

Find Out Who Your Friends Are: A Framework for Determining Whether Employees' Social Media Followers Follow Them to a New Job

No crevice of society remains untouched by the pervasiveness of social media—including the workplace. Every day, employers and employees become more skilled at cultivating an online network of followers and then turning those contacts into dollars. Employees increasingly use social media accounts to expand their business activities, be it the journalist who breaks news on Twitter or the realtor who advertises open houses on Facebook. While the ever-expanding use of social media in the course of employment provides immeasurable benefits to both the employer and employee alike, it also creates more problems. Perhaps chief among them: Whose account is it? Whereas employers and departing employees used to fight over the rolodex, they now jockey over the password that delivers direct access to thousands of business contacts.

While password disputes are beginning to trickle into courts across the country, early jurisprudence on the issue is wildly inconsistent. Before the floodgates of professional social media account litigation open, courts need to adopt a framework that resolves disputes consistently and fairly. This Comment suggests that the license agreements underlying social media accounts should constitute personal property. Then, the Comment provides a two-step approach for determining whether the employer or employee is the real licensee of the account and, therefore, receives the property rights that attach to the license.

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INTRODUCTION

Renowned ESPN NFL reporter Adam Schefter has nearly 6 million Twitter followers.¹ Schefter has certainly worked hard to cultivate such a large following. He has spent his entire professional career earning the trust of valuable sources and works tirelessly to exchange information with NFL insiders who provide the substance of his reports.² The preeminent NFL reporter frequently communicates on two phones at once and rarely,

1. Adam Schefter (@AdamSchefter), TWITTER, <https://twitter.com/AdamSchefter> [<https://perma.cc/XEW3-U333>].

2. See Rick Maese, *Adam Schefter is NFL Reporting Machine*, WASH. POST (Sept. 2, 2014), https://www.washingtonpost.com/sports/redskins/adam-schefter-is-nfl-reporting-machine/2014/09/02/93e009f2-32cc-11e4-9f4d-24103cb8b742_story.html [<https://perma.cc/4RQM-QU8M>].

if ever, takes vacation.³ Yet, it is a near-certainty that Schefter would have far fewer followers without the ESPN name in his biography. Other significant NFL reporters such as FOX's Jay Glazer and *Sports Illustrated*'s Peter King, for example, have 1.09 million⁴ and 1.82 million⁵ followers, respectively.

Now, suppose Schefter leaves ESPN and signs with a competing news outlet when his contract expires. Who retains access to those followers?⁶ Both ESPN and Schefter have substantial interests in the account. For ESPN, the account represents direct access to 6 million football fans who may click on links to its website⁷ or tune into ESPN programming after seeing a post promoting the network.⁸ ESPN would be justified in believing that the Twitter account was part of the employee's work created within the scope of his employment. This could give it the superior claim under the copyright work-made-for-hire doctrine.⁹ On the other side of the coin, Schefter's large following allows him to negotiate for a higher wage or even send out endorsements for sponsors,¹⁰ rendering the account potentially lucrative. Schefter also has a compelling claim to the account—it is an extension of his personality and the fruits of his labor, not all of which his employment necessarily requires.

This hypothetical conflict is becoming reality in offices across the country. In the modern workplace, employers are encouraging or expecting their employees to maintain social media presences.¹¹ The chief

3. *Id.*

4. Jay Glazer (@JayGlazer), TWITTER, <https://twitter.com/JayGlazer> [<https://perma.cc/RAS4-G53J>].

5. Peter King (@SI_PeterKing), TWITTER, https://twitter.com/SI_PeterKing [<https://perma.cc/V9BB-2TAG>].

6. Of course, this question assumes the parties have not contracted to an assignment of rights.

7. *See, e.g.*, Adam Schefter (@AdamSchefter), TWITTER (Aug. 5, 2016, 6:34 AM), <https://twitter.com/AdamSchefter/status/761510581484400641> [<https://perma.cc/V862-J5D2>] (sharing an ESPN link on his Twitter account).

8. *See, e.g.*, Adam Schefter (@AdamSchefter), TWITTER (Aug. 4, 2016, 8:49 PM), <https://twitter.com/AdamSchefter/status/761363389050458112> [<https://perma.cc/Q6NB-DWLK>].

9. *See* 17 U.S.C. § 201(b) (2012).

10. Timothy Burke, *Pro-Domino's Pizza Tweets from Adam Schefter & Chris Mortensen Were—You Guessed It—Ads*, DEADSPIN (Jan. 5, 2016, 2:45 PM), <http://deadspin.com/pro-dominos-pizza-tweets-from-adam-schefter-chris-mor-1751177008> [<https://perma.cc/L378-PCE9>].

11. *See, e.g.*, *Eagle v. Morgan*, No. 11-4303, 2013 U.S. Dist. LEXIS 34220, at *3 (E.D. Pa. Mar. 12, 2013) (“As time passed, it became the policy for Edcomm not only to urge employees to create LinkedIn accounts, but also to become involved in the account content.”).

executive officers of companies use LinkedIn to foster relationships with clients¹² or Twitter to keep the public abreast of their developments.¹³ Further down the chain of command, salesmen pitch products on Facebook accounts, and public relations directors carefully groom corporate Twitter profiles. More and more companies are hiring employees for the exclusive purpose of running their social media accounts from behind the curtain.¹⁴ Yet, some things about the employment relationship never change. Employers and employees will always split for sundry reasons. The only difference is that now, the fight over the rolodex becomes the fight over the password.

Disputes over the rights to use social media accounts are beginning to creep into caselaw.¹⁵ But, so far, the outcomes have been inconsistent, if not entirely contradictory. This Comment explores the property interests that employers and employees have in professional social media accounts and suggests one framework for resolving the conflicts surrounding those interests. Part I explains three of the most prominent social media platforms that professionals frequently use, the value of a social media connection, and why this issue is so disputed. Part II discusses the body of caselaw that is beginning to form in this area and explains the need for consistency moving forward. Part III proposes a framework that courts should adopt when addressing disputes over the access to social media accounts.

12. *See id.*

13. *See, e.g.,* Elon Musk (@elonmusk), TWITTER (July 20, 2016, 5:57 PM), <https://twitter.com/elonmusk/status/755929747763245061> [<https://perma.cc/SEGY-B5A9>] (describing the “Tesla Master Plan, Part Deux”).

14. *See* Social Media Manager Jobs, LINKEDIN, <https://www.linkedin.com/jobs/social-media-manager-jobs> [<https://perma.cc/FF8D-DBUP>]. On March 17, 2017, a search for “Social Media Manager” yielded 1,080 results under job openings in the United States on LinkedIn. *Id.*

15. *See, e.g., In re* CTLI, LLC, 528 B.R. 359 (Bankr. S.D. Tex. 2015); *Mattocks v. Black Entm’t Television LLC*, 43 F. Supp. 3d 1311 (S.D. Fla. 2014); *Eagle*, 2013 U.S. Dist. LEXIS 34220.

I. SOCIAL MEDIA ACCOUNTS: WHAT THEY ARE AND HOW THEY ARE REPLACING THE ROLODEX

A. *Common Social Media Platforms*

From anecdotal observation, professionals most commonly use three social media platforms: Facebook, Twitter, and LinkedIn.¹⁶

1. *Facebook*

Currently, Facebook is the world's preeminent social media platform.¹⁷ The number of users—1.23 billion people used Facebook on a daily basis during December 2016—indicates how Facebook is engrained in modern society.¹⁸ Individual users engage with the platform by creating profiles that reflect their identities where they post photos, publish personal information, and generally create an online community with their friends and family.¹⁹ Facebook users “friend” one another, thereby allowing them to access the information on each other's profiles and view the posts that each user makes.²⁰

An individual's use of Facebook differs from the commercial use of the platform, though. Facebook has drawn a line in the sand between individual users and business users by developing the “Pages” feature.²¹ Whereas individual users create and manage personal accounts, business users develop Pages.²² A Page is a free, easy way for companies to generate brand exposure and leads, and many companies have reaped the

16. Instagram is also a frequently-used platform; however, again anecdotally speaking, it is better utilized for advertising than it is to convey messages or reach clients and customers. Further, Instagram is often accessed through Facebook and Twitter posts.

17. Richard A. Gershon, *Facebook: A Business Perspective on the Power of Intelligent Networking and Social Media*, in *HANDBOOK OF SOCIAL MEDIA MANAGEMENT: VALUE CHAIN AND BUSINESS MODELS IN CHANGING MEDIA MARKETS* 375, 387 (Mike Friedrichsen & Wolfgang Mühl-Benninghaus eds., 2013), http://ayorek.org/files/References/Handbook%20of%20Social%20Media%20Management_%20Value%20Chain%20and%20Bus.pdf [<https://perma.cc/7T4H-9PYJ>].

18. *Company Info*, FACEBOOK NEWSROOM, <http://newsroom.fb.com/company-info/> [<https://perma.cc/H434-2EEW>].

19. *See Your Profile and Settings*, FACEBOOK, https://www.facebook.com/help/239070709801747?helpref=popular_topics [<https://perma.cc/29XG-6Q6B>].

20. *Friending*, FACEBOOK, <https://www.facebook.com/help/1540345696275090> [<https://perma.cc/K4GB-B5JJ>].

21. *Pages*, FACEBOOK, <https://www.facebook.com/help/282489752085908> [<https://perma.cc/QPC5-V4AL>] (“Pages are for brands, businesses, organizations and public figures to create a presence on Facebook, whereas profiles represent individual people.”).

22. *See id.*

benefits of establishing a Facebook presence through this feature.²³ Any Facebook user can “like” a Page, and, subsequently, posts from that Page will appear on the user’s homepage.²⁴ Additionally, users who “like” the Page can engage with the company by making comments on the Page, sharing the Page’s posts, and sometimes even sending private messages to the administrators of that Page.²⁵ Through the ability to have direct conversations with users, advertise, and create a brand identity through communications, the Pages feature gives companies a litany of tools to engage with clients and customers.²⁶

Given its immense popularity, it is no surprise that Facebook is a key tool for companies of all sizes. By late 2015, more than 50 million businesses were using Facebook Pages.²⁷ At that time, users were posting 2.5 billion comments on business Pages each month.²⁸

Before individual users can register and access their accounts, they must accept a Statement of Rights and Responsibilities, which sets out the terms of the relationship between Facebook and the user.²⁹ Through those terms, Facebook reserves the right to terminate a user’s access to an account if the user violates the terms or creates “risk or possible legal exposure.”³⁰ The terms place limits on how users can act on Facebook, such as prohibiting users from using their accounts “primarily for [their] own commercial gain.”³¹ Business users forming Pages must also accept a separate Terms agreement before creating their Pages.³² Incorporated into the Pages Terms is the same Statement of Rights and Responsibilities that

23. See, e.g., *Real Businesses. Real Results.*, FACEBOOK, <https://www.facebook.com/business/success/> [<https://perma.cc/6WAD-LCNY>].

24. *Pages*, *supra* note 21.

25. See *Like and Interact with Pages*, FACEBOOK, <https://www.facebook.com/help/1771297453117418/> [<https://perma.cc/2DPQ-EHFH>].

26. See *Facebook Pages*, FACEBOOK, <https://www.facebook.com/business/products/pages> [<https://perma.cc/RH9Z-GJHA>].

27. Kathleen Chaykowski, *Number of Facebook Business Pages Climbs to 50 Million With New Messaging Tools*, FORBES (Dec. 8, 2015, 3:07 PM), <http://www.forbes.com/sites/kathleenchaykowski/2015/12/08/facebook-business-pages-climb-to-50-million-with-new-messaging-tools/#731b601c1c2c> [<https://perma.cc/3XJZ-723Z>].

28. *Id.*

29. See *Statement of Rights and Responsibilities*, FACEBOOK, <https://www.facebook.com/legal/terms> [<https://perma.cc/5KG5-K6HT>] (last updated Jan. 30, 2015).

30. *Id.* (“[W]e can stop providing all or part of Facebook to you.”).

31. *Id.* (“You will not use your personal timeline primarily for your own commercial gain, and will use a Facebook Page for such purposes.”).

32. See *Facebook Pages Terms*, FACEBOOK, https://www.facebook.com/page_guidelines.php [<https://perma.cc/LTJ9-TW7B>] (last updated Mar. 30, 2017).

applies to individual users.³³ Though Facebook does not expressly identify the legal relationship it attaches to accounts and Pages, the agreements for both individual account users and Pages users likely constitute licenses to use the Facebook platform.³⁴ Two terms are particularly pertinent to the subject matter of this Comment: (1) “You will not share your password . . . , let anyone else access your account, or do anything else that might jeopardize the security of your account,” and (2) “[y]ou will not transfer your account (including any Page or application you administer) to anyone without first getting our written permission.”³⁵

2. Twitter

Twitter is a social media platform through which users create posts—called “Tweets”—limited to 140 characters or fewer.³⁶ Other users can “follow” the account, which means that every time the account posts a new Tweet, that Tweet will show up on the follower’s homepage.³⁷ Users can unfollow an account at any time, meaning they unsubscribe from that

33. *See id.*

34. *See generally* Elizabeth I. Winston, *Why Sell What You Can License? Contracting Around Statutory Protection of Intellectual Property*, 14 GEO. MASON L. REV. 93, 98 (2006) (“A license is a contract between two parties, one of whom owns intellectual property (the licensor) that the other (the licensee) wishes to use. A licensee . . . may only use the intellectual property in the manner allowed by the license.” (footnote omitted)). The terms agreement could modernly be classified as a point-and-click agreement, which is “[a]n electronic version of a shrinkwrap license in which a computer user agrees to the terms of an electronically displayed agreement by pointing the cursor to a particular location on the screen and then clicking.” *Point-and-Click Agreement*, BLACK’S LAW DICTIONARY (10th ed. 2014). Though identifying online contracts by a uniform name has proven difficult, the majority of such contracts contain terms that constitute a license:

Computer information contracts are “licenses.” The standard terms of these licenses set out what the parties contracting for the information, i.e., the licensees, may do with it. Typically these licenses limit the number of users the licensee may permit to use the information, restrict the uses that the licensee may put the information to, and control the circle of recipients to whom the licensee may distribute the information.

James R. Maxeiner, *Standard-Terms Contracting in the Global Electronic Age: European Alternatives*, 28 YALE J. INT’L L. 109, 111 (2003). *See also* MICHAEL L. RUSTAD, *SOFTWARE LICENSING, CLOUD COMPUTING AGREEMENTS, OPEN SOURCE, AND INTERNET TERMS OF USE: A PRACTICAL APPROACH TO INFORMATION AGE CONTRACTS IN A GLOBAL SETTING* 442 (2016–2017 ed. 2016) (“The vast majority of wrap contracts are standard form licenses defined in Uniform Computer Information Transaction Act (UCITA) as transactions targeting a broad market.”).

35. *Statement of Rights and Responsibilities*, *supra* note 29.

36. *New User FAQs*, TWITTER, <https://support.twitter.com/articles/13920> [<https://perma.cc/KZ8Z-BRZH>].

37. *Id.*

account and will no longer see any of its Tweets unless the users access them directly.³⁸ An account can be private or public.³⁹ If the account is public, any person using the Internet can access the account and view every Tweet it has ever posted.⁴⁰ If the account is private, then only approved users can read Tweets sent from the account.⁴¹

While Twitter has fewer global users than Facebook, the amount of users who regularly engage with the platform is still staggering. As of May 2016, Twitter users had created 1.3 billion accounts, with 310 million of those accounts active monthly.⁴² According to *Brandwatch*, 65.8% of companies in the United States with more than 100 employees use Twitter accounts for marketing.⁴³ The average Twitter user follows roughly five businesses.⁴⁴ Customer service conversations on Twitter are increasingly common, and “[c]ompanies using Twitter for customer service see a 19% lift in customer satisfaction.”⁴⁵ As a result, more than 90% of companies Tweet daily.⁴⁶

When users first create an account, they must agree to Twitter’s Terms of Service, which creates a license to use the Twitter software per the express terms of the agreement.⁴⁷ According to the Terms, Twitter may “suspend or terminate your account or cease providing you with all or part of the Services at any time for any or no reason.”⁴⁸

Unlike Facebook, Twitter does not have a separate platform particularly for business users, but it does envision that some users will register Twitter accounts through the scope of their employment. Under

38. *Unfollowing People on Twitter*, TWITTER, <https://support.twitter.com/articles/15355> [<https://perma.cc/6X9J-28TA>].

39. See *New User FAQs*, *supra* note 36.

40. See *id.*

41. *About Public and Protected Tweets*, TWITTER, <https://support.twitter.com/articles/14016> [<https://perma.cc/G9F8-6S6N>].

42. Kit Smith, *44 Twitter Statistics for 2016*, BRANDWATCH (May 17, 2016), <https://www.brandwatch.com/2016/05/44-twitter-stats-2016/> [<https://perma.cc/NR6U-ESD7>].

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Twitter Terms of Service*, TWITTER, <https://twitter.com/tos?lang=en> [<https://perma.cc/R2CS-UG95>] (“Twitter gives you a personal, worldwide, royalty-free, non-assignable and non-exclusive license to use the software provided to you as part of the Services. This license has the sole purpose of enabling you to use and enjoy the benefit of the Services as provided by Twitter, in the manner permitted by these Terms.”). This classification by Twitter seems appropriate because such standard computer contracts are best classified as licenses. See Maxeiner, *supra* note 34, at 111.

48. *Twitter Terms of Service*, *supra* note 47.

the first section entitled “Who May Use The Services,” the Terms provide that “[i]f you are accepting these Terms and using the Services on behalf of a company, organization, government, or other legal entity, you represent and warrant that you are authorized to do so.”⁴⁹

3. *LinkedIn*

LinkedIn is an online platform that allows professionals to create virtual networks with other professionals and companies.⁵⁰ Users create profiles that resemble an interactive résumé, which detail the user’s job, education, skills, experience, and interests.⁵¹ Users can search for other people and invite them to become a “connection,” which is similar to a friend on Facebook.⁵² Once two users are connected, they can message each other, monitor developments in each other’s careers, and interact with posts that they each make.⁵³ Employers can create Company Pages, on which they can give general information about their businesses, manage groups of employees, post updates, and create connections with colleagues and potential leads.⁵⁴ Employers can also post job openings on the platform, and individual users can search for such job openings and apply directly through LinkedIn.⁵⁵

Well over 400 million individuals use LinkedIn, according to the platform’s official website.⁵⁶ The platform proclaims that it is “the world’s largest professional network on the Internet.”⁵⁷ Like Facebook and Twitter, LinkedIn users must agree to a User Agreement before using the website’s services.⁵⁸ Section 2.2 of the User Agreement seems to set out a clear rule concerning ownership of an account: “[a]s between you and others, your

49. *Id.*

50. *See How LinkedIn Can Help You*, LINKEDIN, <https://www.linkedin.com/help/linkedin/answer/45/how-linkedin-can-help-you?lang=en> [<https://perma.cc/ZWB5-9YF3>].

51. *See Editing Your Profile*, LINKEDIN, <https://www.linkedin.com/help/linkedin/topics/6042/6043> [<https://perma.cc/W6VE-5U9R>].

52. *See Invitations*, LINKEDIN, <https://www.linkedin.com/help/linkedin/topics/6096/6097> [<https://perma.cc/R4G7-3B4Y>].

53. *See Contacting Connections*, LINKEDIN, <https://www.linkedin.com/help/linkedin/topics/6073/6074> [<https://perma.cc/HD9E-W37N>].

54. *See Creating a LinkedIn Company Page*, LINKEDIN, <https://www.linkedin.com/help/linkedin/topics/6227/6228/710> [<https://perma.cc/626M-UTWS>].

55. *See Posting a Job on LinkedIn*, LINKEDIN, <https://www.linkedin.com/help/linkedin/topics/6317/6318/166> [<https://perma.cc/F7MV-J56W>].

56. *About Us*, LINKEDIN, <https://press.linkedin.com/about-linkedin> [<https://perma.cc/4MZA-3Y98>].

57. *Id.*

58. *See User Agreement*, LINKEDIN, <https://www.linkedin.com/legal/user-agreement> [<https://perma.cc/FWN8-U8BX>].

account belongs to you.”⁵⁹ LinkedIn reserves the right to limit a user’s use or terminate an account entirely.⁶⁰ LinkedIn users lose the right to access their accounts upon termination.⁶¹ Just as Facebook and Twitter grant users licenses, the legal relationship between LinkedIn and account-holders appears to be that of a licensor-licensee.⁶²

4. *License Agreements Underlie All Three Major Social Media Platforms*

Based on an initial review of the use policies governing each social media platform, Facebook, Twitter, and LinkedIn all impliedly or expressly compel users to enter into license agreements. Generally, a license is an agreement between two parties in which a licensor permits a licensee to use the licensor’s property, but only on the terms specified in the contract.⁶³ While licenses spring from contracts,⁶⁴ Part III of this Comment discusses how property interests also inhere in them.⁶⁵

B. *The Indefinite Value of a Social Media Connection*

Professionals crave a strong social media presence.⁶⁶ A well-managed social media account provides direct access to millions of people who could become clients, customers, or valuable resources to career development. Accordingly, there appears to be some monetary value attached to each friend, follower, or connection. Few reliable studies have addressed the exact valuation of such a connection, but courts have shown

59. *Id.*

60. *Id.* (“[Section] 3.4. Limits[:] LinkedIn reserves the right to limit your use of the Services, including the number of your connections and your ability to contact other Members. LinkedIn reserves the right to restrict, suspend, or terminate your account if LinkedIn believes that you may be in breach of this Agreement or law or are misusing the Services (e.g. violating any Do and Don’ts).”).

61. *Id.*

62. This is particularly supported by LinkedIn’s restriction on the account-holder’s use of the account. *See supra* text accompanying note 60.

63. *See* Winston, *supra* note 34, at 98.

64. *See, e.g.,* McCoy v. Mitsuboshi Cutlery, Inc., 67 F.3d 917, 920 (Fed. Cir. 1995) (quoting Power Lift, Inc. v. Weatherford Nipple-Up Sys., Inc., 871 F.2d 1082, 1085 (Fed. Cir. 1989)).

65. *See generally* Christopher M. Newman, *A License Is Not A “Contract Not To Sue”*: *Disentangling Property and Contract in the Law of Copyright Licenses*, 98 IOWA L. REV. 1101 (2013).

66. KENNETH OLMSTEAD, CLIFF LAMPE & NICOLE B. ELLISON, PEW RESEARCH CENTER, *SOCIAL MEDIA AND THE WORKPLACE* 5 (2015) (“78% of workers who use social media platforms for work-related purposes say social media is useful for networking or finding new job opportunities.”).

a willingness to recognize some value—most notably in *PhoneDog v. Kravitz*.⁶⁷

PhoneDog involved a dispute between a website-blog, PhoneDog, and a former employee, Noah Kravitz.⁶⁸ In April 2006, Kravitz created and began operating a Twitter account with the name @PhoneDog_Noah, through which he promoted PhoneDog content and services.⁶⁹ The account amassed approximately 17,000 followers during the course of Kravitz's employment.⁷⁰ In October 2010, Kravitz left the company and PhoneDog requested he terminate use of the account.⁷¹ Kravitz refused and instead changed the account name to @noahkravitz.⁷² PhoneDog brought action in federal district court, alleging, *inter alia*, conversion and misappropriation of trade secrets.⁷³ PhoneDog alleged \$340,000 in damages, calculated by multiplying 17,000 followers by \$2.50 per follower, then multiplying that total, \$42,500, by eight months.⁷⁴ Kravitz moved to dismiss the action for lack of subject matter jurisdiction, alleging that PhoneDog could not meet the \$75,000 amount-in-controversy required when a case hinges on diversity of citizenship.⁷⁵ The district court recognized the novelty of the issues that PhoneDog raised, but it ultimately refused to dismiss the complaint for lack of subject matter jurisdiction, concluding:

[w]hether PhoneDog has any property interest in the Twitter account cannot be resolved on the record at this stage of the case. Likewise, should PhoneDog be able to establish that it has some property interest in the Twitter account or the password and follower list, the question becomes what is the proper valuation of such items. Again, the parties have proffered competing methodologies for valuing the account, and on this limited record, the Court is unable to resolve this dispute at this juncture.

67. *PhoneDog v. Kravitz*, No. C 11-03474, 2011 U.S. Dist. LEXIS 129229 (N.D. Cal. Nov. 8, 2011); *see also, e.g.*, *Maremont v. Susan Fredman Design Grp., Ltd.*, No. 10 C 7811, 2014 U.S. Dist. LEXIS 26557, at *13 (N.D. Ill. Mar. 3, 2014) (concluding that there could have been a “marketable commercial interest” when a social media user “created her Twitter and Facebook accounts for her own economic benefit, knowing that if she left her employment . . . she could promote another employer to her Twitter and Facebook followers.”).

68. *PhoneDog*, 2011 U.S. Dist. LEXIS 129229, at *1.

69. *Id.* at *2–3.

70. *Id.* at *3.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at *3, *8 (multiplying the value of the account's followers by eight months because that is how long Kravitz used the account before PhoneDog filed its action).

75. *Id.* at *3–4.

At the same time, PhoneDog has expressly alleged \$340,000 in damages stemming from its misappropriation and interference with economic advantage claims. The Court cannot say that PhoneDog's allegation as to the amount in controversy is in bad faith or that it appears beyond a legal certainty that the claim is really for less than the jurisdictional amount.⁷⁶

While the court did not come close to deciding the proper valuation for a follower, or even if PhoneDog would have a right to damages, it dismissed outright the notion that there is absolutely no monetary value attached to a follower.⁷⁷ The parties eventually settled without a final resolution on these issues, and Kravitz retained custody of the account.⁷⁸

The court's reluctance to dismiss the case in *PhoneDog*, along with the uptick of social media cases on dockets, suggests that courts recognize the financial implications of access to social media accounts. In cases like *PhoneDog*, employers and employees are not quibbling over passwords in vain. Access to an established account with a large following is a legitimate asset.⁷⁹

II. SOCIAL MEDIA DISPUTES TRICKLE INTO COURTS

The body of caselaw surrounding social media access disputes is small, but it is growing. *PhoneDog* was a harbinger of more password conflicts to come. In the five years since, state and federal courts across the country have grappled with novel issues and arguments in this field. Following is a discussion of several cases that have addressed the hypothetical Schefter-ESPN Twitter account conflict in one way or another. More specifically, this Part begins by addressing whether courts have identified a property interest when adjudicating these cases.

76. *Id.* at *12–13.

77. *See id.*

78. *Dispute Over Ownership of Twitter Account Settles*, WINSTON & STRAWN LLP (Dec. 17, 2012), <http://www.winston.com/en/privacy-law-corner/dispute-over-ownership-of-twitter-account-settles.html> [<https://perma.cc/FFT9-4L56>].

79. Zoe Argento, *Whose Social Network Account? A Trade Secret Approach to Allocating Rights*, 19 MICH. TELECOMM. & TECH. L. REV. 201, 209–10 (2013) (“Social network platforms began as sites for individual use, but an increasingly broad range of organizations see participation in them as a necessity. Social network participation can repay organizations with free access to vast numbers of people, amplification of communication through network effects, consumer feedback, access to niche markets, and enhanced brand loyalty. As a result, organizations increasingly attempt to engage with the public not only by advertising on social network platforms, but also by creating social network accounts and entering the conversation themselves.” (footnote omitted)).

A. *PhoneDog, In re Borders, and Mattocks: Early Cases Identify Property Interests, or a Lack Thereof, in Social Media Accounts*

Although the trial court in *PhoneDog* did not reach a final conclusion on the employer's conversion claim, the court seemed to approach the question as if the Twitter account at issue was, indeed, property that was capable of being converted.⁸⁰ The employee moved to dismiss the conversion claim, and the court denied the request, writing:

Mr. Kravitz first argues that PhoneDog has failed to sufficiently allege that it owns or has the right to immediately possess the Account. PhoneDog, however, maintains that it has adequately alleged that it was and still is the owner of the Account and is entitled to possession of the Account. It points out that it has alleged that it gave Mr. Kravitz permission to use the Account during his employment, but he has refused to surrender the Account following his departure from PhoneDog. At this stage of the proceedings, the Court finds that PhoneDog has adequately alleged that it owns or has the right to possess the Account. As discussed above, the nature of that claim is at the core of this lawsuit and cannot be determined on the present record.⁸¹

In *In re Borders Group, Inc.*, a bankruptcy court in 2011 declared that social media accounts were assets that a seller group had to transfer to the buyer, similarly placing social media accounts on the property side.⁸² Finding property interests in a social media account would seem to match the modern judicial trend of finding that modern bits of technology, such as Internet domain names, constitute items of personal property.⁸³ However, in *Mattocks v. Black Entertainment Television LLC*, one of the earliest social media cases litigated all the way through trial, a Florida federal district court came down on the other side of that issue.⁸⁴ In *Mattocks*, the

80. *PhoneDog*, 2011 U.S. Dist. LEXIS 129229, at *26.

81. *Id.* at *26–27 (citations omitted).

82. *In re Borders Grp., Inc.*, No. 11-10614, 2011 Bankr. LEXIS 4606, at *37–38, *38 (Bankr. S.D.N.Y. Sept. 27, 2011).

83. Argento, *supra* note 79, at 274 (“In some cases, courts have found that similar items qualified as property and could be the subject of conversion. In *Kremen v. Cohen*, for example, the Ninth Circuit held that, under California law, an internet domain name was personal property for purposes of a conversion claim. Similarly, in *Staton Holdings, Inc. v. First Data Corp.*, the Northern District of Texas found that, under Texas law, a telephone number could be subject to conversion as personal property. 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.” (footnotes omitted)). It should be noted that in this article, Professor Argento was actually arguing that social media accounts should *not* be treated as property. *See id.* at 273–78.

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

plaintiff, a fan of the TV program *The Game*, created a Facebook Fan Page to discuss the show.⁸⁵ Black Entertainment Television (BET), the defendant in the case, eventually hired the plaintiff on a part-time basis to manage the Page.⁸⁶ BET encouraged its viewers to like the Page, placed its logos and trademarks in various sections of the Page, and held editorial control over what the plaintiff could and could not post.⁸⁷ The plaintiff still created most of the content on the Page, but other BET employees also contributed.⁸⁸ The two parties later signed a “Letter Agreement,” under which both the plaintiff and BET held administrative rights in the Page, such that they both could update the Page at their own discretion.⁸⁹ The plaintiff also created a Twitter account to promote the show.⁹⁰

A year later, the relationship between the parties deteriorated when the plaintiff informed BET that she would restrict BET’s access to the account until they entered into a full-time employment agreement.⁹¹ The day after conveying this message, the plaintiff removed administrative capabilities from BET’s users and took exclusive control of the Page once again.⁹² In response, BET sent a cease and desist letter to the plaintiff informing her that she could no longer use BET’s intellectual property.⁹³ BET petitioned Facebook to shut down the plaintiff’s Page and Facebook obliged, migrating the followers to a BET-owned Page and terminating the plaintiff’s account.⁹⁴ Similarly, BET successfully persuaded Twitter to disable her account on that platform.⁹⁵ The plaintiff brought an action against BET alleging, *inter alia*, conversion and tortious interference with the contractual relationships she had with Facebook and Twitter.⁹⁶ The court granted summary judgment to defendant BET on the tortious interference claim because an element of the tort is “the absence of any justification or privilege,”⁹⁷ and the court deemed BET justified in

85. *Id.* at 1315. The “Fan” Page was a subset of Facebook’s Page platform; this account was substantially similar to the type of account a business makes, rather than an individual profile of the plaintiff. *See id.*

86. *Id.* at 1315–16.

87. *Id.* at 1316.

88. *Id.*

89. *Id.*

90. *See id.* at 1317.

91. *Id.* at 1316.

92. *Id.*

93. *Id.* at 1316–17.

94. *Id.* at 1317.

95. *Id.*

96. *Id.*

97. *Id.* at 1318 (quoting *U.S. Life Ins. Co. v. Logus Mfg. Corp.*, 845 F. Supp. 2d. 1303, 1320 (S.D. Fla. 2012)).

interfering.⁹⁸ The court also granted BET summary judgment on the conversion claim, stating:

Based on the record, Mattocks cannot establish that she owns a property interest in the “likes” on the FB Page. As explained . . . , “liking” a Facebook Page simply means that the user is expressing his or her enjoyment or approval of the content. At any time, moreover, the user is free to revoke the “like” by clicking an “unlike” button. So if anyone can be deemed to own the “likes” on a Page, it is the individual users responsible for them. 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.⁹⁹

Thus, the district court in *Mattocks* refused to find any property interest in an account.

Because courts do not know where to even begin when labeling the entities in dispute, they have arrived at markedly different conclusions, in turn spitting out a body of law that is wholly unclear and unreliable. The reluctance to label a social media account as a piece of personal property is a key factor in the unpredictability plaguing this body of law. For instance, consider two of the major decisions that squarely apply to the Schefter-ESPN hypothetical: *Eagle v. Morgan*¹⁰⁰ and *In re CTLI*.¹⁰¹

B. Eagle v. Morgan: Denying Property Interests but Protecting Individual Investment in Social Media Accounts

Eagle concerned a company executive’s frequently used personal LinkedIn account.¹⁰² The plaintiff, Linda Eagle, co-founded the company (Edcomm) with a man who felt strongly that LinkedIn could be a valuable sales and marketing tool.¹⁰³ Thus, he pushed all employees to create and actively manage LinkedIn accounts.¹⁰⁴ Edcomm did not pay for the

98. *Id.* at 1319 (“A defendant is not a ‘stranger’ to a business relationship if the defendant ‘has any beneficial or economic interest in, or control over, that relationship.’ Thus, a party cannot be liable for tortious interference ‘when it has a supervisory interest in how the relationship is conducted or a potential financial interest in how a contract is performed.’ . . . The record in this case shows conclusively that BET was not a ‘stranger’ to Mattocks’s user agreements with Facebook and Twitter.” (citations omitted)).

99. *Id.* at 1321 (citations omitted).

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

101. *In re CTLI, LLC*, 528 B.R. 359 (Bankr. S.D. Tex. 2015).

102. *See Eagle*, 2013 U.S. Dist. LEXIS 34220, at *2–3.

103. *Id.* at *3.

104. *Id.*

LinkedIn accounts or require its employees to have accounts.¹⁰⁵ However, Edcomm believed the accounts were its property because it provided guidelines for LinkedIn use.¹⁰⁶ Further, employees registered LinkedIn accounts with Edcomm e-mail domains, on Edcomm's computers, and with Edcomm's permission.¹⁰⁷ Despite Edcomm's belief that it owned the accounts, it did not contract with its employees to declare rights to their LinkedIn accounts if the employees ever left the company.¹⁰⁸ At least in Eagle's case, Edcomm employees shared passwords so that a company representative could respond to clients in a timely manner, even if the account user was unavailable.¹⁰⁹

Eagle, co-founder of the company, built a LinkedIn network of 4,000 contacts.¹¹⁰ Conflict arose when Eagle's employment was terminated and her co-workers changed her LinkedIn password, leaving her without access to her contacts or messages.¹¹¹ In the days following Eagle's dismissal, the most important information on her account—including the name, picture, education, and experience—was changed to reflect Sandi Morgan, the interim CEO and defendant in this case.¹¹² The URL of the account did not change, though, such that a Google search for Linda Eagle would still direct users to the account.¹¹³ Trial testimony revealed that Eagle was responsible for \$6.6 million in sales one year, and more than 70% of her sales came from existing contacts that she typically communicated with on the LinkedIn platform.¹¹⁴

In court, Eagle brought many claims against Edcomm, including the tort of conversion.¹¹⁵ On the conversion claim, the court ruled in favor of defendant Edcomm, concluding: “[a]s the LinkedIn account is not tangible chattel, but rather an intangible right to access a specific page on a computer, [Eagle] is unable to state a cause of action for conversion.”¹¹⁶

105. *Id.*

106. *See id.* at *4.

107. *See id.* at *5.

108. *Id.* at *6.

109. *Id.*

110. *Id.* at *11.

111. *Id.* at *6.

112. *Id.* at *8. Some portions of the profile, such as a section for honors and awards, still reflected the information of Eagle. *Id.*

113. *Id.*

114. *Id.* at *10.

115. *Id.* at *14.

116. *Id.* at *27–29 (concluding that the LinkedIn account was similar to “items such as software, domain names, and satellite signals,” and further that “[w]hile courts in other states have expanded the tort of conversion to apply to intangible property, in Pennsylvania this expansion is limited ‘to the kind of intangible rights that are customarily merged in, or

However, Eagle did succeed on three of her claims: (1) unauthorized use of name, (2) invasion of privacy by misappropriation of identity, and (3) misappropriation of publicity.¹¹⁷ The court's reasoning on the misappropriation of publicity claim is particularly interesting:

Plaintiff maintains an exclusive right to control the commercial value of her name and to prevent others from exploiting it without permission. By using Plaintiff's password to enter her LinkedIn account, changing the password to block Dr. Eagle from entering it, and then *altering her account to reflect Sandi Morgan's information—in lieu of simply creating a new LinkedIn account for Ms. Morgan*—Defendant Edcomm deprived Plaintiff of the commercial benefit of her name. As stated previously, as a result of Edcomm's actions, a person who was specifically searching for Dr. Eagle in connection with business opportunities would unwittingly be directed to an Edcomm webpage with Sandi Morgan's name, picture, and credentials. This result clearly provided promotional benefit for Edcomm and constitutes the appropriation of a name for commercial use. Such actions therefore rise to the level of tortious activity.¹¹⁸

While this court did not deem Eagle the account owner—on the grounds that nobody could own the account—it did seem to insinuate that it would be unlawful for a company to seize the account and reap the benefit that Eagle sowed under her own identity.

The facts of *Eagle* are more damning for the employer than most scenarios because the profile still contained components of the plaintiff's name and credentials. But, in a broader context, the company took a body of work a former employee created and simply swapped out the user and name on the account.¹¹⁹ This is the exact type of conduct any company would engage in if it could gain the rights to a former employee's account. Further, it would be difficult to completely expunge every trace of a user from any account that the user actively manages.¹²⁰ Courts could easily lean on this determination to find that repurposing a former employee's social media account for the company's benefit could amount to tort liability against the company.

identified with, a particular document (for example, a deed or a stock certificate).” (quoting *Giordano v. Claudio*, 714 F. Supp. 2d 508, 524 (E.D. Pa. 2010)).

117. *Id.* at *50.

118. *Id.* at *23–24 (emphasis added).

119. *See id.* at *8.

120. Consider, for example, a salesman who posts Tweets advertising a service and directing interested clients to send messages to his personal email address or phone number. The identity of that employee is embedded into the account, and a website search for his name could possibly turn up results for those Tweets sent from the account. These sorts of digital fingerprints will accompany any social media account.

Furthermore, the *Eagle* court actually found that the plaintiff could have had a viable action for tortious interference of contract had she properly alleged damages:

[T]he Court can reasonably infer from the existence of her account that Plaintiff had in fact entered into a contractual relationship with LinkedIn. Moreover, Plaintiff has established that, by entering her account and changing her password, Defendant Edcomm acted with purpose or intent to harm Plaintiff by preventing that relationship from continuing. Edcomm asserts that it had a privilege to enter Dr. Eagle's account under Edcomm's policy that it "owned" its employees' LinkedIn accounts and could "mine" them for information upon departure of those employees. As set forth above in the Findings of Fact, however, no such official policy existed. Moreover, the LinkedIn User Agreement clearly indicated that the individual user owned the account.¹²¹

This finding adds to the body of law that favors the employee when employers and employees battle over professional social media account access. In sum, even though *Eagle* refused to recognize a property interest in the social media accounts at issue, it seemed to favor protecting the employee's interests in the account.

C. *In re CTLI: Protecting Employer Interests in Social Media Accounts*

On the other hand, the bankruptcy court in *In re CTLI* disagreed with *Eagle* on both the property question and the employer-employee question.¹²² In that case, a man named Jeremy Alcede opened a firearms store (the company) that eventually went into bankruptcy.¹²³ Alcede created and managed a Facebook Page entitled "Tactical Firearms."¹²⁴ Alcede managed two Facebook accounts: a "friends page" that was his own personal profile and a "likes page," the aforementioned Tactical Firearms Page,¹²⁵ which he more affirmatively managed in his professional capacity as the owner of the firearms store.¹²⁶ As part of the bankruptcy action, the court required the company to transfer its assets to the new owner.¹²⁷ Specifically, the order required the company to deliver "possession and control" of the password to the company's Facebook account to the new

121. *Id.* at *30.

122. See generally *In re CTLI, LLC*, 528 B.R. 359 (Bankr. S.D. Tex. 2015). At the time of the writing of this Comment, *In re CTLI* was one of the most recently published cases that addressed social media interests as between an employer and a former employee.

123. *Id.* at 362.

124. *Id.* at 367.

125. *Id.* at 365.

126. See *id.* at 367–68.

127. *Id.* at 362.

owner.¹²⁸ Alcede refused to relinquish control of the account, arguing that the account belonged to him personally and did not belong to the company.¹²⁹

The bankruptcy court in *In re CTLI* began its analysis by noting that Texas courts had never determined whether social media accounts carry property interests.¹³⁰ Then, the court discussed the disconnect between other jurisdictions that considered the issue, noting *Mattocks*' holding that an account holder could not have an ownership interest in revocable likes, which contradicts *In re Borders Group*'s and other courts' holdings that social media accounts have property interests because they are tantamount to subscriber lists.¹³¹ In reconciling the holdings of other courts with the broad definition of property in the Bankruptcy Code, the court held that "business social media accounts are property interests."¹³² The court found the *In re Borders Group* line of reasoning more compelling than *Mattocks*, stating: "[l]ike subscriber lists, business social media accounts provide valuable access to customers and potential customers. The fact that those customers and potential customers can opt out from future contact does not deprive the present access of value."¹³³

However, the *In re CTLI* court ultimately considered the Page property of the company and not the personal property of Alcede.¹³⁴ The court identified a number of factors that led to this determination: (1) the company's name was the title of the Page, which raises the presumption that it was the company's Facebook Page; (2) the Page was directly linked to the company's website; (3) Alcede managed another personal page that was separate from this page; (4) the majority of posts were "expressly business-related;" (5) the profile was a Page and not an individual profile; (6) Alcede shared the login information with a business associate; and (7) the use of the Page was "clearly to generate revenues" for the store.¹³⁵ Alcede made several arguments supporting that the profile was his personal

128. *Id.*

129. *Id.* at 363.

130. *Id.* at 366.

131. *Id.*

132. *Id.* at 366–67. The court noted that the "characterization of *individual*—as opposed to business—social media accounts as property is much more difficult," but it ultimately decided that an individual account likely falls under the *persona* interest and would be categorized as property of the estate. *Id.* at 367.

133. *Id.* at 367 (noting further that federal law requires an opt-out process for subscriber email lists, yet courts still consider those property, and therefore it is not determinative that a "like" on Facebook is revocable).

134. *See id.* at 368.

135. *Id.*

property, namely that he “started the page for personal reasons, used it to share personal posts, and accessed it through his personal Profile.”¹³⁶ The court recognized that the Page was likely an extension of Alcede’s personality, but it ultimately concluded that Alcede’s claims were insufficient to overcome the presumption that the account was the company’s asset and property.¹³⁷ Instead of determining that Alcede had a property interest, the court concluded “the proper way to characterize Mr. Alcede’s interest in the reorganized Debtor’s social media accounts is an interest in professional goodwill.”¹³⁸

D. Inconsistency Reigns

In sum, the lower courts considering the social media ownership issue have arrived at markedly different conclusions. The handful of litigated cases mostly involved federal courts applying state law to a novel entity. As a result, there is no certainty for employers and employees who wish to bring social media disputes to the courts.

III. PROVIDING A WORKABLE FRAMEWORK FOR FUTURE PASSWORD DISPUTES

Turning toward the future of this area of law, uniformity requires answers to two major questions: (1) whether a social media account constitutes personal property, and (2) how to decide who has the superior claim when two parties have interests in the account. This Comment answers those two questions accordingly: (1) the license to use a social media account is a piece of personal property, and (2) when the terms of the agreement granting the license are ambiguous as to whom the license runs, courts should adopt a framework similar to *In re CTLI* when determining the identity of the licensee.

As to the question of whether the account is property, recall that the underlying agreements of Facebook, Twitter, and LinkedIn all give users licenses to use their platforms.¹³⁹ Courts rarely hesitate to find property interests in real and personal property licenses.¹⁴⁰ It seems prudent to

136. *Id.*

137. *Id.*

138. *Id.* at 373.

139. *See supra* Section I.A.4.

140. *See, e.g.,* *Lowe v. Scott*, 959 F.2d 323, 334 (1st Cir. 1992) (concluding that there is a property interest in a physician’s license to practice medicine); *In re Cent. Ark. Broad. Co.*, 170 B.R. 143, 146 (Bankr. E.D. Ark. 1994) (finding that a “broadcasting license is valuable intangible property of [a bankruptcy] debtor’s estate”); *Nortel Networks Inc. v. Bd. of Equalization*, 119 Cal. Rptr. 3d 905, 912 (Cal. Ct. App. 2011) (“Intangible property

extend that doctrine to include social media licenses. The analysis and conclusion the bankruptcy court set forth in *In re CTLI*—grouping social media accounts with valuable, intangible business property like subscriber lists—provides a compelling rationale for attaching property interests to social media accounts. The court’s justifications for identifying a property interest in the *account* are equally applicable to identifying a property interest in the license to use the account; thus, the analysis arrives at the same end.

Additionally, as discussed above, monetary value is attached to followers, meaning an account that maintains a base of followers is an asset.¹⁴¹ The users who create social media accounts hold most of the rights included in the so-called property bundle of rights.¹⁴² They, of course, can use and control their accounts.¹⁴³ Users can exclude others from accessing their accounts through password management.¹⁴⁴ Users can create and destroy their accounts at will.¹⁴⁵ Although social media platforms purport to prohibit the sale of an account,¹⁴⁶ users are free to

includes a license to use information under a copyright or patent.” (citing *Preston v. Bd. of Equalization*, 19 P.3d 1148, 1161–63 (Cal. 2001)); *Dodds v. Shamer*, 663 A.2d 1318, 1324 (Md. 1995) (“Together, the characteristics of the executor’s right, salability, assignability, the protection from arbitrary prosecution, and the tangible representation of the privilege to engage in the commerce of alcoholic beverages imbue liquor licenses with sufficient attributes of property for us to hold that a liquor license is property . . .”). In the context of state-granted licenses, “the licensee maintains a property interest in a license prior to its revocation.” 51 AM. JUR. 2D *Licenses and Permits* § 2 (2011).

141. See *supra* Section I.B.

142. See, e.g., Craig Anthony Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENVTL. L. REV. 281, 284–85 (2002) (“The metaphor of property as a bundle of rights dominates contemporary property law. The metaphor’s image is a bundle of sticks in which each stick in the bundle represents a different right associated with property. Scholars disagree about precisely which rights the property bundle contains. The rights most commonly identified with the property bundle include the right to exclude others, the right to possess, the right to use, and the right to alienate (or transfer or dispose of). Other rights that may be included in the property bundle are the rights to manage, receive income, be secure, and maintain quiet enjoyment.” (footnotes omitted)).

143. Though it is worth nothing that the terms agreement for most accounts dictate that the platform has a right to terminate accounts, users have full use and control over the accounts prior to revocation.

144. See, e.g., *Account Security Tips*, TWITTER, <https://support.twitter.com/articles/76036#> [<https://perma.cc/Q5GG-NF32>].

145. *Twitter Terms of Service*, TWITTER, <https://twitter.com/tos?lang=en> [<https://perma.cc/R2CS-UG95>] (“You may end your legal agreement with Twitter at any time by deactivating your accounts and discontinuing your use of the Services.”).

146. See, e.g., *The Twitter Rules*, TWITTER, <https://support.twitter.com/articles/18311> [<https://perma.cc/K9P6-T3G7>] (“You may not buy or sell Twitter usernames.”).

share passwords and transfer the right to use them.¹⁴⁷ Social media users can benefit from their accounts, be it through direct commercial transactions or the development of goodwill or brand identity. Courts are slowly beginning to recognize property interests in nontangible objects,¹⁴⁸ and they should soon accept that social media accounts are valuable entities that deserve the same protections as real property and chattels.

Once courts consider social media accounts—or, more specifically, the licenses to use them—property, the rest of the analysis flows easily. The property interests in the license run to the owner of the license.¹⁴⁹ That just leaves the court to determine the question of fact: the identity of the licensee.

At this point, the analysis depends on the terms of the social media platform at issue. When the terms agreement is unambiguous, the licensee is simply whomever the agreement identifies. However, when the terms agreement is ambiguous, the court must implement a framework for finding the true licensee.

A. *Unambiguous Terms: LinkedIn*¹⁵⁰

Courts routinely uphold online agreements,¹⁵¹ so if the agreement clearly labels a specific licensee, the court must give effect to the terms. LinkedIn's terms fall into this category. The language “[a]s between you and others, your account belongs to you”¹⁵² is strong indicia of whom the platform considers the licensee. This clause alone seems to foreclose the idea that an individual user can create an account on behalf of a larger entity, such as an employer. Another clause in the same section also supports this proposition by specifically distinguishing the user from the

147. Some terms agreements purport to prohibit the sharing of passwords, but that is an unenforceable provision in reality. *See, e.g., Eagle v. Morgan*, No. 11-4303, 2013 U.S. Dist. LEXIS 34220, at *6 (E.D. Pa. Mar. 12, 2013) (illustrating one company's policy of all employees sharing passwords so that they could maintain client communication even when one employee was unavailable).

148. *See Argento, supra* note 79, at 274.

149. This is simple application of the fundamental property law concept that “[o]wnership” is a collection of rights to possess, to use, and to enjoy property, including the right to sell and transmit it.” 63C AM. JUR. 2D *Property* § 26 (2009).

150. This Comment sorts the social media platforms into “unambiguous” or “ambiguous” groups based on the terms agreements that existed as of the time of writing. It is possible the terms could change, so it is important to first look at the terms of the particular platform to determine if they are unambiguous or ambiguous as to license ownership.

151. *See Rustad, supra* note 34, at 443.

152. *User Agreement, supra* note 58.

employer: “Note that for Premium Services purchased by another party for you to use (e.g. Recruiter seat bought by *your employer*), the party paying for the Premium Service . . . may terminate your access to it.”¹⁵³ These terms clearly grant a license exclusively to the user who registers the account and agrees to the terms.

Application of this framework to the facts of *Eagle* would show that Eagle was the true licensee and owner of her LinkedIn account because she was the one who created the account and assented to the terms agreement. As such a property owner, Eagle should have been able to proceed on her conversion claim.

B. *Ambiguous Terms: Facebook and Twitter*

The terms agreements of Facebook and Twitter do not contain the same precise language as the terms of LinkedIn. The closest Facebook comes to labeling a particular licensee is between these two clauses: “You will not share your password . . . , let anyone else access your account, or do anything else that might jeopardize the security of your account,” and (2) “[y]ou will not transfer your account (including any Page or application you administer) to anyone without first getting our written permission.”¹⁵⁴ These are restrictive terms, but they speak more to transferability than ownership. Additionally, whereas LinkedIn specifically separates the user from an employer, Facebook encompasses users who are administering accounts, most likely as agents for larger entities. Under this ambiguous terms agreement, the license could run to the individual user or the company on whose behalf the individual is creating the account.

Twitter’s terms are even less helpful. Its agreement specifically permits users to register accounts on behalf of companies.¹⁵⁵ There are no other terms expressly identifying to whom Twitter is giving a license. Accordingly, as with Facebook, the licensee could be an individual user or an employer.

Identifying the true licensee for such ambiguous accounts becomes a question of fact. To aid in this inquiry, courts should adopt a framework similar to that used in *In re CTLI*.¹⁵⁶ The court in that case used a two-step approach.¹⁵⁷ First, it looked at (1) the title of the page, (2) the type of page,

153. *Id.* (“[Section] 2.2 Your Membership.”) (emphasis added).

154. *Statement of Rights and Responsibilities*, *supra* note 29.

155. *Twitter Terms of Service*, *supra* note 47 (“If you are accepting these Terms and using the Services on behalf of a company, organization, government, or other legal entity, you represent and warrant that you are authorized to do so.”).

156. *See In re CTLI, LLC*, 528 B.R. 359 (Bankr. S.D. Tex. 2015).

157. *See id.* at 368, 372.

and (3) the link between the page and the company's website, finding a presumption of company property because the title was the name of the company and the account was a formal Page rather than an individual profile.¹⁵⁸ For the second part of the analysis, the court looked at the content and the use of the profile to determine if the employee could overcome that presumption.¹⁵⁹ When determining whether the employee met that burden, the court considered the following factors: (1) whether the employee operated a separate, personal page, (2) whether the majority of the posts were business-related, (3) whether multiple people within the company shared access to the profile, and (4) whether the use of the page was for the intended benefit of the company instead of the individual.¹⁶⁰

For practical purposes, this proposed framework is applicable to the hypothetical conflict at the beginning of this Comment.¹⁶¹ Adam Schefter's Twitter account is titled in his own name, and because Twitter does not differentiate its type of pages, it is the same type of page operated by all users. Therefore, the presumption is that Schefter is the true licensee. To turn an eye to the content and the use of the account, Schefter does not operate a separate account, which suggests it is employee property under the first factor. The Tweets are primarily Schefter's sports reports with a few personal remarks sprinkled into the feed.¹⁶² There is also some corporate product pitching.¹⁶³ This would be a traditional mixed-use account, but because the Tweets are mostly sent in Schefter's professional capacity as a reporter, the second factor tends to favor the employer. However, the Tweets appear to be sent exclusively by Schefter, and there is no indication that any other ESPN employee can access his account. Additionally, there is no indication that the Tweets are sent for the *purpose* of generating revenue for ESPN, but rather to aid Schefter's individual work. Accordingly, while the account does have some business-oriented characteristics, there are insufficient facts to overcome the presumption that the license to use the account is Schefter's property. Thus, if he and ESPN part ways, Schefter should be able to retain control of his account. If ESPN

158. *Id.* at 372.

159. *Id.* at 368. The bankruptcy court actually approached these two steps in opposite order, but it is clear that the court was testing whether the facts of the case could overcome the presumption that arose through the official name of the account, stating: "[T]he evidence is utterly insufficient to overcome the presumption that the Facebook Page entitled 'Tactical Firearms' at the time of the Plan confirmation was anything other than what it appeared to be: a business Facebook Page for the business known as Tactical Firearms." *Id.*

160. *Id.* at 368–72.

161. *See supra* Introduction.

162. *See* Schefter, *supra* note 1.

163. *Id.*

were to then attempt to seize control of the Twitter account, Schefter could bring a tort action.¹⁶⁴

Applying this framework to *Eagle*¹⁶⁵ with tweaked facts would likely result in a similar outcome. For the purposes of this hypothetical, pretend Eagle's LinkedIn account is actually a Facebook account that she similarly used to message clients and build a community. Recall that in *Eagle*, the name of the account was the employee's own.¹⁶⁶ The type of account was an individual account and not a type of account specifically designed for corporate use.¹⁶⁷ Therefore, there would be no presumption that the license ran to the business instead of the individual user. The use of the account was likely primarily commercial.¹⁶⁸ Multiple users from the company accessed it,¹⁶⁹ and a large amount of the communications on the account was in the course of making sales to clients.¹⁷⁰ However, the information contained within the account was all Eagle's personal information,¹⁷¹ and she presumably also used the account for her own personal connections. Though this would be a close call, the facts of the case would likely be insufficient to overcome the presumption that the license belongs to Eagle. As such, she would have been able to proceed on a conversion claim.

The *Mattocks*¹⁷² case, too, presents an enlightening fact pattern for application of this framework. First, decide to whom the presumption of license ownership should be given. The exact title of the Facebook Fan Page is not disclosed in the court order, but it appears the title had some

164. Which cause of action governs password disputes is another issue of social media law that needs resolution. A cause of action sounding in conversion should be the most applicable once courts recognize property interests in the account. See Courtney W. Franks, Comment, *Analyzing the Urge to Merge: Conversion of Intangible Property and the Merger Doctrine in the Wake of Kremen v. Cohen*, 42 HOUS. L. REV. 489, 491 (2005). States have traditionally been hesitant to apply the common law conversion doctrine to intangible property but are beginning to relax tangibility requirements. *Id.* at 493–94. Tortious interference with the user agreement contract is another possible cause of action. See RESTATEMENT (SECOND) OF TORTS § 766A (AM. LAW INST. 1979) (“One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person, by preventing the other from performing the contract or causing his performance to be more expensive or burdensome, is subject to liability to the other for the pecuniary loss resulting to him.”).

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

166. *Id.* at *6.

167. *See id.* at *3.

168. *See id.* at *2.

169. *See id.* at *6.

170. *See id.* at *9–13.

171. *See id.* at *3.

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

reference to *The Game*, the name of the TV show, instead of personal information identifying Mattocks.¹⁷³ Additionally, the account was registered as a Fan Page, rather than a personal profile.¹⁷⁴ It is unclear whether there was a link between the actual BET website and the Page, but BET did display its trademarks on the Page, encouraged viewers to like the Page, and posted exclusive materials to the Page.¹⁷⁵ Based on the business-aligned title, the form of account designated for business use, and the strong ties between BET's central operations and the Page, the presumption is that BET is the licensee.

Second, analyze the factors to see if Mattocks can overcome the presumption. Going to the first factor, it is undisclosed whether Mattocks operated a separate account, but there was sufficient evidence to show that she set out to manage the Page as an online community of the show's fans rather than as a personal account.¹⁷⁶ To the second factor, it is clear the majority of the posts were business-related because they contained exclusive material such as video clips and photographs.¹⁷⁷ There was no evidence of Mattocks making posts unrelated to *The Game*, and it would be safe to presume that most—if not all—of the posts had some sort of connection to the show. The third factor equally points toward BET as the licensee because, per the Letter Agreement, BET and its employees had full administrative access and were able to post to the Page.¹⁷⁸ And, fourth, the purpose of the Page was to promote dialogue about the show and, eventually, to develop the show's brand.¹⁷⁹ All four factors support BET's interest in the account. Accordingly, BET should be declared the true licensee of the Page, such that it could continue to interact with the six million friends of the Page while not exposing itself to liability for any tort claim connected to the property interest of the account, such as conversion.¹⁸⁰ Even if the jurisprudential preference is to give more

173. *See id.* at 1315.

174. *Id.*

175. *Id.* at 1316.

176. *Id.* at 1315 (“In 2008, when the Series was airing on CWN, Plaintiff Stacey Mattocks created a Facebook Page focusing on the Series . . .”).

177. *Id.* at 1316.

178. *Id.*

179. *See id.* at 1315–16. Once Mattocks contracted with BET to operate the account, BET started to advertise the Page and placed its intellectual property on the Page. *Id.* at 1316. During this relationship, the amount of “likes” on the Page swelled to 6 million. *Id.* Regardless of Mattocks' original intentions with the Page, once she agreed to work part-time for BET by administering the Page, it clearly became a promotional tool for the network. *See id.*

180. The claims for breach of contract, breach of good faith and fair dealing, and tortious interference of contract could presumably move forward because those are specific to the

protection to the individual managers of professional, mixed-use social media accounts, this case presents a conflict that should clearly be decided in favor of the business. The individual user was merely using the license as an agent of the company.

These hypothetical analyses demonstrate a clear and fair approach for settling password disputes among employers and employees. The two-step framework requires resolution of just two questions: (1) By looking at the face of the account, who is the presumptive licensee? (2) Does the actual use of the account sufficiently demonstrate that the presumption is incorrect?

CONCLUSION

By accepting that a social media account contains property interests through its licensing scheme and adopting this two-step method for determining the true licensee, courts will be able to efficiently dispose of disputes concerning social media rights. With the increase in professional social media usage,¹⁸¹ it is important for judicial economy that the courts adopt a clear framework for addressing these conflicts. This approach recognizes the value of a social media account and provides a method for assigning control to the entity that was intended to be the beneficiary of the labor that went into building the account. Accordingly, in the future, courts should adopt this approach when facing disputes like the hypothetical conflict posed in the introduction above.

This Comment ends with advice to employees and employers on how to proceed regarding professional social media accounts. In each of the cases that came before courts, none of the parties had signed contracts regarding their social media accounts. If the parties had incorporated that item into their employment contracts, they would not have needed to proceed through litigation that was bound for murky waters. Employers and employees both need to set clear expectations about who has the superior rights to the network of clients and customers they spend so much time and resources cultivating. Employers who want to claim an interest in employees' professional social media accounts should adopt some combination of the following three practices: (1) include provisions in employment contracts that any license obtained by the employee in the scope of the employee's employment is acquired on behalf of the employer; (2) create the account and obtain the license, then allow the

transactions between BET and Mattocks and unrelated to the property interests attached to the account at issue.

181. *See supra* Part I.

employee to operate the account on the employer's behalf; or (3) mandate that employees include sufficient information about the employer and use their accounts primarily for company-specific purposes so that the company could overcome any presumption of license ownership in favor of the employee.

However, until businesses can adopt such practices, the inevitable upward trend in litigation surrounding access to professional social media accounts will continue. Per the discussion above, courts should adopt a clear framework for addressing those issues. The framework of identifying the true licensee by assigning presumptions based on the identity of the account and then analyzing factors concerning the use of the account presents the clearest solution.¹⁸² Additionally, this proposed approach most closely matches the way employers and employees think about their interests in accounts. Only by adopting a universal framework will courts be able to consistently answer whether followers will follow an employee to a new job.

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182. *See supra* Section III.B; *see also In re CTLI, LLC*, 528 B.R. 359 (Bankr. S.D. Tex. 2015).

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