

NAME, IMAGE and LIKENESS



“What’s In a Name?”

STOLL | KEENON | OGDEN

PLLC

Juliet Got It Wrong

What's in a name? That which we call a rose by any other name would smell as sweet [unless rose has an NIL Deal].

Olivia Got It Right

*Sitting at **No. 3** on the On3 NIL Valuation Rankings at \$3.4 M, behind Bronny James and Arch Manning.*

What is On3 NIL Valuation

- *Industry's leading index that sets high school and college athletes' projected annual value*
 - *Brand Value Index* measures the national licensing and sponsorship market
 - *Roster Index* collects data from all school Collectives
- *Performance, Influence, Exposure*

1. What is NIL?
2. Pre-June 2021
3. *Alston Decision*
4. Kentucky's "Pay to Portray" Act
5. Advising on NIL Issues
6. The Benefits
7. The Future

1. NIL Rights - **Generally**

Protects individuals from unauthorized use of their name, image, and likeness in connection with advertising, selling, or soliciting of commercial goods or services and may include name, voice, signature, photograph, and identity

1. NIL Rights – Sources

- Common law right of publicity/right of privacy
- Statutory right

“...a person has property rights in his name and likeness which are entitled to protection from commercial exploitation”

KRS 391.170

STOLL | KEENON | OGDEN

PLLC

1. NIL Rights/Right of Publicity – **Varies by State**

- Post-mortem rights
 - *Duration*
 - *Public figure/celebrity status*
- Place of domicile before and after death
- Scope of protection – persona?
- Celebrity/Public Figure/Commercial Value
- Statutory Damages

1. NIL Rights/Right of Publicity – Exemptions

- First Amendment
- Expressive Works
- Newsworthiness
- Transformative
- Serial Killers (and other celebrity criminals)

1. NIL Rights/Right of Publicity – Ohio Exemptions

- *“any news, public affairs, sports broadcast”*
- *“political campaign”*
- *“literary work, dramatic work, fictional work, historical work, audio visual work, musical work”*
- *“Material that has political or newsworthy value”*
- *“Original works of fine art”*
- *“use of an aspect of an individual’s persona in connection with the broadcast or reporting of an event or topic of general or public interest”*
- *“use ... protected by the First Amendment”*
- *Nomative uses*

1. NIL Rights/Right of Publicity – **Transformative**

- *Taking an original work and changing so that it is more reflective of the person who did the re-design than the original work*



2. Pre-June 2021: Sports Cases

Akeem Daniels v. FanDuel (2018)



- Asserted claim under Indiana Right of Publicity statute by using name, likeness, and statistics in daily fantasy sports game
- Held that Defendant's activities and materials fell within "*newsworthiness*" exception and dismissed claim.

2. Pre-June 2021: Sports Cases

Ed O'Bannon v. NCAA (2018)



- Asserted claims under Section 1 of the Sherman Antitrust Act by using NIL in videogames, trading cards, etc.
- Rule of reason
- 3-week bench trial

2. Pre-June 2021: Sports Cases

Ed O'Bannon v. NCAA (2018)

- NCAA Defenses
 - Amateurism
 - Fan Interest
 - Preservation of the STUDENT-athlete

2. Pre-June 2021: Sports Cases

Ed O'Bannon v. NCAA (2018)

- NCAA violated Section 1 of Sherman Act
- Member schools need to provide up to the cost of attendance
- Stipend from \$2-5,000 tethered to educational expenses

2. June 2021: *NCAA v. Alston* – Unanimous 9-0

- NCAA violated Section 1 of Sherman Act
- No “Amateurism” exception
- Restrictions on education related benefits unlawful
- At US Supreme Court from 9th Circuit

3. June 2021: *NCAA v. Alston* – *Justice Kavanaugh*

The NCAA...asserts that its compensation rules are procompetitive because those rules help define the product of college sports. Specifically, the NCAA says that colleges may decline to pay student athletes because the defining feature of college sports, according to the NCAA, is that the student athletes are not paid.

In my view, that argument is circular and unpersuasive.... The NCAA's business model would be flatly illegal in almost any other industry in America. All of the restaurants in a region cannot come together to cut cooks' wages on the theory that "customers prefer" to eat food from low-paid cooks.

Price-fixing labor is price-fixing labor. And price-fixing labor is ordinarily a textbook antitrust problem because it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work... Businesses like the NCAA cannot avoid the consequences of price-fixing labor by incorporating price-fixed labor into the definition of the product.

And if that asserted justification is unavailing, it is not clear how the NCAA can legally defend its remaining compensation rules.

3. June 2021

- State statutes
 - 19 states; 6 effective July 1, 2021
- June 21, 2021 – NCAA relents
 - minimum limitations
 - “comply with state laws”
- June 24, 2021 – Ky Executive Order

4. Kentucky “Pay to Portray” Act

- Builds upon Governor’s Executive Order
- Act signed into law on March 9, 2022
- Protects student athletes from NCAA rules prohibiting NIL deals
- Market Rate
- Open records
- University Involvement
- Limits Liability to Universities
- No “pay to transfer”
- Duration



5. Advising on NIL Issues

- NCAA Interim NIL Policy and Guidance
- State Statutes
- University policies
- High School Athletic Associations
- Other IP Sources – trademarks & copyright
- Tax Issues
- Immigration Issues
- Financial Aid Impacts
- Contract issues – exclusivity, duration/termination, morality, indemnity,

6. Benefits of Sports NIL

- Monetize personal brand
- Entrepreneurial endeavors
- Real business/negotiating experience
- Networking
- Job opportunities
- Female athletes/sports

6. The Future

- The Death of NCAA Amateurism?
- *Ralph “Trey” Johnson, et al. v. NCAA, et al.* – Third Circuit
 - Six present and former college student athletes are suing their schools and the NCAA under the Fair Labor Standards Act and parallel state statutes to collect wages