

## PROTECTING YOUR POSSIBILITIES PODCAST WITH LUKE FEDLAM

### Episode 51: Where is NIL going? | July 28, 2021

*The following is a transcription of the audio podcast recording. It is largely accurate but in some cases it is incomplete or inaccurate due to inaudible passages or transcription errors.*

Luke: I'm sports attorney Luke Fedlam, and welcome to the Protecting Your Possibilities podcast. Each conversation we focus on sharing information and having conversations around how athletes can best educate and protect themselves or their life outside of their sport.

Thank you so much for tuning into the protecting your possibilities podcast. I'm your host, Luke Fedlam. And I'm excited to get into another episode this week. Last week, if you are a subscriber to our podcast, you realize that last week's conversation was on franchises. And I've been getting a lot of conversation and questions from various athletes and others around understanding how franchises work. And so wanted to put together an episode on franchising and what all goes into it. But you know, as you can only imagine being here, towards the end of July, most of the questions I get every single day, or the requests for topics on the podcast relate back to name, image and likeness. And I'll be honest with you, I could talk about this every single day. And we could do every episode on name, image and likeness. And so my commitment to you as a subscriber as a listener is that I'm really going to focus on name image and likeness when there are things that I haven't already talked about, or things that have changed, or things that have been updated, or that are new, when it comes to name, image and likeness. So you can trust and believe that if you see the title of an episode saying NIL or name, image and likeness, that it's going to be something new that maybe I haven't discussed so far at this point.

And so I thought today would be a good opportunity to just share some reflections on kind of what we've seen over the last few weeks. And in particular, just start to think about where we're going, where his name, image and likeness even going. So if you think about it, let's just think about how quickly things have happened. And I know I say quickly, and those who have listened to my podcast for the past year, or heard me speak at different events, they know that quickly, is kind of a funny term to use here, because the state of California said back in 2019, we're passing this legislation as relates to name image and likeness. And so we knew that it was coming. And we've been talking about it for a couple years now.

But I think if we just go back over the last six to eight weeks, things have changed and moved incredibly quickly. So we have the Supreme Court ruling in the NCAA vs. Alston case that came out towards the end of June. And that really caused the NCAA to ultimately say, you know, we can't come up with a name image and likeness policy, because it will most certainly be taken to the courts. So we're going to kick it back to the schools and the individual institutions to come up with their own name, image and likeness policy. And so that final vote happened on June 30. But it was just a matter of a few days of knowing that that was going to be the case. And so schools really were scrambling to put together their individual policy as related to name image and likeness, with some guidance from the fact that the NCAA did have a plan originally, back in

January of 2021, that was supposed to be voted on that never got voted on, there was really built around a lot of the work of the NCAA Working Group on name, image and likeness.

So the policies though, needed to be written and put into place and preparing student athletes, all of that has taken place over the last few weeks, end of June, very beginning of July. And so now we're a few weeks in and I think we're at an interesting inflection point because I know that may sound a bit like hyperbole, it might be a bit extreme to say we're at an inflection point. But we're at an interesting point to evaluate where things are at and where things are going right now. Because we're again, we're three, three and a half weeks into name, image and likeness being a reality. Most student athletes right are not in season yet. I know that we've got you know, some student athletes, you know, usually football and basketball that are on campuses across the country right now, during the summertime and some other sports also, are usually on campus during the summertime. But, you know, we're gonna start to see I think, some additional movement, some additional kind of changes and evolution in names and likeness, engagement by student athletes, once their seasons start as well. And so we're gonna start to see that here in the next month or two. And I think it's important to take a moment now to just really look at where we're at and where we're going.

So I want to talk about the where we're at from the perspective of institutions across the country. And what's interesting about this is, you know, at first we had the situation where the NCAA back in January was going to come out with their policy on name, image and likeness that would affect all schools, and all student athletes. Obviously, that got put on hold. And so then we found ourselves in this place where states started coming up more and more states were coming up with their either their state legislation and actual legislation getting passed by their state legislatures, or executive order by the power of the governors of a few different states to authorize name, image and likeness. And once the Supreme Court came out with their holding in the Alston case, you know, just a few weeks ago, then it really was very clear that instead of just being a nationwide plan, or a national standard for name, image and likeness through the NCAA, and then instead of it being a state by state policy, or legislative solution for states, on the whole, you actually end up now with individual institutions having their own policy, their own rules, as it relates to name image and likeness.

And the guidance that was provided was that if you're a school that's within a state that has legislation that is passed, or by executive order, name, image and likeness is authorized, then you have to follow the state rules, or the state executive order in the creation of your individual school policy. But if you're in a school, that's within a state that does not have that legislation in place, or does not have any name, image and likeness laws, in effect, then individual schools can come up with their own policy as relates to name image and likeness. So that's interesting, right? Because now you have instead of states and I did a whole podcast episode on the nuances within state law.

So now instead of state laws really driving kind of differences and potential recruiting differences. Now you really have individual institutions, right. And institutions are deciding, okay, well, now that everyone can do name, image and likeness, how can we be different? Right? What is it that's going to be different about our institution as relates to name image and likeness? And there are some things that are just either geographic or corporately different, right? Some institutions are in cities that house or host, you know, the headquarters of many different companies, vibrant entrepreneurial culture, within certain cities, that you know, so there's a lot of opportunities, you know, in some cities, just because of the companies that are there. And that doesn't necessarily mean all the big cities, right? Because in big cities, student

athletes would also be competing with professional athletes who play on professional teams within those cities.

So those differences play a role and the geography plays a role in in that kind of thing. But I also think that there are choices that schools can make as to how they're going to implement their policy, and what rights will they authorize their student athletes to have, that will also play a role. And I want to share just a few examples of what I mean when I when I say that -- so one is Chapel Hill, right University of North Carolina Chapel Hill, university of North Carolina, announced that they launched the first ever group licensing program for current NCAA student athletes, right? This is really interesting, because it's, it's just so different. It is groundbreaking to have this kind of group licensing exists within a college, college university setting. And, again, other schools may have this or may be looking at implementing something like this. But again, Carolina came out as one of the first to be able to do that. So to be able to bring together numerous student athletes and groups of student athletes to be able to work together and be able to use which we'll get into even more here in a minute and be able to use the trademarks and logos of the University of North Carolina. That's a really interesting proposition.

And when you think about it, you know, I think it's Bubba Cunningham, who's their athletic director, specifically talked about how he appreciates the group licensing concept because it can have such an effect on so many student athletes, as opposed to just you know, certain student athletes. So it's going to be interesting to see how this plays out and what that looks like. But again, very interesting to see this group licensing concept come out at the college level, but people are talking about it, it differentiates them in their application of their name, image and likeness policy.

Another interesting school to discuss and to look at is LSU, right, so LSU came out and said with name, image and likeness, that while most schools were not allowing the use of trademarks, logos or other protected intellectual property of the institution, LSU came out and said specifically that they're going to allow their student athletes to use the LSU logos as part of their ability to be marketable. All right, and to go out and to find name, image and likeness opportunities. And when you think about that, I mean, that's significant, that's really significant the use of a school's protected marks, because oftentimes, it's the school's platform, the brand of the school that adds so much value to the marketing or the branding of a particular student athlete, don't get me wrong, a student athlete has to perform, maybe they have a following of people based on either kind of what they've done on within their sport, or potentially just because of what they've done on social media. But to use actual marks of the institution, logos, trademarks, etc. It just makes that student athlete, any student athlete that much more valuable when it comes to their marketing.

And other schools have started to discuss it, some schools are looking at the possibility of a student athlete in order to use the marks having to pay to use the marks, just like anyone else who wants to license the use of the marks from an from an institution. But again, we're going back to these differences as it relates to individual school policy. And by doing that, you know, you have a coaching staff that can go out and recruit, say, Hey, this is how we're different. This is how name image and likeness is, is being managed here at our institution. And it's going to be different than what you'll see at other schools.

So again, you know, really important to understand these unique differences. The last school that I'll kind of go and mention is Michigan right now. So Michigan came out, and they said, You know what, we're going to allow one of our official kind of licensed retailers to be able to sell customized jerseys with the names and numbers of current student athletes on those football

jerseys, right. And so they may come out with something similar for basketball. But when you think about that, right, there's long been discussion about student athletes and, and school selling jerseys and players, you know, having their names and numbers on jerseys that are being sold, and never seeing, you know, a dime of those of those resources for that this is something that flips that completely on its head, and ultimately says, you know, hey, if a student athlete enters into an agreement with that official, officially licensed retailer, you know, then they can offer up that particular student athletes jersey, with the name on the back with the number on it for sale, and the student athlete will receive a portion of the proceeds.

Now, there really hasn't been, it's not public what that percentage is or what that amount is per sale. But it's something and it's something that's different. And we know, the value of customized jerseys with current players on those jerseys. So again, three different schools that are all kind of approaching name, image and likeness in different ways, attempting to differentiate themselves in the marketplace when it comes to name, image and likeness, as they think about both the recruiting side of things and bringing in, you know, elite talent for their athletic programs.

But also, one of the pieces that a lot of people don't talk about is the retention of student athletes. And I haven't done too many episodes, but I know I've mentioned and talked about the changes to the rules around the transfer portal, and student athletes having a one-time transfer exemption where they can transfer and not have to sit out for a season. So because of that, right, it really is incumbent upon the school, the athletic department, the coaching staff, to continue to do what's necessary to retain and to keep the elite talent that they have on their athletic programs. And so coming up with new and innovative ways to engage in name, image and likeness, is truly a way that they can, you know, differentiate themselves in the marketplace.

Now, with all that being said, right, and that's, that's a lot. And we could go into more schools, but you know how I am, I like to try to keep these podcast episodes under 20 minutes. So we could go on and you can look up and see how other schools are doing things differently. But I think this does lead to one point that I have to spend some time on, which is, so where do we go like what's next? Right? And I think what everyone is expecting is that there will be a national standard when it comes to name, image and likeness that will be imposed by the federal government. After this NCAA versus Alston case, it really is hard to see a way in which the NCAA themselves come up with a name image and likeness policy that doesn't get struck down. So it's mostly it looks like it's going to be up to Congress to come up with federal legislation, as it relates to a national standard for name image and likeness. So that schools are on the same playing field and we won't see as many of these really outlier nuances when it comes to the execution of name image and likeness at different individual schools.

So what I think we'll see there is federal legislation most likely later this year, possibly, potentially sometime early next year. But I think that having just had a conversation with a power five conference Commissioner the other day talking about this national standard, I think schools, conferences, people really want this national standard, because I mean, you could look at a conference. And I mean, you think about the headache of knowing that you may be your schools may be spread out across 7, 8, 9, 10 different states. And beyond that, you may have a lot of different policies in place by the schools, that makes the name image and likeness experience, very different across a conference.

So I do think that we're going to see a federal legislation that's going to provide some guidance, and oversight to name, image and likeness and how name image and likeness becomes much more standardized across the country as we look at various schools and how they implement

their name, image and likeness policy. So a lot more to come. But I think until we see that national standard, I think we'll daily continue to read stories about how schools have innovated, or taken on new measures as relates to name image and likeness to continue to differentiate themselves among recruits, to continue to stay in the spotlight when it comes to media coverage. Because every time you do something that's different and unique in this space, obviously, it's garnering a lot of attention right now. So it will be interesting to see over the next three to six months, especially once the academic year starts, and sports start moving to being in season a name, image and likeness is authorized. It'll be very interesting to see where things go. But you can guarantee one thing as things continue to change, I will continue to talk about it.

So thank you so much for tuning in today, to the protecting your possibilities podcast. If you have ideas on topics that you'd like to hear, please don't hesitate to reach out to me, you can find me on all social media platforms @LukeFedlam. You can email me you can reach out, please do provide a rating and subscribe to the podcast, continue to share with your contacts and with your network. Because we're continuing to try to put out really important, timely and informative information. As you hear me say often education is key. And so I want to be able to provide that education here. So again, thank you so much for tuning in. I look forward to talking to you again real soon. Have a great day.

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