

INTELLECTUAL PROPERTY

ALERT | NOVEMBER 2019

Intellectual Property and College Athletes: New Directions by the NCAA and Several States about Athlete Compensation

By E. Taylor Hodges and W. Drew Kastner

The rules for compensation of college athletes have become a hot issue involving state legislation, litigation, and a major announcement by the National Collegiate Athletic Association (NCAA). The NCAA recently announced it intends to implement major changes regarding student athletes' compensation for their intellectual property rights and right of publicity. Although the NCAA statement declared the general thrust of its expected policy changes, details of how these new rules will work remain unclear. Until those details are determined, recent developments indicate that universities may want to consider reviewing their internal policies and preparing for a possible new order of intellectual property and publicity rights for student athletes.

On October 29, the NCAA's Board of Governors unanimously voted to allow college athletes to profit from use of their name and likeness "in a manner consistent with the collegiate model." The NCAA's Board did not indicate how students would be permitted to do so and what restrictions may apply. That will wait until April 2020, when the Board's Federal and State Legislation Working Group will submit more specific recommendations for these rules, which will then be instituted within the NCAA by January 2021.

This announcement from the NCAA comes on the heels of a California law passed in September which, when it goes into effect in 2023, will allow college athletes to be paid for the use of their image, name, and likeness and would make it illegal for universities and the NCAA to punish students who elect to do so. Since then, similar bills have been formally proposed,

but not yet passed, in the state legislatures of New York, Florida, Washington, and Illinois.

How NCAA-enacted regulations will ultimately co-exist with state legislation is unclear. But the NCAA has appeared to declare itself willing to challenge the states, recently stating: "The action taken by California likely is unconstitutional, and the actions proposed by other states make clear the harmful impact of disparate sets of state laws. The NCAA is closely monitoring the approaches taken by the state governments and the U.S. Congress and is considering all potential next steps."

Universities should take note of the overall direction being taken on these issues. It appears that college athletes may have rights to compensation for their image, name, and likeness within the next few years. Universities in California and beyond, as well as businesses utilizing the images and names of athletes for their products, will face the need to honor these new rights and work with athletes on compensation and related intellectual property issues.

It is also worth noting that the state legislation recently adopted and under consideration contains, in general, the following kinds of overall provisions: (a) Prohibitions against university actions that prevent athletes from receiving compensation for their image, name, or likeness; (b) Allowances for athletes to obtain approved and licensed professional representation; (c) Restrictions on athlete contracts that conflict with contracts held by their team or university; and (d) Some exemptions for smaller and community colleges. While the California law stops short of mandating

athlete compensation by universities, other proposed state legislation requires it.

Separately, regulations published by state lotteries and sports betting commissions may also require consideration in view of the recent move to legalize sports betting and the attendant NCAA and state regulations.

Given the momentum behind these developments, universities may want to consider taking action to prepare for these changes. This may be a good time to assess existing policies and compliance systems, and identify steps needed to conform with expected mandates for intellectual property and publicity rights as they intersect with athlete compensation. It may be important, for example, for universities to consider strengthening their policies to ensure student athletes who eventually profit from their own name and likeness are not profiting from the trademarks of the school and its teams. In addition, schools should consider reviewing endorsements by student athletes to confirm that they do not mistakenly project an endorsement from the school itself. In light of these and other concerns, universities may want to take steps to increase their capabilities to monitor and respond to these activities.

Stay tuned as we continue to examine proposals coming from the NCAA and legislative bodies. ♦

This summary of legal issues is published for informational purposes only. It does not dispense legal advice or create an attorney-client relationship with those who read it. Readers should obtain professional legal advice before taking any legal action.

For more information about Schnader's Intellectual Property Group or to speak with a member of the firm, please contact:

*W. Drew Kastner
Co-Chair, Intellectual Property Practice Group
215-751-2122
dkastner@schnader.com*

*Ronald E. Karam
Co-Chair, Intellectual Property Practice Group
215-751-2364
rkaram@schnader.com*

*E. Taylor Hodges
215-751-2019
thodges@schnader.com*

www.schnader.com

© 2019 Schnader Harrison Segal & Lewis LLP
All rights reserved.

* See: www.schnader.com/jakarta