

Who Owns Your Social Media Account?

By Adam S. Walker

Throughout history, technological and societal advances have led to the creation of new property rights.¹

I. Introduction

Communication through interactive dialogue, otherwise known as social media, is reshaping the way those in society interact with one another. As social media accounts continually become more intertwined with the daily routines of our lives, the accounts themselves become increasingly more valuable to businesses. *PhoneDog v. Kravitz*,² a case currently pending in the Northern District of California, has the potential to significantly alter the legal landscape regarding social media rights. The claims in the case are rooted, at least in part, in ownership of various aspects of a social media user account, and the case raises an important question: to what extent does a social media account belong to the user?

II. Background

In April 2006, Noah Kravitz began working at PhoneDog.com (“PhoneDog”), a mobile news and review resource company. Kravitz’s duties required Kravitz, under the Twitter handle @PhoneDog_Noah, accessed only through a password, to regularly post his opinions and reviews of mobile products and services.³ During Kravitz’s employment with PhoneDog, the @PhoneDog_Noah accumulated approximately 17,000 Twitter followers.⁴ In October, 2010, Kravitz’s employment with PhoneDog ceased, and PhoneDog requested that Kravitz turn over to it control of the account and all account followers. Instead of complying, however, Kravitz changed the account handle to @noahkravitz and continued to post regularly.

PhoneDog sued Kravitz in the Northern District of California for: “(1) misappropriation of trade secrets; (2) intentional interference with prospective economic advantage; (3) negligent interference with prospective economic advantage; and (4) conversion.”⁵

On November 8, 2011, the initial complaint survived a motion to dismiss filed by Kravitz. The court allowed the misappropriation of trade secrets and conversion claims to stand, and gave PhoneDog leave to amend its claim for intentional interference with prospective economic advantage.⁶ Following the filing of the amended complaint, on January 30, 2012, the court denied Kravitz’s motion to dismiss the tortious interference claim.⁷

III. Who Has Ownership Rights to User Accounts?

The procedures to create an account on Twitter are simple. After accessing the Twitter website, a registrant needs to submit a name and an email address, create a

user name and a password, and accept Twitter’s terms of service to activate the account. Though the registration is fairly straightforward, the terms of service, to which every user must agree, include language that creates a significant, yet overlooked, distinction between ownership rights to the website and the website’s services—the account and use of the account—on the one hand, and ownership of the account and ownership of the content, on the other.

Twitter’s terms of service state: “All right, title and interest in and to the Services [defined as a user’s “access to and use of the services and Twitter’s websites”] (excluding Content provided by users) are and will remain the exclusive property of Twitter and its licensors.”⁸ These rights appear to be all-encompassing and to grant Twitter rights to the website, including all services provided. But the terms also state: “[y]ou retain your rights to any Content [any information, text, graphics, photos or other materials uploaded, downloaded or appearing on the Services] you submit, post or display on or through the Services.”⁹ The terms also provide:

[b]y submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods (now known or later developed).¹⁰

Although the terms of service specifically state that they govern a user’s “access to” and “use of” Twitter, they do not convey ownership rights to anything other than content posted by the user. The language in the terms clearly attempts to distinguish between ownership of the content (by the user) and of the website and its services (by Twitter).

In addition to contractual ownership rights in the website, the terms of service also assert intellectual property rights in the website and its services: “[t]he Services are protected by copyright, trademark, and other laws of both the United States and foreign countries.”¹¹ Assuming that the Twitter software and the user account computer program(s) are copyrightable and Twitter is the “creator,” as a matter of copyright law, all copyright rights in the software belong to Twitter. As a result, Twitter owns the user account, whereas the user holds a right or license to use the account. In any event, the terms of service

between Twitter and all users grant Twitter exclusive ownership of all aspects of the website. These contractual rights almost certainly would extend to ownership of the user accounts themselves (since the user accounts are part of the website) and to the right to allow use of a user account (a service offered by the website). The terms do not grant users ownership rights to any aspect of the Twitter services except content ownership.

In addition, as will be examined more hereafter, Twitter, not the user, exerts dominion and control over the user accounts. Twitter is the only entity that has the ability to activate and remove user accounts from the website, social network and the underlining software codes where the accounts are stored. Twitter's authority over the website reinforces the distinction between the rights of Twitter and the limited rights of users.

The question of who owns the website and user accounts has not yet been decided. In *PhoneDog*, Kravitz raised the issue in his initial motion to dismiss, but the judge refused to answer until more facts were in the record,¹² but copyright and contract law appear to lead to the same conclusion: the user accounts, either as a service offered by Twitter or as part of Twitter, are owned exclusively by Twitter. If this is true, *PhoneDog* may have a significant hurdle to overcome, particularly on its conversion claim, as it does not appear to be the owner of the services to and in Twitter's website and/or the user account in question. Demonstrating such ownership rights will be necessary for *PhoneDog* to prevail on its conversion claim.

IV. Who Owns User-Posted Content?

To most individuals, Tweets (a post or status update on a user's Twitter account) appear to be nothing more than inconsequential mishmashes of 140 characters or less. In situations where an individual has created and/or is using an account for primarily personal, non-employment related postings, the posted content may be of little or no value to anyone. However, the importance of content ownership has increased dramatically since companies like *PhoneDog* have begun employing individuals to administer company social media accounts and make regular posts as part of the company's business.

Ownership rights in content posted by an employee ultimately may be determined by the circumstances in which the content was created, such as whether the content is copyrightable and whether the employer has an agreement with the employee regarding ownership of the content.

Under U.S. copyright law, with certain exceptions, such as works made for hire, once an original work is fixed in a tangible medium of expression,¹³ the creator of the work owns the copyright.¹⁴ Although the "originality" threshold is low under the law, the work must contain some minimal amount of creativity.¹⁵ Meeting this stan-

dard may be difficult for Twitter users, since the radically compacted way Twitter promotes communication stifles creativity. Many posts of 140 characters or less about one's everyday occurrences lack any semblance of creativity. By contrast, someone who crafts something such as a poem is more likely to meet the creativity threshold since some level of creativeness has been exerted. As a result, whether a user's post on his or her Twitter account will be copyrightable will need to be determined on a case-by-case basis.

If posted content is not copyrightable, the determination of ownership is likely to depend on a number of factors, the most important of which may be whether the employer has affirmatively addressed the issue in an employment agreement, social media policy, etc. with clear language transferring all rights to content posted to the employer. Absent such language, the employer may still retain ownership of posted social media content if the posts were made within the employee's scope of employment and, under the law of agency,¹⁶ all benefits and rights resulting from the actions of the agent will be attributed to the employer.¹⁷

With respect to copyrightable posts, the employer may own the copyright as a work-for-hire (1) if the work was created within the scope of the employee's work duties or (2) if the work was specially ordered or commissioned.¹⁸ To determine who is an employee under the work-for-hire doctrine, courts look to a number of factors under the general common law of agency, such as: (1) control by the employer over the work; (2) control by the employer over the employee; and (3) the status and conduct of the employer.¹⁹ "Specially ordered or commissioned work" applies to works created by independent contractors who are not employees under the general common law of agency. Work performed by independent contractors will be a work-for-hire only if *both* of the following conditions are met: (1) the work was performed within one of the nine categories of work listed under the statutory definition, and (2) there is a written agreement between the parties specifying that the work is a work-for-hire.²⁰ Failure to satisfy these requirements will result in the independent contractor, and not the employer, retaining ownership in the copyrights created.

Nothing in the record in *PhoneDog* indicates that Kravitz was acting as an independent contractor, and neither party disputes that the posts were done outside the scope of his employment or outside the instruction of *PhoneDog*.²¹ An employer-employee relationship appears to have existed between Kravitz and *PhoneDog*. If the posts are copyrightable, *PhoneDog* is likely to maintain copyright ownership.

Finally, situations where copyrightable posts are created that have no relation to the employee's work and/or were created outside the scope of the employee's duties will likely result in the employee retaining rights in the

content posted. Essentially, the less a correlation there is between the content posted by an individual and his or her employment duties with the employer, the less likely the employer will be able to make an argument that the content was posted in furtherance of or as part of, the employee's employment duties; as a result, the content posted will be deemed to be the property of the employee and not the employer. This may seem obvious, but as Twitter and other social media platforms become increasingly intertwined with the way companies do business, and as social media usage by individuals becomes increasingly popular, the line between personal and professional content becomes blurred.

Although ownership of the content posted on social media accounts may seem of no great consequence in light of the fact that a user could attempt to recreate a similar or identical post, maintaining ownership of the content significantly limits the possibility that an ex-employee will be able to benefit from content created on behalf of the company—especially if the work is copy-rightable, is difficult to recreate, and/or is highly valuable to the company. As noted, determining ownership of the content could depend on one or more of the following: the nature of the content; what agreements, if any, the employer and employee have with each other; and the relationship between the postings and the employee's employment duties.

Although there is no evidence in the *PhoneDog* trial record of any intention by PhoneDog to claim ownership of the posts at issue or of the existence of an employment agreement specifying control over the Twitter account, an employer-employee relationship appears to have existed that will convey all benefits of Kravitz's work to PhoneDog, including ownership of the posted content and/or any copyrights in the posts.

V. Who Owns the Followers of a User Account?

Invariably, one of the true benefits of Twitter, Facebook or any other social media platform is the user's ability to subscribe to another user's post, status, etc. Those subscribing to the feed are known as *followers*. One element of the *PhoneDog* litigation is PhoneDog's belief that a follower is of economic value and benefit to a user and that users "own" their followers. But whether a follower is of economic benefit to a user, and, more important, whether a follower has monetary value, is a question that in *PhoneDog* will likely be subsidiary to the issue, raised by PhoneDog's conversion claim, of whether a user owns his followers.

The elements of conversion, similar to most theft-based tort claims, are intertwined with one's right to own or possess²² tangible and, depending on the jurisdiction, intangible property as well.²³ According to *Black's Law Dictionary*, ownership "implies the right to possess a thing;"²⁴ "possession" is defined as "the exercise of dominion over property."²⁵ Examining PhoneDog's conver-

sion claim based on Twitter's terms of service casts doubt on whether a user has ownership rights over followers on a social media platform.

Twitter's terms of service provide that Twitter retains exclusive ownership rights to the website and to services offered by the website and/or intellectual property embodied in the website—all of which, either individually or combined, are likely to entail rights to the user accounts. This conclusion is strengthened by Twitter's exercise of dominion and control over all accounts.

Twitter's terms of service state: "We [Twitter] reserve the right at all times (but will not have an obligation) to remove or refuse to distribute any Content on the Services and to terminate users or reclaim usernames."²⁶ Even if a user "deactivates" his account, Twitter does not remove the code from its operating programs; only the visual representation of the account is removed, i.e., the account name and listing. When a user "reactivates" a recently deactivated account, all of her prior information is reinstated. This is because Twitter, not the users, retains control over the source code or software that contains all account information. Possession of the user accounts belongs solely to Twitter; users simply have the right to use an account.²⁷ Thus, if all followers are account holders, and if Twitter owns all rights to all accounts, then it follows that a user cannot own a follower.

Twitter and other social media platforms afford users the ability to be self-selecting. Users are free to be friends with only those they wish and to follow only the feeds that interest them. More importantly, users are free to de-friend those with whom they do not wish to be friends, and users are a click away from removing themselves from following people and things they no longer want to follow. This self-selection ability illustrates that a follower cannot be owned, at least by another user, because the holder of the account being followed has no control over—and thus no ownership rights in—the account's followers.

Due to the contractual limitations imposed in Twitter's terms of service and/or the lack of dominion and control over account followers, PhoneDog's claim of ownership in the account followers is significantly diminished. Unless PhoneDog is able to assert legal control and/or possession over account followers, PhoneDog is unlikely to meet its burden of proof for conversion of the account followers by Kravitz.

VI. What Should Businesses Do?

The facts of *PhoneDog* illustrate that as a company's business model becomes increasingly intertwined with social networking, businesses need to take steps to alleviate any confusion as to use and/or control over company controlled social media accounts and content.

Protecting a company's rights in social media accounts can be achieved in a variety of ways. Registering

user accounts under the company's name will minimize confusion as to the purpose of the account and for whose benefit it exists. Companies also can seek injunctive relief against infringement of their trademarks²⁸ and/or dilution²⁹ in social media. A number of social media sites offer the option to terminate or transfer ownership of accounts that infringe third-party rights or have the potential to confuse other users.³⁰ Both seeking injunctive relief and/or utilizing social media remedial procedures are ways to combat unauthorized use of a company's intellectual property or other tortious conduct. Preventing access to the account upon termination of an employee reduces the risk of an embattled ex-employee hampering or damaging the company's social media presence. Conversely, if companies are hesitant to grant access and use of the account to a select few individuals, certain social media platforms allow more than one person to be an administrator of an account.

As may be evident from *PhoneDog*, arguably the most important measure a company can take to protect its interest in a user account is to establish clear and concise contractual rights as to all aspects of the company's social media account(s) in the event of termination of the administrator of the account. In addition, specifying precisely the scope of the employee's duties can minimize confusion as to whether the employee's actions were or were not job-related. Although, as discussed above, an employment contract may not be able to convey ownership rights in the account to the employer (because the service operator is the owner), a contract can, at a minimum, specify control over use of the account—thus reducing the potential for a dispute such as that between *PhoneDog* and *Kravitz*.

VII. Conclusion

Examining Twitter's terms of service reveals that users maintain no ownership rights, aside from ownership in the posted content, to the services of or in the Twitter website; users merely have the right to use or access the services and the website. Users also lack ownership rights to account followers since users exercise no dominion and control over followers, because followers are self-selecting and are free to decide and choose their actions without interference or influence from the account holder. Due to the limited rights afforded to it, *PhoneDog* is unlikely to succeed in meeting its burden of proof to any claim of conversion or theft of account followers.

In order to adequately protect themselves from the pitfalls currently facing *PhoneDog*, companies should familiarize themselves with the rights afforded to them under a social media website's terms of service, and craft clear and concise social media guidelines and/or language in the company's employment contracts that address control and use of any company social media account and social media content posted by the user prior to account activation.

Endnotes

1. Courtney W. Franks, *Analyzing the Urge to Merge: Conversion of Intangible Property and the Merger Doctrine in the Wake of Kremen v. Cohen*, 42 Hous. L. Rev. 489, 503 (2005) (quoting Juliet M. Moringiello, *Seizing Domain Names to Enforce Judgments: Looking Back to Look to the Future*, 72 U. Cin. L. Rev. 95, 115 (2003)) (examining how a party maintains ownership rights in intangible property).
2. *PhoneDog v. Kravitz*, No. C 11-03474, 2011 WL 5415612 (N.D. Cal. Nov. 8, 2011).
3. *See id.* at *1.
4. *Id.*
5. *Id.*
6. *See id.* at *7, 10.
7. *See PhoneDog v. Kravitz*, No. C 11-03474, 2012 WL 273323, at *1 (N.D. Cal. Jan. 30, 2012) (dismissing *Kravitz's* motion to dismiss based on *PhoneDog's* amended complaint, alleging tortious interference). The court stated that it was "able to draw the reasonable inference that *PhoneDog* had an economic relationship with at least one-third party advertiser that was disrupted by *Kravitz's* alleged conduct, causing it economic harm." *Id.*
8. Twitter Terms of Service, TWITTER, <https://twitter.com/tos> (last visited Mar. 18, 2012).
9. *Id.*
10. *Id.*
11. *Id.*
12. *PhoneDog v. Kravitz*, No. C 11-03474, 2011 WL 5415612 at *5-6.
13. 17 U.S.C. § 102 (2010).
14. *See id.* at § 201(a).
15. *See Feist Publ'n v. Rural Tel. Serv.*, 499 U.S. 340, 358 (1991). The Court held that the "originality requirement [of copyright law] is not particularly stringent," requiring only "some minimal level of creativity." *Id.*
16. RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006) (defining agency as "the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") [acting] on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act").
17. *See id.* at § 3.05. The employer must still ratify the actions of the employee to be binding under agency law.
18. *See* 17 U.S.C. §§ 101, 201(b) (2012).
19. *See Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989).
20. *See* 17 U.S.C. § 101. The nine categories of a work made for hire are (1) contribution to a collective work, (2) part of a motion picture or other audiovisual work, (3) a translation, (4) a supplementary work, (5) a compilation, (6) an instructional text, (7) a test, (8) answer material for a test, or (9) an atlas.
21. *See PhoneDog v. Kravitz*, No. C 11-03474, 2011 WL 5415612 at *2 (N.D. Cal. Nov. 8, 2011).
22. RESTATEMENT (SECOND) OF TORTS § 222A (1965). Conversion is defined as "an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel."
23. Courts are split as to whether ownership rights can extend to intangible property. Jurisdictions that recognize ownership rights in intangible property generally do so when the intangible property is "merged" into a tangible medium; *see Brass Metal Prods., Inc. v. E-J Enters., Inc.*, 984 A.2d 361 378 (Md. App. 2009) (citing *Allied Inv. Corp. v. Jasen*, 731 A.2d 957, 965 (1999) (stating that to succeed on a claim for conversion of intangible property,

the Maryland courts have held that the owner's rights must be "merged or incorporated into a transferable document.")).

24. BLACK'S LAW DICTIONARY (9th ed. West 2009).
25. *Id.*
26. <https://twitter.com/tos>.
27. *Id.* The beginning clause of Twitter's terms of service states: "These Terms of Service ("Terms") govern your access to and use of the services and Twitter's websites (the "Services"), and any information, text, graphics, photos or other materials uploaded, downloaded or appearing on the Services (collectively referred to as "Content"). Your access to and use of the Services is conditioned on your acceptance of and compliance with these Terms. By accessing or using the Services you agree to be bound by these Terms." The language carefully states "your access to and use of the services...." Nowhere in this section, or any other section in the terms of service, except in the User's Rights section, does Twitter use the words "rights to, rights in, ownership in," etc.; rather, the wording relating to users always states "access to" and "use of."
28. See Lanham Act, 15 U.S.C. § 114, which states that one is liable for trademark infringement if he or she "use[s] in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to

cause mistake, or to deceive...." In order to be liable for trademark infringement in the social media realm the account must satisfy the "use in commerce" requirement, such as selling goods through the account.

29. See *id.*; see also 15 U.S.C. § 1127. Remedies for dilution extend only to famous marks.
30. See <http://support.twitter.com/articles/18367-trademark-policy> [Twitter's policy] (last accessed May 1, 2012); see also <http://www.facebook.com/legal/copyright.php> (last accessed May 1, 2012) [Facebook policy].

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