

Universities Monitoring Social Media Accounts of Student-Athletes

A Recipe for Disaster

BY JOHN BROWNING

Student-athletes may be subject to discipline based on the content of their tweets and Facebook postings, particularly if that content contains “fighting words” or true threats, defamatory statements, obscenity, violations of criminal laws, or violations of reasonable team or NCAA rules. However, it becomes trickier for constitutional purposes when the content on a student-athlete’s social networking page isn’t materially disruptive, but actually can be classified as protected free expression.

The focus should not be on how universities should react upon learning of a student’s potentially objectionable social-networking activities, but rather on how universities discover this content in the first place — by monitoring the social media accounts of their student-athletes. In Orwellian fashion, college and university athletic departments across the country are mandating that competing in varsity sports comes with a hefty price tag: one’s right to privacy and the protections afforded by the First, Fourth, and Fourteenth Amendments to the U.S. Constitution. In an attempt to justify this, schools are pointing to the incredible popularity of social networking sites; the alarming frequency with which student-athletes are posting questionable content;¹ oversight obligations that might be incumbent upon the universities in wake of recent NCAA rulings; and the potential damage that offensive tweets, Facebook posts, and YouTube videos can do to a university’s “brand” — both in terms of reputational harm as well as the quantifiable revenues generated by a major athletic department. As this article will demonstrate, monitoring a student-athlete’s social media accounts not only raises serious constitutional questions, but can also expose schools in a steadily-growing number of jurisdictions to violations of state law as well as risk other types of civil liability exposure.







There are now more than 1 billion Facebook users worldwide. Twitter processes more than 340 million tweets (messages of 140 characters or less) each day, and more than 35 hours of video are uploaded to YouTube each minute. More than 65 percent of all adult Americans have at least one presence on a social networking site, and for younger age groups, that figure climbs dramatically higher, approaching 95 percent. Just as social networking platforms have transformed the communication and information-sharing habits of people generally, athletes have been quick to embrace social networking as a means of sharing with not only friends and family but fans as well. Virtually every major sports league and governing body now imposes rules for the use of social media by its athletes, yet despite this, there is a continual parade of athletes posting crude or offensive content online (witness the number of Olympic athletes who exhibited poor social media judgment, like U.S. hurdler Lolo Jones and her tweets about “shooting sports” after the Aurora massacre, and her insensitive comments towards paralyzed Rutgers football player Eric LeGrand).

On the collegiate level, the NCAA already regulates social networking activities in the context of the recruiting of student-athletes.² In addition, in an era in which big-time football or basketball programs can generate tens of millions of dollars in annual revenue for a school through lucrative television contracts, licensing apparel, and ticket sales — and millions more in alumni donations for a high-profile university — colleges and universities are protecting their “brand” and the school’s reputation by taking an increasingly active interest in the social media musings of student-athletes. For some, this may take the form of coach-imposed limitations on social media use, or the implementing of university social media policies that apply to all students.

However, a growing number of universities are turning to third-party vendors like UDiligence, Varsity Monitor, and Centrix Social to monitor the social media accounts of student-athletes. The student-athletes are required to install the software applications on their computers and wireless devices, and the vendor monitors their activities, searching the social networking sites looking for key words that might point to discussion of drug or alcohol use, obscenities, offensive comments, or references to potential NCAA violations like agents or free gifts. With every school, “we work to customize their key word list,” said Sam Carnahan, chief executive of Varsity Monitor. “We look for things that could damage the school’s brand and anything related to their eligibility.”³ For about \$6,450 a year, a company like UDiligence (used by universities such as Texas, Texas A&M, Texas Tech, Baylor, LSU, Missouri, and Utah State) or Varsity Monitor (used by Oklahoma, Nebraska, and North Carolina) will use proprietary technology to scan and filter athletes’ personal accounts for specific content, and then email the university’s athletic department about the flagged content.

Putting the university in charge of deciding what words warrant a red flag, though, is problematic to say the least. Consider the recent revelations surrounding the social media monitoring of student-athletes at the University of Kentucky (which uses Centrix

Social) and the University of Louisville (which uses UDiligence). The 400 or so words of slang terms that appear on each school’s “red flag” list of potentially embarrassing or damaging comments include the predictable: names of agents; words like “free,” “pay-off,” or “cheat sheet”; references to alcohol (“beer,” and specific brand names); references to drug use (“doobie,” “zoomies,” “weed,” “bong,” etc.); and references to “porn,” “rape,” slang terms for genitalia, and Internet acronyms like GNOC (get naked on camera). However, the list also includes more troubling words and phrases like “Arab,” “Muslim,” “gay,” and “drunk driving.”⁴ Why are certain ethnic or religious groups singled out? If a student-athlete chooses to discuss his or her sexual preference with select friends online, is it the coach’s or university’s business? Should a student have to think twice before posting about a friend killed by a drunk driver, for fear of college officials lurking on his or her Facebook page?

University of Kentucky athletics spokesman DeWayne Peevy defends the practice, saying that the school’s primary concern is what the public can see, since this impacts the brand of the university and the athlete. “If they’re all wanting to have private accounts and not put it out to the public, I think we’d be all for that,” he says. Peevy goes on to claim that, “We spend every day trying to protect their privacy here . . . [social media] is a tool, but if used wrong it’s a dangerous tool.”⁵ If the spin of “we have to invade their privacy in order to protect it” seems to you reminiscent of a “we had to destroy the village in order to save it” justification, you’re not alone. A university’s decision to engage in such monitoring puts it on a slippery slope, said William Creeley, director of legal and public advocacy of Foundation for Individual Rights in Education, a free speech and civil liberties advocacy group. “First it’s their Twitter feed, then it’s their dorm room conversations, then it’s their work in class, etc. It sends a strange message to student-athletes about what being a student-athlete entails,” he said.⁶

Forcing student-athletes into having their social media accounts monitored raises a host of troubling legal issues. First, the very arrangement is expressly prohibited by most social networking sites’ terms of service. Facebook, for example, explicitly forbids a user from sharing his password with a third party (on this basis, Facebook has taken a stand against employers seeking the passwords and login information of job applicants). Second, the practice could spawn unanticipated civil liability.

The family of Yeardley Love, a University of Virginia women’s lacrosse player who was murdered by her ex-boyfriend (a member of the men’s lacrosse team), is suing athletic department officials for \$30 million in a negligence suit alleging that they ignored previous violent behavior of her attacker and other warning signs. Imagine if the school had engaged in social media monitoring, but missed signs of such behavior, or if any school with such a monitoring program “knew or should have known” of a student-athlete’s violent tendencies or statements before a campus shooting but failed to take action? Bradley Shear, a Maryland attorney who closely follows social media legal issues, says this is a serious risk. “Can you imagine if the coaches are following everything these kids are saying online, and they knew or should have



known that a student was doing something or should be doing something and didn't act to stop it? That's a liability situation that I don't think any school should have to deal with," he said.⁷

Besides such civil liability exposure, there are also the constitutional issues. The landmark case of *Tinker v. Des Moines Independent Community School District* and its progeny made it clear that students do not check their First Amendment rights at the schoolhouse door.⁸ And while several courts have justified certain invasions of a student-athlete's Fourth Amendment rights in cases involving random drug testing, recent decisions in the digital age have come down on the side of protecting a student's right to expression via social media. For example, in September, a federal court in Minnesota held that school officials violated a middle school student's First and Fourth Amendment rights by forcing her to turn over her Facebook password and searching her Facebook and private email accounts.⁹ The student had posted a message about an adult hall monitor at the school being "mean" to her. Citing concerns about "impermissible bullying," school officials browbeat the girl into providing the access information before disciplining her for "insubordination." The court held that the comments in question weren't true threats or a disruption of the school environment, and that the rummaging around the student's Facebook page violated the Fourth Amendment.¹⁰

Beyond the civil liability exposure and the constitutional questions that universities' social media monitoring of student-athletes raises, such monitoring is already against the law in several states, and may soon be banned in others. Legislatures in Maryland, Delaware, and California have passed legislation forbidding colleges from requesting or requiring login information like passwords or from installing monitoring software. While Maryland's bill has stalled, the Delaware act and California's SB 1349 have become law, and other states are mulling similar legislation.¹¹ These laws were inspired, in part, by similar laws prohibiting an employer from forcing an employee or job applicant to turn over their Facebook passwords. Such laws have been passed in California, Illinois, and Maryland, with 10 other states considering similar legislation (U.S. senators Richard Blumenthal of Connecticut and Charles Schumer of New York have threatened similar federal legislation).

Finally, some schools have defended the practice of monitoring student-athletes based on a March 2012 NCAA ruling. The NCAA investigation was prompted by tweets and posts by University of North Carolina football players Marvin Austin and Donte Paige-Moss alluding to impermissible benefits. On March 12, 2012, it levied penalties against North Carolina that included a one-year bowl ban and the loss of 15 football scholarships.¹² But universities that point to the NCAA's action as justification for social media monitoring are ignoring the actual wording of the NCAA's report, which expressly states that, "The committee declines to impose a blanket duty on institutions to monitor social networking sites."¹³ In fact, the NCAA made it clear that a duty to monitor or investigate would only arise if there was some reasonable suspicion of rules violations:

The committee recognizes that social networking sites are a preferred method of communication in present society, particularly so among college-aged individuals. While we do not impose an absolute duty upon member institutions to regularly monitor such sites, the duty to do so may arise as part of an institution's heightened awareness when it has or should have a reasonable suspicion of rules violations. If the membership desires that the duty to monitor social networking sites extend further than we state here, the matter is best dealt with through NCAA legislation.¹⁴

While it's true that universities have considerable reputational and tangible investments at stake in their athletic programs, student-athletes are still students first and foremost, not merely living billboards for a school's sports programs. As such, they have rights. Rather than risk civil liability, the potential violation of applicable privacy laws, or the undermining of constitutional protections afforded to every other student, colleges and universities concerned about social media fallout would be better advised to do what they do best: educate. Schools can and should teach their student-athletes about the dangers of misusing social media, thereby protecting their brands while refraining from invasive, legally-dubious conduct.

NOTES

1. See, for example, the cautionary tale of Yuri Wright, a much-heralded recruiting prospect from Ramsey, N.J. The high school cornerback was expelled in January 2012 after a series of sexually-graphic and racially-charged tweets, which also cost him football scholarship offers from a number of Division I programs.
2. See, e.g., Victor Broccoli, *Policing the Digital Wild West: NCAA Recruiting Regulations in the Age of Facebook and Twitter*, 18 Sports Lawyer J. 43 (Spring, 2011); Mary Pilon, *Watch That Tweet! N.C.A.A., Colleges Wrestle With Social Media Recruiting Rules*, N.Y. Times, Dec. 12, 2011.
3. Pete Thamel, *Tracking Twitter, Raising Red Flags*, N.Y. Times, Mar. 20, 2012, http://www.nytimes.com/2012/03/31/sports/universities-track-athletes-online-raising-legal-concerns.html?pagewanted=all&_r=0.
4. Sam Laird, *Inside the Battle for College Athletes' Social Media Lives*, MASHABLE.COM, Aug. 20, 2012, <http://mashable.com/2012/08/20/college-athletes-social-media/> (last visited Oct. 7, 2012); Mark Boxley, *University of Kentucky, Louisville Flag Hundreds of Words From Athletes' Tweets*, Courier-Journal, Aug. 21, 2012.
5. Allie Grasgreen, *California Second State to Forbid Colleges From Social Media Monitoring of Athletes*, Inside Higher Ed., Aug. 27, 2012, <http://www.insidehighered.com/news/2012/08/27/california-second-state-forbid-colleges-social-media-monitoring-athletes> (last visited Oct. 7, 2012).
6. *Id.*
7. *Id.*
8. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).
9. *R.S. ex rel. S.S. v. Minnewaska Area Sch. Dist.* No. 2149, 2012 WL 3870868 (D. Minn. Sept. 6, 2012).
10. *Id.*
11. Grasgreen, *supra* note 5.
12. N.C.A.A. – University of North Carolina, Chapel Hill Public Infractions Report, Mar. 12, 2012.
13. *Id.* at 11.
14. *Id.* at 12.

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