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That's Going to Leave a Mark: The Effect of Trademark Law on Colleges and Universities

By: Bryn Ericksen

I. Introduction

Trademark law is an important aspect of intellectual property law and allows brands to protect their identity and how their image is represented to the public. The existence of trademark law, however, primarily focuses on protecting the consumer from confusion rather than protecting the rights of the trademark owner.¹ An owner of goods or services may wish to register a trademark to make their brand identifiable to a consumer.² Registering trademarks has been utilized by many different entities, especially colleges and universities, to prevent counterfeiting and fraud, and ensure that they receive the profits made from any goods that depict that mark.³ However, recent litigation might greatly impact the rights colleges and universities currently have regarding their registered trademarks. In addition to the recent litigation, student-athletes will likely impact how college trademarks are used in the future.

Trademark law is a federal issue and governed by the Lanham Act. Under the Lanham Act, a trademark can be obtained for “any word, name, symbol, or device, or any combination thereof ... used by a person ... to identify and distinguish his or her goods”⁴ Three important functions of a trademark include identifying the source of the goods or services, providing legal protection for the trademark owner’s brand, and aiding in protecting against counterfeiting and

¹ 15 U.S.C. § 1127.

² United States Patent and Trademark Office, <https://www.uspto.gov/trademarks/basics/what-trademark> (last visited Nov. 13, 2022).

³ *Id.*

⁴ 15 U.S.C. § 1127.

fraud.⁵ The rights of a trademark owner only extend to how that particular word or phrase is used in relation to the specific goods or services of the trademark owner.⁶

Trademark owners can include individuals, partnerships, corporations, limited liability companies, sole proprietorships, and any other entity that wishes to protect its brand.⁷ To distinguish a particular brand's goods and services from those of another brand, the owner of those goods and services can apply a trademark on the products.⁸ Someone becomes a trademark owner as soon as the trademark is used for the goods or services provided by the trademark owner.⁹ If anyone other than the trademark owner uses the distinct mark that was registered by the owner, then the owner may pursue legal action for infringement.¹⁰

Trademarks are crucial to many owners, especially small businesses. A trademark is a symbol of identity and is what consumers tend to associate with a particular brand.¹¹ When consumers are able to easily identify a trademark, the brand's reputation will be directly associated with that mark.¹² Consumers might make decisions on what to purchase based on the reputation of the brand represented by the trademark, greatly impacting sales either positively or negatively depending on that brand's reputation.¹³ For these reasons, it is important for small

⁵ United States Patent and Trademark Office, <https://www.uspto.gov/trademarks/basics/what-trademark> (last visited Oct. 30, 2022).

⁶ *Id.*

⁷ Legal Information Institute, https://www.law.cornell.edu/wex/trademark_owner#:~:text=A%20trademark%20owner%20can%20include,legal%20action%20against%20trademark%20infringement (last visited Oct. 30, 2022).

⁸ *Id.*

⁹ United States Patent and Trademark Office, <https://www.uspto.gov/trademarks/basics/what-trademark> (last visited Oct. 30, 2022).

¹⁰ Legal Information Institute, https://www.law.cornell.edu/wex/trademark_owner#:~:text=A%20trademark%20owner%20can%20include,legal%20action%20against%20trademark%20infringement (last visited Oct. 30, 2022).

¹¹ Deborah Sweeney, Why Trademarks Are So Valuable For Your Small Business (2020), <https://www.forbes.com/sites/allbusiness/2020/09/23/trademarks-are-valuable-for-your-small-business/?sh=7ea508e770f8>.

¹² *Id.*

¹³ *Id.*

businesses especially to be conscious of their trademarks and brand reputation because future sales could depend on an accurate depiction of the quality of the business. Like small businesses, colleges and universities also have an interest in protecting the reputation of their brand to ensure that students continue to enroll and pay tuition.

Infringement of a trademark occurs if the plaintiff can demonstrate that (1) it has a valid and legally protectable mark; (2) it owns the mark; and (3) the defendant's use of the mark to identify goods or services causes a likelihood of confusion.¹⁴ Additionally, the plaintiff must establish that the defendant used the plaintiff's mark, or a similar mark, in commerce in connection with the sale or advertising of goods or services without the plaintiff's permission.¹⁵ The "use" of a trademark must be established by the plaintiff because it prevents trademark owners from asserting a generalized right to control language.¹⁶ Federal trademark infringement law also requires that the plaintiff establish that the infringing mark was "in commerce," meaning that the infringing mark must have a substantial effect on interstate commerce.¹⁷ This can be shown by proving the mark was advertised by the alleged infringer in more than one state, there was interstate movement of goods bearing an infringing mark from a manufacturer to a seller, a product was sent to another state for the purpose of registering a trademark, or there was advertising in newspapers that have interstate distribution.¹⁸ In addition to the "in commerce" requirement, federal law also requires a "likelihood of confusion" to hold infringement.¹⁹ A "likelihood of confusion" occurs when consumers that see an infringing mark would probably

¹⁴ A&H Sportswear, Inc. v. Victoria's Secret Stores, Inc., 237 F.3d 198 (3rd Cir. 2000).

¹⁵ Legal Information Institute, https://www.law.cornell.edu/wex/trademark_infringement#:~:text=Trademark%20law%20protects%20a%20trademark,federal%20statute%20which%20governs%20trademarks (last visited Oct. 30, 2022).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

assume the product or service it represents is associated with the source of a different product or service that was identified with a similar mark.²⁰ Factors used to determine whether there is a “likelihood of confusion” are: (1) the strength of the trademark owner’s mark; (2) the degree of similarities between the marks; (3) evidence of actual consumer confusion; (4) the marketing channels used; (5) the type of goods involved and degree of care likely to be exercised by the purchaser; (6) the intent of the alleged infringer when selecting the mark; and (7) other facts showing the public would expect the trademark owner to manufacture a product in the alleged infringer’s market.²¹

Understanding the foundation of trademark law is necessary to fully understand the impact trademarks can have on the reputation of the brands of trademark owners. The importance of preserving the reputation of a trademark is one of the predominant factors that causes colleges and universities to work so hard to maintain exclusive rights to their registered trademarks. However, recent litigation raises the question of if colleges and universities should be receiving exclusive protection regarding these marks. This article will address this question by analyzing the purpose of trademark law and critically analyzing whether that purpose is fulfilled in relation to student-athletes and college trademarks generally.

II. Background

The purpose of trademark law has traditionally been to protect consumers from confusion by preventing sellers from imitating marks to pass off their goods as ones of another.²²

Trademark law also aims to promote efficiency in the consumer search costs associated with

²⁰ *Id.*

²¹ *Interpace Corp. v. Lapp, Inc.*, 721 F.2d 460 (3d Cir. 1983).

²² *S.C. Johnson & Son v. Johnson*, 116 F.2d 427, 429 (2d Cir. 1940).

identifying goods and services that emanate or are affiliated with a source they recognize as having good qualities.²³

Trademarks are an integral aspect of collegiate licensing and have historically been used to protect the branding of colleges and universities.²⁴ When the collegiate licensing industry was created nearly fifty years ago, it was met with skepticism. Some people resisted the notion that colleges and universities could exert control over who could capitalize on their names and insignias.²⁵ Prior to colleges licensing their trademarks, the use of marks on goods were intended for athletic uniforms and school supplies, with the primary intentions being to benefit the institution, students, and alumni directly.²⁶ Evolvement of the licensing industry has caused colleges and universities to heavily rely on trademarks to ensure profits by granting exclusive rights to third-parties.²⁷ Additionally, colleges and universities have relied on licensing their trademarks to merchandisers, creating the modern college sport apparel industry that we are familiar with today.²⁸

Colleges and universities began to increase their use of licensing in the 1990s, finding that consumers were interested in purchasing items depicting their names, logos, and insignias.²⁹ The rise in licensing agreements caused colleges and universities to increase enforcement of their trademarks to further their interest in profiting from the third-party use of their marks on goods.³⁰ Trademarks are particularly important for colleges and universities because they can directly influence the students that will choose to attend the school in the future. If a college or

²³ Jacob H. Rooksby, *University™: Trademark Rights Accretion In Higher Education*, 27 Harv. J.L. & Tech. 349, 358 (2014) (discussing trademarks as they relate to colleges and universities).

²⁴ *Id.*

²⁵ *Id.* at 359.

²⁶ *Id.* at 360.

²⁷ *Id.* at 359.

²⁸ *Id.* at 360.

²⁹ *Id.* at 367.

³⁰ *Id.* at 369.

university's trademark is infringed it could greatly impact their profits not only through merchandise sales, but also enrollment if students do not support the way the school is being portrayed.³¹

III. Discussion

A. The Student Athlete's Perspective:

Since college athletics create one of the largest markets for universities to sell merchandise bearing school marks, it is crucial to understand how the athletes representing the schools could possibly use school trademarks in the future. The NCAA was founded in 1906 and is responsible for regulating college sports, with its primary goal being to keep college athletes safe.³² Although student-athlete safety continues to be the primary goal of the NCAA, profits from the college sports industry became an equally important aspect of the rules and regulations set in place by the association.³³ College sports, especially football and basketball, generate billions of dollars in profits, with the total revenue generated by NCAA athletic departments in 2019 reaching \$18.9 billion.³⁴ Even though the college sports industry has seen enormous amounts of profits each year, the NCAA set forth strict limitations on the benefits student-athletes were allowed to receive.³⁵

Since its creation, the NCAA has focused on protecting the safety of college athletes, but the association has been criticized for preventing those athletes from collecting the profits they

³¹ *Id.*

³² NCAA Mission and Priorities, <https://www.ncaa.org/sports/2021/6/28/mission-and-priorities.aspx> (last visited Nov. 13, 2022).

³³ Bill Cross, *The NCAA as Publicity Enemy Number One*, 58 U. Kan. L. Rev. 1221, 1221 (2010) (discussing the right of publicity for college athletes).

³⁴

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/>.

³⁵ Bill Cross, *The NCAA as Publicity Enemy Number One*, 58 U. Kan. L. Rev. 1221, 1221 (2010) (discussing the right of publicity for college athletes).

may or may not be entitled to.³⁶ The NCAA has justified restricting athlete profits by claiming to “maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.”³⁷ This commitment to amateurism has created a dispute among college athletes and the universities they attend. As long as student-athletes are not attempting to depict university marks on items they are selling, they should be allowed to utilize the marks of the universities they attend when entering into any name, image, and likeness contracts.

The Supreme Court addressed the long standing issue between athletes and the universities they attend in *NCAA v. Alston*.³⁸ This issue was an often debated topic, and before *Alston* was decided a class-action lawsuit against the NCAA was filed by Division I football and basketball players contending the NCAA’s restrictions on student-athlete compensation violated federal antitrust laws by barring the athletes from receiving fair-market compensation for their labor.³⁹ In *Alston*, the Court applied the most common test in antitrust law, known as the “rule of reason,” and upheld a district court ruling that the NCAA’s rules limiting education-related compensation violated Section 1 of the Sherman Act.⁴⁰ After the unanimous holding by the court in *NCAA v. Alston*, the NCAA was prevented from restricting the educational benefits provided to athletes.⁴¹ This opened up possibilities for college athletes to make money off of their own name, image, and likeness.

³⁶ *Id.*

³⁷ NCAA, NCAA Constitution, art. 1.3.1, at 1 (2008-09).

³⁸ National Collegiate Athletic Assn. v. Alston, 141 S. Ct. 2141 (2021).

³⁹ Amy Howe, NCAA athletes win 9-0 on educational perks as Kavanaugh calls out ban on direct payments, SCOTUSblog (Jun. 21, 2021, 8:23 PM), <https://www.scotusblog.com/2021/06/ncaa-athletes-get-unanimous-win-on-educational-perks-as-kavanaugh-calls-out-limits-on-direct-payments/>.

⁴⁰ National Collegiate Athletic Assn. v. Alston, 141 S. Ct. 2141 (2021).

⁴¹ *Id.* at 2163

The Supreme Court ruling in *Alston* created concerns of future lawsuits, prompting the NCAA to revise its rules. Recent NCAA policies now allow college athletes to have the opportunity to receive benefits from their name, image and likeness (NIL).⁴² The new NCAA policy provides that individuals can engage in NIL activities that are consistent with the law of the state where the school is located.⁴³ College athletes who attend a school in a state without an NIL law can engage in this type of activity without violating NCAA rules related to name, image and likeness.⁴⁴ The changes in NCAA policies allow athletes to use a professional services provider for NIL activities, but they should report NIL activities consistent with state law or school and conference requirements to their school.⁴⁵ This policy continues to enforce the fact that college sports are not pay-for-play, but provides athletes with clarity regarding the potential to benefit from their own name, image, and likeness.⁴⁶

An important question to ask after *Alston* relates to how colleges and universities will allow student-athletes to use the school's intellectual property when making their own name, image and likeness deals. Colleges and universities are currently divided in their views on allowing athletes to use school intellectual property, such as trademarks, when NIL deals are made. Some schools may be hesitant to allow athletes to utilize school intellectual property because it may imply that not only is the athlete endorsing the advertisement, but the school is also endorsing the advertisement.⁴⁷ This could cause potential student athletes to choose a school based on their rules restricting the use of the school's trademarks when utilizing their own name,

⁴² Michelle Brutlag Hosick, *NCAA adopts interim name, image and likeness policy*, NCAA (June 30, 2021, 4:20 PM), <https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx>.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Corinne Zucker, *Trademark Considerations for the NCAA's NIL Policy*, Sports Litigation Alert (Dec. 17, 2021), <https://sportslitigationalert.com/trademark-considerations-for-the-ncaas-nil-policy/>.

image and likeness deals. Allowing student-athletes to utilize a school's trademark creates an incentive for athletes to choose a school that will allow them to use the school's intellectual property because the student athlete's name, image and likeness value will increase with the added use of a school's trademark.⁴⁸ The policy behind trademark law however raises the question of if schools should even be given the choice of regulating how athletes utilize the school trademarks in relation to their own NIL contracts. A likelihood of confusion for customers is required to prove trademark infringement, which would not occur if student-athletes were to merely bear the mark of their schools for their NIL contracts. The concerns that colleges and universities have regarding athletes representing and endorsing specific brands with their NIL contracts is valid, but the policy behind trademark law does not support schools restricting the use of their marks for this reason.

Colleges and universities must now make important decisions regarding who they will allow to use their trademarks. Colleges that allow athletes to use the trademark alongside their own name, image and likeness may attract more students over colleges that do not allow the athletes the same benefit. Allowing students an opportunity to use a school's trademark would not only benefit the athlete, but will also benefit the school if the athlete is a positive representative of the university. Additionally, since the policy behind trademark law does not support the restriction of a trademark for these purposes, it is likely in a school's best interest to allow student-athletes to use their trademarks when making NIL deals.

The NCAA will likely continue to expand the rights of student-athletes regarding their name, image and likeness. Expanded rights of athletes to profit on their own intellectual property will likely make it more challenging for colleges and universities to continue to make use of the

⁴⁸ *Id.*

exclusive licensing agreements currently in place. If colleges want to appeal to prospective athletes, they need to seriously consider what benefits they will receive by restricting use of their trademarks to student athletes. With recent court opinions such as the Supreme Court ruling in *Alston*, colleges and universities will need to prepare for a world where student-athletes could begin to hold the upper hand when it comes to utilizing a school's intellectual property.

B. College Trademarks Generally:

Changes in trademark law are likely going to affect the future of how colleges and universities will be able to license rights to their trademarks to third parties. More cases are likely going to be brought to court regarding use of college and university trademarks on various sport merchandise because the foundation of the industry is not strongly supported by the rationale of trademark law.

After the Supreme Court's decision in *Alston*, colleges and universities will be faced with decisions to either allow student athletes to use their official trademarks or restrict their use. In addition to the possibility of athletes monopolizing the trademarks of colleges and universities, other advancements in trademark law could leave schools in a different position when it comes to the rights associated with their trademarks. Colleges need to be aware of the evolving trademark law to protect the way they are portrayed and how people perceive their values. This is proving to be harder for colleges and universities to achieve because the policy behind trademark law is only concerned with consumer confusion.

An important case to analyze when determining how colleges could be affected by trademark law in the future is *Pennsylvania State University v. Vintage Brand, LLC*. In this case, the court denied a motion filed by Pennsylvania State University that would have dismissed counterclaims filed by Vintage Brands that sought to remove Pennsylvania State University's

exclusive control over the use of logos identifying the university and its teams.⁴⁹ For Vintage Brand to prevail against Pennsylvania State University, it had to prove the three registered trademarks owned by the university were invalid.⁵⁰ Vintage Brand claimed its use of the marks were mere decoration and do not serve to identify Penn State as the source or origin of the goods, that consumers perceive the marks to be merely a decorative feature of the goods and not an indication of the source of the goods, and that their overall commercial impression is purely ornamental or merely a decorative feature and do not identify and distinguish Penn State's goods from those of others and therefore do not function as a trademark.⁵¹

To prove the invalidity of Penn State's trademarks, Vintage Brand challenged the ornamentality of the marks.⁵² The opinion noted that a trademark will fail on this ground when its overall commercial impression is "solely as attractive ornamentation" and not "also as a symbol that identifies and distinguishes a single source", with Pennsylvania State's marks falling into the latter category.⁵³ Another consideration the court must address is if the marks "identify and distinguish" the goods, which is the area where the parties' understanding of the law differs.⁵⁴

Vintage Brand argued that consumers understand the marks to be representative of their support for the University and not that the University has produced, approved, or guaranteed the quality of the item the marks are depicted on.⁵⁵ Alternatively, Penn State argued that "it would be unimaginable that using PENN STATE, the University, or the Pozniak Lion Logo on a good, no

⁴⁹ The Pa. St. University v. Vintage Brand, LLC, No. 4:21-CV-01091, 2022 WL 2760233, at *2 (United States D. M.D. Pa. July 14, 2022).

⁵⁰ *Id.*

⁵¹ *Id.* at 1.

⁵² *Id.* at 2.

⁵³ *Id.*

⁵⁴ *Id.* at 3.

⁵⁵ *Id.*

matter how prominently, could be perceived by the consuming public as anything other than an identification of Penn State as the source or second source of the good.”⁵⁶ To determine the proper outcome of this case, the Court emphasized that the primary purpose of trademark law is consumer protection and enabling the public to easily identify a product with a particular source.⁵⁷ Trademark protection is not provided to create economic benefits for the owner of the mark and the law also does not seek to encourage entities to seek more trademarks.⁵⁸

Several ways of thinking are described in the opinion that would influence the outcome of this case. The “per se” approach adopted by the Fifth Circuit is supported by Penn State because Courts that follow this approach recognize that consumers purchase trademarked goods due to the mental association between the marks and their owner.⁵⁹ This Court rejected the per se approach because trademark law requires more than a mental association between the trademark and trademark holder.⁶⁰

It is also important to understand the circularity of the arguments presented in this case and described by the court. The beliefs of consumers are based on an incorrect assumption that goods bearing Penn State’s trademark must be licensed.⁶¹ The law only offers protection if there is a belief, yet the belief comes from consumers’ misconceptions about the law.⁶² This circularity prompted Judge Brann to ask three questions at the end of the opinion in *Vintage Brand*:

- 1) What percentage of consumers are confused as to the source of Vintage Brand’s merchandise?
- 2) Does the consumer belief vary by logo or merchandise type?

⁵⁶ *Id.*

⁵⁷ *Id.* at 8.

⁵⁸ *Id.*

⁵⁹ *Id.* at 4.

⁶⁰ *Id.* at 5.

⁶¹ *Id.* at 10.

⁶² *Id.*

- 3) Does the consumer belief stem from the belief that Penn State is the actual source or sponsor of the goods, or is that belief really based on a misunderstanding of trademark law itself?⁶³

Penn State will need to bring evidence in the form of data to court in the future if it is going to properly answer Judge Brann's questions.⁶⁴ Judge Brann also noted that the modern college trademark and licensing industry has grown drastically, generating billions of dollars of revenue, but ultimately has been built on sand.⁶⁵ The case of *Pennsylvania State v. Vintage Brand, LLC* addressed an interesting concept in trademark law and presented a new problem for college and professional sports because they themselves do not produce their own merchandise.⁶⁶ Modern trademark law does not account for an industry that depends on third party manufacturers to produce goods and only profits by granting exclusive rights to those manufacturers.⁶⁷

Judge Brann's third question could raise concerns for college and professional sports brands if this case is upheld on appeal.⁶⁸ To function as it does now, the merchandise industry of college and professional sport brands relies on property rights in their trademarks to permit them to license use of the marks to third parties and prevent others from using the marks without compensation to the trademark owners.⁶⁹

⁶³ *Id.*

⁶⁴ Thomas Baker, *Penn State Trademark Case Produces Potential Problems For Sports Teams And Merchandisers*, Forbes (Jul 28, 2022, 4:02 PM), <https://www.forbes.com/sites/thomasbaker/2022/07/28/penn-state-trademark-case-produces-potential-problems-for-sport-teams-and-merchandisers/?sh=55383eb623f6>.

⁶⁵ The Pa. St. University v. Vintage Brand, LLC, No. 4:21-CV-01091, 2022 WL 2760233, at *10 (United States D. M.D. Pa. July 14, 2022).

⁶⁶ Thomas Baker, *Penn State Trademark Case Produces Potential Problems For Sports Teams And Merchandisers*, Forbes (Jul 28, 2022, 4:02 PM), <https://www.forbes.com/sites/thomasbaker/2022/07/28/penn-state-trademark-case-produces-potential-problems-for-sport-teams-and-merchandisers/?sh=55383eb623f6>.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

It can be argued that the trademark owners should hold the exclusive right to control who can produce merchandise that bears the trademark, but trademark law does not exist to protect the owner of the mark, it only exists to protect consumers from confusion. If colleges and universities have less control over their trademarks, it could negatively affect school profits. However, Judge Brann notes that although it may disincentivize investment in the school's merchandising, it will not discourage investment in the school's academic and athletic programs.⁷⁰

Allowing colleges and universities to exercise strict trademark enforcement against anyone who uses the marks does not advance the policy of trademark law, which is to protect the consumer from confusing one brand from another. Therefore, it is important for schools to seek other forms of intellectual property protection if they wish to continue licensing exclusive rights in their marks to third parties.

IV. Conclusion

The topic of trademarks as they relate to colleges and universities will likely continue to be debated among athletes, merchandisers and the colleges themselves until the courts or legislature provide a definitive ruling on the matter. The purpose of trademark law differs from that of patent or copyright law in that its goal is protecting the consumer and not the creator of the trademark. Where patents and copyrights seek to provide protection as a means of incentivizing creativity and innovation, trademark law's primary goal is not to incentivize companies to register more trademarks. This policy likely follows the idea that trademarks are not meant to be intellectual property of the creator, but instead signal to consumers that the creator of the mark is associated with the goods or services that depict the mark.

⁷⁰ The Pa. St. University v. Vintage Brand, LLC, No. 4:21-CV-01091, 2022 WL 2760233, at *10 (United States D. M.D. Pa. July 14, 2022).

Understanding the policy behind trademark law illustrates that colleges and universities should seek a different form of protection on their branding if they want to continue to profit off of their marks in the future. Although changes in the NCAA's rules and regulations along with future court rulings regarding potential use of university trademarks might restrict the trademark rights universities have been accustomed to in the past, the future of trademark law is still evolving.

Colleges and Universities should prepare for a future that consists of expanded use of their trademarks among merchandisers and allowing student-athletes to use their marks when promoting their own name, image and likeness. Even though these changes might seem drastic, they will ultimately benefit consumers and student-athletes, while only moderately impacting total university profits.