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A PICTURE IS WORTH A THOUSAND LIVES: STUDENT ATHLETES' PUBLICITY RIGHTS AND SOCIAL JUSTICE

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INTRODUCTION

In 1968, two American sprinters, John Carlos (Carlos) and Tommie Smith (Smith), shocked the world by raising their fists while standing on the Olympic podium.¹ The two were protesting black poverty in the United States. The image of Carlos and Smith was captured by photographers far and wide.² Back then, the image was not worth much amid the intense national backlash and scrutiny, however today, 50 years later, the photo is priceless.³ The defiant demonstration on the Olympic stand eventually lead to impactful strides by the Olympic Project on Human Rights and the Civil Rights Movement.⁴ Similarly, in September of 2018, Nike unveiled its 30th anniversary “Just Do It” campaign featuring football superstar Colin Kaepernick.⁵ Kaepernick had become a controversial figure for protesting police brutality and the unjustified shootings of Black Americans by law enforcement officers by kneeling during the national anthem.⁶ With the new campaign, Nike has pledged to donate money to the “Know Your Rights” campaign, a social justice venture lead by Kaepernick.⁷

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1. Tom Parfitt, *Black Power Salute 50 years on: Iconic Olympic Protest by Tommie Smith and John Carlos remembered*, INDEPENDENT (Oct. 17, 2018), <https://www.independent.co.uk/news/world/americas/black-power-salute-1968-50-years-olympics-tommie-smith-john-carlos-racism-mexico-city-a8587811.html>.

2. Kareem Abdul-Jabbar, *Smith and Carlos Embodied many African Americans' Summer of Love and Reckoning*, THE GUARDIAN (Oct. 17, 2018), <https://www.theguardian.com/sport/2018/oct/17/smith-and-carlos-embodied-many-african-americans-summer-of-love-and-reckoning>.

3. Nikita Chulani, *Black Panther salute: 50 years on how much has changed?*, THE GUARDIAN (Oct. 17, 2018), <https://www.theguardian.com/sport/video/2018/oct/17/black-power-salute-50-years-on-how-much-has-changed-video-explainer>.

4. Dave Zirin, *The explosive 1968 Olympics*, INTERNATIONAL SOCIALIST REVIEW, no. 61 (Sep-Oct 2008), <http://www.isreview.org/issues/61/feat-zirin.shtml>.

5. Dan Wolken, *What fans told their college programs after Nike launched Colin Kaepernick ad campaign*, USA TODAY (Oct. 4, 2018), <https://www.usatoday.com/story/sports/ncaaf/2018/10/04/how-fans-reacted-college-sports-nike-colin-kaepernick-ad/1498729002/>.

6. *Id.*

7. Kevin Draper & Ken Belson, *Colin Kaepernick's Nike Campaign Keeps N.F.L. Anthem Kneeling in Spotlight*, N.Y. TIMES (Sep. 3, 2018), <https://www.nytimes.com/2018/09/03/sports/kaepernick-nike.html>.

In many instances, professional athletes have been able to use their respective name, image, or likeness or intellectual property rights to garner support for the various social justice causes. Student athletes have not been given the same opportunities or latitude to act, although their platforms are just as significant and powerful as professional athletes. Imagine Duke Basketball standout Zion Williamson raising awareness for STOP Hunger Now, a feeding initiative, or Alabama Football superstar Tua Tagovailoa protesting gender inequality by endorsing a shirt with the phrase “Pay Her.” What are the consequences of such actions? Should there be consequences for these actions? Given the NCAA’s emphasis on education and amateurism, are student athletes allowed to use their rights of publicity to further social justice or human rights campaigns? Should they be allowed to do so?

This note contends that student athletes can and should be able to use their rights of publicity to support social change initiatives because the activity is not inherently commercial and promotes entrepreneurial learning. Furthermore, allowing student athletes to use their intellectual property rights would provide a unique educational experience, enhancing their worldview and providing them with new skills.

Part I of this note will provide a legal overview of the right of publicity, in the context of student athletes. Part II will explain the NCAA Bylaws and rules on the use of name, image, and likeness, as well as discuss landmark cases concerning NCAA. Next, Part III discusses the definition and explanation of social justice, and the importance of social justice to society and student athletes. This section will also explore the NCAA’s take on social justice and activism. Part IV is a proposed plan of action for allowing athletes to use their rights of publicity while balancing the principle amateurism. Lastly, Part V looks at the advantages and disadvantages of allowing student athletes to use their intellectual property rights to advance human rights campaigns.

SECTION I: LEGAL HISTORY OF THE RIGHT OF PUBLICITY

A right of publicity is similar to a personal trademark. It is the exclusive right of prominent individuals, such as athletes and celebrities, to control the commercial exploitation of their identity.⁸ The right of publicity is a derivative of the right to privacy, as discussed by Samuel Warren and Louis Brandeis.⁹ Dean William Prosser detailed the right to privacy into four categories of protection against intrusion into private affairs, against disclosure

8. See Kurt M. Sanders & Michael A. Lozano, Article: *More Than an Academic Question: Defining Student Ownership of Intellectual Property Rights*, 28 *Fordham Intell. Prop. Media & Ent. L.J.* 175, 193 (2018); Restatement (Third) of Unfair Competition §46 (Am. Law Inst. 1995).

9. See Sean Hanlon and Ray Yasser, Article: “*J.J. Morrison*” and His Right of Publicity Lawsuit Against the NCAA, 15 *Vill. Sports & Ent. L.J.* 241, 256 (2008); Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 *Harv. L. Rev.* 193, 195 (1890).

of private facts, against false light, and against appropriation of the commercial value of one's likeness.¹⁰ The right of publicity arises from the fourth category: appropriation of an individual's name or likeness.¹¹ Athletes and public figures rely on state laws to protect the commercial use of their name, image, and likeness. The first right of publicity law in the United States was enacted in New York in 1903, although it was not labeled as a right of publicity law.¹² The right of publicity was not formally recognized until 1953 by the 2nd Circuit Court of Appeals in the *Haelan Labs v. Topps Chewing Gum, Inc* opinion.¹³ In the case, the court stated "in addition to and independent of the right to privacy . . . a man has a right in the publicity value in his photograph."¹⁴ This law prevents commercial exploitation and unjust enrichment of one's interest in property. Today, the right of publicity is recognized in nearly half of the United States. While scholars have argued for federal protection of the right of publicity by statute or the Lanham Act¹⁵, such legislation has fallen apart in the development stage.

In order to show a violation of a right of publicity there must be: (1) use of plaintiff's identity; (2) commercial value in the plaintiff's identity; (3) appropriation of that commercial value for the purpose(s) of trade; (4) a lack of consent by the plaintiff; and (5) a resulting injury.¹⁶ Publicity rights can be broadly defined as to include both personal and commercial harm to a plaintiff.

SECTION II: NCAA AND NAME, IMAGE, AND LIKENESS

In the majority of jurisdictions, every person may claim the right to publicity, however celebrities or individuals that have commercial value in their name or likeness are more likely to be successful in making such a claim. Student athletes from successful and prominent athletics programs, especially Division I student athletes, certainly have publicity rights in their name, image, and likeness. The commercial value of student athletes' identity can be seen in video games sales, athletic apparel sales, and television network ratings. Converse to the law on the right of publicity, NCAA bylaws do not

10. See William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383, 384 (1960).

11. *Id.*

12. N.Y. Laws Ch. 132, §§ 1-2 (1903), which subsequently became N.Y. Civ. Rights Law §§ 50, 51. The original 1903 Session law can be viewed at <https://babel.hathitrust.org/cgi/pt?id=nyp.33433090742549;view=1up;seq=320>.

13. See Sanders & Lozano, *supra* note 8 at 261.

14. *Id.* at 262.

15. The Lanham Act, or the Trademark Act is the federal statute that provides protection for trademark and regulates unfair competition.

16. See Matthew J. Mitten, *Intellectual Property Issues in Sports in Sport Law and Regulation*, 975, 1017-18, (4th ed. 2017).

allow student athletes to be compensated for the use of the name, image, or likeness, nor does it protect their right of publicity.¹⁷ These regulations fall under the fundamental principle that student athletes shall be amateurs motivated by education and should be protected from exploitation by professional and commercial enterprises.¹⁸ With the growth and popularity of many collegiate sports and the NCAA's use of intellectual property (e.g., television and media rights, video games, and merchandising), the focus on amateurism and education has become increasingly blurred.

Section 12.5.1.1 of the NCAA Division I Manual, states that colleges and universities, charities, and nonprofits may use the student athletes' name, picture, or appearance to support its activities.¹⁹ This allowance is subject to limitations such as no direct compensation to the athlete and the athlete's name, picture, and appearance cannot be used to promote the commercial ventures of any nonprofit agency. Section 12.4.4 states that student athletes may create businesses, provided their name, photo, appearance, or athletic reputation are not used to promote the business.²⁰ The rule does not specify whether student athletes can establish nonprofit agencies, but it seems likely that they would be able to since nonprofits are generally less commercial in nature. Contrary to the other rules, Section 12.5.2.1 states that an individual shall be ineligible for accepting any financial benefit or allowing the use of his or her name or picture to advertise, recommend or promote the sale or use of a commercial product or service directly.²¹ Additionally, under Section 12.5.1.3., the NCAA permits student athletes to continue modeling and non-athletic related activity if the activity began before enrollment, the activity is independent of the student's athletic ability, the athlete does not endorse the commercial product, and remuneration is not based on athletic reputation.²² This rule was the subject of *Bloom v. NCAA*.²³ A professional skier turned college football player at the University of Colorado, asked a court to waive the rule since his compensation from television and modeling funded his skiing career. Although Bloom had standing as a third-party beneficiary of the NCAA rules, the court denied Bloom's relief because he failed to show that the NCAA applied its rule arbitrarily.²⁴

17. See Sanders & Lozano, *supra* note 8, at 193.

18. NCAA, *2018-19 NCAA Division I Manual* 4 (National Collegiate Athletic Association 2018).

19. *Id.* at 73.

20. *Id.*

21. *Id.* at 76.

22. See *Id.* at 74 (Continuation of Modeling and Other Nonathletically Related Promotional Activities After Enrollment).

23. See *Bloom v. Nat'l Collegiate Athletic Ass'n*, 93 P.3d 621, 622 (Colo. App. 2004).

24. *Id.* at 628.

Another important case on this issue is *O'Bannon v. NCAA*.²⁵ Ed O'Bannon, a former UCLA basketball player, brought a cause of action against the NCAA and Collegiate Licensing Company for the unconsented and uncompensated use of his likeness in a videogame.²⁶ O'Bannon claimed that the NCAA's amateur rules that prevented student athletes from being compensated, violating Section I of the Sherman Antitrust Act.²⁷ The case was consolidated with another similar case brought by Sam Keller, and former Quarterback for Arizona State University and University of Nebraska.²⁸ Keller also sued EA, the maker of the videogames that misappropriated Keller's and other student athletes' name, image, and likeness. The Ninth Circuit Court of Appeals agreed with O'Bannon and Keller's arguments. The NCAA is subject to the Sherman Act or antitrust law, and applying the rule of reasons, the restrictions on student athletes' compensation were an illegal restraint on trade.²⁹ The court denied the \$5,000 in deferred compensation to student athletes, but they held that member institutions must raise scholarships to the actual or full cost of attendance.³⁰ The court agreed that amateurism is an essential part of the collegiate model, so the compensation was limited to educational activity, in effect affirming the "illegal" NCAA compensation rules.³¹ While the cases have not provided much clarity or control to student athletes over their publicity rights, it has opened the door for more causes of actions on these issues. Furthermore, the most recent case to be decided will be *Jenkins v. NCAA*, where the Ninth Circuit will be ruling on whether the NCAA's rules illegally suppress the value of athletic scholarships.³²

SECTION III: UNDERSTANDING SOCIAL JUSTICE

Sociology is the study of human social relationships and groups. Social justice is a phenomenon of sociology, although it can be challenging to define.³³ Social justice centers on the concept of egalitarianism or the equal

25. See *O'Bannon v. NCAA*, 802 F.3d 1049, 1049 (9th Cir. 2015).

26. *Id.* at 1055.

27. The Sherman Act promotes free competition in the marketplace and protects against unlawful restraints in trade and monopolies. The Rule of Reason uses economic factors to determine if a practice is an unreasonable restraint of trade, in violation of the Sherman Act.

28. *Id.*

29. *Id.* at 1056-60.

30. *Id.* at 1074-79.

31. *Id.* at 1079.

32. Joe Nocera, *O'Bannon Ruling Stands But NCAA Status Quo May Yet Collapse*, N.Y. Times, Oct. 4, 2016, at B10; Michael McCann, *NCAA Amateurism to go back under Courtroom Spotlight in Jenkins Trial*, Sports Illustrated, (Apr. 2, 2018), <https://www.si.com/college-football/2018/04/02/ncaa-amateurism-trial-judge-wilken-martin-jenkins-scholarships>.

33. UNC Department of Sociology, *What is Sociology?*, <https://sociology.unc.edu/undergraduate-program/sociology-major/what-is-sociology/> (last visited Dec 17, 2018).

distribution of wealth, opportunities, and privileges in society.³⁴ The United Nations calls social justice an “underlying principle for peaceful and prosperous coexistence within and among nations.”³⁵ Social justice requires that barriers based on gender, race, age, culture, or disability be removed to have successful coexistence. Furthermore, because there is no single definition of social justice, pursuing social justice can be done in many ways. For some, social justice can mean participating in protests, getting involved with non-profit agencies, fundraising for a cause, or raising awareness among many other ways.

“Student athletes should not lose their constitutional rights,” says Kevin Rome, president of Lincoln University.³⁶ Nor should they lose the identities that are the basis their athletic personas. Student athletes should be able to use their rights of publicity to address social justice issues central to their personal identities and cultures. Since the ancient Olympic games in 776 BC, athletes have championed social justice and political causes through their athletic performance on or off the playing field. Athletes in the ancient Olympics games promoted strong mind and body, as well as “peaceful coexistence” between countries and communities.³⁷ The motto of the games was “Faster, Higher, Stronger.”³⁸ As a microcosm of society, athletes and sports have been increasingly connected to human rights causes. For instance, boxing champion, Muhammed Ali, formerly Cassius Clay, refused to enter the Vietnam War because of his strongly-held religious and cultural beliefs.³⁹ Ali resisted the War and mainstream political thought, at the peak of his boxing career. Alternatively, professional basketball legend in the making, LeBron James, created a school in his hometown, Akron, Ohio that provides children and parents a wealth of resources to combat socioeconomic disparities.⁴⁰ Promoting positive social change is important because it allows individuals to

34. *Definition of Social Justice*, Merriam-Webster Dictionary, available at <https://www.merriam-webster.com/dictionary/social%20justice>.

35. International Labour Organization (ILO), *World Day of Social Justice: 20 February 2018*, Greening the Blue, <http://www.greeningtheblue.org/event/world-day-social-justice>.

36. Jake New, *Athletes and Activism*, InsideHigherEd.com, Feb. 3, 2017 (last visited Nov. 7, 2018).

37. Mitten, *supra* note 14, at 269. (An “ekecheria” or “sacred truce” was established for three-months among the competing nations, for the time surrounding the Games.)

38. Olympic Movement, FAQ, What is the Olympic motto? (Sep. 18, 2005), <http://registration.olympic.org/en/faq/detail/id/29> [<https://web.archive.org/web/20150918085634/http://registration.olympic.org/en/faq/detail/id/29>].

The Olympic motto is the *hendiatris Citius, Altius, Fortius*, which is Latin for “faster, higher, stronger”

39. Krishnadev Calamur, *Muhammad Ali and Vietnam*, The Atlantic, Jun. 4, 2016, available at <https://www.theatlantic.com/news/archive/2016/06/muhammad-ali-vietnam/485717/>.

40. Max Zahn, *Inside LeBron James’s New \$8 Million Public School, Where Students Get Free Bikes, Meals, and College Tuition*, Time, Jul. 31, 2018, <http://time.com/money/5354265/lebron-james-i-promise-school-akron/>.

acknowledge and preserve their personal identities while highlighting the interests and needs of marginalized communities. Student athletes should be able to promote social justice causes, using their intellectual property rights because many of them are community thought leaders like Muhammed Ali and LeBron James. With their heightened level of notoriety, student athletes can bring sidelined community interests and perspectives into the mainstream.

Moreover, student athletes being allowed to exercise their publicity rights is an act of social justice, consistent with the Lockean approach that property is power and to gain property one must work for it.⁴¹ Student athletes build their athletic reputation and the publicity that is associated. They should have some control over the use of their property interest, especially in non-commercial activity. Furthermore, student athletes have the ability to largely influence others and shape the conversations on social justice issues, just as they influence the success of commercial enterprises.

In a recent NCAA meeting, presidents from member institutions discussed student athlete participation in social activism or social initiatives.⁴² Many of the college presidents shared the sentiment that athletes should participate in social activism. Division III Chairman Alan Cureton reasoned, “[a]thletes have a prominent role. . . We have an opportunity to be a voice for those who do not have a voice. We have an opportunity to speak up for those who can’t speak up.”⁴³ The group of college presidents also discussed whether student athletes should be encouraged to protest restrictive name, image, and likeness rights. The answer was less clear; however, the group cited protests by football players at Stanford University and the University of Missouri that were successful in fighting similar issues.

Furthermore, some social justice issues require more deliberate action than a clear line of communication between student athletes and the University. Racial inequities, sexual harassment, and gender discrimination require much more attention, new perspectives, and legal reform. These grand issues also necessitate demonstrations and protests that attract or touch a multitude of people. Therefore, student athletes should be able to use their publicity right and other intellectual property rights to address social justice issues on a grand scale, given their unique, large social platforms.

41. Anjali Vats & Deidre A. Keller, Article: *Critical Race IP*, 36 *Cardozo Arts & Ent. L.J.* 735, 761-62 (2018).

42. New, *supra* note 33.

43. *Id.*

SECTION IV: A PLAN OF ACTION

A potential plan of action allowing student athletes to use the publicity rights is to create an NCAA task force comprised of IP attorneys and consultants to assist students with identifying legitimate causes and helping student athletes to provide support and awareness. The task force can function as both a consultant and a monitor for the student athlete. The task force will operate similar to the licensing arm and career transition teams of a professional players' association's (i.e., Think450 (NBAPA), NFL Players, Inc. (NFLPA)). The task force would identify businesses and causes to partner with for endorsements and community operations needs and to provide brief externships for student athletes to gain practical experience.⁴⁴ The student athletes would have the option to choose a cause to work on and explore the ins and outs of the cause or nonprofit that he or she works with. This aspect helps to preserve the emphasis on education and learning while balancing the commercial use of student athletes' right of publicity. Student athletes would be able to pose for pictures and endorse the cause; however, the student athletes would not be allowed to wear their uniform or any trademarks or logos affiliated with their respective college or university. The majority of the proceeds arising from the athlete's activity would remain with the selected nonprofit agency or be donated to the athlete selected cause. A portion of the funds raised would go to the athlete for directly performed since it would be related to educational activity.

Next, the time and efforts of student athletes would be measured similar to pro bono hours. Once an athlete reaches a threshold of hours or activities, they can receive incentives for participation like compensation or course credit, as well as public recognition, a celebratory dinner, and graduation cords. This proposed action plan focuses primarily on the student athlete's learning experience and would be compliant with the current NCAA amateurism rules.

Another idea is to allow passionate student athletes to create nonprofit organizations to support various social justice initiatives. With this option, student athletes would gain a better understanding of community relations and nonprofit building. Student athletes would establish their own 501(c)3 organizations that would be able to focus on multiple social justice issues. The student athletes would develop or recruit a board of directors to run the daily operations of the nonprofit and create a program calendar. This option would be compliant since section 12.4.4 permits athletes to establish businesses provided their name, photo, and athletic reputation are not used to promote the

44. NFLPA Externship, <https://www.nflpa.com/active-players/career/nflpaexternship> (last visited Dec. 17, 2018).

business.⁴⁵ Moreover, this option could develop with student athletes, even beyond their time in college.⁴⁶

SECTION V: PROPOSAL CONSIDERATIONS

There are many benefits to allowing student athletes to use their publicity rights to achieve social justice. First, the prominence of some student athletes could attract an array of people to be more involved and concerned about human rights issues. Ideally, society will more likely achieve positive social change when more individuals become active participants in resolving society's issues. As previously stated, "student athletes have a prominent role."⁴⁷ They should not be restricted from drawing awareness to social causes. Next, participating in activism is a unique learning experience that can impact one's identity and worldview. Allowing student athletes to use their publicity rights for social justice could inspire the next generation of leaders. The more that individuals know about specific issues, the better their understanding of relationships and people. This advantage could potentially improve team chemistry or dynamics for student athletes. Moreover, student athletes exercising control over their intellectual property rights are rooted in the central principles of the NCAA: education, amateurism, and student wellness.⁴⁸ Also, athletes will have greater knowledge and practical experience with intellectual property before they enter professional sports careers or the workforce. Moreover, allowing student athletes some control of their rights of publicity is an act of social justice in itself because it restores some of their autonomy and economic freedom.

Furthermore, there are some limitations to this exercise of publicity rights. First, there may be difficulty distinguishing commercial activity from nonprofit work or social activism. The most significant challenges would be keeping athlete separated from commercial functions of the nonprofit agencies and ensuring they do receive remuneration for work performed. Another concern is the potential for false associations between the universities or athletic programs and specific causes or viewpoints based on student athletes' use of their image and likeness. Blurring or tarnishment claims could arise

45. NCAA, *supra* note 18, at 96.

46. Daren Rovell, *Lawsuit filed claims 'Johnny Football' infringement*, ESPN.com (Feb. 23, 2013), http://www.espn.com/college-football/story/_/id/8977054/lawsuit-filed-claims-johnny-football-infringement.

Notably, former college quarterback Johnny Manziel created a business, "JMan2 Enterprises LLC", to protect his intellectual property rights, mainly trademarks. He successfully protected his rights to "Johnny Football" while still playing for Texas A&M University

47. New, *supra* note 33.

48. NCAA, *supra* note 16, at 12-4.

from athlete activism.⁴⁹ If a student uses his name and image, then the trademarks and logos of the universities, athletic departments, nor the NCAA should not be used. In addition, protection of the right of publicity may vary from state to state due to the difference in state laws.

CONCLUSION

If student athletes' intellectual property rights can be used to bring popularity to commercial ventures, they should also be able to use them to promote social justice. In their inception, the rule on amateurism and name, image, and likeness were meant to preserve collegiate athletics and the importance of education. Currently, the NCAA rules expose student athletes to commercial exploitation, and do little to protect and educate student athletes about their intellectual property rights. Not only should student athletes be able to use their right of publicity to promote social justice, but the NCAA rules must be updated to better serve the modern-day student athlete and protect them from commercial exploitation by businesses and its own member institutions.

49. Howard Winter, *Dilution Under The Trademark Laws*, N.Y. L.J. (Sep. 24, 2018), <https://www.law.com/newyorklawjournal/2018/09/24/dilution-under-the-trademark-laws/>. Tarnishment is a cause of action for trademarks where the use of associated marks cause damage to the reputation of a famous mark.