It seems there is seldom a time when social media is not in the spotlight one way or another and the sporting world is no exception. Most recently, we have seen incidences of athletes falling foul of their governing body's social media policies, such as Pittsburgh Steelers’ Antonio Brown who earlier this week found himself in hot water after posting a live Facebook video of coach Mike Tomlin’s post-game locker-room speech. Brown’s post breached the NFL’s social media policy, which prohibits players from posting during a blackout period lasting from 90 minutes before until 90 minutes after the game. Brown has since acknowledged his error and apologised, saying that he mistakenly let his “genuine excitement” and “desire to share that moment with our fans” get the better of him. In many ways, this example neatly encapsulates both the power and the pitfalls of social media in sport.

Indeed, since its inaugural post in August last year, Sports Shorts has covered all manner of topical issues linked to the use of social media in sport, from restrictions on publicising Olympic athletes’ successes, to the rise in live streaming of games, the approach of sponsors towards morality clauses, the reaction of athletes to ill-considered tweets by sponsors, and the potential perils of sharing sports clips online. The pitfalls are numerous. Yet, the power of social media is immense and, used wisely, can have a hugely positive impact from both a social and commercial perspective.

With all of this in mind, Sports Shorts looks at three key things to consider (whether you’re an athlete, brand or sports fan) before you hit the “post” button.
1. **Intellectual property – protecting your brand and avoiding infringement**

**Do you own the content you’re posting?**

The basic position under English law is that copyright in a photograph or video footage is owned by the person who took the relevant photograph or footage (although this may differ if the photographer is an employee or subject to a contract which varies this position). However, the recording and sharing of broadcast footage or other footage containing the trade marks or graphics created by or belonging to a third party, is likely to constitute an infringement in the absence of a licence. This is a key consideration for individuals and brands alike. Platforms which facilitate the sharing of live nor near-live content, such as Periscope and Snapchat, have proven particularly problematic for sports rightsholders, due to the difficulties with detecting and removing infringing material, not least due to the “host” and “mere conduit” defences under the *E-Commerce Regulations*, which make it difficult to pursue the platforms themselves, and necessitating individual takedowns of infringing content (though GIF crawlers and new forensic digital technology may yet assist with this).

In a recent win for rightsholders, in a dispute between the England & Wales Cricket Board and Tixdaq (the operator of a platform for users to post and share extracts of sports broadcasts), the High Court confirmed that eight-second extracts of broadcasts (even where the games/matches in question were often hours in length) were capable of amounting to a ‘substantial part’ of the broadcast from which they were taken, thereby infringing the ECB’s copyright.

**#ConsiderYourHashtags**

Hashtags carry a huge amount of potential as a marketing tool. They enable business to monitor and gather posts relating to their brand, engage with fans/consumers, and even harness the power of consumers to promote a brand through shares and copying of hashtags. However, hashtags have also been known to instigate negative feedback trends and “brand bashing” meaning brands must adhere to the old adage “be careful what you wish for”. Additionally, use of a hashtag which matches or incorporates another brand’s trade mark is capable of amounting to trade mark infringement if used in certain commercial contexts and in a manner which is likely to cause confusion in the minds of the public (for example as to the origin of a product). Whilst use of a well-known brand’s hashtag might be tempting to attract more views, it is important to consider whether its use risks trade mark infringement or portrayal of a non-existent official association with a brand or event. This is often particularly important in relation to the Olympic Games, where the IOC requires hosting nations to implement certain legal protections in relation to key Olympic words (even catching words such as “summer” and “performance”), and also imposes strict rules on references to Olympic athletes.

2. **Social Media policies, regulations, and sponsorship contracts**

For athletes and clubs, the social media policies and regulations of the relevant
leagues or governing bodies are likely to contain certain restrictions on what can be shared. These restrictions range from specific social-media targeted policies, such as a social media ‘blackout’ for a specified period before, during and after games, to more general regulation covering wider aspects of athlete behaviour.

In cases involving game footage or locker room footage, such as that of Antonio Brown, not only does the posting of content breach the blackout but, from the governing body’s perspective, it may also present exclusivity issues in relation to certain rights packages. Locker room footage, for example, has become a valuable asset, with the increase in partnership with social media platforms (such as the NFL and Snapchat) to create a wider range and depth of ‘digital content’. For rightsholders, this means it is essential to retain control over the dissemination of content which potentially conflicts with these licences.

Most governing bodies, leagues and clubs will impose rules upon their players which prohibit certain types of behaviour. Rule E3 of the Football Association’s Rules and Regulations, for example, relates to “General Behaviour” and requires that players “at all times act in the best interests of the game and... not act in any manner which is improper or brings the game into disrepute or use any one, or combination of, violent conduct, serious foul play, threatening, abusive, indecent or insulting words or behaviour.” The Rules go on to provide for enhanced sanctions where a breach relates to certain matters such as race, ethnicity, gender, sexual orientation etc. Whilst this type of rule is not explicitly targeted at social media, it is easy to see how tweets, Instagram photos, or Snapchats might fall foul of its terms.

In a similar vein, sponsored athletes will also need to consider their sponsorship agreements, which most likely contain morality clauses (risking loss of sponsorship if the athlete uses social media in a way which might bring him/herself or the sponsor’s brand into disrepute) and restrictions on promoting competing brands. Conversely, many sponsors now place minimum tweet quotas on their athletes, meaning athletes not only need to monitor the content of their tweets but also their frequency.

3. **UK advertising regulation**

In the UK, brands and sponsored athletes must take care with promotional and sponsored posts. This is regulated by the Advertising Standards Authority and the Committee of Advertising Practice Codes. The CAP Code requires that marketing communications must be “obviously identifiable as such”. Wayne Rooney and Jack Wilshire fell foul of this in 2012, after posting a tweet under Nike’s campaign slogan #makeitcount without making sufficiently clear that the tweets were Nike marketing communications. Including “#spon” “#ad” within a post can assist in ensuring the post is identifiable as a marketing communication, although each case is assessed on its own facts and context.

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