

BUSINESS DISPUTES OVER SOCIAL MEDIA ACCOUNTS: LEGAL RIGHTS, JUDICIAL RATIONALES, AND THE RESULTANT BUSINESS RISKS

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This Article examines the risk exposure of business organizations involved in disputes over rights in social media accounts. The complexity of both the legal rights asserted and the judicial rationales used to adjudicate these rights triggers unique risks for business organizations. Increasingly, business organizations rely on social media outreach to perform core business operations such as advertising, marketing, marketing intelligence, and sales. These uses engender litigation and create judicial precedent in which courts struggle to define and delineate the legal rights and remedies applicable to these disputes. There are unresolved legal issues resulting from conflicting analytical frameworks advocated by litigants and used by courts to adjudicate these disputes. Operating in this complicated legal environment poses unique risks for business organizations. This Article analyzes those risks and proposes risk mitigation strategies.

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I. INTRODUCTION

As individual social media engagement grows each year, business organizations increasingly rely on social media to perform core business functions, such as advertising, marketing, and sales.¹ This trend presents emerging business risks triggered by disputes over control of business social media accounts and a complex and confusing legal framework used to adjudicate these disputes. As business organizations expand their social media presence, their risk exposure arising from these legal issues expands.²

The number of individuals using social media represents a substantial percentage of all internet users and a significant portion of the adult population in the United States. A 2016 Pew Research Center study reports the significant social media engagement of individuals in the United States on at least one, and often multiple, social media sites:

- 79% of internet users use Facebook, which represents 68% of all U.S. adults,³
- 32% of internet users use Instagram, which represents 28% of all U.S. adults,⁴

¹ See, e.g., Shea Bennett, *88% of Brands Will Use Social Media Marketing in 2014 [Study]*, ADWEEK (Nov. 14, 2013), <http://www.adweek.com/digital/smm-2014/> [perma.cc/9HC8-QWBP]; Facebook, *Twitter Remain Top Social Networks Used by US Companies*, EMARKETER (Dec. 2, 2015), <https://www.emarketer.com/Article/Facebook-Twitter-Remain-Top-Social-Networks-Used-by-US-Companies/1013290> [perma.cc/834W-FSQV].

² For a discussion of the role of legal compliance in the strategic management of a firm's resources, see generally Constance E. Bagley, *What's Law Got to Do With It?: Integrating Law and Strategy*, 47 AM. BUS. L.J. 587 (2010).

³ Shannon Greenwood et al., *Social Media Update 2016: Facebook Usage and Engagement Is on the Rise, While Adoption of Other Platforms Holds Steady*, PEW RES. CTR. (Nov. 11, 2016), <http://www.pewinternet.org/2016/11/11/social-media-update-2016/> [perma.cc/SP8D-JLW9].

⁴ *Id.*

- 24% of internet users use Twitter, which represents 21% of all U.S. adults,⁵
- 29% of internet users use LinkedIn, which represents 25% of all U.S. adults,⁶ and
- 31% of internet users are on Pinterest, which represents 26% of all U.S. adults.⁷

The study further found that fifty-six percent of adults who use the internet use more than one of these five social media sites.⁸ While the demographics of social media users vary by age, gender, education level, and income,⁹ Facebook's global footprint dominates the market in most countries around the world.¹⁰ Facebook in 2017 boasted two billion monthly users globally, a seventeen percent increase from the previous year.¹¹

Business organizations market to this growing population of social media users through social media outreach with a reported eighty-eight percent of brands in the United States with one hundred or more employees engaging in social media marketing.¹² Business engagement on social media sites is driven by the multivalent impact such outreach has on a business organization's core operations, as its marketing strategies, advertising, sales, and marketing intelligence capabilities are directly affected by social media engagement.¹³ A 2010 McKinsey & Co. study demonstrated

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Facebook Remains the Largest Social Network in Most Major Markets*, EMARKETER (Apr. 8, 2016), <https://www.emarketer.com/Article/Facebook-Remains-Largest-Social-Network-Most-Major-Markets/1013798> [perma.cc/6HFZ-AM9A].

¹¹ *Mark Zuckerberg Says Facebook Now Has 2 Billion Users Worldwide*, FORTUNE (June 27, 2017, 1:56 PM), <http://www.fortune.com/2017/06/27/mark%20-%20zuckerberg%20-%20facebook%20-userbase/> [perma.cc/B58E-L28J].

¹² Bennett, *supra* note 1.

¹³ Joan Lindsey-Mullikin & Norm Borin, *Why Strategy Is Key for Successful Social Media Sales*, 60 BUS. HORIZONS 473, 473–74 (2017).

that “networked enterprises,” which include those that engage in social media outreach, are “more likely to be market leaders and also more likely to have higher margins than companies using the Web in more traditional ways.”¹⁴ These efforts have measurable outcomes. For example, the value of advertising on social media worldwide was estimated to be \$17.74 billion in 2014, a jump from \$11.36 billion the previous year.¹⁵ Social media impacts an estimated fifty-four percent of consumers’ decisions as brands leverage these platforms to increase sales by “reminding, informing, and entertaining customers.”¹⁶

Businesses’ expenditures to create, maintain, and litigate over social media accounts corroborate the contention that such accounts are valuable business assets:

One indication of this value is the large sum which companies have spent developing and maintaining a viable presence on Facebook, Twitter, Tumblr, Google+ and other platforms, and creating marketing campaigns that utilized these mediums. Indeed, a multi-billion dollar industry has been created to help firms manage their social media footprint¹⁷

The social media platforms that are the “most popular” for selling merchandise are Facebook, Instagram, Twitter, and Pinterest.¹⁸ Data further suggests that the type of social media platform employed by a business to interact with its customers influences the level of attention the brand receives. For example, the market leader in social media platforms is Facebook, but Instagram users interact with brands 58 times more often than Facebook users and 120

¹⁴ John G. Loughnane et al., *Valuation of Social Media Assets*, AM. BANKR. INST. J., Dec. 2015, at 36, 36 (quoting David Gilfoil & Charles Jobs, *Return on Investment for Social Media: A Proposed Framework for Understanding, Implementing and Measuring the Return*, 10 J. BUS. & ECON. RES. 637, 638 (2012)).

¹⁵ Lindsey-Mullikin & Borin, *supra* note 13, at 474.

¹⁶ *Id.* at 481.

¹⁷ Loughnane, *supra* note 13, at 36.

¹⁸ Lindsey-Mullikin & Borin, *supra* note 13, at 474.

times more often than Twitter users.¹⁹ The potential to convert a social media post into an actual sale is both measurable and, in part, related to which social media site the business employs: “[A]n Instagram photo next to an item for sale boosts sales conversions by a factor of seven.”²⁰ Social media is an accessible, affordable, and useful tool for business organizations to capture market share and build brand loyalty. But legal risks attend the business use of social media.

Business use of social media accounts to connect with and influence customers and clients has led to legal disputes over the right to control and derive economic benefits from the accounts.²¹ These disputes arise when a business organization’s right to control a social media account is challenged by an employee,²² an independent contractor,²³ a corporate debtor in bankruptcy,²⁴ or a social media management company that refuses to relinquish control over the account it manages on behalf of the business organization.²⁵ Litigation ensues and the courts wrestle with a myriad of legal questions posed by a technological advancement—namely, a social media account—that has legal kinship with property rights,²⁶ privacy rights,²⁷

¹⁹ *Id.*

²⁰ *Id.* (“Fifty-three percent of adults between the ages of 18 and 29 use Instagram . . . making it arguably the world’s most powerful platform for brands . . .”).

²¹ *See infra* Part II.

²² *See, e.g.,* *Maremont v. Fredman*, No. 10 C 7811, 2014 U.S. Dist. LEXIS 26557 (N.D. Ill. Mar. 3, 2014).

²³ *See, e.g.,* *Salonclick, L.L.C. v. Superego Mgmt., L.L.C.*, No. 16 Civ. 2555 (KMW), 2017 U.S. Dist. LEXIS 6871 (S.D.N.Y. Jan. 18, 2017).

²⁴ *See, e.g., In re CTLI, L.L.C.*, 528 B.R. 359 (Bankr. S.D. Tex. Apr. 3, 2015).

²⁵ *See, e.g.,* *Keypath Educ., Inc. v. Brightstar Educ., Inc.*, No. 16-cv-2545-JWL, 2017 U.S. Dist. LEXIS 14061 (D. Kan. Jan. 31, 2017).

²⁶ *See, e.g.,* *PhoneDog v. Kravitz*, No. C 11-03474 MEJ, 2011 U.S. Dist. LEXIS 129229, at *26–27 (N.D. Cal. Nov. 8, 2011); *see infra* Section III.A for a discussion of the judicial precedent on this issue.

²⁷ *See In re CTLI*, 528 B.R. at 377–78; *see infra* Section III.F for a discussion of the judicial precedent on this issue.

intellectual property rights,²⁸ contract rights,²⁹ and duties arising under tort law.³⁰ The precedent that emerges is complex, confusing, and, in certain instances, contradictory.

This Article examines the risk exposure of business organizations operating in this legal environment when disputes over rights in social media accounts arise. Part II of this Article reviews the judicial precedent and identifies the legal theories examined by courts to define and delineate the rights arising in social media account business disputes. Part III explores the complicated and, in certain instances, unresolved legal issues resulting from the analytical frameworks discussed in Part II. Finally, Part IV investigates the risks posed to business organizations operating in this legal environment and proposes a framework for mitigating risk caused by social media account disputes.

II. THE LEGAL LANDSCAPE OF SOCIAL MEDIA ACCOUNT BUSINESS DISPUTES: A LONG AND WINDING ROAD

Business disputes over the right to control and derive economic benefits from social media accounts are increasingly adjudicated by the courts. These challenges arise under both federal and state law.³¹ The legal claims cover a wide array of asserted rights rooted in the law of

²⁸ See, e.g., *Christou v. Beatport*, 849 F. Supp.2d 1055, 1074–77 (D. Colo. 2012); see *infra* Section III.D for a discussion of the judicial precedent on this issue.

²⁹ See, e.g., *CDM Media v. Simms*, No. 14 CV 9111, 2015 U.S. Dist. LEXIS 37458, at *5–10 (N.D. Ill. Mar. 25, 2015); see *infra* Section III.C for a discussion of the judicial precedent on this issue.

³⁰ See, e.g., *Ardis Health v. Nankivell*, No. 11 Civ. 5013 (NRB), 2011 U.S. Dist. LEXIS 120738, at *8 (S.D.N.Y. Oct. 19, 2011); see *generally infra* Part III for a discussion of the judicial precedent on this issue.

³¹ See, e.g., *Maremont v. Fredman*, No. 10 C 7811, 2014 U.S. Dist. LEXIS 26557 (N.D. Ill. Mar. 3, 2014); *Eagle v. Morgan*, No. 11-4303, 2013 U.S. Dist. LEXIS 34220, at *14–15 (E.D. Pa. Mar. 12, 2013).

contracts, torts, and intellectual property.³² The disputes themselves arise from contested control over social media accounts between business organizations and various parties, including former employees, independent contractors, former business partners, and business entities retained to manage these accounts.³³ The context of these disputes include employment terminations, soured business partnerships, and bankruptcy proceedings. What emerges from the precedent is a kaleidoscope of judicial rationales used by courts to define and delineate the legal rights over these social media accounts.

A. The Employee's Rights in a Social Media Account Used for Business

1. *PhoneDog v. Kravitz*

In *PhoneDog v. Kravitz*,³⁴ the United States District Court for the Northern District of California considered a legal challenge brought by a business against a former employee who refused to give up control of a Twitter account. The business, PhoneDog, provided news and web resources for mobile products and services.³⁵ PhoneDog's promotional and marketing social media outreach to its customer base included the use of multiple social media sites such as Facebook, YouTube, and Twitter.³⁶ Employees of PhoneDog used Twitter accounts with the business's name in the Twitter account handle to promote PhoneDog's business activities and provide information to its customers.³⁷ Noah Kravitz was hired by PhoneDog to work as a video blogger and product reviewer and, in that capacity, was provided with a Twitter account with the handle @PhoneDog_Noah.

³² See *infra* Part II.

³³ *Id.*

³⁴ *PhoneDog v. Kravitz*, No. C 11-03474 MEJ, 2011 U.S. Dist. LEXIS 129229, at *1 (N.D. Cal. Nov. 8, 2011).

³⁵ *Id.* at *2.

³⁶ *Id.*

³⁷ *Id.*

Mr. Kravitz used a password to access this Twitter account and tweeted on it about PhoneDog's services and informational content he generated as a product reviewer and video blogger.³⁸ By the time Mr. Kravitz left PhoneDog some four-and-a-half years later, @PhoneDog_Noah had approximately 17,000 Twitter followers.³⁹ Mr. Kravitz refused to relinquish the account to PhoneDog when he left the company, continuing to use the account under a new handle, @noahkravitz.⁴⁰ PhoneDog sued Mr. Kravitz.

At the outset of the litigation, the court examined a jurisdictional challenge: Mr. Kravitz sought dismissal of his former employer's case on the grounds that the \$340,000 in damages claimed by PhoneDog was based on a faulty valuation.⁴¹ Mr. Kravitz argued that the jurisdictional threshold of \$75,000, a prerequisite to litigate in federal court, had not been met. The court deferred this challenge for summary judgment adjudication, but acknowledged that competing methodologies existed for the valuation of the Twitter account and that this was a contested issue.⁴²

The lawsuit against Mr. Kravitz asserted that his refusal to relinquish control of the Twitter account to PhoneDog when he left the company constituted (1) misappropriation of trade secrets, (2) intentional interference with prospective economic advantage, (3) negligent interference with prospective economic advantage, and (4) conversion.⁴³ The district court refused to dismiss the trade secret claim at the pleadings phase, ruling that there were evidentiary issues

³⁸ *Id.* at *2–3.

³⁹ *Id.* at *3.

⁴⁰ *Id.*

⁴¹ *Id.* at *8. PhoneDog reached this calculation by alleging that the Twitter account “generated approximately 17,000 followers, which according to industry standards, are each valued at \$2.50. Thus, PhoneDog contends that its damages amount to \$42,500 (\$2.50 x 17,000) for each month that Mr. Kravitz has used the account, which at the time of filing amount to \$340,000 for eight months.” *Id.*

⁴² *Id.* at *12–13.

⁴³ *Id.* at *3.

over whether the Twitter account password and followers were protected trade secrets and whether Mr. Kravitz's actions constituted misappropriation.⁴⁴ The conversion claim survived dismissal at the pleadings phase as well. The court determined that, under California tort law, the Twitter account was property and the conversion claim was at the "core of this lawsuit."⁴⁵

The district court initially dismissed PhoneDog's claims related to interference with economic advantage.⁴⁶ Each of those torts required PhoneDog to demonstrate in its pleadings what economic relationships were disrupted by Mr. Kravitz's actions, what economic harms flowed from these disruptions and, on the claim of negligent interference with prospective economic advantage, the duty of care owed by Mr. Kravitz to his employer, PhoneDog.⁴⁷ These claims were reinstated when PhoneDog amended its complaint.⁴⁸ The district court reasoned that PhoneDog's economic relationship with its advertisers—current and future—was potentially disrupted by Mr. Kravitz's change in the social media account handle.⁴⁹ @PhoneDog_Noah generated traffic to PhoneDog's website which increased website views; this had a direct link to increases in advertising revenue for PhoneDog.⁵⁰ Changing the Twitter handle allegedly decreased the traffic to PhoneDog's website and detrimentally impacted PhoneDog's advertising revenue. PhoneDog also alleged damage to its relationships with the 17,000 Twitter followers and CNBC and Fox News outlets. Mr. Kravitz countered that PhoneDog did not demonstrate how the Twitter followers and news outlets were in economic relationships with PhoneDog, an argument the district court

⁴⁴ *Id.* at *15–20.

⁴⁵ *Id.* at *26–27.

⁴⁶ *Id.* at *23–26.

⁴⁷ *Id.* at *20–27.

⁴⁸ PhoneDog v. Kravitz, No. C 11-03474 MEJ, 2012 U.S. Dist. LEXIS 10561, at *1 (N.D. Cal. Jan. 30, 2012).

⁴⁹ *Id.* at *3–4.

⁵⁰ *Id.*

reserved for disposition at a later phase in the litigation.⁵¹ This case eventually settled with Mr. Kravitz retaining sole control of the Twitter account.⁵²

2. *Maremont v. Susan Fredman Design Group*

In a second case, *Maremont v. Susan Fredman Design Group*,⁵³ a lawsuit was brought by an employee against the business that hired her for the business's usurpation of control of her social media accounts—the reverse of the case *PhoneDog v. Kravitz*. Jill Maremont was the director of marketing, public relations, and e-commerce at a firm specializing in interior design. She sued the design firm and its owner for unauthorized use of her social media accounts, in federal district court.⁵⁴ The dispute arose after Jill Maremont was hired by Susan Fredman Design Group (“SFDG”) to promote SFDG’s sales; Ms. Maremont’s social media efforts on SFDG’s behalf were explicitly tied to her bonus compensation.⁵⁵ Ms. Maremont’s LinkedIn page confirmed that her responsibilities at SFDG included “developing and conducting social media campaigns for SFDG on Facebook and Twitter.”⁵⁶

The social media marketing campaign that Ms. Maremont launched on behalf of SFDG included a blog created for SFDG that was displayed on SFDG’s website.⁵⁷ Ms. Maremont also opened a personal Twitter account and a Facebook account for her personal and professional use,⁵⁸

⁵¹ *Id.* at *4–5 n. 2.

⁵² Susan Park & Patricia Sánchez Abril, *Digital Self-Ownership: A Publicity-Rights Framework for Determining Employee Social Media Rights*, 53 AM. BUS. L.J. 537, 544 (2016).

⁵³ No. 10 C 7811, 2014 U.S. Dist. LEXIS 26557 (N.D. Ill. Mar. 3, 2014).

⁵⁴ *Maremont*, 2014 U.S. Dist. LEXIS 26557, at *1–3.

⁵⁵ *Maremont v. Susan Fredman Design Grp.*, No. 10 C 7811, 2011 U.S. Dist. LEXIS 140446, at *4 (N.D. Ill. Dec. 7, 2011).

⁵⁶ *Maremont*, 2014 U.S. Dist. LEXIS 26557, at *3.

⁵⁷ *Id.*

⁵⁸ *Id.*

posted to these social media accounts to promote the business activities of SFDG, linked the Twitter account and the Facebook account to SFDG's blog and website, and stored account access information for these accounts in a password-protected folder on a SFDG-owned computer and SFDG server.⁵⁹ The Twitter account that Ms. Maremont created, @jmaremont, had approximately 1120 followers.⁶⁰

Whether SFDG directed Ms. Maremont to open the Twitter account for its business was an issue contested by the parties.⁶¹ However, Susan Fredman did request that Ms. Maremont create a Facebook Page for the group. Using her personal account, Ms. Maremont created a Page for SFDG.⁶² To manage the SFDG Facebook Page, an administrator had to log on through his or her personal Facebook account.⁶³ Ms. Maremont claimed that she listed both herself and Susan Fredman as administrators of the SFDG Page, and later added another SFDG employee.⁶⁴ Ms. Maremont denied that she provided direct access to the Twitter and Facebook accounts to SFDG employees.⁶⁵ However, an SFDG intern claimed that Ms. Maremont gave her access to the social media accounts' passwords to assist Ms. Maremont in posting on these platforms.⁶⁶

While off from work recuperating from an automobile accident, Ms. Maremont's Twitter account was used by

⁵⁹ *Maremont*, 2011 U.S. Dist. LEXIS 140446, at *5.

⁶⁰ *Maremont*, 2014 U.S. Dist. LEXIS 26557, at *3.

⁶¹ *Id.* at *3–4.

⁶² *Id.* at *4. A Page is distinct from an Account. Accounts are tied to individual people. In addition to their personal Profiles, any individual can create a Page representing a business. The user designates themselves or other individuals as Administrators to manage the Page on behalf of the business. Administrators can post content, interact with other Facebook users, and connect with customers as the business. But the business never has its own Account. It can only operate on Facebook through individuals' Accounts to manage its Page. *See Pages*, FACEBOOK: BUSINESS PRODUCTS, <https://www.facebook.com/business/products/pages> [perma.cc/6T6V-LDK7].

⁶³ *Maremont*, 2014 U.S. Dist. LEXIS 26557, at *4.

⁶⁴ *Id.* at *4.

⁶⁵ *Id.* at *5.

⁶⁶ *Id.*

SFDG, allegedly without her authorization, to promote SFDG's business activities.⁶⁷ SFDG admitted accessing Ms. Maremont's personal Facebook account to post on the SFDG Page but denied Ms. Maremont's allegation that her personal Facebook account was used by SFDG to accept Facebook friend requests and to make posts on her personal Profile.⁶⁸ An SFDG employee found an electronic spreadsheet with the social media accounts' passwords on Ms. Maremont's desk and accessed the accounts on SFDG's behalf using this information.⁶⁹ Ms. Maremont claimed that she told the owner and the president of SFDG to refrain from posting on these social media accounts—a claim they denied.⁷⁰ When her employer allegedly ignored her request, Ms. Maremont changed the password to her Twitter and Facebook accounts, preventing SFDG from accessing either.⁷¹

Ms. Maremont left SFDG and brought a lawsuit in the United States District Court for the Northern District of Illinois against the design firm and its owner, alleging legal violations arising from SFDG's access and control over the disputed social media accounts.⁷² Ms. Maremont alleged violations of (1) the Lanham Act, 15 U.S.C. § 1125(a); (2) the Stored Communications Act, 18 U.S.C. § 2701 *et seq.*; (3) the Illinois Right of Publicity Act, 765 Ill. Comp. Stat. 1075/1 *et seq.*; and (4) the common law right of privacy.⁷³

Ms. Maremont first claimed false association or false endorsement under the Lanham Act, which makes it illegal to falsely represent “the origin, association or endorsement of goods or services through the wrongful use of another's distinctive mark, name, trade dress, or other device.”⁷⁴ The

⁶⁷ *Id.* at *5–6.

⁶⁸ *Id.* at *6–7.

⁶⁹ *Id.* at *5.

⁷⁰ *Id.* at *8.

⁷¹ *Id.*

⁷² *Id.* at *1.

⁷³ *Id.*

⁷⁴ *Id.* at *11 (quoting *L.S. Heath & Son, Inc. v. AT&T Info. Sys., Inc.*, 9 F.3d 561, 575 (7th Cir. 1993)).

district court ruled that Ms. Maremont stated a cognizable claim, finding that Ms. Maremont's following on Facebook and Twitter was a result of her prominence as a professional interior designer and that she used these social media accounts to promote her work at SFDG.⁷⁵ The commercial context of her Facebook and Twitter posts and the alleged deceptive use by SFDG of her name and likeness when it posted on these platforms sufficiently alleged a "commercial injury" under the Lanham Act.⁷⁶

Later ruling on summary judgment adjudication of this claim, the district court stated that the availability of relief under the statute was a disputed issue for the jury to decide. She could proceed with this claim because the jury might reasonably conclude that her social media accounts constituted a commercial interest *of hers*, which she would have a right to protect.⁷⁷ Ms. Maremont could show that she created the Facebook and Twitter accounts "for her own economic benefit, knowing that if she left her employment at SFDG, she could promote another employer to her Twitter and Facebook followers."⁷⁸ The district court acknowledged that these social media accounts were tied to SFDG's business interests as well but it ruled that Facebook and Twitter followers can become a "marketable commercial interest"⁷⁹ for the employee even while she is posting through these social media accounts for her employer:

A social network account not only serves the worker's interest by facilitating contact with her network, but also helps the worker to build her reputation and market herself to potential employers. Specifically, the social network account helps the worker to

⁷⁵ *Maremont v. Susan Fredman Design Grp.*, 772 F. Supp. 2d 967, 971 (N.D. Ill. 2011).

⁷⁶ *Id.*

⁷⁷ *Maremont v. Fredman*, No. 10 C 7811, 2014 U.S. Dist. LEXIS 26557, at *12 (N.D. Ill. Mar. 3, 2014). The district court noted that standing to assert a Lanham Act violation is limited to a commercial class of plaintiffs seeking to protect commercial interests.

⁷⁸ *Id.* at *13.

⁷⁹ *Id.*

develop her “personal brand”—the combination of her online image, reputation, and network.⁸⁰

The district court further explained that because the Twitter account was in Ms. Maremont’s name—and not in SFDG’s name—the tweets by SFDG could constitute a Lanham Act violation despite the fact that the tweets pertained to SFDG’s business activities.⁸¹ The use of Ms. Maremont’s Twitter account by SFDG could trigger, according to the district court, a false endorsement Lanham violation, even though SFDG tweeted a link to a blog entry by SFDG’s owner.⁸² The blog entry explained Ms. Maremont’s accident and related injuries, and notified readers that another employee would temporarily replace Ms. Maremont in posting on the Twitter account.⁸³

The false endorsement Lanham Act claim brought by Ms. Maremont was ultimately dismissed, however, on the issue of damages: Ms. Maremont admitted in her deposition testimony that she did not suffer any financial injury as a result of SFDG and its owner’s use of her Facebook and Twitter accounts.⁸⁴ Ms. Maremont’s recovery under this claim had to constitute either compensation for financial losses she suffered or proof of unjust enrichment by SFDG and its owner.⁸⁵ The only injuries Ms. Maremont asserted under the false endorsement claim were damages related to the mental distress she suffered over the alleged misuse of her social media accounts; these damages did not meet the financial harm contemplated under §1117 of the Lanham Act.⁸⁶

⁸⁰ *Id.* (quoting Zoe Argento, *Whose Social Network Account? A Trade Secret Approach to Allocating Rights*, 19 MICH. TELECOMM. & TECH. L. REV. 201, 221 (2013)).

⁸¹ *Maremont*, 2014 U.S. Dist. LEXIS 26557, at *15.

⁸² *Id.* at *15–16.

⁸³ *Id.*

⁸⁴ *Id.* at *16–18.

⁸⁵ *Id.* at *18.

⁸⁶ *Id.*

The district court granted summary judgment to SFDG on the Illinois Right of Publicity claim. It ruled that there was no evidence in the record about the nature of the Facebook account's postings with respect to this claim. Focusing on SFDG and its owner's use of Ms. Maremont's Twitter account, the district court held that this use did not constitute misappropriation of Ms. Maremont's name or likeness because the initial tweet by SFDG linked to Susan Fredman's blog, which explained Ms. Maremont's accident and her replacement during her recovery by a guest blogger/tweeter.⁸⁷

SFDG and its owner also prevailed on summary judgment on Ms. Maremont's common law right of privacy claim. The district court ruled that the facts discussed in the Facebook posts and tweets were not "private" and "Maremont did not try to keep any such facts private."⁸⁸ Therefore, there was no intrusion upon "private" matters, as the tort requires.⁸⁹ In discussing the privacy issue, the district court did distinguish between Facebook posts which are "accessible only to those whom the user selects, and thus they are not strictly public" and tweets which are "usually visible and accessible to the general public" although tweeters can restrict messages to their Twitter followers.⁹⁰

The final claim advanced by Ms. Maremont alleged that the actions of SFDG and its owners in accessing and using Ms. Maremont's Twitter and Facebook accounts without her authorization violated the Stored Communications Act (SCA or the "Act"). The district court stated that "the SCA provision at issue states that whoever '(1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or (2) intentionally exceeds an authorization to access that facility; and by doing so 'obtains, alters, or prevents authorized access to a wire or electronic communication while it is in

⁸⁷ *Maremont v. Susan Fredman Design Grp.*, No. 10 C 7811, 2011 U.S. Dist. LEXIS 140446, at *18–19 (N.D. Ill. Dec. 7, 2011).

⁸⁸ *Id.* at *21.

⁸⁹ *Id.* at *20–21.

⁹⁰ *Id.* at *21 n.2.

electronic storage in such system' violates the SCA."⁹¹ The district court denied summary judgment on this claim, determining that there were triable issues of fact as to whether SFDG and its owner's conduct in accessing and controlling the Facebook and Twitter accounts constituted a violation of the SCA as well as whether this conduct warranted the imposition of both statutory and punitive damages.⁹² Punitive damages are recoverable under the Act if the evidence demonstrates that SFDG and its owner willfully and intentionally accessed the Facebook and Twitter accounts despite Ms. Maremont's directives.⁹³ The district court also noted that evidence of Ms. Maremont's emotional distress related to SFDG's access and control of the social media accounts could constitute actual damages under the statute.⁹⁴ At trial, a jury ruled in favor of SFDG and its owner, Susan Fredman, on the SCA claim, ending the lengthy litigation with a judgment in favor of the business and its owner who were sued by their employee.⁹⁵

3. *Eagle v. Morgan*

In another case brought by an employee against her former employer, *Eagle v. Morgan*,⁹⁶ a business dispute erupted over the access and control of a LinkedIn account. The employee, Dr. Linda Eagle, co-owned a banking education company, Edcomm, Inc.⁹⁷ While she was a principal and an employee of Edcomm, Inc., the business

⁹¹ *Maremont v. Susan Fredman Design Grp.*, No. 10 C 7811, 2014 U.S. Dist. LEXIS 26557, at *19–20 (N.D. Ill. Mar. 3, 2014) (quoting 18 U.S.C. § 2701(a) and *Shefts v. Petrakis*, 758 F. Supp. 2d 620, 635 (C.D. Ill. 2010)).

⁹² *Id.* at *23–28.

⁹³ *Id.* at *28.

⁹⁴ *Id.* at *25–28.

⁹⁵ *Maremont v. Susan Fredman Design Grp.*, No. 10 C 7811, 2015 U.S. Dist. LEXIS 17749, at *1 (N.D. Ill. Feb. 13, 2015).

⁹⁶ No. 11-4303, 2013 U.S. Dist. LEXIS 34220, at *2 (E.D. Pa. Mar. 12, 2013).

⁹⁷ *Id.* at *1.

used LinkedIn, a social media networking site devoted to business-related connections, to pursue marketing and sales initiatives of Edcomm, Inc.⁹⁸ Edcomm, Inc. did not have a policy mandating that its employees create LinkedIn accounts nor did it pay to have such accounts maintained.⁹⁹ However, it did urge its employees to create a LinkedIn account and the business “became involved in the account content” of its employees, creating policies covering the “online content” of the LinkedIn accounts.¹⁰⁰ Edcomm, Inc. also did not have a policy regarding how an employee’s LinkedIn account could be transferred to Edcomm, Inc. should an employee leave,¹⁰¹ although company executives believed Edcomm, Inc. “owned” all of its current and former employees’ LinkedIn accounts:

What about LinkedIn . . . the question is who really owns that account?

We do. It was created with an email account that is ours, on our computers, on our time and at our direction.¹⁰²

Pursuant to Edcomm, Inc.’s policies and practices, Dr. Eagle created a LinkedIn account affiliated with an email address provided by Edcomm.¹⁰³ Dr. Eagle provided her LinkedIn password to certain Edcomm employees to assist her in managing the account.¹⁰⁴

⁹⁸ *Id.* at *2–3. Like Facebook Pages, LinkedIn only permits businesses to administer Company Pages through individual users’ Accounts. Businesses do not have their own Accounts. *Requesting to Become an Admin of a Company Page*, LINKEDIN: HELP, <https://www.linkedin.com/help/linkedin/answer/17481> [perma.cc/78R8-2JZ3].

⁹⁹ *Eagle*, 2013 U.S. Dist. LEXIS 34220, at *3.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at *6.

¹⁰² *Id.* at *5.

¹⁰³ *Id.* at *3.

¹⁰⁴ *Id.* at *6. According to the court, Dr. Eagle shared her LinkedIn account password sometime “prior to her termination”—either before or after the stock purchase sale of Edcomm, Inc. *Id.*

Dr. Eagle and her co-owners of Edcomm entered into a stock purchase agreement to sell their interests to Sawabeh Information Services Company.¹⁰⁵ These former business owners continued to work for Edcomm as employees until their employment was terminated several months after the stock sale.¹⁰⁶ After Dr. Eagle's termination, employees of Edcomm changed the password to Dr. Eagle's LinkedIn account.¹⁰⁷ For approximately two weeks, Edcomm had exclusive control of the social media account.¹⁰⁸ During this period, Edcomm altered Dr. Eagle's LinkedIn account information to include the name, picture, education, and experience of its interim chief executive officer, although some information pertaining to Dr. Eagle remained on the LinkedIn profile.¹⁰⁹ Edcomm notified the public within a week of Dr. Eagle's termination that she was no longer affiliated with it, but neglected to post this notification on the LinkedIn profile.¹¹⁰ A Google search of Dr. Eagle's name during the period when Edcomm controlled the account confusingly brought up the LinkedIn profile with the interim chief executive officer's name and likeness.¹¹¹ After this two-week period, LinkedIn took control of the account; shortly thereafter, Dr. Eagle regained access to it.¹¹²

Dr. Eagle sued Edcomm and several other defendants in the United States District Court for the Eastern District of Pennsylvania over their access, control and alteration of her LinkedIn account.¹¹³ She asserted eleven claims:

- (1) violation of the Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030(a)(2)(C);
- (2) violation of the CFAA, 18 U.S.C. § 1030(a)(5)(C);
- (3) violation of

¹⁰⁵ *Id.* at *2.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at *6.

¹⁰⁸ *Id.* at *6–7.

¹⁰⁹ *Id.* at *8.

¹¹⁰ *Id.* at *7–8.

¹¹¹ *See id.* at *8.

¹¹² *Id.* at *7.

¹¹³ *Id.* at *14.

Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(A); (4) unauthorized use of a name in violation of 42 Pa.C.S. § 8316; (5) invasion of privacy by misappropriation of identity; (6) misappropriation of publicity; (7) identity theft under 42 Pa. C.S. § 8315; (8) conversion; (9) tortious interference with contract; (10) civil conspiracy; and (11) civil aiding and abetting.¹¹⁴

Edcomm, Inc. pursued counterclaims against Dr. Eagle for conversion, misappropriation and unfair competition.¹¹⁵ Edcomm won summary judgment on the first two claims brought by Dr. Eagle under the CFAA, as well as the Lanham Act unfair competition claim.¹¹⁶ The district court ruled that Dr. Eagle's alleged lost business opportunities resulting from Edcomm's two-week control of her LinkedIn account were not compensable under the CFAA; damages involving loss of goodwill, lost revenue, or interference with a customer relationship are not recoverable under the CFAA.¹¹⁷ The district court also found that Dr. Eagle did not offer proof that Edcomm's alteration of the LinkedIn account—replacing her name and likeness with the interim chief executive officer's name and likeness—created a likelihood of confusion as required under the Lanham Act.¹¹⁸

The district court adjudicated the remaining claims and counterclaims at a bench trial. The district court ruled that Dr. Eagle proved Edcomm's use of her LinkedIn account violated Pennsylvania's statutory prohibition¹¹⁹ against the unauthorized use of a name.¹²⁰ Edcomm, Inc.'s unauthorized use of Dr. Eagle's name—which had commercial value—through its access, control, and alteration of her LinkedIn

¹¹⁴ *Id.* at *14.

¹¹⁵ *Id.* at *15.

¹¹⁶ *Eagle v. Morgan*, No. 11-4303, 2012 U.S. Dist. LEXIS 143614, at *18, *27 (E.D. Pa. Oct. 4, 2012).

¹¹⁷ *See id.* at *14–16.

¹¹⁸ *Id.* at *23–27.

¹¹⁹ *See* 42 PA. STAT. AND CONS. STAT. ANN. § 8316 (West 2018).

¹²⁰ *Eagle*, 2013 U.S. Dist. LEXIS 34220, at *17.

account, was done for its commercial benefit.¹²¹ The statute prohibits this conduct.¹²² The district court also found that Edcomm's control and use of the LinkedIn account constituted invasion of privacy through the misappropriation of Dr. Eagle's identity¹²³ and violated the tort of misappropriation of publicity by depriving Dr. Eagle of her "exclusive right to control the commercial value of her name and to prevent others from exploiting it without permission."¹²⁴ While Dr. Eagle prevailed on these two claims, the district court ruled that she could not recover compensatory or punitive damages for Edcomm, Inc.'s violations of the law because she did not present evidence to support damages awards on these claims.¹²⁵ She was awarded "compensatory damages of \$0."¹²⁶ The district court refused to award punitive damages since Dr. Eagle did not prove by a preponderance of the evidence that Edcomm, Inc. acted with "maliciousness and reckless indifference."¹²⁷

The court awarded judgment to Edcomm and the individually named defendants on Dr. Eagle's remaining claims at the bench trial. The district court ruled that information about Dr. Eagle that remained on the LinkedIn page after Edcomm replaced the page with identifying information about its interim chief executive officer did not constitute identity theft;¹²⁸ a LinkedIn account "is not tangible chattel, but rather an intangible right to access a specific page on a computer" so the tort of conversion was not relevant to these facts;¹²⁹ and the civil conspiracy and civil aiding and abetting claims failed due to lack of evidence on how the individual defendants conspired or assisted in the

¹²¹ *See id.* at *18–19.

¹²² *Id.*

¹²³ *See id.* at *20–22.

¹²⁴ *Id.* at *23.

¹²⁵ *Id.* at *41–42.

¹²⁶ *Id.* at *42.

¹²⁷ *Id.* at *44.

¹²⁸ *See id.* at *25–26.

¹²⁹ *Id.* at *28–29.

tortious conduct.¹³⁰ The district court also dismissed Dr. Eagle's claim that Edcomm's use of her LinkedIn account constituted tortious interference with her LinkedIn contract.¹³¹ Dr. Eagle did not prove damages, as required under this tort.¹³² However, the district court did note that other evidence established the remaining elements of the tort.¹³³ There was a contractual relationship between Dr. Eagle and LinkedIn which Edcomm, Inc. "acted with purpose or intent to harm . . . by preventing that relationship from continuing."¹³⁴ The district court rejected Edcomm's justification for its usurpation of Dr. Eagle's account—that the company had an "official policy" stating that Edcomm owned its employees' LinkedIn accounts and could "mine" these social media accounts for data and information when the employees left Edcomm.¹³⁵ No such policy existed and the district court construed the LinkedIn user agreement which Dr. Eagle entered into as "clearly" indicating that Dr. Eagle herself owned access to the LinkedIn account.¹³⁶

Edcomm, Inc lost on its counterclaims against Dr. Eagle for misappropriation¹³⁷ and unfair competition¹³⁸ and withdrew its conversion claim.¹³⁹ Edcomm failed to establish that Dr. Eagle's account was developed through the expenditure of Edcomm's resources and that Dr. Eagle's LinkedIn contacts list was created and maintained by Edcomm's efforts.¹⁴⁰ Because of this, the district court ruled that Dr. Eagle's efforts to regain control of the LinkedIn account were not evidence of misappropriation or unfair

¹³⁰ *Id.* at *31–35.

¹³¹ *Id.* at *31.

¹³² *Id.*

¹³³ *Id.* at *30.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at *46.

¹³⁸ *Id.* at *49.

¹³⁹ *Id.* at *15 n.3.

¹⁴⁰ *Id.* at *46.

competition, impliedly ruling that the LinkedIn account was legally hers to control at all times.¹⁴¹

4. *Mattocks v. Black Entertainment Television*

Stacey Mattocks was unable to achieve even Dr. Eagle's Pyrrhic victory in her case against her part-time employer, Black Entertainment Television, L.L.C. (BET). In *Mattocks v. Black Entertainment Television*,¹⁴² the United States District Court for the Southern District of Florida entered summary judgment in favor of BET in a dispute between BET and its part-time employee, Stacey Mattocks, involving a Facebook "fan" page Ms. Mattocks created for a televised series owned by BET.¹⁴³ Ms. Mattocks' fan page was not an official Facebook fan page as defined by Facebook's Terms of Service, which differentiates between an "official Page" created and maintained by an authorized representative of a brand and those created to express support or interest in a brand.¹⁴⁴ Two years after Ms. Mattocks created her fan page, BET contacted her and, shortly thereafter, hired her part-time to work on an hourly basis for BET and manage the show's fan page on BET's behalf.¹⁴⁵ BET provided its trademarks and logos for the fan page, encouraged BET viewers to "like" the fan page, shared exclusive content with Ms. Mattocks to post on the page, and directed Ms. Mattocks on the posting of certain information on the fan page.¹⁴⁶ BET employees posted content on the page as well and Ms. Mattocks was tasked with notifying BET of intellectual property infringement related to the page users.¹⁴⁷ During

¹⁴¹ *See id.* at *46–49.

¹⁴² 43 F. Supp. 3d 1311 (S.D. Fla. 2014).

¹⁴³ *Id.* at 1315, 1321.

¹⁴⁴ *See id.* at 1314–15.

¹⁴⁵ *Id.* at 1315–16.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 1316.

this period, Facebook “likes”¹⁴⁸ on the fan page grew from two million to over six million.¹⁴⁹

BET and Ms. Mattocks eventually entered into a Letter Agreement in which Ms. Mattocks gave full access to the fan page to BET, including administrative access and the right to update content at BET’s “sole discretion.”¹⁵⁰ In exchange for these rights, BET agreed not to change Ms. Mattocks’ administrative rights to the page in any way to exclude her from page access. The parties entered into discussions about Ms. Mattocks becoming a full-time employee of BET. In the course of those discussions, Ms. Mattocks notified BET that she planned to restrict BET’s access to the page until their employment discussions were amicably resolved.¹⁵¹ Ms. Mattocks then “demoted BET’s administrative access” to the page, effectively preventing BET from having direct access to the page to post content.¹⁵² These actions triggered a cascade of events: BET requested that Facebook “migrate” fans from the unofficial page to a BET-sponsored fan page, a request Facebook granted. Additionally, Facebook shut down the page and Twitter assented to BET’s request to disable the Twitter account Ms. Mattocks used to promote the television series for BET.¹⁵³

Ms. Mattocks brought suit against BET, asserting that its actions with respect to these social media accounts tortiously interfered with Ms. Mattocks’ contractual relationships with Twitter and Facebook, constituted a conversion of a business interest, breached a duty BET owed Ms. Mattocks to act in good faith and fair dealing towards her, and violated the

¹⁴⁸ *Id.* at 1315 (quoting *Bland v. Roberts*, 730 F.3d 368, 385 (4th Cir. 2013) (“‘Liking’ of Facebook is a way for Facebook users to share information with each other. The ‘like’ button, which is represented by a thumbs-up icon, and the word ‘like’ appear next to different types of Facebook content. Liking something on Facebook ‘is an easy way to let someone know that you enjoy it.’”)).

¹⁴⁹ *Id.* at 1316.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

Letter Agreement entered into by the parties.¹⁵⁴ The district court ruled that BET did not tortiously interfere with Ms. Mattocks' contractual relationships with Twitter and Facebook because BET had a "supervisory interest in how the relationship is conducted or a potential financial interest in how a contract is performed" which justified its interference.¹⁵⁵ Additionally, BET's control over the social media accounts during the period when Ms. Mattocks managed the fan page and the Twitter account, and its financial interest in maintaining that control, justified its subsequent decision to lobby Facebook and Twitter to shut down the accounts (and "migrate" fans to a new Facebook fan page). BET's conduct, in the district court's assessment, was not motivated by "purely malicious reasons," which, if shown, could negate BET's justification for its interference.¹⁵⁶

Ms. Mattocks also lost on her contract claims because the district court found that Ms. Mattocks was in material breach of the Letter Agreement when she restricted BET's access to the Facebook fan page. This legally excused BET from performing any obligations pursuant to that agreement.¹⁵⁷ Because BET was excused from any contractual obligations once Ms. Mattocks breached the Letter Agreement, no covenant of good faith and fair dealing could be imposed on BET.¹⁵⁸ Finally, Ms. Mattocks alleged that BET's request that Facebook "migrate" the Facebook page "likes" to a new, BET-sponsored Facebook fan page deprived her of a business interest she had in those "likes" as well as the business opportunities gleaned from those "likes."¹⁵⁹ The district court refused to categorize the Facebook "likes" as a "property interest" owned by Ms. Mattocks:

¹⁵⁴ *Id.* at 1316–17.

¹⁵⁵ *See id.* at 1319 (quoting *Palm Beach Cty. Health Care Dist. v. Prof'l Med. Educ., Inc.*, 13 So.3d 1090, 1094 (Fla. Dist. Ct. App. 2009)).

¹⁵⁶ *Id.* at 1319.

¹⁵⁷ *Id.* at 1320.

¹⁵⁸ *Id.* at 1320–21.

¹⁵⁹ *Id.* at 1321.

“[L]iking” a Facebook Page simply means that the user is expressing his or her enjoyment or approval of the content. At any time, moreover, the user is free to revoke the “like” by clicking an “unlike” button. So if anyone can be deemed to own the “likes” on a Page, it is the individual users responsible for them.¹⁶⁰

The district court further found that no tortious conversion occurred because BET’s conduct was neither unauthorized nor wrongful; Facebook’s acquiescence to BET’s request after its review of the facts and Facebook’s policies confirmed this conclusion.¹⁶¹

5. *Vaughn v. Radio One*

In another media business dispute in which the media company prevailed, *Vaughn v. Radio One*,¹⁶² the United States District Court for the Southern District of Indiana granted summary judgment in favor of Radio One, the owner and operator of radio stations in Indianapolis, Indiana. Radio One was sued by its former, part-time employee, Kelly Vaughn, for gender discrimination under Title VII, 42 U.S.C. Section 2000e-2.¹⁶³ Radio One successfully defended against the Title VII discrimination claim by demonstrating that Ms. Vaughn’s termination resulted from her failure to abide by Radio One’s conflict-of-interest policy and her failure to take the corrective actions ordered by Radio One to remedy that conflict, which were related to Ms. Vaughn’s use of social media.¹⁶⁴ The conflict of interest arose when Ms. Vaughn developed a television show for another media outlet with an on-air Radio One personality, Amos Brown. Ms. Vaughn created a Facebook Page and a Twitter account using the name and likeness of Mr. Brown and created websites to promote this television show.¹⁶⁵ When Radio One learned

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² 151 F. Supp. 3d 877 (S.D. Ind. 2015).

¹⁶³ *Id.* at 879, 885.

¹⁶⁴ *Id.* at 886.

¹⁶⁵ *Id.* at 881–82.

about the show, it directed Ms. Vaughn to transfer “ownership of the URLs and social media pages that incorporated the name and likeness of Mr. Brown” to Radio One pursuant to Radio One’s conflict-of-interest policy.¹⁶⁶ Ms. Vaughn refused to transfer the rights to the social media accounts and the URLs to Radio One; she did, however, delete the Facebook Page and the website promoting the television show.¹⁶⁷ Radio One terminated Ms. Vaughn’s employment for refusing to transfer ownership of the social media accounts and websites and for violating its conflict-of-interest policy.¹⁶⁸ Without resolving the legal issue involving the ownership rights to either the social media accounts or the URLs,¹⁶⁹ the district court ruled that Ms. Vaughn failed to make a *prima facie* showing that she met Radio One’s “legitimate expectations,” which were laid out in its conflict-of-interest policy. Even assuming she had, the district court also found that Ms. Vaughn failed to rebut Radio One’s legitimate, non-discriminatory reason for termination—violation of its conflict-of-interest policy.¹⁷⁰

6. *CDM Media USA v. Simms*

*CDM Media USA v. Simms*¹⁷¹ involved another social media dispute in which corporate policies were at issue. Robert Simms was a senior manager at CDM Media USA (CDM).¹⁷² When hired, Mr. Simms agreed to abide by CDM’s employee handbook which required employees to keep confidential certain information and to return any property

¹⁶⁶ *Id.* at 883.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 884.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 889–91. The court also held that she failed to identify a similarly-situated male employee who received more favorable treatment. *Id.*

¹⁷¹ No. 14 CV 9111, 2015 U.S. Dist. LEXIS 37458 (N.D. Ill. Mar. 25, 2015).

¹⁷² *Id.* at *3.

to CDM upon leaving the business.¹⁷³ A few years after he was hired, CDM and Mr. Simms entered into a non-compete agreement that had a one year competition prohibition clause, an assignment clause of Mr. Simms' inventions to CDM, and a requirement that Mr. Simms return confidential information to CDM when he left the company.¹⁷⁴ As a senior manager, Mr. Simms had access to some of CDM's "most sensitive information"¹⁷⁵ and he was CDM's designated "point person" for the online communities CDM used for its business.¹⁷⁶ One of these online communities headed by Mr. Simms was the CIO Speaker Bureau, a private, member-only LinkedIn group launched by CDM and comprised of senior executives in the information and technology field.¹⁷⁷ This LinkedIn group's membership was controlled by CDM and its membership list and communications were not publicly available.¹⁷⁸ The membership in the CIO Speaker Bureau had grown to 679 members by the time Mr. Simms resigned his position at CDM.¹⁷⁹

When Mr. Simms resigned, CDM directed him to change "the contacts" for CDM's social media accounts; Mr. Simms followed this directive for all the accounts except the CIO Speaker Bureau LinkedIn group.¹⁸⁰ CDM accused Mr. Simms of refusing to return the membership information and communications related to that LinkedIn group and subsequently using this information to compete against CDM in violation of their non-compete agreement.¹⁸¹ CDM claimed that Mr. Simms refused to return other highly sensitive and confidential company information as well.¹⁸²

¹⁷³ *Id.* at *2–3.

¹⁷⁴ *Id.* at *3.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at *4.

¹⁷⁷ *Id.* at *3–4.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at *4.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at *4–5.

¹⁸² *Id.* at *5.

CDM sued its former employee, Mr. Simms, for breach of contract, common law misappropriation of trade secrets, and violation of the Illinois Trade Secrets Act arising from his refusal to relinquish control over the CIO Speaker Bureau LinkedIn group. CDM also alleged in its lawsuit that Mr. Simms unlawfully retained CDM's confidential information after he resigned from CDM and used that information to compete against CDM.¹⁸³

CDM successfully defended against the dismissal of the breach of contract claim at the pleadings phase of the litigation. That claim was premised, in part, on the confidentiality provision of the non-compete agreement which required Mr. Simms to "return plaintiff's [CDM's] confidential information upon leaving the company."¹⁸⁴ The district court ruled that Mr. Simms' refusal to relinquish control of the LinkedIn group and his alleged use of any confidential information contained on that social media account was arguably a breach of the non-compete's requirement that he return confidential information to the company when he left.¹⁸⁵ The employee handbook's language, however, did not create contractual obligations in light of the explicit contractual terms in the non-compete agreement that no other agreement, including any statements in the employee handbook, governed the employment relationship between CDM and Mr. Simms.¹⁸⁶

The district court determined that the membership list of the LinkedIn group could plausibly constitute a protectable trade secret under the Illinois Trade Secrets Act, 765 ICS §1065/1 *et seq.* and refused to dismiss this claim at the pleadings stage as well.¹⁸⁷ The district court dismissed CDM's claim, however, that the "private communications" on the LinkedIn group contained confidential information which constituted a protectable trade secret: "While a private

¹⁸³ *Id.* at *1.

¹⁸⁴ *Id.* at *3.

¹⁸⁵ *Id.* at *9–10.

¹⁸⁶ *Id.* at *6–7.

¹⁸⁷ *Id.* at *12–13.

communication may contain a trade secret, it is not itself a trade secret.”¹⁸⁸ Finally, the common law misappropriation of information claim survived dismissal as well.¹⁸⁹

7. *Ardis Health v. Nankivell*

A social media account business dispute also involving a corporate policy stipulating the return of confidential information was at the heart of another case, *Ardis Health v. Nankivell*.¹⁹⁰ In this case, the United States District Court for the Southern District of New York entered a preliminary injunction against a former employee of Curb Your Cravings, L.L.C. (CYC) and USA Herbals L.L.C. (Herbals), whose duties included maintaining social media pages, blogs, and websites for a group of “closely affiliated online marketing companies” which had a common owner.¹⁹¹ The employee, Ashleigh Nankivell, signed a “Work Product Agreement” at the start of her employment with CYC requiring Ms. Nankivell to return all confidential information at the employer’s request.¹⁹² The agreement also stipulated that the work Ms. Nankivell developed or created while employed was the “sole and exclusive property” of the employer and constituted “work-for-hire” within the meaning of the Copyright Act of 1976,¹⁹³ and that an actual or threatened breach of the agreement constituted “irreparable injury and damage” to the employer.¹⁹⁴

After Ms. Nankivell’s termination, she refused to provide the companies with the access information to the online social media accounts, emails, and websites.¹⁹⁵ The

¹⁸⁸ *Id.* at *13–14.

¹⁸⁹ *Id.* at *17. The court rejected Mr. Simms’ argument that the Illinois Trade Secrets Act preempts a common law misappropriation of information claim. *Id.* at *16–17.

¹⁹⁰ No. 11 Civ. 5013 (NRB), 2011 U.S. Dist. LEXIS 120738 (S.D.N.Y. Oct. 19, 2011).

¹⁹¹ *Id.* at *2.

¹⁹² *Id.* at *3.

¹⁹³ *Id.* at *3.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at *4–5.

companies filed suit, alleging that her refusal prevented the companies from accessing these accounts and websites to update them.¹⁹⁶ The district court ruled that the companies owned the rights to the access information unlocking these social media accounts, email accounts, and websites, and that Ms. Nankivell's "unauthorized retention" of that information likely constituted conversion under New York law.¹⁹⁷ Of note, the district court concluded that the companies provided sufficient evidence to warrant injunctive relief, and ordered Ms. Nankivell to provide them immediately with the access information¹⁹⁸:

Plaintiff has provided this Court with sufficient evidence to support a finding of irreparable harm if the Access Information is not returned prior to a final disposition in this case. Plaintiffs depend heavily on their online presence to advertise their businesses, which requires the ability to continuously update their profiles and pages and react to online trends. The inability to do so unquestionably has a negative effect on plaintiffs' reputation and ability to remain competitive, and the magnitude of that effect is difficult, if not impossible, to quantify in monetary terms. Such injury constitutes irreparable harm.¹⁹⁹

Implicit in this ruling was the district court's determination that the social media accounts managed by Ms. Nankivell were the property of CYC as well as, possibly, its related companies: "It is uncontested that plaintiffs own the rights to the Access Information."²⁰⁰

¹⁹⁶ *Id.* at *1, *5. The companies also alleged that Ms. Nankivell had illegally retained a company laptop and committed intellectual property infringement. *Id.*

¹⁹⁷ *Id.* at *8.

¹⁹⁸ *Id.* at *9.

¹⁹⁹ *Id.* at *6–7.

²⁰⁰ *Id.* at *8.

8. *Christou v. Beatport*

In three lawsuits involving the music industry, courts examined the ownership rights of social media accounts used to market and promote music venues and bands. In *Christou v. Beatport*,²⁰¹ a falling out between Bradley Roulrier and his former employer—nightclub owner Regas Christou—led to litigation over multiple issues including access and control over a social media account on the site, MySpace.²⁰² Mr. Roulrier, a co-owner of an online music service, left his employment with Mr. Christou and founded a rival nightclub.²⁰³ Mr. Christou and his businesses accused Mr. Roulrier and his businesses of violations of the Racketeer Influenced Corrupt Organizations Act, federal antitrust laws, trade secret theft and intentional interference with business expectancies.²⁰⁴

Part of the alleged strategy to destroy Mr. Christou's nightclub businesses involved the misappropriation by Mr. Roulrier and his businesses of a list of MySpace profile "friends" maintained by Mr. Christou's nightclubs.²⁰⁵ Some 10,000 MySpace profile "friends" of Mr. Christou's nightclubs were developed by Mr. Roulrier and other employees for use by Mr. Christou's businesses.²⁰⁶ When he left his employment with Mr. Christou's businesses, Mr. Roulrier and/or his representatives took the MySpace friends list as well as the web profile login and password and posted the MySpace friends list on his new nightclub's website.²⁰⁷ Mr. Christou eventually succeeded in pressuring Mr. Roulrier's business into returning the list, or at least removing it from their website.²⁰⁸ At the pleadings phase of the litigation, the

²⁰¹ 849 F. Supp. 2d 1055 (D. Colo. 2012).

²⁰² *See id.* at 1074.

²⁰³ *Id.* at 1062–63.

²⁰⁴ *Id.* at 1063–64.

²⁰⁵ *See* *Christou v. Beatport*, No. 10-cv-02912-RBJ-KMT, 2014 U.S. Dist. LEXIS 43459, at *19 (D. Colo. Mar. 31, 2014).

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

United States District Court for the District of Colorado ruled that whether the MySpace friends list is a protectable trade secret under Colorado trade secret law is a question of fact and that Mr. Roulrier's actions, if proven, could constitute misappropriation.²⁰⁹ The district court also ruled that Mr. Roulrier's misappropriation could be imputed to his online music company which he co-owned.²¹⁰

In its analysis of the trade secret status of the MySpace friends list, the district court stated:

Social networking sites enable companies, such as the SOCO clubs, to acquire hundreds and even thousands of 'friends.' These 'friends' are more than simple lists of names of potential customers. 'Friending' a business or individual grants that business or individual access to some of one's personal information, information about his or her interests and preferences, and perhaps most importantly for a business, contact information and a built-in means of contact.²¹¹

The district court both recognized the strategic value of these social media contacts to a business and determined that such information is not known by employees from "general experience" and is not easily replicated.²¹² Mr. Christou and his businesses took reasonable steps to secure and safeguard the secrecy of the MySpace profile friends list by limiting and restricting access to passwords and profile login information to select employees.²¹³ While MySpace users can "friend" multiple businesses, the district court concluded that the MySpace profile friends list was not information obtainable through a public directory or a source outside of Mr. Christou's businesses.²¹⁴ "The names themselves, readily available to the public, are not the

²⁰⁹ 849 F. Supp. 2d at 1074–76.

²¹⁰ *Id.* at 1077.

²¹¹ *Id.* at 1075.

²¹² *See id.* at 1075–76.

²¹³ *Id.* at 1075.

²¹⁴ *Id.* at 1076.

important factor,” the district court concluded.²¹⁵ The trade secret status turned on “ancillary information” such as MySpace friends’ “email and contact information as well as the ability to notify them and promote directly to them via their MySpace accounts.”²¹⁶ Mr. Christou and his businesses expended cost and effort in developing the friends list and the list was not easily duplicated by a competitor.²¹⁷ The trade secrets claim and others were withdrawn at trial;²¹⁸ a jury returned a verdict for the defense on the remaining monopolization and attempted monopolization claims.²¹⁹

9. *Emerald City v. Kahn*

In *Emerald City v. Kahn*,²²⁰ the United States District Court for the Eastern District of Texas presided over litigation arising from a business dispute between a band musician, Jordan Kahn, and his employer, Dean Taglioli’s Emerald City Management, L.L.C. and Emerald City Band, Inc. (collectively referred to as Emerald City). When Mr. Kahn left his employment as a musician in Emerald City’s bands, he allegedly “blocked” access to Emerald City’s social media accounts and websites.²²¹ The parties accused each other of intellectual property misappropriation, including claims of trade secret theft, trademark and copyright infringement, and violations of contract and tort law.²²²

With respect to Emerald City’s claim that Mr. Kahn misappropriated trade secrets in violation of the Texas Uniform Trade Secrets Act when Mr. Kahn took possession

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Christou v. Beatport*, No. 10-cv-02912-RBJ-KMT, 2014 U.S. Dist. LEXIS 43459, at *17 (D. Colo. Mar. 31, 2014).

²¹⁹ *Id.* at *7.

²²⁰ No. 4:140-cv-358, 2016 U.S. Dist. LEXIS 2143 (E.D. Tex. Jan. 8, 2016).

²²¹ *Id.* at *3.

²²² *See id.* at *4–5.

of music tracks, a customer list and passwords,²²³ the district court ruled that “as a matter of law, passwords do not qualify as trade secrets.”²²⁴ Looking to the definition of a trade secret under the Texas Uniform Trade Secrets Act, the district court concluded that passwords lack “independent economic value” as required by that statute and granted dismissal of the trade secret claim on summary judgment adjudication.²²⁵

The district court refused to dismiss Emerald City’s claim that Mr. Kahn’s alleged use of Emerald City’s social media accounts constituted a breach of fiduciary duty under Texas state law.²²⁶ The initial registration of the social media accounts in Mr. Kahn’s name, as opposed to his employer’s name, also implicated a breach of fiduciary duty.²²⁷ The district court concluded “[t]herefore, Emerald City has presented evidence raising a fact issue regarding whether Kahn’s registration of the various media accounts and website in his own name, and his use of Emerald City’s passwords after his termination constitute a breach of fiduciary duty.”²²⁸

The district court also noted that business losses likely resulted from Mr. Kahn’s social media account lock-out and his efforts to direct web traffic away from Emerald City’s website to his own website.²²⁹ Finally, the district court refused to dismiss Emerald City’s claim of tortious

²²³ It is unclear from the district court’s opinion whether it is referring to passwords related to the social media accounts or other confidential, password protected aspects of Emerald City’s business operations such as the email system. *See id.* at *54–56.

²²⁴ *Id.* at *55.

²²⁵ *Id.* The district court distinguished passwords from customer lists and client information. The former is a barrier or lock to keep secret the latter which may have independent economic value and constitute a protectable trade secret. *Id.*

²²⁶ *See id.* at *58.

²²⁷ *Id.*

²²⁸ *Id.* at *60.

²²⁹ *Id.* at *59.

interference with prospective business relationships. Emerald City provided evidence that Mr. Kahn's interference with Emerald City's social media accounts and website interrupted business dealings with prospective customers.²³⁰

10. *WBS v. Croucier*

In *WBS, Inc. v. Croucier*,²³¹ a third case involving disputing band members and control over social media accounts, the United States District Court for the Central District of California dismissed claims brought against a band manager for his refusal to relinquish control over the accounts. Rob Hoffman, the band manager of RATT, a heavy metal band whose trademarks were owned by WBS, was sued by WBS for violating California tort law. WBS alleged that Mr. Hoffman's refusal constituted conversion and intentional interference with prospective economic advantage.²³²

Hoffman managed RATT pursuant to the directives of WBS, and he was the sole administrator of their Facebook and Twitter accounts.²³³ The two shareholders of WBS gave conflicting directions to Mr. Hoffman regarding relinquishing control of the social media accounts to one of the shareholders—Mr. Hoffman informed the shareholders of his “desire to remain neutral” until the shareholder dispute was resolved.²³⁴ The district court granted Mr. Hoffman's motion for summary judgment on the conversion claim because WBS, Inc.'s Code of Conduct and Operation required a majority vote to end Mr. Hoffman's management and control of the social media accounts or to threaten litigation against him.²³⁵ Without this vote, Mr. Hoffman's refusal to turn over control of the band's social media accounts could

²³⁰ See *id.* at *62–67.

²³¹ No. CV 15-07251 DDP (JCx), 2016 U.S. Dist. LEXIS 155740 (C.D. Cal. Nov. 8, 2016).

²³² *Id.* at *6.

²³³ *Id.* at *4–5.

²³⁴ *Id.* at *6.

²³⁵ *Id.* at *18–19.

not be construed “to be a wrongful taking of WBS property.”²³⁶

The claim of intentional interference with prospective economic advantage was dismissed as well. The district court concluded that WBS failed to provide any evidence that Mr. Hoffman committed an independently wrongful act in refusing to relinquish control of the band’s social media accounts, as required by California tort law.²³⁷ Further, WBS provided no evidence that Mr. Hoffman’s actions caused economic harm to WBS: “WBS simply assumes, without any evidentiary support or citation to the record, that had Hoffman turned over the passwords to Blotzer’s counsel, WBS would have more actively communicated with followers over social media and successfully translated those outreach efforts into some economic gain.”²³⁸ Lacking evidentiary support, the intentional interference with prospective economic advantage claim was dismissed.

B. The Independent Contractor and Business Social Media Accounts

In *Salonclick v. SuperEgo Management*, the United States District Court for the Southern District of New York heard a case involving a dispute between Salonclick L.L.C. (Salonclick), a business which manufactures and sells hair and skin care products, and SuperEgo Management L.L.C. (SuperEgo), which Salonclick hired as an independent contractor of marketing, public relations, and graphic design services, as well as administrative support.²³⁹ Salonclick terminated its association with SuperEgo several years later; SuperEgo’s principal, Mindy Yang, then allegedly accessed Salonclick’s website and social media accounts—a Twitter

²³⁶ *Id.* at *19.

²³⁷ *See id.* at *21.

²³⁸ *Id.* at *20.

²³⁹ No. 16 Civ. 2555 (KMW), 2017 U.S. Dist. LEXIS 69960, at *3 (S.D.N.Y. May 8, 2017).

account and a Facebook Page—to divert followers of the website and social media accounts to her own business.²⁴⁰

During the pleadings phase of the litigation, the district court examined whether Salonclick’s claims of conversion, replevin, trespass, and breach of fiduciary duty against SuperEgo should proceed. It ruled that Salonclick’s Twitter and Facebook accounts were intangible property protected under New York law’s common law torts of conversion and replevin.²⁴¹ The district court refused SuperEgo’s later request to dismiss Salonclick’s conversion claim for the misappropriation of the social media accounts, noting the availability of punitive damages if the evidence demonstrated that the social media accounts were taken by SuperEgo as a result of malice or reckless or willful disregard of Salonclick’s rights to the social media accounts.²⁴² The district court further ruled that no “demand and refusal” for the return of the control over the social media accounts was required because SuperEgo knew it had “no right” to control the social media accounts.²⁴³ This was demonstrated, according to the district court, when SuperEgo used Salonclick’s social media accounts to promote, without any authorization, its own business interests.²⁴⁴

The district court dismissed Salonclick’s trespass claim, however, because Salonclick did not allege “injury to the chattel” as required by New York trespass law.²⁴⁵ In its ruling, the district court concluded that the social media accounts were “chattel” under New York law of trespass. No trespass of the accounts was alleged because the business losses arising from SuperEgo’s control of Salonclick’s social media accounts did not demonstrate injury or harm to the

²⁴⁰ *See id.* at *3–4.

²⁴¹ *Salonclick, L.L.C. v. SuperEgo Mgmt., L.L.C.*, No. 16 Civ. 2555 (KMW), 2017 U.S. Dist. LEXIS 6871, at *10 (S.D.N.Y. Jan. 18, 2017).

²⁴² *Salonclick*, 2017 U.S. Dist. LEXIS 69960, at *8.

²⁴³ *Id.* at *9.

²⁴⁴ *Id.*

²⁴⁵ *Salonclick*, 2017 U.S. Dist. LEXIS 6871, at *10–12 (emphasis in original).

social media accounts themselves.²⁴⁶ The district court also concluded that even as an independent contractor, SuperEgo was plausibly alleged to be an agent of Salonclick with respect to managing and posting on the social media accounts, and may have owed fiduciary duties to Salonclick when acting in that capacity.²⁴⁷ At the pleadings phase, the district court refused to dismiss Salonclick's breach of fiduciary duty claim against SuperEgo.²⁴⁸

C. Business Management Companies and Social Media Accounts

Business organizations who use social media accounts can create and manage those accounts internally through employees, or externally by hiring management companies or independent contractors to perform this work. In *Keypath Education, Inc. v. Brightstar Education Group*,²⁴⁹ Select Education, Inc. (Select) purchased certain assets of Brightstar Education Group, Inc. (Brightstar). Pursuant to this asset-purchase, Select began operating four technology institutes in California and Oregon previously operated by Brightstar.²⁵⁰ Prior to this asset-sale, Brightstar hired Keypath Education, Inc. (Keypath) to provide marketing, sales, and social media account management services for these four technology institutes.²⁵¹ After the asset-sale, Select became concerned about Keypath's performance of these services, including its alleged "failing to post content frequently and regularly" on the social media accounts, "creating social media content that was plagiarized from other websites," and failing to update information on the

²⁴⁶ *Id.* at *11.

²⁴⁷ *Id.* at *13.

²⁴⁸ *Id.*

²⁴⁹ No. 16-cv-2545-JWL, 2017 U.S. Dist. LEXIS 14061 (D. Kan. Jan. 31, 2017).

²⁵⁰ *Id.* at *3.

²⁵¹ *Id.*

social media accounts.²⁵² When Select terminated its relationship with Keypath, Select requested Keypath's assistance in transitioning control of the social media accounts over to new entities. Keypath allegedly refused that assistance:

Select Education alleges that Keypath could not transfer ownership or provide access to IOT Campuses' social media accounts because Keypath created those accounts in its own name and lost the passwords to those accounts. Even after various social media vendors (such as Facebook and LinkedIn) proposed solutions to provide access to these accounts, Keypath delayed assistance and failed to execute the instructions of those vendors.²⁵³

Select claimed that Keypath's delay and interference with the transition of control of the social media accounts and other services to new entities resulted in the loss of potential students, the unnecessary expenditure of time and resources, and the delay of the launch of a new marketing campaign.²⁵⁴

Keypath filed a lawsuit against Select and Brightstar in the United States District Court for the District of Kansas for breaches of various contracts. Select filed multiple counterclaims against Keypath: breach of contract, breach of the covenant of good faith and fair dealing, breach of fiduciary duty, and unjust enrichment.²⁵⁵ The district court refused Keypath's request to dismiss the fiduciary duty claim. The district court ruled that Keypath and Select had an implied fiduciary relationship arising from the following allegations: Keypath became an agent of Select with respect to the social media accounts; Keypath was the "owner" of these social media accounts and had exclusive access to the accounts; and Keypath created the accounts for the technology institutes in its own name and barred Select from

²⁵² *Id.* at *4.

²⁵³ *Id.* at *5.

²⁵⁴ *Id.* at *5–6.

²⁵⁵ *Id.* at *6.

accessing the accounts without Keypath's authorization.²⁵⁶ Select's relinquishment of control over the social media accounts was a "key characteristic" of a fiduciary relationship.²⁵⁷

D. Bankruptcy Proceedings and Business Social Media Accounts

Before the United States Bankruptcy Court for the Southern District of Texas was a case of first impression involving the question of "whether social media can ever be property of a bankruptcy estate."²⁵⁸ The Bankruptcy Court in *In re CTLI, L.L.C.*²⁵⁹ concluded that business social media accounts are the property of the corporation's bankruptcy estate.²⁶⁰ This case involved a Chapter 11 reorganization of a business called CTLI, L.L.C. (CTLI), a gun store and shooting range that, prior to the bankruptcy, was doing business under the name, "Tactical Firearms."²⁶¹ The Bankruptcy Court reasoned that the meaning of "property of the estate" under the United States Bankruptcy Code, 11 U.S.C. § 541 includes both tangible and intangible property; further, the underlying state law of the bankruptcy action controls the determination of what specifically constitutes property.²⁶² Because no Texas court had examined the issue of whether social media accounts can be construed as property under Texas law, the Bankruptcy Court guided its analysis by looking at other jurisdictions and concluded:

[B]usiness social media accounts are property interests. Like subscriber lists, business social media accounts provide valuable access to customers and

²⁵⁶ *Id.* at *9.

²⁵⁷ *Id.* at *10 (citing *Dana v. Heartland Mgmt. Co.*, 301 P.3d 772, 778 (Kan. Ct. App. 2013)).

²⁵⁸ *In re CTLI, L.L.C.*, 528 B.R. 359, 361 (Bankr. S.D. Tex. 2015).

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 366.

²⁶¹ *Id.* at 362.

²⁶² *Id.* at 366.

potential customers. The fact that those customers and potential customers can opt out from future contact does not deprive the present access of value. Just as Facebook Users can “unlike” a Page at any time, subscribers to email lists can also, by federal law, opt out at any time.²⁶³

This judicial determination to include a social media account in a bankruptcy estate turns on the Bankruptcy Court’s recognition that a distinction exists between individual social media accounts and business social media accounts. The Bankruptcy Court stated that individual social media accounts would likely not qualify as a property interest under the United States Bankruptcy Code because of the Code’s prohibition against using property to coerce an individual to perform personal services: “Because the value in a Facebook Page or Profile lies in the ability to reach Friends or Fans through future communications, the property interest in an individual Profile would likely not become property of the estate.”²⁶⁴ Noting the “liberty” interests and concerns connected to individual social media accounts, the Bankruptcy Court concluded that no such interests are at risk if a social media account is a business account, “even if the business is closely associated with an individual.”²⁶⁵

The Bankruptcy Court then analyzed whether a Facebook Page titled “Tactical Firearms” was a business social media account. It concluded that CTLI owned the Page, not the former majority owner of the business, Jeremy Alcede, because the Facebook Page was named after the gun store and shooting range, Tactical Firearms; it was linked to a business website; the posts made by Mr. Alcede on the Facebook Page were related to CTLI’s business activities and promotional campaigns; and Mr. Alcede granted access to the Facebook Page to a CTLI employee through a paid marketing tool and granted a vendor access to the Facebook

²⁶³ *Id.* at 366–67.

²⁶⁴ *Id.* at 367.

²⁶⁵ *Id.* at 373.

Page as well to promote certain products.²⁶⁶ The Bankruptcy Court rejected Mr. Alcede's argument that because he posted personal status updates on his Facebook Profile or tweeted political messages, the Tactical Firearms Page and Twitter account belong to him, not CTLI:

The very nature of social media dictates that its best use for business is somewhat more subtle than other forms of marketing. A Tweet advertising the fact that the owner of a gun store is at a gun show, far from being especially "personal" in nature, is a perfect example of this kind of subtle marketing. This Tweet most assuredly served to develop Mr. Alcede's reputation as being a well informed, connected insider in the gun-buying community, a reputation that would attract consumers to the business of Tactical Firearms that he was running at the time he issued this Tweet.²⁶⁷

The Bankruptcy Court also concluded that the political posts on the social media accounts related to a pro-gun political agenda directly related to CTLI's business.²⁶⁸ Finally, the fact that the Tactical Firearms Facebook Page initially could only be accessed through Mr. Alcede's personal Facebook Profile did not convince the Bankruptcy Court to classify that Page as personal and not business-related. The Bankruptcy Court explained that Facebook page access can be granted to others who also have Facebook profiles in order to manage a page, while not providing access to the personal Facebook profile itself.²⁶⁹ The Twitter account at issue in the bankruptcy proceedings was determined to be a business social media account as well. The Twitter account was originally named after the business, Tactical Firearms, with a Twitter handle of @tacticalfirearm.²⁷⁰ The summary of the

²⁶⁶ *Id.* at 368–70.

²⁶⁷ *Id.* at 371.

²⁶⁸ *Id.* at 371–72.

²⁶⁹ *Id.* at 372.

²⁷⁰ *Id.*

Twitter account described the business and the Tactical Firearms web page linked directly to this Twitter account.²⁷¹

In analyzing the property interests associated with the social media accounts, the Bankruptcy Court discussed the difference between the business goodwill accrued in a business social media account (and attributable to the bankruptcy estate) and the professional goodwill of an individual who is closely associated with a business social media account:

A business social media account is in a sense a manifestation of the business's accrued goodwill. The goodwill of a company is developed by its employees over the years. Nonetheless, whatever goodwill the individual caused to be associated with the business remains property of the business.²⁷²

Mr. Alcede may have developed professional goodwill through his use of the business social media accounts, which “manifested” through the Facebook fans and Twitter followers of CTLI’s social media accounts.²⁷³ This professional goodwill attributable to CTLI’s social media accounts and any “property interest” associated with that professional goodwill can literally “follow” Mr. Alcede through the voluntary migration of Twitter followers and Facebook followers to his own personal social media accounts.²⁷⁴ Ceding control of the social media accounts to CTLI does not impede Mr. Alcede’s protection of those property interests.²⁷⁵

Mr. Alcede was unsuccessful in convincing the Bankruptcy Court that its transfer of the right to administer the Facebook and Twitter social media accounts from him to CTLI violated his right of privacy. The Bankruptcy Court ruled that Mr. Alcede waived any privacy right he may have had in Facebook messages he sent from the Tactical

²⁷¹ *Id.*

²⁷² *Id.* at 373 (internal citation omitted).

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 373–74.

Firearms Facebook Page because that Page was business-related, separate and distinct from his personal Facebook Profile.²⁷⁶ It was irrelevant that CTLI lacked a policy explaining to employees that the social media accounts were the property of CTLI; however, such a policy would put employees on notice that no privacy rights accrued in these accounts:

Here, though to this Court's knowledge the Debtor had no explicit policy regarding social media, the social media accounts were unambiguously property of the Debtor and not of Mr. Alcede personally. The Court concludes that given that the social media accounts were named for the Debtor and were used for business purposes, Mr. Alcede should have been aware that the accounts were property of the Debtor and thus that he did not have a personal privacy interest therein.²⁷⁷

The Bankruptcy Court also concluded that Mr. Alcede's waiver of his alleged privacy rights was confirmed by the fact that he provided administrative access to the Facebook Page to a CTLI employee and to an outside business vendor.²⁷⁸

The remedial relief that the Bankruptcy Court contemplated—to return control of the valuable business social media accounts to CTLI—was complicated by Mr. Alcede's actions. Facebook had granted Mr. Alcede's request, per its corporate policy, to permit a one-time, irreversible change from the name of the Tactical Firearms Facebook page to Jeremy Alcede Entrepreneur.²⁷⁹ The Bankruptcy Court noted that Facebook's "one-time-change" policy is triggered when a Facebook page has 200 or more Facebook "likes" which, according to the Bankruptcy Court, "suggests that Facebook is aware of the property interest inherent in a popular Page and the importance of helping the rightful

²⁷⁶ *Id.* at 377.

²⁷⁷ *Id.* at 378.

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 374.

owner protect this interest.”²⁸⁰ The Tactical Firearms Page had more than 11,000 likes and, pursuant to this Facebook policy, the page’s name could be and was irreversibly changed by Mr. Alcede. The Bankruptcy Court ordered Mr. Alcede to turn over access to the former Tactical Firearms Facebook page to CTLI. If CTLI were to request that Facebook change this Facebook page to the current business name and that request was not granted, the Bankruptcy Court stated that CTLI could seek compensatory damages arising from Mr. Alcede’s actions.²⁸¹ Mr. Alcede also changed the Tactical Firearms Twitter account handle. The Bankruptcy Court ordered Mr. Alcede to provide a new password and new email address for the Twitter account to CTLI so that it could gain access to the social media account and change the Twitter handle to reflect the fact that it belongs to CTLI.²⁸²

The Bankruptcy Court summarized its lengthy analysis of the legal issues by noting that “the social media accounts of Tactical Firearms were, pre-confirmation, property of the estate, and there is no reason not to treat them as the Court would treat any other assets belonging to the estate. . . . [T]his Court holds that the reorganized Debtor should have full control over these social media accounts.”²⁸³

III. THE JUDICIAL PRECEDENT: A COMPLICATED LEGAL TERRAIN

Courts have used a variety of analytical frameworks to examine the legal arguments in business disputes involving the right to control and derive economic benefits from social media accounts.²⁸⁴ The precedent emerging from these court

²⁸⁰ *Id.*

²⁸¹ *Id.* at 374–77. The Bankruptcy Court noted an additional avenue of relief: Facebook’s migration of Facebook Fans to a new Facebook Page.

²⁸² *Id.* at 377.

²⁸³ *Id.* at 374.

²⁸⁴ Legal scholarship has proliferated in the past several years in this area; notably, the scholarship proposes specific analytical frameworks for the analysis of legal rights arising from social media account disputes arising in a business context. *See* Argento, *supra* note 80 (proposing a

cases present judicial rationales that are complicated, confusing, and in certain instances, contradictory. As will be discussed in Part IV, this creates risk for business organizations operating in this legal environment.

Federal courts, the favored forum to bring these disputes, evaluate both federal and state law claims when analyzing the rights associated with business social media accounts. The jurisprudence involving disputes about control over social media accounts has addressed a variety of issues: property rights, the right to control property, interference with economic opportunities or contractual relationships through misappropriation of that control, intellectual property violations, fiduciary duties, privacy rights, and the valuation of social media accounts and damages calculations.

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A. Property Rights and Social Media Accounts

The emerging precedent on the issue of property rights and social media accounts establishes that social media

trade secrets framework); Park & Abril, *supra* note 52 (proposing a multifactor quasi-publicity rights framework); Courtney J. Mitchell, *Keep Your Friends Close: A Framework for Addressing Rights to Social Media*, 67 VAND. L. REV. 1459 (2014) (advocating for a shop-right and hired-to-invent doctrine analogous to patent law); Tiffany A. Miao, *Access Denied: How Social Media Accounts Fall Outside the Scope of Intellectual Property Law and into the Realm of the Computer Fraud and Abuse Act*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1017 (2013) (arguing that the authorization framework of the Computer Fraud and Abuse Act provides a superior framework to intellectual property frameworks when resolving social media account disputes); Smita Gautam, *#Bankruptcy: Reconsidering "Property" to Determine the Role of Social Media in the Bankruptcy Estate*, 31 EMORY BANKR. DEV. J. 127 (2014) (arguing that social media accounts should be excluded from bankruptcy estates because they present inherent liberty interests beyond the scope of traditional notions of property).

²⁸⁵ The precedent arises in varying adjudication phases of the litigation: dismissal at the pleadings stage, summary judgment, bench trials, and post-trial motions. The courts' conclusions on various legal issues discussed in Part III are in the context of the pleading and evidentiary standards appropriate to each phase.

accounts constitute intangible property. The *CTLI* court explicitly ruled that social media accounts constitute intangible property and are legally protectable assets identical to other assets held by a business organization.²⁸⁶ The *PhoneDog* court stated unequivocally that a Twitter account constitutes property.²⁸⁷ The *Salonlick* court held that under New York law, Twitter and Facebook accounts are intangible property and that the wrongful taking of this intangible property could constitute tortious misconduct under conversion and replevin claims.²⁸⁸ The *PhoneDog* court agreed, stating that the conversion of property claim was “at the core of this lawsuit.”²⁸⁹ The *Ardis* court discussed these property rights in the context of the access information itself, i.e. passwords which control the social media accounts. If a business organization owns the right to the access information unlocking social media accounts, unauthorized retention of that access information constitutes conversion of property.²⁹⁰

Courts disagree on how to characterize the legal form of property interests in social media accounts, and also where to draw boundary lines for those property interests. The *Eagle* court refused to characterize wrongful control of a LinkedIn account as conversion under Pennsylvania law because it ruled that the LinkedIn account was not chattel.²⁹¹ It concluded that a LinkedIn account is an intangible right of access, not tangible chattel. Therefore, no conversion occurred when control of the LinkedIn account was usurped. This contradicts the holding of the *Salonlick* court, which held that social media accounts are chattel

²⁸⁶ *In re CTLLI, L.L.C.*, 528 B.R. 359, 366–67 (Bankr. S.D. Tex. 2015).

²⁸⁷ *PhoneDog v. Kravitz*, No. C 11-03474 MEJ, 2011 U.S. Dist. LEXIS 129229, at *26–27 (N.D. Cal. Nov. 8, 2011).

²⁸⁸ *Salonlick, L.L.C. v. SuperEgo Mgmt., L.L.C.*, 16 Civ. 2555 (KMW), 2017 U.S. Dist. LEXIS 6871, at *10 (S.D.N.Y. Jan. 18, 2017).

²⁸⁹ *PhoneDog*, 2011 U.S. Dist. LEXIS 129229, at *27.

²⁹⁰ *Ardis Health v. Nankivell*, No. 11 Civ. 5013 (NRB), 2011 U.S. Dist. LEXIS 120738, at *8 (S.D.N.Y. Oct. 12, 2011).

²⁹¹ *Eagle v. Morgan*, No. 11-4303, 2013 U.S. Dist. LEXIS 34220, at *28–29 (E.D. Pa. Mar. 12, 2013).

under the law of New York.²⁹² The *Mattocks* court ruled that even if a Facebook Page's "likes" constituted a property interest, no conversion occurred when the business organization took over the Page because its control was neither unauthorized nor wrongful.²⁹³ The *Mattocks* court, however, refused to characterize Facebook "likes" as property interests, ruling that there were no business interests or business opportunities in Facebook "likes."²⁹⁴ By contrast, the *CTLI* court recognized that an employee who posts on a business social media account may also have a "property interest" in those accounts associated with her professional goodwill developed through the social media account's use and its followers.²⁹⁵

B. The Right to Control a Social Media Account

While courts largely treat social media accounts as legal property interests, judicial determinations differ on who has the right to control this property and derive economic benefit from it. Also, the judicial rationales used by courts to arrive at these determinations are crafted from different and, in some instances, divergent justifications. Ownership rights over a social media account used in business might derive from the motivation behind creating the account, the registration and name on the account, the supervision of the account's content and its users' activities, or a combination of all of these factors.

"What's in a name? That which we call a rose/By any other word would smell as sweet."²⁹⁶ Shakespeare's insight was unheeded by courts that ruled the naming of a social media account is persuasive evidence as to who owns that

²⁹² *Salonclick*, 2017 U.S. Dist. LEXIS 6871, at *11.

²⁹³ *Mattocks v. Black Entm't Television*, 43 F. Supp. 3d 1311, 1321 (S.D. Fla. 2014).

²⁹⁴ *Id.*

²⁹⁵ *In re CTLI, L.L.C.*, 528 B.R. 359, 373 (Bankr. S.D. Tex. 2015).

²⁹⁶ WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 2, sc. 2 (Rene Weis et al. eds., *The Arden Shakespeare* 3d ed. 2012).

social media account. The *PhoneDog* court indicated that an employee's creation and naming of a Twitter handle after the business organization when the employee was hired, as well as the Twitter account's use to promote the interests of that business, likely gave the business a property right in the Twitter account.²⁹⁷ The *Maremont* court and the *CTLI* court blurred the analysis on this ownership issue when they both acknowledged that both parties shared marketable and commercial interests in the accounts.²⁹⁸ However, the *CTLI* court concluded the Twitter account and Facebook Page were owned by the employer, not the employee. They were named after the business, linked to a business web page, were used to promote the business's activities and interests, and access to these accounts was shared with individuals both within and outside the business.²⁹⁹ The *Maremont* court came to the opposite conclusion, holding that the social media accounts belonged to the employee despite the fact that her social media accounts, pursuant to her job responsibilities, were used to promote the business organization's marketing campaigns and Maremont's bonus compensation was tied to the success of her social media efforts on behalf of her employer.³⁰⁰

The *Vaughn* court abstained from identifying who owned the disputed Facebook and Twitter pages,³⁰¹ but the *CDM* court stated that a business organization had sufficiently alleged that control of a LinkedIn group formed at the direction of a business organization could constitute confidential information, to which the employer was entitled

²⁹⁷ See *PhoneDog v. Kravitz*, No. C-11-03474 MEJ, 2011 U.S. Dist. LEXIS 129229, at *2-3, *26-27 (N.D. Cal. Nov. 8, 2011).

²⁹⁸ See *Maremont v. Fredman*, No. 10 C 7811, 2014 U.S. Dist. LEXIS 26557, at *12-13 (N.D. Ill. Mar. 3, 2014); *In re CTLI*, 528 B.R. at 373-74.

²⁹⁹ *In re CTLI*, 528 B.R. at 368-70.

³⁰⁰ *Maremont*, 2014 U.S. Dist. LEXIS 26557, at *13; see also *Maremont v. Susan Fredman Design Grp.*, No. 10 C 7811, 2011 U.S. Dist. LEXIS 140446, at *4-5 (N.D. Ill. Dec. 7, 2011).

³⁰¹ See *Vaughn v. Radio One*, 151 F. Supp. 3d 877, 890-91 (S.D. Ind. 2015).

under a non-compete agreement.³⁰² The *Mattocks* court concluded that the business had the right to control the Facebook and Twitter accounts created and managed by a part-time employee, which included a Facebook Fan Page which was not an Official Fan Page as defined by Facebook's Terms of Service and which was created independently by someone who the business later hired as a part-time employee. This right to control the account arose from the business's supervisory role in directing the employee's posts and its financial interest in those accounts. The *Mattocks* court disregarded the fact that the employee unilaterally created the Facebook account prior to her employment.³⁰³

The *Ardis* court relied on a work product agreement in its analysis and subsequent conclusion that a business organization and its related companies owned the access rights to information for accessing its social media accounts. Their employee signed a work product agreement which contained language that work created or developed during employment was the "sole and exclusive property" of the business organization, and which required the return of any confidential information.³⁰⁴ The *Salonlick* court implicitly ruled that the disputed Twitter and Facebook accounts belonged to a business organization, not the independent contractor who created and managed these accounts.³⁰⁵ In contrast, the *Keypath* court found a plausible fiduciary relationship between a management company which created the accounts and allegedly established itself as their owner,

³⁰² CDM Media USA v. Simms, No. 14 CV 9111, 2015 U.S. Dist. LEXIS 37458, at *9–10 (N.D. Ill. Mar. 25, 2015).

³⁰³ See *Mattocks v. Black Entm't Television L.L.C.*, 43 F. Supp. 3d 1311, 1319–21 (S.D. Fla. 2014).

³⁰⁴ See *Ardis Health, L.L.C. v. Nankivell*, No. 11 Civ. 5013 (NRB), 2011 U.S. Dist. LEXIS 120738, at *3–8 (S.D.N.Y. Oct. 19, 2011).

³⁰⁵ See *Salonlick, L.L.C. v. SuperEgo Mgmt., L.L.C.*, 16 Civ. 2555 (KMW), 2017 U.S. Dist. LEXIS 69960, at *8–9 (S.D.N.Y. May 8, 2017).

but operated them for the benefit of the principal business.³⁰⁶

The *Eagle* court diverged from this analysis and concluded that a LinkedIn account was a commercial interest owned by the employee, not her employer. The court acknowledged the commercial value of the LinkedIn account to its user, Dr. Eagle, even though the employer directed Dr. Eagle to create the account, the account was used to promote sales and marketing initiatives of the employer, the employer was involved in managing the account content, and other employees had access to and assisted in managing the LinkedIn account. The *Eagle* court also pointed to the language of the LinkedIn User Agreement, stating it conclusively established that the account's user, Dr. Eagle, owned the social media account.³⁰⁷

C. Social Media Accounts and Interference with Economic Opportunities and Contractual Relationships

Courts vary in how they identify and explain the nature of economic relationships, economic opportunities, and contractual rights implicated in disputes over business social media accounts. The *PhoneDog* court ruled that tortious interference with economic advantage claims could proceed against an employee who diverted Twitter followers to a personal account by changing the account handle because the diversion potentially disrupted the business's economic relationship with both current and future advertisers.³⁰⁸ In *Emerald City*, the court similarly held that it was a question of fact whether a former employee's interference with a

³⁰⁶ *Keypath Educ., Inc. v. BrightStar Educ. Grp.*, Case No. 16-cv-2545-JWL, 2017 U.S. Dist. LEXIS 14061, at *9–10 (D. Kan. Jan. 31, 2017).

³⁰⁷ *See Eagle v. Morgan*, No. 11-4303, 2013 U.S. Dist. LEXIS 34220, at *30, *46–49 (E.D. Pa. Mar. 12, 2013).

³⁰⁸ *PhoneDog v. Kravitz*, No. C 11-03474 MEJ, 2012 U.S. Dist. LEXIS 10561, at *3–4 (N.D. Cal. Jan. 30, 2012).

business organization's social media accounts interrupted business dealings with potential customers.³⁰⁹

The *CDM* court concluded that a former employee's control and use of the employer's LinkedIn group could constitute a contractual violation of a non-compete agreement. The court explained that although the employee was the "point person"³¹⁰ for the LinkedIn group, a confidentiality provision in that agreement required this employee to return confidential information, including confidential information contained on the LinkedIn account.³¹¹ The *Eagle* court concluded the opposite: it stated that a LinkedIn account was owned not by the employer but by the employee. Thus, the employer would have tortiously interfered with the employee's contractual relationship with the social media provider, LinkedIn, when it exercised control over the LinkedIn account, if Dr. Eagle had provided evidence of damages.³¹² The *Mattocks* court reached a different conclusion, holding that an employer did not tortiously interfere with the employee's contractual relationships with social media site providers, Twitter and Facebook. The court found that the employer had cognizable interests in the social media site user agreements between the employee and the providers: The business had a "supervisory interest in how the relationship is conducted or a potential financial interest in how a contract is performed," which justified its interference in the contractual agreements.³¹³

D. Intellectual Property Violations and Social Media

³⁰⁹ *Emerald City Mgmt. v. Kahn*, No. 4:140-cv-358, 2016 U.S. Dist. LEXIS 2143, at *62–67 (E.D. Tex. Jan. 8, 2016).

³¹⁰ *CDM Media USA v. Simms*, No. 14 CV 9111, 2015 U.S. Dist. LEXIS 37458, at *4 (N.D. Ill. Mar. 25, 2015).

³¹¹ *Id.* at *9–10.

³¹² *Eagle v. Morgan*, No. 11-4303, 2013 U.S. Dist. LEXIS 34220, at *30 (E.D. Pa. Mar. 12, 2013).

³¹³ *Mattocks v. Black Entm't Television L.L.C.*, 43 F. Supp. 3d 1311, 1319 (S.D. Fla. 2014).

Accounts

Litigants often allege intellectual property violations in business disputes over social media accounts. Courts examine both federal and state law claims where the misuse of the social media account may violate intellectual property rights. However, the courts' analyses of these claims conflict on certain issues and are idiosyncratic and fact-specific on others. For example, courts disagree as to what constitutes trade secret misappropriation in a social media business dispute. The *PhoneDog* court refused to dismiss a trade secret claim at the pleadings phase ruling that there were evidentiary issues surrounding whether a Twitter account password and Twitter followers were protected trade secrets.³¹⁴ The *Emerald City* court disagreed on this point stating unequivocally that social media account passwords are not trade secrets because they "lack independent economic value."³¹⁵

The *CDM* court ruled that a LinkedIn account could be the subject of a common law misappropriation of trade secret claim and that a membership list of a LinkedIn group could plausibly constitute a protectable trade secret under an Illinois state statute. However, the *CDM* court held that private communications on LinkedIn are not trade secrets in and of themselves, although the content of the communications on this social media messaging might contain protectable trade secrets.³¹⁶ The *Christou* court ruled that a MySpace friends list could constitute a protectable trade secret and the misappropriation of that list by a former employee could be imputed to the employee's rival company, which used the MySpace friend list to benefit that business. The strategic value of such a list, according to the *Christou* court, derives from social media networking sites' ability to

³¹⁴ *PhoneDog v. Kravitz*, No. C 11-03474 MEJ, 2011 U.S. Dist. LEXIS 129229, at *20 (N.D. Cal. Nov. 8, 2011).

³¹⁵ *Emerald City Mgmt. v. Kahn*, No. 4:140-cv-358, 2016 U.S. Dist. LEXIS 2143, at *55 (E.D. Tex. Jan. 8, 2016).

³¹⁶ See *CDM Media USA v. Simms*, No. 14 CV 9111, 2015 U.S. Dist. LEXIS 37458, at *12-14, *16-17 (N.D. Ill. Mar. 25, 2015).

grant a business access to the contact information, an explanation of preferences and interests of those potential customers, and a “built-in” platform to contact those persons.³¹⁷

An employee might bring a false association or false endorsement claim under the Lanham Act if the employee creates a social media account in her own name and another employee from the business posts on that account. The *Maremont* court ruled that a Lanham Act violation for impersonation was plausible under these facts. The Lanham Act violation derived from the commercial context of Facebook and Twitter posts. The court held that the business’s impersonation of the employee on the Facebook and Twitter accounts could constitute a “commercial injury” under the Lanham Act.³¹⁸ Even though these social media accounts were tied to her employer’s business interests, the employee arguably had a marketable commercial interest in her Twitter and Facebook followers because they helped to build her professional brand.³¹⁹ Confusingly, under these same facts, the *Maremont* court found there was not a valid state law right of publicity claim for misappropriation of an employee’s name or likeness because the business tweeted that a guest blogger was using the account, not the employee in whose name the account was held.³²⁰

The *Eagle* court, however, concluded that because the employee’s name has commercial value, a business violates Pennsylvania statutory law through the unauthorized use of an employee’s name when it accesses, controls, and alters the employee’s LinkedIn account. The *Eagle* court also ruled that this behavior violated the common law torts of

³¹⁷ *Christou v. Beatport*, 849 F. Supp. 2d 1055, 1074–76 (D. Colo. 2012).

³¹⁸ *Maremont v. Susan Fredman Design Grp.*, 772 F. Supp. 2d 967, 971 (2011).

³¹⁹ *Maremont v. Fredman.*, No. 10 C 7811, 2014 U.S. Dist. LEXIS 26557, at *13 (N.D. Ill. Mar. 3, 2014).

³²⁰ *Maremont v. Susan Fredman Design Grp.*, No. 10 C 7811, 2011 U.S. Dist. LEXIS 140446, at *18–19 (N.D. Ill. Dec. 7, 2011).

misappropriation of publicity³²¹ and an invasion of privacy through misappropriation of Dr. Eagle's identity.³²² Unlike in *Maremont*, the *Eagle* court found insufficient evidence to support a Lanham Act claim.³²³ The *Eagle* court concluded that replacing another executive's name and likeness on a former employee's LinkedIn account did not violate the Lanham Act without proof of a likelihood of confusion.

E. Fiduciary Duties and Social Media Accounts

Courts have consistently ruled that when a business entrusts the management of a social media account to an individual or entity, the account manager owes a fiduciary duty to the business. These fiduciary duties arise in various contexts. The *Emerald* court stated that a former employee's misuse of control over a social media account could constitute a breach of a fiduciary duty.³²⁴ The breach allegedly arose when the employee registered the social media account in his own name rather than the employer's name,³²⁵ indicating that fiduciary duties extend even to the initial registration of a social media account.

The *Salonclick* court ruled that an independent contractor could act as an agent of the business organization by managing and posting on the business's social media accounts and owe a fiduciary duty to the business organization when providing those services.³²⁶ This fiduciary obligation arose in *Keypath* when a social media management company was hired to control and manage social media accounts of another business organization. Confusingly, the *Keypath* court reasoned that the social

³²¹ *Eagle v. Morgan*, No. 11-4303, 2013 U.S. Dist. LEXIS 34220, at *23 (E.D. Pa. Mar. 12, 2013).

³²² *Id.* at *20–21.

³²³ *Eagle v. Morgan*, No. 11-4303, 2012 U.S. Dist. LEXIS 143614, at *26–27 (E.D. Pa. Oct. 4, 2012).

³²⁴ *Emerald City Mgmt. v. Kahn*, No. 4:140-cv-358, 2016 U.S. Dist. LEXIS 2143, at *58–60 (E.D. Tex. Jan. 8, 2016).

³²⁵ *Id.* at *60.

³²⁶ See *Salonclick, L.L.C. v. SuperEgo Mgmt., L.L.C.*, 16 Civ. 2555 (KMW), 2017 U.S. Dist. LEXIS 6871, at *13 (S.D.N.Y. Jan. 18, 2017).

media account was arguably owned by the management company, but it had a fiduciary duty to manage that account on behalf of the business organization.³²⁷

F. Privacy Rights and Social Media Accounts

Courts examine the issue of whether privacy rights exist in a social media account used for business purposes. This legal question arises in cases where a social media account contains both business-related posts and personal posts, or where the account is identified with an individual who uses the account to advance the interests of a business as well as her own professional brand. The analytical frameworks used by courts to answer this question differ. One framework focuses on the characterization of the posts and whether they are private in nature. The *Maremont* court stated there was no invasion of privacy by a business when it accessed its employee's Facebook and Twitter accounts because the posts on those accounts were not private and the employee did not try to keep them private.³²⁸

A second analytical framework used by courts centers on the initial categorization of a social media account as either a business or an individual account. If the account itself is characterized as a business account, no privacy interests arise from the posts on the accounts; the account users are on notice that no such privacy rights exist in these accounts. The *CTLI* court ruled that no privacy rights existed in Facebook messages sent from a business organization's Facebook page because that page was business-related. The *CTLI* court stated that a former employee and majority business owner waived any privacy rights by sharing administrative access to the social media accounts. Also, the *CTLI* court concluded that the business nature of the account as well as naming the social media account after the

³²⁷ *Keypath Educ., Inc. v. BrightStar Educ. Grp.*, No. 16-cv-2545-JWL, 2017 U.S. Dist. LEXIS 14061, at *9–10 (D. Kan. Jan. 31, 2017).

³²⁸ *Maremont v. Susan Fredman Design Grp.*, No. 10 C 7811, 2011 U.S. Dist. LEXIS 140446, at *20–21 (N.D. Ill. Dec. 7, 2011).

business put the employee on notice that he had no privacy interests in the account.³²⁹ Confusion, however, could arise from a distinction made by the *CTLI* court between individual social media accounts and business social media accounts. It noted that a social media account of a public figure or a celebrity could be characterized as a personal property interest that might not be included as property of the estate under bankruptcy law.³³⁰

It is unclear how a given court might ascertain whether a social media account is a business or individual account. The legal implications of a social media account's categorization as a business or individual account are significant, however. Further, the judicial precedent does not apply uniform standards on how to analyze privacy concerns: should the analysis focus on the nature of the social media account or the nature of the posts on the social media account?

G. Social Media Account Valuations and Damages Calculations

Legal scholars as well as courts acknowledge the difficulty in assessing the valuation of social media accounts. This is a substantial hurdle in the proof of damages in litigation disputes over control of business social media accounts. Limited research exists to prove the assumption that social media accounts have value.³³¹ However, multiple courts assert that such accounts have value to business organizations, which expend resources to create and maintain these accounts and litigate over ownership rights, corroborating the argument that social media accounts used for business purposes possess value.

The *PhoneDog* court recognized the problem inherent in the valuation of business social media accounts when it

³²⁹ See *In re CTLI, L.L.C.*, 528 B.R. 359, 377–78 (Bankr. S.D. Tex. 2015).

³³⁰ *Id.* at 367.

³³¹ For a discussion of this issue, see Loughnane et al, *supra* note 14, at 36 (“However, there is limited research on the topic of social media valuation at present.”).

delayed ruling upon a jurisdictional challenge to a business's valuation of damages over the loss of control of a Twitter account. The *PhoneDog* court acknowledged that "competing methodologies" exist related to the valuation of the social media account, deferring until summary judgment adjudication the complicated task of ascertaining what financial harm the business sustained, if any, when it lost 17,000 Twitter followers.³³² Other courts acknowledge the implicit value in these accounts without directly addressing the valuation problem. The *Ardis* court reasoned that a business would be irreparably harmed if access information to social media accounts was not returned until the end of the litigation over the control of those accounts. While noting the difficulty in quantifying the business harm in "monetary terms," the *Ardis* court adamantly said that loss of the control over the social media accounts "unquestionably has a negative effect on plaintiffs' reputation and ability to remain competitive. . . ." ³³³ The *Emerald City* court argued that business losses likely resulted from a former employee's social media account lock-out of his former employer to business-related social media accounts. Evidence of such losses was inferred from efforts to direct web traffic away from the business's website to the former employee's own website.³³⁴

However, courts do not hesitate to discuss the economic attributes associated with social media accounts. The *Maremont* court cited the "commercial injury" sustained by an employee whose Twitter and Facebook accounts were usurped by her employer.³³⁵ The *Eagle* court similarly noted that an employee's name used in her LinkedIn account had

³³² See *PhoneDog v. Kravitz*, No. C 11-03474 MEJ, 2011 U.S. Dist. LEXIS 129229, at *12-13 (N.D. Cal. Nov. 8, 2011).

³³³ *Ardis Health, L.L.C. v. Nankivell*, No. 11 Civ. 5013 (NRB), 2011 U.S. Dist. LEXIS 120738, at *7 (S.D.N.Y. Oct. 12, 2011).

³³⁴ See *Emerald City Mgmt., L.L.C. v. Kahn*, No. 4:140-cv-358, 2016 U.S. Dist. LEXIS 2143, at *59 (E.D. Tex. Jan. 8, 2016).

³³⁵ *Maremont v. Susan Fredman Design Grp.*, 772 F. Supp.2d 967, 971 (N.D. Ill. 2011).

commercial value, which she had the exclusive right to control.³³⁶ A MySpace friends list provided strategic value to the business in *Christou*.³³⁷ The *CTLI* court explained that a “business’s accrued goodwill” resides in its social media account and remains the property of the business³³⁸ even while an employee’s professional goodwill may be simultaneously accrued in that social media account. Professional goodwill can “follow” the employee when she leaves if followers of the social media account migrate to an employee’s new account.³³⁹

Despite widespread judicial agreement that social media accounts used in business have economic value, this problem of the valuation of a social media account translates into a problem of proving damages. Speculative or unproven damages derail recovery on claims brought in these business disputes. For example, the *Eagle* court awarded compensatory damages “in the amount of zero dollars” on proven violations of misappropriation of identity and misappropriation of publicity.³⁴⁰ Failure to prove damages torpedoed the employee’s claim that her employer tortiously interfered with her contract with LinkedIn.³⁴¹ A claim for intentional interference with prospective economic advantage was dismissed in *WBS, Inc. v. Croucier* because no evidence proved that transferring account control would have produced economic benefits to the shareholders of the business.³⁴² The *Maremont* court dismissed a false endorsement claim brought under the Lanham Act on the issue of damages. Recovery under the statute required proof of either financial losses suffered by the complaining party or

³³⁶ *Eagle v. Morgan*, No. 11-4303, 2013 U.S. Dist. LEXIS 34220, at *23 (E.D. Pa. Mar. 12, 2013).

³³⁷ See *Regas Christou v. Beatport, L.L.C.*, 849 F. Supp. 2d 1055, 1075 (D. Colo. 2012).

³³⁸ *In re CTLI, L.L.C.*, 528 B.R. 359, 373 (Bankr. S.D. Tex. 2015).

³³⁹ *Id.* at 373–74.

³⁴⁰ *Eagle*, 2013 U.S. Dist. LEXIS 34220, at *42.

³⁴¹ See *id.* at *30–31.

³⁴² *WBS, Inc. v. Croucier*, No. CV 15-07251 DDP (JCx), 2016 U.S. Dist. LEXIS 155740, at *20 (C.D. Cal. Nov. 8, 2016).

unjust enrichment to the business that violated the Lanham Act, neither of which was proffered.³⁴³

Finally, the risk of punitive damages in social media account business disputes exists. The *Maremont* court allowed a claim to proceed to trial under the Stored Communications Act which permits the recovery of punitive damages if the jury concludes that the business willfully and intentionally accessed the employee's social media accounts despite the employee's explicit directives to not do so.³⁴⁴ The *Salonclick* court warned that punitive damages could be awarded on a conversion claim if the evidence established that an independent contractor misappropriated a business's social media accounts with malice or reckless or willful disregard of the business's right to control the social media accounts.³⁴⁵

IV. THE RESULTANT BUSINESS RISKS AND PROPOSALS FOR RISK MITIGATION

Significant risks³⁴⁶ exist for business organizations that use social media accounts. The risk involves lengthy, protracted litigation arising from efforts to establish who has the right to control these social media accounts and derive economic benefits from these accounts. It also includes the potential expenditure by business organizations of substantial resources and monies to pursue their legal rights. Calculating outcomes as to how courts will rule on specific legal questions and whether courts will adopt specific methodologies for valuation of social media accounts

³⁴³ See *Maremont v. Susan Fredman Design Grp.*, No. 10 C 7811, 2014 U.S. Dist. LEXIS 26557, at *18 (E.D. Pa. Mar. 3, 2014).

³⁴⁴ See *id.* at *23–28.

³⁴⁵ See *Salonclick, L.L.C. v. SuperEgo Mgmt., L.L.C.*, No. 16 Civ. 255 (KMW), 2017 U.S. Dist. LEXIS 69960, at *8 (S.D.N.Y. May 8, 2017).

³⁴⁶ See, e.g., Nadelle Grossman, *The Duty to Think Strategically*, 73 LA. L. REV. 449, 461 (2013) (“Broadly speaking, *risk* is the potential for an outcome to deviate from what is expected.”). This Article discusses the critical importance of risk analysis and risk mitigation in order to strategically create and sustain value in business organizations.

is difficult given the wide array of judicial rationales adopted by courts on such issues. Additionally, business organizations may be sued over the control of social media accounts and may face, in certain instances, the risk of punitive damages if their behavior warrants imposition of such damages.

The reputational risk to a business associated with the loss of its ability to control messaging on its social media accounts compounds the harm resulting from financial losses such as lost revenue. A hostile takeover of a social media account by a disgruntled employee, independent contractor, former business partner, or management company could result in significant reputational harm or damage to the brand which is not easily remedied or repaired. Revenue risk is a relevant risk as well. As detailed in Part I, social media accounts are engines of advertising, marketing, and branding increasingly relied upon by business organizations to communicate, connect and transact with customers, clients, and the public. Multiple courts have ruled that interfering with a social media account imperils a business's ability to use the social media platform to sell its products and services. In its broadest terms, lost business opportunities result from the disruption of control over a business social media account. Finally, the risk of intellectual property misappropriation, including the theft of trade secrets which provide strategic and competitive advantages to a business, is recognized by courts as well.

The judicial precedent establishes that business organizations must navigate a complex legal environment and face multiple risks when disputes occur over the control of social media accounts. The examined cases provide a blueprint for how business organizations can mitigate these risks. Below is a proposed framework for risk mitigation.

A. The Creation of Social Media Accounts

A business organization decreases the risk that a social media account will be judicially determined to be the property of an employee or other entity if it: (1) names the social media account after the business; (2) links the social

media account to a business page or website; (3) ensures that posts on the account are related to business activities and promotional campaigns; (4) provides a social media account summary that identifies the business purpose of the account; and (5) shares access to the account with multiple individuals within the business organization.³⁴⁷

The business organization should document that it directed an employee, independent contractor, or external management company to create and manage the account solely and exclusively on behalf of the business. The business organization can further mitigate risk by entering into an agreement explicitly stating that the social media accounts are created solely for the economic benefit of the business and, in the case of an employee managing the account, are not created or maintained for the benefit of the employee.³⁴⁸ If a social media account is created in an individual's name, the business organization should solicit an acknowledgment or agreement from that individual that the account was created at the direction of the business organization in the context of the work the employee or individual performs for the business organization and posts made on that account are for the sole benefit of the business organization.³⁴⁹

B. The Management of Social Media Accounts and Company Policies

Risk mitigation strategies should continue once social media accounts are created. Business organizations should adopt policies detailing the creation, management, and retention of control over social media accounts. Managers

³⁴⁷ See, e.g., *In re CTLL, L.L.C.*, 528 B.R. 359, 366–79 (Bankr. S.D. Tex. 2015).

³⁴⁸ See, e.g., *PhoneDog v. Kravitz*, No. C 11-03474 MEJ, 2011 U.S. Dist. LEXIS 129229, at *2–3 (N.D. Cal. Nov. 8, 2011); *Maremont v. Fredman*, No. 10 C 7811, 2014 U.S. Dist. LEXIS 26557 (N.D. Ill. Mar. 3, 2014).

³⁴⁹ See *Eagle v. Morgan*, No. 11-4303, 2013 U.S. Dist. LEXIS 34220, at *3-8 (E.D. Pa. Mar. 12, 2013); see also *Maremont*, 2014 U.S. Dist. LEXIS 26557, at *3–5.

should be trained on the policies and implement practices consistent with these policies, including routine audits which monitor and test whether the policies are adhered to and compliance is achieved.

These policies should include notification to employees, independent contractors, and social media management companies that the social media accounts are the exclusive property of the business organization³⁵⁰ and that the social media accounts are subject to content review and revision by the business organization.³⁵¹ The policies should also clearly state that an employee or manager of a social media account has no privacy rights in the account, regardless of whether the account is a privately-maintained or publicly-available account.³⁵² The business should procure and document acknowledgment of these policies.

Employees who create and manage business social media accounts should be trained on the use of the account. Employees should also be monitored on their management of these accounts and evaluated on their conduct, as part of their employment review. Training, monitoring, and evaluating an employee on social media use signals to these employees and to the courts that the social media account is the property of the business and its management is for business purposes exclusively. Employers should draft and enforce a policy specifically related to the transfer of the social media account to the control and management of another employee when the employee leaves the business.³⁵³ This policy can include language prohibiting an employee from changing the name of a social media account or

³⁵⁰ See, e.g., *Ardis Health, L.L.C. v. Nankivell*, No. 11 Civ. 5013 (NRB), 2011 U.S. Dist. LEXIS 120738, at *2–9 (S.D.N.Y. Oct. 19, 2011).

³⁵¹ See, e.g., *Mattocks v. Black Entm't Television L.L.C.*, 23 F. Supp. 3d 1311, 1316 (S.D. Fla. 2014).

³⁵² See *In re CTLI, L.L.C.*, 528 B.R. 359, 377–78 (Bankr. S.D. Tex. 2015).

³⁵³ See *Eagle*, 2013 U.S. Dist. LEXIS 34220, at *7; *PhoneDog*, 2011 U.S. Dist. LEXIS 129229, at *2–3.

otherwise attempting to divert social media account followers from the business organization.³⁵⁴

A business organization can adopt a conflict of interest policy, empowering the business to discipline and even terminate an employee who uses social media accounts in a way that competes with the business or misuses the business's intellectual property or proprietary information.³⁵⁵ A corporate policy on the return of confidential information should include the return of access information for social media accounts.³⁵⁶

C. Contract Review and Due Diligence Involving Social Media Accounts

Business organizations may mitigate risk through the careful drafting and review of contracts which relate to the rights and duties surrounding social media account control. Requiring an employee to sign a work product agreement at the start of employment diminishes the risk of losing control over a social media account if the agreement stipulates that: (1) all confidential information of the employer must be returned by the employee at the request of the employer; (2) the work developed by the employee or created while employed at the business is the sole and exclusive property of the employer and constitutes "work for hire"; and (3) any actual or threatened breach of the work product agreement constitutes irreparable injury and damage to the employer.³⁵⁷

Non-compete agreements can be broadly drafted to prohibit employees from "taking" social media accounts with

³⁵⁴ See *Emerald City Mgmt., L.L.C. v. Kahn*, No. 4:14-cv-358, 2016 U.S. Dist. LEXIS 2143, at *58–60 (E.D. Tex. Jan. 8, 2016); *PhoneDog*, 2011 U.S. Dist. LEXIS 129229, at *3.

³⁵⁵ *Vaughn v. Radio One of Ind.*, 151 F. Supp. 3d 877, 880–81 (S.D. Ind. 2015); see also *CDM Media United States, Inc. v. Simms*, No. 14 CV 9111, 2015 U.S. Dist. LEXIS 37458, at *2–3 (N.D. Ill. Mar. 25, 2015).

³⁵⁶ See, e.g., *CDM Media*, 2015 U.S. Dist. LEXIS 37458, at *2–5.

³⁵⁷ *Ardis Health, L.L.C. v. Nankivell*, No. 11 Civ. 5013 (NRB), 2011 U.S. Dist. LEXIS 120738, at *3 (S.D.N.Y. Oct. 19, 2011).

them, using information from those accounts, and failing to return “property” associated with those accounts, including access passwords for these accounts.³⁵⁸

Business organizations that outsource the creation or management of a social media account to independent contractors or management companies should draft and enter into social media account contracts with those entities. These contracts should stipulate that the business has exclusive ownership and control over the accounts and that the entity managing it owes a fiduciary duty to manage the account on behalf of the business.³⁵⁹ Business organizations should closely monitor and control the sharing of intellectual property on social media accounts as well.³⁶⁰

A business organization conducting due diligence in connection with business acquisitions, mergers, or asset purchases should investigate and review contracts or affiliations involving the management of social media accounts. This review should include identifying who has access and control over these accounts, whether the contractual obligations survive the merger, acquisition, or asset purchase, and how transfer of the control over the account will occur after the closing on the transaction.³⁶¹ This due diligence should include an assessment of the quality of the management of the social media accounts.³⁶²

³⁵⁸ A business organization should draft contractual language (such as a non-compete or confidentiality agreement) in a manner that does not vitiate binding language in the employee handbook. *See CDM Media*, 2015 U.S. Dist. LEXIS 37458, at *3–10.

³⁵⁹ *See* *Keypath Educ., Inc. v. BrightStar Educ. Grp.*, No. 16-cv-2545-JWL, 2017 U.S. Dist. LEXIS 14061, at *3–6 (D. Kan. Jan. 31, 2017); *Salonlick, L.L.C. v. SuperEgo Mgmt., L.L.C.*, 16 Civ. 2555 (KMW), 2017 U.S. Dist. LEXIS 6871, at *2–3 (S.D.N.Y. Jan. 18, 2017).

³⁶⁰ *Mattocks v. Black Entm’t Television L.L.C.*, 43 F. Supp. 3d 1311, 1315–16 (S.D. Fla. 2014).

³⁶¹ *See Keypath*, 2017 U.S. Dist. LEXIS 14061, at *3–6.

³⁶² *See id.*

D. Remedies and Risk Management of Social Media Account Disputes

An analysis of the judicial precedent reveals risk mitigation strategies a business organization can employ—both pre-dispute and post-dispute—to contain the detrimental effects on a business embroiled in a dispute over a social media account. These strategies include enlisting the aid of social media providers, avoiding conduct that could justify punitive damages awards, and selecting methodologies that substantiate valuations of social media accounts.

Prior to a dispute, business organizations should review the social media policies and contracts of social media providers that govern the social media accounts used by the business. If a dispute erupts over the control of an account, the business organization can enlist the support of these social media providers to regain control over these accounts. These policies and contracts may empower the social media provider to take proactive action to assist the business organization in establishing its property rights in the account.³⁶³ The business organization's policies, or lack thereof, in establishing its ownership rights in the account are relevant to the social media provider's assessment of who should control the account.

A business organization should be alert to the risk that an employee, independent contractor, or management company may pre-emptively contact the social media providers and convince them to irrevocably change the accounts, damaging the business organization's ability to recover control over the social media accounts and access to account followers.³⁶⁴ Courts struggle to provide adequate remedies where social media providers' policies prevent them from undoing certain actions.³⁶⁵

³⁶³ See, e.g., *Mattocks*, 43 F. Supp. 3d at 1316–17.

³⁶⁴ See *In re CTLI, L.L.C.*, 528 B.R. 359, 374–76 (Bankr. S.D. Tex. 2015).

³⁶⁵ See *id.* at 374–77.

As social media account disputes carry the risk of punitive damages³⁶⁶ so business organizations should proceed prudently in the wake of a social media account dispute. Evidence of malice or willful disregard of an employee's directives to refrain from accessing a social media account can justify punitive damages, depending on the claims brought in the litigation and how a court examines ownership rights over the account. To mitigate this risk, the business organization should train employees to seek the guidance of legal counsel when a social media account dispute occurs. Counsel can evaluate the facts, identify the rights over the accounts, and take appropriate action to maintain, regain, or refrain from exercising control over the social media account.

Legal redress may include seeking emergency judicial relief in the form of a temporary restraining order or a preliminary injunction.³⁶⁷ If legal redress is sought, a court will require proof of the social media account's value as well as the damages related to the account's misuse. The risk business organizations face, like other litigants in these cases, is an inability to convince a court of a compelling methodology for the valuation of the social media account and the specter of speculative arguments on financial losses related to the account's misuse.³⁶⁸ To mitigate this risk, business organizations should adopt a methodology, pre-dispute, to provide accurate valuations of its social media accounts and to substantiate these accounts' connections to business revenue.³⁶⁹ These valuations should be tracked, audited, and continuously updated for use by a court seeking reliable evidence on damages.

³⁶⁶ See, e.g., *Maremont v. Fredman*, No. 10 C 7811, 2014 U.S. Dist. LEXIS 26557, at *18 (E.D. Pa. Mar. 3, 2014); *Salonclick, L.L.C. v. SuperEgo Mgmt., L.L.C.*, 16 Civ. 2555 (KMW), 2017 U.S. Dist. LEXIS 69960, at *8 (S.D.N.Y. May 8, 2017).

³⁶⁷ See, e.g., *Ardis Health, L.L.C. v. Nankivell*, No. 11 Civ. 5013 (NRB), 2011 U.S. Dist. LEXIS 120738 (S.D.N.Y. Oct. 19, 2011).

³⁶⁸ See, e.g., *Eagle v. Morgan*, No. 11-4303, 2013 U.S. Dist. LEXIS 34220, at *40–42 (E.D. Pa. Mar. 12, 2013).

³⁶⁹ See *Loughnane et al.*, *supra* note 14, at 36.

V. CONCLUSION

Business organizations' increasing reliance on social media for sales, marketing, and branding presents unique challenges to those organizations in risk identification and mitigation as social media account disputes over the right to control and derive economic benefits from these accounts proliferate. The risk exposure intensifies as business organizations navigate a complex and complicated legal environment in which courts struggle to apply coherent and consistent legal rules to define and delineate the rights related to these social media accounts. Risk mitigation efforts focused on creating and communicating clear and comprehensive policies and procedures regarding the ownership of these accounts can assist business organizations in securing their rights.