LAW360, "IMMINENT COLLEGE ATHLETE LICENSING PUTS COS. ON NOTICE"

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Since California's adoption of the Fair Pay to Play Act[1] in the early fall of 2019, the education, sports and legal communities have been buzzing about the prospect that college athletes may finally be able to profit off their names and likenesses.

Much has been written about the potential impact on the athletes and universities, but less has been said about the impact on the potential licensees — the businesses and content creators — that stand to benefit financially alongside the athletes.

Of course, with all the potential upside, there are new and significant business risks associated with partnering up with this new category of endorsers.

Brief Background on Regulation and Legislation

Traditionally, college athletes (scholarship athletes in particular) have been considered amateurs and, therefore, are prohibited by governing bodies from engaging in any commercial activity related to their student-athlete status. This means that college athletes, with very limited exceptions, cannot endorse businesses or products, register and enforce trademarks, or otherwise monetize their name, likeness or other intellectual property rights.

However, over the past half-century, college athletics has grown into a massive business, with the National Collegiate Athletic Association's (the largest regulating body in college sports) reporting in excess of $1 billion in revenue in the year 2018.[2]

The NCAA's (and its constituent universities') big business has created bigger pushback from the athletes ultimately responsible for bringing in all of the money. While the NCAA points out that it is responsible for awarding over $3.5 billion in scholarships annually, athletes argue that they continue to suffer financially under the significant restrictions they are placed under to accept those scholarships. Athletes say that it is simply unfair that their nonathlete peer students are free to start a business and endorse products (such as through social media), but the athlete must sit idly by or otherwise face suspension or loss of his or her scholarship.

As a result of the groundswell against regulating bodies such as the NCAA, California was the first state to adopt legislation that allows college athletes in the state to profit off their name and likeness. Many other states, such as Minnesota, Georgia, Florida, New York and South Carolina have presented and/or passed bills

mirroring that of California.

Under significant pressure, in late October 2019, the NCAA governing board voted unanimously to allow athletes to be compensated, although the NCAA still must adopt specific rules and regulations framing athletes' rights. Although very few details have emerged, it is only a matter of time before the gates open and the mass of college athletes begin looking for ways to commercialize their names and likenesses.

The New Normal for Licensees

Under the current scheme, businesses can license college names, logos and colors for their products and services through the Collegiate Licensing Company and other collective licensing agencies. Nonathlete college sports personnel, such as head coaches, generally license their names and likenesses to businesses subject to their contractual obligations with the school at which they are employed.

For the college athlete, it is unclear whether licensing will happen through a central licensing agency (like CLC) or directly through the school. It is more uncertain what restrictions will be put in place by the NCAA and/or its constituent schools — will athletes be prohibited from endorsing products and businesses that a school considers to be subjectively amoral or is otherwise harmful to its reputation? Will schools cut deals with local businesses to generate a list of approved partners with which its student-athletes are permitted to do business?

However it shakes out, business owners such as retailers and content creators will be at the center of an explosive marketplace when thousands of college athletes begin looking for ways to monetize their name and likeness. Businesses centered around big-market schools (such as those in the Power Five football conferences) stand to gain the most but will also be exposed to the most risk. Dollars will be flying while regulation, early on, will remain untested. Retailers may very well find themselves in a middle of a dispute between a college athlete and the school (or the NCAA) over royalties and other commercial issues related to endorsement deals.

Business owners will have to face a complicated set of discrete rights owned by each athlete, rights that can be very difficult to manage on a large scale. Businesses looking to engage college athletes as social media influencers will have to be even more careful because they will have to comply with Federal Trade Commission regulation and platform advertising policies in addition to navigating the NCAA-university-athlete relationship.

Presumably, businesses will look to professional sports to understand best practices for endorsement and influencer deals, but the expectation is that college athletes are under much tighter restrictions than the relatively open-market professional athletes enjoy.

Aside from commercial and contractual issues, businesses will need to implement focused policies to avoid unintentional trademark and copyright infringement because of the larger volume of intellectual property rights that will enter the relevant marketplace. On the flip side, college athletes will need to be trained and educated on how to establish, maintain and enforce their intellectual property rights, including on various state laws and statutes relating to the misappropriation of name and likeness. Of course, athletes will need access to competent and cost-effective business and intellectual property counsel.

While much uncertainty remains, the question of whether college athletes can profit off their name and likeness is no longer an "if." There is a huge potential upside for businesses looking to cash in on the popularity of college athletes and often transcendent fame of the individual athletes. With that upside always come new and complex risk factors that both the businesses and the athletes must be ready to navigate.

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