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# *A Game Plan for Athletes to Monetize their Name, Image, and Likeness*

**Eric Fishman and Nicholas Saady**

*Eric Fishman is a partner at Pryor Cashman LLP and the head of the firm's Sports Law Practice where he represents some of the top athletes in the world.*

*Nicholas Saady is an associate at Pryor Cashman LLP with significant experience in complex and high-profile litigation, including sports litigation, in the U.S. and Australia.*

Technology has transformed the way that athletes monetize their name, image, and likeness, providing both additional revenue streams and a sophisticated way to control and protect their valuable intellectual property (IP). From NFTs and TikTok to unique licensing deals and even tokenization of player contracts, the increasingly virtual and connected global marketplace presents vast opportunities and eliminates market barriers, allowing athletes to instantly reach their fans in every corner of the globe with the click of a button (or a voice command).

U.S. Supreme Court decisions have helped too—most recently with the *Alston* decision allowing college athletes to profit from their name, image, and likeness. *Alston* sent shockwaves through the sports industry, as college athletes—open to innovation, hungry for success, and familiar with new technologies—have embraced novel methods of marketing. This has also created competition for professional athletes to follow suit.

There are potential risks associated with the novel methods by which players can now monetize their name, image, and likeness. Athletes and their advisors should understand the critical legal and practical issues when stepping onto this new playing field and have clear game plans to overcome or avoid them.

## **NFTs**

Blockchain products are the current buzz among both athletes and celebrities, providing athletes with unique opportunities to monetize their star power. Non-fungible tokens (NFTs) are the most

prominent—now regularly the subject of dinner table and court-side discussions. We recently saw Naomi Osaka drop her own NFT series, Michael Jordan launch a platform for athlete-NFTs and even college athletes, like Bryce Young, launch their own NFT collections.

We are also witnessing the development of the ways in which NFTs are utilized, marketed, and curated—bringing them further into the mainstream and adding to their appeal for athletes. Infinite Objects has partnered with NBA Top Shot to display their NFTs on a loop, and physical galleries are popping up all over the world displaying NFTs using products like Tokenframes. Web3 startups such as Campground are also offering athletes, among others, opportunities to create tours of curated content called “Trails,” which are accessible through the purchase of exclusive NFTs.

Fans have always wanted to buy sports memorabilia and experiences. NFTs and related experiences just provide them with a different method for them to do so—at a greater scale, in a more efficient manner and with a more verifiable way to demonstrate authenticity through the use of blockchain technology. But this new form of “memorabilia” is more complex than an autograph on a baseball bat, making it important for athletes to protect themselves from the start. Athletes should consider ensuring that contracts associated with an NFT make it clear that they remain the sole owner of their IP rights, and that they are simply licensing the relevant IP to the NFT owner for a specific purpose. Athletes should also consider utilizing smart contracts to secure secondary royalties from their NFTs, which can provide a lucrative source of future income.

## **Tokenization**

Tokenization is another novel, but increasingly popular, method of generating revenue in the sports world. These so-called digital investment vehicles have been utilized most in Europe—for example, soccer clubs like Paris Saint-Germain have created tokens that allow their fans to become involved in club decision-making and give fans access to unique experiences. Such moves follow the innovative approach

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taken over two years ago by NBA player Spencer Dinwiddie, who attempted to tokenize his \$US34 million contract with the Brooklyn Nets.

However, U.S. athletes and teams have generally taken a more cautious approach to tokenization. These tokens are essentially a form of digital currency, with associated rights, and therefore could be considered “securities” under U.S. law. This means that they could be subject to the array of U.S. securities laws and the jurisdiction of an increasingly active Securities and Exchange Commission, which has nearly doubled the headcount in its renamed “Crypto Assets and Cyber Unit.”

Athletes, agents, and their teams should be acutely aware of the requirements imposed by applicable securities laws—particularly around disclosure and reporting—in all jurisdictions that tokens are offered. They should also be aware of the upfront and ongoing costs of compliance, which may limit the palatability of tokenization.

## Athletes in the Metaverse

The metaverse provides immense opportunities for athletes, along with immense risks. Apart from sporting events held in the metaverse (like the Nets’ recent metaverse broadcast), athletes from many sports have sought to monetize their stardom by buying land in the metaverse. Stars and brands have purchased islands in The Sandbox and Decentraland to launch NFTs, hold events, and offer exclusive experiences.

The metaverse provides athletes with similar business opportunities to those in the real world, including merchandise and clothing deals, brand sponsorships, and even virtual meet-and-greets. The appeal for athletes is the ease by which they can engage in the metaverse, its geographic and time efficiency, and the maintenance of their real-world privacy.

However, this early stage of the metaverse has proven to be a modern wild west for protecting IP. Courts have been faced with tough issues concerning how IP laws apply to products in the virtual world—a point illustrated in the two NFT-focused U.S. court cases involving Nike (against sneaker resale marketplace StockX, regarding the alleged use of Nike’s logos and products in the NFT market) and Hermes (against NFT artist Mason Rothschild, regarding the MetaBirkins NFTs).

It is critical for athletes to be proactive and methodical in protecting their IP. Athletes creating products, brands, or even virtual doubles of themselves in the metaverse should consider applying for trademark protection—including in multiple

jurisdictions. It is also desirable for athletes to ensure that all agreements they enter clearly prescribe whether their IP can be exploited in the real world, the metaverse, or both. If athletes collaborate with others in the metaverse, they should confirm that their collaborators comply with relevant IP laws and obtain written warranties to that effect.

## Social Media and Traditional Partnerships

Social media is, remarkably, now a “mainstream” form of monetization. Athletes engaging with platforms like Instagram and TikTok to generate revenue must be aware of the inherent risks. When promoting products or services on social media, care must be taken to ensure that statements are not misleading, deceptive, defamatory, or might implicate other tortious actions. Athletes should also be conscious of peculiar laws—for example, certain jurisdictions may prohibit influencers from posting testimonials about certain health products and cosmetics.

Traditional business partnerships remain common and profitable for athletes, though the opportunities have developed in new areas. Think of UFC star Conor McGregor’s affiliation with Proper Whiskey, Coinbase’s deal with NBA player Kevin Durant, and NBA player Giannis Antetokounmpo’s partnership with WhatsApp. Regardless of the deal size, it is essential that the terms of the relevant contracts are carefully and clearly drafted. This is particularly so for terms dealing with the exploitation of athletes’ IP—including the definition of that property, the manner in which it may be exploited and the duration of exploitation rights. Athletes should also be attentive to exclusivity provisions, so that they have sufficient flexibility to utilize other avenues of monetization.

## Playing Defense

Athletes now possess a multitude of opportunities to monetize their name, image, and likeness. Technology has opened so many doors that enable athletes—from all sports and with all levels of experience—to more closely connect with their fans and communities and generate income in doing so. However, there are risks associated with athletes’ ventures into these new forms of monetization, particularly in the Web3 world, which make it important for athletes and their advisors to carefully consider and address the associated legal and practical issues with a smart and strong defensive game plan.

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