

WHOSE SOCIAL NETWORK ACCOUNT? A TRADE SECRET APPROACH TO ALLOCATING RIGHTS

*Zoe Argento**

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Who has the superior right to a social network account? This is the question in a growing number of disputes between employers and workers over social network accounts. The problem has no clear legal precedent. Although the disputes implicate rights under trademark, copyright, and privacy law, these legal paradigms fail to address the core issue. At base, disputes over social network accounts are disputes over the right to access the people, sometimes numbering in the tens of thousands, who follow an account. This Article evaluates the problem from the perspective of the public interest in social network use, particularly the use that blurs professional and personal roles. The Article argues that the public interest is best served by resolving these disputes under a trade secret approach.

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* Assistant Professor, Roger Williams University School of Law. Generous comments were provided by Sharon Sandeen, Alexandra Roberts, Viva Moffatt, Yvette Liebesman, and the Roger Williams writing workshop. The author would like to thank Andy Tugan, Shawn Masse, and Christa Harris for their help as research assistants. Mistakes, if any, are the sole responsibility of the author.

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INTRODUCTION

Imagine that you work for a law firm, focusing on a discrete practice area, say music law. One of your many non-billable responsibilities is to contribute to an industry newsletter. However, the law is changing so rapidly in your area that your articles are typically out of date the moment they are published. One day, you decide that your time would be better spent opening a Twitter account and simply tweeting the latest developments. In the casual spirit of Twitter, you write tweets that not only inform, but also entertain your clients and yourself. You make wry comments about judicial opinions and the antics of the outsized personalities in the industry. You write a little about your personal life, in part because you use the same account to keep in touch with friends and family. Within a few months, several thousand people in your industry have become followers of your Twitter stream. You and your law firm are delighted. The firm even adds a link to your account on the firm web page.

A few years later, you leave your employer to go to a different firm. To your surprise, a week after you leave, your old firm demands that you return “their” Twitter account. What to do? Who “owns” the account?

This is, of course, not a problem unique to law firms. In many industries, workers maintain popular social network accounts followed by thousands, even millions, of people. How do we figure out when the account belongs to the employer and when it belongs to the worker? Who gets the account when the parties part ways? This question has recently arisen in a spate of cases. In *PhoneDog v. Kravitz*, a company that provides cell phone reviews sued a reviewer for taking his Twitter account with him after he left the job.¹ In *Eagle v. Morgan*, a former employee sued a financial service company for changing the password on her LinkedIn account and transferring it to another employee the day she was fired.² In *Christou v. Beatport, LLC*, a night-club owner sued a former employee for using the password to the plaintiff’s MySpace pages to advertise his new club.³

The cases have aroused intense interest.⁴ Approximately one billion people participate in online social networking.⁵ In addition, more than 70 percent of companies maintain a social network presence, and the number is rapidly increasing.⁶ Cumulatively, employers and individuals have enormous investments in social network platforms at stake. The precedents set will

1. *PhoneDog v. Kravitz*, No. C 11-03474 MEJ, 2011 WL 5415612 (N.D. Cal. Nov. 8, 2011).

2. *Eagle v. Morgan*, No. 11-4303, 2011 WL 6739448 (E.D. Pa. Dec. 22, 2011).

3. *Christou v. Beatport, LLC*, 849 F. Supp. 2d 1055 (D. Colo. 2012); *see also* *Maremont v. Susan Fredman Design Grp., Ltd.*, No. 10 C 7811, 2011 WL 6101949 (N.D. Ill. Dec. 7, 2011) (involving an employee suing an employer for accessing and posting messages through her personal Twitter and Facebook accounts); *Ardis Health, LLC v. Nankivell*, 11 CIV. 5013, 2011 WL 4965172 (S.D.N.Y. Oct. 19, 2011) (involving a plaintiff who claimed that a former employee took social network accounts she had maintained as an employee when she left plaintiff’s employment); Complaint, *TEKsystems, Inc. v. Hammernick*, No. 10-cv-00819 (D. Minn. Mar. 16, 2010), available at [http://op.bna.com/pen.nsf/id/jmer-86fq5g/\\$File/linkedin-hammernick.pdf](http://op.bna.com/pen.nsf/id/jmer-86fq5g/$File/linkedin-hammernick.pdf) (alleging that a former employee contacted former clients through her LinkedIn account in violation of her noncompete agreement).

4. *See, e.g.*, John Biggs, *A Dispute Over Who Owns a Twitter Account Goes to Court*, N.Y. TIMES, Dec. 26, 2011, at B1; Elise Bloom & John Barry, *The Role of Social Media in Workplace Disputes*, CORP. COUNS., Mar. 20, 2012, at 22; Melissa Maleske, *Companies Sue Employees Over LinkedIn, Twitter Accounts*, INSIDECOUNSEL, Mar. 2012, at 19; Joe Palazzolo, *Before Dispute over Twitter Account, a Fight over LinkedIn*, WALL ST. J. BLOG (Jan. 10, 2012, 12:12 PM), <http://blogs.wsj.com/law/2012/01/10>.

5. *See infra* note 19.

6. *The Overlooked Side of Social Media*, BUSINESS WEEK (Sept. 11, 2009), <http://www.businessweek.com/stories/2009-09-11/the-overlooked-side-of-social-mediabusiness-week-business-news-stock-market-and-financial-advice>; Doug Gross, *Employers, Workers Navigate Pitfalls of Social Media*, CNN (Feb. 7, 2012), <http://www.cnn.com/2012/02/07/tech/social-media/companies-social-media/index.html> (“In 2012, it is nearly impossible to imagine any company engaging with the public without using Facebook, Twitter, LinkedIn or other social networks.”).

affect not only these investments but also the public interest in preserving the immense benefits of social network use.

These disputes are likely the harbingers of many more to come for two principal reasons. First, social network accounts can be quite valuable. A social network account may provide the means to transmit a message to thousands of people. In the *PhoneDog* case, for example, 17,000 people followed the Twitter account at issue.⁷ However, a social network account provides much more than a means to make a one-way broadcast. A popular account offers access to an engaged audience, a means to crowdsource ideas and feedback, a self-reinforcing community of people connected by their shared interests, and, finally, a way to reach into the network of each person linked to the account.

Take Lady Gaga's Facebook page, for example. The pop star has fifty million Facebook users linked to her account.⁸ She uses her Facebook page to promote her music, products, and charities by sending messages which appear automatically in the newsfeeds of her followers.⁹ Meanwhile, her followers can both respond to Lady Gaga and communicate with each other by posting on her page, giving Lady Gaga direct feedback and strengthening her community of fans, the so-called "little monsters."¹⁰ Moreover, each fan may pass on Lady Gaga's comments and other postings to their friends. As a result, Lady Gaga's messages are distributed to an even larger circle than the fifty million Facebook users linked to her account.¹¹ Unsurprisingly, not only individuals, but a broad range of organizations, have created social network accounts to take advantage of these opportunities.

Second, the blurring of personal and professional roles on social network platforms leads to confusion over who has the superior rights to account. Because the account is in some ways a proxy for a person, people tend to use one account on a given platform to represent themselves for all purposes, including both personal and professional types of use. And because users participating in social network platforms expect interaction with people, organizations have found that using real people to "converse" on their behalf in a personal manner leads to success on social network platforms. Therefore, the features that make social network platforms effective as a means of communication lead to competing claims to an account. Individuals tend to blur personal and professional use at the same time that em-

7. *PhoneDog v. Kravitz*, No. C 11-03474 MEJ, 2011 WL 5415612, at *1 (N.D. Cal. Nov. 8, 2011).

8. Courtney Palis, *Facebook's 15 Most Popular People: Celebrity Pages with the Most Likes*, THE HUFFINGTON POST (Mar. 14, 2012), http://www.huffingtonpost.com/2012/03/14/facebook-popular-people-pages-likes_n_1341726.html?view=print&comm_ref=false.

9. *Lady Gaga*, FACEBOOK, <https://www.facebook.com/ladygaga> (last visited Feb. 9, 2013).

10. *Id.*

11. *Id.*

ployers ask their workers¹² to represent them in a personal manner. Where there is no express agreement on the issue, the question of who has superior rights to the account becomes blurry indeed.

This is a new area with no clear legal framework. The problem of legal framing is this: a social network account can be shorn of all content that gives rise to clear legal rights. The name of the account may be changed to avoid a trademark claim. Copyrighted and private content can be deleted. The account may be reduced to a node to which other people have linked their accounts. No clear legal rights inhere in the links to the account, yet, by providing automatic access to an audience, the links are what give the account value.

This Article argues that trade secret law provides the best legal framework for resolving these disputes. The secret of access to the social network account—the password—should be protectable as a trade secret.¹³ A password's secrecy confers independent economic value by giving the account holder exclusive access to the links in the account.¹⁴ This trade secret protection, however, would be highly limited. It would protect only access to the account, but not any content otherwise available to the public. Crucially, any other user could still contact the account's followers through other accounts. Although narrow, trade secret protection would protect the interest at the heart of these disputes: the right to retain exclusive access to the account's followers.

Similar trade secret claims have survived motions to dismiss in two cases on the issue.¹⁵ This Article expands on the cursory reasoning in these cases and argues that protecting the account's password as a trade secret best balances the interests at stake in these disputes. The investment of time and effort to build up links to a social network account appears to yield significant social benefits in the form of improved dissemination of information, economic efficiency, and labor mobility. The blurring of professional and personal roles while building up the links to accounts only appears to add to these benefits.

Trade secret law preserves incentives to invest in the account while protecting access to the account from misappropriation. Further, the hired-to-invent doctrine would allocate rights in social network accounts between employers and workers at the moment of creation in a manner that not only maximizes incentives to invest in social networking, but also preserves

12. This Article uses the term "worker," because the worker could be either an employee or an independent contractor.

13. As required for trade secret protection, the password to the account is generally secret. See UNIF. TRADE SECRETS ACT § 1(4), 14 U.L.A. 433 (1985); *infra* Part III.A.

14. This is true to the extent that the people linked to the account are potential customers. See UNIF. TRADE SECRETS ACT § 1(4), 14 U.L.A. 433 (1985); *infra* Part III.A.

15. *Christou v. Beatport, LLC*, 849 F. Supp. 2d 1055, 1076 (D. Colo. 2012); *PhoneDog v. Kravitz*, No. C 11-03474 MEJ, 2011 WL 5415612, at *7 (N.D. Cal. Nov. 8, 2011).

workers' incentives to invest in themselves.¹⁶ As a result, the trade secret approach promotes the public interest in online social network use without unduly hampering workers' rights. Moreover, this approach would, except in a few rare cases, work in concert with the resolution of other legal interests implicated in these disputes, such as privacy, copyright, and trademark concerns.

This Article proceeds as follows: Part I describes in detail why and in what circumstances disputes over social network accounts arise. Part II analyzes the legal rights and interests at stake in disputes over social network accounts. These disputes implicate legal rights under trademark, personality rights, copyright, and privacy law. The Article argues, however, that the core issue does not fall under any of these legal paradigms and instead implicates the public interest in developing links to the social network account. Part III shows that trade secret law not only provides a mechanism to assert a right in the core value of the account but also provides the best framework to resolve the interests at stake in disputes over social network accounts.

I. WHY DISPUTES ARISE OVER RIGHTS TO SOCIAL NETWORK ACCOUNTS

Social networking sites are “web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system.”¹⁷ Some of the most popular social network platforms now are

16. In trade secret law, the default rule is that, at the moment of creation, ownership of the trade secret vests in the party that created the trade secret. *See Ingersoll-Rand Co. v. Ciavatta*, 542 A.2d 879, 885 (N.J. 1988); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 42 cmt. e (1995). Under the hired-to-invent doctrine, however, ownership in the trade secret vests in the employer at the moment of creation if the employer and worker had an implied-in-fact agreement that the worker would develop the trade secret for the employer. *Teets v. Chromalloy Gas Turbine Corp.*, 83 F.3d 403, 407 (Fed. Cir. 1996); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 42 cmt. e (1995). These rules are discussed in more detail in Part III.

17. danah m. boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMM. 210, 211 (2007) [hereinafter *SNS Definitions*], available at <http://jcmc.indiana.edu/vol13/issue1/boyd.ellison.html>. “Social network site” is a subset of “social media.” “Social media” refers roughly to the group of Internet-based applications, such as social network platforms, content communities, collaborative projects, and virtual worlds, that build on the foundations of “Web 2.0,” or the more participatory and collaborative internet platforms that developed after about 2004. *See* Andreas M. Kaplan & Michael Haenlein, *Users of the World, Unite! The Challenges and Opportunities of Social Media*, 53 BUS. HORIZONS 59, 60–62 (2010). These definitions tend to blur in the common usage, however. Commentators often refer to “social network platforms” simply as “social media.” In addition, some commentators refer to these sites as “social networking sites.” *See, e.g.,* KEITH N. HAMPTON ET AL., PEW INTERNET & AM. LIFE PROJECT, *SOCIAL NETWORKING SITES AND OUR LIVES* (2011). This Article uses the term “social network platforms,” however, because the term “site” is constrictive given the change in the landscape of technology away from solely websites. In addition, the main focus of these platforms is less networking than making visible existing networks. *See SNS Definitions, supra*, at 213 (“While networking is

Facebook, Google+, LinkedIn, Pinterest, Myspace, and Twitter.¹⁸ Together, these sites represent at least a billion users across the planet.¹⁹

Several structural features of social network platforms and conventions surrounding their use are crucial to understanding why links to an account can become valuable and the subject of disputes over access. First, a social networking account containing a profile is typically perceived by other users as a proxy for the individual or entity.²⁰ Unlike the web page context, where the connection is understood to be a link to a web page and not a person, in the social networking context, a link to an account is understood as a link to the account holder.²¹ The terminology itself is suggestive of this perception. For example, a social network user might say: “I ‘friended’ Noah Kravitz on Facebook.”²²

Second, social networks both facilitate and make visible the connections between people. Online social networking is a means of articulating a sense of connection by linking visibly to the account representing an individual or entity.²³ Indeed, the opportunity for users to link to each other’s social network accounts is a defining feature of social networking. A user linked to another user’s account typically receives all the messages posted by that

possible on these sites, it is not the primary practice on many of them, nor is it what differentiates them from other forms of computer-mediated communication (CMC).”).

18. See *Top Sites*, QUANTCAST, <http://www.quantcast.com/top-sites-1> (last visited Feb. 19, 2013) (listing website rankings). The number of users on these sites are: Facebook 901 million; Twitter 555 million; Google+ 170 million; LinkedIn 150 million; and Pinterest 11.7 million. *User Activity Comparison of Popular Social Networking Sites [Infographic]*, GO-GULF (May 2, 2012), <http://www.go-gulf.com/blog/social-networking-user>.

19. This number is based on the monthly active users of Facebook alone, which Facebook has reported as 950 million. FACEBOOK, INC., QUARTERLY REPORT (FORM 10-Q), at 20 (July 31, 2012). The number may be far higher given the number of users of other social network services. Since it is difficult to know how many people use multiple social network platforms, it is hard to add the numbers of users of each platform together to arrive at a total number of users of these services. Based on a survey of thirty five countries, however, Insites Consulting reached the conclusion that the number of social network users worldwide is greater than one billion. Steven Van Belleghem, Insites Consulting, *Social Media Around the World 2011*, at 31 (Sept. 4, 2011), <http://www.slideshare.net/stevenvanbelleghem/social-media-around-the-world-2011>.

20. danah boyd, *Social Network Sites as Networked Publics: Affordances, Dynamics, and Implications*, in *A NETWORKED SELF: IDENTITY, COMMUNITY, AND CULTURE ON SOCIAL NETWORK SITES* 39, 43 (Zizi Papacharissi ed., 2010) (“Profiles both represent the individual and serve as the locus of interaction.”).

21. danah boyd, *Friends, Friendsters, and Top 8: Writing Community into Being on Social Network Sites*, 11 *FIRST MONDAY* 12 (2006) (“Social network sites provide a new organizing mechanism for developing context. Instead of slicing interest first and people second, the Friending process allows people to choose people first and interests second.”).

22. Cici Stewart, *I Do Not Understand How Facebook Can . . .*, FACEBOOK, <http://www.facebook.com/help/community/question/?id=10151067468783440> (last visited Feb. 24, 2013).

23. See *SNS Definitions*, *supra* note 17, at 211 (“What makes social network sites unique is not that they allow individuals to meet strangers, but rather that they enable users to articulate and make visible their social networks.”).

other user automatically.²⁴ The term often attributed to a user linked to another user's account is a "follower" because the user follows the other user's account in the same way that a reader might follow a story in the news by reading each update as it is published.²⁵ Every time the follower checks her account, she sees the latest postings from the users she follows.

Links can be unidirectional or bidirectional. On Twitter, for example, links are unidirectional.²⁶ When one user links to another user's account, the first user receives the second user's postings, but the second user must separately link to the first user's account to receive the first user's postings.²⁷ In contrast, links to a personal timeline on Facebook are bidirectional; the liked users become each other's followers and both will receive each other's posts.²⁸ Users who are not followers of a particular social network account can still see the messages posted on that account's newsfeed if the newsfeed is public, but they do not automatically receive the postings in their own feeds.²⁹ In other words, a non-follower would have to go to the other account's site instead of receiving messages directly in his or her own account.

Linking between social network accounts is therefore different than linking two web pages together with a URL hyperlink.³⁰ When a social network user links to another user by following her on the same social network platform, she receives communications directly from that other user.³¹ She tunes in, as it were, to the messages broadcasted from the account. Linking therefore provides an exceptionally convenient way for an account holder to

24. See, e.g., *FAQs About Following*, TWITTER, <https://support.twitter.com/articles/14019-faqs-about-following> (last visited Oct. 30, 2012); *What Is a Twitter Timeline?*, TWITTER, <https://support.twitter.com/articles/164083-what-is-a-twitter-timeline> (last visited Nov. 1, 2012); *What Is Following?*, PINTEREST (Jan. 24, 2013, 10:19 AM), <https://help.pinterest.com/entries/22980502-What-is-following>. The account holder, however, can often choose which messages followers see. For example, on Facebook, the account holder can limit who can see a particular posting by making her postings only available to individuals in defined groups. *How to Post and Share*, FACEBOOK, <https://www.facebook.com/help/333140160100643/> (last visited Oct. 30, 2012).

25. See, e.g., *FAQs About Following*, *supra* note 24; *What Is Following?*, *supra* note 24. Not all social network platforms use the term "follower," but this Article will use the term for the sake of uniformity.

26. *FAQs About Following*, *supra* note 24.

27. *Id.*

28. Michael Wu, *Google+ vs. Facebook vs. Twitter vs. . . . Part 1: The Strength Of Bidirectional Connections*, LITHIUM (Aug. 8, 2011, 1:40 AM), <http://lithosphere.lithium.com/t5/Science-of-Social-blog/Google-vs-Facebook-vs-Twitter-vs-Part-1-The-Strength-of/ba-p/29770>.

29. See, e.g., *About Public and Protected Tweets*, TWITTER, <https://support.twitter.com/groups/31-twitter-basics/topics/109-tweets-messages/articles/14016-about-public-and-protected-tweets#> (last visited Nov. 12, 2012); *Who Can See Your Posts*, GOOGLE, <http://support.google.com/plus/bin/answer.py?hl=en&answer=1053543&topic=1257360&ctx=topic> (last visited Nov. 12, 2012).

30. When this Article uses the terms "link" or "linking," unless otherwise specified, the links intended are those between social network accounts.

31. See *FAQs About Following*, *supra* note 24; *What Is Following?*, *supra* note 24.

communicate with the people following the account, sometimes on a massive scale. For example, in *PhoneDog v. Kravitz*, the Twitter account at issue had 17,000 followers.³² In such cases, the social network account becomes a medium for mass communication, not only from the account to the followers, but also, due to the direct access that linking provides, from the followers to the account holder and between followers.

Finally, social network platforms are, as the name suggests, social.³³ People link to each other because of a social connection, typically a preexisting personal connection.³⁴ Social network platforms provide virtual social worlds in which each account functions as a proxy for an individual and the links among people are represented electronically.³⁵

As succeeding sections explain, these characteristics create both opportunities and stumbling blocks for organizations as they attempt to follow the public onto social network platforms. They offer direct, automatic, and intimate contact with the public, but organizations struggle to communicate in a system based on and designed for social interaction between individuals. Consequently, employers use their workers to communicate for them in a personal capacity. The resulting blurring of professional and personal roles on social network platforms leads to confusion regarding who has rights to the account.

A. Why Organizations Participate on Social Network Platforms

Social network platforms began as sites for individual use, but an increasingly broad range of organizations see participation in them as a necessity.³⁶ Social network participation can repay organizations with free access

32. *PhoneDog v. Kravitz*, No. C 11-03474 MEJ, 2011 WL 5415612, at *1 (N.D. Cal. Nov. 8, 2011).

33. *See id.*

34. *See* HAMPTON ET AL., *supra* note 17, at 27 (“A very small number of Facebook friends are people that we might refer to as strangers.”); *SNS Definitions*, *supra* note 17, at 211 (“On many of the large SNSs, participants are not necessarily ‘networking’ or looking to meet new people; instead, they are primarily communicating with people who are already a part of their extended social network.”).

35. *See generally SNS Definitions*, *supra* note 17.

36. *See id.* at 210 (describing social networking sites as services principally for individuals); Doug Gross, *Employers, Workers Navigate Pitfalls of Social Media*, CNN (Feb. 7, 2012, 10:33 AM), <http://www.cnn.com/2012/02/07/tech/social-media/companies-social-media/index.html> (“In 2012, it is nearly impossible to imagine any company engaging with the public without using Facebook, Twitter, LinkedIn or other social networks.”); *The Overlooked Side of Social Media*, BUSINESSWEEK (Sept. 11, 2009), <http://www.businessweek.com/stories/2009-09-11/the-overlooked-side-of-social-mediabusinessweek-business-news-stock-market-and-financial-advice> (“More than 70% of companies are already using social media; many are planning to increase their spending on social media across the coming years.”). The organizations that participate in social media through social network accounts run the gamut. *See, e.g.*, Carolyn Elefant, *The “Power” of Social Media: Legal Issues & Best Practices for Utilities Engaging Social Media*, 32 ENERGY L.J. 1 (2011) (utility companies); Irwin A. Kishner & Brooke E. Crescenti, *The Rise of Social Media: What Professional Teams and Clubs Should*

to vast numbers of people, amplification of communication through network effects, consumer feedback, access to niche markets, and enhanced brand loyalty. As a result, organizations increasingly attempt to engage with the public not only by advertising on social network platforms, but also by creating social network accounts and entering the conversation themselves.³⁷

Perhaps foremost, social network platforms provide a means to go where the people are. In 2011, the Pew Research Center found that forty-seven percent of adults use social network platforms and the bulk of those users engage with them on a daily basis.³⁸ In addition, use of social networking is rapidly increasing, almost doubling since 2008.³⁹ As researchers at the Pew Research Center's Internet and American Life Project observed, "The pace with which new users have flocked to social networking sites has been staggering."⁴⁰ A whole generation is becoming accustomed to obtaining information through social network platforms.⁴¹ Moreover, unlike advertising to the public through television, radio, or even a web page or a search engine, social network accounts are free.⁴²

Participating in online social networks not only provides organizations with direct access to potential customers and audiences, it also allows them to reach into the network of each person directly contacted.⁴³ By making

Consider, ENT. & SPORTS LAW., Winter 2010, at 24 (sports teams); Nuria Lloret Romero, *ROI. Measuring the Social Media Return On Investment In a Library*, 24 BOTTOM LINE: MANAGING LIBR. FIN. 145, 145-48 (2011) (libraries); Lee Rainie et al., *Ask the Expert*, PEW RESEARCH CENTER (Sept. 22, 2011), <http://www.pewresearch.org/2011/09/22/ask-the-expert-2/> (political campaigns).

37. Brian Honigman, *6 Benefits of Social Media for Business*, LUNAMETRICS (June 8, 2011), <http://www.lunametrics.com/blog/2011/06/08/6-social-media-benefits-for-business> (describing several ways in which social network use is beneficial for companies); see also Jefferson Graham, *Businesses Turn to Facebook for Word-of-Mouth Advertising*, USA TODAY (Aug. 5, 2009, 11:33 AM), http://www.usatoday.com/tech/products/2009-08-04-facebook-advertising-businesses_N.htm. This section tends to use the example of for-profit companies for purposes of simplicity. However, non-profit organizations, such as universities, political campaigns, or public interest groups, have similar interests in reaching the public.

38. HAMPTON ET AL., *supra* note 17, at 3.

39. *Id.*

40. MARY MADDEN & KATHRYN ZICKUHR, PEW INTERNET & AM. LIFE PROJECT, *65% OF ONLINE ADULTS USE SOCIAL NETWORKING SITES 2* (2011).

41. Robert McLuhan, *Special Report: New Reality Demands a Response*, MARKETING, Oct. 26, 2011, at 37.

42. Most social network platforms are free, with the exception of some additional services like LinkedIn's "premium accounts." See Albrecht Enders et al., *The Long Tail of Social Networking: Revenue Models of Social Networking Sites*, 26 EUR. MGMT. J. 199 (2008); *Finding the Right People Just Got Easier*, LINKEDIN <http://www.linkedin.com/mnyfe/subscriptionv2?displayProducts=> (last visited Feb. 23, 2013). Of course, participating in social media has costs in terms of time and energy, but the services are generally free.

43. Stephen Baker, *Beware Social Media Snake Oil*, BLOOMBERG BUSINESSWEEK (Dec. 2, 2009), <http://www.businessweek.com/stories/2009-12-02/beware-social-media-snake-oil> ("As millions of people flock to these online services to chat, flirt, swap photos, and network, companies have the chance to tune in to billions of digital conversations.").

each individual's interactions visible to his or her network, social network platforms effectively make the individual an advertiser for the company with which he or she interacts.⁴⁴ One way in which the user advertises for the company is through word-of-mouth marketing.⁴⁵ For example, when a Facebook user "likes" the Facebook page of a company, this action is posted as a news item to all of that particular user's Facebook friends.⁴⁶ Social network platforms also help organizations leverage "brand ambassadors"—those consumers who already advocate for the company to their networks.⁴⁷ Organizations can use social network platforms both to find these people and to leverage their enthusiasm by giving them greater voice.⁴⁸ The most extreme example of the multiplier effect of social networking is "viral marketing."⁴⁹ In "viral marketing," an advertisement or promotion may be disseminated at an exponential rate as users pass the information on to members of their networks, who pass it on to members of their networks, and so on.⁵⁰

Social network platforms also make it possible to exploit niche markets more effectively. Social networking tools make it easier for people to build

44. William McGeveran, *Disclosure, Endorsement, and Identity in Social Marketing*, 2009 U. ILL. L. REV. 1105, 1116. Professor McGeveran principally discusses how for-profit employers engage in social media, but the same reasons would apply in the case of any organization that desires to communicate with the public. *See id.*

45. *Id.* at 1116–19. *See generally* Eric Goldman, *Online Word of Mouth and Its Implications for Trademark Law*, in TRADEMARK LAW AND THEORY: A HANDBOOK OF CONTEMPORARY RESEARCH 404 (Graeme B. Dinwoodie & Mark D. Janis eds., 2008) (discussing the phenomenon of word of mouth generally in the online context).

46. *What Does It Mean to Like a Page or Content off of Facebook?*, FACEBOOK, <https://www.facebook.com/help/131263873618748/> (last visited Feb. 19, 2013).

47. *See* SHIV SINGH & STEPHANIE DIAMOND, *SOCIAL MEDIA MARKETING FOR DUMMIES* 13–17 (2d ed. 2012); Todd Wasserman, *How to: Turn Fans into Brand Ambassadors*, MASHABLE (July 13, 2011), <http://mashable.com/2011/07/13/fans-brand-ambassadors/>.

48. *See* SINGH & DIAMOND, *supra* note 47, at 219–30; David G. Taylor et al., *Friends, Fans, and Followers: Do Ads Work On Social Networks? How Gender and Age Shape Receptivity*, 51 J. ADVERTISING RES. 258, 258 (2011) ("Not content merely to draw fans to its Facebook page, the Red Robin restaurant chain enlisted Facebook users as 'brand ambassadors,' asking them to send pre-written recommendations to online friends. Some 1,500 customers—each with an average of 150 friends—agreed to post recommendations, which the company estimates resulted in approximately 225,000 positive advertising impressions."); Wasserman, *supra* note 47.

49. *See* McGeveran, *supra* note 44, at 1113; Natalie Petouhoff, *Calculating the ROI of Social Media*, ADVERTISING AGE (June 24, 2011), <http://adage.com/article/adagestat/calculating-roi-social-media/228399/> (discussing the benefits to a company of taking advantage of SuperUsers).

50. *See* Lisa P. Ramsey, *Intellectual Property Rights in Advertising*, 12 MICH. TELECOMM. & TECH. L. REV. 189, 243 (2006). For example, in the Miracle Whip "pick a side" campaign, thousands passed along Miracle Whip's invitation to vote as to whether they liked or hated the condiment through Facebook. Nigel Hollis, *Miracle Whip, Marmite, and the "Love It or Hate It" Brand*, BUSINESSWEEK (Mar. 1, 2011), http://www.businessweek.com/managing/content/mar2011/ca2011031_248948.htm.

networks based on very specific interests or demographics.⁵¹ Companies can then tap into these networks to sell the goods and services that specifically interest them.⁵²

Because social network platforms enable two-way communication, organizations also benefit from consumer responses in the form of input and feedback on their products.⁵³ For example, companies can participate in communities, which are already discussing their products, or make their own social network presence through a Facebook page or Twitter feed—places where consumers discuss products and provide feedback.⁵⁴ Soliciting consumer feedback also gives companies a way to avoid bad press on social networks.⁵⁵ By entering the conversation, companies use the viral power of social network platforms in their favor by countering false information, publicizing efforts to fix problems, and apologizing.⁵⁶

Finally, social network platforms facilitate engagement with customers in a “virtuous digital cycle” which increases consumers’ brand loyalty.⁵⁷ Interested customers seek out brands online and then are rewarded with opportunities to engage with the brand, which strengthens their interest and loyalty to the brand.⁵⁸ By building a following (a group of linked followers) around a social network account, an organization creates a community around its

51. *SNS Definitions*, *supra* note 17, at 214 (“Some sites are designed with specific ethnic, religious, sexual orientation, political, or other identity-driven categories in mind. . . . [I]t is not uncommon to find groups using sites to segregate themselves by nationality, age, educational level, or other factors that typically segment society . . .”).

52. See CHRIS ANDERSON, *THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE* 98–124 (2006) (describing how demand for niche products has increased dramatically due to the increase in online word of mouth marketing); Heather Whaling, *Niche Social Networks Deliver Big Results for Brands*, MASHABLE (Nov. 27, 2011), <http://mashable.com/2011/11/27/niche-social-marketing/>.

53. See JEFF HOWE, *CROWDSOURCING: WHY THE POWER OF THE CROWD IS DRIVING THE FUTURE OF BUSINESS* 112–13 (2008) (discussing how companies benefit from crowdsourcing).

54. For example, Frito-Lay solicits input on new potato chip flavors on Facebook. Stephanie Clifford, *Social Media Are Giving a Voice to Taste Buds*, N.Y. TIMES (July 31, 2012), http://www.nytimes.com/2012/07/31/technology/facebook-twitter-and-foursquare-as-corporate-focus-groups.html?_r=0; see also *The Case for Social Media Feedback Management*, ALLEGIANCE (2010), http://www.allegiance.com/documents/Case_for_Social_Media_Feedback_Management.pdf.

55. See Tristan Morales, *Social Media Campaigns as an Emerging Alternative to Litigation*, 38 RUTGERS COMPUTER & TECH. L.J. 35, 50–53 (2012) (discussing opportunities for companies to address bad press in the blogosphere); Gabriel Beltrone, *Brand #Fail*, ADWEEK (May 15, 2012, 6:40AM), <http://www.adweek.com/news/advertising-branding/brand-fail-140368> (discussing examples of social media publicity fire storms and successful tactics to counter them).

56. See Morales, *supra* note 55; Beltrone, *supra* note 55.

57. Louise Jack, *Digital Consumers: Internet Turns Customers into Ambassadors*, MARKETING WK. (June 4, 2009), <http://www.marketingweek.co.uk/internet-turns-customers-into-ambassadors/3001054.article>.

58. *Id.*

brand.⁵⁹ For example, members of a community built around a digital camera brand might share ideas for improving their photography skills.⁶⁰ The connections that brand followers make with each other and the information they share give them another reason to remain loyal to the brand.⁶¹

As David Post observed in *In Search of Jefferson's Moose*, the value of a network which enables multi-way communication grows hyper-geometrically with the number of members of the network.⁶² In a social network account, the connections followers make with each other give the followers more reason to belong. Thus, the more that followers link to the social network account, the more valuable the social network account becomes, not only to the social network account holder, but also to the followers.

B. Why Employers Use Workers in a Personal Capacity on Social Networks

Many organizations, however, struggle to take advantage of the benefits of social network platforms.⁶³ Social networking campaigns often stumble comically⁶⁴ or simply fail to draw any interest.⁶⁵ The problem is that social networks not only function differently than traditional forms of media, but they also function differently than the so-called Web 1.0,⁶⁶ the less collaborative and participatory platforms of the early internet. Traditional forms of media and even the nonsocial media internet operate primarily as one-way forms of communication.⁶⁷ The company transmits a message via a website

59. See Eilene Zimmerman, *Small Retailers Open up Storefronts on Facebook Pages*, N.Y. TIMES, July 26, 2012, at B9.

60. Chris Brogan, *Build Strong Online Communities Using Social Media*, in SUCCESS SECRETS OF THE SOCIAL MEDIA MARKETING SUPERSTARS 85, 87 (Mitch Meyerson ed., 2010).

61. See *id.*; SINGH & DIAMOND, *supra* note 47, at 91.

62. DAVID POST, *IN SEARCH OF JEFFERSON'S MOOSE* 48 (2009).

63. See Beltrone, *supra* note 55.

64. For example, the social media agency for Entenmann's, a producer of baked goods, joined the conversation under the #notguilty hashtag on Twitter with the tweet: "Who's #notguilty about eating all the tasty treats they want?!" Jason Fell, *Lessons from Entenmann's 'Insensitive' #NotGuilty Casey Anthony Tweet*, ENTREPRENEUR (July 6, 2011), <http://www.entrepreneur.com/blog/219951>. The tweet showed up in a stream of #notguilty tweets relating to a murder trial verdict, drawing widespread criticism for insensitivity. *Id.*

65. Chris Brogan, *supra* note 60, at 90 ("Even if you build [an online community], there's a chance that people won't come (and this happens a lot)."); Alexandra Reid, *Customers Won't Come Just Because You're on Social Media*, BUS. INSIDER (June 9, 2011), http://articles.businessinsider.com/2011-06-09/strategy/30063170_1_social-media-startups-can-customer-service.

66. "Web 1.0" refers roughly to early internet pre-2001, when the internet applications were less participatory. See Kaplan & Haenlein, *supra* note 17, at 61; see also Mary Madden & Susannah Fox, *Riding the Waves of "Web 2.0": More than a Buzzword, but Still Not Easily Defined*, PEW INTERNET 1, 2 (Oct. 6, 2006), http://pewinternet.org/~/media/Files/Reports/2006/PIP_Web_2.0.pdf.pdf.

67. Mohit Kishore, *Interactive Brands*, HINDU BUS. LINE (Mar. 15, 2007), <http://www.thehindubusinessline.com/todays-paper/tp-brandline/article1678913.ece>.

or a television advertisement, and the public, or some subset of the public, receives that message.⁶⁸ In contrast, online social networks function as a two-way, and sometimes as a multi-way, form of communication.⁶⁹ Where traditional media might be best characterized as a broadcast, social networking might be best characterized as a conversation.⁷⁰

This format poses a challenge for corporations and other organizational entities. Organizations fail to engage the public on social network platforms when they attempt to simply broadcast a one-way, impersonal message.⁷¹ For example, the online universe reacted with fury when Toyota indiscriminately sent reply tweets to users who were tweeting about the 2012 Super Bowl.⁷² Toyota's tweets were sent from impersonal accounts like "@Camry-Effect" and invited the Twitter users to enter a contest to win a 2012 Toyota.⁷³ To contain the damage, Toyota's social media manager was forced to publicly apologize.⁷⁴

Both the architecture and norms on social network platforms encourage conversations between people who have a personal connection with each other. On most social network platforms, communication between parties that have not voluntarily created an electronic link is limited by the site's software.⁷⁵ Even in social network platforms which allow broader communication, such as Twitter, users expect a conversation with people with whom

68. See *id.*

69. See Pierre R. Berthon et al., *Marketing Meets Web 2.0, Social Media, and Creative Consumers: Implications for International Marketing Strategy*, 55 BUS. HORIZONS 261, 263 (2012) ("Web 2.0 technologies transform broadcast media monologues (one to many) into social media dialogues (many to many)."); Alice E. Marwick & danah boyd, *I Tweet Honestly, I Tweet Passionately: Twitter Users, Context Collapse, and the Imagined Audience*, 13 NEW MEDIA & SOC'Y 114, 128–30 (2011) (discussing the distinctions between a traditional broadcast audience and a networked audience where viewers are able to communicate with the writer and other viewers).

70. See Peter Merholz, *How to Extend Your Customer Experience Through Social Media*, HARV. BUS. REV. (Aug. 24, 2009, 10:23 AM), <http://blogs.hbr.org/merholz/2009/08/how-to-extend-your-customer-ex.html> ("It's a conversation, which means you both listen and take part."); Poornima Mohandas, *Firms Logging into Networking Sites to Connect with Customers*, MINT (Sept. 16, 2009, 8:59 PM), <http://www.livemint.com/2009/09/16205917/Firms-logging-into-networking.html?h=B> ("Social media is not a one-way traffic"); Marwick & boyd, *supra* note 69, at 128–130.

71. Mohandas, *supra* note 70 ("[One-way advertising campaigns] fail because social network users are not looking for advertising and see through the sloganeering.").

72. Tonia Ries, *Toyota Under Fire For #CamryEffect Twitter Spam Superbowl Promotion*, REALTIME REP. (Feb. 6, 2012), <http://therealtime.com/tag/automotive/>.

73. Drew Olanoff, *Toyota Takes to Spamming Twitter for Camry Super Bowl 'Promotion'*, NEXT WEB (Feb. 4, 2012), <http://thenextweb.com/socialmedia/2012/02/04/toyota-takes-to-spamming-twitter-for-camry-super-bowl-promotion/>; Ries, *supra* note 72.

74. She posted: "We apologize to anyone in the Twitterverse who received an unwanted @reply over the past few days. . . . We've certainly learned from this experience and have suspended the accounts effective immediately to avoid any additional issues." Olanoff, *supra* note 73.

75. See *infra* note 130 and accompanying text.

they have some personal connection. The Twitter users' reaction in the Toyota incident illustrates this expectation. Users complained because they felt they had been "spammed."⁷⁶ They expected a conversation, not an indiscriminate broadcast.⁷⁷

Because of this preference for a human connection, companies have found that success with social network platforms often requires using real people to engage with the public on the company's behalf.⁷⁸ As one commentator noted, "[T]here appears to be real and lasting value for employers in having an online presence that feels human, not corporate, sanitized and aloof."⁷⁹ A constant refrain in the advice of marketers and public relations professionals in this area is to replace the corporate voice with "real," "human," and "authentic" voices.⁸⁰

Of course, companies are made up of real people and have always used real people to communicate with the public. The difference in social networking campaigns is that companies allow employees to interact with the public in a personal, rather than purely professional, manner.⁸¹ As PhoneDog, the company involved in a Twitter dispute with its former worker, stated, "PhoneDog has always strived to provide a very personal user experience by frequently communicating with its audience, and all of

76. Olanoff, *supra* note 73.

77. "Spam" is generally defined as "unsolicited commercial e-mail." BLACK'S LAW DICTIONARY 712 (9th ed. 2009).

78. James Walsh, *Companies Look to Capitalize on Viral Voices*, WORKFORCE (May 27, 2011), <http://www.workforce.com/article/20110527/NEWS02/305279995>.

79. Doug Gross, *Employers, Workers Navigate Pitfalls of Social Media*, CNN (Feb. 7, 2012, 10:33 AM), <http://www.cnn.com/2012/02/07/tech/social-media/companies-social-media/index.html>.

80. For example, Rob Frappier, a community manager at online reputation and Internet privacy company Reputation.com Inc., states: "If your employees want to contribute and they want to share their voice, not only is it a way to add value to your brand because it humanizes the company, but it also allows employees to feel really invested in your communications strategy." Walsh, *supra* note 78. An article in Advertising Age advises: "As the lines between professional and personal continue to blur, companies that create more access for employees to tweet and add friends will bolster the bottom line." Kaplan Mobray, *How to Turn High-Profile Employees into Brand Ambassadors*, ADVERTISING AGE (May 28, 2009), <http://adage.com/article/talentworks/turn-high-profile-employees-brand-ambassadors/136918/>; see also SINGH & DIAMOND, *supra* note 47, at 91–98.

81. See Michael Masri & Pedram Tabibi, *Social Media at Work Raises Issues of Account Ownership*, L. TECH. NEWS (Mar. 27, 2012), available at LEXIS 1202546958712. As Masri and Tabibi eloquently explain, "The line between online work and personal life—and the content each generates—is increasingly blurring. Employees spend time on social media platforms at work while also promoting themselves and their companies via social media. As a result, questions inevitably arise as to who exactly is building a brand, what the brand is, and who owns any customers." *Id.*

our editors were and are encouraged to tweet personal aspects of their life to the account.”⁸²

At the same time, personal use must necessarily involve some discretion by the worker. PhoneDog’s former worker Noah Kravitz not only tweeted about mobile phone technology, but he also tweeted on whimsical and personal subjects, such as bathroom smells and unicorn paintings.⁸³ The company must surrender some control to the individual worker to allow him to express himself in this manner.

Not all organizations are willing to expose themselves to the risks of discretionary social networking use. Employees may leak confidential information,⁸⁴ embarrass the company,⁸⁵ or post offensive or private information about co-workers.⁸⁶ The fact that many employers continue to allow employees to blur personal and professional use of social network platforms, and often even request that they do so, attests to the benefit this practice provides them.

C. *Blurred Personal and Professional Use and Blurred Personal and Professional Roles*

The blurring of professional and personal use on social network platforms makes it unclear whose interests an account holder intends to serve. The problem is not simply that the same account contains both personal and professional information. To equate discussing professional matters, such as cell phone features, with serving the employer and discussing personal matters, such as thoughts about unicorn paintings, with serving the worker over-

82. Shaylin Clark, *Follow-Up: PhoneDog Discusses Twitter Lawsuit*, WEBPRONews (Dec. 29, 2011), <http://www.webpronews.com/follow-up-phonelog-discusses-twitter-lawsuit-2011-12>.

83. Chris Taylor, *Meet the Writer Being Sued for His 17,000 Twitter Followers*, MASHABLE (Dec. 30, 2011), <http://mashable.com/2011/12/30/twitter-follower-lawsuit-noah-kravitz/>.

84. A 2010 study found that ninety-four percent of users of one large social network accepted a “friend request” from a complete stranger, presented to them as being an attractive young woman, and then revealed confidential business information to their new “friend.” Marie-Andrée Weiss, *The Use of Social Media Sites Data by Business Organizations in Their Relationship with Employees*, J. INTERNET L., Aug. 2011, at 16, 19–20.

85. In one example, an employee of a company handling Chrysler’s new media strategies sent out a rogue tweet: “I find it ironic that Detroit is known as the #motorcity and yet no one knows how to fucking drive.” Carter Yang, *Chrysler’s “F’ing” Tweet No LOL Matter to Detroit*, CBS MONEY WATCH (Mar. 10, 2011), http://www.cbsnews.com/8301-503983_162-20041891-503983.html. In another example, followers of the Red Cross Twitter account were surprised to see the following tweet: “Ryan found two more 4 bottle packs of Dogfish Head’s Midas Touch beer. . . . when we drink we do it right #gettngslizzerd,” posted mistakenly by a Red Cross employee. Dean Praetorius, *The Red Cross’ Rogue Tweet: #gettngslizzerd on Dogfish Head’s Midas Touch*, HUFFINGTON POST (Feb. 16, 2011, 7:30 PM), http://www.huffingtonpost.com/2011/02/16/red-cross-rogue-tweet_n_824114.html.

86. Robert H. Bernstein, *On the Horizon: Employer Liability for Employee Social Media Communications and Conduct*, ASPATORE, Feb. 2011, at *3–5, available at 2011 WL 601170.

simplifies the matter. The problem is also that the personal or professional nature of the content does not clearly indicate which party the speaker is serving. Personal commentary serves the employer by humanizing the company, while professional commentary serves the worker by boosting his reputation and professional network.

Not surprisingly, given the concerns about online gaffes, the employees that organizations allow to engage with the public on behalf of the company tend to be those workers who already have significant experience and discretion in dealing with the public. The blurring of personal and professional social network use seems particularly common among three categories of workers: journalists, high-ranking company officers, and salespeople. Thus far, all of the suits filed involving disputes over rights to social network accounts feature workers in one of these three categories.⁸⁷ The cases reflect widespread practices in these groups.

The use of social network platforms among journalists is particularly ubiquitous. The development of the internet in the last decade has put tremendous pressure on print media to adapt to the digital world or dramatically lose readership.⁸⁸ Many media organizations have responded to this threat by using social network platforms to build readership, with significant success.⁸⁹ For example, like many internet-based businesses, PhoneDog is essentially a media company; it uses content to draw an audience and uses the audience to sell advertising.⁹⁰ The content, in the form of cell phone reviews, is primarily provided on its website. However, PhoneDog also uses

87. Journalist can be interpreted more broadly as media-worker or content provider. *Eagle v. Morgan*, No. 11-4303, 2013 WL 943350, at *1 (E.D. Pa. 2013) (involving seller of professional services); *PhoneDog v. Kravitz*, No. C 11-03474 MEJ, 2011 WL 5415612, at *1 (N.D. Cal. Nov. 8, 2011) (involving media worker who provided content for phone review website); *Maremont v. Susan Fredman Design Grp., Ltd.*, 772 F.Supp.2d 967, 969 (N.D. Ill. 2011) (involving Director of Marketing). A point of overlap is the media-worker who provides content for websites or social media sites. Such workers could be considered senior officers in the sense that they control marketing or public relations or could be considered journalists in the sense that they provide content. Other cases involving disputes over rights to access accounts involve similar categories. *E.g.*, *Complaint ¶ 128, Christou v. Beatport, LLC*, 849 F. Supp. 2d 1055 (D. Colo. 2012) (No. 10-cv-02912-RBJ-KMT) (involving media-worker who helped develop social media pages).

88. Newspaper advertising revenues have dropped steadily since the popularization of the internet. *Annual Advertising Expenditures*, NEWSPAPER ASS'N OF AM. (Mar. 14, 2012), <http://www.naa.org/Trends-and-Numbers/Advertising-Expenditures/Annual-All-Categories.aspx>. Newspaper advertising revenue is now at its 1982 level in inflation-adjusted dollars. Hal Varian, *Newspaper Economics: Online and Offline*, FED. TRADE COMM'N (Mar. 13, 2010), <http://www.ftc.gov/opp/workshops/news/mar9/docs/varian.pdf>.

89. By January 2011, a study showed that over eighty percent of newspapers had created Facebook and Twitter accounts. Sounman Hong, *Online News on Twitter: Newspapers' Social Media Adoption and Their Online Readership*, 24 INFO. ECON. & POL. 69, 71 (2012). Using social media appears to lead to significantly more page views. *Id.* at 73.

90. First Amended Complaint ¶¶ 8–10, *PhoneDog, LLC v. Kravitz*, No. 3:11-cv-03474-MEJ, 2011 WL 6955632 (N.D. Cal. Nov. 29, 2011).

social network platforms to draw more readers and sell more advertising.⁹¹ The following is a segment of a current PhoneDog product reviewer's Twitter feed:

Aaron Baker, @PhoneDog_Aaron

I can't quite pinpoint what it is, but ICS appears to change the gesture input on the ATT Galaxy S II. Have to re-learn how to press screen

Aaron Baker, @PhoneDog_Aaron

RT @PhoneDog Samsung Galaxy Note sneaks onto new T-Mobile store signage <http://pdog.ws/Ma8cGv>

Aaron Baker, @PhoneDog_Aaron

I just used "doodads" in a conversation. As in ". . . it was one of those doodads that sticks to the wall." Not sure how I feel about this

Kim, @happdgirl

@PhoneDog_Aaron Agreed.

Aaron Baker, @PhoneDog_Aaron

@happdgirl do you use the word as well? I'm glad to hear this⁹²

These tweets are, consecutively, (1) a short update on a cell phone product, (2) a link back to an article on the PhoneDog website, (3) a personal comment, (4) a follower's response, and (5) a reply to that follower. Baker's use of Twitter attracts readers to the PhoneDog site in several ways. The link back to an article draws readers directly to the website to find more information. More circuitously, the short updates draw readers to the PhoneDog website because the website has links to Twitter feeds providing these updates.

Baker's sharing of personal information offers its own draw. Baker's Twitter account becomes a proxy for him personally. As shown below, his photograph and a short description at the top of the page suggest that the account represents him individually.⁹³



91. *Id.* ¶ 11.

92. Aaron Baker, *Twitter / PhoneDog_Aaron*, TWITTER, https://twitter.com/PhoneDog_Aaron (last visited July 6, 2012, 1:33 PM).

93. See Aaron Baker, *Aaron Baker (PhoneDog_Aaron) on Twitter*, https://twitter.com/PhoneDog_Aaron (Aug. 3, 2013).

The personal information he includes, such as his thoughts about “doo-dads,” makes his persona more real. As danah boyd and Alice Marwick⁹⁴ observed in their study on personal and professional use on Twitter, “[R]evealing personal information is seen as a marker of authenticity.”⁹⁵ A follower’s ability to talk back to Baker, and to literally converse with him, completes the experience of connecting with him on a personal level.

In a very real sense, followers develop relationships with Baker. They hear from him on a daily, even hourly, basis, and may, at their discretion, engage him in a conversation. As a result, they care more about what he has to say. This is especially true where the account holder provides information, such as a review, which reflects his own opinions. Naturally, when readers feel a sense of personal connection with Baker—perhaps even identifying with him—his opinions become more important to them. This in turn benefits Baker’s employer, PhoneDog, by attracting more people to the site, thereby increasing PhoneDog’s advertising revenue.

This type of social network use is widespread. Many major news organizations, for example, employ writers who also provide content in a personal and individualistic manner on social network platforms.⁹⁶ The Boston Globe, NPR, and CNN are a few prominent examples of media organizations in which journalists attract readers to their employers through vast followings on their social network accounts.⁹⁷

Not quite as ubiquitous, but still common, is the mingling of personal and professional roles on social network platforms by high-ranking employees at companies.⁹⁸ These high-ranking employees, such as executive officers, chief marketing officers, and directors of public relations, often mingle promotion of the company with personal use on a social network account. For example, the Senior Vice President of Public Affairs and Communications for Coca-Cola, Sonya Soutus, uses a Twitter page in which she

94. In deference to Ms. boyd’s preferred orthography, her name is not capitalized.

95. Marwick & boyd, *supra* note 69, at 127.

96. See, e.g., *Twitter*, Bos., <http://www.boston.com/tools/twitter/> (last visited Feb. 13, 2013); *NPR Social Media*, NAT’L PUB. RADIO, <http://www.npr.org/templates/community/> (last visited Feb. 13, 2013); see also Marshall Kirkpatrick, *CNN’s Social Media Pioneer Gets Fired: What Happens to Rick Sanchez on Twitter?*, READWRITE (Oct. 1, 2010), http://www.readriteweb.com/archives/cnns_social_media_pioneer_gets_fired_what_happens.php.

97. *NPR Social Media*, *supra* note 96; *Twitter*, *supra* note 96; *CNN*, TWITTER, <https://twitter.com/cnn> (last visited Feb. 13, 2013).

98. Barbara Lippert, *The Tweet Life of CMOs: Some Social Network Rights in a World of Wrongs*, MEDIA WK., Sept. 13, 2010, at 15; Maleske, *supra* note 4, at 19 (“Ninety percent of chief marketing officers now participate in three or more social media activities.”); see also SINGH & DIAMOND, *supra* note 47, at 102–05.

both promotes the company⁹⁹ and tweets about more personal subjects, such as her family.¹⁰⁰

Companies formally encourage this type of use. As Coca-Cola's *Online Social Media Principles* states, "We recognize the vital importance of participating in these online conversations" ¹⁰¹ Indeed, these officers serve the company by advertising the company's products, and often provide links directly to products on retail websites. But, again, part of the advantage is the individual touch. Even when the worker advertises a product, he may put it in a personal context. The Chief Marketing Officer of L.L. Bean, for instance, tweeted: "The woman sitting next to us at the airport is making earrings. They look remarkably like Royal Coachman fishing flies."¹⁰² Naturally, when consumers feel a personal connection with the company's employee on a social network, they are more likely to buy what that employee recommends.¹⁰³ More broadly, the worker's use makes the whole company seem relatable.¹⁰⁴

Finally, salespeople have always used their personal connection with customers to persuade those customers to buy their company's products. Use of social network platforms is a natural extension of this practice. The alleged facts in *Eagle v. Morgan* are representative.¹⁰⁵ In that case, Dr. Eagle worked for a financial services company called Edcomm, where she provided banking education services to clients in the financial services industry.¹⁰⁶ She used her account to "promote Edcomm's banking education services; foster her reputation as a businesswoman; reconnect with family, friends, and colleagues; and build social and professional relationships."¹⁰⁷ Such use is particularly prevalent in the market for professional services where workers develop long-term relationships with clients.¹⁰⁸

99. Sonya Soutus, *Twitter / SonyaSCocaCola: Check out the Neat Things . . .*, TWITTER (July 5, 2012, 12:14 PM), <https://twitter.com/SonyaSCocaCola/status/220958770325504001>.

100. Sonya Soutus, *Twitter / SonyaSCocaCola: Love my Friends and Family*, TWITTER (July 6, 2012, 3:58 PM), <https://twitter.com/SonyaSCocaCola/status/221377617666916353>.

101. *Online Social Media Principles*, COCA-COLA Co. (Jan. 1, 2012), <http://www.coca-colacompany.com/stories/online-social-media-principles>.

102. Lippert, *supra* note 98, at 15.

103. See SINGH & DIAMOND, *supra* note 47, at 96.

104. See Lippert, *supra* note 98, at 15 ("Done right, it's very humanizing, a way to be authentic and a way for followers to engage and find common ground." (internal quotation marks omitted)); Noreen O'Leary, *Employee Benefits: Workers as Brand Ambassadors*, ADWEEK (Mar. 15, 2010), <http://www.adweek.com/news/advertising-branding/employee-benefits-workers-brand-ambassadors-101844?page=1> ("[S]taffs offer a kind of peer credibility as corporate advocates.").

105. *Eagle v. Morgan*, No. 11-4303, 2011 WL 6739448 (E.D. Pa. Dec. 22, 2011).

106. *Eagle v. Morgan*, No. 11-4303, 2013 WL 943350, at *1 (E.D. Pa. Mar. 12, 2013).

107. *Eagle*, 2011 WL 6739448, at *1.

108. See Ed Frauenheim, *You Can't Take It With You . . . Or Can You?*, WORKFORCE MGMT., June 2011, at 32.

Again, the personal connection made by the worker furthers the employer's interest in building and maintaining relationships with customers. Indeed, the employer in the *Eagle v. Morgan* case urged employees to create LinkedIn accounts.¹⁰⁹ The accounts, however, also serve the worker's personal interests. Workers such as Eagle use social network platforms not only to connect to customers, but also to build a personal network of relationships among colleagues, mentors, friends, and family.¹¹⁰ Even the links with customers are not built solely on behalf of the employer. Although the employer might view them as its own customers, they are perhaps primarily the worker's customers. Certainly, in the absence of any agreement with the employer to the contrary, the worker is free to take the customers with her when she leaves the company.¹¹¹ In many circumstances, clients feel a stronger loyalty to the worker than to the company because the worker is the person with whom the client has direct contact.¹¹²

A social network account not only serves the worker's interest by facilitating contact with her network, but also helps the worker to build her reputation and market herself to potential employers. Specifically, the social network account helps the worker to develop her "personal brand"—the combination of her online image, reputation, and network.¹¹³ As Dan Schawbel explains in *Me 2.0*, an individual's online image and network can be a powerful marketing tool.¹¹⁴ Through social network platforms, the individual can demonstrate her expertise, create an appealing persona and develop a network of supporters, advisers, and potential consumers.¹¹⁵ The online image she creates is far more than simply a marketing tool for show-

109. *Eagle*, 2013 WL 943350, at *1.

110. *Eagle*, 2011 WL 6739448, at *1; see DAN SCHAWBEL, *ME 2.0: BUILD A POWERFUL BRAND TO ACHIEVE CAREER SUCCESS* 67–72 (2009).

111. See *Leo Silfen, Inc. v. Cream*, 278 N.E. 2d 636, 641 (N.Y. 1972) ("In the absence of express agreement to that effect between the parties, or a demonstration that a customer list has the several attributes of a trade secret, courts, without more, should not enjoin an ex-employee from engaging in fair and open competition with his former employer."); RESTATEMENT (THIRD) OF EMPLOYMENT § 8.05 (Tentative Draft No. 4, 2011); RESTATEMENT (SECOND) OF AGENCY § 396 (1958); see also Phillip J. Closious & Henry M. Schaffer, *Involuntary Nonservitute: The Current Judicial Enforcement of Employee Covenants Not to Compete—A Proposal for Reform*, 57 S. CAL. L. REV. 531, 534 (1983). However, a worker may be liable for trade secret misappropriation if she uses her former employer's trade secrets about those customers. See, e.g., *Leo Silfen*, 278 N.E. 2d at 641. For more discussion of trade secrets, see *infra* notes 263–271 and accompanying text.

112. See Terry A. O'Neill, *Employees' Duty of Loyalty and the Corporate Constituency Debate*, 25 CONN. L. REV. 681, 703 (1993) ("If the employee has a direct relationship with, and valuable knowledge about, the employer's customers, that is enough to make the employee better able than any other competitor to entice those customers away when he leaves.").

113. See, e.g., SCHAWBEL, *supra* note 110; Lisa Barone, *Get over Yourself & Build Your Personal Brand*, BUS. INSIDER (July 25, 2011), http://articles.businessinsider.com/2011-07-25/strategy/30025616_1_brand-social-media-audience.

114. See SCHAWBEL, *supra* note 110.

115. *Id.* at 3.

ing herself in a good light; it also shows in practical terms the skills she can bring to an employer to build a following or to use her existing following on the employer's behalf.

Baker's Twitter feed is a good example. The professional content shows Baker's expertise and knowledge, while the personal content demonstrates his personal charm and charisma. And the number of links to his account attests to both his personal and professional abilities. Based on the 22,000 followers to Baker's account alone, many employers would undoubtedly be interested in hiring him.¹¹⁶ Given the current employment context where job security and loyalty are rare, a "personal brand" such as Baker's is a valuable and portable asset.¹¹⁷ It provides a way for a worker to take ownership of her work and to protect her career.¹¹⁸

In all the above contexts, the social network account serves the interests of both the employer and employee. Even the most personal post, such as a link to a recent family photograph, serves the employer by humanizing the company.¹¹⁹ At the same time, establishing a reputation in the online community for expertise or attracting a following of potential clients and consumers improves a worker's employment and earning prospects.

D. *The Resulting Confusion Over Rights to Social Network Accounts*

The mixing of personal and professional use in social network platforms leads to ambiguity as to whether the employer or the worker has the right to the account. This problem, however, does not arise to the same extent in the web page context. Even if an employer gives workers significant discretion as to how they communicate on the company web page, the employer clearly has the right to the domain name because it is registered to the company.¹²⁰

In contrast, in the context of social network platforms, the employer's rights are less clear. The social network account exists on a third party platform run by the provider, and, to the extent that workers open their own separate accounts, all the accounts cannot be under the employer's name. Indeed, social network providers often encourage users to open accounts

116. *Twitter / PhoneDog_Aaron*, TWITTER, https://twitter.com/PhoneDog_Aaron (last visited Aug. 3, 2012).

117. *See* Frauenheim, *supra* note 108, at 33.

118. *See id.*

119. *See* Soutus, *supra* note 100.

120. Where the employer registers the domain name in its name, it obtains a contractual right to the domain name. *See, e.g.,* Dorer v. Arel, 60 F. Supp. 2d 558, 561 (E.D. Va. 1999); Zurakov v. Register.com, Inc., 304 A.D.2d 176, 179 (N.Y. App. Div. 2003); Network Solutions, Inc. v. Umbro Int'l, Inc., 529 S.E.2d 80, 87 (Va. 2000). *But see* Kremen v. Cohen, 337 F.3d 1024, 1030 (9th Cir. 2003) (holding that the registrant holds a property right in the domain name). This contractual right includes the right to exclusively control the domain name. *Zurakov*, 304 A.D.2d at 179.

under their own names.¹²¹ As a result, the name under which the account is opened does not necessarily indicate on whose behalf the account is opened or operated.¹²² Thus, absent any express agreement on whether the worker's use is personal or professional in nature, it is unclear from the account alone what the parties intended regarding rights to the account.

E. *The Heart of the Dispute: Links to Followers*

At this point, one might reasonably ask: why does the account itself matter? After all, the links are only virtual representations of real links between real people. The party which loses the account can always start a new account and set up new links to the same people. For example, a consumer's interest in reading reviews from PhoneDog about mobile phones does not disappear or automatically transfer when a worker like Kravitz leaves PhoneDog, taking the Twitter account with him.¹²³ The consumer can always return to PhoneDog's website or connect to other social network accounts that PhoneDog operates. Links are also easy to change. Every one of the 17,000 people following Kravitz's Twitter account can delink with the click of a button at the moment Kravitz deletes the word "PhoneDog" from his Twitter handle.¹²⁴ If the followers choose not to do so, then the reason may be that they follow Kravitz because they like him personally. In that case, PhoneDog simply suffers the same problem as a company in any context that loses a well-liked employee.

Nevertheless, the account has worth independent of the interests and preferences of the real people they reflect, and this value heightens the potential for dispute between employer and worker. First, the chief value of the links between social network accounts is that they are automatic. Although an internet user can always make a habit of checking a particular web page for updates, the user receives communications from a social network plat-

121. For example, the LinkedIn User Agreement states: "Don't undertake the following: . . . Create a user profile for anyone other than a natural person; Use or attempt to use another's account without authorization from the Company, or create a false identity on LinkedIn . . ." *LinkedIn User Agreement*, LINKEDIN (June 16, 2011), http://www.linkedin.com/static?key=user_agreement. Similarly, the Facebook Community Standards state: "On Facebook people connect and share using their real identities." *Facebook Community Standards*, FACEBOOK, <http://www.facebook.com/communitystandards> (last visited Aug. 4, 2012).

122. For example, the Google Plus Terms of Service explicitly allow users to use its services on behalf of a company. *Google Terms of Service*, GOOGLE, <http://www.google.com/intl/en/policies/terms> (last modified Mar. 1, 2012) ("If you are using our Services on behalf of a business, that business accepts these terms."). But Google Plus cannot ascertain on whose behalf a user has agreed to Google Plus's Terms of Service, simply from the fact that the user goes on to use the services.

123. *PhoneDog v. Kravitz*, No. C 11-03474 MEJ, 2011 WL 5415612, at *1 (N.D. Cal. Nov. 8, 2011).

124. See *How to Unfollow Users on Twitter*, TWITTER, <https://support.twitter.com/groups/31-twitter-basics/topics/108-finding-following-people/articles/15355-how-to-unfollow-users-on-twitter#> (last visited Aug. 4, 2012).

form to which she is linked automatically and immediately.¹²⁵ To use an analogy to an older medium of communication, the follower has preset her radio to that station. Unlike a radio station, however, a social network platform is a two-way form of communication in which followers interact not only with the account holder but also with other followers.¹²⁶

Second, the links in an account are sticky. People do not immediately delink from an account when the name changes.¹²⁷ They may not notice the name change, may fail to understand what the name change means, or may simply view delinking as a low priority.¹²⁸ The account holder has a window of time to reengage and secure this captive audience. Meanwhile, the party which lost the social network account must invest time and effort to build an account of comparable worth. Setting up a new account is trivial; the challenge is to persuade users to follow the new account.¹²⁹ All of the major current social network platforms provide users with the choice as to whether to follow an account;¹³⁰ they cannot be compelled to do so.¹³¹ And it takes considerable investment of time and effort to attract followers.¹³² Even if the account holder is merely recreating links which he already had in a previous account, the process is laborious. The account holder must effectively fight against the same inertia which makes the links sticky.¹³³ In short, such iner-

125. See *supra* Part I. A close parallel to the links to a social account is a list of email addresses or snail mail addresses because these are also links that make it possible to automatically receive communications.

126. See *supra* Part I.

127. See Lauren Indvik, *How to Change Your Twitter Handle*, MASHABLE (Nov. 27, 2011), <http://mashable.com/2011/11/27/change-twitter-handle/>.

128. See *id.*

129. See, e.g., Jason Spooner, *How to Instantly Lose All Your Twitter Followers*, TINDOG COFFEEHOUSE (Jan. 18, 2010), <http://www.tindog.com/2010/01/18/how-to-instantly-lose-all-your-twitter-followers/>.

130. *Accepting Or Declining Invitations: What Are My Options When Responding to Invitations to Connect*, LINKEDIN, http://help.linkedin.com/app/answers/detail/a_id/1303 (last updated Mar. 7, 2011); *FAQs About Following*, LINKEDIN, <https://support.twitter.com/groups/31-twitter-basics/topics/108-finding-following-people/articles/14019-faqs-about-following#> (last visited Feb. 19, 2013) (“There is no way to ask other users to follow you on Twitter.”); *How Do I Add a Friend?*, FACEBOOK, <https://www.facebook.com/help/146466588759199> (last visited Feb. 19, 2013) (“Once they confirm that they actually are friends with you, they will show up on your list of Facebook friends.”); *What Is Following?*, *supra* note 24; *What to Do if Someone Wants to Connect with You on Google+*, GOOGLE, <http://support.google.com/plus/bin/answer.py?hl=en&answer=1294841&topic=1257347&ctx=topic> (last visited Feb. 19, 2013) (“If someone adds you to a circle, that person isn’t automatically added to one of yours.”).

131. See *id.*

132. See, e.g., Thomas McNish, *How to Build a Following On Facebook*, HOUS. CHRON. (Aug. 2, 2012), <http://smallbusiness.chron.com/build-following-facebook-32249.html>; Ching Ya, *10 Ways to Grow Your Facebook Page Following*, SOCIAL MEDIA EXAMINER (July 22, 2010), <http://www.socialmediaexaminer.com/10-ways-to-grow-your-facebook-page-following/>.

133. See, e.g., Spooner, *supra* note 129.

tia favors the party controlling the account. Once followers are connected to an account, they must consciously opt out to delink, even if the account changes hands. Conversely, followers must opt in to follow a new account.

Finally, parties generally cannot share an account after they part ways. In theory, a social network account could be shared, but this is not a solution seen in practice for several reasons. First, one party can always lock out the other by changing the password. Second, one account generally represents one person. As danah boyd and Nicole Ellison observed, “[S]ocial network sites are structured as personal (or ‘egocentric’) networks, with the individual at the center of their own community.”¹³⁴ The intrusion of companies into this world does not change the convention. An account is a proxy for one person, whether that person is a company or an individual.¹³⁵ Thus, other users expect the account holder to use the same account for different uses, such as personal and professional roles, but not to share the account with others;¹³⁶ they expect the account to represent one source.¹³⁷ Third, the terms of use on many social network platforms reiterate this convention by prohibiting sharing.¹³⁸ These prohibitions on sharing generally do not prohibit one party operating an account on behalf of the other party as an agent, but they do bar sharing between two entities.¹³⁹ Fourth, the account would have less value to each party if shared, because the other party would reduce its control over the account and dilute the first party’s voice. Sharing would diminish the sense of personal connection social network users would feel toward the account.

In sum, the core of these disputes lies in competing claims of exclusive access to a social network account.

134. *SNS Definitions*, *supra* note 17, at 210.

135. *Id.* at 211.

136. Marwick & boyd, *supra* note 69, at 114.

137. *See SNS Definitions*, *supra* note 17, at 9.

138. *See, e.g., LinkedIn User Agreement*, LINKEDIN § 2.4, http://www.linkedin.com/static?key=user_agreement&trk=hb_ft_userag (last revised June 16, 2011) (“You agree to: (1) Keep your password secure and confidential; (2) not permit others to use your account; (3) refrain from using other Users’ accounts”); *Facebook Statement of Rights and Responsibilities*, FACEBOOK § 4.8 (Dec. 11, 2012), <http://www.facebook.com/legal/terms> (“You will not share your password, (or in the case of developers, your secret key), let anyone else access your account”); *Twitter Terms of Service*, TWITTER § 3 (June 25, 2012), <https://twitter.com/tos> (“You are responsible for safeguarding the password that you use to access the Services and for any activities or actions under your password.”). Of course, the parties could simply ignore the terms of use and take their chances on the likelihood that the social network site provider disables the account for violating the terms of use.

139. An agent has the power to enter into a contract on behalf of the principal. RESTATEMENT (THIRD) OF AGENCY § 6.01 (2006).

F. Failing to Contract

In many cases, parties could avoid disputes by expressly agreeing about which party has the right to control the social network account.¹⁴⁰ Nevertheless, the default rules remain important because some parties will inevitably fail to contract around them. Many companies have no employment agreements for their employees at all,¹⁴¹ and those that do may fail to address rights to social network accounts.¹⁴² Employment agreements are particularly prone to omitting important issues because employees' roles tend to change over time.¹⁴³ For example, the social media director's employment agreement may be the same one she signed when she was hired years before as an administrative assistant, or even before a new social network platform existed. In addition, given the rapid change in the world of social network platforms, employers are unlikely to revise employment agreements as necessary to keep pace with the development of new and different social network platforms.¹⁴⁴ Moreover, courts will likely adhere to the general principle of contract interpretation that contracts should be interpreted conservatively against the drafter¹⁴⁵ and will protect workers on policy grounds.¹⁴⁶ Such an interpretation would not extend general or vague provisions that cover preexisting social network platforms to new platforms. For these reasons, even though more employment agreements will likely address rights in social network accounts as the issue gains more attention, the parties will still fail to contract around disputes in a significant number of cases.

140. As Part III will discuss in more detail, an agreement between the parties is generally the optimal solution for allocating rights in social network accounts.

141. For example, even many CEOs at publicly traded companies, a class of employee particularly likely to operate under a written contract, do not have employment agreements. Stewart J. Schwab & Randall S. Thomas, *An Empirical Analysis of CEO Employment Contracts: What Do Top Executives Bargain for?*, 63 WASH. & LEE L. REV. 231, 241 (2006).

142. A 2011 survey found that only twenty-two percent of organizations have social media policies of any kind in place. Maleske, *supra* note 4; *see also* Frauenheim, *supra* note 108 (“[C]ompanies generally are not focusing on potential legal issues raised by employees’ use of social media for business purposes . . .”).

143. Rachel Arnow-Richman, *Foreword: The Role of Contract in the Modern Employment Relationship*, 10 TEX. WESLEYAN L. REV. 1, 2 (2004) (noting that employees’ job descriptions are not fully described in their contract, that roles and duties change, and that obligations are often unclear when a dispute arises).

144. Consider the growth of Facebook, for example. Within two years of its founding, Facebook could boast 14.8 million unique visitors in one month. Verne Kopytoff, *Yahoo May Pay \$1 Billion for Site: Offer for Facebook Being Considered, According to Report*, S.F. CHRON. (Sept. 22, 2006), <http://www.sfgate.com/business/article/Yahoo-may-pay-1-billion-for-site-offer-for-2469263.php>. A social media site may progress from nonexistent to ubiquitous in a short time. *See id.*

145. RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981). The employer is usually the drafter of employment agreements.

146. This will be particularly true where the court views the agreement as a noncompete agreement. *See* Viva R. Moffat, *Making Non-Competes Unenforceable*, 54 ARIZ. L. REV. 939, 943 (2012). To the extent these agreements prohibit a former worker from contacting people through a social network, they may be viewed as noncompete agreements.

Thus, the recent spate of cases involving disputes over rights to social network accounts is likely a harbinger of many disputes to come. As public participation in social network platforms increases, companies will grow their participation as well, if only to be where their target market is located. To improve their chances of success in this realm, they will ask their employees to participate in social network platforms in a personal manner. However, without express agreements in place, disputes over rights to an account are inevitable.

II. THE NATURE OF THE PROBLEM

Disputes over social network accounts implicate rights arising under a number of different legal paradigms: trademark, personality rights, copy-right, privacy rights, and trade secrets. However, besides trade secrets, none of the other legal paradigms effectively resolves the issue of which party should have access to the account.¹⁴⁷ This Part therefore concludes by considering the problem from the perspective of the public interest to determine what approaches would best serve society at large.

A. Association: Trademark and Personality Rights

To the extent that disputes over social network accounts are disputes over the source of content in a social network account, they implicate trademark law and personality rights. Both areas are concerned with protecting designations of source. Trademark law protects trademarks from use that confuses the public about the source of a good or service.¹⁴⁸ Personality rights protect an individual's right to be the source of control over the use of her identity, at least to the extent that such use would cause dignitary or commercial harm. Personality rights may be divided roughly into two types of claims.¹⁴⁹ First, claims based on misappropriation of identity protect a dignitary interest in control over the use of identity.¹⁵⁰ Second, right of pub-

147. With the exception of a novel trade secret approach, which is discussed in Part III.

148. Infringement of a trademark occurs when the defendant uses the plaintiff's trademark in commerce in connection with goods or services in a way that is likely to cause confusion among consumers. 15 U.S.C. § 1125(a) (2011); *Id.* § 1114(1)(a); *see also, e.g.*, *Lamparello v. Falwell*, 420 F.3d 309, 314 (4th Cir. 2005). Infringement under state law is substantially the same as infringement under the Lanham Act. J. THOMAS MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 23:1.50 (4th ed. 2012).

149. McGeveran, *supra* note 44, at 1149.

150. The *Restatement of Torts* frames the tort as: "One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy." RESTATEMENT (SECOND) OF TORTS § 652C (1977). Although some states limit liability for this tort to commercial torts, generally courts reserve misappropriation of identity claims for dignitary harms. 1 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 5:63 (2d ed. 2009); *see, e.g.*, *Allison v. Vintage Sports Plaques*, 136 F.3d 1443, 1446–47 (11th Cir. 1998); *Jim Henson Prods., Inc. v. John T. Brady & Assocs.*, 867 F. Supp. 175, 188–89 (S.D.N.Y. 1994) ("The privacy-based action is designed for individuals who have not placed themselves in the public eye. It shields such people from the embarrassment of having

licity claims protect the commercial value of identity.¹⁵¹ In addition, trademark law protects an individual's identity by creating liability for the use of a name or other symbol that would falsely suggest the individual's endorsement.¹⁵²

Trademark law and the right of publicity protect designations of source in part to protect the rights holder's investment in developing goodwill in a brand or person.¹⁵³ In the context of social network platforms, the links to a social network account are effectively hardwired goodwill. The links represent people who feel a connection to the source of content behind the account.¹⁵⁴ As a result, trademark law and personality rights would seem to be a natural fit for resolving disputes over who has the right to control the account and profit from the goodwill associated with the account's links. This has certainly been the case in disputes over rights to websites.¹⁵⁵ But neither trademark law nor personality rights resolve the core issue of the right to access the links in a social network account for the simple reason

their faces plastered on billboards and cereal boxes without their permission. The interests protected are dignity and peace of mind, and damages are measured in terms of emotional distress.”).

151. Liability for violating the right of publicity requires the unauthorized use of some aspect of the plaintiff's identity or persona that is likely to cause damage to the commercial value of that persona. 5 MCCARTHY, *supra* note 148, at § 28:7; RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995). Under either statute or common law, the right of publicity is recognized in thirty-one states. 1 MCCARTHY, *supra* note 150, at § 6:3.

152. See, e.g., Parks v. LaFace Records, 329 F.3d 437, 445 (6th Cir. 2003); Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1110 (9th Cir. 1992).

153. See United Drug Co. v. Theodore Rectanus Co., 248 U.S. 90, 98 (1918) (“In truth, a trade-mark . . . is merely a convenient means for facilitating the protection of one's good will in trade by placing a distinguishing mark or symbol—a commercial signature—upon the merchandise or on the package in which it is sold.”); Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 774 (1992) (“Protection of . . . trademarks, serves the Act's purpose to ‘secure to the owner of the mark the goodwill of his business’”); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. c (1995) (“With its emphasis on commercial interests, the right of publicity also secures for plaintiffs the commercial value of their fame and prevents the unjust enrichment of others seeking to appropriate that value for themselves.”). The misappropriation of identity tort is more concerned with dignitary concerns than incentives to create goodwill in the public. See *supra* note 150.

154. See *SNS Definitions*, *supra* note 17, at 213.

155. For nearly twenty years, trademark law has governed disputes over rights to domain names. Trademark law was initially not a good fit for disputes over domain names because both claims of trademark infringement and trademark dilution require that the plaintiff prove that the defendant use the mark in commerce. Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687, 1702 (1999). A “cybersquatter” could evade the use in commerce requirement by “warehousing” the domain name—registering the disputed domain name without using it. See S. REP. NO. 106-140, at 7 (2002). The passage of the Anticybersquatting Consumer Protection Act in 1999, however, resolved this problem by creating a cause of action against registering trademarks as domain names even when the trademark was not used in commerce. 15 U.S.C. § 1125(d) (2011). In addition, a form of arbitration loosely based on trademark law, the Uniform Domain Name Dispute Resolution Procedure (UDRP), provides trademark holders another way to resolve disputes over domain names. See 4 MCCARTHY, *supra* note 148, § 25:74.75.

that a trademark or signifier of personal identity may be deleted from a social network account without any technical effect on the links to the account, easily eliminating potential liability.¹⁵⁶

In this sense, the social network context is fundamentally different from the web page context. In the web page context, URL links to a website point to the domain name of the website.¹⁵⁷ When a plaintiff discovers that a third party website is using a name to free ride on goodwill that the plaintiff created, the plaintiff may simply claim that the website has infringed her trademark. For example, the plaintiff may claim that her trademark rights in “People for the Ethical Treatment of Animals” are infringed by a third party using the domain name *peta.org* or that Julia Roberts’s rights in her name are infringed by a third party using the domain name *juliaroberts.com*.¹⁵⁸ By obtaining an injunction against the use of these domain names, the plaintiff prevents the website from free riding off the plaintiff’s investment in goodwill in a brand.¹⁵⁹ Thus, in the web page context, trademark law enables the rights holder to benefit from goodwill in the form of URL links to a website.¹⁶⁰

In the social network context, the problem is different. For example, in *PhoneDog v. Kravitz*, the Twitter account at issue was initially named

156. This is true at least for the major social media platforms. See *Editing Your Profile*, LINKEDIN, http://help.linkedin.com/app/answers/detail/a_id/5 (last visited Feb. 19, 2013); *How Do I Change My Name?*, FACEBOOK, <https://www.facebook.com/help/173909489329079/> (last visited Feb. 19, 2013); *How Do I Edit My Profile: Username*, PINTEREST, <https://help.pinterest.com/entries/21047367-How-do-I-edit-my-profile-#username> (last visited Feb. 19, 2013); *How to Change Your Username: Follow These Steps to Change Your Username*, TWITTER, <https://support.twitter.com/groups/31-twitter-basics/topics/107-my-profile-account-settings/articles/14609-how-to-change-your-username#> (last visited Feb. 19, 2013) (“Changing your username will not affect your existing followers, Direct Messages, or @replies. Your followers will simply see a new username next to your profile photo when you update.”).

157. 4 MCCARTHY, *supra* note 148, § 25:72.

158. See *People for Ethical Treatment of Animals v. Doughney*, 263 F.3d 359, 367 (4th Cir. 2001); *Roberts v. Boyd*, WIPO Arbitration and Mediation Center Case No. D2000-0210, 2000 WL 33674395 (May 29, 2000) (Page & Bridgeman, Arbs.), available at <http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-0210.html>.

159. See, e.g., *Graduate Mgmt. Admission Council v. Raju*, 267 F. Supp. 2d 505 (E.D. Va. 2003) (finding domain names “GMATPLUS.com” and “GMATPLUS.net” for websites advertising and selling GMAT test questions likely to cause confusion among consumers with the registered and well-established trademarks owned by the plaintiff for graduate school admissions tests). However, where the website itself is clearly not associated with the trademark in dispute, some courts have found that use of the disputed trademark in the domain name does not rise to trademark infringement and, for related reasons, that the use does not violate the Anticybersquatting Consumer Protection Act. See, e.g., *Lamparello v. Falwell*, 420 F.3d 309, 316, 320 (4th Cir. 2005) (holding that confusion must be determined by evaluating the accused domain name in conjunction with the content of the Web site).

160. Rights in a domain name are limited by First Amendment rights and other limitations to the trademark right. See, e.g., *id.* at 314 (“Congress left little doubt that it did not intend for trademark laws to impinge the First Amendment rights of critics and commentators.”).

@PhoneDog_Noah.¹⁶¹ If Noah Kravitz had continued using the account after leaving PhoneDog without changing the name, PhoneDog would have a strong case for trademark infringement.¹⁶² Conversely, if PhoneDog took possession of the Twitter account without changing the name, Kravitz might have a claim for misappropriation of identity or right of publicity, especially if other identifying features remained in the account, such as his picture.¹⁶³ However, Kravitz avoided a trademark infringement suit by changing the handle of the Twitter account to “@noahkravitz” after he left PhoneDog.¹⁶⁴ This change did not disrupt his followers’ links to his account; all 17,000 followers remained connected.¹⁶⁵ Thus, in the social network context, Kravitz could keep the links without infringing PhoneDog’s trademark.

161. PhoneDog v. Kravitz, No. C 11-03474 MEJ, 2011 WL 5415612, at *1 (N.D. Cal. Nov. 8, 2011).

162. Again, a trademark infringement claim requires that the defendant use the plaintiff’s trademark in commerce in connection with goods or services in a way that is likely to cause confusion among consumers. See 15 U.S.C. § 1125(a) (2011). Here, the use of the trademark “PhoneDog” would likely confuse consumers as to whether PhoneDog was the source of the tweets in the account. *PhoneDog*, 2011 WL 5415612, at *1; see also *Maremont v. Susan Fredman Design Grp., Ltd.*, 10 C 7811, 2011 WL 6101949, at *5 (N.D. Ill. Dec. 7, 2011) (employee’s false endorsement claim under the Lanham Act survived a motion for summary judgment where her employer posted messages under her Twitter handle and through her Facebook page). The “use in commerce” element might be met if Kravitz used the account to make advertising revenue, for example, by providing links to a site with paid advertising. See 15 U.S.C. § 1125(a) (2011); Eric Goldman, *supra* note 45, at 414–24 (discussing differing approaches to the use in commerce requirement). If Kravitz used the handle for purposes of criticism and comment or perhaps parody of PhoneDog, however, he might have a free speech defense to trademark infringement. See, e.g., *Lamparello*, 420 F.3d at 314.

163. Kravitz would likely have a prima facie claim that PhoneDog misappropriated his identity by using his name. See, e.g., *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831, 834 (6th Cir. 1983). Kravitz would also likely have a prima facie claim that PhoneDog violated his right of publicity by profiting from the commercial value of his name. See, e.g., *Parks v. LaFace Records*, 329 F.3d 437, 459 (6th Cir. 2003). For example, in *Eagle v. Morgan*, the plaintiff succeeded in her claims for misappropriation of identity and misappropriation of publicity because her former employer continued to use a LinkedIn account bearing the plaintiff’s name after firing her. *Eagle v. Morgan*, 11-4303, 2013 WL 943350, at *7–8 (E.D. Pa. Mar. 12, 2013). Furthermore, in *Maremont v. Susan Fredman Design Group*, the plaintiff claimed that her right of publicity was violated when her employer tweeted under her Twitter handle. *Maremont*, 2011 WL 6101949, at *6. Her claim might have survived summary judgment if the defendant’s employees had not explained in the disputed tweets that they were in fact not the plaintiff. See *id.* at *7. Finally, he might make a colorable claim of false endorsement under the Lanham Act. See 15 U.S.C. § 1125(a) (2011); *Maremont*, 2011 WL 6101949, at *5.

164. See *PhoneDog*, 2011 WL 5415612, at *1.

165. See First Amended Complaint at 3, *PhoneDog*, 2011 WL 6955632 (“Defendant has used and continues to use the Account, by way of the handle @noahkravitz, to communicate with PhoneDog’s Followers without PhoneDog’s permission.”). The only change for the followers is that Kravitz’s tweets would appear under the handle “@noahkravitz” instead of “@PhoneDog_Kravitz.” See *How to Change Your Username: Follow These Steps to Change Your Username*, TWITTER, <https://support.twitter.com/groups/31-twitter-basics/topics/107-my-profile-account-settings/articles/14609-how-to-change-your-username#> (last visited Feb. 19, 2013) (“Changing your username will not affect your existing followers, Direct Messages, or

If Kravitz instead had a website at the domain name `phonedog_noah.com`, he would have faced a more difficult choice. He could change the name of the website to `noahkravitz.com`, but then any URL links to that website would be broken. Or he could retain the name and the links, but PhoneDog would likely win a trademark suit claiming that the website's domain name, `phonedog_noah.com`, infringed its trademark in "PhoneDog."¹⁶⁶ Instead, Kravitz lost none of the goodwill in the form of his followers' links to the Twitter account while avoiding liability for trademark infringement.¹⁶⁷

Any lingering association in the minds of users between the account and the trademark are not, and should not be, grounds for a trademark infringement claim. In *PhoneDog*, for example, some percentage of the account's followers likely linked to the account because of the trademark "PhoneDog" in the original handle of "@PhoneDog_Noah,"¹⁶⁸ but changing the name should be adequate to remedy any likelihood of confusion.

As a threshold requirement, claims of trademark infringement and trademark dilution require that the defendant use the mark.¹⁶⁹ Similarly, claims for misappropriation of identity and violation of the right of publicity must allege that the defendant used the plaintiff's identity.¹⁷⁰ The boundaries of the use requirement are a matter of controversy. With regard to trademarks, courts have split on the question of whether use of a trademarked keyword to trigger advertisements on search engines would qualify as a use in commerce because the trademark is not visible to end consumers.¹⁷¹ In the misappropriation of identity and right of publicity context, some courts have held that uses which merely evoke the plaintiff's identity constituted ade-

@replies. Your followers will simply see a new username next to your profile photo when you update."). Of course, some followers might have decided to unfollow the account when Kravitz left PhoneDog, but the name change itself does not disrupt the links. *See id.*

166. *See supra* text accompanying note 158.

167. *See PhoneDog*, 2011 WL 5415612, at *1. Of course, changing the name of an account does have some effects on links. When the social network account name changes, web links to the URL of the social network account no longer work. In addition, searches for that particular handle using internet search engines are less likely to find the account. Accordingly, the account's influence might be somewhat diminished. Nevertheless, the social network account still retains much of its value because the followers within the social network application remain linked to the account. That is, although URL links to the social network account webpage would be disrupted by an account name change, the links to Twitter followers would remain undisturbed.

168. *Id.*

169. *See* 15 U.S.C. §§ 1114(a)(1), 1125(a)(1), 1125(c)(1) (2011).

170. *See, e.g., Allison v. Vintage Sports Plaques*, 136 F.3d 1443, 1447 (11th Cir. 1998); RESTATEMENT (SECOND) OF TORTS § 652C (1977); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

171. *See* Eric Goldman, *Keyword Law*, ERIC GOLDMAN.ORG 5, <http://www.ericgoldman.org/Resources/keywordlaw.pdf> (last visited Feb. 23, 2013).

quate uses to establish infringement.¹⁷² These holdings have been heavily criticized.¹⁷³ However, even in these disputed cases at the edge of trademark and personality rights, courts still require some form of use of the disputed trademark or identity. Where the social network account holder deletes the disputed name from the account, the account holder no longer uses the term at all.¹⁷⁴ Holding that no use constitutes infringement would go far beyond

172. See Stacey L. Dogan, *An Exclusive Right To Evoke*, 44 B.C. L. REV. 291, 303–08 (2003).

173. See, e.g., Paul J. Heald, *Filling Two Gaps in the Restatement (Third) of Unfair Competition: Mixed-Use Trademarks and the Problem with Vanna*, 47 S.C. L. REV. 783, 804–07 (1996); Linda J. Stack, Note, *White v. Samsung Electronics America, Inc.’s Expansion of the Right of Publicity: Enriching Celebrities at the Expense of Free Speech*, 89 NW. U. L. REV. 1189, 1194–97 (1995); Fred M. Weiler, Note, *The Right of Publicity Gone Wrong: A Case for Privileged Appropriation of Identity*, 13 CARDOZO ARTS & ENT. L.J. 223, 258 (1994); Peter K. Yu, Note, *Fictional Persona Test: Copyright Preemption in Human Audiovisual Characters*, 20 CARDOZO L. REV. 355, 359–67 (1998).

174. The form of trademark infringement that comes closest to describing the confusion at issue in social network cases may be initial interest confusion. Initial interest confusion describes situations in which the defendant’s use of a trademark that is confusingly similar to that of the plaintiff diverts consumers to the defendant. See, e.g., *Mobil Oil Corp. v. Pegasus Petroleum Corp.*, 818 F.2d 254, 260 (2d Cir. 1987). In the famous case of *Grottrian v. Steinway & Sons*, for example, customers believed that pianos made by Grottrian Steinweg were related to or came from the Steinway brand. *Grottrian v. Steinway & Sons*, 365 F. Supp. 707, 716 (S.D.N.Y. 1973). Although consumers might not have been confused about the origin of Grottrian Steinweg pianos at the point of purchase, the Second Circuit held that the initial interest confusion infringed Steinway’s trademark. *Grottrian v. Steinway & Sons*, 523 F.2d 1331, 1342 (2d Cir. 1975). The Second Circuit concluded that the initial confusion led some customers to consider and eventually buy Grottrian Steinweg pianos, who would otherwise have considered only Steinway pianos. See *id.*

The use of website domain names that are identical to or confusingly similar to trademarks presents a close analogy to the use of a trademark in the name of a social network account. In many cases, courts have found defendants liable for trademark infringement under a theory of initial interest confusing for using domains names that are confusingly similar to the plaintiff’s trademark. See, e.g., *Victoria’s Secret Stores v. Artco Equip. Co.*, 194 F. Supp. 2d 704, 728–29 (S.D. Ohio 2002); *N.Y. State Soc’y of Certified Pub. Accountants v. Eric Louis Assocs., Inc.*, 79 F. Supp. 2d 331, 342 (S.D.N.Y. 1999). But see *Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1179 (9th Cir. 2010) (“[C]onsumers don’t form any firm expectations about the sponsorship of a website until they’ve seen the landing page—if then. This is sensible agnosticism, not consumer confusion. . . . So long as the site as a whole does not suggest sponsorship or endorsement by the trademark holder, such momentary uncertainty does not preclude a finding of nominative fair use.”).

However, in the case of social network account names where the account holder changes the name of the account upon leaving the trademark holder, there is no initial interest confusion. When the social network holder is affiliated with the trademark holder and has permission to use the trademark, followers are not misled by the use of a trademark in the account name. The account holder in fact may have permission to use the trademark. See, e.g., *PhoneDog v. Kravitz*, No. C 11-03474 MEJ, 2011 WL 5415612, at *1 (N.D. Cal. Nov. 8, 2011) (“PhoneDog alleges that [a]n employee of PhoneDog, [Mr. Kravitz] was given use of and maintained the Twitter account @PhoneDog_Noah” (internal quotation marks omitted)). Once the social network holder leaves the trademark holder and changes the account name, the users are not confused by any erroneous use of a trademark. Because the confusion

the bounds of even the most aggressive judicial opinions in this area.¹⁷⁵ In short, trademark law and personality rights provide a remedy for infringement of a trademark or name, but not for the loss of followers' links to a social network account.

B. Proprietary Content: Copyright

Part of what makes an account valuable is the content in the account—the postings, photographs, layout, descriptions, and so on—that the account holder has spent time and effort to develop and which draws viewers to the account. To the extent that the material is original, much of it would qualify for copyright protection.¹⁷⁶ But like trademark and personality rights law, copyright law does not provide a means to regain access to the account or to the links in that account.

First, a plaintiff with rights to copyrighted content in the account would not have a straightforward claim of infringement against a defendant who locked her out of the account. The new possessor of the account would not violate copyright's exclusive right to copy because no copying occurs; the content is already in the account.¹⁷⁷ The copyright owner might have better success arguing that by continuing to operate the account without the copyright owner's permission, the account holder violates her exclusive right of public display.¹⁷⁸ In some social network accounts, however, the content in the account disappears with time. Only the most recent tweets in a Twitter account, for example, remain visible.¹⁷⁹ As a result, the plaintiff would only

does not revolve around use of a trademark, consumer confusion cannot rise to the level of trademark infringement.

175. Under this reasoning, anybody who leaves a company with a trademark would have to refrain from competition until no consumer associated her with the former employer, an absurd and anticompetitive result.

176. Copyright protects original works of authorship fixed in a tangible medium of expression. *See* 17 U.S.C. § 102 (2011). Copyright does not extend to preexisting material used unlawfully in a compilation or derivative work. *Id.* § 103. Although a very short posting might not be protected because copyright does not protect ideas alone, most postings, even tweets, would be adequately expressive to merit copyright protection. Adam S. Nelson, *Tweet Me Fairly: Finding Attribution Rights Though Fair Use in the Twittersphere*, 22 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 697, 724–27 (2012) (discussing the ability to copyright tweets).

177. *See* 17 U.S.C. § 106 (2011). Infringement of a copyright occurs when one of the exclusive rights in the copyright is violated: the exclusive right to copy, make derivative works, distribute, publicly perform, and publicly display the work. *Id.* The plaintiff might make an argument that the account user was secondarily liable for infringement by enabling viewers to violate the right to copy by making automatic copies on their browsers each time they view the account, but such use is typically considered either a fair use or a use subject to an implied license. *See Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 725–26 (9th Cir. 2007).

178. *See* 17 U.S.C. § 106 (2011).

179. *Get to Know Twitter: New User FAQ*, TWITTER, <https://support.twitter.com/articles/13920-frequently-asked-questions#3200> (last visited Feb. 8, 2013) (“We store all your Tweets.

have a limited claim for copyright infringement, but not a continuing claim that could be used as a proxy for a claim to the account itself. Secondly, on many social network platforms, the new account holder may simply delete the copyrighted content, thereby obviating any copyright claim.¹⁸⁰ Although a copyright claim would provide some relief to the plaintiff in certain cases, it fails to resolve the problem of rights to the links in the account.¹⁸¹

C. Non-Public Information: Trade Secrets and Privacy

In some cases, a party who takes over an account may violate privacy and trade secret rights in nonpublic information in the account. With regard to privacy law, the Fourth Amendment, privacy torts, and statutes—particularly the Stored Communications Act (“SCA”)¹⁸²—address privacy in the employment context. The critical inquiry under these laws is whether the subject has a reasonable expectation of privacy in the information or place at issue.¹⁸³ In a dispute between an employer and worker, the worker’s private

You can click the Me tab to view up to 3200 of your most recent Tweets in your profile timeline.”) The material might be cached elsewhere on the internet, but this is not the work of the new possessor of the account. *See, e.g., TwimeMachine—Read and Search Your Old Tweets*, TWIME MACHINE, <http://www.twimemachine.com/> (last visited Feb. 8, 2013).

180. *See, e.g., How to Delete a Tweet*, TWITTER, <http://support.twitter.com/entries/18906-how-to-delete-a-tweet#> (last visited Feb. 8, 2013); *What Happens to Content (Posts, Pictures, Etc) that I Delete from Facebook?*, FACEBOOK, <http://www.facebook.com/help/356107851084108/> (last visited Feb. 8, 2013). The posting may remain in the social network’s memory, but at least they are no longer publicly displayed when removed.

181. Another claim that could be made based on the content in the account is a reverse passing off claim under the Lanham Act. *See, e.g., Cleary v. News Corp.*, 30 F.3d 1255, 1261 (9th Cir. 1994); *F.E.L. Publ’ns, Ltd. v. Catholic Bishop of Chi.*, 214 U.S.P.Q. (BNA) 409, 10 (7th Cir. 1982). Reverse passing off is a form of unfair competition in which the defendant misrepresents that it made a product when the product was actually made by the plaintiff. *Cleary*, 30 F.3d at 1261. In this context, by taking over the account, the defendant may be effectively representing to the public that it produced the content in the account when in fact the plaintiff produced that content. *See id.* However, the Supreme Court’s holding in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003), sheds doubt on the success of a reverse passing off claim in this context. *See id.* at 37. The Supreme Court concluded that the rights conferred by the Lanham Act belong to “the producer of the tangible goods that are offered for sale” rather than “the author of any idea, concept, or communication embodied in those goods.” *Id.* The Court rejected the latter possible interpretation because it would effectively grant copyright protection through the back door. *Id.* In the case of social network accounts, there is no tangible good for sale. The social network account only contains communications. As the Supreme Court observed in *Dastar*, using the Lanham Act to protect communications alone would “creat[e] a species of perpetual . . . copyright,” which exceeds the constitutional limit on copyright protection. *Id.* In any case, as explained in the text, in some accounts, this content will simply disappear; in others, it will be deleted. In any case, as explained in the text, in some accounts, this content will simply disappear; in others, it will be deleted.

182. 18 U.S.C. §§ 2701–2712.

183. Fourth Amendment: *O’Connor v. Ortega*, 480 U.S. 709, 724, 726 (1987) (holding that an employee’s reasonable expectation of privacy in the workplace must be balanced against the public employer’s need to ensure that their agencies operated in an efficient and

information would typically be the information at stake because the worker would likely do the work of posting in the account.¹⁸⁴ The law recognizes that a worker may have a reasonable expectation of privacy in some spaces at work under both public and private employers.¹⁸⁵

Whether a user has a reasonable expectation of privacy in information posted in a social network account, however, is a vexing question. Information that is readily available to the public generally does not receive privacy protections,¹⁸⁶ and information in an account is typically available to multiple parties. First, the social network provider generally has access to everything posted in the account.¹⁸⁷ Second, a host of advertisers may also have

effective manner); *Katz v. United States*, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring) (holding that the Fourth Amendment protects individuals from government searches violating a reasonable expectation of privacy). Privacy torts: *Smyth v. Pillsbury Co.*, 914 F. Supp. 97, 101 (E.D. Pa. 1996) (holding that a claim of invasion of privacy under the tort of intrusion upon seclusion against an employer requires a showing that the employer invaded a reasonable expectation of privacy). The Stored Communications Act (“SCA”) prohibits the intentional access of electronic communications in storage. *See* 18 U.S.C. § 2701(a) (2011). Although a plaintiff need not demonstrate a reasonable expectation of privacy in the messages at issue, the SCA requires that the plaintiff show that the messages are not “readily accessible to the general public.” *Id.* § 2511(2)(g)(i); *see also, e.g.,* *Snow v. DirecTV, Inc.*, 450 F.3d 1314, 1321 (11th Cir. 2006) (“[T]he requirement that the electronic communication not be readily accessible by the general public is material and essential to recovery under the SCA.”).

184. Of course, one could imagine a situation in which the employer’s private information or perhaps another worker’s private information was posted in the account.

185. *See, e.g., O’Connor*, 480 U.S. at 718–19 (holding that the employee of a public employer had a reasonable expectation of privacy in his desk and file cabinets); *Dir. of Office of Thrift Supervision v. Ernst & Young*, 795 F. Supp. 7, 10 (D.D.C. 1992) (applying similar analysis to a private employer); *see also* *Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650, 663 (D.N.J. 2010) (finding reasonable expectation of privacy in a private employee’s password-protected, web-based e-mail account, accessed on a company laptop).

186. In *O’Connor*, the Supreme Court noted that an individual loses his reasonable expectation of privacy in spaces that are open to others. *O’Connor*, 480 U.S. at 717–18 (recognizing that spaces that are “continually entered by fellow employees and other visitors during the workday for conferences, consultations, and other work-related visits,” can be “so open to fellow employees or the public that no expectation of privacy is reasonable”); *see also* *City of Ontario v. Quon*, 130 S. Ct. 2619, 2628 (2010). States have come to similar conclusions regarding information available to the public. *See, e.g., Ernst & Young*, 795 F. Supp. at 10 (applying the *O’Connor* standard to the question of employee privacy in diaries containing personal and company data). Moreover, messages that are “readily accessible to the general public” receive no protection under the SCA. *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965, 991 (C.D. Cal. 2010) (discussing briefly the extent to which private messages and postings on Facebook and MySpace pages might meet the SCA’s not “readily accessible” requirement).

187. *See, e.g., Data Use Policy: Information We Receive About You*, FACEBOOK, <http://www.facebook.com/about/privacy/your-info> (last visited Feb. 19, 2013) (“We receive a number of different types of information about you, including: . . . [r]egistration information . . . [i]nformation you choose to share . . . [i]nformation others share about you”); *Twitter Privacy Policy*, TWITTER, <https://twitter.com/privacy> (last visited Feb. 19, 2013) (“We collect and use your information . . . to provide our Services and to measure and improve them over time.”).

access to the information.¹⁸⁸ Third, the followers linked to the account have access to at least some of the postings.¹⁸⁹ In some cases, these followers may number in the thousands, even the millions.¹⁹⁰ The question is whether, and at what point, information posted in an account qualifies for privacy protections.

The fact that an individual chooses to share information or a space with some parties does not necessarily destroy his reasonable expectation of privacy with respect to other parties.¹⁹¹ Under the Fourth Amendment, the fact that an individual shares a space with others does not always obviate her reasonable expectation of privacy in that space.¹⁹² For example, the Supreme Court held in *Mancusi v. DeForte*, that an individual may retain a reasonable expectation of privacy in a shared office.¹⁹³ Similarly, the Northern District of Illinois found that a television station might be liable under the privacy tort of intrusion upon seclusion for broadcasting film of a prisoner exercising in a prison gym visible to others in the prison.¹⁹⁴ The court observed that the “[plaintiff’s] visibility to some people does not strip him of the right to remain secluded from others.”¹⁹⁵ Finally, courts have held that plaintiffs may maintain claims for violation of the SCA where employers accessed web-

188. See Emily Steel & Jessica E. Vascellaro, *Facebook, MySpace Confront Privacy Loophole*, WALL ST. J. (May 21, 2010), <http://online.wsj.com/article/SB10001424052748704513104575256701215465596.html>.

189. See, e.g., *How to Post & Share*, FACEBOOK, <https://www.facebook.com/help/333140160100643/> (last visited Feb. 19, 2013) (see “When I share something, how do I choose who can see it?” under “Privacy Controls for Stories You Share”).

190. *PhoneDog v. Kravitz*, No. C 11-03474, 2011 WL 5415612, at *1 (N.D. Cal. Nov. 8, 2011) (17,000 followers); Palis, *supra* note 8 (over 49 million followers). Other functions in a social network account vary in their claim to privacy. Registration information, such as birthday, full name, and address may be available to no one other than the social network provider. Although a posting may be visible to the public at large, a private message sent through the same social network may be visible only to the recipient and the social network provider. In *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965, for example, the court distinguished private messaging services on Facebook with postings on completely public electronic bulletin boards in evaluating the accessibility of messages under the SCA’s readily accessible standard. *Id.* at 981–82.

191. See, e.g., RESTATEMENT (THIRD) OF EMPLOYMENT: EMPLOYEE PRIVACY AND AUTONOMY § 7.04 cmt. d, illus. 4 (Tentative Draft No. 5, 2012).

192. See *Mancusi v. DeForte*, 392 U.S. 364, 368–69 (1968).

193. *Id.*

194. *Huskey v. Nat’l Broad. Co.*, 632 F. Supp. 1282, 1287–88 (N.D. Ill. 1986); see also *Stessman v. Am. Black Hawk Broad. Co.*, 416 N.W.2d 685, 688 (Iowa 1987) (holding that a television station might be liable under the tort of intrusion upon seclusion for broadcasting a film of a woman eating in a public restaurant).

195. *Huskey*, 632 F. Supp. at 1288; see Adam Pabarcus, *Are “Private” Spaces on Social Networking Websites Truly Private? The Extension of Intrusion upon Seclusion*, 38 WM. MITCHELL L. REV. 397, 412–14 (2011).

sites without authorization even though the websites were accessible to other parties.¹⁹⁶

Although courts have held that unauthorized access of websites with restricted access, including social network accounts, would violate the SCA under some circumstances,¹⁹⁷ the question is open as to whether claims against such intrusions would succeed under the Fourth Amendment or as privacy tort claims.¹⁹⁸ Some commentators argue that privacy protections should apply to social network accounts at least when the information is only available to a restricted set of viewers.¹⁹⁹ This logic can be applied not only to the account holder, but also to other users. Private communications from members of the account holder's network to the account holder may also deserve protection for the same reasons. For example, if a "friend" on Facebook sends a private message to me through Facebook, it seems that the "friend's" reasonable expectation of privacy in that message should be protected, perhaps not from me, but from unauthorized intrusions by others.²⁰⁰ Effectively, another user should not be tricked into thinking that a public venue is a private venue.

Trade secret law protects information from misappropriation which confers an independent economic advantage due to the fact that it is not generally known or readily ascertainable to competitors.²⁰¹ To qualify for

196. See, e.g., *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 880 (9th Cir. 2002); *Pietrylo v. Hillstone Rest. Grp.*, No. 06-5754 (FSH), 2009 WL 3128420, at *3 (D.N.J. 2009).

197. See, e.g., *Snow v. DirecTV, Inc.*, 450 F.3d 1314, 1322 (11th Cir. 2006) (noting that the court might consider a website not readily accessible to the public if the website holder screened users before granting them access to the website); *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965, 991 (C.D. Cal. 2010) (holding that compelling disclosure of Facebook wall and MySpace comments would violate the SCA if access to such comments was restricted); *Viacom Int'l Inc. v. YouTube Inc.*, 253 F.R.D. 256, 264–65 (S.D.N.Y. 2008) (denying motion to compel disclosure of YouTube videos when videos could only be viewed by others authorized by the user who posted them).

198. See Patricia Sanchez Abril et al., *Blurred Boundaries: Social Media Privacy and the Twenty-First-Century Employee*, 49 AM. BUS. L.J. 63, 74–77 (2012).

199. E.g., James Grimmelmann, *Saving Facebook*, 94 IOWA L. REV. 1137, 1195–97 (2009); see also RESTATEMENT (THIRD) OF EMPLOYMENT § 7.04 cmt. d, ill. 4 (Tentative Draft 5, 2012). See generally Pabarcus, *supra* note 195 (arguing that the common law tort of intrusion upon seclusion should apply to the unauthorized access to information posted on social networking sites in which there is a reasonable expectation of privacy).

200. See Orin Kerr, *The Case for the Third Party Doctrine*, 107 MICH. L. REV. 561, 588–90 (2009) (arguing that giving information to a third party may indicate consent to disclosure by that party but should not necessarily destroy a reasonable expectation of privacy in the information with regard to other parties).

201. See UNIF. TRADE SECRETS ACT, 14 U.L.A. 433 (1985). "Trade secret" means information, including a formula, pattern, compilation, program device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." *Id.* UTSA has been adopted in most states. 1 ROGER M. MILGRIM & ERIC E. BENSON, MILGRIM ON TRADE SECRETS

protection, the trade secret holder must additionally make reasonable efforts to maintain secrecy of the information.²⁰² Links to an account would seem to be obvious candidates for trade secret protection because they bear a close resemblance to customer lists. Courts often protect employers' customer lists as trade secrets where the customer information is not readily ascertainable from outside sources.²⁰³ In some circumstances, the links to an account might meet this standard. For example, where the names of customers linked to a social network account could only be accessed through the account and were not otherwise generally known, the list of people linked to the account might qualify as a trade secret.²⁰⁴

Many social network accounts, however, only contain information available to the public at large. Not only the account profile, but also the links to the profiles of all the followers of a Twitter or Pinterest account, for example, may be viewed publicly.²⁰⁵ More fundamentally, the rights in trade secrets and privacy may preclude access to nonpublic information, but they do not necessarily preclude access to a social network account. Even if a court found that every fact militated in favor of the employer—for example, that the employer had paid the worker to create the account and had controlled every aspect of its use—the existence of a trade secret or a private comment in the account should not be a reason against transferring the account to the employer. The former worker can simply delete the private or trade secret information before giving the employer access to the account.

Thus, a key point in all these legal paradigms is that the information at issue can be largely disaggregated from the account itself. On the one hand, this point simplifies the resolution of disputes over social network accounts because the legal rights can be resolved independently of the dispute over

§ 101[2][b] (2011) (providing a table of jurisdictions where the Uniform Trade Secrets Act has been adopted).

202. See UNIF. TRADE SECRETS ACT, 14 U.L.A. 433 (1985).

203. See, e.g., *Hertz v. Luzenac Grp.*, 576 F.3d 1103, 1115 (10th Cir. 2009). Factors militating toward trade secret protection are:

- (1) whether proper and reasonable steps were taken by the owner to protect the secrecy of the information;
- (2) whether access to the information was restricted;
- (3) whether employees knew customers' names from general experience;
- (4) whether customers commonly dealt with more than one supplier;
- (5) whether customer information could be readily obtained from public directories;
- (6) whether customer information is readily ascertainable from sources outside the owner's business;
- (7) whether the owner of the customer list expended great cost and effort over a considerable period of time to develop the files; and
- (8) whether it would be difficult for a competitor to duplicate the information.

Id. Jurisdictions vary in the degree of protection that courts grant customer lists. See *Dicks v. Jensen*, 768 A.2d 1279, 1283–84 (Vt. 2001) (discussing variation among jurisdictions, and even within the same jurisdiction, in the protection of customer lists as trade secrets).

204. See *Hertz*, 576 F.3d at 1115.

205. *Secret Boards 101*, PINTEREST, <https://help.pinterest.com/entries/22277603-Secret-Boards-101> (last visited Feb. 19, 2013).

access to the account, at least to the extent that the content at issue can be separated from the account. On the other hand, these legal paradigms fail to provide a simple and straightforward solution to the problem of which party has the right to the account itself. Unlike the web page context, trademark law does not provide a means to claim rights in the account in the way that it provides a mechanism to claim a disputed domain name. Therefore, the solution to the problem of access to the account must be found elsewhere.

Nevertheless, to the extent that information cannot be disaggregated from the account, any solution must address issues arising under the legal paradigms discussed above. For example, where copyrighted or private information belonging to the previous account holder cannot be deleted or does not disappear, the resolution of a dispute regarding access to the links must accommodate copyright and privacy rights. Aside from these concerns, the problem of how to resolve disputes over access to social network accounts may be analyzed on its own terms.

D. *Public Interests at Stake in Social Networking*

This section considers the problem of rights in a social network account from a public interest standpoint. Participation in social network platforms promotes the public interest by enhancing the free flow of information, improving social cohesion, and increasing economic efficiency and dynamism. To optimize benefits to the public, the best solution will provide incentives for beneficial participation in social network platforms.

1. Informational Benefits from Participation in Social Network Platforms

The use of social network platforms by workers and employers enhances the flow of information not only to the public but also from and among the public.²⁰⁶ As a general matter, the free flow of communication furthers the societal interest in the fullest possible dissemination of information.²⁰⁷ Participation in social network platforms leads to a number of specific informational advantages. Further, the blending of personal and professional use tends to increase these advantages.

First, social network use improves the flow of commercial information to consumers in ways that are particularly convenient and useful for consumers.²⁰⁸ Because consumers exercise more control over the flow of information on social network platforms than they do in traditional media channels, consumers are more likely to benefit from the information they receive.

206. YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 25 (2006).

207. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561–62 (1980).

208. See Robert Hainer, *What Are the Benefits for Customers of Major Companies Using Social Media?*, *Hous. Chron.*, <http://smallbusiness.chron.com/benefits-customers-major-companies-using-social-media-29682.html> (last visited Feb. 14, 2013).

Whereas the listener may simply ignore the bombardment of unwanted and irrelevant advertising from a broadcast medium, such as a radio station, the user may read the social network feeds she has chosen to follow with real interest and attention.

The voluntary nature of a consumer's decision to link to a social network account alone indicates that the companies which successfully participate in social network platforms provide valuable information to their followers. Why else would consumers choose to follow them? If the incentive for companies to provide this valuable information is to attract followers, then this incentive should be preserved.

Secondly, network effects amplify the advantages of disseminating information through social network platforms. An individual is likely to find particularly useful the information passed to her through a network of people she trusts and with whom she shares common interests.²⁰⁹ These network effects not only help consumers but also contribute to the more efficient functioning of the market as a whole. As Professor McGeeveran observed in his article on marketing through social network platforms, "markets function better when individual consumer purchasing decisions rely on improved information, as they do in an environment saturated with accessible and relevant peer opinions."²¹⁰

A third benefit is the ease and efficiency with which users obtain answers to questions through social network platforms.²¹¹ A consumer can simply respond to a posting from a company she follows with a question.²¹² The convenience of this feature is just one of the advantages.²¹³ In addition, companies are more likely to respond to questions on social network platforms

209. For example, a mother may find it valuable to know that other mothers with similarly aged children 'liked' a specific article about child-rearing or decided to follow a particular children's clothing company. See McGeeveran, *supra* note 44, at 1110 ("Most fundamentally, however, word of mouth influences consumers' decisions because they believe it: a recommendation from a disinterested person similar to the consumer is likely to be 'immediate, personal, credible, and relevant.'").

210. *Id.* at 1113.

211. HOWE, *supra* note 53, at 16–17.

212. Consider this exchange with Aaron Baker on Twitter, in which a follower directly asks Baker a technical question and Baker in turn provides a direct response:

Josh Anderson @THE_CATZ_MEOW_2

@PhoneDog_Aaron aaron how do u feel about the Htc one x? I like it but what do u think of it?

Aaron Baker @PhoneDog_Aaron

@THE_CATZ_MEOW_2 Great Android phone—even better at \$99.99

Josh Anderson & Aaron Baker, @PhoneDog_Aaron, TWITTER (Aug. 3, 2012, 4:44 AM), https://twitter.com/PhoneDog_Aaron/status/231412639136362496.

213. See Hainer, *supra* note 208; *Special Report: New Reality Demands a Response*, MARKETING, Oct. 26, 2011, at 37.

because both the question and answer are more visible.²¹⁴ On a public Facebook page, for example, anyone can see the question and the response. This visibility increases the company's incentive to answer (and to answer promptly) in order to build a reputation for providing helpful customer service.²¹⁵ Visibility also amplifies the helpfulness of the answer because other consumers with similar questions can see the answer too.²¹⁶ This saves the company time and money because it need not repeatedly provide the same answer as it would in a less visible format, such as a customer service call or individual chat.²¹⁷ In an efficient market, these savings are passed on to the public.

Fourth, the public benefits when customers provide feedback in terms of questions and comments to companies.²¹⁸ Companies have always solicited customer feedback, but social network platforms vastly increase the amount of input available to companies by providing a forum for a conversation among thousands of people.²¹⁹ The public gains when companies deliver products and services better suited to consumers' needs.²²⁰

The benefits to the public are even greater when employers use their workers to personally engage with the public on their behalf. As described above, companies promote the public interest in the free flow of information by engaging in social network platforms in two principal ways: by facilitating the flow of convenient and useful commercial information to consumers, and by providing massive amounts of feedback for companies. Neither of

214. Alan Henry, *Get Big Companies to Pay Attention to Your Complaints with These Five Steps*, BUS. INSIDER (Mar. 13, 2012), <http://www.businessinsider.com/get-big-companies-to-pay-attention-to-your-complaints-with-these-five-steps-2012-3>.

215. See *id.*

216. Alexandra Reid, *Customers Won't Come Just Because You're on Social Media*, BUS. INSIDER (June 9, 2011, 5:57 PM), http://articles.businessinsider.com/2011-06-09/strategy/30063170_1_social-media-startups-can-customer-service ("You can share a solution with everyone who has the same question on a platform instead of addressing each individual separately.").

217. See *id.*; Natalie Petouhoff & Kathy Herrmann, *Calculating the ROI for Social Customer Service: How to Combine Strategy with ROI to Accelerate Executive Approval*, SALESFORCE (May 2011), https://secure2.sfdcstatic.com/assets/pdf/misc/Social_Customer_ROI_Guide.pdf.

218. See Hainer, *supra* note 208 ("When a company you follow sends out a poll or asks for opinions on a new product through social media, your response can help shape the future of that product or idea by voting for or against it.").

219. Robert Wollan, *As Fewer Consumers Switch Service Providers, CMOs Must Piece Together the Customer-Loyalty Puzzle*, ADVERTISING AGE (Apr. 20, 2011), <http://www.adage.com/article/cmo-strategy/cmos-advantage-customer-service-dissatisfaction/227108/> ("Social-media monitoring also provides unfiltered feedback from customers on a scale that focus groups and surveys alone simply cannot provide."); JAN ZIMMERMAN & DOUG SAHLIN, *SOCIAL MEDIA MARKETING ALL-IN-ONE FOR DUMMIES* 85, 123, 470 (2010).

220. HOWE, *supra* note 53, at 2. Further, this feedback is easy to collect and analyze because it is digital, written, and publicly available; it is essentially a large, easily searchable database of information, which helps companies refine and improve their products. Clifford, *supra* note 54.

these advantages can occur, however, unless consumers choose to engage with companies on social network platforms. As discussed in Part I, consumers are more likely to do so when they feel a personal connection with a real person. The personal connection improves the flow of information in both directions—members of the public will be more inclined not only to follow but also to respond to an account when it is operated by a real person.

2. Public Benefits from Workers' Participation in Social Network Platforms

Workers benefit themselves and the public when they enhance their skills through social network participation. Workers improve their skills in at least three ways. First, they develop their proficiency at using social network platforms by learning how to use the various services and speak in the mode appropriate to each.²²¹ Given the trend toward commercial use of social network platforms,²²² an employer might find this specifically valuable. Second, a worker might use an account to develop her “personal brand”: some combination of personal style, expertise, and perspective that other social network users find useful or interesting.²²³ These two skill sets promote the public interest by improving the worker’s ability to communicate. Finally, a worker might also use social networking to enhance more traditional skills. A worker’s social network might provide her with mentoring, advice, industry news, and educational opportunities.²²⁴

In a fluid market, a worker’s investment in developing her own professional abilities benefits the worker by increasing her compensation.²²⁵ The worker may either go to an employer who will pay her more or leverage her outside opportunities to demand greater compensation from her current employer.²²⁶ The worker’s enhanced abilities also provide the employer more

221. Marwick & boyd, *supra* note 69, at 118.

222. See *supra* Part I.A.

223. See *supra* notes 113–118 and accompanying text.

224. See, e.g., Madeline Kriescher, *Professional Benefits of Online Social Networking*, 38 COLO. LAW. 61, 61–62 (2009), available at <http://www.aallnet.org/chapter/coall/lrc/lrc0209.pdf>; Xení Jardin, *Online Social Networks Go to Work*, NBC NEWS (Feb. 4, 2008), <http://www.nbcnews.com/id/5488683#.URxnWGAcPD4>.

225. See generally Matt Marx, Jasjit Singh & Lee Fleming, *Regional Disadvantage? Non-Compete Agreements and Brain Drain* (Sept. 22, 2010) (unpublished manuscript), available at http://elsa.berkeley.edu/~bhhall/others/FlemingMarxSingh11_braindrain100925.pdf.

226. See Catherine Fisk & Adam Barry, *Contingent Loyalty and Restricted Exit: Commentary on the Restatement of Employment Law*, 16 EMP. RTS. & EMP. POL’Y J. (forthcoming 2013) (manuscript at 27), available at <http://ssrn.com/abstract=2060621>.

value.²²⁷ The increase in a worker's productivity due to enhanced skills furthers the public interest at large by increasing economic efficiency.²²⁸

3. Public Benefits from Providers' Investment in Social Network Platforms

Due to the public benefits from social networks generally, any solution should be careful to avoid unnecessarily discouraging companies from providing these services. In addition to the various commercial benefits described above, social networking contributes to the public good in many ways. On balance, it appears to promote social cohesion and civic engagement.²²⁹ Online social networking is correlated with closer friendships, more social support, and greater political participation.²³⁰ Studies suggest that use of these sites facilitates networking, decreases the costs of communication, and makes it easier to find information.²³¹ Moreover, social network platforms give people a new power to effect social change. The successes of the revolutions in the Middle East illustrates the potential for using social network platforms to help people organize, create a sense of solidarity, and rally others to a cause.²³²

As a result, the law should encourage social network providers to provide their services. Relying on providers to forestall or resolve disputes over social network accounts, however, would likely burden them too much. Moreover, service providers would not be well positioned to adequately re-

227. In a perfectly fluid market, the employer would not receive a benefit because it would pay the worker exactly what the additional skills are worth. Nevertheless, because a worker's self-investment typically benefits the employer more than the employer's investment in the worker, the worker's initiative to improve herself may benefit the employer by saving it the resources necessary to train the worker itself. See Mark J. Garmaise, *Ties that Truly Bind: Noncompetition Agreements, Executive Compensation, and Firm Investment*, 47 J. L. ECON. & ORG. 376 (2009).

228. See HUMAN CAPITAL AND AMERICA'S FUTURE: AN ECONOMIC STRATEGY FOR THE NINETIES 3-4 (David Hornbeck & Lester M. Salamon eds., 1991); see generally Theodore W. Schultz, *Investment in Human Capital*, 51 AM. ECON. REV. 1, 1-17 (1961) (discussing the effect of investments in human capital on economic growth).

229. Janna Q. Anderson & Lee Rainie, *The Future of Social Relations*, PEW INTERNET 2 (July 2, 2010), http://pewinternet.org/~media/Files/Reports/2010/PIP_Future_of_Internet_%202010_social_relations.pdf.

230. See Keith N. Hapton et al., *Social Networking Sites and Our Lives*, PEW INTERNET 25, 28, 39 (June 16, 2012), <http://pewinternet.org/~media/Files/Reports/2011/PIP%20-%20Social%20networking%20sites%20and%20our%20lives.pdf> (finding that most social network users are Facebook users and Facebook users tend to have more close connections, use social media to maintain those connections, and tend to be more politically engaged than similar demographics).

231. Anderson & Rainie, *supra* note 229, at 2.

232. See generally, Nouredine Miladi, *New Media and the Arab Revolution: Citizen Reporters and Social Activism*, 4 J. ARAB & MUSLIM MEDIA RES. 113 (2011); Jon B. Altermann, *The Revolution Will Not Be Tweeted*, WASH. Q., Fall 2011, at 103 (arguing that participation in social media, including social networks, played a significant, though limited, role in the Middle East movements in 2011).

solve disputes. Social network platform providers might seem to be best placed to both forestall and resolve disputes because they write the code that structures the social network and the terms of use for using it. Moreover, they have an incentive to avoid disputes to prevent dissatisfaction among their subscribers.²³³ Due to the nature of disputes over access to social network accounts, however, software and terms of use are largely ineffective tools for forestalling and settling disagreements.

Social network providers have two tools at their disposal for resolving or preempting disputes over rights to accounts: code²³⁴ and contract. As social networking sites are currently structured, the primary software tool for controlling access to the site is the password.²³⁵ But passwords are inadequate to prevent disputes or to ensure that the party which has invested the most in the account retains access to the account.

Typically, any party with access to the password can lock the other party out of the account simply by changing the password.²³⁶ As a result, knowledge of the password is not necessarily a proxy for rights to the account in any situation in which access is shared.²³⁷ And access must be shared when an organization attempts to use a social network because the organization relies on employees to do the work on behalf of the incorporeal entity. Employers are particularly vulnerable in this regard. However, employees are vulnerable in a different way. Although an employee does not have to physically share the password with the employer, they often lack power in the employment relationship.²³⁸ If the employer demands access, many employees will be unlikely to refuse.²³⁹

233. Most social networking sites work under an advertising model in which more subscribers lead to more advertising revenues. *Money from Friends: Finding the Right Revenue Model for Social Media*, KNOWLEDGE@WHARTON (Aug. 29, 2012), <http://knowledge.wharton.upenn.edu/article.cfm?articleid=3064>.

234. See generally LAWRENCE LESSIG, *CODE IS LAW* (2006) (arguing that cyberspace may be regulated through computer code).

235. As of this writing, there are hundreds of social networking sites. See *SNS Definitions*, *supra* note 17, at 210.

236. The ease with which this may be done depends on the extent of security protections in the account. Sometimes changing the password requires access to an email account. Depending again on the security protections, someone with access to the account could change the email account associated with the account. The more fundamental point is that in an employment context of shared access, the parties may also have access to the same email account.

237. One could imagine a social network which required a user to affirm on whose behalf any action was taken, but given the competition to attract users, it seems unlikely that any site would be designed in such a burdensome and inconvenient manner.

238. James R. Glenn, *Can Friendly Go Too Far? Ramifications of the NLRA on Employer Practices in a Digital World*, 2012 U. ILL. J.L. TECH. & POL'Y 219, 220; Robert Sprague, *Invasion of the Social Networks: Blurring the Line Between Personal Life and the Employment Relationship*, 50 U. LOUISVILLE L. REV. 1, 18 (2011).

239. See, e.g., *Pietrylo v. Hillstone Rest. Grp.*, No. 06-5754 (FSH), 2009 WL 3128420, at *3 (D.N.J. 2009) (finding that an employee felt coerced, because of her employee status, to give her employer the password to her social network account); *Senators Question Employer*

Social network providers may also regulate users by contract. Invariably, providers post user agreements on their web sites which set the terms under which users may use the services.²⁴⁰ The provider typically retains the right not only to terminate a user who violates the terms of use, but also to terminate a user at will.²⁴¹ Therefore, the provider usually has the power by contract to resolve disputes by terminating or transferring the accounts of users who misbehave.²⁴²

Their position as providers, however, gives them little advantage in determining the merits of the case. Specifically, the provider cannot know on whose behalf an account is opened or operated. To use the example of Sonya Soutus from Part I.C, it is unclear from the Twitter account itself what agreement she might have with her employer, Coca-Cola, regarding the account. Even if she registered the account under her name, used it to discuss personal matters, and included her name in the handle “@SonyaSCocaCola,” she may still have agreed to create the account for Coca-Cola, and Coca-Cola may have compensated her very well for her labor.²⁴³

Requests for Facebook Passwords, N.Y. TIMES (Mar. 25, 2012), <http://www.nytimes.com/2012/03/26/technology/senators-want-employers-facebook-password-requests-reviewed.html>. To combat the problem of employees involuntarily consenting to give their employees access to social network accounts, the state of Illinois recently passed a law prohibiting employers from demanding social network account passwords from their employees. Ill. Legis. Serv. 097-0875 (West 2012).

240. Such contracts are generally deemed enforceable. *See, e.g.*, Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 401–03 (2d Cir. 2004) (holding that where the terms of use were clearly posted on the website, the user manifested assent by using the web site services).

241. *See, e.g.*, *Terms of Service* § 4.c, PINTEREST, <http://pinterest.com/about/terms/> (last visited Feb. 20, 2013) (“We may permanently or temporarily terminate or suspend your User account or access to the Service for any reason, without notice or liability to you, including if in our sole determination you violate any provision of our Acceptable Use Policy or these Terms, or for no reason.”); *Terms of Service* § 8, TWITTER, <https://twitter.com/tos/> (last visited Feb. 20, 2013) (“We reserve the right at all times . . . to suspend or terminate users, and to reclaim usernames without liability to you.”); *User Agreement* § 7.1, LINKEDIN, http://www.linkedin.com/static?key=user_agreement (last visited Feb. 20, 2013) (“LinkedIn may terminate the Agreement and your account for any reason or no reason, at any time, with or without notice.”).

242. Some sites explicitly claim this right. *E.g.*, *User Agreement*, LINKEDIN § 4.4, http://www.linkedin.com/static?key=user_agreement (last visited Feb. 20, 2013) (“LinkedIn reserves the right, but has no obligation, to monitor disputes between you and other members and to restrict, suspend, or close your account if LinkedIn determines, in our sole discretion, that doing so is necessary to enforce this Agreement.”).

243. The social network provider might set a rule that the account must be named after the party on whose behalf it is opened, but such a rule would not resolve all disputes. A company may want multiple accounts and it cannot give them all the same name. What happens when the account name includes both the worker and the company’s name, such as “@PhoneDog_Noah” or “@SonyaSCocaCola”? The larger issue is that companies want accounts which showcase the individual worker and, therefore, it is hard to tell from the account itself on whose behalf the account is created. Without some knowledge of the agreement between the employer and worker, it is hard to resolve these disputes.

The underlying problem is that social network providers are not well-placed to resolve disputes about rights to social network accounts. The core competency of providers is providing social network services, not dispensing justice. They are particularly ill-equipped to deal with the array of complex issues at stake in disputes over social network accounts, such as incentives to invest, employer-employee contracts, and rights that stem from privacy, trademark, and copyright law. Indeed, the efforts of social network providers to resolve disputes in other contexts have been poor at best.²⁴⁴ As a result, the parties should have recourse to the courts, as they are better suited to resolve the problem. Therefore, any solution should offer the parties a legal cause of action they can bring to court. Whether or not the parties actually choose to go to court, the existence of a legal framework for resolving disputes would at least give the parties guidance on how to settle their disputes and how to avoid them in the first place.

Nevertheless, social network providers have an interest in resolving these disputes because the public is more likely to use their services if users feel that their investments in the media will be protected from misappropriation and that disputes will be resolved fairly.²⁴⁵ Accordingly, without some other source of dispute resolution, providers may feel compelled to resolve disputes themselves, which would impose undesirable costs on their businesses.²⁴⁶ To the extent that social network platforms are valuable services, it

244. See e.g., *Black Sheep Television, Ltd. v. Town of Islip*, No. 2:10-CV-04926, 2010 WL 4961669, at *2 (E.D.N.Y. Dec. 6, 2010) (The court ordered a preliminary injunction enjoining plaintiffs from use of their four Twitter accounts after defendant had initially attempted to use Twitter's trademark infringement complaint mechanism which only resulted in the takedown of one of the four user names.); Jillian Bluestone, *La Russa's Loophole: Trademark Infringement Lawsuits and Social Networks*, 17 VILL. SPORTS & ENT. L.J. 573, 576 (2010); Daniel Solove, *Facebook Banishment and Due Process*, CONCURRING OPINIONS (Mar. 3, 2008), http://www.concurringopinions.com/archives/2008/03/facebook_banish.html (describing the predicament of one Facebook user whose profile was inexplicably deleted).

245. The fact that social network platforms typically have terms of use stating that the provider retains all right to the services does not indicate in itself that social network providers are averse to resolution by a court. To the contrary, the terms of use indicate the providers' desire to avoid both disputes and liability. E.g., *Myspace.com Terms of Use Agreement*, MYSPACE § 11 (May 9, 2012), <http://www.myspace.com/Help/Terms> ("You are solely responsible for your interactions with other Myspace Users, third party developers or any other parties with whom you interact through the Myspace Services and/or Linked Services. Myspace reserves the right, but has no obligation, to become involved in any way with these disputes."); *User Agreement*, LINKEDIN § 4.4, http://www.linkedin.com/static?key=user_agreement (last visited Feb. 20, 2013) ("LinkedIn reserves the right, but has no obligation, to monitor disputes between you and other members and to restrict, suspend, or close your account if LinkedIn determines, in our sole discretion, that doing so is necessary to enforce this Agreement."). What the social network providers most likely want is resolution of disputes without incurring any additional responsibilities. To this end, courts should be wary of interpreting the law in a way that imposes unnecessary burdens on social network providers.

246. Another possible solution is an arbitration procedure resembling the uniform domain name dispute resolution procedure (UDRP) for websites. *Rules for Uniform Domain Name Dispute Resolution Policy*, INTERNET CORP. FOR ASSIGNED NAMES & NUMBERS (Mar. 1,

makes sense to avoid imposing additional burdens on the businesses that provide them. Such burdens may increase the cost of doing business and pose a hurdle to the creation of new or improved social network services. Thus, protecting social-network service providers' incentives to invest requires creating an adequate opportunity to resolve disputes in court.

4. Benefiting the Public by Preserving Incentives to Invest in Social Network Platforms

The implication of all the advantages offered by employers' and workers' participation in these sites is that the principal parties—employers, workers, and social network providers—should retain their incentives to invest in social network platforms.²⁴⁷ Further, because blurred professional and personal use enhances these benefits, the solution should not penalize such combined use.

First, employers and workers should have recourse when an account is wrongfully taken from them, specifically for the value of access to the followers of the account. As explained in Part I, for most purposes, the links to followers are the real attraction of the account. Creating an audience of followers is one of the primary reasons employers and individuals invest time

2010), <http://www.icann.org/en/help/dndr/udrp/rules>; see 4 MCCARTHY, *supra* note 148, at § 25:74.75 (describing the UDRP process). Social network providers, like registrars, could be required, or perhaps merely encouraged by the FTC, to include a clause in their terms of use binding all users to a dispute resolution procedure. *Id.* The parties could then take their dispute to a neutral third party arbitrator under some form of established procedure. *Id.* The arbitrator would be empowered to provide remedies such as transferring or canceling an account, which the social network provider would be obligated to execute. *Id.*

Even if there were some form of arbitration available to social network users, however, they should, as in the website domain name context, also have the option of taking disputes to court for a full hearing. See, e.g., *Broadbridge Media, L.L.C. v. Hypercd.com*, 106 F. Supp. 2d 505, 509 (S.D.N.Y. 2000) (“First, ICANN’s policy, rules and complaint form do not state that a complainant gives up the right to proceed in court by filing a domain name dispute complaint.”). Although a UDRP-like arbitration might be cheaper and faster than proceedings in court, the trade-off is a less developed record and a less nuanced examination of the issues. See A. Michael Froomkin, *ICANN’s “Uniform Dispute Resolution Policy”—Causes and (Partial) Cures*, 67 BROOK. L. REV. 605, 670–71 (2002).

247. Use of social networks may also have negative social effects. A Pew Research Center study found that internet experts and leaders worried that internet use fosters meaningless, shallow relationships, invasions of privacy, and intolerance. See Anderson & Rainie, *supra* note 229, at 2. A follow-up study of social network use, however, suggested that social network use did not appear correlated with an increase in shallow relationships and intolerance. See Hapton et al., *supra* note 230, at 22, 34. Nevertheless, the loss of privacy resulting from sharing personal details on social networks remains a concern. See Lauren Gelman, *Privacy, Free Speech, and “Blurry-Edged” Social Networks*, 50 B.C. L. REV. 1315, 1330–35 (2009) (describing the tendency of internet users to release details intended for a small online social network to the public); Grimmelmann, *supra* note 199, at 1160–75 (describing the harms resulting from the posting of private information on Facebook).

and effort into social network accounts.²⁴⁸ To preserve their incentive to invest in social network accounts—and the public benefits of this investment—the parties must have a legal remedy for loss of access to the followers.²⁴⁹

An adequate remedy for some plaintiffs might take the form of monetary damages or restitution. For other plaintiffs, however, the only adequate remedy may be regaining access to the account itself. This is likely to be particularly true in these disputes because it is very difficult to measure the return on investment in the context of social network platforms and therefore the worth to a party of a social network account.²⁵⁰ It is even more difficult to measure the value of the account when it is transferred, since some number of followers may decide to delink.²⁵¹ For some plaintiffs, therefore, the burden of establishing the monetary value of the account will be too heavy. Those plaintiffs should have the option of relief in the form of the account itself.

Finally, in order to preserve incentives to invest, the party that principally invested in the account should have the superior right to the account. Thus, if the employer has paid the worker to attract followers to an account, the employer's investment should be protected. Likewise, if the worker did the work independently without compensation, the worker's investment should be protected. It is not always clear on whose behalf the work was performed. Nevertheless, the best solution for the public interest from the standpoint of incentives would tease out which party would be unjustly enriched by being awarded the social network account and which party would be unfairly harmed by losing it.

III. THE SOLUTION

At heart, the problem is that none of the legal paradigms surveyed provides protection for exclusive access to the links in an account. Particularly in the employment context, the employer or worker can easily take an account, leaving the other party with no legal recourse despite the loss of considerable investment to build a following. The risk of losing the account reduces incentives to put effort into building a following. And public interest

248. In commercial terms, the account is valuable because of the audience it reaches. The audience may also be valuable because the account holder wishes to communicate a message, perhaps for ideological reasons, such as an anti-abortion message, or for political reasons, such as campaign advertisements. For purposes of simplicity, however, this Article focuses on the commercial value of the account.

249. See *supra* Part I.A–C.

250. See, e.g., Romero, *supra* note 36, at 145–48.

251. See *supra* Part I.E. Furthermore, it is equally, if not more, difficult to determine the cost of reproducing that following in a new account. Again, an individual's decision to follow an account is voluntary. See *supra* note 128 and accompanying text. It is hard to know what level of effort and what type of content and how much time will be required to persuade social network users to follow a particular account. See *supra* note 113 and accompanying text.

suffers as a result because of the significant benefits that social network platforms provide to society. This Part proposes a novel application of trade secret law to resolve these disputes. As this Part argues, trade secret law is best suited to preserve incentives which benefit the public and to balance rights between employers and workers.

A. Password as Trade Secret: A Proxy for the Account

At first blush, trade secret law appears unsuited to the problem because much of the information in a social network account is public.²⁵² However, one piece of information is invariably secret: the means of accessing the account. As this Part describes, the secret of access qualifies for narrow trade secret protection and provides a legal basis for asserting a right of exclusive access to the account itself.

Information must satisfy three requirements to qualify for trade secret protection. First, it must not be generally known or readily ascertainable to those who might obtain economic value from its use.²⁵³ In other words, it must be secret, at least with regard to potential competitors. Second, the information must derive independent economic value from being secret.²⁵⁴ Third, the information must be subject to reasonable efforts to maintain its secrecy.²⁵⁵

The secret of social network account access typically comprises some combination of login information necessary to enter the account. Often the login information is a combination of both a username and password, each of which includes strings of alphanumeric characters.

A confusing aspect of the secret of account access, from the perspective of trade secret protection, is that this information is not constant. Many trade secrets are some form of fixed information. A classic example is the formula for Coca-Cola.²⁵⁶ The information here is constant: a recipe for making Coca-Cola that has remained the same or similar for many years.²⁵⁷ In contrast, login information for a given account can be changed repeatedly. Indeed, anyone who knows the login information can generally change it, thereby locking everyone else out of the account until they learn the new key. As a result, it does not make sense to think of the secret of access to the account as simply one specific set of alphanumeric strings or other combination of information. Rather, the secret of account access must be conceived of more broadly as the set of information necessary to access the account at any given time. For convenience, this Article will refer to the secret of ac-

252. *See supra* Part II.C.

253. UNIF. TRADE SECRETS ACT, 14 U.L.A. 433 (1985).

254. *Id.*

255. *Id.*

256. Coca-Cola Bottling Co. v. Coca-Cola Co., 107 F.R.D. 288, 289 (D. Del. 1985).

257. *Id.* at 289–91.

cess to the account as the “password,” but the secret itself is whatever combination of information is necessary to access the account at a given time.

Many protected trade secrets are similarly mercurial. A business’s strategic information may sometimes qualify as a trade secret.²⁵⁸ This information changes as the business’s strategy changes. Similarly, customer lists, another form of information sometimes granted trade secret protection, change as information about the customers changes and customers are replaced.²⁵⁹

1. Secrecy

Regarding the first and last requirements, the requirements of secrecy and reasonable efforts to maintain secrecy, a password to a social network account is typically not generally known or readily ascertainable to competitors or potential competitors in the field.²⁶⁰ In most cases, passwords are difficult to discover and are quickly changed if they do become available.²⁶¹ Keeping passwords secret from the public and from competitors requires no great effort. A social network account user generally does so as a matter of course.

In the context of social network accounts, both employers and workers have typically made at least reasonable efforts to keep the account password secret from the public. If the parties dispute over the account, they likely do so because they both value the account. And if they value the account, they recognize the importance of maintaining exclusive access. An account that anyone can access would quickly lose its appeal to followers and therefore its value as a means of reaching those followers.²⁶²

Nevertheless, in some circumstances, a party might appreciate the need to keep the password secret from others, but take the password in the belief that it owned the trade secret. This question, however, merges with the question of which party has the right to the account ab initio, which is discussed in Part III.B.2. In such circumstances, as will be explained, ownership should be reasonably clear to the parties.

Password-sharing between workers and employers presents more difficulty. As discussed in Part II.D.3, employers must often share the password with workers, and workers may be compelled to share passwords with their employers. Either employer or worker may still retain a protectable trade

258. See, e.g., *Aetna, Inc. v. Fluegel*, No. CV074033345S, 2008 WL 544504, at *5 (Conn. Super. Ct. Feb. 7, 2008).

259. See *Dicks v. Jensen*, 768 A.2d 1279, 1283–84 (Vt. 2001) (noting the proposition that customer lists are often protected as trade secrets).

260. See *id.*

261. Security mechanisms on website accounts are generally effective at keeping out those without specific knowledge of the password and username. *How to Reduce the Probabilities of Your Web Site Getting Hacked*, CRYPTURL (Mar. 1, 2012), <http://www.crypturl.com/how-to-reduce-the-probabilities-of-your-web-site-getting-hacked/>.

262. See *supra* Part II.E.

secret in the password even if shared with the other party in the employment relationship. The law imposes a duty on workers to safeguard their employer's trade secrets.²⁶³ The duty generally only applies, however, when the employee was on notice that the employer regarded the information as its trade secret.²⁶⁴ Courts vary in the degree of notice required. Some impose an exacting duty of notice on employers, requiring that the employer clearly indicate to the employee that information is confidential.²⁶⁵ Others have found that the employee is on notice of the importance of keeping certain information secret simply by virtue of her experience and knowledge of the company's operations.²⁶⁶

Conversely, where the trade secret belongs to the worker, similar rules would appear to apply.²⁶⁷ The employer has no general equivalent to the duty of confidence of a worker to the employer,²⁶⁸ but the general rules regarding what constitutes reasonable efforts to protect a trade secret would seem to apply. The trade secret owner is usually deemed to have made reasonable efforts to keep the information secret where she obtains a confidentiality agreement from the party to whom she discloses the information.²⁶⁹ Even without a confidentiality agreement, however, the mere fact of disclo-

263. See, e.g., *Am. Bldg. Maint. Co. v. ACME Prop. Servs.*, 515 F. Supp. 2d 298, 310 (N.D.N.Y. 2007) (“[Under New York law,] former employees can be restricted from using their former employer’s trade secrets to advance their own interests, even when they have not signed an employment agreement limiting their activities.”); *Premier Lab Supply, Inc. v. Chemplex Indus. Inc.*, 10 So. 3d 202, 206 (Fla. 4th Dist. App. 2009) (holding lack of a confidentiality agreement with an employee to whom confidential information is disclosed does not by itself defeat trade secret status for the information because an employee who acquires a special technique or process in his employment is, as a matter of law, under a duty not to use it for his own benefit or disclose it to others).

264. See, e.g., *Electro-Craft Corp. v. Controlled Motion, Inc.*, 332 N.W.2d 890, 901–03 (Minn. 1983) (“If [an employer] wanted to prevent its employees from [producing similar products for other companies], it had an obligation to inform its employees that certain information was secret.”); *1st Am. Sys., Inc. v. Rezatto*, 311 N.W.2d 51, 58 (S.D. 1981).

265. A clear indication, for example, might involve requiring employees to sign confidentiality agreements clearly identifying the trade secrets, by labeling the trade secrets as confidential, and explaining the importance of secrecy to employees. See *Electro-Craft*, 332 N.W.2d at 903; see also *Shatterproof Glass Corp. v. Guardian Glass Co.*, 322 F. Supp. 854, 864–65 (E.D. Mich. 1970), *aff’d and remanded*, 462 F.2d 1115 (6th Cir. 1972).

266. E.g., *Technicon Data Sys. Corp. v. Curtis 1000, Inc.*, 224 U.S.P.Q. (BNA) 286, 291, (Del. Ch. 1984) (employee’s experience working for former employer made him aware that his former employer regarded the information at issue as a trade secret).

267. *Kinkade v. N.Y. Shipbuilding Corp.*, 122 A.2d 360, 363 (N.J. 1956) (suggesting in dicta that employee maintained the secrecy of his trade secret where he made only the disclosure necessary to ascertain whether his employer was interested in the information). The case law on this issue is sparse.

268. An agent owes the principal a duty not to use confidential information for the agent’s own purposes or to serve a third party. *RESTATEMENT (THIRD) OF AGENCY* § 8.05 (2006). Although the principal owes the agent a duty to deal fairly and in good faith, this duty is not typically characterized as a duty of confidentiality. See *id.* § 8.15.

269. See, e.g., *Learning Curve Toys, Inc. v. PlayWood Toys, Inc.*, 342 F.3d 714 (7th Cir. 2003).

sure to the employer should not necessarily preclude trade secret protection. For example, at least in some cases where an employer abuses its authority by demanding access to a trade secret, the employer's demand might qualify as misappropriation by improper means.²⁷⁰ If the employer misappropriates a worker's trade secret, the worker not only retains the right to the trade secret but may be entitled to damages for the employer's actions.²⁷¹

2. Independent Economic Value

Second, to qualify for trade secret protection, the information at issue must derive independent economic value from its secrecy.²⁷² The information must be not generally known or readily ascertainable to those who could gain economic value from its disclosure or use.²⁷³ Many parties would gain economic benefit from accessing a widely followed account. For example, the opportunity to access Lady Gaga's fifty million Facebook followers could be quite valuable.²⁷⁴ Indeed, widely followed social network account owners are often paid thousands of dollars to endorse products from their accounts.²⁷⁵

The key point for trade secret protection, however, is that the information at issue derives independent economic value from being secret.²⁷⁶ This

270. "If a trade secret is acquired through conduct that is itself tortious or criminal invasion of the trade secret owner's rights, the acquisition ordinarily will be regarded as improper." RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 43 cmt. c. (1995). Extortionate behavior by employers could be tortious or criminal. For example, some states have statutes prohibiting employers from demanding fees or other forms of remuneration in exchange for continuing employment. *E.g.*, *Logan v. Forever Living Prods. Intern., Inc.*, 52 P.3d 760, 763 (Ariz. 2002).

271. See UNIF. TRADE SECRETS ACT § 3, 14 U.L.A. 433 (1985). A trade secret owner's rights are the same whether she is a worker or an employer. However, when a worker creates a trade secret using the employer's resources, such as the employer's equipment, courts typically hold that the employer, as a matter of equity, gains a shop right to the trade secret. See, *e.g.*, *Larisey v. United States*, 949 F.2d 1137, 1143–45 (Fed. Cir. 1991); *Kincade*, 122 A.2d at 364–65. A shop right is an irrevocable, non-exclusive, royalty-free license to use the trade secret. *Id.* at 364–65. As a doctrine based on equitable principles, however, the shop right does not make sense in the context of the secret of access to a social network account. *Kincade*, 122 A.2d at 364. A social network account, as discussed in Part IIE, cannot be effectively shared. The account would lose all of its value. If the employee had the right to the trade secret in the secret of access to the account, then it would be grossly inequitable to destroy the value in her right to the social network account by requiring that she share it with her former employer. Neither side would gain from access to a worthless account and the worker would lose the value of her trade secret. As Professor Milgrim observed, granting a shop right may not be appropriate in the context of every trade secret. 1 MILGRIM & BENSEN, *supra* note 201, at § 5.02[4][c] ("[I]t is submitted that the nature of trade secret rights . . . must be assessed to determine if a shop right is appropriate in the trade secret context.")

272. See UNIF. TRADE SECRETS ACT § 1(4), 14 U.L.A. 433 (1985).

273. See *id.*

274. Palis, *supra* note 8; Brad Stone, *A Friend's Tweet Could Be an Ad*, N.Y. TIMES (Nov. 21, 2009), <http://www.nytimes.com/2009/11/22/business/22ping.html>.

275. Stone, *supra* note 274.

276. See UNIF. TRADE SECRETS ACT § 1(4), 14 U.L.A. 433 (1985).

is the case for social network account passwords. If the password is not secret and anybody could use it to access the account, the password's worth would decrease because the value of the account would decrease.

As a matter of convention, social network users expect an account to represent one person—one source.²⁷⁷ Users tend to follow a social network account because the account becomes a proxy for a person with whom they feel a sense of connection.²⁷⁸ As a result, following the account would lose its appeal if the password was not secret and no single person had control over the account. Followers would leave.

In addition, the account holder would have to compete with other voices to gain the followers' attention if others had access to the account. The account would have significantly less value to the account holder if he or she no longer had a monopoly on communications from the account. To analogize again to a radio station, a band of frequency would have less worth to a radio station if it were shared with another radio station. In short, whatever economic value the password offers the account holder is in large part based on the fact that it is secret—that the account holder has exclusive access to this account. Indeed, the account is to a great extent defined by its exclusivity in that access is limited. The limited access marks it off from other internet spaces. In that sense, the password, or more broadly, the secret of access, is an integral part of the account.

The idea of protecting the password as a trade secret may seem counter-intuitive because the password has no intrinsic value. The password is just some arbitrary combination of alphanumeric characters which happens to be secret. How can a right to something of no intrinsic value confer protection on something of great value, namely, the social network account? Would providing trade secret protection to passwords metastasize into a means of granting trade secret protection to any information protected by a password? If a password offered legal protection to any information to which it restricted access, trade secret protection would become a vast new property right, superseding the limitations on copyright and patent protection and engulfing the public domain.

Protecting social network account passwords as trade secrets will not lead to this nightmare scenario. It provides only a narrow and limited form of protection—simply prohibiting someone else from misappropriating the secret of exclusive access to the account.²⁷⁹ All other information in the account already accessible to the public would remain unprotected by trade secret law, and all content openly posted in the account would remain availa-

277. See *supra* Part II.E.

278. See *supra* Part I.C.

279. Assuming that the requirements for trade secret protection were met: that the password derived independent economic value from not being generally known and readily available and so on. See *supra* discussion accompanying notes 253–255 .

ble.²⁸⁰ Likewise, the identities and other public information about the people openly linked to the account would also remain unprotected.²⁸¹

Protecting the password as a trade secret would mean only that no one without a trade secret right in the password could access the account's followers through the links from the protected account. The followers, however, could still be accessed from *another* account. For example, returning to the *PhoneDog* case, if Noah Kravitz held the trade secret right to the password to his Twitter account, he would have a right of exclusive access to his account.²⁸² Effectively, this would mean that he would have an exclusive right to post messages under his account name—messages that might be read by other users linked to his account. But trade secret protection would not give Kravitz an exclusive right to access users linked to his account, just an exclusive right to access them from his account. Because profiles of followers on Twitter are usually public, any other Twitter user could identify Kravitz's Twitter followers and communicate with them. Another user would simply lack the efficiency of the automatic links to Kravitz's followers from Kravitz's account. This other user could build links of her own to Kravitz's followers; she just could not use the links laboriously built up in Kravitz's account. In short, trade secret protection for a social network account password would be a very narrow form of protection. It would only grant the rights holder exclusive use of links from the account.

Passwords are a relatively novel form of trade secrets, but courts have already protected them as trade secrets, particularly when the passwords are for a social network account. The Northern District of California, for example, held in *TMX Funding, Inc. v. Impero Technologies* that the password to a computer system merited trade secret protection because it was secret and because it derived economic value from not being readily known.²⁸³

280. Of course, content in the account might be protected under some other intellectual property regime, such as copyright law or trademark law. See *supra* Part II.

281. In some social network services, the account profiles are secret and the identities of followers cannot be seen except by the party which controls the account they follow. In those cases, protecting the exclusive access to the account might protect this information, but only to the extent it is not available from some other source.

282. See, e.g., *Terms & Privacy*, PINTEREST, <http://pinterest.com/about/terms/> (last visited Feb. 20, 2013) ("Except for User Content, the Service itself, all content and other subject matter included on or within the Service, and all Intellectual Property Rights in or related to the Service or any such content or other subject matter ('Pinterest Content') are the property of Pinterest and its licensors."); *Terms of Service*, TWITTER, <https://twitter.com/tos> (last visited Feb. 20, 2013) ("All right, title, and interest in and to the Services (excluding Content provided by users) are and will remain the exclusive property of Twitter and its licensors."). The fact that the social network provider claims a right in the services does not mean that the user cannot claim a right in an account against another user. Users might have rights relative to each other subject to the rights of the social network provider.

283. *TMX Funding, Inc v. Impero Techs.*, No. C 10-00202 JF, 2010 U.S. Dist. LEXIS 60260, at *7 (N.D. Cal. June 17, 2010). The court held that the plaintiff had alleged adequate evidence for the trade secret claim to survive a motion to dismiss. *Id.* Although not apparently the basis for the court's holding, the passwords in *TMX* appeared to protect other information

As courts have already recognized in the recent disputes involving social network accounts, the benefit of access to the account is not access to the information in the account, such as posted messages and the identity of followers, because in many social network accounts, this information is available without the account password.²⁸⁴ Indeed, in the case of many accounts, any member of the public may view the account postings and followers.²⁸⁵ The benefit of access to the account is the convenience of communicating through the account (messages will be automatically sent to the account's followers) and the advantages of cost-effectively interacting with this community.²⁸⁶

Therefore, the password to a social network account derives independent economic value because it is secret. A competitor cannot use the account to conveniently communicate with the account's followers and instead must attract followers by developing her own social network account. The District of Colorado explained the competitive advantage afforded by a secret password to a MySpace account with many followers in *Christou v. Beatport, LLC*:

“Given adequate time and effort, [the defendant] could most likely duplicate or nearly duplicate the list of MySpace friends that [the plaintiff] had developed. However, this would involve individually contacting thousands of individuals with friend requests, and it is by no means clear that all of those individuals would grant [the defendant] permission to contact them. While [the defendant] may be able to duplicate a near approximation of the list, duplicating it exactly and doing so within a time frame in which the list would still be useful to him is less likely.”²⁸⁷

More recently, the Northern District of California came to a similar conclusion in *PhoneDog*, denying a motion to dismiss and allowing a claim for trade secret misappropriation in the password to the Twitter account at issue to continue.²⁸⁸ Thus, exclusive access to such an account with a secret password creates an enormous advantage by offering links already available for

that might qualify for trade secret protection, such as product information and marketing plans. Complaint ¶¶ 43, 60–63, *TMX Funding, Inc. v. Impero Techs.*, No. 510CV00202, 2010 WL 1220930 (N.D. Cal. Jan. 14, 2010). Passwords to social network accounts may differ due to the fact that, in many accounts, the password does not protect any other information that would meet the requirements for trade secret protection. *See supra* Part II.C.

284. *See, e.g., Christou v. Beatport, LLC*, 849 F. Supp. 2d 1055, 1074–77 (D. Colo. 2012).

285. *See supra* Part II.C.

286. *See supra* Part I.B (describing how links work).

287. *Christou*, 849 F. Supp. 2d at 1076.

288. *See PhoneDog v. Kravitz*, No. C 11-03474 MEJ, 2011 WL 5415612, at *7 (N.D. Cal. Nov. 8, 2011).

communication instead of requiring the time-consuming and difficult task of creating them anew.²⁸⁹

3. Remedies

Unlike other legal paradigms, a trade secret claim based on the password makes it possible for the plaintiff to recover for the loss of access to the account itself. Trade secret protection would give the account holder the legal grounds to sue for misappropriation of the password. Misappropriation of a trade secret occurs when a party acquires a trade secret by improper means or violates a promise to keep it secret.²⁹⁰ Essentially, where the owner of the trade secret has taken adequate measures to maintain the secrecy of the trade secret, he has a claim for trade secret misappropriation against a party that has violated a promise to keep the password secret.²⁹¹

Remedies available to a trade secret owner for misappropriation include money damages, injunctions, and court orders requiring the defendant to return the trade secret.²⁹² A court may enjoin the defendant's use of a trade secret.²⁹³ Perhaps more helpfully, the court would have the power to restore the plaintiff's access to the account. Section 2(c) of the Uniform Trade Secrets Act gives courts the authority to order the defendant to take "affirmative actions to protect a trade secret."²⁹⁴ Because a defendant in a dispute over the password to a social network account is likely to change the password, thereby locking the plaintiff out of the account, simply enjoining the defendant from using the password fails to restore access to the plaintiff. The more effective remedy is a court order requiring that the defendant return the password to the plaintiff. Section 2(c) is intended in part to give courts the power to order the return of trade secrets.²⁹⁵ The commentary to section 2(c) explains that a court may order "that a misappropriator return the fruits of misappropriation to an aggrieved person, e.g., the return of stolen blueprints or the surrender of surreptitious photographs or recordings."²⁹⁶ An order re-

289. See *supra* Part II.E.

290. See UNIF. TRADE SECRETS ACT § 1(2), 14 U.L.A. 433 (1985). Misappropriation may also occur where the defendant knows that the trade secret had been acquired by mistake. See *id.*

291. See *id.* § 1; see also, e.g., *Learning Curve Toys, Inc. v. PlayWood Toys, Inc.*, 342 F.3d 714, 725–26 (7th Cir. 2003).

292. UNIF. TRADE SECRETS ACT §§ 2–3.

293. *Id.* § 2; see, e.g., *Lamb Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 975 (9th Cir. 1991).

294. See UNIF. TRADE SECRETS ACT § 2(c). Under the common law, courts also sometimes ordered the defendant to return material in which the trade secret was embodied as an equitable remedy. See 1 MILGRIM & BENSON, *supra* note 201, at § 15.02[4].

295. See UNIF. TRADE SECRETS ACT § 2; see, e.g., *Cent. Valley Gen. Hosp. v. Smith*, 75 Cal. Rptr. 3d 771, 793–94 (Cal. App. 5 Dist. 2008) (holding that a court might order the defendant to return materials to the plaintiff under the California's Uniform Trade Secrets Act and citing to the commentary to Section 2(c) of the Uniform Trade Secrets Act).

296. UNIF. TRADE SECRETS ACT § 2.

quiring that the defendant relinquish the password to the plaintiff would likely be the most straightforward form of remedy.

The plaintiff might also recover money for the misappropriation. Monetary recovery for trade secret misappropriation is the greater of the plaintiff's actual losses or the defendant's actual gains.²⁹⁷ Because trade secret protection for a password is narrow, damages would be quite limited.

In considering the plaintiff's actual losses, courts typically focus on the plaintiff's lost profits due to misappropriation of the trade secret.²⁹⁸ Calculating the profits lost by the plaintiff due to the misappropriation of a social network account would be difficult. First, determining the extent to which a follower linked to a social network account translates into profits for the social network account holder is far from an exact science.²⁹⁹ In some cases, the plaintiff could point to click-through sales (those sales made to users who click a link to the sales website posted in the social network account).³⁰⁰ However, it might not be clear whether the sale was made to a follower or someone else who happened upon the social network account, thereby making it unclear whether the links in the account led to the sale. Furthermore, many sales might not be captured by click-through data.

Second, the plaintiff's losses for misappropriation of the password would have to be measured against the information she could access in the account even without the password. For example, in *Eagle v. Morgan*, even after Eagle's former employer locked her out of the LinkedIn account at issue, Eagle could still find her contacts.³⁰¹ Her loss was only the loss of convenience of automatic connections to her contacts from the account.³⁰² In some cases, this loss of convenience might be quite significant. In *PhoneDog*, for example, PhoneDog lost direct and immediate access to 17,000 people who were likely interested in the products their advertisers offered.³⁰³ As the court observed in *Christou*, duplicating links to followers

297. *Id.* § 3(a); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 45 (1995).

298. *See, e.g.*, *Children's Broad. Corp. v. Walt Disney Co.*, 245 F.3d 1008, 1016 (8th Cir. 2001). *Contra* *Roton Barrier, Inc. v. Stanley Works*, 79 F.3d 1112, 1120–22, 37 U.S.P.Q.2d (BNA) 1816 (Fed. Cir. 1996) (including price erosion as a measure of damages).

299. *See, e.g.*, *Romero, supra* note 36, at 145–48.

300. ZIMMERMAN & SAHLIN, *supra* note 219, at 681–99; Chris O'Brien, *Charlie Sheen Offers Lessons to Silicon Valley. Yes, Really*, MERCURY NEWS (Mar. 8, 2011), http://www.mercurynews.com/business/ci_17568271.

301. *Eagle v. Morgan*, No. 11-4303, 2013 WL 943350, at *14 (E.D. Pa. 2013) (“Although the Court is aware of the hardship in Plaintiff's efforts to prove who attempted to contact her during this time period when no records were maintained, the Court nonetheless notes that any reasonable person seeking Dr. Eagle and aware of her self-proclaimed prompt responsiveness would have sought out other ways to reach her or, at a minimum, informed her that they had tried to reach her.”).

302. *Id.*

303. *See* First Amended Complaint ¶¶ 11, 12, 19–22, *Phonedog, LLC v. Kravitz*, No. 3:11-cv-03474, 2011 WL 6955632 (Nov. 29, 2011). Of course, Kravitz would likely argue that PhoneDog never had real access to these people because he maintained control over the ac-

would likely take considerable time and effort.³⁰⁴ However, the cost in time and effort of building the account cannot be the measure of the plaintiff's lost profits because costs must be compared against revenues in calculating lost profits.³⁰⁵ Calculating the defendant's actual gains would involve similar challenges.³⁰⁶ In theory, however, a court could calculate the amount of money required to compensate the plaintiff for the loss of access to the social network account.

Protecting the social network account password as a trade secret would be only a very narrow and limited form of protection, but it would fill the gap left by other legal paradigms. Privacy, publicity, trademark, and copy-right law do not protect the links to the account. Yet, at the heart of disputes over social network accounts are conflicting claims to exclusive access to links built up in the account. Trade secret protection for the password would protect precisely this exclusive access to these links.³⁰⁷ Trade secret law

count. Noah Kravitz's Counterclaims and Answer To Plaintiff's First Amended Complaint for Misappropriation Of Trade Secrets, Interference with Prospective Economic Advantage and Conversion ¶ 18, *Phonedog*, 2012 WL 554034 (Feb. 14, 2012). However, in theory, at least, a company might lose such direct access if an employee took a social network account that it had used to communicate with followers.

304. *Christou v. Beatport, LLC*, No. 10-cv-02912-RBJ-KMT, 2012 WL 872574, at *16 (D. Colo. Mar. 14, 2012).

305. *See, e.g., Healthcare Advocates v. Affordable Healthcare Options*, No. 09-5839, 2010 U.S. Dist. LEXIS 122365, at *5-6 (E.D. Pa. Nov. 18, 2010).

306. *See UNIF. TRADE SECRETS ACT* § 3(a), 14 U.L.A. 433 (1985).

307. A plaintiff might claim that a defendant's action in taking a social network account password violates the Computer Fraud and Abuse Act ("CFAA"). 18 U.S.C. § 1030(a) (2011). Potential claims might include a claim under Section 1030(a)(2)(C) that the defendant intentionally accessed a computer without authorization and thereby obtained information from the protected computer or a claim under Section 1030(a)(5)(C) that the defendant intentionally accessed a protected computer without authorization, and as a result of such conduct, caused damage and loss. *Eagle v. Morgan*, No. 11-4303, 2012 WL 4739436, at *2 (E.D. Pa. Oct. 4, 2012). However, civil claims under the CFAA must show "damage or loss." 18 U.S.C. § 1030(g). Some courts have interpreted this damage or loss requirement quite strictly, requiring that the plaintiff show that his losses stem from some impairment of the computer system. *E.g., Eagle*, 2012 WL 4739436, at *5; *Resdev, LLC v. Lot Builders Ass'n, Inc.*, No. 6:04-CV-1374ORL31DAB, 2005 WL 1924743, at *5 n.5 (M.D. Fla. 2005); *Moulton v. VC3*, No. 1:00CV434-TWT, 2000 WL 33310901, at *6 (N.D. Ga. 2000). The plaintiff would be unlikely to show that the computer system has been impaired by the loss a social network account. *Eagle*, 2012 WL 4739436, at *5. However, a claim under the CFAA might be more successful in the Ninth Circuit, where courts construe "damage or loss" more liberally. *Therapeutic Res. Faculty v. NBTY, Inc.*, 488 F. Supp. 2d 991, 995-97 (E.D. Cal. 2007) (holding that a claim could be stated under the CFAA against a party that exceeded authorized use of password and thereby obtained additional access to licensed materials). In any case, the CFAA does not provide a means of determining which party has the right to the social network account ab initio and therefore which party's access is unauthorized. 18 U.S.C. § 1030. In disputes over social network accounts in the employment context, a critical issue is which party holds rights to an account created during the course of employment. Trade secret law is a better approach for resolving disputes over social network accounts because, as explained in the next part, it provides a framework for allocating rights in a trade secret account ab initio.

therefore provides a legal means to protect what is of most value in the account.

B. Trade Secret Law: The Best Framework to Promote Incentives

Trade secret law not only offers a legal mechanism to regain access to the account, but is also the best fit for the problem of allocating and protecting rights in a social network account. The right solution to disputes over social network accounts will provide incentives for the development of useful information. Trade secret law is driven in large part by this same policy concern. The rationale for trade secret protection therefore aligns with the rationale for protecting rights to an account. Furthermore, trade secret law's framework for providing incentives fits the problem of disputes over social network accounts.

1. Preserving Incentives to Produce Valuable Information

The trade secret framework preserves incentives to produce valuable information by protecting that information from misappropriation.³⁰⁸ Trade secret law would operate the same way in the context of social network platforms. By protecting the social network account from misappropriation, trade secret law would provide an incentive for the development of valuable information. In a social network account, the links to the account roughly represent the value of the information, both to the public and to the account holder. With regard to the public, the fact that members of the public choose to follow an account suggests that the information provided in the account has worth to them. The number of links to an account may therefore roughly correspond to the usefulness to the public of the information provided.³⁰⁹ The links also have worth to the account holder by providing an audience and a means to obtain feedback.

Moreover, providing trade secret protection encourages organizations to leverage the talents of their workers and encourages workers to sell their labor by giving each party recourse against the other for misappropriation of the social network account. Thus, protecting the account from misappropriation

308. This is the property rationale for trade secret protection. See RESTATEMENT (THIRD) UNFAIR COMPETITION § 39 cmt. a (1995). A competing rationale for the legal protection of trade secrets is the discouragement of unfair competition by creating a tort for the wrongful appropriation of competitive information. See *id.* As Judge Posner has argued, however, the property and tort rationales are complementary not contradictory. *Rockwell Graphic Sys., Inc. v. DEV Indus., Inc.*, 925 F.2d 174, 178–79 (7th Cir. 1991). The aim of both rationales is to discourage individuals from engaging in activities that merely redistribute wealth rather than creating wealth. *Id.*

309. In fact, due to the amplifying effect of the social networks in social media, the benefits of information provided in the account goes beyond the value to the people connected to the account. Those in the network of a person connected to an account benefit from information passed on to them. The public also benefits from the continual feedback provided to companies through the conversation that social media fosters. See *supra* Part II.D.1.

tion encourages organizations and individuals to provide information of value to the public.

The paradoxical effect of trade secret protection is that protection of trade secrets encourages confidential disclosure—to the benefit of the public.³¹⁰ Without protection, trade secret owners would hesitate to disclose their trade secrets, even for the purpose of engaging in useful transactions.³¹¹ Protection despite disclosure is crucial to many forms of transactions, particularly for interactions between employers and workers. For instance, assured of legal protection, employers disclose their trade secrets to workers in order that the workers may use them on the employer's behalf.³¹² The public then benefits from the production of goods and services made possible by these trade secrets.³¹³

Perhaps more importantly, trade secret law properly allocates rights in the account *ab initio*. The particular challenge in disputes over social network accounts is that they cannot be resolved by reference to a preexisting right. Unlike disputes over domain names, a social network account is not tied to a trademark in the way that a domain name is tied to a preexisting trademark.³¹⁴ Whatever value there is in an account is created when the links in the account are generated. Therefore, resolving a dispute over rights to a social network account requires determining which party had the rights to the links at creation. Moreover, the solution must allocate rights in a way that best sets incentives to create and invest in these accounts.

As described in Parts I and II, the benefits of organizations' participation in social network platforms are enhanced when employers use their workers to engage with the public in a personal manner. At the same time, the public benefits when workers have an incentive to use social networking to enhance their skills. Consequently, the solution to disputes over social network accounts should provide incentives to both employers and workers to invest in social network accounts without punishing blended personal and professional use.

2. Rights to a Trade Secret Developed During Employment

Trade secret law has a well-established set of principles for optimizing incentives to create in the employment context. First, rights to a trade secret vest in the party that developed the trade secret information.³¹⁵ By granting

310. Mark Lemley, *The Surprising Virtues of Treating Trade Secrets as IP Rights*, 61 STAN. L. REV. 311, 332–37 (2008).

311. *Id.*

312. *Id.*

313. *Id.* at 335.

314. *See supra* Part II.A.

315. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 42 cmt. e (1995); *Wireless Specialty Apparatus Co. v. Mica Condenser Co.*, 131 N.E. 307, 308 (Mass. 1921); *MILGRIM & BENSEN*, *supra* note 201, at § 5.02[4]; *see Ingersoll-Rand Co. v. Ciavatta*, 542 A.2d 879, 885

rights to the creator, trade secret law encourages the development of useful information by encouraging the work at its source.³¹⁶

This default rule can be modified by the “hired-to-invent” doctrine. Even in the absence of an express agreement, where the worker develops the information on behalf of the employer, the rights to the trade secret belong to the employer.³¹⁷ Under the hired-to-invent doctrine, courts determine whether the employer or worker possesses the right to a trade secret developed during the course of the employment based on an implied-in-fact agreement between the parties.³¹⁸ The case law regarding the hired-to-invent doctrine is more developed in the context of patents, but the underlying principle is the same.³¹⁹ The employer obtains the rights to inventions which it hired the employee to invent, whether the invention results in a trade secret or a patent.³²⁰

The hired-to-invent doctrine uses contract principles to optimize incentives for both employer and worker.³²¹ When the employer hires the worker to create a specific invention, the worker effectively bargains for and receives compensation for his creation in the form of his pay.³²² Assuming low transaction costs and competitive markets, contracts optimize benefits for both parties and the public.³²³ The worker obtains the greatest available compensation for his creative labor, and the employer obtains the creative work at the lowest possible cost.³²⁴ In turn, the public enjoys the benefits of the trade secret at minimal cost.³²⁵

(N.J. 1988) (“The common law regards an invention as the property of the inventor who conceived, developed, and perfected it.”).

316. See *American Stay Co. v. Delaney*, 97 N.E. 911, 912 (Mass. 1912); *Wexler v. Greenberg*, 160 A.2d 430, 433–34 (Pa. 1960).

317. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 42 cmt. e. The law on this subject is virtually identical in every state. Mary Lafrance, *Nevada’s Employee Inventions Statute: Novel, Nonobvious, and Patently Wrong*, 3 NEV. L.J. 88, 91 (2002).

318. *Teets v. Chromalloy Gas Turbine Corp.*, 83 F.3d 403, 407 (Fed. Cir. 1996).

319. 1 MILGRIM & BENSEN, *supra* note 201, at § 5.02[4]; see, e.g., *McClain v. State*, 269 S.W.3d 191, 198 (Tex. App. 2008). Logically, the rules for the hired-to-invent doctrine should be the same for patent law and trade secret law because the same invention might qualify for both trade secret protection and meet the requirements for patentability. 1 MILGRIM & BENSEN, *supra* note 201, at § 8.02[1].

320. See *Wireless Specialty Apparatus*, 131 N.E. at 308 (applying the same reasoning under the hired-to-invent doctrine to both trade secrets and patents).

321. As the Federal Circuit observed, the hired-to-invent doctrine is grounded “in the principles of contract law that allow parties to freely structure their transactions and obtain the benefit of any bargains reached.” *Banks v. Unisys Corp.*, 228 F.3d 1357, 1359 (Fed. Cir. 2000).

322. Michael I. Swygert & Katherine Earle Yanes, *A Primer on the Coase Theorem: Making Law in a World of Zero Transaction Costs*, 11 DEPAUL BUS. L.J. 1, 9–11 (1998) (explaining how contracts optimize benefits in conditions of low transaction costs and competitive markets).

323. *Id.*

324. *Id.*

325. *Id.*

Therefore, to overcome the default rule that rights to a trade secret vest in the creator, the employer must show that the parties in fact agreed that the rights would instead vest in the employer.³²⁶ Specifically, the employer is required to show that there was a true “meeting of the minds” or “tacit understanding.”³²⁷ To fall under this implied agreement, the trade secret must arise out of the duties assigned to the employee.³²⁸ Thus, where the employee was directed to create specific information for the employer, any trade secret resulting from that work belongs to the employer.³²⁹ Where the employee is hired in a general inventive capacity, however, whether the employee’s work belongs to the employer depends on a number of factors such as how closely related the information was to the employer’s business, the amount of resources assigned to this task, and whether workers have assigned inventions to the employer in the past.³³⁰ The analysis seeks to determine whether the employer made the terms of its offer clear.³³¹ A reasonable person in the worker’s shoes should understand that the employer has offered to pay the worker in exchange for obtaining the rights to the information the worker has created.³³² The worker must agree to this offer, even if tacitly.³³³

326. *Banks*, 228 F.3d at 1359.

327. *Teets v. Chromalloy Gas Turbine Corp.*, 83 F.3d 403, 407 (Fed. Cir. 1996) (quoting *Balt. & Ohio R.R. Co. v. United States*, 261 U.S. 592, 597 (1923)).

328. Courts demand more specific instructions where the trade secret is a true invention in the sense that it would qualify for patent protection. A patentable invention is inherently unique and unpredictable due to the requirements of novelty and nonobviousness. Therefore, the employer must show that the invention resulted from specific instructions instead of being conceived as a merely fortuitous by-product of the worker’s job. *See United States v. Dubilier Condenser Corp.*, 289 U.S. 178, 188 (1933) (“The reluctance of courts to imply or infer an agreement by the employee to assign his patent is due to a recognition of the peculiar nature of the act of invention . . .”). Where the information is a compilation of information, the standard appears to be more relaxed: the trade secret should arise out of the duties to which the employee was assigned. *See RESTATEMENT (THIRD) UNFAIR COMPETITION* § 42 cmt. e (1995); *see, e.g., N. Elec. Co., Inc. v. Torma*, 819 N.E.2d 417 (Ind. App. 2004).

329. *See, e.g., Vigitron, Inc. v. Ferguson*, 419 A.2d 1115, 1117 (N.H. 1980) (“The product of one who is hired to invent, accomplish a prescribed result, or aid in the development of products belongs to the employer in the absence of a written contract to assign.”); *Kinkade v. N.Y. Shipbuilding Corp.*, 122 A.2d 360, 369 (N.J. 1956); *Nat’l Dev. Co. v. Gray*, 55 N.E.2d 783, 787 (Mass. 1944).

330. Thomas F. Cotter, *Conflicting Interests in Trade Secrets*, 48 FLA. L. REV. 591, 594 (1996); 8 DONALD S. CHISUM, CHISUM ON PATENTS § 22.03[2] (2012) (listing factors for the hired-to-invent doctrine in cases of patentable inventions).

331. *See Nat’l Dev. Co.*, 55 N.E.2d at 786–87 (noting that a hired-to-invent agreement only exists where “the contract, construed in the light of the attending circumstances, shows that the employee must have reasonably understood that such inventions as resulted from his performance of the contract should belong to the employer”).

332. *See id.*

333. *See Teets v. Chromalloy Gas Turbine Corp.*, 83 F.3d 403, 407 (Fed. Cir. 1996) (“An implied-in-fact contract is an agreement ‘founded upon a meeting of the minds, which, although not embodied in an express contract, is inferred, as a fact from conduct of the parties

This agreement may take place at any time during the course of employment. In this sense, the term hired to invent is misleading because the parties may agree that the employee will invent on behalf of the employer long after the employee is hired.³³⁴ The implied-in-fact agreement in place at the time of the invention governs the rights to the invention.³³⁵

3. Applying the Trade Secret Approach

The trade secret approach applies in a straightforward fashion to optimize the incentives of the employer and worker to invest in social networking. First, the party that does the work of creating the account should, by default, have the rights to the account.³³⁶ Creating the account should not be defined as merely the trivial work of opening the account, however, but as the substantial investment of time and energy needed to develop the links in the account. The links to the account are an integral part of the account and give it value.

Second, where the parties have agreed, even impliedly, that the worker created the account in exchange for his salary or other compensation, the employer should have the rights to the account. Again, allocating rights based on contract principles optimizes incentives to invest in social network accounts. In a free market, the worker bargains for the highest compensation for his labor in developing a following for the social network account. The employer bargains for access to the account at the lowest cost. And the public benefits from the creation of the account at the lower cost.

Trade secret law recognizes two competing policy concerns in employer-worker disputes over rights to material developed during the course of employment. On the one hand, allowing the parties the freedom to bargain enables each to optimize their benefits through contract.³³⁷ On the other hand, granting the employer rights in a worker's skills and information

showing, in the light of the surrounding circumstances, their tacit understanding.” (quoting *Balt. & Ohio R.R. v. United States*, 261 U.S. 592, 597 (1923)).

334. *Pursche v. Atlas Scraper & Eng'g Co.*, 300 F.2d 467 (9th Cir. 1961) (employer is entitled to inventions of an employee who, although not initially hired to invent, was later assigned to use his inventive talents on behalf of the employer); *Houghton v. United States*, 23 F.2d 386, 390 (4th Cir. 1928) (“It matters not in what capacity the employee may originally have been hired, if he be set to experimenting with the view of making an invention . . . what he accomplishes by the experiments belongs to the employer.”).

335. *Liggett Grp., Inc. v. Sunas*, 437 S.E.2d 674, 679–80 (N.C. Ct. App. 1993).

336. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 42 cmt. e (1995); MILGRIM & BENSON, *supra* note 201, at § 5.02[4]; *see, e.g.*, *Ingersoll-Rand Co. v. Ciavatta*, 542 A.2d 879, 885 (N.J. 1988) (“The common law regards an invention as the property of the inventor who conceived, developed, and perfected it.”); *Wireless Specialty Apparatus Co. v. Mica Condenser Co.*, 131 N.E. 307, 308 (Mass. 1921).

337. *See Swygert & Yanes, supra* note 322, at 9–11.

harms the worker by decreasing his ability to earn a livelihood.³³⁸ The public interest in open competition in turn suffers when workers are prevented from competing with former employers.³³⁹ Granting the employer a right to such skills and information, either by contract or through trade secret protection, discourages an employee from leaving because she cannot make a living outside the company.³⁴⁰ As a result, employers do not compete for the best employees either through retention or hiring.³⁴¹ The worker then has no incentive to improve her skills because she will not be compensated for her investment in enhanced skills through competition among employers.³⁴² A number of undesirable consequences result, including decreases in innovation, worker mobility and economic growth.³⁴³

Trade secret law attempts to resolve this tension by carving out the skills, experience, and knowledge necessary to a worker to make a living in her chosen profession from trade secret protection and from noncompete agreements.³⁴⁴ Therefore, trade secret law does not give the employer a right to a worker's skill or knowledge, even when such skill or knowledge is acquired during the employment.³⁴⁵ Nor may the employer contractually restrict a departing worker from using his skills or knowledge to the extent that

338. See *Wexler v. Greenberg*, 160 A.2d 430, 433 (Pa. 1960) (noting that preventing a worker from using his skills for another employer may restrain the worker from pursuing his livelihood).

339. See *id.* (noting that preventing a worker from using his skills for another employer may harm "the public in general in forestalling, to any extent widespread technological advances").

340. Matt Marx, *The Firm Strikes Back: Non-Compete Agreements and the Mobility of Technical Professionals*, 76 AM. SOC. REV. 695 (2011).

341. Fisk & Barry, *supra* note 226 (manuscript at 33).

342. *Id.* at 27 ("[E]mployees in strict enforcement jurisdictions will be discouraged from investing in their human capital because they know that they will not be able to solicit employment offers from outside firms that they could either accept or use as leverage to negotiate an increase in their salary at their current employer.").

343. *Id.* at 26, 28–30, 35 (describing Fisk & Barry's argument that restraints on employees' ability to compete depresses innovation by impeding the cross-pollination of skills and ideas between organizations, hampers the creation of new firms and entrepreneurial activity, and increases employer search costs).

344. See Robert Unikel, *Bridging the Trade Secret Gap: Protecting "Confidential Information" Not Rising to the Level of Trade Secrets*, 29 LOY. U. CHI. L.J. 841, 867–75 (1998) (describing the current two-tiered approach, in which an employee's knowledge is classified either as general and thus not subject to judicial protection, or as a trade secret and entitled to judicial protection).

345. *Basic Chems., Inc. v. Benson*, 251 N.W.2d 220, 227 (Iowa 1977) ("One rather salient point runs steadfastly throughout decisions in this area in most jurisdictions, and that is that the employee, upon terminating his employment relationship with his employer, is entitled to take with him 'the experience, knowledge, memory, and skill, which he had gained while there employed.'"); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 42 cmt. d (1995) ("The distinction between trade secrets and general skill, knowledge, training, and experience is intended to achieve a reasonable balance between the protection of confidential information and the mobility of employees.").

the agreement unreasonably restricts the worker's ability to make a living.³⁴⁶ Indeed, a growing chorus of commentators argues that all types of noncompete agreements harm the public interest and should not be enforced.³⁴⁷

The same concerns arise in the context of rights to social network accounts. Workers use their social network accounts to develop skills and knowledge and to build a network which enables them to continue developing skills and knowledge. A worker might, for example, use her social network account to hone her communication skills, build a personal brand, learn about news and opportunities specific to her industry, and build a personal and professional network.³⁴⁸ Allowing the employer to prevent a worker from using her skills and knowledge when she leaves her employer without compensation would decrease the worker's incentive to invest in herself through social networking. Nevertheless, a distinction can be made between the social network account and the worker's collective abilities. The account is only the consequence of a worker's skill and experience in her chosen field, not the worker's skill or experience itself. With regard to the worker's network, the social network account is likewise only a virtual representation of links to people rather than the network itself.

Therefore, a worker's agreement to transfer rights in the social network account to the employer would not necessarily harm the worker's interest or the public interest. Where the worker freely bargains away the social network account in exchange for its market value, the worker will have received optimal compensation for her labor and skill.³⁴⁹ Such an agreement does not prevent the worker from making a living in her chosen profession. She may still use her expertise. Moreover, her personal brand is still hers because she retains the right to her identity. Thus, the worker could enjoin the employer from continuing to use her name or even a username associated with her without permission based on a trademark, right of publicity, or misappropriation of identity theory.³⁵⁰ The worker can open new accounts to recreate the electronic links with her network and, to the extent former followers followed her personally, they might be persuaded to follow her again. Of course, recreating the links to former followers would take an investment

346. RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. g (1981) (explaining that states vary widely in their interpretations of reasonableness and some states do not enforce noncompete contracts at all); see Viva Moffat, *Making Non-Competes Unenforceable*, 54 ARIZ. L. REV. 939 (2012).

347. See Moffat, *supra* note 346; Alan Hyde, *Should Noncompetes Be Enforced? New Empirical Evidence Reveals the Economic Harm of Non-compete Covenants*, REG., Winter 2010–2011, at 6; see also Fisk & Barry, *supra* note 226 (manuscript at 35). Not all states enforce noncompete agreements. In California, for example, noncompete agreements are prohibited. CAL. BUS. & PROF. CODE § 16600 (West 2010).

348. See *supra* Part I.A, specifically text accompanying notes 92–102.

349. See *supra* text accompanying notes 289–292.

350. See *supra* Part II.A.

of time and effort. But in a fair bargain, the employer will have compensated her for the work required to recreate the electronic links to her network.

Nevertheless, the employer should bear a heavy burden to prove that the worker in fact agreed not only to ensure that both parties had a true opportunity to bargain for the best deal, but also to avoid the harms caused by decreasing the worker's incentive to invest in her own skills and knowledge. A worker may make less effort to build a social network online and to develop a personal brand if she believes that her employer may take away her social network account without compensation. As a result, she may forego opportunities to learn more about her industry, hone her communication skills, meet other professionals, and, in general, improve her expertise and knowledge.

As in the trade secret context, the challenge in applying this analysis is determining the nature of the agreement. The distinctions are subtle. The fact that the worker used the trade secret (access to a social network account) on the employer's behalf does not end the analysis.³⁵¹ The parties must agree not only that the worker will use the trade secret on the employer's behalf, but that the employer will obtain the rights to the trade secret.³⁵² Thus, in the context of social network platforms, the fact that a worker agreed to use her social network account to benefit the employer (for example, by linking to the employer's web site in the *PhoneDog* case) does not necessarily imply that the parties agreed that the account itself belongs to the employer. As in the trade secret context, a court must carefully scrutinize the circumstances and the objective manifestations of each party to determine the nature of the agreement.³⁵³

The inquiry and factors used in trade secret cases provide useful tools for analyzing the facts in a given case.³⁵⁴ The first challenge in analyzing the terms of any implied agreement between employer and worker is to determine the nature of the employer's offer. The relatively easy case is one in which the employer gives specific instructions to create social network ac-

351. See, e.g., *Structural Dynamics Res. Corp. v. Eng'g Mech. Res. Corp.*, 401 F. Supp. 1102, 1112 (D. Mich. 1975) (finding that an employer did not have a trade right to its former workers' invention although the workers created it during the time of their employment and used it on behalf of their former employer).

352. The mere fact that the worker creates something of use to the employer does not mean that the employer has rights to that invention. See RESTATEMENT (THIRD) UNFAIR COMPETITION § 42 cmt. e (1995) ("[I]f one is employed merely to do work in a particular line in which he is an expert, there is no inference that inventions which he makes while so working belong to the employer.").

353. See *Teets v. Chromalloy Gas Turbine Corp.*, 83 F.3d 403, 407 (Fed. Cir. 1996); see also Richard A. Lord, *Requirements for Informal Contracts*, in 1 WILLISTON ON CONTRACTS § 3:2 (4th ed. 2010) (stating that a binding mutual agreement may be implied from the parties' conduct and the surrounding circumstances where the parties manifest objectively an intent to be bound by the agreement).

354. Thomas F. Cotter, *supra* note 330, at 594; 8 CHISUM, *supra* note 330, § 22.03[2] (listing factors for the hired-to-invent doctrine in cases of patentable inventions).

counts for the employer's use. Where the employer gives the worker more general instructions, a court might look to the factors outlined above—custom, relation to the employer's business, and the employer's dedication of resources to the task—to determine whether the employer made clear its expectation that the worker create a social network account for the employer in exchange for compensation.

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. An employer's dedication of resources to help workers develop social network accounts, such as guidance, training, and evaluation, would also indicate agreement.

The nature of the content in the account also indicates the purpose for which the account is created and developed. Courts, however, should be cautious in drawing conclusions solely based on the account's content. Again, professional and personal content blur on social network platforms. An individual may post professional content for personal reasons, such as to build skills and a professional network. Conversely, an individual may post personal content on behalf of the employer to attract an audience for the employer's website. A court should not conclude that a worker created an account on behalf of the employer solely because the worker posted content related to his profession.

To determine whether the worker agreed to the employer's implied offer, the court must evaluate the objective manifestations of the worker.³⁵⁵ The worker's agreement might be manifested through his words.³⁵⁶ For example, in *Morris v. Scenera Research*, the court construed the worker's reference to himself as the "chief inventor" and his statement that his employment goal was to develop new inventions as indicating that he understood that his inventions would belong to his employer.³⁵⁷ Similarly, in the social network context, a worker's reference to herself as "social networking director" and a statement that her goal is to develop a social network account for her employer might indicate an understanding that she had built the social network account for her employer to keep. In a case where the employer made the terms quite clear, the employee's agreement might simply be gleaned from her decision to stay at the job and perform by creating the social network account.³⁵⁸

355. See *Teets*, 83 F.3d at 407; see also Lord, *supra* note 353, at § 3:2.

356. *Morris v. Scenera Research*, No. 09 CVS 19678, 2012 WL 70347, at *5, ¶ 25 (N.C. Super. 2012).

357. *Id.*

358. Whether the worker adequately manifests agreement by simply continuing to work when the employer imposes an additional obligation after the initial hiring is a difficult question. As the Michigan Supreme Court observed in *Bankey v. Storer Broadcasting Co. (In re Certified Question)*, 443 N.W.2d 112 (Mich. 1989), the characterization of employment as a series of one-day unilateral contracts is "strikingly artificial." *Id.* at 116 (holding that employer may unilaterally change written discharge-for-cause policy to employment-at-will policy, but,

A number of other factors specific to the social network account context would help to determine the intentions of the parties: the name of the account, exclusivity of access, the type of account, and whether the account preexists the employment relationship. First, the name of the account provides an important clue. Where the account is named after the employer, the name suggests that the parties intended that the employer would have a right to the account. Similarly, an account named after the worker suggests that the parties understood that the worker would retain exclusive right of access. Of course, the harder cases are those like the *PhoneDog* case where the name of the account combined both the name of the employer and the worker, like @PhoneDog_Noah.³⁵⁹

With regard to the exclusivity of access, the fact that several workers had access to and worked on one account would suggest that the parties did not contemplate that any one worker had an exclusive right to the account. Conversely, the fact that only one worker ever accessed the account would be evidence in support of that worker's exclusive right to the account. The type of account might also indicate the parties' intentions. For example, on Facebook, a user's "personal timeline" must only represent individuals, at least according to Facebook's instructions.³⁶⁰ However, "Facebook Pages" may represent an organization, business, or celebrity.³⁶¹ The fact that a worker chose to create a "personal timeline" on Facebook as opposed to a "Facebook Page," or some other form of social network account, might indicate that the parties intended that the account would belong to the worker. Finally, the fact that an account preexists the employment relationship obviates the need to analyze ownership under the work-made-for-hire doctrine. The worker was clearly not hired to invent if she created the account before she was hired.³⁶²

to be effective, the affected employees must receive reasonable notice of the change). "Few employers and employee begin each day contemplating whether to renew or modify the employment contract in effect at the close of work on the previous day." *Id.* at 116. For example, in *Liggett Group, Inc. v. Sunas*, 437 S.E.2d 674 (N.C. App. 1993), the court held that a policy unilaterally implemented by the employer that employee inventions belong to the employer years after the employee was hired did not become incorporated into the employment agreement. *Id.* at 678–79. However, the court held in the same case that the employer's instruction to the employee to create a particular invention could form the basis of an agreement to assign the invention to the employer if the employee created the invention after the instruction. *Id.* at 679–80.

359. *PhoneDog v. Kravitz*, No. C 11-03474 MEJ, 2011 WL 5415612, at *1 (N.D. Cal. Nov. 8, 2011).

360. *How Are Pages Different from Personal Timelines?*, FACEBOOK, <http://www.facebook.com/help/217671661585622/> (last visited Feb. 11, 2013).

361. *See id.*

362. The parties could still agree to transfer the account between them. In that case, again, a court would have to evaluate the nature of the agreement between the parties.

In short, these factors might help ascertain the parties' intentions. However, in each case, a court would have to carefully evaluate all the circumstances to determine the nature of the parties' "tacit understanding."³⁶³

To conclude, trade secret law offers a flexible and appropriate set of rules for allocating the right of exclusive access to a social network account between employers and workers. Trade secret law not only provides the best framework for optimizing incentives to create valuable information and invest in workers, but trade secret analysis can also be applied directly to disputes over social network accounts to achieve the right outcome.

C. Trade Secrets in Conjunction with Other Legal Concerns

Trade secret analysis will also lead to a just outcome for legal claims arising under other legal paradigms. In many cases, the question of access to the account can be separated from the issue of legal rights in the content of the account. The outcome of the trade secret analysis in these cases will have no bearing on the outcome of other legal claims. Where access to the account implicates other rights, however, the trade secret resolution to the access question will generally not conflict with the resolution of other legal claims related to the account.

1. Trademark and Personality Rights

In general, trademark and personality rights claims may be resolved independently from the issue of access to the account.³⁶⁴ Where trademarks or signifiers of identity are used confusingly in an account, they may often be deleted or changed.³⁶⁵ If the trademark holder has lingering concerns about confusion, a court might require the account holder to post disclaimers disavowing any connection to the trademark's owner.

That is not to say that the issue of rights in an account and the issue of rights in the name of the account have no relation to each other. As described in Part III.B.2, the name of the account should be a factor in the hired-to-invent analysis. For example, when a Coca-Cola employee creates a Facebook page named "Coca-Cola," the name strongly suggests that the parties agreed that the page would belong to Coca-Cola.³⁶⁶ In most cases, as a result, the trade secret approach would award access to the account to the party that owned the rights to the trademark or persona in the name of the account.

363. *Teets v. Chromalloy Gas Turbine Corp.*, 83 F.3d 403, 407 (Fed. Cir. 1996).

364. *See supra* Part I.A.

365. *See supra* note 159 and accompanying text.

366. The situations where the account is named after both parties will be the hard cases.

2. Privacy and Trade Secrets

To the extent that an account contains trade secrets in addition to the password,³⁶⁷ the analysis regarding the rights to those trade secrets would parallel the analysis regarding the right to access the account. Thus, whichever party had the right to access the account would, in most cases, also have the right to the trade secrets in the account. If the outcomes conflicted, a court might simply order the party that loses the account to delete the secret information before turning over the password.³⁶⁸ Privacy concerns can be resolved similarly.

Moreover, like trademarks and personality rights, the existence of private information may help to resolve the hired-to-invent question by indicating the expectations of the parties. The fact that a worker posted highly private information in the account may indicate that the worker did not foresee and therefore did not agree to turn the account over to the employer. Similarly, the trade secret analysis may help to resolve the privacy question. Where the parties clearly agreed that the employer would take the account, a court might reasonably conclude that the worker did not consider the information in the account to be private.

The expectations of the followers linked to the account raise a more difficult privacy problem. Where the account is only visible to a small circle, such as friends and family, followers of that account might reasonably expect that information sent to that account or visible from that account would remain out of public view.³⁶⁹ Simply as a matter of public policy, social network users should be able to proceed with some confidence that their private information will not be turned over to others as accounts change hands.³⁷⁰ Although the followers may not be party to a suit over rights to a social network account, the plaintiff in most cases will request that the court enjoin the defendant from using the account and, in considering whether to grant an injunction, the court must consider the public interest as a factor in the decision.³⁷¹ This consideration of the public interest should include an

367. A set of customers linked to the account might qualify as trade secrets where the customers linked to the account were not publicly visible. Similarly, information communicated to those customers through the account, such as pricing or order details, could merit trade secret protection to the extent the information remained secret. *See supra* note 203.

368. *See supra* note 159 and accompanying text.

369. *See* James Grimmelmann, *supra* note 199, at 1164–66 (giving examples of expectations of privacy on Facebook).

370. *Id.* at 1195–97 (arguing that the privacy expectations of social network users should be respected).

371. *See* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) (“According to well-established principles of equity, a plaintiff seeking a permanent injunction must . . . demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.”).

analysis of the interests of the followers. On privacy grounds, a court should hesitate to turn over an account unless the followers could have reasonably expected that the employer would have access to the information.

However, the factors for determining the reasonable expectations of the followers will significantly overlap with the factors in determining whether the account belongs to the employer under a hired-to-invent analysis. Where the worker is clearly acting on behalf of the employer—for example, by naming the account at least in part after the employer, advertising the employer’s products, or frequently posting links to the employer’s website—a follower should reasonably expect that the employer would have access to anything that follower decided to share with the account. Thus, in the main, privacy concerns will not be in tension with the proposed trade secret resolution of disputes over rights to the account.

3. Copyright

Finally, the trade secret approach would be unlikely to conflict with concerns regarding the display of content under copyright law.³⁷² With respect to copyright law, the analysis used to determine which party has the rights to new copyrightable material in the account is quite similar to the analysis to determine which party has the right to access the account itself, and thus is likely to lead to the same outcome. The rules regarding ownership of copyrightable works in the employment context closely parallel the rules in the trade secret context. As in trade secret law, copyright vests in the creator of the work by default.³⁷³ In the trade secret context, this default rule is modified by the hired-to-invent doctrine, in which the employer obtains the rights to trade secrets that the employee was hired to create. Copyright law has a similar doctrine called “work made for hire.”³⁷⁴ Where the copyrighted work is created as a work made for hire during the course of employment, the rights vest in the employer.³⁷⁵

The chief difference between the trade secret and copyright analysis is that, unlike the hired-to-invent doctrine in patent law, which is based in principles of contract law, the work-made-for-hire rule is based in principles of agency law.³⁷⁶ The copyright in a worker’s work belongs to the employer when the worker is an employee and the work is created during the scope of

372. See *supra* Part II.B.

373. 17 U.S.C. § 201(a) (2011); *Ingersoll-Rand v. Ciavatta*, 542 A.2d 879, 885 (N.J. 1988) (providing support for trade secret law proposition).

374. See 17 U.S.C. § 101(1); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 42 cmt. e (1195).

375. 17 U.S.C. § 101(1).

376. See *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 750–51 (1989). Some types of copyrightable works, such as compilations, only qualify as works made for hire when the parties sign an express contract. 17 U.S.C. § 101(2). If a social network account were considered one of the works subject to this rule, then the employer would only have copyright rights in the account content if the parties signed an agreement to that effect. See *id.*

employment.³⁷⁷ Both the question of whether a worker is an independent contractor and whether the work was prepared during the scope of employment are determined in light of the common law of agency.³⁷⁸ Where the worker is an employee, the outcome of the analysis of work made for hire is likely to be the same as the outcome of a hired-to-invent analysis because the inquiry in both is essentially whether the worker consented to do the work on behalf of the employer, based on the objective manifestations of the parties.³⁷⁹

The factors courts consider are quite similar in each analysis. Again, to determine whether a worker is hired to invent a trade secret, a court would consider whether the worker was directed to create specific information for the employer.³⁸⁰ In a situation without a specific instruction, the court examines factors such as how closely related the information was to the employer's business, the amount of resources assigned to this task, and whether workers have assigned inventions to the employer in the past.³⁸¹ Similarly, a court seeking to determine whether a copyrightable work is a work made for hire would consider whether "(a) [the work] is of the kind [the servant] is employed to perform; (b) it occurs substantially within the authorized time and space limits; [and] (c) it is actuated, at least in part, by a purpose to serve the master."³⁸² As a result, the circumstances that would indicate that the worker had impliedly agreed to leave the social network account to the employer would also likely be circumstances suggesting that the copyrightable content in the account was a work made for hire.

Even where the ownership of the copyright in the content and the ownership of the account differ, copyright law will most likely not be a barrier to

377. See *id.* § 101(1). A work is also a work made for hire if the parties sign a written agreement to that effect and the copyrightable work falls into one of the categories listed in Section 101(2). In the case of a written agreement, the question would be whether the agreement addressed disputes over social network accounts.

378. See *Cnty. for Creative Non-Violence*, 490 U.S. at 740–41.

379. In *Nevada's Employee Inventions Statute: Novel, Nonobvious, and Patently Wrong*, Mary LaFrance argues that the requirement that a work be prepared within the scope of employment gives employees notice as to when their future copyrightable works will belong to their employers. LaFrance, *supra* note 317, at 103. As a result, employees may bargain for appropriate compensation. *Id.* Under this reasoning, the work-made-for-hire rule functions as a way to ensure that an employee agrees that her employers will own the copyright to the work because the employee can decide ahead of time if she will produce copyrightable works under these conditions. *Id.*

380. See *Vigtron, Inc. v. Ferguson*, 419 A.2d 1115, 1117 (N.H. 1980) ("The product of one who is hired to invent, accomplish a prescribed result, or aid in the development of products belongs to the employer in the absence of a written contract to assign."); see also *Kinkade v. N.Y. Shipbuilding Corp.*, 122 A.2d 360, 364 (N.J. 1956); *Nat'l Dev. Co. v. Gray*, 55 N.E.2d 783, 787 (Mass. 1944).

381. Cotter, *supra* note 330, at 594; 8–22 CHISUM ON PATENTS § 22.03[2] (2012) (listing factors for the hired-to-invent doctrine in cases of patentable inventions).

382. *Avtec Sys., Inc. v. Pfeiffer*, 21 F.3d 568, 571 (4th Cir. 1994); *City of Newark v. Beasley*, 883 F. Supp. 3, 7–9 (D.N.J. 1995).

resolving the right of access to the account under the trade secret law approach. For example, where the worker is an independent contractor, the copyright in any content she posted in a social network account would vest in her at creation, even if she had impliedly agreed that the account itself would belong to her employer.³⁸³ However, where the worker has agreed to give the right of access to her employer, she would likely be considered to have given the employer an implied license to the content to the extent necessary to use the account.³⁸⁴ In the worst case, however, where the court determined that different parties owned the rights to copyrighted material as opposed to rights to the account, the court could order that copyrighted material be deleted from the account.³⁸⁵ In short, copyright claims would likely not conflict with the trade secret approach to resolving access to the account.

Inevitably, there will be some hard cases where rights conflict—for instance, where one party clearly has rights to the social network account and the other has a right to copyrighted content, which cannot be deleted. Courts will struggle to balance the interests in these cases. Nevertheless, in most cases, the trade secret approach will offer the best approach to allocating rights in the account while avoiding conflict with other legal paradigms.

D. *The Comparative Inferiority of a Personal Property Approach*

A possible alternative to the trade secret approach is treating a social network account as a form of personal property. The plaintiff might claim a right of personal property in the account itself and make a claim for conversion. Indeed, in the cases thus far, the plaintiffs have done just that.³⁸⁶ The trade secret approach, however, is superior for two principal reasons. First, the hired-to-invent doctrine in trade secret law offers a robust common law framework to resolve the issue of allocation of rights *ab initio* which the law of personal property lacks. Second, the definition of a trade secret restricts trade secret protection to the interests at the heart of these disputes. In contrast, personal property does not have such strict definitional limitations. As a result, protecting social network accounts as personal property may result in overprotection, to the detriment of competition and the public interest.

Assuming a plaintiff can establish that she has a personal property right in a social network account, she would be likely to succeed in a conversion

383. Unless it fell under 17 U.S.C. § 101(2) (2011).

384. See, e.g., *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 558 (9th Cir. 1990) (holding that an implied license is granted where the copyright owner gives the licensee material embodying the work in exchange for compensation where the material would have no value without a copyright license to the copyrighted work).

385. See *supra* note 159 and accompanying text. This option would not apply, of course, where the information could not be deleted.

386. *Eagle v. Morgan*, No. 11-4303, 2013 WL 943350, at *10 (E.D. Pa. Mar. 12, 2013); *PhoneDog v. Kravitz*, No. C 11-03474 MEJ, 2011 WL 5415612, at *1 (N.D. Cal. Nov. 8, 2011).

claim against someone who locked her out of the account. Conversion is an intentional exercise of dominion or control over personal property which “seriously interferes with the right of another to control it.”³⁸⁷ Where a defendant locks the plaintiff out of the account by changing the password, the defendant has “seriously interfered” with the right of control.³⁸⁸ The plaintiff, in fact, loses all control.³⁸⁹ The harder question is whether the account should be considered a form of personal property.

A social network account possesses some of the characteristics of property. It is rivalrous where only one of the disputing parties may effectively use the links in the account to communicate with others at one time.³⁹⁰ The account is also excludable in the sense that access requires a password which can be safeguarded from others. Finally, the account resembles property in that it satisfies Locke’s justification for property rights. Under the Lockean labor theory of property, the account holder should have a property right in the fruits of her own labor.³⁹¹

In some cases, courts have found that similar items qualified as property and could be the subject of conversion. In *Kremen v. Cohen*, for example, the Ninth Circuit held that, under California law, an internet domain name was personal property for purposes of a conversion claim.³⁹² Similarly, in *Stanton Holdings, Inc. v. First Data Corp.*, the Northern District of Texas found that, under Texas law, a telephone number could be subject to conversion as personal property.³⁹³ In general, the law appears to be moving in the direction of finding intangible items such as domain names and phone numbers to be personal property and subject to conversion.³⁹⁴

Granting personal property rights in the account does not necessarily conflict with the terms of use of the social network platform. Property rights in the account might be defined quite narrowly, perhaps only as a right of

387. RESTATEMENT (SECOND) OF TORTS § 222A (1965). The plaintiff might be even better served by a claim for replevin. The elements of replevin are the same as those of conversion, but, in an action for replevin, the plaintiff may recover possession of the property at issue, whereas, in an action of conversion, the plaintiff may only recover damages. *See, e.g.*, *First Nat. Bank of Steepleville v. ERB Equip. Co.*, 972 S.W.2d 298, 300 (Mo. Ct. App. E.D. 1998).

388. RESTATEMENT (SECOND) OF TORTS § 222A.

389. *Id.*

390. *See* Joshua A.T. Fairfield, *Virtual Property*, 85 B.U. L. REV. 1047, 1048–49 (2005).

391. *See* Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 388 (2003).

392. *Kremen v. Cohen*, 337 F.3d 1024, 1035 (9th Cir. 2003).

393. *Stanton Holdings v. First Data Corp.*, No. 3:04-CV-2321-P, 2005 U.S. Dist. LEXIS 47190, at *15 (N.D. Tex. May 11, 2005).

394. *See, e.g. Kremen*, 325 F.3d at 1045–46 n.5 (Kozinski, J., dissenting) (citing cases); *Astroworks, Inc. v. Astroexhibit, Inc.*, 257 F. Supp. 2d 609, 618 (S.D.N.Y. 2003) (holding that the plaintiff could maintain a claim for conversion of his website); Val D. Ricks, *The Conversion of Intangible Property: Bursting the Ancient Trover Bottle with New Wine*, 1991 BYU L. REV. 1681, 1682.

use and exclusion subject to the rights of the social network platform provider.³⁹⁵

The conversion cause of action, however, stumbles in the employment context where the challenge is to determine which party has the right to the account at the moment of creation. It is, in a sense, previously un-owned. Personal property law rarely tackles the question of who gains the property right in previously unowned items.³⁹⁶ Except for a few odd cases involving things like foxes on public beaches,³⁹⁷ most issues of personal property ownership are resolved by tracing the chain of title back one link or so to the last instance of good title.³⁹⁸ Thus, in the employment context, even if the agreement between the parties is unclear, disputes over items of personal property created during the course of employment can typically be resolved by reference to the chain of title. For example, if a worker makes a shoe, the employer has a right to the shoe when the shoe was made from leather belonging to the employer.³⁹⁹

The chain of title approach, however, does not resolve disputes over rights to an account. Both the account and the links in the account are created anew. They are previously nonexistent and unowned, subject to rights of the social network services.⁴⁰⁰ Moreover, a right to possess the account does not flow clearly from the social network platform provider to one party or the other. Although the terms of use create a contract with the user granting a limited right to use the account, it is not necessarily clear on whose behalf the user has contracted with the social network platform provider.⁴⁰¹

In intellectual property law, however, new intellectual property is created all the time. As a result, a robust set of rules exists for assigning rights in new intellectual property, especially in the employment context. This Ar-

395. Property is essentially just a catchall phrase for a bundle of rights, such as the rights to enjoy, use, transfer, possess, and exclude. Pamela Samuelson, *Information as Property: Do Ruckelshaus and Carpenter Signal a Changing Direction in Intellectual Property Law?*, 38 CATH. U. L. REV. 365, 370 (1988–1989). Property may possess only some of these rights and even those rights may be subject to numerous limitations. *See id.* In practice, the terms of use on social media websites invariably claim that the social network provider retains all rights in the social network. *See supra* note 282.

396. Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 73 (1985).

397. *Pierson v. Post*, 3 Cai. 175 (N.Y. Sup. Ct. 1805).

398. *See* Rose, *supra* note 396, at 74–75.

399. *See, e.g.*, Bd. of Tr. of Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc., 131 S. Ct. 2188, 2196 (2011) (“No one would claim that an autoworker who builds a car while working in a factory owns that car.”); RAY ANDREWS BROWN, A TREATISE ON THE LAW OF PERSONAL PROPERTY 49 (1936) (discussing the law of accession); Earl C. Arnold, *The Law of Accession of Personal Property*, 22 COLUM. L. REV. 103, 111–13 (1922) (discussing right to recover damages for personal property made into a new product by the application of skill or labor).

400. *See supra* note 282.

401. *See supra* note 122 (The Terms of Service for Google Plus explicitly allow users to use its services on behalf of a company).

title has described in some detail the hired-to-invent and work-made-for-hire doctrines.⁴⁰²

In the personal property context, the law of agency would likely govern disputes about title to items created during the course of employment. Because the law of agency governs when a worker's actions affect the employer's legal position, the law of agency would also govern when the worker's actions vest legal property rights in the employer to a new account.⁴⁰³ However, because the problem is so rare, there is no robust common law tradition or legislation addressing the problem of rights to newly created personal property in the employment context.⁴⁰⁴ As a result, courts would have to create law which balances interests in optimizing incentives to create, promoting worker mobility, and protecting the expectations of the parties out of whole cloth. In contrast, trade secret law provides a ready framework for balancing the relevant policy concerns.

Furthermore, the dangers of conferring a new property right in social network accounts outweigh the advantages. As a general rule, property rights should only be granted when they promote the public good.⁴⁰⁵ In this case, where trade secret law provides a limited and effective form of protection, it is unnecessary to create a new personal property right to resolve the problem.⁴⁰⁶

Worse, granting a personal property right may cause harm. Personal property rights would have to be very narrowly defined to avoid overprotecting the account. But properly delineating the extent of rights would be challenging for the courts or legislatures, especially since the technology and terminology is changing rapidly. A broadly defined personal property right in a social network account might circumvent intellectual property limitations, thereby reducing the public domain and diminishing the free flow of information. For example, a personal property right in followers' publicly available names linked to a social network account might decrease competition by preventing others from collecting and using this information. In addition, a proliferation of rights might create an anticommons in which the

402. See *supra* Parts III.B and III.C.3.

403. See RESTATEMENT (THIRD) OF AGENCY § 1.01, comment c (2006).

404. The author has tried in vain to find law dealing directly with the issue of rights to previously unowned personal property in the employment context. Copyright law draws on the law of agency to resolve ownership in the employment context, but the copyright approach is the result of a legislative compromise and common law development specific to the copyright context. See, e.g., *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 750–51 (1989).

405. Samuelson, *supra* note 395, at 392 (“Justice Holmes seemed to say that where protection can be afforded without granting a right to exclude, it is unnecessary to create property rights to resolve the problem.”).

406. See *id.*

transactional costs of dealing with the rights of other participants discourages investment in social network platforms.⁴⁰⁷

Limiting the trade secret rights to a social network account poses considerably less challenge because trade secrets are already adequately limited by their definition.⁴⁰⁸ In contrast, the definition of personal property is broad: “any movable or intangible thing that is subject to ownership and is not classified as real property.”⁴⁰⁹ Indeed, the definition of personal property is effectively a definition by default—property that is not real property.⁴¹⁰

Trade secrets do not encompass information in the public domain.⁴¹¹ Trade secret protection would only provide protection for exclusive access to the account and only when the secret of access is kept secret and derives independent economic value from its secrecy. Damages would essentially only cover the loss of convenience resulting from lost secret access to the account.

A trade secret approach would also limit frivolous litigation. If protection were not limited to accounts to which exclusive access conferred a competitive advantage, the putative owner could sue, for example, for harassment of a former worker who had gone to a competitor, even if the account would provide no commercial advantage.⁴¹² Trade secret law would also require that the plaintiff take reasonable steps to keep the password secret.⁴¹³ A broadly defined personal property might require no such self-help efforts.

The personal property approach has another flaw. Because many states do not allow claims for conversion for intangible items, the law would not

407. See generally Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CALIF. L. REV. 439, 442–44 (2003).

408. Again, trade secrets are limited to information that derives independent economic value from being secret and that is subject to reasonable efforts to maintain its secrecy. See UNIF. TRADE SECRETS ACT § 1(4), 14 U.L.A. 433 (1986).

409. BLACK’S LAW DICTIONARY 1337 (9th ed. 2009); see also BROWN, *supra* note 399, at 49 (categorizing personal property as rights in moveables as opposed to rights in land).

410. See BLACK’S LAW DICTIONARY 1337 (9th ed. 2009).

411. See UNIF. TRADE SECRETS ACT § 1(4). By definition, trade secrets are information that derive independent economic value from not being generally known or readily ascertainable. *Id.*

412. See *id.* (requiring a trade secret to have “independent economic value”). This requirement would not prevent a worker from reclaiming a purely personal account from an employer. Even if the worker did not intend to use the account for commercial purposes, the fact that the employer wants the account indicates it must have some commercial value at least to the employer. See *id.*

413. See *id.* § 1.

develop in a coherent manner.⁴¹⁴ In contrast, trade secret laws, including the hired-to-invent principle, are quite similar in every state.⁴¹⁵

For all these reasons, the better approach is to resolve the disputes using trade secrets law.

CONCLUSION

As social network accounts become ever more influential and valuable, the allocation of rights in these accounts will have increasingly important consequences to society. This Article examines in detail the tremendous benefits which accrue to the public from online social networking. In essence, account holders should be encouraged to provide information that members of the public clearly value due to their decision to follow the account. At the same time, account holders should have confidence that their investment in attracting followers to the account will give them the rewards of access to those followers. To protect this investment and the resulting benefits to the public, this Article offers a simple and practical solution. Account holders do not need a new species of personal property; traditional principles of trade secret law provide the best framework to optimize incentives to invest in social network accounts.

414. As a case in point, the court in *Eagle v. Morgan* rejected the claim for conversion because Pennsylvania does not recognize a claim of conversion for intangibles. *Eagle v. Morgan*, No. 11-4303, 2013 WL 943350, at *10 (E.D. Pa. Mar. 12, 2013). However, the conversion claim survived a motion to dismiss in *PhoneDog*. *PhoneDog v. Kravitz*, No. C 11-03474 MEJ, 2011 WL 5415612, at *9 (N.D. Cal. Nov. 8, 2011). Several states do not recognize a claim of conversion for intangibles. *Am. Nat'l Ins. Co. v. Citibank, N.A.*, 543 F.3d 907, 910 (7th Cir. 2008) (Illinois); *Struzziero v. Lifetouch Nat'l Sch. Studios, Inc.*, 677 F. Supp. 2d 350, 354 (D. Mass. 2009) (Massachusetts); *In re Paige*, 413 B.R. 882, 916 (Bankr. D. Utah 2009) (Utah). However, further muddying the waters, Utah law considers domain names to be tangible property. *Paige*, 413 B.R. at 918. Other states do recognize a claim for conversion of intangibles. *Wells Fargo Equip. Fin., Inc. v. State Farm Fire & Cas. Co.*, 805 F. Supp. 2d 213, 221 (E.D. Va. 2011) (noting that in Virginia the intangible rights are merged into a document); *Paradigm Alliance, Inc. v. Celeritas Techs., LLC*, 659 F. Supp. 2d 1167, 1189 (D. Kan. 2009) (Kansas); *In re Wal-Mart Wage & Hour Emp't Practices Litig.*, 490 F. Supp. 2d 1091, 1101 (D. Nev. 2007) (recognizing that the intangible rights are merged into a document in Delaware).

415. See 1 MILGRIM & BENSON, *supra* note 201, at § 101[2][b] (showing a table of jurisdictions where the Revised Uniform Trade Secrets Act has been adopted).