

INTELLECTUAL PROPERTY

ALERT

MAY 11,
2020

Intellectual Property and College Athletics – NCAA Clarifies Stance on Student-Athlete Compensation

By *W. Drew Kastner, Matthew N. Korenoski and E. Taylor Hodges*

On April 29, 2020, the National Collegiate Athletic Association (“NCAA”) clarified its position supporting the NCAA’s Federal and State Legislation Working Group’s proposed rule changes to allow student-athletes to receive compensation for third-party endorsements, social media influence, personal appearances, and their own businesses – all for the first time.

This action follows on the heels of an October 29, 2019 NCAA Board of Governors vote that allowed student-athletes to be compensated for use of their names, images, and likenesses (“NILs”) “in a manner consistent with the collegiate model.” The NCAA now expects rules to be written by October 31, 2020, with a vote occurring no later than January 31, 2021. Applicable NIL rights would be in effect for the 2021-22 athletic season.

Read the NCAA announcements here:

- April 29, 2020 Announcement – <http://www.ncaa.org/about/resources/media-center/news/board-governors-moves-toward-allowing-student-athlete-compensation-endorsements-and-promotions>
- October 29, 2019 Announcement – <http://www.ncaa.org/about/resources/media-center/news/board-governors-starts-process-enhance-name-image-and-likeness-opportunities>

NIL AND INTELLECTUAL PROPERTY ISSUES – BACKGROUND AND ANALYSIS

Student-athletes’ ability to receive compensation for their right of publicity has risen to the legal forefront

in the past decade. This growing emphasis has run the gamut from legislation to litigation involving current and former college athletes who have sparred with the NCAA over rules that historically precluded them from profiting from use of their NILs.

The NCAA Working Group recently stated its intention to adapt to both longstanding socioeconomic trends as well as more recent events. “As we evolve, the Association will continue to identify the guardrails to further support student-athletes within the context of college sports and higher education,” said Val Ackerman, commissioner of the Big East Conference and Working Group co-chair. “In addition, we are mindful of the impact of the COVID-19 pandemic on higher education, college sports and students at large. We hope that modernized name, image and likeness rules will further assist college athletes during these unprecedented times and beyond.”

While the NCAA continues to chart a course towards NIL compensation for student-athletes, it still holds the reins tight by specifying limitations. Although student-athletes may identify themselves by sport and school, the use of conference and school logos, trademarks, or other involvement would not be allowed. The NCAA also emphasized that a university or college should *never* compensate student-athletes for use of their NILs – a prohibition the NCAA has long endorsed.

Further, the Board of Governors noted several potential challenges to modernizing rules, as posed by outside legal and legislative actions, that could undercut the NCAA’s own ability to implement meaningful

changes. Specifically, the NCAA will seek to engage the U.S. Congress to enact measures that include:

- Ensuring federal preemption over state NIL laws.
- Establishing a “safe harbor” exemption protecting the NCAA against future lawsuits filed for NIL rules.
- Safeguarding the nonemployment status of student-athletes.
- Maintaining the distinction between college athletes and professional athletes.
- Upholding the NCAA’s core values, including diversity, inclusion, and gender equity.

One issue in particular warrants further explanation. The NCAA plans to engage Congress to create federal NIL legislation to preempt state laws that have already been passed, no doubt including a California law passed in September of 2019, a Colorado law passed in March of 2020, as well as other similar bills proposed in the state legislatures of New York, Florida, Washington, and Illinois, not to mention numerous others. In particular, when the California and Colorado laws go into effect in 2023, they will allow student-athletes to be compensated for use of their NILs and would make it illegal for universities and the NCAA to punish students who elect to do so.

The NCAA’s goal of ensuring federal preemption over state NIL laws likely stems, in part, from the desire to prevent a patchwork of state laws that could conflict with one another and thereby give certain schools advantages over others, such as enabling student-athletes in one state to profit from use of their NILs but denying that same privilege for student-athletes in other states.

PRACTICAL TAKEAWAYS

In light of recent NCAA announcements and the seemingly inevitable result that student-athletes will achieve the ability to be compensated in some way for NIL usage – whether stemming from NCAA regulations, state law, or federal law – colleges and universities should review their internal policies and prepare for a new age of student-athlete rights. Universities in

California and beyond, as well as businesses utilizing student-athletes’ NILs for their products, will face the need to honor these new rights and work with student-athletes on compensation and related intellectual property issues.

As recommended in our previous Client Alert from November of 2019, universities should consider taking action to prepare for these changes. Now may be a good time to assess existing policies and compliance systems and identify steps needed to conform to expected mandates for intellectual property and publicity rights as they intersect with student-athlete compensation. For example, colleges and universities should consider strengthening their policies to ensure student-athletes who eventually profit from their own NILs do not do so through use of 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 by the school itself. In light of these and other concerns, colleges and universities may want to take steps to increase their resources and ability to monitor and respond to these activities.

Stay tuned as we continue to examine announcements and updates from the NCAA and the legislative bodies.

- See Schnader’s November 2019 Client Alert “Intellectual Property and College Athletes – New Directions by NCAA about Compensation” – <https://www.schnader.com/blog/intellectual-property-and-college-athletes-new-directions-by-ncaa-about-compensation/>. ♦

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 Practice 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

Matthew N. Korenoski
Associate
215-751-2021
mkorenoski@schnader.com

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

www.schnader.com

© 2020 Schnader Harrison Segal & Lewis LLP
All rights reserved.

* See: www.schnader.com/jakarta