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Name, Image, and Likeness in Amateur Sports

Kenneth D. Ferguson

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Name, Image, and Likeness in Amateur Sports*

Keynote Address

Speaker: Kenneth Ferguson

Alicia Ouellette:

Hello everyone and welcome. I am so pleased to see so many of you tonight for our symposium on Name, Image, and Likeness hosted by the Albany Law School Journal of Science and Technology. I want to congratulate Christian Lichtenberger and Amanda Potter and every single student on the journal that has played a role in putting together tonight's fantastic panel. We are really in for a treat. We are going to learn a lot about big business. College athletics is big business. In 2019, college athletic departments reported taking in almost $19 billion in revenue with little of that money flowing to the student athletes. That changed with the landmark Supreme Court decision in *NCAA v. Alston* earlier this year. The door is now open for student athletes to profit from their name, image, and likeness. This was a change in college sports landscape which creates opportunities and challenges for athletes, schools, and businesses involved.

States are left scrambling to rethink their NIL laws in this new context while colleges and universities are figuring out the best ways to support and protect their student athletes, some of whom are adding the challenge of managing their personal brand to their academic and athletic workload. Again, I want to thank the Journal of Science and Technology for assembling a remarkable panel to discuss this timely and relevant topic, and I want to thank everyone of our panelists for joining us tonight, taking the time out of your schedules to be with us, and to help us understand this whole new world. I'm looking forward to the discussion. With that, I turn the microphone over to our wonderful Editor-in-Chief, Amanda Potter.

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* On November 15, 2021, the Albany Law Journal of Science and Technology presented a symposium discussing the critical questions about the evolving perception and reality of student-athlete rights. These remarks have been annotated and edited by the Journal staff.

Amanda Potter:

Thank you, Dean Ouellette. My name is Amanda Potter, and I am the Editor-in-Chief of the Albany Law Journal of Science and Technology. I would like to thank you all for joining us this evening for the Albany Law Journal of Science and Technology symposium on Name, Image, and Likeness in Amateur Sports. We have wonderful panelists joining us tonight and before we get started, I would just like to thank all of them for being here.

I would like to give a brief history and overview of our journal before we begin. The Albany Law Journal of Science and Technology is a student-run journal that was established in 1990 and publishes articles on issues relating specifically to science and technology. Our members work extremely hard to produce a quality law journal and I think I speak for everyone on the journal when I say that we are thrilled to have everyone here this evening. I would be remiss if I did not take a moment to thank Christian Lichtenberger for planning this event from start to finish. Christian has worked tirelessly to organize and advertise the symposium, and for that, we are very grateful. Christian, thank you for your unwavering commitment and dedication to this event. I will now turn it over to Christian to say a few words to kick us off.

Christian Lichtenberger:

Awesome, thank you so much. My name is Christian Lichtenberger, and I am the Symposium Editor here at the Albany Law Journal of Science and Technology. Thank you again for joining us. Now, we are incredibly fortunate to have such amazing speakers from around the country who you are going to hear from shortly. Very quickly, I just wanted to thank our journal advisor, Professor Heverly, our Editor-in-Chief, Amanda Potter, and then Howie Lien in alumni engagement for helping put this all together. It really could not have happened without all of them. They have worked tirelessly throughout the process for the past few months, so I really do thank them a lot.

Before I kick it over to our brilliant moderator, Dan Lust, I just wanted to give you guys a little bit of the structure we are going to be working with. So, I am going to kick it over to Dan Lust who is the moderator. He is going to introduce our keynote, Professor Ferguson. Professor Ferguson is going to give a phenomenal keynote speech, and then following that, our moderator, Dan Lust,

will be asking questions to the panelists, so if you have any questions at all for any of the panelists in particular, please try and save them until the end or to the last fifteen minutes. So, at 7:30 PM, start putting your questions in and at 7:45 PM we will start answering them for the last fifteen minutes until we conclude at 8:00 PM.

Now, before we can finally get into the program, our moderator Dan Lust is one of the most prominent sports entertainment law attorneys that we have out there. He has been incredibly influential to me as a law student with *Conduct Detrimental,*[1] as well as all of his work with law students across the country. He has helped them get placements and opportunities they would not have otherwise. He also is an adjunct professor at New York Law School where he teaches sports and entertainment law. He has also helped create a group I am a part of, the Student Sports Law Network[2] that has been incredibly influential and helped a lot of students as I have said. Now, without further ado, I will kick it over to the man himself.

Professor Dan Lust:

Thank you, Christian, for that lovely introduction, and I guess I will also mention I went to Union College, which is fifteen minutes down the road from Albany Law School. So, I had plenty of friends that went to Albany, and I know the Capital Region incredibly well. I know we are on a little bit of a time crunch and we will try to stick to the schedule as best as we can. So yeah, as Christian laid out, we have a tremendous panel tonight obviously kicked off by Professor Kenneth Ferguson. I will provide his intro and then we will let Professor Ferguson go as long as he wants. We are very fortunate to have him, and then we will get into the panel.

So, without further ado, Professor Kenneth Ferguson is a professor of law at the University of Missouri Kansas City School of Law, has his Bachelor of Arts from Drake University, and his J.D. from O.W. Coburn Law School (Oral Roberts University). Professor Ferguson is recognized nationally for his bankruptcy law and sports law scholarship. His bankruptcy law scholarship has evolved from preferential transfers and applying linguistic theory to bankruptcy law, to proposing an innovating two-part business

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[1] Dan Lust & Dan Wallach, Conduct Detrimental (2016), https://www.conductdetrimental.com/podcast (last visited Mar. 30, 2022).

[2] *About Us*, SPORTS L. NETWORK, https://www.studentsportslawnetwork.com (last visited Apr. 3, 2022).

in-fact and business in-law analytical process that courts should consider in determining whether a debtor can avoid the reorganization process of Chapter 11 bankruptcy by instead selling their business under Bankruptcy Code § 363. Professor Ferguson's sports law scholarship considers application of assumption of risk theory to distinguish liability for injuries to athletes in amateur and professional sports. His sports law scholarship also focuses on achieving gender equity under Title IX for girls from economically disadvantaged, rural, urban, and minority communities. So, with that said Professor Ferguson, I will turn the microphone over to you both metaphorically and physically if I had a microphone.

Professor Kenneth Ferguson:

I am always impressed with what people say about me because I very seldom read my file. I am not going to take a whole lot of time because there are a lot of other people on this panel a lot more experienced, and maybe even more knowledgeable in in some areas than I am, but I wanted to start off by talking a little bit about the two cases that that got us where we are today. The *O'Bannon*[3] case and the *Alston*[4] case, the latter of which was recently decided by the Supreme Court. I am doing those cases as sort of a backdrop about the NCAA before moving on to summarize some data about name and likeness statues that have been enacted throughout the country. Then, I will briefly talk a little bit about the name and image and likeness statutes and Title IX, before finishing up with this brief statement about race and who profits literally from amateur sports, or at least the notion of amateurism that the NCAA has been pushing for some time.

Historically, the NCAA has taken the position that it plays a critical role in maintaining what it refers to as its "revered tradition of amateurism in college sports." It made the argument, both in the *O'Bannon* case and then also in the *Alston* case, that any challenge to its amateurism rules must fail as a matter of law because of the 1984 Supreme Court case *NCAA v. Board of Regents,*[5] which held that these rules, meaning its compensation rules, are presumptively valid. Of course, the Ninth Circuit in *O'Bannon* disagreed because the Court said the language that was

[3] O'Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015).
[4] Nat'l Collegiate Athletic Ass'n. v. Alston, 141 S. Ct. 2141 (2021).
[5] Nat'l Collegiate Athletic Ass'n. v. Bd. of Regents of Univ. of Okla., 468 U.S. 85 (1984).

relied on by the NCAA to make that argument is really dicta from the Supreme Court case that it cited.

The *O'Bannon* case also rejected a second argument made by the NCAA. In that case, the plaintiff claimed that the answer to his eligibility rules, forbidding student athletes from being paid for the use of their name, image, and likeness, violated antitrust law. NCAA contended that its compensation rules were not subject to antitrust law because the compensation rules were mere eligibility rules, which do not regulate commercial activity. We have already mentioned the commercial nature of amateur sports here in the U. S. Any restraint that has no effect on commerce is really exempt from antitrust law. The Ninth Circuit, however, rejected the NCAA's argument that its competition rules had no such commercial effect. According to the Court, the modern definition of commerce is broad enough to embrace a transaction in which an athletic recruit exchanges his or her labor and NIL rights for a scholarship at a Division I school because it is undeniable that both parties to that exchange anticipate economic gain. The Court ruled that the NCAA's compensation rules were, therefore, within the ambit of the Sherman Act.

However, the Ninth Circuit rejected part of the plaintiff's claim, concluding that the District Court clearly erred in this viable alternative to allowing student athletes to receive NIL cash payments untethered to their educational expenses. Now, the NCAA again, as it did in *O'Bannon*, argued that its restrictive compensation rules were presumptively valid and that the Supreme Court precedent, again citing *NCAA v. Board of Regents*, expressly approved its limits on student athletes' compensation. That approval forecloses any meaningful review of those limits by the Court, and I thought that was a pretty bold statement to make. The Court obviously rejected the applicability of *NCAA v. Board of Regents* and determined that its review, under the rule of reason approach, was really more deferential to the NCAA than the NCAA actually was representing. And the quick-look analysis of *Board of Regents* was applied to condemn the NCAA's restrictions. So, that sort of set us up for the name and likeness legislations that have been passed and are continuing to be proposed in states throughout our country.

The National College Players Association (NCPA)[6] has

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[6] *About Us,* NCPA, https://www.ncpanow.org/about-us (last visited Apr. 2, 2022).

developed a grading system for assessing state laws which provides student athletes the upmost freedom to negotiate for monetizing their name, image, and likeness. The grading scale is from 0 to 100 percent, with the higher percentage scores going to states with laws that provide the greatest authority for student athletes to make NIL deals. The National College Players Association has rated states' name and likeness laws, and they rely on about twenty-one benchmarks in assessing those laws. Now, I will just point out a couple of those benchmarks. For example, they assess whether the laws give student athletes the freedom to receive food, shelter, medical expenses, and insurance from third parties. They assess whether the laws prohibit athletic program boosters and booster clubs to pay student athletes for their name and likeness. Such a law would, in fact, be contrary to the recommendations that were made by the NCAA regarding how involved universities should be in the payment of name and likeness compensation to their student athletes. They assess whether the laws allow colleges to prevent student athletes from what they refer to as "pre-schedule name and likeness deal activities, i.e., timed Tweet during game."[7] They also look at whether those laws allow colleges to dictate what the students could wear at non-mandatory college events—more specifically, the logos, the marks of their sponsors. Those were just some of the things that that were mentioned as possible factors to be considered.

Now, it is pretty obvious from the factors that I just mentioned, and others that I did not mention, that there will be a recruiting advantage to the benefit of colleges and universities that are located in states with higher benchmark percentage scores—scores that are given by this organization. I should really point out that unless there is also some type of federal approach to the name and likeness laws, there will be a continuing problem in the NIL space for student athletes in states with low ratings. This is sort of the flip side of the recruiting balance because if you go to a school within a state with a higher rating, it means that your benefits would be greater. The highest ranked school of the twenty-eight that have enacted statutes—and that number may have increased since this work was done—was New Mexico State, with a score of 90%. Maryland is 81%, Missouri is 81%, and so is

[7] *NCPA's Official NIL Ratings on a Scale of 0-110%*, SYMPOSIUM.US, https://symposium.us/wp-content/uploads/2021/10/NCPAs-Official-NIL-Ratings.pdf (last visited Apr. 2, 2022).

Oregon. The lowest score was Illinois with 43%. Now, the schools in states that have not enacted NIL laws receive a mark of zero. So, there are approximately twenty-two states that have not enacted any of those statues as of yet. Now, the one question that looms large in the face of new name and likeness legislation that has been proposed is, "Will these statues lead colleges and universities to violate Title IX?" Some, of course, answer that question that with a resounding "Yes," while others answer the question with just the opposite affirmation.

The California statute, referred to as Fair Pay to Play Act, was enacted and signed into law by Governor Newsom in 2019. This law makes it unlawful for the NCAA, any other athletic organization, and colleges and universities, to limit the rights of student athletes to receive payment for the use of their name, image, and likeness. This legislation—as I am assuming most of those legislations that have been enacted or will be enacted—sought to correct the exploitation of student athletes, which has occurred in collegiate athletics. Since its enactment, many other states, of course, have also enacted legislation. Now, the Act places no limits on the compensation which student athletes may receive, unlike other legislations. Some states prohibit the institution from actually paying student athletes for their name, likeness, and image income. Many of the statues that were assessed also included factors that enabled institutions to, in fact, put in place someone who guides, helps, and assesses whether student athletes' name, image, and likeness contracts are in fact reasonable, fair, and so forth. So, they provide some services in that way.

Now, it's clear—well I am not saying it is clear—that most athletic income, at least in the Power Five schools, comes from those conferences from two sports: men's football and men's basketball. The assumption is that Title IX now would, in fact, be violated because of this sort of built-in structural benefit that goes to male student athletes. Title IX was, of course, enacted in 1972. And if you look at the growth of a female student athlete's involvement in sports, it has been incredible. Now, the relationship of the regulations that were issued by U.S. Department of Health and Education as part of the law provided three broad categories of compliance regiments—athletic scholarships, benefit and services, and effective accommodations of student athletes, or student interest and abilities. Scholarship, obviously, required that scholarships be applied substantially, or

proportionately, to all students, regardless of gender status. If there is any disparity, the disparity must be shown to have some legitimate, nondiscriminatory factor. The other factor that is considered in whether an institution is in violation of Title IX is referred to as "benefits and services." As long as there is an equal opportunity in all aspects of both men and women programs, institutions are permitted to offer separate athletic programs for men and women.

The regulation listed about ten non-exclusive factors, which are to be considered in determining whether equal opportunity exists. I will not read all of those, but here are some examples: whether this selection of sports and the level of competition effectively accommodates the interests of, and abilities of, both sexes; whether there are provisions for equipment and supplies that are equal or comparable; travel and per diem allowances; provisions for locker rooms, practices, and competition facilities. All those factors must provide equal benefits to both sexes. Now, there was later added one factor, in addition to publicity and recruiting: support services. Support services is one of the factors that will sort of come in and help us determine whether or not an institution can implement the name, image, and likeness statues and still prevent them from violating Title IX. And many of these statues, for example, will have an officer who reviews the contracts that come in. Although the statute will not permit payment to student athletes, it does allow for a third party to review those contracts and then obviously provide reviewing services to those student athletes. Now, if those services have been provided equally to the men and women student athletes, then obviously there will not be any Title IX issues.

There is a potential for Title IX violation if the third party, who is in fact providing these naming deals, is favoring male versus female students. And it is in that light where an institution can be implicated for having violated Title IX because the third party is coming through the institution. And there have been court decisions that have imposed Title IX violations on institutions when, in fact, some third party is providing services. So, essentially, the third party may be considered an agent of the institution, in which case if they are violating Title IX by how they perform their services, the university may be, as well. So, universities have to be very careful in monitoring the contract-reviewing services that they provide, partly because of the institutions' history of dealing with Title IX issues and the general

notion that they are probably more experienced at being able to identify when there are potential problems.

Now, I am going to finish with talking a little bit about who profits from amateurism. A study of athletic departments' financing was conducted and reported in an article to the National Bureau of Economic Research. The article was titled: Who Profits from Amateurism? Rent-Sharing in Modern College Sports.[8] According to this study, 58% of the total athletic departments' income of NCAA Division I Football Subdivision (FSB) schools is generated by two sports: men's football and men's basketball. And I think a lot of times when people quote those statistics, they lump all Division I schools within those numbers, but that would not be an accurate thing to do. 15% of the of the total athletic departments' income comes from other sports. The other 27% of the total income comes from media rights, sales, and other resources.

Now, barring student athletes from sharing in the profits these institutions generate has created a momentous economic rent for universities that are in the Power Five athletic conferences. The data study included income generated by all Division I sports. The data measured the cities and towns that student athletes came from, as well as their socioeconomic background. The data revealed the revenue production of athletics departments, including how much the central administration of the university contributes to the budget of their athletic department. And that looked at all Division I schools. The statistics and the algorithm broke those schools into two groups: those that were profitable and those that were not. The schools that were profitable, meaning that they were self-sufficient, were not getting financial support from their central administration. Those schools were all from the Power Five conference. And so, when people talk about how much money institutions are making, you have to make a distinction. And I think the Supreme Court, in both those cases that I previously mentioned, made that distinction between institutions that are in FBS football and men's basketball.

Now, it came as no surprise that the that predominantly black, and student athletes from other racial minorities within the Power Five conferences, subsidized all other campus sports. This

[8] CRAIG GARTHWAITE ET AL., WHO PROFITS FROM AMATEURISM? RENT-SHARING IN MODERN COLLEGE SPORTS (Becker Friedman Inst., 2d ed. 2020).

data confirms what Justice Kavanaugh's critique was in *Alston*. According to Kavanaugh:

> The bottom line is that the NCAA and its member colleges are suppressing the pay of student athletes who collectively generate *billions* of dollars in revenue for colleges every year. Those enormous sums of money flow to seemingly everyone except student athletes. College presidents, athletic directors, coaches, conference commissioners, and NCAA executives take in six or seven figure salaries. Colleges build lavish new facilities. But the student athletes who generate the revenue, many of whom are African Americans and from lower-income backgrounds, end up with little or nothing.
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> Everyone agrees that the NCAA can require student athletes to be enrolled students in good standing. But 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. In particular, it is highly questionable whether the NCAA and its member colleges can justify not paying student athletes a fair share of the revenues on the circular theory that the defining characteristic of college sports is that the colleges do not pay student athletes. And if that asserted justification is unavailing, it is not clear how the NCAA can legally defend its remaining compensation rules.

Nat'l Collegiate Athletic Ass'n. v. Alston, 141 S. Ct. 2141, 2168 (2021) (Kavanaugh, B., concurring).

And so, that concurring opinion signals that there may be problems for the NCAA and the NCAA's model for amateur sports in the future. And with that with that, I will end my comments.

Professor Dan Lust:

Thank you, Professor Ferguson. When it comes to NIL and *Alston*, there are so many levels to it, but I'm happy to continue that conversation onto the panel. Professor Ferguson, any further thoughts or anything further on your end before we head into the panel?

Professor Kenneth Ferguson:

No. I am excited to hear from the other panelists.