

Social Media at Work Raises Issues of Account Ownership

By Michael Masri and Pedram Tabibi [Contact All Articles](#)

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The continuing growth and business integration of social media platforms such as Facebook,¹ Twitter,² LinkedIn³ and Google+⁴ signifies that social media is entering all aspects of everyday life. Businesses, for one, increasingly rely on social media to promote their brand, advertise products, and connect with clients and potential clients. In fact, 2012 will mark the first time that online advertising spending will surpass print advertising spending in total dollars.⁵

At the same time, individuals are increasingly registering social media accounts—Facebook alone has over 800 million active users.⁶ Individuals also increasingly access these social media accounts while at work. Forty-eight percent of firms say that all employees are permitted to access social networking sites at work for non-business use.⁷

The line between online work and personal life—and the content each generates—is increasingly blurring. Employees spend time on social media platforms at work while also promoting themselves and their companies via social media. As a result, questions inevitably arise as to who exactly is building a brand, what the brand is, and who owns any customers.

If a company contributes content or otherwise assists in building an employee's social media account, who owns the account and who should reap the fruits of the account's success? If a LinkedIn account that an employee and employer jointly contribute to makes connections and brings in clients, whose clients are these? Many would argue that, given the personal nature of social media, an employee "owns" the account and the content and benefits it produces.

Employers, however, are mindful of protecting their business and proprietary information and it is only a matter of time before disputes arise over ownership of social media accounts utilized for business branding and marketing.

That day has arrived. Lawsuits between employers and employees over who owns a social media account have surfaced as of late. This article focuses on those lawsuits and on the importance of employers implementing policies and strategies to address these growing social media legal issues. Such strategies include implementing social media guidelines for employees and addressing social media matters in employment agreements. Failure to properly address these issues may make a company the next social media news story of the day.

Recent Disputes

Edcomm and Dr. Linda Eagle LinkedIn Lawsuit. In 2011, a dispute arose over ownership of a LinkedIn account between an employee and employer.⁸ Dr. Linda Eagle co-founded Edcomm Inc. in 1987 to provide financial and banking services.⁹ In 2008, Eagle established a LinkedIn account to promote Edcomm's banking education services, foster her business reputation, reconnect with family, friends and associates, and build social and professional relationships.¹⁰ An Edcomm employee assisted Dr. Eagle in maintaining her LinkedIn account and had access to Eagle's LinkedIn password.¹¹ In October 2010, a company entered into a term sheet with Edcomm and its principals to purchase Edcomm.¹² While Eagle and her partners originally stayed on as Edcomm employees following the purchase, they were terminated in June 2011.¹³ Dr. Eagle could not access her LinkedIn account following her termination, as Edcomm employees accessed the account and changed the password.¹⁴ According to the complaint, Edcomm employees also changed Dr. Eagle's account profile to display the name and picture of Edcomm's interim CEO, but with Dr. Eagle's honors and awards, recommendations and connections.¹⁵

Eagle alleges that the defendants used her account to prevent her connections from reaching her and to acquire business connections for Edcomm's benefit.¹⁶ Eagle claims that the alleged misappropriation of her LinkedIn account has cost her time, money, loss of good will, damage to her reputation, and the diminution of the fair market value of her name.¹⁷ Eagle brought an action in federal court alleging, among others things,

Lanham Act violations, invasion of privacy, misappropriation of identity and publicity, identity theft and conversion.¹⁸

Edcomm filed a counterclaim complaint, alleging that while under Dr. Eagle's management, Edcomm actually implemented a policy requiring Edcomm's employees to create and maintain LinkedIn accounts.¹⁹ Edcomm employees then monitored these LinkedIn accounts, corrected any violations of Edcomm policy, and maintained accounts for several employees for the benefit of Edcomm.²⁰ According to Edcomm, its management requested and retrieved Edcomm-related LinkedIn connections and content from all the parting employees' LinkedIn accounts.²¹ Edcomm's allegations, if true, are interesting because unlike many employers, Edcomm actively addressed social media account issues and created social media policies for its employees.

A court recently dismissed all of Edcomm's claims except those for conversion and misappropriation of the LinkedIn account.²² Edcomm alleged that with respect to the LinkedIn connections and content, Edcomm personnel—and not Dr. Eagle—developed and maintained all connections and most of the content, and that these actions were taken solely at Edcomm's expense and for its own benefit exclusively.²³ The court held this created an issue of fact requiring further discovery and denied Eagle's motion for judgment on the pleadings as to Edcomm's misappropriation counterclaim.²⁴

PhoneDog and Noah Kravitz Twitter Lawsuit. On July 15, 2011, PhoneDog,²⁵ an interactive mobile news and reviews website, filed a lawsuit against former employee Noah Kravitz.²⁶ In April 2006, PhoneDog employed Mr. Kravitz as a product reviewer and video blogger whose content was transmitted to PhoneDog's users through platforms including PhoneDog's website and the Twitter account @PhoneDog_Noah.²⁷ PhoneDog claims Kravitz was given use of and maintained the Twitter account to disseminate and promote PhoneDog services on PhoneDog's behalf.²⁸ Over the course of Kravitz' PhoneDog employment until October 2010, the Twitter account built over 17,000 Twitter followers.²⁹

Upon Kravitz's resignation in October 2010, PhoneDog claims it requested that Kravitz relinquish use of the Twitter account.³⁰ Kravitz disputes this claim, stating he was told that when he left PhoneDog that he could keep his Twitter account in exchange for posting occasionally about the company.³¹ Upon leaving PhoneDog, Kravitz changed the Twitter handle to @NoahKravitz and continues to use the account.³² It is unclear why

PhoneDog waited several months before deciding to seek the Twitter account from Kravitz, and that fact does not fall in PhoneDog's favor. However, PhoneDog's decision to go after Kravitz and the Twitter handle may have been spurred in part by its claim that Kravitz obtained a position with a company offering competing services to that of PhoneDog months later.³³

PhoneDog alleges that Kravitz used its confidential information to access the Twitter account after resigning from PhoneDog and continues to use the account to communicate with PhoneDog's followers without PhoneDog's permission in an attempt to market and advertise Kravitz' services and the services of his new employer.³⁴ PhoneDog is suing Kravitz and seeks damages of \$340,000, calculated by taking 17,000 Twitter followers, each worth an estimated \$2.50 per month, and multiplied by eight months.³⁵ PhoneDog's contentions aside, many have questioned PhoneDog's seemingly high monetary valuation of Twitter followers.

PhoneDog claims its company Twitter account passwords constitute confidential information.³⁶ PhoneDog also claims that the list of Twitter followers is akin to a business customer list, in which PhoneDog has an intangible property interest.³⁷ Kravitz claims he initially created the password and that PhoneDog did not make any reasonable efforts to maintain the password's secrecy.³⁸ Kravitz also counters that PhoneDog is not entitled to damages because it lacked proof that it had ownership or right to possession over the Twitter account or the Twitter followers.³⁹

PhoneDog countered that even if Kravitz created the account, he did so at PhoneDog's request and in the course and scope of his employment with PhoneDog.⁴⁰ A review of the @NoahKravitz Twitter account, however, shows that many of its Tweets are personal in nature, including Tweets about sports, entertainment and personal musings.⁴¹ PhoneDog's claims recently survived motions to dismiss by Kravitz.⁴²

Strategies Moving Forward

While the aforementioned lawsuits are ongoing, they underscore larger business issues regarding social media use. These lawsuits and the increased discussion about social media legal issues should serve as a strong wake up call to employers and the hundreds of millions of social media users who believe their social media accounts and resulting content are unquestionably personal. Companies should seize the opportunity to

contemplate and properly address these lingering social media issues before they too encounter similar disputes.

As companies increasingly integrate social media into their business model, connect with clients via social media, and promote their brand online, the importance of addressing social media legal issues will increase. At this point in the social media timeline, many companies simply do not understand the legal implications of social media business use. Although 76 percent of businesses use social networking for business, 45 percent of all businesses still do not have social networking policies.⁴³ Employers and employees should be mindful of these lingering and growing issues and consider creating clear guidelines before an employee uses a social media account to market and build a company's brand.

Adopting social media policies or guidelines—signed and acknowledged by employees—may be one method for addressing these prevailing social media legal issues. Such guidelines should address social media account ownership between an employer and employee during and following the employment period. These guidelines may include provisions regarding:

(i) whether the employer or employee may create a social media account used for business marketing and branding;

(ii) whether the account name should incorporate the company name;

(iii) who has access to account settings and passwords;

(iv) who may edit or add content to the account; and

(v) procedures to relinquish use of an account at the end of the employment period. These guidelines, if crafted carefully to meet a business' particular needs, may help avoid confusion, disputes and potential litigation down the line. Businesses should consult with an attorney regarding the specific facts of their individual situations.

A written agreement signed by an employee prohibiting post-employment competition or solicitation on social media platforms may also help safeguard against social media issues. Importantly, one reason employers are currently seeking ownership of social media accounts is because of what can or will be done with the accounts, including use

of the account's Facebook friends, LinkedIn connections or Twitter followers to compete with or adversely impact the business. A written non-compete agreement clearly stating what post-employment social media activities an employee may and may not engage in, prohibiting an employee from conducting business on the Internet competitive with the employer's business and from using Facebook, Twitter, LinkedIn , Google+ and other social media platforms for purposes that compete with the employer's business may be prudent.

An employer should avoid, however, overly rigid social media policies, given the growing and evolving state of social media. Social media policies should also reflect a company's business model and values. Businesses should consult with an attorney regarding the specific facts of their individual situations.

Companies are wise to properly address potential social media issues in an appropriate manner in order to avoid becoming tomorrow's social media legal news. As a result, a company may then focus on utilizing social media for the many benefits it can bring to a business.

Michael Masri is a partner in the employment and labor and litigation practice groups at Meltzer, Lippe, Goldstein & Breitstone. Pedram Tabibi is an associate in the firm's litigation, corporate, technology, internet and e-commerce groups.

Endnotes:

1. Facebook, <http://www.facebook.com>.
2. Twitter, <http://www.twitter.com>.
3. LinkedIn, <http://www.linkedin.com>.
4. Google+, <http://www.google.com/+>.
5. U.S. Online Advertising Spending to Surpass Print in 2012, <http://www.emarketer.com/PressRelease.aspx?R=1008788>. U.S. online advertising spending expects to grow 23.3 percent to \$39.5 billion in 2012, while U.S. print advertising spending expects to fall from \$36 billion to \$33.8 billion. Id.

6. Fact Sheet, <http://newsroom.fb.com/content/default.aspx?NewsAreaId=22>.

7. Proskauer Rose, "Social Networks in the Workplace Around the World," <http://www.proskauer.com/files/uploads/Documents/Survey-Social-Networks-in-the-Workplace-Around-the-World.pdf>.

8. *Eagle v. Sandi Morgan, et al.*, Case No. 2:11-CV-04303-RB (E.D.Pa. 2011).

9. *Id.* at Complaint, para. 12.

10. *Id.* at paras. 15-17.

11. *Id.* at para. 17.

12. *Id.* at para. 27.

13. *Id.* at para. 28.

14. *Id.* at paras. 30-38.

15. *Id.* at paras. 39-40, 47-53. According to the Complaint, Edcomm's attempts to access also the LinkedIn account of Eagle's partner, which included contacting LinkedIn, failed. *Id.* at para. 42.

16. *Id.* at para. 54.

17. *Id.* at para. 57.

18. *Id.* at paras. 61-141.

19. *Eagle v. Sandi Morgan, et al.*, Dec. 22, 2011 Memorandum, at 4

20. *Id.* at 5.

21. *Id.*

22. *Id.* at 21-23.

23. Id. at 23.

24. Id. at 24.

25. PhoneDog, <http://www.phonedog.com/> (last visited Feb. 10, 2012).

26. *PhoneDog v. Noah Kravitz*, Case No. C 11-03474 MEJ (N.D.Cal. 2011).

27. Id. at Complaint, para. 14.

28. Id. at para. 15.

29. Id. at paras. 16-17.

30. Id. at para. 17.

31. John Biggs, "A Dispute Over Who Owns a Twitter Account Goes to Court," N.Y. Times, Dec. 25, 2011, available at http://www.nytimes.com/2011/12/26/technology/lawsuit-may-determine-who-owns-a-twitter-account.html?_r=1.

32. Supra note 30.

33. Id. at para. 18.

34. Id. at para. 19-20.

35. Id. at Complaint. PhoneDog's claims include: misappropriation of trade secrets, intentional interference with prospective economic advantage, negligent interference with prospective economic advantage and conversion. Id.

36. Id. at para. 12.

37. Order on Defendant's Motion to Dismiss Pursuant to FRCP 12(B)(1) and 12(B)(6) (Docket No. 4) (Nov. 8, 2011), at 6.

38. Id. at 9. Kravitz further adds that Twitter account passwords do not provide any substantial business advantage. Id. at 8-9.

39. Id. at 5-6.

40. Id. at 6.

41. Noah Kravitz, <http://twitter.com/#!/noahkravitz>.

42. See supra note 37; Order on Defendant's Motion to Dismiss Plaintiff's Second and Third Claims for Relief (Docket No. 30) (Jan. 30, 2012).

43. Supra note 7.