William & Mary Business Law Review

Volume *14 (2022-2023)*
Issue 1

Article 5

11-2022

Who Owns the Meme?: Establishing a Definitive Framework to Resolve Disputes in Social Media Account Ownership Between Employers and Employees

Tom Galvin

WHO OWNS THE MEME?: ESTABLISHING A DEFINITIVE FRAMEWORK TO RESOLVE DISPUTES IN SOCIAL MEDIA ACCOUNT OWNERSHIP BETWEEN EMPLOYERS AND EMPLOYEES

TOM GALVIN*

ABSTRACT

The pervasive nature of social media and its growing impact on every aspect of society has created a novel issue: who owns a social media account, an employer or an employee, following the termination of the employment relationship? Courts thus far have produced an inconsistent and confusing legal terrain that will only continue to breed uncertainty amongst parties involved in disputes over social media account ownership. This Note examines the current jurisprudence, analyzes its strengths and weaknesses, proposes a definitive framework to determine ownership between the parties, and demonstrates that framework using the facts of an ongoing case. This framework includes a five-part test that considers: (1) personal versus business usage; (2) purpose at the time of creation; (3) access to the account; (4) job function and industry custom; and (5) economic impact. In doing so, this Note offers some much-needed clarity to a body of law that both over-complicates the issue and gives the parties involved little direction on how to handle these disputes.

* JD Candidate, 2023, William & Mary Law School; Bachelor of Science, 2019, University of Maryland. I would like to thank my parents for their constant love and support, as well as my friends, Daniel Farraye and Alex Boone, for listening to me ramble on and on about this Note. I would also like to thank the *William & Mary Business Law Review* staff, particularly Andrew Kihara, for the assistance in preparing this Note for publication.

TABLE OF CONTENTS

INTRODUCTION

Today, social media has made its way into almost every part of people's lives.[1] From the news to job postings to ridiculous gender reveal videos that always seem to do more harm than good, there is no way around the fact that most of the world is now perpetually online.[2] In fact, over half the world[3] and around seven-in-ten Americans use some type of social media.[4] These percentages only grow larger when looking at younger generations.[5]

So, with the meteoric rise in social media usage and its impact on people's lives, it is no surprise that the workplace has not been immune to social media's influence.[6] While many people's first thought regarding social media in the employment context is an employer screening a candidate's Instagram page before making a hiring decision, or perhaps their own employer's social media policy, it is so much more than that—and companies recognize it.[7] Today, almost every business uses social media to

---

[1] Kenneth Olmstead et al., *Social Media and the Workplace*, PEW RSCH. CTR. (June 22, 2016), https://www.pewresearch.org/internet/2016/06/22/social-media-and-the-workplace/ [https://perma.cc/BF6B-LAVN].

[2] *Gender Reveal Party Couple Faces Jail Over Deadly California Wildfire*, BBC NEWS (July 21, 2021), https://www.bbc.com/news/world-us-canada-57898993 [https://perma.cc/XVL3-3UYY].

[3] S. Dixon, *Number of Social Media Users Worldwide from 2018 to 2022, with Forecasts from 2023 to 2027*, STATISTA (Aug. 22, 2022), https://www.statista.com/statistics/278414/number-of-worldwide-social-network-users/ [https://perma.cc/3T74-GEG7] (there are 4.59 billion active social media users globally).

[4] *Social Media Fact Sheet*, PEW RSCH. CTR. (April 7, 2021), https://www.pewresearch.org/internet/fact-sheet/social-media/ [https://perma.cc/5CEC-YBWH] (72% of the public uses some type of social media).

[5] 84% of American adults aged eighteen to twenty-nine use at least one social media platform, while only 45% of American adults sixty-five and older said the same. *Id.* Age groups of thirty to forty-nine and fifty to sixty-four fell somewhere in between, at 81% and 73%, respectively. *Id.*

[6] Olmstead et al., *supra* note 1.

[7] *More Than Half of Employers Have Found Content on Social Media That Caused Them NOT to Hire a Candidate, According to Recent CareerBuilder Survey*, PR NEWSWIRE (Aug. 9, 2018, 5:03 AM), https://www.prnewswire.com/news-releases/more-than-half-of-employers-have-found-content-on-social-media-that-caused-them-not-to-hire-a-candidate-according-to-recent-careerbuilder-survey-300694437.html [https://perma.cc/BL2F-LTRZ] ("Seven in ten employers ([seventy] percent) use social networking sites to research job candidates during hiring process."); Olmstead et al., *supra* note 1 ("Half of all full-time and part-time workers ([fifty-one percent]) say their workplace has rules about using social media while at work.").

engage with customers, advertise products and services, and make sales.[8] Moreover, these companies expect their employees to use social media to advance their organization's initiatives.[9] Why? Well, because consumers use social media to make purchasing decisions,[10] so companies can leverage social media to make more sales, create goodwill, and increase brand awareness.[11] These accounts, particularly those with higher numbers of followers or "likes," possess incredible value.[12]

The capabilities of social media in the professional context and the expectation that an employee will take advantage of them, coupled with the potentially immense value of the social media account itself, have led to an interesting yet unresolved legal issue.[13] Who owns the account, the employer or the employee,

---

[8] Chris Porteous, *97% of Fortune 500 Companies Rely on Social Media. Here's How You Should Use It for Maximum Impact*, ENTREPRENEUR (Mar. 18, 2021), https://www.entrepreneur.com/article/366240 [https://perma.cc/34B9-46CE]; *Social Media Marketing Usage Rate in the United States from 2013 to 2022*, STATISTA (Aug. 4, 2021), https://www.statista.com/statistics/203513/usage-trends-of-social-media-platforms-in-marketing/ [https://perma.cc/6KKY-9U5K] ("In the United States alone, social media marketing spending is expected to exceed 17 billion U.S. dollars in 2019.").

[9] *Id.* ("In 2021, 91.9% of U.S. marketers in companies larger than 100 employees were expected to use social media for marketing purposes."); LINKEDIN, STATE OF SALES 2018 12 (2019) ("70% of sales professionals say they're most active on LinkedIn for business purposes, compared to social media platforms like Facebook (64%), Twitter (43%), YouTube (41%), and Instagram (39%).").

[10] Flori Needle, *80+ Essential Social Media Marketing Statistics for 2022*, HUBSPOT BLOG (Nov. 15, 2021, 7:00 AM), https://blog.hubspot.com/blog/tabid/6307/bid/23865/13-mind-bending-social-media-marketing-statistics.aspx [https://perma.cc/DPG5-R6VE]. Fifty-four percent of people research products via social media and seventy-nine percent of people note their purchasing decisions are significantly impacted by "user-generated content." *Id.*

[11] LINKEDIN, *supra* note 9, at 8 ("Decision makers are more likely to engage with sales when introduced through a mutual connection.").

[12] John G. Loughnane et al., *Valuation of Social Media Assets*, 2015 AM. BANKR. INST. J. 36, 36 ("Further validating the premise that social media exposure has value, various media reports have noted the large sums paid to athletes and celebrities to promote products on social media."). Courts have had trouble finding the right metric to determine the value of a social media account. *See, e.g.*, PhoneDog v. Kravitz, No. C 11-03474 MEJ, 2011 WL 5415612, at *5 (N.D. Cal. Nov. 8, 2011).

[13] *See, e.g.*, Thomas C. Mahlum & Andrew J. Pieper, *From the Experts: Company vs. Employee Ownership of Social Media Assets*, CORP. COUNS. 1 (Aug. 20, 2012), https://www.robinskaplan.com/-/media/pdfs/from-the-experts-company-vs-employee-ownership-of-social-media-assets.pdf [https://perma.cc/79M7-MTPF]

after the termination of the employment relationship?[14] Since this is a fairly novel issue, there have been few cases on the matter,[15] and the courts that have heard these cases have not established a unified test or methodology to determine which party is the true owner.[16] This issue will only become more prevalent without clear judicial guidance or intervention from lawmakers.[17]

("[S]ocial media sites are a bane to in-house and outside counsel alike, creating legal thickets in previously unknown areas.").

[14] *Id.*

[15] *See, e.g.*, PhoneDog v. Kravitz, No. C 11-03474 MEJ, 2011 WL 5415612 *1 (N.D. Cal. Nov. 8, 2011); Eagle v. Morgan, Civil Action No. 11-4303, 2012 WL 4739436, at *1 (E.D. Pa. Oct. 4, 2012); Maremont v. Susan Fredman Design Grp., Ltd., 772 F. Supp. 2d 967, 969–70 (N.D. Ill. 2011); Mattocks v. Black Ent. Television LLC, 43 F. Supp. 3d 1311, 1314–17 (S.D. Fla. 2014); Ardis Health, LLC v. Nankivell, No. 11 Civ. 5013(NRB), 2011 WL 4965172, at *1 (S.D.N.Y. Oct. 19, 2011); Salonclick LLC v. SuperEgo Mgmt. LLC, No. 16 Civ. 2555 (KMW), 2017 WL 1906865, at *1 (S.D.N.Y. May 8, 2017); *In re* CTLI, LLC, 528 B.R. 359, 362–63 (Bankr. S.D. Tex. 2015); Int'l Bhd. of Teamsters Loc. 651 v. Philbeck, 464 F. Supp. 3d 863, 867–69 (E.D. Ky. 2020); JLM Couture, Inc. v. Gutman, No. 20 CV 10575-LTS-SLC, 2021 WL 827749, at *1 (S.D.N.Y. Mar. 4, 2021).

[16] *See* Benjamin Halperin, *"Why Do You Want My Password?": Assessing Ultimate Control of A Journalist's Twitter Account Used for Work Purposes*, 30 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 325, 336 (2019) ("[C]ourts have not yet developed a unified method of determining whether the former employee or the employer should maintain control of a social media account."); Kathleen McGarvey Hidy, *Business Disputes over Social Media Accounts: Legal Rights, Judicial Rationales, and the Resultant Business Risks*, 2018 COLUM. BUS. L. REV. 426, 471–72 ("Courts have used a variety of analytical frameworks to examine the legal arguments in business disputes involving . . . social media accounts. The precedent emerging from these court cases present judicial rationales that are complicated, confusing, and in certain instances, contradictory.").

[17] *See* Tiffany A. Miao, *Access Denied: How Social Media Accounts Fall Outside the Scope of Intellectual Property Law and into the Realm of the Computer Fraud and Abuse Act*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1017, 1022 (2013) ("[T]he increasing role of social media in the corporate world has created a niche of lawsuits between employers and employees."). New social media marketing trends—like influencer marketing—are a potential breeding ground for this type of dispute, particularly because of its meteoric growth and the nature of the relationship between an "influencer" and the company that hires them. *See* Jacinda Santora, *100 Influencer Marketing Statistics for 2021*, INFLUENCER MKTG. HUB (Mar. 29, 2022), https://influencermarketing hub.com/influencer-marketing-statistics/ [https://perma.cc/A42X-KWAD] ("The market grew from $1.7 billion in 2016 to $9.7 billion in 2020. In 2021, it soared to $13.8 billion, indicating a steady growth."). Further, social media marketing will likely become even more important to advertisers given the relationship between social media and smartphones. The vast majority of people who use social media do so with their mobile devices, and cellphones account

The need for a unified methodology to determine account ownership is self-evident.[18] This Note advocates for a new comprehensive framework that courts should apply in the absence of an explicit agreement between an employer and employee on this issue.[19] This framework is a five-factor balancing test that considers: (1) personal versus business usage; (2) purpose at the time of creation; (3) access to the account; (4) job function and industry custom; and (5) economic impact.[20]

Part I briefly discusses the underlying issues involved in social media disputes and reviews the history of cases that contemplated these disputes.[21] Part II details the proposed test and explains each factor in depth.[22] Part III outlines the other frameworks that have been offered by the legal academic community to resolve social media account ownership disputes and compares their efficacy to the test proposed by this Note.[23] Part IV applies the proposed test to the facts of a prior case.[24]

I. A LEGAL LANDSCAPE OF DISPUTES OVER SOCIAL MEDIA ACCOUNT OWNERSHIP

Disputes over social media account ownership contemplate a variety of issues, such as: whether a social media account constitutes property,[25] intellectual property rights,[26] trade

---

for over half of all web traffic. *Id.* It follows that this relationship will lead companies to increase their focus on social media marketing which will, in turn, lead to a greater volume of disputes.

[18] *See* Hidy, *supra* note 16, at 487 (arguing the confusing and, at times contradictory, analytical frameworks used by courts to adjudicate these types of disputes expose businesses to unique risks).

[19] *See infra* Part II.

[20] *See infra* Part II.

[21] *See infra* Part I.

[22] *See infra* Part II.

[23] *See infra* Part III.

[24] *See infra* Part IV.

[25] *See* Christopher A. Moore, *Find Out Who Your Friends Are: A Framework for Determining Whether Employees' Social Media Followers Follow Them to a New Job*, 39 CAMPBELL L. REV. 493, 512 (2017). Moore argues that society must answer the question of whether a social media account constitutes property to create uniformity in this body of law. *Id.*

[26] Intellectual property law finds its way into these disputes because it addresses the issue of who retains the rights to content posted on a social media

secrets,[27] and the Computer Fraud and Abuse Act (CFAA).[28] Case law regarding disputes over the ownership of social media accounts is neither substantial nor especially clear in understanding this body of law.[29] However, the following cases provide useful background information into the modes of analysis used by courts as well as the factual circumstances they found most dispositive.[30] Moreover, while this Note substantially takes the position that the current jurisprudence gets it wrong, there are bits and pieces from each case that remain valuable.[31]

A. Property Rights in Social Media Accounts

In order for something to be owned, it must first be ownable, meaning it must constitute property,[32] whether tangible or intangible.[33] Courts thus far have been somewhat noncommittal in assigning property rights to social media accounts.[34] However,

---

account, but it does not, however, address the right to access and control the account itself. *See* Susan Park & Patricia Sánchez Abril, *Digital Self-Ownership: A Publicity-Rights Framework for Determining Employee Social Media Rights*, 53 AM. BUS. L.J. 537, 558 (2016).

[27] *See, e.g.*, PhoneDog v. Kravitz, No. C 11-03474 MEJ, 2011 WL 5415612, at *6–7 (N.D. Cal. Nov. 8, 2011); Christou v. Beatport, LLC, 849 F. Supp. 2d 1055, 1074–77 (D. Colo. Mar. 14, 2012); s*ee also* Zoe Argento, *Whose Social Network Account? A Trade Secret Approach to Allocating Rights*, 19 MICH. TELECOMM. & TECH. L. REV. 201, 249 (2013). Argento argues trade secrets law is best situated to resolve disputes of ownership of social media accounts between employers and employees. *Id.*

[28] *See* Eagle v. Morgan, Civil Action No. 11-4303, 2012 WL 4739436, at *3–6 (E.D. Pa. Oct. 4, 2012); Miao, *supra* note 17, at 1054–62. Miao argues the CFAA best addresses this issue of ownership. *Id.*

[29] *See* Halperin, *supra* note 16, at 336; Hidy, *supra* note 16, at 471–72.

[30] *See infra* case discussion in Sections I.A–B.

[31] *See infra* Part II.

[32] *See Property*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Property signifies . . . one's exclusive right of ownership of a thing. In their strict meanings, therefore, the right of ownership and property are synonymous . . . the term 'property' is applied to every kind of valuable right and interest that can be made the subject of ownership.").

[33] *See Personal Property*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Any movable or intangible thing that is subject to ownership.").

[34] *Compare In re* Borders Grp., Inc., No. 11-10614 MG, 2011 WL 5520261, at *13 (Bankr. S.D.N.Y. Sept. 27, 2011) (treating social media accounts as property, grouping them with subscriber lists), *and* Ardis Health, LLC v.

the growing trend is to recognize property interests in, at least, certain aspects of social media accounts.[35]

1. PhoneDog v. Kravitz[36]

PhoneDog v. Kravitz concerned a dispute between a business, PhoneDog, and former employee, Kravitz, who refused to relinquish control of a Twitter account used in connection with his employment.[37] Kravitz was originally hired by PhoneDog to work as a video blogger and product reviewer and was given a Twitter account with the handle "@PhoneDog_Noah" to "disseminate information and promote PhoneDog's services on behalf of PhoneDog."[38] Kravitz, however, asserted that over half the tweets from the account were personal in nature and wholly unrelated to PhoneDog.[39] When Kravitz left PhoneDog, he changed the account—which had amassed around 17,000 followers—handle to "@noahkravitz" and continued to tweet.[40] Consequentially, PhoneDog filed suit against Kravitz, asserting state law claims for misappropriation of trade secrets, tortious interference, and conversion.[41]

This case eventually settled with Kravitz in control of the account.[42] However, there were still a few significant points, particularly stemming from the trade secrets and conversion claims, both of which survived Kravitz's initial motion to dismiss.[43] Notably,

---

Nankivell, No. 11 Civ. 5013 NRB, 2011 WL 4965172, at *3 (S.D.N.Y. Oct. 19, 2011) (holding property interests exist in the access information of social media accounts), *with* Mattocks v. Black Ent. Television LLC, 43 F. Supp. 3d 1311, 1321 (S.D. Fla. 2014) (holding there are no property interests in Facebook "likes").

[35] *See* Hidy, *supra* note 16, at 472–73 ("The emerging precedent on the issue of property rights and social media accounts establishes that social media accounts constitute intangible property.").

[36] No. C 11-03474 MEJ, 2011 WL 5415612 (N.D. Cal. Nov. 8, 2011).

[37] *Id.* at *1.

[38] *Id.*

[39] Noah Kravitz's Countercls. and Answer to Pl.'s First Am. Compl. for Misappropriation of Trade Secrets, Interference with Prospective Economic Advantage and Conversion at ¶ 14, PhoneDog v. Kravitz, 2012 WL 554034 (N.D. Cal. Feb. 14, 2012) (No. 3:11-03474 MEJ).

[40] *PhoneDog*, 2011 WL 5415612, at *1.

[41] *Id.*

[42] *See* Stipulation for Dismissal After Settlement at ¶¶ 2–3, PhoneDog v. Kravitz, 2013 WL 207773 (N.D. Cal. Jan. 7, 2013) (No. 3:11-cv-03474-MEJ).

[43] *See PhoneDog*, 2011 WL 5415612, at *7–8, 10.

the court left open the possibility that the followers and password of a social media account could be trade secrets.[44] Further, the court found that the account was property, and the conversion claim was at the "core of this lawsuit."[45]

2. Eagle v. Morgan[46]

In *Eagle v. Morgan*, an employee brought an action against her former employer to regain access and control of a LinkedIn account.[47] Eagle, the employee, co-owned a banking education company, Edcomm.[48] The business encouraged employees to create and actively manage LinkedIn accounts for marketing and sales purposes.[49] While Edcomm did not require employees to create accounts, it was very involved in the account content of its employees.[50] Edcomm set policies for employee LinkedIn use; employees registered their accounts with Edcomm email domains and with Edcomm's permission.[51] Company executives believed Edcomm owned employee LinkedIn accounts, and, in Eagle's case, multiple employees had access to and helped manage her account.[52]

When Edcomm terminated Eagle's employment, Edcomm employees changed Eagle's LinkedIn password, which prohibited her from accessing her contacts and messages.[53] For approximately two weeks following Eagle's termination, Edcomm had exclusive access to the account, and it changed the name, image, education, and experience of the account to that of its interim CEO.[54] However, some information regarding Eagle remained, and a Google search of Eagle's name brought up the account with the new CEO's photograph.[55] Eagle then filed suit, asserting

---

[44] *See id.* at *6–7.
[45] *Id.* at *9.
[46] No. 11-4303, 2012 WL 4739436 (E.D. Pa. Oct. 4, 2012).
[47] *Id.* at *2.
[48] *Id.* at *1.
[49] *Id.*
[50] *Id.*
[51] *Id.* at *2.
[52] *Id.* at *2–3.
[53] *Id.* at *3.
[54] *Id.*
[55] *Id.*

eleven claims, including CFAA violations, misappropriation, conversion, and tortious interference.[56] Edcomm filed counterclaims for misappropriation, unfair competition, and conversion.[57]

The court granted Edcomm summary judgment on Eagle's CFAA claims, holding that Eagle's alleged loss of business opportunities while she was unable to access her account was not recoverable under the CFAA.[58] At a bench trial, the court also ruled in favor of Edcomm on Eagle's conversion and tortious interference claims.[59] Notably, regarding the conversion claim, the court held that a LinkedIn account "is not [a] tangible chattel, but rather an intangible right to access a specific page on a computer."[60] This holding squarely conflicts with *PhoneDog*, where the court specifically found a property interest in the social media account.[61] Eagle, however, did succeed on her misappropriation of identity and publicity claims, but was awarded no compensatory damages.[62] Edcomm's counterclaims were unsuccessful as well.[63]

3. Maremont v. Susan Fredman Design Group[64]

Maremont v. Susan Fredman Design Group addressed an employer's right to access an employee's personal social media accounts that were used in conjunction with a company campaign.[65] The employee, Maremont, sued her former employer, Susan Fredman Design Group (SFDG), after SFDG began to post on her Twitter and Facebook accounts to promote the business while she was recovering from an injury in the hospital.[66] Maremont was the director of marketing, public relations, and e-commerce for SFDG, and her responsibilities included developing and conducting social

---

[56] *Id.* at *2.
[57] *Id.* at *6.
[58] *Id.* at *3–6.
[59] *Id.* at *10–11.
[60] *Id.* at *10.
[61] *See* PhoneDog v. Kravitz, No. C 11-03474 MEJ, 2011 WL 5415612, at *9 (N.D. Cal. Nov. 8, 2011).
[62] *Eagle*, 2013 WL 943350, at *13–15.
[63] *Id.* at *17.
[64] 772 F. Supp. 2d 967 (N.D. Ill. 2011).
[65] *Id.* at 969–70.
[66] *Id.* at 970.

media campaigns for SFDG on Facebook and Twitter.[67] Her bonus compensation was tied to the success of her social media efforts.[68] Maremont's social media accounts were used in both a personal and professional capacity, and she frequently posted links to SFDG's website and blog.[69] This, in turn, would increase SFDG's visibility, sales, "and, ultimately, add to her bonus."[70] SFDG also instructed Maremont to create a Facebook Page for SFDG, which she did using her personal account.[71]

When Maremont was informed SFDG was posting on her accounts, she instructed the company to stop, but when the company allegedly ignored her request, Maremont changed the password to her accounts.[72] Maremont then left SFDG and sued the company, alleging various claims arising from SFDG's access and control of her social media accounts.[73]

Maremont's false association and false endorsement claims under the Lanham Act and her claims under the Stored Communications Act (SCA) initially survived summary judgment.[74] Notably, the court found that the social media accounts could constitute Maremont's commercial interest, which she had the right to protect if she created the accounts for her own economic benefit.[75] The court also found dispositive the fact that the account was in Maremont's name, so even though the account was associated with SFDG, it would be reasonable to conclude that the posts were made by Maremont herself.[76] However, Maremont's Lanham Act claims were ultimately dismissed, as she could not

---

[67] *Id.* at 969.

[68] Maremont v. Susan Fredman Design Grp., Ltd., No. 10 C 7811, 2014 WL 812401, at *1 (N.D. Ill. Mar. 3, 2014).

[69] *Id.*

[70] *Id.*

[71] *Id.* at *2.

[72] *Id.* at *3.

[73] *Id.* at *1.

[74] Maremont v. Susan Fredman Design Grp., Ltd., 772 F. Supp. 2d 967, 971 (N.D. Ill. 2011); *Maremont*, 2014 WL 812401, at *8.

[75] *Maremont*, 2014 WL 812401, at *4 ("[S]he created her Twitter and Facebook accounts for her own economic benefit, knowing that if she left her employment at SFDG, she could promote another employer to her Twitter and Facebook followers. This following has, in the internet age, become a marketable commercial interest.").

[76] *Id.* at *5.

show financial injury.[77] Additionally, at trial, a jury ruled in favor of SFDG on Maremont's SCA claim.[78]

4. Mattocks v. Black Entertainment Television[79]

In *Mattocks v. Black Entertainment Television*, Stacey Mattocks, a part-time employee, sued her employer Black Entertainment Television (BET), over control of a Facebook "Fan" Page created by Mattocks for a television series BET owned.[80] Mattocks's Page was an unofficial fan page, meaning she could not hold the Page out to the public as the "official" series page sponsored or operated by BET.[81] BET contacted Mattocks two years after she created the Page and later hired her to manage the Page on a part-time basis.[82] BET then displayed its trademarks and logos on the Page, encouraged its viewers to "like" the Page, and provided Mattocks with exclusive content.[83] BET also regularly instructed Mattocks to post—or not post—certain information to the Page.[84] Mattocks posted the majority of the content on the Page, but other BET employees occasionally posted content as well.[85] Throughout Mattocks's employment with BET, the number of "likes" on the Page grew from approximately two million to over six million.[86]

The parties then entered into an agreement whereby BET agreed not to exclude Mattocks from the Page by changing her administrative rights, while Mattocks granted administrative access to BET and allowed BET to update the content in its sole

---

[77] *Id.*

[78] Maremont v. Susan Fredman Design Grp., Ltd., No. 10 C 7811, 2015 WL 638503, at *1 (N.D. Ill. Feb. 13, 2015).

[79] 43 F. Supp. 3d 1311 (S.D. Fla. 2014).

[80] *Id.* at 1314–15.

[81] *Id.* at 1315. Facebook Fan Pages are "created with a specific focus—such as a corporate brand, place, organization, or public figure—allowing fans of that subject to express support for or interest in the topic." *Id.* at 1314–15 (internal citation omitted). Facebook differentiates between "official" and "unofficial" Fan Pages. *Id.* at 1315. Only an authorized representative of the entity the page represents may administer official pages. *Id.* While unofficial pages can be created by any user, provided they do not mislead others into believing it is an official page and must make it clear it is not an official page. *Id.*

[82] *Id.* at 1315–16.

[83] *Id.* at 1316.

[84] *Id.*

[85] *Id.*

[86] *Id.*

discretion.[87] After signing the agreement, the parties discussed Mattocks joining BET full-time and, in the course of the discussions, Mattocks informed BET that she would restrict BET's access to the Page until they reached a "mutually beneficial resolution" regarding her employment.[88] BET subsequently created a new official page for the series, asked Facebook to "migrate" the fans of Mattocks's Page to the new Page, and terminated its agreement with Mattocks.[89] Facebook granted BET's migration request and also shut down Mattocks's Page.[90] BET took similar action with Twitter for another account made by Mattocks.[91] Mattocks then brought suit against BET, asserting claims of tortious interference with Mattocks's contracts with Facebook and Twitter, breach of contract, breach of good faith and fair dealing, and conversion.[92]

The court held BET did not tortiously interfere with Mattocks's contracts with Facebook and Twitter because BET's interference was justified as it had "a supervisory interest in how the relationship is conducted or a potential financial interest in how a contract is performed."[93] Further, BET's interference was not solely based on malice and was, at least partially, motivated by Mattocks's revocation of BET's access, which impacted BET's economic interest.[94] The court ruled in favor of BET on the breach of contract and breach of good faith claims as well, finding that Mattocks materially breached the agreement when she restricted BET's access to the Page, which excused BET of any of its contractual obligations.[95] Finally, the court also rejected Mattocks's conversion claim, in which Mattocks argued the "likes" of the Page that she had accumulated while she worked on it were a business interest that BET converted.[96] The court held that Facebook "likes" did not constitute a property interest, noting the ease with which users can remove their "likes."[97]

---

[87] *Id.*
[88] *Id.*
[89] *Id.* at 1316–17.
[90] *Id.* at 1317.
[91] *Id.*
[92] *Id.*
[93] *Id.* at 1319.
[94] *Id.*
[95] *Id.* at 1320–21.
[96] *Id.* at 1321.
[97] *Id.* ("'[L]iking' a Facebook Page simply means that the user is expressing his or her enjoyment or approval of the content. At any time, moreover, the

5. Ardis Health v. Nankivell[98]

Ardis Health v. Nankivell is another case in which a former employee took social media accounts with them after the termination of the employment relationship.[99] The plaintiffs, Ardis Health (Ardis), Curb Your Cravings (CYC), and USA Herbals, were a group of closely affiliated online marketing companies that developed and marketed beauty products.[100] All of the companies are owned and operated by their founder, Jordan Finger.[101] Nankivell, the defendant, was originally hired by CYC as a video and social media producer but performed work for each of the plaintiff companies.[102]

Nankivell's responsibilities included "producing videos and maintaining websites, blogs, and social media pages in connection with the online marketing of plaintiffs' products."[103] Additionally, she maintained the passwords and login information for the companies' websites, email accounts, and social media accounts (collectively, "access information").[104] Nankivell signed a "Work Product Agreement" at the start of her employment with CYC mandating that she return all confidential information at the employer's request and that the work she developed while employed was the "sole and exclusive property" of her employer.[105] After approximately three years, the plaintiffs terminated Nankivell's employment and requested the return of the access information.[106] Nankivell refused to provide the companies with the access information, and the companies subsequently filed suit seeking injunctive relief.[107]

---

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."). The court held Facebook "likes" could not be converted in the same manner as goodwill or other intangible business interests due to the tenuous relationship between "likes" on a Facebook Page and the creator of the Page. *Id.*

[98] No. 11 Civ. 5013(NRB), 2011 WL 4965172 (S.D.N.Y. Oct. 19, 2011).

[99] *Id.* at *2.

[100] *Id.* at *1.

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.* at *2.

[107] *Id.*

The court ruled in favor of the companies and held that the plaintiffs owned the rights to the access information.[108] Furthermore, the court recognized that Nankivell's unauthorized retention of the access information could form the basis of a conversion claim.[109] Again, there is contradictory case law as to whether property rights exist in social media accounts.[110] Here, the court answered definitively in the affirmative.[111]

6. Salonclick v. SuperEgo Management[112]

In *Salonclick v. SuperEgo Management*, Salonclick, a hair and skin care seller, hired SuperEgo Management as an independent contractor for marketing, public relations, and administrative support.[113] After eight years, Salonclick terminated its relationship with SuperEgo.[114] Salonclick alleged, after it terminated SuperEgo, that SuperEgo's founder, Yang, accessed Salonclick's social media accounts for Yang's benefit.[115] Yang redirected some of Salonclick's websites to her website and used Salonclick's social media accounts, such as Twitter and Facebook, to promote her new online business.[116] Salonclick subsequently filed suit, bringing multiple causes of action related to this unauthorized use.[117]

SuperEgo moved to dismiss Salonclick's replevin and conversion claims on the grounds that Salonclick could not have a cognizable property interest in access to a social media account.[118] The court, however, rejected this argument and recognized the

---

[108] *Id.* at *3.

[109] *Id.*

[110] *Compare id.* (holding that property interests exist in social media accounts), *with* Eagle v. Morgan, Civil Action No. 11-4303, 2013 WL 943350, at *10 (E.D. Pa. Mar. 12, 2013) (holding there is no property interest in a LinkedIn account), *and* Mattocks v. Black Ent. Television LLC, 43 F. Supp. 3d 1311, 1321 (S.D. Fla. 2014) (holding there is no property interest in Facebook "likes").

[111] Ardis Health, LLC, 2011 WL 4965172, at *3 ("It is uncontested that plaintiffs own the rights to the Access Information.").

[112] No. 16 Civ. 2555 (KMW), 2017 WL 1906865 (S.D.N.Y. May 8, 2017).

[113] *Id.* at *1.

[114] *Id.*

[115] *Id.* at *2.

[116] *Id.*

[117] *Id.* at *1.

[118] *Id.* at *2.

existence of property rights in social media accounts.[119] The court held that Salonclick properly stated a claim for conversion of its social media accounts and a claim for replevin "which requires that 'defendant is in possession of certain property of which the plaintiff claims to have a superior right.'"[120] While this case follows the continuing trend of recognizing property rights in social media accounts, it does not provide a useful framework to determine the account's rightful owner.[121]

B. Determining Ownership

1. In re CTLI, LLC[122]

While not the typical dispute between employer and former employee, *In re CTLI*, a bankruptcy case, provides perhaps the most useful and well-defined framework available for determining ownership of a social media account.[123] There, the bankruptcy court had to resolve an issue of first impression: "whether social media can ever be property of a bankruptcy estate."[124] This case arose out of the Chapter 11 reorganization of CTLI, LLC, which, prior to bankruptcy, was doing business as Tactical Firearms, a gun store and shooting range in Texas wholly owned by Jeremy Alcede.[125] During the bankruptcy proceedings, Alcede was ordered to "deliver possession and control" of "passwords for the Debtor's social media accounts" to a party acting on behalf of the reorganized debtor.[126] Alcede did not honor that instruction and

---

[119] *Id.* at *4. Actions for conversion typically require a piece of tangible property. *Id.* However, the court acknowledged, "New York courts recognize exceptions when the rightful owner of intangible property is prevented from creating or enjoying a 'legally recognizable and protectable property interest in his idea.'" *Id.* (quoting Triboro Quilt Mfg. Corp. v. Luve LLC, No. 10 Civ 3604, 2014 WL 1508606, at *9 (S.D.N.Y. Mar. 18, 2014)).

[120] *Id.* (quoting Nissan Motor Acceptance Corp. v. Scialpi, 944 N.Y.S.2d 160, 162 (App. Div. 2012)).

[121] *See id.*; Ardis Health, LLC v. Nankivell, No. 11 Civ. 5013 NRB, 2011 WL 4965172, at *3 (S.D.N.Y. Oct. 19, 2011); Maremont v. Susan Fredman Design Grp., Ltd., No. 10 C 7811, 2014 WL 812401, at *4 (N.D. Ill. Mar. 3, 2014).

[122] 528 B.R. 359, 359 (Bankr. S.D. Tex. 2015).

[123] *See id.* at 366–73.

[124] *Id.* at 361.

[125] *Id.* at 362.

[126] *Id.* at 362–63.

argued the social media accounts belonged to him personally, not the debtor.[127]

The court first examined the issue of whether social media accounts are property interests and answered in the affirmative for *business* social media accounts.[128] Then the court examined the factual circumstances to determine whether the business or Alcede, personally, owned the account, ultimately holding the accounts were property of the business.[129] The court identified a variety of factors leading to this conclusion: (1) the company's name was the title of the Facebook Page, which raised the presumption that it was the company's Page;[130] (2) the Page linked to the company's website;[131] (3) the majority of posts were business-related;[132] (4) Alcede shared the login information with other business associates;[133] (5) the use of the Page was to generate revenues for the business;[134] (6) the account was a page, not an individual profile;[135] and (7) Alcede had another personal Page separate from the contested Page.[136]

---

[127] *Id.* at 363.

[128] *Id.* at 366–67.

[129] *Id.* at 367–74.

[130] *Id.* at 367–68 ("The fact that this was a Page . . . entitled 'Tactical Firearms' raises a presumption that it was the Debtor's Facebook Page, is now the reorganized Debtor's Facebook Page, and has never been Mr. Alcede's personal Facebook Page.").

[131] *Id.* at 368.

[132] *Id.* ("Many of Mr. Alcede's posts were expressly business-related; for example, he advertised the store's Black Friday sale and new inventory, and he spoke for the store with phrases like, 'on behalf of myself and the Tactical Firearms family.'").

[133] Alcede "granted access for a Tactical Firearms employee to post Status Updates to the Tactical Firearms Facebook Page directly through the business's Constant Contact account, an email marketing tool." *Id.* Alcede also shared his personal Facebook login information with a business associate so the associate could post updates to the Page promoting the company's products. *Id.*

[134] *Id.* ("[U]se of the Tactical Firearms Facebook Page was clearly to generate revenues for the company, and confirms that this Page belongs to the reorganized Debtor.").

[135] *Id.* at 372 ("Pages can be managed by multiple individuals with Profiles, so that no individual needs access to any other individual's personal information in order to manage the Page—the Court cannot stress this point enough.").

[136] Alcede had a personal profile in addition to the contested Page. *Id.* at 369. He referred to his personal profile as his "friends page" and the former Tactical Firearms Page as his "likes page." *Id.*

Additionally, the court held that the fact that Alcede posted content referencing himself as an individual and otherwise made personal posts on the account did not transform the Page into his personal property.[137] Instead of recognizing that Alcede had property interests in the accounts themselves, the court found that "the proper way to characterize Mr. Alcede's interest in the reorganized Debtor's social media accounts is an interest in professional goodwill."[138]

The methodology used by the *In re CTLI* court is the most well-defined framework employed by courts thus far.[139] The framework can essentially boil down to a two-step analysis: (1) look at the account on its face to determine a presumption of ownership, and (2) look at the use of the account to overcome that presumption.[140]

2. International Brotherhood of Teamsters Local 651 v. Philbeck[141]

In *International Brotherhood of Teamsters Local 651 v. Philbeck*, a local union sued its former president, Philbeck, after

---

[137] *Id.* at 370.

[138] *Id.* at 373. This is a deceptively profound distinction. While Alcede used the business's account, some of his professional goodwill might have been reflected in the account's followers in addition to the business goodwill. *See id.* In any case, the overall goodwill of a company is developed through its employees over the course of the company's tenure, but that general goodwill is still property of the company; ownership of that general goodwill is not parceled out to each individual employee. *See id.* If an employee leaves a company and some goodwill is thereby withdrawn, that goodwill would be the sole property of the departed employee. *See id.* "The line of demarcation between professional and personal goodwill is precisely the line between goodwill that departs with the professional and goodwill that remains with the business." *Id.* The loss of followers to a business's accounts and subsequent gain in followers by a former employee's accounts would reflect the true extent of his personal interest in the accounts. *See id.* at 373–74. So, by granting exclusive control to a company, a departed employee is unrestricted in their ability to control whatever property interest they legitimately hold in a company's social media accounts. *See id.* at 373.

[139] *Compare id.* (holding that the line that distinguishes personal and professional goodwill is the goodwill that departs with the professional when they leave), *with* Mattocks v. Black Ent. Television LLC, 43 F. Supp. 3d 1311, 1321 (S.D. Fla. 2014) (holding that there is no property interest in social media likes due to the fact that users may freely remove likes from a page).

[140] *See In re* CTLI, LLC, 528 B.R. at 368–72; Moore, *supra* note 25, at 515–16.

[141] 464 F. Supp. 3d 863, 863 (E.D. Ky. 2020).

he refused to turn over passwords to social media accounts allegedly belonging to the union after he lost his re-election bid.[142] While Philbeck was president of the union, he exerted control over its Facebook Page and created a union member group.[143] Philbeck removed administrative privileges from other union executive board members and changed the passwords for the Pages after he lost re-election.[144] The union asserted a variety of claims including conversion of union property and sought to compel Philbeck to return the passwords of all union social media accounts back to the union.[145]

The preeminent issue of the case was whether the union or Philbeck was the true owner of the social media accounts.[146] Relying heavily on the framework used in *In re CTLI*, the court held that the union was the owner of the accounts.[147] The court found that while Philbeck created the Facebook Pages, he did so in his capacity as union president.[148] The court rejected Philbeck's argument that he created the accounts and Pages for his own personal benefit as the Pages were advertised on business cards paid for by the union, in the union newsletter, and on the union's website.[149] Further, other employees had administrative privileges and helped promote, monitor, and maintain the Pages while at work.[150] The court found these facts indicative that the Pages were used to communicate and disseminate information to the union.[151] The nature of the posts supported the idea that the Page was an official union page, not Philbeck's private page.[152] For these reasons, the court concluded the Facebook Pages were property of the union.[153]

---

[142] *Id.* at 868.
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] *Id.* at 870.
[147] *Id.* at 871–72.
[148] *Id.* at 871.
[149] *Id.*
[150] *Id.*
[151] *Id.*
[152] *Id.* ("[O]ne post stated, 'Teamsters Local 651 page created in 2010 has been informed we are in the top 10% of union pages in the entire country,' while another invited viewers to 'share *our* page.'").
[153] *Id.* at 872.

3. JLM Couture, Inc. v. Gutman[154]

JLM Couture v. Gutman involved a dispute over the control and use of social media accounts between a leading bridal wear designer, Gutman, and the manufacturer from whose employment she recently resigned, JLM Couture (JLM).[155] While employed by JLM, Gutman created an Instagram account and used the account "to display aspects of her life and her personality, posting images, text, and videos that focused on her parents, her travels, and her hobbies."[156] She also frequently used the account in conjunction with JLM's marketing programs to display JLM's apparel and, in the biographical section of the account, displayed links to JLM's public relations department email address and a website owned by JLM.[157] Additionally, JLM provided Gutman with photographs and draft captions to post on the account. However, Gutman composed substantially all the captions and other narrative content.[158]

Gutman also had discretion to post to the account and respond to direct messages from followers regarding both her personal life and JLM's products.[159] Another JLM employee assisted Gutman in managing the account, Gutman requested JLM's employees write content for the account, and she requested that JLM hire a "'Social Media Director/Strategist' to 'manage the digital media marketing efforts and day-to[-]day activities/posts on all platforms.'"[160] JLM made the account a part of its efforts to market its brand, adding references to the account on tags placed on its physical products and in print advertisements.[161] Further, JLM's employee responded to email inquiries, which consisted mainly of industry-related appearance requests for Gutman, sent to the address listed in the account's biographical section.[162]

---

[154] No. 20 CV 10575-LTS-SLC, 2021 WL 827749 (S.D.N.Y. Mar. 4, 2021).
[155] *Id.* at *1.
[156] *Id.* at *4.
[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] *Id.* at *4–5.
[161] *Id.* at *5.
[162] *Id.*

Approximately nine years after the parties entered into their original agreement, Gutman entered into deals and began to promote two other brands on the Instagram account.[163] After JLM extended Gutman's contract, the parties engaged in unsuccessful negotiations to amend the terms of the agreement.[164] Gutman then changed the access credentials for the account—which had reached over 1.1 million followers—and did not share them with JLM, and informed JLM that she would "not be posting any JLM-related business" to the account.[165] JLM subsequently sued Gutman, asserting multiple claims arising from Gutman's activities in connection with social media accounts.[166]

The court issued a temporary restraining order directing Gutman to turn over control of the account and other social media accounts to JLM and prohibiting Gutman from altering or posting to the accounts without JLM's permission.[167] Oddly, in its order granting JLM a preliminary injunction, the court declined to address JLM's conversion and trespass to chattel claims because those claims turned on the dispute over ownership of the accounts, yet the court granted complete control over the accounts to JLM.[168] However, on appeal, the Second Circuit vacated that portion of the preliminary injunction, holding the district court exceeded its discretion in effectively assigning valuable assets to JLM without first deciding who owns them.[169]

C. A Body of Law Ripe with Inconsistencies

It is nearly impossible to surmise a cognizable set of rules that govern a party's legal rights related to social media accounts from the cases above. The *Eagle* court declined to recognize property rights in a LinkedIn account for a conversion claim, while the *Salonclick* and *PhoneDog* courts held that there were property rights in Facebook and Twitter accounts.[170] Similarly, the *Maremont*

---

[163] *Id.*

[164] *Id.* at *6.

[165] *Id.*

[166] *Id.* at *1.

[167] *Id.* at *6.

[168] *Id.* at *19.

[169] *See* JLM Couture, Inc. v. Gutman, 24 F.4th 785, 801 (2d Cir. 2022).

[170] *See* Eagle v. Morgan, Civil Action No. 11-4303, 2013 WL 943350, at *10 (E.D. Pa. Mar. 12, 2013); Salonclick LLC v. SuperEgo Mgmt. LLC, No. 16 Civ.

court recognized a marketable and commercial interest in social media accounts.[171] The *Ardis* court held that there was a property interest in the access information to social media accounts, while the *Mattocks* court held that there was no property interest in the "likes" on a Facebook Page since users were free to like and unlike at their discretion.[172] The *CTLI* court directly contradicted the *Mattocks* court, and held that social media accounts constituted intangible property similar to subscriber lists, even though customers could opt out of such lists.[173]

The judicial rationales used to determine control and ownership are confusing and contradictory as well.[174] The *PhoneDog* court suggested that the creation of the account and reference to the company in the Twitter handle when the employee was hired, as well as the Twitter account's use to promote company objectives, likely gave the company a property right in the Twitter account.[175] The *Mattocks* court granted the employer the right to control the account and totally disregarded the fact that the employee had unilaterally created the Facebook account prior to her employment.[176] Both the *Maremont* and *CTLI* courts recognized that both parties had an interest in the accounts but came

---

2555 (KMW), 2017 WL 239379, at *4 (S.D.N.Y. Jan. 18, 2017); PhoneDog v. Kravitz, No. C 11-03474 MEJ, 2011 WL 5415612, at *9 (N.D. Cal. Nov. 8, 2011).

[171] *See* Maremont v. Susan Fredman Design Grp., Ltd., No. 10 C 7811, 2014 WL 812401, at *4 (N.D. Ill. Mar. 3, 2014).

[172] *See* Ardis Health, LLC v. Nankivell, No. 11 Civ. 5013 NRB, 2011 WL 4965172, at *3 (S.D.N.Y. Oct. 19, 2011); Mattocks v. Black Ent. Television LLC, 43 F. Supp. 3d 1311, 1321 (S.D. Fla. 2014).

[173] *See In re* CTLI, LLC, 528 B.R. 359, 367 Bankr. S.D. Tex. 2015) ("Like 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. Just as Facebook Users can 'unlike' a Page at any time, subscribers to email lists can also, by federal law, opt out at any time.").

[174] *Compare PhoneDog*, 2011 WL 5415612, at *9 (referencing the company and using the account to promote the company likely gives the company a property right in the account), *and In re CTLI, LLC*, 528 B.R. at 367 (naming the accounts after the company was sufficient to give the company a property interest), *with Maremont*, 2014 WL 812401, at *4 (N.D. Ill. Mar. 3, 2014) (using the account to promote the company was not sufficient to give the company a property interest).

[175] *See PhoneDog*, 2011 WL 5415612, at *9.

[176] *See Mattocks*, 43 F. Supp. 3d at 1319–21.

to different conclusions as to ownership based on similar facts.[177] The *CTLI* court held that the accounts belonged to the business because they were named after the business, used to advance the business's interests, accessible by multiple employees, and linked to the business's website.[178] The *Maremont* court, however, held that the accounts belonged to the employee, notwithstanding the facts that the accounts were used to advance the company's interests, multiple employees had access, and social media use was a large part of the employee's job responsibilities.[179] The *Eagle* court concluded that a LinkedIn account was a commercial interest owned by the employee, even though the employer directed the employee to create the account, the account was used to promote the company's objectives, the employer assisted in managing account content, and other employees had access.[180]

II. PROPOSED TEST

The lack of cohesion outlined in the preceding section evidences the need for a more universal standard to decide these types of lawsuits.[181] This is not to say that those courts did not get anything right.[182] In fact, there is a fair amount of overlap between their analyses and the test this Note proposes.[183] The problem with the current jurisprudence on the issue is not necessarily incorrect outcomes, but simply that there is not a clear and identifiable framework for decision makers to turn to when they hear this issue.[184] Further, the most defined and repeatable

---

[177] *See Maremont*, 2014 WL 812401, at *4; *In re CTLI, LLC*, 528 B.R. at 373–74.

[178] *See In re CTLI, LLC*, 528 B.R. at 368–70.

[179] *See Maremont*, 2014 WL 812401, at *3–4.

[180] *See* Eagle v. Morgan, Civil Action No. 11-4303, 2013 WL 943350, at *10 (E.D. Pa. Mar. 12, 2013).

[181] *See supra* Section I.C.

[182] *See, e.g.*, *In re CTLI, LLC*, 528 B.R. at 368–72 (the court considered personal versus business usage and access to the account); *Maremont*, 2014 WL 812401, at *4 (the court considered purpose at the time of creation).

[183] *See supra* Part I.

[184] *See* Moore, *supra* note 25, at 512 ("[T]here is no certainty for employers and employees who wish to bring social media disputes to the courts."); Halperin, *supra* note 16, at 336 ("[T]he courts have not yet developed a unified method of determining whether the former employee or the employer should maintain control of a social media account.").

test currently in existence creates an overly difficult burden on the employee to overcome the presumption the account belongs to the business and ignores other essential factors.[185]

The test this Note proposes amalgamates the good from previous decisions, disposes of the cumbersome, and adds what the courts missed.[186] The elements of the five-factor balancing test proposed as the standard to determine ownership of social media accounts are: (1) personal versus business usage; (2) purpose at the time of creation; (3) access to the account; (4) job function and industry custom; and (5) economic impact. Of course, the weight each factor carries in rendering a decision will vary based on the facts of the case, but taken together, this comprehensive test can lead decision makers to the right conclusion regardless of the circumstances. In some cases, one factor may be enough to decide the dispute, but these situations rarely create lawsuits, or the suit is resolved swiftly.[187]

A. Personal Versus Business Usage

While the terminology used may differ slightly, every court that has heard this issue considered personal versus business usage.[188] If a social media account is used solely for personal

---

[185] *See In re CTLI, LLC*, 528 B.R. at 368 (holding the fact that Alcede created the Facebook Page for personal reasons, used the Page to share personal posts, and accessed the Page through his personal profile was insufficient to overcome the presumption that it was a business page).

[186] The test proposed in this Note includes reshaped elements of some of the cases previously discussed. *See* JLM Couture, Inc. v. Gutman, No. 20 CV 10575-LTS-SLC, 2021 WL 827749, at *4–5, *21–22 (S.D.N.Y. Mar. 4, 2021) (considering the economic impact the loss of control of the account would have on the parties and shared access to the account among multiple employees). It also removes the presumption of the business's ownership, that the employee must rebut. *See* Moore, *supra* note 25, at 515–16. Also, this test includes job function and industry custom, and economic impact. *See infra* Sections II.D–E.

[187] *See* Ardis Health, LLC v. Nankivell, No. 11 Civ. 5013 NRB, 2011 WL 4965172, at *4 (S.D.N.Y. Oct. 19, 2011).

[188] *See, e.g.*, *In re CTLI, LLC*, 528 B.R 368–72. The court considered the fact that the company's name was the title of the Page, the company's website was linked to the Page, and the majority of posts were "expressly business-related." *Id.*

purposes, then there is no dispute.[189] Generally, there are not disputes over accounts used solely for business purposes either.[190] The majority of disputes concern accounts in which there is a mix of personal and business use.[191] In many cases, this element has been either the single most important factor,[192] or the only factor that courts considered.[193] Additionally, courts have not given enough weight to an employee's use of the account for personal reasons, and the approach used to analyze this element seeks to remedy that discrepancy.[194]

There are many facts a court can use to decide which party this factor of the test supports. Facts that support the argument that the account belongs to the company include, but are not limited to: the account uses the company's name in its title or handle;[195] the account links to the company's website;[196] the employee maintains another account for solely personal use;[197] the

---

[189] *See* Alexandra L. Jamel, Comment, *Mixing Business with Pleasure: Evaluating the Blurred Line Between the Ownership of Business and Personal Social Media Accounts Under § 541(a)(1)*, 33 EMORY BANKR. DEV. J. 561, 562 (2017) ("If a clear distinction exists between how a social media account is used—for business or personal use—ownership issues do not arise.").

[190] *But see* Eagle v. Morgan, Civil Action No. 11-4303, 2013 WL 943350, at *1 (E.D. Pa. Mar. 12, 2013) (plaintiff's LinkedIn account was only used for business purposes).

[191] *See* Jamel, *supra* note 189, at 562 ("Significant ownership issues arise, however, when an account has a mixed business and personal use.").

[192] *See In re CTLI, LLC*, 528 B.R. at 367–68.

[193] *See id.* at 367–72; Int'l Bhd. of Teamsters Loc. 651 v. Philbeck, 464 F. Supp. 3d 863, 871 (E.D. Ky. 2020).

[194] *See id.*

[195] *See* PhoneDog v. Kravitz, No. C 11-03474 MEJ, 2011 WL 5415612, at *1 (N.D. Cal. Nov. 8, 2011) (considering the fact that Kravitz's Twitter handle was @PhoneDog_Noah).

[196] *See* JLM Couture, Inc. v. Gutman, No. 20 CV 10575-LTS-SLC, 2021 WL 827749, at *4 (S.D.N.Y. Mar. 4, 2021) (noting that the biographical section of the Instagram account linked to a company website).

[197] *See* Maremont v. Susan Fredman Design Grp., Ltd., No. 10 C 7811, 2014 WL 812401, at *1 (N.D. Ill. Mar. 3, 2014) ("Maremont also had Twitter and Facebook accounts for her personal use as well as to promote SFDG."). A separate account used solely in a personal capacity would give inference to the presumption that the contested account is a business account and social media platforms allow for this distinction. Facebook differentiates between personal Facebook profiles and business pages. Jamel, *supra* note 189, at 570–72. Twitter specifically allows for the creation of a business profile by the

majority of posts concern the business;[198] and the account was used to generate revenue or facilitate sales.[199] Some of these facts are more persuasive than others. For example, if the account is literally titled "Company Name," then it clearly appears to be a company account in which the employee is charged with its maintenance.[200]

Facts supporting the argument that the account belongs to the employee include, but are not limited to: employee uses their own name in the title or handle of the account;[201] no references to the company are present in the "about" or "bio" sections of the account; the account is the employee's only account on that particular platform; the manner in which the employee uses accounts on other social platforms;[202] the majority of the posts are personal in nature;[203] and the employee does not use the account to engage with others to facilitate company objectives.[204]

It is important to note the distinction between referencing an employer in an "about" or "bio" section and providing a link to the company website. If the account does not reference the company in those sections at all, it is clear evidence the intent is for personal use.[205] However, referencing the company or simply

---

business entity and an individual person does not need to be associated with a business account on Twitter. *Id.* at 576.

[198] *See In re CTLI, LLC*, 528 B.R. at 368 ("Many of Mr. Alcede's posts were expressly business-related.").

[199] *See id.* ("[T]he Tactical Firearms Facebook Page was clearly to generate revenues for the company.").

[200] *See* Int'l Bhd. of Teamsters Loc. 651 v. Philbeck, 464 F. Supp. 3d 863, 871 (E.D. Ky. 2020) (the Facebook Page was entitled "Teamsters Local 651.").

[201] *See Maremont*, 2014 WL 812401, at *1 ("Maremont's Twitter account was in her name, @jaremont.").

[202] If an employee maintains their accounts on all other platforms for strictly personal use, but mixes business and personal on one platform, that will give rise to the assumption the mixed account is a business account.

[203] *But see In re CTLI, LLC*, 528 B.R. at 368 (holding that use of the account for personal reasons did not overcome the presumption the account was a business account).

[204] For example, answering direct messages from their followers regarding business-related comments or inquiries.

[205] *See In re CTLI, LLC*, 528 B.R. at 369. Courts consider the use of a company name in the name of the account in a similar manner. *Compare* PhoneDog v. Kravitz, No. C 11-03474 MEJ, 2011 WL 5415612, at *1 (N.D. Cal. Nov. 8, 2011) (the Company name was used in the name of the account

signaling you are an employee of the company does not provide real support for either side.[206] Conversely, a link to the company website is clearly an attempt to drive traffic to said website.[207]

These courts certainly have been correct in finding this element is incredibly important—and at times determinative—in deciding who owns a social media account, but it does not tell the whole story.[208] There are many tools, both tangible and intangible, that an employee may use almost exclusively for business purposes, but which undeniably belong to the employee.[209] At the same time, there are also tools that undeniably belong to the employer.[210] For these reasons, the following elements should also play an important role in the decision of ownership.

B. Purpose at the Time of Creation

The employee's intended use of the account when they created it is relatively straightforward but exceptionally relevant to the determination of ownership.[211] If, at the time the employee created the account, they intended to use it for their *employer's* purposes, this factor weighs in favor of the *employer*.[212] If, at the

---

and the Court found the company had an ownership interest), *with Maremont*, 2014 WL 812401, at *1, *5 (the Company name was not used in the name of the account and the Court found the employee had a personal ownership interest).

[206] This is a common practice even for accounts that have nothing to do with the employee's professional life. It is simply a biographical point.

[207] *See* Matt Smith, *How to Use Your Instagram Bio Link to Drive Traffic to Your Website*, SOCIAL MEDIA TODAY (Mar. 27, 2019), https://www.socialmediatoday.com/news/how-to-use-your-instagram-bio-link-to-drive-traffic-to-your-website/551359/ [https://perma.cc/THX7-58KY].

[208] *See, e.g.*, *In re CTLI, LLC,* 528 B.R. at 368–72. This is why it is important to include these other factors outlined in this Note's proposed test.

[209] *See infra* notes 212–13 and accompanying text.

[210] *See infra* notes 212–13 and accompanying text.

[211] *See* Maremont v. Susan Fredman Design Grp., Ltd., No. 10 C 7811, 2014 WL 812401, at *4 (N.D. Ill. Mar. 3, 2014) (the court considered the fact that Maremont created her Twitter and Facebook accounts for her own economic benefit).

[212] There is an important distinction between creating an account for business purposes and creating an account to advance their specific employer's objectives. The court noted this distinction in *Maremont*. *See id.* ("[S]he created her Twitter and Facebook accounts for her own economic benefit, knowing that if she left her employment at SFDG, she could promote another employer to her Twitter and Facebook followers.").

time the employee created the account, they intended to use it for *personal* purposes this factor weighs in favor of the *employee*.

This element weighs heavily in favor of the party that created the account if the account was created prior to the existence of the employment relationship. If the employee created the account prior to his or her employment with the company, only in rare cases would the account have been created for that particular company's purposes.[213] Even if the employee began to use the account solely for business purposes during the course of their employment, the fact that the account existed prior to their employment weighs in favor of employee retaining the account post termination of the employment relationship.[214] This idea is not altogether that different from an employee owning a computer or any other piece of equipment prior to an employment relationship that they now use for work. Clearly, an employee would keep a computer they previously owned after the termination of the employment relationship.[215] The same is true for a company-issued computer; clearly, that computer belongs to the company.[216]

On the other hand, the fact that the employee made the account during the course of the employment relationship creates a rebuttable presumption that weighs in favor of the employer.[217] This presumption is rebuttable using the other elements of the test.

---

[213] *See* Mattocks v. Black Ent. Television LLC, 43 F. Supp. 3d 1311, 1315 (S.D. Fla. 2014) (noting that Mattocks created the fan page prior to her employment with BET).

[214] It is particularly relevant to note this proposition is contingent on the absence of an express agreement between the employee and the employer that governs the account. There are many situations where an employee may be hired based on the value their social media account brings to the company, in which case it would be likely the employment contract would govern this. *See* JLM Couture, Inc. v. Gutman, No. 20 CV 10575-LTS-SLC, 2021 WL 827749, at *1–2 (S.D.N.Y. Mar. 4, 2021) (Gutman created her accounts prior to her employment with JLM but signed an employment contract giving intellectual property rights to the accounts to JLM).

[215] *See In re* Pork Antitrust Litig., No. 18-CV-1776 (JRT/HB), 2022 WL 972401, at *5 (D. Minn. Mar. 31, 2022).

[216] *See Not Returning Company Laptop: What Happens?*, TECH WITH TECH (Aug. 3, 2022), https://techwithtech.com/not-returning-company-laptop-what-happens/ [https://perma.cc/A3DZ-TLUY].

[217] *See* Park & Abril, *supra* note 26, at 589–90.

Courts have used a similar standard when deciding if a member of a government agency's calendar is subject to a Freedom of Information Act (FOIA) request.[218] These courts looked to the purpose of the calendar when the employee created it and found that if the employee's original intention was for personal convenience, the calendar is not subject to a FOIA request.[219] Conversely, if the employee's original intention was for business purposes, then the calendar is subject to a FOIA request.[220] While not totally analogous, the logic behind the standard is similar.[221]

---

[218] *See* Bureau of Nat'l Affs., Inc. v. U.S. Dept. of Just., 742 F.2d 1484, 1492–93 (D.C. Cir. 1984) ("Our inquiry must therefore focus on the totality of the circumstances surrounding the creation, maintenance, and use of the document to determine whether the document is in fact an 'agency record' and not an employee's record."); Consumer Fed'n of Am. v. Dept. of Agric., 455 F.3d 283, 289 (D.C. Cir. 2006) ("[T]he question is whether the employee's creation of the documents can be attributed to the agency for the purposes of FOIA.").

[219] *See Bureau of Nat'l Affs.*, 742 F.2d at 1486 ("[A]ppointment materials that are created solely for an individual's convenience, that contain a mix of personal and business entries, and that may be disposed of at the individual's discretion are not 'agency records' under FOIA."); *Consumer Fed'n of Am.*, 455 F.3d at 293 (holding that calendars "created for the personal convenience" of the employee were not agency records and therefore not subject to FOIA requests).

[220] *Id.* at 291 (daily agendas were created to be distributed to other employees rather than retained solely for the convenience of the individual officials were agency records); *Bureau of Nat'l Affs.*, 742 F.2d at 1495 (daily agendas were created with the purpose of informing staff of the employee's availability were agency records).

[221] *See Bureau of Nat'l Affs.*, 742 F.2d at 1495 ("[T]he daily agendas are 'agency records' within the meaning of FOIA. They were created for the express purpose of facilitating the daily activities of the Antitrust Division."). These cases evidence that consideration of an employee's purpose when they created a tool now used in the course of business is not a novel mode of analysis. *See id.* at 1492–93. Further, this reasoning takes into consideration some of the other relevant factors included in this Note's proposed test and demonstrate the need for a multifactor analysis. *See id.*; *Consumer Fed'n of Am.*, 455 F.3d at 287. In *Bureau of National Affairs*, the agendas had a mix of personal and business appointments, but their main use and the reason they were created was to facilitate the organization's objectives. 742 F.2d at 1495 ("Even though the agendas reflected personal appointments, they were circulated to the staff for a business purpose."). The court also noted that perhaps their conclusion would be different on calendars in which they found were not agency records if other factors relevant to their determination were present. *See id.* at 1496 ("Our conclusion might be different if the agencies had exercised any control

C. Access to the Account

The access to the account element is also fairly straightforward. If more than one employee has access or uses the account, this factor weighs in favor of the employer.[222] If the employee in question is the only one with access to the account, this factor weighs in favor of the employee.[223] The logic behind this is not hard to understand. A resource commonly shared amongst employees is often presumed a company-owned resource that exists for the benefit of the company or to promote company objectives.[224] However, unlike some of the other factors of this test, this element does not work in absolutes.[225] Meaning, neither party can win on this element alone and it simply acts to tilt the balance towards one side or the other.[226]

---

over the materials or if the documents had been created solely for the purpose of conducting official agency business.").

[222] *See, e.g.*, Int'l Bhd. of Teamsters Loc. 651 v. Philbeck, 464 F. Supp. 3d 863, 871 (E.D. Ky. 2020); JLM Couture, Inc. v. Gutman, No. 20 CV 10575-LTS-SLC, 2021 WL 827749, at *4–5 (S.D.N.Y. Mar. 4, 2021); *In re* CTLI, LLC, 528 B.R. 359, 368 (Bankr. S.D. Tex. 2015).

[223] *See id.* at 371 ("Alcede's most vehement argument against characterizing the former Tactical Firearms Facebook Page as a business Page is that it is only accessible through his personal Facebook Profile.").

[224] *See id.* at 368 ("Alcede shared his personal Facebook login information with a business associate so that this associate could post Status Updates to the Tactical Firearms Facebook Page promoting the company's products. This particular use of the Tactical Firearms Facebook Page was clearly to generate revenues for the company and confirms that this Page belongs to the reorganized Debtor.").

[225] The purpose of the access remains relevant. If other employees have access to the account because they also regularly use the account for business purposes, then it would evidence the account belongs to the company. *See id.* at 369–70 ("[T]he fact that Mr. Alcede gave an employee . . . access to post to the Page through a paid marketing tool, and the fact that he gave a vendor access specifically to promote the company's products, supports the conclusion that the [company] Facebook Page is a business Page."). However, if access is limited and other employees simply have only accessed the account for special circumstances, then the fact that multiple people have access carries less weight. *See* Eagle v. Morgan, Civil Action No. 11-4303, 2013 WL 943350 *17 (E.D. Pa. Mar. 12, 2013) (holding the former employee owned the account, even though she granted access to other employees to make updates to her account).

[226] *See In re CTLI, LLC*, 528 B.R. at 371–72.

Like the previous element, courts deciding issues regarding FOIA calendar requests also considered the issue of access.[227] If other employees had access to the agency member's calendar and their access was to facilitate agency business, the courts found that the calendars *were* subject to FOIA requests.[228] Conversely, if other employees did not have access or access was limited, the court found that calendars *were not* subject to FOIA requests.[229]

D. Job Function and Industry Custom

The employee's actual duties and the industry in which they perform them are highly relevant to the determination of account ownership.[230]

While the particular job function of an employee has not been a major consideration in the few cases that discuss this issue, it will likely become more prevalent as the role of social media in the workplace increases.[231] If an employee's job duties

---

[227] *See* Bureau of Nat'l Affs., Inc. v. U.S. Dept. of Just., 742 F.2d 1484, 1496 (D.C. Cir. 1984); Consumer Fed'n of Am. v. Dept. of Agric., 455 F.3d 283, 290 (D.C. Cir. 2006).

[228] *See* Bureau of Nat'l Affs., 742 F.2d at 1496 ("[T]he daily agendas were created by Mr. Baxter's secretary for the express purpose of informing other staff of Mr. Baxter's whereabouts during the course of a business day so that they could determine Mr. Baxter's availability for meetings."); Consumer Fed'n of Am., 455 F.3d at 293.

[229] *See* Consumer Fed'n of Am., 455 F.3d at 292 n.16 ("In allowing computer access, the official surrenders personal control over the document and indicates that it will be used by others to plan their own workdays."); Bureau of Nat'l Affr., 742 F.2d at 1495–96 (the fact that access by other employees was only episodic reinforced the conclusion that the official retained tight control over the calendars and that their principal use was personal).

[230] *See* PhoneDog v. Kravitz, No. C 11-03474 MEJ, 2011 WL 5415612, at *4 (N.D. Cal. Nov. 8, 2011) (Kravitz argued that "the industry precedent has been that absent an agreement prohibiting any employee from doing so, after an employee leaves an employer, they are free to change their Twitter handle.").

[231] *Social Media Manager Statistics and Facts in the US*, ZIPPIA, https://www.zippia.com/social-media-manager-jobs/demographics/ [https://perma.cc/6PVB-5V78] (last visited Nov. 4, 2022) (there are over 26,725 social media managers currently employed in the United States); Ana Gotter, *Social Media Career Growth in 2021: What You Need to Know*, SOCIAL MEDIA COLL. (Feb. 21, 2021), https://www.socialmediacollege.com/blog/social-media-career-growth-in-2021/ [https://perma.cc/8CNA-X9L6] (1357% increase in social media positions listed on the platform since 2010, which shows an even more rapid growth over the past decade).

center around the maintenance or creation of a social media account, this will weigh in favor of the employer.[232] Conversely, if social media usage is outside the scope of the employee's typical duties or the employee uses social media merely to supplement their performance, this weighs in favor of the employee.[233]

Industry custom is a more specific part of this element of the test. Most industries do not have customs regarding the ownership of social media accounts following the termination of the employment relationship.[234] Further, the industries that do have customs are only just taking shape.[235] If the industry custom provides an answer for which party typically retains ownership of the account, that custom should be taken into consideration.[236] The media and journalism industry is a prime example of this.[237]

However, as these customs develop either organically, as they have in journalism,[238] or via judicial intervention,[239] they could evidence a mutual understanding of which party is the actual owner of the account.[240]

E. Economic Impact

This element of the test considers the potential economic harm associated with the loss of the account as well as the most productive use of the account going forward.

---

[232] *See* Ardis Health, LLC v. Nankivell, No. 11 Civ. 5013(NRB), 2011 WL 4965172, at *1, *3 (S.D.N.Y. Oct. 19, 2011) (Nankivell's responsibilities for the company included managing company social media account access information and the court held the company was the definitive owner of said access information).

[233] *See* Park & Abril, *supra* note 26, at 588.

[234] *See* Halperin, *supra* note 16, at 334–36.

[235] *See id.* at 334–36 (discussing a series of journalists who held onto their Twitter accounts after changing employers). Halperin argues journalists have created an industry custom that accounts with an individual's name, even if made at the direction of their employer, belong to the employee. *Id.* at 389.

[236] *See* JLM Couture, Inc. v. Gutman, No. 20 CV 10575-LTS-SLC, 2021 WL 827749, at *10 (S.D.N.Y. Mar. 4, 2021).

[237] *See* Halperin, *supra* note 16, at 389.

[238] *See id.* at 333.

[239] *See id.* at 336.

[240] *See* Argento, *supra* note 27, at 267 ("Regarding custom, the fact that workers for a particular employer routinely gave the employer access to their accounts upon leaving would be indicative of the parties' understanding.").

In disputes over social media account ownership, one party will suffer more harm without access to the account.[241] Oftentimes, it seems the employee would suffer more harm.[242] In the analysis of harm, the ease with which both parties can rebuild the following should be considered.[243] The most competitive solution would be for both parties to have access to the account or to duplicate it, but that is not feasible.[244] It is also important to consider the party to which the risk is allocated.[245] The party who bears the burden of the risk should also bear more of the burden of proving they cannot rebuild or that the account belongs to them. Another important part of the harms analysis is the goodwill created by each party.[246]

The second prong of this element considers which party can maximize the value of the account, or who can put the account to the most productive use following the termination of the employment relationship. At first glance, it may seem like the employer has the advantage in this analysis, but second-hand use may diminish the value of the account.[247]

---

[241] *See* Park & Abril, *supra* note 26, at 587.

[242] *See id.*

[243] *See* Christou v. Beatport, LLC, 849 F. Supp. 2d 1055, 1075–76 (D. Colo. 2012) (considering the time, effort, and resources spent in developing a Myspace profile).

[244] *See* Mattocks v. Black Ent. Television LLC, 43 F. Supp. 3d 1311, 1317 (S.D. Fla. 2014) (Facebook migrated the "likes" from one page to another but did not duplicate them).

[245] Employers would likely bear the burden of the risk because, typically, they are the party who drafts the employment contract. *See* Michael Faraday, *How to Draft an Employment Agreement*, BUS. WRITING, https://www.businesswritingblog.com/business_writing/2020/07/how-to-draft-an-employment-agreement.html [https://perma.cc/V2ZQ-FFK4] (last visited Nov. 4, 2022).

[246] *See In re* CTLI, LLC, 528 B.R. 359, 373 (Bankr. S.D. Tex. 2015) ("The line of demarcation between professional and personal goodwill is precisely the line between goodwill that departs with the professional and goodwill that remains with the business."). If the majority of the goodwill that exists in the account is personal goodwill that would depart with the employee, the value of the account to the business is significantly reduced. *See* Jamel, *supra* note 189, at 593–95.

[247] *See id.* at 594 ("[I]f a second-hand user does not maintain the social media account in a way in which the original user would, then the account will likely reduce its existing value.").

In order to determine the economic impact of the loss of the account, courts must first determine its value.[248] This is not a particularly straightforward endeavor.[249] Although there is no uniform valuation technique for social media accounts, there are recognized approaches for the valuation of similar intangible assets such as trademarks, patents, and customer lists.[250] These general approaches for valuing intangible assets are the cost, market, and income approaches.[251]

The cost approach considers three definitions of cost: (1) historical cost, the original cost to acquire the intangible asset; (2) replacement cost, the cost to create an asset with equivalent utility (the price of a comparable intangible asset); and (3) reproduction cost, the cost to create an exact duplicate.[252] While the cost approach is the simplest valuation technique, it does not contemplate potential future earnings.[253] Future earning potential is particularly relevant for the purposes of determining which party is likely to suffer the most harm due to loss of a social media account and which party can maximize the value of the account.[254] There are other deficiencies in the cost approach in its application to social media accounts as well.[255] Social media platforms and marketing strategies are still rapidly evolving,[256] so the historical cost to build the account to where it is now is likely irrelevant today.[257] Further, it is uncertain whether a comparable account can even be created and even more unlikely an exact replica could be built, thus making replacement and reproduction cost appraisals extraordinarily difficult.[258]

---

[248] *See id.* at 590 (discussing account valuation techniques).

[249] *See id.* ("Valuation of social media accounts is especially difficult because a uniform valuation technique does not exist."); PhoneDog v. Kravitz, C 11-03474 MEJ, 2011 WL 5415612, at *4 (N.D. Cal. Nov. 8, 2011) (the parties argued over the monetary valuation of a Twitter account).

[250] *See* Loughnane et al., *supra* note 12, at 36.

[251] *Id.*

[252] *See id.* at 37.

[253] *See id.*

[254] Maremont v. Susan Fredman Design Grp., Ltd., No. 10 C 7811, 2014 WL 812401, at *4 (N.D. Ill. Mar. 3, 2014).

[255] *See* Loughnane et al., *supra* note 12, at 37, 98.

[256] *See id.* at 37.

[257] *See id.*

[258] *See id.* at 98. Much of the value in a social media account is derived from the perceived authenticity of the account or poster. *See* Argento, *supra*

The market approach assesses the value of an intangible asset through a comparison to other similar intangible assets with known values.[259] Typically, this valuation is computed using the actual sales price in market transactions of such assets.[260] Theoretically, this valuation technique could be suitable for calculating the value of a social media account, but the market for social media accounts is both fairly novel and lacks a robust reporting regime.[261] Though, it is possible—perhaps probable—that the market for social media accounts will develop to the point where this valuation technique is feasible.[262] However, the numerous metrics involved in determining the value of an account compared to others may be too complicated and overly burdensome to expect courts to sift through.[263]

Finally, the income approach values an intangible asset via a calculation of the net present value of estimated future cash flows.[264] The income approach is likely the most appropriate valuation technique to assess the value of a social media account.[265] This approach directly addresses a major deficiency in the cost approach—the future value that can be created by social media for the business.[266] Additionally, this approach only considers social media cash flow estimates specific to the business in question, negating any need to perform the imprecise

---

note 27, at 215–16 (discussing the preference for a "human" connection in social media interactions). Given that most social media account ownership disputes exist in situations in which the employee used the account in both a personal and business capacity, it would appear virtually impossible to replicate the account.

[259] Loughnane et al., *supra* note 12, at 37.

[260] *Id.*

[261] *See id.* at 98.

[262] *See id.* at 99.

[263] *See id.* ("[U]nderlying differences in demographics, spending habits and 'conversion values' (*i.e.*, the percentage of followers that can be converted into customers) among social media user bases may still complicate the application of this approach."); Lim How Wei, *How Much Should I Sell My Instagram Account For?*, FOLLOWCHAIN (May 6, 2021), https://www.followchain.org/sell-instagram-account/ [https://perma.cc/RNR8-TUUN]. Metrics used to value Instagram accounts include but are not limited to: (1) number of followers; (2) niche; (3) username; (4) demographic; and (5) engagement. *Id.*

[264] *See* Loughnane et al., *supra* note 12, at 37.

[265] *See id.* at 99.

[266] *See id.*

comparisons based on limited data that hinders the market approach in this context.[267] The parties involved in the dispute over ownership likely have the relevant data to perform these future cash flow estimates as well, given the proliferation of social media analytics and tracking activities performed by companies and often made available through the platform itself.[268] While social media analytics and tracking are not perfect—for example, consumers could be impacted by a social media marketing campaign and buy the product in person or via any other untracked method—they are likely sufficient to form a reasonable estimate of cash flows generated by a company's social media activities.[269]

In summary, this element considers which party can maximize the value of the account going forward and which party will suffer the greater harm due to loss of the account. Since the income approach values a social media account based on future cash flow estimates, it is likely the best method to evaluate this element.[270]

III. OTHER PROPOSED FRAMEWORKS

This Note is not the first piece of academic writing to take notice of the inconsistencies of the current jurisprudence involving social media account ownership, nor is it the first to propose a solution.[271] While those legal academics have played some role in shaping the analysis in this Note, the frameworks they proposed are less preferable than the test this Note proposes for a few reasons. Some delve too deeply into a specific area of law that is not totally applicable to this issue, like trying to fit a square peg in a round hole.[272] Some over-complicate the solution, and some suggest an entirely too narrow application.[273] In fairness to them—and as previously discussed in this Note—social media has evolved exponentially, meaning something that made sense two years ago may not make sense today.[274]

---

[267] *See id.*
[268] *See id.*
[269] *See id.*
[270] *See supra* text accompanying notes 264–69.
[271] *See supra* notes 16–18.
[272] *See* Argento, *supra* note 27, at 249.
[273] *See* Moore, *supra* note 25, at 519.
[274] *See supra* notes 8–11.

Some legal academics have argued that the CFAA should govern social media account disputes—not intellectual property law.[275] While they are correct in that intellectual property law is wrong for this issue, the CFAA is no better.[276] The crux of the damages involved in account ownership disputes is the loss of potential business opportunities without access to the account or the inability to otherwise derive value from it.[277] These kinds of damages are simply not compensable under the CFAA.[278]

Others have argued for a publicity rights approach to determine account ownership, specifically for journalists.[279] This approach may be acceptable in the media industry, but having a different framework for each individual industry is unnecessary.[280] However, these proposals were correct in recognizing the importance of established industry custom but is still unduly narrow in his proposal.[281] The test proposed in this Note both provides broad application to any industry and considers industry custom.[282]

Many have argued for a trade secret approach to resolve account ownership disputes and suggested using the password as a proxy for the account.[283] While some of the cases previously discussed found property rights in the access information to social media accounts, they did not do so based on trade secrets law.[284] The challenge with this approach is that a password does not really satisfy the "independent economic value" requirement of a trade secret.[285] The string of letters and symbols that make up a

---

[275] *See* Miao, *supra* note 17, at 1055.

[276] *See id.* at 1039.

[277] *See supra* Part I.

[278] *See* Eagle v. Morgan, Civil Action No. 11-4303, 2012 WL 4739436, at *5 (E.D. Pa. Oct. 4, 2012).

[279] *See* Halperin, *supra* note 16, at 389–91.

[280] *See supra* Part II.

[281] *See* Halperin, *supra* note 16, at 389.

[282] *See supra* Section II.D.

[283] Argento, *supra* note 27, at 249. Courtney Mitchell also advocated for a trade secrets approach. Courtney J. Mitchell, *Keep Your Friends Close: A Framework for Addressing Rights to Social Media Contacts*, 67 VAND. L. REV. 1459, 1469 (2014).

[284] *See* Ardis Health, LLC v. Nankivell, 11 Civ. 5013(NRB), 2011 WL 4965172, at *3 (S.D.N.Y. Oct. 19, 2011).

[285] *See* State Analysis, Inc. v. Am. Fin. Servs. Assoc., 621 F. Supp. 2d 309, 321 (E.D. Va. 2009) (holding the passwords at issue have some economic

password does not have worth in and of itself; the value of the account is in its followers—which are viewable by anyone and not a secret.[286] Access information is merely a barrier to entry and does not create a substantial business advantage by itself.[287]

Some legal academics have argued for a blanket judicial prohibition on the forced transfer of social media accounts from employees to employers and for intervention from social media companies.[288] First, a blanket prohibition is inequitable.[289] While previous cases may have, at times, been too employer-friendly, there are undoubtedly instances in which the account rightfully belongs to the employer.[290] Second, intervention from social media companies is infeasible.[291] This niche issue, while likely to be become more prominent in the future, is hardly on their list of priorities.[292] In other words, they do not care.[293]

---

value as they provided access to a database, they have no independent economic value in the way a formula or a customer list might have).

[286] *See id.*

[287] *See id.*

[288] *See* Hugh McLaughlin, *You're Fired: Pack Everything but Your Social Media Passwords*, 13 NW. J. TECH. & INTELL. PROP. 87, 116 (2015).

[289] *See In re CTLI, LLC*, 528 B.R. 359, 368–70 (Bankr. S.D. Tex. 2015) (a blanket prohibition in this case would have been inequitable as the disputed account clearly belongs to the company).

[290] *See supra* note 185 and accompanying text.

[291] *But see* McLaughlin, *supra* note 288, at 113–14.

[292] There are many weighty and pressing issues at the forefront of the contemporary social media discourse, which likely take precedence over disputes in ownership of social media accounts between employers and employees. *See, e.g.*, Katelyn Cordero, *States Want to Better Patrol Social Media. These Are the Challenges.*, POLITICO (Aug. 13, 2022, 7:00 AM), https://www.politico.com/news/2022/08/13/states-social-media-guns-00047794 [https://perma.cc/5G7T-6UXN] (examining the growing push for increased government regulation of social media at the state level); Samantha Lai & Brooke Tanner, *Examining the intersection of data privacy and civil rights*, BROOKINGS (July 18, 2022), https://www.brookings.edu/blog/techtank/2022/07/18/examining-the-intersection-of-data-privacy-and-civil-rights/ [https://perma.cc/H6Y5-T9ZD] (examining issues surrounding data privacy and civil rights in the social media space); Gabriel R. Sanchez et al., *Misinformation Is Eroding the Public's Confidence in Democracy*, BROOKINGS (July 26, 2022), https://www.brookings.edu/blog/fixgov/2022/07/26/misinformation-is-eroding-the-publics-confidence-in-democracy/ [https://perma.cc/CU9V-G6D4] (examining the impact of misinformation on social media platforms on societal confidence in democracy in the United States).

[293] *See* McLaughlin, *supra* note 288, at 113–14.

In re CTLI has also been the basis for previously suggested frameworks to decide this issue.[294] These legal academics did an excellent job of synthesizing the factors discussed in *CTLI* and turning them into a cognizable framework,[295] but their proposal suffers from the same flaws in the *CTLI* court's reasoning.[296] Additionally, these academics advocate for different analyses for different social media networks based on their respective terms of service.[297] This is unnecessarily complicated and ignores the fact the terms of service are rarely ever read.[298]

Kathleen McGarvey Hidy, writing for the *Columbia Business Law Review*, recognized the complicated legal terrain regarding account ownership and considered similar elements to those in the test proposed in this Note.[299] However, Hidy's focus was on ex-ante risk mitigation strategies for businesses to maintain ownership of accounts following the termination of the employment relationship, not how courts should decide ownership ex-post.[300]

The strength of the test proposed in this Note is that it addresses the concerns posed by other legal academics without attempting to clumsily fit this novel issue of account ownership into an already established area of law.[301] Further, this test is very simple while remaining comprehensive, so it applies broadly to any scenario that involves a social media account ownership dispute.[302]

IV. CASE STUDY

The *JLM* case provides the perfect opportunity to demonstrate the test proposed in this Note, particularly because it is exactly the type of scenario that evidences the necessity for more clarity on this issue moving forward.[303] In its opinion vacating

---

[294] *See* Moore, *supra* note 25, at 519.

[295] *See id.*

[296] *See supra* Part II.

[297] Moore, *supra* note 25, at 514–19.

[298] *See* Jessica Guynn, *What You Need to Know Before Clicking 'I agree' on that Terms of Service Agreement or Privacy Policy*, USA TODAY (Jan. 28, 2020, 8:00 AM), https://www.usatoday.com/story/tech/2020/01/28/not-reading-the-small-print-is-privacy-policy-fail/4565274002/ [https://perma.cc/9T9R-MAD3].

[299] Hidy, *supra* note 16, at 471–72, 487–88.

[300] *See id.* at 492–94.

[301] *See supra* Part II.

[302] *See supra* Part II.

[303] *See supra* Section I.B.3.

the portion of the preliminary injunction granting control of the accounts to JLM, the Second Circuit stated, "[w]e do not attempt to decide for the first time on appeal—without full argument from the parties—the correct framework for answering who owns the Disputed Accounts or what result that framework would dictate."[304] This Note can provide, at least, some direction for both. For simplicity's sake, this section will focus on Gutman's Instagram account.

A. Personal Versus Business Usage

Unsurprisingly, the usage element is tricky, as Gutman used the account for both personal and business purposes.[305] Gutman used the account to display aspects of her life and her personality, posting images, text, and videos that focused on her parents, travels, and hobbies.[306] Further, the account's handle is "@misshayleypaige" a variation of Gutman's name.[307] However, Gutman also regularly used the account in conjunction with JLM's advertising programs to display JLM's gowns and apparel.[308] Additionally, the account displayed links to JLM's public relations department email address and a website owned by JLM.[309] Gutman responded to direct messages about both her personal life and JLM's products via the account.[310] Gutman and JLM's CEO also discussed a marketing strategy whereby they would "combine the personality with the brand."[311]

Clearly, Gutman's personality and personal life were tremendously intertwined with the brand.[312] So, while Gutman used the account at times for purely personal reasons and had the account in her name, much of that personal use was strategic.[313] It was about brand-building, specifically in connection to

---

[304] JLM Couture, Inc. v. Gutman, 24 F.4th 785, 800 (2d Cir. 2022).

[305] *See* JLM Couture, Inc. v. Gutman, 20 CV 10575-LTS-SLC, 2021 WL 827749, at *4 (S.D.N.Y. Mar. 4, 2021).

[306] *Id.*

[307] *Id.* at *3.

[308] *Id.* at *4.

[309] *Id.*

[310] *Id.*

[311] *Id.*

[312] *Id.* ("[T]he Account's unique blend of product and personality was 'a big part of [JLM's] strategy because then brides feel closer to the brand.'").

[313] *Id.*

her employment with JLM.[314] Therefore, the usage element weighs in favor of JLM.

B. Purpose at the Time of Creation

The purpose element is relatively straightforward. While Gutman maintained Facebook, Twitter, and LinkedIn accounts prior to contracting with JLM, she created the Instagram account on April 6, 2012, after she was already employed by JLM.[315] She then began to use the account in the manner described in the preceding subsection.[316] While Instagram was newer at the time, Gutman's use of the platform demonstrates that her purpose, when she created the Instagram account, was to advance JLM's marketing objectives.[317] Therefore, the purpose element weighs in favor of JLM.

C. Access to the Account

Gutman specifically requested that JLM hire a social media strategist to help manage the account and another JLM employee responded to comments and direct messages on the account.[318] Gutman had complete discretion to post on the account, but also requested that JLM employees write content for the account.[319] Not only did other JLM employees have actual access to the account—meaning they were in possession of the access information—they had creative access to the account as well.[320] JLM provided content for Gutman to post and was involved in the creative efforts that went into building the brand associated with the account.[321] For these reasons, the access element weighs in favor of JLM.

---

[314] *Id.* (Gutman herself stated: "I think it's important that we do not dilute this Instagram with too much promotion/advertisement so that we can maintain the aesthetic and personality of the brand.").

[315] *Id.* at *3.

[316] *Id.* at *4.

[317] *See id.*

[318] *Id.*

[319] *Id.* at *5.

[320] *Id.* at *4.

[321] *Id.*

D. Job Function and Industry Custom

Gutman was hired by JLM as a designer of bridal dresses, bridesmaid dresses, and evening wear.[322] The role of designer would suggest that social media activities are outside the scope of her employment. However, Gutman was also required to perform "additional duties," which included assisting in JLM's advertising campaigns.[323] So, Gutman's use of social media arguably was part of her job duties.[324] At the same time, JLM admits Instagram was relatively new when the account was created, so the job function element is rather murky.[325] If anything, it weighs slightly in favor of Gutman but is more likely neutral.

There is no cognizable industry custom in the fashion industry regarding the ownership of social media accounts so that part of this element is not applicable to this case.[326]

E. Economic Impact

The analysis of this element requires financial information only the parties involved can provide. However, based on the parties' damages calculations, the value of the account is likely well into the millions of dollars.[327] Additionally, JLM claims to have spent over $4 million in advertising for Gutman's brand.[328]

Assuming the value is that high, it appears Gutman would suffer more economic harm than JLM, given that Gutman is an individual designer while JLM is a massive name in fashion with retail sales of approximately $220 million from 2017 to 2020.[329] Additionally, since the account and brand are in Gutman's name, she is likely the party best able to maximize the value of

---

[322] *See* Second Amended Complaint ¶ 19, JLM Couture, Inc. v. Gutman, 2021 WL 5320914 (Aug. 31, 2021) (No. 1:20-CV-10575-LTC-SLC).

[323] *Id.* ¶ 23.

[324] *See id.*

[325] *See id.* ¶ 52.

[326] *See* Jennifer E. Rothman, *Navigating the Identity Thicket: Trademark's Lost Theory of Personality, the Right of Publicity, and Preemption*, 135 HARV. L. REV. 1273, 1286 n.57 (2022).

[327] *See* Second Amended Complaint ¶ 330, JLM Couture, Inc., 2021 WL 5320914 (No. 1:20-CV-10575-LTC-SLC).

[328] *Id.* ¶ 50.

[329] *See id.* ¶ 13.

the account.[330] Because the brand and account are so intertwined with Gutman's personality, JLM's second-hand use would likely diminish the value of the account greatly.[331] Therefore, this element weighs heavily in favor of Gutman.

In summary, the personal versus business usage, purpose at the time of creation, and access to the account elements weigh in favor of JLM, while the economic impact element likely weighs in favor of Gutman.[332] Additionally, the job function and industry custom element are likely neutral. Given the analysis above, the ownership of the Instagram account should be granted to JLM.

CONCLUSION

The five-part balancing test proposed in this Note is the most appropriate framework to adjudicate disputes over the ownership of a social media account between an employer and employee. This test would provide some much-needed stability to a confusing and inconsistent body of judicial precedent.[333] Under this approach, courts will be able to reach equitable decisions that recognize the realities of modern social media usage without clumsily trying to fit a novel issue into a framework designed to address other problems.[334] By considering (1) personal versus business usage; (2) purpose at the time of creation; (3) access to the account; (4) job function and industry custom; and (5) economic impact,[335] courts will be able to assign ownership of a social media account to the appropriate party in any circumstance in which this dispute arises.

---

[330] *See* Rothman, *supra* note 326, at 1327–28.
[331] *See id.*
[332] The caveat is a lack of information into JLM's financials.
[333] *See supra* Part II.
[334] *Id.*
[335] *Id.*