

What You Need to Know About Brand Protection in NIL Deals

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The NIL era has created exciting opportunities for student-athletes to capitalize on their right of publicity. At the same time, NIL opportunities present several complexities that student-athletes and institutions must navigate to safeguard their interests, including protecting their intellectual property and avoiding trademark infringement liability. Although NIL commercialization may be unfamiliar territory for many student-athletes and institutions, athletes should consider protecting their brands by implementing effective trademark strategies, and institutions need to be aware of copyright and intellectual property right laws to ensure that their NIL-related policies are within the confines of the law.

WHAT HAVE WE SEEN SO FAR?

Several student-athletes have successfully established individualized brands based on their NIL to generate revenue opportunities. Will Ulmer, a football player at Marshall University, has made headlines by using his NIL to pursue a unique passion: music. Before the NCAA launched its NIL policy, Ulmer was forced to navigate restrictions that impeded his music career. To comply with the NCAA's NIL limitations, Ulmer formerly performed under the stage name "Lucky Bill." Today, however, Ulmer performs using his real name. Spencer Rattler, a University of Oklahoma football player, has created his own logo, which is now a trademark he sells on merchandise and apparel. Fans can purchase shirts, hoodies, shorts, and other branded apparel on spencerrattlershop.com. Paige Bueckers, a standout basketball player for the University of Connecticut's women's program, has established a brand using her name and sobriquet she's developed, "Paige Buckets," a reflection of her outstanding scoring ability. On July 13, 2021, Bueck-

ers filed for a trademark on her nickname for its use on athletic apparel.

INTELLECTUAL PROPERTY HURDLES AND NIL:

A. WHAT SHOULD INSTITUTIONS CONSIDER?

The NIL landscape is relatively new for athletes as well as institutions. As a result, schools have encountered distinctive challenges within this evolving environment. It is imperative that schools take a proactive approach to mitigate potential liability and to ensure that their NIL-related policies comply with applicable

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copyright laws and intellectual property rights. As a starting point, institutions must be sure to have well-written NIL policies that safeguard compliance with state law. Moreover, to ensure student-athletes can identify and follow proper protocol, a school's NIL policies should be publicized and accessible to its

student-athletes. Several schools have implemented NIL-related education programs, which provide student-athletes with training regarding how athletes can build personal brands while respecting state and institutional guidelines and how athletes can appropriately use a school's slogan or logo within NIL activity.

Although certain schools permit student-athletes to use the institution's intellectual property, others have adopted a different approach. It is important to recognize that imposing copyright restrictions on student-athletes may challenge a school's ability to recruit talented athletes. For instance, a university's prohibition on using its intellectual property in NIL may deter athletes from attending that school, as such restriction could hurt the student athlete's NIL value and weaken their NIL opportunities.

B. WHAT SHOULD STUDENT-ATHLETES CONSIDER?

As discussed above, colleges and universities are split on whether to allow athletes to use an institution's intellectual property in NIL activity. Texas NIL legislation, for example, expressly prohibits athletes from using a school's intellectual property for NIL purposes. However, there is an exception where there is a co-licensing agreement between the school and the student-athlete. On the other hand, some schools openly support student-athletes' use of their trademark for NIL purposes. The University of Dayton signed a licensing agreement for all varsity sports with The Brandr Group (TBG), allowing Dayton student-athletes to use the school's trademarks and logos in NIL opportunities. Accordingly, student-athletes must consider institutional limitations concerning intellectual property for NIL use before wearing an institution's logo or name during NIL pursuits. As a preliminary measure, student-athletes should inquire as to whether their school

has IP protections in place and obtain an institution's written consent before engaging in NIL activity that incorporates the institution's intellectual property.

Perhaps the most crucial copyright-related consideration for student-athletes comes from the infamous "Johnny football" trademark case. A collegiate football player, Johnny Manziel, won his legal battle over the trademark right to his nickname. Manziel sought to trademark the nickname, which had become quite popular. However, Manziel was forced to file suit after Eric Vaughan began creating and selling shirts with the phrase "Keep Calm and Johnny Football." The NCAA held that Manziel and his family could keep any financial awards from the lawsuit, even while Manziel continued to compete at the collegiate level.

Athletes who have established, or wish to establish, a personal brand should seek legal counsel to assist them with safeguarding their names, symbols, slogans, and other marks affiliated with their NIL. Taking legal action will provide athletes



with the protection necessary to effectively capitalize on profitable NIL opportunities and avoid liability for trademark infringement. Not only does copyright protection shield an athlete's brand from unwanted use by others and provide athletes the right to control how their NIL is used, but such protection also allows an athlete to defend and recover damages from an infringement and impact on their brand.

WHAT'S NEXT?

Although the NIL landscape is uncertain, we anticipate increasing NIL copyright-related litigation as student-athletes seize NIL opportunities. As noted above, student-athletes and institutions should seek competent legal counsel to discuss copyright and intellectual property rights challenges and implement legally sound strategies to address any issues.

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