

CORPORATE COUNSEL

From the Experts : Company vs. Employee Ownership of Social Media Assets

By *Thomas C. Mahlum and Andrew J. Pieper*

The rise of social media sites like Facebook, Twitter, and LinkedIn has been a boon to companies and brands in search of new and innovative marketing forums. They allow companies to interact with new and existing customers on a micro-level and respond to consumer demands in real time. Yet these same social media sites are a bane to in-house and outside counsel alike, creating legal thickets in previously unknown areas. One particular area that has been complicated by social media sites involves this very simple question: Who owns social media assets accessed or controlled by company employees?

Answering this question requires first identifying the component parts of a social media account:

- First, there is basic user information, such as an account's username and password.
- Second, there is user-generated content such as text, pictures, and links posted to the user's profile and to the profiles of others.
- Finally, there are the relationships that users form with other users, which are the driving force behind social media sites.

Each of these components of social media accounts present companies with unique ownership issues that are not universally addressed by corporate policies, social media terms of use, or existing legal remedies. Understanding how to navigate these issues is thus crucial to a company's protecting its ownership of social media assets.

Who owns a social media account?

The answer to this question should be obvious, but it's not always clear-cut. For example, what happens when a company



Thomas C. Mahlum



Andrew J. Pieper

directs an employee to set up a Twitter account to market her professional work and the employee later leaves the company? Does the former employee have to relinquish the username and disclose the password to her former employer? Or is she permitted to take the Twitter account with her when she goes and refocus it as she sees fit? Would answers to these questions change if the Twitter account combined the employee's professional work and personal interests?

In one case, *PhoneDog v. Kravitz* (2012), an employee attracted 17,000 followers to his employer-affiliated Twitter account, which was used to distribute information primarily

related to the employer's business. When his employment at the company ended, the now-former employee changed the Twitter account's username and password—effectively converting it into a personal Twitter account—instead of relinquishing the account as requested by the employer. The employer brought suit against the former employee to get the Twitter account back.

Untangling the overlapping interests in these situations requires separating out the expectations of both the employee and the employer. Generally, if there is an agreement that an employee's use of a social media account is on behalf of her employer and that agreement prohibits the employee from changing the username or withholding the password, then there is no question that the employer has ownership rights to the account. Absent such an explicit agreement, however, an employer may be vulnerable to losing social media accounts it believes it owns when an employee leaves the company.

What about the content?

Ownership of content posted to a company's social media account is more straightforward, but not without potential minefields. Social media providers—including Facebook, LinkedIn, and Twitter—do not purport to take ownership of information that's uploaded and shared through a social media account. In addition, to the extent posts to a social media profile include a company's own text, pictures, and links to its website, those materials can be protected through common copyright and trademark procedures.

The property boundaries for content posted to a company's social media profile become a bit murkier, though, when you consider the fact that other users may be allowed to post their own content to the company's profile.

For example, Facebook allows companies to create specific sites known as Facebook Pages to promote themselves or their brands. This allows other Facebook users to post content like text, pictures, and links to a company's Facebook Page. This also creates situations in which unsavory or illegal content may be attributed to a company, even though the content is posted to its Facebook Page by someone who is unaffiliated with the company.

Another important factor with regard to ownership of content posted to social media accounts is a user's ability to export her data. Facebook, Twitter, and LinkedIn all have clauses as part of their terms of service that state that users own their content. The potential for problems arises, however, if a user wants to take that content with them. For example, while a user can disable her Facebook account, she cannot export content she posts on Facebook—and thus, content she owns under Facebook's terms—for use in some other application or in another way she sees fit.

As a result of these ambiguities, defining who owns what content with regard to a company's social media account can become an important endeavor. One way to address part of these issues, in the context of Facebook, is to establish separate terms of use for your company's Facebook Page. Facebook allows companies to create such terms, so long as they don't conflict with its own policies. Therefore, a company can establish terms in which an unaffiliated user agrees, for example, that content she posts to the company's Facebook Page is accurate, does not violate any laws, and does not infringe any intellectual property. In this way, companies can—at the very least—limit responsibility for content that may be wrongly attributed to them through their social media account.

And who owns those all-important relationships?

Friends, connections, followers; no matter what they're called, the relationships between companies or brands and their existing or potential customers are what make social media sites tick. That's why it's imperative for companies to protect their social media relationships. 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. There is, of course, an important difference in whether

an employee's social media relationships are proprietary customer information owned by her employer, or whether those relationships are personal to the employee.

For example, in *Eagle v. Morgan* (2011), a dispute arose over a former employee's LinkedIn connections after the employee's termination. The profile was in the name of the former employee, but other employer personnel helped maintain the LinkedIn content and connections. The employer alleged that the former employee wrongfully misappropriated the LinkedIn connections when, after termination, he changed the password and denied the employer access to the account. The misappropriation claim in that case survived a Rule 12 challenge (under the Federal Rules of Civil Procedure), primarily because—at least on the face of the pleadings—the employer had expended time and money developing and maintaining the LinkedIn connections.

While the question of the proprietary nature of relationships formed through social media accounts will continue to evolve, it would seem that resolving ownership of those relationships resides in the answers to two questions:

1. Who is responsible for establishing the relationships?
2. How are those relationships intended to be used?

If, in one instance, a company's personnel are tasked with establishing connections through an executive's "personal" social media account to expand and strengthen that company's business relationships and objectives, such factors would weigh in favor of company ownership of the relationships. If, in another instance, a company executive takes sole responsibility for managing his social media connections in order to both expand and strengthen his company's—and his own—business and personal relationships, such factors would weigh in favor of the executive's personal ownership of those relationships.

To avoid pitfalls, know your company's and your employee's expectations and get ahead of potential problems.

As social media ownership issues crop up, there exist remedies available to companies that find themselves in the position of trying to regain social media assets taken by former

employees. Depending on the circumstances, these could include common-law claims of conversion and misappropriation, as well as possibly claims for breaches of contract or non-compete agreements, and unfair and deceptive trade practices.

There are also strategies, however, that a company can follow to limit liability before such problems ever arise. These could include executing tactics to more fully define the ownership boundaries of an employee's work-related social media assets through employment contracts or separate social media use agreements. They could also include revising company social media policies to distinguish a company's social media assets from its employees' social media assets. And, perhaps most effectively, a company can engage in full and frank discussions with its employees regarding how it views ownership of social media assets accessed and used by its employees. Taking these steps will go a long way toward helping a company avoid ambiguities among its employees—and avoid litigation with former employees—concerning who owns what components of social media accounts.

Thomas C. Mahlum is a partner at Robins, Kaplan, Miller & Ciresi. His business litigation experience includes business disputes with contracts, trade secrets, intellectual property, unfair competition, and fraud actions. Andrew J. Pieper is an attorney at Robins, Kaplan, Miller & Ciresi. He focuses on complex business and intellectual property litigation and has experience in disputes involving Internet and e-commerce infrastructure, search engine software, and DVD and Blu-ray technologies.