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That's Your Name, Don't Wear it Out: How NCAA Athletes Can Avoid Crossing the Invisible Line Between Name and Brand

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THAT’S YOUR NAME, DON’T WEAR IT OUT: HOW NCAA ATHLETES CAN AVOID CROSSING THE INVISIBLE LINE BETWEEN NAME AND BRAND

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I. INTRODUCTION

One day, you may lose the right to use your own name. Without more explanation, this proposition seems incredible, unlikely, or implausible. But it happened to a twenty-five-year-old fashion designer who signed an iron-clad contract.¹ It happened to a son bearing his father's trademarked name.² And it happened to a multi-millionaire designer when she decided to sell her business.³ Losing the right to a name is becoming increasingly common in the world of trademark law. Entrepreneurs, influencers, and business owners alike should take notice.⁴ In fact, student-athletes, in light of a newfound freedom to develop personal brands, are at a heightened risk of losing this right as their name, image, and likeness ("NIL") increases in commercial value and competes with its familial value.⁵

A rise in personal brand identification has blurred the line between what separates a person from their brand.⁶ Under the new National Collegiate Athletic Association ("NCAA") rules, in conjunction with courts' increasing propensity to acknowledge individuals' names as trademarks, student-athletes must start considering how to create a brand that will evolve with their professional sports careers or lose the right to associate their personal names with the trademarked version of themselves.⁷ This Comment discusses what factors tip the scale toward allowing a name to become a trademark, and in what circumstances applicants can overcome the general rule prohibiting surname trademarks.⁸

To promote clarity on this issue, this Comment elucidates the United States Patent and Trademark Office's ("USPTO") name-trademark decision-making process by examining its core value: commercialism. Even though the USPTO asserts that a name may only receive trademark registration if it acquires a "secondary meaning" in the eyes of the consuming public, this methodology is unhelpful to trademark applicants because it fails to emphasize how public perception merely attempts to measure the mark's commercial value; the subjective perception of the public is not the real indicator of a successful name-trademark application.⁹ Thus, applicants should not judge the validity of their trademark

1. *JLM Couture, Inc. v. Gutman*, No. 20-CV-10575-SLC, 2021 WL 827749, at *2 (S.D.N.Y. Mar. 4, 2021); Samantha Grindell et al., *A complete timeline of bridal designer Hayley Paige's year-long legal battle with JLM Couture*, INSIDER (Aug. 8, 2022, 9:43 AM), <https://www.insider.com/hayley-paige-gutman-jlm-couture-controversy-timeline-2021-1>.

2. See *RSR Art, LLC v. Bob Ross, Inc.*, 380 F. Supp. 3d 510, 512–16 (E.D. Va. 2019); Alston Ramsay, *Sex, Deceit, and Scandal: The Ugly War Over Bob Ross' Ghost*, DAILY BEAST (May 19, 2021), <https://www.thedailybeast.com/sex-deceit-and-scandal-the-ugly-war-over-bob-ross-ghost>.

3. *ARCHIVE: Kate Spade Turns Kate Valentine, Demonstrates the Risks of the Personal Brand Name*, THE FASHION L. (June 5, 2018), <https://www.thefashionlaw.com/kate-spade-turns-kate-valentine-demonstrates-the-risks-of-the-personal-brand-name/> (hereinafter *Kate Spade Turns Kate Valentine*).

4. See *JLM Couture, Inc.*, 2021 WL 827749, at *2; Matthew D. Asbell, *The Designer Formerly Known As . . . Intellectual Property Issues Arising from Personal Names as Fashion Brands*, LADAS & PARRY EDUC. CTR. (Feb. 11, 2017), <https://ladas.com/education-center/5633-2/>.

5. *Interim NIL Policy*, NCAA, https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf (last visited Jan. 26, 2023).

6. SUSAN J. DOUGLAS & ANDREA McDONNELL, *CELEBRITY: A HISTORY OF FAME* 249–52 (2019).

7. *Interim NIL Policy*, *supra* note 5. See also *JLM Couture, Inc.*, 2021 WL 827749, at *2, *23–24; Asbell, *supra* note 4.

8. 15 U.S.C. § 1052(e)(4).

9. Trademark Manual of Examining Procedure §§ 1211.01, 1212 (July 2021) (quoting *Ralston Purina Co. v. Thomas J. Lipton, Inc.*, 341 F. Supp. 129, 133 (S.D.N.Y. 1972)) (hereinafter *TMEP*).

application solely on the perception of an indeterminable “public.”¹⁰ This discussion also considers potential problems with student-athletes filing name trademarks at the beginning of their careers and how they can protect the future of their intellectual property.

Part II of this Comment provides an overview of trademark law. It notes that, generally, the USPTO prohibits applicants from registering a mark that is “primarily merely a surname.”¹¹ Despite this rule’s codification in trademark law and discussion in prominent trademark cases, certain names have been trademarked.¹² Part II also illustrates what types of marks pass the USPTO’s application process and why.¹³ Part II concludes with a synopsis of the NCAA’s current NIL rules and a summary of the United States Supreme Court’s reasoning in a recent case discussing how NCAA rules restricting education-related benefits were unfair to players, setting the stage for new collegiate regulations.¹⁴

Part III of this Comment summarizes personal branding trademark cases. While courts in earlier cases were hesitant to allow names to reference brands (even when the name represented a good or service unique to the trademark applicant), courts in the last forty years have increasingly acknowledged individuals’ names as trademarks.¹⁵ In fact, courts in several high-profile cases have found that a person may lose the right to use their own name freely in commerce once that name becomes synonymous with—or solely recognizable as—a brand.¹⁶ Part III concludes with a discussion of what factors play a role in transforming a name into a brand and the risks associated with registering a trademark of one’s own name.

Part IV discusses college athletes’ new opportunities to use their name, image, and likeness to earn money. This Comment determines that the most likely way college athletes will take advantage of the new rules is through licensing agreements and potentially rigid contracts. Part IV lays out certain considerations these athletes must acknowledge early in their careers to ensure their names’ and business endeavors’ longevity.¹⁷ Part IV also urges the NCAA and universities to provide adequate legal counsel, funding, programs, and incentives for student-athletes to ensure the new NIL rules—originally promulgated in the name of athletes’ rights and fairness—continue to protect student-athletes from losing the right to use their own name in NIL brand deals.¹⁸

Because personal brand identification is on the rise and the NIL rules are so new, this Comment relies on hypothetical situations to illustrate certain issues.¹⁹ There is already ample scholarship discussing prominent trademark issues, such as the likelihood of confusion and trademark dilution, and how successfully registered trademarks have overcome these problems.²⁰ Therefore, this Comment does not discuss the details of these

10. *Id.*

11. Surname marks are only registrable trademarks if they gain secondary meaning as common-law trademarks. 15 U.S.C. § 1052(e)(4).

12. *See RSR Art*, 380 F. Supp. 3d at 512–15; *Kate Spade Turns Kate Valentine*, *supra* note 3.

13. 15 U.S.C. § 1052(e)(4); TMEP § 1211.01(b)(v).

14. *NCAA v. Alston*, 141 S. Ct. 2141, 2166 (2021).

15. *In re Sawyer Elec. Mfg. Co.*, 144 F.2d 893, 895 (C.C.P.A. 1944); *RSR Art*, 380 F. Supp. 3d at 512–15.

16. *Asbell*, *supra* note 4; *Kate Spade Turns Kate Valentine*, *supra* note 3.

17. William McGeeveran, *Selfmarks*, 56 HOUS. L. REV. 333, 341 (2018).

18. *Alston*, 141 S. Ct. at 2166.

19. *Interim NIL Policy*, *supra* note 5.

20. *See generally* RICHARD L. KIRKPATRICK, *LIKELIHOOD OF CONFUSION IN TRADEMARK LAW* (2d ed.

issues in much depth. However, in discussing personal names as trademarks and overcoming the rule prohibiting surname marks, this Comment uses hypotheticals to illustrate how these trademark issues involving personal brand deals can uniquely affect collegiate athletes who sign multiple, simultaneous agreements.²¹

For the purposes of hypothetical illustration, consider a twenty-year-old sophomore college athlete named Viktor Allistar, the quarterback of the football team at State U. The school has a population of about 30,000 students. On game day, thousands of fans pack the school's stadium to watch Viktor—a Heisman contender—play, and millions watch on television. Sports commentators have discussed Viktor's athletic career since he was in high school, and he is well-known in his hometown; his signing day ceremony was even broadcast on ESPN. Viktor has amassed 100,000 followers on his social media accounts since joining the team at State U.

In July 2021, in light of the new NIL rules, Viktor now has the opportunity to use his name, image, and likeness in brand deals online and in association with local and national businesses.²² Because Viktor is particularly well-known, millions of dollars are on the bargaining table. Viktor is considering partnerships with a local, popular grocery store in the same state as State U. Viktor has already accepted a licensing deal with Walmart to sell his name and likeness on t-shirts. He has received other brand-deal offers from national food chains and car dealerships, and he wants to accept as many deals as possible given this new, lucrative opportunity. Likewise, Viktor is not only interested in playing the game; he wants to coach younger athletes one day, and he has an interest in creating a clothing label under his name to sell athletic gear and equipment if he decides to “go pro.”

While the NCAA has presented college athletes like Viktor Allistar with an opportunity to make millions, these athletes must consider how the right to use their own name in different brand deals and business ventures now could limit lucrative deals later.²³ Athletes must understand how registering a trademark of their name can both protect and limit their right to use a personal name for commercial uses.²⁴ Further, before Viktor can consider applying for registration of his name, he must understand when a personal name becomes a brand to decide at what stages in his career he should pursue legal guidance and trademark protection. This hypothetical scenario predicts what legal issues are likely to occur in spite of the new NIL rules, and it offers an illustration of how these issues may affect other NCAA athletes signing brand deals today.²⁵

2013); DAVID S. WELKOWITZ, TRADEMARK DILUTION: FEDERAL, STATE, AND INTERNATIONAL LAW (2002).

21. See *infra* Section III.A.

22. *Interim NIL Policy*, *supra* note 5.

23. Tom VanHaaren, *Ohio State Buckeyes QB Quinn Ewers has NIL deal for \$1.4 million, source says*, ESPN (Aug. 31, 2021), https://www.espn.com/college-football/story/_/id/32120440/ohio-state-buckeyes-qb-quinn-ewers-nil-deal-14-million-source-says. See also *RSR Art, LLC v. Bob Ross Inc.*, 380 F. Supp. 3d 510, 512–14 (E.D. Va. 2019).

24. *Court Bars Hayley Paige from Using Name, Social Media Accounts for the Duration of Battle with Former Employer*, THE FASHION L. (Mar. 11, 2021), <https://www.thefashionlaw.com/court-bars-hayley-paige-from-using-name-social-media-accounts-for-the-duration-of-battle-with-former-employer/> (hereinafter *Court Bars Hayley Paige*); *RSR Art*, 380 F. Supp. 3d at 512–14.

25. VanHaaren, *supra* note 23; see also *RSR Art, LLC*, 380 F. Supp. 3d at 512–14.

II. PERSONAL NAME TRADEMARKS: A RISKY INVESTMENT FOR STUDENT-ATHLETES IN LIGHT OF NIL RULES

The Lanham Act of 1946 established federal trademark registration standards and guidelines, thus creating the application requirements for trademark applicants, including college sport stars.²⁶ Currently, the Act defines a trademark as “any word, name, symbol, or device, or any combination thereof—(1) used by a person, or (2) which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this chapter, to identify and distinguish his or her goods”²⁷ The Act’s purpose is to “distinguish the services of one person” and to “indicate the source of the services.”²⁸ In short, trademark law helps protect any “word, phrase, symbol, [or] design” that identifies the source of one’s goods or services, and trademarks can protect how one uses a word or phrase in relation to the types of goods or services she offers.²⁹ Consequently, a trademark distinguishes one’s goods from those of competitors.³⁰ Federal trademark registration creates a record of that protection and results in nationwide rights in one’s trademark, dissuading trademark “copycats” from confusing consumers about the source of certain goods or services.³¹ Because U.S. trademark registration signals and creates an assumption that trademark law protects the source identifiers, personal brands can thrive.

The United States’ trademark application process requires careful forethought by the applicant before the USPTO will register the mark.³² The process requires applicants to identify certain classes of goods and services they seek registration under before an examining attorney will accept the application for review.³³ If an athlete wants to register a trademark of his name for media appearances and for a brand of athletic gear, these situations will require him to apply for registration in at least two different trademark classes.³⁴ These limitations help deter brands and businesses from over-registering their mark in multiple trademark classes the applicant never anticipates using.³⁵ In general, two businesses can have the same name if there is not a “likelihood of confusion.”³⁶ To prevent a likelihood of confusion, the USPTO will only allow a later business with the same name

26. Lanham Act, Pub. L. No. 79-489, 60 Stat. 427 (1946).

27. 15 U.S.C. § 1127.

28. *Id.*

29. *What is a trademark?*, USPTO, <https://www.uspto.gov/trademarks/basics/what-trademark> (last visited Jan. 26, 2023).

30. *Id.*

31. *Id.*; Sid Peddinti, *Everything You’ve Ever Wanted to Know About Trademarks*, ENTREPRENEUR (Oct. 17, 2021), <https://bit.ly/3GSVuxU>.

32. TMEP § 1401.

33. *Id.* §§ 1401.03(c), 1401.04(b).

34. *Id.* § 1401. An applicant applying for trademark registration for media appearances could file under Class 41 and 45. *Id.*

35. *Id.* §§ 1401.03(c), 1401.04(b).

36. *Likelihood of Confusion*, USPTO, <https://www.uspto.gov/trademarks/search/likelihood-confusion> (last visited Jan. 26, 2023).

as another business to file in different trademark classes.³⁷ Thus, an applicant is both deterred and prevented from over-registering in classes that he does not intend to use.³⁸ Finally, because the USPTO requires applicants to have already used the mark in commerce in conjunction with the specified classes or submit an intent to use the mark within six months, all applicants must anticipate which classes to file under before applying.³⁹

A. The Prohibition of Surname Trademarks and Why Personal Name Trademarks are Distinct

To protect college athletes' personal brand identity, there are two trademark rules an athlete must note.⁴⁰ First, one cannot generally trademark a surname.⁴¹ As currently enacted, the Lanham Act requires USPTO examining attorneys to reject applications that are "primarily merely a surname" or that lack a secondary meaning in its role as both a name and source identifier.⁴² The Trademark Manual of Examining Procedure ("TMEP") offers guidance on how courts will determine whether a mark is primarily merely a surname by collecting court cases discussing the various factors that judges apply to make the determination.⁴³ The TMEP is a reference guide for trademark attorneys and applicants updated regularly by the USPTO.⁴⁴ Per the manual, judges must base their decision on whether "the primary, not the secondary, significance" of the trademark in an application is recognizable as a surname.⁴⁵ Although this explicit rule is widely known, it is not widely accepted in every instance.⁴⁶ Several famous sport stars have registered trademarks that consist primarily of their surname, including Dwayne Wade and his brand "Way of Wade" and Michael Jordan's shoes "Air Jordans."⁴⁷ Even 2019 Heisman winner Joe Burrow has applied to register the word mark "Burreaux," a play on words of his surname and the fact that he played at Louisiana State University.⁴⁸

To understand how surname trademarks are permissible, further discussion about the prohibition is required. *In re Hutchinson* provides the primary statement of the general no-surname rule in trademark case law.⁴⁹ The case illustrates how courts have interpreted the Trademark Act's prohibition on registration of surnames.⁵⁰ In general, to decide

37. *Id.*

38. TMEP §§ 1401.03(c), 1401.04(b).

39. *Id.*

40. 15 U.S.C. §§ 1052(c), (e)(4).

41. *Id.* § 1052(e)(4).

42. *Id.* See also TMEP § 1212.

43. TMEP § 1211.

44. *Id.* § 1206.

45. *Id.* § 1211.01.

46. Examples of successful name trademarks include Dwayne Wade's "Way of Wade" trademark and Michael Jordan's "Air Jordan" trademark. WAY OF WADE, Registration No. 5,807,260; AIR JORDAN, Registration No. 1,370,283. An example of an unsuccessful name trademark is Joe Burrow's attempt to trademark the name "Burreaux." U.S. Trademark Application Serial No. 88/731,491 (filed Dec. 18, 2019).

47. Registration No. 5,807,260; Registration No. 1,370,283.

48. Serial No. 88/731,491.

49. *In re Hutchinson Tech. Inc.*, 852 F.2d 552, 554 (Fed. Cir. 1988).

50. *Id.*

whether a mark is primarily merely a surname requires determining “the primary significance of the mark as a whole to the purchasing public.”⁵¹ Therefore, USPTO examining attorneys look past the application for evidence that the public perceives the name as identifying more than the individual.⁵² The USPTO permits registration of surnames that have accomplished “acquired distinctiveness.”⁵³ In fact, the Trademark Trial and Appeal Board (“TTAB”) weighs five different inquiries to gauge the “public’s perception” of this characteristic.⁵⁴ The inquiries are (1) the rareness of the surname, (2) whether the applicant’s surname is the mark applying for registration, (3) any meaning beyond identifying a person by a surname, (4) whether the “structure and pronunciation” relatively matches that of a regular surname, and (5) whether the styling of the name is “distinctive.”⁵⁵ Until the purchasing public perceives a name as acquiring a secondary meaning, the USPTO disallows its registration.⁵⁶

The USPTO sends office actions to applicants when their name violates a portion of the Lanham Act or other applicable trademark law.⁵⁷ Trademark applicants, including interested NCAA athletes, must consider the three ways they may prove the distinctiveness of their trademarks, particularly if they do decide to register their name.⁵⁸ In these office actions, examining attorneys have advised that to overcome the attorney’s suggestion that the name is primarily merely a surname, an applicant should show that (1) the mark has acquired distinctive use over five years, (2) there are prior registrations of the mark, or (3) there is other evidence the name has acquired a specific, distinctive meaning.⁵⁹ For example, athletes may be able to convince examining attorneys to register marks that have acquired distinctiveness through the commercial use of their image in relation to their sport.⁶⁰ Therefore, it is important to determine how trademarks that are primarily merely surnames prove acquired distinctiveness.

One could argue an application for registration of a student’s first and last name, despite what commercial or sport significance it may have with the general public, is still primarily merely a surname used to identify an individual. However, the second relevant rule that athletes must consider in protecting their identity is that the Lanham Act implicitly suggests that trademarks registrable on the principal register may consist of a first and last name “identifying a particular living individual” on the condition that the living person consents to the application and the mark serves to identify a source of goods or services.⁶¹ In fact, first names, first and last names, and initials all classify as personal names and carry an inherent distinctiveness.⁶² Despite the apparent straightforwardness of this rule,

51. *Id.*

52. TMEP § 1211.01.

53. *Id.* § 1212; 15 U.S.C. § 1052(2)(f).

54. TMEP § 1211.01. The TTAB handles all trials and appeals for cases involving trademark applications and denials. *Id.*

55. *Id.* (quoting *In re Colors in Optics, Ltd.*, 2020 U.S.P.Q.2d 53784, at *1–2 (T.T.A.B. 2020)).

56. *Id.* § 1212.

57. *Responding to Office Actions*, USPTO, <https://bit.ly/40a2Ztc> (last visited Jan. 26, 2023).

58. TMEP § 1212.

59. *Id.*

60. *Id.*

61. 15 U.S.C. § 1052(c).

62. TMEP §§ 1211.01(b), (b)(iii). See also Nikki Siesel, *Can You Use Your Name as a Trademark?*, L. OFFS.

a later section adds that these names may be registered “if there is evidence that the name identifies a specific living individual who is publicly connected with the business in which the mark is used, or who is so well known that such a connection would be assumed.”⁶³

To make matters less clear, the TMEP suggests that Section 1052 of the Lanham Act is primarily concerned with determining whether an applicant must attain consent from a living individual to use their name.⁶⁴ In one decision by the TTAB, it admitted that this consent is not available to all; too many people have the same or similar names.⁶⁵ Instead, “the Statute was intended to protect one who, for valid reasons, could expect to suffer damage from another’s trademark use of his name.”⁶⁶ This caveat suggests only well-known or famous celebrities can fight an application for use of their name.

This Comment implicitly distinguishes regular trademarks from name trademarks, and that distinction is significant for student-athletes seeking to assert their ownership of the brands they create by registering a trademark. For instance, some student-athletes may wish to curate a personal brand and trademark their name as a source identifier in commerce despite the risks, a scenario detailed further in Part III. These types of trademarks are more accurately called “selfmarks.”⁶⁷ Understanding the conceptual differences between a standard trademark and a selfmark assists student-athletes in recognizing their options in protecting their intellectual property. While trademarks historically reference a logo, slogan, or business name, law professor William McGeeveran considers “selfmark” to be a more accurate name for when a person registers a name trademark due to its distinct, individualistic nature.⁶⁸ In fact, law professor Laura Heymann has pointed out how trademarks serve similar, denotative functions: “to identify a person or thing, to distinguish that person or thing from others, and, relatedly, to act as a vehicle for certain intended or unintended associations about the individual, company, good, or service.”⁶⁹ These similarities further promote the idea that names as marks have unique qualities and should be separately categorized as selfmarks.

Selfmarks are increasingly gaining popularity following the rise of personal celebrities and influencers.⁷⁰ As more people are discovering the value in personal brand identification, the importance of curating a selfmark that is protected by federal law is arguably crucial. However, while registering a selfmark can create a valuable commercial asset, doing so causes the name’s familial value to decline. While the moment a name transforms into a trademarkable brand may be blurry, registered trademarks prevent the dual use

NIKKI SIESEL PLLC, <https://www.ny-trademark-lawyer.com/can-you-use-your-name-as-a-trademark.html> (last visited May 3, 2023).

63. TMEP § 1206.01. This Comment distinguishes between surname trademarks (i.e., a mark that is primarily a last name) and personal name trademarks (i.e., a mark that generally includes an applicant’s first name or initials). However, the phrase “personal-name trademark” or “personal name-brand trademark” is also used generally throughout this Comment to discuss both types of marks overall. Trademark applicants hoping to register their name as a brand face similar risks, irrespective of whether the mark consists of their surname or their first, middle, and last name.

64. *Id.*

65. *Id.* § 1206.02.

66. *Id.* (quoting *Martin v. Carter Hawley Hale Stores, Inc.*, 206 U.S.P.Q. 931, 933 (T.T.A.B. 1979)).

67. McGeeveran, *supra* note 17, at 334.

68. *Id.* at 333, 335.

69. Laura A. Heymann, *Naming, Identity, and Trademark Law*, 86 IND. L.J. 381, 444–45 (2011).

70. McGeeveran, *supra* note 17, at 335; DOUGLAS & MCDONNELL, *supra* note 6, at 249–52.

(commercial and familial) of the name outside of private, personal settings.⁷¹ Student-athletes must acknowledge that they are only at risk of losing the right to use their own name *if* they register a selfmark.

In conclusion, trademark law can be complicated, especially when registering a trademark of one's name. While names that primarily consist of surnames are forbidden unless they are distinct in the minds of the consuming public, the Lanham Act implicitly suggests full names may be trademarked with the living individual's consent if that living individual is "well known in the relevant field of goods or services" or if the trademark has acquired secondary meaning.⁷² Furthermore, trademark protection only covers the use of the mark based on the class of services it identifies, so it is important that college athletes interested in obtaining federal trademark protection carefully and strategically choose applicable trademark classes to ensure the longevity of both their intellectual property and professional careers.⁷³ Having summarized the federal trademark registration requirements for name-trademark applications, a question remains about *how* risky filing a personal name trademark (as opposed to a regular mark) is for undergraduate student-athletes, specifically.

B. The Importance of Trademarks

Before one can understand the relevance of determining when a name becomes a brand, it is important to appreciate the purpose of trademarks generally. Although the Lanham Act's purpose is to distinguish and protect certain goods and services associated with particular people or brands, why does anyone care to register their own name? Vic Lin, a patent and trademark attorney, found that celebrities often want to trademark their name to protect it from other people trying to use their name to represent other goods and services not associated with the celebrity.⁷⁴ However, even the rich and powerful run into issues if others have already trademarked that name and used it in relation to a good or service in commerce.⁷⁵ Trademarks also "indicate the origin of the market offerings," as well as identify the mark in a competing marketplace.⁷⁶ Thus, trademarks are excellent at deterring other businesses from encroaching on the use of one's registered mark.⁷⁷ Because businesses not associated with a celebrity may only care to use the name to sell more goods or services through unsolicited endorsements, people with recognizable names are interested in using their name's commercial value to their benefit.⁷⁸

Furthermore, trademarks can protect the likeness of an individual, and sports stars should take particular interest in this feature.⁷⁹ Several successful trademark applications

71. See *Court Bars Hayley Paige*, *supra* note 24; *Kate Spade Turns Kate Valentine*, *supra* note 3.

72. TMEP §§ 1206.02, 1212.

73. *Id.* § 1401.04(b).

74. Vic Lin, *Can you trademark a person's name?*, PAT. TRADEMARK BLOG, <https://www.patenttrademark-blog.com/person-name-trademark/> (last visited Jan. 26, 2023).

75. Kaitlyn Tiffany, *Why Celebrities Try to Trademark Their Catchphrases and Baby Names*, VOX (Apr. 19, 2019, 2:40 PM), <https://bit.ly/2GxCWFn>.

76. Carolina Castaldi, *All the Great Things You Can Do with Trademark Data: Taking Stock and Looking Ahead*, 18 STRATEGIC ORG. 472, 473 (2020).

77. *Id.*

78. *Id.*

79. *Can I Trademark My Likeness?*, SECUREYOURTRADEMARK.COM, <https://secureyourtrademark.com/can->

preserve the likeness of sports stars' famous poses.⁸⁰ In fact, Nike has recently filed for registration of the famous Jordan dunking silhouette.⁸¹ Moreover, an illustrated image depicting Usain Bolt doing his "lightning bolt" pose is currently a registered mark.⁸² Although these marks refer to the likeness of professional athletes, college athletes could also likely achieve registration for their likeness, depending on the mark's distinctiveness.⁸³

C. NCAA Name, Image, and Likeness Rules Offer Student-Athletes Newfound, Lucrative Opportunities in the Name of Fairness

Since July 2021, the NCAA has allowed its athletes to earn money based on their name, image, and likeness for the first time—a product of the NCAA's new NIL rules.⁸⁴ Concurrent with the rise of social media influencers, some student-athletes are poised to make millions off their personal brands through licensing agreements and brand deals.⁸⁵ Although professional athletes have had the right to monetize their name and likeness, there are approximately 500,000 NCAA athletes in the United States today, giving rise to an entirely new class of commercialized athletes.⁸⁶ Because these rules are so recent, an overview of the NIL rules is essential. This section briefly discusses the landmark Supreme Court case *NCAA v. Alston* and the debate surrounding the NCAA's previously overbearing restrictions.⁸⁷ Understanding how the Supreme Court set the stage for the new NIL rules sheds light on why the NCAA issued them.⁸⁸ The new NIL rules are revolutionary for athletes starting their college careers. Still, they are only helpful to the extent that athletes can ensure their rights are legally protected after they have signed NIL deals.

i. Interim NIL Policy, July 2021

Effective July 1, 2021, NCAA athletes were permitted to use their name, image, and likeness to establish brand deals and earn money.⁸⁹ While direct compensation for playing time is still forbidden, athletes can now use their star power to earn brand deals.⁹⁰ Notably,

you-trademark/trademark-my-likeness/ (last visited Jan. 26, 2023).

80. KAEPERNICKING, Registration No. 4,431,402. The phrase "kaeperknicking" is a registered word mark referring to Colin Kaepernick's famous touchdown pose; it is not a literal depiction of his likeness. *Id.* The mark itself is a depiction of a man with one arm extended and pointing upward and the other arm raised and pointing at the back of his head. Registration No. 4,177,904.

81. U.S. Trademark Application Serial No. 97/096,945 (filed Oct. 28, 2021).

82. Registration No. 4,177,904.

83. Registration No. 4,431,402; Registration No. 4,177,904.

84. *Interim NIL Policy*, *supra* note 5.

85. VanHaaren, *supra* note 23.

86. *Student-Athletes*, NCAA, <https://www.ncaa.org/sports/2021/7/9/your-journey.aspx> (last visited Jan. 26, 2023).

87. 141 S. Ct. 2141 (2021); Michael Delle Donne & Richard J. Hunter, Jr., *An Essay on the NCAA, Amateurism, and the Student-Athlete: Protecting Their Greatest Asset*, 2 J. BUS. & SOC. SCI. REV. 1, 2 (2021).

88. *Alston*, 141 S. Ct. at 2141–66.

89. *Interim NIL Policy*, *supra* note 5. An athlete's name, image, and likeness are also generally protected by the right of publicity. *Right of publicity*, BLACK'S LAW DICTIONARY (11th ed. 2019). Right of publicity laws vary by state, and there is no federal right of publicity statute. *Id.* This Comment addresses trademark issues, not the common-law right of publicity.

90. *Interim NIL Policy*, *supra* note 5.

the NIL rules do not allow an athlete to associate with their school in these personal branding deals.⁹¹ In other words, the new NIL rules forbid Viktor from relying on his brand in connection with State U. Instead, Viktor—and NCAA athletes—must rely on personal brand identification to promote products and earn money.⁹²

ii. The NIL Debate: The Ball is in Athletes' Court

The debate surrounding college athletes using their name, image, and likeness to earn money while playing college sports did not begin with the *Alston* case.⁹³ Instead, athletes were fighting for the right of publicity as the NCAA became more controlling of their careers.⁹⁴ Before the new NIL rules, the NCAA controlled how soon and to what degree these athletes' careers could become profitable by prohibiting name, image, and likeness rights (and in turn prohibiting trademark registration of college athletes' names since they must first prove use in commerce).⁹⁵ This is a major, positive change for athletes, emphasizing how college athletes must now sort out their intellectual property rights. A college athlete who fails to trademark their name brand early enough in the licensing deal process may lose the right to use their name if the athlete, without proper legal advice, signs over that right except in positive association with a product or brand.⁹⁶

iii. *NCAA v. Alston*: SCOTUS Urges the NCAA to Throw in the Towel

Clearly, understanding the new NIL rules illustrates why athletes should consider registering a trademark of their name concerning the goods and services they may want to sell or provide. For further context, a background of the United States Supreme Court case that led to this rule change is in order.⁹⁷ In *NCAA v. Alston*, the Court held the NCAA's restriction on education-related benefits violated federal antitrust laws.⁹⁸ Although this case did not deliberately address whether the NCAA must consider allowing student-athletes to use their name, image, and likeness in brand deals, the Court reasoned that compensating college athletes is not only beneficial to the athlete, but fair.⁹⁹ In his concurrence, Justice Kavanaugh described the situation: “[t]he NCAA couches its arguments for not paying student-athletes in innocuous labels. But the labels cannot disguise the reality: The NCAA’s business model would be flatly illegal in almost any other industry in America.”¹⁰⁰ The NCAA established the new NIL rules to promote fairness for college athletes who bring in money for their schools and the NCAA by participating in college sports, and the *Alston* case helps provide the context for why the NCAA made that decision.¹⁰¹

Later, this Comment will highlight how trademark law can offer NCAA athletes an

91. *Id.*

92. *Id.*

93. *Alston*, 141 S. Ct. at 2141–66; Donne & Hunter, *supra* note 87, at 1–2.

94. Donne & Hunter, *supra* note 87, at 2.

95. *Id.*; 15 U.S.C. § 1127.

96. *Court Bars Hayley Paige*, *supra* note 24.

97. *See generally Alston*, 141 S. Ct. at 2141–66.

98. *Id.*

99. *Id.*

100. *Id.* at 2167 (Kavanaugh, J., concurring).

101. *Interim NIL Policy*, *supra* note 5; *Alston*, 141 S. Ct. at 2166–69 (Kavanaugh, J., concurring).

opportunity to protect the brands some will seek to create in light of the new NIL rules. Providing this context simply illustrates that both trademark law and the new NIL rules are based upon principles of fairness. However, this Comment will also stress the dangers of personal name trademarks, ultimately suggesting that athletes exercise restraint while registering their intellectual property with the USPTO. Moreover, using the Supreme Court’s fairness-based argument as a foundation, college athletes—in the interest of fairness—deserve ownership of their names as their personal brands and careers expand and change.¹⁰² The same considerations that the NCAA took into account in creating the new NIL rules support advocating for college athletes to own the rights to their intellectual property.¹⁰³

Given this context of the NIL rules and an overview of trademark law basics, it is clear there is not a determinative test for understanding how a person’s surname is trademarkable. Even though the Lanham Act suggests names may be trademarked, it does not explain the circumstances where this would be permissible; thus, the USPTO relies on caselaw to create the applicable legal rules.¹⁰⁴ Furthermore, the TMEP discusses the use of first names as trademarks if the mark relates to a business, good, or service.¹⁰⁵ This Comment seeks to gather the factors courts consider in determining when a name became synonymous with a brand from personal brand identification cases. Although big brands will be unlikely to steal the right to use an athlete’s name publicly, NCAA athletes must prospectively consider brand licensing agreements carefully, or risk losing the right to use their name outside of the brand deal.¹⁰⁶

III. CROSSING THE INVISIBLE LINE: COURTS INCREASINGLY PROTECT COMMERCIAL INTERESTS IN DETERMINING WHEN A NAME BECOMES A BRAND

Courts in the last forty years have increasingly recognized names as trademarks, and this phenomenon is likely to keep growing with the rise of social media influencers.¹⁰⁷ However, this change only makes sense in the context of trademark jurisprudence. For instance, determining how a court understands the Lanham Act’s prohibition on surname trademarks is valuable information because it sheds light on how courts will consider these changes in the future.

A. Prominent Patterns in Surname-Brand Identifier Cases

The Trademark Manual of Examining Procedure relies on several foundational cases

102. *Alston*, 141 S. Ct. at 2141–66.

103. *Interim NIL Policy*, *supra* note 5 (stating that “[t]he NCAA is committed to ensuring that its rules, and its enforcement of those rules, protect and enhance student-athlete well-being and maintain national standards for recruiting.”).

104. Lanham Act, Pub. L. No. 79-489, § 2(c), 60 Stat. 427, 431 (1946) (current version at 15 U.S.C. § 1052(c)). *See also* *Dresser Indus., Inc. v. Heraeus Engelhard Vacuum, Inc.*, 395 F.2d 457, 461 (3d Cir. 1968) (holding “there is no precise formula or rule of law which can be applied mechanically to determine whether there has been an infringement of a trademark or name.”).

105. TMEP §§ 1206.01–.02.

106. For a recent example of a celebrity losing the right to her name in commerce, *see* *JLM Couture, Inc. v. Gutman*, No. 20-CV-10575-SLC, 2022 WL 2914531, at *22, —F. Supp. 3d.— (S.D.N.Y. July 25, 2022). The ongoing litigation over Hayley Paige Gutman’s name trademark will be discussed *infra* Section II.B.iii.

107. *DOUGLAS & MCDONNELL*, *supra* note 6, at 249–52.

that illustrate why and to what degree surnames are prohibited as trademarks.¹⁰⁸ What follows are two prominent surname-trademark cases.

i. *In re Sawyer Electrical Manufacturing Co.*

In *In re Sawyer*, a 1944 case from the Court of Customs and Patent Appeals, the court determined that registering a name as a trademark applies to both when a name simply references an individual and when it has another meaning in commercial business practice.¹⁰⁹ Despite being nearly eighty-years-old, *In re Sawyer* remains precedential.¹¹⁰ In applying the surname prohibition, the court defined the word “merely” to refer to any applicant mark that at its “foundation” was a surname.¹¹¹ The court, despite the business’ previous use of the name in commerce, still rejected the application on these grounds.¹¹² For instance, the court based its reasoning on the fact that the surname at issue was not visibly distinctive, even though the standard today allows for surnames to become distinctive based on public perception.¹¹³ Even though this case focused primarily on surname registration, the considerations for *full* name registration are less defined.¹¹⁴ Also, since surnames are typically fifty percent of an individual’s mark that he will apply for trademark registration, it is not clear how this fact changed the *Sawyer* court’s reasoning.

ii. *In re Etablissements Darty Et Fils*

Similarly, in the 1985 case *In re Etablissements Darty Et Fils*, the Federal Circuit Court of Appeals followed the *Sawyer* court by refusing to register the applicant’s trademark since “Darty” was primarily merely a surname.¹¹⁵ The examining attorney determined the service mark was primarily a surname and failed to “become distinctive of the applicants’ goods.”¹¹⁶ Because the name was common enough that the general public would not solely associate it as referencing a good instead of a name, the court denied the application.¹¹⁷ Overall, the court relied on a strict interpretation of the Lanham Act to defend its position that a trademark is primarily merely a surname when the mark still identifies a person at its foundation, regardless of other commercial purpose.¹¹⁸ Thus, this case illustrates how even in instances where parties applied for registration of trademarks for businesses that have purposes other than to identify the person, those applications were denied.¹¹⁹

108. TMEP § 1211.

109. *In re Sawyer Elec. Mfg. Co.*, 144 F.2d 893, 895 (C.C.P.A. 1944).

110. *Id.* at 893, *acq.*, *Brooks Bros. v. Brooks Clothing of Cal., Ltd.*, 60 F. Supp. 442, 449 n.11 (S.D. Cal. 1945).

111. *Sawyer*, 144 F.2d at 894–95 (quoting 15 U.S.C. § 85 (1905) (current version at 15 U.S.C. §§ 1052(c), (e))).

112. *Id.*

113. *Id.*; TMEP § 1212.06(d) (explaining that market research and consumer surveys are “relevant in establishing acquired distinctiveness.”).

114. 15 U.S.C. § 1052(c) (prohibiting a trademark of a “name,” but without specifying what a prohibited name consists of).

115. *In re Etablissements Darty Et Fils*, 759 F.2d 15, 16–18 (Fed. Cir. 1985).

116. *Id.* at 16.

117. *Id.* at 16–18.

118. *Id.* at 16–17.

119. *Id.* at 16–18.

B. Surpassing Secondary Meaning: Personal Brands Lose Familial Value

Sawyer, Etablissements Darty, and other caselaw from the era classified surnames used in business names as unregistrable marks. However, more recent cases have upheld trademarks that represent a person simply because they are in the public eye when the mark is used in commerce in some way as a source identifier.¹²⁰ The following cases showcase courts' increasing tendency to prioritize protection of a name used for commercial purposes against its familial function.

i. *RSR Art, LLC v. Bob Ross, Inc.*

Bob Ross' legacy was recently litigated in 2019.¹²¹ In short, the famous painter and art instructor, Bob Ross, filed several trademarks under Bob Ross Inc. ("BRI") to protect his name and likeness.¹²² Throughout the painter's life, he encouraged and consented to his name and likeness being licensed to certain companies for different branding deals—a practice that most NCAA athletes can also pursue if they want to make money from their name, image, and likeness.¹²³ The court found that Bob Ross' son, a painter who shares the same name, did not own the intellectual property rights to his father's name; instead, BRI did.¹²⁴ The court in *Bob Ross* determined that, even though one may successfully trademark their name to protect its use on their own terms, whoever ends up owning the trademark ultimately controls the name.¹²⁵

Paired with the other cases in this section, the *Bob Ross* case shows what can go wrong when a person does not think about the future of their mark prior to application. For instance, Bob Ross' son, who shares the same name as his father and sued as RSR Art, stated that he initially lost the right to use his father's name, image, and likeness, and could not advertise himself as an artist under that same name.¹²⁶ Although this may seem unfair, this case demonstrates that, despite the fact that owners of trademarks may intend to pass down the intellectual property rights of their name to other generations, personal name trademarks can actually prevent the decedent's intent.¹²⁷ The familial value of a name is

120. *RSR Art, LLC v. Bob Ross, Inc.*, 380 F. Supp. 3d 510, 512–16 (E.D. Va. 2019).

121. *Id.* at 510–11.

122. *Id.* at 511–12.

123. *Id.* at 512.

124. *Id.* at 511, 514–16. Bob Ross altered his will in an attempt to transfer his intellectual property rights to his son Robert "Steve" Ross. Ultimately, the court decided to uphold previous contracts and other estate planning documents leaving Ross' name, image, likeness, and other intellectual property to BRI. *RSR Art, LLC*, 380 F. Supp. 3d at 512–16.

125. *Id.* at 515–16.

126. Ramsay, *supra* note 2. Steve Ross claims Annette Kowalski—who obtained sole ownership of BRI after Ross' death—called Steve to let him know he could not use his name in relation to any art projects or products. *Id.* BRI and the Kowalski family dispute this assertion. See Anthony Breznican, *Bob Ross Inc. Would Love It If You Stopped Hating Them*, VANITY FAIR (Oct. 7, 2021), <https://www.vanityfair.com/hollywood/2021/10/bob-ross-inc-joan-kowalski>. However, a recent settlement agreement between BRI and Steve Ross has apparently given Ross the right to use the Bob Ross name, even in art projects and products, suggesting Steve Ross was not afforded these rights prior to the agreement. *Id.* Moreover, in an interesting twist, BRI has once again filed for trademark registration of the Bob Ross name. U.S. Trademark Application Serial No. 97/263,892 (filed Feb. 11, 2022). It is unclear how this could affect the Bob Ross intellectual property, or why BRI is actively seeking this registration.

127. *RSR Art, LLC*, 380 F. Supp. 3d at 512–16.

not recognized in courts.¹²⁸ Because personal name trademarks receive protection under federal trademark law, that name is protected from use in commerce no matter the circumstances.¹²⁹ Thus, despite “Bob Ross” being a family name passed down between generations of artists, Bob Ross’ son had no inherent rights to use his own name to promote his work. The name had crossed the invisible and indistinguishable line between name and brand.¹³⁰

ii. Kate Spade Case Study

The story surrounding Kate Spade losing the right to use her own name is that of a new, up-and-coming professional wanting to achieve personal recognition for her unique product.¹³¹ By the late 1990s, Kate Spade was a revolutionary fashion designer, specializing in iconic handbags with minimalistic features that carried a sense of elegance.¹³² However, in 1993, then known by her maiden name Kate Brosnahan, the designer began venturing into handbag design with her future husband Andy Spade.¹³³ The couple decided on the name brand “Kate Spade” because each party contributed fifty percent of the name.¹³⁴ Eventually, the two designers got married, and Kate Brosnahan legally became Kate Spade.¹³⁵

Kate Spade started designing these bags after working in the fashion industry and noticing a lack of the simplistic elegance that she liked.¹³⁶ Because the bags filled a gap in the handbag market, their style was easily recognizable with the Kate Spade brand.¹³⁷ As previously noted, trademark law in the United States works to recognize and encourage creativity and variety in the market, and Kate Spade’s brand was clearly no exception.¹³⁸ Thus, Kate Spade quickly became an icon in the industry, and her name a valuable piece of intellectual property.¹³⁹

Because her name trademark was extremely valuable, Kate Spade and her legal team likely considered the implications of her decision to name the brand after herself for the fourteen years she owned the company.¹⁴⁰ As an innovative entrepreneur and creative designer, Spade likely wanted to explore new business endeavors and apply her talents to new opportunities. However, innovation—especially after founding a name brand—comes

128. *Id.*

129. *Trademark Scope of Protection*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/trademarks/basics/scope-protection> (last visited Jan. 27, 2023).

130. *RSR Art, LLC*, 380 F. Supp. 3d at 512–16.

131. See Connie Wang, *For Kate Spade, Her Name Was Everything & Nothing*, REFINERY29 (June 5, 2018, 5:30 PM), <https://www.refinery29.com/en-us/2018/06/201040/kate-valentine-spade-name-designer-fashion-career>.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Who We Are*, KATE SPADE NEW YORK, <https://www.katespade.com/who-we-are> (last visited Jan. 27, 2023) (hereinafter *Who We Are*).

137. *Id.*

138. See Castaldi, *supra* note 76, at 473.

139. *Kate Spade Turns Kate Valentine*, *supra* note 3.

140. *Id.*

with a price: personal name forfeiture.¹⁴¹

While non-parties to the transaction can merely speculate about why Kate Spade decided to sell her business and what terms she and the Liz Claiborne company agreed to, legal commentators surmise that Kate Spade lost almost all rights to use her own name: “Ms. Spade, herself, likely entered into an iron-clad agreement with Claiborne The agreement likely allowed Spade to use her name to identify herself personally, but not much more [S]he surrendered the right to use her personal name *in a commercial manner*.”¹⁴² Journalists at *The Fashion Law* made this inference based on Kate Spade’s career after Liz Claiborne acquired the Kate Spade brand intellectual property.¹⁴³ For example, in 2016, news outlets reported that Kate Spade was “forced to rebrand if she want[ed] to design,” and Kate Spade personally announced that she would professionally and personally go by the name “Kate Valentine,” a family name.¹⁴⁴ In an interview discussing the name change, she insisted, “[w]e’re not trying to be cheeky or coy. It really was to distinguish the name[] and separate the two worlds.”¹⁴⁵ The drastic decision to change her name—a name that not only identified the designer’s life work, but was her personal, married name—can help future trademark applicants appreciate the outcomes of trademark name registration.¹⁴⁶

Kate Spade’s story offers compelling reasons to trademark one’s name carefully, while also highlighting how the USPTO’s decision-making methodology—the consuming public’s perception of a name as a brand—does not always produce black-and-white results.¹⁴⁷ For instance, news of the tragic death of Kate Spade in June 2018 garnered worldwide coverage.¹⁴⁸ At this point in the designer’s career, she had already officially changed her name to Kate Valentine, and she had cut ties with the Kate Spade brand over ten years earlier.¹⁴⁹ However, as numerous publications and people mourned her death and celebrated her impact, “nearly every publication . . . ignored the name that she chose for herself and [was] legally tied to.”¹⁵⁰ Further, even though the USPTO found the name Kate Spade solely synonymous with the brand, Kate Spade the person was ingrained in Kate Spade the brand, and people thought of the person equally as much as they thought of the brand when hearing the name “Kate Spade.”¹⁵¹ For instance, thousands of people were surprised to learn Kate Spade had no affiliation with the Kate Spade brand since 2007.¹⁵² And while it may seem unclear how Kate Spade managed to keep her personal identity equal to—and not replaced by—her ultra-successful handbags, this success likely comes from her effortless ability to ingrain her personality into her brand.¹⁵³

141. *Id.*

142. *Id.* (emphasis in original).

143. *Id.*

144. *Kate Spade Turns Kate Valentine*, *supra* note 3.

145. *Id.*

146. Wang, *supra* note 131.

147. TMEP § 1212.

148. *See generally Kate Spade Turns Kate Valentine*, *supra* note 3; Wang, *supra* note 131.

149. *See* Wang, *supra* note 131.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*; *see also Who We Are*, *supra* note 136.

Ingraining one's personality into their brand or public persona is an inherent part of succeeding as a public figure or influencer, especially for college athletes.¹⁵⁴ In the social media age, people want to know what a celebrity is like behind-the-scenes, as well as on screen.¹⁵⁵ Viktor, an up-and-coming football player, has as much potential to create a brand with longevity as Kate Spade. Viktor the quarterback can learn valuable lessons about brand identity and trademarks from the Kate Spade saga because it shows how an ultra-successful personal brand became less personal and more commercial. Athletes like Viktor must consider that professional careers and identities change over time, and that using one's personal name in one instance (e.g., to make public appearances) could necessitate a name change once they have established careers but want to expand their brand to include activewear lines or sports-camp services.

Unfortunately for legal scholars, the Kate Spade name dispute was never litigated.¹⁵⁶ Therefore, there are no bright-line rules in this case study to help indicate how courts deal with names that become synonymous with a brand but ultimately keep *both* their brand and personal significance at the forefront of buyers' minds. Given that the USPTO and courts use public perception as their deciding factor in registering name brand trademarks, Kate Spade's story offers an interesting look at how public perception is an imperfect measure of brand recognition.¹⁵⁷ Even when a designer separates from their business for almost ten years, the name and the brand can co-exist, something this author humbly suggests the USPTO may take for granted.¹⁵⁸

iii. *JLM Couture Inc. v. Hayley Paige Gutman*

Name brand trademarks continue to interfere with designers in the fashion industry. Currently, wedding designer Hayley Paige Gutman is at risk of losing the right to use her name aside from solely private, personal matters.¹⁵⁹ Even though Hayley Paige Gutman helped curate the successful Hayley Paige wedding dress brand, the brand's parent company, JLM Couture, took over the complete rights to use the Hayley Paige name in its employment contract.¹⁶⁰ JLM received the exclusive right to use various versions of Ms. Gutman's name, including "Hayley Paige" and "Hayley Paige Gutman," as they related to the design, manufacturing, or marketing of bridal fashion.¹⁶¹ This iron-clad employment contract that Hayley Paige entered when she started her career is at the center of this dispute.¹⁶²

On January 25, 2022, the Second Circuit upheld a preliminary injunction that "prohibits Gutman from 'using' [her name] 'in trade or commerce.'"¹⁶³ However, the Second Circuit remanded on an issue that caught the media's attention: whether Hayley Paige

154. DOUGLAS & MCDONNELL, *supra* note 6, at 249–52.

155. *Id.* at 243–44.

156. *See* Wang, *supra* note 131; *see also* *Who We Are*, *supra* note 136.

157. TMEP § 1212.

158. *See* Wang, *supra* note 131.

159. *JLM Couture, Inc. v. Gutman*, 24 F.4th 785, 797, 801 (2d Cir. 2022).

160. *Id.* at 788–89, 801.

161. *Id.* at 792–93.

162. *Id.* at 787.

163. *Id.* at 796 (quoting the "Name-Rights Agreement" between Hayley Paige and JLM Couture).

could access her personal, named Instagram accounts, including the @misshayleypaige account.¹⁶⁴ In short, the Second Circuit determined that the district court did not adequately consider the novel question of whether the social media accounts were the property of Ms. Gutman.¹⁶⁵ In effect, the court vacated the provisions of the injunction prohibiting Ms. Gutman's use of the accounts and granting JLM Couture access to them.¹⁶⁶ The court reasoned that if the accounts were her property, JLM may not take her property.¹⁶⁷

On remand, the district court reinstated the vacated portions of the injunction order, with modifications.¹⁶⁸ In the court's view, the changes to the order "will ensure that JLM retains the ability to access social media accounts that serve as critical advertising platforms . . . in a manner consistent with the Contract."¹⁶⁹ Thus, the court decided that, based on a single contract entered into at the beginning of Ms. Gutman's career, she now loses the right to use her own name in her Instagram account.¹⁷⁰ The court did grant Ms. Gutman shared access to the account with JLM, but her use of the account is extremely limited.¹⁷¹

The district court revised the preliminary injunction again on July 25, 2022, establishing more restrictions on Ms. Gutman's use of her own name and her professional career.¹⁷² Hayley Paige still cannot use her own name, but the court also limited the designer's ability to work in the bridal industry until August 1, 2027.¹⁷³ For five years, the designer cannot use her name in public "as the designer of any goods in competition with goods manufactured and sold by JLM," and the court restricted her from allowing third parties in competition with JLM to use Hayley Paige to promote their bridal goods.¹⁷⁴ Hayley Paige's career both began and ends—at least for the next five years—with a strict intellectual property agreement limiting the right to use her own name.¹⁷⁵ Clearly, this agreement has had profound, unforeseen consequences on the designer's profession.

The overall outcome of the case favors JLM's right to most of Hayley Paige's intellectual property, including the designer's full, legal name.¹⁷⁶ Although this result may shock or surprise the public, it is ultimately the product of a legally sound intellectual property contract that benefitted the designer as well as the purchaser. JLM Couture and

164. *JLM Couture, Inc.*, 24 F.4th at 787. See also *Court Bars Hayley Paige*, *supra* note 24.

165. *JLM Couture, Inc.*, 24 F.4th at 788.

166. *Id.*

167. *Id.* at 801–02.

168. *JLM Couture, Inc. v. Gutman*, No. 20-CV-10575-SLC, 2022 WL 5176849, at *1 (S.D.N.Y. Feb. 14, 2022).

169. *Id.* at *4.

170. *Id.* at *4–5. The court decided there was insufficient evidence to conclude whether the @misshayleypaige TikTok account, in contrast to the Instagram and Pinterest accounts, "was used in connection with promotion of the [Hayley Paige] brands" and whether Ms. Gutman's use of the account violated the original employment contract. *Id.* at *5. Ms. Gutman retained control of the @misshayleypaige TikTok account; however, her use of the account is subject to the terms of JLM's contract. *Id.* at *5, *7.

171. *JLM Couture*, 2022 WL 5176849, at *7.

172. *JLM Couture, Inc. v. Gutman*, No. 20-CV-10575-SLC, 2022 WL 2914531, at *22, —F. Supp. 3d.— (S.D.N.Y. July 25, 2022). On July 25, 2022, the district court denied Ms. Gutman's motion to dissolve the preliminary injunction issued on March 4, 2021. *Id.* at *19 n.11.

173. *Id.* at *22–23.

174. *Id.*

175. *Id.*

176. *JLM Couture*, 2022 WL 2914531, at *22–23.

Hayley Paige created this social media account primarily to promote the bridal brand Hayley Paige, which JLM Couture ultimately owned.¹⁷⁷ Ms. Gutman also agreed to grant JLM “the exclusive world-wide right and license to use her name . . . or any derivative thereof” for bridal marketing and manufacturing purposes for two years after the contract terminated.¹⁷⁸

However, even though Ms. Gutman transferred considerable rights to her name and valuable intellectual property, the agreement also included that she would, “for ten years ‘following the termination of her employment’” with the company, receive a percentage of revenue based on products aligned with the Hayley Paige brand.¹⁷⁹ Although these drastic terms seem unfair in hindsight, the up-and-coming wedding dress designer secured her professional relationship with a larger, more established brand while also attaching her name to her own work product.¹⁸⁰ Additionally, Ms. Gutman knew she would reap the benefits of this partnership even after she parted ways with JLM Couture.¹⁸¹ These alluring opportunities likely helped persuade Hayley Paige to sign the contract and lose the right to her personal name in the future.

Although the Hayley Paige saga has yet to ultimately conclude, it serves as another clear lesson to young professionals, particularly college athletes, due to its analogous circumstances.¹⁸² JLM Couture’s intellectual property lawsuit will likely turn on the validity and meaning of that original employment contract signed over ten years ago by a young, entrepreneurial Hayley Paige.¹⁸³ Although federal trademark registration protects applicants from intellectual property copycats, a less visible issue—with a higher risk—lies in the iron-clad licensing contracts that big businesses may present to these students.¹⁸⁴

Several analogous circumstances highlight this current risk to student-athletes considering monetizing their name, image, and likeness. First, when Hayley Paige entered the employment agreement with JLM Couture, weddings were becoming increasingly commercialized.¹⁸⁵ In fact, shows like *Say Yes to the Dress* and *Four Weddings* gained popularity in the late 2000s, and Hayley Paige was featured frequently in *Say Yes to the Dress*.¹⁸⁶ Similarly, athletes have a newfound opportunity to monetize their name, image,

177. *JLM Couture, Inc. v. Gutman*, 24 F.4th 785, 804 (2d Cir. 2022) (Lynch, J., concurring in part and dissenting in part).

178. *JLM Couture, Inc. v. Gutman*, No. 20-CV-10575-SLC, 2021 WL 827749, at *2 (S.D.N.Y. Mar. 4, 2021) (quoting the “Name-Rights Agreement” between Hayley Paige and JLM Couture).

179. *JLM Couture*, 24 F.4th at 791 (quoting the employment agreement between Gutman and JLM Couture).

180. *See generally JLM Couture*, 24 F.4th 785.

181. *Id.* at 791.

182. CHEVAL (@allthatglittersonthegram), INSTAGRAM (Aug. 1, 2022), <https://bit.ly/3j8x7nR>. Haley Paige Gutman officially changed her name to CHEVAL on August 8, 2022. Anna Lazarus Caplan, *Bridal Designer Hayley Paige Officially Changes Her Name to Cheval Amid Ongoing Legal Battle*, PEOPLE (Aug. 9, 2022, 3:14 PM), <https://bit.ly/3kPwd0c>.

183. *JLM Couture*, 24 F.4th at 788–89.

184. Peddinti, *supra* note 31.

185. Rebecca Mead, *Princess for a Day*, THE GUARDIAN (Aug. 6, 2010), <https://www.theguardian.com/life-andstyle/2010/aug/07/weddings-industry-commercial-giles-fraser>.

186. *Say Yes to the Dress TV Listings*, TV GUIDE, <https://www.tvguide.com/tvshows/say-yes-to-the-dress/tv-listings/1000019444/> (last visited Jan. 27, 2023); *Four Weddings Season 1 Episodes*, TV GUIDE, <https://www.tvguide.com/tvshows/four-weddings/episodes-season-1/1030245006/> (last visited Jan. 27, 2023); *Court Bars Hayley Paige*, *supra* note 24.

and likeness.¹⁸⁷ Thus, like Hayley Paige, today's college athletes start their careers in new and expanding industries, and they will likely take advantage of brand deals associated with their industries' new markets.

Additionally, Hayley Paige licensed the right to use her own name, a method of monetization many college athletes will likely choose.¹⁸⁸ Finally, and most importantly for college athletes, Hayley Paige only lost the right to use her own name after she started to advertise other products on her personal Instagram page, even though the products were entirely unrelated.¹⁸⁹ Similarly, athletes can choose to use their name, image, and likeness in a variety of ways, as long as they enter into contracts that protect their right to future endeavors.

Overall, the Hayley Paige litigation teaches athletes that major companies may reach out to new student-athletes with lucrative branding deals that require trademark registration of the athlete's name. These contracts, as evidenced by the Hayley Paige case study, can significantly limit a college athlete's career. Securing trademark registration is beneficial in many circumstances, but understanding the risks associated with personal name brand trademarks is essential before these students attempt to capitalize on the first branding deals they are offered.

C. Understanding the Rules of the Trademark Game

The above cases highlight at least five instances where a person lost or was refused the right to use their own name. Previously, courts were strict in disallowing surname trademarks.¹⁹⁰ However, that trend is changing as personal brands, elevated by social media and a rise in personal brand identification, become more common.¹⁹¹ For instance, while the court in *Sawyer* determined that "the [Lanham Act] must be read to mean that any mark which has as its foundation, substance or nature or is merely the name of an individual may not be registered," the USPTO has recently registered trademarks for businesses based on the owner's surname even though the name's foundation is both commercial and personal.¹⁹² This transition illustrates courts' increasing propensity to recognize names as brands with distinct, commercial value.

Notably, the USPTO has not only approved registration of iconic surnames/brand names like Chanel; other surname trademarks of businesses known in single, smaller communities have received trademark registration.¹⁹³ This pattern is relevant in relation to the discussion of *Etablissements Darty* because, based on courts' growing tendency to recognize names as trademarks, it follows that it is increasingly easy to overcome the secondary-meaning standard. For instance, the names "Miller Swim School" and "Schlafly Beer"

187. *Interim NIL Policy*, *supra* note 5.

188. *See JLM Couture*, 24 F.4th at 790–91.

189. *JLM Couture, Inc. v. Gutman*, No. 20-CV-10575-SLC, 2021 WL 827749, at *5 (S.D.N.Y. Mar. 4, 2021).

190. *In re Sawyer Elec. Mfg. Co.*, 144 F.2d 893, 895 (C.C.P.A. 1944); *In re Etablissements Darty Et Fils*, 759 F.2d 15, 16–18 (Fed. Cir. 1985).

191. *DOUGLAS & MCDONNELL*, *supra* note 6, at 249–52.

192. *Sawyer*, 144 F.2d at 895; *MILLER SWIM SCHOOL*, Registration No. 5,865,152; *Schlafly v. Saint Louis Brewery, LLC*, 909 F.3d 420 (Fed. Cir. 2018).

193. *CHANEL*, Registration No. 3,134,695; *CHANEL*, Registration No. 1,660,866; *CHANEL*, Registration No. 1,559,404; *CHANEL*, Registration 1,348,842; *CHANEL*, Registration No. 1,263,845; *MILLER SWIM SCHOOL*, Registration No. 5,865,152; *Schlafly*, 909 F.3d at 420.

reference the owners' surnames and are now registered trademarks.¹⁹⁴ *Sawyer* and *Etablissements Darty* are still good law, suggesting the legal standard as written (i.e., "acquired distinctiveness" or "secondary meaning") has not changed, but how courts apply this standard has.¹⁹⁵

Furthermore, personal name brand cases suggest that courts continue to appreciate commercial value as defined in an intellectual property contract compared to familial value. *RSR Art, LLC v. Bob Ross, Inc.* illustrated how the legacy of an artist may live on through his intellectual property, but not through his son's name, at least in a public, commercial setting, until a private settlement agreement is reached.¹⁹⁶ Similarly, courts continue to side with JLM Couture and uphold its rights to Hayley Paige Gutman's full name in all uses besides personal and private matters.¹⁹⁷ Ultimately, a contract binds both parties to their duties and obligations; and while losing one's name may seem like an unconscionable term, courts are drawing a distinction between the name as a brand and the name as a personal identifier.¹⁹⁸

However, this clear distinction is blurred by the one thing courts cannot directly mandate or control: public perception. A study of Kate Spade's personal branding story illustrates several points about the importance of looking ahead in terms of one's business—and more specifically, intellectual property—decisions.¹⁹⁹ Kate Spade's story also showcases how personal-brand recognition cannot always be severed from the public's recognition of the named person.²⁰⁰ Consequences of this phenomenon include the possibility, even when a designer changes their personal name to separate it from an existing brand, of public confusion. This illustrates that there are limits to the USPTO's reliance on the public to guide name brand trademark application eligibility.

Even though this limitation exists, acknowledging its faults and determining why the USPTO still chooses to measure surname registrability against public perception offers clarity about what trademark courts and the USPTO consider in deciding IP disputes and approving name-trademark applications.²⁰¹ Based on the foregoing analysis, this Comment suggests that personal- and surname-trademark applicants do not solely consider what the "public"—a vague and potentially subjective population—believes has a distinct or secondary meaning. Instead, the line of when a name becomes a brand depends on when the name acquires a distinct, *commercial value* that surpasses its *familial value* in the eyes of USPTO examining attorneys.

The line dividing a name and a brand is ultimately drawn by the USPTO on a case-by-case basis. The USPTO likely uses public perception as a measure of whether an application gains trademark status because the entire trademark system was invented to differentiate products for the benefit of the consuming public.²⁰² However, it is clear that the

194. MILLER SWIM SCHOOL, Registration No. 5,865,152; *Schlafly*, 909 F.3d at 420.

195. *Sawyer*, 144 F.2d at 895; *Etablissements*, 759 F.2d at 16–18.

196. *RSR Art, LLC v. Bob Ross, Inc.*, 380 F. Supp. 3d 510, 512–16 (E.D. Va. 2019).

197. *See JLM Couture, Inc. v. Gutman*, 24 F.4th 785, 801–02 (2d Cir. 2022).

198. *See generally id.*

199. *See generally* Wang, *supra* note 131.

200. *Id.*

201. TMEP § 1212.

202. Castaldi, *supra* note 76, at 473.

USPTO is *primarily* concerned with registering trademarks that have commercial value since its goal was to help the public by organizing commerce.

People tend to recognize popular brand names as having both familial and commercial value, likely because they can imagine their own names holding both values. However, once the USPTO decides to register a mark in its system, it only values and protects the commercialized name. Recognizing this pattern not only helps trademark applicants determine their mark's eligibility status, it also explains why courts are so adamant to protect the intellectual property owner's rights over the rights of the named individual, despite media attention and outcry from the public.²⁰³

IV. PROTECTING THE RIGHT TO USE ONE'S OWN NAME: STUDENT-ATHLETES MUST PLAY THE LONG GAME BY APPLYING EARLY AND THINKING AHEAD, AND UNIVERSITIES MUST OFFER STUDENT-CENTRIC LEGAL RESOURCES

While there is no bright-line rule for when a name officially becomes trademarkable, the considerations above indicate patterns and factors courts have referenced in abridging the right to use one's name freely.²⁰⁴ Thus, these factors are considerations that student-athletes should reference in figuring out when to apply for a trademark of their own name and how to enter reasonable brand deals. Moreover, Parts II and III of this Comment described the benefits of trademark protection, albeit while mentioning the risks associated with registering one's name in relationship to any particular brand. Now, the remainder of this Comment speaks directly to college athletes and NCAA representatives to suggest practical advice about student-athletes' next steps, and to demand that the NCAA provide rules that hold colleges accountable in this new era of student-athlete freedom and vulnerability.

A. The Trademark Transition, From Student to Pro: Unique Considerations for Student-Athletes Now in a League of Their Own

The career of a student-athlete is unique, and in a time when Congress has yet to pass NIL laws to regulate these students, distinctive problems may arise that students can prospectively avoid by filing a trademark that protects their brand. Notwithstanding any examining attorneys' concerns with whether the athlete is well-known enough to have commercial recognition in the public's opinion, athletes who can expect successful trademark applications should consider their name, image, and likeness before entering licensing agreements with brands. These licensing agreements are a popular way that student-athletes are already earning money.²⁰⁵ As the saying goes, fame is fleeting, and many college athletes will not have professional sports careers.²⁰⁶

However, personal name trademarks may hinder an athlete's ability to evolve with

203. See generally *JLM Couture, Inc. v. Gutman*, 24 F.4th 785 (2d Cir. 2022); *Court Bars Hayley Paige*, *supra* note 24.

204. See discussion *supra* Part II.

205. Rafael Canton, *Adweek article: Student-Athlete and Brand Partnerships Increase Following New NIL Policy*, LEARFIELD (Jan. 10, 2022), <https://www.learfield.com/2022/01/student-athlete-and-brand-partnerships-increase-following-new-nil-policy/>.

206. *Id.*

their careers. Even if an athlete were able to apply for trademark registration of their personal name on their own, this potentially valuable asset still poses risks such as “pigeonholing” the athlete and limiting the different branding endeavors they explore throughout college and beyond.²⁰⁷ Therefore, personal name trademarks are likely not a wise investment for student-athletes given the changing nature of their careers and the potential for these students to receive a variety of offers to sign licensing agreements with different companies.

Athletes should also not underestimate endorsement confusion due to their limited recognition, particularly because their brand is their identity. A college student may enter a successful branding deal with a local sporting goods store, and as a result the general public may only recognize the athlete beyond their sport as representing that store. Registering a trademark of one’s name in relation to a business or licensing venture and subsequently losing the right to use the name in other brand deals because the public forgets its use primarily as a name identifier (as opposed to a brand identifier) would be extremely detrimental to the student’s career overall. While one would expect their star power to protect their personal brand identity, the most successful college athletes are actually substantially more at risk for endorsement confusion between the multiple brand-deal offers they will likely receive. Consider the following: if Viktor is primarily known for his Walmart brand deal, will the general public confuse his other deals with grocery stores if he endorses a similar product, or even a different product based on the trademark value of his name in relation to earlier endorsement deals? Additionally, these deals will likely be handled through contracts which, as previously mentioned, may have clauses with unforeseeable consequences from the perspective of the student-athlete.²⁰⁸ Those brands have their own trademarks to protect their intellectual property and may seek legal recourse if a student dilutes their mark.²⁰⁹

Another unique issue for athletes to consider is how trademark classification can affect their career, particularly for college athletes entering professional sports. While this Comment highlights the risks associated with registering a trademark of one’s own name, it is important for athletes making this decision to consider what protections they are actually afforded once registration is complete. As noted in Part II, one must use, or prove an intent to use, the good or service in relation to the mark in the trademark application.²¹⁰ This procedure forces applicants to decide in advance of receiving federal trademark registration how their brand will act as a source identifier and for what goods.²¹¹ These different trademark “classes” help businesses avoid confusion in the marketplace (e.g., Dove Chocolate and Dove Soap).²¹²

Trademark classification is relevant for college athletes because their careers will transition over time. Athletes will need to find a balance between simply registering their

207. See generally *JLM Couture*, 24 F.4th 785; *Court Bars Hayley Paige*, *supra* note 24.

208. See sources cited *supra* note 207; *Kate Spade Turns Kate Valentine*, *supra* note 3.

209. See sources cited *supra* note 207.

210. USPTO, *Goods and Services*, <https://www.uspto.gov/trademarks/basics/goods-and-services> (last visited Feb. 2, 2023).

211. *Id.*

212. *Id.*

names for the service of endorsing products, and over-registering and being denied trademark registration entirely.²¹³ These athletes may amend their trademarks over time (a detailed process that this Comment will not discuss), but failing to strike a balance between safely under-applying and over-applying for various trademark classes may lead to licensing agreements that take advantage of an athlete's future career and limit future business and branding opportunities.²¹⁴ If a college athlete like Viktor registers his name, then federal trademark law will give him power by signaling his ownership of his intellectual property. However, NFL teams may be hesitant to work with—or around—his registrations.²¹⁵

Moreover, failure to think ahead may result in a loss of rights to use Viktor's trademark in any capacity other than for endorsements as a college athlete.²¹⁶ Just as the *JLM Couture* court agreed that Hayley Paige cannot use her name in relation to any other business ventures, athletes in Viktor's position are at risk of losing the right to use their own name, too. For instance, the local grocery store's licensing deal could prohibit the use of Viktor's name beyond personal identification and its own endorsement.²¹⁷ Considering that famous designer Kate Spade lost the right to use her name, college athletes cannot wait to take defensive action.²¹⁸ Although this Comment relies on hypothetical situations to illustrate how personal branding deals may result in unfavorable consequences for college athletes, each example is based on real cases of personal branding mishaps with at least one notable difference: each of the personal brand identification cases highlighted professionals in their field, rather than amateurs.²¹⁹ Compared to professionals, amateur student-athletes are even more vulnerable and face a greater risk of losing the right to use their name.

B. Defending Student-Athletes: The NCAA and Universities Must Continue to Promote Students' Best Interests by Providing Legal Counsel and Support in Student Brand Deals

While this Comment focuses on the steps college athletes need to take to protect their brand and personal identity, universities should not expect students to handle complex intellectual-property agreements on their own. Instead, the NCAA and NCAA-affiliated universities must continue to support their students beyond what the NIL rules require. In 2019, Congress considered legislation that proposed the creation of the Presidential Commission on Intercollegiate Athletics to finance intercollegiate athletics, including financing so that a student-athlete "may retain a personal representative to negotiate on behalf of the student-athlete."²²⁰ Although this legislation did not pass, it is evidence

213. *Id.*

214. *Id.*

215. *What is a trademark?*, *supra* note 29.

216. *Goods and Services*, *supra* note 210.

217. *Court Bars Hayley Paige*, *supra* note 24.

218. *Kate Spade Turns Kate Valentine*, *supra* note 3.

219. *See JLM Couture, Inc. v. Gutman*, No. 20-CV-10575-SLC, 2021 WL 827749, at *1, *9 (S.D.N.Y. Mar. 4, 2021); *RSR Art, LLC v. Bob Ross, Inc.*, 380 F. Supp. 3d 510, 512–16 (E.D. Va. 2019); and *Kate Spade Turns Kate Valentine*, *supra* note 3.

220. NCAA Act, H.R. 2672, 116th Cong. (2019).

of congressional bipartisan support for additional legal representation for college athletes.²²¹ Another congressional bill introduced in early 2021 would have allowed NCAA athletes to profit from the new NIL rules with few restrictions.²²² Given the 2021 NIL rules, these athletes need these resources now more than ever.²²³ Therefore, universities need to provide funding, or at least adequate programs and incentives, to make sure their students are protected in the brand deals they make. Although star athletes expected to make millions from endorsement deals will likely hire a decent lawyer, I am particularly concerned with how less-renowned athletes, especially women, may not have access to competent legal advice.

This Comment specifically proposes NCAA-affiliated universities provide legal resources, including legal counsel, that students may use during the trademark-filing process and as student-licensing agreements form. While colleges should ultimately rely on professional legal advice to curate these necessary resources and programs, students will likely need help drafting and reviewing licensing agreements and filing trademarks of their name, image, and likeness. Because of the risks associated with filing for trademark registration of one's own name—particularly in relation to a single licensing agreement—universities must warn their students of these risks and inform athletes of their rights of publicity, which are largely governed by state law.²²⁴ In conclusion, colleges should use a proactive approach, hosting informational seminars about student-athletes' rights before students begin negotiations potentially unrepresented and unaware of their personal brand's worth.

Because colleges in the United States generate billions of dollars in revenue from athletics each year, these colleges must now invest and ensure the safety of their students' intellectual property.²²⁵ Between ticket sales, media rights, and donor investments, sports generally increase a school's revenue, at least prior to COVID-19.²²⁶ Allocating additional funds each year is a necessary investment that prioritizes the students. Furthermore, universities should consider reaching out to alumni in the legal profession about performing pro-bono hours or offering informational sessions for students in exchange for mandatory Continuing Legal Education credits for lawyers. The new NIL rules pose an exciting opportunity not only for students, but for lawyers motivated by this new legal industry. Investing in one's students is key to a stronger and more successful university.

V. CONCLUSION

Determining the exact moment a name becomes a brand for purposes of trademark registration is likely an impossible task. But understanding that the USPTO only registers names after they garner commercial value—and not solely when a portion of the public

221. *Id.*

222. Dennis Dodd, *New Congressional bill aims to make name, image and likeness 'a federal right' for college athletes*, CBS SPORTS (Feb. 4, 2021, 1:47 PM), <https://bit.ly/3wT5ZMS>.

223. *Interim NIL Policy*, *supra* note 5.

224. *Right of publicity*, *supra* note 89 (“[t]he right to control the use of one's own name, picture, or likeness . . .”). See also discussion *supra* Part III.

225. Felix Richter, *U.S. College Sports Are a Billion-Dollar Game*, STATISTA (Jul. 2, 2021), <https://www.statista.com/chart/25236/ncaa-athletic-department-revenue/>.

226. *Id.*

acknowledges they have a secondary meaning—makes the invisible line much clearer.²²⁷ In a system prioritizing commercial standards of value, personal name-trademark owners are met with increasingly stringent restrictions on the use of their name outside of its approved use in commerce.²²⁸ Names are important to people, and while familial value will always exist from the point of view of the individual, its use is an unprotected right post-trademark registration.²²⁹ In understanding this distinction, one can more easily identify whether their personal name brand will achieve trademark status.

College athletes like Viktor must acknowledge the USPTO's values and understand that a trademark system formed to protect their intellectual property might ultimately hurt their personal and professional development.²³⁰ People losing the right to use their own name face an alienating experience; their brand overtakes their personal identity, and the person left behind must start anew.²³¹ However, even though the trademark system is focused on enhancing commercial value, trademarks give young professionals, including NCAA athletes, the opportunity to protect their name, image, and likeness while signing lucrative brand deals for the first time in history.²³² Acknowledging the potential risks of personal name- or surname-trademark registration is the first step in preventing unwanted outcomes, and this Comment ultimately suggests student-athletes—vulnerable to unfair licensing agreements—avoid filing name-brand trademarks at this early stage in their career.

While college athletes must acknowledge the risks associated with registering a trademark and potentially signing an iron-clad brand-licensing agreement, colleges themselves must ultimately take responsibility for their students by offering affordable legal services and educational programming to their new athletes. These programs will ensure students know their rights regarding their name, image, and likeness, and the services will assist students with necessary legal needs, like fashioning sample licensing agreements or filing a trademark that will grow with their careers.

Personal brand development is becoming increasingly popular as people advertise their products and services online through personal social media accounts.²³³ Nevertheless, in associating part of oneself with a commercial product, the line between person and brand becomes blurred, even in the eyes of the trademark applicant. In preparing for the future, one cannot forget the dual values of what is in a name.

-Claire Lenz-Dean*

227. See Wang, *supra* note 131; *Interim NIL Policy*, *supra* note 5.

228. See, e.g., *JLM Couture, Inc. v. Gutman*, 24 F.4th 785 (2d Cir. 2022).

229. *Id.* at 802 (Newman, J., concurring).

230. *Id.*

231. *Id.*

232. TMEP § 1212; Castaldi, *supra* note 76, at 473; *Interim NIL Policy*, *supra* note 5.

233. DOUGLAS & MCDONNELL, *supra* note 6, at 247.

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