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# Digital Self-Ownership: A Publicity-Rights Framework for Determining Employee Social Media Rights

Susan Park  
*Boise State University*

Patricia Sánchez Abril  
*University of Miami School of Business Administration*

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# Digital-Self Ownership: A Publicity-rights Framework for Determining Employee Social Media Rights

*Susan Park\** and *Patricia Sánchez Abril\*\**

## INTRODUCTION

Imagine an up-and-coming company hires you as one of its first employees. Passionate about your employer, you put in long hours doing everything from marketing to accounting to event planning. You are also proud of your employer's product, so you begin to publicize it to your friends through your social network accounts. (In fact, the company's founder is also one of your Facebook friends.) You tell your friends about the product launch, invite them to marketing events, and eventually blog about your industry, amassing a significant social media following while creating buzz about your employer. But one day, during layoffs unrelated to your own efforts, you are fired. As you walk out the door, your supervisor asks you to return the office keys, your parking pass, and . . . *administrative rights to your social media profiles*. Can this be?

The term "social media" encompasses any online platform that allows individuals to communicate, create content, and interact socially.<sup>1</sup> Social media can include blogs, wikis, podcasts, photos and video sharing, virtual worlds, and social networking sites such as LinkedIn, Facebook, Instagram, and Twitter.<sup>2</sup> For individuals, social media can be the digital representation of the self online. Social media profiles are fora for communication, self-expression, identity creation, and relationship-building in front of audiences of few or many. The phenomenon of social media—and its use in business—is less than a decade old.<sup>3</sup> It is thus no surprise that both normative and legal questions regularly test its limits.

The ubiquity and accessibility of social media has proven enticing to businesses and

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\* Associate Professor of Legal Studies in Business, Boise State University. This work was generously supported through a summer research grant from the Boise State University College of Business and Economics.

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<sup>1</sup> See, e.g., Simeon Edosomwan et al., *The History of Social Media and Its Impact on Business*, 16 J. APPLIED MGMT. & ENTREPRENEURSHIP (2011); CHRISTIAN FUCHS, SOCIAL MEDIA: A CRITICAL INTRODUCTION (2013).

<sup>2</sup> Alexander Naito, Comment, *A Fourth Amendment Status Update: Applying Constitutional Privacy Protection to Employees' Social Media Use*, 14 U. PA. J. CONST. L. 849, 858 (2012).

<sup>3</sup> The three principal social media sites—Twitter, LinkedIn, and Facebook—were all founded between 2002 and 2006. Sarah Phillips, *A Brief History of Facebook*, THE GUARDIAN (July 25, 2007, 5:29 AM), <http://www.theguardian.com/technology/2007/jul/25/media.newmedia>; Charles Arthur, *How Twitter was Born: The First 140 Users*, THE GUARDIAN (Jan. 11, 2010, 8:14 AM), <http://www.theguardian.com/technology/blog/2010/jan/11/twitter-first-140-users-history>; *A Brief History of LinkedIn*, LINKEDIN, <https://ourstory.linkedin.com/> (last visited Mar. 13, 2016).

institutions, which increasingly use it as a low-cost marketing, sales, and branding tool. The presence of businesses on social media is thus growing rapidly. Recent studies show that the overwhelming majority of Fortune 500 companies are active on social media: ninety-seven percent have a presence on LinkedIn.<sup>4</sup> Over eighty percent have corporate Facebook accounts and eighty-three percent use Twitter at least once every thirty days.<sup>5</sup> These trends mirror those of smaller businesses, whose success often depends on the strength of their relationships with customers and other constituencies.<sup>6</sup>

But the mere existence of a social media presence cannot alone anthropomorphize an institution, or cultivate valuable relationships. Individuals—employees and agents—work to create and advertise the institutional identity and create relationships through their own posts, content, and management of complex networks of individual and business relationships. Although the practice of social media management is ubiquitous, the work of these modern-day *Cyranos* is caught in a blurred<sup>7</sup> and legally undefined territory where the personal melds with the professional. Sometimes, employees create the company’s profile as individuals, becoming personally bound to user contracts with the social network providers. These employees may control the password and access to the company account. In other cases, employees may use their own profiles to boost their company’s notoriety alongside their own, or write their own industry-related blogs whose goodwill spills over to the author’s employer. Or companies might encourage employees to foster their own social media presence to enhance professional connections and reputation. The result, in physical terms, is both a personal calling card and a company billboard, sharing the attention of a coveted audience.<sup>8</sup>

When employers and employees who have shared a social media profile part ways, who retains the right to control the Twitter feed, the Facebook page, or the blog? More specifically, who keeps the *social media audience*?<sup>9</sup> What legal interest, if any, should a person obtain in the

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<sup>4</sup> Nora Ganlm Barnes & Ava M. Lescault, *The 2014 Fortune 500 and Social Media: LinkedIn Dominates as Use of Newer Tools Explodes*, CHARLTON COLL. OF BUS. CTR. FOR MKTG. RESEARCH, UNIV. OF MASS. DARTMOUTH (2014), <http://www.umassd.edu/cmr/socialmediaresearch/2014fortune500/>. The University of Massachusetts Dartmouth Center for Marketing Research surveyed Fortune 500 companies recognized as of May 2014 to compile data on company usage of social media platforms including Facebook, Twitter, Instagram, Google+, Foursquare, Pinterest, YouTube, and others. *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> A recent survey revealed that the majority of small businesses have an online presence, which they use primarily for business networking. NAT’L SMALL BUS. ASSOC., 2013 SMALL BUSINESS TECHNOLOGY SURVEY (2013), <http://www.nsba.biz/wp-content/uploads/2013/09/Technology-Survey-2013.pdf>.

<sup>7</sup> Several scholars have described the online convergence of personal and work-related as “blurred.” See Lauren Gelman, *Privacy, Free Speech, and “Blurry-Edged” Social Networks*, 50 B.C. L. REV. 1315, 1316 (2009); see also Patricia Sánchez Abril et al., *Blurred Boundaries: Social Media Privacy and the Twenty-First-Century Employee*, 49 AM. BUS. L.J. 63, 95 (2012); Robert Sprague, *Invasion of the Social Networks: Blurring the Line Between Personal Life and the Employment Relationship*, 50 U. LOUISVILLE L. REV. 1, 12 n.72 (2011).

<sup>8</sup> It is worth noting that people use social media for many reasons, including communication, companionship, and connectivity. This article focuses narrowly on those accounts whose primary or secondary purpose is to promote a business or a professional.

<sup>9</sup> For ease of reference, we refer to the act of attracting and amassing a following through social media, with the intention to garner attention, reputation, or an audience, as *social media audience management*. While different websites describe their participants differently—as friends, followers, or connections—we selected “audience” as a website-neutral descriptor that captures the aim of those who promote a business on social media.

social network of virtual friends that person has amassed while on the job?

In the absence of a clear agreement, the employer is likely to demand the ongoing right to control communications with present and potential customers. The employee, on the other hand, may wish to maintain the relationships, and, in some cases, the digital persona that she has nurtured. Relationships carry value—and demand hard work to cultivate and maintain. But can a digital self and the cultivated relationships ever be property? What rights, if any, should attach to this new type of amassed virtual audience?

Disputes over post-employment retention of social media are increasingly common.<sup>10</sup> For employees, interests range from the dignitary (control of their virtual identities and goodwill) to the financial (ability to reap the benefits accruing from their amassed audience). Employers, on the other hand, have legitimate interests in promoting their brands, maintaining access to their customers, and keeping their employees' work product. However, the law does not provide clear guidance,<sup>11</sup> and relatively little scholarly work has been written about this issue.<sup>12</sup> As a result, employers and employees face undue uncertainty when it comes to ownership of social media content and audiences.

This article posits two reasons for the generalized unease. The first is the lack of an established legal rubric addressing employee social media rights. The second, and related, factor is an overly tentative (and sometimes erroneous) conceptualization of social media's existing norms, the work exerted in cultivating an audience, its value, and the reputational and financial harms that can ensue when a digital forum is unjustifiably usurped from its rightful holder. This article addresses the legal and normative issues in turn and concludes with a way forward. We argue that, with few exceptions, individuals should be entitled to protection against those who seek to misappropriate their work, personae, and goodwill on social media for economic gain. It proposes a multifactor analysis that is protective of employee personality yet considerate of the employer's reasonable business interests.

Part I explores the existing law. First, it examines recent illustrative court cases regarding the post-employment control of social media audiences.<sup>13</sup> 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

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<sup>10</sup> See Carrie Pixler Ryerson & John Balitis, Jr., *Social Media's Lessons: Employers Adapt as Viewers, Publishers*, 48 ARIZ. ATT'Y., Apr. 2012, at 17, 17 ("As more and more employers are using social media for their own gain, a new controversy has emerged. Employers now are embroiled in litigation against former employees over the issue of *who* owns social media pages and accounts: the employer or the employee."); Hugh McLaughlin, Comment, *You're Fired: Pack Everything but Your Social Media Passwords*, 13 NW. J. TECH. & INTELL. PROP. 87, 90–91 (2015).

<sup>11</sup> See Zoe Argento, *Whose Social Network Account? A Trade Secret Approach to Allocating Rights*, 19 MICH. TELECOMM. & TECH. L. REV. 201, 205 (2013) ("This is a new area with no clear legal framework."); Thomas C. Mahlum & Andrew J. Pieper, *From the Experts: Company vs. Employee Ownership of Social Media Assets*, CORP. COUNSEL (Aug. 20, 2012), <http://www.robinskaplan.com/~media/PDFs/From%20the%20Experts-Company%20vs%20Employee%20Ownership%20of%20Social%20Media%20Assets.pdf> ("The 'ownership' of relationships formed and maintained by a company's employees, however, remains something of an open question, and is largely in the eye of the beholder.").

<sup>12</sup> See, e.g., McLaughlin, *supra* note 10; Argento, *supra* note 11; Tiffany A. Miao, Note, *Access Denied: How Social Media Accounts Fall Outside the Scope of Intellectual Property Law and Into the Realm of the Computer Fraud and Abuse Act*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1017 (2013); Courtney J. Mitchell, Note, *Keep Your Friends Close: A Framework for Addressing Rights to Social Media Contacts*, 67 VAND. L. REV. 1459 (2014).

<sup>13</sup> See *infra* notes 16–19.

resolve these issues? Or is intellectual property or tort law better suited to address them? We assert that the conundrum surrounding the applicable law is due in part to a lack of understanding of the exercise and value of social media in the business context. To that end, Part II analyzes social media through the lens of social science and business, describing it with five fundamental tenets that can ultimately inform its legal protection. Social media audience management is a creative, dynamic, and generative process whose fruits—networked relationships—can be inextricably interwoven with the individual. Given this intimate tie to personhood and the complexity of extricating the personal from the professional, Part III proposes a multifactor framework grounded in a theory of publicity rights to guide its resolution. With roots in both privacy and property, publicity rights protect the unjustified commercialization or exploitation of another’s name, likeness, reputation, accomplishments, or endorsement.<sup>14</sup> The right recognizes that intangible fruits of one’s persona carry value, which must be protected in the vein of property.<sup>15</sup> Since social media is the dominant disseminator of publicity today and it offers widespread notoriety to many, adopting a framework informed by the well-established law of publicity rights is both logical and desirable.

## I. THE UNTETHERED LAW OF EMPLOYEE RIGHTS IN SOCIAL MEDIA

Given the ubiquity of social media as a marketing tool and its blurring of personal and professional, it is hardly surprising that employees have begun to defend their rights and creations in social media. Four recent cases—*PhoneDog v. Kravitz*,<sup>16</sup> *Eagle v. Morgan*,<sup>17</sup> *Maremont v. Susan Fredman Design Group*,<sup>18</sup> and *Mattocks v. Black Entertainment Television LLC*<sup>19</sup>—elucidate this burgeoning legal issue in diverse industries and on varied social media sites. In this section, we first briefly discuss the cases and their holdings. We then examine in more detail the various legal claims and arguments put forth by the litigants. Their analysis sheds light on the current confusion regarding applicable law and uncovers some fundamental misconceptions about social media, both of which must be clarified for a coherent solution to emerge.

### A. Four Representative Cases

In *PhoneDog v. Kravitz*, the plaintiff PhoneDog.com is a website that provides interactive news

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<sup>14</sup> See *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953); *Ettore v. Philco Television Broad. Corp.*, 229 F.2d 481, 484 (3d Cir. 1956).

<sup>15</sup> According to the Restatement, “[o]ne who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of privacy.” RESTATEMENT (SECOND) OF TORTS § 652C (AM. LAW INST. 1977). The comments also make clear that “the right created by [§ 652C] is in the nature of a property right.” *Id.* § 652 cmt. a; see also *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977) (“[T]he State’s interest [in permitting a ‘right of publicity’] is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors . . .”).

<sup>16</sup> No. C 11-03474 MEJ, 2011 WL 5415612 (N.D. Cal. Nov. 8, 2011).

<sup>17</sup> No. 11-4303, 2013 WL 943350 (E.D. Pa. Mar. 12, 2013).

<sup>18</sup> No. 10 C 7811, 2014 WL 812401 (N.D. Ill. Mar. 3, 2014).

<sup>19</sup> 43 F. Supp. 3d 1311 (S.D. Fla. 2014).

and reviews about cellular phones and mobile devices. In April 2006, PhoneDog hired Noah Kravitz as a product reviewer and video blogger.<sup>20</sup> In this capacity, Kravitz was charged with submitting written and video content, which PhoneDog then disseminated to its users through a variety of online mediums, including its website and Twitter account.<sup>21</sup> As part of his employment, Kravitz was given a Twitter account named “@PhoneDog\_Noah” for which he created a password.<sup>22</sup> In his four years with PhoneDog, Kravitz accumulated approximately 17,000 Twitter followers.<sup>23</sup>

When Kravitz resigned in 2010, PhoneDog demanded he hand over the use of his Twitter account, which he had popularized during his tenure at PhoneDog.<sup>24</sup> But PhoneDog did not have a policy regarding retention of social media accounts.<sup>25</sup> Kravitz refused, and, in protest, continued to use the account to communicate with his followers but changed the handle from “@PhoneDog\_Noah” to “@noahkravitz.”<sup>26</sup> PhoneDog claimed that the Twitter password was a trade secret, and its continued unauthorized use was misappropriation, and sued Kravitz on four claims: 1) misappropriation of trade secrets; 2) conversion; and 3) intentional and 4) negligent interference with prospective economic advantage.<sup>27</sup> Could a Twitter password be a trade secret—a proprietary interest capable of being misappropriated by its own creator?

Employee Kravitz argued that the password to the Twitter account could not be a trade secret because it was neither valuable nor secret. Passwords, he argued, could carry no actual or economic value because they merely allow individuals to login to an account to view information. Moreover, Kravitz himself created the password, and his employer made no attempt to secure its secrecy.<sup>28</sup>

On Kravitz’s motion to dismiss, the court dismissed the claims for intentional and negligent interference, but allowed the claims for conversion and misappropriation of trade secrets to go forward, accepting (for purposes of ruling on the motion to dismiss) that under certain circumstances a Twitter password could be a trade secret.<sup>29</sup> The parties eventually entered into a confidential settlement that allowed Kravitz to maintain sole custody of the Twitter account and its thousands of followers.<sup>30</sup> The case settled amidst public confusion and

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<sup>20</sup> *PhoneDog*, 2011 WL 5415612 at \*1.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at \*4.

<sup>26</sup> *Id.* at \*1.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at \*6.

<sup>29</sup> *Id.* at \*7–10; *see also* Argento, *supra* note 11, at 266 (noting that “in the trade secret context, a court must carefully scrutinize the circumstances and the objective manifestations of each party to determine the nature of the agreement”); David S. Almeling, *Seven Reasons Why Trade Secrets Are Increasingly Important*, 27 BERKELEY TECH. L.J. 1091, 1109 & n. 106 (2012) (suggesting that new technologies and trends can cause the scope of trade secret law to shrink).

<sup>30</sup> Jessica Mendelson, *Former PhoneDog Employee Off the Hook in Closely Watched Trade Secrets Spat*, TRADING SECRETS (Dec. 5, 2012), <http://www.tradesecretslaw.com/2012/12/articles/trade-secrets/2351>; Chris Taylor, *Writer Sued for His Twitter Followers Settles Case*, MASHABLE (Dec. 3, 2012), <http://mashable.com/2012/12/03/noah->

speculation, leaving the law unsettled.

In *Eagle v. Morgan*,<sup>31</sup> Linda Eagle was an executive and founder of Edcomm, Inc., an education and business training company focused on the banking industry. Well-known in her industry, Eagle was often published and quoted on professional matters. In 2009, Edcomm decided to begin using a LinkedIn profile as a sales and marketing tool.<sup>32</sup> At the enthusiastic urging of Edcomm's then-CEO, Eagle "created her own LinkedIn account using her Edcomm e-mail address," engaging on the site on both her personal and her company's behalf.<sup>33</sup> Through this social network, Eagle promoted the company's services, fostered her reputation, stayed connected with friends and family, and built social and professional relationships.<sup>34</sup> Eagle's assistant had access to her account for the purpose of managing and updating its content.<sup>35</sup>

LinkedIn's User Agreement made explicit that users owned their accounts and were individually bound to the User Agreement, regardless of whether their use was on behalf of an employer.<sup>36</sup> Although Edcomm neither required employees to use LinkedIn nor paid for its employees' LinkedIn accounts, it provided them certain guidelines as to posted content.<sup>37</sup> However, these guidelines did not address the company's right to access or control the accounts.<sup>38</sup>

After Edcomm was sold, the new owners terminated Eagle and hired Sandi Morgan in her place.<sup>39</sup> Edcomm then accessed Eagle's LinkedIn account and changed the password and the account profile to display Morgan's name and photograph.<sup>40</sup> For approximately two weeks, Eagle was locked out of what she believed to be "her" LinkedIn account, causing her to lose messages and feel that her virtual personality had been hijacked.<sup>41</sup> During this time, an Internet search for Eagle's name produced the LinkedIn account that bore Morgan's name and likeness.<sup>42</sup> Although Edcomm returned the account to Eagle within a month, she sued her former company and the individuals involved for a medley of claims: (1) unauthorized use of name; (2) invasion of privacy by misappropriation of identity; (3) misappropriation of publicity; (4) identity theft; (5) conversion; (6) tortious interference with contract; (7) civil conspiracy; and (8) civil aiding and abetting.<sup>43</sup> Was the nature of Eagle's harm dignitary, proprietary, or both? What would be its

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kravitz-lawsuit-twitter.

<sup>31</sup> No. 11-4303, 2013 WL 943350, at \*1 (E.D. Pa. Mar. 12, 2013).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at \*3.

<sup>36</sup> *Id.* at \*1.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at \*3.

<sup>41</sup> *See id.* at \*10.

<sup>42</sup> *Id.* at \*3.

<sup>43</sup> *Id.* at \*6. In an earlier 2012 decision in the case, the court dismissed the federal law claims alleging violation of the Computer Fraud and Abuse Act, Pub. L. No. 99-474, 100 Stat. 1213 (1986) (amending Pub. L. No. 98-473, §

correspondent remedy? Under which of these assorted legal bases could Eagle recover?

Following a non-jury trial, judgment was entered in favor of all of the individually named defendants.<sup>44</sup> Edcomm was awarded judgment on the counts of identity theft, conversion, tortious interference with contract, civil conspiracy, and civil aiding and abetting,<sup>45</sup> and the court dismissed Edcomm's counterclaim that Eagle had actually misappropriated the LinkedIn account as her own.<sup>46</sup>

Eagle, did, however, succeed on her claims for unauthorized use of name (in violation of Pennsylvania law), misappropriation of publicity, and invasion of privacy by misappropriation of identity—a tort prohibiting both the commercial and noncommercial use of another's image or likeness.<sup>47</sup> The court acknowledged that Edcomm had improperly usurped Eagle's digital persona to her detriment.<sup>48</sup> The court reasoned that by virtue of the existence of her LinkedIn membership, Eagle had a contractual relationship with LinkedIn and noted that the LinkedIn User Agreement clearly indicated that the individual user controlled the account.<sup>49</sup> By entering her account and changing her password, Edcomm had acted with purpose or intent to harm Eagle by preventing that relationship from continuing.<sup>50</sup>

The court concluded that Eagle had proved tortious interference by her employer but failed to prove any damages with reasonable certainty.<sup>51</sup> It noted that “[a]side from her own self-serving testimony that she regularly maintained business through LinkedIn, Plaintiff failed to point to one contract, one client, one prospect, or one deal that could have been, but was not obtained during the period she did not have full access to her LinkedIn account.”<sup>52</sup>

The court further held that even if Eagle “had made a showing of a ‘fair probability’ that she sustained some damages[,] . . . she failed to provide a reasonably fair basis for calculating such damages.”<sup>53</sup> Although Eagle succeeded in her privacy cause of action, the court awarded neither compensatory nor punitive damages.<sup>54</sup> Thus, even when a plaintiff has a valid cause of action in a post-employment social media dispute, it is not clear whether the plaintiff is limited to equitable remedies alone.

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2102, 98 Stat. 1837, 2190 (1984) (codified as amended at 18 U.S.C. § 1030 (a)(2)(c) (2012)), and the Lanham Act, Pub. L. No. 79–489, tit. VI, § 32, 60 Stat. 427, 437 (1946) (codified as amended at 15 U.S.C. § 1125 (a)(1)(A) (2012)). *See* *Eagle v Morgan*, No. 11-4303, 2012 WL 4739436 (E.D. Pa. Oct. 4, 2012).

<sup>44</sup> *Eagle*, 2013 WL 943350, at \*17.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at \*16.

<sup>47</sup> *Id.* at \*17.

<sup>48</sup> *Id.* at \*13–16.

<sup>49</sup> *Id.* at \*11.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at \*17.

<sup>52</sup> *Id.* at \*13.

<sup>53</sup> *Id.* at \*14. Eagle did present one witness to establish damages, but that witness was never properly qualified as an expert. *Id.*

<sup>54</sup> *Id.* at \*17.



In *Maremont v. Susan Fredman Design Group*,<sup>55</sup> Jill Maremont was employed as the Director of Marketing, Public Relations, and E-commerce at the Susan Fredman Design Group (SFDG).<sup>56</sup> As part of her job, she wrote the “Designer Diaries: Tales from the Interior” blog hosted on the SFDG website.<sup>57</sup> Through her personal Facebook and Twitter accounts, Maremont promoted SFDG by frequently posting links to her employer.<sup>58</sup> At SFDG’s request, she created a company Facebook page.<sup>59</sup> Per Facebook’s policy, a company page can only be created through a personal Facebook account.<sup>60</sup> As a result of this policy, Maremont created and accessed SFDG’s company Facebook page required through her personal account.<sup>61</sup> Maremont was also a frequent contributor on Twitter, on behalf of SFDG and on her own behalf.<sup>62</sup> She stored various social media passwords on an electronic spreadsheet on an SFDG-owned computer.<sup>63</sup>

Maremont was seriously injured in an automobile accident, which caused her to temporarily abandon her job and all social media communications.<sup>64</sup> SFDG’s own marketing efforts continued in spite of Maremont’s absence.<sup>65</sup> During Maremont’s convalescence, SFDG accessed and posted seventeen times from her Twitter account without her consent. Some postings notified readers that the account would be maintained by her temporary replacement.<sup>66</sup> Other messages were in the first person, giving readers the impression that she wrote them.<sup>67</sup>

Maremont sued, alleging that SFDG’s actions violated: (1) the Lanham Act<sup>68</sup> (false endorsement); (2) the Stored Communications Act<sup>69</sup> (“SCA”); (3) the Illinois Right of Publicity

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<sup>55</sup> No. 10 C 7811, 2014 WL 812401 (N.D. Ill. Mar. 3, 2014)

<sup>56</sup> *Id.* at \*1.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Set up A Page*, FACEBOOK, <https://www.facebook.com/business/learn/set-up-facebook-page/> (last visited Mar. 14, 2016).

<sup>61</sup> *Maremont*, 2014 WL 812401, at \*2. The parties contested whether or not Maremont made other employees administrators of the page (meaning they would not need to access her personal Facebook account to manage the company page). This factual question was left to the jury. *Id.* at \*6. Giving access to a personal password would violate Facebook’s Statement of Rights and Responsibilities, which prohibits users from sharing passwords, allowing others to access the account, or transferring accounts to others without the written permission of Facebook. *Statement of Rights and Responsibilities*, FACEBOOK, <https://www.facebook.com/legal/terms> (last updated Jan. 30, 2015).

<sup>62</sup> *Maremont*, 2014 WL 812401, at \*1.

<sup>63</sup> *Id.* at \*2.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* Maremont also claimed that SFDG accessed her personal Facebook page, but she was unable to provide any evidence to support her claim. *Id.*

<sup>67</sup> *Id.* at \*5.

<sup>68</sup> 15 U.S.C. § 1125(a) (2012).

<sup>69</sup> Pub. L. No. 99-508, tit. II, § 2701, 100 Stat. 1848, 1860 (1986) (codified as amended at 18 U.S.C. § 2701(a) (2012)) (“[W]hoever (1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or (2) intentionally exceeds an authorization to access that facility; and thereby

Act;<sup>70</sup> and (4) a common law right to privacy.<sup>71</sup>

In March 2011, the court dismissed Maremont’s common law invasion of privacy claim, holding that the Illinois Right of Publicity Act replaced the common-law tort of appropriation of likeness.<sup>72</sup> Maremont maintained that she had “sufficiently alleged two other common law invasion of privacy torts: (1) unreasonable intrusion upon the seclusion of another and (2) a claim based on publicity that reasonably places another in a false light before the public.”<sup>73</sup> The court disagreed, holding that Maremont:

fail[ed] to develop her argument that Defendants’ intrusion into her personal “digital life” is actionable under the common law theory of unreasonable intrusion upon the seclusion of another. Meanwhile, viewing the facts and all reasonable inferences in Maremont’s favor, she has failed to sufficiently allege a false light claim because she has not alleged that Defendants acted with actual malice, nor has she alleged special damages.<sup>74</sup>

In December 2011, the court granted summary judgment to SFDG on the Illinois right of publicity claim as well as a renewed common-law right of privacy claim—intrusion upon seclusion.<sup>75</sup> The court held that Maremont failed to meet the elements of the Right of Publicity Act—(1) an appropriation of one’s name or likeness; (2) without written consent; and (3) for another’s commercial benefit—because SFDG did not appropriate Maremont’s identity.<sup>76</sup> SFDG announced Maremont’s absence and the fact that a guest blogger would be filling in for Maremont during her absence; thus, SFDG did not attempt to “pass themselves off as Maremont.”<sup>77</sup> Furthermore, Maremont’s intrusion upon seclusion claim failed because Maremont could not “point to any private information upon which Defendants intruded.”<sup>78</sup>

In March 2014, the court granted SFDG summary judgment on the Lanham Act claim.<sup>79</sup> Although the court recognized that “[w]hen viewed in the light most favorable to Maremont, a

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obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system [violates the SCA].”). The SCA authorizes civil suits for damages for victims of such unauthorized access. *Id.* § 2707.

<sup>70</sup> 765 ILL. COMP. STAT. 1075/30(a) (2016) (“A person may not use an individual’s identity for commercial purposes during the individual’s lifetime without having obtained previous written consent from the appropriate person or persons . . . or their authorized representative.”).

<sup>71</sup> *Maremont*, 2014 WL 812401, at \*1.

<sup>72</sup> *Maremont v. Susan Fredman Design Grp.*, 772 F. Supp. 2d 967, 972 (N.D. Ill. 2011).

<sup>73</sup> *Id.* at 972.

<sup>74</sup> *Id.* at 973 (citation omitted).

<sup>75</sup> *Maremont v. Susan Fredman Design Grp.*, No. 10 C 7811, 2011 WL 6101949, at \*7–8 (N.D. Ill. Dec. 7, 2011).

<sup>76</sup> *Id.* at \*7.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at \*8. To prove an intrusion upon seclusion claim, a plaintiff must show “(1) an unauthorized intrusion into seclusion; (2) the intrusion would be highly offensive to a reasonable person; (3) the matter intruded upon was private; and (4) the intrusion caused the plaintiffs anguish and suffering.” *Id.* (quoting *Cooney v. Chicago Pub. Schs.*, 407 Ill. App. 3d 358, 366 (2010)).

<sup>79</sup> *Maremont v. Susan Fredman Design Grp.*, No. 10 C 7811, 2014 WL 812401, at \*5 (N.D. Ill. Mar. 3, 2014).

jury could find . . . that Defendants committed a Lanham Act violation,”<sup>80</sup> it also recognized that Maremont “submitted no proof of cognizable damages.”<sup>81</sup>

The Stored Communications Act claim was allowed to proceed to trial, primarily because the court found that Maremont “need not prove actual damages in order to be entitled to statutory damages for an SCA violation.”<sup>82</sup> The case—on the sole remaining claim of the SCA violation—did go to trial, but that did not end favorably for Maremont either. In October 2014, a jury returned a verdict in favor of SFDG.<sup>83</sup> Following the trial, the court awarded SFDG \$4,401.14 in costs associated with defending the SCA claim.<sup>84</sup> Maremont’s case is currently on appeal with the Seventh Circuit Court of Appeals.<sup>85</sup>

Finally, *Mattocks v. Black Entertainment Television*<sup>86</sup> involved a Facebook fan page Stacey Mattocks created in 2008 focusing on a television series called “The Game,” which aired on Black Entertainment Network (BET) and focused on the personal lives of professional football players.<sup>87</sup> Mattocks’s fan page was not official, nor did it initially contain BET-sponsored content.<sup>88</sup> However, it amassed two million “likes” and, in 2010, caught the attention of executives at BET.<sup>89</sup> In January 2011, BET hired Mattocks on a part-time basis to manage the show’s Facebook page.<sup>90</sup> Upon Mattocks’s employment, BET began to supply her with exclusive and copyrighted content and to prominently display its trademarks on her Facebook page, which subsequently became official and whose likes grew to six million.<sup>91</sup> One month later, the parties agreed to share administrative rights over the page, meaning that they could not prevent one another from posting content, making changes, or accessing the page or its audience.<sup>92</sup>

Despite a seemingly fruitful union, the relationship severed. In June of the following year, as Mattocks and BET negotiated her possible full-time employment, Mattocks unilaterally restricted BET’s administrative access to the page and informed it that she would do so “[u]ntil

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.* To recover under the Lanham Act, a plaintiff “must show that she ‘suffered actual injury, *i.e.*, a loss of sales, profits, or present value (goodwill),’ or that Defendants were unjustly enriched.” *Id.* (citations omitted). At her deposition, Maremont denied suffering any financial injury, admitting that her damages claim was limited to mental distress. Later—after the close of discovery—Maremont claimed that she was entitled to a portion of SFDG’s gross sales for the period during which SFDG posted to her social media accounts. *Id.* Because the latter damages were never disclosed during discovery, the court struck Maremont’s evidence related to that claimed injury. Without a “basis from which to award Maremont any recovery if she succeeded in proving her Lanham Act claim,” the court granted SFDG summary judgment on the Lanham Act claim. *Id.* at \*5.

<sup>82</sup> *Id.* at \*7 (citations omitted).

<sup>83</sup> *Maremont v. Susan Fredman Design Grp.*, No. 10 C 7811, 2015 WL 638503, at \*1 (N.D. Ill. Feb. 13, 2015).

<sup>84</sup> *Id.*

<sup>85</sup> *Maremont v. Susan Fredman Design Grp.*, No. 15-1548 (7th Cir. filed Mar. 13, 2015).

<sup>86</sup> 43 F. Supp. 3d 1311 (S.D. Fla. 2014).

<sup>87</sup> *Id.* at 1314–15.

<sup>88</sup> *Id.* at 1315.

<sup>89</sup> *Id.* at 1316.

<sup>90</sup> *Id.* at 1315.

<sup>91</sup> *Id.* at 1316.

<sup>92</sup> *Id.*

such time as we can reach an amicable and mutually beneficial resolution” concerning her employment.<sup>93</sup> In reaction, BET created another official Facebook page for the series and asked Facebook to migrate the likes on the Mattocks-created page to its new page.<sup>94</sup> Facebook granted BET’s request after its internal review determined that the new page was in fact the now-official representative of the brand owner.<sup>95</sup> BET was also able to disable the Twitter account used by Mattocks to promote the show.<sup>96</sup>

Mattocks sued BET for (1) tortious interference with contractual relationships she had with Facebook and Twitter; (2) breach of employment contract; (3) breach of duty of good faith and fair dealing; and (4) conversion of business interest.<sup>97</sup> BET prevailed on all of the claims at the summary judgment stage. As to the tortious interference claim, Mattocks did not succeed because BET was not a stranger to the contract between Mattocks and Facebook.<sup>98</sup> Because of the contract between Mattocks and BET and BET’s prior control over content posted on Mattocks’s page, BET had a financial interest in the contractual relationship between Mattocks and Facebook.<sup>99</sup> BET was also awarded summary judgment on the breach of contract and breach of good faith and fair dealing claims because Mattocks had first breached the contract by restricting BET’s access to the Facebook page.<sup>100</sup>

Finally, Mattocks’s conversion claim rested on whether an intangible “like” could be a verifiable business interest. Mattocks alleged that the “substantial interest” in the Facebook page and the “significant number of ‘Likes’” she generated provided her with business opportunities—opportunities BET willfully deprived her of by transferring the likes to a different page.<sup>101</sup> The court, however, held that Mattocks could not establish that she owned a property interest in the Facebook likes.<sup>102</sup> Furthermore, even if she could have established a property interest, she could not prove that BET’s migration request was unauthorized or wrongful.<sup>103</sup>

Kravitz, Eagle, Maremont, and Mattocks created social media exposure for their employers through the use of their individual skills, contacts, and social media identities. Like many other employees today, they operated in an uncertain environment. On one hand, they were encouraged to promote their firms online (and indeed, for some, it was part of the job). On the other hand, the control over the fruits of their labor was left entirely undefined. None had contracts making explicit their rights (or lack thereof) in their social media accounts or

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<sup>93</sup> *Id.* (alteration in original).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 1317.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 1319.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 1319–21.

<sup>101</sup> *Id.* at 1321.

<sup>102</sup> *Id.* (“[I]f anyone can be deemed to own the ‘likes’ on a Page, it is the individual users responsible for them. Given the tenuous relationship between ‘likes’ on a Facebook Page and the creator of the Page, the ‘likes’ cannot be converted in the same manner as goodwill or other intangible business interests.”) (citation omitted).

<sup>103</sup> *Id.*

audiences. Yet, the four employees shared strong entitlements, which may or may not be acknowledged by current law.

Although they sued on diverse and questionably applicable claims, these cases boil down to the employees' entitlement over their digital self-ownership. The employees' ire grew out of their need to: (1) continue to access the social media audiences they attracted, (2) control their own online identities, and (3) sever the association between their online personae and their former firms, so as to prevent the former employers from trading on their personal reputation and social media relationships. The outcomes of these contentious cases would impact not only the employees' identities, but also their abilities to exercise their trades and communicate with their online cohorts.

As Table 1 illustrates, the lawsuits focus on disparate legal claims, from personal property to privacy, tort to intellectual property—as if to test which would best apply. Indeed, litigants, courts, and commentators, clearly uncertain about applicable law, have conceptualized the reality and rights associated with a social media profile in a variety of different ways. Deeper analysis of these claims is necessary to understand how the law can and should provide a remedy to social media litigants.

[Insert Table 1 Here]

### B. A Mixed Bag of Legal Claims

Before analyzing the various claims in detail, it is helpful to parse the discrete aspects of social media to which litigants may feel entitled.<sup>104</sup> A cursory analysis of the popular press and blogosphere reveals confusion about the legal rights a person has to his social media accounts.<sup>105</sup> Articles about the *PhoneDog* and *Eagle* cases often include the word “ownership” in the title,<sup>106</sup> or profess to cover the topic of ownership of online accounts.<sup>107</sup> Some courts have also referred

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<sup>104</sup> See Mahlum & Pieper, *supra* note 11 (“[Answering the question of] who owns social media assets accessed or controlled by company employees [involves identifying the three different parts of a social media account:] the basic user information, . . . user-generated content[, and] . . . the relationships . . . which are the driving force behind social media sites.”).

<sup>105</sup> Rachael E. Ferrante, Comment, *The Relationship Between Digital Assets and Their Transference at Death: “It’s Complicated,”* 15 LOY. J. PUB. INT. L. 37, 42 (2013); see also Venkat Balasubramani, *Employee’s Claims Against Employer for Unauthorized Use of Social Media Accounts Move Forward—Maremont v. SF Design Grp., TECH. & MKTG. L. BLOG* (Dec. 8, 2011), [http://blog.ericgoldman.org/archives/2011/12/maremont\\_v\\_sfg.htm](http://blog.ericgoldman.org/archives/2011/12/maremont_v_sfg.htm) (“Property-wise, it’s tough to slot the accounts in a particular box.”).

<sup>106</sup> See, e.g., Robert B. Milligan, *Federal Court Questions Whether Damages Exist in LinkedIn Account Ownership Dispute*, TRADING SECRETS (Mar. 2, 2013), <http://www.tradesecretslaw.com/2013/03/articles/trade-secrets/federal-court-questions-whether-damages-exist-in-linkedin-account-ownership-dispute/> (“The ownership of social media accounts in the employment context remains a very hot topic.”); Amy McIlwain, *Social Media Ownership: Is it a Business Account or Personal Account*, FIN. SOC. MEDIA (Oct. 10, 2013), <http://financialsocialmedia.com/social-media-ownership-business-account-personal-account/>.

<sup>107</sup> See, e.g., Miao, *supra* note 12 (“Given the benefits and competitive necessity, for at least some businesses, to use social media, explicit ownership of an SMA [(social media account)] allows a business to control how and what it communicates to its customers and to the public.”); Jennifer L. Parent, *Advising Clients on Today’s Top Employment Law Issues*, in EMPLOYMENT LAW 2013: TOP LAWYERS ON TRENDS AND KEY STRATEGIES FOR THE UPCOMING YEAR 50 (Aspatore Thought Leadership ed., 2013) (“A more difficult issue raised by these types of cases involves ownership over an employee’s individual LinkedIn accounts.”); Robert J. Kolansky, Note, *Can We Really Ascribe a Dollar Amount to Interpersonal Communication? How PhoneDog v. Kravitz May Decide Who Owns a Twitter*

to “ownership” of social media accounts.<sup>108</sup> Although they generally demonstrate society’s disorientation regarding who controls social media accounts, the slippery semantics are also misleading as to the law. The legal reality is that social media accounts are comprised of a bundle of rights, not all of which are legally recognized.

On a basic level, an employee might claim rights to the content on the social media page, such as text, pictures, and logos. The right to posted content is beyond the scope of this inquiry because it is addressed by referring to established tenets of intellectual property law and the terms and conditions of the host websites. The harder questions—and the ones with which the law has struggled—involve the continued right to access and control the account and retain its amassed audience. Among other exercises, the right to control the account allows its holder to continue using the medium as a platform for speech and to make administrative and content changes (including limiting membership). Such was the dispute in *Eagle* and *Maremont*. The right to “keep” or “take” the account’s membership allows its holder to either migrate the audience to another social media account (unrelated to the employer or employee) or, more generally, retain the ability to continue contacting them.<sup>109</sup> This was the nature of the dispute in *PhoneDog*<sup>110</sup> and *Mattocks*.<sup>111</sup> We will refer to the interests related to the rights to access and control the account, as well as the right to retain the audience, as “administrative rights.”<sup>112</sup> After a brief discussion of claims regarding content posted to a social media site, we will turn to an analysis of administrative rights, considering the issue through the lens of the laws of (1) trade secret, (2) contract, (3) personal property, and (4) privacy.

Intellectual property law governs any personal property interest in content posted on

*Account*, 20 JEFFREY S. MOORAD SPORTS L.J. 133 (2013); Jeffrey Gross, *Court Rules that LinkedIn Account Belongs to Employee, not Employer*, NYTECHLITIGATION.COM (Mar. 15, 2013), <http://nytechlitigation.com/court-rules-that-linkedin-account-belongs-to-employee-not-employer/> (“Who owns a social media account, the employer or the employee, if there is no written corporate policy on point?”).

<sup>108</sup> *PhoneDog v. Kravitz*, No. C 11-03474 MEJ, 2011 WL 5415612, at \*9 (N.D. Cal. Nov. 8, 2011). The *PhoneDog* opinion found “that PhoneDog has adequately alleged that it owns . . . the Account.” *Id.* The *Eagle* court used similar language, implying that such ownership would entitle the user to the login information, all content posted on the profile, and all contacts associated with the account. *Eagle v. Morgan*, No. 11-4303, 2013 WL 943350, at \*11 (E.D. Pa. Mar. 12, 2013) (“[T]he LinkedIn User Agreement clearly indicated that the individual user owned the account.”).

<sup>109</sup> Venkat Balasubramani, *Battle Over LinkedIn Account Between Employer and Employee Largely Gutted—Eagle v. Morgan*, TECH. & MKTG. L. BLOG (Oct. 7, 2012), [http://blog.ericgoldman.org/archives/2012/10/court\\_dismisses\\_8.htm](http://blog.ericgoldman.org/archives/2012/10/court_dismisses_8.htm) (“As with all of these disputes, control over the account itself should be separated from access to contact information or ongoing ability to contact customers, which is what the employer really cares about.”).

<sup>110</sup> See *supra* notes 20–30 and accompanying text.

<sup>111</sup> See *supra* notes 86–103 and accompanying text.

<sup>112</sup> Some have referred to social media profiles and online accounts as “digital assets,” distinct from the content they contain. The question of how digital assets should be characterized has been much discussed in the law, often with regard to the transference of digital assets upon death, divorce, or bankruptcy. The term “digital assets” has also been subject to varying definitions, which leaves the term vague. See Rachel Pinch, Note, *Protecting Digital Assets After Death: Issues to Consider in Planning for Your Digital Estate*, 60 WAYNE L. REV. 545, 547–48 (2014); Michael D. Roy, Note, *Beyond the Digital Asset Dilemma: Will Online Services Revolutionize Estate Planning?*, 24 QUINNIPIAC PROB. L.J. 376, 384 (2011); Kristina Sherry, Comment, *What Happens to Our Facebook Accounts When We Die?: Probate Versus Policy and the Fate of Social-Media Assets Postmortem*, 40 PEPP. L. REV. 185, 193–94 (2012).

social media profiles.<sup>113</sup> Social media content is the subject of a copyright or trademark, especially in a business context. Social media posts, photos, and videos are protected by copyright. Trademark law protects a company name and logo. Aside from content that is protected by a company's trademarks or copyrights, users are the sole owners of the content posted on their social media profiles. All three major social networking sites—Facebook, LinkedIn and Twitter—give users ownership over the content of their profiles.<sup>114</sup> In other words, while the social media sites maintain ownership of the actual accounts,<sup>115</sup> they stake no claim to user-generated content—the user retains the intellectual property rights to his creations.

The sites' terms of service governing user rights are written for individuals, not necessarily businesses who employ individuals to speak for them.<sup>116</sup> In the absence of a contract or policy outlining the post-employment retention of intellectual property rights to content posted on social media, employers and former employees will be forced to duke it out on traditional copyright theories of work-made-for-hire and joint authorship. If the posts were made in the employee's scope of employment,<sup>117</sup> copyright law's work-made-for-hire doctrine would apply and the employer will hold all rights to the work.<sup>118</sup> If the employee did not author the posts as part of his job, the content on the company profile might be considered a work of joint authorship. Under this theory, both parties are coauthors and co-owners and have the ability to restrict changes to the work, the use of their name, and claim to authorship.<sup>119</sup> These legal theories are well established; their applicability in any given case relies heavily on the

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<sup>113</sup> See Bethany N. Whitfield, Comment, *Social Media @ Work: #PolicyNeeded*, 66 ARK. L. REV. 843, 868 (2013) (“Determination of ownership rights in the *content* posted by an employee, however, is an entirely different matter. One may determine ownership of social-media content by evaluating several factors, including the circumstances that imply ownership, an ownership agreement regarding social-media posts, and content entitled to copyright protection. Therefore, employers should proactively define their social-media rights.”) (emphasis in original) (footnotes omitted).

<sup>114</sup> See *Statement of Rights and Responsibilities*, *supra* note 61, at § 2; *User Agreement*, § 2, LINKEDIN, [https://www.linkedin.com/legal/user-agreement?trk=hb\\_ft\\_userag](https://www.linkedin.com/legal/user-agreement?trk=hb_ft_userag) (last updated Oct. 23, 2014); *Twitter Terms of Service*, TWITTER, <https://twitter.com/tos> (last updated Jan. 27, 2016).

<sup>115</sup> *User Agreement*, *supra* note 114, § 3.1; *Twitter Terms of Service*, *supra* note 114, § 4; Jason Mazzone, *Facebook's Afterlife*, 90 N.C. L. REV. 1643, 1648–49 (2012) (“Facebook's terms of use (called ‘Statement of Rights and Responsibilities’), to which every user must agree in accessing the Facebook site, do not specifically state that Facebook retains ownership of individual Facebook accounts. Nonetheless, several key provisions make clear that, according to Facebook, accounts are not property owned by individual users. For one thing, Facebook imposes numerous restrictions on how a Facebook account can be used. Users who violate the ‘letter or spirit’ of Facebook's terms lose access to the site. Thus, what Facebook users possess is the ability to access the Facebook site via an account so long as they comply with Facebook's terms.”) (footnotes omitted).

<sup>116</sup> Many businesses are wary of social media as a conduit for the infringement or dilution of intellectual property, or dissemination of trade secrets or disparaging information. See Abril et al., *supra* note 7, at 90 (noting that on social media, “[a] disgruntled employee can easily divulge trade secrets, intellectual property, or confidential information—or can harm the organization's reputation with disparaging commentary. Even a well-intentioned but reckless employee can tarnish an organization by disseminating potential evidence of the organization's negligence, immorality, or incompetence.”).

<sup>117</sup> *Ardis Health, LLC v. Nankivell*, No. 11 Civ. 5013(NRB), 2011 WL 4965172, at \*1 (S.D.N.Y. Oct. 19, 2011) (finding employee's duties included maintaining social media accounts).

<sup>118</sup> 17 U.S.C. § 101 (2012).

<sup>119</sup> *Id.* § 106A(a) (2012).

circumstances of each case.

Intellectual property law addresses only the issue of who retains rights to the content posted on a social media account. It does not directly address the issue at the core of the cases discussed in this article—the right to access and control of the account itself and its associated audience. Plaintiffs typically allege a host of varied and often-unsuccessful claims, including violations of trade secret (regarding the account’s password), privacy, and contract law. Some have also alleged conversion and other property-related claims. These different claims through which litigants have presented rights in a social media profile and its related audience have merit, although a closer look reveals their limitations. We address the merits and drawbacks of trade secret, contract, personal property, and privacy, in turn.

## 1. Trade Secret

Some plaintiffs have claimed that social media passwords are trade secrets and their continued unauthorized use constitutes misappropriation.<sup>120</sup> Other litigants have gone further, claiming that the list of social media friends or followers was, itself, a trade secret.<sup>121</sup> Can a password or a social media audience be a trade secret?

A determination of whether information, be it a username and password or a social media audience, rises to the level of a trade secret is a highly fact-specific inquiry that will depend upon an analysis of several factors.

First, it must not be generally known or readily ascertainable to those who might obtain economic value from its use. In other words, it must be secret, at least with regard to potential competitors. Second, the information must derive independent economic value from being secret. Third, the information must be subject to reasonable efforts to maintain its secrecy.<sup>122</sup>

One scholar has argued that account access information (specifically a username and password) meets the three requirements to be a trade secret. Professor Argento argues:

The secret of access to the social network account—the password—should be protectable as a trade secret. A password’s secrecy confers independent economic value by giving the account holder exclusive access to the links in the account. This trade secret protection, however, would be highly limited. It would protect only access to the account, but not any content otherwise available to the public. Crucially, any other user could still contact the account’s followers through other accounts. Although narrow, trade secret protection would protect the interest at the

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<sup>120</sup> See *PhoneDog v. Kravitz*, No. C 11-03474 MEJ, 2011 WL 5415612, at \*5 (N.D. Cal. Nov. 8, 2011).

<sup>121</sup> See *Christou v. Beatport, LLC*, 849 F. Supp. 2d 1055, 1062 (D. Colo. 2012). *Christou* involves a long battle between a nightclub owner and a former employee-turned-competitor regarding once jointly-controlled MySpace profiles. *Id.* The plaintiffs claimed that the list of friends associated with those profiles were trade secrets akin to a customer list. *Id.* at 1074. The court concluded that the plaintiffs alleged sufficient facts to maintain their trade secret claim at the motion to dismiss stage. *Id.* at 1076. The plaintiffs subsequently withdrew their trade secret claim during trial. See *Christou v. Beatport, LLC*, No. 10-cv-02912-RBJ-KMT, 2014 WL 1293296 (D. Colo. Mar. 31, 2014).

<sup>122</sup> Argento, *supra* note 11, at 249 (footnotes omitted); see also, Jasmine McNealy, *Who Owns Your Friends?: PhoneDog v. Kravitz and Business Claims of Trade Secret in Social Media Information*, 39 RUTGERS COMPUTER & TECH L.J. 30, 36–37 (2013).



heart of these disputes: the right to retain exclusive access to the account's followers.<sup>123</sup>

Argento's analysis, although compelling, falls short. A username and password that grant access to a profile simply do not have *independent* economic value and thus cannot be a trade secret. Access information can be analogized to keys to a safe deposit box. The value of the keys, like a username and password, is arguably temporary because they are only the means with which to retrieve the property or information contained inside. Without content to be accessed, the keys have no value. Once those assets are accessed, the keys are inconsequential. Their value is not independent, but in fact is *dependent* upon the desirability or value of the contents they unlock. Indeed, just as physical keys and locks can be changed, passwords can also be easily altered, rendering the prior version valueless.<sup>124</sup> Further, relying on the flimsy trade secrecy of passwords leaves the social media audience unprotected. As we have contended, the interest at the heart of these disputes centers on administrative rights—the continued ability to interact with an audience, not the one-time access to the profile.

Application of trade secret law to social media audiences is similarly problematic. Can social media relationships or contacts ever be trade secrets? Such a claim has arisen in at least two recent cases, with little resolution. In *CDM Media USA, Inc. v. Simms*,<sup>125</sup> a marketing company claimed that a former employee misappropriated a trade secret when he continued to use the LinkedIn group that he created during his employment. Although the court denied a motion to dismiss, it suggested that whether the list of its 679 members constituted a trade secret would depend on information regarding the contents, configuration, and function of the LinkedIn group.<sup>126</sup> A second case, *Christou v. Beatport, LLC*, involves a long battle between nightclub owners and a former employee-turned-competitor regarding the right to access a MySpace profile and control the contacts associated with the account.<sup>127</sup> The former employer claimed that the lists of friends associated with its social media profiles were trade secrets.<sup>128</sup> The defendants argued that such contacts could not possibly constitute trade secrets because they were available to the public and not secret.<sup>129</sup> The *Christou* court, ruling on a motion to dismiss, found that the question of whether a social media contact list was a trade secret is a question of fact, and that the plaintiffs had alleged enough facts to withstand a motion to dismiss.<sup>130</sup> Given that both of these cases concluded at the preliminary motion to dismiss stage, they provide little guidance.

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<sup>123</sup> Argento, *supra* note 11, at 205 (footnotes omitted).

<sup>124</sup> See Miao, *supra* note 12, at 1048–49. *But see* Kyle-Beth Hilfer, *Minimizing Legal Risks for Clients Using Social Media to Advertise and Market Their Brands*, 38 WESTCHESTER B.J. 35, 42 (2012), [http://wcbany.site-ym.com/resource/resmgr/Journals/2012\\_ws\\_hilfer.pdf](http://wcbany.site-ym.com/resource/resmgr/Journals/2012_ws_hilfer.pdf) (arguing that employers should “file trademarks for [employees’ social media] handles, and they should control the administration and passwords for the accounts to strengthen their claims of ownership”).

<sup>125</sup> No. 14 CV 9111, 2015 WL 1399050 (N.D. Ill. Mar. 25, 2015).

<sup>126</sup> *Id.* at \*4.

<sup>127</sup> *Christou v. Beatport, LLC*, 849 F. Supp. 2d 1055, 1074–75 (D. Colo. 2012).

<sup>128</sup> *Id.* at 1074.

<sup>129</sup> *Id.* at 1074–75.

<sup>130</sup> *Id.* at 1076. In a March 31, 2014 Order, the judge ruled that the trade secret claims, withdrawn by the plaintiffs during trial, were not made in bad faith as there was evidence the Myspace password was taken, but the Order does not elaborate on whether it is a trade secret. *See Christou v. Beatport, LLC*, No. 10–cv–02912–RBJ–KMT, 2014 WL

Many scholars and courts have viewed a social media audience as simply a subscriber or customer list.<sup>131</sup> Under this perspective, determining rights to a social media audience through a trade secret analysis makes sense, since trade secret law is the traditional method of protection for a customer list. However, as will be explained in Part II, this characterization of a social media audience will often be overly simplistic and outdated. It breaks down when applied to the reality of a social media audience, which is fluid and dynamic rather than a static list of names.<sup>132</sup>

The *Christou* court hinted at recognition of the richness of a social media audience. The judge wrote:

Social networking sites enable companies. . . to acquire hundreds and even thousands of “friends.” These “friends” are more than simple lists of names of potential customers. “Friending” a business or individual grants that business or individual access to some of one’s personal information, information about his or her interests and preferences, and perhaps most importantly for a business, contact information and a built-in means of contact.<sup>133</sup>

Although an encouraging step, this limited view continues to miss the broader perspective. The likes and dislikes frequently found on a social media profile have more significance than simply providing information about those contacts; instead they often become part of the user’s profile, much of which is visible to the broader audience.<sup>134</sup> While in some circumstances a contact list may indeed meet the criteria required to establish a trade secret, a social media audience encompasses far more than a simple list of contacts. The focus on trade secrets misses the essential point about the value of a social media audience, which is found not by focusing on each individual contact, and placing a monetary value on that particular relationship. Instead, the value lies in the audience as a whole and the impact it has on the user’s online persona.<sup>135</sup>

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1293296, at \*28 (D. Colo. Mar. 31, 2014).

<sup>131</sup> See, e.g., Miao, *supra* note 12, at 1019 (referring to a social media audience as a “subscriber list”); Adam S. Walker, *PhoneDog vs. Kravitz: In the World of Social Media, Who Really Owns What?*, 50 PRACTICAL LAW. 49, 49 (June 2012) (referring to a social media audience as “followers”); *PhoneDog v. Kravitz*, No. C 11-03474 MEJ, 2011 WL 5415612, at \*1 (N.D. Cal. Nov. 8, 2011) (referring to Twitter audience as “subscribers” or “followers”).

<sup>132</sup> See *infra* Part II.D.

<sup>133</sup> *Christou*, 849 F. Supp. 2d at 1075.

<sup>134</sup> Indeed, a visible list of contacts negates the possibility of a trade secret. See McLaughlin, *supra* note 10, at 106 (“Finding that these user accounts are eligible for trade-secret protection seems entirely antithetical to social media’s purpose in the workplace. Simply stated, professional networking requires public exposure.”); McNealy, *supra* note 122, at 50 (“The purpose of social media is to share and consume information. Connections are public, and meant to be so. A business using an SNS [(social network site)] platform to generate customers does not change the fact that anyone with an Internet connection can view the business’s list of friends or followers.”) (footnotes omitted).

<sup>135</sup> Miao suggests that a list of contacts associated with an online social media account may not rise to the level of a trade secret because the subscribers themselves choose to remain on the list. See Miao, *supra* note 12, at 1050; see also Walker, *supra* note 131. While interesting, the changing nature of a contact list audience does not necessarily mean it is incapable of ownership. Other lists that may be a trade secret can easily be unsubscribed to, yet that does not negate the possibility of ownership.

## 2. Contract

Contract law provides two possible avenues of analysis. First, the Terms of Service agreement (ToS) between the employee who created the profile and the social media site might provide a basis for an interference with contract claim, as was the case in *Eagle*.<sup>136</sup> Second, employment agreements may dictate the disposition of administrative rights when the employment relationship ends. However, such agreements may be an unlawful restraint of trade, as we explain in more detail at the end of this subpart.<sup>137</sup>

Terms of Service agreements govern the relationship between a social media site and its users. In creating social media accounts, users enter into these agreements individually with the website. They typically govern how the account can be used, who can use and access the account, and what content can be posted.<sup>138</sup> For example, Facebook and LinkedIn require users to have personal profiles before creating pages for businesses. The individual user/creator, not the business he represents, is held responsible under the site's terms of service.<sup>139</sup>

When a former employer revokes access to the social media audience cultivated by the employee, some former employees have sued for tortious interference with contractual relations, a common law tort arising out of a third party's intentional interference with a contract expectancy that leads to damages.<sup>140</sup> Under this theory, the employers acted intentionally to induce a breach of the terms and conditions—and their ensuing rights—vis-à-vis the social media websites. Employees, however, have thus far not been successful in asserting this tort in this context. Both *Eagle* and *Mattocks* suggest that agents are likely to have a hard time proving the elements of the tort. In addition to the courts' reluctance to find in favor of employees regarding their ToS arguments, their application as a method of resolving disputes fails to acknowledge the interests involved. ToS agreements are written generically to apply to any user who creates the account. Social media sites will rarely become involved in disputes over access to a profile, siding in almost all circumstances with the individual who created the profile, without regard to whether that might violate a separate employment contract, unless trademark or copyright violation allegations are involved, as they were in *Mattocks*. Thus, the application of ToS, alone, may result in an outcome that is entirely unfair to employers. Furthermore, whether contract law is, or should be, applicable to determine who is entitled to administrative rights is certainly questionable.<sup>141</sup> As a result, possible employment contracts are likely the better avenue. However, they too have their limitations.

Clearly, many of the cases discussed herein could have been easily avoided with a clear

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<sup>136</sup> See *supra* notes 43, 51–52 and accompanying text.

<sup>137</sup> See *infra* notes 142–147 and accompanying text.

<sup>138</sup> See *User Agreement*, *supra* note 114; *Twitter Terms of Service*, *supra* note 114; *Statement of Rights and Responsibilities*, *supra* note 61.

<sup>139</sup> See *Page Basics*, FACEBOOK, <https://www.facebook.com/help/281592001947683/> (last visited Mar. 14, 2016); *Statement of Rights and Responsibilities*, *supra* note 61.

<sup>140</sup> RESTATEMENT (SECOND) OF TORTS § 766 (AM. LAW INST. 1979).

<sup>141</sup> See, e.g., David Horton, *Indescendibility*, 102 CAL. L. REV. 548, 597 (2014) (“The degree to which courts should honor adhesive terms is one of the most fraught issues in modern contract law. The problem is the yawning gulf between contract theory and contract reality: although binding agreements supposedly arise from mutual assent, we are only dimly aware of the fine print spawned by most commercial transactions. Thus, once in a great while, a judge will find that a purported form contract is not a contract at all.”) (footnotes omitted).

employment contract designating the rights to the social media profile. The continued stream of cases on this matter evidence, at least casually, that such contract provisions are not widely used in practice, despite the fact that many commentators have recommended their use.<sup>142</sup> However, those contracts that limit ex-employee access to social media may be unenforceable as an overbroad restraint of trade.

Recent cases challenging the validity of noncompete and non-solicitation agreements vis-à-vis social media suggest that courts tend to take an employee-friendly view. Some courts have held that ex-employee posts announcing new employment or inviting social media audiences to view a new employer's website do not violate non-solicitation agreements.<sup>143</sup> At least one court has held that connecting with former clients on Facebook is permissible.<sup>144</sup> Even posting a job opportunity that would likely reach employees that an individual was contractually prohibited from soliciting does not violate non-solicitation agreements if the post is publicly available.<sup>145</sup> One court has even posited that agreements restricting employees from engaging in the above social media interactions would likely be overly broad and unenforceable.<sup>146</sup> McLaughlin argues that a non-compete agreement requiring an employee to transfer rights to a social media account when employment ends (a "forced-transfer" provision) may be fundamentally unfair because it forces an employee into a situation that necessarily requires a breach of contract— either the ToS or the employment contract.<sup>147</sup> "[W]hen employers knowingly induce employees to breach SNS user agreements, courts should acknowledge the unequal bargaining power between the parties, and thus equitably prohibit the enforcement of these agreements."<sup>148</sup>

Thus, contract law, while it might be applicable and useful in select cases in which the parties have signed an employment agreement that identifies rights to social media accounts, will often not provide courts with useful tools to resolve these disputes.

### 3. Personal Property

As mentioned above, the relationship between a social media site and its user is governed by the site's ToS agreement, which specifically covers whatever property interests may arise through creation of a social media account. One cannot own a social media account in the traditional sense of personal property law. As discussed previously, a look at the ToS agreements of three

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<sup>142</sup> See Argento, *supra* note 11, at 226 ("In many cases, parties could avoid disputes by expressly agreeing about which party has the right to control the social network account. Nevertheless, the default rules remain important because some parties will inevitably fail to contract around them. Many companies have no employment agreements for their employees at all, and those that do may fail to address rights to social network accounts. Employment agreements are particularly prone to omitting important issues because employees' roles tend to change over time.") (footnotes omitted); Hope A. Cominsky & Tracey E. Diamond, *The Risks and Rewards of a BYOD Program: Ensuring Corporate Compliance Without Causing "Bring Your Own Disaster" at Work*, 8 CHARLESTON L. REV. 385, 401 (2014). None of the employers in *PhoneDog*, *Eagle*, or *Maremont* had social media policies in place.

<sup>143</sup> See *BTS, USA, Inc. v. Exec. Perspectives, LLC*, No. X10CV116010685, 2014 WL 6804545, at \*12 (Conn. Super. Ct. Oct. 16, 2014); *Pre-Paid Legal Servs., Inc. v. Cahill*, 924 F. Supp. 2d 1281, 1292 (D. Okla. 2013).

<sup>144</sup> *Invidia, LLC v. Difonzo*, No. MICV20123798H, 2012 WL 5576406, at \*6 (Mass. Super. Ct. Oct. 22, 2012).

<sup>145</sup> *BTS*, 2014 WL 6804545, at \*12.

<sup>146</sup> *Id.*

<sup>147</sup> McLaughlin, *supra* note 10, at 114–15.

<sup>148</sup> *Id.* at 114.

major social networking platforms—Facebook, Twitter, and LinkedIn—reveals that none grant users any type of ownership interest in their accounts.<sup>149</sup> Terms of service typically grant members nothing more than a revocable license to use the site.<sup>150</sup> Users do not have rights to convey, transfer, sell, or use their social media profiles in the same way that traditional property ownership would imply.

However, in some respects business social media accounts do indeed provide value to the business with access to customers and potential customers. For instance, as mentioned above, bankruptcy courts have found that business accounts on social media, including pages for businesses run by individual employees, are property interests cognizable as intangible assets under the Bankruptcy Code.<sup>151</sup> In *In re CTLI, LLC*, the bankruptcy court was faced with the challenge of determining whether a Facebook page was primarily a business or personal asset.<sup>152</sup> Alcede, the debtor, contended that the page in question (“Tactical Firearms”) was distinguished from his personal profile and another page he created called “Jeremy Alcede Patriot.”<sup>153</sup> Like Kravitz, Eagle, and Maremont, Alcede argued that the page’s followers reflected the relationship with an audience he had developed, thus earning him a stake in the page based on the goodwill that had accrued to the account.<sup>154</sup>

Even though Alcede wrote posts in the first person and changed the name of the page, the court found that its primary use as a forum to promote the business was persuasive evidence the page was a business page.<sup>155</sup> However, the court made an important distinction, attempting to disentangle professional goodwill from business goodwill. Recognizing that business goodwill is developed by employees of the business over time, the court stated that professional goodwill was that amount of goodwill that is withdrawn when the individual leaves the business; whatever remains is business goodwill, an intangible asset that rightfully accrues to the business and remains with it when the employee leaves.<sup>156</sup> Employees are entitled only to professional goodwill, which the court identified as embodied in the ability of Facebook followers of the

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<sup>149</sup> See *User Agreement*, *supra* note 114; *Twitter Terms of Service*, *supra* note 114; *Mazzone*, *supra* note 115, at 1648–49.

<sup>150</sup> See Jamie Patrick Hopkins & Ilya Alexander Lipin, *Viable Solutions to the Digital Estate Planning Dilemma*, 99 IOWA L. REV. BULL. 61, 66–67 (2014); Sally Brown Richardson, *How Community Property Jurisdictions Can Avoid Being Lost in Cyberspace*, 72 LA. L. REV. 89, 111 (2011) (“Twitter accounts, though creating property rights, are not owned. The tweeter-wife who creates the Twitter account during the marriage has a license to use the account; Twitter remains the owner of the actual Twitter service.”); John Conner, Comment, *Digital Life After Death: The Issue of Planning for a Person’s Digital Assets After Death*, 3 EST. PLAN. & COMMUNITY PROP. L.J. 301, 306–07 (2011); Whitfield, *supra* note 113, at 868 (“From an intellectual property and a contractual perspective, actual user accounts offered by social-network sites appear to be the exclusive property of the sites, rather than the property of employee or employer users.”).

<sup>151</sup> See *In re CTLI, LLC*, 528 B.R. 359, 359 (Bankr. S.D. Tex. 2015); *In re Borders Grp.*, No. 11-10614 (MG), 2011 WL 5520261, at \*13 (Bankr. S.D.N.Y. Dec. 7, 2011).

<sup>152</sup> *In re CTLI*, 528 B.R. at 361.

<sup>153</sup> *Id.* at 369.

<sup>154</sup> *Id.* at 373.

<sup>155</sup> *Id.* at 369–70.

<sup>156</sup> *Id.* at 373.

Tactical Firearms page to follow Alcede to his personal Jeremy Alcede Patriot page.<sup>157</sup>

On the other hand, in *Eagle*, the plaintiff sought the right to control her social media profile by suing for identity theft and conversion. The court expressed discomfort in applying property-related theories to social media and denied her claim for identity theft, finding that her name was publicly available and therefore not unlawfully possessed.<sup>158</sup> The *Eagle* court also denied the claim of conversion, noting that intangible property, such as software, domain names and “an intangible right to access a specific page on a computer” cannot be subject to a conversion claim.<sup>159</sup> Although some commentators have advocated for intangible items such as digital assets to be considered personal property,<sup>160</sup> current case law does not suggest any movement in that direction.<sup>161</sup>

#### 4. Privacy

A sudden disconnection from one’s group or an unwanted association (or disassociation) with a former employer can provoke feelings of intrusion, embarrassment, and anxiety. Such actions may also have economic and professional repercussions. For these reasons, former employees often allege violation of privacy in attempting to regain control over their social media and digital selves. However, courts have floundered in their approaches to privacy online, resulting in disparate results. For instance, the plaintiff in *Eagle* prevailed on her privacy cause of action yet the court did not award her damages.<sup>162</sup> The *Maremont* court held that the plaintiff had provided no evidence to support her claim that the defendant employer had intruded upon her seclusion by accessing her social media accounts without consent.<sup>163</sup>

Generally, nothing is private on social media. The Supreme Court “consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.”<sup>164</sup> Since sharing and interaction are the premises of social media, proving privacy

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<sup>157</sup> *Id.* at 373–74.

<sup>158</sup> *Eagle v. Morgan*, No. 11-4303, 2013 WL 943350, at \*9 (E.D. Pa. Mar. 12, 2013).

<sup>159</sup> *Id.* at \*10.

<sup>160</sup> Argento, *supra* note 11, at 274 (“In general, the law appears to be moving in the direction of finding intangible items such as domain names and phone numbers to be personal property and subject to conversion[.]” noting some cases that have found domain names and phone numbers to be personal property). *See also* Horton, *supra* note 141, at 568; Susan Eisenberg, Note, *Intangible Takings*, 60 VAND. L. REV. 667, 696 (2007) (arguing in favor of recognition of a “new class of virtual property” which would include web sites, screen names, email addresses, etc.).

<sup>161</sup> *See, e.g., Eagle*, 2013 WL 943350, at \*10; *Giordano v. Claudio*, 714 F. Supp. 2d 508, 524 (E.D. Pa. 2010); *Apparel Bus. Sys., LLC v. Tom James Co.*, No. 06–1092, 2008 WL 858754, at \*18–19 (E.D. Pa. Mar. 28, 2008) (“Software is not the kind of property subject to a conversion claim. . . .”); *DirectTV, Inc. v. Frick*, No. Civ.A. 03-6045, 2004 WL 438663, at \*2–3 (E.D. Pa. Mar. 2, 2004) (finding that satellite signals constitute intangible property which cannot be converted under Pennsylvania law); *Famology.com Inc. v. Perot Sys. Corp.*, 158 F. Supp. 2d 589, 591 (E.D. Pa. 2001) (holding that domain names are not the type of tangible property that may be converted).

<sup>162</sup> *Eagle*, 2013 WL 943350, at \*15.

<sup>163</sup> *Maremont v. Susan Fredman Design Grp.*, No. 10 C 7811, 2014 WL 812401 (N.D. Ill. Mar. 3, 2014).

<sup>164</sup> *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979) (citations omitted); *cf. City of Ontario v. Quon*, 560 U.S. 746, 758–65 (2010) (discussing the complicated privacy expectations relating to communications made on electronic equipment owned by a government employer and what intrusions can be regarded as “reasonable” as such technology becomes more integrated into the workplace). *But see United States v. Jones*, 132 S. Ct. 945, 957 (2012)

in this realm is difficult, if not impossible, under current interpretations of law.<sup>165</sup> Sharing photos even on the most restrictive of privacy settings does not guarantee privacy, no matter what personal entitlement the person may hold. In *United States v. Meregildo*,<sup>166</sup> the defendant only allowed his profile to be viewed by his friends, not an extended network of friends of friends, or publicly. Despite these settings, the court held that Meregildo had no justifiable expectation that his Facebook friends would keep his profile private and dissemination of information on his profile by his friends was legal.<sup>167</sup> Even a minor does not have an expectation of privacy on social media.<sup>168</sup> When seventeen-year-old Chelsea Chaney's bikini-clad Facebook photo was used in a school presentation about Internet safety, the court found she had no reasonable expectation of privacy when she shared the photo with the broadest possible audience on her profile.<sup>169</sup>

As the vast majority of relevant cases make clear, a social media audience, and its close connection with the user's profile, will not likely be deemed private.<sup>170</sup> Moreover, even if the right to privacy has been violated, plaintiffs may still have difficulty proving damage.<sup>171</sup> The sheer variety of claims and the courts' hesitant approaches to resolving them may be evidence of a lack of understanding of the nature and exercise that these employees performed on social media. Thus, before determining how the law should address post-employment social media audience retention, a critical examination of the act of social media audience management is required. The following part examines social media, with an eye toward unraveling the nature of the plaintiffs' purported harms, and ultimately, lending support to the application of a new

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(Sotomayor, J., concurring) (stating in dicta that "it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks.") (citations omitted).

<sup>165</sup> See, e.g., *Chaney v. Fayette Cty. Pub. Sch. Dist.*, 977 F. Supp. 2d 1308, 1315–18 (N.D. Ga. 2013) (finding no violation of due process clause and no unreasonable search and seizure when a high school used a student's semi-private Facebook photo in a county-wide seminar without the student's knowledge or consent).

<sup>166</sup> 883 F. Supp. 2d 523 (S.D.N.Y. 2012).

<sup>167</sup> *Id.* at 526; see also *Ehling v. Monmouth-Ocean Hosp. Serv. Corp.*, 961 F. Supp. 2d 659, 669 (D.N.J. 2013) (holding that social media users who attempt to safeguard the privacy of their profiles should enjoy some corresponding right to privacy, at least as applicable under the SCA; further holding, however, that once possibly private Facebook information was shared by a friend, its access by the employer did not violate the SCA because it was not unauthorized).

<sup>168</sup> See *Chaney*, 977 F. Supp. 2d at 1316.

<sup>169</sup> *Id.* at 1315.

<sup>170</sup> See Corey A. Ciocchetti, *The Eavesdropping Employer: A Twenty-First Century Framework for Employee Monitoring*, 48 AM. BUS. L.J. 285, 289–90 (2011); Allyson W. Haynes, *Virtual Blinds: Finding Online Privacy in Offline Precedents*, 14 VAND. J. ENT. & TECH. L. 603, 638 (2012); Pauline T. Kim, *Electronic Privacy and Employee Speech*, 87 CHI.-KENT L. REV. 901, 902 (2012); Susan Park, *Employee Internet Privacy: A Proposed Act that Balances Legitimate Employer Rights and Employee Privacy*, 51 AM. BUS. L.J. 779, 799–800 (2014); Robert Sprague, *Orwell Was an Optimist: The Evolution of Privacy in the United States and Its De-Evolution for American Employees*, 42 J. MARSHALL L. REV. 83, 84 (2008).

<sup>171</sup> See *supra* text accompanying notes 53–54, 78; McLaughlin, *supra* note 10, at 104 ("Although some privacy rights recognize the inherent value in an individual's name and reputation, imposing such a high threshold for certainty of damages likely precludes recovery for most claimants in this context, even after proving a clear privacy violation.").

legal framework.

## II. CONCEPTUALIZING THE VALUE AND EXERCISE OF SOCIAL MEDIA

One reason the law is so muddled is because courts and lawmakers battle with conceptualizations of the nature and value of a social media presence.<sup>172</sup> Is a social media audience like an old-fashioned Rolodex or database listing a series of contacts? Or is it more like a corporate business card? Could it ever be as labor-intensive as an advertising campaign or as private as a secret recipe? Evidence of the struggle in understanding social media abounds in the four representative cases above: *PhoneDog* wondered whether a password could be a trade secret; the *Eagle* court pondered whether a company could keep a former employee's LinkedIn account; the judge in *Maremont* had to decide whether it was reasonable for an employer to continue marketing via an absent employee's Facebook account; and in *Mattocks*, the court had to determine whether a "like" was a verifiable business interest. These are ultimately normative questions whose answers rest not only in interpretations of applicable law, but in accurate characterizations of a digital environment that did not exist a decade ago.

What follows are five tenets that describe the process, the reality, and ultimately the value, of social media audience management. While individuals engage in social media for varied purposes, we focus narrowly on the case where employees promote their employers through social media. For ease of reference, we refer to the employee directing and managing the social media site as the "manager." It is the common act of online socialization, and its resultant relationships, that form the essence of this analysis.

### A. *Through Its Rules and Architecture, Each Website Provides Context, Norms, and Culture for Social Media Interaction*

Facebook, Twitter, and LinkedIn—all founded between 2002 and 2006<sup>173</sup>—are the dominant social media platforms in the United States.<sup>174</sup> The terms and conditions of the three sites are similar. None grants users any ownership interest in the accounts themselves.<sup>175</sup> Users of all

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<sup>172</sup> See McLaughlin, *supra* note 10, at 100 ("The [Eagle] court's comparison of social media to dissimilar technologies shows the inherent challenges associated with the application of archaic doctrines to novel innovation.").

<sup>173</sup> See Phillips, *supra* note 3; Arthur, *supra* note 3; *A Brief History of LinkedIn*, *supra* note 3.

<sup>174</sup> Facebook, Twitter, and LinkedIn are three of the five most popular social media sites according to a survey by the Pew Research Center. Maeve Duggan et al., *Social Media Update 2014*, PEW RESEARCH CTR. (Jan. 9, 2015), <http://www.pewinternet.org/2015/01/09/social-media-update-2014/>. Facebook is the most widely used with seventy-one percent of internet users over eighteen signed up as members. *Id.* The other two platforms—Pinterest and Instagram—differ from the aforementioned sites in that the two are photo-sharing sites where the only dialogue between users occurs in comments of photos users upload. *Id.*

<sup>175</sup> LinkedIn and Twitter provide the most explicit statements negating any possibility of ownership. Section 2.4 of the LinkedIn *User Agreement*, titled "Your Membership," states that "[t]he profile you create on LinkedIn . . . will become part of LinkedIn and except for the content and information that you *license* to us is owned by LinkedIn. However, between you and others, your account belongs to you." *User Agreement*, *supra* note 114 (emphasis added). See also *Twitter Terms of Service*, *supra* note 114; Mazzone, *supra* note 115, at 1648 ("Facebook's terms of use (called 'Statement of Rights and Responsibilities'"), to which every user must agree in accessing the Facebook site, do not specifically state that Facebook retains ownership of individual Facebook accounts. Nonetheless, several



three sites are the sole owners of the content posted on their profiles.<sup>176</sup>

Facebook is an “online social network where members develop personalized web profiles to interact and share information with other members.”<sup>177</sup> Individuals can create both personal profiles and pages about themselves or others.<sup>178</sup> Profiles and pages can include multimedia, news articles, and personal updates.<sup>179</sup> Facebook users generally have control over their visibility settings and can set their profiles to be public or visible only to the user’s “friends.”<sup>180</sup> Users see their friends’ activity in their “News Feed” on the Facebook home page.<sup>181</sup> “Likes” are “a way for Facebook users to share information with each other” and convey enjoyment or approval without leaving a textual comment.<sup>182</sup> When users “like” content posted on a profile or page, they become connected with it.<sup>183</sup> Once connected, users will see content from that profile or page in their news feed, the page will appear on their profile, and the user will appear on the page as someone who likes that page, as an association or implicit endorsement.<sup>184</sup>

In contrast to Facebook’s emphasis on the personal, LinkedIn distinguishes itself as a site for individuals to network in a professional capacity. Individuals with whom a user is “linked” see updates to the individual’s profile (depending on the individual’s notification settings).<sup>185</sup> In keeping with its business-networking culture, LinkedIn profiles have sections for education, associations, honors and awards.<sup>186</sup> LinkedIn users may only maintain one account at a time and may set up company pages only as authorized representatives.<sup>187</sup>

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key provisions make clear that, according to Facebook, accounts are not property owned by individual users. For one thing, Facebook imposes numerous restrictions on how a Facebook account can be used. Users who violate the ‘letter or spirit’ of Facebook’s terms lose access to the site. Thus, what Facebook users possess is the ability to access the Facebook site via an account so long as they comply with Facebook’s terms.”) (footnotes omitted).

<sup>176</sup> *User Agreement*, *supra* note 114, § 3.1; *Twitter Terms of Service*, *supra* note 114, § 4; *Statement of Rights and Responsibilities*, *supra* note 61, § 2.

<sup>177</sup> *Mattocks v. Black Entm’t Television, LLC*, 43 F. Supp. 3d 1311, 1314 (S.D. Fla. 2014) (citations omitted).

<sup>178</sup> Pages must be created and managed by people who have personal profiles. *Page Basics*, *supra* note 139. Facebook pages can either be created by authorized representatives of a company or by individuals as “Fan” pages, which can be either unofficial or officially sponsored. *Mattocks*, 43 F. Supp. 3d at 1315.

<sup>179</sup> *Mattocks*, 43 F. Supp. 3d at 1314.

<sup>180</sup> *Id.* at 1314–15.

<sup>181</sup> *How News Feed Works*, FACEBOOK, <https://www.facebook.com/help/327131014036297/> (last visited Mar. 15, 2016).

<sup>182</sup> *Mattocks*, 43 F. Supp. 3d at 1315 (citation omitted). *See also What Does it Mean to “Like” Something?*, FACEBOOK, <https://www.facebook.com/help/110920455663362/> (last visited Mar. 15, 2016).

<sup>183</sup> *Mattocks*, 43 F. Supp. 3d at 1315 (citations omitted).

<sup>184</sup> *Id.* Users are in control of their “likes” and may remove them at any time. *Id.*

<sup>185</sup> *See BTS, USA, Inc. v. Exec. Perspectives, LLC*, No.X10CV116010685, 2014 WL 6804545, at \*3 (Conn. Super. Ct. Oct. 16, 2014).

<sup>186</sup> *See Eagle v. Morgan*, No. 11-4303, 2013 WL 943350, at \*3 (E.D. Pa. Mar. 12, 2013).

<sup>187</sup> *See id.* LinkedIn requires that users who make company profiles have a full profile for over a week, have several connections on the profile, and have the company for which the page is being created as the current employment listed on the user’s profile. LinkedIn also requires a company email domain and asks users to confirm via a check box that they are authorized to create the page by the company. *See Requirements for Adding Company Pages*, LINKEDIN (Jan. 30, 2015), [https://help.linkedin.com/app/answers/detail/a\\_id/1594/ft/eng](https://help.linkedin.com/app/answers/detail/a_id/1594/ft/eng).

Twitter differs greatly from Facebook and LinkedIn because it is not a profile-based network. Its default setting allows users to freely follow each other without prior notice or approval. Users can see the “tweets,” 140 character messages that can include a photo or video, of all the accounts they follow.<sup>188</sup> Users can also mention each other in tweets using “@” and the username of another<sup>189</sup> and hashtags (“#”) to tag topics.<sup>190</sup> Individuals can create accounts with any username they desire that is not already in use,<sup>191</sup> but the site offers a verification option to “establish authenticity of identities of key individuals and brands on Twitter.”<sup>192</sup>

### *B. The Social Media Manager Is Spokesperson, Author, and Relationship Administrator*

In most instances, a business’s primary goal in maintaining an online social media presence is to communicate and build relationships with a large assembly of consumers and constituents, thereby strengthening brand reputation and recognition. The employee charged with maintaining the profile (Twitter feed or Facebook page) may be acting in the capacity of a representative of the employer. Unlike a traditional spokesperson reading from a well-vetted script, the employee must infuse personality into the social media so as to anthropomorphize the company, communicating in a way that creates and sustains relationships.<sup>193</sup>

In the world of social media, where many compete for attention, it is well recognized that “accounts don’t really work unless they have a touch of personality. Tweeted press releases aren’t interesting on Twitter; personal wit is regarded above all, and encouraged at every smart firm with a social media presence.”<sup>194</sup> As such, to be successful, the social media manager must entertain as well as inform, add value as well as perform. Unlike the traditional author, his written work is published and judged instantaneously; his agility with words, prized. He must also be responsive, reactive, and up-to-date. Ultimately, the objective is to create a relationship with the audience through the persona presented.

Given these varied roles, the process is time-consuming and requires a great deal of effort. One business blogger compared the demands of social media on a business to a hungry baby requiring feeding on a very regular basis.<sup>195</sup> Audience management requires understanding

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<sup>188</sup> See *In re CTLL, LLC*, 528 B.R. 359, 366 (Bankr. S.D. Tex. 2015).

<sup>189</sup> See *What are Replies and Mentions?*, TWITTER, <https://support.twitter.com/articles/14023> (last visited Mar. 15, 2016).

<sup>190</sup> See *In re CTLL, LLC*, 528 B.R. at 366; *Using Hashtags on Twitter*, TWITTER, <https://support.twitter.com/articles/49309> (last visited Mar. 15, 2016).

<sup>191</sup> See *Why Can’t I Register Certain Usernames?*, TWITTER, <https://support.twitter.com/articles/101299> (last visited Mar. 15, 2016).

<sup>192</sup> *FAQs about Verified Accounts*, TWITTER, <https://support.twitter.com/groups/31-twitter-basics/topics/111-features/articles/119135-about-verified-accounts> (last visited Mar. 15, 2016). Users in areas such as “music, acting, fashion, government, politics, religion, journalism, media, sports, [and] business” can apply for verification of their accounts. *Id.*

<sup>193</sup> Bob Sullivan, *When You and Employer Split, Who Gets Your Friends and Followers?*, NBCNEWS.COM (Oct. 12, 2012, 3:11 AM), [http://redtape.nbcnews.com/\\_news/2012/10/12/14373762-when-you-and-employer-split-who-gets-your-friends-and-followers](http://redtape.nbcnews.com/_news/2012/10/12/14373762-when-you-and-employer-split-who-gets-your-friends-and-followers).

<sup>194</sup> *Id.*

<sup>195</sup> Michael Fertik, *Is Social Media Worth It for Small Businesses?*, FORBES (Aug. 21, 2014, 1:05 PM), <http://www.forbes.com/sites/michaelfertik/2014/08/21/is-social-media-worth-it-for-small-businesses/>.

the audience, planning content, and “constant, ubiquitous engagement.”<sup>196</sup> Managers must remember identities and connections of individuals in the network and what information has been exchanged, and when.<sup>197</sup> Some companies have been forced to dedicate full-time employees solely to manage social media.<sup>198</sup> According to one study, many business owners and senior executives spend over four hours per day on social media.<sup>199</sup> Because of the time, labor, and personality put in to this effort, one scholar called losing a profile a “harsh blow.”<sup>200</sup>

#### *D.C. The Social Media Audience Is Interactive and Highly Dynamic*

Social media scholars Alice Marwick and danah boyd have proposed that the medium has changed the relationship between the audience and the broadcaster.<sup>201</sup> The traditional broadcast audience, comprised of a single broadcaster communicating with nonresponsive observers, has evolved into a highly interactive “networked audience.”<sup>202</sup> In radio or television broadcasts, one-way content is institutionally created and directed at a passive audience of consumers. A networked audience, on the other hand, is active and connected.<sup>203</sup> Social media allows for participants to both send and receive information in an interactive manner.<sup>204</sup> Audience members participate in the creation of content by adding comments, posting photos, liking, sharing, or “retweeting” posts and comments provided by others.

As a result of this constant interaction, the social media manager is not only a content producer, but also a mediator of the evolving content and relationships that emerge. Social media audiences influence the content an individual produces, and affect how the manager crafts her evolving image. In other words, the audience becomes part of the process of constructing a social media persona.<sup>205</sup> A social media audience becomes so closely tied to the user’s persona that the

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<sup>196</sup> Dorie Clark, *It’s Time to Cut Back on Social Media*, HARV. BUS. REV. (Jan. 23, 2013), <https://hbr.org/2013/01/why-2013-is-the-year-to-cut-ba>.

<sup>197</sup> Bonnie A Nardi et al., *Integrating Communication and Information Through ContactMap*, 45 COMM. OF THE ACM 89 (2002).

<sup>198</sup> Meghan Casserly, *Why Small Businesses Are Losing on Social Media*, FORBES (Apr. 17, 2013, 12:11 PM), <http://www.forbes.com/sites/meghancasserly/2013/04/17/why-small-businesses-are-losing-on-social-media/>.

<sup>199</sup> *Social Networking Eats Up 3+ Hours Per Day for the Average American User*, MARKETINGCHARTS (Jan. 9, 2013), <http://www.marketingcharts.com/online/social-networking-eats-up-3-hours-per-day-for-the-average-american-user-26049/> (reporting on findings from Ipsos Open Thinking Exchange (OTX)).

<sup>200</sup> James Grimmelman, *Saving Facebook*, 94 IOWA L. REV. 1137, 1198 (2009).

<sup>201</sup> See generally Alice E. Marwick & danah boyd, *I Tweet Honestly, I Tweet Passionately: Twitter Users, Context Collapse, and the Imagined Audience*, 13 NEW MEDIA & SOC’Y 114, 122 (2011).

<sup>202</sup> *Id.* at 128–29; see also ALICE MARWICK, STATUS UPDATE: CELEBRITY, PUBLICITY, AND BRANDING IN THE SOCIAL MEDIA AGE 213 (2013).

<sup>203</sup> MARWICK, *supra* note 202, at 213.

<sup>204</sup> *Id.*; see also Marwick & boyd, *supra* note 201, at 130 (“In sites like Twitter and Facebook, social contexts we used to imagine as separate co-exist as parts of the network.”); Sonia Livingstone, *On the Relation Between Audiences and Publics*, in AUDIENCES AND PUBLICS: WHEN CULTURAL ENGAGEMENT MATTERS FOR THE PUBLIC SPHERE 17 (Sonia Livingstone ed., 2005).

<sup>205</sup> See Daniel Nemet-Nejat, *Hey, That’s My Persona!: Exploring the Right of Publicity for Blogs and Online Social Networks*, 33 COLUM. J.L. & ARTS 113, 122 (2009) (“Online identities are often created through interaction between author and audience.”); Marwick & boyd, *supra* note 201, at 130.

two cannot be separated. It is also highly fluid, changing constantly as individuals and content are added or removed.<sup>206</sup>

*E.D. The Social Media Manager Often Works Across Personal and Professional Contexts*

Social media renders the line between the professional and personal undeniably blurry. Social media users manage multiple audiences from different life contexts (childhood friends, professional contacts, family, etc.) in a single online platform for varied reasons. Given the unwieldiness and time-consuming nature of managing multiple social media profiles, some choose to consolidate into a single profile or site for efficiency or convenience. Additionally, the very structure or terms of the sites may force users to intermingle audiences.<sup>207</sup>

For the avid social media audience manager aiming to broaden his social media presence, this amalgamation may prove useful as it increases his followers, activity, and reach. On the other hand, the erasure of the fine distinctions among audiences may result in what has been referred to as “context collapse.”<sup>208</sup> Context collapse involves the forced merging of social and professional contexts, making the individual unable to differentiate self-presentation online.<sup>209</sup> As a result, some users may adjust their behavior “so as to make it appropriate for a variety of different situations and audiences;”<sup>210</sup> others may simply suffer the social repercussions that ensue from dissonant self-presentations.

In addition, employees may intentionally meld personal contacts to increase visibility and networking ability, or may import contacts accumulated prior to their current efforts on behalf of an employer. For example, in the *Mattocks* case, prior to employment, Mattocks had personally created and managed a fan page devoted to a BET show. Upon joining BET’s marketing effort, she amalgamated her prior fan base (amounting to 2 million likes) to her work for BET.<sup>211</sup> The result was a highly successful fan page with ambiguous ownership, which BET ultimately took as its own.

*E.E. A Social Media Audience Has Social and Financial Value*

A social media audience carries value in terms of social currency, reputation, and personal

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<sup>206</sup> Alice Marwick & Nicole B. Ellison, “*There Isn’t Wifi in Heaven!*” *Negotiating Visibility on Facebook Memorial Pages*, 56 J. BROADCASTING & ELECTRONIC MEDIA 378, 378 (2012) (“Social media such as Facebook make possible future audiences that may not be anticipated by the participants.”).

<sup>207</sup> For instance, LinkedIn and Facebook allow only one profile per person. See *User Agreement*, *supra* note 114, § 2.1; *Statement of Rights and Responsibilities*, *supra* note 61, § 4.

<sup>208</sup> Marwick & boyd, *supra* note 201, at 122; see also Jessica Vitak et al., “*Why Won’t You Be My Facebook Friend?*”: *Strategies for Managing Context Collapse in the Workplace*, [http://www-personal.umich.edu/~enicole/VitakLampeGrayEllison\\_iConf2012.pdf](http://www-personal.umich.edu/~enicole/VitakLampeGrayEllison_iConf2012.pdf); Bernie Hogan, *The Presentation of Self in the Age of Social Media: Distinguishing Performances and Exhibitions Online*, 30 BULL. SCI. TECH. & SOC’Y 377, 383 (2010).

<sup>209</sup> Marwick & boyd, *supra* note 201, at 122.

<sup>210</sup> Dawn R. Gilpin, *Working the Twittersphere: Microblogging as Professional Identity Construction*, in A NETWORKED SELF: IDENTITY, COMMUNITY, AND CULTURE ON SOCIAL NETWORK SITES 233 (Zizi Papacharissi ed., 2011) (citation omitted).

<sup>211</sup> *Mattocks v. Black Entm’t Television, LLC*, 43 F. Supp. 3d 1311, 1315–16 (S.D. Fla. 2014).

brand.<sup>212</sup> Interaction with social media audiences can result in social and dignitary benefits for the individual collector. On a basic level, the individual may experience the relational welfare stemming from strengthened individual bonds and fulfillment at being at the nucleus of a networked group.

Both the social media manager and the business he promotes can also gain significant social capital and business goodwill from a wide, heterogeneous audience.<sup>213</sup> Research conducted by Bain & Company found that customers who engage businesses on social media spend twenty percent to forty percent more with those businesses than other customers and feel greater loyalty to the businesses with which they connect.<sup>214</sup> Other sources have calculated the potential value to the business sector from effective use of social networks to between \$900 billion and \$1.3 trillion a year.<sup>215</sup> As Marwick observes, upgrading social status through popularity and influence often drives online participation.<sup>216</sup> Acknowledging this need, most social networking sites employ indicators of status and importance, such as Facebook “likes” and Twitter “retweets.”<sup>217</sup> Researchers have noted that individuals with an online influence can benefit from resources such as access to useful information, access to individuals outside their own circle, and elevated social status.<sup>218</sup> For the individual, this creates professional goodwill, which can result in concrete benefits such as business and employment connections.<sup>219</sup> Businesses enjoy their own distinct advantages. Enhanced relationships with a broad network of consumers can strengthen reputation, engage current and future customers, and generate profit.

Google Executive Chairman Eric Schmidt refers to online identity as both “commodity” and “currency.”<sup>220</sup> He suggests that in the future, “[i]dentity will be the most valuable commodity for citizens . . . and it will exist primarily online. . . . We are what we tweet.”<sup>221</sup> For

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<sup>212</sup> Current economic models are ineffective at valuing the relational ties of a social media networked audience, but scholars are developing models to value social media audiences based on interconnectivity of the network of users. See, e.g., Martin Gneiser et al., *Quantifying Users’ Interconnectedness in Online Social Networks—An Indispensable Step for Economic Valuation*, in VALUE CREATION IN E-BUSINESS MANAGEMENT 246 (Matthew L. Nelson et al. eds., 2009) [hereinafter *Quantifying Users’ Interconnectedness*]; Martin Gneiser et al., *Valuation of Online Social Networks Taking into Account Users’ Interconnectedness*, 10 INFO. SYS. & E-BUS. MGMT. 61, (2012) [hereinafter *Valuation of Online Social Networks*].

<sup>213</sup> Social capital refers to the benefits that can be attained from connections between people through their social networks. See Nicole B. Ellison et al., *With a Little Help from My Friends: How Social Network Sites Affect Social Capital Processes*, in A NETWORKED SELF: IDENTITY, COMMUNITY, AND CULTURE ON SOCIAL NETWORK SITES 127 (Zizi Papacharissi ed., 2011).

<sup>214</sup> CHRIS BARRY ET AL., PUTTING SOCIAL MEDIA TO WORK 1–2 (2011), [http://www.bain.com/Images/BAIN\\_BRIEF\\_Putting\\_social\\_media\\_to\\_work.pdf](http://www.bain.com/Images/BAIN_BRIEF_Putting_social_media_to_work.pdf).

<sup>215</sup> James Manyika et al., *Social Media’s Productivity Payoff*, HARV. BUS. REV. (Aug. 21, 2012), <https://hbr.org/2012/08/social-medias-productivity-pay> (citing a report from McKinsey Global Institute).

<sup>216</sup> MARWICK, *supra* note 202, at 74–75.

<sup>217</sup> *Id.*

<sup>218</sup> Ellison et al., *supra* note 213.

<sup>219</sup> Nicole B. Ellison, et al., *The Benefits of Facebook “Friends:” Social Capital and College Students’ Use of Online Social Network Sites*, 12 J. COMPUTER-MEDIATED COMM. 1143, 1145–46 (2007).

<sup>220</sup> ERIC SCHMIDT & JARED COHEN, THE NEW DIGITAL AGE: RESHAPING THE FUTURE OF PEOPLE, NATIONS AND BUSINESS 36 (2013).

<sup>221</sup> *Id.*

all of the reasons outlined in the preceding paragraphs, there is ample evidence that the future Schmidt envisions of online identity as a commodity is close, if not here. Marketing strategies once reserved for companies are being applied to individuals. An entire industry has developed around self-branding—assisting individuals in creating a successful identity with which to market themselves widely.<sup>222</sup>

Further evidencing the rising value of online identity, social media has led to the democratization of celebrity. Scholars have loosely defined fame as “the informal attribution of distinction on an individual within a given social network.”<sup>223</sup> In the twentieth century, businesses began to manufacture individuals’ fame as a commodity that was leveraged for profit.<sup>224</sup> Few could attain the level of notoriety that would result in an identity with commercial value.

Today, social media has changed the dynamic of the manufacturing and distribution of celebrity, facilitating a phenomenon known as “micro-celebrity.” Micro-celebrity is “the phenomenon of being extremely well known not to millions but to a small group,” a few thousand or even a few dozen people.<sup>225</sup> Micro-celebrity, like self-branding, is a construction of identity that can be consumed by others with the audience acting as a fan base.<sup>226</sup> This identity draws a fan base that can be used to promote one’s self and monetized through sponsored promotions.<sup>227</sup> Internet scholars have noted that the concept of micro-celebrity “implies that all individuals have an audience that they can strategically maintain through ongoing communication and interaction.”<sup>228</sup>

Anecdotes abound of people promoting themselves through social media, garnering a following, and translating that self-made fame into lucrative careers.<sup>229</sup> One commentator has observed that this path to success has become “well-trodden.”<sup>230</sup> For example, Michelle Phan, a YouTube blogger known for her homemade make-up instruction videos, launched a commercial empire that includes her own line of makeup, a music label, and a lifestyle site.<sup>231</sup>

Despite Schmidt’s statements and conventional wisdom about the value of identity, some courts and commentators have struggled with attaching value to online identity and social media

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<sup>222</sup> MARWICK, *supra* note 202, at 166.

<sup>223</sup> CHRISTOPHER ROJEK, *CELEBRITY* 12 (2004).

<sup>224</sup> *Id.*; see ERIC GUTHEY ET AL., *DEMYSTIFYING BUSINESS CELEBRITY* 11 (2009).

<sup>225</sup> Clive Thompson, *Clive Thompson on the Age of Microcelebrity: Why Everyone’s a Little Brad Pitt*, WIRED (Nov. 27, 2007, 12:00 PM), [http://archive.wired.com/techbiz/people/magazine/15-12/st\\_thompson](http://archive.wired.com/techbiz/people/magazine/15-12/st_thompson); MARWICK, *supra* note 202, at 114 (“Micro-celebrity is a state of being famous to a niche group of people, but it is also a behavior: the presentation of oneself as a celebrity regardless of who is paying attention.”).

<sup>226</sup> Ruth Page, *The Linguistics of Self-branding and Micro-celebrity in Twitter: The Role of Hashtags*, 6 DISCOURSE & COMM. 181, 182 (2012).

<sup>227</sup> See Taffy Brodesser-Akner, *Turning Microcelebrity into a Big Business*, N.Y. TIMES (Sept. 19, 2014), <http://www.nytimes.com/2014/09/21/magazine/turning-microcelebrity-into-a-big-business.html>.

<sup>228</sup> Marwick & boyd, *supra* note 201, at 121.

<sup>229</sup> Kathleen Hou, *Lisa Eldridge is Lancôme’s New Creative Director*, N.Y. MAG. (July 6, 2015, 5:25 PM), <http://nymag.com/thecut/2015/07/youtuber-is-lancmes-new-creative-director.html>.

<sup>230</sup> Nellie Bowles, *Michelle Phan: From YouTube Star to \$84 Million Startup Founder*, RE/CODE (Oct. 27, 2014, 3:48 PM), <http://recode.net/2014/10/27/michelle-phan-youtube-star-to-startup-founder/>.

<sup>231</sup> *Id.*

audiences.<sup>232</sup> Linda Eagle’s former employer locked her out of her LinkedIn account, causing search results for her name to be redirected to her successor’s page. Although the court held in her favor, it did not award her damages because it held that she could not prove a loss of value.<sup>233</sup> Some courts have refused to attach value to what they view as an indeterminate reputational matter or an impermanent asset.<sup>234</sup> In other words, since social media platforms allow members to unilaterally disconnect from the networked group at any time, some have argued that it is a non-static list incapable of ownership and assessable value.<sup>235</sup>

Interestingly, however, both bankruptcy courts and the financial industry have recognized the value of social media presence and audiences, no matter how changeable or intangible. The recent bankruptcy cases discussed previously in Part I involving the ownership and valuation of social media profiles conclude that the administrative privileges and associated digital rights are bona fide assets and business goodwill.<sup>236</sup> The *Maremont* court also recognized value in the plaintiff’s Twitter and Facebook followers, noting that they were “a marketable commercial interest.”<sup>237</sup>

Well-established financial standards and metrics also quantify the value of networked audiences. For instance, some general valuation models divide the number of users on a platform by the company’s valuation to determine the monetary value of each user.<sup>238</sup> PhoneDog, in its case against Kravitz, argued that industry standards valued each Twitter follower at \$2.50 per month.<sup>239</sup> Other valuation metrics capture factors such as relationships between users, connections of users, and loyalty of users, rather than just numbers.<sup>240</sup>

With an understanding of the many claims involved and the burgeoning meaning and value of social media audiences in firmer grasp, the next part proposes that publicity rights, a hybrid of privacy and property law, is an appropriate lens through which to analyze the harm that employees suffer when their digital identities and work product are usurped.

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<sup>232</sup> Adam S. Walker, *Yours, Mine, or Ours? The Battle over Social Media Content*, DCBAR (Aug. 2012), <http://www.dcb.org/bar-resources/publications/washington-lawyer/articles/july-august-2012-social-media.cfm>.

<sup>233</sup> *Eagle v. Morgan*, No. 11-4303, 2013 WL 943350, at \*14 (E.D. Pa. Mar. 12, 2013).

<sup>234</sup> *Mattocks v. Black Entm’t Television, LLC*, 43 F. Supp. 3d 1311, 1321 (S.D. Fla. 2014) (“Given the tenuous relationship between ‘likes’ on a Facebook Page and the creator of the Page, the ‘likes’ cannot be converted in the same manner as goodwill or other intangible business interests.”).

<sup>235</sup> *Id.*

<sup>236</sup> See *In re Borders Group, Inc.*, No. 11-10614 (MG), 2011 WL 5520261, at \*13 (Bankr. S.D.N.Y. Sept. 27, 2011); *In re CTLI, LLC*, 528 B.R. 359, 373–74 (Bankr. S.D. Tex. 2015).

<sup>237</sup> *Maremont v. Susan Fredman Design Grp.*, No. 10 C 7811, 2014 WL 812401, at \*4 (N.D. Ill. Mar. 3, 2014).

<sup>238</sup> Tristan Louis, *How Much Is A User Worth?*, FORBES (Aug. 31, 2013, 3:25 PM), <http://www.forbes.com/sites/tristanlouis/2013/08/31/how-much-is-a-user-worth/>.

<sup>239</sup> *PhoneDog v. Kravitz*, No. C 11-03474 MEJ, 2011 WL 5415612, at \*3 (N.D. Cal. Nov. 8, 2011).

<sup>240</sup> See *Valuation of Online Social Networks*, *supra* note 212; *Quantifying Users’ Interconnectedness*, *supra* note 212, at 62–63.

### III. USING PUBLICITY RIGHTS RATIONALE TO DETERMINE POST-EMPLOYMENT SOCIAL MEDIA CONTROL

As we have shown above, courts have had difficulty resolving employment cases involving social media retention and balancing competing interests.<sup>241</sup> They have analyzed the issues through the lenses of trade secret, personal property, privacy, and intellectual property rights to little avail. Given that social media is laborious, creative, and often tied to its manager's personality, this section argues that the law of publicity rights offers a fuller, more accurate foundation for the analysis of the post-employment control of social media accounts. As a well-established quasi-property claim in identity, publicity rights protect the economic fruit of a person's name and identity. Justified in publicity rights, we contend that individuals should be entitled to protection against those who seek to misappropriate their work, personae, and goodwill for economic gain, except when their work falls squarely in the scope of their employment. However, as discussed in Part II, disentangling the personal from the professional and defining the scope of employment requires surgical precision in the modern world. As such, we propose a framework for application of publicity rights to this novel employment context. Inspired by the precepts of agency and publicity law, our proposed rubric balances the employee's financial, social, and emotional interests in his social media while balancing the employer's legitimate business claims.

#### A. *Applying Publicity Rights to Social Media Personae*

The right of publicity is a relatively new quasi-property right that grew out of the privacy tort of commercial appropriation.<sup>242</sup> Historically, an appropriation claim sought recovery for the dignitary and emotional harms that result from unauthorized appropriation of a person's likeness.<sup>243</sup> However, as the practice of celebrity endorsements in advertising grew in the latter half of the twentieth century, it became clear that the identity of public figures carried commercial value—apart from the privacy interests protected by the appropriation tort.<sup>244</sup> An early seminal New York case involved the unauthorized use of the images of major league baseball players in baseball cards.<sup>245</sup> The Second Circuit found—for the first time—that individuals had a property right in their own images.<sup>246</sup>

Celebrities clamored for the protection of this intangible asset, which could not be

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<sup>241</sup> See *supra* Part I.

<sup>242</sup> See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (arguing that an invasion of privacy should be an actionable tort, premised on that fact that everyone has a property interest in their personality); see also Mark Bartholomew, *A Right is Born: Celebrity, Property, and Postmodern Lawmaking*, 44 CONN. L. REV. 301, 309 (2011); Mark Conrad, *A New First Amendment Goal Line Defense—Stopping the Right of Publicity Defense*, 40 OHIO N.U. L. REV. 743, 747 (2014); Nemet-Nejat, *supra* note 205, at 115; Christina Smedley, Note, *Commercial Speech and the Transformative Use Test: The Necessary Limits of a First Amendment Defense in Right of Publicity Cases*, 24 DEPAUL J. ART, TECH. & INTELL. PROP. L. 451, 453–54 (2014).

<sup>243</sup> Samantha Barbas, *From Privacy to Publicity: The Tort of Appropriation in the Age of Mass Consumption*, 61 BUFF. L. REV. 1119, 1120 (2013).

<sup>244</sup> *Id.* at 1120–21.

<sup>245</sup> *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953).

<sup>246</sup> *Id.*



justified in privacy alone.<sup>247</sup> One argument that was particularly persuasive in favor of the new tort was that the time and effort that celebrities invested in themselves carried a real, protectable value.<sup>248</sup> As a result, a handful of states led the emergence of a new tort, the right of publicity, which takes a property-based view of the right to one's likeness, persona, and reputation.<sup>249</sup> Scholars have extensively debated the tort's theoretical underpinnings.<sup>250</sup> What justifies the prevention of the unauthorized commercial appropriation of a valuable persona? One common moral justification for the right centers upon Lockean labor considerations: the person who puts time and energy into creating value in his image is justified in owning the fruit of his labor, reaping its benefits, and preventing others from unjustly enriching from it.<sup>251</sup> Economic rationales for the right are utilitarian in nature, as economic incentives promote creativity and progress and protect consumers from deception.<sup>252</sup> Others point to the importance of individual dignity and autonomy as the driving force for publicity rights.<sup>253</sup> Theories of personhood and autonomy justify publicity rights based upon the inherent link between the self and a person's

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<sup>247</sup> See generally *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977); *Groucho Marx Prods., Inc. v. Day & Night Co.*, 689 F.2d 317 (2d Cir. 1982); *Estate of Presley v. Russen*, 513 F. Supp. 1339 (D.N.J. 1981); *Guglielmi v. Spelling-Goldberg*, 603 P.2d 454 (Cal. 1979).

<sup>248</sup> See *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 800 (Cal. 2001); *Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 426 (Cal. Ct. App. 1983), *superseded by statute*, CAL. CIV. CODE § 3344 (West 2016); J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY*, §§ 2.2–2.7 (2d ed. 2000); see also Justin Hughes, *The Personality Interest of Artists and Inventors in Intellectual Property*, 16 CARDOZO ARTS & ENT. L.J. 81, 83 (1998) (exploring in detail the creation of a celebrity personality).

<sup>249</sup> The first statute recognizing such a right was 1903 N.Y. Laws ch. 132, §§ 1–2 (now N.Y. CIV. RIGHTS LAW §§ 50–51 (Consol. 1982)), which effectively reversed the New York Court of Appeals' holding in *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902), that no such right existed in New York law. The first significant case in which a right of privacy was found to exist at common law was *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905). States followed suit. See, e.g., *Ettore v. Philco Television Broad. Corp.*, 229 F.2d 481 (3d Cir. 1956) (applying Pennsylvania law); *Hogan v. A.S. Barnes & Co.*, 114 U.S.P.Q. 314, 320 (Pa. Ct. Com. Pl. 1957); *Cabaniss v. Hipsley*, 151 S.E.2d 496 (Ga. Ct. App. 1966); *Palmer v. Schonhorn Enters. Inc.*, 232 A.2d 458 (N.J. Super. Ct. Ch. Div. 1967); *Ferguson v. Hawaiian Ocean View Estates, Inc.*, 441 P.2d 141 (Haw. 1968); *Cepeda v. Swift & Co.*, 415 F.2d 1205 (8th Cir. 1969) (applying Missouri law). For the historical development of the law of privacy, see PROSSER AND KEATON ON THE LAW OF TORTS 849–54 (W. Page Keeton et al. eds., 5th ed. 1984). See also Conrad, *supra* note 242, at 748, nn.26–27 (listing nineteen state statutes creating a right of publicity and discussing the thirty states that have common-law right of privacy protection).

<sup>250</sup> William McGeeveran, *Disclosure, Endorsement, and Identity in Social Marketing*, 2009 U. ILL. L. REV. 1105, 1149–51 (2009) (“Judges and scholars have puzzled at length over the contours of the two claims and their relationship to one another.”); Barbas, *supra* note 243, at 1122–23 (“No one seems to dispute that this shift occurred. Why it happened, however, has yet to be sufficiently explained. Why was the tort action for commercial appropriation of identity, initially rooted in dignitary and privacy interest, eventually eclipsed by a profit-oriented ‘right of publicity?’”) (footnote omitted).

<sup>251</sup> Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 229–30 (2005); Nemet-Nejat, *supra* note 205, at 115–17; David Tan, *Beyond Trademark Law: What the Right of Publicity Can Learn from Cultural Studies*, 25 CARDOZO ARTS & ENT. L.J. 913, 927–28 (2008).

<sup>252</sup> Tan, *supra* note 251, at 927–28; Nemet-Nejat, *supra* note 205, at 116–17; McKenna, *supra* note 251.

<sup>253</sup> See, e.g., Ellen S. Bass, Comment, *A Right in Search of a Coherent Rationale—Conceptualizing Persona in a Comparative Context: The United States Right of Publicity and German Publicity Rights*, 42 U.S.F. L. REV. 799, 804–05 (2008)

right to control its presentation.<sup>254</sup>

Today, over thirty states recognize publicity rights, either through common law<sup>255</sup> or by statute.<sup>256</sup> The Restatement (Third) of Unfair Competition sets forth the four elements of a right of publicity claim. A claimant must show that (1) the defendant used the plaintiff's identity (2) for the defendant's commercial (or other) advantage (3) without the plaintiff's consent, (4) causing injury.<sup>257</sup>

Over the past forty years, the right of publicity has experienced a significant expansion. Traditionally, courts had held that only name and likeness were the proper indicia of identity to support a right of publicity claim.<sup>258</sup> However, over the years, jurisdictions, led by the Ninth Circuit Court of Appeals, expanded the indicia of identity to recognize a broader concept of identity, such as "name, voice, signature, photograph or likeness."<sup>259</sup> One famous case held that the mere evocation of a person's signature role as a game show model violated her publicity rights.<sup>260</sup>

Given the justifications and the expanded scope of the modern right of publicity, its application to social media is logical. Outside of the employment context, various scholars have made this argument persuasively.<sup>261</sup> A social media profile can be an extension of its creator's

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<sup>254</sup> *Id.* at 822–23.

<sup>255</sup> Nemet-Nejat, *supra* note 205, at 117 (eleven states have developed the tort via the common law).

<sup>256</sup> At least nineteen states have enacted some form of a right of publicity statute, including: California (CAL. CIV. CODE § 3344 (West 2016)), Florida (FLA. STAT. § 540.08 (2016)), Illinois (765 ILL. COMP. STAT. 1075 (2016)), Kentucky (KY. REV. STAT. ANN. § 391.170 (West 2016)), Indiana (IND. CODE § 32-36-1 (2016)), Massachusetts (MASS. GEN. LAWS ch. 214, § 3A (2016)), Nebraska (NEB. REV. STAT. § 20-211 (2016)), Nevada (NEV. REV. STAT. § 52-597 (2016)), New York (N.Y. CIV. RIGHTS LAW §§ 50–51 (McKinney 2016)), Ohio (OHIO REV. CODE ANN. § 2741 (LexisNexis 2016)), Oklahoma (OKLA. STAT. tit. 12, § 25 (2016)), Pennsylvania (42 PA. CONS. STAT. § 8316 (2016)), Rhode Island (R.I. GEN. LAWS § 9-1-28.1 (2016)), Tennessee (TENN. CODE ANN. § 47-25-1104 (2016)), Texas (TEX. PROP. CODE ANN. § 26 (West 2015)), Utah (UTAH CODE ANN. § 45-3 (LexisNexis 2015)), Virginia (using a person's name or picture for a commercial purpose without authorization: VA. CODE ANN. § 18.2-216.1 (2015); misappropriation: VA. CODE ANN. § 8.01-40 (2015)), Washington (WASH. REV. CODE § 63.60 (2015)), and Wisconsin (WIS. STAT. § 995.50 (2015)).

<sup>257</sup> RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (AM. LAW INST. 1995). Although the Restatement definition applies in many of these states that recognize the right, its application and interpretation remains "decidedly varied." Nemet-Nejat, *supra* note 205, at 116–18. Some states, such as New York, recognize a cause of action only when one's name or likeness has been used in advertising. *Id.* at 117. Other states take a broader approach. California law is much friendlier to celebrities, adopting an expansive approach by allowing claims for various indicia of identity such as tone of voice and other distinctive characteristics. *Id.*

<sup>258</sup> David Tan, *Much Ado About Evocation: A Cultural Analysis of "Well-Knownness" and the Right of Publicity*, 28 CARDOZO ARTS & ENT. L.J. 317, 321 (2010) ("The classic definition of identity in a common law claim is usually 'name and likeness.'"); *see also* Eastwood v. Superior Court, 198 Cal. Rptr. 342, 347 (Cal. Ct. App. 1983), *superseded by statute*, CAL. CIV. CODE § 3344 (West 2016); Lugosi v. Universal Pictures, 603 P.2d 425, 431 (Cal. 1979), *superseded by statute*, CAL. CIV. CODE § 3344 (West 2016).

<sup>259</sup> Tan, *supra* note 258, at 321, 329 ("The circuit decisions for the state of California have expanded the meaning of identity in a common law publicity claim beyond 'name and likeness' to include virtually any attribute associated with a celebrity individual."); *see, e.g.*, White v. Samsung Elecs. Am., Inc., 971 F.2d 1395 (9th Cir. 1992); Waits v. Frito-Lay, Inc., 978 F.2d 1093 (9th Cir. 1992); Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988).

<sup>260</sup> *White*, 971 F.2d at 1399 (holding that Samsung's advertisement depicting a robot that evoked the style and role of a recognizable game show hostess was a violation of her right to publicity).

<sup>261</sup> Recent scholarship proposes the application of the right of publicity to online identities. For instance, William

persona and will likely include indicia of identity such as name and likeness, as demonstrated by the four social media cases discussed earlier. Like traditional celebrities, these employees put in considerable time and effort in their personae. Like the historical justification for granting celebrities publicity rights, there is economic value in their work, their reputations, and their following.<sup>262</sup> From a Lockean perspective, they should enjoy the fruits of their labor, which, as established above, is quite intensive and encompassing in its dynamism. In their capacity as thought-disseminators, social media managers may also carry high endorsement value with their trusted audiences. The plaintiffs in *PhoneDog*, *Maremont*, and *Mattocks* each made their living by sharing their opinions and endorsements in a signature style. Their audiences followed them, seeking out their particular expertise and musings. There is little doubt in the business world that the plaintiffs' actions carried value. In fact, the four employers' actions (in usurping the social media post-employment) are a recognition of this value. However, both *Eagle* and *Maremont* failed to remunerate the wronged employees based on their right to publicity. While it acknowledged that *Eagle* had made a prima facie showing of publicity rights, the *Eagle* court had trouble with the concept that the temporary hijacking of the employee's LinkedIn could have caused damage—and in fact sought proof that actual damage had occurred.<sup>263</sup> The *Maremont* court concluded that the employer's act of communicating through an employee's Facebook page without her consent was not an unjust appropriation of her identity.

While the majority of courts today recognize that publicity rights are available to all individuals (regardless of their fame), they often struggle conceptualizing of value of the rights of non-traditional celebrities or nonpublic figures.<sup>264</sup> As more nonpublic individuals garner personality value through their social media efforts, we will likely see more such cases. These cases illustrate the need for a clear rubric to apply publicity rights in the context of social media employment cases.

#### B. *The Employee's Persona Versus the Employer's Asset: A Multi-Factor Analysis for Determining Post-Employment Retention of Social Media*

As mentioned above, the four elements of a right of publicity claim are that (1) the defendant used the plaintiff's identity (2) for the defendant's commercial (or other) advantage (3) without

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McGeeveran advocates a "persona rights" paradigm for digital identities, based on a combination of privacy and intellectual property law. McGeeveran, *supra* note 250, at 1149–55. Similarly, Daniel Nemet-Nejat proposes that courts should apply the copyright theory of separability to determine what parts of an online persona should be protected. Nemet-Nejat, *supra* note 205, at 130. Mark Conrad proposes a standard to determine the parameters of a right of publicity action that would grant a constitutional privilege for depictions of actual people unless the use is for a "sole commercial purpose." Conrad, *supra* note 242, at 799; *see also* Dora Georgescu, Note, *Two Tests Unite to Resolve the Tension Between the First Amendment and the Right of Publicity*, 83 *FORDHAM L. REV.* 907, 909 (2014) (proposing a "transformative use" test to determine whether an author's creative work which uses the likeness of another has enough creative elements to be considered expression worthy of First Amendment protection). Each of the articles relate to the free speech issues that arise when online personae are used by another for social media marketing or artistic purposes, which is outside the scope of this inquiry. Our focus is different and narrower—employment law and the right to keep relationships that have become inextricably connected to the persona.

<sup>262</sup> *See generally* Barbas, *supra* note 243.

<sup>263</sup> *See supra* text accompanying notes 51–54.

<sup>264</sup> J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY* § 4:14 (2d ed. 2009).

the plaintiff's consent, (4) causing injury.<sup>265</sup> In the employment context, it is clear that employers often have the right—whether implicit or explicit—to use their employees' identities for their commercial advantage. However, the world of social media is replete with blurred boundaries and context collapse.<sup>266</sup> More than ever employees mix contacts, worlds, and behavior, sometimes resulting in a lack of clarity regarding whether the employer used the employee's identity wrongfully, without his consent, and caused injury.

The following five-part analysis is intended to provide specific factors that courts could consider to determine the proper post-employment fate of a mixed-use social media account. The rubric is structured with five overarching themes, each undergirded by a series of questions. The themes to examine are: (1) the purpose and nature of the employment relationship; (2) the purpose and nature of the social media account, including its creation; (3) the employer's access or control of the social media account; (4) the degree to which the employee's persona is infused in the forum; and (5) the injury caused by the employer's alleged infringement. We address each theme and factor in detail below.<sup>267</sup>

### 1. Employment Purpose and Relationship

An analysis to determine administrative rights to a social media profile and audience begins by looking at the reasons for which the employee was hired and the nature of the employee's job. Thus, if an employee was hired for a marketing or communications-related post, or was primarily responsible for creating and maintaining social media relationships for the employer, these facts would weigh in favor of employer retention. A court should ask whether building or maintaining a social media audience on behalf of the employer was a critical part of the employee's job description. In *PhoneDog v. Kravitz*, the employee was hired to be a video blogger, reviewing products and sharing his views on Twitter.<sup>268</sup> Although the employee eventually became a micro-celebrity to his followers, this factor would weigh heavily against his continued retention and control of the social media.

On the other hand, if the creation of a social media audience was not part of the employee's work duties, and the employee used a primarily personal social media account to promote the employer's business only occasionally, those facts would indicate that the employer did not have the automatic right to use the employee's identity—and administrative rights would rightfully belong to the employee. In *Eagle v. Morgan*, an education executive sued for the return of her social media after it was hijacked by her former company.<sup>269</sup> The executive's employment was not premised or contingent on her social media involvement, nor was social media interaction her obligation; hence, this factor would weigh in her favor.

Thus, questions courts might consider under this first prong include:

- Was building or maintaining a social media presence on behalf of the employer a critical part of the employee's job description? Alternatively, did the employee

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<sup>265</sup> RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (AM. LAW INST. 1995); *see also supra* note 257.

<sup>266</sup> *See supra* text accompanying notes 207–210.

<sup>267</sup> The themes and factors are also set forth in *infra* Appendix A.

<sup>268</sup> No. C 11-03474 MEJ, 2011 WL 5415612, at \*1 (N.D. Cal. Nov. 8, 2011).

<sup>269</sup> No. 11-4303, 2013 WL 943350, at \*6 (E.D. Pa. Mar. 12, 2013).

promote the company on social media as a secondary consideration or out of loyalty to the employer?

- Was the employee hired for a marketing or communications-related post?
- Was the employee hired with the understanding that she would contribute or import her existing social media presence to the company?

## 2. Purpose and Nature of the Social Media Account

Courts should also consider the purpose and nature of the account, including the facts surrounding its creation. This analysis first considers whether the employee or the employer created the account. If the employee's job required maintenance of an account that had been set up before employment began, that would weigh in favor of the employer's continued right to the audience associated with it. Similarly, if an employee's existing account(s) and social media audience were important factors in her hiring, and the employee brought a majority of the social media audience with her when she began working for the employer, then the presumption would be that the employee is entitled to keep the administrative rights to the profile and its associated audience when employment ends.

If the employee created the account after becoming employed, then courts must carefully consider the circumstances surrounding its creation, including who set up the account and whose name is associated with it. Employees who create social media profiles on their own behalfs unrelated to their job description have a stronger claim to the account. Timing and location may also be factors. An employee who creates an account during employment may be considered to be acting as an agent for the employer, and thus could have a weaker claim to the associated audience when she leaves. On the other hand, if the employee created the account on her own, this may be indicative that the employee should retain access rights.<sup>270</sup> For instance, in the *PhoneDog* case, Kravitz claimed "that he created the account on his own initiative to promote his freelance work, including the freelance work he was doing for PhoneDog."<sup>271</sup> If such facts are true, this presumption should apply particularly if the account was used primarily for personal reasons.<sup>272</sup>

The name and e-mail account officially associated with the account is also an important factor. If the account is set up in the employee's name only, as was Linda Eagle's,<sup>273</sup> the presumption should be that the account remains within the employee's control. In *Maremont*, the

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<sup>270</sup> See Argento, *supra* note 11, at 268; Balasubramani, *supra* note 109 ("To the extent there were . . . legitimate competitive restrictions, it makes sense for the court to impose to [sic] restrictions and include social media contacts in any such restrictions, but it's a bizarre result that would allow the company/employer to control her personal LinkedIn account."); McIlwain, *supra* note 106; cf. Richardson, *supra* note 150, at 111–12 (suggesting that upon termination of a marriage, a joint Facebook profile should be assigned to the spouse who registered for and created the account).

<sup>271</sup> Kolansky, *supra* note 107, at 154.

<sup>272</sup> See Balasubramani, *supra* note 109 ("[C]ontrol over the account . . . should be separated from access to contact information or ongoing ability to contact customers. . . but it doesn't make sense from the standpoint of expectations to have the company take over someone's personal account."). Privacy issues also dictate that accounts used primarily for personal reasons should remain within the employee's control. See Mazzone, *supra* note 115, at 1652 ("Individuals may . . . have privacy interests in their accounts at social networking sites. . . Likewise, information about a person's location on particular days and at particular times can give rise to privacy interests.").

<sup>273</sup> Eagle, 2013 WL 943350, at \*1–2.

fact that the employee had set up the account under her name won the day for the employee, who was the victor.<sup>274</sup>

Facebook in particular provides settings that allow users to keep information private, including friend lists.<sup>275</sup> However, the default setting is that “everyone” can see the friends associated with a particular account.<sup>276</sup> Thus, if an employee creates and maintains an account in his own name, and affirmatively changes the privacy settings so that public viewing is restricted, and the employer has no access to the account to change these settings or see private posts, this would weigh in the employee’s favor.

In addition to the circumstances surrounding the creation of the account, the type and nature of the account at issue is also relevant, as it can indicate the intentions of its creator.<sup>277</sup> A personal timeline on Facebook displays an individual’s identity and stands in contrast to a Facebook page which represents businesses, organizations, or a celebrity’s public profile. The creation of a personal timeline may therefore indicate a personal rather than professional focus to the user’s account. LinkedIn provides personal accounts, group pages, and also an option for corporate accounts that are managed by one particular person.<sup>278</sup> However, LinkedIn tends to be used more for business-related purposes, while Twitter and Facebook accounts are often highly personal.<sup>279</sup> Courts must have the ability to properly distinguish between these various options in context.

Thus, questions courts might consider under this second prong include:

- Why was the social media forum created?
- Did the employee create the social media profile in question? If so, on whose behalf? Or alternatively, did the employee inherit the forum?
- Is the social media forum predominantly personal or job-related in nature?
- What are the privacy settings on the account?
- What is the prevalent purpose of the social media platform (e.g., personal or business) and its particular format (Profile, fan page, TimeLine, etc.)?
- Did the employee bring the majority of the social media audience with him when he began working for the employer?

### 3. Employer Access and Control

Employer access and control of the social media accounts is a third significant element in the

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<sup>274</sup> *Maremont v. Susan Fredman Design Grp.*, No. 10 C 7811, 2014 WL 812401, at \*1 (N.D. Ill. Mar. 3, 2014).

<sup>275</sup> See *Timeline Privacy, Who Can See the Friends Section of my Timeline*, FACEBOOK, <https://www.facebook.com/help/www/115450405225661> (last visited Mar. 17, 2016).

<sup>276</sup> *Id.*

<sup>277</sup> Argento, *supra* note 11, at 268; see also Balasubramani, *supra* note 109 (“[I]t’s crucial for courts to distinguish between the different types of accounts.”) (comment by Erik Goldman); Richardson, *supra* note 150, at 124 (“Facebook in general and the individual Facebook profile in question must be understood before a decision can be rendered regarding how the profile should be divided between the spouses and valued.”).

<sup>278</sup> See *Requirements for Adding Company Pages*, *supra* note 187.

<sup>279</sup> See Sullivan, *supra* note 193 (suggesting that the difference between a Twitter account, which is often highly personality-based, and a LinkedIn account, which is often simply a list of business connections, may dictate the employer’s arguments in favor of the right to access the account).

analysis. Here, courts will look at the level of authority the employer maintains over the accounts in question. If part of the employee's job was to cultivate a social media audience, did the employer give guidance as to that presence? Did the employer openly monitor or control the subject forum and postings? The answers to these questions relate to whether maintenance of the account in question was part of the employee's job duties and are closely related to the first two factors. An employer who requires the employee to create a Facebook account, for instance, may be more likely to impose rules on the maintenance of that account.

Courts should also consider who has access to the account and passwords. An employer who has insisted on having administrative rights or maintaining control of the social media accounts or their login information would have a strong argument that the accounts are primarily work-related.<sup>280</sup> For example, in the *Mattocks* case, the employee was hired for her social media presence and skill in promoting a BET show on Facebook.<sup>281</sup> Upon her employment, she consented to allowing her employer administrative rights to the fan page over which she previously had sole control.<sup>282</sup> This act evidences clear consent and weighs in favor of the cable network. If more than one employee worked on an account, it is likely that the parties did not contemplate that any one employee would have an exclusive right to the account, but if only one employee managed the account this may favor the employee.<sup>283</sup>

Thus, questions courts might consider under this third prong include:

- Did the employer require employees to maintain and cultivate a social media audience?
- Did the employer give guidance as to the employee's social media presence?
- Did the employer monitor or control the subject forum and postings?
- Did the employer impose rules regarding the subject social media account?
- Did the employer legitimately have administrative rights or password information?
- Did more than one employee have access to edit and change the account?

#### 4. Employee Persona

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<sup>280</sup> Rebecca Bentz, *Employer vs. Employee: Who Owns Social Media?*, WORKPLACE HR & SAFETY <http://www.workplacemagazine.com/Ezine/FullStory.aspx?EzineDataID=860> (last visited Mar. 17, 2016) ("Controlling social media account passwords might also support an employer's ownership claim."); see also Balasubramani, *supra* note 109 ("If you use your account for both company and personal uses and your employer has your social media login credentials, chances are it's become a corporate account in practice.") (comment by Eric Goldman).

<sup>281</sup> *Mattocks v. Black Entm't Television, LLC*, 43 F. Supp. 3d 1311, 1315–16 (S.D. Fla. 2014).

<sup>282</sup> *Id.* at 1316.

<sup>283</sup> Argento, *supra* note 11, at 268. Absent authority to access accounts, employers should avoid doing so to avoid possibility liability for violating the SCA, as may be the resulting outcome of *Maremont*. Although the defendant employer claimed it was authorized to access her Twitter account, she denied giving such authorization. See Phillip Barendolts, *Using an Employee's Personal Social Media Accounts Without Her Authorization to Market Employer May Create Liability Under Trademark and Electronic Privacy Laws*, PATTISHALL IP BLOG (Jan. 5, 2012) <http://blog.pattishall.com/2012/01/05/using-an-employees-personal-social-media-accounts-without-her-authorization-to-market-employer-may-create-liability-under-trademark-and-electronic-privacy-laws/> ("According to one court, the employer's use of these accounts without the employee's authorization can lead to liability under the Lanham Act and the Stored Communications Act.") (citation omitted).

Employees should have a strong claim to social media they created and infused with their own identity and for the purposes of socialization or personal networking. This factor in the analysis requires a close look at the employee's online persona and presence. As mentioned above, many social media audiences are amassed largely through a person's individual expressions of personality, wit, expertise, or flair.<sup>284</sup> The stronger the employee's online identity or indicia of identity, the greater should be the presumption that the employee is entitled to retention. Reflective of publicity rights, this presumption reflects the value of the employee's online persona and prevents the employer from trading on or misappropriating the employee's identity.

Thus, questions courts might consider under this fourth prong include:

- Does the social media forum identify the employee by name?
- Is the forum infused with the personality and identity of the employee? Was it representative of the individual?
- Did the employee enjoy social media recognition or notoriety independent of the employer?
- Did the employee write or create the majority of his or her own content?
- Did the employee amass the social media audience under his or her own name or was he or she writing anonymously or pseudonymously on behalf of the employer?

Employees who attract social media audiences through a variety of accounts have a particularly persuasive argument for publicity rights.

## 5. Degree of Injury

Finally, if courts are to apply publicity rights to remedy social media employees, they must broaden their views of celebrity and injury to publicity rights to meet contemporary notions and established law. In 2015, the District Court for the Eastern Division of Illinois held that a grocery chain infringed basketball-great Michael Jordan's publicity rights when it published a print ad in a 2009 commemorative edition of *Sports Illustrated* magazine congratulating Mr. Jordan on his induction to the Basketball Hall of Fame.<sup>285</sup> The mere association of the business with the famous man—even in a congratulatory context—without his consent triggered a judgment against the defendant of \$8.9 million.<sup>286</sup> In contrast, social media employees who have contested their publicity rights have come away with no damages, even when they successfully made a prima facie showing of a violation to their publicity rights.<sup>287</sup>

Existing law provides that the measure of damages for a publicity rights violation is the “fair market value of the property right in plaintiff's identity which defendant has used without

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<sup>284</sup> See *supra* text accompanying notes 194–202.

<sup>285</sup> *Jordan v. Dominick's Finer Foods*, 115 F. Supp. 3d 950 (N.D. Ill. 2015). In another case with similar facts, the Seventh Circuit Court of Appeals held that a similar advertisement run by Jewel-Osco supermarkets constituted image advertising—a form of “commercial speech,” thereby defeating the supermarket's First Amendment defense. *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509 (7th Cir. 2014).

<sup>286</sup> *Jewel Foods Stores*, 743 F.3d at 522. Kim Janssen, *Michael Jordan in Settlement Talks with Jewel over Alleged Misuse of Name*, CHICAGO TRIBUNE, (Sept. 30, 2015, 2:35 PM), <http://www.chicagotribune.com/business/ct-michael-jordan-jewel-1001-biz-20150930-story.html> (last visited Apr. 19, 2016).

<sup>287</sup> See *supra* text accompanying notes 51–53.



permission.”<sup>288</sup> For celebrities, such a market value is often ascertained by expert testimony as to comparables: “amounts received by comparable persons for comparable uses.”<sup>289</sup> For non-celebrities, the calculus should be similar, without bias.

Thus, questions courts might consider under this fifth prong include:

- Did the employee’s identity have a fair market value independent of his employer?
- If so, did the employer cause injury to the employee by usurping the employee’s identity without consent?
- What is the fair market value of the employee’s contribution or identity?
- How much would the employer likely pay to another to create what it took from the employee?

The foregoing five-part analysis represents a step forward in thinking about the scope of celebrity and social media—and their value in the modern world. A view of information, as a hybrid between property and reputation, as Eric Schmidt suggests,<sup>290</sup> will help courts fashion a legal framework that reflects the modern reality and understanding of social media.

## CONCLUSION

“People don’t belong to people.”<sup>291</sup>

Social media interactions are often an extension of the self. Yet they can also be sources of individual and corporate value. However, when it comes to the rights of employees to their social media, the law is conflicted and unclear. To date, litigants, courts, and commentators have miscast this issue, blurring it with a panoply of ill-fitting legal theories, from trade secret to conversion. At the core of these cases is the right to control a social media profile and to continue to interact with its audience, a desire inextricably intertwined with an individual’s personality and work product.

With a firmer understanding of the prevalent norms of social media, we argue that reasoning grounded in publicity rights provides a better lens through which to view an employee’s social media activity: Individuals should be entitled to protection against those who seek to misappropriate their work, personae, and goodwill for economic gain, except when their work falls squarely in the scope of their employment. On that basis, this article proposes an analysis that applies publicity rights and balances the employee’s professional and dignitary interests against the employer’s commercial concerns. It is only by taking into account the reality of social media interaction, its value on multiple levels, and each party’s legitimate expectations that we can begin to balance the many interests that compete for social media’s innovative assets and update the law to reflect our modern reality.

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<sup>288</sup> *Dominick’s Finer Foods*, 115 F. Supp. 3d at 957 (quoting 2 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 11:30 (2d ed. 2011)).

<sup>289</sup> *Id.* (“An expert is permitted to testify as to his opinion about the fair market licensing value of plaintiff’s identity for the kind of usage made by defendant. In fact, courts routinely rely on a calculation based upon the value of the infringing use at the time of that use.”) (citation omitted) (internal quotation marks omitted).

<sup>290</sup> See *supra* text accompanying notes 220–221.

<sup>291</sup> BREAKFAST AT TIFFANY’S (Paramount Pictures 1961) (quoting Holly Golightly, played by Audrey Hepburn).

**APPENDIX A – MULTIFACTOR QUESTIONS*****Factor One Questions:***

- Did the employee create the social media profile in question? If so, on whose behalf? Or alternatively, did the employee inherit the forum?
- Is the social media forum predominantly personal or job-related in nature?
- The nature of the social media platform (i.e. LinkedIn, Facebook, and so on), and whether more than one social media account is at issue.

***Factor Two Questions:***

- Was building a social media audience on behalf of the employer a critical part of the employee's job description? Was the employee hired for a marketing or communications-related post?
- Was the employee's social media audience a factor in his or her hiring? Did the employee bring the majority of the social media audience with him when he began working for the employer?
- Would it matter which party was acting to terminate the relationship?

***Factor Three Questions:***

- Did the employer require employees to maintain and cultivate a social media audience? Did the employer give guidance as to the employee's social media presence? Did the employer openly monitor or control the subject forum and postings?
- Whether the content that is posted is publicly available, or whether the employee also relied upon privacy settings in some cases to limit access
- Whether the employer required access to the account - username and password info.

***Factor Four Questions:***

- Is the social media forum infused with the personality and identity of the employee? Was it representative of the individual?
- Did the employee have other social media accounts?
- Did the employee enjoy social media recognition or notoriety independent of the employer?
- Did the employee write or create the majority of his/her own content?
- Did the employee amass the social media audience under his or her own name or was he or she writing anonymously or pseudonymously on behalf of the employer?

***Factor Five Questions:***

- Did the employee's identity have a fair market value independent of his employer?
- If so, did the employer cause injury to the employee by usurping the employee's identity without consent?
- What is the fair market value of the employee's contribution or identity?

- How much would the employer likely pay to another to create what it took from the employee?

Case	Nature of the Case	Platform(s) Involved	Legal Claims
<i>PhoneDog v. Kravitz</i> (N.D. Cal. 2011)	An “interactive mobile news and reviews web resource suing a former blogger for his continued use of a company Twitter account.	Twitter	<ul style="list-style-type: none"> <li>• Misappropriation of Trade Secrets</li> <li>• Intentional/Negligent Interference with a Prospective Economic Advantage</li> <li>• Conversion</li> </ul>
<i>Eagle v. Morgan</i> (E.D. Pa. 2013)	Former executive suing her company and her replacement over who controlled a LinkedIn account.	LinkedIn	<ul style="list-style-type: none"> <li>• Unauthorized Use of Name</li> <li>• Invasion of Privacy</li> <li>• Misappropriation of Publicity</li> <li>• Identity Theft</li> <li>• Conversion</li> <li>• Tortious Interference with Contract</li> <li>• Civil Conspiracy</li> <li>• Civil Aiding and Abetting</li> </ul>
<i>Maremont v. Susan Fredman Design Group, Ltd.</i> (N.D. Ill. 2011)	Employee suing company for making posts from her Facebook and Twitter pages without her permission.	Facebook  Twitter  Company blog	<ul style="list-style-type: none"> <li>• Lanham Act (False Endorsement)</li> <li>• Stored Communications Act</li> <li>• Right to Publicity</li> <li>• Common Law Right to Privacy</li> </ul>
<i>Mattocks v. Black Entm’t Television</i> (S.D. Fla. 2014)	Fan page creator suing BET over a conflict involving BET “migrating” fans of one page to an official page without the creator’s permission.	Facebook	<ul style="list-style-type: none"> <li>• Tortious Interference with Contractual Relationships</li> <li>• Breach of Contract</li> <li>• Breach of Duty of Good Faith and Fair Dealing</li> <li>• Conversion</li> </ul>

Table 1