



An analysis of social media ownership litigation between organizations and PR practitioners



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ABSTRACT

This article explores recent lawsuits surrounding social media ownership in the United States and United Kingdom. Because social media has become a valuable tool for public relations, many organizations now claim an ownership interest in their employees' social media accounts. This article explores three recent cases (two in the U.S. and one in the U.K.) that involve social media ownership issues. An overview of these cases is presented, and suggestions are made for PR practitioners, agencies, and organizations.

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1. Introduction

Lawsuits to determine ownership of personal social media accounts have increased since 2010. An issue is whether social media accounts (including personal accounts) developed by employees during the scope of their employment constitute work-product owned by employers. These cases arise when employees use personal social media accounts for promotional purposes or change organizational social media accounts to personal accounts post-employment. These lawsuits involve ownership issues concerning personal professional social media accounts, such as LinkedIn, which constitute a virtual Rolodex of professional contacts that are developed during work. Organizations increasingly allege that those professional accounts are also proprietary because they contain trade secrets.

In the past few years, there have been several lawsuits in which organizations sued their former employees in an attempt to prevent them from taking these social media accounts with them post-employment (Eagle, 2013; PhoneDog, 2012). These cases yielded mixed results with some courts finding in favour of former employees, while others side with organizations. At the heart of these cases is whether the organization has a social media policy and how the social media account in question was developed in context with that policy. These cases arise from the blurring of personal and organizational social media accounts, employee use of personal accounts to promote an organization, and professional accounts developed as part of an employee's role in an organization's communications department. These social media ownership issues are particularly important to PR professionals who are frequently hired to create a social media presence for organizations. These lawsuits present two different issues. First is the loss of control of an organization's image if social media sites are owned by former employees. The loss of online image, message control, and valuable social media data is detrimental for any organization's public relations strategy. Second, the loss of personal social media accounts adversely affects practitioners because they

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may lose professional and media contacts. However, these legal issues can be avoided if organizations and practitioners take preventive action.

2. Methods

This research answers the question of when does an employer own an employee's social media account. To answer this question, this research analyses two federal cases in the United States and one from the United Kingdom. While some legal literature has examined ownership of online content, currently no literature addresses social media ownership in a public relations context (Fisher, 2012; Masri & Tabibi, 2012; McNealy, 2013). The three cases examined in this study were chosen because they represent three cases of first impression by U.S. and U.K. courts and involve parties who are in public relations practice. These cases were obtained through a keyword search of "social media" and ownership in LexisNexis legal database. These cases are important because they represent U.S. and U.K. courts' first and most recent attempt at regulating social media ownership in a corporate context. This analysis provides practical advice for both PR practitioners and organizations concerning the crafting of social media policies and developing social media accounts.

3. Organizations' ownership of employee content: an analysis of U.S. trade secret law

The year 2012 marked the first time in history online promotional expenditures surpassed print (US online advertising, 2012). According to eMarketer, expenditures for online promotions will equal \$62 billion by 2016 as opposed to only \$32.3 billion for print (eMarketer, 2012). This new phenomenon makes it clear that online promotions will become the norm for the future. Because of this, ownership of outlets for digital reputation has become extremely important (Masri & Tabibi, 2012). Social media outlets compound these issues of ownership because of the complex levels of ownership social media platforms have. As Masri and Tabibi (2012) pointed out in the *New York Law Journal*, social media promotions create issues in determining who owns what because frequently there is no distinction between an individual's professional and personal social media accounts. Further complicating social media promotions are the legal reality that social media companies actually own all social media accounts (Walker, 2011–2012). Social media sites, such as Twitter, Facebook, and LinkedIn give their users a license to use the accounts. Social media sites keep records of all communications and can store and access these communications as they see fit (Warren & Pedowitz, 2011–2012). These user licenses do constitute property, but these property rights are limited according to the licensing agreement between individual users and social media companies.

Because of this complexity of ownership of social media accounts, American organizations use trade secret laws to sue employees who want to keep social media accounts post-employment. Given that actual ownership of the account belongs to the social media site, using American trade secret law as legal grounds for a lawsuit against former employees is clever. Trade secrets are a form of intellectual property [IP] law. Unlike other IP laws, such as copyright, trademark, and patent, trade secrets are only protected under state law. These state laws usually follow the Uniform Trade Secrets Act [UTSA] that was first developed in 1979 by the Uniform Law Commission [ULC]. The ULC wrote the UTSA to create a comprehensive statute for trade secrets that could be adopted by states. Currently 46 states and three territories model their trade secret statutes after the UTSA (McNealy, 2013).¹ Many trade secrets could also be protected under federal patent law. However, state trade secret laws provide certain legal advantages. Unlike other forms of IP, such as copyright or patents, trade secrets potentially last forever and have no statutorily mandated termination. Unlike patents, trade secrets do not have to be registered and formally published with the federal government. Because of this, trade secrets, such as Coca Cola's secret formula, have become a preferable means of protecting IP because they are not readily accessible to the public. Trade secrets also do not have to undergo a formal application process or review. They can become protected immediately so long as the owners take the proper steps. These state laws for trade secrets are powerful protection and cannot be superseded by federal patent laws (Kewanee Oil Co., 1974). Currently Section 1 of the UTSA defines a trade secret as:

Information, including a formula, pattern, compilation program, device, method, technique or process, that:

- (i) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
- (ii) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. (p. 5).

Despite the advantages of using trade secrets, there are several legal drawbacks. Unlike patent laws that give owners' rights upon registration with the federal government, trade secrets require a long-term commitment by companies to protect their secrets. The UTSA states that a trade secret is only protected by "efforts that are reasonable under the circumstances" (UTSA, 1985, p. 5). This rather vague standard creates problems when a company tries to prove it has, in fact, made all "reasonable" efforts (UTSA, 1985, p. 5). However, some guidance is given by the Restatement of Torts on what "reasonable" efforts are in the UTSA (p. 5). The restatement suggests courts look to six factors when determining whether a trade secret has been properly protected (Restatement of Torts, 1939, § 757). They are:

¹ The purpose behind the UTSA was to create a uniform law about trade secrets. Prior to 1979 states varied in their trade secret laws. Because trade secret protection differed state-by-state there was not a uniform protection under trade secret laws.

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