SOCIAL MEDIA AND RESTRAINT OF TRADE: AN OLYMPIC CASE STUDY

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The rise of social media in the last five years is nothing short of extraordinary and many areas of law are grappling with its effect. Social media is an incredibly useful marketing tool. At the same time, social media is extremely effective at disseminating scandalous information, with many sporting personalities recently being caught up in controversy.

Sporting administrators and sponsors are naturally apprehensive. Athlete agreements increasingly contain restrictions on an athlete's use of social media. The Blogging and Media Guidelines ('Beijing Guidelines') contained in the Australian Olympic Athlete Agreement ('OAA') for the Beijing Olympic Games contained highly prescriptive limitations on social media use. The restrictions facing athletes participating in the London Olympics contemplate different types of social media use, however still impose significant limitations on the professional athlete ('London Guidelines'). This paper examines the extent to which the Beijing Guidelines and London Guidelines (together 'Guidelines') could be a restraint of trade.

Restraint of trade has been considered extensively in a sporting context, traditionally being applied to scenarios such as limitations on player transfer rules, salary caps and collective bargaining. The basic principles of the doctrine require that the restraint is directed at a protectable interest and that it is reasonable to protect that interest. If not, the restraint is void.

It will be demonstrated that the Guidelines are directed at a protectable interest and are reasonable given the unique nature of the Olympics and limited timeframe in which the relevant provisions of the Guidelines apply. However, not all athlete agreements will share these unique features. If the Guidelines were imposed by a club on a full-time athlete in the National Rugby League for example, then the answer may well be different.

Although conduct related to a social media scandal in most cases would fall within a traditional disrepute clause, such clauses only offer an indirect form of protection to the commercial interests of sponsors or administrators. Therefore, disrepute clauses will continue to co-exist with more targeted social media limitations to protect the totality of sponsors' and administrators' interests.

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Social media

Social media's popularity has exploded in recent years: if Facebook were a nation, its population would make it the third largest country in the world, behind only India and China.[1] Social media changes the way in which people interact, gather and disseminate information and entertain themselves. It is also becoming increasingly integrated into other traditional forms of media – for example in the Australian Broadcasting Corporation's program *Q&A,* public Twitter feeds, although moderated, accompany a panel discussion – with both elements broadcast live.

The implications of social media present opportunities and challenges to administrators and sponsors alike. It is a fertile area for marketing. People post details about their hobbies, location, interests and other information allowing a marketer to get a rich picture of an individual and deliver highly targeted advertising.

Non-traditional forms of media, including social media, can be extremely effective tools for marketing an athlete, sport or products. For example, the Association of Surfing Professionals has been incredibly successful in deploying a strategy combining internet streaming of live events with a social media presence. Audience numbers have increased significantly despite there being a lack of interest from traditional broadcasters.

Social media networks also have devastating efficacy in delivering damaging information. In recent times there have been numerous high profile scandals involving professional athletes:

- a photograph of Michael Phelps, the prodigious American swimmer, smoking marijuana at a university party saw him lose a highly lucrative sponsorship deal with Kellogs in 2009;[2]
- offensive remarks posted by Stephanie Rice on Twitter saw her dropped from a Jaguar sponsorship in September 2010;[3] and
- naked photographs of high profile St Kilda AFL players Nick Dal Santo, Nick Riewoldt and Zac Dawson were distributed over Facebook and Twitter.[4]

In response to the potential for social media to have a damaging effect on an athlete's reputation, the United States has seen the establishment of companies

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[1] 'Facebook population: Status update', *The Economist* (online), 22 July 2010 <http://www.economist.com/node/16660401>.

[2] Juliet Macur, 'Phelps Disciplined Over Marijuana Pipe Incident', *The New York Times* (online), 5 February 2009 <http://www.nytimes.com/2009/02/06/sports/othersports/06phelps.html>.

[3] Michael Cowley, 'Twitter turns into anti-social networking trap for sport stars', *Sydney Morning Herald* (online), 9 September 2010 <http://www.smh.com.au/technology/technology-news/Twitter-turns-into-antisocial-networking-trap-for-sport-stars-20100908-151g3.html>.

[4] Adrian Musolino, 'Social media exposes sport stars for who they really are', *The Roar* (online), 21 December 2010 <http://www.theroar.com.au/2010/12/21/social-media-exposes-athletes-for-who-they-really-are/>.

to continually monitor a college athlete's social media pages, ensuring that an athlete's online behaviour would not be contrary to the standards expected by college sporting administrators. UDiligence is one such company, describing itself as:[5]

> The only automated service that helps collegiate athletic departments protect against damaging posts made on student-athletes' Facebook, Twitter and MySpace pages. Departments receive alert emails whenever a troublesome post occurs, so staff can address the issue before it becomes a bigger problem for the student-athlete and the athletic department.

Internet and privacy regulation are struggling to keep up with social media. This is vividly illustrated by the farcical situation in the United Kingdom where well known footballer Ryan Giggs was able to obtain an injunction restraining the traditional media (i.e. newspapers, television and radio) from publicising his name in connection with an alleged act of infidelity, despite the information being common knowledge after being widely circulated on Twitter.[6]

Other areas of law, such as employment law, are also grappling with these challenges. Fair Work Australia upheld the decision of a Newtown hairdresser to dismiss an employee for reasons including publicly posting disparaging remarks about her employer on Facebook.[7] Similarly, English courts were forced to consider whether contacts on the professional social networking site LinkedIn were covered by a confidential information clause in an employment contract.[8]

The Australian Olympic Athlete Agreement

Professional athletes are increasingly subject to restrictions on their use of social media, and the OAA is no different. The OAA contains a number of limitations on athletes, with the most prominent relating to commercial sponsorship issues and prohibitions on drug taking and gambling.[9] In addition to these usual suspects, the OAA contains a five page schedule of 'Blogging Guidelines'. Athletes participating in the London Olympics are subject to the *IOC Social Media, Blogging and Internet Guidelines for participants and other accredited persons at the London 2012 Olympic Games*.[10] The main elements of the Guidelines are set out in the table below:

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[5] Reputation Management for Student Athletes on Social Networks, UDiligence (2011) <http://www.udiligence.com/>.

[6] Patrick Wintour and Dan Sabbagh, 'Ryan Giggs named by MP over injunction', *The Guardian*, (23 May 2011 <http://www.guardian.co.uk/media/2011/may/23/ryan-giggs-mp-injunction>.

[7] *Fitzgerald v Escape Hair Design* [2010] FWA 735. Note that Fair Work Australia did not consider the remarks themselves as a valid ground for termination [65]-[66].

[8] *Hays Specialist Recruitment v Mark Ions* [2008] EWHC 745 (Ch).

[9] Clause 11 (Marketing and Promotional Activities); clause 15 (Doping Requirements and Use of Drugs) and clause 8 (Gambling).

[10] International Olympic Committee, *IOC Social Media, Blogging and Internet Guidelines for participants and other accredited persons at the London 2012 Olympic Games*, 31 August 2011 <http://www.olympic.org/Documents/Games_London_2012/IOC_Social_Media_Blogging_and_Internet_Guidelines-London.pdf>.

Element	Beijing Guidelines	London Guidelines
Application	Eight days prior to the Opening Ceremony to Three days after the Closing Ceremony.	Period of the Olympic Games.
Scope	'a website, or a webpage on a website, where entries are made (such as a journal or diary).' The website must be 'controlled' by the athlete – with control defined as 'complete control of the content which is posted on and which appears on the blog'.	Social media platforms, websites, tweets and blogs.
General content restrictions	Only personal Olympic-related experience may be posted, including 'descriptions or accounts of conversations with other [athletes] however the [athlete] must not post content such as commentary, speculation or opinion about other [athletes]. The Guidelines permit a factual account of events and personal experiences only'. No sound or moving images. No images, unless of the athlete themselves without any sporting action.	Must not report on competition or comment on activities of other participants. Must be in a first person diary format. Still photographs within Olympic venues may be posted for 'personal use'. No audio/video of events, competitions or other activities at Olympic venues.
Sponsorship / advertising restrictions	Athletes 'must not include any commercial reference in connection with any Olympic Content posted on their blogs. Specifically, this means that no advertising and/or sponsorship (such as brands) maybe visible on their blog at the same time as Olympic Content.'† Athletes may, however, including advertising and brands if they are one of the International Olympic Committee's ('IOC') 'TOP Partners' and that the advertising and brands are non-intrusive (less than 15 per cent of the screen at any given time).	Athletes, 'are not permitted to promote any brand, product or service within a posting, blog or tweet on any social media platforms or on any websites.' Athletes 'must not enter into any exclusive commercial agreement with any company with respect to their postings, blogs or tweets on any social media platforms or on any websites.'

Footnote: † There is a conflict within these guidelines as the prohibition regarding advertising and Olympic Content, as athletes are already prohibited from providing Olympic Content on their blogs.

Schedule 5 of the OAA, Media Guidelines, also limits the scope of what an athlete can say using 'all internet based activities'. Athletes are limited to being allowed to 'comment or communicate with the media only in relation to their events, prospects or performance at the games.'[11] Even more broadly, the Media Guidelines state:[12]

> Athletes may not, for the Games Period, write or post content relating to their participation in the Games, events, prospects or performance at the Games on the Internet whether for a personal or commercial purpose.

Although the focus of this paper is the OAA, there are a number of other examples where sporting administrators seek to regulate use of social media. The NBA and NFL prohibit players from tweeting immediately before and after games.[13] The University of Arizona also requires all college athletes to keep their Facebook pages private and other US colleges have banned athletes use of Facebook entirely.[14] Members of the 'All Blacks', the New Zealand Rugby Union team, were subject to a social media ban during the 2011 Rugby World Cup – with the New Zealand team keen to avoid any distractions arising from social media similar to that which occurred in 2009 when Cory Jane, an All Black with over 14,000 Twitter followers, announced that he had been dropped from the team before the news was officially made public.[15]

In contrast, athlete agreements historically took a broader approach in a pre-social media context. For example, the NRL 2003 player contract prevents a player from commenting publicly on a range of matters including: the game, the player's club or other clubs, and the competition or the performance of officials. 'Comment publicly' includes 'when it is known or ought to be known that the comment or action may be reported in the media.'[16] Given the prevalence of social media, such a restriction would clearly apply to statements on social media sites.

The dynamic nature of technology also makes drafting restrictions that will be 'future proof' difficult. The London Guidelines specifically apply to 'tweets', a concept not included in the Beijing Guidelines which relied upon a broader notion of a 'website' or 'blog'. The Memorandum of Understanding for 2001–2005 between the Australian Cricket Board and the Australian Cricketer's Association contains detailed provisions on the circumstances in which players

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[11] Cl 3(a).
[12] Cl 3(c).
[13] Len Berman, 'When Social Media Gets Athletes in Trouble', *Mashable*, 4 January 2010 <http://mashable.com/2010/01/04/social-media-athletes/>.
[14] Ibid.
[15] 'All Blacks impose social media blackout for World Cup', *BBC Sport*, 17 June 2011 <http://news.bbc.co.uk/sport2/hi/rugby_union/13808100.stm>.
[16] National Rugby League Player Contract (Newcastle Knights) (2003) cl 3.2(b).

will be required to participate in 'Player Chat Sessions.'[17] Although this is not defined, presumably at the time the intention was to capture text based chat sessions – a medium which now seems wholly outdated.[18] To the extent possible, effective restrictions on social media need to be drafted in a manner which is 'technology neutral' and not tied to a particular form of communication or social media service in order to avoid becoming obsolete or capable of circumvention. To be enforceable the Guidelines must also fall within the scope of limitations which are permissible as a matter of law, including under the restraint of trade doctrine.

Restraint of trade

(a) General principles

The classic formulation of restraint of trade comes from the case *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd*:[19]

> All interference with individual liberty of action in trading, and all restraints of trade themselves, if there is nothing more, are contrary to public policy, and are therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, if the restriction is reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party whose favour it is imposed, while at the same time it is in no way injurious to the public.

This robust principle of common law is further modified by statute. Section four of the *Restraints of Trade Act 1976* (NSW) provides that a restraint will only be invalid *to the extent* that it is not contrary to public policy. As a result, contractual restraints, which may be perceived as susceptible to breaching the common law principle are often drafted in 'cascading' manner – for example, a non-compete clause in a sale of business agreement may prevent the previous owner from running a business within (a) 10 km; (b) 25 km; (c) 50 km and so on, to assist with in the partial severance of the impinged term under the statutory rule.

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[17] cl 15.4.

[18] There is an argument that a chat session could extend to video based services, however, this does not detract from the point that drafting agreements will always be difficult where they underlying subject matter changes over time.

[19] [1894] AC 535 ('Nordenfelt').

The test, or rather exception, is framed broadly – all restraints are void unless reasonable in the circumstances. It also applies to all restraints, voluntary or involuntary.[20] This language affords flexibility to the courts to consider restraints on their merits. The benefit of this approach is that courts can deal with novel restraints, such as the Guidelines.

The restraint of trade doctrine exists in parallel with the statutory regime governing anti-competitive conduct. The *Competition and Consumer Act 2010* (Cth) ('CCA'), which regulates anti-competitive conduct generally, including in relation to practices such as exclusive dealing, boycotts and refusals to supply, expressly provides that it 'does not affect the operation of the restraint of trade in so far as that law is capable of operating concurrently with this Act.'[21]

Restraint of trade is particularly important in an employment context. The CCA does not generally apply to employment contracts as the definition of 'services' in section four explicitly excludes contracts for service. A contract for service exists where:[22]

> (i) The servant agrees that in consideration of a wage or other remuneration he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service

Although the control which the Australian Olympic Committee ('AOC') and IOC exercise over an athlete is extensive, the nature of the Olympic Games and the fact that athletes are not paid as employees for participation in the Games, make it unlikely that an employment relationship exists between an Australian Olympic athlete and the AOC or IOC. The cases of *Adamson*[23] and *Hughes*[24] discussed below contrast the different approaches taken by courts when an athlete is an employee (*Adamson*) or not (*Hughes*).

(b) Restraints of trade in sports

Restraint of trade has been considered extensively in the sporting context. Most commonly restraint of trade issues have arisen in relation to limits on transfer

[20] *News Limited v Australian Rugby Football League* [1996] FCA 1813, [47].
[21] *Competition and Consumer Act 2010* (Cth) s 4M.
[22] *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 1 All ER 433, 439–440 (Mackenna J).
[23] *Adamson v New South Wales Rugby League* (1991) 27 FCR 535.
[24] *Hughes v Western Australian Cricket Association (Inc)* (1986) 19 FCR 10.

rules, salary caps and collective bargaining.[25] Many of the highest profile competition law cases in Australia have been in a sporting context – including those in relation to the Super League and the exclusion of the South Sydney Rabbitohs from the NRL competition.[26]

Paterson notes that outside of restraint of trade, Australian courts have been reluctant to get involved in sporting disputes.[27] However, courts have said the following about the scope of an athlete's service:[28]

- a professional athlete's agreement with a club will usually give rise to an employment relationship;[29]
- courts will take a stricter view of restraints when they are contained in an employment contract;[30] and
- a professional athlete's participation in a sport is a 'trade' in which they are entitled to be paid.[31]

The Australian High Court first applied the restraint of trade principle in respect of a transfer rule limitation in *Buckley v Tutty*[32] that limited the ability of a player to change clubs. Although recognising the legitimacy of a sporting organiser's interest in having rules in respect of transferring players, the rules in this case were unreasonable as they were poorly conceived – open ended time limits on which a player may be retained by a particular club and a club could set any transfer fee it wanted before it would release a player.[33] The practical effect of the second limb is that other clubs would be foreclosed from approaching talented players by prohibitively high transfer fees. The court held that although the organiser had a protectable interest, the restriction was void as it went beyond what was reasonable to protect that interest.

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[25] See, Stephen Ross, 'Anti-Competitive aspects of sports' (2003) 7 *Competition and Consumer Law Journal* 1; Chris Davies, 'The Use of Salary Caps in Professional Team Sports and the Restraint of Trade Doctrine' (2006) 22(3) *Journal of Contract Law* 246; Sam Chadwick, 'Restraint of Trade In Australian Sport – Was the AFL's hand forced on Ben Cousins' (2010) *Bond University Sports Law eJournal.*

[26] *Superleague and News Ltd v South Sydney District Rugby League Football Club Ltd* [2003] HCA 45.

[27] James Paterson, 'Disciplining athletes for off-field indiscretions: a comparative review of the Australian Football League and the National Football League's personal conduct policies' (2009) 4(1) *Australian and New Zealand Sports Law Journal* 105, 111.

[28] See the discussion in K E Lindgren, 'Sport and the Law: The Player's Contract' (1991) *Journal of Contract Law* 135, 138–142.

[29] Ibid, 136.

[30] *Geraghty v Minter* (1979) 142 CLR 177, 185 (Gibbs J).

[31] See, *Buckley v Tutty* (1971) 125 CLR 353 ('Buckley'), 371 (Barwick CJ, McTiernan, Windeyer, Owen and Gibbs JJ).

[32] Ibid. For a fuller analysis of this and similar cases see Lindgren, above n 29, 138–144.

[33] *Buckley* [17]–[18].

A salary cap was effectively challenged in the case of *Cliftonville*.[34] The court found that a restriction preventing a player in the Northern Irish Football League from negotiating a salary, one of the most basic elements of an employee's relationship with their employer, was invalid.[35] However, such an approach has not been extended by Australian courts despite the existence of salary caps in the two major sporting competitions, the AFL and NRL. The justifications given by the competitions are that a salary cap creates a more financially stable, even and fairer competition. The lack of a successful challenge to the salary cap system suggests that a court would find the organisers of the AFL and NRL had a legitimate interest to protect, and the salary cap was a reasonable measure to protect that interest.[36]

Other well known cases include:

- *Adamson*: internal transfer rules restricting the ability of players to choose which club they could transfer to; [37] and
- *Hughes*: rules of the Western Australian Cricket Council prohibiting a player from participating in a competition in South Africa were held to be a restraint of trade and therefore invalid.[38]

Despite similarity in the nature of the restriction, the contrasting outcomes in *Adamson* and *Cliftonville* highlight that any restraints need to be carefully drafted, proportionate and appropriately reflect the nature of the underlying subject matter or problem that the restraint is directed towards.

Courts are likely to canvass voluntary commercial sponsorship arrangements with less scrutiny than restrictive arrangements such as player transfer rules (as seen in *Buckley*) that limit an athlete from plying their trade in the purest sense – actually playing and participating in the game. Somewhere between these extremes, compliance with the Guidelines forms part of an Olympic athlete's agreement.[39]

(c) A restraint of trade? Does the OAA unreasonably prevent an athlete from exploiting their trade?

(i) Protectable interest

The first question to ask is does the AOC have a protectable interest in restricting the use of social media as outlined in the Guidelines. For the purposes of the

[34] *Johnston v Cliftonville Football and Athletic Club Ltd* [1984] NI.
[35] See the general discussion in Davies, above n 26, 249–250.
[36] See Davies, above n 26, 266–267.
[37] *Adamson v New South Wales Rugby League* (1991) 27 FCR 535.
[38] *Hughes* [180]–[181].
[39] OAA, cl 10 (Media Requirements).

analysis the limitations will be categorised as follows: sponsorship, content and restrictions on opinions.

The sponsorship restriction prohibits athletes from promoting non IOC 'TOP Partners' on their blogs. IOC TOP Partners have been estimated to pay up to US$100,000,000 for two Olympic Games events.[40] With such significant investment, sponsors will reasonably demand exclusivity.[41] This interest is likely to be recognised by the courts as protectable.

The content restriction excludes athletes from using certain 'Olympic content' on their blogs or other social media, prohibiting the reproduction of sound, moving images or still photographs, except where those photographs feature the athlete (without sporting action) or are outside Olympic venues. There is also a question as to whether the relevant content could be properly characterised as intellectual property of the AOC at law.[42] If nothing else, the content restriction facilitates the AOC in maintaining control over the broadcasting of the Olympics and associated media. This allows the AOC to extract a higher premium from broadcasters and also provides them with control so they can ensure the Olympics are kept free from commerciality or politics. The courts should recognise such an interest.

The interest sought to be protected by the 'opinion' restriction is difficult to ascertain with certainty, though it is a product of the unique nature of the Olympics and the desire for it to be seen as an apolitical event that promotes international co-operation where grudges, prejudices or grievances are set aside for the greater good. To some extent, the opinion restriction also helps to further protect the content exclusion by limiting the supply of alternative sources of opinions, views and commentary on the Olympics other than officially sanctioned sources. This allows the AOC to command a greater premium when taking those rights to market.

Freedom of expression is a cornerstone of modern democracies. Any court would not lightly preclude the existence of this right. However, the basis of this

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[40] Karolos Grohmann, 'Olympics-IOC in talks to extend deals with three top sponsors', *Reuters* (online), 19 May 2011 <http://www.reuters.com/article/2011/05/19/olympics-sponsors-idUSLDE74I0S220110519>.

[41] The importance of exclusivity is demonstrated no more clearly than by the perennial problem of ambush marketing and unauthorised sponsorship. For example, although not an Olympic sponsor, in the mid 1990s, Holden conducted a campaign called 'Golden Holdens' where it would provide cars to Olympic athletes. Holden went to great lengths to publicise this offer. The campaign was incredibly successful, so much so that Holden was perceived as an official Olympic sponsor, and Toyota, the actual official sponsor withdrew its support for future Australian Olympic teams. See, Senate Legal and Constitutional References Committee, Parliament of Australia, *Cashing in on the Sydney Olympics: Protecting the Sydney Olympic Games from Ambush Marketing* (1995) 4–5.

[42] See the approaches in *Victoria Park Racing & Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479; *Nine Network Australia Pty Ltd v Australian Broadcasting Corporation* [1999] FCA 1864, such matters of course be modified by contract, whether with the athlete or spectator (for example, through the OAA or the terms and conditions of ticket to an Olympic event). *Hospitality Group Pty Ltd v Australian Rugby Union Ltd* (2001) 110 FCR 157.

right is not for those participating in sporting competitions but that it allows citizens to participate in the community and hold governments accountable. The extraordinary audience the Olympics commands does, however, make it an incredibly powerful platform to communicate any message (whether political or commercial). Although we may feel uneasy about restrictions on such basic rights – it is likely, but by no means certain, that the public interest in keeping the Olympics purely about the sporting competition would make it likely that a court would recognise the legitimacy of the AOC's interest.

(ii) Reasonableness

The AOC and IOC provide a unique opportunity for a professional athlete to compete in the Olympic Games which represents the pinnacle of sporting competition – the FIFA Football World Cup is the only comparable event. For many athletes Olympic participation is the primary goal and many years of dedicated and gruelling training are endured to achieve it.

An athlete involved in the Olympic Games has the potential to receive enormous international exposure. The Beijing Olympic Games attracted an estimated worldwide television audience of 4.7 billion (up from 3.9 billion in Athens).[43] The platform the Olympic Games provides means that Olympic success can translate into commercial success off the field. Many well known Australian Olympic champions such as Grant Hackett and Cathy Freeman continue to feature as media personalities in Australia despite their main achievements having occurred many years ago.

The IOC necessarily requires a certain degree of centralisation and control over the Olympic Games given the enormity of the task in coordinating an event which includes countries from all over the world with different cultural, historical and political perspectives and interests. The Olympic Charter states that:[44]

> The goal of Olympism is to place sport at the service of the harmonious development of humankind, with a view to promoting a peaceful society concerned with the preservation of human dignity.

The spirit of the Olympic Games is one which in its ideal form is apolitical and focused on international cooperation and an altruistic understanding of sporting competition – however, it is not always entirely possible to divorce sport and politics.

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[43] 'Beijing Olympics attracts record 4.7 billion TV viewers', *China Daily* (online), 6 September 2008 <http://www.chinadaily.com.cn/olympics/2008-09/06/content_7005208.htm>.

[44] International Olympic Committee, *Olympic Charter,* 8 July 2011 <http://www.olympic.org/Documents/olympic_charter_en.pdf> 10.

The commercial reality of modern sport, including the Olympic Games, is also unavoidable. Retaining control over 'Olympic content' allows the IOC to charge greater premiums to advertisers, broadcasters and sponsors with the funds being available for the IOC in promoting Olympism and its lofty ideals.

For high performing athletes, their trade is more than just achievements on the field. An athlete's 'brand' is the largest aspect of their trade – at least in a financial sense. Forbes Magazine reports that despite having been involved in significant controversy in the last two years, Tiger Woods remains the world's highest paid athlete with annual earnings for the last twelve months of US$75,000,000 – half of which came from Electronic Arts (a video game manufacturer) and Nike.[45] A prime example of an athlete whose brand is arguably bigger than sporting ability is Maria Sharapova, also a member of Forbes' top 50 list of highest-paid professional athletes, largely due to sponsorship arrangements with Nike and Cole Hann (shoes).[46] The modern professional athlete's trade is much more than what happens on the sporting field.

The Guidelines apply to social media sites such as Facebook and Twitter – as they are websites controlled by an athlete where entries are made (in the case of the Beijing Guidelines) and self-evidently with the London Guidelines. The sponsorship restriction identified in section 1.1(c)(i) squarely excludes an athlete from having any non-IOC TOP Sponsor feature on a social media page. Given the importance of exploiting 'brand' as part of a high performing athlete's trade, are these restrictions reasonable?

Social media provides an enormous opportunity for Australian athletes who have limited legal rights and autonomy in exploiting their personality. Australians do not enjoy a general right of 'personality' as a matter of law.[47] An Australian athlete has more limited 'defensive' protections through common law actions such as passing off or a statutory action for misleading and deceptive conduct.[48] An Australian athlete can also only exploit their image through trademarks, which can be difficult – Lleyton Hewitt unsuccessfully attempted to apply for the deregistration of a trademarked logo with the words 'C'mon', his signature phrase in competitive tennis, which was being used by another person to market sporting goods.[49] By restricting social media as a channel in which an athlete

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[45] Kurt Badenhausen, 'The World's Highest-Paid Athletes', *Forbes Magazine* (online), 31 May 2011 <http://blogs.forbes.com/kurtbadenhausen/2011/05/31/the-worlds-highest-paid-athletes/>.

[46] Ibid.

[47] Hilary Black, 'The role of trade mark law in the protection of celebrity personality' (2002) 7(2) *Media and Arts Law Review* 638.

[48] See, eg, *Honey v Australian Airlines Ltd* (1990) 18 IPR 185; and *Talmax Pty Ltd v Telstra Corp Ltd* (1996) 36 IPR 46.

[49] Decision of a Delegate of the Registrar of Trade Marks, *Opposition by John Patrick Shiels to application under section 92 of the Act by Lleyton Hewitt Marketing Pty Ltd to remove trade mark number 986440(25, 28) – COME-ON and device – in the name of John Patrick Shiels* (31 May 2010).

can market themselves, the Guidelines further constrain the ability of an athlete to raise their profile and exploit their personality.

The Guidelines occur in a unique context. The better view is that the restraints in the Guidelines are unusual due to the following factors: the very limited time in which the restraint applies (the approximately two week period in the Guidelines is in stark contrast to the open ended limit in *Buckley*); the uniqueness of the Olympic Games; and the special nature of the Olympic Games and public interest in keeping the event purely focused on sport. These factors suggest that the Guidelines would be reasonable within the *Nordenfelt* formulation.

The role of 'disrepute' clauses

Every athlete agreement will contain a disrepute clause. These clauses provide rights of termination if an athlete brings themself, the sport or the sponsor into disrepute. To some extent the Guidelines are not necessary given that a disrepute clause would extend to the types of conduct which make administrators nervous about social media scandals. The OAA approach is typical and states that an athlete must not:[50]

> engage in conduct which, in the absolute discretion of the AOC (or during the period of the 2008 Olympic Games, the Chef de Mission) if it becomes or were to become publicly known will, or would be likely to, bring me, my sport, the AOC or the Team into disrepute or censure.

In the Nick D'Arcy case, involving a drunken physical assault by an athlete selected for the Australian swimming team, the Court of Arbitration for Sport said 'bringing a person into disrepute is to lower the reputation of a person in the eyes of ordinary members of the public to a significant extent.'[51]

Codes of conduct may also supplement the primary agreement an athlete has with a sporting organisation. For example the AFL and NFL each have detailed personal conduct policies, which also cover 'disreputable conduct'.[52]

Patrick George identifies a number of dimensions to disreputable conduct.[53] The three set out below are most significant in a social media context:

- a requirement that the conduct be 'publicly known' – all conduct on social media and the internet is inherently public, even more so with

[50] Cl 7.1(6).
[51] *Nicholas D'Arcy v AOC* [2008] CAS 2008/A/1539 [1]; see also the discussion in Patrick George, 'Sport in disrepute' (2009) 4(1) *Australian and New Zealand Sports Law Journal* 24, 28–30.
[52] See generally, Paterson, above n 28.
[53] George, above n 52, 28–30.

professional athletes who use social media as platform for promoting their image;

- 'a connection with sport' – the professional athlete is almost inevitably connected to the sport creating little opportunity for an athlete to argue that any disreputable conduct was not sufficiently connected with the sport; and
- evidence the athlete engaged in the conduct – although a careless social media and internet post can be deleted, it will be widely distributed and communicated to a significant audience. Additionally after a post is deleted it may also be retrieved by viewing a cached version of a website (easily accessible via Google).

Social media scandals will invariably be 'disreputable'. The element of publicity in the OAA is a low hurdle to clear in the context of social media – with the essence of the test, as it should be, focussed on the 'disreputable' nature of the conduct. If we consider the three examples of Michael Phelps, Stephanie Rice and the St Kilda AFL players provided above, these are all sufficiently disreputable incidents – and it is reasonable to assume that the first issue Kellogs' and Jaguar's lawyers checked when they received news of the Phelps and Rice scandals respectively was the disrepute clause, which they undoubtedly followed promptly with a letter of termination to the athletes concerned.

Social media guidelines or codes of conduct are not necessary given the significant overlap with the disrepute clause and other traditional restraints around competing sponsorship and media. However specific social media rules maintain a key practical advantage: placing specific types of conduct in the front of an athlete's mind which may encourage athletes to think twice before posting remarks on social media sites.

Disrepute clauses offer an indirect form of protection for the interests of sponsors or administrators. In contrast, social media restrictions may be much more commercially focused – for example, restrictions on using Twitter before, after or during games helps to protect broadcasters retain exclusive control over sporting content. Athlete agreements will therefore continue to contain a combination of specific social media limitations in addition to the traditional disrepute clause to protect the entirety of sponsors' and administrators' interests.

Conclusion

Social media is having a profound effect beyond the 'social' – it is changing the world of commerce, sport and the law. Social media brings with it great potential and enormous challenges for sporting sponsors and administrators alike while professional athlete agreements are increasingly seeking to regulate social media use.

Any restrictions placed on a sportsperson may breach the restraint of trade doctrine if they do not protect a legitimate interest and they exceed reasonable measures in protecting that interest. Restraint of trade has been applied by the courts in a number of well known cases, primarily in relation to transfer rules, salary caps and collective bargaining issues. However, the test is flexible and has the potential to be applied to novel situations.

Social media restrictions are not likely to breach the restraint of trade doctrine unless they are particularly onerous. The Guidelines are directed at a protectable interest and are reasonable given the enormity of the task facing the IOC. The IOC necessarily requires a greater degree of control and an ability to ensure that the Olympic Games are conducted in a manner consistent with its ideals. However, not all athlete agreements will share the unique features found in the Guidelines. If a club imposed the Guidelines on a full-time athlete then the answer may well be different.

Specific guidelines do not provide any significantly different protections from those afforded under the traditional disrepute, sponsorship and media limitations found in athlete agreements. The essential dimensions of 'disrepute': publicity, a connection with the sport, and evidentiary requirements, are readily satisfiable given the nature of social media and the internet. However, they do have the practical advantage of placing certain types of conduct at the forefront of an athlete's mind.

In recent months the farcical situation involving Ryan Giggs in the United Kingdom highlights the struggles that modern legal systems face in effectively regulating social media. Technological change also makes it difficult for those in practice to draft effective restraints, not just from a restraint of trade perspective, but from a technological one. The intersection of commerce, sport and technology will continue to rapidly change with the law struggling to keep up with the pace of development.