

## What's in a Name, Image and Likeness for Student Athletes?

By Michael T. Seeburger

**A**midst pressure from sweeping legislation across the country, and still reeling from a major loss at the United States Supreme Court, the National Collegiate Athletic Association (NCAA) suspended all rules prohibiting student-athletes from profiting off their name, image, and likeness (NIL) effective July 1st.

For decades, the NCAA prohibited student-athletes from profiting from their NIL, but the seismic shift in policy opens the door to a whole new era for amateur athletics. As a brand-new industry emerges where student-athletes are permitted to contract with third parties to sponsor, endorse, or publicly support a brand, product, or company, what happens next?

### Background

The story is an old one; you may have heard it before. College athletics is big business. In some of its most profitable years, the NCAA has reported annual revenue hovering at or around \$1 billion per year for tournaments, marketing, endorsements, ticket sales, and television contracts. The idea of profiting from NIL in higher education is not exactly a novel concept—coaches, colleges, universities, and the NCAA

have done it for years. However, under the NCAA's now-former policy, any outside income related to NIL paid directly to student-athletes was strictly prohibited. In fact, student-athletes found to have accepted compensation or endorsed a brand or product have had awards rescinded, records erased, and team victories retroactively vacated. Considering the draconian sanctions imposed for these violations, what led to this complete reversal in policy?

For context, it is important to understand that the amateur system the NCAA now governs was established well over 100 years ago. Much has evolved over the last 100 years, including the way games are played and broadcast, the speed at which information is transmitted, and the platforms for doing so. We now live in a world with almost untethered access. Outside of the national networks, major conferences have established their own television channels or streaming services, and websites, phone apps, and social media have created an almost constant presence. As a result, universities, colleges, and the athletes that compete for them have never been more recognizable. Likewise, the opportunity to market and capitalize on branding has never been so ripe.



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### Brief History

In 2015, stemming largely from a dispute over the lack of compensation for student-athlete NIL in the popular NCAA video games, the 9th Circuit Court of Appeals in *O'Bannon v. NCAA*, held that the NCAA's rules prohibiting student-athletes from receiving compensation from their NIL was an illegal restraint on trade. Following the ruling, the NCAA agreed to review policies on how to compensate players for NIL.

In October 2019, before the NCAA ever fully addressed the issue, California became the first state to enact NIL legislation when it passed the Fair Pay to Play Act. The law, in some ways revolutionary, allows student-athletes attending California schools to profit from sponsorships and endorsements based on their NIL. At the time, the NCAA vehemently opposed the statute and called it an "existential threat" to

amateur athletics. Shortly thereafter, Colorado, Florida, Nebraska, Michigan, and many other states followed (26 in total) with similar legislation. As public policy started to evolve and more and more states began to jump on the bandwagon, it was apparent the NCAA had an imminent crisis on its hands.

Furthermore, in a landmark 9–0 decision in June 2021, the United States Supreme Court in *NCAA v. Alston* unanimously held that NCAA policies capping compensation to student-athletes for education-related benefits violated federal anti-trust statutes, namely the Sherman Act. With the walls caving in and pressure mounting, the NCAA reversed course and suspended its policy restricting student-athletes from profiting from their NIL.

### Implications

Not surprisingly, student-athletes, along with large and small businesses across the country, were quick to capitalize on this new endeavor. On July 1st, news of NIL agreements, endorsements, and sponsorships swept across the country. For the first time, student-athletes were permitted to profit from their NIL while still actively attending college and still being considered “amateur” athletes.

Consider the following immediate opportunities presented for student-athletes:

- Some signed up for Cameo, a website where celebrities create personalized videos, for a fee, for events, birthdays, or special occasions;

- Some partnered with apparel and merchandising companies to sell brands and promote products;
- Some began trademarking their own logos (Spencer Rattler, Nebraska quarterback, was one of the first to create his own personal trademark); and
- Some joined forces with agents and professional service providers to represent their interests and market their NIL.

### Not Pay for Play

It is also important to note what the change in NCAA policy *does not* do. At the forefront, the change in policy does not permit colleges or universities to pay student-athletes a salary to compete on the football field, baseball diamond, basketball court, or ice hockey rink. In other words, student-athletes are not employees. It simply allows these student-athletes to contract with third parties to profit from NIL.

### How Is NIL Value Determined?

Perhaps most compelling is the realization that being the “best” athlete does not necessarily equate to being the most valuable in terms of NIL. One reason may be that a combination of factors determines the value of an individual’s NIL. They are, at a minimum: (1) on-field athletic ability; (2) social media presence; (3) prestige and name-recognition of the college or university; (4) the sport participated in; and (5) statutes, rules, and regulations from the state where the school is located. While these are just factors, one of the largest seems to be social media presence. Student-

athletes with the most followers on Twitter, Instagram, Snapchat, or Tik Tok have become some of the most widely sought after. As a result, the market for female student-athletes has been just as lucrative as the market for male student-athletes.

For example, Olivia Dunn, a gymnast from LSU with more than a million followers on Instagram, was featured on a billboard in Times Square promoting the change in NIL policy. Similarly, Haley and Hanna Cavinder, Fresno State women’s basketball players with over a million followers on Tik Tok, announced partnerships with Boost Mobile and a nutritional supplement company to promote their products.

On the men’s side, Nick Saban, Alabama football coach, indicated that the team’s presumed starting quarterback, Bryce Young, was poised to receive compensation nearing \$1 million for NIL agreements. Young has yet to take a snap for the Crimson Tide. However, utilizing some of the factors noted above, Young seems to check all the boxes for maximizing NIL.

Perhaps not surprisingly, the NIL debate has also trickled down to high school. On July 28th, the number-one overall football recruit in the nation, Quinn Ewers, a high school senior in Texas, announced that he was considering forgoing his senior year of high school to attend Ohio State early, strictly to take advantage of the opportunity to profit off his NIL. As a high school student in Texas, if Ewers were to profit off his NIL, he

would be ineligible to participate in high school athletics. At 18 years-old, it is estimated that Ewers could be paid up to seven figures in NIL compensation if he forgoes his senior year. Under Ohio State admission requirements, Ewers may be able to complete his high school education online before becoming eligible to play for the Buckeyes in 2021. It is likely that the story of Quinn Ewers will not be the last of its kind.

## Legislation

While there has been a strong push for immediate federal legislation to create a uniform policy, Congress been slow to the table. Absent federal legislation, policies on student-athletes' NIL are the responsibility of the individual states. Many states have already passed legislation authorizing student-athletes to either immediately profit from their NIL or to profit from their NIL at some point in the near future. Meanwhile, some states have yet to address the issue at all. In the interim, in those states without immediate NIL legislation (like New Jersey), the responsibility for developing, enacting, and monitoring policies defers to the universities and colleges within. Naturally, this type of patchwork legislation has led to a hybrid of policies and procedures across the country.

## So, What Is New Jersey Doing?

On Sept. 14, 2020, Governor Murphy signed the New Jersey Fair

Play Act ("the Act"). Under the Act, which is not slated to take effect until 2025, student-athletes attending colleges or universities in New Jersey may profit from their NIL. For example, student-athletes may be paid to make sponsored social media posts, appear in advertisements, profit from autograph and merchandising sales, and hold camps or training sessions. Furthermore, beginning in 2025, any college or university in New Jersey would be barred from joining a member institution which forbids compensation to student-athletes for NIL.

New Jersey student-athletes may now accept a free lunch from a booster or retain agents to represent them, activities that would previously disqualify them from NCAA play. Likewise, universities or colleges may retain the services of professional companies whose goals are to educate and market the student-athlete, maximize NIL, and provide guidance on contracts, trademark licensing, taxes, and business formation.

Under the Act, endorsement deals with certain industries or brands are still prohibited, including those with alcohol, adult entertainment, gambling, gaming, tobacco, prescription pharmaceuticals, controlled dangerous substances, and weapons.

Student-athletes must also disclose any NIL contract to the college or

university, mainly to avoid the possibility of conflicting contracts or sponsorships with the school.

While it is likely that New Jersey will attempt to move up the start date of the Act, universities like Rutgers are enacting procedures to mirror the Act to fill the gap in the interim and effectuate policy.

## Summary

With NIL legislation taking effect across the country, a budding legal niche may be forming. Student-athletes will require representation, as will the schools they attend, and the businesses they engage with. Contracts will need drafting, review, and negotiating. Trademarks will need to be created, developed, and protected. Litigation is guaranteed to ensue. Colleges and universities will need guidance for developing, marketing, and educating their students on NIL. With all these factors in play, could NIL create an entirely new specialty within the legal industry?

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