Social Media Law Blog
Highlighting Legal Issues Regarding Social Media
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Do Your Social Media Accounts Belong To Your Business? Why Worry, When There Are Safeguards You Can Take Now

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The world is closely watching a federal case in the Northern District of California where a mobile news and reviews resource company, PhoneDog, is suing a former employee Noah Kravitz (or independent contractor, depending on what news report you read) over who owns a Twitter account that was started in association with PhoneDog, and is now being used by Kravitz as his own Twitter account. The issues drawing so much attention include who owns a social media account – the employee who posts on it, or the employer on whose behalf the employee was posting. The other issue is what value, if any, can be placed on Twitter followers (or, by analogy Facebook likes), when social media attracts people who are portable and not "owned" by the social media account.

As will be discussed more fully below, PhoneDog does not enter court with the best of facts in order to decide these larger issues of interest to employers and the social media community. However, the shortcomings in PhoneDog's case are instructive in terms of steps employers should take to better demonstrate ownership over their social media sites.

1. PhoneDog Lawsuit

The crux of the lawsuit is that Kravitz was paid as a product reviewer and video blogger for PhoneDog from April 2006 through October 2010, and that this position included posting tweets on a Twitter account called @PhoneDog_Noah. After Kravitz left PhoneDog, he changed the name of the account to @noahkravitz, and kept its followers instead of relinquishing the account and its followers over to PhoneDog as was requested of him.

On November 28, 2011, the complaint survived a motion to dismiss filed by Kravitz with the magistrate judge allowing the claims for misappropriation of trade secrets and conversion to stand, and giving PhoneDog leave to file amended claims for intentional interference with prospective economic advantage and negligent interference with prospective economic advantage. On the tortious interference claims, the court held that PhoneDog failed to allege how Kravitz continuing to use the Twitter account in his own name disrupted the purported relationships between PhoneDog and the Twitter users, or how it resulted in economic harm – two essential elements for these claims.

In reviewing the complaint, and what it does not allege, PhoneDog has some formidable hurdles to prevailing on its remaining claims. For example, PhoneDog alleges that it took reasonable measures to protect the confidential information that it loosely describes as the Twitter account password and "many details of PhoneDog's relationships with its users that are not generally known or readily accessible to the public or PhoneDog's competitors." However, PhoneDog does not allege that it had an employment agreement or confidentiality agreement with Kravitz that would have protected this information, or clearly stated that this information should be treated as confidential, proprietary information.

2. The Importance Of Having Written Agreements With Your Employees Concerning Use Of The Company's Social Media Accounts

In a statistical study of trade secret litigation in federal courts with issued written opinions from 1950 through 2008, it was found that employees prevailed more often than the employers with employees winning 54.1% of the summary judgment motions, and employers winning 34.7%. The study also found that while there is no bright line rule for what reasonable measures an employer must take to protect its trade secrets, the most important thing an employer can do is to have a confidentiality agreement with its employees.

3. Social Media And The Internet Present Unique Challenges To Demonstrating Something Is A Trade Secret

With the growth of the internet, we are also finding that the universe of trade secret information is becoming smaller. This would seem to be especially true in the case of Twitter followers who are on a public list that can be viewed by anyone with a Twitter account. Indeed, a federal court in the Eastern District of New York held in August 2010, that a customer list of an executive search consulting firm was not a trade secret given the fact that the list and needs of the firm's clients could be pieced together through internet searches of FX Week, Google, Bloomberg.com, and LinkedIn:

> "The information in Sasqua's database concerning the needs of its clients… may well have been a protectable trade secret in the early years of Sasqua's existence when greater time, energy and resources may have been necessary to acquire the level of detailed information to build and retain the business relationships at issue here. *However, for good or bad, the exponential proliferation of information made available through full-blown use of the Internet and the powerful tools it provides to access such information in 2010 is a very different story." Sasqua Group, Inc. v. Courtney,* 2010 WL 3613855 (E.D.N.Y. Aug. 2, 2010).

As the *PhoneDog* court held in its motion to dismiss order, PhoneDog also faces a hurdle in alleging "facts regarding how Mr. Kravitz's conduct disrupted its relationships and what economic harm it caused." It is worth noting that the complaint alleges a following of approximately 17,000 followers on Twitter when Kravitz was with PhoneDog. The account that is now used by Kravitz in his personal capacity shows followers numbering 23,578 as of December 28, 2011. In contrast, principals of PhoneDog have far less

followers on their respective company Twitter accounts with the Editor in Chief, @PhoneDog_Aaron, having 12,603 Twitter followers as of December 29, 2011, and the President, @PhoneDog_TK, having only 846 as of the same date.

4. Act Promptly To Remove Employees From Social Media Accounts When You Know The Employment Relationship Is Ending

In the trade secrets study, another reasonable measure for protecting trade secrets that an employer should take is introducing computer-based protections. These protections may include requiring personalized logins and passwords for users having access to the information; monitoring their access and use of the information; and terminating access when a user no longer needs access to the confidential information or their employment has been terminated. In the *PhoneDog* action, the complaint is vague on who established the Twitter account, and whether the plaintiff PhoneDog had the login and password information for the account used by Kravitz. PhoneDog alleges that its confidential information included the passwords, but then alleges that it requested that Kravitz "relinquish use of the Account." If PhoneDog had the Twitter account login with password, then one of the reasonable measures that PhoneDog should have arguably taken was to change the password, and take back control of the Twitter account when Kravitz quit in October 2010.

In general, companies should to the greatest extent possible register social media accounts in their own names or through a senior marketing person and/or social media manager if the account needs to be in the name of a person. Further, on social media accounts such as Facebook pages, where you can have more than one administrator, companies should take advantage of this option and have several administrators. Having several administrators, and asserting control over the account, is another way to demonstrate "ownership" of the account, and also avoid some of the problems experienced by PhoneDog.

Indeed, the time gap between when Kravitz left the company in October 2010, and the filing of the legal action in July 2011 is another hurdle for PhoneDog in its case. Reading between the lines of the complaint, and theorizing from there, it appears that there may be some credence to Kravitz's argument that PhoneDog asked him to "tweet on their behalf from time to time," as reported in the December 25, 2011 New York Times article. In the complaint, PhoneDog also alleges that, "[o]n information and belief, from October 2010 and December 2010, Kravitz free-lanced for a variety of media outlets before obtaining a full-time position with TechnoBuffalo", who is described as a competitor of PhoneDog. In other words, PhoneDog also seems to be pursuing this action because Kravitz is now working for a competitor of PhoneDog. PhoneDog does not allege that there was a non-compete agreement with Kravitz.

5. If You Have A Social Media Non-Compete Or Confidentiality Agreement With Your Employees, Make Sure Your Intentions Are Clearly Stated

It does not appear that PhoneDog had any written agreement that would prevent Kravitz from continuing to tweet about mobile news and reviews after he left the company. If there was a non-compete agreement, or a confidentiality agreement concerning PhoneDog's purported trade secrets, then the agreement needs to be clear about what the parties intended, and the terms of their agreement.

For example, a federal court of appeals held that an ex-News Corporation employee did not breach his post-employment agreement in a trade secrets case by sending 55 pages of internal documents from his former employer to a U.S. Senate staffer because the documents were mailed one day before he signed the agreement in which he promised not to disclose NewsAmerica's confidential information or disparage the company. *News America Marketing v. Emmel,* D.C. Docket No. 07-00791-CV-TCB-1 (11th Cir. June 8, 2011).The court's decision turned on the post-employment agreement only referring in the present tense to future acts. Robert Emmel agreed that he "will not disparage, denigrate or defame the company, " and that he "will maintain in complete confidence" the company's confidential information. The court held, "If it had wanted the agreement to cover past acts or future inaction, New America should have written the agreement to say that."

The *News America Marketing* case highlights the importance of having an agreement with employees concerning their access and use of social media accounts on behalf of the company, and ensuring that the agreement clearly spells out the relationship and the parameters for it because some courts will literally interpret agreements with employees.

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