

The Rise of Social Media

What Professional Teams and Clubs Should Consider

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A recent study found that 73 percent of Americans regularly use social media,¹ such as popular networking sites Facebook, LinkedIn, and Twitter. How many of those Americans are sports fans? Likely a significant percentage. Leagues, teams, and players are all beginning to consider and address such social media platforms—some with trepidation and others with enthusiasm. In this article, we will explore the ways in which sports teams can simultaneously reap the benefits of, and protect against the potential risks inherent in, social media and social networking.

There is no doubt that sports have a significant presence in the social media world. According to Twitter, three of the top 10 most-discussed individuals on Twitter in 2009 were professional athletes: Kobe Bryant, Tiger Woods, and Alex Rodriguez. Sports teams (Los Angeles Lakers, Cleveland Cavaliers, Chelsea Football Club, New York Yankees, and Liverpool Football Club) comprised five of the top 10 most-discussed sports topics. The New York Yankees were the first Major League Baseball (“MLB”) club to reach 1 million “fans” on Facebook. Shaquille O’Neal has approximately 2.6 million Twitter “followers” and is the most-followed athlete on Twitter. The National Basketball Association (“NBA”) is the most-followed professional sports league, with approximately 1.7 million followers, and the Orlando Magic is the most-followed professional sports team, with approximately 940,000 followers on Twitter. This recent explosion of social media technology in the sports arena presents both opportunities and concerns for professional sports teams and leagues.

Most professional sports leagues have developed social media policies for their athletes and other employees, including coaches and officials. For example, the National Football League’s (“NFL”) latest Twitter policy states that players, coaches, and other “inside” personnel are prohibited from “tweeting” (sending electronic messages of 140 characters or less to those following the individual on Twitter), either directly or through a third party acting on such individual’s behalf, during the period beginning 90 minutes before the applicable game time and ending after all post-game media interviews have been concluded. Accredited media personnel are warned not to use social media to approximate any type of “play-by-play” updates, and game officials are strictly forbidden from using any social media in a professional capacity. This version of the policy was updated in response to several incidents involving player tweets described below.

In September 2009, a Washington Redskins rookie took to Twitter to criticize Redskins fans, expressing anger at the lack of support shown by the fans at a recent game. Jets receiver David Clowney was benched by coach Rex Ryan for tweeting his thoughts on his playing time, and San Diego cornerback Antonio Cromartie was fined \$2,500 by the team for tweeting his opinion that the “nasty” food in training camp might be the reason for the lack of a Super Bowl victory. Running back Larry Johnson was actually fired from the Kansas City Chiefs as a result of tweets criticizing his coach. These examples beg the question as to whether teams would agree that the cliché “there’s no such thing as bad publicity” applies to them in the social networking world.

The NBA and the U.S. Open have similar social networking policies to the NFL. Under NBA rules, players, coaches, and team personnel are prohibited from using cell phones and other handheld devices during games (including timeouts and halftime) and for 45 minutes before and after each game. The NBA policy also states that individual NBA teams may adopt their own supplemental rules with regard to practices, team meetings, and other team events. Certain NBA clubs have done so, essentially placing social networking restrictions on all “team time.”² The Tennis Integrity Unit (“TIU”), a division of the International Tennis Federation, banned on-court and locker room tweets at the U.S. Open and warned players not to use social media at any time

in such a way as to disseminate any “inside information” that might alter the outcome of any match.³ The restrictions applied not only to players, but also to coaches, agents, tournament staff, and even family members. Andy Roddick, who frequently tweets, immediately tweeted his response to the TIU restrictions: “. . . lame. . . .”⁴ MLB, on the other hand, has so far embraced social media. Although MLB has taken efforts to prevent members of the media from disseminating reports that could be seen as “real-time” game coverage,⁵ it has not yet adopted a formal policy with respect to players and other personnel, and in fact promotes player and “insider” tweeting on its Web site, offering links to active tweeters and bloggers from each MLB club. Similarly, the National Hockey League (“NHL”) is a decidedly “self-regulatory” league and has not adopted any formal social media policies to date.⁶

With leagues prescribing the minimum standard (or providing no guidelines at all), individual member teams and clubs should consider what supplemental protections should be put in place as to their players and other employees. Teams and clubs must recognize that the image and brand equity of a team can be drastically affected in an instant, given the reach of social networking platforms. Previously, if an athlete were to criticize his team or his coach, it might be seen in the local television market and printed in newspapers with a mostly local circulation. Now, with Twitter and Facebook, one critical statement can be broadcast globally. Therefore, the rise of social media—while it offers many benefits and opportunities to teams, as we discuss later in this article—must be considered with a critical eye.

Private organizations, teams, and clubs have the right to restrict what their players do and say on social networking platforms through contract. Though players and personnel may have a knee-jerk reaction of “you can’t tell me what I can and can’t say on my own time,” teams can do just that. First Amendment protections only apply when a restriction on speech is being imposed by a governmental agency, not a private organization.⁷ Therefore, by virtue of player and employment contracts or at-will employment (in compliance with applicable federal and state antidiscrimination laws), teams and clubs may impose additional

restrictions on their employees when it comes to social media and even prohibit certain types of statements about the team, its management and ownership, its performance, and the like. To that end, when crafting social media policies and provisions, teams and clubs should make all players and key personnel (and perhaps all personnel) sign on to “antidisparagement” provisions, agreeing that they will not put the team, its coaches, its management, its ownership, its sponsors, or even its fans in a bad light on any social media platform. In addition, teams should consider appropriate supplemental “blackout” periods (i.e., certain periods of time before, during, and after games; in-season—as opposed to off-season—restrictions; team meetings and practices; and so forth) and punishments when the policy is not adhered to (e.g., imposition of monetary fines, community service requirements, and traditional breach-of-contract remedies, including termination of employment in appropriate cases).

In monitoring and enforcing their social media policies, teams and clubs will have to determine the level of resources to be devoted to “policing” the social media networks. Certain violations may be so egregious as to be made publicly known almost instantly—for example, Andy Roddick’s response to the TIU hit the mainstream media that same day, given Roddick’s popularity and massive Twitter following. However, less visible players and personnel may be able to defy team policies more easily if they are not regularly monitored. As a general matter, teams must weigh the benefits of having their star players communicate directly with fans and keeping them engaged against the inherent risks of the unpredictable “open mic” nature of sites like Facebook and Twitter. There will undoubtedly be a tension between the best interests of the organization and the message the organization is sending when attempting to restrict its employees—a message that is being sent not only to players and personnel, but also to fans, who often denounce teams for lack of transparency or efforts to stifle criticism.⁸

On the flip side, it is obvious that social media appears to be a force to be reckoned with when it comes to marketing, sponsorship opportunities, and connecting with a fan base. Used properly, teams could derive tremendous benefit.

Sponsors are increasingly eschewing traditional media advertising, such as television, radio, and print, for interactive and viral media campaigns that reach consumers online. Pepsi, a Super Bowl advertising mainstay for over 20 years, announced in late 2009 that it would not run any advertisements during the 2010 Super Bowl XLIV, instead opting for an interactive online media campaign focused on community service. A Pepsi spokesperson explained that the brand was seeking a “two-way dialogue” with its consumers⁹—an opportunity that social media platforms are tailor-made to provide. In the down economy, sponsors are negotiating lower sponsorship rates with teams than in years past and even abandoning sponsorship relationships entirely. However, if teams offer sponsorship opportunities that tap into the new social media market, offering more meaningful, direct interaction with the teams’ fan base, sponsors may be more receptive to entering into partnerships, perhaps even for multiyear terms. Further, although the economy at some point will be revived, it is likely that sponsors will continue to be receptive to social media partnerships. Social media marketing opportunities offer the benefit of being relatively low cost in comparison to traditional billboard or television advertising, while tapping into a larger geographical market.¹⁰

Sponsored contest marketing lends itself particularly well to online media (but teams must be cognizant of, and in compliance with, any federal, state, or local laws and regulations regarding games of chance and wagering). As noted above, all teams and clubs should enact policies to restrict players and personnel from disparaging such teams’ and clubs’ sponsors, giving sponsors comfort that their brands will be protected.

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However, teams and sponsors could potentially go even further by leveraging individual players’ social media activities in conjunction with the sponsorship relationship. For example, the official luxury auto retailer of the Dallas Cowboys might agree, as part of its sponsorship package, to run a car giveaway promoted on the Cowboys’ traditional media channels (e.g., Cowboys’ Web site, game day programs, and so forth). However, imagine the greater visibility that the contest would receive if Tony Romo were to tweet about it or post the contest information on his Facebook page.¹¹

Beyond sponsorship activities, social media platforms offer teams the opportunity to connect and interact with their fans in a very real way. While almost all professional teams have their own Web sites, those sites typically offer a “monologue” from the team—e.g., information is posted and changed periodically and will be seen by those users actively opting to visit the Web site at any particular time. Many teams will use e-mail marketing to drive fans to the Web site, but again, the team is talking “at” the e-mail recipient.

Conversely, social media give teams the opportunity to directly interact with fans, potential fans, and even those who may never have sought out the team in the first place. Every time a tweet is sent or a Facebook page is updated, connected users can receive the message in real time, whether at a computer or on a mobile network, such as through a cell phone or other Internet-enabled portable device. Not only that, they can directly respond to whatever message is being sent their way—fans are no longer observers; they are participants. Therefore, instead of a monologue, teams using social

media are creating a dialogue. Whenever a new message is posted on Facebook and Twitter for the popular teams, users immediately begin to post replies and create sub-conversations with other users. The setup of social networking sites is such that even if a particular user is not connected to the team as a "friend" or "follower," chances are that he or she has a friend or follows someone that is connected to the team and will see all the postings on his or her pages. As such, teams have an opportunity to reach individuals that may never think to actively log on to the team's Web site but may be intrigued by something they see on someone else's page.

There will always be a concern that opening a team-sponsored dialogue with fans will result in negative commentary and postings. However, fans will appreciate an officially branded community in which to connect with other fans and foster team loyalty, as evidenced by the many "unofficial" fan clubs that pop up all over the Internet. Also, as discussed above, fans are cognizant of efforts to squelch open dialogue and criticism and will likely embrace any team-sponsored forum in which to sound off. Teams also can create a greater buzz than ever before by sending real-time updates on players, statistics, ticket sales, and even weather conditions at the stadium or arena on game day. They also can increase awareness of the team's charitable activities, premium offerings at the stadium or arena, and official fan clubs.

Despite the popularity of social networking sites,¹² there has been relatively little reported litigation with respect to social media activities, with only a handful of published judicial opinions relating to Twitter and Facebook (and none in a sports context). However, Twitter has not been completely free from legal trouble. In June 2009, St. Louis Cardinals manager Tony La Russa settled a lawsuit against Twitter out of court after having sued the social networking site for trademark infringement, cybersquatting, and misappropriation of name and likeness in response to a tweet that went out in April 2009 from an individual claiming to be La Russa, stating, "Lost 2 out of 3, but we made it out of Chicago without one drunk driving incident or dead pitcher."¹³ The site also posted a message on the account page stating, "Hey There! Tony La Russa is using Twitter."¹⁴ The Twitter identity was not in fact created by La Russa and he had no connection to it whatsoever. La Russa has been criticized in the media for taking legal action against Twitter for what was likely a prank by an anonymous Twitter user. (Twitter has an impersonation policy, stating that the only impersonation accounts permissible are parody accounts, i.e., accounts that reasonable persons would be able to identify as a joke.) Any nonparody impersonation accounts are subject to removal by Twitter.

With the rapid growth of social media platforms and the new types of content uploaded and traded each day, it is likely that the social media world and the legal world will begin to collide in a more significant way—a player may contest his termination for an inappropriate tweet, leagues and member clubs may clash with conflicting social media policies, a team employee may argue that his social media content is his copyrighted work, impersonators will be sued for defamation and misappropriation as in La Russa's case, and so forth. As such, social media use and content raise potential issues of copyright and trademark ownership and infringement, defamation, misappropriation, and employment, privacy, and contract law—all of which will have bearing on social media in the sports context. However, harnessed properly, social media can offer teams unprecedented opportunities to reach fans, potential fans, and sponsors, and teams should be encouraged to embrace the future of communication. Team counsel can be invaluable in assisting teams in structuring social media guidelines and strategies to ensure that teams are getting the maximum value from social networking while protecting their organizations' interests in an evolving and somewhat unpredictable online landscape. ♦

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ENDNOTES

1. Pat Coyle, *Teams Active in Social Media Build a Strategic Advantage*, SPORTS BUS. J., Jan. 4–10, 2010.
2. Marc Stein, *NBA Social Media Guidelines Out*, ESPN.COM, Sept. 30, 2009.
3. Signs posted by the TIU in the players' lounges, locker rooms, and referee's office stated, "Certain sensitive information concerning your match or other matches and/or players should be avoided. Depending on the information sent out this could be determined as the passing of 'inside information.'" "Inside information" was defined as "information about the likely participation or likely performance of a player in an event or concerning the weather, court conditions, status, outcome or any other aspect of an event which is known by a Covered Person and is not information in the public domain." Associated Press, *Roddick Calls U.S. Open Twitter Warning "Lame,"* NBCSPORTS.MSNBC.COM, Aug. 28, 2009.
4. *Id.*
5. Eric Fisher, *MLB Imposes Restrictions for Online Content*, SPORTS BUS. J., Feb. 25, 2008.
6. Kimberly Maul, *Sports Entities Must Adapt a New Game Plan to Reach Fans*, PR WK., Oct. 12, 2009, at 20. The director of social media marketing and strategy for the NHL has explained that the culture of the NHL is such that players would not opt for player-centric online activities in the locker room, as opposed to fostering a team environment, so the league has left any social media regulation to the discretion of its individual clubs.
7. *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976); *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 114 (1973).
8. When an athlete posts on a third-party Web site, is he or she posting as, say, Chad Ocho Cinco of the Cincinnati Bengals, or as Chad Ocho Cinco, an individual? Even teams that impose more restrictive social media policies than their respective leagues typically limit the restrictions to times when their athletes and employees are engaging in team activities or are on team property. It appears that most teams resort to more traditional punishments, such as fines, when their athletes make social media statements detrimental (or deemed detrimental) to the team on their "own time."
9. Frank Washkuch, *Pepsi Abandons Super Bowl in Favor of CRM*, DMNews, Jan. 4, 2010.
10. Facebook's official "Press Room" reported that as of Jan. 27, 2010, about 70 percent of its users are outside of the United States.
11. Such activities, of course, would have to be squared with any personal sponsorships that players have negotiated for themselves. However, this type of integrated marketing is something that teams should think about in negotiating player contracts and potentially harnessing individual talent to increase teams' attractiveness to sponsors.
12. Facebook's official "Press Room" reported that, as of Jan. 27, 2010, it had more than 350 million active users.
13. *Tony La Russa Settles Lawsuit Against Twitter Out of Court*, SPORTS BUS. DAILY, June 8, 2009.
14. *Id.*