

Social Media Accounts and Ownership Rights

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- Franchise and Distribution
- Intellectual Property Litigation
- International and Domestic Intellectual Property Strategic Counseling and Management
- International Franchise and Distribution
- Internet, E-Commerce and Domain Names
- Restaurant and Foodservice
- Trade Dress, Design Patents and Product Clearance
- Trademarks, Advertising and Brand Management
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- J.D., New York University School of Law, 2002, Staff Editor, *Review of Law and Social Change*
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David Bell is a partner and Chair of the firm's Social Media Practice Group. He counsels clients on emerging technology and branding trends, including social media issues, smart phone applications, and online scams, protects companies' product designs, and represents plaintiffs and defendants in intellectual property and domain name disputes. Additionally, he clears, procures, manages, and enforces trademarks for clients with domestic and international portfolios.

David is called upon by Fortune 10 and emerging companies to provide 24/7 service, as well as knowledgeable and creative counseling. He is also a prolific publisher and speaker, with more than thirty-five speeches and articles to his name, in addition to overseeing the Social Media Practice Group's blog, the SoMeLawBrief.com.

As part of his practice, David:

- Evaluates product and packaging designs for trade dress and other intellectual property issues, including for footwear, apparel, food items, liqueur bottles, pet supplies, and electronic instruments.
- Conducts international and complex trademark clearance searches, preparing trademark applications worldwide, and prosecuting trademarks for established and emerging companies.
- Enforces clients' trademark and trade dress rights worldwide, through litigation, Trademark Trial and Appeal Board proceedings, and foreign legal proceedings.
- Enforces clients' intellectual property rights through domain name disputes.
- Protects brands in regard to smart phone applications, social networking websites, and blogs.
- Investigates and prosecutes online fraud, including spam e-mails and fraudulent gift card offer schemes.
- Drafts various intellectual property agreements.
- Counsels clients on trademark, copyright, domain name, website, and privacy law issues.

Recent Honors

- Received the 2013 International Law Office (ILO) and Lexology Client Choice award in the Intellectual Property: Designs and Trade Secrets category.
- Ranked among the top trademark lawyers in Texas in *World Trademark Review (WTR) 1000 - The World's Leading Trademark Professionals*, 2012-2013. According to WTR, his clients tout him as being "incredibly dedicated and always prepared to go the extra mile to assist" and acknowledged his work as head of the firm's Social Media Practice Group, where he has "a profound grasp of the most significant trends."
- Selected for inclusion in Texas Super Lawyers - Rising Stars Edition (2006-2012)
- The College of the State Bar of Texas

Recent Memberships

- International Trademark Association - Prior Subcommittee Chair; Current Member of Academic Committee
- CT Corsearch Advisory Board
- State Bar of Texas - Intellectual Property Section, Trademark, Copyright, and Diversity Task Force Committees
- Dallas Bar Association - Intellectual Property Section

Social Media Accounts and Ownership Rights

I. INTRODUCTION

To protect their assets, companies and former employees have sued one another to dispute social media accounts, raising interesting questions including:

- Who owns business-related social media accounts?
- Can a follower list constitute a trade secret?
- Can an employer access, and post to an account having a business purpose?

II. SOCIAL MEDIA USE

The immense popularity of social media has made it both an influential tool and a desirable platform for companies to leverage for many purposes, including marketing and retail engagement. Social media accounts supplement, and in some cases have dwarfed or entirely replaced, company websites.

A. Definition and History of Social Media

For the purpose of this article, Merriam-Webster defines social media rather succinctly:

forms of electronic communication (as Web sites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other contents (as videos).¹

Social media is often viewed as a relatively new phenomenon. Yet, the initial online social community arose in the late 1970s, when two computer hobbyists created a bulletin board system to inform friends about meetings, post announcements, and share other information.² The 1990s saw the rise of GeoCities and SixDegrees.com.³

At the turn of the century, social media truly took off. In 2002, Friendster launched and almost immediately grew to 3 million users.⁴ Myspace and LinkedIn launched in 2003, followed by Facebook in 2004 and Twitter in 2006.

The year 2012 was dubbed “the rise of the visual web,” as Pinterest, Tumblr, and Instagram each gained more than 10 million users that year.⁵

Other popular social media sites among U.S. residents include YouTube, Google Plus, eBay, Craigslist, and Flickr.

B. Social Media Marketing

One study in December 2012 noted that 67 percent of Internet users in the U.S. used social media.⁶ The amount of time spent on social media also is remarkable. Another study in December 2012 reported that more than 10 percent of time spent online, and 5 of every 6 minutes spent on a social media site, was spent on Facebook alone.⁷

Because potential customers are on social media, so are savvy businesses.

Most sizeable companies have their own Facebook, LinkedIn, YouTube, and/or Twitter accounts. Participating in social media allows companies to connect to, and interact directly with, current and prospective customers, obtain instantaneous feedback, and promote new products and services.

MASHABLE, Jan. 24, 2011, <http://mashable.com/2011/01/24/the-history-of-social-media-infographic/>.

⁴ Posting of Jolie O’Dell, MASHABLE, Jan. 24, 2011, <http://mashable.com/2011/01/24/the-history-of-social-media-infographic/>.

⁵ Andrew Lipsman et. al., U.S. DIGITAL FUTURE IN FOCUS 2013: KEY INSIGHTS FROM 2012 AND WHAT THEY MEAN FOR THE COMING YEAR 14 (2013), available at, http://www.comscore.com/Insights/Presentations_and_Whitepapers/2013/2013_US_Digital_Future_in_Focus.

⁶ Maeve Duggan and Joanna Brenner, *The Demographics of Social Media Users—2012*, PEW INTERNET & AMERICAN LIFE PROJECT 2 (Feb. 14, 2013), <http://pewinternet.org/Reports/2013/Social-media-users.aspx>.

⁷ Mike Shaw, *The State of Social Media: COMSCORE REPORT* (2012), available at <http://www.slideshare.net/karanbhujbal/the-state-of-social-media2012-comscore-report>; see also Lipsman et. al., note 5 above, at 13.

¹ MERRIAM-WEBSTER at <http://www.merriam-webster.com/dictionary/social%20media>.

² *The Brief History of Social Media*, <http://www.uncp.edu/home/acurtis/NewMedia/SocialMedia/SocialMediaHistory.html>.

³ Posting of Shea Bennett, TWITTER, Feb. 17, 2012, http://www.mediabistro.com/alltwitter/social-media-history_b18776; see also Posting of Jolie O’Dell,

As of 2012, 48 percent of all *Fortune Global 100* companies have Google Plus accounts, and 25 percent are on Pinterest.⁸

The amount of traffic to a company's social media site sometimes exceeds – and even far exceeds – the traffic to a company's standalone website. For example, www.skittles.com attracted 23,000 U.S. unique visitors, while www.facebook.com/skittles attracted almost fifteen times that number (320,000) in March 2012.⁹

Some businesses' social media accounts have followers in the millions. Facebook accounts for the Nike and Adidas brands boast more than 12 million fans apiece as of March 2013.

Retail and marketing activities have penetrated the social media experience. Companies use social media to advertise, either through traditional display advertisements or with brand pages. And Facebook and Twitter allow users to buy items through their platforms, either by clicking on a “Buy Ticket” button on a Facebook Event Page, or by tweeting a special hashtag on Twitter.¹⁰

In 2012, 1 in every 8 online ads was “socially enabled.” That is, those ads requested people to like or follow brands on social networking sites.¹¹

Businesses acknowledge that investments in social media marketing will only increase.¹² This is understandable as companies clearly perceive social media as a beneficial way to advertise their brands increase their web presence, enhance their relationships with customers and clients, and acquire information regarding customer preferences, among other things.

Research supports the hypothesis that social media advertising efforts pay off. A 2011 study found that the purchasing decisions of approximately 38

million people are influenced by social media.¹³ Additionally, 77 percent of business-to-consumer companies and 43 percent of business-to-business companies have reported acquiring customers from Facebook.¹⁴

For a plethora of reasons, therefore, the value of a company's social media assets can quickly and exponentially grow.

III. PROPERTY RIGHTS IN SOCIAL MEDIA ACCOUNTS AND FOLLOWERS

With high perceived, and actual, intangible value in accounts comes ownership disputes.

One type of conflict can arise when an employee who has been using or coordinating a social media account for the business departs the company.

In these situations, uncertainty may exist regarding who owns the rights not just to the account itself, but also to different aspects of the account including the account name, access, content, and the list of followers or other connections. For example, a company may be entitled to the account or user name, but does the departing employee own rights to the content, the list of account followers, and to exclusively use the account going forward based on his or her development efforts?

The employee's personal communications, in addition to promotion of their employer's business with the social media account, further complicates the issue in many cases.¹⁵

A social media account can be analogized to a domain name. Each could be viewed as a standalone type of intangible property, but actually may be better understood as a contract right with a third-party provider (a registrar in the case of a domain name; a social media network in the case of a social media account). Thinking about a social media account in

⁸ Sonya Strnad & Cynthia G. Burnside, *E-discovery in the Age of Social Media*, 2012 A.B.A. Litig. Sec. Annual conference, at 4 (also noting a previous study indicating that 71 percent of companies use Facebook, 59 percent use Twitter, and 33 percent use YouTube).

⁹ Lipsman et al., note 5 above.

¹⁰ Posting of KS Sandhya Iyer, NDTV GADGETS, Feb. 12, 2013, <http://gadgets.ndtv.com/social-networking/news/facebook-testing-buy-tickets-button-for-events-329810>; see also Posting of Bridget Carey, CNET, Feb.12, 2013, http://news.cnet.com/8301-33692_3-57569038-305/shop-on-twitter-with-a-hashtag/.

¹¹ Lipsman et. al, note 5 above, at 21.

¹² Posting, SALESFORCE MARKETING CLOUD, Oct. 4, 2011, <http://www.buddymedia.com/newsroom/2011/10/booz-company-and-buddy-media-research-highlights-capabilities-key-to-capturing-value-from-social-media/>.

¹³ *Social Media Statistics: By-the Numbers*, Banking.com, July 5, 2011, available at <http://www.banking2020.com/2011/07/05/social-media-statistics-by-the-numbers-july-2011/>.

¹⁴ Posting of Brian Honigman, HUFFPOST, Nov. 29, 2012, http://www.huffingtonpost.com/brian-honigman/100-fascinating-social-me_b_2185281.html.

¹⁵ Even further complicating the issue is the fact that some social media sites offer multiple types of accounts. For example, Facebook features both individual profile and business profile pages. Additionally, some individuals may have a personal account, but use that account occasionally for business purposes.

that way helps to make sense of why a social media account is not a single intellectual property right, but rather a bundle of information and rights.

A. Confidential Information and Trade Secrets

The following notable lawsuits involving company disputes with over social media account ownership address numerous issues, including theft of trade secrets and related claims.

1. Eagle v. Morgan

In *Eagle v. Morgan*, a case filed in the Eastern District of Pennsylvania, Linda Eagle, sued the company she co-founded in 1987.¹⁶

In 2008, while serving as the president of Edcomm, Inc., Eagle established a LinkedIn account for Edcomm to promote the company's banking education services, foster Eagle's reputation as a successful businesswoman, and build professional and personal relationships.¹⁷ Eagle sold the company in 2010, but initially remained employed as an Edcomm executive until Edcomm discharged her in June 2011.

Shortly after her termination, Eagle attempted to access the LinkedIn account but was unable to do so. Edcomm had changed the password and replaced Eagle's photo and name with those of Sandy Morgan, the interim CEO.¹⁸

According to Eagle, these actions redirected LinkedIn users who were searching for Eagle to a profile page that featured Morgan's name and photograph, but with all of Eagle's honors and awards, recommendations, and connections.

Eagle promptly sued Morgan, Edcomm, and several other defendants on July 1, 2011. Eagle's complaint set forth eleven causes of action stemming from the alleged misappropriation of the LinkedIn account.¹⁹ These claims included: alleged violations of two federal statutes, the Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. §1030, and the Lanham Act, 15 U.S.C. §1125, as well as state law claims for unauthorized use of name, invasion of privacy by misappropriation of identity, misappropriation of publicity, identity theft, conversion, tortious

interference with contract, civil conspiracy, and civil aiding and abetting.²⁰

Edcomm countersued for common law claims of misappropriation of an idea, unfair competition, and conversion.²¹ The court denied Eagle's motion to dismiss the counterclaims for misappropriation and unfair competition, finding that the LinkedIn connections had value to the company and that Edcomm sufficiently pled that its own employees, rather than Eagle, developed the LinkedIn account and maintained the connections gained through it.²²

Next, the judge granted summary judgment in favor of the defendants on Eagle's claims for violations of the CFAA and the Lanham Act. Eagle's state-law claims for unauthorized use of name, invasion of privacy, misappropriation of publicity, identity theft, conversion, tortious interference with contract, civil conspiracy and civil aiding and abetting survived defendants' motion, as the court opted to exercise supplemental jurisdiction over these claims.²³

The case proceeded to a bench trial on November 19, 2012, and on March 12, 2013, the court issued its decision.²⁴ The court found in favor of defendants on Eagle's identity theft, conversion, civil conspiracy, and civil aiding and abetting claims.²⁵ Regarding the conversion claim, the court explained that a LinkedIn account is simply a right of access to a web page and therefore constitutes intangible property that, under Pennsylvania law, cannot be the subject of a conversion claim.²⁶ With respect to the identity theft claim, the court found that Eagle failed to establish that Edcomm unlawfully possessed any of plaintiff's personal identifying information or that Edcomm had any unlawful purpose for possessing such information.²⁷ Similarly, in the instance of the civil conspiracy and aiding and abetting claims, the court determined that Eagle had not proven that any of the

²⁰ *Id.*

²¹ Edcomm also countersued Eagle for several claims relating to ownership of a laptop computer and an AT&T phone number. *See id.*, Answer and Counterclaims (Aug. 1, 2011).

²² The court dismissed the claim for conversion as it related to the LinkedIn account because Edcomm failed to adequately respond to plaintiff's arguments in her Motion for Judgment on the Pleadings with respect to that particular claim. *Id.*, slip op. at 21 (Dec. 22, 2011).

²³ *Id.*, 2012 U.S. Dist. LEXIS 143614 at *9.

²⁴ *Eagle*, No. 11-4303, slip op. (Mar. 12, 2013).

²⁵ *Id.* at 15-18, 20-21.

²⁶ *Id.* at 18.

²⁷ *Id.* at 15-17.

¹⁶ *Eagle v. Morgan*, No. 11-4303, 2012 U.S. Dist. LEXIS 143614 (E.D. Pa. Oct. 4, 2012).

¹⁷ *Id.* at *1-2.

¹⁸ *Id.* at *2.

¹⁹ Complaint, *Eagle*, No. 11-4303 (July 1, 2011).

individual defendants had the necessary malice or took actions that would sustain the claims.²⁸

Eagle prevailed, however, on her claims for unauthorized use of name, invasion of privacy, and misappropriation of publicity by establishing that Edcomm used Eagle's name (which had commercial value) for its own commercial benefit.

Eagle also established three of the four elements of her tortious interference claim, including the existence of a contractual relation with LinkedIn and defendant's intent to harm Eagle by interfering with the relation. Although Edcomm argued it had a privilege to enter Eagle's account under the company policy that Edcomm owned employee accounts, the court disagreed, noting that no such policy existed and that the LinkedIn User Agreement specified the individual user owned the account.²⁹

Ultimately, however, Eagle's tortious interference claim failed because, the court found, she did not establish the fourth element of this claim – compensatory damages – with any reasonable certainty. “Plaintiff failed to point to one contract, one client, one prospect, or one deal that could have been, but was not obtained during the period she did not have full access to her LinkedIn account.”³⁰ The court further explained that even if Eagle had established damages, she failed to provide a reasonably fair basis for calculating such damages and to connect any damages to Edcomm's conduct. Given these failures, the court declined to award Eagle any damages for any of her claims.³¹

2. PhoneDog, LLC v. Kravitz

Another case involving ownership and use of a social media account was filed 14 days after the filing of the *Eagle v. Morgan* case.

In *PhoneDog, LLC v. Kravitz*, a magistrate judge in the Northern District of California refused to dismiss a misappropriation of trade secrets claim based on an ex-employee's refusal to turn over a Twitter account.³²

PhoneDog is an interactive mobile news and reviews web resource, which reviews mobile products

and services. The company relies on social media technologies as part of its marketing strategy.³³

When PhoneDog hired Noah Kravitz as a product reviewer and video blogger in 2006, it assigned him the Twitter account @PhoneDog_Noah, and Kravitz used the account to provide information to customers and to promote PhoneDog's services, such as through product reviews.³⁴ The account grew quite popular, amassing more than 17,000 followers.³⁵

When Kravitz left PhoneDog in 2011, PhoneDog allegedly requested that he stop using the Twitter account.³⁶ Kravitz continued using the account, although he changed the Twitter handle to @noahkravitz.³⁷

On July 15, 2011, PhoneDog sued Kravitz in the Northern District of California. The company claimed that Kravitz's continued use and holding of the account—though it no longer bore a PhoneDog name—amounted to theft of trade secrets, interfered with the company's business dealings, and discredited the company.³⁸ PhoneDog alleged that the account details, and specifically its follower list and password, are tantamount to a traditional customer list.³⁹

Kravitz barked back at PhoneDog by countering. Kravitz argued that the follower list was not a trade secret since “the followers of the Account ... have been publicly available for all to see at all times.”⁴⁰ He further contended that the follower list and password (which he alone knew) “do not derive any actual or potential independent economic value under [California's Uniform Trade Secrets Act] because they do not provide any substantial business advantage.”⁴¹

The court held that PhoneDog described the subject matter of the trade secret with sufficient particularity to require the claim to proceed to discovery.⁴² The court noted that it could not decide whether the account followers and password

²⁸ *Id.* at 20-22.

²⁹ Using a similar rationale, the court entered judgment in favor of Plaintiff on Edcomm's counterclaims for misappropriation of an idea and unfair competition. *Id.* at 28-31.

³⁰ *Id.* at 24.

³¹ *Id.* at 24-26.

³² *PhoneDog, LLC v. Kravitz*, 2011 U.S. Dist. LEXIS 129229 (N.D. Cal. Nov. 8, 2011).

³³ *Id.* at *2.

³⁴ *Id.* at *2-3.

³⁵ *Id.* at *3.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at *3, 11.

⁴⁰ *Id.* at *15-16.

⁴¹ *Id.* California's Uniform Trade Secrets Act, which, among other things, defines a trade secret in part as information that “derives independent economic value, actual or potential, from not being generally known to the public.” The UTSA requires that a substantial business advantage exist before misappropriation can be found. Cal. Civ. Code § 3426.1(d).

⁴² *Id.* at *19-20.

constituted trade secrets on a motion to dismiss, because it required evidence outside the record.⁴³

In a second opinion, the court also allowed PhoneDog's claims for negligent and intentional interference with prospective economic advantage to proceed.⁴⁴ Although the court had previously dismissed these claims for failure to sufficiently allege an economic relationship that was disrupted by Kravitz's conduct, it gave PhoneDog leave to amend its complaint. The court found the relevant allegations in the amended complaint—that Kravitz's interference with the Twitter account decreased traffic to PhoneDog's web site and therefore disrupted PhoneDog's relationships with companies that advertised on the web site—was sufficient to sustain these claims.⁴⁵

This case settled in late 2012, interestingly, with Kravitz retaining the disputed account.⁴⁶ For those seeking greater clarity, the court unfortunately will not have a chance to further opine on and resolve the issues at stake.

3. *Christou v. Beatport, LLC*

A third case involving ownership of a social media account remains pending in Colorado. The case, *Christou v. Beatport, LLC*,⁴⁷ involves a promoter who used a Myspace page to advertise various Denver nightclubs.⁴⁸

When the promoter ceased representing those nightclubs, it retained the Myspace account and used that account to promote a new club it founded that competed directly with plaintiffs' clubs.⁴⁹

In ruling on a motion to dismiss the complaint for failure to state a claim, the court allowed a theft of trade secrets claim as to the Myspace page to proceed.⁵⁰

The court applied a multi-factor test to determine that a list of Myspace friends that is viewable by the public could plausibly constitute a trade secret, noting that “[t]he trade secret is not merely a list of names but their email and contact information as well as the ability to notify them and promote directly to them via their MySpace accounts.”⁵¹

The court later denied defendants' motion for summary judgment, on the theft of trade secrets claim, on the same grounds as the motion to dismiss.⁵²

As of March 30, 2013, it appears some claims may be headed for settlement. The plaintiffs filed a motion to dismiss all claims against defendant Beatport, which motion is pending court approval.⁵³ Additionally, some of the plaintiffs have filed a partially contested motion to voluntarily dismiss the claims against the other defendants.⁵⁴

The remaining claims against these defendants are pending trial, scheduled for June 24, 2013.

4. *Sasqua Group, Inc. v. Courtney*

In this case, a company maintained that a former employee's LinkedIn and Facebook relationships with clients comprised trade secrets belonging to the company.

The court disagreed, taking a more dismissive view on the issue than did the *Christou* court. In *Sasqua Group*, the court held that the contact information and professional details were hardly protected secrets in an age where “everyone . . . puts it out there for the world to see because people want to be connected now.”⁵⁵

The court reasoned further that the vastness of the specific industry that Sasqua targeted – the financial services industry – made it even more likely key information would be available on line. In this regard,

⁴³ *Id.* at *20.

⁴⁴ *PhoneDog*, No. 3:11-cv-03474-MEJ, slip op. at 2-3 (Jan. 30, 2012).

⁴⁵ *Id.*

⁴⁶ See, e.g., Chris Taylor, *Writer Sued for his Twitter Followers Settles Case*, MASHABLE, Dec. 3, 2012, available at <http://mashable.com/2012/12/03/noah-kravitz-lawsuit-twitter/>.

⁴⁷ No. 10-cv-02912-RBJ-KMT, slip op. (D. Colo. Mar. 14, 2012).

⁴⁸ Complaint at 8, *Christou*, No. 10-cv-02912-RBJ-KMT (D. Colo. Dec. 1, 2010).

⁴⁹ Complaint, *supra* note 40, at 33-34.

⁵⁰ *Id.*, slip op. at 23-26 (Mar. 14, 2012). The court's decision also addressed other claims unrelated to the social media

account, such as antitrust and conspiracy claims. Those claims are not discussed here.

⁵¹ *Christou*, No. 10-cv-02912-RBJ-KMT, slip op. at 24, 26.

⁵² *Id.*, slip op. at 21 (Jan. 23, 2013)].

⁵³ *Id.*, Unopposed Motion to Dismiss Party Beatport, LLC (Mar. 26, 2013).

⁵⁴ *Id.*, Motion to Dismiss Claims by Certain Plaintiffs against Bradley Roulier and BMJ&J, LLC (Mar. 26, 2013); Response to Motion to Dismiss Claims by Certain Plaintiffs against Bradley Roulier and BMJ&J, LLC (Mar. 29, 2013) (arguing defendants are entitled to an award of attorney fees and costs as a prevailing party).

⁵⁵ *Sasqua Group, Inc. v. Courtney*, No. 2:10-cv-00528-ADS-ETB, slip op. at 25 (E.D.N.Y. Aug. 2, 2010) (quoting defendant's trial testimony).

the court distinguished cases involving highly technical industries with just a few key employees, such as specialized engineers,⁵⁶ with businesses requiring significant relationship development before any actual business transaction could occur.⁵⁷

The court admitted that the information in Sasqua's database, which included client needs, preferences, practices and strategies, and any relationships with decision-makers employed by those clients, may have been a trade secret at the beginning of Sasqua's existence, when "greater time, energy and resources may have been necessary to acquire the level of detailed information to build and retain the business relationships at issue here."⁵⁸ In 2010, however, the "exponential proliferation of information" available and easily accessible through the Internet, search engines, and social media, provided a very different context for the analysis.⁵⁹

5. **Maremont v. Susan Fredman Design Group, Ltd.**

The case of *Maremont v. Susan Fredman Design Group, Ltd.*,⁶⁰ addresses whether a company owns access rights to social media accounts created for an employee's personal gain, yet in conjunction with a company campaign.

As part of her company's social media marketing efforts, Susan Maremont, director of marketing for a design company, created a Facebook account using her company's computer and at the office. She also created a second Facebook account and a Twitter accounts, both which the company acknowledged were created for her personal gain.

Subsequently, while Maremont was in the hospital on work leave, her employer accessed her Facebook⁶¹ and Twitter accounts to promote the company's business. Her employer clearly stated in the posts that these were "guest" posts to fill in for Maremont while she was away from work.

⁵⁶ *North Atlantic Instruments v. Haber*, 188 F.3d 38 (2d Cir. 1999).

⁵⁷ *Freedom Calls Foundation v. Bukstel*, No. 05CV5460, 2006 WL 845509 (E.D.N.Y. Mar. 3, 2006).

⁵⁸ *Sasqua*, No. 2:10-cv-00528-ADS-ETB, slip op. at 39 (Aug. 2, 2010).

⁵⁹ *Id.*

⁶⁰ No. 10 C 7811 (N.D. Ill. Dec. 7, 2011).

⁶¹ It is unclear whether the Facebook account accessed by the employer is Maremont's personal or "work-related" account.

Ultimately, she was none too pleased. She allegedly asked her employer to stop updating the accounts and, when those efforts were unsuccessful, she changed the passwords to the accounts.

After leaving the company, she sued. Her claims of false association and false endorsement claim under the Lanham Act 1125(a) and violation of the Stored Communications Act survived summary judgment.

The judge dismissed several of her other claims. The court dismissed her intrusion upon seclusion claim, finding no evidence indicating the matters plaintiff shared on Facebook and Twitter were private, but rather were meant to be shared with a public audience.⁶²

The court also ruled in favor of defendants on the Illinois Right of Publicity Act claim (which Act superseded the common law image misappropriation claim), finding that the plaintiff could not prove the misappropriation of identity element, because, even though the defendants used plaintiff's Facebook and Twitter accounts, they never attempted to pass themselves off as her.

6. **Ardis Health, LLC v. Nankivell**

The plaintiffs in this case, a group of closely affiliated online marketing companies, hired Ashleigh Nankivell to develop videos, websites, blogs and social media pages touting the companies' products. The employment contract contained work for hire provisions, and stipulated that Nankivell would return all confidential information to her employer upon termination.

Nankivell was fired, and the marketing companies sought injunctive relief requiring Nankivell to return the passwords and restore the companies' access to the accounts that she had managed, including social media accounts and blogs.⁶³ The court granted the requested injunction with respect to these accounts, noting that the plaintiffs depended heavily on their online presence to advertise, including by updating social media profiles and pages in reaction to current trends.⁶⁴ The court reasoned that the inability to access these

⁶² The author notes, however, that although the posts on those accounts were publicly made, there could certainly be private information within those social media accounts – e.g., certain friends in her friend list, private emails, photographs and videos marked as private, and so on – that the defendants might have accessed.

⁶³ *Ardis Health, LLC v. Nankivell*, No. 11 Civ. 5013 (NRB), slip op. at 6 (S.D.N.Y. Oct. 19, 2011).

⁶⁴ *Id.*

accounts was unquestionably detrimental to plaintiffs' reputation and competitive ability.⁶⁵

The parties subsequently agreed to a voluntary dismissal of the action without prejudice.⁶⁶

7. Takeaways from Ownership Cases Involving Employee Disputes

Several preliminary lessons can be gleaned from the cases discussed above.

First, an account itself could be deemed to most rightfully belong to either a business or the blogging employee, depending on the facts of the case. Potentially relevant factors include:

- Who created, or directed the creation of, the account;
- The type of account;
- Who generated the content;
- Who had access to the login and password information;
- The industry at issue;
- The subject matter of communications sent from the account;
- The terms of use or user agreement of the social media platform; and
- The content of any employment policies or agreements relevant to ownership of these accounts.

In *PhoneDog*, for instance, Kravitz claimed to have maintained the login and password information for the Twitter account, generated the content, and used the account for both professional and personal communications.⁶⁷ These facts that favored the former employee may have led to the settlement that left the account in his hands.

Second, whether a social media account follower list can constitute a trade secret also appears to be a matter of debate among courts. The *Christou* court indicated that a social media account follower list may, indeed, constitute a trade secret, provided the list is intertwined with other information, such as email and contact details, as well as the ability to notify them and promote directly to them via their social media accounts. In contrast, the *Sasqua Group* court doubted whether contact information and professional details could be subject to trade secret protection.

⁶⁵ *Id.*

⁶⁶ *Id.*, Stipulation of Voluntary Dismissal Without Prejudice (Mar. 7, 2013).

⁶⁷ Answer at 15, *PhoneDog*, No. 3:11-cv-03474.

Third, and as *Maremont* shows, even where a social media account appears to be a personal account, an employer could own rights to access and post to the account under certain circumstances.⁶⁸

At the very least, and as will be described below, where a departing employee makes off with a social media account, the username or handle associated with the account (if bearing the company's brand and not agreed upon otherwise by the company) is most likely rightfully owned by the company.

B. Trademarks, Copyrights, and Right of Publicity

This section will explore a few of the other intellectual property rights associated with social media accounts.

1. Trademarks as Usernames

First, as background on trademarks, a trademark consists of a word, symbol, device, or combination thereof used with a product or service in commerce.⁶⁹ Trademarks identify the source of goods or services and distinguish them from other goods and services in the marketplace.⁷⁰ Reserving and using a social media username that features a trademark can also identify the social media account with the trademark owner.

Trademark infringement constitutes use of the same or a similar trademark in a way that is likely to cause confusion as to the source of products or services, or as to an affiliation with the trademark owner.⁷¹ Where the trademark is well-known or famous, the owner might have a dilution claim even if likelihood of confusion (and thus infringement) cannot be proven.⁷² Dilution involves a potential weakening or tarnishing of a brand.⁷³

On several leading social media sites, a company may select a username or account name that consists of or includes a company's trademark. A username is the

⁶⁸ As this paper has prepared for the State Bar of Texas, a brief reference to Texas is in order. Note that none of these three cases was filed or in Texas or in the Fifth Circuit. With respect to a case where an employer impedes upon the employee's social media account and certain other facts are in play, an employee might have a valid claim for common law misappropriation under Texas state law.

⁶⁹ 15 U.S.C. § 1125(a)(1).

⁷⁰ *Id.*

⁷¹ 15 U.S.C. § 1125.

⁷² *Id.* at § 1125(c).

⁷³ *Id.* at § 1125(c)(1).

social media account nickname or handle, generally corresponding to a post-domain path—*e.g.*, in [Twitter.com/brand](https://twitter.com/brand), “brand” (or @brand) functions as the username. An account name may be identical to or different from the username. The account name typically is displayed as a prominent header on the account page. The username and account name are often but not always the same.

A company may decide to obtain as a username a phrase incorporating a trademark and additional wording, depending on the purposes for which a company may use the account. For example, a company that wishes to use a Twitter account as an interface for customer complaints and comments may register the username @brandcustomerservice. A business may also benefit from usernames that target specific geographic regions, *e.g.*, @brandNY, or highlight specific programs the company wishes to promote, *e.g.*, @brandcharity.

Because a username that features a trademark often creates an association between the social media account page and the trademark owner in the consumer’s mind, companies sometimes find themselves victims of username squatting (also known as namesquatting) by a third party seeking to unfairly capitalize on the goodwill associated with the brand. Namesquatting involves a person or company that obtains a username featuring the true owner’s trademark, with the intent to mislead the public as to the ownership of the account. Depending on the username and the use made of the account, namesquatting can constitute a form of trademark infringement or dilution, as well as violate the terms of service of the social media site being used.

Thus far, under precedent and statutory constraints, social media namesquatting is typically not actionable as cybersquatting under the U.S. AntiCybersquatting Protection Act, 15 U.S.C. § 1125(d) (the “ACPA”). Cybersquatting laws generally protect against unauthorized use of trademarks in a domain name, and courts addressing cybersquatting claims have yet to recognize that a post-domain path of a URL (*e.g.*, the brand portion in domain.com/brand) may constitute a domain name. Rather, courts do not view such portions of domain names to be source-identifying.⁷⁴

⁷⁴ See, *e.g.*, *Interactive Prods. Corp. v. a2z Mobile Office Solutions, Inc.*, 326 F.3d 687, 696 (6th Cir. 2003) (the post-domain path of a URL “merely shows how the website’s data is organized within the host computer’s files” and does not suggest an association between page and mark holder;

Nor is a social media username actionable, as are generic top level domain names (*e.g.*, dot coms), under the Uniform Domain-Name Dispute Resolution Policy, which provides brand owners with an administrative remedy to recover domain names incorporating their trademarks. For one thing, social media sites are not parties to the UDRP, which is a consensual policy that requires agreement by registries (and, in turn, the registrars of those registries). Moreover, at least one UDRP panelist has also acknowledged in a decision opinion that the UDRP does not apply to post-domain paths.⁷⁵

Very few username lawsuits have been litigated to a decision in the U.S. The cases that have been filed generally have promptly settled, while at least one remains pending.

In one case, Tony LaRussa, the well-known manager of the St. Louis Cardinals baseball team, sued Twitter and several John Does in 2009 over the Twitter username Tony LaRussa.⁷⁶ An unknown party had registered the username and used it to post off-color comments about current and former Cardinals players. The Twitter page featured the statements “Tony LaRussa is using Twitter” and “Join today to start receiving Tony LaRussa’s updates,” and a photograph of LaRussa. LaRussa’s claims included trademark infringement, cybersquatting, and violation of his right of publicity. The case settled six weeks after filing, with the username being turned over to LaRussa.

Another case filed against Twitter was resolved even more quickly. Oneok, an energy services company that owns a registered trademark for ONEOK, sued Twitter (and only Twitter) for doling out the username ONEOK to another party, which posted information about Oneok. Claims included direct and contributory trademark infringement. The complaint was dismissed almost immediately, and Oneok received control of the username.⁷⁷

use of the plaintiff’s trademark in a post-domain path was not even deemed to be trademark use).

⁷⁵ *Romantic Tours, Inc. v. Whois Privacy Protection Service, Inc.*, No. FA1003001316557 (NAF Apr. 28, 2010), available at <http://domains.adrforum.com/domains/decisions/1316557.htm>.

⁷⁶ *LaRussa v. Twitter*, No. CGC-09-488101 (Cal. Dep’t Super. Ct. May 6, 2009) (removed to N.D. Cal. Sep. 28, 2009).

⁷⁷ *ONEOK, Inc. v. Twitter, Inc.*, No. 4:09-CV-00597-TCK-TLW (N.D. Okla. Sep. 15, 2009).

A lawsuit was filed over a Facebook username.⁷⁸ In this case, in March of 2010, German company Merck KGaA had allegedly contracted with Facebook for exclusive use of the @Merck username – that is, www.facebook.com/merck. Yet, in October of 2011, Merck KGaA discovered that its competitor, U.S.-based Merck & Co., was using the page.

On November 21, 2011, Merck KGaA filed a Motion to Compel Disclosure Prior to Instituting Action against Facebook, by which Merck KGaA sought to compel Facebook to explain how it permitted its page to be turned over to Merck & Co.

On March 23, 2012, the court denied Merck KGaA's motion, finding, among other things, that the company had failed to establish a meritorious claim with sufficient particularity.⁷⁹ The court further explained that Facebook's Statement of Rights and Responsibilities broadly provides that Facebook may reclaim usernames, and Merck KGaA had otherwise failed to demonstrate how reclamation of a username gives rise to a cause of action.⁸⁰ Judgment was thus entered against Merck KGaA on April 18, 2012.

Facebook apologized in the meantime, blaming an administrative error.⁸¹ Facebook made the URL in question unavailable to any party until the two companies agree which one will use it.⁸² As of March 30, 2013, the @Merck username still does not appear to be assigned to either Merck entity; it redirects to Facebook's home page.⁸³

Although it will not be described in detail in this paper, trademark misuse on social media of course can exist even where the mark in question is not incorporated into the username.

For instance, a trademark may be used without authorization in the account name or logo. This can nonetheless cause concerns of impersonation,

infringement, or dilution by blurring or tarnishment of the brand.

2. Copyrighted Material in Social Media Accounts

A company may post photographs of one of its products staged in a variety of settings or may share one of its new advertisements through a video posted on its social media site. The ability to share such content, however, also raises the possibility of unauthorized posting of copyrighted content owned by a company or person other than the social media account holder. Additionally, as mentioned above in § II.A., visual social networks have skyrocketed in popularity, adding fuel to the fire.

A copyright protects the original way an idea is expressed, although not the idea itself.⁸⁴ Examples of copyrighted works include photographs, songs, drawings, videos, and articles.⁸⁵ Copyright law provides owners of copyrighted material with specific exclusive rights (subject to certain exceptions), including the rights to reproduce the material, prepare derivative works based upon the material, and publicly distribute, perform, and display the material.⁸⁶ This protection for creative works applies in the social media context, as well.

Copyright infringement occurs when someone violates the exclusive rights of a copyright owner by reproducing, making a derivative work of, distributing, performing, or displaying the owner's work without authorization.⁸⁷ Copyright owners may find their works posted or shared by others through social media accounts. Once shared with the public, the content may be further disseminated by Internet users. This viral spread of content is particularly troublesome where the content is not only copyrighted, but also contains sensitive, proprietary, or confidential information.

To describe one of the more popular visual social networks in further detail, let us take a closer look at Pinterest. The platform allows each user to "pin" images, including ones that may be "discovered" on the Internet, to the user's own pinboards. Other users can view the pinned images, click on them to be redirected to the original source where the content was found, and share those images with others through a

⁷⁸ *In re Matter of the Application of Merck KGaA to Compel Disclosure Prior to Instituting Action by Facebook, Inc.*, No. 11113215 (N.Y. Sup. Ct. Nov. 21, 2011).

⁷⁹ *In re Matter of the Application of Merck KGaA*, No. 11113215 (N.Y. Sup. Ct. Mar. 23, 2012).

⁸⁰ *Id.*

⁸¹ Jonathan Stempel, *Facebook apologizes for Merck homepage mix-up*, THOMPSON REUTERS, <http://www.reuters.com/assets/print?aid=USTRE7AR24K20111128> (last visited March 30, 2013).

⁸² *Id.*

⁸³ Merck & Co. now uses the Facebook user name @MerckBeWell, while Merck KGaA maintains a community Facebook page at <http://www.facebook.com/pages/Merck/115239148488920>.

⁸⁴ 17 U.S.C. § 102.

⁸⁵ *Id.*

⁸⁶ 17 U.S.C. § 106.

⁸⁷ 17 U.S.C. § 501(a).

process known as “repinning.” Much of the content that users pin to their pinboards consists of copyright-protected material owned by third parties. While some of the owners may consent to the use of their materials in this manner, certain usage is unauthorized and could amount to copyright infringement.

3. Fair Use and Other Defenses to Trademark and Copyright Claims

Not all unauthorized use of another’s trademarks or copyrighted content is unlawful. Some use may fit within the bounds of certain defenses. Although an extensive analysis of fair use falls outside the scope of this article on ownership issues, a brief explanation of fair use follows.

With respect to trademark infringement or dilution, descriptive fair use or nominative fair use will not result in liability.⁸⁸ The defense of descriptive fair use protects against liability where someone uses a word or phrase to comparatively describe his or her own products or services, even if that word or phrase serves as a trademark for another party. Nominative fair use, on the other hand, allows limited use (e.g., not in a prominent or frequent way) of a trademark to refer to the trademark owner’s goods or services, for comparative advertising, commenting on, criticizing, or parodying the trademark owner.⁸⁹

In the copyright context, the application of the fair use defense involves an analysis of four statutory factors:

- the purpose and nature of the use, including whether such use is of a commercial nature or for non-profit educational purposes;
- the nature of the copyrighted work;
- the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- the effect of the use upon the potential market for or value of the copyrighted work.⁹⁰

With both trademark and copyright usage, the fair use analysis is highly fact specific. In both contexts, however, certain characteristics of the use in question may increase the likelihood of a successful fair use defense.

For example, where the alleged infringer uses no more of the trademark or the copyrighted material than is necessary for his or her purposes, a defense of fair use is more likely to be successful. Use of a few sentences excerpted from a copyrighted work, therefore, is likely to better support a fair use defense than verbatim copying of key content from a work.⁹¹ Additionally, use of a trademark-protected phrase is more likely to be deemed fair use than use of another’s logo. Moreover, where the use in question is strictly noncommercial, a court (or social media platform) also is more likely to favor a fair use defense.⁹²

Examples of brand or copyright usage in social media, while perhaps undesired, are not necessarily unlawful include:

- Comparative use provided that the user is not overusing the name, (such as via a logo or very prominent font) and is using it to truthfully discuss the other company;
- Critical speech that uses another’s trademark – e.g., a social media account called “*Brand Sucks*” that makes it clear that the account holder is unaffiliated with (and critical of) the company;
- News, factual, or opinionated commentary about a company;
- Clear parody; and
- Linking to or bookmarking copyrighted content.

4. Right of Publicity

Another category of unlawful appropriation of intangible property involves the right of publicity. This is the exclusive right of an individual to control his or her identity, including the elements of likeness, name, and image.⁹³

Violations of this right may give rise to claims under state laws, including laws governing privacy and unfair competition, or under the federal Lanham Act, such as for trademark infringement or false designation of origin.⁹⁴

⁸⁸ 15 U.S.C. § 1125(c)(3)

⁸⁹ *Id.*

⁹⁰ 17 U.S.C. § 107; *see also Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 576-77 (1994).

⁹¹ *See Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985).

⁹² *See id.* at 562. *But see Campbell*, 510 U.S. at 584-85 (noting that commercial use does not automatically disqualify a fair use defense; rather, it is simply one consideration of the defense).

⁹³ *See, e.g.,* RESTATEMENT (SECOND) OF TORTS § 652(c).

⁹⁴ *See, e.g., Bogart, LLC v. Burberry Group PLC*, No. 12-4491 (C.D. Cal. 2012) (lawsuit over Burberry’s use in social

In the social media context, a claim for a violation of right of publicity might arise, for example, where a social media account owner uses a photograph of a celebrity in a social media marketing campaign⁹⁵ or as a Facebook account profile picture, or where an individual registers a celebrity's name as a Twitter username.⁹⁶

A right of publicity case that garnered significant attention is *Fraley v. Facebook, Inc.*, a class action suit in the Northern District of California.⁹⁷ Plaintiffs alleged that Facebook used their names and images without authorization, displaying them alongside "Sponsored Stories" advertisements visible to the plaintiffs' Facebook friends.⁹⁸ The manner in which Facebook displayed the plaintiffs' names and images allegedly gave the impression that plaintiffs were endorsing the products and services advertised in the Sponsored Stories. The plaintiffs claimed that Facebook's conduct violated, among other things, their rights of publicity under California Civil Code §3344, and deprived them of compensation for the economic value of their personal endorsements—which endorsements, according to Facebook, significantly increased the value of advertisements.⁹⁹

In a decision on Facebook's motion to dismiss the complaint, the court allowed plaintiffs' right of publicity claim to proceed, finding that this alleged deprivation was a sufficient injury to support the plaintiffs' standing, and that the plaintiffs' allegations adequately supported the elements of the right of publicity claim.¹⁰⁰ Subsequently, the parties reached a tentative settlement of the class action, which received preliminary approval from the court on December 3, 2012.¹⁰¹

media of a photograph of Humphrey Bogart wearing a Burberry trench coat, involving claims of misappropriation of right of publicity, common law unfair competition, and federal trademark infringement).

⁹⁵ See *id.*

⁹⁶ See *La Russa v. Twitter Inc.*, No. 3:09-cv-02503-EMC (N.D. Cal. 2009) (lawsuit by former St. Louis Cardinals' manager Tony La Russa involving an impersonating Twitter account set up in his name and featuring his photograph).

⁹⁷ No. 3:11-CV-01726-RS (N.D. Cal. filed Apr. 8, 2011).

⁹⁸ Second Amended Complaint at 8-9, *Fraley*, No. 3:11-CV-01726-RS (N.D. Cal. June 6, 2011).

⁹⁹ *Id.* at 12, 22-23.

¹⁰⁰ *Fraley*, 830 F. Supp. 2d 785, 799-800 (N.D. Cal. Dec. 16, 2011).

¹⁰¹ Preliminary Approval of Class Settlement and Provisional Class Certification Order, *Fraley*, No. 3:11-CV-01726-RS (N.D. Cal. Dec. 3, 2012). The matter is set for a Fairness Hearing on June 28, 2013.

In some instances, the right of publicity extends beyond the lifetime of the person whose identity is misappropriated. For example, a beneficiary of Albert Einstein's will claimed that a General Motors' ad featuring Einstein's likeness violated the right of publicity passed down through Einstein's estate.¹⁰² In an October 15, 2012 decision, the court opined that the applicable state law limited a postmortem right of publicity to fifty years postmortem.¹⁰³ The court, refusing to apply the longer time limit to copyright protection, reasoned in part that it would be unwise to strengthen the right of publicity in the face of newer technology like social media.¹⁰⁴

IV. RECOMMENDATIONS

A company's social media assets are typically only going to increase in value and, accordingly, companies are going to fight to protect them. A company seeking to assert control over a social media page or account should probably do so promptly, controlling the log-in information, passwords, and nature of social media activities to the greatest extent possible. The ownership of these assets and their proprietary nature should be addressed in carefully crafted employment agreements, social media policies, or other agreements.

Additionally, companies should consider making any employees who use any official social media account aware in writing that they are doing so on behalf of the company, and in the event they part ways with the company, they will no longer have any rights to access the accounts.

Companies should also evaluate whether to establish and enforce user name, account name, and logo usage rules. These can be addressed through a clear, written policy—and, better still for an employer, a contract with or written acknowledgement of understanding from the employee—governing ownership of social media accounts and setting forth procedures for returning control of the account to the company when an employee leaves.

Preferably, this sort of policy this would be distributed to and signed by the employee while he or she is still employed. Alternately, it can be addressed during an exit interview.

¹⁰² *Hebrew Univ. v. General Motors LLC*, No. 2:10-cv-03790-AHM-JC (C.D. Cal. Oct. 15, 2012).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

A company hoping to protect its social media followers also must take care to protect the secrecy of its customer lists through technical and other strategic means, so that the list potentially could become – and remain – a trade secret.

When an intellectual property rights holder encounters an unlawful use of its intangible property on a social media site, it has available options other than litigation for addressing the problematic conduct. A cease-and-desist letter directed to the infringer can be effective under some circumstances. Under others, a complaint sent to the social media site itself, seeking deactivation or transfer of the account or takedown of the infringing content, is appropriate. Most major sites have automated forms that can be used to address trademark, copyright, and impersonation issues.

While policing a trademark from unauthorized use is necessary to maintain its strength, polite communications and creative settlements with third parties also can be effective and avoid unnecessarily alienating brand supporters.

The company may be able to use some initially unwanted uses to its own advantage by, for example, offering a license to those users to continue using the brand and touting its benefits.

In cases of copyright infringement, for example, complaints follow a standard procedure made available by the Digital Millennium Copyright Act (the DMCA).¹⁰⁵ The DMCA establishes substantive and procedural requirements for copyright owners, online service providers, and alleged infringers with respect to certain online use of copyrighted material.¹⁰⁶ Under these requirements, social media sites have legal motivation to comply with the complaints, as the DCMA provides a “safe harbor” for online services providers who take certain steps, including acting expeditiously on a notice of infringement.¹⁰⁷ These sites, therefore, often respond promptly to a copyright infringement complaint. Although the DMCA procedures and protections do not apply in cases of

trademark infringement or impersonation, many sites also will promptly address these types of complaints as well.

When drafting a takedown request, whether using a social media site’s form or preparing a more targeted letter, it is advisable to consult the social media site’s terms of service and point out how the wrongful conduct also violates the site’s terms. Unless a rights holder is willing to sue in court, a social media site’s own interpretation of the law, and willingness to act on a complaint, will often govern what is ultimately permitted. A site may be more likely to comply with a takedown request that involving an account holder who has violated the platform’s terms of use.

¹⁰⁵ 17 U.S.C. § 512.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* Other laws also provide certain safe harbors for online service providers. For example, the Communications Decency Act (“CDA”) provides protections to online service providers from claims arising from information or content posted by a third party, such as defamation. 47 U.S.C. § 230. The CDA expressly exempts intellectual property claims from the scope of its immunity, however. *Id.* § 230(e)(2). This exemption may extend to state law claims, as well. See *Doe v. Friendfinder Network*, 540 F. Supp. 2d 288 (D.N.H. 2008).