

## N(IL)FT's: Is There Opportunity for College Athletes Amidst a Slow Market?



Photo Source: Recur Forever, Inc., *NFTU.com* (Oct. 5, 2022).

By: David Brake

### **Introduction**

The NCAA's adoption of an interim name, image, and likeness (NIL) policy for college athletes in June of 2021 cleared the way for thousands of athletes to benefit from their name image and likeness without sacrificing eligibility for their sport.<sup>1</sup> This announcement ended a years-long path that began with California's enactment of the Fair Pay to Play Act, through which the state became the first to allow college athletes to benefit financially from their NIL and to enter into licensing contracts.<sup>2</sup> Despite threats from the NCAA to rule schools in the state ineligible for competition, several other states followed through on their own NIL legislation, of which there are now 29 states with passed legislation.<sup>3</sup> The U.S. Supreme Court also commented on the issue through its ruling in *Alston v. NCAA* that NCAA rules limiting education-related benefits produced anticompetitive effects in violation of the Sherman Act.<sup>4</sup> Just days after the

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<sup>1</sup> See Olivia Hinerfeld and G. Zachary Terwilliger, Game Changer: Understanding the NCAA's New NIL Policy, *JDSupra* (February 23, 2022), <https://www.jdsupra.com/legalnews/game-changer-understanding-the-ncaa-s-9174982/> (discussing the NCAA's interim policy allowing student-athletes to profit from their name, image, and likeness).

<sup>2</sup> Cal. S.B. 206 (Sept. 30, 2019), [https://leginfo.ca.gov/faces/billTextClient.xhtml?bill\\_id=201920200SB206](https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB206). (allowing California student-athletes to profit from their name, image, and likeness).

<sup>3</sup> See Jarrett Varsik, Madison Hiegel, and Jeffrey Parry, Tracker: Name, Image and Likeness Legislation by State, *Business of College Sports* (June 17, 2022), <https://businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state/> (listing states that have passed an NIL bill or enacted an NIL law).

<sup>4</sup> *Alston v. NCAA*, 594 U.S. 1 (2021) (holding that NCAA rules limiting education-related compensation violated Section 1 of the Sherman Act).

*Alston* decision, the NCAA announced its interim policy that is meant to govern until federal legislation is passed or a final policy is created.<sup>5</sup>

### **NFT's as NIL Revenue Stream**

Within the college sports landscape, one of the largest modes of NIL earning for student-athletes has been non-fungible tokens (NFT's).<sup>6</sup> An NFT is a unit of data stored on a digital public ledger called a blockchain that certifies a digital asset to be unique.<sup>7</sup> NFTs can be used to represent items such as photos, videos, animations, audio, graphic arts, and other digital files.<sup>8</sup> The prototypical college sports NFT has been the virtual trading card showing the athlete or a major highlight in their career.<sup>9</sup> The largest and most well-known marketplace is NFTU.com, a marketplace created by Learfield and RECUR for collectable highlights of both current and former student-athletes.<sup>10</sup> Student-athletes have also released NFT's on their own, including prominent football players such as Jack Coan (Notre Dame) and basketball players such as Collin Gillespie (Villanova).<sup>11</sup> Individual universities such as Syracuse have created NIL earning opportunities for student-athletes as well.<sup>12</sup> NFT's are a popular option for student-athletes' NIL deals because they require a low time commitment from the student-athlete, provide the opportunity to earn royalties on the resale of the NFT, enable student-athletes to engage with

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<sup>5</sup> See Michelle Brutlag Hosick, NCAA Adopts Interim Name, Image and Likeness Policy (June 30, 2021), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx> (announcing the NCAA's new NIL policy).

<sup>6</sup> See Opendorse, NIL: One Year of Name, Image and Likeness (July 21, 2022), [https://opendorse.com/wp-content/uploads/2022/07/N1L\\_Full\\_063022\\_3.pdf#gf\\_24](https://opendorse.com/wp-content/uploads/2022/07/N1L_Full_063022_3.pdf#gf_24) (reporting on the impacts of NIL opportunities for student-athletes through data on industry sectors. NFT's represented the largest industry segment by percent of total money spent (17.9%) on NIL deals).

<sup>7</sup> See Learfield, Capture Unforgettable College Sports Moments in NFTs, <https://www.learfield.com/nft/> (describing what an NFT is and their application to the college sports NIL industry).

<sup>8</sup> See *id.*

<sup>9</sup> See Paul Steinbach, Brands Dump Big Money Into College Athlete NIL Deals, Athletic Business (July 22, 2022), <https://www.athleticbusiness.com/operations/marketing/article/15294513/brands-dump-big-money-into-college-athlete-nft-deals> (discussing the different types of athletes, schools, and companies that have joined the NFT industry through NIL deals).

<sup>10</sup> See Learfield, Capture Unforgettable College Sports Moments in NFTs, <https://www.learfield.com/nft/> (describing NFTU.com).

<sup>11</sup> See Nick Denuzzo, NFTs the Future of College Sports NIL Deals, On3 (March 18, 2022), <https://www.on3.com/news/nfts-the-future-of-college-sports-nil-deals/> (describing past NFT projects from former and current student-athletes).

<sup>12</sup> See Mike McAllister, Syracuse Becomes First School to Create NFT for Student-Athletes, Sports Illustrated (June 20, 2022), <https://www.si.com/college/syracuse/recruiting/syracuse-first-school-nft-student-athletes-nil-deal> (describing university-created NFT marketplace for Syracuse student-athletes to profit from the name, image and likeness).

their fans directly and digitally (the “utility” of the NFT to buyers), and provide exposure to the more widely adopted cryptocurrency community.<sup>13</sup>

### **Pitfalls and Market Uncertainty**

A primary concern with NFT’s as NIL ventures is that their connection with cryptocurrency and its volatility can give rise to major depreciation of assets as well as scams.<sup>14</sup> Despite Deloitte Global’s prediction that NFTs for sports media will generate more than \$2 billion in transactions in 2022, the overall NFT market’s trading volume is down 97 percent since January.<sup>15</sup> In addition, the decentralization of cryptocurrency, through which NFT’s are bought and sold, has brought the concern that NIL-related NFT projects may follow the path of others that have been abandoned by their founders or are just “money grabs” from those looking to quickly profit from fame.<sup>16</sup> Among the projects that have shed a negative light on the industry is that of De’Aaron Fox of the Sacramento Kings, who backed away from his NFT project after pulling in approximately \$1.5 million in sales after launching.<sup>17</sup> While Fox thus far has only had his public perception damaged, the founders of intentional scam projects have faced more severe penalties including lawsuits and criminal charges.<sup>18</sup>

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<sup>13</sup> See Draftly, NFTs for College Athletes, <https://www.draft.ly/blog/nfts-for-college-athletes> (describing why NFTs have value and are an opportunity for student-athletes looking to profit from their name, image and likeness).

<sup>14</sup> See Daniel Roberts, Prepare for a Flood of College Athlete NFTs, Decrypt (July 10, 2021), <https://decrypt.co/75164/ncaa-nil-rules-college-athlete-nft-not-dead-yet> (describing the various intentions student-athletes may have for an NFT project).

<sup>15</sup> See Paul Lee et al., From Trading Cards to Digital Video: Sports NFTs Kick Sports Memorabilia into the Digital Age, Deloitte (December 1, 2021), <https://www2.deloitte.com/xe/en/insights/industry/technology/technology-media-and-telecom-predictions/2022/sports-nfts-digital-media.html> (predicting the size of the NFT sports media market); Shanti Escalante-De Mattei, NFT Trading Volume is Reportedly Down 97 Percent Since January (September 29, 2022), <https://www.artnews.com/art-news/news/nft-trading-volume-down-97-since-january-artnews-1234641141/> (noting the decrease in NFT sales volume during 2022).

<sup>16</sup> See Daniel Roberts, Prepare for a Flood of College Athlete NFTs, Decrypt (July 10, 2021), <https://decrypt.co/75164/ncaa-nil-rules-college-athlete-nft-not-dead-yet> (reporting how past college athlete NFT projects have been a “rug pull” or way to quickly make money and abandon the project).

<sup>17</sup> See Bill Shea and Mike Vorkunov, The De’Aaron Fox NFT Scandal, Explained: From Legality to What Happens Next, The Athletic (February 25, 2022), <https://theathletic.com/3150554/2022/02/25/faq-an-explanation-of-deaaron-foxs-messy-nft-project/> (reporting how past college athlete NFT projects have been a “rug pull” or way to quickly make money and abandon the project).

<sup>18</sup> *United States v. Ethan Nguyen and Andre Llacuna*, 22 mag 2478, (listing criminal charges against founders of NFT project “Frosties” that scammed buyers by not intending to fulfill roadmap promises and abandoning project).

Trademark ownership issues also present major barriers for NIL activities with NFT's.<sup>19</sup> Most universities own the trademarks to their logos and other marks and therefore can decide whether athletes can wear team issued gear in any form of NIL deal.<sup>20</sup> Sports NFTs based on game moments require licensing for the photo or video used, and universities are seldom the sole owners of the media portraying student-athletes.<sup>21</sup> Further, clearance with sportswear sponsors adds an additional layer of approval needed by student-athletes or the companies creating a project.<sup>22</sup>

## **Conclusion**

Student-athletes that see the long-term opportunities associated with NFT's, such as a deeper connection to one's fanbase, are best positioned to be successful in pursuing those projects.<sup>23</sup> The NFT and cryptocurrency industry being in a lull opens the door for student-athletes, universities, and third-party companies to obtain the necessary licenses, agreements, and art necessary for a well-made product.<sup>24</sup> Overall, despite the decision in *Alston*, the change in policy by the NCAA, and new legislation from states, student-athletes looking to profit from their likeness with NFTs still find themselves looking to the governing body and schools to give them what they need to best profit from their name, image, and likeness.<sup>25</sup>

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<sup>19</sup> See Josh Schafer, NIL: College Athlete NFTs Are Booming, But a Key Aspect is Missing, Yahoo Finance (January 20, 2022), <https://finance.yahoo.com/news/college-sports-nil-rules-and-laws-143623459.html> (pointing out that major challenge to creating NFT project for college athletes is acquiring trademark licenses for logos and brands).

<sup>20</sup> See *id.*

<sup>21</sup> See *id.*

<sup>22</sup> See *id.*

<sup>23</sup> See Draftly, NFTs for College Athletes, <https://www.draft.ly/blog/nfts-for-college-athletes> (making recommendations to student-athletes who wish to pursue NFT projects to benefit from their NIL rights).

<sup>24</sup> See *id.*; See Josh Schafer, NIL: College Athlete NFTs Are Booming, But a Key Aspect is Missing, Yahoo Finance (January 20, 2022), <https://finance.yahoo.com/news/college-sports-nil-rules-and-laws-143623459.html> (describing process for acquiring trademark deals).

<sup>25</sup> See Josh Schafer, NIL: College Athlete NFTs Are Booming, But a Key Aspect is Missing, Yahoo Finance (January 20, 2022), <https://finance.yahoo.com/news/college-sports-nil-rules-and-laws-143623459.html> (criticizing barriers to entry for student-athletes to benefit from the NCAA's interim NIL policy).