LET THEM EAT CAKE: SOCIAL MEDIA ACCOUNTS, PROPERTY RIGHTS, AND THE DIGITAL RIGHTS REVOLUTION

Kathleen McGarvey Hidy[1]*

Revolutions – both intellectual and societal – occur when paradigms of thought are no longer useful, explanatory, or shared. In law, such a revolution in legal rights may advance through paradigm-shifts: a judicial or legislative rejection of legal constructs that do not adequately and fairly account for the nature of the rights at stake. This Article investigates a revolution in the digital rights arising from social media account ownership. Emerging judicial precedent confirms that traditional notions of common law property rights are challenged and transformed when applied to this digital technology, social media. Divergent and inconsistent outcomes in the adjudication of social media account ownership disputes create legal anomalies. This increases the risk exposure for business organizations who view social media as a strategically important business asset and digital tool. Using a historical perspective on the development of common law property rights in the Anglo-American legal tradition, this Article investigates the feasibility of adopting a new legal paradigm. This Article proposes a uniform and coherent approach to the categorization and application of property rights to social media account ownership disputes that mitigates risks to business organizations.

1. *Assistant Professor of Legal Studies, Xavier University. B.A., University of Notre Dame; J.D., Columbia Law School. The author wishes to thank her parents for their gift to her of an extraordinary education: Barbara and William H. McGarvey, Jr.

I. THE DIGITAL RIGHTS REVOLUTION: THE LEGAL REGIME FALLS

"*In a revolution, as in a novel, the most difficult part to invent is the end.*"[3]

Revolutions – both intellectual and societal – occur when paradigms of thought are no longer useful, explanatory, or shared.[4] In law, such a revolution in legal rights may advance through paradigm-shifts

2. WILLIAM SHAKESPEARE, SHAKESPEARE'S THE TEMPEST: A MODERN ENGLISH TRANSLATION, act 2, sc. 1 (Morgan D. Rosenberg trans., Algora Publ'g 2013).

3. ALEXIS DE TOCQUEVILLE, The Recollections of Alexis de Tocqueville 59 (1948) ("[F]or in a rebellion, as in a novel, the most difficult part to invent is the end."). The word "rebellion" used in the original is widely translated and quoted as "revolution." *See Find Quotes*, GOODREADS, https://www.goodreads.com/quotes/search?utf8=%E2%9C%93&q=in+a+revolution%2C+as+in+a+novel%2C+the+most+difficult+part+to+invent+is+the+end&commit+Search (last visited Aug.7, 2020).

4. *See* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 50TH ANNIVERSARY EDITION 92–93 (4th ed. 2012) (advocating in his ground-breaking book the theory that revolutions in scientific thought mirror processes at work in political revolutions. When existing scientific theoretical paradigms or governance institutions no longer adequately account for or explain problems, so-called anomalies arise in a laboratory experiment or a society. "Political revolutions are inaugurated by a growing sense, often restricted to a segment of the political community, that existing institutions have ceased adequately to meet the problems posed by an environment that they have in part created. In much the same way, scientific revolutions are inaugurated by a growing sense, again often restricted to a narrow subdivision of the scientific community, that an existing paradigm has ceased to function adequately in the exploration of an aspect of nature to which that paradigm itself had previously led the way. In both political and scientific development the sense of malfunction that can lead to crisis is prerequisite to revolution."); David Kaiser, *In Retrospect: The Structure of Scientific Revolutions*, 484 NATURE 164, 166 (2012). The author's exegesis of Thomas Kuhn's innovative work on the development of scientific theory explains that thought revolutions resolve anomalies – "findings that differ from expectations" – through paradigm-shifts: "[b]ut once enough anomalies have accumulated, and all efforts to assimilate them to the paradigm have met with frustration, the field enters a state of crisis. Resolution comes only with a revolution, and the inauguration of a new paradigm that can address the anomalies."

that develop through a judicial or legislative rejection of legal constructs that do not adequately and fairly account for the nature of the rights at stake.[5] This revolution takes shape when divergent and inconsistent legal outcomes create anomalies that neither the rights-holders nor the rights-adjudicators can continue to abide:

> In Kuhnian terms, divergences between reality and law or legal theory lead to the development of a new paradigm. In contract, rules are changed and new standards asserted to close the gap. The paradox is that the revolution is not based on a sudden dramatic insight or event, but is based upon a steady build-up of changes in reality, and law's response or lack of response to those changes.[6]

A revolution in digital rights – the legal regime governing technological innovations of the digital revolution[7] – mirrors this process. This digital rights revolution is paradoxically slow and painstaking even as the technological environment in which these rights operate shifts and changes at a rapid pace.[8] Scholars theorize that this "cat-and-mouse chase game between the law and technology will probably

5. Larry A. DiMatteo, *Unframing Legal Reasoning: A Cyclical Theory of Legal Evolution,* 27 S. CAL. INTERDISC. L.J. 483, 513 (2018). This Article discusses the application of Thomas Kuhn's paradigm-shift theory to the development of new legal standards. The author's analysis examines the broader context of how different theories of legal development inform debates on the nature of legal reasoning.

6. *Id.*

7. The digital revolution is an imprecise, elastic term used by scholars to discuss technological developments that include the internet, Mark Cooper, *Why Growing Up is Hard to Do: Institutional Challenges for Internet Governance in the "Quarter-Life Crisis" of the Digital Revolution*, 11 J. ON TELECOMM. & HIGH TECH. L. 45, 51 (2013), digital information sharing, Alberto B. Lopez, *Posthumous Privacy, Decedent Intent, and Post-Mortem Access to Digital Assets,* 24 GEO. MASON L. REV. 183, 183–84 (2016), digital assets, Natalie M. Banta, *Electronic Wills and Digital Assets: Reassessing Formality in the Digital Age*, 71 BAYLOR L. REV. 547, 549 (2019), and a broad array of technological advances such as "processing power and storage capacity, the steady miniaturization of computing, ubiquitous communications and networking capabilities, and the digitization of all data," Ryan Hagemann et al., *Soft Law for Hard Problems: The Governance of Emerging Technologies in an Uncertain Future,* 17 COLO. TECH. L.J. 37, 57 (2018).

8. *See* Hagemann et al., *supra* note 7, at 38. Technological change outpaces the law's ability to adequately and appropriately address technology-driven legal problems:

> The underlying drivers of the modern computing and Internet revolution - microprocessors, networked technologies, software, sensors, wireless geolocation, and other digital devices and applications - are invading numerous precincts of the economy and upending the way business is done in a wide variety of sectors. These new technological capabilities are accelerating the well-known pacing problem: technology evolves faster than the law's ability to keep up. As a result, these new and rapidly-evolving technologies and sectors will present formidable challenges to traditional regulatory regimes and will necessitate the formulation of new governance processes. *Id.*

The authors argue that the pace of innovation in certain technology sectors as well as the global impacts of these technological advancements usher in a new governance model based on soft law—standards and norms followed by the industry market participants which are non-binding and unenforceable under hard law regulatory regimes. *Id.* at 41.

always tip in favor of technology"[9] because the technology itself – the digitization of information flowing through the internet – is qualitatively different than predecessor communication technologies, such as the telephone and the television, and is inherently disruptive.[10] This relentless march towards technological advancements, as well as the speed of consumer adoption of these technologies,[11] creates a "pacing problem"[12] in which the law and regulation lag behind technology creation and use.

This pacing problem, inherent in the digital rights revolution, produces inconsistent and divergent judicial outcomes to a legal question that is of strategic importance to business organizations: is a social media account a form of property that confers property rights in the social media account? Emerging judicial precedent on this legal question confirms the existence of a digital rights revolution in which traditional notions of property rights are challenged and transformed when applied to this form of digital technology—social media.[13]

This Article first examines how this digital rights revolution involving social media account ownership disputes causes the current legal regime to fall. This Article then evaluates the risk this regime failure

---

9. Adam Thierer, *The Pursuit of Privacy in a World Where Information Control Is Failing,* 36 HARV. J.L. & PUB. POL'Y 409, 432 (2013) (quoting Konstantinos K. Stylianou, *Hasta La Vista Privacy, or How Technology Terminated Privacy*, PERSONAL DATA PRIVACY AND PROTECTION IN A SURVEILLANCE ERA: TECHNOLOGIES AND PRACTICES 44, 54 (Christina Akrivopoulou & Athanasios-Efstratios Psygkas eds., 2011)).

10. *Id.* at 432 (The author investigates privacy interests in relation to the internet's use of digital communication networks and explains this digital technology poses unprecedented challenges because "it is innately resistant to control.").

11. Hagemann et al., *supra* note 7, at 59 (contrasting the number of Americans that purchased telephones, which reached 25% of the population more than thirty years after the technology became available, with the seven-year time lag for American consumer adoption of internet access to reach a similar purchase percentage. American consumer adoption of smart phone and tablet technology outpaced internet access adoption.).

12. *Id.* at 59 (quoting WENDELL WALLACH, A DANGEROUS MASTER: HOW TO KEEP TECHNOLOGY FROM SLIPPING BEYOND OUR CONTROL 395 (2015)). The "pacing problem" referred to by scholars is the "gap between the introduction of a new technology and the establishment of laws, regulations, and oversight mechanisms for shaping its safe development."

13. *See infra* Parts II.B.1, 2; Digital technology arguably provides the "external shock to the relevancy of existing law" that forces the re-thinking and replacement of an existing legal regime. DiMatteo, *supra* note 5, at 508 (acknowledging the Industrial Revolution's role in the development of the Uniform Commercial Code, an adaptation to new and different forms of contractual relations that emerged from this transformational economic and societal change). The author notes that alternative models of legal development provide different theoretical frameworks in which to analyze this phenomenon. *Id.* at 510 (delineating gradualism – a theory of legal development that identifies the development of common law as a centuries-long maturation process – from a Kuhnian paradigm-shift theory of legal development in which the "most rational model would combine the case-by-case gradualism of common law with intermittent paradigm-shifts or legal 'jumps'").

poses to business organizations. Specifically, in Part II, this Article investigates the data on the critical importance of this legal question to business organizations who view social media accounts as both a valuable business asset and a strategic tool used to execute core business functions.[14] Part II then analyzes the current legal regime in the United States that addresses the legal question of whether property rights exist in social media accounts.[15] The legal rules used to address this question are judicially-created.[16] The legal frameworks used by courts to analyze this property rights question are analytically inconsistent and lack coherence and uniformity. This creates anomalies in the legal precedent. Part II of this Article next examines how these anomalies impact business organizations as they attempt to protect a valuable business asset: social media accounts.[17] The risk to business organizations increases as the predictive power and reliability of this precedent decreases.

Parts III and IV of this Article examine the feasibility of judicial and legislative adoptions of a new paradigm that applies consistent and analytically coherent legal rules to property rights disputes in social media accounts.[18] Part III asks whether the past is prologue: Can a paradigm-shift emerge from an understanding of legal history?[19] In Part III, this Article uses a historical lens to investigate how property rights in the Anglo-American legal tradition evolved.[20] In Part IV, this legal history informs an evaluation of whether a new legal paradigm to address the property rights at issue in social media accounts can be judicially- or legislatively-created.[21] Part IV of this Article analyzes the use of a proposed judicial or legislative framework to mitigate risk to business organizations.[22]

II. Social Media Account Ownership Disputes: The Risks to Business Organizations

Social media[23] – the digital revolution's 1997 game changer[24] – impacts a range of societal behavior in profound and significant ways.

14. *See infra* Part II.A.
15. *See infra* Part II.
16. *See infra* Parts II.B.1, 2.
17. *See infra* Part II.C.
18. *See infra* Parts III, IV.
19. *See infra* Part III.
20. *See infra* Part III.
21. *See infra* Part IV.
22. *See infra* Part IV.
23. Social media has been defined as "forms of electronic communication (such as websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (such as videos)." Rachel E. Van-

Studies confirm the widespread adoption of this digital tool both in the United States and globally. A 2018 report documented 4.02 billion internet users globally, which is 53% of the total population worldwide, with users active on social media reaching 3.2 billion, which is 42% of the world's population.[25] In 2019, the Pew Research Center reported a 67% increase in social media use in the United States adult population from 5% use in 2005 to 72% use in 2019.[26] This data echoes a social media use-rate globally that is similarly high in many developed countries, such as South Korea, Australia, Sweden, Canada, and Israel,[27] as well as a use-rate in developing economies that is quickly approaching that of the advanced economies.[28] In the United States, social media use and engagement influence a wide range of individual and societal behaviors, magnifying the importance and impact of this digital innovation.[29]

Landingham, *Jailing the Twitter Bird: Social Media, Material Support to Terrorism, and Muzzling the Modern Press*, 39 CARDOZO L. REV. 1, 10 (2017) (quoting *Social Media*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/social%20media (last visited July 20, 2020)); Susan Park & Patricia Sanchez Abril, *Digital Self-Ownership: A Publicity-Rights Framework for Determining Employee Social Media Rights*, 53 AM. BUS. L. J. 537, 538 (2016) ("The term 'social media' encompasses any online platform that allows individuals to communicate, create content, and interact socially. Social media can include blogs, wikis, podcasts, photos and video sharing, virtual worlds, and social networking sites such as LinkedIn, Facebook, Instagram, and Twitter.").

24. The roots of social media extend back to 1997 with the launch of a nascent form of a social networking site called SixDegrees.com. Gil Press, *Why Facebook Triumphed Over All Other Social Networks,* FORBES (Apr. 8, 2018, 4:11 PM), https://www.forbes.com/sites/gilpress/2018/04/08/why-facebook-triumphed-over-all-other-social-networks/#4df21e0e6e91.

25. Atanu Shaw, *How Social Media Can Move Your Business Forward,* FORBES (May 11, 2018, 8:00 AM), https://www.forbes.com/sites/forbescommunicationscouncil/2018/05/11/how-social-media-can-move-your-business-forward/#33797dfc4cf2.

26. Brooke Auxier et al., 10 *Tech-related Trends that Shaped the Decade*, PEW RES. CTR. (Dec. 20, 2019), https://www.pewresearch.org/fact-tank/2019/12/20/10-tech-related-trends-that-shaped-the-decade/.

27. A 2018 Pew Research Center study reported that "two-thirds or more" of adults in these countries engaged in social media use. Jacob Poushter et al., *Social Media Use Continues to Rise in Developing Countries but Plateaus Across Developed Ones*, PEW RES. CTR. (June 19, 2018), https://www.pewresearch.org/global/2018/06/19/social-media-use-continues-to-rise-in-developing-countries-but-plateaus-across-developed-ones/.

28. *Id.* ("When it comes to social media use, people in emerging and developing markets are fast approaching levels seen in more advanced economies.").

29. The Pew Research Center reports that social media is not merely used for socializing, noting that "we have documented how social media play a role in the way people participate in civic and political activities, launch and sustain protests, get and share health information, gather scientific information, engage in family matters, perform job-related activities and get news." Lee Rainie, *Americans' Complicated Feelings About Social Media in an Era of Privacy Concerns*, PEW RES. CTR. (Mar. 27, 2018), http://www.pewresearch.org/fact-tank/2018/03/27/americans-complicated-feelings-about-social-media-in-an-era-of-privacy-concerns/.

A. The Strategic Business Importance of Social Media Accounts

Social media plays a critical role in business organizations' outreach to this increasingly networked segment of the population; business operations' core functions executed through social media include brand management, marketing and advertising, sales, and corporate culture-building.[30] Data on business use of social media underscores the increasing importance of this business tool to a wide array of industries:

- A 2019 report surveying 1,800 business organizations across a range of industries including consumer products, financial services, e-commerce, and travel and tourism confirms: "[s]ocial media marketing has been around for many years now, and the majority of marketers sees it as an important part of their overall strategy. [58%] of marketers say social media is '[v]ery important', with 30[%] saying it's '[s]omewhat important.'"[31]
- 92% of business-to-business marketing executives share content over social media.[32]
- A 2019 report surveying 1,800 business organizations found that various social media platforms are used by business organizations with the following top five garnering the greatest social media account use by business organizations: Facebook (93.7%); Twitter (84.4%); Instagram (80.9%); LinkedIn (70%); and YouTube (60.8%).[33]
- 65.6% of 1,800 business organizations responding to a 2019 survey stated they planned to increase their social media advertising budget in 2019.[34]
- 69% of 5,700 marketers surveyed in 2017 reported using social media to develop brand loyalty.[35]

---

30. Leslie K. John et al., *Ads that Don't Overstep*, 96 HARV. BUS. REV. 62, at 62, 64 (2018); Kiely Kuligowski, *Social Media for Business: A Marketer's Guide*, BUS. NEWS DAILY (Oct. 2, 2020), https://www.businessnewsdaily.com/7832-social-media-for-business.html; *2019 Report, State of Social: How Marketers Across the Globe Think About Social Media, What's Working, How the Industry is Changing, and More,* BUFFER, https://buffer.com/state-of-social-2019 (last visited Oct. 13, 2020); James Mulvey, *Social Media in 2020: 11 Data-Backed Predictions*, HOOTSUITE (Apr. 10, 2018), https://blog.hootsuite.com/social-media-2020/.

31. BUFFER, *2019 Report, supra* note 30; *see also* Shea Bennett, *88% of Brands Will Use Social Media Marketing in 2014 [Study],* ADWEEK (Nov. 14, 2013), https://www.adweek.com/digital/smm-2014/ (88% of surveyed U. S. companies with 100 or more employees planned to market using social media platforms in 2014, an increase from previous years.).

32. Shea Bennett, *92% of B2B Marketers Use Social Media to Share Content*, ADWEEK (Feb. 23, 2015), https://www.adweek.com/digital/b2b-marketing-channels-content/.

33. *2019 Report, State of Social: How Marketers Across the Globe Think About Social Media, What's Working, How the Industry is Changing, and More*, *supra* note 30.

34. *Id.*

35. *See* Shaw, *supra* note 25 (noting that 69% of 5,700 marketers surveyed in 2017 reported using social media to develop brand loyalty).

Business organizations use social media as a key driver of profitability, investing in outcomes to achieve measurable impacts on consumer decisions.[36] A substantial majority of surveyed marketers report that they use social media to shape brand loyalty.[37] In a 2018 report on global social media use, the findings confirmed that "almost half of internet users follow brands they like or brands they are thinking of buying something from on social media."[38]

With over 4 billion documented internet users,[39] the digital revolution, in general, and social media use, in particular, provide business organizations an unprecedented opportunity to dramatically impact their marketing and sales to potential customers and clients. These customers and clients increasingly use social media to conduct product research; this consumer behavior is linked to the use of social media to engage in e-commerce as well, ushering in social media as a sales engine or digital storefront:[40]

> From product galleries on Instagram to product launches on Facebook Live, social content is already used by younger demographics to discover and evaluate products. As more consumers research potential purchases on social networks, it's a short leap to buying directly on Facebook, Pinterest, or Instagram. Chatbots will help consumers transition to social commerce, making it easy and seamless to discover products, ask questions, process digital payments, and see automatic updates on your order's delivery date.[41]

Social media use as a powerful consumer vehicle for digital window shopping, product research, and potentially product purchases is reflected in data: "[g]lobally, online consumers spend one-third of their time on social media."[42] Social media use for consumer purchases ex-

---

36. John et al., *supra* note 30, at 62, 64. Online data about consumers allows marketers to identify and respond to consumer behavior, positively impacting the performance of advertising launched by these marketers:

> With users regularly sharing personal data online and web cookies tracking every click, marketers have been able to gain unprecedented insight into consumers and serve up solutions tailored to their individual needs. The results have been impressive. Research has shown that digital targeting meaningfully improves the response to advertisements and that ad performance declines when marketers' access to consumer data is reduced. *Id.*

37. *See* Shaw, *supra* note 25.

38. Mulvey, *supra* note 30.

39. Shaw, *supra* note 25.

40. Mulvey, *supra* note 30 ("Globally, online consumers spend one third of their time on social media.").

41. *Id.*

42. *Id.*

tends as well to services such as banking, where social media messaging is used for banking transactions on mobile platforms.[43]

Cited benefits to business engagement on social media platforms include brand awareness, brand personality, thought leadership, increased website traffic, reputation management, analytics and insights, competitor analysis, and targeted advertisements.[44] An additional use of social media by business organizations is corporate culture-building:

> Whether tracking employee perceptions of new leaders to prioritizing critical problems in corporate culture, social data will become a new area of advantage. Using publicly available data (such as comments on Instagram or perceptions on LinkedIn), social data will provide a true look into the health of an employer brand.[45]

Business organizations' embrace of social media as a critically important business tool and the significant impact social media has on profitability leads to litigation over the ownership rights in social media accounts. A kaleidoscope of legal theories is advanced by litigants, and the judicial analyses courts employ to adjudicate these social media account ownership disputes result in divergent and inconsistent outcomes across jurisdictions, creating risk exposure for business organizations.[46]

B. Divergent and Inconsistent Judicial Outcomes in Ownership Disputes

The strategic importance of social media account ownership and control to business organizations invariably leads to litigation over the nature of these digital rights and the available remedies. Legal scholarship documents both the proliferation of this litigation as well as the need for an analytically sound legal framework and approach to categorizing and adjudicating these digital rights.[47] Evidence of the digital

43. *Id.*

44. Kuligowski, *supra* note 30.

45. Mulvey, *supra* note 30.

46. *See infra* Part II.B.2.

47. Kathleen McGarvey Hidy, *Business Disputes over Social Media Accounts: Legal Rights, Judicial Rationales, and the Resultant Business Risks,* 2018 COL. BUS. L. REV. 426, 433 (detailing the emerging judicial precedent from social media account ownership litigation which is "a kaleidoscope of judicial rationales used by courts to define and delineate the legal rights over these social media accounts."); Park & Sanchez Abril, *supra* note 23, at 541 (The authors propose a framework derived from a publicity rights approach for post-employment disputes over control of social media accounts. In their examination of relevant caselaw, the authors conclude: "Analysis of these cases reveals that this legal question does not fit neatly into conventional interpretations or areas of law. Is this a matter of property law? Or perhaps contract law? Do we engage the law of trade secrets to resolve these issues? Or is intellectual property or tort law better suited to address them?"); Zoe Argento, *Whose Social Network Account? A Trade Secret Ap-*

rights' pacing problem emerges from caselaw—the judicial forum for the adjudication of these disputes. This evidence demonstrates that courts struggle to select and apply clear and consistent legal rules and principles that allow them to analyze and adjudicate the property rights question embedded in these disputes. The judicial precedent arising from litigation over social media account ownership disputes creates divergent and inconsistent outcomes; anomalies in the law where the analytical framework or paradigm used by various courts to identify and adjudicate these property rights is neither uniform nor logically coherent.

1. The Littered Litigation Landscape

Courts adjudicate disputes arising from the ownership and control of social media accounts under both federal and state law; this litigation landscape is littered with legal theories of recovery that obscure essential questions about the nature of the property embedded in these lawsuits and what legal rights should attach to those property interests.[48] What is clear from an analysis of the caselaw is that courts provide idiosyncratic interpretations of whether and how a legal theory of recovery applies to a dispute over social media account control.[49]

The question of whether intellectual property rights arise from social media accounts confounds the courts as they apply an array of intellectual property regimes to social media account disputes. These courts adopt various rationales to justify the logic of the distinctions they make as they apply intellectual property law to the unique features of each kind of social media platform. In *Christou v. Beatport*, the U.S. District Court for the District of Colorado identified a MySpace friends list as a possible trade secret protectable under Colorado

---

proach to Allocating Rights, 19 MICH. TELECOMM. & TECH. L. REV. 201, 277 (2013) (advocating for the adoption of a legal regime that grants trade secret protection to social media account passwords, vesting control over exclusive access to the account to the holder of the trade secret).

48. Hidy, *supra* note 47, at 472: "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."

49. The legal question of ownership and the legal question of control over a social media account itself get muddled by litigants when asserting their rights over social media accounts. PhoneDog v. Kravitz, No. C 11-03474 MEJ, 2011 U.S. Dist. LEXIS 129229, at *11 (N.D. Cal. Nov. 8, 2011) ("PhoneDog further argues that, notwithstanding any ownership interest or right to possession it has in the [Twitter] Account, it is entitled to damages based upon Mr. Kravitz's interference with its access to and use of the Account.").

law.[50] This view echoed a ruling by a federal district court in California that refused to dismiss a trade secret theft claim brought under California law in a Twitter account dispute.[51] That district court ruled that Twitter account followers as well as the password on the Twitter account could constitute protectable trade secrets.[52] In *CDM Media USA v. Simms*, the U.S. District Court for the Northern District of Illinois parsed the meaning of a trade secret as applied to different aspects of another kind of social media account:[53] LinkedIn. The district court examined a LinkedIn account's protectability under the Illinois Trade Secrets Act[54] and concluded that a LinkedIn membership list could constitute a trade secret[55] but a "LinkedIn group's private communications" could not.[56]

Other intellectual property rights asserted in disputes over social media accounts include Lanham Act[57] violations, common law tortious misappropriation of publicity,[58] and common law tortious invasion of privacy through the misappropriation of identity.[59] In *Maremont v. Fredman,* the U.S. District Court for the Northern District of Illinois ruled that Twitter and Facebook account followers can constitute a "marketable commercial interest" satisfying the commercial interest requirement under the Lanham Act.[60] The district court found that a Lanham Act false endorsement claim could arise when an employer tweets from a Twitter account in which ownership and control of that account is disputed by an employee.[61]

In *Eagle v. Morgan*, the U.S. District Court for the Eastern District of Pennsylvania rejected a claim asserting an unfair competition Lanham Act violation brought under Section 43(a), finding insufficient

50. Christou v. Beatport, LLC, 849 F. Supp. 2d 1055, 1076 (D. Colo. 2012) (ascribing the trade secret status of the MySpace friends list as a question of fact and refusing to dismiss the trade secret claim on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6)).

51. *PhoneDog*, 2011 U.S. Dist. LEXIS 129229, at *20.

52. *Id.* at *19–20.

53. CDM Media USA, Inc. v. Simms, No. 14 CV 9111, 2015 U.S. Dist. LEXIS 37458, at *12 (N.D. Ill. Mar. 25, 2015).

54. 765 Ill. Comp. Stat. Ann. 1065/2(d) *et seq.* (2020).

55. CDM Media USA, Inc., 2015 U.S. Dist. LEXIS 37458, at *12–14.

56. *Id.* at *13–14. The federal district court did note that trade secrets may be contained in LinkedIn private messaging, stating that this legal assertion must be made with a specificity that ties the information in the LinkedIn message to the definition of what constitutes a trade secret under Illinois law.

57. 15 U.S.C. § 1125(a) (2012).

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

59. *Id.* at *20–22.

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

61. *Id.* at *15–16.

evidence of confused LinkedIn users over a disputed LinkedIn account.[62] The *Eagle* court ruled that a business organization did violate Pennsylvania's common law tort of misappropriation of publicity, depriving its former executive of "an exclusive right to control the commercial value of her name and to prevent others from exploiting it without her permission."[63] The evidence presented at trial illustrates the efforts parties undertake to keep and control an existing social media account. These efforts demonstrate the value inherent in an established social media account and reveal the economic motivations driving parties to litigate social media account ownership disputes:

> By using Plaintiff's password to enter her LinkedIn account, changing the password to block Dr. Eagle from entering it, and then altering her account to reflect Sandi Morgan's information – in lieu of simply creating a new LinkedIn account for Ms. Morgan – Defendant Edcomm deprived Plaintiff of the commercial benefit of her name.[64]

Additionally, the district court in *Eagle* held that the business organization's use of the LinkedIn account established an invasion of privacy through misappropriation of identity, a tort under Pennsylvania common law.[65] In Pennsylvania, this tort recognizes misappropriation of the "reputation, prestige, social or commercial standing, public interest or other values" derived from an individual's name or likeness.[66] The LinkedIn account became the cyber real estate on which these interests sat. Control of this social media account allowed the manipulation of these intangible but valuable interests.

These same interests – reputation and prestige – were at stake in the disputed ownership and control of Facebook accounts and Facebook pages.[67] The U.S. District Court for the Eastern District of Kentucky, on summary judgment adjudication, held a union's ex-president liable for violating the union's rights under Kentucky's common law invasion of privacy tort.[68] The ex-president retained control over the union's social media accounts and "benefitted from the goodwill

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

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

64. *Id.* at *23.

65. *Id.* at *20–22.

66. *Id.* at *20 (quoting Wallace v. MediaNews Group., Inc., No. 1:12-CV-0872, 2013 U.S. Dist. LEXIS 7485, at *11 (M.D. Pa. Jan. 18, 2013) (quoting RESTATEMENT (SECOND) OF TORTS § 652C cmt.c), *aff'd in part, vacated in part on other grounds*, Wallace v. MediaNews Group, Inc., No. 13-2079, 2014 U.S. App. LEXIS 11047 (3d Cir. June 13, 2014)).

67. Int'l Bhd. of Teamsters Local 651 v. Philbeck, 423 F. Supp. 3d 364, 375 (E.D. Ky. 2019).

68. Int'l Bhd. of Teamsters Local 651 v. Philbeck, 464 F. Supp. 3d 863, 873 (E.D. Ky. 2020).

associated with the [u]nion's reputation and prestige," which were intangible but valuable interests embedded in the disputed Facebook accounts and Facebook pages.[69]

Other legal theories courts confront in litigation over social media account ownership and control include the tort of trespass,[70] tortious interference with economic and business opportunities,[71] breach of fiduciary duty,[72] civil conspiracy and unfair competition,[73] civil theft,[74] and contract-based rights.[75] This precedent, along with the caselaw ad-

69. *Id.*

70. Salonclick, LLC v. SuperEgo Mgmt., LLC, No. 16 Civ. 2555 (KMW), 2017 U.S. Dist. LEXIS 6871, at *10–12 (S.D.N.Y. Jan. 18, 2017) (The federal district court categorized a Twitter account and Facebook page as "intangible property"; New York's common law tort of trespass to chattels requires a plaintiff to demonstrate "injury" to the social media accounts themselves, not simply damage to business interests.).

71. Emerald City Mgmt., LLC v. Kahn, No. 4:14-cv-358, 2016 U.S. Dist. LEXIS 2143, at *62–68 (E.D. Tex. Jan. 8, 2016) (A question of fact remained for adjudication at trial on the issue of whether social media account control constituted tortious interference with prospective business relationships under Texas common law.); PhoneDog v. Kravitz, No. C 11-03474 MEJ, 2012 U.S. Dist. LEXIS 10561, at *2–4 (N.D. Cal. Jan. 30, 2012) (ruling that the plaintiff had sufficiently pled a claim for intentional interference with prospective economic advantage through disruption in advertising revenue directly related to the plaintiff's loss of control over a Twitter account.).

72. Keypath Educ., Inc. v. BrightStar Educ. Grp., No. 16-cv-2545-JWL, 2017 U.S. Dist. LEXIS 14061, at *9 (D. Kan. Jan. 31, 2017) (Applying Kansas law, a federal district court refused to dismiss a breach of fiduciary duty claim brought by a company that alleged a social media management company had an implied fiduciary relationship with the company when it "established itself as the owner of those social media accounts . . . and Select Education was unable to access those [social media] accounts without permission from Keypath."); *Salonclick,* 2017 U.S. Dist. LEXIS 6871, at *13 (A business organization alleged breach of fiduciary duty under New York law against an independent contractor who created a Twitter account and was given administrative access to a Facebook page.); *Emerald City Mgmt. LLC*, 2016 U.S. Dist. LEXIS 2143, at *59–60 (A federal district court recognized a breach of fiduciary duty claim under Texas law brought by an employer against its former employee who registered "the various [social] media accounts and website in his own name" and then locked his employer out of the social media accounts when he left that employment.).

73. Farm Journal, Inc. v. Johnson, No. 4:19-cv-00095-SRB, 2019 U.S. Dist. LEXIS 69374, at *23–27 (W.D. Mo. Apr. 24, 2019).

74. In *Mazo v. Merritt*, the U.S. District Court for the District of Colorado refused to dismiss a civil theft claim under Colorado law, categorizing social media accounts as "valuable property." Mazo v. Merritt, No. 18-cv-00831-RBJ, 2019 U.S. Dist. LEXIS 12766, at *20 (D. Colo. Jan. 28, 2019). The district court ruled that the prima facie elements of civil theft under Colorado law were pled in the social media account ownership dispute. Those elements are met when a plaintiff shows that a defendant "knowingly obtains, *retains,* or *exercises control* over anything of value of another without authorization and intends to permanently keep it or prevent the true owner from enjoying the thing's use or benefit." *Id.* at *21 (quoting Colo. Rev. Stat. § 18-4-401(1)(a)–(e) (2021)).

75. CDM Media USA, Inc. v. Simms, No. 14 CV 9111, 2015 U.S. Dist. LEXIS 37458, at *10 (N.D. Ill. Mar. 25, 2015) (A senior executive entered into a non-compete agreement that included a clause related to disclosure of confidential information. The senior executive's "failure to transfer control of the LinkedIn group" may have violated this contractual provision when he resigned and began working for his former employer's customer.); Ardis Health, LLC v.

judicating intellectual property rights, acknowledges the important economic and business-related interests at stake in these social media account disputes. What is left unclear and uncertain in this precedent is the nature of the property interests found in social media accounts and the boundary lines for these property rights.

2. The Social Media Account as Common Law Personal Property

These fundamental questions are addressed through a legal theory embedded for centuries in the Anglo-American legal tradition: the common law tort of conversion.[76] The Restatement 2d of Torts defines conversion as follows:

> (1) Conversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel.
> (2) In determining the seriousness of the interference and the justice of requiring the actor to pay the full value, the following factors are important:
> (a) the extent and duration of the actor's exercise of dominion or control;
> (b) the actor's intent to assert a right in fact inconsistent with the other's right of control;
> (c) the actor's good faith;
> (d) the extent and duration of the resulting interference with the other's right of control;
> (e) the harm done to the chattel;
> (f) the inconvenience and expense caused to the other.[77]

Caselaw demonstrates that many litigants embroiled in social media account ownership and control disputes allege tortious conversion of this digital asset. Framing their legal rights as a property right violation under this tort necessitates that these litigants establish that the digital property they are wrestling over, a social media account, is a form of chattel or personal property.[78] In its adjudication of this tort, a court must first conceptually categorize the nature of the property itself: Is a social media account a form of chattel or personal property? The legal theory of conversion then demands judicial analysis on the question of ownership and control: Who has the right to control the

---

Nankivell, No. 11 Civ. 5013 (NRB), 2011 U.S. Dist. LEXIS 120738, at *3–4 (S.D.N.Y. Oct. 19, 2011) (Work performed by an employee whose duties included maintaining social media accounts for a business organization's online marketing of its products was subject to a work product agreement entered into at the time of the employee's hiring.).

76. William L. Prosser, *Nature of Conversion,* CORNELL L.Q. Winter 1957, at 168, 169.

77. RESTATEMENT (SECOND) OF TORTS, § 222A (AM. LAW INST. 2021).

78. *Id.*

social media account and was that right to control interfered with by the accused party?

The common law tort of conversion provides an analytical vehicle to arrive at answers to these fundamental legal questions; however, the judicial precedent does not drive to the desired destination. Judicial analyses of whether and how the tort of conversion applies to social media account ownership disputes are neither consistent nor uniform. One roadblock is the difference in each state's common law articulation of the elements of the tort of conversion. As one scholar predicted, the judicial categorization of social media accounts as personal property protectable from interference under the common law tort of conversion leads to divergent and inconsistent outcomes:

> The personal property approach has another flaw. Because many states do not allow claims for conversion for intangible items the law would not develop in a coherent manner.[79]

Some states recognize intangible property, such as social media accounts, as personal property subject to conversion claims; others do not.

In *Int'l Bhd. Of Teamster Local 651 v. Philbeck*, the U.S. District Court for the Eastern District of Kentucky evaluated Kentucky's common law tort of conversion in a dispute between a union and its ex-president over the ownership and control of Facebook accounts.[80] The union brought an action in federal court seeking as a remedy the "passwords and administrative access to a plethora of Facebook pages and a permanent injunction to keep Defendant Michael Philbeck from using the Facebook accounts."[81] The district court granted summary judgment in the union's favor on the conversion claim.[82] Citing the elements of the tort of conversion under Kentucky law, the district court assumed that the Facebook pages constitute protectable property under this tort and focused its analysis on whether the union "is the 'owner' of the social media accounts or whether Philbeck is the 'owner' of those accounts."[83] Specifically, the district court sought to determine whether the disputed social media accounts were "business or personal accounts."[84]

The district court stated that the factors relevant to this inquiry are whether the social media account was "originally created as a page for

79. Argento, *supra* note 47, at 277–78.
80. Int'l Bhd. Of Teamster Local 651 v. Philbeck, 464 F. Supp. 3d 863, 867–68 (E.D. Ky. 2020).
81. *Id.* at 868.
82. *Id.* at 873.
83. *Id.* at 870.
84. *Id.* at 871.

the businesses, brands, or organizations, and not an individual person";[85] whether the account "was directly linked to the business's website and posted status updates on the behalf of the business";[86] whether "many posts on the [Facebook] pages were business-related and used for promotion";[87] and whether the business had given employees "access to post on the page [which] supported the conclusion that the page was a business page."[88] Evidence that a business organization failed "to provide administrative privileges to another individual" or that the posting individual also used the social media account for "personal reasons and used it to share personal posts" was not dispositive on the issue of whether a social media account is a business account or a personal account.[89] The district court applied this framework and concluded:

> Here, it has already been established that the Facebook page and resource group are the property of the Union and the plaintiff had the right to possess them at the time of the alleged conversion. The defendant removed administrators and banned certain Union members from the Facebook page and resource group, which interferes with the plaintiff's right to use and enjoy the social media accounts. Philbeck exercised control over the page in a manner inconsistent with the plaintiff's use and enjoyment and the defendant's actions were the legal cause of the conversion. The plaintiff suffered damage because of the inaccurate information being disseminated to members of the Union and it was hindered in its ability to communicate with the Union members.[90]

The Georgia Court of Appeals also ruled that a social media account constitutes protectable property under Georgia's common law tort of conversion.[91] In *Bearoff v. Craton*, the appellate court heard an appeal involving a dispute between affiliated companies doing business as Frisky Biscuit Couples Boutique (Frisky Biscuit) and owners of a company doing business as The Love Library (Love Library).[92] Frisky Biscuit, an adult novelty store, sued a competitor, Love Library, for the conversion of social media accounts, violation of a geographic prohibition in a non-compete agreement, and additional legal

85. Int'l Bhd. Of Teamster Local 651 v. Philbeck, 464 F. Supp. 3d 863, 871 (E.D. Ky. 2020).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. Int'l Bhd. Of Teamster Local 651 v. Philbeck, 464 F. Supp. 3d 863, 872 (E.D. Ky. 2020). On the matter of damages, the district court stated: "[i]t would be difficult to quantify how much the social media accounts of the Union would be worth." *Id.* at 878.

91. Bearoff v. Craton, 830 S.E.2d 362, 367 (Ga. Ct. App. 2019).

92. *Id.* at 366.

claims.[93] Frisky Biscuit alleged that its social media accounts, a Facebook page and a Twitter account,[94] were usurped by Love Library to market and advertise its store.[95]

The Georgia appellate court affirmed the trial court's ruling at a bench trial that Love Library unlawfully converted the plaintiffs' social media accounts and ruled: (i) Frisky Biscuit's Facebook page and Twitter account are a form of intangible property and, under Georgia law, intangible property is subject to a conversion claim;[96] (ii) the social media accounts served as collateral under a security agreement;[97] and (iii) Love Library refused to transfer control over these social media accounts as required under that security agreement.[98]

The U.S. District Court for the Northern District of Georgia also adjudicated a Georgia common law conversion claim in a dispute over ownership and control over social media accounts.[99] It concluded as well that social media accounts constitute protectable property under this tort.[100] In *Mastermind Involvement Mktg. v. Art Inst. Of Atlanta*, the district court granted a preliminary injunction in favor of various art institutes who were sued by a marketing company that performed social media marketing services for these art institutes.[101] The marketing company brought a breach of contract case against the art institutes for failure to pay; the art institutes asserted counterclaims against the marketing company that included the common law tort claim of conversion.[102] The art institutes alleged that the marketing company refused to "transfer back to them sixteen social media accounts (and the accounts' login information) that MasterMind acquired control of pursuant to its contract with [Dream Center Education Holding, LLC]."[103]

The district court concluded that the elements of a conversion claim under Georgia law would likely be met by the art institutes; this justified a preliminary injunction ordering the marketing company to

93. *Id.* at 370.

94. *Id.*

95. *Id.* at 369.

96. Bearoff v. Craton, 830 S.E.2d 362, 375–76 (Ga. Ct. App. 2019).

97. *Id.* at 376.

98. *Id.* The appellate court also affirmed the trial court's finding that the unlawful conversion of the social media accounts by Love Library to directly compete with the plaintiffs' business – along with other misconduct by Love Library – justified the imposition of punitive damages against it. *Id.* at 380.

99. Mastermind Involvement Mktg. v. Art Inst., 389 F. Supp. 3d 1291, 1294 (N.D. Ga. 2019).

100. *Id.*

101. *Id.* at 1293.

102. *Id.*

103. *Id*.

transfer back to the art institutes "the login information to the sixteen social media accounts" to enable the art institutes to "access and exercise complete control over said social media accounts."[104] The district court identified the factors relevant to its analysis, which included evidence of ownership, actual possession, and de facto control over the disputed social media accounts:

> The evidence in the record establishes that AII has valid legal title to the social media accounts and login information; that MasterMind currently has actual possession of the social media accounts and login information; that the AI Defendants and AII demanded return of the accounts and login information, and that MasterMind has refused to transfer back the accounts and login information to the AI Defendants and AII.[105]

The district court noted business harms associated with the conversion: it found that the art institutes' inability to market and advertise through the social media accounts detrimentally impacted their "reputation and business."[106]

Similarly, a permanent injunction was issued by a federal district court in California for the unlawful conversion by a rival business of social media accounts under California common law.[107] The district court ordered the business rival to return Facebook and Instagram accounts as well as all "codes, passwords, [and] credentials" associated with those accounts.[108] This ruling echoed a prior federal case in which a federal district court ruled that under California's common law tort of conversion, a Twitter account is protectable property.[109]

In *McGuire-Sobrino v. TX Cannalliance LLC*, the Texas Court of Appeals affirmed a trial court's temporary injunction requested by Cannalliance LLC, doing business as the Texas Cannabis Business Alliance (TCBA), an educational and support organization dedicated to

104. Mastermind Involvement Mktg. v. Art Inst., 389 F. Supp. 3d 1291, 1295 (N.D. Ga. 2019).

105. *Id.* at 1294.

106. *Id.* at 1295.

107. Left Coast Wrestling, LLC v. Dearborn Int'l LLC, No. 3:17-cv-00466-LAB-NLS, 2018 U.S. Dist. LEXIS 86808, at *18 (S.D. Cal. May 23, 2018), *adopted by* Left Coast Wrestling, LLC v. Dearborn Int'l LLC, No. 17cv466-LAB (NLS), 2018 U.S. Dist. LEXIS 102546 (S.D. Cal. June 19, 2018). The court recited the elements of a conversion claim under California law and then concluded defendant converted property owned by the plaintiff including "the websites and social media pages associated with" the plaintiff's organization. *Left Coast Wrestling, LLC*, 2018 U.S. Dist. LEXIS 86808, at *18.

108. *Left Coast Wrestling, LLC*, 2018 U.S. Dist. LEXIS 86808, at *50–51. This claim and additional legal claims were adjudicated based on a default judgment motion. *Id.* at *50.

109. PhoneDog v. Kravitz, No. C 11-03474 MEJ, 2011 U.S. Dist. LEXIS 129229, at *26–27 (N.D. Cal. Nov. 8, 2011). The court acknowledged the significance of the conversion claim in the case. It stated it was at "the core of this lawsuit" and that at "this stage of the proceedings, the Court finds that PhoneDog has adequately alleged that it owns or has the right to possess the [Twitter] Account."

advancing awareness in Texas of the "issues and opportunities in the Texas cannabis market."[110] TCBA employed Ephraim McGuire-Sobrino to set up and manage its "digital assets" which included Facebook, Twitter, Instagram, and LinkedIn social media accounts.[111] The Texas Court of Appeals concluded that TCBA would likely succeed on the merits of its claim that its employee tortiously converted its social media accounts.[112] The Texas Court of Appeals reasoned that the social media accounts, as well as other digital assets, were property over which TCBA had "legal possession."[113] Evidence in the record demonstrated that McGuire-Sobrino "exercised control over the digital assets which interfered with TCBA's right to the digital assets."[114] TCBA presented evidence of irreparable injury directly related to this interference—its inability to access the social media accounts.[115] This harm included business disruption, threatened injury to a business organization's goodwill and reputation, loss of clientele, and loss of the ability to market in specific ways.[116]

While the law in states such as Georgia, Texas, Kentucky, and California recognize social media accounts as intangible property protected under the common law tort of conversion, other jurisdictions have yet to rule on this issue, creating uncertainty in outcomes. In *Farm Journal, Inc. v. Johnson*, an agricultural media company, Farm Journal, Inc., sued Gregory Johnson, the company's former editorial director, as well as Johnson's current employer, Blue Book Services, Inc., its direct competitor.[117] After he tendered his letter of resignation at Farm Journal, Inc., Johnson allegedly changed the Farm Journal, Inc. Twitter account handle he used to update Twitter followers on company news and to link them to the company's content – @gregofthepacker[118] – to a different Twitter handle – @gregofthebluebook – redirecting the Farm Journal, Inc.'s Twitter account followers to Johnson's new employer's content.[119]

110. McGuire-Sobrino v. TX Cannalliance, LLC, No. 05-19-01261-CV, 2020 Tex. App. LEXIS 6281, at *1 (Ct. App. Aug. 10, 2020).

111. *Id.* at *1–2.

112. *Id.* at *19.

113. *Id.* at *18.

114. *Id.* at *18–19.

115. McGuire-Sobrino v. TX Cannalliance, LLC, No. 05-19-01261-CV, 2020 Tex. App. LEXIS 6281, at *12–13 (Ct. App. Aug. 10, 2020).

116. *Id.* at *3–4, 12–15.

117. Farm Journal, Inc. v. Johnson, No. 4:19-cv-00095-SRB, 2019 U.S. Dist. LEXIS 69374, at *2–3 (W.D. Mo. Apr. 24, 2019).

118. *Id.* at *5.

119. *Id.*

The U.S. District Court for the Western District of Missouri asserted in its opinion that Farm Journal, Inc.'s claim of common law conversion – brought against its former employee, Johnson, and its direct competitor, Blue Book Services, Inc., for redirecting the Twitter account – satisfied all three elements required to prove this claim under Missouri law.[120] The business organization alleged the following: (1) it owned the disputed "Twitter account and it is entitled to possess and control the account";[121] (2) the defendants "'have tortiously taken' the Twitter account and have used the account 'to their own purposes'";[122] and (3) Johnson and his new employer "deprived Plaintiff of access to the Twitter account and 'wrongfully claim a right in opposition to' Plaintiff's right to the account."[123]

While the district court concluded that social media accounts enjoy protectable property rights under Missouri's common law tort of conversion, it acknowledged two issues: a conflict of laws issue on whether Missouri or Kansas law governed this legal question and, secondly, the lack of clear precedent on this legal question in both jurisdictions. The district court refused to rule on the conflict of laws issue, citing the procedural posture of this case.[124] Its analysis of the precedent under Kansas and Missouri law on the property rights question embedded in this social media account ownership dispute proceeded by negative implication:

> At this stage in the case, this Court does not need to perform a choice of law analysis. While neither Kansas nor Missouri courts have decided whether a social media account can be the subject of a conversion claim, no authority from either state requires this Court to dismiss Plaintiff's claim solely because the disputed property is a Twitter account. Neither state's conversion law draws a bright line between physical personal property and intangible personal property, recognizing conversion claims for the former and rejecting claims for the latter. Instead, their law suggests that whether disputed personal property can be subject to a conversion claim depends on whether the defendant's possession or use of the property—regardless of whether the property is physical or intangible—excludes the plaintiff's rights in that property.
>
> * * * *
>
> At bottom, each state's law suggests that intangible personal property such as a plaintiff's social media account may be the subject of

120. *Id.* at *18–19.

121. *Id*. at *18.

122. Farm Journal, Inc. v. Johnson, No. 4:19-cv-00095-SRB, 2019 U.S. Dist. LEXIS 69374, at *18 (W.D. Mo. Apr. 24, 2019).

123. *Id.*

124. *Id.* at *18, n.1. The district court's ruling was pursuant to a motion to dismiss brought under Federal Rule of Civil Procedure 12(b)(6).

> a conversion claim if it can be used or appropriated in a way that excludes the plaintiff.[125]

The district court's analysis underscores the difficulty courts have in trying to excavate the legal principles to use when the precedent does not clearly guide outcomes. This illustrates the pacing problem inherent in the digital rights revolution.

Confusion over applicable precedent and what legal rules to apply has also arisen in cases involving New York law. In *C.D.S., Inc. v. Zetler*, the U.S. District Court for the Southern District of New York presided over a bench trial involving a global dispute between two former business partners.[126] The case involved allegations of unlawful conversion of digital assets: Facebook, Twitter, and Instagram accounts.[127] These social media accounts were set up and administered by the company president,[128] however, the company argued it retained the property rights in these accounts.[129] The district court explained that the common law tort of conversion in New York involves two "key" questions: Does the plaintiff have a "possessory right or interest in the property" and is the defendant's "dominion over the property or interference with it, in derogation of plaintiff's rights"?[130]

The district court ruled in favor of C.D.S., Inc., finding that it had a possessory interest in these social media accounts and that the former president of the company, Bradley Zetler, interfered with this possessory interest by failing to provide the passwords and administrator access codes of these accounts to C.D.S., Inc. when it terminated him.[131] This analytical framework makes the determination of social media ownership under this common law tort a fact-based inquiry. This requires a court to assess: who created the social media accounts; in what capacity did that individual act; and for whose benefit was the account set up, i.e., what was the motivation and purpose for setting up the social media account?

Two other federal district courts applied New York's common law tort of conversion to social media account ownership disputes and concurred that New York recognizes these digital assets as protectable property interests under this legal theory. In *Salonclick, LLC v. SuperEgo Mgmt.*, the U.S. District Court for the Southern District of

125. *Id.*
126. C.D.S., Inc. v. Zetler, 298 F. Supp. 3d 727, 734 (S.D. NY. 2018).
127. *Id.* at 750.
128. *Id.*
129. *Id*.
130. *Id.* at 747 (quoting Colavito v. N.Y. Organ Donor Network, Inc., 860 N.E.3d 713, 717 (2006)).
131. C.D.S., Inc. v. Zetler, 298 F. Supp. 3d 727, 750 (S.D. NY. 2018).

New York stated that although social media accounts are intangible property, they "can be the object of conversion under New York law."[132] *Salonclick* cited an earlier decision in which a federal court ruled that "rights to the Access Information" to social media accounts can be owned and "form the basis of a claim of conversion" under New York common law.[133]

This line of precedent contradicts a ruling made in *Fortified Holistic LLC v. Lucic*.[134] In this case, a New York state trial court refused to grant a preliminary injunction preventing one of three principals in a company engaged in buy-out negotiations from "destroying or modifying" social media accounts and other digital assets.[135] The trial court refused to grant the injunction noting that under New York's common law tort of conversion, "the plaintiff must show legal ownership or an immediate superior right to possession of a specific identifiable thing."[136] The evidentiary record did not establish that the company owned the social media accounts and other digital assets.[137] The trial court also noted that New York law requires the property at issue in a common law conversion claim to be "[t]angible personal property or specific money" and the social media accounts and other digital assets "appear to be intangible property."[138]

Pennsylvania is a jurisdiction that does not recognize social media accounts as protectable property under the common law tort of conversion.[139] In *Eagle*, the U.S. District Court for the Eastern District of Pennsylvania examined whether a LinkedIn account is the kind of property protected under Pennsylvania's common law tort of conversion.[140] It ruled it is not:

> As the LinkedIn account is not tangible chattel, but rather an intangible right to access a specific page on a computer, Plaintiff is unable to state a cause of action for conversion.[141]

---

132. Salonclick, LLC v. SuperEgo Mgmt., LLC, No. 16 Civ. 2555 (KMW), 2017 U.S. Dist. LEXIS 6871, at *8 (S.D.N.Y. Jan. 18, 2017).

133. *Id.* (quoting Ardis v. Nankivell, No. 11 Civ. 5013 (NRB), 2011 U.S. Dist. LEXIS 120738, at *8 (S.D.N.Y. Oct. 19, 2011)).

134. Fortified Holistic LLC v. Lucic, No. 711627/2017, 2017 N.Y. Misc. LEXIS 4482 at *9 (N.Y. Sup. Ct. Nov. 13, 2017).

135. *Id.* at *7.

136. *Id.* at *8.

137. *Id.*

138. *Id.*

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

140. *Id.* at *26–27.

141. *Id.* at *28–29.

This ruling was relied upon in subsequent precedent. In *Peruto v. ROC Nation*, the U.S. District Court for the Eastern District of Pennsylvania explained the nature of intangible property rights under Pennsylvania law concerning conversion and replevin actions.[142] Citing the *Eagle* decision, the *Peruto* court noted that under Pennsylvania law, a LinkedIn account does not constitute a property interest under the common law tort of conversion.[143] The district court explained this precedent and other cases that applied this tort of conversion to intangible property interests as follows: "[t]hese decisions have noted the limitation the Superior Court identified and concluded that, because such digital property interests are both intangible, and not a form of intangible property typically merged with particular documents, they are not subject to conversion or replevin."[144]

These divergent and, in certain cases, colliding judicial rationales pose unique risks to business organizations that use social media to advance core business interests. The unpredictability of the outcomes associated with litigation over ownership rights in these accounts and the uncertainty surrounding protectable property rights under the tort of conversion increase the risk to these business organizations.[145]

142. Peruto v. Roc Nation, 386 F. Supp.3d 471, 475 n.3 (E.D. Pa. 2019).

143. *Id.* at 476.

144. *Id.* at 475–76.

145. What is clear from this precedent is the significant value these digital assets have as well as the substantial harm to business interests when the right to own and control social media accounts are violated. *See* Miss Global Org. LLC v. Mak, No. SA CV 17-2223-DOC (KESx), 2019 U.S. Dist. LEXIS 113907, at 7 (C.D. Cal. Apr. 8, 2019). The U.S. District Court for the Central District of California noted it issued a preliminary injunction pursuant to a prior order. *See* Miss Global Org. LLC v. Mak, No. SA CV 17-2223-DOC (KESx), 2018 U.S. Dist. LEXIS 225462, at *10 (C.D. Cal. Dec. 21, 2018), in which the district court ordered the immediate transfer of control over a Facebook account, the immediate delinking of an Instagram account from a Facebook account, and an order to cease and desist posting on an Instagram account. In a previous ruling, the district court stated the allegedly unlawful control of Facebook and Instagram accounts as well as the control of a company website threatened the company's business reputation and goodwill, constituting "intangible injuries" that can satisfy the irreparable injury requirement. *See* Miss Global Org. LLC v. Mak, No. SA CV 17-2223-DOC (KESx), 2018 U.S. Dist. LEXIS 225386, at *11 (C.D. Cal. Dec. 14, 2018); *See also* PhoneDog v. Kravitz, No. C 11-03474 MEJ, 2012 U.S. Dist. LEXIS 10561, at *2–4 (N.D. Cal. Jan. 30, 2012) (ruling that the plaintiff had sufficiently pled a claim for intentional interference with prospective economic advantage through disruption in advertising revenue directly related to the plaintiff's loss of control over a Twitter account). *See* McGuire-Sobrino v. TX Cannalliance LLC, No. 05-19-01261-CV, 2020 Tex. App. LEXIS 6281, at *15 (Ct. App. Aug. 10, 2020); Int'l Bhd. Of Teamsters Local 651 v. Philbeck, 464 F. Supp. 3d 863, 873 (E.D. Ky. 2020); Mazo v. Merritt, No. 18-cv-00831-RBJ, 2019 U.S. Dist. LEXIS 12766, at *20 (D. Colo. Jan. 28, 2019) (recognizing social media accounts as "valuable property"). Caselaw also identifies social media accounts as digital assets subject to contractual transfer and sale. *See* EEOC v. Danny's Rest., LLC, No. 3:16-CV-00769-HTW-LRA, 2018 U.S. Dist. LEXIS 164062, at *21 (S.D. Miss. Sept. 25, 2018) (The U. S. District Court for the Southern District of Mississippi acknowledged that a "Bill of Sale and Assignment and Assumption Agreement" included as assets the sale of social media accounts.); *see also* Port Orchard

C. Risk Exposure Increases for Business Organizations

The important and strategic business functions that social media accounts perform for business organizations[146] underscore the significance of clear and predictable legal rules that provide property protection when account ownership rights are threatened and challenged. When business organizations navigate a legal environment devoid of clarity, consistency, and uniformity in these ownership disputes, their confidence in the predictive power of legal outcomes wanes. The risk to business organizations rises as the boundary lines for property rights in social media account ownership blurs. In broad terms, these risks arise from the economic consequences resulting from the temporary or permanent loss of control over a valuable digital asset. The costly litigation process associated with regaining control over that asset increases these risks as well.

Scholarship on the nature of the risks arising from disputes over social media account ownership and control identifies the threat of economic losses to business organizations involved in social media account ownership disputes.[147] These losses are tied to reputational risk and brand diminution triggered by a business organization's inability to use and protect messaging on its social media accounts; revenue risks arising from losing social media as a strategic advertising, sales, and marketing tool; business disruption risk; and diminished competitive advantages through intellectual property misappropriation.[148]

Reputational risk derives from the critical messaging and branding that social media performs for a business organization. Loss of control over a social media account imperils these communication functions. Business organizations may suffer a reputational black eye as a result of adverse social media messaging and branding directly related to loss of control over a business social media account or lose "reputation and prestige" associated with their brand when control of an account is lost.[149] Caselaw adjudicating the legal rights at stake in social

---

Airport, Inc. v. Wagner, No. 52498-8-II, 2020 Wash. App. LEXIS 442, at *4 (Ct. App. Feb. 25, 2020) (The Washington Court of Appeals noted that a business organization's sale of assets pursuant to an asset purchase agreement included social media accounts.).

146. *See infra* Part II.A.

147. Hidy, *supra* note 47, at 487.

148. *Id.*

149. *See* Mastermind Involvement Mktg. v. Art Inst., 389 F. Supp. 3d 1291, 1295 (N.D. Ga. 2019) (The inability to market and advertise through the disputed social media accounts detrimentally impacted an art organization's "reputation and business."); Int'l Bhd. of Teamsters Local 651 v. Philbeck, 423 F. Supp. 3d 364, 375 (E.D. Ky. 2019) (recognizing that an organization's goodwill associated with its "reputation and prestige" is derived from use of its Facebook accounts and Facebook pages).

media account ownership disputes recognizes that some forms of intellectual property theft can be intertwined with the misappropriation of a social media account and can result in reputational harm to the account's owner.[150]

Revenue risk and business disruption risk[151] increase as well when social media account ownership disputes erupt. This occurs through disruption to core business functions dependent on social media account access.[152] A business organization sustains economic damage in the form of lost revenue from lost sales as well as lost business opportunities from interrupted communication with clients and customers:

> [S]ocial 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.[153]

Litigation risks to business organizations over social media account ownership disputes arise from multiple factors. Changes in judicial precedent[154] or statutory laws[155] impact the litigation risk to business

150. CDM Media USA, Inc. v. Simms, No. 14 CV 9111, 2015 U.S. Dist. LEXIS 37458, at *12–14 (N.D. Ill. Mar. 25, 2015) (noting a LinkedIn membership list may deserve protectable trade secret status); Maremont v. Susan Fredman Design Grp, No. 10 C 7811, 2014 U.S. Dist. LEXIS 26557, at *12 (N.D. Ill. Mar. 3, 2014) (loss of Twitter and Facebook account followers can constitute a "marketable commercial interest" under a Lanham Act false endorsement claim); Eagle v. Morgan, No. 11-4303, 2013 U.S. Dist. LEXIS 34220, at *21–22 (E.D. Pa. Mar. 12, 2013) (ruling that a hijacked LinkedIn account constituted unlawful misappropriation of identity); Christou v. Beatport, LLC, 849 F. Supp. 2d 1055, 1076 (D. Colo. 2012) (discussing the trade secret status of the MySpace friends list); *see also* PhoneDog v. Kravitz, No. C 11-03474 MEJ, 2011 U.S. Dist. LEXIS 129229, at *20 (N.D. Cal. Nov. 8, 2011) (stating that Twitter account followers and the password to a Twitter account may constitute protectible trade secrets).

151. Emerald City. Mgmt., LLC v. Khan, No. 4:120-cv-358, 2016 U.S. Dist. LEXIS 2143, at *62–67 (ruling that the unlawful takeover and control of a social media account can constitute tortious interference with prospective business relationships under Texas common law); *PhoneDog*, 2012 U.S. Dist. LEXIS 10561, at *2–4 (citing potential intentional interference with prospective economic advantage through disruption in advertising revenue directly related to plaintiff's loss of control over Twitter account).

152. McGuire-Sobrino v. TX Cannalliance LLC, No. 05-19-01261-CV, 2020 Tex. App. LEXIS 6281, at *15 (Ct. App. Aug. 10, 2020) (Interfering with an organization's social media account can cause business disruption, threaten injury to a business organization's goodwill and reputation, loss of clientele, and the loss of the ability to market to customers in specific ways.).

153. Hidy, *supra* note 47, at 487; Constance E. Bagley, *What's Law Got to Do With It?: Integrating Law and Strategy,* 47 Am. Bus. L.J. 587, 614 (2010) ("However, it is increasingly difficult to identify significant sources of firm value wherein legal rights are not important factors in realizing that value. In particular, corporate knowledge, capabilities, and relationships are increasingly important sources of firm value creation. Management of these strategic knowledge assets determines the company's ability to survive, adapt, and compete and has significant legal dimensions that remain largely unexplored in the relevant literatures.").

154. Joel F. Houston et al., *Litigation Risk and Voluntary Disclosure: Evidence from Legal Changes*, 94 The Acct. Rev. 247, 251 (2019).

155. *Id.* at 266.

organizations. In social media account ownership disputes, the law is evolving to keep pace with technological innovations. This pacing problem inherent in the digital rights revolution leaves litigants with unpredictability and uncertainty in the pursuit of securing their rights—the precedent presents unclear legal rules and even colliding judicial rationales on the nature of their property rights at stake in these disputes.[156]

Litigation risks also exist from "lengthy, protracted litigation" with business resources diverted and expended on litigation costs in cases where the calculation of "outcomes as to how courts will rule on specific legal questions and whether courts will adopt specific methodologies for valuation of social media accounts is difficult" at best and potentially speculative.[157] If sued for illegal conduct involving social media account ownership and control, a business organization's litigation risks include potential liability in the form of civil damages,[158] including the award of punitive damages.[159]

The lack of coherence and uniformity in the judicial precedent adjudicating alleged property rights in social media account ownership disputes increases the risk exposure for business organizations who view social media as a strategically important business asset and digital tool. This pacing problem inherent in the digital revolution is overcome through a revolution in legal rights—a paradigm-shift in the law. The path forward can be informed by looking back at legal history and the developments that shaped property rights in Anglo-American jurisprudence.

III. "WHAT'S PAST IS PROLOGUE:"[160] A HISTORICAL PERSPECTIVE ON ANGLO-AMERICAN COMMON LAW PROPERTY RIGHTS AND PARADIGM-SHIFTS IN THE LAW

As the pacing problem of the digital rights revolution persists and judicial precedent fragments over the legal question about the nature and extent of property rights in social media accounts, a paradigm-shift in the analytical understanding of the conception of this legal right can emerge. As Shakespeare reminds: "[w]hat's past is prologue."[161] The lens of history provides perspective on the develop-

156. *See infra* Parts II.B.1, 2.

157. Hidy, *supra* note 47, at 486–87.

158. Bagley, *supra* note 153, at 607 (Civil damages resulting from non-compliance with legal requirements can result in "a very negative monetary return.").

159. Hidy, *supra* note 47, at 487.

160. SHAKESPEARE, *supra* note 2, at act 2, sc. 1.

161. *Id.*

ment of property rights in the common law within the Anglo-American legal tradition. Through understanding both the legal history and evolution of such rights within this legal tradition, as well as the changing conception of the nature and meaning of property, a coherent and uniform approach to categorizing this property right can be proposed. This historical past then becomes the prologue to a judicial or legislative resolution to the legal anomalies of the present.

The conception of property and the rights that protect it hold "enormous importance in American legal thought."[162] The protection of property in English common law dates back to at least the year 1100 with Henry I's ascension to the English throne and the issuance of the Coronation Charter.[163] While legal scholars situate the Anglo-American legal tradition's understanding of property rights in the writings of the seventeenth-century English philosopher and political theorist John Locke, the English common law that developed over the prior centuries embraced notions of property rights that are distinct from Locke's interpretation.[164] Archival evidence demonstrates this: the English common law's understanding of property rights in relation to land – the *sine qua non* recognized by the modern understanding of property law in the Anglo-American tradition – is curiously absent for 200 years in English common law.[165]

In England in the period from 1290 to 1490, there was scant use in common law of a word in legal advocacy to indicate a legally-protected property ownership interest in land.[166] Archival scholarship during this historical period evidences an association of property interests with domestic animals and with goods.[167] However, instead of identifying the good itself as distinct property, the legal terminology used during the fourteenth and fifteenth centuries to analyze property rights pointed to property as an attribute: the assertion of rights was "I

162. David J. Seipp, *The Concept of Property in the Early Common Law*, 12 LAW & HIST. REV. 29, 29 (1994).

163. Paul J. Larkin, *The Original Understanding of "Property" in the Constitution*, 100 MARQ. L. REV. 1, 17 (2016); Coronation Charter of Henry I, 1100 AD, BRIT. LIBR., https://www.bl.uk/collection-items/coronation-charter-of-henry-i (last visited Sept. 30, 2020).

164. Seipp, *supra* note 162, at 30 (explaining that the modern conception of property rights in American law bears little resemblance to the notions embedded in English common law in certain centuries prior to philosopher John Locke's articulation of the nature of property and the rights derived from it during the Enlightenment period).

165. *Id.* at 31. The English word for "ownership" dates back to the sixteenth century although archival evidence demonstrates that the word "owner" is used in English legal documents prior to the sixteenth century. *Id.* at 72.

166. *Id.* at 33. The language used during this historical period in English common law advocacy that is preserved in historical writings was Anglo-Norman French.

167. *Id.*

have property in it"[168]—not a direct assertion that one possesses the property itself.[169] Property was understood during this period to be a characteristic of a good, such as a gem, or an attribute of a domestic animal, such as a cow.[170] Land, during this period, was delineated as a "right"—called a "driet."[171] Conceptually, this "right" pertaining to land under English common law recognized legally-protected interests that included possessory interests; it also included hierarchically higher interests than mere possessory interests which were called tenure and estates.[172]

This conceptual understanding of property rights contrasts with what developed during the period before 1280, when the rudimentary beginnings of English common law litigation employed a Latin term, *proprietas*, to indicate an abstract form of a property right under English law.[173] This concept of property rights used in this earlier period – before 1280 – derived from a notion of property in goods, slaves, and land that dates back hundreds of years to classical Rome.[174]

By the year 1500 – the beginning of the sixteenth century – English common law began to recover a conception of property as an abstraction that earlier appeared in thirteenth-century English law:

> The Year Books from 1490 onward gave the first indications in English common law discourse – the first since the earlier treatise tradition died out in the thirteenth century – of a universal, abstract notion of "property rights" or a "law of property." Here was a conceptual category with enough content of its own to begin reorienting English legal thinking toward assimilation of landholding, consumption of goods, and use of animals.[175]

This is further evidenced in a discourse on common law written in the early sixteenth century by English lawyer Christopher St. Germain, titled *Doctor and Student*.[176] In this treatise, the notion of

168. *Id.*

169. *Id.* at 33.

170. *Id.* This notion of property as an attribute is distinctive from later conceptions of property that evolved in English common law. For example, Blackstone's Commentaries, published in the eighteenth century, delineates property not as an attribute but as that which is separate, independent, and external over which a person can legally assert exclusive dominion and control. *See* WILLIAM C. SPRAGUE, BLACKSTONE'S COMMENTARIES ABRIDGED 105 (9th ed. 1915).

171. Seipp, *supra* note 162, at 39 ("Lawyers classified their writs regarding land into two sorts: 'writs of possession' and 'writs of rights.' In this scheme, 'right' was 'greater' or 'higher' than possession.").

172. *Id.* The author details archival evidence from this period that deviates from this analytical framework. For example, in the year 1405, a judge of the King's Bench court used the term property in reference to a freehold and rights in land in his adjudication of a case. *Id.* at 65.

173. *Id.* at 32.

174. *Id.* at 33.

175. *Id.* at 34.

176. *Id.* at 74.

private property is explained in universal and abstract terms as a "human invention justified by its utility."[177]

This legal evolution continued into the seventeenth century, and the English conception of property under common law extended to land as well as goods during this historical period.[178] By expanding the concept of property to comprise both land and goods, the property rights of the former began to share a kinship with the property rights of the latter: "[i]n so doing, they carried over the conceptual trappings of absolute property in goods and animals into the context of land disputes, and changed the way future generations of common lawyers would talk and think about this new form of 'property.'"[179] Evidence that the conception of property merged in the seventeenth century to include both land and goods is found in the writings of Edward Coke. In 1600, Coke published the first installment of his *Reports* – the same year he served as Attorney General – and in 1615, while serving as Chief Justice of the King's Bench, Coke's eleventh volume of his *Reports* was published.[180] These writings employ the term "property" primarily in the context of goods and animals, not land; by 1628, Coke's additional writings continued this use but with some additional references to land as property.[181]

John Locke's philosophical exposition of property rights arises within this historical context[182] and is captured in William Blackstone's 1766 *Commentaries on the Laws of England* 2, a foundational text in Anglo-American common law property rights:

> For Blackstone, this right of property was 'that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.'[183]

In 1765, the first volume of Blackstone's *Commentaries* appeared; twelve years prior William Blackstone commenced his lectures on the study of law at Oxford.[184] Three additional volumes of the *Commentaries* followed in the following four years.[185]

---

177. *Id.* at 76.

178. *Id.* at 34.

179. *Id.* at 47.

180. *Id.* at 80.

181. *Id.* at 80–81.

182. *Id.* at 34.

183. *Id.* at 29, n.1 (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1766)).

184. SPRAGUE, *supra* note 170, at vii.

185. *Id*.

Blackstone's account of the nature of property and the rights derived from it under English common law are foundational writings on which American common law jurisprudence is built.[186] In Blackstone's *Commentaries,* the eighteenth-century conception of English common law property rights looks markedly different from the centuries that preceded it. Blackstone explains that property itself exists independent, external, and separate from the owner; he casts ownership over property as a form of domination or control: "[t]he objects of dominion or property are *things*, as contra-distinguished from *persons.*"[187] Of note, common law in England at this juncture in history has a merged understanding of property that includes both land and goods, as well as a nuanced analytical framework based on abstract principles to explain distinctions between the two:

> [A]nd things are by the law of England distributed into two kinds; things *real* and things *personal.* Things *real* are such as permanent, fixed, immovable, which cannot be carried out their place, as lands and tenements; things *personal* are goods, money, and all other movables; which may attend the owner's person wherever he thinks proper to go.[188]

By the eighteenth century, English common law employed this universal, abstract conception of property to define and categorize types of property interests recognized in law. Blackstone writes in his *Commentaries* that "chattels" is a property designation that attaches to both land (chattels real) as well as to persons (chattels personal).[189] The latter is characterized by the moveable nature of the property and the power a person can exercise over the object; chattels personal are:

---

186. Bernard H. Siegan, *Propter Honoris Respectum: Separation of Powers & Economic Liberties*, 70 NOTRE DAME L. REV. 415, 422 n.18 (1995) (The author notes the influence John Locke, Edward Coke, and William Blackstone had on American jurisprudence. Specifically, the author identifies the significance of Blackstone's Commentaries as:

> [T]he first important and the most influential systematic statement of the principles of the common law. For generations of English lawyers, it has been both the foremost coherent statement of the subject of their study, and the citadel of their legal tradition. To lawyers on this side of the Atlantic, it has been even more important. In the first century of American independence, the *Commentaries* were not merely an approach to the study of law; for most lawyers they constituted all there was of the law . . . . And many an early American lawyer might have said, with Chancellor Kent, that 'he owed his reputation to the fact that when studying law . . . he had but one book, Blackstone's *Commentaries*, but that one book he mastered.'

Id. (quoting DANIEL J. BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW 3 (1941) (further quoting CHARLES WARREN, HISTORY OF THE AMERICAN BAR 187 (1911))). The writings of Edward Coke were also a profound influence on common law in the Anglo-American legal tradition. *Id.* at 422 n.17.

187. SPRAGUE, *supra* note 170, at 107.

188. *Id.* at 107–08.

189. *Id.* at 242–43.

> [P]roperly and strictly speaking, things *movable*; which may be annexed to or attendant on the person of the owner, and carried about with him from one part of the world to another. Such are animals, household stuff, money, jewels, corn, garments, and everything else that can properly be put in motion and transferred from place to place.[190]

This taxonomy of common law property rights continues – mirroring the Enlightenment aims of rationality and scientific progress – in Blackstone's acknowledgment of "still another species of property" that is "grounded on labour and invention" and protected under English law: "[a]nd this is a right which an author may be supposed to have in his own original literary composition: so that no other person without his leave may publish or make profit of the copies."[191] Blackstone's *Commentaries* acknowledges that the legal right to property necessitates that English common law provides remedies when those rights are abused.[192] These remedies include an action of replevin as well as actions of trover and conversion.[193] In an action of replevin, Blackstone instructs: "[a]nd this is, in the first place the restitution of the goods themselves so wrongfully taken, with the damages for the loss sustained by such unjust invasion; which is effected by action of replevin."[194] This differs from the legal remedy of trover and conversion, recognized in English common law: "for the recovery of damages against such person as had *found* another's goods and refused to deliver them on demand; but *converted* them to his own use; from which finding and converting it is called an action of *trover* and *conversion.*"[195]

The English common law was carried to America by English colonists,[196] and planted in the American colonies' jurisprudence before the American Revolution and the founding of the United States, events that together close the eighteenth century and begin the nine-

190. *Id.* at 243.

191. *Id.* at 251.

192. *Id.* at 334.

193. *Id.* at 334, 337.

194. *Id.* at 334.

195. *Id.* at 337.

196. Letter from Johnathan Sewall to John Adams (Sept. 29, 1759), NAT'L ARCHIVES, https://founders.archives.gov/?q=william%20blackstone%20commentaries. Fellow lawyer Jonathan Sewall remarks in his letter to John Adams that John Adams's "[a]ccount of Mr. Blackstone's Lectures is entirely new to me, but I am greatly pleased with it." The National Archives' annotation of this letter states that this reference is likely to William Blackstone's *Analysis of the Laws of England,* a treatise published in 1754 as a companion to William Blackstone's lectures at Oxford and a precursor of Blackstone's *Commentaries. Id.* at n.4.

teenth century.[197] As one historian notes, the American Revolution was a revolt against English rule but *not* a revolt against English law:[198]

> The Colonists' decision to break from England was different in character from contemporary revolutions. Seeing English customs and rights as an invaluable benefit, more valuable than even England's military or commercial power, the Colonists brought their legal traditions with them to the New World.[199]

The English colonies in America attracted settlers, in part, because the English legal tradition of securing through law "security, liberty, and property" – Blackstone's trinity of "absolute rights of Englishmen" – continued in Colonial America.[200] Specifically, the conception of property in the colonial period mirrored the English view: "American political leaders did not develop new ideas about private property. They merely demanded that the concept of property long since canonized by the English Whigs also apply in the colonies."[201]

Legal scholars and historians remark that the American Founding philosophically embraced a conception of the meaning of property more expansive than mere "private holdings, both personal and real."[202] This expansive understanding of property included these private holdings as well as political and civil rights upon which liberty interests depended.[203] The Americans and English shared this eighteenth-century view of property rights,[204] and the former embedded this view in the drafting of the U.S. Constitution.[205] U.S. Supreme Court constitutional jurisprudence recognizes the importance of An-

197. *See generally* Barbara Stark, *Deconstructing the Framers' Right to Property: Liberty's Daughters and Economic Right*s, 28 HOFSTRA L. REV. 963, 973 (2000) (noting the English historical origins of Colonial America's understanding of rights, including the right to property which had a "privileged place in colonial jurisprudence"). *Id.* at 974.

198. Siegan, *supra* note 186, at 452.

199. Larkin, *supra* note 163, at 21.

200. *Id.* at 23; Siegan, *supra* note 186, at 451 ("From the earliest years of the English state, judges and parliament created and steadily expanded common law protections. As an example, at one time, only the meager rudiments of criminal procedure were required; by Blackstone's day, however, 'absolute rights' to life, liberty, and property were acknowledged.").

201. Larkin, *supra* note 163, at 25 (quoting WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS 189 (Rita & Robert Kimber trans., Rowman & Littlefield, expanded ed. 2001) (1973)).

202. Stark, *supra* note 197, at 975.

203. *Id.*; Larkin, *supra* note 163, at 33.

204. Larkin, *supra* note 163, at 33.

205. *Id.* at 36. James Madison, the fourth President of the United States and architect of the U.S. Constitution, wrote about this expansive conception of property in 1792: "[i]n its larger and juster meaning, [it] embraces every thing to which a man may attach a value and have a right; and which leaves to every one else the like advantage." *Id.* at 34–35 (quoting James Madison, Essay, NAT'L GAZETTE, Mar. 29, 1792, at 174.).

glo-American legal history to guide the meaning of terms used in provisions of the U.S. Constitution.[206]

While legal historians agree that the colonial and early American legal tradition embraced core aspects of the English common law (and the philosophical assumptions undergirding the law),[207] evidence exists that the American legal tradition rebelled against, rejected, and replaced aspects of this English legal tradition, including the conception of property rights:[208]

> There was a difference between what the Colonists said in defense of their decision to break with England, or what the Framers said when discussing the principles that underlay the new government they sought to charter, and what the Colonists and Framers actually did when their hands were on the wheel. They did not translate in its entirety and without modification their philosophical and rhetorical understanding of property into the legal institution of property governed by the former colonial or new federal political institutions.[209]

Legal historians maintain that in Colonial America, property rights did adapt to the unique economic, political, and social circumstances of the New World, including the right to hold land in fee simple, a right unfettered by the feudal land system in England.[210] The right to secure property interests in law at the time of the American Revolution and founding of the United States included the "right to possess, use, enjoy, and dispose" of land, currency, and goods or commodities.[211] This American adaptation of laws to address the colonists' specific circumstances worked through colonial legislatures that retained the right to legislate, and through colonial courts that retained the right to adjudicate legal disputes.[212]

---

206. *Id.* at 3.

207. *See* Siegan, *supra* note 186, at 422 n.18 (acknowledging the reliance American law had even after the American Revolution on Blackstone's *Commentaries*' explication of English law, stating, "[t]o lawyers on this side of the Atlantic, it has been even more important. In the first century of American independence, the Commentaries were not merely an approach to the study of law; for most lawyers they constituted all there was of the law . . . . ").

208. STUART BANNER, AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN 4 (2011).

209. Larkin, *supra* note 163, at 73.

210. *Id.* at 29.

211. *Id.* at 6.

212. Claire Priest, *Creating an American Property Law: Alienability and Its Limits in American History*, 120 HARV. L. REV. 385, 398 (2006) (quoting DANIEL J. HULSEBOSCH, CONSTITUTING EMPIRE 44-45 (2005)) The author states:

> English property law served as the foundation for the property law of the colonies. The charters and patents that conveyed legislative power to the colonies generally included provisos either prohibiting colonial legislatures from making laws 'repugnant to' the laws of England or requiring that the enacted laws be 'not contrary to but as near as

Another example of American deviation from the English conception of property and the legal protections afforded it involves land: during the colonial period, land became the legal equivalent of chattel in the American legal tradition.[213] This commodification of land transformed in a unique way an American understanding of property that is distinctive from the English common law tradition.[214] Achieved by colonial legislation and a British Parliamentary act,[215] Colonial America viewed property rights in land as the legal equivalent of chattel for creditor/debtor claims:

> In America, the treatment of land as legally equivalent to any other form of chattel in relation to creditors' claims obliterated the division between landed wealth and commercial wealth, and thus between landowners and merchants. In America, before the 1840s, all forms of wealth were subject to the commercial risks incurred by the property owner, with the exceptions of land that was entailed during the colonial period and land that was covered by a widow's limited dower interest.[216]

One nineteenth-century lawyer in 1829 described the American transformation of English property law from the mid-eighteenth century explication of the law in Blackstone's *Commentaries* to the American Founding as "a complete revolution."[217] Lawyers, judges, and legislators in the colonies and the newly-formed United States remodeled and crafted legal theories in the area of property ownership and rights according to the political, economic, and geographic realities of America: "American judges and legislators were constantly replacing ancient doctrines with new ones. Few areas of the law, if any, were changing more rapidly than property."[218]

---

conveniently may be made agreeable to the Laws, Statutes & Government of this Our Realm of England.' *Id.*

213. Priest, *supra* note 212, at 389.

214. *Id.*

215. *Id.* at 389 (analyzing the transformational impact of the British Parliament's Act for the More Easy Recovery of Debts in His Majesty's Plantations and Colonies in America known as the Debt Recovery Act of 1732, and American colonial laws on America's departure from English legal tradition through allowing real property to be used as security for debts.).

216. *Id.* at 390.

217. BANNER, *supra* note 208, at 4.

218. *Id*. The shaping of a republic during this period in history impacted the American reaction to English conceptions of property rights that failed to live up to republican ideals. Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. REV. 273, 350–351 (1991) (highlighting how the American discourse on the meaning of property during the period 1765 to 1800 embodied a dialectic that included a reaction to Blackstone's notion of property: "the Blackstonian conception of ownership was a myth in the context of English society. Indeed, they considered that ownership based on individual autonomy and equality had not in fact existed anywhere in history. The common law, in developing the concept of the fee-simple absolute, had articulated that ideal, but had not actually implemented the common-law

This expectation and effectuation of change in property rights in America[219] becomes the historical backdrop for the next two centuries of legal evolution of these rights in the United States. This historical period stretches over a vast legal landscape, with sweeping changes in the legal understanding of the nature of property and the nature of the rights securing these interests. It includes the acknowledgement and articulation of intellectual property rights[220]—legal protections that continued to strengthen as the value of the property itself increases.[221] These intangible rights have roots in legal doctrines embedded in the English common law, but they grew and flowered in American jurisprudence through judicial rulings and legislative enactments:

> [I]ntellectual property had become an important part of the law, and the types of intellectual property had multiplied to include not just patents and copyrights but also trade secrets and trademarks with their associated goodwill. All were ways of owning information, a commodity that would grow ever more valuable, and would be the subject of even newer kinds of property, in the twentieth century.[222]

As the understanding of property rights transformed over time, the United States debated and recognized property interests in a genetically engineered bacterium,[223] human tissue and blood,[224] public school jobs,[225] and an individual's identity.[226]

Throughout American history, property law in the United States also evolved conceptually through the works of English legal theorists, such as law professor John Austin. Austin, in his *Lectures on Jurisprudence* which was published in the 1860s, popularized the notion that property was a bundle of rights, such as the right to use or to ex-

---

ideal. Because the common-law conception of ownership as the fee-simple absolute had not existed anywhere previously, it had not fulfilled its promise of individual liberation.").

219. BANNER, *supra* note 208, at 22.

220. *Id.* at 32 (discussing American courts' recognition in the mid-nineteenth century that trademarks constituted a distinct form of legally protectable property. In 1860, Francis Upton's *Treatise on the Law of Trademarks* explained that ownership of a trademark derived not from owning a "word" but from owning the "right to use that word to designate a particular product.").

See FRANCIS UPTON, A TREATISE ON THE LAW OF TRADEMARKS 14–15 (1860).

221. BANNER, *supra* note 208, at 37. In 1887, then Cincinnati, Ohio, state court judge (and future 27th President of the United States and Chief Justice of the U. S. Supreme Court) William Howard Taft ruled that an employer's trade secret is a legally protected form of property. *Id.* at 43.

222. *Id.* at 44.

223. *Id.* at 252.

224. *Id.* at 246 .

225. *Id.* at 235.

226. *Id.* at 160.

clude.[227] This view, embraced in English and American law, prevailed on both sides of the Atlantic by the end of the nineteenth century.[228] Legal theorists continue to debate what theoretical constructs should be used to conceptualize the meaning of property under the Anglo-American legal tradition.[229]

IV. The Feasibility of a Uniform Approach to Mitigate Risks

This historical perspective on the development of property rights in the Anglo-American legal tradition invites investigation of the feasibility of a uniform approach to the categorization and adjudication of the property rights at stake in social media account ownership. First, this legal history – spanning 900 years – confirms that paradigm-shifts do occur.[230] Even before the American Revolution and the American Founding, aspects of the American legal development of property rights in the American colonial period have been characterized as "a complete revolution"[231] or a rebellion from its English parentage.

Second, lawyers, judges, and legislators remodeled and crafted legal theories in the area of property rights according to the political, economic, and geographic realities of the American colonies.[232] This pragmatic approach embedded in the American legal tradition allows this tradition to adapt to new realities, adjust to specific circumstances, and create new legal rights when needed.[233] This historical perspective lends legitimacy to the pressing problem posed by the digital rights revolution: the inability of the law to keep pace with technological innovation.[234]

Third, a paradigm-shift in this area of law and the adoption of a new legal paradigm are justified.[235] The digital rights revolution's pacing problem is evident as litigation over disputed social media account

227. *Id.* at 57–58.

228. *Id.* at 58. The author notes the constitutional implications of this theoretical construct as well. *Id.* at 69.

229. Henry E. Smith, *Property as the Law of Things*, 125 Harv. L. Rev. 1691, 1697–98 (2012).

230. *See infra* Part III.

231. Banner, *supra* note 208, at 4.

232. Larkin, *supra* note 163, at 29.

233. *Id.*

234. *See infra* Part I.

235. *See* Raymond Shih Ray Ku, *Grokking Grokster*, 2005 Wis. L. Rev. 1217, 1231. The author examines fundamental differences between "property pragmatists" and "property idealists" in light of copyright law's reaction to new digital technologies. The author notes that the "nonlinear nature of progress" theorized by Joseph Schumpeter and Thomas Kuhn should be applied to law's reaction to the creative destruction of technological innovation. *Id.* at 1276.

ownership creates divergent and inconsistent legal outcomes.[236] These anomalies in the precedent create significant risks for the rights-holders whose property interests in this valuable digital asset – a social media account – are neither clearly defined nor reliably certain.[237] The need exists for a judicial or legislative rejection of legal constructs that do not adequately and fairly account for the rights at stake in social media account ownership disputes.

Significant obstacles exist to a judicial adoption of a new legal paradigm. With no statute directly addressing the parameters of the property rights attendant in social media account ownership disputes, the caselaw demonstrates that litigants advance multiple legal theories – arising under both statutory law and common law – to redress the harm resulting from loss of control over a social media account.[238] Each legal theory requires courts to interpret and apply elements of that statute or common law framework to the technological idiosyncrasies of each kind of social media platform. This can and has produced disparate and divergent outcomes, and analytically confusing and conflicting frameworks. In addition, each state articulates the elements of the common law tort of conversion according to its precedent. There is no uniformity in the states' varied approaches to categorizing this common law right of recovery to intangible property such as a social media account.[239] Proposing a single, uniform analytical framework for the judiciary's use when confronted by these diverse legal theories and varied articulations of the common law is not practical. A new legal paradigm is best approached legislatively.

A legislative approach avoids these obstacles and resolves the anomalies now present in the judicial precedent. A blueprint for such a legislative undertaking exists. The digital revolution's disruptive impact in trust and estates law provides insight into how a paradigm-shift through a legislative response creates new, coherent, and uniform legal rules to address problems arising from technology innovations. The Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) is a model law that addresses access questions to certain digital assets when a person dies or loses the capacity to control these assets.[240] The Uniform Law Commission drafted RUFADAA,

236. *See infra* Parts II.B.1, 2.

237. *See infra* Part II.C.

238. *See infra* Parts II.B.1,.2.

239. *See infra* Part II.B.2.

240. *See* Uniform Law Commission, Revised Uniform Fiduciary Access to Digital Assets Act (2015).

and versions have been adopted in almost all fifty states.[241] This model law grants a fiduciary, such as an executor or trustee, certain kinds of access to "manage digital assets" of a decedent or other represented person, and the model law delineates the consent and documentation required for access to certain digital assets, including social media accounts.[242]

The drafting and revision of this uniform law occurred after several states enacted statutes to address these issues.[243] In 2014, a model law drafted by the Uniform Law Commission "treated digital assets like any other property in a decedent's estate."[244] Internet companies opposed this characterization of a digital asset, prompting an industry group to propose an alternative statutory reform.[245] In reaction to industry push back, the Uniform Law Commission revised its model law; the RUFADAA is that iteration of this effort.[246] This progression illustrates the path a model law may travel from idea to adoption. The path traversed may begin with unilateral state legislative action and then proceed to the drafting and proposal of a uniform law. If an industry rejects some or all of the elements of the proposed legislation, redrafting may be necessary in light of industry efforts to lobby and pressure for change in the proposed law.[247]

A model law that addresses the following issues will provide a coherent and uniform approach to property rights in social media account ownership disputes. This model law should:

(1) Define a social media account as a form of intangible, personal property;

---

241. *Access to Digital Assets of Decedents*, Nat'l Conference of State Legislatures (Mar. 26, 2021), https://www.ncsl.org/research/telecommunications-and-information-technology/access-to-digital-assets-of-decedents.aspx.

242. *Fiduciary Access to Digital Assets Act, Revised*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey (last visited July 23, 2020); Shelly Kreiczer-Levy & Ronit Donyets-Kedar, *Better Left Forgotten: An Argument Against Treating Some Social Media and Digital Assets as Inheritance in an Era of Platform Power,* 84 BROOK. L. REV. 703, 716 (2019); UNIFORM LAW COMMISSION, *supra* note 240, § 7 (One legislative challenge in the drafting and adoption of this model law was determining the nature and extent of the fiduciary's access to the digital assets.).

243. Natalie M. Banta, *Electronic Wills and Digital Assets: Reassessing Formality in the Digital Age,* 71 BAYLOR L. REV. 547, 569 (2019). Connecticut was the first state to legislate in this area in 2005. *Id.*

244. *Id.* at 570.

245. *Id.*

246. *Id.* at 571.

247. *Id.* ("Digital asset reform under RUFADAA is a cautionary tale for uniform law in the United States. On a national level, there was enough opposition from online companies to stunt the evolution of freedom of disposition in the digital realm.").

(2) Acknowledge that a social media account can be owned and transferred;
(3) Designate ownership of a social media account through evidence of account creation and account management and contractual transfer of the account;
(4) Designate the exercise of dominion or control over a social media account in a manner that seriously interferes with the account owner's right to access and control the account as unlawful;
(5) Provide civil remedies for this unlawful exercise of dominion and control; and
(6) Acknowledge that other forms of property can be communicated through social media such as intellectual property in the form of trade secrets and trademarks.

This proposed framework imports key components of the Restatement 2d of Torts' definition of conversion as well as standards employed in the judicial precedent interpreting this tort.[248] Section 1 of the proposed legislation explicitly defines a social media account as intangible personal property, removing confusion created by courts over whether intangible property constitutes protectable property under the tort of conversion.[249] Further, Section 1 uses the more generic term "property" and not "chattel" to avoid entangling this model law in state-specific precedent that interprets the meaning of "chattel" under common law.[250] Section 2 of the model law states that social media accounts retain indicia of property including ownership, control, and transferability. Section 3 of this model law provides a framework for the determination of the ownership of a social media account. This will legislatively resolve the multiple and, at times, conflicting analyses courts use to understand and resolve ownership disputes over social media accounts.[251]

Section 4 mirrors the language used in the Restatement 2d of Torts.[252] It requires a "serious" interference of the property owner's right to access and control of the social media account.[253] This stan-

248. *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 77, § 222A; *see infra* Part II.B.2.

249. Pertuto v. Roc Nation, 386 F. Supp. 3d 471, 475–76 (E.D. Pa. 2019); Eagle v. Morgan, No. 11-4303, 2013 U.S. Dist. LEXIS 34220, at *28–29 (E.D. Pa. Mar. 12, 2013) ("As the LinkedIn account is not tangible chattel, but rather an intangible right to access a specific page on a computer, Plaintiff is unable to state a cause of action for conversion.").

250. *See infra* Part II.B.2.

251. Int'l Bhd. Of Teamster Local 651 v. Philbeck, 464 F. Supp. 3d 863, 871–72 (E.D. Ky. 2020); C.D.S., Inc. v. Zetler, 298 F. Supp. 3d 727, 750 (S.D.N.Y. 2018).

252. *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 77, § 222A.

253. *See* Prosser, *supra* note 76, at 173.

dard will require judicial interpretation of what constitutes "serious" interference with the property right. The development of that precedent can look to caselaw interpreting this language in the Restatement 2d of Torts. Section 5 of the model law delineates the nature of the statutory remedy, and Section 6 explicitly allows for other forms of property – such as a trademark – to exist coextensively with the property right in the social media account itself. This preserves as a separate cause of action the intellectual property right contained within the social media, clearing up judicial confusion over this issue.[254]

This legislative approach provides a new paradigm that resolves the anomalies inherent in the digital rights revolution's pacing problem. A model law adopting this legislative approach establishes the nature of the property inherent in social media accounts, articulates a methodology for determining account ownership, and provides a statutory right and remedy to account owners damaged by interference with these property rights. Business organizations relying on this legislative framework gain clarity about their property rights in their social media accounts. The model law also provides business organizations consistent and uniform legal rules if disputes arise over social media account ownership and control. This paradigm-shift in the law mitigates the risks resulting from loss of ownership and control over this valuable digital asset.

V. Conclusion

The digital rights revolution confirms that technological advances challenge and upend the understanding and application of legal rights. Litigation over social media account ownership disputes produces judicial precedent anomalies, with divergent, contradictory, or unclear analytical frameworks applied by courts to adjudicate the rights at issue. Business organizations encounter increased exposure to risk in the wake of this problematic precedent. Defining and delineating ownership rights over this digital asset through a uniform legislative approach informed by historical context provides the judiciary, legislators, legal scholars, and legal practitioners a new paradigm. This paradigm-shift mitigates the risk posed to business organizations, allowing them to understand and secure their rights to a useful and valuable asset: social media accounts.

254. *See* CDM Media USA, Inc. v. Simms, No. 14 CV 9111, 2015 U.S. Dist. LEXIS 37458, at *12–14 (N.D. Ill. Mar. 25, 2015); Christou v. Beatport, LLC, 849 F. Supp. 2d 1055, 1076 (D. Colo. 2012).