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PUTTING A PRICE ON FRIENDSHIP: EXAMINING THE OWNERSHIP BATTLE BETWEEN A BUSINESS' SOCIAL MEDIA NETWORKS, AND THE HUMANS THAT OPERATE THEM

MICHAEL FURLONG*

I. INTRODUCTION

Gary Vaynerchuk took over his father's liquor store, "Shopper's Discount Liquor," and revamped it into his own "Wine Library."¹ Vaynerchuk eventually started "Wine Library TV,"² and grew this previously valued \$4 million business into a \$50 million dollar business³ using social media.⁴ Wine Library has almost 25,000 followers⁵ on Twitter⁶ and 40,000 "likes"⁷ on Facebook.⁸

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1. Eric Asimov, *Pop Goes the Critic*, THE NEW YORK TIMES (Sep. 8, 2009), http://www.nytimes.com/2009/09/09/dining/09pour.html?pagewanted=1&_r=1&adxnnl=1&adxnnlx=1349125013-uMk0oAUk28IFccHDDZ0eBw.

2. *About Wine Library*, WINE LIBRARY TV, <http://tv.winelibrary.com/about/> (last visited Oct. 1, 2012). "Wine Library TV" is a video blog where Vaynerchuk encourages wine tasting, along with educating viewers "about the effects of regional factors (soil, sun, wind) on wine flavors, and how to buy wine." *Id.*

3. Erik Qualman, *SOCIALNOMICS: HOW SOCIAL MEDIA TRANSFORMS THE WAY WE LIVE AND DO BUSINESS* 257 (John Wiley & Sons, Inc. eds., 2011).

4. *Id.* Vaynerchuk marketed his business, "Wine Library TV" using Facebook and Twitter. *Id.*

5. Melanie Nelson, *Social Media Basics: Twitter Terms*, BLOGHER, <http://www.blogger.com/social-media-biases-twitter-terms> (last visited Oct. 4, 2012). A Twitter "follower" is "Someone who subscribes to (i.e., follows) the tweets of another Twitter user." *Id.*

6. WINE LIBRARY, <https://twitter.com/WineLibrary> (last visited Oct. 5, 2012).

7. Facebook Help Center, FACEBOOK, <http://www.facebook.com/help/like> (last visited Oct. 4, 2012). The Facebook Help Center describes what a "like" is: "When you click Like on a Facebook Page . . . you are making a connection. A story about your like will appear on your Wall (timeline) and may also appear in your news feed. You may be displayed on the Page you connected to, in advertisements about that Page, or in social plugins next to the content you like." *Id.*

Vaynerchuk has an interesting view on advertising. He claims that when he was starting his business, his \$15,000 investment in direct mail resulted in two hundred new customers, his \$7,500 investment in billboard advertising resulted in three hundred new customers, and his \$0 investment in social media resulted in 1,800 new customers.⁹

Over 300,000 businesses have a presence on Facebook.¹⁰ LinkedIn contains over 365,000 company profiles.¹¹ More than one million small businesses or individuals promote their goods and services on MySpace.¹² Eighty-two percent of fortune Global 100 companies are now using Twitter.¹³ Social media provides businesses like Wine Library with the best avenue for the most effective form of advertising: word of mouth.¹⁴ Advertisers can get their message out to consumers at a rate that will spread exponentially within minutes, at no cost.¹⁵ This is something unattainable by any other advertising medium.¹⁶ Therefore, social media provides businesses with the rare combination of effective advertising, in an economically efficient manner.¹⁷

As a result of the increasing importance of using social media to promote a business' brand or product, many companies appoint employees to operate a social media account(s) on behalf of the business.¹⁸ However, over the course of the employee operating

8. WINE LIBRARY TV,

<http://www.facebook.com/winelibrarytv?ref=ts&fref=ts>. (last visited Oct. 5, 2012).

9. Qualman, *supra* note 3, at 257.

10. Jon Swartz, *More Marketers Use Social Media to Reach Customers*, USA TODAY (Aug. 28, 2009), http://usatoday30.usatoday.com/tech/news/2009-08-27-social-networks-marketers_N.htm.

11. *Id.*

12. *Id.*

13. Shea Bennet, *Twitter is the Number One Social Network Amongst Global Companies*, MEDIA BISTRO, (Oct. 5, 2012) http://www.mediabistro.com/alltwitter/global-social-media-check-up_b25552.

14. Qualman, *supra* note 3, at 2-3. Normally word of mouth advertising operates in a way in which one person tells a friend, who tells a friend. In social media, one friend posts something to five hundred friends, to which ten of those friends post the same to five hundred of each of their friends. *Id.* Additionally, seventy-eight percent of consumers trust peer recommendations (compared to only fourteen percent who trust traditional advertisements). *Id.* at 263.

15. *Id.*

16. *Id.*

17. *Id.* at 2-3.

18. See Michael O. Loatman, *Who Owns Social Media Accounts: Company or Employee?*, BLOOMBERG BNA CORPORATE COUNSEL WEEKLY (Aug. 22, 2012), available at

http://www.bloomberglaw.com/document/XMA2Q7G5GVG0/download?doc_container=content_document&documentName=XMA2Q7G5GVG0.PDF&document_type=BNA_ISSUE&fmt=pdf&root_url=http%3A%2F%2Fwww.bloomberglaw.com%2F&web_base_url=%2Fdocument (explaining that today more employees are being encouraged to market the companies they work for

this account, it can become ambiguous as to whether the account is operated by an individual or the company itself.¹⁹ It can also become ambiguous as to whether the employee or employer has ownership rights over the account.²⁰ Such ambiguity can cause problems for the business. For example, what if Gary Vaynerchuk's employee that personally operated the "Wine Library TV" Twitter account left the company, and wanted to take the account's followers with him? The following background section will be an introduction to the issues presented by this problem, including an introductory discussion as to how the courts will approach these issues and the significant hurdles the parties will have to overcome to state their case effectively.

This comment will briefly introduce the issues that arise when an employee that operates a social media account on behalf of a company leaves and takes the account. Section II introduces a brief background of examples of these situations, along with the causes of action plaintiffs are claiming in court. Section III highlights the need for the courts to adopt new standards to accommodate the issues arising from social media ownership disputes. Section IV proposes standards the courts should adopt to resolve these issues, along with a proposal for the steps a business can take to prevent these legal battles.

II. BACKGROUND OF LEGAL ISSUES

As of this writing, the courts have not given a clear indication as to where they stand on these ownership issues, but this ambiguity is rapidly becoming a hot litigation issue in courts across the United States.²¹ Employers have a great interest in the

through social media).

19. See *PhoneDog v. Kravitz*, No. C 11-03474 MEJ, 2011 WL 5415612 (N.D. Cal. Nov. 8, 2011) (exemplifying the plight of an employer and employee where the employee operated a Twitter account with the handle "@PhoneDog_Noah" and wanted to use the same account for personal use after leaving the company). The name itself, "@PhoneDog_Noah" is a clear example of where the ambiguity arises. Although the handle contains the company name, it also contains the operator's personal name, therefore creating the initial discrepancy of who the account was intended for: the person or the business? There will be a more detailed discussion on this case to follow. *Id.*

20. See *id.* (explaining the central issue involved in these disputes mainly focuses on the ownership rights of these social media accounts and they value they possess).

21. See *Christou v. Beatport, LLC*, 849 F. Supp. 2d 1055 (D. Colo. 2012) (litigating the issue of whether the plaintiff has a valid claim for misappropriation of trade secrets where his former business partner used the login credentials of the business' MySpace account when jumpstarting his own new company); *Lown Co., LLC v. Piggy Paint, LLC*, No. 1:11-CV-911, 2012 WL 3277188 (W.D. Mich. 2012) (litigating the issue of whether requesting Facebook take down a business' page constitutes a tortious interference with a business expectancy and/or conversion, and what damages result from losing a Facebook page); *Eagle v. Morgan*, No. CIV.A.11-4303, 2011 WL 6739448 (E.D.

outcome of these cases, as these social media accounts can be worth substantial amounts of money.²² These rulings will also force companies to reevaluate their social media policies to prevent similar problems in the future.²³

These issues are best demonstrated by the very popular case of *PhoneDog v. Kravitz*.²⁴ In this case, Noah Kravitz, an employee of PhoneDog, operated a Twitter account with the handle²⁵, “@PhoneDog_Noah.”²⁶ When Kravitz left the company, PhoneDog requested Kravitz relinquish the use of the Twitter account.²⁷ Instead, Kravitz changed the account handle to “@noahkravitz” and immediately gained all of the followers he had gathered for the “PhoneDog_Noah” handle for his personal account.²⁸ Due to Kravitz’s actions, PhoneDog filed a suit in the Northern District of California for (1) misappropriation of trade secrets; (2) intentional interference with prospective economic advantage; (3) negligent interference with prospective economic advantage; and (4)

Pa. 2011) (deciding whether an employer can legally seize a LinkedIn account of a departing employee); *PhoneDog*, 2011 WL 5415612 (N.D. Cal. 2011) (litigating the main issue of whether the employer has ownership rights over a social media account that was operated by a departing employee for both personal and business reasons); *Ardis Health, LLC v. Nankivell*, No. 11 CIV. 5013 NRB, 2011 WL 4965172 (S.D.N.Y. 2011) (determining whether an employee who was hired to run the plaintiffs’ website, blogs, and social media pages converted those pages when he refused to relinquish the login credentials upon his departure from the company).

22. See First Amended Complaint at 11, *PhoneDog*, 2011 WL 5415612 (2011) (No. C 11-03474 MEJ) (alleging the 17,000 Twitter followers the defendant had amassed for eight months had a value of \$340,000 and sought said amount for damages for the “proximate foreseeable cost for defendant’s conversion.”).

23. See Margaret Keane, *Social Media Access Rights Raise Concerns Throughout Employment Circle*, WORKPLACE PRIVACY COUNSEL, <http://privacyblog.littler.com/2012/06/articles/electronic-resources-policy/social-media-access-rights-raise-concerns-throughout-employment-cycle/> (last visited Oct. 1, 2012) (outlining changes employers will have to make to prevent losing ownership rights to these accounts that include implementing policies that clearly demonstrate any social media account relating to the business are property of the company, using a corporate email address when registering the accounts, not allowing any employee to operate a social media account relating to the business unless the username and password was administered by the company, among others).

24. *PhoneDog*, 2011 WL 5415612 at *1.

25. *The Twitter Glossary*, TWITTER, <https://support.twitter.com/entries/166337-the-twitter-glossary> (last visited Oct. 3, 2012). A Twitter “handle” is the chosen username one selects to be identified by when opening an account with Twitter. *Id.* For example, the format resembles something like “@username” along with the accompanying URL link in the form of: “<http://twitter.com/username>.” *Id.*

26. *PhoneDog*, 2011 WL 5415612 at *1. PhoneDog alleged that Kravitz was requested to create the Twitter account to promote the company and to increase traffic to its website. *Id.* at *4.

27. *Id.* at *1.

28. *Id.*

conversion.²⁹ Additionally, PhoneDog sought \$340,000 in damages as a “foreseeable loss resulting from the defendant’s conversion.”³⁰ The plaintiff in this case presented the court with the enormously difficult task of assigning the value of a Twitter follower, LinkedIn connection, or a Facebook or MySpace friend.³¹

PhoneDog is not the only case to address these issues. The four claims³² brought in *PhoneDog* can be consistently found in other cases with similar factual situations to *Phonedog* in district or trial courts around the country.³³

A. Misappropriation of Trade Secrets

The 1979 Uniform Trade Secrets Act defines a “trade secret” as:

[I]nformation, 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

29. *Id.* There is no dispute as to why jurisdiction is proper in federal court based on diversity (Kravitz is a citizen of California, while PhoneDog is a Delaware corporation), however Kravitz does contest the damages do not amount to more than \$75,000. First Amended Complaint at 1, *PhoneDog*, 2011 WL 5415612 (2011) (No. C 11-03474 MEJ); *PhoneDog*, 2011 WL 5415612, at *2.

30. First Amended Complaint at 11, *PhoneDog*, 2011 WL 5415612 (2011) (No. C 11-03474 MEJ). PhoneDog’s claim of a \$340,000 loss derives from their calculation using what it alleged to be the “industry standard” value of twitter followers (\$2.50 per follower per month). So therefore, PhoneDog calculated their 17,000 followers were worth \$42,500 (17,000 x 2.50) each month, multiplied by the eight months that Kravitz used the account, equaling a total of \$340,000 in damages. *Id.*

31. See *Christou*, 849 F. Supp. 2d at 1055 (D. Colo. 2012) (involving a former night club employee who used the login credentials of his former employer to promote his new business that would be an online marketplace to download music); see *Lown Companies*, 2012 WL 3277188 at *3 (examining the issue of whether requesting Facebook take down a business’ page constitutes a tortious interference with a business expectancy and/or conversion, and what damages result from losing a Facebook page).

32. See *infra* pp. 5-10 and Section III (leaving out negligent interference of prospective economic advantage due to the similarity of issues arising under tortious interference of prospective economic advantage). This comment will focus exclusively on misappropriation of trade secrets, tortious interference with a prospective economic advantage, and conversion claims. *Id.*

33. See *Christou*, 849 F. Supp. 2d at 1074 (exemplifying an example in which the plaintiff brought a claim for relief under misappropriation of trade secrets); see *Eagle*, 2011 WL 6739448 at *2 (exemplifying another situation where the Defendant counterclaimed alleging misappropriation of trade secrets). Also, the Plaintiff in *Eagle* and the Defendant in *Lown Co., LLC v. Piggy Paint, LLC* brought claims for tortious interference with a prospective business expectancies and prospective relations. *Id.*; *Lown Companies*, 2012 WL 3277188 at *1. Finally, *Eagle*, *Lown*, and *Ardis Health*, all contained claims for conversion. *Id.*; *Eagle* 2011 WL 6739448 at *2, *4; *Ardis Health*, 2011 WL 4965172 at *3.

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.³⁴

To establish a claim for misappropriation of trade secrets in most states, a plaintiff must show: (1) the defendant possessed a valid trade secret; (2) the defendant who acquired the trade secret knows or has reason to know that the trade secret was acquired by improper means; and (3) the trade secret was disclosed or used without express or implied consent.³⁵

Applying the elements of misappropriation of trade secrets to social media will be very difficult for the courts and parties involved. Currently none of the circuit courts have applied misappropriation to social media accounts in this manner.³⁶ However, courts have found logical analogous examples in which they could try to reconcile Twitter followers, Facebook friends, and LinkedIn connections with trade secrets. Likely comparisons include confidential business assets like customer contact lists including names, phone numbers, and addresses.³⁷

However, it will be difficult to analogize typically confidential information when it is obtained through the World Wide Web. How can a person's contact information constitute a trade "secret" when it is posted on the internet for everyone to see? Courts have been quick to dismiss claims for misappropriation of trade secrets for this reason alone.³⁸ Clearly there are two very persuasive mechanisms in which to apply a misappropriation of trade secrets claim in the social media context.

34. Melvin F. Jager, TRADE SECRETS LAW § 3:41 (Clark Boardman Callaghan 1991) at Appendix A1. It is also very important to note that each state has its own elements for misappropriation, as misappropriation claims are brought under State statutes. *Id.* The elements used here are derived from The Uniform Trade Secrets Act of 1979 (UTSA). *Id.* The UTSA was implemented to harmonize and codify standards regarding misappropriation throughout state common law. *Id.* The goal was to provide unitary definitions for trade secrets and trade secret misappropriation. *Id.*

35. *Id.*

36. *Christou*, 849 F. Supp. 2d at 1074. "Plaintiffs argue that this is an issue of first impression in the circuit. The Court has not found relevant case law on point in this or any circuit." *Id.*

37. *See id.* at 1075 (explaining the inference that MySpace "friends" can be considered confidential customer lists because of the measures the company took in keeping the MySpace friends confidential); *see* First Amended Complaint at 4-5, *PhoneDog* 2011 WL 5415612 (2011) (C 11-03474 MEJ) (alleging that Kravitz sabotaged PhoneDog's "customer" base by communicating with PhoneDog's followers).

38. *See Eagle*, 2011 WL 6739448 at *17 (denying motion for judgment on the pleadings because LinkedIn connections do not qualify as trade secrets because it is generally known in the wider business community or capable of being easily deprived from public information).

B. Tortious Interference with a Prospective Economic Advantage/Business Expectancies

Many state courts rely on section 766 of the Restatement (Second) of Torts to comprise their own elements of a tortious interference with a prospective economic advantage (or similar claim).³⁹ Section 766B, "Intentional Interference With Prospective Contractual Relation"⁴⁰ is very logically interpreted by the Third Circuit for determining the elements for a tortious interference with business expectancies. The Third Circuit's elements for this claim comprise: (1) the existence of a contractual, or prospective contractual relation between the complainant and a third party; (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual legal damage as a result of the defendant's conduct.⁴¹ These elements are a very strong representation of the elements for similar claims of tortious interference with business expectancy around the country.⁴²

The plaintiffs that argue this claim throughout these cases are having a very difficult time even surviving the dismissal stage

39. *Id.* at *14.

40. RESTATEMENT (SECOND) OF TORTS § 766B (1979). Section 766B states: One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation.

Id.

41. *CGB Occupational Therapy, Inc. v. RHA Health Servs. Inc.*, 357 F.3d 375, 384 (3d Cir. 2004).

42. *See CRST Van Expedited, Inc. v. Werner Enterprises, Inc.*, 479 F.3d 1099, 1108 (9th Cir. 2007) (stating the elements to demonstrate interference with prospective economic advantage:

(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant); *see Mattis v. Massman*, 355 F.3d 902, 906 (6th Cir. 2004) (stating the elements to establish a tortious interference with a business relationship are: (1) the existence of a valid business relation or expectancy; (2) knowledge of the relationship or expectancy on the part of the defendant; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resulting damage to the party whose relationship or expectancy has been disrupted).

of the pleadings.⁴³ The largest hurdle facing the plaintiff companies is their ability to demonstrate an economic benefit arising from their social media connections.⁴⁴ It can be argued that the courts may have been too harsh to dismiss these claims before the parties had ample opportunity to demonstrate damages⁴⁵ and the correlation of such damages to loss of social media connections.⁴⁶

C. Conversion

The next issue, conversion, could provide the pathway to solving the issue of ownership rights.⁴⁷ The two major issues that arise under conversion are (1) whether ownership rights can extend to intangible property⁴⁸ and (2) the strong possibility that

43. See *PhoneDog*, 2011 WL 5415612 at *13 (dismissing PhoneDog's claim for intentional interference for prospective economic advantage because of PhoneDog's inability to allege facts describing how the Defendant's conduct caused economic harm); see *Lown Companies*, 2012 WL 3277188 at *5 (dismissing defendant's counterclaim for tortious interference with business expectancy because Piggy Paint could not show that the removal of the Facebook page resulted in the loss of any business).

44. *Lown Companies*, 2012 WL 3277188 at *4. Both PhoneDog and Piggy Paint's claims for interference with business expectancies or economic advantage in their complaints fail to demonstrate an economic connection arising from Facebook "likes" or Twitter followers. *Id.*; First Amended Compl. at 5-7, *PhoneDog* 2011 WL 5415612 (2011) (C 11-03474 MEJ). Additionally, Piggy Paint alleges losses that exceed \$75,000 but does not offer any facts as to how it came up with that calculation. *Id.* Defendant Piggy Paint's Answer to the Amended Compl. at 54-56, *Lown Companies*, 2012 WL 3277188 (2012) (1:11-CV-911).

45. See First Amended Compl. at 5-7, *PhoneDog*, 2011 WL 5415612 (2011) (C 11-03474 MEJ) (containing PhoneDog's allegations that their lost Twitter account resulted in the ability to freely advertise to over 17,000 followers and the loss of free exposure with CNBC and Fox News due to the established relationship PhoneDog and the news outlets maintained on Twitter); see Defendant Piggy Paint's Answer to the Amended Compl. at 55, *Lown Companies*, 2012 WL 3277188 (2012) at *3 (1:11-CV-911) (alleging that the almost 20,000 Facebook fans had an interest in Piggy Paints products and expected to recover a profit from the interest generated from Facebook).

46. *Ashcroft v. Iqbal*, 556 U.S. 662, 1940 (2009). The standard to survive a motion to dismiss is not a strict one: "To survive a motion to dismiss, the complaint must provide factual allegations and not mere legal conclusions." A court must also accept true all allegations in a complaint. *Id.*

47. See RESTATEMENT (SECOND) OF TORTS § 222A (1965) (exemplifying how this is the case because to demonstrate a claim for conversion the plaintiffs/counter-plaintiffs will need to show they owned the social media account in the first place). "Conversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel" *Id.*; see also *G.S. Rasmussen & Associates, Inc. v. Kalitta Flying Serv., Inc.*, 958 F.2d 896, 906 (9th Cir. 1992) (defining the elements of conversion in California as (1) ownership or right to possession of property, (2) wrongful disposition of the property right, and (3) damages).

48. See Adam Walker, *PhoneDog vs. Kravitz: In the World of Social Media*,

neither parties own the accounts because the rights are the lawful property of the website company in which they operate.⁴⁹ *PhoneDog* has been the most on-point case in regard to this issue, and the parties there presented the most practical framework for determining proper ownership rights.⁵⁰ Another conversion issue that must be addressed is not only the ownership rights of the account, but also ownership of the followers, friends, and connections.⁵¹

D. Damages

In addition to adjudicating the conversion, misappropriation of trade secrets, and tortious interference with a prospective economic advantage claims, courts must determine the applicability of a damage remedy, which may be difficult to calculate.⁵² Another step in deciding ownership rights will reside

Who Really Owns What?, PRACTICAL LAWYER 50 (June 2012), available at http://files.ali-aba.org/thumbs/datastorage/lacidoirep/articles/TPL1206_Walker_thumb.pdf (explaining that the courts are split on the issue of whether ownership rights can extend to intangible property).

49. TWITTER TERMS OF SERVICE, <https://twitter.com/tos> (last visited Oct. 4, 2012). Twitter's "Terms of Service" state, We [Twitter] reserve the right at all times (but will not have an obligation) to remove or refuse to distribute any Content on the Services, to suspend or terminate users, and to reclaim usernames without liability to you." *Id.*

50. *See PhoneDog*, 2011 WL 5415612 at *13 (holding that PhoneDog has adequately alleged ownership rights at this stage of the pleadings and must survive the motion to dismiss because the conversion claim "is the core of this lawsuit"). Compared to the other cases discussed in this comment, *PhoneDog* presents the only fact scenario in which one party seizes complete control of a social media account and operates it as his own for personal gain with no further affiliation with the company. *Id.* The other cases are highly important in helping us determine damage values and values for these social media accounts. *Eagle* has a discussion on conversion but not as it relates to the LinkedIn account in dispute. *Eagle*, 2011 WL 6739448 at *12.

51. *See Walker*, *supra* note 48, at 55 (pointing out that PhoneDog is "unlikely to successfully meet its burden of proof to its conversion claim unless PhoneDog can demonstrate some legal control and/or possession over the followers of the account").

52. *See Nancy Messieh*, *Can You 'Own' Your Twitter Followers? One Blog Seems to Think So*, THE NEXT WEB (Dec. 27, 2011), <http://thenextweb.com/twitter/2011/12/27/can-you-own-your-twitter-followers-one-blog-seems-to-think-so/> (highlighting the many difficult factors that must be taken into account when determining the value of a Twitter account); *see also PhoneDog*, 2011 WL 5415612 at *10 (containing the only known party to put a price on their social media account; the plaintiff alleged an "industry standard" value of \$2.50 per follower per month). However, this "industry standard" seems to have no basis and certainly no basis in PhoneDog's complaint. First Amended Compl. at 3, 8, 9, 11, *PhoneDog*, 2011 WL 5415612 (No. C 11-03474 MEJ). *See Defendant's Counterclaims and Answer to Plaintiff's First Amended Compl. at 3, PhoneDog*, 2011 WL 5415612 (denying the existence of an industry standard for the value of a Twitter follower).

with the determination of injunctive relief.⁵³ The grant of injunctive relief will be a good indicator of the courts' feelings as to the rightful owner of these accounts.⁵⁴

The courts' decision on these issues will have a substantial impact on the business world and companies' social media policies.⁵⁵ Companies (especially midsized businesses) are starting to invest more resources into social media.⁵⁶ Businesses across the world would be wise to protect their investments, pay close attention to these issues, take the necessary steps to ensure their ownership rights of these social media accounts, and avoid the risk of losing the benefit obtained from them.⁵⁷

53. See *Eagle*, 2011 WL 6739448 at *2 (E.D. Pa. 2011); First Amended Complaint at 9-11, *PhoneDog*, 2011 WL 5415612 at *7; *Ardis Health*, 2011 WL 4965172 at * 1 (showing all claims seeking injunctions for the other parties to be enjoined from operating these accounts and social media websites.)

54. See *What is an Injunction?*, THE LAW DICTIONARY, <http://thelawdictionary.org/injunction/> (last visited Oct. 4, 2012) (showing that Black's Law Dictionary defines injunction as:

A prohibitive writ issued by a court of equity, at the suit of a party complainant, directed to a party defendant in the action, or to a party made a defendant for that purpose, forbidding the latter to do some act, or to permit his servants or agents to do some act, which he is threatening or attempting to commit, or restraining him in the continuance thereof, such act being unjust and inequitable, injurious to the plaintiff, and not such as can be adequately redressed by an action fit law).

Id.

For the cases in our discussion, the parties are seeking an injunction to enjoin the former employees from operating the account and websites. If the courts grant the injunction it will be an indication the court doesn't feel the employee has the right to the accounts or website, and the first step toward the employers gaining ownership rights.

55. *Loatman*, *supra* note 18, at 260. Because of the rapid development of social media, few businesses have had the foresight to implement policies to protect their interest in their social media endeavors. Because of this, companies will be paying close attention to the outcome of these cases. *Id.*

56. See Corporate Executive Board, *Driving Business Results With Social Media*, BUSINESSWEEK (Jan. 21, 2011), available at http://www.businessweek.com/managing/content/jan2011/ca20110120_489176.htm. (pointing out that in the last two years, midsized companies have nearly doubled their investments in social media.)

57. Michael Stelzner, *How Marketers Are Using Social Media to Grow Their Business*, 2012 SOCIAL MEDIA MARKETING INDUSTRY REPORT (April 2012) available at <http://www.socialmediaexaminer.com/SocialMediaMarketingIndustryReport2012.pdf?9d7bd4>. Time spent on social media promoting a business works. *Id.* 58% of marketers who have been using social media for more than three years report social media has helped improve sales. *Id.* Additionally, 72% have reported that in the last three years, use of social media has generated new leads along with 44% saying the same for businesses that have used social media for less than six months. *Id.*

III. ANALYSIS

Generally, the courts have not given a hard stance on the issues presented.⁵⁸ There is a need to develop a more formulaic method for deciding the claims of conversion, tortious interference with a prospective economic advantage, misappropriation of trade secrets, and how to award damages. This analysis will introduce the need for the courts to adopt proper standards to adjudicate these issues.

A. Conversion

It seems logical to start with an analysis of conversion to set up the problem courts have with granting ownership rights before inquiring into the possible monetary value for these accounts.⁵⁹ A Pennsylvania case, *Eagle v. Morgan* seems to have provided the first indication as to whether the employee or employer retains the right to the social media account.⁶⁰ In *Eagle*, Eagle maintained a LinkedIn account to promote her employer's banking services, to "build professional and social relationships," and also to reconnect with family, friends, and colleagues.⁶¹ However, when the plaintiff's employment was terminated, her LinkedIn account was taken over by the company.⁶² After the takeover, the CEO's profile replaced plaintiff's.⁶³ Eagle brought a claim alleging damages

58. *PhoneDog*, 2011 WL 5415612 at *7, *10. The court denied the defendant's motion to dismiss for PhoneDog's misappropriation of trade secrets and conversion claims. *Id.* So far the courts have been universal in denying claims for intentional interference with a prospective economic advantage, but this can be mainly attributed to the parties' failure to allege proper damages. *PhoneDog*, 2011 WL 5415612 at *8; *Lown Companies*, 2012 WL 3277188 at *4. The Colorado District Court held the plaintiff in *Christou v. Beatport* properly stated a claim for misappropriation of trade secrets. *Christou*, 849 F.Supp.2d at 1076. However, the Eastern District of Pennsylvania denied Eagle's motion for judgment on the pleadings for a misappropriation of trade secrets claim. *Eagle*, 2011 WL 6739448 at *13.

59. See RESTATEMENT (SECOND) OF TORTS § 222A (1965) (exemplifying how this is the case because to demonstrate a claim for conversion the plaintiffs/counter-plaintiffs will need to show they owned the social media account in the first place).

60. See *Eagle*, 2012 WL 4739436 (granting the Defendants' (company) motion for summary judgment because the plaintiff failed to allege sufficient facts to support her claim that she suffered damages as a result from losing her LinkedIn account, and therefore granting EdComm's right to maintain control over her former account).

61. *Id.* at *1.

62. *Id.*

63. *Id.* at *1. Edcomm had access to the plaintiff's LinkedIn account password because the plaintiff created the account with another employee at EdComm. *Id.* EdComm replaced the plaintiff's name and photograph with that of the new CEO, Sandy Morgan. *Id.* Although the new LinkedIn profile contained Morgan's name and picture, it retained all of the plaintiff's connections, awards, honors, and recommendations. *Id.*

under the Computer Fraud and Abuse Act.⁶⁴

In similar cases, the largest hurdle that plaintiffs/counter-plaintiffs must overcome is demonstrating sufficient damages resulting from losing possession of these accounts. It is very difficult to show any form of lost revenue or monetary damages deriving from losing possession of a social media account, and Eagle provided no basis for doing so.⁶⁵

Eagle's failure to state a claim under the CFAA is an example as to why plaintiffs are better suited asserting ownership rights under conversion. It is unlikely the *Eagle* holding will set precedent on similar cases.⁶⁶ When asserting damages and ownership rights, Eagle could not meet the high standard set by the CFAA.⁶⁷ The fact that Eagle failed to allege damages⁶⁸, does not mean that none occurred.⁶⁹ For example, the loss of the LinkedIn account could lead to decreased website traffic, resulting in missed advertising or sales opportunities. The courts must adopt a comprehensive formulation (taking into account all factors) to determine the true value of a social media account.

As mentioned previously, employers must establish that they possessed ownership rights of the social media profile to succeed on many of these claims, and especially conversion claims.⁷⁰ Ownership in this situation is more complex than it appears. For example in *PhoneDog*, the issue presented was whether ownership

64. *Id.* at *3. A claim for future lost revenue caused by the dissemination of trade secrets does not qualify as a "loss" under the CFAA. *Id.* Additionally, harm to ongoing business ventures is insufficient to show a "loss" as well. *Id.*

65. *Id.* at *5-6 However it is important to note that Eagle represented herself as a pro se plaintiff and may have had a better chance of representing these damages if she obtained proper representation. Saranac Hale Spencer, *Suit Over LinkedIn Profile Ownership Now Set for Trial*, LAW TECHNOLOGY NEWS (Oct. 12, 2012), http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1349647365120&Suit_Over_LinkedIn_Profile_Ownership_Now_Set_for_Trial.

66. See Sara H. Jodka, *In the Social Media Battle Over Who Owns a LinkedIn Account, the Greatest Threat is the State Law Claims - How Employers can Protect Themselves in Light of Eagle v. Morgan as 11 State Law Claims Proceed to Trial*, LEXOLOGY (Oct. 24, 2012), available at <http://www.lexology.com/library/detail.aspx?g=1562a27f-a1ff-417d-8798-c580f3be1c14> (explaining how this is not nearly the end of the story and there are still eleven state law claims proceeding to trial, including conversion).

67. *Eagle*, 2012 WL 4739436 at *3. The court stated that future lost revenue, harm to ongoing business ventures, loss of assets, and reputational damages, are insufficient to constitute a loss. *Id.*

68. *Eagle*, 2012 WL 4739436 at *6. The plaintiffs claimed loss was too "generalized" and insufficient to survive summary judgment. *Id.*

69. Further, unlike the CFAA, pecuniary losses, such as lost business or profits, are recoverable from a showing of conversion. JACOB STEIN, STEIN ON PERSONAL INJURY DAMAGES TREATISE, § 5:53 (3d ed. 2012).

70. *PhoneDog*, 2011 WL 5415612 at *9. The court noted that in California, the first element to establish conversion is the "ownership of a right to a possession of property." *Id.*

extends just to the account, to the “tweets,” followers, or other content related to the Twitter account.⁷¹ One strong argument takes the view that one cannot “own” Facebook or MySpace friends, Twitter followers, or LinkedIn connections.⁷² These connections are human beings that freely accept friend requests or follow a Twitter account on their own accord; they cannot be considered “owned” by those they connect with.⁷³ However, the other side of the argument presents a narrower approach.⁷⁴ Under this approach the ownership rights lie solely with the account, and everything else is an asset inherited with ownership.⁷⁵ Using this argument, the business will contend that Twitter followers are like customer lists owned by the company.⁷⁶

Although this argument is very strong, the departing employee may have an equally strong argument in that the plaintiff company cannot establish ownership rights pursuant to the social media website’s Terms of Service.⁷⁷ For example, the Twitter Terms of Service state, “All right, title, and interest in and to the Services . . . are and will remain the exclusive property of Twitter.”⁷⁸ The Twitter terms of service do not leave many avenues to which a user can claim ownership of the Twitter handle he/she

71. See *id.* at *3-4 (noting how Kravitz argues that there is much more than determining the ownership rights of the account; the court must take into account the followers, tweets, content, and user controlling the tweets).

72. *PhoneDog*, 2011 WL 5415612 at *3. This is the argument the defendant, Kravitz made in his FED. R. CIV. P. 12(b)(6) motion to dismiss for failure to state a claim. *Id.*

73. *Id.* The defendant argues that the followers of the account are human beings, and have the discretion to subscribe/unsubscribe to the account without the consent of PhoneDog implying PhoneDog cannot assert ownership rights over people that are free to associate with whomever they please. *Id.*

74. Plaintiff Phonedog, LLC’s Opposition to Defendant Noah Kravitz’s Motion to Dismiss at 6-7, *PhoneDog*, 2011 WL 5415612. (No. C 11-03474 MEJ). PhoneDog argued that Kravitz submitted content through Twitter on behalf of PhoneDog (and under PhoneDog’s supervision) to draw interest to the company and PhoneDog’s website. *Id.* The acquisition of followers was simply a result of the increased interest the public had in PhoneDog’s product. *Id.*

75. *Id.*

76. See *Kremen v. Cohen*, 337 F.3d 1024 at 1032 (9th Cir. 2003) (stating that courts have allowed conversion claims for intangible property such as business customer lists). Also, in *Kremen* the court held the defendant liable for conversion of a domain name (another intangible item). *Id.*

77. *PhoneDog*, 2011 WL 5415612 at *3. See also, Walker, *supra* note 48, at 51 (noting that PhoneDog will have a very difficult time overcoming the language in the Twitter terms of service, and this could prove fatal to PhoneDog’s conversion claim because it seems the user accounts are property of Twitter).

78. Twitter Terms of Service, TWITTER, <https://twitter.com/tos> (last visited Oct. 23, 2012). The terms further state, “We reserve the right at all times . . . to remove or refuse to distribute any Content on the Services, to suspend or terminate users, and to reclaim usernames without liability to you.” *Id.*

operates.⁷⁹ Although the terms do not expressly state that Twitter owns the rights to the accounts, Twitter would not divest itself of so much power over the operation of the accounts if they did not implicitly maintain ownership of the accounts.⁸⁰ It will be difficult for a business to establish it has ownership rights instead of the employee, when the real ownership rights may lie in a third party.⁸¹

Early on, it seems that the employers have shifted their argument toward asserting ownership of the followers as customer lists, instead of the account in general.⁸² For example, this shift will give plaintiffs like PhoneDog a higher probability of success on their conversion claim because the Ninth Circuit historically upholds conversion claims involving intangible property.⁸³ This appears to be the most logical path to take for success, especially because all of PhoneDog's value comes from the 17,000 followers.⁸⁴

In summary, conversion claims have been difficult to decide because the value of social media accounts are hard to determine, along with the uncertainty of which aspects of a social media account presents ownership rights to companies. This problem must be solved to give more clarity to businesses.

B. Misappropriation of Trade Secrets

Several very logical arguments war between whether a social media account and its respective connections can constitute trade secrets. One argument for trade secret protection is that the connections built-up through social media are more than just easily searchable names on the internet.⁸⁵ In fact, these connections often include contact information like email, and

79. *Id.*

80. Walker, *supra* note 48, at 51. Walker states that the contractual rights conveyed in the terms of service, along with Twitter's authority and operation of the website, strengthens the gap between the rights owned by Twitter and limited rights of users. *Id.*

81. See Defendant's Motion to Dismiss, *PhoneDog*, 2011 WL 5415612 (No. C 11-03474 MEJ) (exemplifying defendant's argument that there are many provisions in Twitter's terms of service that are contradictory of plaintiff's claims for ownership rights of the Twitter handle in dispute).

82. Phonedog's Opposition to Kravitz's Motion to Dismiss at 6-7, *PhoneDog*, 2011 WL 5415612. (No. C 11-03474 MEJ).

83. See *Palm Springs-La Quinta Dev. Co. v. Kieberk Corp.*, 115 P.2d 548 (Cal. App. 3d Dist. 1941) (allowing a conversion claim for intangible information in a customer list when some of the index cards on which the information was recorded were destroyed); see also *Kremen*, 337 F.3d at 1036 (holding the defendant liable for conversion of an internet domain name).

84. First Amended Complaint at 11, *PhoneDog*, 2011 WL 5415612. (No. C 11-03474 MEJ). PhoneDog alleged that the \$340,000 in damages was based solely on the amount of followers the account had, and for a sustained period of time. *Id.*

85. *Christou*, 849 F. Supp. 2d at 1075.

provide information such as employment background.⁸⁶ These connections are not generally available to the public as they were amassed through a private account protected by a password.⁸⁷

In *Christou*, the District Court held the argument for trade secret protection was valid and that MySpace friends do constitute trade secrets for a variety of factors including: (1) proper and reasonable steps were taken by the owner to protect the secrecy of the information and (2) customer information could not be readily obtained from public directories.⁸⁸ Next, the court upheld the plaintiff's misappropriation of trade secrets claim because the defendant, as a co-founder of his former company, knew or should have known that the trade secret was acquired by improper means.⁸⁹

The first obvious argument against trade secret protection is that the connections through online social media cannot be considered "secrets" for the mere fact that they are obtained on the World Wide Web, and are therefore available to everyone.⁹⁰ It can be argued that the password to an account merely allows a user to gain access to information already widely known.⁹¹ However, this is likely a weak argument because if the information were public,

86. *Id.* The plaintiff argued that his former partner (defendant) used the login credentials of his company to promote his new business. *Id.* at 1074. The argument was that the defendant needed the plaintiff's secret password to get the contact information for a friend list that the plaintiff built-up, because there was no other way the defendant could amass the same information through the internet. *Id.* at 1075.

87. *Id.* at 1075. This information alleged by the plaintiff satisfies the two general requirements of demonstrating a claim for misappropriation of trade secrets because, first, the plaintiffs put in countless hours to build up their friend list so high, it would be highly unlikely to duplicate. *Id.* Second, the plaintiffs maintained the secrecy of its connections by the protecting of the login and password of the MySpace account. *Id.*

88. *Id.* at 1075-1076. The full list of factors the court used to determine whether the MySpace friends constituted trade secrets was:

- (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.

89. *Id.* at 1077.

90. *PhoneDog*, 2011 WL 5415612 at *6. Kravitz argued that the followers of a Twitter account are publicly available to see at all times and therefore in no way secret. *Id.*

91. Defendant's Motion to Dismiss at 14-15, *PhoneDog*, 2011 WL 5415612 (No. C 11-03474 MEJ).

there wouldn't be any reason to have a password.

Instead, the stronger argument in opposition to a trade secrets claim is that a social media account does not have independent economic value.⁹² It may be wise to take the approach the plaintiff successfully did in *Christou v. Beatport* and argue social media connections are similar to "customer lists" and therefore demonstrate an economic advantage.⁹³

However, even if the courts do accept the customer list argument, the party may still have to show an economic value. Case law makes it clear that plaintiffs must show evidence related to a direct economic impact resulting from their social media efforts. For example, the plaintiff in *PhoneDog* would have to show Kravitz' tweets led to increased traffic on PhoneDog's website and increased PhoneDog's profits due to product sales and advertising opportunities.

Clearly, there are strong arguments on both sides of the misappropriation of trade secrets claim, and a hard stance as to what constitutes a "trade secret" on the internet must be adopted to provide a straight forward approach.

C. Interference With a Prospective Economic Advantage

Plaintiffs have had a difficult time surviving a motion to dismiss when attempting to demonstrate an economic expectancy from their social media connections. The plaintiffs' respective claims in *PhoneDog* and *Lown Companies, LLC v. Piggy Paint, LCC* (counter-plaintiffs), for an intentional interference with a prospective economic advantage and tortious interference with a business expectancy were dismissed because the plaintiff failed to allege sufficient facts showing an economic loss caused by losing control of Twitter and Facebook accounts.⁹⁴ The courts simply do not have any idea what 17,000 Twitter followers or 19,000 Facebook "fans" could mean to a business economically.⁹⁵ To avoid dismissal, the parties must make the economic value very clear.⁹⁶

In *PhoneDog*, the plaintiff wisely abandoned its claim of a seemingly fabricated "industry standard" valuation of a Twitter follower and instead focused on the direct relationship between social media activity and its effect on its website traffic.⁹⁷ This

92. Jager, *supra* note 34, at Appx. A1. A showing that the alleged trade secret has independent economic value is required in common law. *Id.*

93. *Christou*, 849 F. Supp. 2d at 1075.

94. *Lown Companies*, 2012 WL 3277188 at *4; *PhoneDog*, WL 5415612 at *8. The court in both cases stated that the parties failed to provide any factual basis making a business connection between their social media connections and business or economic expectancies.

95. *Lown Companies*, 2012 WL 3277188 at *4. The court noted that Piggy Paint obtained 19,000 fans on Facebook, however, the loss of that account was not enough to demonstrate that Piggy Paint suffered any business loss. *Id.*

96. *Id.*

97. See Defendant's Reply to Plaintiff's Opposition to Motion to Dismiss,

information can provide significant evidence as to the true value of these accounts. If the courts accept this argument, the next problem that must be solved (passive voice) is determining how much lost business can be attributed to the departure of the social media account.⁹⁸

D. Damages – The Missing But Necessary Element

After going through the analysis of these various claims, it is clear this jurisprudence will hinge on one underlying issue – is there a value to a social media account and if so, how much?⁹⁹ Several methods have developed to attempt to demonstrate the existence/nonexistence of the value of a social media account.¹⁰⁰ The courts must determine which method is most logical and accurate.¹⁰¹

The defendant in *PhoneDog* claimed that PhoneDog's damages could not be more than \$75,000 because its value calculated through "Tweetvalue.com" only puts a \$4,380 valuation

PhoneDog, 2011 WL 6955633 (No. C 11-03474 MEJ) (noting how in the plaintiffs' opposition to the defendant's motion to dismiss plaintiffs abandoned their industry standard valuation and stated the value of the Twitter followers is the traffic the Twitter followers generate to PhoneDog's website); see also Plaintiff Phonedog, LLC's Opposition to Defendant Noah Kravitz's Motion to Dismiss at *5-7, *PhoneDog*, 2011 WL 6955629 (No. C 11-03474 MEJ) (alleging that they receive payments on advertising per every 1,000 page views and since the defendant took over the account their page views have decreased). The plaintiffs also allege that as a result of losing control of the Twitter account and the defendant's conduct, plaintiff's relationship with CNBC and Fox News was interrupted. *Id.*

98. Plaintiffs' First Amended Complaint at 5-6, *PhoneDog*, 2011 WL 6955632 (No. C 11-03474 MEJ). PhoneDog amended its complaint after the court initially dismissed their claim for tortuous interference with a prospective economic advantage. *Id.* The court never made a ruling on the sufficiency of the new pleading that included more detailed facts regarding the relationship between twitter followers and website page views. *Id.*

99. See John Biggs, *A Dispute Over Who Owns a Twitter Account Goes to Court*, N.Y. TIMES (Dec. 25, 2011),

http://www.nytimes.com/2011/12/26/technology/lawsuit-may-determine-who-owns-a-twitter-account.html?_r=4& (discussing the many different approaches to placing a value on a Twitter account and how important this issue is to *PhoneDog*).

100. See Defendant's Motion to Dismiss at 11-12, *PhoneDog*, 2011 WL 6955638 (C 11-03474 MEJ) (arguing that there can be no way to put a value on a Twitter account, and even if there is a value there is no basis to claim \$75,000 in damages because even Twitter accounts as popular as Lady Gaga's are barely worth that much). PhoneDog has abandoned the "industry standard" argument and will have to allege a more factual showing of the relationship between their lost revenue as a result caused by the loss of control of the "PhoneDog_Noah" twitter account. *Id.*; see Plaintiffs' First Amended Complaint at 10-11, *PhoneDog*, 2011 WL 5415612 (No. C 11-03474 MEJ) (alleging only a claim for general damages for tortuous interference with a prospective economic advantage after introducing new claims for losses resulting for the decreased traffic to their website).

101. *Id.*

on the account's 20,519 followers.¹⁰² However, Tweetvalue.com cannot make a determination as to the effect the followers have on the company's website traffic or advertisements.¹⁰³ For this reason, a source like Tweetvalue.com is not very credible. Further, research has shown that the use of social media does have a positive effect on businesses that choose to use it.¹⁰⁴ Going forward, it will be up to plaintiffs like PhoneDog to specifically allege this value to their company and the resulting damages caused by losing control of the social media platform, and the courts must implement a standard to determine the validity of these claims.

IV. PROPOSAL

The analysis of the various issues the courts are struggling with presents two major problems: (1) who is the rightful owner of a social media account? and (2) what is the value? The courts must adopt standards to determine these issues. The following proposal will outline a method to help courts answer these questions, including exact formulations courts can use to determine validity of claims and damages. In addition, this proposal will introduce precautions businesses can take to avoid these issues from ever arising.

A. Ownership

The first aspect that needs to be examined is the scope of the account's use.¹⁰⁵ This will vary from different social media websites. For example, LinkedIn is primarily used for one's own personal gain. Although a user is directly affiliated with the company that currently employs said user, LinkedIn operates like a personal resume that allows one person to build his or her own *personal* brand.¹⁰⁶ If the Twitter, LinkedIn, Facebook, or MySpace

102. Defendant's Motion to Dismiss at 12, *PhoneDog*, 2011 WL 6955632 (No. C 11-03474 MEJ).

103. TWEETVALUE, www.tweetvalue.com (last visited Feb. 9, 2014). This website demonstrates minimal credibility for its method of determining the value of a Twitter account. The "about" section of their website reads, "[t]his service was created by the Swedish entrepreneur and developer Jonas Lejon. *Id.* "The value is calculated with a Ph.Dalgoritm [*sic*] that is based on the public information available on your Twitter profile." *Id.* It then continues below, "uuhm. not really :-)." *Id.*

104. Stelzner, *supra* note 57.

105. For example PhoneDog claimed they gave Kravitz permission to use the "@PhoneDog_Noah" Twitter handle and their "naming convention with the PhoneDog trademark to purposefully promote the brand along with the company's editorial team." Jennifer Van Grove, *The Case of the 'Stolen' Twitter Account*, VENTUREBEAT (Nov. 11, 2011), <http://venturebeat.com/2011/11/11/phonedog-v-kravitz/>.

106. LinkedIn Learning Center, http://www.linkedin.com/company/raz-chorev/linkedin-training-recruiters-5017/product?trk=biz_product

account in dispute operated under a title with just the company name (like “Pepsi” or “@Pepsi”) and produced content related to general business operations or promotions; it is clear the account was created solely to benefit the company and the company should retain full ownership rights over the account. When the purpose behind the title of the account becomes ambiguous (i.e. “PhoneDog_Noah”), the court must look to the content of the account and also look into why the account was created in the first place. In many instances, it will be the employer that directed the employee to create the social media account and promote the company through that medium.¹⁰⁷ In this case, the employee should not be able to assert any ownership rights.¹⁰⁸ The account would not have existed but for the employer’s direction. Additionally, the reason for the employer’s direction was for the benefit of the company, not his employee’s personal gain.

However, even if these accounts are created and used for the benefit of the company, many of these websites, like Twitter, assert their own ownership right in the Terms of Service.¹⁰⁹ Because of this, companies may not be able to assert general ownership rights over the account itself. However, when it comes to the followers, connections, and friends from a social media account; the courts should adopt the standard that allows for a company to assert ownership rights over intangible property like “customer lists”¹¹⁰ and apply it to the problem here.

(last visited Feb. 4, 2014). “LinkedIn connects you to your trusted contacts and helps you exchange knowledge, ideas, and opportunities with a broader network of professionals.” *Id.* LinkedIn’s purpose is to help professionals network with people around the world to help build their own personal brand. *Id.*

107. James Walsh, *Companies Look to Capitalize on Viral Voices*, WORKFORCE (May 27, 2011), <http://www.workforce.com/articles/10079>. Many companies are capitalizing on employee “word of mouth,” and asking them to promote the company they work for through social media. *Id.* For example, PepsiCo is now asking all 300,000 of their employees to become “brand ambassadors” of Pepsi and promote the company through their own social media accounts. *Id.*

108. Biggs, *supra* note 99. Intellectual property lawyer Henry J. Cittance stated, “It all hinges on why the account was opened . . . if it was to communicate with PhoneDog’s customers or build up new customers or prospects, then the account was opened on behalf of Phonedog, not Mr. Kravitz.” *Id.*

109. *Twitter Terms of Service*, TWITTER, <https://twitter.com/tos> (last visited Nov. 14, 2012). The Twitter Terms of Service state, “All right, title, and interest in and to the Services . . . are and will remain the exclusive property of Twitter.” *Id.* However, this is not a problem for some social media websites like Facebook. Facebook’s terms of service state, “You own all of the content and information you post on Facebook.” *Statement of Rights and Responsibilities*, FACEBOOK, <http://www.facebook.com/legal/terms> (last visited Nov. 14, 2012).

110. *See Umbenhauer v. Woog*, 1993 WL 134761, at *3 (E.D. Pa. 1993) (allowing a claim for conversion of various intangible assets, including

In these social media account disputes, the courts should adopt the practice of characterizing these mediums as intangible property (such as customer lists), and convertible trade secrets.¹¹¹ Virtually all circuits have allowed conversion claims of intangible property to proceed, including those claims for conversion of customer lists.¹¹² The connections built up from a social media account are no different from a standard customer list that every company uses to solicit business.¹¹³ If companies are permitted to assert ownership rights over customer lists, then the same should be applied to Twitter followers, Facebook and MySpace friends, and LinkedIn connections. The clear value that companies can derive from a customer list has been enough to satisfy the prong of conversion that requires a showing of damages.¹¹⁴ This factor should be just as simple for social media connections because of the instant access to prospective customers.¹¹⁵

customer lists, to proceed); *Datacomm Interface, Inc. v. Computerworld, Inc.*, 489 N.E.2d 185, 194 (Mass. 1986) (finding damages for conversion of a magazine circulation list); *Palm Springs-La Quinta Dev. Co. v. Kieberk Corp.*, 115 P.2d 548, 550 (Cal. App. 3d Dist. 1941) (finding conversion not only for the improper use for the index cards, but for the prospective customer information listed on them; the court awarded damages based off of the conversion of the misuse of the customer list information on the cards); *Tennant Co. v. Adv. Mach. Co., Inc.*, 355 N.W.2d 720, 725 (Minn. App. 1984) (adopting California's standard and recognizing conversion of marketing information including customer lists).

111. This standard should not be limited to conversion. The courts should also adopt the customer list analogy when analyzing trade secrets claims also. This is what the court correctly did in *Christou v. Beatport*. The court in *Christou* used a customer list standard formulation and upheld the plaintiff's trade secret claim based on the similarities to confidential customer lists. *Christou*, 849 F. Supp. 2d at 1062.

112. See *supra* text accompanying note 111 (suggesting that the courts should adopt the analogy of the customer list when analyzing trade secrets claims).

113. Corporate Executive Board, *supra* note 56. Many companies use social media to listen to what customers are looking for, and build their target audience based on customer sentiments. *Id.* Businesses through social media can reach out to their prospective customers and determine which types of services respond favorably or unfavorably with consumers. *Id.*

114. For example, in *Palm Springs-La Quinta Dev. Co.*, the court stated that the ability of another realty firm to use the information on the index cards diminished the ability of the rightful owner of the cards to exclusively sell to the contacts they had built up (the court also discussed the time and resources put in to create such an extensive customer list). *Palm Springs-La Quinta Dev. Co.*, 115 P.2d at 551. Social media accounts operate in a very similar fashion. Businesses build up a large follower base for the exclusivity of promoting their brand to the consumers. *Palm Springs-La Quinta* reiterates the fact that these exclusive customer and consumer bases provide great value to the companies that have amassed them.

115. Additionally, a lot of customer lists are merely a contemplation of prospective interested people that *may* be interested in the business. Social media followers and friends are people that have chosen to become a connection, and therefore have implicitly expressed interest in the content of

B. Damages

In calculating a value on a social media account and its connections, one thing is certain: delegating an arbitrary value to each friend, follower, or connection is not logical.¹¹⁶ There are many different reasons why one chooses to engage with another user on social media. One person might follow an account because he/she is interested in the services that the company or person behind the account offers, while another person may not even realize he/she is even following a certain Twitter account.¹¹⁷ For these reasons, it makes little sense to place the same arbitrary value to each individual follower or friend.¹¹⁸

One method that does make sense is evaluating the difference in website traffic¹¹⁹ during the time the company had control over the account, and after the control was lost.¹²⁰ This methodology would serve two very important interests. The first would be a demonstration of the purpose the account served to the friends or followers. For example, if PhoneDog received heavy website traffic during the time Noah Kravitz operated “PhoneDog_Noah”, and considerably less traffic once he changed the handle to “NoahKravitz”; that is a clear indication his followers followed him for their interest in PhoneDog the company, and not Noah Kravitz the person.

In addition, this provides a clear model for showing the economic value of a social media account. Many websites generate revenue from advertisements, and they base the cost of

the account.

116. First Amended Complaint at 11, *PhoneDog*, 2011 WL 6955632 (C 11-03474 MEJ). PhoneDog’s alleged a \$2.50 valuation per Twitter follower based on the “industry standard.” *Id.* However, PhoneDog provided no support as to where this “industry standard” is derived from, nor any support explaining the method behind the valuation. *Id.*

117. Messieh, *supra* note 52. Messieh points out that not all social media friends or followers are legitimate. For example on Twitter, “you’ll find a fair share of bots, dormant accounts, or accounts that follow thousands of users, making it highly unlikely that they ever see your tweets in the first place.” *Id.*; see also Doug Gross, *Facebook Cracking Down on Fake ‘Likes’*, CNN (Sep. 27, 2012), http://www.cnn.com/2012/09/27/tech/social-media/facebook-fake-likes/index.html?hpt=hp_t3 (explaining how Facebook has had to remove “likes” or followers of a person or business because they were illegitimate). Many “likes” are created by malware or when a user is deceived into “liking” something they did not intend to “like” or have no interest.

118. Messieh, *supra* note 52.

119. Stelzner, *supra* note 57 at 15. Sixty-nine percent of all marketers surveyed for the study reported the increased traffic to their website after using social media. *Id.*

120. The plaintiff in *PhoneDog* appeared to base their damages on this evaluation. Plaintiff’s Opposition to Defendant’s Motion to Dismiss at 5, *PhoneDog*, 2011 WL 6955638 (C 11-03474 MEJ). PhoneDog noted that the “@PhoneDog_Noah” Twitter account was a great avenue to generate website hits. In addition, advertisers paid PhoneDog for every one thousand page views. *Id.*

advertising off of the number of page views they receive every week, month, and year.¹²¹ Therefore, if a Twitter or Facebook account results in an increased number of page views on the company's website, that company's website is more attractive to advertisers. More advertisers provide more money for the company. This is a clear economic value.

Further, the representation of economic losses should not be limited to page views. If a business can show a loss in revenue from services offered on social media after losing control of the account, the courts must accept this economic loss as real. For example, if Piggy Paint, LLC suffers a decrease in nail products¹²² sold immediately after their Facebook page is removed, this is not a coincidence. This is a real loss the courts must recognize and hold in the plaintiff's favor.

The courts must recognize the value a social media account has to a company.¹²³ To this point, the courts have shockingly dismissed businesses' claims for misappropriation of trade secrets, tortious interference with an economic advantage, and conversion because of their failure to recognize the economic value of a social media account to a company.¹²⁴ It is time for the courts to accept the worldwide trend of social media brand building.¹²⁵ There would not be so many businesses around the world investing millions of dollars into social media if it didn't yield a profit.¹²⁶

121. *Id.* PhoneDog, for example, claimed that website traffic is one of their "main" sources of revenue. *Id.* PhoneDog also requests their representatives maintain Twitter accounts and that they frequently post links to the PhoneDog website to increase traffic, and in turn generate advertising revenue. *Id.*

122. *Piggy Paint Natural as Mud*, FACEBOOK, <http://www.facebook.com/RefinedNailPolish?ref=ts&fref=ts>. Piggy Paint LLC advertises their "non-toxic, odorless, kid-friendly" nail polish products on Facebook. *Id.* In addition, the company offers deals and coupons exclusive to Facebook users. *Id.*

123. Stelzner, *supra* note 57, at 16. Fifty-eight percent of marketers questioned for the survey indicated use of social media for three years resulted in increased sales. *Id.* Also, 85% of marketers noted that social media efforts resulted in increased exposure of their business. *Id.* That number increases to 95% for those who employed social media marketing for three years. *Id.*

124. *Eagle*, 2012 WL 4739436 at *3; *Eagle*, 2012 WL 6739448 at *11; *Lown Companies*, 2012 WL 3277188 at *4; *PhoneDog*, WL 5415612 at *8.

125. Companies are now expanding their social media efforts year after year. Stelzner, *supra* note 57 at 24. Marketers are increasing their efforts on YouTube (76%), Facebook (72%), Twitter (69%), blogs (68%), Google+ (67%), and LinkedIn (66%). *Id.*

126. Phil Mershon, *5 Social Media Marketing Trends: New Research* (Feb. 29, 2012), <http://www.socialmediaexaminer.com/5-social-media-marketing-trends-new-research-2/>. A study conducted by Borrell Associates indicated that small and mid-sized businesses spent about \$1 billion in social media in 2011. *Id.* In addition, 95% of these businesses employ at least one person to advance their social media efforts. *Id.*; see also Corporate Executive Board, *supra* note 56, (showing that 74% of midsized companies use Twitter, 71% use twitter, 53% use YouTube, and 36% of companies use blogs to promote their

In summary, the formulation is clear. A company claiming damages after losing control of a social media account must show (1) a loss of revenue or profit, (2) immediately after losing control of the account, and (3) the economic loss must be reasonably related to the lost advertising provided by social media.¹²⁷ The damage amount should then be determined by the lost revenue from the moment control of the account was lost, until the company is given access back to the account.

C. Prevention

The simplest way to solve this problem is for businesses to take the necessary steps to prevent this issue from ever occurring in the first place. When pursuing social media to build a brand, the business must make it clear to the employee that the sole purpose of the account is for the benefit of the company, and the company retains all operating rights of the account. Companies should look to the “Work Product Agreement” implemented by the plaintiff company, “Curb Your Cravings, LLC” (CYC) in *Ardis Health, LLC v. Nankivell*.¹²⁸ In this case, the defendant was retained by the plaintiffs to operate the plaintiffs’ website, blogs, and social media pages.¹²⁹ The “Work Product Agreement” stated all work created or developed by defendant “shall be the sole and exclusive property of CYC, in whatever stage of development or completion,” and the agreement also provided the defendant must return all confidential information to CYC upon request.¹³⁰ After the defendant was fired, she refused to relinquish the login credentials of the online accounts.¹³¹ The suit followed, and the Southern District Court of New York adamantly determined the plaintiffs had the right to the credentials and granted injunctive relief.¹³²

All companies should implement a policy similar to that of Curb Your Cravings when pursuing any social media operation. The policy must (1) outline a clear understanding that any social media account maintained by the employee relating to his employment is the property of the employer, and (2) implement a clear procedure for returning any login in credentials upon the employee’s departure from the company.¹³³ Policies such as these

business).

127. For example, a wine company that exclusively advertises its internet deals on Twitter may not blame a decline in store sales on the loss of a Twitter account.

128. *Ardis Health*, 2011 WL 4965172 at *1 (S.D.N.Y. 2011).

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at *3.

133. Additional steps employers can take that would help maintain control over their social media account would be to: (1) issue all login credential information to the employee that is set to operate the account; and (2) to

can prevent long litigation, attorney fees, and lost revenue resulting from forfeited social media accounts.

V. CONCLUSION

Any social media account relating to a business presents economic value to that business. The courts should adopt the standard that social media connections can be converted just like other intangible property, like customer lists. Further, these social media accounts present true value by way of lost revenue, sales, website page views, and advertising. Courts must recognize this value and award damages to businesses accordingly. Finally, if a company has proper foresight, it can avoid all of these legal issues if it simply implements a clear policy outlining where the proper ownership rights lie before the employee commences the operation of the account.

mandate the employee use his or her work email address when registering for a social media account. These additional steps are not necessary, but are very simple and could make it easier for any company that has to deal with a dispute.