<u>Social Media Beyond the Social Sphere</u>

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Social media has transformed the way that friends and even acquaintances interact, creating an entirely new alternative to traditional modes of communication. But is it possible that the "social" aspect of social media is becoming a misnomer?

A recent survey of marketing professionals revealed that 83 percent of respondents held social media to be an important part of their business strategy.[1] This statistic is not surprising, as Experian reports that Facebook alone garners 20 percent of all internet page views in the U.S.[2] Perhaps even more attractive from a commercial standpoint, social media presents an enormous consumer audience at which businesses can aim their outreach and marketing efforts.[3]

<u>Who Controls What?</u>

With these impressive statistics, however, come new challenges that have yet to be fully appreciated by the law. Suppose a business encourages its employee to use social media to increase brand exposure and promote its goods and services. The employee dutifully posts content on various social media networks, and eventually develops a substantial following among users of the networks. This, of course, is welcome news for the business, which now benefits from the opportunity presented by social media. One day, though, the employee gives notice and leaves the company for new, albeit related, work. In an action between the employer

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[1] Michael A. Stelzner, *2012 Social Media Marketing Industry Report: How Marketers are Using Social Media to Grow Their Businesses*, SOCIAL MEDIA EXAMINER 10, http://www.socialmediaexaminer.com/SocialMediaMarketingIndustryReport2012.pdf.
[22] *10 Key Statistics about Facebook*, EXPERIAN MARKETING SERVICES (Feb. 2, 2012), http://www.experian.com/blogs/marketing-forward/2012/02/07/10-key-statistics-about-facebook/.
[3] Brian Honigman, *100 Fascinating Social Media Statistics and Figures from 2012*, HUFFINGTON POST (Nov. 29, 2012, 7:32 PM), http://www.huffingtonpost.com/brian-honigman/100-fascinating-social-me_b_2185281.html.

and the employee for control of the social media accounts, who will prevail? Will the employer be able to state a proper claim that the employee's large online following is akin to a client list, and may therefore be proprietary? Alternatively, can the employee rely on a variant of his personal right of publicity to exclude the employer from seizing the social media account?

As it turns out, these are precisely the facts of a case recently pending in a federal district court. Mobile technology review website PhoneDog hired Noah Kravitz as a reviewer and video blogger in 2006.[4] Over the course of Kravitz' employment, PhoneDog provided him with the Twitter handle "@PhoneDog_Noah" through which he could promote the website and his own content.[5] During his four-year employment Kravitz amassed approximately 17,000 followers of this Twitter account, many of whom presumably "followed" Kravitz to receive updates on mobile technology.[6] The conflict arose when Kravitz left PhoneDog in October 2010 and shortly thereafter ignored PhoneDog's requests to have the Twitter account returned to its control.[7] Kravitz subsequently altered the Twitter handle from "@PhoneDog_Noah" to "@noahkravitz."[8] The dispute turned on ownership and control of the Twitter account, which served as a direct gateway to many thousands of uniquely interested consumers.

<u>Protectable as Intellectual Property? A "Non-Secret Secret"?</u>

PhoneDog in its complaint contended that access to the account, namely, the username and password used to sign in and interact with followers, is protected as a trade secret. Trade secret protection serves as an alternative to patent protection for companies that aim to protect unpatentable information or do not wish to engage in the *quid pro quo* of the patent system.

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[4] PhoneDog v. Kravitz, C 11-03474 MEJ, 2011 WL 5415612, at *1 (N.D. Cal. Nov. 8, 2011).
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*

Trade secrets maintain immense value for U.S. companies that choose strict self-protection of the information in question over the more absolute, but time-limited rights granted by a patent. Trade secret law generally protects information that derives independent value by not being generally known or easily deduced, and that is subject to reasonable efforts to maintain secrecy.[9] As a common example, confidential client lists can be protected as trade secrets if a company develops a database of interested clients, maintains its secrecy, and the list has economic value. This protection is governed exclusively by state law; however, adoption of the Uniform Trade Secrets Act by 46 states reduces irregularity between jurisdictions.[10] Courts rely on a sliding scale to determine whether a trade secret exists, examining factors such as the extent to which the information is known, the extent of protective measures, the value of the information, the resources expended in developing the information, and the ease with which the information could be properly acquired.[11]

With this analysis in mind, trade secret law in its traditional sense almost certainly would not give PhoneDog a cause of action against Kravitz for misappropriation of its Twitter followers. In fact, it is likely that the followers themselves do not constitute trade secrets to begin with. In the age of online networking and instant communication, there is no doubt that access to a large number of interested consumers carries immense value. With immediate access to a captive group of followers, a company's Twitter account can be an effective way to notify consumers of a new product or simply boost brand recognition. However, value is not the only consideration in determining whether a trade secret exists. Indeed, the second overarching consideration, secrecy, weighs heavily against the Twitter followers being treated as a trade

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[9] UNIF. TRADE SECRETS ACT § 1, U.L.C. (1985), *available at* http://www.uniformlaws.org/shared/docs/trade%20secrets/utsa_final_85.pdf.

[10] *Legislative Fact Sheet – Trade Secrets Act*, UNIFORM LAW COMMISSION, http://uniformlaws.org/LegislativeFactSheet.aspx?title=Trade%20Secrets%20Act.

[11] Restatement (First) of Torts § 757 cmt. b (1939).

secret. Lists of followers on Twitter are fully accessible by the public. As a matter of common sense, then, it seems contrary to public policy and the basic tenets of trade secret law for the so-called client list to be protectable.

Alleging that PhoneDog failed to state a reasonable claim for relief in its trade secret misappropriation claim, Kravitz filed a motion for summary judgment. Despite the unlikeliness of trade secret protection for the Twitter followers themselves, the district court held that PhoneDog had not necessarily failed to state a claim in its complaint against Kravitz.[12] In other words, the district court, by denying Kravitz' motion, suggested that PhoneDog might be able to plausibly argue that the social media account was protectable as a trade secret.[13]

The *PhoneDog* case is not alone in calling into question the limits of current intellectual property law in employment relationships. In a recent federal district court case between an employer and a former employee, the court acknowledged that client lists are often protectable as trade secrets, since "time, energy and resources may [be] necessary to acquire the level of detailed information to build and retain the business relationships."[14] This court ultimately decided that a client list freely accessible via the internet was *not* a trade secret, however, due to the "exponential proliferation of information made available through full-blown use of the internet."[15] Conversely, a Colorado district court in 2012 denied a motion to dismiss in a dispute as to whether a list of friends on the MySpace social network is protectable as a trade secret.[16] Finally, demonstrating the expansive reach of modern intellectual property case law, a case in another federal court recently centered on whether an employee has ownership rights to a

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[12] PhoneDog, 2011 WL 5415612, at *7.
[13] The dispute ultimately concluded in a confidential settlement agreement between Kravitz and PhoneDog. PhoneDog v. Kravitz, Stipulation for Dismissal After Settlement, C 11-03474 MEJ (N.D. Cal. Jan. 8, 2013).
[14] Sasqua Gr., Inc. v. Courtney, No. CV-10-528, 2010 WL 3613855, at *22 (E.D.N.Y. Aug. 2, 2010).
[15] *Id.*
[16] Christou v. Beatport, L.L.C., No. 10-cv-02912, 2012 WL 872574, at *17 (D. Colo. Mar. 14, 2012).

personal LinkedIn account when that account was used for business purposes in a previous employment relationship.[17]

While perhaps limited to specific facts, pending cases and their decisions suggest that intellectual property, and more specifically trade secret law, may be expanding to encompass previously unimagined sources of commercial value. Ultimately, one of the most challenging issues currently facing intellectual property law is how far protection can extend in a sphere such as social networking, where business gain and personal use are inherently intertwined. No longer do employees leave their personal eccentricities behind when they go to work to promote a brand or product. Instead, a user who develops goodwill by posting useful, engaging information with a healthy dose of entertainment is vastly more likely to flourish on social media than a user who posts solely for utilitarian purposes. In social media, there is more to success than convincing users of professional competence. Social media values a balance of information personal and professional.

Value Not Necessarily Decreased by Access to Customer Information

Because one of the overarching goals of trade secret law is to protect the value of information that a business expends resources in developing, trade secret protection serves as an optimal starting point for protecting customer contacts in the age of social media. As *PhoneDog* demonstrates, social media contacts on networks like Twitter, although not secret by any stretch of the imagination, are often effectively unavailable to consumers. A business cannot simply view the social media contact list of a competitor and use it at will. Social media requires that the business connect with each individual on the list at the personal level that distinguishes social

[17] Eagle v. Morgan, CIV.A. 11-4303, 2012 WL 4739436, at *9 (E.D. Pa. Oct. 4, 2012).

media from traditional business communications. Social media connections, especially those on networks like LinkedIn, often represent professional relationships that must be cultivated, as opposed to instantaneous relationships. Users may discern between social media contacts that they recognize and those that are unfamiliar to them, thus preventing a competitor from taking advantage of another company's client list. Many social networks encourage these controls, further allowing users to hide their accounts from discovery by unknown businesses. In this way, obtaining a publicly available list of social media contacts does not necessarily compromise the *value* that the actual holder of the list maintains.

Trade Secrets or Trademarks?

Beyond the realm of traditional trade secret law, customer lists in the form of social media contacts also implicate a degree of consumer goodwill akin to trademark law. Not only does social media provide an outlet for businesses to develop swaths of interested followers, but more and more frequently it also serves as a vehicle to promote brand recognition with consumers. Thus, similar to the way that a traditional trademark protects against consumer confusion regarding source, a social media account allows a business to reach out and develop recognition among a group of consumers. Consumers may then begin to form associations between the social media user posting specific content and the brand he or she represents.

Consumer association in this area brings up an interesting question: why should intellectual property law treat social media differently than traditional employment relationships? In *PhoneDog*, a central issue was whether the court should be concerned with consumer perception when Kravitz, a former employee, left the company and changed his Twitter handle from "@PhoneDog_Noah" to "@noahkravitz." If Kravitz gained Twitter followers as a result of

his affiliation with PhoneDog, should he be allowed to maintain the social media connections post-employment? Critics of intellectual property protection for these contacts might argue that using social media for business development is not any different than it was before the internet. In this older model, an employee could network through his position to gain professional contacts. Later, after leaving the position, the employee would not be prohibited from using these contacts, regardless of whether they were originally developed on company time. In the legal field in particular, ethical rules permit an attorney in many circumstances to effectively bring clients with her during a move between law firms.[18] It remains to be seen whether courts will accept this argument; *PhoneDog* and other pending cases certainly cast such reasoning into doubt.

Perhaps the most obvious alternative to intellectual property protection is a deferral purely to contract law. Employment agreements offer sufficient flexibility to conform to a wide variety of industries and account for the specific interests of contracting parties. Certainly, companies should establish defined social media policies in order to avoid misunderstandings that may arise when the employment relationship falters. But, in an era of accessibility and social media pervasiveness, can we expect that all parties will be well-informed of their rights?

Conclusion

Should intellectual property law concern itself with difficult distinctions between personal and professional use of social media? While contract law offers a clear solution to the division of rights in social media, businesses, and more importantly, lay users of social media are unlikely to protect themselves in the event of a conflict.

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[18] *See* Lynda C. Shely, *Law Firms Changes: The Ethical Obligations When Lawyers Switch Firms*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/content/dam/aba/migrated/cpr/pubs/Shely.authcheckdam.pdf.

Intellectual property law can and should prepare to address the shortcomings of traditional contract law. Modern case law, focusing on employment disputes between employers and former employees, underscores the value of social media to business development. Further, although many issues at the interface of social media and intellectual property have yet to be realized in practice, these cases reflect that intellectual property law, in particular trade secret law, can adjust to cope with new technologies as the issues arise. Just as the law protects the value of expression through copyrights, the value of goodwill through trademarks, and the value of inventions through patents, intellectual property maintains sufficient flexibility to protect valuable business information while continuing to defend users' rights in their use of social media.