The regulation of social media use in sport

The recent rise in social media has enabled players to get closer than ever to their fans, and vice-versa. Leslie Ross examines the dangers that hold, recent incidents involving social media and sport’s policies on its use. She also examines sport’s rules on social media use in the light of freedom of expression legislation and whether instant messaging can be regulated by sport, as it is a ‘private’ form of social media.

The 21st century has brought with it a new form of communication and networking - collectively referred to as ‘social media’. Social media most commonly in use within the sports industry are Twitter and Facebook, although other formats such as internet blogging and instant messaging are also forms of social media.

Twitter and Facebook are simple to access and, importantly, allow both teams and players to communicate directly with their supporters. The advantage to a fan is the possibility of direct contact with a player or team. For teams, it is a new way to stimulate commercial activity and create new revenue streams. A quick glance at the Facebook page of Real Madrid FC reveals 8,779,170 ‘fans’.

Directing these ‘fans’ to Real Madrid TV, competitions and merchandise sites is sure to generate interest and additional revenue for the club.

A major downside for teams and sporting federations of the use by players is that they are apt to lose control of their central media messages. Through Twitter or Facebook, players can communicate directly with fans without going through the filter of the club or federation’s media relations departments. Players may go ‘off message’ or may simply ‘go bananas’. The question then becomes, how far can (or should) sporting federations and/or teams go to regulate the use of social media by players and others involved in the sport?

Regulation of the use of social media
In the UK, the recent case of Liverpool striker Ryan Babel illustrates that the English Football Association (FA) takes a dim view of negative comments posted by players using social media.

Following Liverpool’s defeat to Manchester United in the FA Cup, Babel tweeted a mock-up photo of referee Howard Webb in a Manchester United shirt and commented: ‘And they call him one of the best referees. That’s a joke’. Babel admitted to improper conduct at an FA disciplinary hearing and was subsequently fined £10,000 and warned about his future conduct.

The FA does not have an official social networking policy but, on 12 February 2011, issued a ‘Social Networking Clarification’ on its website. Players were reminded that comments made on Twitter, Facebook or internet blogs ‘...may be considered public comment and that further to FA Rule E3, any comments which are deemed improper, bring the game into disrepute, or are threatening, abusive, indecent or insulting may lead to disciplinary action’.

Both Portsmouth FC and Queens Park Rangers have recently banned their players from posting comments relating to their respective football clubs on Twitter. Portsmouth manager Steve Cotterill implemented a fine of £1,000 per word for any player who broke this rule, although presumably the enforceability of this fine will be subject to the general rule that players cannot be fined more than two weeks basic wages for a transgression of club rules.

The major US sports all have conduct policies similar to those of the FA. In 2009, Dallas Mavericks owner Mark Cuban was fined $25,000 by the National Basketball Association (NBA) for using his Twitter account to criticise match officials following a defeat for his team. The major US Sports have also taken a different approach to that of the FA and two of the four have introduced bans on the use of Twitter from a certain point prior to the start of a game (National Football League - 90 minutes, National Basketball Association - 45 minutes) until after the players have met their post-match media obligations (such as mandated interviews with traditional media outlets). Neither the National Hockey League nor Major League Baseball (MLB) have such a formal policy, but MLB has a long-standing rule prohibiting the use of any communication devices within 30 minutes of the start of a game.

The bans on the use of Twitter also shed light on its possible use within the ‘dark side’ of sport. On 16 February 2011, the International Cricket Council (ICC) banned the use of Twitter by players in teams participating in its World Cup. This is undoubtedly motivated by a desire to prevent the proliferation of information deriving from teams which might assist those involved in illegal gambling, the ICC having been recently embroiled in a major scandal concerning spot fixing which resulted in minimum bans of five years from the sport being imposed upon three Pakistani cricketers.

The basis of the regulatory framework
Among others, the FA and the major US sports all regulate the conduct of their players through...
league rules and player contracts. In addition to Rule E3 noted above, clause 3 of the basic Premier League contract contains a provision that the player shall not: ‘... knowingly or recklessly do write or say anything or omit to do anything which is likely to bring the Club or the game of football into disrepute cause the Player or the Club to be in breach of the Rules or cause damage to the Club or its officers or employees or any match official’.

Clause 13 states further that: ‘The Player may, save as otherwise mutually agreed and subject to the overriding obligation contained in the Rules of The Football Association not to bring the game of Association Football into disrepute, contribute to the public media in a responsible manner’. These provisions appear to clearly cover postings made on Facebook or Twitter and would likely have been relied on by the FA in the Babel case.

Teams can further restrict the conduct of their players by implementing supplemental policies or rules, as the respective teams noted above have done. Golfers and tennis players are among examples of athletes whose use of social media is more difficult to regulate, as they are independent contractors and not subject to any such ‘team’ rules or contracts. They will, however, be subject to the rules of their respective Tours or of the competitions in which they participate and these will almost certainly contain clauses regulating conduct and purporting to preserve the integrity of the sport.

Freedom of expression
It does not appear that invoking the right to freedom of expression will greatly assist a player who has fallen foul of his team or governing body’s social media policy. In the UK, the right to freedom of expression derives from Article 10 of the Human Rights Act 1998. As the Act is only applicable to public authorities, such applicability must be determined on a case-by-case basis in public law, while only having tangential relevance in private. As the majority of sports teams are private enterprises, they are free to implement rules and regulations and to contract privately with players as they choose, within the limits of the law. The European Commission has held that there will be no interference where an individual has agreed to limit his freedom of expression (for example, by signing a Premier League Contract).

When regulation goes too far - public vs. private domain
It seems clear that teams and governing bodies can regulate comments made by players using social media in the public domain. The issue becomes much less clear when dealing with mediums such as instant messaging, where the comments are arguably made in the private domain.

In Ms. Sarah Baskerville v. The Daily Mail, the UK Press Complaints Commission (PCC) ruled that material posted on Twitter is effectively public and that the ‘tweeter’ therefore did not have an expectation of privacy. The PCC further opined that a notable feature of Twitter was that any message could be ‘re-tweeted’ without the tweeter’s consent or control to a larger subscription list. Although decisions of the PCC may not be binding on a particular team or sporting federation, its ruling will be useful to support an argument that comments made by players on Twitter are in the public domain and are therefore rightly subject to greater contractual regulation than those made privately.

Information posted on Facebook will also likely be considered to be in the public domain. However, where the poster has set privacy settings and restricted or prohibited access to their account beyond a certain number of selected people, an argument could be made for an expectation of privacy and no doubt may be considered against Facebook where such privacy settings are ignored or private information is misused by Facebook itself.

Instant Messaging is a step removed from Twitter and Facebook and should be considered to be in the private domain. In a column published in the Guardian newspaper on 22 January 2011, a Premier League footballer - who writes under the pseudonym 'The Secret Footballer' - effectively admitted that much of the discussion that takes place among the players via Instant Messaging would be in violation of the conduct provisions of their contracts. It is, however, private speech - being similar to a private discussion or phone call. Consequently, it will be much more difficult for the governing body (in this case the FA) to impose any sanctions, primarily because it is never likely to see the comments.

In the event such information did come into the public domain, and - on that basis - the governing body is attempting to sanction the player, consideration would have to be given as to the manner in which it did so. For example, did someone else who was a party to the Instant Messenger chat forum leak information to the public and, if so, is this a breach of confidence? Alternatively, what if the information comes to light via illegal means such as phone hacking (as has recently been alleged to be carried out by News of the World journalists)? In that situation, the player could apply...
for an injunction (or indeed a
super-injunction, if these have not
slipped out of vogue) to prevent
publication. However, if such
information is already in the public
domain, can the player still argue
expectation of privacy to avoid
imposition of a sanction? Although
it did not occur in a social media
context, it is relevant to consider
the case of Sky Sports presenter
Andy Gray, who was recently
sacked for comments he made
while he was not on the air and
thought his microphone was
turned off. This raises the same
question of when one is entitled to
rely on an expectation of privacy.

Conclusion
The use of social media has a
tremendous upside for players,
teams and sporting federations as a
new medium with which to
communicate and interact directly
with their supporters. The
regulation of its use is still evolving
and, among sporting organisations,
there is a great disparity of policies
with respect to its use. Manchester
United is an example of a club that
has evolved from a total ban on
social media a year ago to fully
embracing Twitter by having both
a team account and a player (Rio
Ferdinand) who has more than
500,000 followers. Teams and
governing bodies can and should
regulate the content of material in
the public domain to ensure
nothing objectionable is posted,
but also to protect the integrity of
their sports, particularly from the
‘dark side’ elements such as spot
fixing and other forms of illegal
gambling, as noted above.
However, they should also be wary
of cracking down too hard on
offenders and being seen in any
way as opposed to the use of social
media in general. It would seem a
better use of their energies to
provide education for their players,
many of whom are naïve young
athletes who may not even
appreciate that something posted
on Twitter can be endlessly re-
tweeted and is not just between
them and their mates. Use of
social media is now firmly
entrenched in our day-to-day lives
and sports teams and federations
would be best served to embrace it
and use it to enhance their
commercial potential and their
fundamental relationship with
their supporters.

Leslie Ross Sports Lawyer
leslie.ross@gmail.com

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