exclusive license of the copyright over the analysis. The university should consider having the right to prepare derivative works based on the data and analysis, and license that right to the data analytics company.

These data issues have not escaped the NCAA's attention. On the day before the Supreme Court issued its decision in *Murphy v. National Collegiate Athletic Association*, the NCAA announced that it has entered into a partnership for data collection and distribution with Genius Sports, a company that has been providing data collection technology and other services to sports leagues around the globe. The software platform promises enhanced data capture and distribution services, richer coaching insights, and what they call a "captivating fan and media experience with statistics delivered to multiple platforms and other companies in real time." The technology was rolled out for the men's and women's basketball tournaments in 2019. The NCAA has said that it will offer the software to its members at no cost for an introductory period. As the NCAA's official partner, Genius Sports will be its exclusive agent in licensing real-time official data from championship series to media platforms and other companies.

It is important to note that this partnership between the NCAA and Genius Sports does not foreclose teams from developing their own data collection and analytics. If NCAA members were to take up the offer to adopt this NCAA platform, it would be advisable to review how the rights to the data are structured, not only who owns the right to the data that is collected and the analytics that result, but whether the members own any derivative work that Genius Sports may develop using that original data set.

Takeaways

Colleges and universities may want to take stock of their current intellectual property assets that are generated by and related to their athletic activities, and evaluate the potential IP impact of the growing sports betting industry. Key actions may involve monitoring the use of trademarks and logos, as well as protecting the names and likeness of athletes. Schools may also want to assess how they are generating and protecting athletic data to monetize and use this asset. Changes may be warranted in internal data processing protocols and data licensing agreements with vendors.

To preserve the ability to exclude from federal income tax the amounts received from others for use of protected intellectual property, it is important for schools to consider forming the business relationship as a traditional licensing agreement (with no services required by the licensor) and not as a profits interest in a partnership that, more likely than not, would constitute taxable "unrelated business income".

In short, this is an area of university operations that will only continue to increase in complexity. ♦

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