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NIL and the NCAA

Though it is not explicitly mentioned as an unalienable right in the Declaration of Independence, the right to privacy has been highly valued since the founding of the United States. In one way or another, the right to privacy is connected to the Third, Fourth, Fifth, Ninth and Fourteenth Amendments. In *The Law of Journalism and Mass Communication,* "Justice John Harlan's 'reasonable expectation of privacy test from *Katz* establishes a Fourth Amendment right to privacy when a person has an actual expectation of privacy that society recognizes as reasonable" (Ross et al., 2020, p. 217). Before the 21st century, privacy might normally have been associated with physical intrusion upon someone else's property or person without their consent or knowledge. With the evolution of cell phones and social media, the right to privacy now extends to other areas, such as cell-site location information (CSLI), GPS tracking and data given to third parties via cell phones. But the right to privacy now includes an individual's right to have control over their identity and the use of their image.

Appropriation is the main category that this situation falls under in the courts. Ross (2020) defines appropriation as, "using a person's name, picture, likeness, voice or identity for commercial or trade purposes without permission" (p. 226). When it goes to the courts, there are two ways an individual's right to privacy could be infringed upon regarding the area of appropriation. Commercialization and the right of publicity are similar but differ in who they protect. Commercialization protects people who want privacy while the right of publicity

protects a celebrity's right to have control over how their image is used with permission (Ross et al., 2020, p. 226). For proving appropriation, the plaintiff's case must include these points. They must show that the plaintiff's name, image or likeness was used for a commercial purpose without their permission. On the defense side of the case, they can use one of five different defenses: news, First Amendment, incidental use, mass media advertising and consent (Ross et al., 2020, p. 230).

While having the written consent of the individual is the best defense, the defense backed by the First Amendment is central in looking at cases regarding the misuse of the NIL of college athletes. NIL stands for name, image and likeness. Under the First Amendment, there are two tests to measure the piece of media against: the artistic relevance test and the transformative use test. The artistic relevance test is "a test to determine whether the commercial use of a celebrity's name, picture, likeness, voice or identity is relevant to a disputed work's artistic purpose" (Ross et al., 2020, p. 232). The test that is applied to cases of NIL regarding collegiate athletes is the transformative use test. The transformative use test is similar to the artistic relevance test but the important difference comes when looking to see if the work changed "the original to give it new meaning or a different message justifies First Amendment protection" (Ross et al., 2020, p. 233). In order for something to receive protection and not be considered appropriation with legal repercussions, the original must be used in a way that gives it a new meaning. There are several cases that show the different ways, both legally and illegally, that NIL can be incorporated into the media.

In 2009, Ed O'Bannon, a former basketball player at UCLA, saw an "avatar of himself – a virtual player who visibly resembled O'Bannon, played for UCLA, and wore O'Bannon's jersey number 31" on a video game that allowed the user to play as players from college

basketball teams from the early 90s made by a company called Electronic Arts (EA) (*O'Bannon v. NCAA,* 2015). O'Bannon was unaware of this game and that his image and likeness were being used in this way without his knowledge or being compensated. Though his name was not explicitly used in the video game, O'Bannon decided to sue the National Collegiate Athletic Association (NCAA) and Collegiate Licensing Company (CLC),"the entity which licenses the trademarks of the NCAA and a number of its member schools for commercial use" (*O'Bannon v. NCAA,* 2015). His main point was that because the NCAA did not allow its athletes to benefit from the NIL due to its amateurism rules, it was an "illegal restraint of trade under Section 1 of the Sherman Act" (*O'Bannon v. NCAA,* 2015).

Around the same time, Sam Keller, a former quarterback for Arizona State University and the University of Nebraska, also sued the NCAA, CLC and EA. He alleged that "EA had impermissibly used student-athletes' NILs in its video games and the NCAA and CLC had wrongfully turned a blind eye to EA's misappropriation of these NILs" (*O'Bannon v. NCAA,* 2015). Both of these suits were consolidated together in 2013. During these proceedings, the NCAA sought to dismiss the right-of-publicity claims under protection of the First Amendment. The district court denied this motion, and the Court of Appeals Ninth Circuit upheld this decision on account that "'[u]nder California's transformative use defense, EA's use of the likenesses of college athletes like Samuel Keller in its video games is not, as a matter of law, protected by the First Amendment" (*O'Bannon v. NCAA,* 2015). In summary, both courts found that the video game produced by EA did not significantly change or transform Keller's image or likeness enough for use in its game and to be protected under the First Amendment.

This led the court to grant class certification to the plaintiffs creating a class action lawsuit, which is "a lawsuit in which a group of people with similar injuries caused by the same

product or action sue a defendant as a group" (Ross et al, 2020, p. 233). After this, the plaintiffs settled with EA and CLC, and the cases of O'Bannon and Keller were deconsolidated. In 2014, the issue of a breach of antitrust laws in the O'Bannon case went to trial before a district court. The court then stated that "because the plaintiffs have shown that, absent the NCAA's compensation rules, video game makers would likely pay them for the right to use their NILs in college sports video games, the plaintiffs have satisfied the requirement of injury in fact and, by extension, the requirement of antitrust injury" (*O'Bannon v. NCAA,* 2015).

The district court then concluded that "the NCAA's rules for prohibiting student-athletes from receiving compensation for their NILs violate Section 1 of the Sherman Act" (*O'Bannon v. NCAA,* 2015). The Ninth Circuit Court of Appeals then used the Rule of Reason to require that the "NCAA permit its schools to provide up to the cost of attendance to their student athletes" in order to maintain its amateurism, which does not allow student-athletes to be paid outside of educational purposes (*O'Bannon v. NCAA,* 2015). In its bylaws, the NCAA clearly stated what was nonpermissible for student-athletes to engage in regarding their NIL:

> "A student-athlete shall not be eligible for participation in intercollegiate athletics if the student-athlete: (a) accepts any remuneration for or permits the use of the student-athlete's name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind; or (b) receives remuneration for endorsing a commercial product or service through the student-athlete's use of such product or service" (*2022-23 NCAA Division I Manual,* 2022, Bylaw 12.5.2.1).

Another similar case was unfolding around this time in the Third Circuit in the Court of Appeals regarding former quarterback at Rutgers University, Ryan Hart. Hart filed a suit against

EA for violating his right of publicity by using his likeness in one of their college football video games. The right of publicity is the "appropriation tort protecting a celebrity's right to have his or her name, picture, likeness, voice and identity used for commercial or trade purposes only with permission" (Ross et al., 2020, p. 226). Hart's first claim was dismissed and so he filed another "claim pursuant to the right of publicity based on Appellee's purported misappropriation of Appellant's identity and likeness to enhance the commercial value of NCAA Football" (*Ryan Hart v. Electronic Arts, Inc.,* 2013). The District Court then granted summary judgment and ruled in favor of EA and stated that the First Amendment did grant protection to EA and NCAA Football. Hart then appealed to the Court of Appeals in the Third Circuit. The Court disagreed with the Appellee's argument that the video game as a whole and certain features within it were transformative enough to pass the transformative use test. The Court of Appeals reversed the District Court's decision and remanded it back to the lower court. Though the circumstances in both the O'Bannon and Hart lawsuits were almost the same, the district courts both used the transformative use test and came to different conclusions. It was only when the Hart case went to the higher Court of Appeals that the court decided that the EA video game was not transformative enough to warrant First Amendment protection.

In 2016, Javon Marshall, a former football player for Vanderbilt University, filed for a similar right of publicity suit on behalf of other collegiate athletes in the state of Tennessee. They filed with the "assertion that college football and basketball players have a property interest in their names and images as they appear in television broadcasts of games in which the players are participants… [and said] those broadcasts are illegal unless licensed by every player on each team" (*Javon Marshall v. NCAA,* 2016). The Court of Appeals stated that the plaintiffs' claim "under the Tennessee Personal Rights Protection Act is meritless because that Act expressly

permits the use of any player's name or likeness in connection with any 'sports broadcast'" (*Javon Marshall v. NCAA,* 2016). The court also pointed out that there was no right of publicity under Tennessee common law.

Another area where the right of publicity has come up is in the area of online sports gambling. In the case of *Daniels v. FanDuel, Inc.*, the defense of newsworthiness came up in order to determine whether or not online regulators of fantasy sports needed to obtain the consent of athletes to use their NIL and game statistics. Before ruling on this case, the Seventh Circuit of the Court of Appeals posed this question to the Indiana Supreme Court:

> "Whether online fantasy-sports operators that condition entry on payment, and distribute cash prizes, need the consent of players whose names, pictures, and statistics are used in the contests, in advertising the contests, or both" (*Daniels v. FanDuel, Inc.,* 2018).

"The Indiana Supreme Court answered that the newsworthiness exemption would include an online fantasy sports operator's use of players' names, pictures and statistics, so the Seventh Circuit then terminated the lawsuit" (Ross et al., 2020, p. 232).

In 2020, the NCAA was involved in another lawsuit that took a closer look at its policy on compensating athletes with non-educational benefits (*NCAA v. Alston,* 2021). In *NCAA v. Alston*, "the district found for the athletes, holding that the NCAA must allow for certain types of academic benefits" (*NCAA v. Alston,* 2021). The case then went before the Court of Appeals in the Ninth Circuit and to the Supreme Court, who ruled unanimously in favor of Alston and the other athletes, and said that the "NCAA's rules restricting certain education-related benefits for student-athletes violate federal antitrust laws" (*NCAA v. Alston,* 2021). It is in Justice Kavanaugh's concurring opinion that the issue of the NCAA's policy on athletes receiving

payments for their NILs through endorsements and similar deals is discussed. Kavanaugh states that “the NCAA’s business model of using unpaid student athletes to generate billions of dollars in revenue for the colleges raises serious questions under the antitrust laws” (*NCAA v. Alston,* 2021). He points out the futility in the NCAA’s argument in showing that “those enormous sums of money flow to seemingly everyone except the student athletes” and how this would be illegal in any other industry (*NCAA v. Alston,* 2021). The bottom line of the NCAA’s argument in not allowing their student-athletes to be compensated in any way stems back to their desire to maintain the amateurism of collegiate sports. They saw the compensation of collegiate athletes from their NILs as a threat to the foundation of college sports built upon the amateur status of its athletes. But starting with the case of O’Bannon v. NCAA and most recently pushed by the opinion of Justice Kavanaugh, the NCAA has been forced to reexamine their policy on athletes being able to profit from their NILs and similar deals.

On June 30, 2021, the NCAA adopted an interim policy that allowed collegiate athletes across all three divisions to profit from their NIL. The interim policy allows players to “engage in NIL activities that are consistent with the law of the state where the school is located” (*Taking action,* 2022). The policy also allows players to go through a third party to set up their NIL services, participate in NIL activity even if the state their school is in does not have an NIL law and allows state and school authorities to require the reporting of such activity (*Taking action,* 2022). After this change in policy, many states also passed laws that regulate NIL activities, and athletes in those states that do not have NIL laws must abide by the rules of the NCAA and their school (*Laws for name, image, and likeness rights of college athletes,* 2022).

One area to look at as athletes start to sign NIL deals is looking at how schools and universities will capitalize on the outright publicity of their school through these athletes.

"Experts say colleges and universities that provide the most NIL opportunity for their athletes in this regard will benefit when it comes to future recruiting cycles" (Liffreing, 2021). Schools are turning to outside professional companies with both legal and marketing expertise in order to guide them through the new and uncertain changes regarding this new policy. One challenge to work through is the variability in legislation between states and making sure that both the school and athlete are abiding by those laws. "By not developing and implementing its own official NIL policy, the NCAA is leaving it up to its member institutions and various state legislatures to decide how NIL issues will be handled" (Romano, 2021). Though there is not yet a federal law directly dealing with NIL deals, schools are "pairing student athletes with brands that reach out, providing content for students to use to build their social presence and educating them on brand strategy and the new NIL laws – pretty much everything outside of actually brokering deals" (Liffreing, 2021).

Another area that the NCAA has been clear to define regarding NIL compensation is regarding who as a third party can be involved. In a statement released after the interim NIL policy change was announced, the NCAA made sure to clarify that third-parties who have a known and vested interest in the promotion of a certain school are defined as a booster and cannot engage in NIL deals with prospective or current student-athletes (*Interim Name, Image and Likeness Policy Guidance Regarding Third Party Involvement*, 2021). Though there are still many different aspects to work through regarding the details of NIL profits, the future of college athletes has been opened to many more possibilities because of this change in the NCAA's NIL policy.

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