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Who Owns Your Name? The Trend and Economic Impact of Personal Trademarks in the NCAA NIL Aftermath

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WHO OWNS YOUR NAME? THE TREND AND ECONOMIC IMPACT OF PERSONAL TRADEMARKS IN THE NCAA NIL AFTERMATH

Daniel Foster

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I. INTRODUCTION

As the world of sports has become increasingly commercialized, athletes' personal brands have become a popular avenue of revenue.¹ For protection and profit maximization, these athletes have begun trademarking their names and personal logos.² Athletes ranging from

¹ See Igor, *25 Outstanding Logos of Professional Athletes*, INSPIRATIONFEED, <https://inspirationfeed.com/athlete-logo-designs/> (last updated on Mar. 3, 2022).

² See Ahiza Garcia, *Pro Athletes and the Things They Trademark*, CNN (Aug. 19, 2016, 12:39 PM),

Michael Jordan to Roger Federer to Tom Brady have used these personal logos to further their brand and personalize their endorsements.³ “[L]ogo recognition boosts the marketing efforts of” athletes’ personal brands as well as their sponsor brands.⁴ In today’s social climate, “companies often seek athletes who [not] only market their brand, but also [appeal to] their [consumers’ political or social positions].”⁵ The pertinent question becomes: Who owns the intellectual property behind these trademarks and personal brands?⁶ Ownership may depend on who designed or developed the logo.⁷ In some cases, companies approach an athlete that already has a personal brand and possibly a trademark, and in other cases, these companies help develop the player’s platform and brand.⁸

Many of the recent and most recognizable cases involving these types of trademarks have come from established professional athletes since they were the only athletes able to earn from their name and

<https://money.cnn.com/2016/08/19/news/trademarks-athletes-usain-bolt-olympics/>; see also Igor, *supra* note 1 (discussing the various business-related benefits that come with a professional logo) Because these athletes are often seen on “TV commercials, print ads, . . . and special events” and are always acting as a brand or endorser, “a logo brings everything together” for the athlete, making it easy to associate a variety of brands with one individual. Igor, *supra* note 1.

³ Igor, *supra* note 1.

⁴ *Id.*

⁵ See Vejay Lalla & Albert Tawil, *The Evolving Relationship Between Brands and Athletes: What Comes Next?*, JD SUPRA (Dec. 3, 2020), <https://www.jdsupra.com/legalnews/the-evolving-relationship-between-23655/> (discussing the current trend of athletes’ “realiz[ing] their voices matter on and off the field,” leading to their speaking out and furthering both their own and their endorser’s brands); see also Michael A. Rueda & Gregory Pun, *Athlete Activism Is Changing Partnerships with Brands*, WITHERSWORLDWIDE, <https://www.withersworldwide.com/en-gb/insight/athlete-activism-is-changing-partnerships-with-brands> (Sept. 27, 2018) (discussing Nike, Inc.’s deal with Colin Kaepernick after his national anthem protest, making him “a face of the 30th anniversary commemoration of [its] ‘Just Do It’ campaign,” and Simone Manuel’s deal with TYR Sport, Inc., which included an “inclusion rider” provision “ensur[ing] that her partners extend meaningful opportunities to . . . underrepresented groups and that diversity be reflected in” her partnership with TYR).

⁶ See Lalla & Tawil, *supra* note 5.

⁷ *Id.* (addressing that ownership was historically determined by “which party was driving the overall financial commitment,” but now may depend on other factors like “whether [a] company is simply providing a platform for the individual’s preexisting brand . . . [or] launching an individual’s brand for the first time.”).

⁸ *Id.*

likeness.⁹ That all changed in June of 2021 with the decision of *NCAA v. Alston*, where the Court ruled against limiting education-related compensation,¹⁰ and the subsequent change in the National Collegiate Athletic Association (NCAA) name, image, and likeness (NIL) policy, where student-athletes are now able to earn off their name and likeness.¹¹ Due to the pressure from individual states' policy decisions and the Court's ruling in *Alston*, the NCAA made this policy change regarding NIL that it had long avoided, given its concerns about "blurring the lines between amateur and professional" sports.¹² This decision opened a "new category of personal athletic brands."¹³ Many junior athletes already have an extensive social media following and now can sign endorsement deals or create personal trademarked logos to further their brand.¹⁴ Moving forward, these junior athletes should be aware of their rights and weigh the short-term prestige of signing an endorsement deal with the potential long-term ramifications of losing ownership over their personal brands.¹⁵

⁹ See *id.* (discussing the high-profile cases of Roger Federer and Kawhi Leonard and the recent change extending rights to amateur athletes).

¹⁰ See Adarsh Annamaneni et al., *An In-Depth Summary and Analysis of the Important Alston Decision*, NAT'L L. REV. (Aug. 17, 2021), <https://www.natlawreview.com/article/depth-summary-and-analysis-important-alston-decision> (discussing the likely impacts on universities and potential costs of "gain[ing] a recruiting advantage [by] offer[ing] benefits . . . directly . . . impact[ing] [the] prospective student-athletes").

¹¹ See Michelle Brutlag Hosick, *NCAA Adopts Name, Likeness and Image Policy* NCAA (June 30, 2021, 4:20 PM), <http://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx>; Katie McInerney, *What Is NIL? NCAA Rules Are Changing Regarding Athlete Pay. Here's What It Means*, BOS. GLOBE, <https://www.bostonglobe.com/2021/06/30/sports/ncaa-nil-rules-change/> (July 2, 2021, 10:57 AM).

¹² McInerney, *supra* note 11.

¹³ See Lalla & Tawil, *supra* note 5.

¹⁴ See *id.*; see also Jeremy M. Evans, *Student-Athlete Brands in the Age of Name, Image, and Likeness*, A.B.A. (Dec. 1, 2020), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2020-21/november-december/student-athlete-brands-age-name-image-likeness/ (discussing the value of social media, where influencers are paid for advertising to large numbers of followers, and noting that student-athletes are in high-profile positions with great popularity and often large follower bases, creating opportunities for monetary gain).

¹⁵ Lalla & Tawil, *supra* note 5; Rueda & Pun, *supra* note 5; see also Evans, *supra* note 14 (discussing the value of social media where influencers are paid for advertising to large numbers of followers is; student athletes are in high profile positions with great popularity and often large follower bases, creating opportunities for monetary gain).

Personal athlete logos not only bring in money for the athletes, but they also have a large economic impact on the marketing of popular brands such as Nike and Under Armour.¹⁶ When athletes with a previously trademarked logo enter into a sponsorship relationship, the endorsement company will have to pay for and license these marks in order to use them on its clothing and products.¹⁷ This is a trend that goes beyond the athletic world as celebrities with established brands often partner with companies to launch new products, etc., and license out their image, likeness, or trademarks.¹⁸ On the flip side, if the endorsement company designs and trademarks the logo for the athlete, as was the case with Steph Curry and Under Armour or Roger Federer and Nike, that company owns the rights.¹⁹ The Supreme Court's decision in *NCAA v. Alston*, indirectly implicating name, image, and likeness,²⁰ puts companies in a position where they may be forced to consider the licensing option.²¹ With student-athletes having an earlier start in launching their brands and creating their personal logos, companies may have to use "revenue streams outside of . . . developing and owning [the] athlete's brand."²²

¹⁶ See *id.* ("Under Armour is tapping into the goodwill underlying [Tom] Brady's name and likeness as well as his personal brand.").

¹⁷ See Lalla & Tawil, *supra* note 5 (discussing the alternative methods a company can pursue, such as in Under Armour's case, where "Brady developed [and trademarked] the TB12 brand on his own," but the company, via licensing agreement, is able to "[tap] into the goodwill underlying Brady's name[,] likeness[,] [and] personal brand"); see also Anthony J. Dreyer et al., *In Brief: Sponsorship and Image Rights of Professional Athletes in USA*, LEXOLOGY (Aug. 28, 2020) <https://www.lexology.com/library/detail.aspx?g=7cb19572-e467-4c8e-a29c-f3a20c169645> (discussing how "[a]thletes commercialize their publicity rights through licensing" and can contractually define how they want their image or trademark to be used).

¹⁸ See Lalla & Tawil, *supra* note 5.

¹⁹ *Id.*

²⁰ Corinne Zucker, *Trademark Considerations for the NCAA's NIL Policy*, SPORTS LITIG. ALERT (Dec. 17, 2021), <https://sportslitigationalert.com/trademark-considerations-for-the-ncaas-nil-policy/>.

²¹ Lalla & Tawil, *supra* note 5, (discussing the pertinence of NIL intellectual property issues as the country shifts towards a decision "to allow [student] athletes to monetize their name and likeness"); see also Zucker, *supra* note 20 (arguing that trademark protection for a logo allows the athlete to decide "where the logo appears, which other parties may use it, and how it may change over the years").

²² *Id.*

To aid in understanding the prevalence of personal athlete logos and the trend of ownership and design, Section II will outline the history of this area of trademark law in the United States. It will provide background on the theory of trademark ownership and the development of this intellectual property discipline in the athletic and celebrity sphere. Section II will look at the two common and distinct processes, a company-designed logo versus an athlete-designed logo, and the modern trends in this area. Moving on from this historical discussion, Section III will examine the 2021 decision of *NCAA v. Alston*, the NCAA policy change that followed, and the potential impacts of this decision on the intellectual property and specifically the trademark law world. Finally, this will lead into a discussion of the potential long-term economic impacts on endorsement companies and how this shift will affect the economic landscape of how athletic and other brands will pursue sponsorship and personal athlete branding in the future. In conclusion, this examination will highlight the perceivably strong impact *Alston* and the NIL policy shift will have on athlete trademarks going forward, moving towards a license-centric market.

II. HISTORY AND BACKGROUND

A. *The Backdrop of Trademark Law for Logos*

A trademark can come in a variety of forms; it can be a word or name, such as “Nike”; a symbol, such as Nike’s swoosh; a slogan, such as “just do it”; or even a number, color, shape, sound, or smell.²³ Trademarks empower companies and individuals to protect their respective intellectual property and act as a sort of badge to help customers, fans, and bystanders recognize a person or brand.²⁴ These trademarks allow companies “to build a reputation in the market and . . . [help them] retain loyal clientele by instilling consumer confidence [in a product].”²⁵ The purpose of trademarks is “largely economic and market-oriented”; trademarks are

²³ *Sport and Branding*, WORLD INTELL. PROP. ORG., <https://www.wipo.int/ip-sport/en/branding.html> (last visited Sept. 17, 2022); see also *Trademark vs. Copyright: Everything You Need to Know*, UPCOUNSEL, <https://www.upcounsel.com/trademark-vs-copyright> (Nov. 11, 2020) (discussing how a logo is both copyrightable and capable of obtaining trademark protection because it is often used to distinguish one product from another); 15 U.S.C. § 1052(d) (enumerating categories of trademarks that cannot be registered).

²⁴ See *Sport and Branding*, *supra* note 23 (describing trademarks as “valuable assets” that “build trust, confidence[,] and loyalty in a product” and “represent . . . a promise kept”).

²⁵ *Id.*

often considered private goods given that “if anyone other than the mark owner simultaneously uses a particular trademark, this . . . interfere[s] with the [owner’s] benefits.”²⁶

Although it is unnecessary to register a trademark to have protection over it, registration with the U.S. Patent and Trademark Office (USPTO) gives the owner added protection against infringers.²⁷ A mark will fail the registration process if it falsely represents a connection with a person or if it will cause confusion or deception regarding the ownership.²⁸ For a trademark to be registered, there must be an actual service behind the mark.²⁹ Thus, a name or catchphrase cannot be trademarked unless it is associated with a product or service.³⁰ A young athlete must first ensure the mark is associated with something, such as themselves, and second, they should register as soon as possible before others intentionally or innocently register it before them.³¹ Once your trademark is registered,

²⁶ David W. Barnes, *A New Economics of Trademarks*, 5 NW. J. TECH. & INTELL. PROP. 22, 22–23, 25 (2006) (discussing dilution law, where the more people use a trademark, even in non-competing spheres, the less distinct that mark becomes, and this interferes with the power of the trademark). Trademarks, according to this article, are “impure public goods, with . . . uses that are rivalrous, non-rivalrous, or congesting” *Id.* at 25.

²⁷ See Julian Gonzalez, *What Is the Difference Between a Logo and a Trademark*, GOLDSTEIN PAT. L., <https://goldsteinpatentlaw.com/what-is-the-difference-between-logo-and-trademark/> (last visited Sept. 27, 2022) (explaining that individuals with a USPTO registered trademark may bring a trademark infringement claim against an infringer in federal court, which may result in damages and an injunction, while those without such registration may “still acquire some common law rights [when they] use the logo in commerce in connection with [their] business.”). The major difference with this unregistered protection is often that it is limited to its specific geographic region. *Id.*

²⁸ 15 U.S.C. § 1052(a)–(d); see also 15 U.S.C. § 1062. The USPTO uses an examiner to investigate the mark and determine whether it is in compliance with all the requirements. 15 U.S.C. § 1062. Once the examiner approves the trademark, it will last for ten years from the filing date before it must be renewed; as long as the mark is continuously renewed, it can last forever. 15 U.S.C. §§ 1058–59.

²⁹ Josh Gerben, *What Do Athletes Need to Know About Registering a Trademark*, Gerben (Sep. 17, 2022, 12:55 PM), <https://www.gerbenlaw.com/blog/what-do-athletes-need-to-know-about-registering-a-trademark/>.

³⁰ *Id.*

³¹ *Id.* (discussing Johnny Manziel and Jeremy Lin’s cases of “Johnny Football” and “Linsanity,” where both respectively attempted to be trademarked by ill-intentioned individuals; and while both athletes were able to successfully appeal to the USPTO given the marks’ strong association with these athletes, it is much safer to register as soon as possible).

you can ensure that you and anyone you choose to license the rights to are the only ones who can benefit from it.³² Upon registration, your trademark will be protected for 10 years and must be renewed at the 10-year mark to retain protection; therefore, a trademark could last forever.³³

One of the most common areas of trademark intellectual property is branding.³⁴ Branding is a vital part of business, and sporting companies, endorsement brands, and athletes are no exception to this.³⁵ When a brand uses a trademark that represents a person—such as a celebrity or an athlete—it conveys that individual’s endorsement of the brand to the public.³⁶ Intellectual property rights, such as trademarks, provide a source of protection for athletes and sports personalities against unauthorized use of their name or image; it is a way for them to further their personal brand and manage their image.³⁷ When a mark becomes famous, it garners even more protection under federal law.³⁸ For instance, trademark dilution laws protect famous marks like “Nike” and the Jordan logo by prohibiting their use for unrelated goods and services.³⁹

³² *Id.*; see also Barnes, *supra* note 26, at 24 (discussing licenses as adding a non-rivalrous and public component to trademarks, challenging the previously mentioned private goods theory). Many consumers may use a trademark without interfering with another’s use. Barnes, *supra* note 26, at 24. There are both rivalrous and non-rivalrous uses of trademarks; the dominant search-cost theory focuses on the benefit of consumers who recognize and refer to the trademark. *Id.*

³³ 15 U.S.C.S. § 1058.

³⁴ Sport and Branding, *supra* note 23.

³⁵ See also Barnes, *supra* note 26 (discussing the opportunity for sports personalities to generate significant earnings from leveraging their own brand and from sponsorship deals with brand owners. These athletes can register trademarks to their names, nicknames, poses, slogans, signatures, and more, and beyond even this protection, athletes often have image rights to prevent unauthorized use of their NIL).

³⁶ Sport and Branding, *supra* note 23.

³⁷ Sport and Branding, *supra* note 23. See also 15 U.S.C.S. §§ 1125 (c)(1) and c(2)(B(i)-(vi) (If a trademark becomes famous or extremely distinctive, it could garner protection even against people using the mark in an area where there is no confusion or competition, and if a mark is widely recognized by consumers as a source of a good, it may be famous, and courts will look to a variety of factors to determine the dilution of the mark).

³⁸ *Overview of Trademark Law*, Intellectual Property in Cyberspace: Library Catalogue [in small caps], <https://cyber.harvard.edu/metaschool/fisher/domain/tm.htm#8> (Last visited Sept. 20, 2022). Federal courts look to a variety of dilution factors, but under state law, a mark need not be famous for the owner to bring a dilution claim; the mark must only have selling power and the two marks must be substantially similar. *Id.*

³⁹ See *id.*

B. *History of Athletic Logos*

Trademarks are a common way for individuals to earn from their intellectual property,⁴⁰ including their art and design, name, or initials.⁴¹ Athletic careers are typically short, thus, the earning life of an athlete may be short.⁴² Intellectual property rights allow athletes to continue earning from their likenesses in perpetuity.⁴³ Athletes can trademark their signatures,⁴⁴ names, slogans,⁴⁵ and logos.⁴⁶ The phenomenon of trademarking athletes' logos began in 1984 when Nike created the "Jumpman" logo for Michael Jordan based on a *LIFE Magazine*

⁴⁰ *Matal v. Tam*, 137 S.Ct. 1744, 1764 (2017) (acknowledging trademarks' commercial function).

⁴¹ Gonzalez, *supra* note 27; *see also Personal Logos of the Top 4 in Men's Tennis*, TONI MARINO, <https://tonimarino.co.uk/personal-logos-of-the-top-4-in-mens-tennis/> (last visited Sept. 20, 2022). While it is more common for athletes to build personal brands around initials or numbers, the nickname of Rafael Nadal, a professional tennis player, inspired his logo. *Personal Logos of the Top 4 in Men's Tennis*, *supra* note 41. Early in his career, the public gave Nadal the nickname Raging Bull, so Nike created a simple logo of two lightning bolts resembling a bull head. *Id.*

⁴² Judy Martel, *Pro Athletes: How To Navigate Short Careers, Long Retirements*, FORBES (Jul. 17, 2015), <https://www.forbes.com/sites/rbcwealthmanagement/2015/07/17/pro-athletes-how-to-navigate-short-careers-long-retirements/?sh=dce4c0769802> (stating that the average major sport career lasts less than six years).

⁴³ Abby R. Glaus, *The Intersection of Trademark Law, Athletes, and Money: A "Three-Peat®"*, 32 MARQ. SPORTS L. REV. 583, 593–94 (2022) ("The perpetuity of a trademark is . . . as long as it is used in commerce [T]his blocks others' right to protection for a lifetime or more.").

⁴⁴ Ahiza Garcia, *Pro athletes and the things they trademark*, CNN MONEY (Aug. 29, 2019, 12:39 PM), <https://money.cnn.com/2016/08/19/news/trademarks-athletes-usain-bolt-olympics/>.

⁴⁵ Gerben, *supra* note 29.

⁴⁶ *See* Chris Dolmetsch & Christopher Yaszko, *Pro Athletes Like the 'Greek Freak' Are Going After Trademark Violators*, BLOOMBERG (Dec. 20, 2021), <https://www.bloomberg.com/news/articles/2021-12-20/pro-athletes-like-nba-s-greek-freak-are-suing-trademark-violators> (discussing how generic phrases and slogans can be difficult to trademark, as Lebron James found when he unsuccessfully tried to trademark "Taco Tuesday," but some less generic phrases can garner protection, such as Green Bay Packers lineman Rashan Gary's trademark for "Put Cheese On Everything").

photograph.⁴⁷ Brands then realized the potential that particular athletes had in leveraging sales and products through their individualizations.⁴⁸

The monogram is one of the oldest forms of graphic identity;⁴⁹ in the Middle Ages, artists commonly marked their art with monograms, which were protected against infringement.⁵⁰ According to U.S. trademark data, initials appear today in sports logos 13% more than any other trademarks.⁵¹ Today, athletes commonly use this monogram-style marking, often combining their initials with their uniform numbers to form a logo that is nearly illegible but unique to that individual.⁵²

⁴⁷ Victor Santo, *Get to Know a Brief History About Athletes Logos*, STREETOPIA (Jan. 21, 2021), <https://www.streetopia.me/m/news/600a3bb1ed270b452919a112/get-to-know-a-brief-history-about-athletes-logos>; *Nike Trademarks: Everything You Need to Know*, UPCOUNSEL (Jun. 30, 2020), <https://www.upcounsel.com/nike-trademarks>; see also *Rentmeester v. Nike Inc.*, 883 F.3d 1111, 1116 (9th Cir. 2018). In 1984, Jacobus Rentmeester photographed Jordan in midair as he was about to dunk. *Id.* Rentmeester later claimed that Nike paid him for temporary use of this image, and he sued for infringement due to their extended use. *Id.* Ultimately, Nike paid the photographer \$15,000 to continue using the image for two years in North America; all other rights still belonged to Rentmeester. *Id.* In 1987, Nike commissioned its own photograph of Jordan and used that photo to create the famous logo. *Id.* Nike succeeded against Rentmeester in subsequent lawsuits because the court found that the new image was unmistakably different in material details. *Id.*

⁴⁸ Santo, *supra* note 47.

⁴⁹ Nancy Sharon Collins, *The Modern Monogram: A Historic Survey of Ciphers, Marks and Monograms*, PRINT (Aug. 6, 2019), <https://www.printmag.com/culturally-related-design/the-modern-monogram-a-historic-survey-of-ciphers-marks-and-monograms/>.

⁵⁰ Edward S. Rogers, *Some Historical Matter concerning Trade-Marks*, 9 MICH L. REV. 29, 32–33 (1910).

⁵¹ James Bowie, *Why Colleges are Recruiting Student Athletes with Personalized Logos*, MEDIUM (Jul. 6, 2021), <https://marker.medium.com/why-college-athletes-are-suddenly-adopting-personal-logos-4478a6b00f46> (discussing the trend of thick lines that jut off at sharp angles making a difficult-to-read monogram).

⁵² *Id.* (discussing the common expression of thick lines that jut off at rakish angles to create an initial that requires the onlooker to decipher); see also *Personal Logos of the Top 4 in Men's Tennis*, TONI MARINO, <https://tonimarino.co.uk/personal-logos-of-the-top-4-in-mens-tennis/> (discussing professional tennis player, Andy Murray, who had his logo designed by Aesop Agency. It was initially just going to appear on his court bag and training t-shirts. That then led to his logo appearing on a variety of Under Armour products after he signed an endorsement deal. His logo is unique because it spells out his

In 2006, Roger Federer first wore his “RF” initials, a concept that originated with his wife who used it for a fragrance in 2003.⁵³ Federer wished to retain that “RF” logo after the fragrance was discontinued, so Nike modified the design and created the “RF” logo that we know today.⁵⁴ Due to Nike’s modification of the design and their control over the process, they trademarked the “RF” logo and had full ownership over it.⁵⁵ Over the next 12 years, Nike sold hats, shirts, and other paraphernalia with the “RF” logo.⁵⁶ When Federer parted ways with Nike and signed a new ten-year endorsement deal with UNIQLO, his “RF” mark stayed with Nike, against his will.⁵⁷ Federer was left without his logo and Nike was left in a difficult position of not wanting to lose its asset while also not wanting to risk liability of misleading the public by selling items with the mark, which might risk adverse publicity and loss of the fan base Nike had acquired.⁵⁸ Ultimately, Federer purchased the trademark from Nike through his Swiss company, Tenro AG, for a high price and now licenses it to UNIQLO for use on his current athletic apparel, hats, and shoes.⁵⁹

In a similar situation in 2019, Kawhi Leonard, a member of the Los Angeles Clippers, filed suit against Nike over the rights to his “Klaw” logo.⁶⁰ Leonard had designed a version of the logo eight years prior and forwarded his design to Nike when they reached out wanting to make a logo for him.⁶¹ Nike designed and obtained a registered copyright on their

monogram, “AM,” but also displays the number 77, the number of years it took for a British tennis player to win Wimbledon, which he did in 2013.).

⁵³ Tom Collins, *Advantage Federer: Return of the “RF” Logo*, STEVENS & BOLTON (Dec. 8, 2020), <https://www.stevens-bolton.com/site/insights/articles/advantage-federer-return-of-the-rf-logo>.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* (discussing Nike’s trademark registrations in various jurisdictions, including the UK in 2008 and the EU in 2009).

⁵⁸ *Id.* (discussing the UK/EU laws where a trademark may be cancelled if the registration is liable to mislead the public, and further, any use of Federer’s name by Nike would risk infringing on the “Roger Federer” trademark owner by him personally).

⁵⁹ *Id.*

⁶⁰ Ella Chochrek, *Nike Scores Partial Win Against Kawhi Leonard Over Claw Logo*, FOOTWEAR NEWS (May 20, 2020, 11:26AM), <https://footwearnews.com/2020/business/legal-news/nike-kawhi-leonard-claw-logo-lawsuit-1202991746/>.

⁶¹ Gaetano Urgo, Comment, *Klawing for Protection: Kawhi Leonard’s Battle with Nike over Intellectual Property Rights*, 16 DEPAUL J. SPORTS L. 54, 65–66 (2020).

own version of the “Klaw” based off of Leonard’s image and began using it on merchandise.⁶² Leonard wished to use the logo for commercial purposes and in connection with his charities, but when he obtained trademarks for it, Nike demanded a cease and desist of his use.⁶³ Nike claimed that it was the exclusive owner of the design and all intellectual property rights in the logo because the design was developed in-house on a work for hire basis.⁶⁴ Upon suit, the court ruled in favor of Nike and denied Leonard’s claim to the logo.⁶⁵

C. *The Shift from Company-Designed to Athlete-Designed*

This type of intellectual property ownership seen with Federer and Leonard has been the norm among athletes and endorsement companies.⁶⁶ In recent years, Under Armour launched collaborations with Stephen Curry and Jordan Spieth, filing trademarks for their “SC” and “JJS” logos respectively.⁶⁷ Additionally, Nike has designed and retained ownership rights over a plethora of athlete logos.⁶⁸ The Kawhi Leonard example is one of the most recent to be read in the news, but some notable athlete logos that Nike owns include: Michael Jordan, LeBron James, Kevin Durant, Rafael Nadal, Naomi Osaka, Kyrie Irving, and Ken Griffey Jr., among many others.⁶⁹ It may seem more natural for these logos to belong to the individual that they represent, but this is often not the case.⁷⁰ The Federer situation is a prime example of having to buy back the right to a logo that represents your initials, a logo that your fame made popular; it may seem backward, but this has long been the dominant method.⁷¹ The issue for an athlete is whether there is a clear mechanism for an athlete to

⁶² *Id.* at 66.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 71.

⁶⁶ Julia Schroeder, *The “#RFcapisback?”: What the Fight over Roger Federer’s Iconic Logo Highlights About Protecting Personal Brands*, MIA. BUS. L. REV.: UMBLR INSIGHTS (Feb. 22, 2021), <https://business-law-review.law.miami.edu/rfcapisback-fight-roger-federers-iconic-logo-highlights-protecting-personal-brands/>.

⁶⁷ Collins, *supra* note 53.

⁶⁸ *Id.*

⁶⁹ *Nike Trademarks*, GERBEN LAW, <https://www.gerbenlaw.com/trademarks/footwear/nike/> (last visited Feb. 9, 2022).

⁷⁰ Schroeder, *supra* note 66 (noting the importance for young athletes to be aware of the implications that come with contracting their personal identities).

⁷¹ *Id.*

regain ownership once the relationship potentially ends.⁷² Federer faced this reality and had to pay a large sum, leading the public to believe athletes may push to have more control moving forward.⁷³

While it is historically more common for these sponsorship companies to design logos and retain trademark rights, there has been a modern shift towards the athletes creating and marketing their own brand.⁷⁴ Tom Brady is an example of this, as he developed his own TB12 logo and brand.⁷⁵ Rather than relying on an endorsement company to develop his brand, companies must instead compensate Brady for using his personal brand to further their own business.⁷⁶ Similarly, professional basketball player Giannis Antetokounmpo, who obtained a trademark on the phrase “The Greek Freak,” is now able to police unlicensed “Greek Freak” branded goods for infringement.⁷⁷ Finally, while the original Tiger Woods logo was designed and owned by Nike, Woods now holds the ownership rights over the logo’s redesign.⁷⁸ As shown by the prior examples, when an athlete registers their logo as a trademark, the athlete

⁷² *Id.*

⁷³ Collins, *supra* note 53.

⁷⁴ Lalla and Tawil, *supra* note 5; *see also*, Collin Binkley, *More NCAA athletes seek own trademarks*, THE DETROIT NEWS, (Aug. 27, 2015) <https://www.detroitnews.com/story/business/2015/08/27/college-sports-trademarks/32477447/> (discussing how in professional sports, athletes regularly register trademarks for nicknames, taglines, and such, and then license the monikers to be used on endorsement company merchandise for hefty sums). A few examples discussed include Marshawn Lynch’s “Beast Mode,” Jeremy Lin’s “Linsanity,” and Tim Tebow’s “Tebowing.” Binkley, *supra* note 74.

⁷⁵ Lalla and Tawil, *supra* note 5 (discussing Under Armour’s endorsement deal where they sell certain TB12 branded apparel).

⁷⁶ *Id.* (stating that this business model is becoming more common not just in sports but in the celebrity consumer world where individuals are partnering with larger brands).

⁷⁷ *Id.*; *see also*, Chris Dolmetsch and Christopher Yaszko, *Pro Athletes Like the ‘Greek Freak’ Are Going After Trademark Violators*, BLOOMBERG (Dec. 20, 2021), <https://www.bloomberg.com/news/articles/2021-12-20/pro-athletes-like-nba-s-greek-freak-are-suing-trademark-violators>. This article notes that Antetokounmpo has sued sellers of shower curtains, a spice blend, and cartoon stickers, all selling under his Greek Freak trademark without authorization. Dolmetsch & Yaszko, *supra* note 77. Interestingly, the spice blend did not qualify as counterfeiting given Antetokounmpo’s mark is not registered in any class relating to food, and a reasonable consumer wouldn’t be tricked into thinking they’re buying a genuine Greek Freak spice blend. *Id.*

⁷⁸ Matthew Price, *The 8 best logos of professional athletes*, 99DESIGNS, <https://99designs.com/blog/logo-branding/best-logos-professional-athletes/> (last visited Sept. 20 2022) (discussing that Tiger Woods created this new logo to separate his brand from Nike since they no longer make golf equipment).

has control; they decide where the logo appears and who may license it for use on their product.⁷⁹

Finally, amateur student-athletes historically have not had the opportunity to earn off their likeness.⁸⁰ While professional athletes could trademark their personal logos, monetize their brand, sign endorsement contracts, and earn off their name—college athletes were previously unable to accept endorsement-based, non-educational monetary benefits.⁸¹ The NCAA prohibited its athletes from accepting any outside money, believing scholarships and stipends were sufficient.⁸² All of this changed in 2021 after years of pushback against the NCAA's *Name, Image, and Likeness policy*.⁸³

III. THE IMPACT OF NAME, IMAGE, & LIKENESS DEVELOPMENT

Up to this point, we have discussed the historical and legal backdrop to personal branding in athletic trademarks.⁸⁴ We have addressed the trend towards athletes taking control and ownership over their trademarks,⁸⁵ but what kinds of effects might this have on the endorsement landscape? Further, an interesting development arose in the past year that will likely overhaul the way young athletes look at their personal brand and change their strategy moving forward.⁸⁶ In June of 2021, the United States Supreme Court (SCOTUS) upheld the Ninth Circuit's decision stating the NCAA cannot limit any benefits to student-athletes related to education.⁸⁷ This decision indicated that the NCAA's amateurism model is cracking, and SCOTUS will be on the student-athlete's side in the future.⁸⁸ It did not take long for the NCAA to succumb to the State by State

⁷⁹ Ed Mantilla, *Name, Image, Likeness, And Interplay With Intellectual Property*, JDSUPRA (Jul. 8, 2021), <https://www.jdsupra.com/legalnews/name-image-likeness-and-interplay-with-5098268/>.

⁸⁰ McIerney, *supra* note 11.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *See generally, supra* Part II.

⁸⁵ *See generally, supra* Part II.C

⁸⁶ *The U.S. Supreme Court NINE, the NCAA NIL!*, STRADLEY RONAN 1, 2 (Aug. 9, 2021), <https://www.stradley.com/-/media/files/publications/2021/08/client-alert-ip-education-august-9-2021.pdf>

⁸⁷ Adarsh Annamaneni et al., *An In-Depth Summary and Analysis of the Important Alston Decision*, 11 THE NAT'L L. REV. (Aug. 17, 2021), <https://www.natlawreview.com/article/depth-summary-and-analysis-important-alston-decision>.

⁸⁸ *Id.*

pressure and the *Alston* decision, and change its long-standing policy on college athletes' ability to earn off their name, image, and likeness. How will this decision add to the above-mentioned trend? What kind of economic impact may this shift, the *Alston* decision, and the NIL policy change have on endorsement brand companies? This next section will attempt to answer these questions.

A. *The Significance of the NIL Decision*

The United States Supreme Court in *NCAA v. Alston* upheld the district court's order enjoining the NCAA from enforcing limits on education-related benefits, basically making for less restrictive rules related to educational benefits.⁸⁹ The NCAA is still able to restrict non-education-related compensation to their athletes, but this case lays the groundwork for a potential future challenge to this restriction as well.⁹⁰ Before the *Alston* decision, compensation was limited to the cost of attendance, so benefits unrelated to education as well as benefits tied to education were restricted.⁹¹ Although the purposeful lack of pay separates amateur college sports from professional sports, there has been much debate about whether college athletes should be compensated in some way for the revenue they bring to a university.⁹² The district court in *Alston* agreed that there was a purpose for limiting compensation, keeping college and professional athletics separate, but concluded that the NCAA could limit compensation through less restrictive means, a theory that the Supreme Court affirmed.⁹³ According to the Court, since education-related benefits are clearly different from professional athletic compensation, there should not be limits on these benefits.⁹⁴ Both the district court and the Ninth Circuit found a need to craft a balance that prevents anticompetitive harm to student-athletes while still preserving the amateur aspect of the sport.⁹⁵ Supreme Court Justice Kavanaugh stated in his concurrence that “[n]owhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate . . . The NCAA is not above the law.”⁹⁶

⁸⁹ Zucker, *supra* note 20.

⁹⁰ *NCAA v. Alston*, 135 HARV. L. REV. 471, 471 (2021).

⁹¹ *Id.* at 471–72.

⁹² *Id.* at 480.

⁹³ *Id.* at 473–74.

⁹⁴ *NCAA v. Alston*, *supra* note 90.

⁹⁵ *Id.*

⁹⁶ *Id.*

This case marked the first time the Supreme Court stated that the NCAA compensation rules were subject to the rule of reason test under the Sherman Act.⁹⁷ This test requires an analysis of the relevant product and geographic market, the market power of the defendants in the relevant market, and the existence of anticompetitive effects.⁹⁸ The Court essentially shifts the burden onto the defendants to show a procompetitive justification.⁹⁹ The NCAA has one sole justification for its remaining rules—they enhance college athletics by distinguishing them from their professional counterparts.¹⁰⁰ This justification fails to satisfy the second prong of the above mentioned rule to reason test.¹⁰¹ The Supreme Court established that “antitrust rules do apply to labor market rules in collegiate athletics.”¹⁰² Due to the introduction of this test by the Court, and the clear failure by the NCAA, there is room for more changes in the future.¹⁰³ Justice Kavanaugh’s concurrence even seems to invite a challenge on the remaining rules, foreshadowing more significant changes moving forward.¹⁰⁴

It did not take long before the NCAA took notice of the changing landscape.¹⁰⁵ Just days after this ruling, there was a hearing in the case of *House v. NCAA* which resulted in the NCAA implementing an interim policy that suspended the NCAA NIL rules for incoming and current student-athletes. This ruling allows these athletes to make money from a variety of business ventures and not lose their eligibility.¹⁰⁶ While this new

⁹⁷ *Id.*

⁹⁸ *Antitrust Standards of Review: The Per Se, Rule of Reason, and Quick Look Tests*, BONALAW (last visited Sept. 25, 2022), <https://www.bonalaw.com/insights/legal-resources/antitrust-standards-of-review-the-per-se-rule-of-reason-and-quick-look-tests>.

⁹⁹ *NCAA v. Alston*, *supra* note 90.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *NCAA v. Alston*, *supra* note 90.

¹⁰⁶ *Id.*; see also *The U.S. Supreme Court Nine, the NCAA NIL!*, STRADLEY RONON (Aug. 9, 2021), <https://www.stradley.com/insights/publications/2021/08/ip-and-education-client-alert-august-2021>; Michelle Hosick, *NCAA Adopts Interim Name, Image and Likeness Policy*, NCAA (Jun. 30, 2021, 4:20 PM), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx> (the NIL policy includes: individuals can engage in NIL activities consistent with state law, college athletes in a state without an NIL law can engage in the activities without violating the NCAA rules, the student-athletes

policy does preserve the fact that college sports are not pay-for-play, for the first time, the door is open for student-athletes to monetize their brand and earn off of their likeness.¹⁰⁷ Students are still unable to monetize their time on the field or court, but the restrictions are looser than ever.¹⁰⁸ The *Alston* decision pushed this pay-for-play concept closer to fruition; only time will tell where the NCAA rules expand.¹⁰⁹

This NIL policy change was perhaps the biggest change to ever occur in college athletics, and it opened the world of endorsements, compensation, and sponsored social media content.¹¹⁰ The policy, often referred to as NIL, standing for “name, image, and likeness,” allows college athletes at every level to earn off their name, image, or likeness.¹¹¹ Examples of NIL activities include advertising for a business, autographs, personal appearances, sale of merchandise with the athlete’s NIL, or representation in movies or video games.¹¹² Part of this could come from trademarks, which allow consumers to associate a brand with a particular good or service; it’s a way for these young athletes to license out and develop their brand.¹¹³ Following this NCAA NIL policy in the wake of the *Alston* decision, student-athletes are no longer amateurs when it comes to building their brand through intellectual property.¹¹⁴ More than 450,000

can use NIL professional service providers, and they should report their NIL activities to their school).

¹⁰⁷ *Id.*

¹⁰⁸ *NCAA v. Alston*, *supra* note 90.

¹⁰⁹ *See id.*

¹¹⁰ McInerney, *supra* note 11; *see also* Christopher Pham et al., *Maximizing Your Worth: Name, Image and Likeness (NIL) Rights in Amateur Athletics*, FREDRIKSON & BYRON (Jul. 29, 2021), https://www.fredlaw.com/news__media/maximizing-your-worth-in-amateur-athletics/. The authors note that the beginning of this shift occurred in 2009 following UCLA basketball player’s lawsuit). Pham et. al., *supra* note 110. Former UCLA basketball player Ed O’Bannon sued the NCAA arguing that men’s Division I football and basketball players should be compensated for the use of their NIL in the NCAA Basketball and NCAA Football video games. *Id.* The Ninth Circuit found in O’Bannon’s favor in 2015, and while they stopped producing these video games, the ruling that they violated the Sherman Antitrust Act opened the door for further change. *Id.*

¹¹¹ McInerney, *supra* note 11.

¹¹² Katlyn Andrews and Kyra Castano, *The Future of Name, Image and Likeness in Higher Education*, BAKERTILLY (May 25, 2021), <https://www.bakertilly.com/insights/the-future-of-name-image-and-likeness-in-higher-education>.

¹¹³ *See id.*; *see, e.g.*, Collins, *supra* note 53.

¹¹⁴ *See* Andrews & Castano, *supra* note 112.

student-athletes are now facing this transition, and it appears that the student-athlete experience is forever changed.¹¹⁵

As of January of 2022, the NCAA Board of Governors approved a newly proposed constitution placing more NIL policy authority in the hands of universities and conferences.¹¹⁶ Most universities are expected to permit NIL deals, but various policies will likely soon be implemented to restrict access to certain NIL opportunities.¹¹⁷ This policy change comes three years after California passed its Fair Pay to Play Act, which “made it illegal for state schools to prohibit athletes from [earning] off their [NIL].”¹¹⁸ This law will not be enacted until 2023, but it clearly oversteps prior NCAA rules.¹¹⁹ Since the California decision, nineteen other states have passed similar NIL laws (some of which have already gone into effect) and others that will be enacted between now and 2025.¹²⁰ The NCAA has been pressured and pushed into this policy change, likely to try to preempt these state laws and make its own guidelines reflect the trend.¹²¹ Given the NCAA was unable to prompt Congress to pass a nationwide NIL law, states have full control over their NIL policies, and some states would thus have a strong advantage in future recruitment.¹²² The NCAA has followed suit to avoid these unfair advantages and stay ahead of the nationwide trend.¹²³ This policy does not allow athletes to accept payments by specific athletic programs as incentives, and it does not allow schools

¹¹⁵ STRADLEY RONON, *supra* note 106.

¹¹⁶ Skyler Hicks, *What Brands Can Expect from College Sports’ Ever Evolving NIL Landscape*, THE NATIONAL LAW REVIEW (Jan. 20, 2022), <https://www.natlawreview.com/article/what-brands-can-expect-college-sports-ever-evolving-nil-landscape>.

¹¹⁷ *Id.* (discussing that BYU, for instance, is requiring student NIL deals to adhere to their honor code, prohibiting the promotion of alcohol, tobacco, or caffeine products).

¹¹⁸ McNerney, *supra* note 11.

¹¹⁹ *Id.*

¹²⁰ *Id.* (discussing seven states—Alabama, Florida, Georgia, Kentucky, Mississippi, New Mexico, and Texas—which immediately implemented this into law within a week of the NIL policy change).

¹²¹ *Id.*; see also Dan Murphy, *Schools Brokering Name, Image and Likeness Deals Adds Layer to College Conundrum*, ESPN (Feb. 7, 2022), https://www.espn.com/college-football/story/_/id/33229931/schools-brokering-name-image-likeness-deals-adds-layer-college-conundrum (discussing the implications of the new NIL changes in college sports).

¹²² McNerney, *supra* note 11 (discussing the significant edge that schools in eight states with new laws in 2021 would gain when it came to recruiting top athletes who wanted to profit off the NIL immediately).

¹²³ *Id.*

to pay their athletes directly for nonacademic purposes.¹²⁴ Further, athletes are mostly unable to use their university's intellectual property in conjunction with their name; instead, it is strictly the athlete's name, image, and likeness that they can benefit from.¹²⁵

The NCAA has long been concerned about changing this policy, primarily because they fear blurring the line between amateur and professional sports.¹²⁶ The claim has been that consumers enjoy college sports because they are unpaid amateurs and the ability to earn off NIL could negatively affect the competitive balance.¹²⁷ On the flip side, there lies an argument that it will strengthen the level of college play due to the incentives to stay and compete at the college level.¹²⁸

Beginning on July 1, 2021, when this policy was set in place, student-athletes began taking advantage of the NIL opportunities at their

¹²⁴ *Id.*; see also Zach Braziller, *NCAA Changes College Sports Forever: 'An Entirely New Landscape'*, N.Y. POST (June 30, 2021), <https://nypost.com/2021/06/30/ncaas-new-nil-rule-changes-everything/> (discussing how this policy change has a variety of guidelines, including: “deals cannot serve as recruiting inducements[;] athletes cannot receive benefits without services given[;] agents or representation are allowed for NIL benefits[;] schools cannot be involved in creating opportunities for their athletes[;] and players cannot promote alcohol, legal drugs like cannabis, tobacco products, adult entertainment, or gambling.”).

¹²⁵ McInerney, *supra* note 11; see also Hicks, *supra* note 116 (discussing how these NIL deals range from massive six figure deals to hundred dollar deals to even non-cash compensation).

¹²⁶ *NCAA v. Alston*, *supra* note 90, at 473.

¹²⁷ *Id.* at 476.

¹²⁸ See Braziller, *supra* note 124 (discussing how many high school basketball prospects have recently decided to earn money in the G-League rather than play a year in college); see also Hagens Berman, *Expanded Class-Action Lawsuit Against the NCAA Seeks Broader Damages for College Athletes Denied Name, Image and Likeness Rights*, ACROFAN (July 28, 2021, 9:23 AM), <https://us.acrofan.com/detail.php?number=507277> (discussing the various agreements student athletes have entered into, including “clothing brands, beverage companies, restaurants, cell phone companies, video games,” and local retailers). If high school athletes had the ability to earn money while in college, perhaps some of these athletes would have chosen college instead. Braziller, *supra* note 124. Similarly, earning money while in school and raising their draft stock could college a more attractive option for football players and keep them in school for an extra year. *Id.* Former Ohio State University quarterback Cardale Jones said he would have stayed for a fifth year if the NIL laws were different back when he decided to go pro, believing he would have made more money as a household name in his college town than he did being selected low in the draft. *Id.*

fingertips.¹²⁹ These student-athletes quickly utilized trademarks, unveiling personal logos via social media.¹³⁰ They have taken a cue from professional athletes who seem to all have a personal logo today, and similar to many before them, have trademarked some version of their monogram.¹³¹ Within a few weeks of the decision, the quarterbacks for Wisconsin and Oklahoma Football, respectively, filed trademarks for logos related to their names.¹³² These two athletes, and the plethora of others who have done the same, may never make it in the NFL, but these early trademarks allow them to start earning off their likeness with the amount of stardom they currently have.¹³³ Some colleges have already started designing logos for their athletes; USC designed logos for their entire men's basketball roster, and Texas and Oklahoma did the same for their incoming football players.¹³⁴ Since this NIL decision, colleges are

¹²⁹ Berman, *supra* note 128 (discussing the various agreements student-athletes have entered into, including clothing brands, beverage companies, restaurants, cell phone companies, video games, and local retailers); *see also* Braziller, *supra* note 124 (discussing how these athletes “can monetize their social media followings, brand themselves or host a sports clinic, sign autographs, or make paid appearances, appear in commercials or endorse products”).

¹³⁰ Bowie, *supra* note 51; *see also* Evans, *supra* note 14 (discussing how trademark protection over an athlete's personal brand may have the added positive impact of showing corporate responsibility, making them more valuable brand partners to sponsors).

¹³¹ Bowie, *supra* note 51.

¹³² Brendan Menapace, *College Athletes are Already Gearing Up for Merchandise After Supreme Court NCAA Ruling*, PROMO MARKETING (July 1, 2021), <https://magazine.promomarketing.com/article/college-athletes-are-already-gearing-up-for-merchandise-after-supreme-courts-ncaa-ruling/>.

¹³³ *Id.*; *see also* Shanna McCarriston, *Bronny James, LeBron James' 17-Year-Old-Son, Files Trademarks for NFTs, Clothing Apparel and Video Games*, CBS SPORTS (Feb. 3, 2022, 1:20 PM), <https://www.cbssports.com/nba/news/bronny-james-lebron-james-17-year-old-son-files-trademarks-for-nfts-clothing-apparel-and-video-games/> (discussing how Bronny James, LeBron James' son, recently filed three trademark applications for “Bronny,” “Bronald,” and monogram-type logo of stylized letters “BJ JR” as a seventeen-year-old high school Junior. These trademark applications include uses in multimedia entertainment services, clothing, and potential future NFTs.)

¹³⁴ Bowie, *supra* note 51; *see also* Dan Murphy, *Schools brokering name, image and likeness deals adds layer to college conundrum*, ESPN (Feb. 7, 2022) https://www.espn.com/college-football/story/_/id/33229931/schools-brokering-name-image-likeness-deals-adds-layer-college-conundrum (discussing how BYU became the first school to broker a full teamwide deal for its athletes, when a BYU alum and CEO of a protein bar company offered to give endorsement deals to each of the team's walk-on players so that they could cover tuition and the Athletic

having to pivot their brand consulting to attract new players and help them build their personal brands.¹³⁵ While very few players will actually earn off of their trademarked logo—only those with the star power to sell items—this creates for those star players an early branding platform that will carry over into their potential professional careers and future endorsement deals.¹³⁶

A college athlete's name is the first thing the public will recognize and perhaps associate with a brand; therefore, these athletes should create a sound trademark strategy around their name.¹³⁷ A strong trademark strategy allows athletes to control how their name is used and protect themselves against undesired uses and associations, however they must ensure that the trademark be used in commerce to receive protection.¹³⁸

Another added consideration is the endorsement company's market strategies.¹³⁹ In addition to the athletes' ability to earn non-educational funding since the *Alston* decision and NCAA NIL policy shift, companies are able to market on a wider scale.¹⁴⁰ Therefore, all of the college student-athletes that have been approached for partnerships with local companies, social media brands, clothing brands or shoe companies

Director of BYU has set up the details of endorsement deals and NIL opportunities totaling more than \$1 million for over 450 athletes in a range of sports).

¹³⁵ *Id.*; see also, Leah Vann, *Here's how LSU baseball players are starting to capitalize on NIL opportunities*, THE ADVOCATE (Feb. 9, 2022 3:08 PM), https://www.theadvocate.com/baton_rouge/sports/lsu/article_5eb06be4-89ec-11ec-8ffe-6b5b516a9e44.html (discussing how at LSU, some athletes are working with "Blue Chip," a consumer platform where athletes can design, collaborate, and showcase their brand. Blue Chip's executive director says they sit for a thirty-to-sixty-minute design session with their athletes where they learn about them and get to create a brand identity and logo for that athlete).

¹³⁶ *Id.* (discussing how in all reality, everyone will think they should get something, but most athletes won't get anything); see also, Braziller, *supra* note 124 (discussing how multiple experts believe that elite athletes will earn into the seven figures).

¹³⁷ Zucker, *supra* note 20 (discussing the benefit of a logo making it possible to connect a particular athlete's logo to what a company might do).

¹³⁸ *Id.*; Gonzalez, *supra* note 27.

¹³⁹ See John Post, *Small Business Owners See New Opportunities with NIL Era in College Athletics*, Talkbusiness (Sep. 1, 2021) <https://talkbusiness.net/2021/09/small-business-owners-see-new-opportunities-with-nil-era-in-college-athletics/> (discussing the scramble of local businesses securing endorsements with college athletes, from nutrition shops to moped companies to law firms).

¹⁴⁰ *Id.*

can now accept these endorsements.¹⁴¹ These athletes may already have a logo prepared for these companies to license and may already have a base of followers on social media.¹⁴² Although this may take away from a large company's ability to own an athlete's logo, it provides a huge new platform for smaller companies to license and feature student-athlete marketing tools that they couldn't touch previously.¹⁴³ Small town businesses such as car dealerships may not be able to afford a big celebrity endorsement, but local college star athletes give them a new avenue of advertising.¹⁴⁴ An MMA gym offered to pay the Miami football team to promote his gym on social media, Degree Deodorant created a 5 million dollar plan to give NIL endorsements, a Baylor Basketball player sold all his gear after their 2021 championship, and twin Fresno State Basketball players signed deals with Boost Mobile and Six Star nutrition.¹⁴⁵ Finally, the Alabama quarterback is on track to earn one million dollars in endorsement deals within the first year of this NCAA decision.¹⁴⁶ It

¹⁴¹ See *id.* (discussing the scramble of local businesses securing endorsements with college athletes, from nutrition shops to moped companies to law firms).

¹⁴² Austin Green, *How local businesses, college athletes are taking advantage of the NIL era*, NATIONAL CENTER FOR BUSINESS JOURNALISM, (Oct. 20, 2021) <https://businessjournalism.org/2021/10/how-local-businesses-college-athletes-are-taking-advantage-of-the-nil-era/> (discussing how an athlete's social media affects their NIL earnings even more than their athletic performance, with NIL compensation of over \$11,000 for over 50,000 followers but only \$300 for under 5,000 followers); see also Evans, *supra* note 14 (discussing the difference of college athlete brand partnerships on social media given sports are played weekly or even daily; they are on television at least every week during college sports season, growing their popularity quicker than many other brand ambassadors could).

¹⁴³ Green, *supra* note 142 (discussing the importance of community for local vendors, seeing these NIL partners as community investment not just in the present but in the future; further discussing the importance of local companies sponsoring local student-athletes so that recruiting doesn't shift towards the places that they can get more endorsements).

¹⁴⁴ *Id.* (discussing the massive new marketing opportunity for local businesses, whether or not the ultimate return on investment is a success).

¹⁴⁵ Lily Ford, *Name, Image, Likeness: What's Really Going On In The NCAA*, GMTM, (Oct. 30, 2021) <https://gmtm.com/articles/whats-happening-with-name-image-likeness-2021>; see also Hayleigh Colombo, *Here's how much money Ohio State athletes have made from NIL deals so far*, COLUMBUS BUSINESS FIRST, (Jan. 24, 2022), <https://www.bizjournals.com/columbus/news/2022/01/24/osu-athletes-nil-deals.html> (discussing how during the first six months of the rules' existence, 220 Ohio State Athletes have earned a total of \$2.98 million dollars in NIL deals).

¹⁴⁶ Ford, *supra* note 145.

appears as though this policy change may increase the number of sponsors on the scene, opening up the field for smaller local sponsors.¹⁴⁷ Further, it will increase the number of trademarks filed as every college athlete that wishes to earn off their likeness has the opportunity to design and market their brand—whether that’s with an endorsement giant like Nike or a locally owned shop.¹⁴⁸

This NIL policy provides a great opportunity for athletes that wouldn’t otherwise be considered profitable.¹⁴⁹ The policy doesn’t only affect sports like football and basketball, but also likely allows swimmers, gymnasts and track stars to develop and earn off of their own brands as well.¹⁵⁰ It’s rare to make the NBA or NFL, but it’s even more rare to make the Olympics or become relevant in a lesser-viewed sport; this opportunity allows athletes to seize their college fame and monetize it.¹⁵¹ Further, this opportunity to earn off their personal brand may incentivize athletes to remain with their collegiate team for longer before leaving to play professionally.¹⁵² These student-athletes have more time to develop their own brand before going to the next level, and thus more time, for instance, to create a solidified trademark logo before working with the endorsement giants such as Nike or Adidas.¹⁵³

¹⁴⁷ Hicks, *supra* note 116 (discussing how larger brands will look to nationally known college athletes with large social media followings, but regional companies should partner with athletes who are popular in their local market. Further, these local companies should be careful not to offer contracts that could be interpreted as incentivizing players to play for particular schools, a concern that is more pertinent when looking at high school students or potential transfer students); *see also* Braziller, *supra* note 124 (discussing where the CEO of an influencer marketing company says there is a massive desire for Gen Z, early millennial college-age audiences, and these young college athletes hit them better than anyone).

¹⁴⁸ *See, e.g.*, Kaitlyn Tiffany, *Why celebrities try to trademark their catchphrases and baby names*, VOX (Apr. 19, 2019) <https://www.vox.com/the-goods/2019/4/19/18507920/celebrity-trademark-history-baby-names-taylor-swift>. There has been a spike in trademark applications in recent years, with 6.7 million applications filed with the USPTO since 1985. However, one of the fundamental rules in trademark law is “no hoarding of trademarks,” so while these athletes will want to get their name and likeness protected, there’s a limit on how much they can protect.

¹⁴⁹ McInerney, *supra* note 11.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*; *see also* Ford, *supra*, note 145 (discussing the appeal, particularly in basketball, to go to the draft after a year in college; this NIL policy could make the athletes think more seriously about college since they can earn an income).

¹⁵³ *See* Hicks, *supra* note 116; *see, e.g.*, Ross Dellenger, *New NIL Summit Will Help College Athletes Optimize Opportunities*, SPORTS ILLUSTRATED (Jan.

Colleges around the country will also likely be changing their strategy because of this NIL policy change and trademark trend.¹⁵⁴ Given the absence of a national standard, state laws govern this NIL system, and consequently, some states are more appealing for college athletes that want to earn off their likeness.¹⁵⁵ For example, the University of Central Florida created a website to get potential athletes to want to go to UCF in order to build their brand; their tagline is “your brand is go for launch.”¹⁵⁶ Colleges know the draw that this NIL policy is for future student-athletes, the idea of trademarking their name or brand logo and earning off of it is probably very enticing.¹⁵⁷ As seen above, some colleges have used logo design as a recruiting tool; even if they don’t amount to profits, these trademarked logos function as a “badge of legitimacy” for college athletes.¹⁵⁸ Some colleges are even giving their athletes the opportunity to combine their NIL with the school’s official trademarks in a sort of group licensing program.¹⁵⁹ This creates an opportunity for cobranding—the athlete’s individually owned trademark mixed with the university’s trademark—and could be beneficial to them both.¹⁶⁰

23, 2022), <https://www.si.com/college/2022/01/23/name-image-likeness-summit-help-college-athletes-optimize-opportunities> (discussing an opportunity for student-athletes to learn about brand development). This June will feature the first ever NIL summit to educate and award college athletes, hosted by the Student Athlete NIL (SANIL) at the College Football Hall of Fame. *Id.* This event will include panel discussions and brand representatives and will teach student-athletes how to negotiate partnerships and most successfully earn off of their likeness. *Id.*

¹⁵⁴ McInerney, *supra* note 11.

¹⁵⁵ *Id.*

¹⁵⁶ UCF is ‘Go for LAUNCH’ to Support NIL Efforts, UCF (June 18, 2021), <https://ucfknight.com/news/2021/6/18/general-your-brand-is-go-for-launch.aspx>.

¹⁵⁷ McInerney, *supra* note 11.

¹⁵⁸ Bowie, *supra* note 51 (discussing the connection between college sports and graphic design; in luring new players, schools have designers to create social media edits and facilitate brand engagement).

¹⁵⁹ Matt Charboneau, *Licensing Program Will Allow MSU Student-Athletes to Use Logos, Trademarks in NIL Deals*, THE DETROIT NEWS (Aug. 27, 2021), <https://www.detroitnews.com/story/sports/college/michigan-state-university/2021/08/27/licensing-program-allow-michigan-state-student-athletes-use-logos-trademarks-nil-deals/5618268001/>.

¹⁶⁰ *Id.*

Perhaps the most significant impact of this new policy, for the sake of this article, is the earlier timeline of trademark registration.¹⁶¹ The primary recommendation by legal scholars for young student-athletes is to file appropriate trademarks and protect their brand out of the gate.¹⁶² These trademarks should garner the necessary protection for an effective branding campaign.¹⁶³ It is vital to evaluate each contractual arrangement and intellectual property consideration in order to protect the athlete and avoid future disputes.¹⁶⁴ Especially in cases where an athlete's brand is closely tied to their individual self—for instance, if their brand logo is a monogram of their initials—it is beneficial for them to protect this brand and trademark their logo early.¹⁶⁵ By designing, and even registering, trademarks earlier, it will presumably continue the shift towards athletes having greater ownership and control over the licensing process.¹⁶⁶ There will be more and more deals like that of Tom Brady, where the athlete has more leverage and sets up licensing agreements since the endorsement company didn't design and trademark the logo themselves.¹⁶⁷ Although the company in question will not have ownership rights over the logo and will have to pay licensing fees, it isn't all negative for them.¹⁶⁸ If these companies wish to develop an athlete's brand and include the logo on their products, they can obtain an exclusive license for the duration of the deal.¹⁶⁹ Here, we avoid the situation that Leonard and Federer are in, where their endorsement deal is over, but they do not retain their intellectual property.¹⁷⁰ In those scenarios, Nike likely doesn't have the right to continue using the branding without creating consumer confusion and facing reduced brand interest.¹⁷¹ By designing, and potentially registering, the athlete's trademark and brand early, as a result of NIL, and not requiring future endorsement companies to design a brand for them, the

¹⁶¹ See Mantilla, *supra* note 79.

¹⁶² *See id.*

¹⁶³ *Id.*

¹⁶⁴ See Lalla & Tawil, *supra* note 5.

¹⁶⁵ *Id.*; see, e.g., Tiffany, *supra* note 148 (discussing how celebrities are taking the idea of early trademarking to a new level with trademark registrations for their children's names: Kim Kardashian holds registration for each of her three children's names, Kylie Jenner filed for trademarks for "Stormi Webster" and "Stormiworld," and Beyonce filed for protection of her twins' names, Rumi and Sir Carter).

¹⁶⁶ See Mantilla, *supra* note 79.

¹⁶⁷ See Lalla & Tawil, *supra* note 5.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

parties can likely have a mutually beneficial relationship and avoid future litigation.¹⁷²

B. *The Economic Impact of the Shift from Ownership to Licensing*

The value of a personal logo will vary greatly from athlete to athlete depending on their level of fame, and we may consider both the monetary value and personal value on a case-by-case basis.¹⁷³ The “Jumpman” logo, owned by Nike and part of Michael Jordan’s brand, is arguably the most famous athlete logo—bringing in roughly \$3 billion annually.¹⁷⁴ Similarly, LeBron James’ signature business and brand with Nike, his crown logo products, generate an estimated \$600 million per year for the endorsement company.¹⁷⁵ These examples fall on the very high end of the industry for personal logos, but they show the potential impact that one athlete and their personal brand can have on a company such as Nike.¹⁷⁶ Brand-specific elements and assets may account for 20–25% of a company’s value.¹⁷⁷ For Roger Federer’s RF brand, which had a market value of 27 million in 2018, the RF logo itself could be worth as much as 6.75 million.¹⁷⁸ It remains unknown what Federer paid to regain ownership rights of his logo, but this estimate suggests he paid a high price.¹⁷⁹ Further, these athletes often have an emotional connection with their logos, giving them independent value. For instance, Federer said, “I hope

¹⁷² See Lalla & Tawil, *supra* note 5.

¹⁷³ Compare Jael Rucker, *What is Michael Jordan’s Net Worth*, ONE37PM (Sep. 15, 2021, 3:30 PM), <https://www.one37pm.com/grind/entrepreneurs/what-is-michael-jordans-net-worth> (discussing how Jordan’s brand is the most impactful in sports history; he still nets roughly \$100 million per year in royalties from Nike), with *The RF is Back*, THE FASHION LAW (Jan. 29, 2021), <https://www.thefashionlaw.com/the-rf-is-back-reflecting-on-the-making-popularizing-and-assigning-of-roger-federers-famous-logo/>.

¹⁷⁴ Rucker, *supra* note 173 (discussing how Jordan’s brand is the most impactful in sports history; he still nets roughly \$100 million per year in royalties from Nike).

¹⁷⁵ Nick DePaula, *Inside Nike’s New LeBron James Innovation Center*, ANDSCAPE (Nov. 11, 2021), <https://andscape.com/features/inside-nikes-new-lebron-james-innovation-center/>.

¹⁷⁶ See *id.*; Rucker, *supra* note 173.

¹⁷⁷ THE FASHION LAW, *supra* note 173.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

rather sooner than later Nike can be nice and helpful in the process to bring it over to me. It's something that was very important for me."¹⁸⁰

When an endorsement company designs and owns a trademark, they have no further cost other than trademark renewal fees, and they control whatever value the mark holds.¹⁸¹ Even after an endorsement relationship ends, the company has two options: shelf the logo or request the athlete pay a sum of money to use it.¹⁸² On the other hand, when an athlete licenses their personally owned and trademarked logo to these companies, the likes of Nike and Under Armour are left paying recurring licensing fees.¹⁸³ Tom Brady, for example, received almost three million dollars in licensing fees in one year alone.¹⁸⁴ The value of these licensing fees, like the value of a logo itself, will vary greatly based on one's fame, but we can imagine the potential for an athlete to capitalize on their trademark ownership and place endorsement companies in a weaker position.¹⁸⁵ Athletes, along with musicians, artists, and other influencers, are realizing the voices and platforms that they have and the ability to empower their own brand.¹⁸⁶ This may demonstrate to them the economic benefit of shifting away from the brands and towards the individual.¹⁸⁷

¹⁸⁰ *Id.*; see also Jack Blakey & Jacob M. Davis, *Leonard v Nike: Copyright in the Klaw*, THE NATIONAL LAW REVIEW, (May 28, 2020), <https://www.natlawreview.com/article/leonard-v-nike-copyright-klaw> (discussing how Kawhi put his heart and soul into this design and was disappointed by the court's ruling).

¹⁸¹ *How much does it cost?*, USPTO, <https://www.uspto.gov/trademarks/basics/how-much-does-it-cost> (last visited Sep. 25, 2020).

¹⁸² Urgo, *supra* note 61, at 72.

¹⁸³ See, e.g., Jacopo Liguori, *Athletes trademarks – how to handle*, WITHERSWORLDWIDE (May 6, 2020), <https://www.withersworldwide.com/en-gb/insight/athletes-trademarks-how-to-handle> (discussing the opportunity for athletes to choose their licensing policy and partners, setting up a contractual framework to ensure proper appropriation, and making it possible to regain control swiftly).

¹⁸⁴ Douglas Charles, *Tom Brady's TB12 Company Received at Least 350K in PPP Loans, While Brady Made 3M Just From Licensing*, BROBIBLE (Jul. 8, 2020), <https://brobible.com/sports/article/tom-brady-tb12-received-ppp-loans/>.

¹⁸⁵ See generally, *id.*

¹⁸⁶ See Lalla & Tawil, *supra* note 5 (discussing the trend of turning to personal social media platforms to speak out, taking their brand into their own hands).

¹⁸⁷ See *id.*

One final consideration in this realm is a company's inability to earn off of an athlete's trademark post-contractual relationship.¹⁸⁸ As with Federer, the logo's close link to him as an athlete and his performances reduced Nike's interest in using the trademark after their working relationship expired.¹⁸⁹ Many athletes hold the trademark rights to their name and likeness, which complicates a company's ownership over a logo that signifies this name in the form of initials.¹⁹⁰ Using the logo without the athlete's consent could give rise to a deceptive practices case, mislead the public, and/or result in an invalid trademark.¹⁹¹ This is why the court's decision in Kawhi Leonard's case leaves Nike with a choice: force Leonard to buy back the rights or shelf the logo.¹⁹² Thus, there is an economic question for the endorsement company: whether it's worth keeping the logo to prevent competition, which we see in Leonard's case, or selling it for a lump sum, as we see with Federer.¹⁹³

IV. CONCLUSION: HOW THE MODERN TREND AND NIL POLICY

WILL AFFECT THE TRADEMARK LANDSCAPE

The reason that athletes, whether professional or amateur, create and trademark logos for their brand is to provide for themselves an earning opportunity.¹⁹⁴ Historically, endorsement companies such as Nike, Adidas, or Under Armour design, trademark, and thus own their sponsored athlete's logos.¹⁹⁵ This is the case for athletes like Michael Jordan, LeBron James, Rafael Nadal, and in more contentious news, Roger Federer and Kawhi Leonard.¹⁹⁶ We see from both Federer and Leonard the impact of this trademark ownership as it prevented Leonard from claiming his "Klaw" logo post-litigation and forced Federer to pay to regain his rights.¹⁹⁷ Between the licensing fees and ownership control, a strategy such as Tom Brady's with his personally owned and created TB12, has become a common trend.¹⁹⁸ The court decision in *Alston* and recent action taken by state legislatures nearly forced the NCAA to adopt a dramatic policy

¹⁸⁸ See Collins, *supra* note 53.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² Urgo, *supra* note 61, at 72.

¹⁹³ *Id.*; Collins, *supra* note 53.

¹⁹⁴ See Igor, *supra* note 1.

¹⁹⁵ See Lalla & Tawil, *supra* note 5.

¹⁹⁶ See *supra* Part II.C.

¹⁹⁷ Lalla & Tawil, *supra* note 5.

¹⁹⁸ Lalla & Tawil, *supra* note 5.

change — one that will likely have a large impact on this already-present trademark ownership trend.¹⁹⁹ With the NCAA’s NIL policy change of 2021, college athletes have the right to monetize their name, image, and likeness.²⁰⁰ Thus, college athletes will likely start designing and registering their logos and brands earlier than ever before.²⁰¹ By the time college athletes enter the NFL or NBA or any other league, they could already have an established brand.²⁰² This has the potential to only further the already present trend towards athlete ownership and licensing strategies with their sponsors.

¹⁹⁹ Mantilla, *supra* note 79.

²⁰⁰ *See id.*

²⁰¹ *See id.*

²⁰² *See id.* (“The ‘Fair Pay to Play’ Act, which becomes effective in 2023, guarantees college athletes a right to profit from their identities. The Act also authorizes college athletes to hire agents and other representatives to assist them in negotiating and securing commercial opportunities.”).