Name, Image, and Likeness in the NCAA

Sam Watson

Department of Journalism, Baylor University

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For over 70 years, generations of college athletes waived their identities at the beginning of their respective seasons. To participate in college athletics (no matter what division), every student-athlete under jurisdiction of the NCAA must review and agree to the conditions of the nonprofit titan. The organization's conditions include the forfeiture of an athlete's name, image, and likeness (NIL). However, this is no longer the case. Name, image, and likeness is something each person has rights to. It is one's persona, one's right to their identity. As of June 2021, college athletes' rights to their NIL have been restored, and the NCAA has since fallen into a chasm of complex law pertaining to the First Amendment.

Prior to 1948, college athletics were unregulated in terms of compensation. Athletes were tempted to assorted academic institutions through prizes and forms of payment. To cite a few examples, University of Pittsburgh football players went on strike in 1939 because upperclassmen earned more money than underclassmen. Some teams spent as much as $200,000 annually on players. This would not last. In 1948, the NCAA instituted a Sanity Code. In summation, the code prohibited direct payment for athletes, but permitted the payment of tuition. The scope of payments expanded in 1956, with room, board, books, and small-scale miscellaneous payments (i.e. cash for laundry). In 1974, athletes who competed at a professional level in one sport were allowed to compete at an amateur level in another. Rules would loosen through 2014, where the NCAA announced it would let athletic conferences allow their member schools to increase scholarships to full cost of attendance. Between 2014 and 2021, the NCAA helped athletes make ends meet on a case-by-case basis (NCAA v. Alston, 594 U.S., 8, 2021).

In that span, the reach of college sports has grown, and so has the NCAA. The association has become a sprawling enterprise, generating billions of dollars annually. Every year, the Division I Men's Basketball Tournament (also known as March Madness) proves to be their most valuable property, reaping over a billion dollars. After a relatively trifling year in the pandemic, the NCAA bounced back in 2021 and doubled their profits. To no surprise, the staff has a ridiculous salary. The president of the organization earns roughly $4 million, the commissioner makes roughly $3 million, and executives earn about $1 million (Non Profit Light, 2021). Business is booming.

In March 2014, Shawne Alston, a former running back at West Virginia University, sued the NCAA for violating Section 1 of the Sherman Antitrust Act. Alston and the plaintiffs, who consisted of a gathering of former college football and basketball players, challenged the amounts and types of compensation student-athletes were entitled to. Their frustration was understandable, as student-athletes faced opposition for benefitting from their status, no matter how big or small their offense was. Leonard Fournette, a current NFL running back and former LSU star, was reprimanded by the NCAA since his family sold t-shirts saying "Buga Nation". This catchphrase, a motto for Fournette, was considered a variation of his own likeness (ESPN, 2015). No benefit is too small, though. Former Nebraska quarterback Eric Crouch was friends with Jay Matzke, who was on the board of regents for the University of Nebraska at the time. On May 6, 2000, Crouch accepted a $13.41 plane ride and a four-dollar ham sandwich from Matzke, and the NCAA rebuked him and demanded he write a check paying for the plane ride–and yes–the ham sandwich (Columbus Telegram, 2000). It was instances like this in tandem with athletes' inability to utilize their NIL for any benefit that poured over into court.

Alston v. NCAA ran its course. It sped through the Ninth Circuit, which ruled in favor of Alston, stating the NCAA violated the Sherman Antitrust Act. Seeking immunity from normal antitrust laws and arguing the lower courts should have approved of its restraints, the NCAA filed a writ of certiorari. The case was then brought before the Supreme Court. On June 21, 2021, the Supreme Court affirmed the Ninth Circuit's decision, 9-0.

Why did the NCAA lose the case in such outright fashion? Well, there are numerous reasons. One was the distinguishing factor of amateurism. Amateurism led to the separation of the NCAA from the likes of professional sports leagues. Inability to quantifiably measure their own consumer market also harmed the sports giant. Most importantly, when analyzing market power, structure, and competition, it was viewed the NCAA enjoys near complete dominance in their market (athletic services in men's and women's Division I basketball and FBS football). They can alter student-athlete compensation any way at any time they wish, without diminishing their own superiority in their respective market. The lack of compensation devalued the fair market due to the limits placed, inducing an anticompetitive atmosphere.

Justice Brett Kavanaugh's remarks in the conclusion of the case emphasized they were only investigating a narrow subset of the NCAA's compensation rather than the entirety of their compensation rules. They only inspected education-related benefits in the case, and the court doesn't address the legality of the NCAA's remaining compensation rules. The court established that the ultimate legality of the remaining compensation rules should be subject to ordinary rule of scrutiny. This means the rule must be narrowly tailored to achieve a compelling governmental interest. He elaborates into his next point, saying the NCAA must supply a legally valid pro-competitive justification for its remaining compensation rules. Kavanaugh lets his position be known. He says, "The bottom line is that the NCAA and its member colleges are suppressing the

pay of student athletes who collectively generate billions of dollars in revenues for colleges every year." (NCAA v. Alston, 594 U.S., 44, 2021).

The NCAA still controls the market for college athletes and sets the price for student athlete labor below the market rate. They also recognize student-athletes have no real, meaningful ability to negotiate compensation rules. Their position is that compensation rules are pro-competitive because they help define the product of college sports. Student-athletes are unpaid beyond the high school level, so universities have the option to decline to pay athletes because it is a defining feature of collegiate sport. On June 30, however, the NCAA opted to adopt a new name, image, and likeness policy that heavily favored the players and opened the long-awaited door to capitalize as student-athletes. The policy is as follows from their website (Hosick, 2021):

> Individuals can engage in NIL activities that are consistent with the law of the state where the school is located. Colleges and universities may be a resource for state law questions. College athletes who attend a school in a state without an NIL law can engage in this type of activity without violating NCAA rules related to name, image and likeness. Individuals can use a professional service provider for NIL activities. Student-athletes should report NIL activities consistent with state law or school and conference requirements to their school.

Clearly, this new policy offers plenty of opportunity for student-athletes across all divisions. Although not directly compensated, they are given back their NIL and can do with it what they want, like any other college student. Since NCAA president Mark Emmert failed to pass a uniform bill by July 1, 2021, this is simply the interim policy until something concrete is

established at a federal level. The current legislative and legal environment prevents an immediate permanent solution for all athletes, and the state-by-state rule is a messy, incongruent landscape open for abuse by athletic programs across the country. The concern of pay-for-play (students cannot take NIL deals unless they are playing and can't take NIL deals in exchange for playing) and a spike in recruiting violations is a significant concern, especially in this "wild west" phase of NIL regulation. Athletes across all sports at all levels are getting in on NIL opportunities before states conceptualize what the NIL process should look like. This is leading to rushed conversations with universities and a range of varying policies across the NCAA (Dellinger, 2021).

Despite the variance among state legislatures and universities, there seems to be a somewhat uniform outline of rules institutions are motivated to follow. Student-athletes are typically restricted by their institution's endorsement deals, deals with vice industries are prohibited, and there are broader restrictions on deals conflicting with undefined institutional values (Erlich and Ternes, 2021). Athletes are normally bound to their institution's endorsements. Not in the sense that if their university is sponsored by Under Armour, said athlete must wear Under Armour. More so the athlete in question cannot wear Nike when the team has a deal with Under Armour, at least when the team is on the field. Or if the university is sponsored by Pepsi, they can't shoot a Coca-Cola advertisement in the dining hall. Deals with vice industries are generally not permitted either. Most, if not all, universities will not allow their players to appear in cigarette ads, beer commercials, spots for casinos and gambling, etc. It creates a bad look for the institution because the athlete carries that association. Colleges want their athletes to appear in positive endorsements that reflects well on the academic institution. This is often expressed in talks between the two parties. Broad restrictions depend on each

universities' independent standards. For example, a northwestern Division II private Christian college might have different values than a large southeastern state school. The bottom line is that NIL should not interfere with institutional interests and reputation.

Now, NIL is linked to the First Amendment, freedom of speech specifically. Commercial speech is most closely linked to NIL, meaning speech linked to a commercial transaction. It is difficult to determine which cases pertain to commercial and non-commercial speech. This receives a lot less protection compared to other versions of freedom of speech. Due to the interactions between student-athletes and universities, it is likely down the road, unless a federal standard is applied soon, there will be an evaluation of the current NIL system in place. The Central Hudson Test will likely be employed to determine whether commercial speech falls within constitutional limits. According to Cornell Law School's Legal Information Institute (2022), the Central Hudson Test consists of four steps in evaluation:

1. The speech in question must concern lawful activity and not be misleading
2. The government interest in regulating the speech must be substantial
3. The regulation must directly advance the stated government interest
4. Restrictions must not be unnecessarily extensive to achieve the state's interest

If a student-athlete were to decide to take part in an advertisement for alcohol, or another brand or industry the university doesn't approve of, the university is likely affirmed by the Central Hudson Test through condition two, but it gains uncertainty around point three. The university would have to justify the restriction, unlike the other two points which are easily identifiable. The nature of commercial speech demands a form of justification at this instance of the test. It would prove difficult for a university to outright produce evidence in the confines of this

scenario. They could argue it harms their reputation but proving that is difficult without precedent. For the final point, issues regarding free speech must be *narrowly* tailored (Strickland, 2009). The institution or state would have to prove its restrictions or regulations are not stricter than they need to be, as drafting them too restrictive is unconstitutional.

To summarize this portion, NIL is hard to restrict from a state and university level because of the relevance to the First Amendment and commercial speech. Prior restraint will be difficult to utilize given the current infancy of NIL law within the collegiate athletic space. Prior restraint, to add, is censorship utilized to prevent instances of expression (Ehrlich and Ternes, 2021). However, in all this dialogue concerning the Central Hudson Test and prior restraint, it is important to remember these student-athletes are nonetheless students and will be treated as such. They're not independent of the university entirely. Cases in the past have allowed institutions to exercise prior restraint for matters off campus, so there is a chance prior restraint can be exercised in the context of NIL opportunities. On the other hand, universities have been shown not to be exempt from the first amendment and limiting student speech falls under strict scrutiny.

So, what's next for NIL in college sports? The newly implemented opportunity for college athletes across the country is plunging into an important stage in its development. In the short term, it is to be watched carefully, as its loosely governed structure leaves it vulnerable for abuse by those that inhabit collegiate sports. After a season of college athletes being able to profit off their NIL, ESPN reported the Division I board of directors met virtually on Feb. 18 to review NIL policies (or the lack of NIL policies). They reported they were keen on maintaining what has gone well, while revising what has been problematic. They also emphasized reviewing

how new benefits have affected athletes' school choice, transfer opportunities, academics, mental health, recruiting violations, representations of athletes as deals are conducted, booster involvement, and how schools are arranging deals (Uggetti, 2022). This began only a few days ago, so it is exciting to see how these new possibilities metamorphosize in the world of sports.

In the long term, it is important NIL achieves some sort of regulation before it falls into categorical precedent. It would be better passing draft by means of constitutional inspection from the NCAA through the Supreme Court rather than a case between a university and a student-athlete. In a case, national concerns are not at the front of the plaintiff or defendant's cognitive vector. From Olympian Jeremy Bloom's defeat in his trial to retain ski sponsorships while he plays football, to Jason White's argument scholarships aren't enough to cover needs of student-athletes, to EA Sport's class action lawsuits regarding NIL, to California's Fair Pay to Play Act, to today, name, image, and likeness is to be taken delicately. If NIL becomes twisted by precedent instead of thoughtful, constitutional process, it may become the very thing sports fans and the media feared it would become: the greedy construct that destroys the glorious venue that is collegiate athletic competition.

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