

# Of Smart Phones and Facebook: Social Media's Changing Legal Landscape Provides Cautionary Tales of "Pinterest" for Sport Organizations

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Due to the prevalence with which today's consumers access and utilize social media, sport organizations are increasingly devoting more financial and personnel resources to marketing through these platforms, and are seemingly getting a return on their investment. The benefits of using social media platforms must, however, be mitigated by the hurdles that can arise from careless and potentially unlawful usage. As evidenced by our discussion of recent social media lawsuits, administrative decisions by federal regulators, and the rules and regulations governing promotions and contests, we show that potential legal troubles can be mitigated through the thoughtful crafting of internal social media policies as well as continued monitoring of social media platform policies.

The use of social media as a communications and marketing tool has rapidly increased over the past decade.<sup>1</sup> The Securities and Exchange Commission (SEC), a staid and cautious organization, has sanctioned the use of social media platforms, such as Twitter and Facebook, as suitable mediums for the dissemination of corporate news releases.<sup>2</sup> With approximately one-half of the U.S. population ages 18–35 actively following a sport team and 35% actively commenting via social media, mobile marketing strategies have become especially attractive for sport marketers.<sup>3</sup>

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<sup>1</sup> Laci Wallace, Jacquelyn Wilson & Kimberly Miloch. *Sporting Facebook: A Content Analysis of NCAA Organizational Sport Pages and Big 12 Conference Athletic Department Pages*. Intern'l J. of Sport Comm. 422444 (2011).

<sup>2</sup> Jessica Holzer & Greg Benzinger. *SEC Embraces Social Media*. Wall St. J. (April 2, 2013, 7:49 PM), <http://online.wsj.com/news/articles/SB1000142412788732361160457839886229299735>  
2. As the SEC explained, a growing number of public companies are turning to social media to inform shareholders and public investors. The regulations require that companies notify investors of the social media platform(s) they intend to use. *Id.*

<sup>3</sup> Tracy Keller, *The Rise of Mobile in Sports Marketing*. Concordia University Saint Paul Blog (April 29, 2013), <http://online.csp.edu/blog/business/theriseofmobileinsportsmarketing>.

Indeed, sport organizations have identified the efficacy of social media and are seeking ways in which they can capitalize on the efficiency of these tools as part of their comprehensive marketing, communication, and brand management strategies.<sup>4</sup>

The continued emergence of social media platforms as marketing tools has, perhaps not surprisingly, also led to an increase in litigation, with the vast majority of incidents and issues occurring beyond the sport industry. Hence, it is essential that sport organizations<sup>5</sup> maintain tabs on the current legal environment involving social media and develop and implement appropriate policies for use of social media platforms within the organization and amongst its employees. Failure to do so can have detrimental managerial and legal implications. Accordingly, the purpose of this article is to discuss recent lawsuits and administrative decisions regarding social media usage and glean from that discussion implications for sport practitioners.

In Part I of this paper, we briefly examine the increased use of social media platforms among sport organizations, providing a range of examples. In Part II, we examine in more detail several recent precedential lawsuits involving a variety of popular social media platforms that serve to illustrate the range of legal issues and to inform the development of sport organizations' social media and mobile marketing policies. Subsequently, we examine recent administrative agency decisions and proffered guidelines, focused primarily on the Federal Trade Commission, that should further inform sport organizations, particularly with respect to the use of bloggers and celebrity endorsers to promote products and services via social media platforms. In Part III, we discuss some of the key issues sport organizations need to be attentive to when conducting consumer promotions, such as sweepstakes and contests, on social media platforms. Finally, in Part IV, we discuss the implications of our research and present some overarching guidance for sport organizations.

## Expanding Use of Social Media Platforms

The prevalence with which today's consumers access and utilize social media has made it an increasingly attractive marketing vehicle for sport organizations. According to the Pew Research Center, 73% of all online adults were using social media as of September 2013, with Facebook the most prevalent platform.<sup>6</sup> However, a growing number of individuals are using other emerging platforms, such

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<sup>4</sup> Pat Coyle, *Teams Active in Social Media Build Strategic Advantage*. Sports Bus. J., January 4, 2010, at 18.

<sup>5</sup> The authors use the term "sport organizations" throughout this article to refer primarily to professional leagues/teams and college and university athletic programs. However, in a broader sense, the term "sport organizations" can also be expanded to include industry segments such as sporting goods manufacturers and licensees; sport promotion and management agencies; and athlete representation firms.

<sup>6</sup> *Social Networking Fact Sheet*. Pew Research Center (December 31, 2013), <http://pewinternet.org/Commentary/2012/March/Pew-Internet-Social-Networking-full-detail.aspx>.

as LinkedIn (22%), Pinterest (21%), and Twitter (18%).<sup>7</sup> Further, approximately 42% used multiple social media platforms.<sup>8</sup>

Given the tremendous growth of social media, sport organizations are increasingly devoting more financial and personnel resources to marketing through these platforms,<sup>9</sup> and are seemingly getting a return on their investment. As of 2013, the three most valuable professional sport franchises in the world also ranked as the top three in terms of Facebook followers.<sup>10</sup> Moreover, the most valuable teams in both Major League Baseball and the National Football League also lead their respective leagues in Facebook following.<sup>11</sup> Teams and other organizations are using a variety of social media platforms to market themselves and engage with their consumers. These include, most popularly, Twitter,<sup>12</sup> Facebook,<sup>13</sup> Pinterest,<sup>14</sup>

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<sup>7</sup> Maeve Duggan & Aaron Smith, *Social Media Update 2013*. Pew Research Center (December 30, 2013), [http://pewinternet.org/~media/Files/Reports/2013/Social%20Networking%202013\\_PDF.pdf](http://pewinternet.org/~media/Files/Reports/2013/Social%20Networking%202013_PDF.pdf).

<sup>8</sup> Camille Calman, *When Journalists Tweet: Social Media Guidelines for News Organizations*. MediaLawMonitor.com (September 6, 2012), <http://www.medialawmonitor.com/2012/09/when-journalists-tweet-social-media-guidelines-for-news-organizations>. Although the length of this paper precludes addressing an exhaustive list of social media platforms, Calman notes several additional growing platforms including Google+, Tumblr, Vine, and Foursquare. *Id.*

<sup>9</sup> Terry Lefton, *With Rise of the Millennials, Calls for a New Kind of Marketing*. Sports Bus. J., October 14, 2013, at 12. Organizations are increasing the social media portion of their marketing budgets by as much as 30% domestically and 20% globally. *Id.*

<sup>10</sup> Kurt Badenhausen, *Barcelona and Real Madrid Rule Social Media*. Forbes.com (July 15, 2013, 11:07 AM), <http://www.forbes.com/sites/kurtbadenhausen/2013/07/15/barcelona-and-real-madrid-rule-social-media/>.

<sup>11</sup> *Id.*

<sup>12</sup> See Brandon Smith, *The Beginner's Guide to Twitter*. Mashable.com (June 5, 2012), <http://mashable.com/2012/06/05/twitter-for-beginners/>. This website explains that Twitter is “a platform wherein users share their thoughts, news, information and jokes in 140 characters of text or less. Twitter makes global communication cheap and measurable. Profiles are (usually) public — anyone in the world can see what you write, unless you elect to make your profile private. Users “follow” each other in order to keep tabs on and converse with specific people.” *Id.*

<sup>13</sup> The “About Facebook” page on Facebook.com states that Facebook’s mission is “to give people the power to share and make the world more open and connected. People use Facebook to stay connected with friends and family, to discover what’s going on in the world, and to share and express what matters to them.” Furthermore, Facebook pages provide an opportunity for businesses, brands, and organizations to engage with consumers by posting stories, hosting events, and adding apps, among other things. use Facebook to stay connected with friends and family, to discover what’s going on in the world, and to share and express what matters to them.

<sup>14</sup> Pinterest describes their platform as “a place to discover ideas for all your projects and interests.” Essentially, then, Pinterest is a photo-collecting web application that allows users to create “boards” by selecting items, pages, and websites of interest and “pin” this content to said board, which is typically organized around some theme.

LinkedIn,<sup>15</sup> Instagram,<sup>16</sup> and Snapchat,<sup>17</sup> among others. For example, university athletic departments, such as the University of Oregon and the University of California–Irvine, have created social media command centers regularly monitored by social media–savvy personnel.<sup>18</sup> Sport organizations are also increasingly using contests, prizes, games, and videos (most notably of the behind-the-scenes variety) to keep fans engaged.<sup>19</sup>

Perhaps the most vivid evidence of social media’s prevalence in the sport industry is SocialGuide’s Nielsen Twitter TV ratings service.<sup>20</sup> The service, which provides clients with access to SocialGuide’s platform to track and analyze

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<sup>15</sup> According to their “About Us” page, LinkedIn’s self-proclaimed mission is to “Connect the world’s professionals to make them more productive and successful. When you join LinkedIn, you get access to people, jobs, news, updates, and insights that will help you be great at what you do.”

<sup>16</sup> According to the Frequently Asked Questions section on the Instagram website, the platform provides a “fun and quirky way” to share one’s life events with friends through pictures. Once posted to Instagram, the picture is visible to all connected to the user, and potentially to the general public, depending on one’s privacy settings. The purpose of Instagram is thus to allow individuals to experience moments in their friends’ lives in real-time, thereby contributing to a more connected world through pictures. See Jim Edwards, *Execs at Instagram Believe They Will Soon Eclipse Twitter as They Head Toward 1 Billion*. Business Insider (May 13, 2014, 10:50 AM), <http://www.businessinsider.com/instagram-and-twitter-user-statistics-2014-5>. See also, Katie Ayn Van Veghel, *The 5 Most Engaging Teams Across YouTube, Facebook, Instagram, Snapchat, and Twitter*. Sporttechie.com (October 26, 2014), <http://www.sporttechie.com/2014/10/26/the-5-most-engaging-nfl-teams-across-youtube-facebook-snapchat-instagram-and-twitter/>. This website discusses a plethora of National Football League teams making heavy use of Instagram for marketing purposes, but the Denver Broncos perhaps lead the pack, as they post not just pictures of fans at games, but also unique infographics that serve to preview the team’s upcoming matchup. *Id.*

<sup>17</sup> J.J. Colao, *Snapchat: The Biggest No-Revenue Mobile App Since Instagram*. Forbes (November 27, 2012, 1:36 PM), <http://www.forbes.com/sites/jjcolao/2012/11/27/snapchat-the-biggest-no-revenue-mobile-app-since-instagram/>. Snapchat is described as a photo-sharing mobile application that allows friends to share photos that permanently disappear in just seconds. *Id.* As of 2012, Snapchat users were sending roughly 1,000 photos per second. *Id.* See also, Cooper Smith, *Exclusive: Snapchat Users are Sending 400 million ‘Snaps’ Daily, Edging Past Facebook’s Photo-upload Volume*. Business Insider (November 19, 2013, 8:26 AM), <http://www.businessinsider.com/snapchat-edges-past-facebook-in-photos-2013-11> (the volume has since grown to 400 million daily. Such volume has led a growing number of sport organizations to utilize the platform in their marketing activities); Preston McClellan, *Snapchat’s ‘Our Story’ Takes Crowdsourcing to a New Level*, Sporting News (October 1, 2014), <http://www.sportingnews.com/ncaa-football/story/2014-09-30/snapchat-football-college-gameday-user-content> (sport organizations are increasingly utilizing a Snapchat feature known as ‘Our Story,’ which allows organizations to share a stream of 1-10 second videos with all of their followers. These videos can be viewed an unlimited amount of times for up to 24 hours); Katie Ayn Van Veghel, *supra* note 16 (nothing that the Philadelphia Eagles of the National Football League utilize this feature not just to give fans access to their gameday experience, but also behind the scenes footage at the team facilities throughout the week).

<sup>18</sup> Dave Butler, *We’re Engaged: Savvy Teams Use New Tools to Connect with Fans*. Sports Bus. J., April 15, 2013, at 13.

<sup>19</sup> Erik Spanberg, *Connecting With Consumers*. Sports Bus. J., November 26, 2012, at 29.

<sup>20</sup> John Lombardo, *Twitter TV Rating to Track Suns Traffic*. Sports Bus. J., November 11, 2013, at 3.

real-time tweets during games, was adopted by the Phoenix Suns, the first major professional sports team to do so, in November 2013.<sup>21</sup> Just two months prior, the University of Michigan became SocialGuide's first college client,<sup>22</sup> and were able to take advantage of the platform's ability to track the total activity and reach of TV-related Twitter conversations during games.<sup>23</sup> In addition, Twitter is being used by organizations such as NASCAR to engage fans via behind-the-scenes video footage of race teams as a means of directing fans to their website and generating topics for conversation.<sup>24</sup>

Facebook has also become an increasingly effective social media platform for sport organizations seeking to engage and grow their fan bases. For example, the Detroit Lions tapped into a growing craft beer trend by running a "Craft Beer of the Week" promotion on Facebook, enabling fans to vote on which craft beers would be served at Ford Field, the Lions home stadium.<sup>25</sup> The Wells Fargo Center, home to several Philadelphia-based professional sport teams, including the 76ers and Flyers, has also drawn on Facebook's power to engage fans.<sup>26</sup> Their recent "Big Ticket" promotion allowed fans to enter a contest to win a pair of tickets to every home game of the four teams that play at the arena as well as every concert hosted at the arena for a full year.<sup>27</sup> Last but by no means least, the University of Michigan, in seeking to eclipse the one-million Facebook fan threshold, conducted a contest awarding premium tickets, merchandise, and experiential rewards that generated nearly 18,000 new Facebook fans.<sup>28</sup>

While Facebook and Twitter are among the most widely used social media platforms, sport organizations have also begun to incorporate other platforms with an eye toward extending their marketing reach. In particular, photo sharing platforms such as Pinterest have proliferated in recent years and major professional sport leagues as well as individual teams have looked to capitalize.<sup>29</sup> For example, the NBA has utilized Pinterest's "digital pinboard" concept, one especially attractive to the female demographic, while also linking Pinterest with their online store as a means of driving merchandise sales.<sup>30</sup> On the collegiate level, universities such as Florida State University have integrated their Facebook and Pinterest pages, allowing them to produce product-specific Pinterest boards to increase merchandise

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<sup>21</sup> *Id.*

<sup>22</sup> Michael Smith, *Nielsen Helps Michigan Size Up Tweets*. Sports Bus. J., September 16, 2013, at 3.

<sup>23</sup> *Id.* Among the information provided by the service is the number of tweets sent and seen during games, the point in time during the game at which the most tweets are sent, the type of apps used to post the tweets, and the keywords used in the tweets. *Id.*

<sup>24</sup> Spanberg, *supra* note 19.

<sup>25</sup> Don Muret, *Tapping New Revenue*. Sports Bus. J., January 13, 2014, at 18.

<sup>26</sup> Butler, *supra* note 18.

<sup>27</sup> *Id.* This promotion served to extend the organization's Facebook likes for 49%. *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Eric Fisher, *Teams, Leagues Take Fresh Look at Photo Sharing*. Sports Bus. J., July 16, 2012, at 20.

<sup>30</sup> *Id.*

sales to 25- to 34-year-old females, their target Pinterest demographic.<sup>31</sup> A growing number of sport organizations are also leveraging LinkedIn, particularly as a means of streamlining their hiring searches.<sup>32</sup> In addition, teams are utilizing LinkedIn to learn the identities of spectators that may not have directly purchased tickets, but rather, entered the stadium with a ticket purchased by a friend.<sup>33</sup>

Indeed, while teams' fan bases are taking to social media sites with increasing frequency, the teams themselves are using a variety of aforementioned social media platforms for professional purposes, as a means of reaching new customers, increasing engagement levels of current customers, and recruiting future employees.<sup>34</sup> Additionally, individual athletes and their agents are becoming increasingly focused on growing social media followings, with an eye toward gaining leverage in sponsorship negotiations.<sup>35</sup> In fact, sport leagues, teams, and athletes are increasingly utilizing multiple social media platforms as part of their marketing efforts<sup>36</sup> (Table 1 illustrates the prevalence and variety of social media platforms currently being utilized by major sport organizations). The benefits of using social media platforms must, however, be mitigated by the potential hurdles that can arise from careless and potentially unlawful usage. Although, with very limited exceptions, the lawsuits and administrative actions discussed below occurred outside of the sport industry, they could just as readily occur in a variety of sport industry contexts.

## Judicial Actions Involving Social Media

### LinkedIn Dilemma: *Eagle v. Morgan, et al.*<sup>37</sup>

By way of example, we begin with this hypothetical scenario: Bob Richardson, the vice president of marketing for a minor league baseball team, provides his LinkedIn password to several of his marketing employees. He instructs them to maintain his account, including accepting connections, responding to messages and updating relevant information. One employee in particular, Emma Jordan, takes the lead on

<sup>31</sup> Butler, *supra* note 18.

<sup>32</sup> Glenn Horine, @TEOTD, *Honing Social Media Skills Nothing to LOL About*. Sports Bus. J., April 18, 2011, at 14.

<sup>33</sup> Coyle, *supra* note 4.

<sup>34</sup> Pat Hanlon, *Social Issues*. Sports Bus. J., July 19, 2010, at 21.

<sup>35</sup> *Social media proves gold for promoting athletes*. Wall St. J. (August 16, 2012, 8:17 AM), <http://online.wsj.com/news/articles/SB10000872396390444508504577591411891704258>.

<sup>36</sup> See Jeremy Taylor, *Great Stats on Sports and Social Media*. Our Social Times (January 17, 2013), <http://oursocialtimes.com/great-stats-on-sports-and-social-media-infographic/>, for a list of the most liked teams and athletes on Facebook, and followed teams and athletes on Twitter. Many of the same teams and athletes sit atop both lists, illustrating the pervasiveness of balancing multiple platforms amongst sport organizations.

<sup>37</sup> No. 114303, 2013 U.S. Dist. Lexis 34220 (E.D. Pa., Mar. 12, 2013). See Seyfarth Shaw, *Court Issues Decision in Eagle v. Morgan: Employee Owns LinkedIn Account but Fails to Recover Any Damages Against Former Employer*, Lexology.com (April 3, 2013), <http://www.lexology.com/library/detail.aspx?g=1b8ecdfe-898b-4f12-ad86-43a856483577>.

**Table 1 Social Media Platform Use by Sport Organizations**

	Facebook	Twitter	LinkedIn	Instagram	Pinterest	Vine	Yo	Milq
MLB	X	X	X	X	X	X		
NFL	X	X	X	X	X	X		
NBA	X	X	X	X	X	X	X	X
NHL	X	X		X	X	X		
Arena Football League	X	X	X	X	X	X		
NASCAR	X	X	X	X	X	X		
NCAA	X	X	X	X	X	X		
PGA	X	X	X	X	X	X		
LPGA	X	X	X	X	X			
WTA	X	X	X	X	X	X		
ATP	X	X	X	X				
MLS	X	X	X	X	X	X		

maintaining the account. Over the next few months, Jordan updates the account on an almost daily basis. While the account primarily includes information about Richardson's career, interests, and academic background, Jordan alters various aspects of the page to incorporate marketing information about the team. When Richardson abruptly resigns, he attempts to access his LinkedIn page and quickly discovers that the name, photograph, and password on his LinkedIn account has been changed, with the account now reflecting the identity of new vice president of marketing, Sally Smith. The account reflected the identity of Smith for a two-week time period from April 3, 2011 until April 17, 2011, at which time the account was turned back over to Richardson. Richardson, however, took issue with the fact that during this two-week period, his contacts were directed to a page which featured his personal information, but Smith's name and photo. This hypothetical raises the question of who owns the LinkedIn account.

The issue of ownership of a LinkedIn account, and the legal ramifications of its misuse, was the basis of the recent decision in *Eagle vs. Morgan*, the facts of which are briefly provided below. In 1987, Linda Eagle and Clifford Brody cofounded Edcomm, Inc., a multimedia banking and consulting solutions company.<sup>38</sup> In 2009, Brody, as Chief Executive Officer (CEO), decided to begin using LinkedIn as a sales and marketing tool for Edcomm, and also encouraged employees to create LinkedIn accounts.<sup>39</sup> Edcomm also provided employees with guidelines to participate in LinkedIn.<sup>40</sup> However, Edcomm adopted no policies, guidelines, or procedures to inform employees that their LinkedIn accounts were property of the company.<sup>41</sup> Eagle subsequently created her own LinkedIn account using her Edcomm email address and provided her LinkedIn password to numerous Edcomm employees.<sup>42</sup> In 2010, Edcomm was purchased by another company and Eagle was eventually terminated from her position at Edcomm in 2011.<sup>43</sup> Subsequently, an EdComm employee changed the password on Eagle's LinkedIn account, thus restricting her access to the page, and changed the account to reflect the photograph and name of Sandy Morgan, who at the time was serving as Edcomm's interim CEO.<sup>44</sup> From June 20, 2011 to July 6, 2011, Edcomm had full control of the account.<sup>45</sup> Although Eagle was able to eventually regain access to her account, she claimed that during the time that she was not in control of her LinkedIn page, her business contacts or potential customers were routed to a LinkedIn page containing Morgan's name and photograph, but which still included Eagle's awards, recommendations, and

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<sup>38</sup> *Id.* at \*3.

<sup>39</sup> *Id.* at \*3-4.

<sup>40</sup> *Id.* at \*4.

<sup>41</sup> *Id.* at \*6.

<sup>42</sup> *Id.* Eagle's distribution of her password was in contravention of the LinkedIn "User Agreement," which required her to keep her password confidential and not allow other individuals to access her account. *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at \*3.

<sup>45</sup> *Id.* at \*7.



connections.<sup>46</sup> Accordingly, Eagle filed suit against Morgan and Edcomm, alleging, *inter alia*, the unauthorized use of her name and likeness,<sup>47</sup> invasion of privacy by misappropriation of identity,<sup>48</sup> and misappropriation of publicity.<sup>49</sup>

Noting that the defendants had used Eagle's name without her consent for commercial purposes, the court ruled in favor of Eagle on all three causes of action. First, the court stated that Eagle met her burden of proving the elements required for unauthorized use of name and likeness, including that her name had commercial value.<sup>50</sup> Eagle also provided the court with adequate evidence that Edcomm "used her name, without her consent, for commercial or advertising purposes."<sup>51</sup> The court then held that the defendants had invaded Eagle's privacy by misappropriation of her identity.<sup>52</sup> The court stressed that Edcomm invaded Eagle's privacy because an individual searching for Eagle on LinkedIn would have unknowingly been routed towards a page containing information about Morgan and Edcomm.<sup>53</sup> For the same reasons, the court found for Eagle on her misappropriation of publicity claim.<sup>54</sup> This case, the first to be litigated within the context of LinkedIn and account ownership, serves to reinforce the need for sport organizations to carefully devise and monitor their internal policies with regard to the ownership and use of LinkedIn accounts, or risk a range of legal claims related to potential misuse.

### Twitter Quandary: *PhoneDog v. Kravitz*<sup>55</sup>

We again turn first to a hypothetical scenario: Jim Roberts and Bob Parker are the founders of Magic Sports Marketing, Inc., a boutique sports marketing firm that

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<sup>46</sup> *Id.* at \*4.

<sup>47</sup> 42 Pa. Cons. Stat. §8316(a) providing in relevant part: "Any natural person whose name or likeness has commercial value and is used for any commercial or advertising purpose without the written consent of such natural person or the written consent of any of the parties authorized in subsection (b) may bring an action to enjoin such unauthorized use and to recover damages for any loss or injury sustained by such use." *Id.*

<sup>48</sup> To be liable for invasion of privacy in Pennsylvania under the Restatement of Torts §652B and its comments, "a defendant must have appropriated to his own use or benefit the reputation, prestige, social or commercial standing, public interest or other values of plaintiff's name or likeness" (citing, *Wallace v. MediaNews Grp., Inc.*, No. Civ.A.12872, 2013 U.S. Dist. LEXIS 7485, \*4 (M.D. Pa. 2013)).

<sup>49</sup> As distinguished from a privacy-based tort, Pennsylvania common law also grants a person exclusive entitlement to control the commercial value of his or her name or likeness and to prevent others from exploiting it (akin to a property right). See *Eagle's Eye, Inc. v. Ambler Fashion Shop, Inc.*, 627 F. Supp. 856 (E.D. Pa. 1985).

<sup>50</sup> *Eagle v. Morgan*, *supra* note 37, at \*18.

<sup>51</sup> *Id.* at \*19.

<sup>52</sup> *Id.* at \*22.

<sup>53</sup> *Id.* at \*21.

<sup>54</sup> *Id.* at \*24. Despite prevailing on the three claims, Eagle failed to recover any damages. The court held that Eagle did not make a showing of a "fair probability" that she sustained any damages during the periods in which she did not have control of the LinkedIn account. *Id.* at \*37.

<sup>55</sup> No. C1103474 MEJ, 2011 U.S. Dist. LEXIS 129229 (N.D. Cal. Nov. 8, 2011).

operates a Twitter account with the handle @magicsports. The account has grown to having more than 150,000 followers. Parker created the account, maintains it, and sends out most of the firm's "Tweets." Roberts occasionally suggests topics for Parker to Tweet, but does not have the account password and rarely inquires about the status of the account. Eventually, after several years of growing tensions between the founders, Parker departs to open Parker Sports Agency & Associates. Realizing the economic importance of the Twitter followers, Parker changes the handle on the Twitter account to @parkersports, thus immediately securing the account with 150,000-plus followers. The company has no internal written social media policy that addresses ownership of Twitter followers.

The issue of who owns a company's Twitter account, particularly in the absence of a well-drafted and internally publicized policy, was the basis of *PhoneDog v. Kravitz*.<sup>56</sup> Defendant Noah Kravitz was hired by PhoneDog as a product reviewer and video blogger.<sup>57</sup> Part of his responsibilities included control and maintenance of the Twitter account @PhoneDog\_Noah.<sup>58</sup> During the course of Kravitz's employment the account generated approximately 17,000 Twitter followers.<sup>59</sup> Kravitz ended his employment with PhoneDog in October 2010, upon which the company requested he terminate use of the Twitter account.<sup>60</sup> However, Kravitz refused and subsequently changed the account handle to @noahkravitz.<sup>61</sup> In July 2011, PhoneDog sued Kravitz, asserting four causes of action: (1) misappropriation of trade secrets,<sup>62</sup> (2) intentional interference with prospective economic advantage,<sup>63</sup>

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<sup>56</sup> For a thorough analysis of this case, see Jasmine McNealy, *Who Owns Your Friends?: PhoneDog v. Kravitz and Business Claims of Trade Secret In Social Media Information*, 39 Rutgers Computer & Tech. L.J. 30-55 (2013).

<sup>57</sup> *PhoneDog v. Kravitz*, *supra* note 55, at \*2.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at \*4.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> California Uniform Trade Secrets Act ("UTSA"), California Civil Code section 3426.1(d), which provides in relevant part: "[t]rade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." *Id.*

<sup>63</sup> In order to prevail on this claim under California law, a plaintiff must establish: (1) an economic relationship between the plaintiff and some third party with the probability of future economic benefits to the plaintiffs; (2) defendant's knowledge of the relationship; (3) intentional acts, apart from the interference itself, by defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant (citing *CRST v. Van Expedited v. Werner Enters., Inc.*, 479 F.3d 1099, 1108 (9th Cir. 2007)).

(3) negligent interference with prospective economic advantage,<sup>64</sup> and 4) conversion.<sup>65</sup> Conversely, Kravitz argued that the value of the Twitter account was derived from the interest generated in following him and receiving his tweets, not from the Twitter account itself.<sup>66</sup> A decision on the merits of the case would have likely given much clearer guidance to business organizations and individuals regarding the legal issues surrounding the ownership of Twitter followers; in December 2012, however, the case was settled, with Kravitz retaining sole ownership and custody of the Twitter account.<sup>67</sup> This case—the first to examine the alleged “theft” of a Twitter account—underscores the need for sound internal policies that carefully delineate the terms of ownership of such accounts where created and managed within an organizational setting, as well as the need to anticipate the future emergence of other social media platforms.

### Facebook Face-off: *Bland et al. v. Roberts*<sup>68</sup>

Given that public university athletic programs are deemed to be state actors, and thus trigger constitutional protections,<sup>69</sup> we propose the following hypothetical: The athletic department of State U. is publicly rumored to be considering a change of

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<sup>64</sup> To state a cognizable claim for negligent interference with prospective economic advantage, a plaintiff in California must allege: (1) an economic relationship existed between the plaintiff and a third party which contained a reasonably probable future economic benefit or advantage to plaintiff; (2) the defendant knew of the existence of the relationship and was aware or should have been aware that if it did not act with due care its actions would interfere with this relationship and cause plaintiff to lose in whole or in part the probable future economic benefit or advantage of the relationship; (3) the defendant was negligent; and (4) such negligence caused damage to plaintiff in that the relationship was actually interfered with or disrupted and plaintiff lost in whole or in part the economic benefits or advantage reasonably expected from the relationship. *See*, N. Am. Chem. Co. v. Super Ct. (Trans Harbor, Inc.), 59 Cal. App. 4th 764, 786, 69 Cal. Rptr. 2d 466 (1997). *Id.*

<sup>65</sup> *PhoneDog v. Kravitz*, *supra* note 55, at \*4. PhoneDog alleged that, based upon industry standards, its 17,000 followers were valued at no less than \$340,000. *Id.*

<sup>66</sup> *Id.* at \*9-10.

<sup>67</sup> Daniel Terdmian, *Curious Case of Lawsuit over Value of Twitter Followers is Settled*, C/Net.com (Dec. 3, 2012, 4:23 PM), <http://www.cnet.com/news/curious-case-of-lawsuit-over-value-of-twitter-followers-is-settled>. When Kravitz started working at PhoneDog, Twitter did not yet exist. At the time of settlement, @NoahKravitz had grown to 23,378 followers. *Id.*

<sup>68</sup> 857 F. Supp. 2d 599 (E.D. Va. 2012), *aff'd in part, rev'd in part, and remanded*, 730 F. 3d 368 (4<sup>th</sup> Cir. 2013).

<sup>69</sup> The Constitutional protections provided in Bill of Rights, including the Due Process protections of the Fifth and Fourteenth Amendments, apply only to conduct on the part of the government, thus limiting “state action” consideration to that carried out directly or indirectly by a state, local, or federal government. Hence, it is less likely to apply to sport organizations that operate as private entities, including professional sport leagues/teams, sporting goods manufacturers, sport marketing and management agencies, etc. For articles discussing the concept of state action and its application within the sports industry, see Richard J. Hunter & Paula Alexander Becker, *Is it Time to Revisit the Doctrine of “State Action” in the Context of Intercollegiate and Interscholastic Sports?* 14 VILL. SPORTS & ENT. L.J. 191-232 (2007); Dionne Koller, *Frozen in Time: The State Action Doctrine’s Application to Amateur Sports*, 82 ST. JOHN’S L. REV. 183-233 (Winter 2008).

athletic directors. A local businesswoman, having become aware of the rumors of a potential change, creates a Facebook page to promote her interest in and qualifications for the athletic director position. While most of State U's athletic department employees do not actively support a change in athletic directors, two marketing department employees access the local businesswoman's Facebook page, "like" it, and post words of encouragement. Ultimately, State U decides to renew its current athletic director for an additional five years. Shortly thereafter, however, the athletic director, having learned of the two employees who "liked" the Facebook page of the potential job challenger, decides not to renew their employment contracts.

An analogous scenario recently played out in *Bland et al. v. Roberts*, in which six sheriff's deputies accused Hampton, Virginia Sheriff B.J. Roberts of unlawful retaliation in deciding not to reappoint them following Roberts' successful reelection as sheriff.<sup>70</sup> During the election campaign, two of the plaintiffs, Daniel Ray Carter and Robert W. McCoy, expressed their support for Roberts' opponent via the opponent's Facebook campaign page. Specifically, Carter both "liked" and posted an encouraging message on the page, while McCoy posted a supportive message. A third plaintiff, John C. Sandhofer, was pictured on Facebook at a campaign event held for Rogers' opponent. The incumbent sheriff was made aware of these actions and delivered a speech during which he indicated that he would oust any nonsupporters after the election.<sup>71</sup> The plaintiffs alleged that Rogers' decision to not reappoint them was due to their support of his opponent, claiming a violation of their First Amendment freedom of speech rights. The district court granted summary judgment against the plaintiffs, who then appealed to the Fourth Circuit. The appellate court applied the three-prong balancing test that is typically used in retaliation cases, whereby a public employee must prove (1) that they are a citizen speaking on a matter of public concern rather than as an employee for their own personal interests, (2) that the interest of public concern outweighs the government's concern in providing effective and efficient services to the public, and (3) the employee's speech is a primary element in the employee's termination decision.<sup>72</sup>

In the case of McCoy, the judge concluded that a reasonable jury could conclude that "Roberts' knowledge of McCoy's support for [the opponent] would have strongly motivated Roberts not to reappoint McCoy,"<sup>73</sup> thus ruling that "liking" and posting an encouraging message on social media is indeed sufficient to establish a causal link in a retaliation claim. A similar rationale was applied to the case of plaintiff Carter.<sup>74</sup>

<sup>70</sup> For a comprehensive overview and discussion of this case, see Alicia D. Sklan, @ *Socialmedia: Speech with a Click of a Button? #Social Sharing Buttons*, 32 *Cardozo Arts & Ent. L.J.* 377-410 (2013).

<sup>71</sup> *Bland v. Roberts*, *supra* note 68, at \*26.

<sup>72</sup> *McVey v. Stacy*, 157 F. 3d 271, 277-78 (4<sup>th</sup> Cir. 1998).

<sup>73</sup> *Bland v. Roberts*, *supra* note 68, at \*33-34.

<sup>74</sup> *Id.* at \*34. As for Sandhofer, the court ruled that he had "failed to create a genuine factual dispute regarding whether Sandhofer's political disloyalty to Sheriff Roberts was a substantial basis for his nonreappointment." Lead Plaintiff Bland and the remaining plaintiffs were held not entitled to damages. *Id.* at \*35.

The Fourth Circuit further ruled that by clicking on the “like” button of the opponent’s Facebook campaign page, McCoy and Carter made an unmistakable, “substantive statement” of approval.<sup>75</sup> The fact that an individual can make this statement with a mere click of the mouse (in lieu of typing the same message) was held to be constitutionally insignificant, as it conveys a clear symbolic meaning of support. The court went so far as to suggest that “liking” a campaign page on Facebook is the “internet equivalent of displaying a political sign in one’s front yard.”<sup>76</sup> Notably, Carter’s speech was deemed to be that of a private citizen, and more importantly, political speech, and was thus entitled to the highest degree of Constitutional protection. The plaintiff’s speech was also considered to be, in this particular circumstance, nondisruptive to the work place. A similar rationale was applied to the judge’s finding in favor of McCoy, as his supportive post on the opponent’s page was also deemed to be political speech made by a private citizen that was non-disruptive to the workplace. As a result, Sheriff Roberts was found to have violated the First Amendment rights of Carter and McCoy, and both were entitled to reinstatement. This case of first impression stands for the proposition that, assuming the presence of state action, employers must be cognizant of the First Amendment implications of employees’ posts and messaging on social media platforms including, but not limited to, Facebook.<sup>77</sup>

## Social Media and User-Generated Content

The copyright law issues relating to the ownership of user-generated content (“UGC”) posted on social media platforms is yet another area in which sport organizations need to be vigilant.<sup>78</sup> This issue is presented in the following scenario: During a major league baseball game, a foul ball enters the stands along the third baseline. Reacting quickly, an alert fan reaches up and snares the ball in his

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<sup>75</sup> *Id.* at \*45.

<sup>76</sup> *Id.* at \*46.

<sup>77</sup> Although not within the purview of this article, issues of free speech in the context of labor relations, as governed by the National Labor Relations Board (NLRB) have been subject of legal actions too numerous to cite here. The vast majority of management employees within the sport industry are not unionized and hence their social media conduct is not governed by the NLRB. For a comprehensive overview of speech issues within the unionized labor context, see Patricia Abril, Avner Levin & Alissa Del Riego, *Blurred Boundaries: Social Media Privacy and the Twenty-First Century Employee*. 49 Am. Bus. L.J. 63-124 (Spring 2012).

<sup>78</sup> Copyright law is governed by the federal Copyright Act of 1976 (17 U.S.C. §§ 101, et seq., 2008), which extends copyright protection to “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device (§ 102). Under the federal law, copyright protection begins when a copyrightable work (e.g., literary works, audiovisual works, sound recordings, and photographs) is created and extends for the life of the author plus 70 years. Although registration is not required, it is necessary to register a copyright before bringing a lawsuit against someone for copyright infringement. Photographs can meet the originality element in three respects: rendition, timing, and creation of the subject. See *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444 (S.D.N.Y. 2006) (holding that a billboard for Coors Light beer infringed the plaintiff’s copyright in a photograph of basketball star Kevin Garnett).

beer cup. Karl Trotzman, seated a few rows back, snaps a photo of the beer cup catch on his smartphone, and subsequently uploads it to his Facebook and Twitter accounts. This exciting photo quickly catches the attention of the team's social media marketing intern who, without seeking permission from Trotzman, immediately re-tweets the photo from the team's own Twitter account. She also cuts and pastes Trotzman's photo from his Twitter account and posts it to the team's official website and Facebook page. Upon learning of the team's multiple distributions of this photo, Trotzman—the rightful “owner” of this photograph—sues the team for copyright infringement. Which forms of distribution of the photograph would constitute copyright infringement and which would not?

This scenario resembles (albeit in a more straightforward factual fashion) the facts in the case of *Agence France Presse v. Morel v. Getty Images, Inc.*<sup>79</sup> Daniel Morel, a professional photographer based in Haiti, took eight photographs of the aftermath of the January 2010 earthquake. Agence France Presse (AFP), a newswire service, obtained the photographs from the Twitter feed of a third person (not Morel) who had himself copied the photos from Morel's Twitter feed and claimed them as his own photographs (this third person was initially and mistakenly credited as the photographer).<sup>80</sup> AFP then distributed the photographs to Getty Images (Getty), an online photo licensing firm, which subsequently licensed the photographs to third parties without Morel's authorization.<sup>81</sup> When Morel asserted that the distribution infringed his copyrights, AFP filed suit against Morel seeking a declaration that it had not infringed Morel's photographs. In response, Morel counterclaimed for copyright infringement and violations of the Digital Millennium Copyright Act (DMCA),<sup>82</sup> causing AFP to implead Getty as a third-party defendant that distributed the photographs after receiving them from AFP.

The district court held that AFP was liable for copyright infringement as a matter of law, and Getty conceded it was liable for copyright infringement. A jury trial was conducted to decide whether AFP and Getty's copyright violations were willful, whether they had violated the DMCA, and how much Morel should recover in damages. The jury concluded that AFP and Getty's copyright infringements were willful—permitting a higher award of statutory damages per infringement—and awarded Morel \$303,889.77 in actual damages and infringers' profits and \$1.2

<sup>79</sup> 934 F. Supp. 2d 547 (S.D.N.Y. 2013). AFP obtained the photographs from the Twitter feed of Lisandro Suero, who did not take the photos but who was initially and mistakenly credited as the photographer. *Id.* at 555. AFP argued that it was a third-party beneficiary to Twitpic.com's terms of service, which grants the site a worldwide, non-exclusive, royalty-free license to the photographs. *Id.* at 559..

<sup>80</sup> See Emily R. Caron, *Morel Victory: Verdict Shows perils of Improper Photo Attribution*. Lexology.com (Dec. 6, 2013), <http://www.lexology.com/library/detail.aspx?g=62e2efba-0754-41b6-a549-3344bfbfd54cc>. AFP originally found the images on Morel's TwitPic account page, but when he did not respond quickly enough to a request for the photographs, AFP contacted the third party (Lisandro Suero) who gave AFP his copies of Morel's images. *Id.*

<sup>81</sup> *Id.* Getty Images continued to license Morel's photographs more than two weeks after AFP sent Getty a “kill notice” asking Getty to remove all of Morel's Haiti earthquake photographs from its distribution platforms. *Id.*

<sup>82</sup> 17 U.S.C. § 512 (2013).



million in statutory damages, the maximum possible statutory award amount.<sup>83</sup> The jury also found AFP and Getty had committed 16 violations of the DMCA and awarded Morel an additional \$20,000 for those violations.<sup>84</sup>

This case serves to highlight the need for sport organizations to understand when and how copyrighted materials (Trottman's photograph, in our scenario) can be re-purposed and re-distributed. Given the increasing proliferation of images posted to social media platforms, it is especially critical to understand their specific terms of use. Although the *AFP* case was far more complex than our scenario (including, *inter alia*, improper attribution), the court did confirm that simply "re-tweeting" a photograph does not, under Twitter's terms of use, constitute copyright infringement (hence, in our scenario, the team did not violate copyright law by simply re-tweeting Trottman's photograph on its own Twitter account). However, the act of cutting-and-pasting Trottman's photograph to the team's website and Facebook page would amount to copyright infringement if done so without Trottman's approval.<sup>85</sup> As with the prior cases, *AFP*, a case of first impression regarding how copyright law applies to the dissemination of others' photographs, provides guidance, as well as a cautionary tale, for sport organizations.

## Issues of Compliance With Federal Regulators

In addition to the judicial process, the use of social media channels for marketing purposes has also come under increased scrutiny by governmental agencies, such as the Federal Trade Commission (FTC), charged with enforcing the nation's consumer protection laws as provided in Section 5 of the FTC Act.<sup>86</sup> The FTC exists to promote competition, and actively cooperates with law enforcement partners, both domestically and abroad, to advance their mission.<sup>87</sup> Within the FTC is the National Advertising Division (hereinafter "NAD"), which serves to assess the reliability and accuracy of national advertising in order to ensure public

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<sup>83</sup> Jonathan Zavin, W. Allan Edminston, David Grossman & Jonathan Strauss, *Agence France Presse v. Morel*, Lexology.com (April 18, 2014), <http://www.lexology.com/library/detail.aspx?g=6ccbb28f-1771-4119-8f0a-527b5c6586d8>. In support of its willfulness findings, the court noted that both AFP and Getty Images are sophisticated companies familiar with copyright law and therefore could have been more meticulous and timely in removing Morel's photographs from their systems. *Id.*

<sup>84</sup> *Id.* The defendants appealed the damage award as excessive. While AFP and Getty remained jointly and severally liable for the entire copyright infringement award of \$1.2 million, the court excused Getty from its portion of liability for half of the \$20,000 DMCA award based on its conclusion that Getty had only violated one section of the act. *See Agence France Presse v. Morel v. Getty Images, Inc.*, No. 10-cv-2730 (S.D. N.Y. August 13, 2014).

<sup>85</sup> For instance, under Instagram's terms of use, if someone posts a photograph to Instagram, a third party "re-Graming" that photograph would be liable for copyright infringement.

<sup>86</sup> 15 U.S.C. § 45 (2006).

<sup>87</sup> *See* 16 CFR Pt. 255 (Guides Concerning the Use of Endorsements and Testimonials in Advertising), available at <http://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-publishes-final-guides-governing-endorsements-testimonials/091005revisedendorsementguides.pdf>

confidence in the trustworthiness of ads.<sup>88</sup> While NAD decisions are nonbinding, they are highly respected by the advertising industry and legal community, and are typically considered a “good guide” for steering clear of liability in civil litigation and FTC enforcement actions.<sup>89</sup> Among the most relevant FTC documents pertaining to the sport industry is the FTC Guides Concerning Use of Endorsements and Testimonials in Advertising (hereinafter referred to as “Guides”).<sup>90</sup> The need for professional athletes, their representation agencies and corporate advertisers to understand and adhere to these guidelines has been well documented.<sup>91</sup> Such is also necessary, however, for sport organizations, as illustrated by the following administrative law cases.

While these administrative law cases have largely played out outside of the sport industry, it is just as likely that an unsuspecting sport organization may fall victim to the same traps as the organizations in these cases. For example, consider a scenario in which a Major League Baseball team, as part of their sponsorship agreements, stock supplies of Blitz energy bubble gum and Suzie’s sunflower seeds in the dugout for use by its players and coaches. In an effort to draw attention to the sponsorship deals, the team’s social media director enters the dugout, takes several pictures of players using the products, and subsequently tweets these photos with comments such as “Blitz energy gum is awesome! You can tell by the extra kick our players are playing with today!” Expand this scenario to the same tweet by one of the players, who has a free product deal with Blitz. While on the surface these may appear to be innocuous posts, both may very well run afoul of the FTC’s guidelines requiring the disclosure of “material connections” between companies and endorsers. The examples provided below illustrate the need to understand the regulations regarding the use of endorsements and testimonials via social media platforms.

In 2012, the NAD launched an investigation into advertising content posted on Pinterest by Nutrisystem in order to determine if it was testimonial in nature and

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<sup>88</sup> See NAD Case Reports, available at <http://www.bbb.org/council/the-national-partner-program/national-advertising-review-services/national-advertising-division>. NAD is an investigative unit of the advertising industry’s system of self-regulation and is administered by the Council of Better Business Bureaus. Compliance with NAD decisions is generally a good guide for avoiding liability in civil litigation and Federal Trade Commission (“FTC”) enforcement actions.

<sup>89</sup> *Id.*

<sup>90</sup> 16 C.F.R. Pt. 255. See generally, Robert Sprague & Mary Ellen Wells, *Regulating Online Buzz Marketing: Untangling a Web of Deceit*, 47 Am. Bus. L.J. 415-454 (Fall 2010); Jessica Godell, *Consumer-Generated Media and Advertising—Are They One and the Same? An Analysis of the Amended FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising*, 10 J. Marshall Rev. Intell. Prop. L. 205-229 (2010).

<sup>91</sup> See Steve McKelvey & James Masteralexis, *The Tweet Sponsored By . . . : The Application of the New FTC Guides to the Social Media World of Professional Athletes*, 11 Va. Sports & Ent. L.J. 222-246 (2011-2012); Michael J. Patterson, *Experts, Celebrities and Bloggers Beware: The FTC Publishes Revised Guides Concerning the Use of Endorsements and Testimonials in Advertising*, 22 Loyola Consumer L.J. 462-508 (2010).



thus requiring the appropriate FTC disclosures.<sup>92</sup> NutriSystem's "Real Consumers" pinboard advertised photos of actual NutriSystem customers and emphasized their weightloss success stories.<sup>93</sup> When Pinterest users clicked on NutriSystem's customer testimonial pins, they were redirected to NutriSystem's website. The NAD found that "[i]t is undisputed that these pins represent consumer testimonials."<sup>94</sup> Specifically, the NAD established that the customers' claims were testimonial in nature and thus required the full disclosure of "material" information pursuant to Section 255.2(b) of the FTC Guides.<sup>95</sup> The NAD further noted that the "pins" utilized by NutriSystem focused on uncommon results, the weight loss of each customer. Accordingly, the FTC Guides required that NutriSystem's "pin" be accompanied by a clear and conspicuous disclosure openly notifying the public of normal results consumers can expect when utilizing the NutriSystem weight loss system. At the heart of this decision is the basic principle that "consumers have the right to know when they are being subjected to a sales pitch."<sup>96</sup>

More recently, the FTC issued a closing letter to a shoe retailer utilizing Pinterest for a promotional contest.<sup>97</sup> In the promotion, the company required participants to create pinboards featuring the retailer's product; however, they failed to require that these boards be labeled so as to establish a clear indication that the pins were part of a contest.<sup>98</sup> Although the pins were marked with a hashtag featuring the name of the contest (#WanderingSole), the FTC did not deem this sufficient to communicate a connection between the pin and the financial incentive stemming from the contest.<sup>99</sup> Accordingly, the FTC declared that the retailer was in violation

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<sup>92</sup> Paul C. Van Slyke, *Testimonials and Pinterest: Lessons From NutriSystem*. Law360.com (July 25, 2012, 1:48 PM), <http://www.law360.com/articles/362355/testimonials-and-pinterest-lessons-from-nutrisystem>.

<sup>93</sup> *Id.* The claims at issue in the NAD's review were as follows: 1) "Christine B. lost 46 lbs. on NutriSystem," 2) Michael H. lost 125 lbs. on NutriSystem," 3) "Lisa M lost 115 lbs. on NutriSystem," and 4) "Christine H. lost 223 lbs. on NutriSystem." *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> 16 C.F.R. Pt. 255.2 (b). This section states as follows: "An advertisement containing an endorsement relating the experience of one or more consumers on a central or key attribute of the product or service also will likely be interpreted as representing that the endorser's experience is representative of what consumers will generally achieve with the advertised product or service in actual, albeit variable, conditions of use. Therefore, an advertiser should possess and rely upon adequate substantiation for this representation. If the advertiser does not have substantiation that the endorser's experience is representative of what consumers will generally achieve, the advertisement should clearly and conspicuously disclose the generally expected performance in the depicted circumstances, and the advertiser must possess and rely on adequate substantiation for that representation." *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> Matthew Liebson, Daniel McInnis, Thomas Zych & Darcy Brosky, *When Does Social Media Use Create a Product Endorsement?* Lexology.com (July 15, 2014), <http://www.lexology.com/library/detail.aspx?g=af99e026-55ba-4cf5-8aa1-0b6ca6116b4d>.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

of Section 5 of the FTC Act, thereby establishing that a “pin” can constitute an endorsement.<sup>100</sup>

In a sport-related case involving blogging, the FTC investigated Hyundai’s blogging campaign designed to attract attention to commercials scheduled to air during the 2012 Super Bowl telecast.<sup>101</sup> Hyundai consumers were provided gift certificates as an incentive to serve as bloggers to positively promote Hyundai content and comment on the Super Bowl commercials. The bloggers did not disclose (nor were they instructed to) that they had been compensated for their promotional activities on behalf of Hyundai. This is a typical scenario which mandates that, pursuant to Section 5 of the FTC Act, the material connection between advertiser and “endorsers” (in this case bloggers) be disclosed when the relationship would not otherwise be explicitly clear.<sup>102</sup>

Although technically not a social media platform, the use of mobile marketing, particularly via in-arena text messaging-based promotions, is one that has recently surfaced as a legal issue for sport organizations; again, it is an issue in which sport organizations must remain current. The first case, *Emanuel v. The Los Angeles Lakers, Inc.*,<sup>103</sup> involved an in-game fan promotion run by the Lakers. Specifically, by displaying a message that reads “TEXT your message to 525377,” the Lakers invited fans to submit a text message to the team with the possibility that it would be displayed on the arena scoreboard. Accordingly, the plaintiff sent the text message “I love you Facey. Happy Date Night” to the Lakers exclusively for the purpose of having his message displayed on the scoreboard. Subsequently, a confirmatory text message was sent to the fan on behalf of the Lakers that reads “Thnx! Txt as many

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<sup>100</sup> Dot Com Disclosures: How to Make Effective Disclosures in Digital Advertising, available at <http://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>. In March, 2013, in order to respond to changes in technology, the FTC updated its “Dot Com Disclosures” Guidelines to include specific guidance for making clear and conspicuous disclosures on mobile and social media platforms. These included, *inter alia*: When evaluating whether a disclosure is clear and conspicuous, consider its placement and proximity (i.e., “as close as possible”) to relevant claim; Disclosures that are integral to a claim should not be communicated through a hyperlink; they should be on the same page or immediately next to the triggering claim and sufficiently prominent such that the claim and disclosures re read at the same time; Hyperlinks should not be obvious (for example, different colors, underscored); Hyperlinks should be labeled to convey importance, nature, and relevance of the information to which they link; Display disclosures prominently so that they are noticeable to consumers (size, color, graphics); Avoid distracting factors (such as graphics, sound, text, other links) that could result in consumers not noticing or reading the disclosure. *Id.*

<sup>101</sup> Emilio Cividanes, Tara Sugiyama Potashnik, Julia Kernochan Tama & Kelly A. DeMarchis, *Federal Trade Commission Issues Closing Letter on Hyundai Blog Campaign*. Lexology.com (February 21, 2012), <http://www.lexology.com/library/detail.aspx?g=dce69dcf-4d1f-4bb3-a490-7797800b9641>.

<sup>102</sup> *Id.* After determining that an employee of Hyundai’s media firm, and not Hyundai itself, offered the incentives, the FTC closed their investigation. The FTC further noted that the incentives ran contrary to the social media policies of both Hyundai and the media firm, and Hyundai lacked prior knowledge that the gift certificates would serve as incentives for these bloggers (several of whom did voluntarily disclose the material relationship in question). *Id.*

<sup>103</sup> CV 12-9936-GW(SHX), 2013 U.S. Dist. LEXIS 58842 (C.D. Cal. April 18, 2013).

times as u like. Not all msgs go on screen. Txt ALERTS for Lakers News alerts. Msg&Data Rates May Apply. Txt STOP to quit. Txt INFO for info.”<sup>104</sup>

Although Emanuel participated in the promotion by texting a message, he subsequently alleged, in a class action lawsuit, that the Lakers, in sending him the reply confirmation message, negligently and willfully violated the Telephone Consumer Protection Act of 1991<sup>105</sup> (hereinafter, “TCPA”) by failing to obtain his consent prior to the team sending the follow-up text message.<sup>106</sup> The text message sent by the Lakers was transmitted using an automatic telephone dialing system (ATDS).<sup>107</sup> The central issue before the court was whether the Lakers violated the TCPA by sending a confirmatory text message to the plaintiff. The court, in granting summary judgment to the Lakers, held that common sense would indicate that Emanuel’s original text message qualified as consent to receive a confirmatory message from the Lakers:

Though the Lakers allegedly failed to warn Plaintiff that he might receive a response, a “common sense” reading of the TCPA indicates that, by sending this original message, Plaintiff expressly consented to receiving a confirmatory text from the Lakers. “To hold otherwise would contradict the overwhelming weight of social practice: that is, distributing one’s telephone number is an invitation to be called[.]”<sup>108</sup>

The TCPA was also at the center of a similar lawsuit that was recently settled involving the Buffalo Bills of the National Football League. The lawsuit was filed by Buffalo Bills fan Jerry Wojcik who, in September 2012, signed up for a team text messaging service designed to keep fans up to date on breaking news.<sup>109</sup> He was subsequently assured that he would not receive more than five text messages in a calendar week. However, later that month, Wojcik and thousands of other Bills fans received six text messages in one week, and seven messages several weeks later. Accordingly, Wojcik alleged that the Bills sent out thousands of unsolicited, unwanted, and thus illegal text messages to the thousands of Bills’ consumers who had signed up for the service. Because the TCPA holds that an unlawful text message

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<sup>104</sup> *Id.* at \*2.

<sup>105</sup> 47 U.S.C. § 227 *et. seq.* The primary enforcer of the TCPA is the Federal Communications Commission.

<sup>106</sup> Emanuel v. Los Angeles Lakers, *supra* note 103, at \*2. To the authors’ knowledge, this class action lawsuit was brought by one of a growing number of lawyers and law firms who “troll” for such cases.

<sup>107</sup> *Id.* The plaintiff asserted that such a device has the ability to store or produce telephone numbers to be called through the use of a random or sequential number generator. *Id.*

<sup>108</sup> *Id.* at \*9, citing to Pinkard v. Wal-Mart Stores, Inc., No. CV 12-0292CLS, 2012 U.S. Dist. Lexis 160938 \*4 (N.D. Ala. Nov. 9, 2012). As further noted by the court, the confirmatory message explained that not all messages appear on the scoreboard, information that the court deemed potentially useful and relevant for the plaintiff in this case. *Id.* at \*9.

<sup>109</sup> Darren Heitner, *Buffalo Bills Sued for Sending Too Many Text Messages to Subscribers*. Forbes (November 12, 2013, 9:18 AM), <http://www.forbes.com/sites/darrenheitner/2012/11/12/buffalo-bills-sued-for-sending-too-many-text-messages-to-subscribers/>.

constitutes an unlawful call, the Bills were facing the potential of having to pay tens of millions of dollars in statutory damages.<sup>110</sup> Ultimately, the case was settled with the Bills distributing gift cards to the team store in amounts ranging from \$57.50 to \$75.00.<sup>111</sup> The substantial expense incurred in settling this case underscores the need for sport organizations to know and adhere to the regulations related to mobile marketing, particularly within the realm of text messaging. Recently, the Federal Communications Commission (“FCC”), which oversees and enforces the TCPA, took measures to amend the TCPA by requiring prior express *written* consent by the consumer as opposed to merely the prior express consent that was previously required.<sup>112</sup> Sport organizations can, however, take solace in the fact that written consent can, through technology, be built into the initial promotion.<sup>113</sup>

These investigations serve as notice to a range of sport industry organizations—from teams and leagues, to sport promotion agencies and sporting goods manufacturers—regarding the need to stay current and abreast of federal regulations and guidelines relating to the use of endorsements and testimonials on social media platforms, as well as the utilization of text messaging in marketing and promotional campaigns.

## Use of Social Media for Promotions and Contests

As discussed to this point, the use of popular social media platforms has—both inside and outside of the sport industry—resulted in numerous actions that have established precedence on both the judicial and administrative law fronts. We now turn our attention more specifically to another burgeoning area of legal concern for

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<sup>110</sup> *Id.*

<sup>111</sup> Frank Schwab, *Buffalo Bills Pay About \$3 Million to Settle Lawsuit Over Text Messages*. Yahoo! Sports.com (April 23, 2014, 12:37 PM), <http://sports.yahoo.com/blogs/shutdown-corner/buffalo-bills-pay-about-3-million-to-settle-lawsuit-over-text-messages-163747040.html>. The settlement also called for Wojcik’s lawyers to receive \$562,000 with an additional \$5,000 going to Wojcik. *Id.*

<sup>112</sup> Gregory Casamento, Jason Mueller & Darrian Campbell, *Consumer-initiated Text Message Telemarketing Complies with TCPA Prior Express Written Consent Requirement and E-SIGN Act?* Lexology.com (February 25, 2014), <http://www.lexology.com/library/detail.aspx?g=5dde4c83-e689-4573-9ce4-ec99a802b116>. “The Small Entity Compliance Guide (SECG) states the following requirements for a consumer’s written consent to be sufficient under the new rules: 1. “clear and conspicuous disclosure” of the consequences of providing the requested consent (i.e., that the consumer is willing to receive future calls that deliver prerecorded messages by or on behalf of the telemarketer); 2. Unambiguous agreement to receive autodialed telemarketing calls at a telephone number designated by the consumer; and 3. Written agreement is obtained “without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service.” *Id.*

<sup>113</sup> *Id.* The authors suggest use of the following statement: “By texting “PROMO” to XXXXXX (your Text) you authorize [Company Name] to send up to 2 texts/week (text alerts) to the number you provide by using an autodialer. Consent is not a condition of purchase. Your Text is your electronic signature agreeing to these terms and to giving electronic written consent. Call 800-XXX-XXXX for a free paper copy of these terms. Reply HELP for help; Reply STOP to withdraw consent. Msg. and data rates may apply.” *Id.*

sport organizations: the administration of consumer promotions (i.e., sweepstakes and contests) on social media platforms.

Social media has empowered consumers to the point where they are often more co-creators and/or participants in promotions rather than merely traditional consumers of promotional offerings. Additionally, social media platforms have been increasingly utilized for consumer contests and sweepstakes.<sup>114</sup> The implementation of contests that are premised on consumers submitting UCG (e.g., forum postings, photos, videos) has proven to raise serious legal issues related to both intellectual property infringement<sup>115</sup> and false advertising.<sup>116</sup> Another promotional tactic that lends itself to legal and practical pitfalls are those that utilize public voting as a means of determining the outcome of contests.<sup>117</sup> The use of such practices engenders the consideration of whether the outcome, then, is a demonstration of skill or chance.<sup>118</sup> Indeed, voters could be driven to participate based upon personal relationships (i.e., voting for friends and family) rather than traditional judging criteria. Additionally, the timing and/or placement of an entry can have an undue impact on voting.<sup>119</sup> Furthermore, the use of public voting-based promotions have given rise

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<sup>114</sup> Douglas Wood, Stacy Marcus & Anthony Traymore, *Social Media in Action in Advertising and Marketing*. Lexology.com (June 24, 2010), <http://www.lexology.com/library/detail.aspx?g=5dde4c83-e689-4573-9ce4-ec99a802b116>. Although these two terms (contests and sweepstakes) are often used interchangeably, there is a substantial legal difference between the two. *Id.* See also, Terese L. Arenth, *Recent Developments in Advertising Law Leading Leaders on Applying Traditional Laws and Policy Guidance to Emerging Technologies and Advertising Media—the Impact of Technological Advances on Advertising Laws and Promotions*, 2013 WL 4188242 (July 1, 2013).

<sup>115</sup> *Calden v. Arnold Worldwide, LLC., et al.*, No. 12-10874-FDS (D.C. Ma. Nov. 27, 2012) (ad agency for McDonald's held not liable for copyright infringement claim brought by consumer who participated in on-line contest). See Joshua Alston, *McDonald's, Ad Agency off Hook in Filet-O-Fish Copyright Suit.*, Law360.com (Nov. 28, 2012, 6:48 PM), <http://www.law360.com/articles/396827/mcdonald-s-ad-agency-off-hook-in-filet-o-fish-copyright-suit>.

<sup>116</sup> Louise Story, *Subway Sues Quiznos over User-made Ads*. N.Y. Times (Jan. 28, 2008), [http://www.nytimes.com/2008/01/28/technology/28iht-adco.4.9555321.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2008/01/28/technology/28iht-adco.4.9555321.html?pagewanted=all&_r=0). Quiznos created a contest allowing fans to create and upload commercials for its stores. Subway claimed that many of the ads made false claims about Subway. At trial, Quiznos argued that it wasn't responsible for the content of the ads, since it hadn't actually created them. The court, however, agreeing with Subway that Quiznos was actively involved in some aspects of the ad creation, refused to grant Quiznos' summary judgment motion. See Mike Masnick, *Subway And Quiznos Settle Dispute Over User-Generated Ads; Liability Questions Remain for Next Lawsuit*, Techdirt.com (March 5, 2010, 3:59 PM), <https://www.techdirt.com/articles/20100303/0238048386.shtml>. "Not surprisingly, at this point, Quiznos folded faster than one of its toasted sandwiches, and the two sides settled the case." *Id.*

<sup>117</sup> Peter Touchshner, *Subverting New Media for Profit: How Online Social Media 'Black Markets' Violate Section 5 of the Federal Trade Commission Act*. 3 Hastings Sci. & Tech. L.J. 165-184 (Winter 2010).

<sup>118</sup> Matthew Liebson, Thomas J. Collin & Thomas Zych, *Contests, Promotions and Social Media—Is Public Voting Worth the Risk?* Lexology.com (March 4, 2013), <http://www.lexology.com/library/detail.aspx?g=2bbb88b3-108f-45ee-b1c0-a9da54a66029>.

<sup>119</sup> *Id.*

to concerns such as the creation of fake social media accounts by entrants, the use of third-party web pages to solicit votes, and contestants offering compensation in exchange for votes.<sup>120</sup>

Each of the various social media platforms provide regulations and guidelines for the conduct of contests and sweepstakes, and sport organizations need to comply and keep abreast of frequent updates. For example, Facebook's terms of service strictly mandate that prior written consent be granted prior to the implementation of any contests or giveaways.<sup>121</sup> As a result, it is not uncommon for companies to move their contests off platforms such as Facebook, instead launching contest-specific websites.<sup>122</sup> In 2013, Facebook took steps to make their guidelines less stringent, enabling businesses to run contests and promotions more easily. While companies were previously required to run any promotions or contests through Facebook apps, they now can do so via their page timeline.<sup>123</sup> In addition, Facebook's 2013 promotion guidelines removed its rules prohibiting the use of Facebook functionality as a registration tool; as a result, users can now post on a page, comment and/or like a page post, or message a page in their contest entries.<sup>124</sup> It is worth noting, however, that the use of personal timelines for promotional efforts is still off limits, as marketers cannot currently request Facebook users to engage in a promotion by liking, sharing, or posting content on their own personal timelines.<sup>125</sup> For example, if a marketing intern for a collegiate athletic department were administering a promotion, she would not be able to engage friends and/or users in the promotion by posting content to their personal timelines and/or having them share promotional materials.

Although there are differences in the promotional guidelines across social media platforms,<sup>126</sup> there are some commonalities as well.<sup>127</sup> At the core of all social media promotions guidelines is the goal of protecting community members.<sup>128</sup> Moreover, guidelines generally require that advertisers ensure their promotions do not conflict with the functioning of the service.<sup>129</sup> Finally, all platforms make

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<sup>120</sup> *Id.*

<sup>121</sup> Facebook, Statement of Rights and Responsibilities, <https://www.facebook.com/legal/terms>.

<sup>122</sup> Wood, Marcus & Traymore, *supra* note 114. Services such as Votigo, Wildfire, and Strutta have emerged to aid marketers in this regard. *Id.*

<sup>123</sup> Rene Bissonnette, *Facebook Has Made it Easier to Run Promotions!* Lexology.com (August 30, 2013), <http://www.lexology.com/library/detail.aspx?g=01e86a73-843f-4c41-a5ec-d29dd3dd5b83>.

<sup>124</sup> *Id.*

<sup>125</sup> Sarah Bruno & Eva Pulliam, *Recent Changes to Facebook Promotions Guidelines is Good News for Marketers.* Lexology.com (October 11, 2013), <http://www.lexology.com/library/detail.aspx?g=91dae12e-05b0-42f7-95b0-bbe867b8aef7>.

<sup>126</sup> Wood, Marcus & Traymore, *supra* note 114.

<sup>127</sup> Seth Graham, *Running Contests and Sweepstakes on Facebook, Google+ and Twitter: How the Rules Stack Up.* SociallyAware.com (January 6, 2012), <http://www.sociallyawareblog.com/2012/01/06/running-contests-and-sweepstakes-on-facebook-google-and-twitter-how-the-rules-stack-up/>.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*



efforts to protect against legal pitfalls that can stem from the operation of promotions on their service.<sup>130</sup>

One of Facebook's most recent changes to its "like-gating" policy illustrates the need for sport organizations to continually monitor social media's platform and promotional policy guidelines. For example, in an effort to preserve the meaning and integrity of "likes," one of Facebook's newest policies (effective November 5, 2014) prohibits advertisers from requiring consumers to "like" the advertiser's Facebook page as a condition to access an app-based sweepstakes entry page.<sup>131</sup> Table 2 provides a sampling of promotions policies drawn directly from a sampling of social media platforms.

Although the various social media platforms have guidelines and policies in place,<sup>132</sup> this does not mean the sport marketer's work is done. As Facebook made abundantly clear when amending its policies so as to afford marketers increased flexibility in running a promotion, the sport organization remains responsible for the lawful administration of said promotion.<sup>133</sup> Furthermore, as evidenced in Table 2, various social media platforms have different policies and/or rules regarding content, copyrights, and contests. A social media platform's terms of service represent a mere framework for the actions of promoters and users; however, this should be accompanied by a thorough plan and set of implementation guidelines developed by the organization prior to the launch of any promotion.<sup>134</sup> Well thought out contest rules and regulations can help to mitigate legal risks, and should explicitly state what constitutes objectionable content.<sup>135</sup> Furthermore, they should serve to set

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<sup>130</sup> *Id.*

<sup>131</sup> Ed Chansky, *Like-gating for App-based Sweepstakes Entries Soon to End on Facebook*, Lexology.com (August 8, 2014), <http://www.lexology.com/library/detail.aspx?g=92e6aca6-1767-4a52-a1ce-5fb659abfd75>. As Chansky furthers notes, this new policy applies only to app-based promotions, not necessarily to promotions that consumers enter directly on an advertiser's Facebook page using "native Facebook functionality such as posting a comment or photo, etc." *Id.*

<sup>132</sup> Dale Joerling, *Pinterest Issues New Guidelines for Sweepstakes and Contests*, Lexology.com (December 3, 2012), <http://www.lexology.com/library/detail.aspx?g=591f76aa-2847-4a3e-acf5-38a3ba1c7636>. Pinterest recently updated its guidelines for sweepstakes and contests to include the following recommendations for sponsors: "Encourage authenticity: Reward the quality of pinning, not just the quantity of it; Promote your contest: Link to your Pinterest account or contest board from your website, social media and marketing channels; Prevent spam: Read up on our anti-spam measures to help keep your contest fun and useful; Make getting involved easy: Create clear instructions and a simple process." *Id.* Pinterest also advised that sponsors not "encourage spam, run a sweepstakes where each pin, re-pin, or like represents an entry, overdo it, or suggest that Pinterest sponsors or endorses" them. *Id.*

<sup>133</sup> Bissonnette, *supra* note 123.

<sup>134</sup> Wood, Marcus & Traymore, *supra* note 114. The authors state that marketers must also be cognizant of potential right of publicity violations. That is, if a company is intending to use user-generated content commercially, it is best practice to solicit release forms from any and all individuals featured in the work. Furthermore, it must be made crystal clear that the submission of user-generated content includes a "worldwide, royalty-free right and non-exclusive license to use, distribute, reproduce, modify" and publicly display user-generated content. With that said, this does not authorize the company to convert content into TV or made-for-internet commercials. *Id.*

<sup>135</sup> Liebson, Collin & Zych, *supra* note 118.

**Table 2 Social Media Platforms' Guidelines Regarding Promotions and Contests**

<b>Platform</b>	<b>Promotion guidelines</b>
Facebook <sup>a</sup>	<p>You must not incentivize people to use social plugins or to like a Page. This includes offering rewards, or gating apps or app content based on whether or not a person has liked a Page. It remains acceptable to incentivize people to login your app, check-in at a place or enter a promotion on your app's Page. To ensure quality connections and help businesses reach the people who matter to them, we want people to like Pages because they want to connect and hear from the business, not because of artificial incentives.<sup>147</sup></p>
Twitter <sup>b</sup>	<p>Business, organizations, and even some creative individuals have hosted contests and sweepstakes through their Twitter profile. Contests and sweepstakes on Twitter may offer prizes for tweeting a particular update, for following a particular user, or for posting updates with a specific hashtag. If you've been thinking about hosting a contest using your Twitter profile, here are some simple guidelines to follow to ensure your contest doesn't ask anyone to violate Twitter's rules or guidelines<sup>148</sup>:</p> <ul style="list-style-type: none"> <li>Discourage the creation of multiple accounts</li> <li>Discourage posting the same Tweet repeatedly</li> <li>Ask users to include an @reply to you in their update so you can see all the entries</li> <li>Encourage the use of topics relevant to the contest</li> <li>Follow the Twitter rules</li> <li>Follow applicable laws and regulations</li> </ul>

(continued)



**Table 2 (continued)**

Platform	Promotion guidelines
Instagram <sup>c</sup>	<p>If you are to use Instagram to administer a promotion (ex: a contest or sweepstakes), you are responsible for the lawful operation of that promotion, including<sup>149</sup>:</p> <p>The official rules:</p> <ul style="list-style-type: none"> <li>Offer terms and eligibility requirements (ex: age and residency restrictions); and</li> <li>Compliance with applicable rules and regulations governing the promotion and all prizes offered (ex: registration and obtaining necessary regulatory approvals)</li> </ul> <p>You must not inaccurately tag content or encourage users to inaccurately tag content (ex: don't encourage people to tag themselves in photos if they aren't in a photo)</p> <p>Promotions on Instagram must include the following:</p> <ul style="list-style-type: none"> <li>A complete release of Instagram by each entrant or participant</li> <li>Acknowledgement that the promotion is in no way sponsored, endorsed or administered by, or associated with, Instagram</li> </ul> <p>We will not assist you in the administration of your promotion and cannot advise you on whether consent is required for user contentor on how to obtain any necessary consent</p> <p>You agree that if you use our service to administer your promotion, you do so at your own risk</p>
Pinterest <sup>d</sup>	<p>If you run a contest or other type of promotion on Pinterest, please don't<sup>150</sup>:</p> <ul style="list-style-type: none"> <li>Suggest that Pinterest sponsors you or the promotion</li> <li>Require people to pin from a selection</li> <li>Make people pin your contest rules</li> <li>Run a sweepstakes where each pin, board, like or follow represents an entry</li> <li>Encourage spammy behavior, such as asking participants to comment</li> <li>Ask pinners to vote with pins, boards, or likes</li> <li>Require a minimum number of pins</li> </ul>

<sup>a</sup> See <https://developers.facebook.com/policy/>

<sup>b</sup> See <https://support.twitter.com/articles/68877-guide-lines-for-contests-on-twitter#>

<sup>c</sup> See <https://help.instagram.com/179379842258600>

<sup>d</sup> See <https://about.pinterest.com/en/acceptable-use-policy>

voting limits, prevent fakery, and afford contest regulators the ability to disqualify unethically obtained votes.<sup>136</sup> Finally, given social media's ever-evolving landscape, it is important to note that policies set forth for promotion—be it a sweepstakes, contest, or otherwise—are not necessarily sufficient for future promotional efforts.<sup>137</sup>

## Implications and Conclusion

The world of social media is an ever-evolving universe with an array of potential issues that can pose managerial and legal potholes for careless or uninformed organizations. These potholes can, however, be mitigated through the thoughtful crafting of internal social media policies as well as continued monitoring of social media platform policies. What follows, by way of example, is the internal social media policy statement of a professional sport team and a relevant excerpt from a Division 1 college conference's "Social Media Guidebook."<sup>138</sup> The professional sport team guidelines on employees' social media usage read as follows:

### *Policy on Employee Social Media and Internet Communications*

Participating in social media, or creating a personal weblog, has become a popular activity on the Internet and you may now or sometime in the future decide to start a blog, create a personal Facebook page, open a Twitter account or use other shared online systems. To ensure Company preserves its right and duty to protect itself and its fans, employees, vendors and business partners from unauthorized disclosure of information, and that any use of "social media" for Company business or through Company resources is in compliance with all Company policies, the Company has implemented the following rules on the use of "social media," which apply to all Company employees and cover all publicly accessible communications via the Internet, including, but not limited to blogs, discussion forums, newsgroups, chat rooms and social networking communities such as Facebook, LinkedIn, MySpace, Twitter, etc. Employees are expected to adhere to this policy and the guidelines set forth below.

### *Guidelines for Use of Social Media*

Unless approved by the Company, employees are prohibited from participating in social media for personal business on work time or during working hours,

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<sup>136</sup> *Id.*

<sup>137</sup> Melissa Landau Steinman & Maura Marcheski, *FTC Gives Cole Haan's Contest the #Boot*. Lexology.com (April 7, 2013), <http://www.lexology.com/library/detail.aspx?g=7dcd2849-5314-40cc-a98a-208b0e399e61>. Cole Haan ran a Facebook promotion, offering a \$1000 grand prize, that instructed users to include the hashtag "#WanderingSole" with their photos. However, the company neglected to instruct contestants to also make it clear that they were posting the pins in order to enter a contest. The FTC held the contest to be misleading to consumers due to the failure of the company and contestants to disclose that pins were being made as quid pro quo for contest entry. *Id.*

<sup>138</sup> Both sport organizations provided these materials on condition that the organization remain anonymous. The name of the professional sport organization has been replaced with the word "company"; the name of the college conference has been replaced by "Conference."

and may not at any time use Company resources such as computers, laptops, Company-provided hand-held personal devices or the Company server to do so.

- Employees may not use their Company-provided email address in association with non-work related social media and/or publicly accessible communications over the Internet.
- Employees may not share non-public Company information via social media, including, but not limited to, any sensitive information, trade secrets, proprietary or confidential information about the Company, its employees or anyone affiliated with the Company, player trade rumors, player injury status, financial or business information, marketing information, Company policy, or details of internal Company discussions or affairs regarding its fans, employees, vendors, business partners, or anyone affiliated with the Company or related companies. Unauthorized disclosure of such information is strictly prohibited.
- Employees may not use the Company's logos on their social media site or personal website or reproduce Company material. Employees also may not communicate any materials that violate the privacy or publicity rights of others
- All personnel policies in the employee handbook apply to employees' use of social media (e.g., sexual harassment policy, policy on confidential information, etc.).
- Employees should use good judgment before posting anything online, and will be held responsible for any statements or information they publish online.
- Employee posts on Facebook, MySpace, blogs, chat rooms and other social media sites should comply with applicable copyright, privacy, fair use, financial disclosure, and other applicable laws.
- Employees are not permitted to represent that they speak for the Company unless they are first given explicit written permission by management to do so.
- Media inquiries related to an employee's connection to the Company should be referred to the Company's Vice President of Media Services or Senior Director of Public Relations.

Failure to adhere to this policy may result in disciplinary action, up to and including termination of employment.

While this policy statement is quite comprehensive, the "guidebook" of a Division I college conference, which was primarily created to provide "best practices" and style-guide consistency among its member schools, appears much less so.<sup>139</sup> The relevant provisions, provided under the general heading of "Ethics," reflect a different tone and purpose from that of the professional sport team:

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<sup>139</sup> Although such research is not the primary purpose of this paper, the authors can only presume that athletic departments for each individual institution have their own stated policy to govern its employees' use of social networks (similar to that of the professional sport team illustration).

*Hazards of Social Media*

It is in the best practice of the Conference and its respective schools to monitor not vet their student-athlete's accounts. "Think first and remember that you represent a larger institution when you sign on as a student athlete," should be continually reminded throughout their tenure at their respective institutions.

Many schools are restricting the use of social networks within their organizations because of singular events without looking at the power that their student-athlete's accounts have.

A student-athlete's tweets are just as valuable to an organization as the organization's own social networking efforts.

The Conference encourages all schools, student athletes, administrators, coaches and staff to participate in social networking with the utmost integrity, collegiate sportsmanship and professionalism.

*Guidelines for Staff*

Conference staff are encouraged to interact through social networks with the Conference schools, administration, coaches and staff.

The conference will have no direct contact with any prospective student-athlete through social networking.

Personal accounts may be used to retweet and repost material from the Conference and its respective school but do not represent the viewpoints or opinions of the Conference.

It is encouraged to mention in your personal social networking accounts your affiliation with the Conference but is not required.<sup>140</sup>

Although it would be nearly impossible for sport organizations to monitor the entire social media universe on a daily basis, the failure to do so on a regular and consistent basis exposes it to potential liability. What follows are some important lessons that can be gleaned from the judicial and administrative law cases discussed above, as well as strategies for assessing the risks when engaging in promotion via social media platforms.

As clearly suggested by the professional sport team and college conference examples provided above, there exists no standard policy applicable across all sport organizations and, in fact, there exists a wide range of approaches to managing the internal use of social media. Some organizations do little more than mandate that employees follow the preexisting code of ethics and professionalism—a policy that guides *all* behavior—in their social media usage.<sup>141</sup> While this may work for

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<sup>140</sup> A senior-level executive of this particular college conference confirmed in an email correspondence on January 6, 2015, that the conference office does not have any additional internal policy statement for its employees that would resemble that provided by the professional sport team.

<sup>141</sup> Calman, *supra* note 8.

some, the preceding discussion has made clear that social media is unprecedented in the potential legal traps that can befall negligent organizations. Accordingly, it has become increasingly essential for organizations to take a more thorough, yet nimble, approach to social media policy; they must develop and maintain clearly communicated policies, but retain the ability to amend these as the law and policies of social media evolve.<sup>142</sup>

First and foremost, as evidenced by the *Eagle* and *PhoneDog* cases, any comprehensive internal social media policy must address ownership of social media accounts. Furthermore, not only should the organization's social media accounts reflect a unique name identifying the company versus an employee, but the organization and employee social media accounts should also be required to be kept separate. As suggested in the *Bland* decision which confirmed the constitutional free speech protections that can be accorded to "friending" and "liking," internal social media policy should acknowledge these protections while also clearly stipulating what types of social media interactions (e.g., likes, posts) would be deemed disruptive to the organizational workplace.<sup>143</sup> The lessons of *Morel* suggest that sport organizations must clearly understand and articulate to its personnel the intellectual property right issues pertaining to the re-purposing and dissemination of material via social media. Although *Morel* specifically involved copyright law, the legal issues pertaining to use of others' trademarks and right of publicity must also be clearly communicated internally; this necessitates that sport organizations and the affected personnel (e.g., social media marketers) are keenly aware of the terms of use provisions of the various social media platforms. For instance, whereas Twitter allows for the re-tweeting of otherwise copyrighted materials, sites including Instagram do not.

From a more external marketing perspective, the administrative law cases (including those that ensnared Nutrisystem and Hyundai) reinforce the need for sport organizations to monitor and adhere to the ever-evolving rules with respect to social media advertising and promotion. Of most relevance here are FTC Guides pertaining to the use of bloggers and celebrities (including athletes) in endorsements and testimonials. Sport organizations utilizing bloggers or celebrities in social media-based campaigns must clearly understand not only the situations in which disclosure of a "material connection" is required, but also how to effectively communicate such disclosures to the consuming public. Furthermore, the FTC Guides have clearly placed an onus on organizations and companies to monitor the conduct of its bloggers and endorsers as a means of providing protection in the event that the blogger or endorser fails to disclose his or her relationship with the company.<sup>144</sup> Last but not least, the case of *Emanuel* and the recently costly settlement of the Buffalo Bills highlights the need for sport organizations to understand and communicate internally (particularly to their marketers) the legal intricacies of the TCPA.

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<sup>142</sup> *Id.*

<sup>143</sup> Again, as stated earlier, this type of provision would be applicable to sport organizations that meet the "state action" requirement. See *supra* note 69.

<sup>144</sup> See McKelvey & Masteralexis, *supra* note 91.

In addition to the Guides, organizations must be sure to remain current on the various promotional policies for contests and sweepstakes that each of the major social media platforms have in place. As depicted in Table 1, a number of the sport industry's most prominent leagues have made use of multiple social media platforms in their marketing initiatives. However, as illustrated by Table 2, each platform is unique with respect to what is required for organizations utilizing these tools to conduct a contest or sweepstakes promotion. Complicating matters further is the fact that there is a certain degree of ambiguity inherent in some aspects of the policies these platforms have in place. For example, as depicted in Table 2, Pinterest mandates that contests and promotions on their platform do not encourage "spammy" behavior (asking participants to comment is cited as an example of such conduct). That being said, what constitutes spammy behavior is open to interpretation for sport organizations. Given the ruling of the Lakers case, it is probably best for organizations to use common sense when it comes to clauses such as this. Nevertheless, sport organizations must be aware of the guidelines for *each* platform they use in their marketing efforts. Failure to do so may result in a sticky situation akin to many unsuspecting organizations detailed in this paper.

Finally, it is critical that, in addition to maintaining well-crafted and internally communicated social media policies, sport organizations adopt a risk assessment strategy for social media marketing, especially as it relates to promotional campaigns (e.g., contests and sweepstakes). When developing a promotion, the first step should be to carefully review the terms of use of the respective social media platform. Sometimes, its terms of use can provide broader rights than one might originally assume.<sup>145</sup> Step two entails understanding and adhering to traditional law principles, especially where the terms of use are silent with regard to issues of copyright and trademark law where, in some instances, a "fair use" defense might apply. Step three entails a candid assessment of the potential risks of the promotional campaign, ranging from receipt of a cease-and-desist letter, to negative backlash by consumers, to a lawsuit filed by a celebrity alleging right of publicity violations.

As evidenced by our review of recent judicial and administrative law decisions, as well as our discussion of the ever-evolving promotion policies of social media platforms, even organizations with the best of intentions risk managerial and legal liabilities if they fail to keep abreast of this increasingly complex legal environment. Although by no means intended as an exhaustive inventory, the recommendations provided above are intended as guideposts for the construction and maintenance of sound social media policies. Of course, implicit throughout this paper is the need for legal departments to currently monitor social media-related lawsuits and policy updates,<sup>146</sup> but as important the sport organization must maintain a sound and effective internal process for communicating new and updated information to its marketing and promotions departments. As alluded to throughout, many if not all of the lawsuits and administrative actions

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<sup>145</sup> One example of this is Twitter's terms of use which allow for the re-tweeting of otherwise copyrighted material.

<sup>146</sup> The authors recommend Lexology.com (a free daily newsletter) as an excellent resource for this.

discussed in this paper might have been avoided had the companies had a well-crafted social media policy in place. Ultimately, the wide world of social media represents a unique and ever-changing landscape that sport organizations must monitor closely if they hope to avoid the difficulties befalling many imprudent organizations in recent years.