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“Why Do You Want My Password?”: Assessing Ultimate Control of a Journalist’s Twitter Account Used for Work Purposes

Benjamin Halperin

Fordham University School of Law, bhalperin1@law.fordham.edu

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Cover Page Footnote

Associate Editor, Fordham Intellectual Property, Media & Entertainment Law Journal, Volume XXIX; J.D., Fordham University School of Law, 2019; B.A., University of Michigan, 2012. I would like to thank Professor Olivier Sylvain for his guidance and mentorship throughout the writing and research process. I would also like to thank Volume XXIX’s Editorial Board, particularly Sean Corrado and Jeffrey Greenwood, whose invaluable feedback allowed this Note to be considered by their successors. I further would like to thank IPLJ Volume XXX—both the Editorial Board, particularly Elliot Fink and Hanna Feldman, for their vital insight and assistance, as well as Volume XXX’s Staff, for all their hard work. Finally, I would like to thank my parents, sister, and friends for their continued support and encouragement.

“Why Do You Want My Password?”: Assessing Ultimate Control of a Journalist’s Twitter Account Used for Work Purposes

Benjamin Halperin*

A journalist’s value to an employer can be seen differently in the age of social media. The value to the employer is not necessarily just measured by the number of words or articles produced, or even by how much their work drives increased website traffic or increased subscriptions. In addition to generally maintaining a social media presence, journalists are often encouraged or expected to use their social media accounts. However, such accounts might be in the individual journalist’s name and might pre-date the term of employment with that specific media entity. Therefore, a debate can rise over who might “own” an employee-journalist’s Twitter account, which would include access to the account’s follower list, when the employment relationship terminates. Although this scenario had been debated in the courts, albeit not necessarily with journalists, throughout this decade, courts have “punted” and avoided speaking directly on the issue. In September 2018, the trend continued when the U.S. District Court of the Western District of Virginia ordered a settlement to one such dispute. This Note

* Associate Editor, Fordham Intellectual Property, Media & Entertainment Law Journal, Volume XXIX; J.D., Fordham University School of Law, 2019; B.A., University of Michigan, 2012. I would like to thank Professor Olivier Sylvain for his guidance and mentorship throughout the writing and research process. I would also like to thank Volume XXIX’s Editorial Board, particularly Sean Corrado and Jeffrey Greenwood, whose invaluable feedback allowed this Note to be considered by their successors. I further would like to thank IPLJ Volume XXX—both the Editorial Board, particularly Elliot Fink and Hanna Feldman, for their vital insight and assistance, as well as Volume XXX’s Staff, for all their hard work. Finally, I would like to thank my parents, sister, and friends for their continued support and encouragement.

proposes that absent a clear and mutual understanding over post-employment control of the relevant social media account, the former employee should retain control over the social media account in most circumstances—especially when the account appears to be in the individual’s name.

INTRODUCTION	327
I. AN OVERVIEW OF TWITTER IN THE CONTEXT OF EMPLOYMENT	329
A. <i>Twitter and News and Journalism Employment</i>	329
B. <i>Post-Employment Control of a Former Employee’s Social Media Account</i>	333
C. <i>Judicial Decisions on Post-Employment Ownership of Social Media Accounts</i>	336
1. <i>PhoneDog v. Kravitz</i>	337
2. <i>Eagle v. Norman</i>	338
3. <i>Mattocks v. Black Entertainment Television</i>	341
4. <i>Other Notable Cases</i>	343
D. <i>Legal Academic Landscape for Social Media Disputes</i>	345
E. <i>An Overview of BH Media v. Bitter</i>	347
II. OVERVIEW OF THE LANDSCAPE REGARDING EMPLOYER-EMPLOYEE DISPUTES OVER SOCIAL MEDIA ACCOUNTS	357
A. <i>Theories Involving In re CTLI</i>	357
B. <i>CFAA</i>	364
C. <i>Hired-to-Invent and Shop Right Theories</i>	368
D. <i>Trade Secret</i>	373
E. <i>Publicity-Right Framework</i>	378
III. ENDORSING A PUBLICITY RIGHTS APPROACH.....	384
A. <i>Why A Publicity Framework Is Preferable to the Other Frameworks Discussed</i>	384
1. <i>Theories Involving In re CTLI</i>	385
2. <i>CFAA</i>	386
3. <i>Hired-to-Invent and Shop Right Theories</i>	386
4. <i>Trade Secret</i>	387

5. Right of Publicity	388
<i>B. A Publicity Rights Framework Is Preferable for the Media Industry</i>	389
CONCLUSION.....	392

INTRODUCTION

The changes in the modern world brought upon by social media have been significant and unavoidable.¹ The interactivity of social networks like Twitter has allowed those with large followings, like celebrities, to interact easily with the general public.² The flattening effect of social media has made it such that “[e]veryone is equal . . . [and] [n]o hierarchies need get involved.”³

As these platforms have developed, it is understandable that social media use has become prevalent in a professional context. For instance, Twitter can be an effective customer service tool for entities such as brands⁴ and public utilities.⁵ In addition, businesses can use platforms such as Twitter to cultivate a unique online presence.⁶

¹ See, e.g., Heather Rule, *How Social Media Has Changed the World of Sports Journalism*, NAT’L INST. FOR SOC. MEDIA (July 6, 2017), <https://nismonline.org/how-social-media-has-changed-the-world-of-sports-journalism/> [<https://perma.cc/8239-HQBS>] (“It’s been covered over and over again how much social media has changed our world the past few years. From communication to job searching to procrastination and time-wasting, social media leaves a mark.”); see also, e.g., Bill George, *How Social Networking Has Changed Business*, HARV. BUS. REV. (Dec. 23, 2010), <https://hbr.org/2010/12/how-social-networking-has-chan> [<https://perma.cc/TP9H-6XCU>] (declaring that “[s]ocial networking is the most significant business development of 2010”).

² See, e.g., Christine Teigen (@chrissyteigen), TWITTER, <https://twitter.com/chrissyteigen> [<https://perma.cc/6NKN-27YP>] (showing Teigen interacting with a variety of people).

³ See George, *supra* note 1.

⁴ See, e.g., Wendy’s (@Wendys), TWITTER (Nov. 11, 2018, 3:23PM), <https://twitter.com/Wendys/status/1061716068744523777> [<https://perma.cc/MV5P-V7M8>] (responding to a customer’s complaint).

⁵ See, e.g., NYCT Subway (@NYCTSubway), TWITTER (Nov. 11, 2018, 2:15 PM), <https://twitter.com/NYCTSubway/status/1061699012682792960> [<https://perma.cc/D2WA-NGGM>] (responding to a customer’s query). In addition to answering customers’ questions, these accounts often take the brunt of the customers’ frustrations. See *id.*

⁶ See, e.g., Lauren Katz, *Merriam-Webster Has Become the Sassiest Twitter Account of the Trump Era. Meet Its Author.*, VOX (Jan. 25, 2017), <https://www.vox.com/conversations/2017/1/25/14378798/merriam-webster-dictionary-twitter> [<https://perma.cc/93LT-83A4>];

For those employed in the media industry, particularly journalists, Twitter can be exceptionally useful as a tool to promote their work and interact with followers.⁷ Journalists often use Twitter accounts with eponymous handles, rather than an account exclusively named for the employer.⁸ In such instances, journalists typically use the accounts to tweet links to their work, which is typically hosted on the employer's platform.⁹ Employers will often use official accounts to retweet the reporters when they tweet a link to their work, creating a mutually beneficial relationship where one of the journalist's followers might then follow the employer.¹⁰

In August 2018, Andy Bitter, who covers Virginia Tech football for the online outlet *The Athletic*, was sued after continuing to use the Twitter account that he had utilized when he previously worked for the *Roanoke Times*.¹¹ When the suit was filed, some thought that the court might speak directly on this issue.¹² The following month, the Western District of Virginia directed the parties to schedule settlement negotiations, leaving this novel legal issue unresolved.¹³

see also Tim Nudd, *The Real Story Behind Steak-umm's Delightfully Weird Twitter Account*, ADWEEK (Dec. 7, 2017), <https://www.adweek.com/digital/the-real-story-behind-steak-umms-weird-cultish-twitter-account/> [<https://perma.cc/T9MJ-T3UM>].

⁷ *See infra* Part I.

⁸ *See, e.g.*, Nick Baumgardner (@nickbaumgardner), TWITTER (Nov. 11, 2018, 7:05 AM), <https://twitter.com/nickbaumgardner/status/1061590710284140544> [<https://perma.cc/4VDH-L9CT>] (containing a link with Baumgardner's Detroit Free Press story about the University of Michigan's victory over Rutgers); *see also* angelique (@chengelis), TWITTER (May 21, 2019, 9:08 AM), <https://twitter.com/chengelis/status/1130822570020868097> [<https://perma.cc/34F4-2WQP>] (containing a link with Chengelis's Detroit News story about the University of Michigan's loss to James Madison University in softball); *see also* Tim Rohan (@TimRohan), TWITTER (May 16, 2019, 12:55 PM), <https://twitter.com/TimRohan/status/1129082911771287553> [<https://perma.cc/8WN8-7UCU>] (containing a link with one of Rohan's own stories that he wrote for *Sports Illustrated*).

⁹ *See supra* note 8.

¹⁰ *See infra* Section I.B.

¹¹ *See* Alexis Kramer, *Twitter Account Is Trade Secret, Publisher Says, Testing Law*, BLOOMBERG NEWS (Aug. 10, 2018), <https://news.bloomberglaw.com/tech-and-telecom-law/twitter-account-is-trade-secret-publisher-says-testing-law> [<https://perma.cc/9VMP-G622>].

¹² *See id.*

¹³ *See* Order, *BH Media Group, Inc. v. Bitter*, No. 7:18CV388, 2018 WL 3768425 (W.D. Va. Sept. 27, 2018), ECF No. 26 [hereinafter *Order*]. The parties settled in November 2018. *See* Joint Stipulation of Voluntary Dismissal, *BH Media Group, Inc. v. Bitter*, No. 7:18CV388 (W.D. Va. filed Nov. 16, 2018), ECF No. 49.

This Note proposes that, in the absence of a *clear and explicit* agreement, a former employee should ultimately maintain control of a social media account that is in their name. Part I of this Note will first discuss Twitter and social media use, then highlight how journalists utilize the platform, and finally assess *BH Media v. Bitter*. Part II will further analyze theories in legal academic works that were introduced in Part I, and apply those theories to the facts of *BH Media v. Bitter*. Finally, Part III will advocate for an interpretive framework that invokes the right of publicity in favor of protecting journalists.

I. AN OVERVIEW OF TWITTER IN THE CONTEXT OF EMPLOYMENT

A. *Twitter and News and Journalism Employment*

To this day, Twitter remains pervasive. A 2018 Pew Research Center study found that approximately a quarter of American adults use Twitter.¹⁴ As with most other social media platforms, the same Pew study found that the percentage of American adults that use Twitter has steadily increased at least since 2012.¹⁵ In concluding their 2015 American Press Institute study, Tom Rosenstiel and his co-authors stated that “[s]ocial networks are no longer a new door into news. They have become a primary pathway to it”¹⁶

¹⁴ See Aaron Smith & Monica Anderson, *Social Media Use in 2018*, PEW RES. CTR. (Mar. 1, 2018), <http://www.pewinternet.org/2018/03/01/social-media-use-in-2018/> [<https://perma.cc/R5GW-YJ8A>].

¹⁵ See *id.* at 14–15. The study found that the percentage of American adults using Facebook decreased from April 2016 (79%) to January 2018 (76%).

¹⁶ Tom Rosenstiel, Jeff Sonderman, Kevin Loker, Maria Ivancin & Nina Kjarval, *Twitter and the News: How People Use the Social Network to Learn About the World*, AM. PRESS INST. (Sept. 1, 2015, 10:30 AM), <https://www.americanpressinstitute.org/publications/reports/survey-research/how-people-use-twitter-news/> [<https://perma.cc/6RUB-TJ9F>]. Social media platforms, such as Facebook, have not just been a “pathway” for people to get their news. For instance, college football reporter Brett McMurphy, while working independently, broke a major story with an article published directly on his personal Facebook page. See, e.g., Matt Bonesteel, *ESPN Didn’t Break the Urban Meyer Story, But Ohio State’s Fans Didn’t Seem to Care at Rally*, WASH. POST (Aug. 7, 2018), https://www.washingtonpost.com/news/early-lead/wp/2018/08/07/espn-didnt-break-the-urban-meyer-story-but-ohio-states-fans-didnt-seem-to-care-at-rally/?utm_term=.2ac048098552 [<https://perma.cc/F23K-M739>].

A September 2017 study found that Twitter is used as a news-gathering platform more than Facebook.¹⁷ In their 2015 study, Rosenstiel and his co-authors corroborated this reliance on Twitter to get news—finding that 86% of the Twitter users surveyed use the platform to get news, with 74% of users checking for news daily.¹⁸ The 2017 study also found that, from 2016 to 2017, news usership increased by 15% on Twitter, while remaining nearly constant on Facebook.¹⁹ The authors opine that this jump may be related to President Trump’s frequent Twitter use.²⁰

The journalism industry was relatively quick to adapt to Twitter. For instance, decorated journalist John Dickerson was using the platform as early as November 2007,²¹ less than a year and a half after the platform publicly launched.²² Even when it was in its

¹⁷ Elisa Shearer & Jeffrey Gottfried, *News Use Across Media Platforms 2017*, PEW RES. CTR. (Sept. 6, 2017), <http://www.journalism.org/2017/09/07/news-use-across-social-media-platforms-2017/> [<https://perma.cc/JF88-KKSV>] (finding that while a majority both Facebook and Twitter users surveyed use those platforms to get news, a greater majority—approximately 74%—of Twitter users use Twitter to get news).

¹⁸ Rosenstiel et al., *supra* note 16, at 4. Of the Twitter users who use the platform for news “[v]irtually everyone who uses Twitter for news (92%) clicks through to read stories at least sometimes.” *Id.* at 16.

¹⁹ Shearer & Gottfried, *supra* note 17, at 5. However, from 2013 to 2017, Facebook (by 21%) and Twitter (by 22%) had similar increases of usership to get news. *Id.*

²⁰ *See id.* at 4 (“Since 2013, at least half of Twitter users have reported getting news on the site, but in 2017, with a president who frequently makes announcements on the platform, that share has increased to about three-quarters (74%), up 15 percentage points from last year.”) (citing Maggie Haberman, *Trump Tweets ‘That’s Politics!’ About Son’s Meeting with Russian Lawyer*, N.Y. TIMES (July 17, 2017), https://www.nytimes.com/2017/07/17/us/politics/trump-russia-meeting-twitter.html?_r=0 [<https://perma.cc/KT6G-K4PT>]). Since then, President Trump’s Twitter use has been legally noteworthy. *See, e.g.*, Jen Kirby, *Trump Can’t Block Users on Twitter, Judge Says*, VOX (May 23, 2018, 3:10 PM), <https://www.vox.com/2018/5/23/17385256/trump-twitter-lawsuit-block-users-loser> [<https://perma.cc/2MUV-G3SF>] (describing how a judge from the Southern District of New York “ruled that Trump blocking Twitter users from his @realDonaldTrump account because he disagrees with their views infringes on those users’ First Amendment rights because the president’s Twitter account is a public forum”).

²¹ *See* Leah Betancourt, *The Journalist’s Guide to Twitter*, MASHABLE (May 14, 2009), https://mashable.com/2009/05/14/twitter-journalism/#hJC_9Cs4GOqp [<https://perma.cc/Z7G6-CHWP>].

²² *See* Brian Anthony Hernandez, *Explore Twitter’s Evolution: 2006 to Present*, MASHABLE (May 5, 2011), <https://mashable.com/2011/05/05/history-of-twitter/#Rf1KY15bGaqp> [<https://perma.cc/29US-MDQL>] (providing a timeline of notable events in Twitter’s history to that point).

infancy, journalists recognized that Twitter could allow them to connect with consumers and sources while building a personal “brand.”²³ For journalists, Twitter can also be used to break news,²⁴ share colleagues’ work,²⁵ or, as demonstrated by the Washington Post’s David Fahrenthold, as an effective crowdsourcing tool.²⁶ Because of the sheer quantity of tweets that are disseminated on a daily basis, “Twitter allows journalists to fully immerse themselves in the breaking news of the subject they report on, seeing everything from thought-out, analytical arguments to 140-character hot takes.”²⁷ As Greg Galant, CEO of Muck Rack, stated, Twitter “just lends itself perfectly to news.”²⁸

The inherent immediacy of Twitter that makes it an effective tool for breaking news also makes it conducive to journalists covering beats.²⁹ As such, the platform’s “mobile compatibility, easy accessibility, concise messages, and interactive structure lends itself

²³ See Betancourt, *supra* note 21.

²⁴ See, e.g., Rebecca Lerner, *Twitter Tops Snapchat—Among Journalists, At Least*, FORBES (May 26, 2017, 10:00 AM), <https://www.forbes.com/sites/rebeccalerner/2017/05/26/twitter-tops-snapchat-among-journalists-at-least/#5580fb9e7b79> [<https://perma.cc/BEY4-TEN7>] (“[T]he interactive nature of the platform is conducive to the industry’s need to share and receive constant information. On Twitter, reporters break news in real time.”).

²⁵ See Jennifer Peters, *How To: Use Twitter to Your Advantage as a Journalist*, NEWS MEDIA ALLIANCE (Apr. 25, 2018), <https://www.newsmediaalliance.org/how-to-twitter-for-journalists/> [<https://perma.cc/F4P9-74BG>] (“By sharing the work of others, you’re letting your readers discover new sources of information that they can trust, because they already trust you (a huge thing in the age of fake news), and you’re helping your colleagues find a new audience with whom to engage.”).

²⁶ See Alecia Swasy, *I Studied How Journalists Used Twitter for Two Years. Here’s What I Learned*, POYNTER: INNOVATION (Mar. 22, 2017), <https://www.poynter.org/news/i-studied-how-journalists-used-twitter-two-years-heres-what-i-learned> [<https://perma.cc/G2DF-7M56>] (describing how David Fahrenthold used Twitter to crowdsource a story about the Trump Foundation).

²⁷ Lerner, *supra* note 24. On November 7, 2017, Twitter began allowing users to compose Tweets of up to 280 characters. See, e.g., Sarah Perez, *Twitter Officially Expands Its Character Count to 280 Starting Today*, TECHCRUNCH (Nov. 7, 2017), <https://techcrunch.com/2017/11/07/twitter-officially-expands-its-character-count-to-280-starting-today/> [<https://perma.cc/4UT5-R39V>].

²⁸ Lerner, *supra* note 24. Muck Rack is a “a start-up that analyzes journalism.” *Id.*

²⁹ See Rosenstiel et al., *supra* note 16, at 19 (“Twitter news users said ‘it’s a great way to get news . . . in real time’”); see also *id.* at 41–42 (highlighting that “[s]ports and politics beats are particularly well suited to Twitter” because “[b]oth fit well into the ‘what’s happening now’ behaviors of Twitter”).

very well to sports.”³⁰ Therefore, Twitter allows effective sports reporters to provide their own analysis and to use the retweet function to introduce information from other accounts to enhance the game-following experience.³¹

Twitter’s impact on the world of journalism can be seen by both journalists and sports fans. Social media journalist and author Heather Rule notes that reporters can tweet out snippets of an upcoming story “as an appetizer” before publishing a longer story.³² Therefore, in the interim, one would likely “look to Twitter first for things like player injury updates, weather delay information, roster moves and stand-out quotes from athletes or coaches.”³³ For journalists covering sports beats, Twitter can also act as “a form of note-taking,” wherein reporters can refer back to their “play-by-play updates” and other contemporary insights when they eventually write their article.³⁴ These play-by-play updates also benefit fans—if a fan misses the game, they can track the game by following a beat reporter’s tweets.³⁵ In addition, fans can use Twitter to interact with beat reporters about the team, which creates a type of community in the process.³⁶ Rule writes that watching sports has “an added element now: Checking social media.”³⁷ Twitter has clearly massively changed how people watch sports.³⁸

³⁰ Jeremy L. Shermak, *Scoring Live Tweets on the Beat*, 6:1 DIGITAL JOURNALISM 118, 118 (2018) (internal citation omitted).

³¹ *See id.* Twitter allows “newspaper sports reporters the opportunity to offer commentary and analysis, while at the same time act as ‘curators’ for game-related tweets, selecting reliable sources and useful information for retweeting.” *Id.* at 119.

³² *See* Rule, *supra* note 1. To be sure, this use of Twitter is not limited to sports journalists. *See* Swasy, *supra* note 26 (“Twitter allows the 24/7 monitoring of reporters’ beats. A reporter’s nightly ritual now includes one last check of Twitter before nodding off.”).

³³ Rule, *supra* note 1.

³⁴ *Id.*

³⁵ *See id.*

³⁶ *See id.*

³⁷ *Id.*

³⁸ *Id.* (describing Twitter as a “platform that has really influenced the way the world covers and watches sports”).

Remarking that it can be addictive and destructive, today’s journalists readily acknowledge their reliance on Twitter.³⁹ Daily Beast contributor Erin Gloria Ryan proclaims that without Twitter, she would probably spend a lot more time outdoors.⁴⁰ At the same time, losing Twitter could disproportionately impact the journalism industry as a whole, and could hurt individual journalists as well.⁴¹ Graham Vyse’s New Republic article notes that without Twitter, journalists would lose a method of distributing their work and building a fan base.⁴² Additionally, in lieu of Twitter, journalists looking for work could lose a valuable selling point to employers, because a “large Twitter following is . . . an asset . . . because of the traffic it drives to their employers’ websites.”⁴³ Given its important role and heavy use by journalists, their employers, and consumers, Twitter remains worthy of legal and academic consideration.

B. Post-Employment Control of a Former Employee’s Social Media Account

Journalists and other media professionals have utilized Twitter and other social media platforms to share their work efficiently with a wide audience.⁴⁴ At the same time, these professionals tend to also use social media to post about non-work activities.⁴⁵ For instance, these professionals might use social media to share details about their personal lives, post jokes, and interact with followers.⁴⁶ Taken

³⁹ See Graham Vyse, *Can Journalists Live Without Twitter?*, NEW REPUBLIC (June 26, 2017), <https://newrepublic.com/article/143487/can-journalists-live-without-twitter> [<https://perma.cc/7EQM-YNNY>] (“‘I sometimes joke that Twitter is what I do instead of smoking,’ Garance Franke-Ruta, Yahoo News’ senior politics editor, told [Vyse]. ‘It occupies the same interstitial space. I think if Twitter went away we would all go into withdrawal and have three very uncomfortable weeks—followed by being healthier, happier people.’”).

⁴⁰ See *id.*

⁴¹ See *id.* An internet without Twitter could have “major implications for journalism more than any other industry,” and “would be professionally devastating to some journalists.” *Id.*

⁴² See *id.*

⁴³ *Id.*

⁴⁴ See generally *infra* Part II.

⁴⁵ See Peters, *supra* note 25.

⁴⁶ See, e.g., *id.* (providing examples of journalists posting non-work-related items and interacting with followers); see also Natalie Jomini Stroud, *Interaction on Twitter enhances journalists’ credibility*, AM. PRESS INST. (Dec. 7, 2015),

together, journalists can maximize Twitter's effectiveness when they use the platform to post about more than just their work.⁴⁷ A 2015 study found that journalists who interact with followers on Twitter "are seen as more credible and rated more positively than journalists who use Twitter solely to disseminate news and information"⁴⁸ Between the traffic that a journalist's Twitter feed drives to their employer's website and the boost that a journalist might gain through the association with the employer, an employee's use of social media is mutually beneficial to both the journalists and the employers. Therefore, these non-work uses of social media platforms ultimately benefit employers as well.

The question of what happens to their media personalities' social media accounts (and the account's followers) after they leave their place of employment has been widely debated since at least 2011.⁴⁹ In 2013, upon leaving his post as assistant managing editor of the New York Times, Jim Roberts maintained control of his Twitter account that had approximately 75,000 followers at the time.⁵⁰ The New York Times not only lost Roberts's quarter-century of experience, but also his 75,000 Twitter followers.⁵¹ When asked why he kept the followers upon his departure, Roberts responded, "My feed is my own."⁵² At the time, a New York Times spokesperson noted that "there is not a specific policy in place that covers this kind of situation but, practically, when Jim leaves The Times officially he

<https://www.americanpressinstitute.org/publications/research-review/twitter-credibility/> [<https://perma.cc/W3ZV-H497>] (finding that journalists who interact with their followers are viewed more favorably than those who use the site solely for professional purposes).

⁴⁷ See Peters, *supra* note 25.

⁴⁸ Stroud, *supra* note 46.

⁴⁹ See generally Introduction and Section I.A.

⁵⁰ See Ellyn Angelotti, *Who Owns Your Twitter Followers?*, POYNTER (Apr. 30, 2014), <https://www.poynter.org/news/who-owns-your-twitter-followers> [<https://perma.cc/X2AK-M45M>]. As of October 15, 2018, Jim Roberts had 204,485 followers. See Jim Roberts (@nycjim), TWITTER, <https://twitter.com/nycjim> [<https://perma.cc/DN9L-YCJN>].

⁵¹ See Jeff Roberts, *New York Times Editor to Take 75,000 Twitter Followers out the Door with Him*, GIGAOM (Jan. 24, 2013, 3:24 PM), <https://gigaom.com/2013/01/24/new-york-times-editor-to-take-75000-twitter-followers-out-the-door-with-him/> [<https://perma.cc/L6RL-YNHH>].

⁵² Angelotti, *supra* note 50.

will likely change his account name”⁵³ Eventually, Roberts changed his Twitter handle from @nytjim to “@nycjim.”⁵⁴

Even before Roberts left the New York Times, ESPN dealt with this situation as employees came and left.⁵⁵ Some hires abandoned their accounts as they joined ESPN, because their “accounts were associated with their beats rather than their names”⁵⁶ When Pat Forde (with “nearly 100,000 followers”) and Michelle Beadle (with “more than half a million followers”) left ESPN for Yahoo! Sports and NBC respectively, they held onto their Twitter accounts.⁵⁷

⁵³ Roberts, *supra* note 51.

⁵⁴ See Angelotti, *supra* note 50 (“After leaving, he revised his handle, @nycjim, which endured his stint as executive editor at Reuters.”) (internal citation omitted).

⁵⁵ See Jason Fry, *ESPN Faces Challenges in Twitter Era*, ESPN: POYNTER REV. PROJECT BLOG (July 6, 2012), http://www.espn.com/blog/poynterreview/post/_id/373/espn-faces-challenges-in-twitter-era [<https://perma.cc/TA6W-U25Q>].

⁵⁶ *Id.* (“Windhorst abandoned his Plain Dealer account when he came to ESPN, as did baseball writer Adam Rubin when he moved from the New York Daily News to ESPNNewYork.com. (Both of those accounts were associated with their beats rather than their names, however.)”). At the Plain Dealer, Windhorst had “built a following of more than 70,000 people.” *Id.* As of October 15, 2018, Windhorst’s current account, @WindhorstESPN, had approximately 595,000 followers. See Brian Windhorst (@WindhorstESPN), TWITTER, <https://twitter.com/WindhorstESPN> [<https://perma.cc/E9AU-AA8S>].

⁵⁷ Fry, *supra* note 55. In October 2018, Pat Forde had approximately 347,000 followers. See Pat Forde (@YahooForde), TWITTER, <https://twitter.com/YahooForde> [<https://perma.cc/MT8E-ZPWQ>]. On November 1, 2019, Forde began working for Sports Illustrated. See Phillip Bupp, *Pat Forde is Leaving Yahoo Sports to Join Sports Illustrated*, AWFUL ANNOUNCING (Oct. 29, 2019), <https://awfulannouncing.com/si/pat-forde-is-leaving-yahoo-sports-to-join-sports-illustrated.html> [<https://perma.cc/F6EG-CM5E>]. Forde continues to use the same account, but has since changed the handle to @ByPatForde. See Pat Forde (@ByPatForde), TWITTER, <https://twitter.com/ByPatForde> [<https://perma.cc/T5y6-5NDD>]. When Michelle Beadle returned to ESPN in March 2014, she maintained the same Twitter account as when she had previously left ESPN. See Kevin Yoder, *The Crossover Explodes!!!*, AWFUL ANNOUNCING (Sept. 26, 2013), <https://awfulannouncing.com/2013/the-crossover-explodes.html> [<https://perma.cc/EQM5-9DPU>] (featuring a Tweet from Beadle under the account @MichelleDBeadle); see also Marlow Stern, *Michelle Beadle: ESPN’s Female Rebel, Raw and Uncensored*, DAILY BEAST (June 8, 2015, 5:09 AM), <https://www.thedailybeast.com/michelle-beadle-espns-female-rebel-raw-and-uncensored> [<https://perma.cc/8L6D-TZQE>] (indicating that “Beadle returned to ESPN on March 3, 2014”); see also Jefferson Graham, *ESPN’s Michelle Beadle Takes on Twitter Trolls*, USA TODAY (July 2, 2015, 3:10 PM), <https://www.usatoday.com/story/tech/2015/06/26/espns-michelle-beadle-takes—twitter-trolls/29186535/> [<https://perma.cc/6NXN-B6TT>] (featuring a Tweet from Beadle also from the account @MichelleDBeadle). In October 2018, Beadle’s account had more than

When ESPN re-hired Darren Rovell in 2012, he brought his more than 220,000 followers back with him.⁵⁸ Even in 2012, both media employees and employers recognized the impact of social media followers as it relates an employee's value to the employer, asking whether "reporters [must] surrender their accounts if they change employers"⁵⁹

C. Judicial Decisions on Post-Employment Ownership of Social Media Accounts

While media companies like ESPN, Yahoo!, and the New York Times were navigating the issue of their employees' social media accounts, several contemporary court cases were filed, which had the potential to clarify how these scenarios would be handled going forward.⁶⁰ However, for various reasons, the courts have not yet developed a unified method of determining whether the former employee or the employer should maintain control of a social media account.

1.5 million followers. See Michelle Beadle (@MichelleDBeadle), TWITTER, <https://twitter.com/MichelleDBeadle> [<https://perma.cc/72FZ-RXMG>]

⁵⁸ See Fry, *supra* note 55. In October 2018, Rovell had more than 2 million Twitter followers. See Darren Rovell (@darrenrovell), TWITTER, <https://twitter.com/darrenrovell> [<https://perma.cc/377H-JF63>]. In December of 2018, Rovell again left ESPN—this time for the sports betting website The Action Network. See Darren Rovell, *Rovell: Why I Joined The Action Network and Went All-In on Sports Betting*, ACTION NETWORK (Dec. 3, 2018, 5:00 PM), <https://www.actionnetwork.com/general/darren-rovell-why-i-joined-action-network-sports-betting-business> [<https://perma.cc/B7BM-K5AL>].

⁵⁹ See Fry *supra* note 55. In reference to then-employee Jemele Hill, Fry wonders: Is the "purpose of Hill's Twitter account to promote her ESPN work and grow her audience for the network, or help her to form closer connections with people who read and watch her? It's pretty clearly both." *Id.* Fry continues by noting that many on Twitter "began their accounts as personal experiments, little regarded by their employers at the time. Reporters and analysts increasingly see their accounts as personal assets they've worked hard to build . . . a portable audience for their work. In an era of diminished job security, they will be loath to surrender so valuable an asset." *Id.*

⁶⁰ See e.g., John Biggs, *A Dispute Over Who Owns a Twitter Account Goes to Court*, N.Y. TIMES (Dec. 25, 2011), <https://www.nytimes.com/2011/12/26/technology/lawsuit-may-determine-who-owns-a-twitter-account.html> [<https://perma.cc/7TMA-G9UX>].

1. *PhoneDog v. Kravitz*⁶¹

From April 2006 to October 2010, Noah Kravitz worked as a product reviewer and blogger at PhoneDog,⁶² a company that “provide[s] the consumer with un-biased reviews and interesting content within the wireless industry.”⁶³ At PhoneDog, Kravitz used an account with the handle @PhoneDog_Noah to “disseminate information and promote PhoneDog’s services on behalf of PhoneDog.”⁶⁴ Kravitz claimed that he more frequently used that account to tweet about various non-work-related subjects, such as “his favorite TV shows, sports teams and music.”⁶⁵ So, when Kravitz departed PhoneDog in October 2010, he changed the handle to @noahkravitz, and continued to Tweet to the account’s “approximately 17,000 followers.”⁶⁶ On July 15, 2011, after Kravitz did not abide by PhoneDog’s request to relinquish the account, PhoneDog sued Kravitz in federal court based on diversity jurisdiction, “asserting claims under California law for: (1) misappropriation of trade secrets; (2) intentional interference with prospective economic advantage; (3) negligent interference with prospective economic advantage; and (4) conversion.”⁶⁷

In the legal academic community,⁶⁸ some thought this case would “establish precedent in the online world, as it relates to ownership of social media accounts”⁶⁹ Ultimately, because the case

⁶¹ *PhoneDog v. Kravitz*, No. C 11–03474 MEJ, 2011 WL 5415612 (N.D. Cal. Nov. 8, 2011).

⁶² *Id.* at *1.

⁶³ Robert J. Kolansky, Casenote, *Can We Really Ascribe a Dollar Amount to Interpersonal Communication? How Phonedog v. Kravitz May Decide Who Owns a Twitter Account*, 20 JEFFREY S. MOORAD SPORTS L.J. 133, 141 (2013) (citing Author Page of Tom Klein, PHONEDOG, <http://www.phonedog.com/authors/tkdog/> [<https://perma.cc/9W4U-B37C>]).

⁶⁴ *PhoneDog*, 2011 WL 5415612, at *1.

⁶⁵ Noah Kravitz’s Counterclaims and Answer to Plaintiff’s First Amended Complaint for Misappropriation of Trade Secrets, Interference with Prospective Economic Advantage and Conversion at 15, *PhoneDog v. Kravitz*, No. 3:11–03474 MEJ, 2012 WL 554034 (N.D. Cal. filed Feb. 14, 2012) (“Kravitz estimate[d] that more than 50% of the tweets from the Account were personal in nature and completely unrelated to PhoneDog.”).

⁶⁶ *PhoneDog*, 2011 WL 5415612, at *1 (internal citation omitted).

⁶⁷ *Id.*

⁶⁸ *See, e.g.*, Kolansky, *supra* note 63, at 133.

⁶⁹ *See* Biggs, *supra* note 60 (quoting Henry J. Cittone, a lawyer in New York who litigates intellectual property disputes).

settled,⁷⁰ with Kravitz maintaining control of the account,⁷¹ no such precedent was set. However, the case was still notable for a variety of reasons. With PhoneDog's alleged damages of \$2.50 per follower per month, the case became the first to grapple with a valuation of Twitter followers.⁷² More significantly for subsequent cases, the court left open the possibility that a social media account's password and followers might be deemed trade secrets.⁷³

2. *Eagle v. Norman*⁷⁴

Around the time that *PhoneDog* was being litigated in California, the Eastern District of Pennsylvania heard a similar case, albeit with the litigants' roles reversed, over a disputed LinkedIn⁷⁵ account.⁷⁶ In 2009, when Dr. Linda Eagle was still CEO of Edcomm, Inc. ("Edcomm"), she was urged, but not required, to make a LinkedIn account, and "become involved in the account content."⁷⁷ Per LinkedIn's user agreement, the account belonged to

⁷⁰ See Stipulation for Dismissal After Settlement, *PhoneDog v. Kravitz*, No. 3:11-cv-03474-MEJ, 2013 WL 207773 (N.D. Cal. Jan. 7, 2013); see also Christopher A. Moore, Comment, *Find Out Who Your Friends Are: A Framework for Determining Whether Employees' Social Media Followers Follow Them to a New Job*, 39 CAMPBELL L. REV. 493, 504 (2017).

⁷¹ Moore *supra* note 70, at 504 (citing *Dispute Over Ownership of Twitter Account Settles*, WINSTON & STRAWN LLP (Dec. 17, 2012), <https://www.winston.com/en/privacy-law-corner/dispute-over-ownership-of-twitter-account-settles.html>).

⁷² Kolansky, *supra* note 63, at 135 (2013) (internal citation omitted). Around that time, this \$2.50 "industry standard" was "derided as wildly optimistic." See Roberts, *supra* note 51.

⁷³ *PhoneDog v. Kravitz*, No. C 11-03474 MEJ, 2011 WL 5415612, at *6-8 (N.D. Cal. Nov. 8, 2011) (dismissing PhoneDog's misappropriation of trade secrets claim on other grounds and determining that "whether the password and Account followers are trade secrets and whether Mr. Kravitz's conduct constitutes misappropriation requires consideration of evidence beyond the scope of the pleading").

⁷⁴ *Eagle v. Morgan*, No. 11-4303, 2013 U.S. Dist. LEXIS 34220 (E.D. Pa. Mar. 12, 2013).

⁷⁵ "LinkedIn is a business-oriented social networking site accessible through the internet for contacting current and potential business acquaintances and allowing users to invite other LinkedIn users to 'connect' and communicate directly via e-mail." *Id.* at *2 (internal citation omitted).

⁷⁶ See *id.* In this case, the former employee was the plaintiff. *Id.*

⁷⁷ *Id.* at *3-4. Edcomm, Inc. "which is a banking education company that provides services online and in person to the banking community." See *id.* at *1. Edcomm "provided guidelines" for employees interesting in creating accounts. See *id.* at *4.

Eagle alone.⁷⁸ After making the account, Dr. Eagle allowed Edcomm employees to access the account, to make updates on it, and to maintain correspondence.⁷⁹ After Dr. Eagle’s employment with Edcomm was terminated, Edcomm employees logged onto the account and changed the password, which “effectively lock[ed]” Eagle from the account.⁸⁰ Therefore, Edcomm exclusively controlled the account for about two and a half weeks.⁸¹ Dr. Eagle sued Edcomm, setting forth eleven causes of action,⁸² while Edcomm brought counterclaims of misappropriation and unfair competition.⁸³

On October 4, 2012, the Eastern District of Pennsylvania granted Edcomm summary judgment⁸⁴ over Dr. Eagle’s two Computer Fraud and Abuse Act (“CFAA”)⁸⁵ claims, and her Lanham Act claim.⁸⁶ The CFAA claims failed because the business

⁷⁸ *Id.* at *3 (internal citation omitted).

⁷⁹ *Id.* at *6 (internal citation omitted). Eagle “gave her password to the LinkedIn account to certain Edcomm employees . . . [, seemingly] to enable those employees to respond to certain matters in Dr. Eagle’s account, such as invitations, and also to permit updating of the account.” *Id.* at *3.

⁸⁰ *Id.* at *6–7 (internal citation omitted).

⁸¹ *Id.* (internal citation omitted). Edcomm’s control of the account lasted “from June 20, 2011 to July 6, 2011 . . .” *Id.* The Edcomm employees subsequently altered the LinkedIn page so that it “reflected the name, picture, education, and experience of Sandi Morgan, the newly-appointed Interim CEO of Edcomm.” *Id.*

⁸² *Id.* at *14. Those claims are “(1) violation of the Computer Fraud and Abuse Act (“CFAA”), 18 U.S.C. § 1030(a)(2)(C); (2) violation of the CFAA, 18 U.S.C. § 1030(a)(5)(C); (3) violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(A); (4) unauthorized use of name in violation of 42 Pa.C.S. § 8316; (5) invasion of privacy by misappropriation of identity; (6) misappropriation of publicity; (7) identity theft under 42 Pa.C.S. § 8315; (8) conversion; (9) tortious interference with contract; (10) civil conspiracy; and (11) civil aiding and abetting.” *Id.* Because the court granted Edcomm summary judgment on the first three claims (two CFAA claims and the Lanham Act claim), the court responded to Dr. Eagle’s eight remaining causes of action. *Id.* (internal citation omitted).

⁸³ *Id.* at *15.

⁸⁴ *See* *Eagle v. Morgan*, No. 11–4303, 2012 U.S. Dist. LEXIS 143614 (E.D. Pa. Oct. 4, 2012).

⁸⁵ 18 U.S.C. § 1030 (2008).

⁸⁶ 15 U.S.C. § 1125 (2012). The Lanham Act “provides for a national system of trademark registration and protects the owner of a federally registered mark against the use of similar marks if such use is likely to result in consumer confusion, or if the dilution of a famous mark is likely to occur.” *See Lanham Act*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/lanham_act (last visited May 22, 2019).

opportunities that Dr. Eagle may have lost “were not compensable,” and she could not recover “damages involving loss of goodwill, lost revenue, or interference with a customer relationship”⁸⁷ Dr. Eagle’s Lanham Act claim faltered because she could not establish that there was a likelihood of confusion due to Edcomm changing the information in LinkedIn profile to feature the interim CEO.⁸⁸

In the subsequent 2013 trial, the Eastern District of Pennsylvania ruled in Dr. Eagle’s favor on the invasion of privacy by misappropriation of identity⁸⁹ and misappropriation of publicity⁹⁰ claims, but found that she failed to state a claim on her conversion cause of action.⁹¹ Because Dr. Eagle’s name remained in the URL after the Edcomm employees changed the account’s password and contents, a search for Dr. Eagle which lands on a page featuring the professional profile of Sandi Morgan “could be deemed to be ‘appropriat[ing] to [Edcomm’s] own use or benefit the reputation, prestige, social or commercial standing, public interest or other values of plaintiff’s name.’”⁹² Similarly, a business-opportunity-related search for Dr. Eagle that directs to a page featuring information about her successor could constitute a tortious appropriation of Dr. Eagle’s name and likeness inuring to Edcomm’s benefit.⁹³ Conversely, the court did not find that Edcomm’s action constituted conversion because a “LinkedIn account is not tangible chattel, but rather an intangible right to access a specific page on a computer”⁹⁴

⁸⁷ Kathleen McGarvey Hidy, *Business Disputes Over Social Media Accounts: Legal Rights, Judicial Rationales, and the Resultant Business Risks*, 2018 COLUM. BUS. L. REV. 426, 445 (2018) (citing *Eagle*, 2012 U.S. Dist. LEXIS 143614, at *14–16).

⁸⁸ *Id.* (citing *Eagle*, 2012 U.S. Dist. LEXIS 143614, at *23–27). The plaintiff failed to establish “that Edcomm’s alteration of the LinkedIn account—replacing her name and likeness with the interim chief executive officer’s name and likeness—created a likelihood of confusion.” *Id.*

⁸⁹ *See Eagle v. Morgan*, No. 11–4303, 2013 U.S. Dist. LEXIS 34220, at *20–22 (E.D. Pa. Mar. 12, 2013).

⁹⁰ *See id.* at *22–24.

⁹¹ *See id.* at *26–29. *See generally id.* for the court’s additional findings.

⁹² *Id.* at *22.

⁹³ *Id.* at *23–24. An internet search for Dr. Eagles directed users to “an Edcomm webpage with Sandi Morgan’s name, picture, and credentials . . . [which] clearly provided promotional benefit for Edcomm and constitutes the appropriation of a name for commercial use[,] . . . ris[ing] to the level of tortious activity.” *Id.*

⁹⁴ *Id.* at *28.

Despite ruling in Dr. Eagle’s favor on several claims, the court rewarded her neither compensatory nor punitive damages.⁹⁵ The court noted that Dr. Eagle presented no damage calculation, which meant that “it would be pure guesswork for the Court to determine . . . damages.”⁹⁶ Further, the court found that Dr. Eagle had not “established *the fact* of damages with reasonable certainty,” because she could not establish with any likelihood that, if she had full access to her LinkedIn account during that time period, she would have been able to make any deals.⁹⁷ However, the court implicitly ruled that, at all times, she had the legal right to control the LinkedIn account in question.⁹⁸ After this ruling, Professors Susan Park and Patricia Sánchez Abril noted that “even when a plaintiff has a valid cause of action in a postemployment social media dispute, it is not clear whether the plaintiff is limited to equitable remedies alone.”⁹⁹

3. *Mattocks v. Black Entertainment Television*¹⁰⁰

In 2008, Stacey Mattocks made an unofficial Facebook “Fan Page” (the “Page”) for “The Game,” a television show that first aired on the CW Network before eventually being broadcast on Black Entertainment Television (“BET”).¹⁰¹ In 2010, when BET had syndication rights for “The Game” but had not yet begun airing new episodes,¹⁰² BET hired Mattocks part-time to continue running the Page, which subsequently featured BET’s logos and exclusive content provided by the network.¹⁰³ BET employees would

⁹⁵ See *id.* at *42, *44.

⁹⁶ *Id.* at *14.

⁹⁷ *Id.* at *37–38.

⁹⁸ Hidy, *supra* note 87, at 447–48 (citing *Eagle*, 2013 U.S. Dist. LEXIS 34220, at *46–49).

⁹⁹ Susan Park & Patricia Sánchez Abril, *Digital Self-Ownership: A Publicity-Rights Framework for Determining Employee Social Media Rights*, 53 AM. BUS. L.J. 537, 548 (2016).

¹⁰⁰ *Mattocks v. Black Entm’t Television LLC*, 43 F. Supp. 3d 1311 (S.D. Fla. 2014).

¹⁰¹ See *id.* at 1315.

¹⁰² See *id.* at 1314 (“After CWN cancelled the Series in 2009, Defendant Black Entertainment Television LLC (“BET”) acquired syndication rights to televise seasons one through three of the Series. BET began airing re-runs of the Series in 2010. In March of that year, BET acquired an exclusive license to produce new episodes of the Series, premiering in January 2011.”) (internal citations omitted).

¹⁰³ *Id.* at 1315–16.

occasionally post on the Page, and “BET regularly instructed Mattocks to post, or not to post, certain information.”¹⁰⁴ In February 2011, about three months after BET first contacted Mattocks and about one month after new episodes of “The Game” began airing on BET, the parties entered into a “Letter Agreement.”¹⁰⁵ The Letter Agreement provided that BET would not remove Mattocks’s “administrative rights” on the Page, and that BET would itself have “administrative access” to the Page and “could ‘update the content on the Page from time to time as determined by BET in its sole discretion,’” thereby “entitl[ing] BET to ‘full access’ to the Page ‘in every respect.’”¹⁰⁶

When the parties subsequently began negotiating Mattocks’s full-time employment at BET, Mattocks “demoted BET’s administrative access to the Page” which halted BET’s ability “to post content on the Page”¹⁰⁷ In response, BET successfully convinced “Facebook to ‘migrate’ fans of the Page to another official Series Page created by BET” upon determination by Facebook that the Page “appeared to officially represent the brand owner, BET.”¹⁰⁸ BET successfully took similar action with Twitter for a promotional account that Mattocks had also made.¹⁰⁹

In July 2013, Mattocks sued BET, bringing five claims.¹¹⁰ The court rejected the plaintiff’s tortious interference claims because BET “ha[d] a supervisory interest in how the relationship is conducted or a potential financial interest in how a contract is performed.”¹¹¹ In addition, the court did not find that BET acted improperly when contacting Facebook and Twitter, because those

¹⁰⁴ *Id.* at 1316.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* (internal citation omitted).

¹⁰⁷ *Id.* (internal citation omitted). Mattocks removed BET’s access to the Page during the negotiations “[u]ntil such time as we can reach an amicable and mutually beneficial resolution’ concerning her employment.” *Id.*

¹⁰⁸ *Id.* at 1316, 1317 (internal citation omitted).

¹⁰⁹ *See id.* at 1317 (internal citation omitted).

¹¹⁰ *Id.* (internal citation omitted). Mattocks claimed that “BET [t]ortiously interfered with contractual relationships she had with Facebook and Twitter (Counts I and II), that BET breached the parties’ Letter Agreement (Count III), that BET breached a duty of good faith and fair dealing toward Mattocks (Count IV), and that BET converted a business interest she held in the FB Page (Count V).” *Id.*

¹¹¹ *See id.* at 1319.

actions were “motivated, at least in part, by Mattocks revoking BET’s full access to the [Facebook] page,” which “affected BET’s economic interests by depriving the network of control over its intellectual property on the Page and how the Series was officially promoted there.”¹¹²

In further support of BET, the court held that Mattocks materially breached her agreement with the network by demoting BET’s access to the Page, which negated any need for BET to be bound by the covenant of good faith and fair dealing.¹¹³ Finally, the court rejected the idea that Mattocks could assert a business or “property interest in the ‘likes’ on the [Facebook] Page.”¹¹⁴ The court recognized the ease in which someone can “revoke” a “like,” and limited the understanding of “‘liking’ a Facebook Page [to] simply mean[] that the user is expressing his or her enjoyment or approval of the content.”¹¹⁵ Therefore, the court reasoned, “if anyone can be deemed to own the ‘likes’ on a Page, it is the individual users responsible for them.”¹¹⁶

4. Other Notable Cases

The Eastern District of Pennsylvania was not alone in maintaining the possibility that a social media account’s follower list might constitute a trade secret. Nightclub owner Regas Christou (and his co-plaintiffs) sued former employee Bradley Roulier (co-founder and member of Beatport, LLC) in the District of Colorado, claiming that, upon Roulier’s departure, “Roulier or his representatives, without permission, took the lists, web profile login and password” of MySpace profiles made to promote Christou’s nightclubs, and instead directed those followers toward Roulier’s new nightclub.¹¹⁷ In favor of the argument that the accounts constitute a trade secret,

¹¹² *Id.* The court also noted that, in contacting Facebook and Twitter, “no record evidence shows that BET took those steps for purely malicious reasons.”

¹¹³ Hidy, *supra* note 87, at 450 (citing *Mattocks*, 43 F. Supp. 3d at 1320–21).

¹¹⁴ *Mattocks*, 43 F. Supp. 3d at 1321.

¹¹⁵ *Id.*

¹¹⁶ *Id.* The court compared this finding to *Bland v. Roberts*, 730 F.3d 368, 385–86 (4th Cir. 2013), which held that a “public employee’s ‘like’ of political-campaign page was a protected form of free speech and expression.”

¹¹⁷ *Christou v. Beatport*, No. 10-cv-02912-RBJ-KMT, 2014 U.S. Dist. LEXIS 43459, at *6 (D. Colo. Mar. 31, 2014).

the court acknowledged that the plaintiffs took reasonable steps to protect the secrecy of the information through the existence and selective sharing of a password.¹¹⁸ Further, while the names of the friends list is publicly viewable, the “plaintiffs contend that this list is actually akin to a database of contact information,” because it “is not merely the list of names but their email and contact information as well as the ability to notify them and promote directly to them via their MySpace accounts.”¹¹⁹ The District of Colorado noted that while it is eventually, albeit arduously, possible to re-create an equivalent list of Myspace friends, it would be extremely difficult to accomplish that task in a timeframe that would have been useful to Christou.¹²⁰ Although the court did not confirm that the “Myspace friends list” is a trade secret, it found that Christou’s claims were sufficient to survive a motion to dismiss.¹²¹ This case could indicate that “the password to a social network account derives independent economic value because it is secret,” and that secrecy provides a “competitive advantage” by guarding access to the followers of that account.¹²²

While federal district and circuit courts had been non-committal in assigning property rights to social media accounts, the Bankruptcy Court in the Southern District of Texas took a different tack

¹¹⁸ *Christou v. Beatport, LLC*, 849 F. Supp. 2d 1055, 1075 (D. Colo. 2012).

¹¹⁹ *Id.* at 1075–76.

¹²⁰ *Id.* at 1076 (noting that the re-creation of a friends Myspace friends list “would involve individually contacting thousands of individuals with friend requests, and it is by no means clear that all of those individuals would grant Beatport permission to contact them.”).

¹²¹ *Id.* In a subsequent trial for this matter, the plaintiffs withdrew their trade secret claim, and the court denied that it was brought in bad faith, acknowledging that the defendants “did, without right or permission, take this information.” *Christou*, 2014 U.S. Dist. LEXIS 43459, at *6.

¹²² See Zoe Argento, *Whose Social Network Account? A Trade Secret Approach to Allocating Rights*, 19 MICH. TELECOMM. & TECH. L. REV. 201, 255 (2013). That is because “[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. *Id.* However, at the same time, other federal district courts have not given a password the same status. See, e.g., *Emerald City Mgmt., LLC v. Kahn*, No. 4:14-cv-538, 2016 U.S. Dist. LEXIS 2143, at *53 (E.D. Tex. 8, 2016); *Ardis Health, LLC v. Nankivell*, No. 11 Civ. 503 (NRB), 2011 WL 4965172, at*3 (S.D.N.Y. Oct. 19, 2011); *Salonlick, LLC v. SuperEgo Mgmt., LLC*, No. 16 Civ. 2555 (KMW), 2017 U.S. Dist. LEXIS 6871, at *4 (S.D.N.Y. Jan. 18, 2017).

in 2015 in *In re CTLL*.¹²³ In that case, Tactical Firearms, a shooting range and gun store owned by Jeremy Alcede and his then-wife Sarah Alcede and located in Katy, Texas, went bankrupt.¹²⁴ In a bankruptcy hearing on December 16, 2014, “Mr. Alcede claimed that all social media accounts at issue belonged to him personally and not to the Debtor [Tactical Firearms].”¹²⁵

Although the court acknowledged that Alcede also used the Tactical Firearms Facebook page for personal reasons, the court reasoned that it was a “Business Page,” and noted the page’s content, in that it linked to the store’s website and that he allowed employees to post store-related and promotional information to the page.¹²⁶ The social media page was deemed property of the bankruptcy estate because “Section 541 [of the Bankruptcy Code] is read broadly and is interpreted to include all kinds of property, including tangible or intangible property”¹²⁷ Notably, the court distinguished *Mattocks*, the BET fan page case, by noting that a “federal bankruptcy court, applying New York law, has treated social media accounts as property, grouping them with subscriber lists.”¹²⁸

D. Legal Academic Landscape for Social Media Disputes

These cases have spurred both legal opinions from attorneys in the field and research from academics, which have in turn encouraged companies and individuals to avoid similar confrontations. Commentators have also introduced a variety of potential frameworks for courts to use to determine future disputes between employers and departed employees over the control of social media accounts.

In response to some of these disputes, publications often include interviews from attorneys and experts describing what courts may

¹²³ See *In re CTLL, LLC*, 528 B.R. 359 (Bankr. S.D. Tex. 2015).

¹²⁴ *Id.* at 362.

¹²⁵ *Id.* at 363.

¹²⁶ See *id.* at 367–68.

¹²⁷ *Id.* at 366 (quoting *In re Equinox Oil Co., Inc.*, 300 F.3d 614, 618 (5th Cir.2002)). “The Code defines ‘property of the estate,’ with enumerated exceptions, as ‘all legal or equitable interests of the debtor in property as of the commencement of the case.’” *Id.* (quoting 11 U.S.C. § 541 (2012)).

¹²⁸ *Id.* (citing *In re Borders Grp., Inc.*, No. 11–10614 MG, 2011 WL 5520261, at *13 (Bankr. S.D.N.Y. Sept. 27, 2011)).

look for or providing guidance to companies and employees.¹²⁹ For instance, in response to Jim Roberts leaving the New York Times, Venkat Balasubramani, a lawyer specializing in internet-related issues, remarked that the social media accounts in question are often “a mix of personal and business.”¹³⁰ In a potential dispute, Balasubramani noted that an employer’s name is often part of the account’s handle, and that the employer often deploys company resources to promote the account an employee uses.¹³¹ Meanwhile, the employee could note the time and effort they spent in building an account, and how “the branding in the account name is something that is easily changed.”¹³² Ultimately, Balasubramani suggests that the issue can be circumvented with a clearly worded contract.¹³³

Suzanne Lucas, with a background in human resources, similarly advises that employees insist on a written document detailing who owns a Twitter account, and that social media should be “a specialized part of the job description.”¹³⁴ She also notes that employees should not be asked to post from their previously established accounts; and advises that when multiple people post from the same account, “it’s going to look a lot more like a business account than a personal one.”¹³⁵ Meanwhile, some law journal articles set forth risk mitigation strategies¹³⁶ and “suggest some precautionary measures for both employers and employees to take in order to safeguard their use of social media websites.”¹³⁷

Other authors have proposed varying frameworks to consider. These theories and frameworks will be discussed in further detail in

¹²⁹ See, e.g., Roberts, *supra* note 51.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Suzanne Lucas, *Who Owns Your Twitter Followers*, CBS NEWS (Jan. 28, 2013, 11:22 AM), <https://www.cbsnews.com/news/who-owns-your-twitter-followers/> [<https://perma.cc/93VL-FVQN>]. Lucas goes by @RealEvilHRLady on Twitter. *Id.*

¹³⁵ *Id.*

¹³⁶ See generally Hidy, *supra* note 87.

¹³⁷ See Kolansky, *supra* note 63, at 136; see also Moore, *supra* note 70, at 519–20. Such precautionary measures include adding provisions regarding social media accounts in employment contracts, the companies themselves creating the accounts for the employees to operate, or making employees include “sufficient information about the employer” when using work-related accounts. Moore, *supra* note 70, at 519–20.

Part II.¹³⁸ However, first this Note will highlight a recent case¹³⁹ that raised anew the possibility that an instructive precedent in this context could finally be set, but disappointingly settled before the merits of the case could be decided.¹⁴⁰

E. *An Overview of BH Media v. Bitter*

In October 2011, Andy Bitter was hired to cover Virginia Tech sports for the *Virginian-Pilot* (the “Pilot”) and the *Roanoke Times* (the “Times”).¹⁴¹ After the papers’ joint owner, Landmark Media Enterprises, LLC (“Landmark”), sold the Times to BH Media Group (“BH Media”) in 2013, Bitter wrote for the Times as employee of BH Media.¹⁴² When Bitter began in 2011, he started using a

¹³⁸ These examples include Tiffany A. Miao’s advocacy for a framework stemming from the CFAA. See generally Tiffany A. Miao, Note, *Access Denied: How Social Media Accounts Fall Outside the Scope of Intellectual Property Law and Into the Realm of the Computer Fraud and Abuse Act*, 23 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 1017 (2013). It also includes Professor Zoe Argento’s suggested trade secret approach. See generally Argento, *supra* note 122. In addition, Professors Susan Park and Patricia Sánchez Abril propose a “publicity-rights framework.” See generally Park & Abril, *supra* note 99. Christopher A. Moore’s two-question framework will also be considered, with an analysis similar to what the court utilized in *In re CTLL*, but expanded beyond the bankruptcy setting. See generally Moore, *supra* note 70. Although Alexandra L. Jamel’s proposed three-factor test is catered more toward bankruptcy concerns in relation to *In re CTLL*, it will also be investigated in broader contexts. See generally Alexandra L. Jamel, Comment, *Mixing Business with Pleasure: Evaluating the Blurred Line Between the Ownership of Business and Personal Social Media Accounts Under § 541(A)(1)*, 33 *EMORY BANKR. DEV. J.* 561 (2017). Finally, this Note will examine Courtney J. Mitchell’s suggested framework that “imports patent law’s shop-right rule and hired-to-invent doctrine to determine and assign rights to a social media account and its followers.” See Courtney J. Mitchell, Note, *Keep Your Friends Close: A Framework for Addressing Rights to Social Media Contacts*, 67 *VAND. L. REV.* 1459, 1461 (2014).

¹³⁹ See Complaint, *BH Media Group, Inc. v. Bitter*, No. 7:18CV388, 2018 WL 3768425 (W.D. Va. Aug. 6, 2018), ECF No. 1 [hereinafter *Complaint*].

¹⁴⁰ Kramer, *supra* note 11 (quoting a lawyer who suggests that “[a] well-drafted agreement can often be the silver bullet in these types of cases”).

¹⁴¹ See *Complaint*, *supra* note 139, at 3 (“In October of 2011, Defendant was hired to fill Tucker’s role as a staff writer to focus on Virginia Tech athletics.”); see also Defendant’s Answer, Affirmative Defenses, and Counterclaim at 2, *BH Media Group, Inc. v. Bitter*, No. 7:18CV388, (W.D. Va. Aug. 30, 2018), ECF No. 10 [hereinafter *Counterclaim*] (“Bitter admits that he was hired by the Pilot in October of 2011.”).

¹⁴² See *Complaint*, *supra* note 139, at 3 (alleging that BH Media become the “sole and exclusive owner” of the Twitter account in question following the purchase); see also *Counterclaim*, *supra* note 141, at 15 (“In 2013, BH Media purchased the Roanoke Times from Landmark. Bitter chose to become an employee of BH Media . . .”). BH Media is a

Twitter account (the “Account”) that had previously been created and used by his predecessor Kyle Tucker while Tucker was working for the Pilot.¹⁴³ After resigning on July 6, 2018,¹⁴⁴ Bitter continued to use the Account¹⁴⁵ as he joined the subscription-based online outlet The Athletic.¹⁴⁶

subsidiary of Warren Buffett’s Berkshire Hathaway Inc. See Phil Walzer, *Buffett Media Subsidiary to Buy Roanoke Newspaper*, VIRGINIAN-PILOT (May 30, 2013), https://pilotonline.com/business/article_ae5913a7-2707-527d-88dd-971fd132e25c.html [https://perma.cc/SBD9-ZRXXM]. Interestingly, Landmark, which had owned the Pilot for over a century, sold the Pilot to what was then known as Tronc, the conglomerate that owns papers such as the Chicago Tribune, Baltimore Sun, and the Orlando Sentinel. See Elisha Sauers, Kimberly Pierceall & Robyn Sidersky, *After More Than a Century, Norfolk Family Sells the Virginian-Pilot for \$34 million*, VIRGINIAN-PILOT (May 29, 2018), https://pilotonline.com/business/article_27dff746-6336-11e8-ae3a-77e23727ceab.html [https://perma.cc/G4K9-P58G]. Tronc, which had also owned but then sold the Los Angeles Times, has since changed its name back to Tribune Publishing. See Brett Samuels, *Tronc to Change Name Back to Tribune Publishing*, HILL (Oct. 4, 2018), <https://thehill.com/homenews/media/409993-tronc-to-change-name-back-to-tribune-publishing> [https://perma.cc/9JFF-6V67].

¹⁴³ See *Complaint*, *supra* note 139, at 4 (describing that the account used by Tucker then was used by Bitter, from BH Media’s perspective); see also *Counterclaim*, *supra* note 141, at 12–14 (describing the same events from Bitter’s perspective); see also *Counterclaim*, *supra* note 141, at 12 (noting that Kyle Tucker took a job covering University of Kentucky athletics for a Louisville newspaper).

¹⁴⁴ See *Complaint*, *supra* note 139, at 6 (“On or about June 22, 2018, Defendant notified BH Media that he intended to resign effective July 6, 2018.”); see also *Counterclaim*, *supra* note 141, at 3 (“Bitter admits that on or about June 22, 2018, he notified the Roanoke Times that he intended to resign effective July 6, 2018.”).

¹⁴⁵ See *Complaint*, *supra* note 139, at 6 (“As of the date of this filing, Defendant has used and continues to use the Account”); see also *Counterclaim*, *supra* note 141, at 3 (“Bitter admits that he continues to use his Twitter account.”).

¹⁴⁶ Backed by millions in venture capital funding, The Athletic has been notable in its aggressive and prolific hiring, particularly from local newspapers. See Kevin Draper, *At The Athletic, a Hiring Spree Becomes a Story in Itself*, N.Y. TIMES (Aug. 24, 2018), <https://www.nytimes.com/2018/08/24/sports/the-athletic-netflix.html#click=https://t.co/H82kxIBJa5> [https://perma.cc/6K78-V6D7]; see also Aaron Gordon, *The Sports Pages’ New Clothes*, SLATE (Sept. 6, 2018, 5:55 AM), <https://slate.com/culture/2018/09/the-athletic-is-poaching-from-local-sports-pages-and-reading-like-them-too.html> [https://perma.cc/WBE4-Z9S6] (describing The Athletic’s emergence in the online sports media landscape). In Slate, Aaron Gordon opined that “[l]ike any startup, the Athletic feeds off the hype and breathless coverage of the kind given to other self-appointed industry-revolutionizing companies.” *Id.* To that end, one of the Athletic’s early funders believes that “they can save local sports media.” *Id.* In support, Gordon noted how new hires introduce themselves to the site’s readers with “often over-the-top ‘Why I Joined the Athletic’” that have been joked about. *Id.*; see also Dan Steinberg (@dcsportsblog), TWITTER (July 17, 2018, 9:10 AM), <https://twitter.com/dcsportsbog/status/101920783097>

After Bitter denied BH Media’s request to relinquish the Account,¹⁴⁷ BH Media filed suit on August 6, 2018.¹⁴⁸ BH Media brought the following claims:

- I. “Misappropriation Under the Defend Trade Secrets Act, 18 U.S.C. § 1836”;¹⁴⁹
- II. “Misappropriation Under the Virginia Uniform Trade Secrets Act, Va. Code § 59.1–336”;¹⁵⁰
- III. “Violation of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, *et seq.*”;¹⁵¹
- IV. “Violation of the Stored Communications Act, 18 U.S.C. § 2701, *et seq.*”;¹⁵²
- V. “Violation of the Virginia Computer Crimes Act, Va. Code § 18.2–152.2, *et seq.*”;¹⁵³
- VI. “Common Law Conversion”;¹⁵⁴ and
- VII. “Breach of Fiduciary Duty.”¹⁵⁵

BH Media’s claim to the Account hinged, at least in part, on its position that Kyle Tucker originally created the Account “within the scope of his employment,”¹⁵⁶ and Bitter came to use the Account as part of Bitter taking over Tucker’s position.¹⁵⁷ According to BH

1256832 [<https://perma.cc/TGX4-NATA>] (“The main reason I’d want to join the athletic is so I could write a ‘why I’m joining the athletic’ letter.”). See Andy Bitter, *Andy Bitter: A Better Way to Cover Virginia Tech Football*, ATHLETIC (July 16, 2018), <https://theathletic.com/431027/2018/07/16/andy-bitter-virginia-tech-football-beat-writer/> [<https://perma.cc/GU7T-2KJ4>], for Bitter’s introductory piece in The Athletic. Between the current ownership of his former employers and his current position at The Athletic, it can be said that Bitter’s jobs have been emblematic of the trends in the news media landscape today.

¹⁴⁷ See *Complaint*, *supra* note 139, at 6 (“Defendant refused to relinquish the Account”); see also *Counterclaim*, *supra* note 141, at 3 (“Bitter admits he has refused to give access”).

¹⁴⁸ *Complaint*, *supra* note 139, at 1.

¹⁴⁹ *Id.* at 7.

¹⁵⁰ *Id.* at 9.

¹⁵¹ *Id.* at 10.

¹⁵² *Id.* at 12.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 14.

¹⁵⁵ *Id.* at 15.

¹⁵⁶ *Id.* at 3.

¹⁵⁷ See *id.* at 3–4.

Media, therefore, Bitter “managed [the Account] at the Times’ direction.”¹⁵⁸ BH Media alleges that the Account’s “primary purpose . . . is to generate interest in the Times, and by proxy, generate advertising revenue” by linking to articles posted on the Times’s website.¹⁵⁹ To that end, BH Media sought a temporary restraining order and preliminary injunction so that Bitter would not be able to use the Account while working for the Athletic.¹⁶⁰

Relying on cases such as *PhoneDog* and *Christou*, BH Media alleged that the follower list and other information associated with the Account would constitute trade secrets.¹⁶¹ When Bitter changed the handle name and login information after gaining control of the Account, BH Media alleged that Bitter “was authorized by BH Media to access the Account on behalf of BH Media, and used the Account to disseminate information on behalf of and in order to promote the Times.”¹⁶² In addition, BH Media touted their IT policies and “confidentiality obligations” in its employee handbook to demonstrate the company’s “extensive efforts to maintain the secrecy of its Trade Secrets”¹⁶³

Similar to the plaintiffs in *Christou*, BH Media claimed that it derives independent value from the Account and its associated

¹⁵⁸ Plaintiff’s Reply Memorandum of Law in Support of Motion for Temporary Restraining Order and Preliminary Injunction at 2, *BH Media Group, Inc. v. Bitter*, No. 7:18CV388, 2018 WL 3768425 (W.D. Va. Sept. 21, 2018), ECF No. 24 [hereinafter *Plaintiff Reply Memo*].

¹⁵⁹ *Complaint, supra* note 139, at 5 (noting the main Roanoke Times Twitter account would retweet the Account).

¹⁶⁰ *See* Memorandum of Law in Support of Motion for Temporary Restraining Order and Preliminary Injunction, *BH Media Group, Inc. v. Bitter*, No. 7:18CV388, 2018 WL 3768425 (W.D. Va. Aug. 7, 2018), ECF No. 6 [hereinafter *Plaintiff Memo*].

¹⁶¹ *Plaintiff Memo, supra* note 160, at 3, 8–9 (explaining that “[t]he ancillary information available to the Account holder squarely fits within the categories of information capable of constituting trade secrets . . .” and the unique information the Account holder would gain includes features like the ability to effectively reach the Account’s followers and the ability to direct message with followers).

¹⁶² *Id.* at 3.

¹⁶³ *Id.* at 4. The handbook discussed, in part, repercussions if an employee did not “return any Company-issued equipment” *See* Exhibit C to Memorandum of Law in Support of Motion for Temporary Restraining Order and Preliminary Injunction at 3, *BH Media Group, Inc. v. Bitter*, No. 7:18CV388, 2018 WL 3768425 (W.D. Va. Aug. 6, 2018), ECF No. 6–3 (containing photocopy of Bitter’s signature on a page of BH Media’s employee handbook).

information “because it is not known to the public and . . . it has developed through many years of substantial time, effort, expense, research, and communication with its users.”¹⁶⁴ Given that BH Media asserted that they own the Account, they alleged Bitter misappropriated the Account’s affiliated trade secrets by continuing to use the Account after resigning.¹⁶⁵ BH Media implicated both state and federal trade secrets claims because the Account had followers located in Virginia, other states, and internationally.¹⁶⁶ According to BH Media, Bitter’s post-resignation use of the Account to solicit subscribers to the Athletic amplified the misappropriation.¹⁶⁷

In alleging that Bitter violated the CFAA, BH Media asserted that the Account would qualify as a “protected computer” because “[t]he definition . . . includes accounts connected to and entirely contained within the Internet.”¹⁶⁸ BH Media relied on a Fourth Circuit holding that an employee’s authorization to access a computer is based on the employer’s assent.¹⁶⁹ BH Media’s other computer crime claims similarly hinged on an assertion that Bitter was not allowed to access the Account upon his resignation.¹⁷⁰

BH Media’s common law allegations also depended on BH Media’s assertion that it authorized Bitter to use the Account.¹⁷¹ BH Media noted that the Account’s creation predated Bitter’s employment, and claimed that the Account’s login information was given to Bitter within the scope of his employment.¹⁷² When describing

¹⁶⁴ *Plaintiff Memo*, *supra* note 160, at 4.

¹⁶⁵ *Id.* at 10.

¹⁶⁶ *See id.* at 7 n.5.

¹⁶⁷ *See id.* at 5 (“To that end, Defendant pinned a lead post highlighting his move to the Athletic and soliciting subscriptions to the Athletic from the roughly 27,100 followers of the Account. Thus, Defendant is actively engaged in competing with BH Media for its own customers, and is using BH Media assets to accomplish that goal.”) (internal citation omitted).

¹⁶⁸ *Id.* at 12–13 (citing *Estes Forwarding Worldwide LLC v. Cuellar*, 239 F. Supp. 3d 918, 926 (E.D. Va. 2017)).

¹⁶⁹ *Id.* at 12–13 (quoting *WEC Carolina Energy Sols. LLC v. Miller*, 687 F.3d 199, 204 (4th Cir. 2012)) (“[T]he Fourth Circuit has held that ‘an employee is authorized to access a computer when his employer approves or sanctions his admission to that computer.’”).

¹⁷⁰ *See id.* at 12–15.

¹⁷¹ *See id.* at 15–18.

¹⁷² *Id.* at 17 (“Account was created prior to Defendant’s first employment date and was provided to him within the scope of his employment as a writer for the Times.”).

the conversion allegation, BH Media also contended that compiling an equivalent follower list would take BH Media several years at a cost of \$150,000 to reach the Account's following, but could not likely result in an equivalent configuration of the same list.¹⁷³ Because Bitter was a former employee, BH Media maintained that Bitter returning the Account's confidential information to the company upon his resignation was part of Bitter's fiduciary duty to BH Media.¹⁷⁴ For similar reasons, BH Media alleged that the loss it would face with Bitter's continued use of the Account would be irreparable.¹⁷⁵

Bitter denied BH Media's claims by asserting that BH Media never preserved any ownership over the Account,¹⁷⁶ and therefore "BH Media's lack of ownership is dispositive of every claim in this case."¹⁷⁷ Bitter alleged that the Account was transferred from Kyle Tucker to Bitter without any involvement from BH Media.¹⁷⁸ To dispel the notion that BH Media took certain action to protect the

¹⁷³ *Id.* ("It would take an account representative or writer at BH Media seven years at a cost of at least \$150,000 to attempt recreate the Account, . . . any attempt at recreation would likely never result in the same configuration of followers.").

¹⁷⁴ *Id.* at 18.

¹⁷⁵ *See id.* at 21 ("BH Media has expended much time and effort in developing relationships with its followers. Defendant has improperly used BH Media's property to threaten those relationships, the effect of which cannot be measured.") (internal citations omitted).

¹⁷⁶ *See Counterclaim, supra* note 141, at 3 ("Bitter admits he has refused to give access to his Twitter account to BH Media, because it does not, and never has, belonged to BH Media."). This filing also includes a defamation counter-claim against BH Media, largely stemming from an article that the Roanoke Times published, reporting on the circumstances that led to this lawsuit. *See id.* at 10–25.

¹⁷⁷ Defendant and Counter-Plaintiff Andy Bitter's Memorandum in Opposition to Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction at 1, BH Media Group, Inc. v. Bitter, No. 7:18CV388, (W.D. Va. Sept. 17, 2018), ECF No. 19 [hereinafter *Opposition Memo*].

¹⁷⁸ *Id.* at 1–2. Bitter cites testimony from Tucker in claiming that the login information was passed via the two individuals' personal email accounts. *See* Exhibit 1 to Defendant and Counter-Plaintiff Andy Bitter's Memorandum in Opposition to Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction at 3, BH Media Group, Inc. v. Bitter, No. 7:18CV388, (W.D. Va. Sept. 17, 2018), ECF No. 19–1 [hereinafter *Tucker Testimony*]. *But see Opposition Memo, supra* note 177, at 9 n.5 ("Bitter acknowledges that during part of his ownership of the Account, he associated his work email address with the Account. That fact alone, however, obviously does not amount to a transfer of ownership of the personal Account to BH Media, particularly in light of BH Media's inducement to associate the account with work.").

integrity of the Account and any of its underlying potential trade secrets, Bitter asserted that once he gained control of the Account, he never shared the Account’s login information.¹⁷⁹ Bitter also argued that the growth of the account in the past seven years (from about 4,000 to about 28,000) was through his own efforts.¹⁸⁰

Bitter also relied on Times’s policy and industry testimony to bolster his claim that a temporary restraining order and preliminary injunction should not be granted.¹⁸¹ Bitter pointed to BH Media’s 2015 “Professional Standards and Content Policies,” which demonstrate “BH Media ‘strongly encouraged’ reporters to use their *personal* social media accounts in conjunction with their work at BH Media.”¹⁸² According to Bitter’s filing, BH Media’s position could “induce reporters to unwittingly forfeit ownership of personal accounts”¹⁸³ In addition, the BH Media Employee Handbook distinguished “accounts provided by the Company” from other accounts.¹⁸⁴

To demonstrate that industry custom would favor not granting an injunction or restraining order, Bitter obtained testimony from J.A. Adande, a former journalist for ESPN and current professor at Northwestern’s Medill School of Journalism.¹⁸⁵ Adande stated:

¹⁷⁹ See *Opposition Memo*, *supra* note 177, at 2–3.

¹⁸⁰ *Id.* at 2.

¹⁸¹ See Exhibit 6 to Defendant and Counter-Plaintiff Andy Bitter’s Memorandum in Opposition to Plaintiff’s Motion for a Temporary Restraining Order and Preliminary Injunction at 1, BH Media Group, Inc. v. Bitter, No. 7:18CV388, (W.D. Va. Sept. 17, 2018), ECF No. 19–6 (containing testimony from Nicole Tarrant, editor of the Roanoke Times from May 2007 to June 2013) [hereinafter *Tarrant Testimony*]; see also Exhibit 5 to Defendant and Counter-Plaintiff Andy Bitter’s Memorandum in Opposition to Plaintiff’s Motion for a Temporary Restraining Order and Preliminary Injunction at 2–6, BH Media Group, Inc. v. Bitter, No. 7:18CV388, (W.D. Va. Sept. 17, 2018), ECF No. 19–5 (containing testimony from J.A. Adande, a former ESPN personality and currently the Director of Sports Journalism and Associate Professor at Medill School of Journalism at Northwestern University) [hereinafter *Adande Testimony*].

¹⁸² *Opposition Memo*, *supra* note 177, at 8 (emphasis in original).

¹⁸³ *Id.* at 9.

¹⁸⁴ *Id.* at 10 (citing Exhibit 9 to Defendant and Counter-Plaintiff Andy Bitter’s Memorandum in Opposition to Plaintiff’s Motion for a Temporary Restraining Order and Preliminary Injunction, BH Media Group, Inc. v. Bitter, No. 7:18CV388, (W.D. Va. Sept. 17, 2018), ECF No. 19–10) (containing excerpts of BH Media’s Employee Handbook).

¹⁸⁵ *Id.* at 5 (citing *Adande Testimony*, *supra* note 181, at 2).

[U]nless a sports journalist has a written contract with his or her employer that states that the employer owns the social media account used by the journalist or the account is one created and controlled by the employer (e.g., @espn or @NYTSports), then the sports journalist personally owns his or her social media accounts and is free to continue to use those accounts even as he or she moves to different jobs.¹⁸⁶

Bitter also cited the example of ESPN allowing Bill Simmons to keep his Twitter account (with millions of followers) when he left ESPN and changed his handle.¹⁸⁷

In arguing that the equities should be tipped in his favor, Bitter averred that instead of “actually creating a Times Twitter account focusing on Virginia Tech Football, BH Media has intentionally—though unsuccessfully—attempted to manufacture damages by instructing its writers to forego and later limit tweets about Virginia Tech football, to imply that [the] Account somehow has an exclusive ability to do so.”¹⁸⁸ Finally, Bitter contended that the public interest is in his favor because an employee’s account that might be used for work purposes should not be subject to claims of corporate ownership without sufficient prior notice.¹⁸⁹

In response, BH Media noted that when Tucker first used the Account, its handle was @KyleTuckerVP, “a direct reference to Tucker’s employer,” demonstrating the intent of the Account’s use from its origin.¹⁹⁰ In addition, BH Media raised the existence of a personal Twitter account, @BitterAndy, which BH Media alleged indicates an understanding that the Account was for work purposes,

¹⁸⁶ *Id.* at 5–6.

¹⁸⁷ *Id.* at 6 (citing *Adande Testimony*, *supra* note 181, at 4).

¹⁸⁸ *Id.* at 24–25. Bitter alleges that “[e]ven now, Bitter’s replacement Mike Niziolek is not permitted to tweet from his personal account, but only through the company-owned @SportsTRT account.” *Id.*

¹⁸⁹ *Id.* at 25–26 (describing “an interest in protecting employees’ personal social media accounts from claims of corporate ownership, particularly when, as here, the employer failed to provide employees with notice their personal accounts may be subject to a later claim of corporate ownership if used in connection with their employment.”).

¹⁹⁰ *Plaintiff Reply Memo*, *supra* note 158, at 3–4. At this point, BH Media notes that J.A. Adande recognizes the significance of mentioning your employer in a social media account.

and belongs to BH Media.¹⁹¹ To counter Bitter’s claim that the Account’s growth was due mainly to Bitter’s own efforts, BH Media noted the credibility afforded to Bitter through his association with BH Media, and the access afforded to a newspaper reporter.¹⁹²

In claiming that the balance of equities was in its favor, BH Media pointed to the hiring practices and alleged motives of The Athletic, and the related desire to “prevent unfair competition.”¹⁹³ BH Media cited a New York Times article wherein one of The Athletic’s founders stated that they “will wait every local paper out and let them continuously bleed until we are the last ones standing . . . [and] will suck them dry of their best talent at every moment.”¹⁹⁴ BH Media therefore proclaimed that the public interest favors an injunction because it would help protect local newspapers in a changing business environment.¹⁹⁵

On September 27, 2018, Judge Michael F. Urbanski of the Western District of Virginia denied BH Media’s motion for a temporary restraining order and preliminary injunction.¹⁹⁶ The court found that because “the evidence did not clearly establish that plaintiff was likely to prevail on the merits or the existence of irreparable harm[,] . . . plaintiff fell short of the burden of proof required to support the extraordinary remedy of a mandatory preliminary injunction.”¹⁹⁷ In further support of denying the motion, the court

¹⁹¹ *Id.* at 2 (citing Exhibit 2 to Plaintiff’s Reply Memorandum of Law in Support of Motion for Temporary Restraining Order and Preliminary Injunction, BH Media Group, Inc. v. Bitter, No. 7:18CV388, 2018 WL 3768425 (W.D. Va. Sept. 21, 2018)).

¹⁹² *Id.* at 8 (“Mr. Bitter’s employment with the Times gave him instant credibility (as well as press credentials that allowed him access to areas and press conferences not normally available to the public) and a built-in audience, which allowed him to generate followers for the Account and the Times.”).

¹⁹³ *Id.* at 13.

¹⁹⁴ *Id.* at 1, 13 (quoting Kevin Draper, *Why The Athletic Wants to Pillage Newspapers*, N.Y. TIMES (Oct. 23, 2017), <https://www.nytimes.com/2017/10/23/sports/the-athletic-newspapers.html> [<https://perma.cc/M499-KGVB>]).

¹⁹⁵ *Id.* at 13 (describing how “an injunction furthers the public interest because preserving the Times’ rights in the Account protects the rights of a local newspaper and its efforts to maintain a business in an increasingly competitive landscape.”).

¹⁹⁶ *See Order*, *supra* note 13, at 2.

¹⁹⁷ *Id.* at 1.

noted that BH Media could not decisively demonstrate that the company had ownership over the account.¹⁹⁸ In addition, Judge Urbanski did not believe that BH Media “establish[ed] the existence of a trade secret under federal or state law . . . given the public nature of the Twitter content and followers.”¹⁹⁹ Judge Urbanski also found that BH Media did not “provide any evidence of irreparable harm, given the fact that the followers of the subject Twitter account are publicly known and plaintiff’s remarkable self-imposed ban on its own reporters’ use of Twitter to cover Virginia Tech football.”²⁰⁰

At the same time, even though the court denied BH Media’s motion, the court notably found that the balance of equities slightly favored BH Media, given that the Account “was developed while defendant was employed as a sports reporter for the Roanoke Times . . . and that this activity was, at a minimum, encouraged as part of his sports coverage responsibilities.”²⁰¹ While recognizing “arguments on both sides regarding the public’s interest in this action,” the court found that no interest could outweigh BH Media’s unlikelihood in sufficiently proceeding on the merits of the case, or showing irreparable harm.²⁰²

Ultimately, the matter was referred to a Magistrate Judge to schedule a settlement conference.²⁰³ Thus, the court took a similar path as other courts have previously. Even as the court denied BH Media’s motion, it did not make any declaratory statements about these situations going forward.²⁰⁴ Instead, the court honed in on certain aspects of the claims to make its ruling.²⁰⁵ Therefore, there is no unified framework for a court to rely on, should a similar situation arise again. Despite the settlement of this case, this Note

¹⁹⁸ *Id.* (“[P]laintiff did not prove by clear and convincing evidence that the subject Twitter account was owned by BH Media Group, Inc. or that it was a Roanoke Times branded account, as opposed to a personal Twitter account owned by Andy Bitter.”).

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 2.

²⁰¹ *Id.* (acknowledging a “balance of equities somewhat favor[ing] plaintiff”).

²⁰² *Id.*

²⁰³ *Id.* After the two sides reached a settlement, the case was dismissed on November 16, 2018. *See* Joint Stipulation of Voluntary Dismissal, BH Media Group, Inc. v. Bitter, No. 7:18CV388, (W.D. Va. Nov. 16, 2018), ECF No. 49.

²⁰⁴ *See id.*

²⁰⁵ *See id.*

will use the underlying facts to demonstrate why certain frameworks work better than others to analyze ownership of journalists’ accounts going forward.

II. OVERVIEW OF THE LANDSCAPE REGARDING EMPLOYER-EMPLOYEE DISPUTES OVER SOCIAL MEDIA ACCOUNTS

This Part sets forth various frameworks proposed by various scholars and examines how a court might resolve the dispute between BH Media and Bitter based on these frameworks. First, this Part describes the frameworks that inform the *In re CTLI* decision. Then, this Part explores the CFAA framework, as formerly proposed by Tiffany A. Miao in this Journal. Next, it features a framework emanating from patent law, as introduced by Courtney J. Mitchell. After summarizing Professor Zoe Argento’s trade secret approach, the Part concludes with the publicity-rights approach suggested by Professors Susan Park and Patricia Sánchez Abril.

A. Theories Involving *In re CTLI*

In a 2017 Comment, Alexandra L. Jamel analyzed the *In re CTLI* decision, determining that “[c]ourts should not consider social media business accounts to be property of the [bankruptcy] estate when the social media account: (1) has a mixed business and personal use; and (2) is not primarily used to promote the debtor’s business.”²⁰⁶ In analyzing *In re CTLI*, Jamel noted that while Alcede might have posted information about the business on the Tactical Firearms Page, the Page also included “his personal views on gun control,” and “maintained that that the purpose of creating this Page was not to generate revenue.”²⁰⁷ Jamel’s analysis also discussed the differences between establishing personal and business accounts for both Facebook and Twitter.²⁰⁸ She noted that Facebook differentiates between “profiles” for personal use, and Pages, which can be

²⁰⁶ Jamel, *supra* note 138, at 564.

²⁰⁷ *Id.* at 580 (citing *In re CTLI*, LLC, 528 B.R. 359, 368, 371 (Bankr. S.D. Tex. 2015)).

²⁰⁸ *See id.* at 569–77.

used to promote entities such as “[a] local business, company, organization, band, artist, public figure, or cause”²⁰⁹ Pages, notably, are managed through personal accounts—so while each user can only have one profile, that user can manage multiple Pages.²¹⁰ Further, Jamel notes that users must access a Page through a personal account,²¹¹ and that Facebook allows users to convert their personal profiles into a Page.²¹² Because of these confusions, Jamel argues “that a line needs to be drawn to differentiate a business Page and a Page used for ‘business’ purposes.”²¹³

Meanwhile, Twitter, as Jamel explained, “specifically allows for the creation of a business profile *by* the business,” without an associated individual account.²¹⁴ This decision by Twitter allows it to “avoid[] Facebook’s problematic lack of a clear distinction between individual accounts and business Pages.”²¹⁵ Therefore, as Jamel noted, while Twitter accounts created for business purposes are “easily distinguishable” from those created for personal use, “[a] Facebook account used for business necessarily has a mixed personal and business use”²¹⁶

With this background, Jamel proposed a three-factor balancing framework.²¹⁷ She noted that the determination should be made on

²⁰⁹ *Id.* at 571–72 (citing *Create a Page*, FACEBOOK, https://www.facebook.com/pages/create/?ref_type=registration_form [<https://perma.cc/D3DF-VZU8>]).

²¹⁰ *Id.* at 572 (citing *Why Should I Convert My Personal Account to a Facebook Page?*, FACEBOOK, <https://www.facebook.com/help/217671661585622> [<https://perma.cc/KK62-VU3N>]).

²¹¹ *Id.* at 573 (citing *Should I Create a Page or Allow People to Follow My Public Updates from My Personal Account?*, FACEBOOK, <https://www.facebook.com/help/203141666415461> [<https://perma.cc/D3DX-YVR5>]).

²¹² *Id.* (citing *How Do I Convert My Personal Account to a Facebook Page?*, FACEBOOK, <https://www.facebook.com/help/175644189234902/> [<https://perma.cc/2S3U-8B6V>]).

²¹³ *Id.*

²¹⁴ *Id.* at 577 (citing *Create a Twitter Business Profile*, TWITTER, <https://business.twitter.com/basics/create-a-profile-for-your-business> [<https://perma.cc/YUM5-J5R7>] [Hereinafter *Twitter Business Profile*]).

²¹⁵ *Id.* at 576.

²¹⁶ *Id.* at 577 (citing *Create a Twitter Business Profile*, *supra* note 214).

²¹⁷ *Id.* at 584 (“To determine whether a chapter 11 debtor’s social media accounts constitute property of the estate, courts should balance the following three factors: (1) how the individual account holder uses the account; (2) the ownership interests based on the terms and conditions; and (3) whether the social media account at issue has value.”). Jamel considers a social media account a “pseudo-property interest at best.” *Id.* at 597.

a case-by-case basis, rather than relying on “their classification as individual or business social media accounts,” particularly given the different manners in which users enroll in the social media platforms.²¹⁸ First, she proposed a subjective analysis of how the individual utilizes the account, which analysis “seeks to satisfy an important distinction between an individual who created an account for personal use and an individual who created an account for a business.”²¹⁹ By analyzing the business structure of the company that is going through the bankruptcy proceeding, Jamel hoped this factor would determine whether “the business that arguably entered into the ‘contract’ with the social media website [would] own the content, or would the person who actually generated (or otherwise created) the content own it?”²²⁰

The objective second factor “defers to the social media platform to interpret the terms and conditions the user agreed to upon creating the account.”²²¹ The third factor in the balancing test is whether the social media accounts “have value.”²²² For this factor, Jamel noted that because “[a] definitive valuation calculation does not yet exist for social media accounts . . . , it is possible that an asset of this type would not have value to a creditor or a trustee.”²²³ In the bankruptcy context, Jamel noted that when companies are making good faith efforts to reorganize and become financially solvent pursuant to the “fresh start” theory, turning over a social media account could inhibit that process because the creditor could leave the account dormant or change its content.²²⁴ Jamel concluded that “social media accounts do not have an ascertainable value. At best, [they] are valued at an amount someone on the open market is willing to pay.”²²⁵

Jamel sums up her approach with three questions.²²⁶ The first is: “How does the individual account holder use the account?”²²⁷ Next,

²¹⁸ *Id.* at 586, 597.

²¹⁹ *Id.* at 583.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.* at 584.

²²³ *Id.* at 593.

²²⁴ *See id.* at 593–94.

²²⁵ *Id.* at 595.

²²⁶ *See id.*

²²⁷ *Id.*

“[w]hat are the ownership interests based on the terms and conditions?”²²⁸ And finally, “[d]o the social media accounts have value?”²²⁹ Using these factors, she reasoned that Alcede should have maintained control of the Facebook account in question, rather than the estate.²³⁰ When conducting the test for a Tactical Firearms Twitter account, Jamel conceded that the result would likely be different.²³¹

Although Jamel’s proposal was developed in the context of bankruptcy proceedings,²³² the framework can be utilized with the employee being equivalent to the debtor and the employer equivalent to the estate to analyze the facts of *Bitter*.²³³ Because the Account does not reference the former employer and implies a connection to an individual, it seems that Jamel’s first factor would favor the employee.²³⁴ The Account was registered, mostly maintained, and passed from Tucker to Bitter only with personal email addresses.²³⁵ Further, Bitter posted personal material on the Account, with “many of [his] most ‘liked’ tweets [being] about being a father.”²³⁶

Courts might also consider a predecessor passing a social media account to a successor as a sign that the account was meant to stay

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *See id.* at 595–96.

²³¹ *See id.* at 596.

²³² *See id.* at 583 (“To determine whether a chapter 11 debtor’s social media accounts constitute property of the estate, courts should balance the following three factors . . .”).

²³³ Because the recent case involves a Twitter account, this analysis will mainly concentrate on the aspect of Jamel’s framework that investigates a Twitter account. *See id.* at 595–96.

²³⁴ That is particularly true given the differences in how Twitter and Facebook accounts are set up. *See id.* at 573 (describing how to set up professional and personal Facebook accounts); *see also id.* at 576–77 (describing how to set up a Twitter account).

²³⁵ *Opposition Memo*, *supra* note 177, at 2 (citing *Tucker Testimony*, *supra* note 178). *But see id.* at 9 n.5 (“Bitter acknowledges that during part of his ownership of the Account, he associated his work email address with the Account. That fact alone, however, obviously does not amount to a transfer of ownership of the personal Account to BH Media, particularly in light of BH Media’s inducement to associate the account with work.”).

²³⁶ *Counterclaim*, *supra* note 141, at 14. Alcede specified that he posted non-work material on the Tactical Arms Facebook Page. *See Jamel*, *supra* note 160, at 580 (citing *In re CTLI, LLC*, 528 B.R. 359, 368, 371 (Bankr. S.D. Tex. 2015) and also referencing Alcede posting about gun control).

with the person attached to the beat. Therefore, a court might find that the Account was associated with the Virginia Tech football beat, despite the inclusion in the Account handle at various times of both Tucker and Bitter by name.²³⁷ Courts might further note that Tucker had initially referenced the name of the newspaper in the handle, and that the Account was created after Tucker had started working at the newspaper.²³⁸ However, because the Account’s handle was not directly associated with BH Media, and because the company’s policy suggests reporters use personal accounts to share news,²³⁹ this factor would slightly favor Bitter.

For the second factor, Twitter’s Terms of Service state, “[a]ll right, title, and interest in and to the Services . . . are and will remain the exclusive property of Twitter.”²⁴⁰ When referring to *In re CTLI*, Jamel reasoned that the content is owned by Twitter, rather than Tactical Firearms.²⁴¹ Therefore, Twitter would own the content that Bitter has posted on the Account.²⁴²

Jamel concluded that “[a]rguably, [social media accounts] do not have value.”²⁴³ Although Twitter accounts might not have calculable value, Tactical Firearms would benefit from maintaining

²³⁷ A court could compare these facts to those of Brian Windhorst and Adam Rubin. *See* Fry, *supra* note 55 (“Windhorst abandoned his Plain Dealer account when he came to ESPN, as did baseball writer Adam Rubin when he moved from the New York Daily News to ESPNNewYork.com. (Both of those accounts were associated with their beats rather than their names, however.)”). At the Plain Dealer, Windhorst had “built a following of more than 70,000 people.” *Id.* As of October 15, 2018, Windhorst’s current account, @WindhorstESPN, has approximately 595,000 followers. *See* Brian Windhorst (@WindhorstESPN), TWITTER, <https://twitter.com/WindhorstESPN> [<https://perma.cc/VM5A-FYU5>]; *see also* text accompanying note 55 (“accounts were associated with their beats rather than their names”).

²³⁸ *See, e.g., Opposition Memo, supra* note 177, at 2.

²³⁹ *See id.* at 8 (referring to BH Media’s 2015 “Professional Standards and Content Policies,” which “show that BH Media ‘strongly encouraged’ reporters to use their *personal* social media accounts in conjunction with their work at BH Media.”).

²⁴⁰ Jamel, *supra* note 160, at 596 (citing *Twitter Terms of Service*, TWITTER, <https://twitter.com/tos> [<https://perma.cc/W6RW-995P>]); *see also id.* at 577 (“While the Terms does not expressly state that Twitter owns the rights to the accounts, it does strongly indicate that the rights are not rights of the individual or the business, but are the rights of Twitter, the ‘Service.’”).

²⁴¹ *Id.* at 596 (citing *Twitter Terms of Service, supra* note 240).

²⁴² *See id.* at 595.

²⁴³ *See id.* (“(3) Do the social media accounts have value?”).

control of the Twitter account that had been connected to the business.²⁴⁴ That same logic could be applied to Bitter if the first factor favors him. Thus, Jamel’s analysis would likely indicate that the Account should remain with Bitter.

Christopher A. Moore also proposed an approach that invokes *In re CTLI*.²⁴⁵ To find consistency, according to Moore, one must answer whether a social media account can be considered personal property, and determine which party might have the superior claim in ultimately controlling the social media account.²⁴⁶ As to these inquiries, Moore suggested that:

(1) the license to use a social media account is a piece of personal property, and (2) when the terms of the agreement granting the license are ambiguous as to whom the license runs, courts should adopt a framework similar to *In re CTLI* when determining the identity of the licensee.²⁴⁷

Because Moore deemed Twitter’s Terms of service ambiguous, he found that courts should look to a framework similar to *In re CTLI*.²⁴⁸ As Moore summarized, that court looked at “(1) title of the page, (2) type of the page, and (3) the link between the page and the company’s website” when determining if the relevant Facebook account should be turned over to the creditor.²⁴⁹ Because the account in question was a Page (rather than a profile), “the court looked at the content and the use of the profile to determine if the employee could overcome that presumption.”²⁵⁰

Moore found that the court used the following four factors to determine the content and use of the profile:

(1) whether the employee operated a separate, personal page, (2) whether the majority of the posts

²⁴⁴ *Id.* at 596.

²⁴⁵ Moore, *supra* note 70, at 512.

²⁴⁶ *Id.* Moore describes seeking “answers to two major questions: (1) whether a social media account constitutes personal property, and (2) how to decide who has the superior claim when two parties have interests in the account.” *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 515 (citing *In re CTLI*, 528 B.R. 359 (Bankr. S.D. Tex. 2015)).

²⁴⁹ *Id.* at 515–16.

²⁵⁰ *Id.* at 516 (citing *In re CTLI*, 528 B.R. at 368).

were business-related, (3) whether multiple people within the company shared access to the profile, and (4) whether the use of the page was for the intended benefit of the company instead of the original [creator].²⁵¹

Moore used this framework to analyze the facts of *Eagle* and *Mattocks*, finding that Eagle “would have been able to proceed on a conversion claim,” and that BET still would have similarly prevailed.²⁵² Finally, to Moore, this approach “requires resolution of just two questions: (1) By looking at the face of the account, who is the presumptive licensee? (2) Does the use of the account sufficiently demonstrate that the presumption is incorrect?”²⁵³

Moore’s application of the suggested framework to ESPN NFL reporter Adam Schefter’s Twitter account is instructive for *Bitter*.²⁵⁴ Like with Schefter, the Account is in Bitter’s name.²⁵⁵ Therefore, Bitter would likely be the presumptive licensee of the Account.²⁵⁶ Then, the *In re CTLI* “court looked at the content and the use of the profile to determine if the employee could overcome that presumption.”²⁵⁷ Assuming that Bitter is the presumptive licensee, a court would likely consider if BH Media could overcome the presumption by determining the “content and the use” of the Account.²⁵⁸

Because there are no tweets from Bitter’s separate account @BitterAndy,²⁵⁹ this factor would likely still tip toward Bitter. The Account is a “traditional mixed-use account” because Bitter has posted professional and personal items.²⁶⁰ Assuming that the

²⁵¹ *Id.* (citing *In re CTLI*, 528 B.R. at 368–72).

²⁵² *Id.* at 517–518.

²⁵³ *Id.* at 519.

²⁵⁴ *Id.* at 516–17.

²⁵⁵ *See id.* at 516.

²⁵⁶ *Id.*

²⁵⁷ *Id.* (citing *In re CTLI, LLC*, 528 B.R. at 368).

²⁵⁸ *See id.*

²⁵⁹ *See Plaintiff Reply Memo*, *supra* note 158, at 2 (citing Exhibit 2 to Plaintiff’s Reply Memorandum of Law in Support of Motion for Temporary Restraining Order and Preliminary Injunction, BH Media Group, Inc. v. Bitter, No. 7:18CV388, 2018 WL 3768425 (W.D. Va. Sept. 21, 2018)); *see also* Andy Bitter (@BitterAndy), TWITTER, <https://twitter.com/BitterAndy> [<https://perma.cc/5WRL-FWA9>].

²⁶⁰ *See* Moore, *supra* note 70, at 516 (describing a “traditional mixed-use account”); *see also Counterclaim*, *supra* note 141, at 14 (detailing use of the Account).

majority of tweets Bitter sent from the Account involved his job, it would likely weigh in favor the employer.²⁶¹

Since Bitter testified that once he gained access to the Account, he “alone . . . possessed [the Account’s] login information,”²⁶² the third factor would favor Bitter. Moore also found that, although ESPN benefits when Schefter tweets links to his work hosted on ESPN’s platforms, “there is no indication that the Tweets are sent for the *purpose* of generating revenue for ESPN, but rather to aid his work.”²⁶³ Despite BH Media’s objections regarding the Account’s creation, Bitter could make a similar argument regarding tweets linking to his articles.

B. CFAA

Tiffany A. Miao advocated for a framework developed from the elements of a CFAA claim by synthesizing the Intentional Access (§ 1030(a)(2)(C)) and the Intent to Defraud (§ 1030(a)(4)) subsections of the statute.²⁶⁴ Miao endorsed this approach over one that invokes intellectual property law because the CFAA has become a tool to “combat alleged employee misconduct,”²⁶⁵ and because of “its focus on the unauthorized access of a computer—and not the substance of the information obtained.”²⁶⁶ Further, as Miao noted, “the type of violation envisioned under the CFAA is one that clearly identifies the property owner and the intruder.”²⁶⁷ To that end, a CFAA framework would extend what might be a “protected computer” under initial readings of the CFAA to cover a social media account.²⁶⁸

²⁶¹ See Moore, *supra* note 70, at 516.

²⁶² *Opposition Memo*, *supra* note 177, at 2.

²⁶³ Moore, *supra* note 70, at 516 (emphasis in original).

²⁶⁴ See Miao, *supra* note 138, at 1055–60.

²⁶⁵ *Id.* at 1054 (citing *P.C. Yonkers, Inc. v. Celebrations the Party and Seasonal Superstore, LLC*, 428 F.3d 504, 510 (3d Cir. 2005)).

²⁶⁶ *Id.* at 1054–55 (internal citation omitted).

²⁶⁷ *Id.* at 1055 (citing Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CAL. L. REV. 439, 475–77 (2003)).

²⁶⁸ See *id.* at 1060–61 (explaining why CFAA framework is superior to intellectual property frameworks).

Miao’s first of four main CFAA pillars is “Scope of Authorization.”²⁶⁹ This factor involves whether the employee or ex-employee was deemed “allowed” to continue accessing the account.²⁷⁰ The second pillar is “intent,”²⁷¹ which is demonstrated by “evinc[ing] a clear intent to enter, without proper authorization, computer files or data belonging to another,”²⁷² regardless of whether that person knew the value of the information that was gained as a result of that access.²⁷³ In fact, the mere act of entry can itself demonstrate intent.²⁷⁴

Miao’s third pillar is fraud.²⁷⁵ In this context, fraud “calls for a wrongdoing of more than unauthorized access, ‘a showing of some taking, or use, of information,’”²⁷⁶ rather than a showing of common law fraud.²⁷⁷ Under this theory, Miao hypothesized that actions such as logging onto an account after authorization has been revoked, logging in and posting promotional material for a different company, or changing the password could likely demonstrate intent to defraud.²⁷⁸

Miao’s final pillar is “\$5,000 loss.”²⁷⁹ She recognized that the losses that parties sustained in the cases referenced above (such as replacing advertising and lost value of subscribers) are unlikely to be compensated under the CFAA.²⁸⁰ However, as Miao indicated, companies could claim employee time, third party expenses in contacting the social media platforms to recover accounts, or

²⁶⁹ *Id.* at 1056–57.

²⁷⁰ *See id.* For this factor, that there are relevant jurisdictional differences in how scope of authorization is determined. In the next Part, those differences will be investigated.

²⁷¹ *See id.* at 1057–58.

²⁷² *Id.* (quoting *United States v. Drew*, 259 F.R.D. 449, 459 (C.D. Cal. 2009)).

²⁷³ *Id.* at 1058 (citing *U.S. v. Willis*, 476 F.3d 1121, 1125 (10th Cir. 2007)).

²⁷⁴ *Id.* (citing *Willis*, 476 F.3d at 1125 n.1) (describing how entry “may in and of itself corroborate intent”).

²⁷⁵ *See id.* at 1058–59.

²⁷⁶ *Id.* at 1058 (quoting *P.C. Yonkers*, 428 F.3d at 509).

²⁷⁷ *Id.* (citing Shawn E. Tuma, “What Does CFAA Mean and Why Should I Care?”—*A Primer On the Computer Fraud and Abuse Act for Civil Litigators*, 63 S.C. L. REV. 141, 163 (2011)).

²⁷⁸ *Id.* at 1059 (internal citations omitted).

²⁷⁹ *See id.* at 1059–60.

²⁸⁰ *Id.* (internal citations omitted).

expenses incurred in determining the value of the account as losses pursuant to a CFAA claim.²⁸¹

It is difficult to apply Miao's framework to the *Bitter* case because the sides disagree regarding the inspiration for generating the Account. If Bitter maintains that the Account was not created at the direction of the Pilot or Times, this analysis would be moot. However, according to Miao, determining scope of authorization would depend on the jurisdiction.²⁸²

Under the Seventh Circuit's *Citrin* standard, an employer can argue that accessing a social media account "without authorization" would be outside the requisite scope when an employee "accesses the employer's computer and uses the information obtained in a manner adverse to the employer's economic interest."²⁸³ Although Bitter did not testify to changing the password after he left BH Media, his refusal to provide that information upon BH Media's request has the same effect. Both Bitter's use of the Account to solicit subscribers to The Athletic, as well as providing links to his work hosted on The Athletic's website, arguably hurt BH Media's economic interest.²⁸⁴

The Ninth Circuit's *Brekka-Nosal* standard, on the other hand, involves "a narrower interpretation of authorization[,] . . . stat[ing] that one 'exceeds authorized access' when an employee is authorized to access only certain information but then accesses unauthor-

²⁸¹ *Id.* (internal citations omitted).

²⁸² *See id.* at 1056–57 (summarizing the difference between the *Citrin* standard in the Seventh Circuit and the *Brekka-Nosal* standard, used in the Ninth Circuit).

²⁸³ *Id.* at 1036 (citing *Int'l Airport Ctrs., LLC v. Citrin*, 440 F.3d 418, 420 (7th Cir. 2006)). Under *Citrin*, an employee is "'unauthorized' . . . when she accesses the computer in a way that contradicts the employer's interest." *Id.* at 1037.

²⁸⁴ *See Plaintiff Memo, supra* note 160, at 5 ("To that end, Defendant pinned a lead post highlighting his move to the Athletic and soliciting subscriptions to the Athletic from the roughly 27,100 followers of the Account. Thus, Defendant is actively engaged in competing with BH Media for its own customers, and is using BH Media assets to accomplish that goal.") (internal citation omitted).

ized information; the issue of how the information is used is irrelevant.”²⁸⁵ A *Brekka-Nosal* court could view Bitter’s refusal to relinquish the Account’s login information in the same manner.

However, Bitter could argue that his use of the Account after leaving BH Media does not exceed any authorization, because BH Media did not have authorization in the first place.²⁸⁶ Because “the only proof necessary is ‘that the defendant intentionally accessed information from a protected computer,’” Bitter’s decision to use the Account after warnings from BH Media would qualify as intentional access.²⁸⁷ On the other hand, Bitter’s belief that the Account never belonged to BH Media would indicate that there was no intentional access of BH Media’s computer. However, Bitter’s use of the Account to solicit subscribers to The Athletic would likely constitute an intent to defraud because the account was used to promote a competing organization.²⁸⁸

Finally, as noted above, the last pillar in Miao’s analysis is the \$5,000 loss. Depending on the judge and court, BH Media might be able to claim such losses as employee time or third party expenses incurred in reaching out to the social media website.²⁸⁹ Altogether, it is unlikely that BH Media would prevail under Miao’s CFAA-based framework, even if the first elements were not left open by a disputed question of fact. Given the uniquely mixed purpose and nature of social media presences like the Account, a CFAA framework would probably not be helpful in disputes involving former employees in circumstances similar to that of Andy Bitter.

²⁸⁵ Miao, *supra* note 138, at 1057 (citing *United States v. Nosal (Nosal II)*, 676 F.3d 854, 863 (9th Cir. 2012) (en banc)). Miao opines that changing an account’s password would be considered “access to unauthorized information.” *Id.*

²⁸⁶ See *Counterclaim*, *supra* note 141, at 3 (“Bitter admits he has refused to give access to his Twitter account to BH Media, because it does not, and never has, belonged to BH Media.”).

²⁸⁷ See Miao, *supra* note 138, at 1058 (quoting *United States v. Willis*, 476 F.3d 1121, 1125 (10th Cir. 2007)). In fact, “the act of entering in the access information may in and of itself corroborate intent.” *Id.*

²⁸⁸ See *id.* at 1059 (citing *EF Cultural Travel BV v. Explorica, Inc.*, 274 F.3d 577, 583 (1st Cir. 2001)).

²⁸⁹ See *supra* Part I.C.

C. Hired-to-Invent and Shop Right Theories

Courtney J. Mitchell’s suggested framework implicates the hired-to-invent and shop right doctrines.²⁹⁰ This approach would “bypass the difficult and slippery trade secrets analysis,” which can be especially messy for accounts with large followings.²⁹¹ To jumpstart this process, when assessing the employment relationship and the relevant social media account, a court would first “determine whether to apply the hired-to-invent doctrine or the shop-right rule”²⁹² If a court deems that the employee was “hired to invent,” then “the employee’s rights to access the account to communicate with its contacts would terminate with [their] employment.”²⁹³ A court would invoke the hired-to-invent doctrine if someone were expressly hired to maintain an employer’s social media presence.²⁹⁴ Mitchell compares this to the original patent context, wherein there is a contractual quid pro quo: “maintenance of a creative social media presence in exchange for compensation.”²⁹⁵ Further, Mitchell opines that this arrangement would maintain the incentive structure for both employer and employee.²⁹⁶

Under Mitchell’s assessment, Noah Kravitz’s situation would have satisfied the hire-to-invent doctrine, despite Kravitz injecting

²⁹⁰ See Mitchell, *supra* note 138, at 1488 (“Therefore, following the shop-right and hired-to-invent doctrines can resolve the question of rights to social media followers In importing the hired-to-invent and shop-right doctrines to resolve the issue of social media accounts, the different policy issues at stake should be considered.”).

²⁹¹ *Id.* at 1489–90 (“The court would not have to grapple with whether a public list could be considered ‘secret’ by virtue of containing seventeen thousand names. Nor would it have to determine whether the value of the contacts derived independent value based on that secrecy, let alone what that value was.”).

²⁹² *Id.* at 1488. Included in this determination would be the parties’ expectations when entering the employment relationship. *Id.* at 1490.

²⁹³ *Id.* at 1488. While recognizing the tediousness and difficulty of the task, Mitchell adds that “[s]ince an account’s contacts are publicly available, this would not prevent the former employee from reaching out to the account’s contacts on her own.” *Id.*

²⁹⁴ *Id.* at 1489.

²⁹⁵ *Id.*

²⁹⁶ See *id.* (“It would also preserve the incentive structure: employees’ compensation would serve as incentive to continue to maintain the social media account, and give employers assurance that employees would not use social media accounts, and the access to followers that they provide, to compete with employers when they leave. In turn, this would encourage employers to invest in effective, creative social media.”).

his own personality into his work-related posts, and sometimes sharing non-PhoneDog-related content.²⁹⁷ Pursuant to Kravitz’s duties as product reviewer and video blogger, “the account’s purpose was ultimately to attract new customers and produce advertising revenue for PhoneDog.”²⁹⁸ To Mitchell, therefore, the “contractual quid pro quo” to make Kravitz hired-to-invent meant that “PhoneDog provided Kravitz compensation in exchange for his efforts at attracting new followers and maintaining the Twitter account.”²⁹⁹

If the employer would analogously be allowed a shop right, then the employer would be able to access the account to help the business during and after the employee’s tenure.³⁰⁰ But, as Mitchell proclaimed, “the employee should have ultimate control of the account and retain access to it and its contacts after her employment ends, while the former employer’s ability to access the account to communicate with its contacts should terminate.”³⁰¹ Because of the nature of social media accounts, Mitchell theorized that where a shop-right exists and an employee has left the employer, the employer should be allowed to reach out to the account’s followers to let those followers know of ways to maintain contact with the employer organization or successor employee.³⁰²

A court would find a shop right when “employees use social media in connection with their employment, even though their duties do not expressly, or even impliedly, include maintaining social media accounts.”³⁰³ Included in shop-right would be “scenarios in which employees have pre-existing personal social media accounts to which they actively and regularly post work-related

²⁹⁷ *Id.*

²⁹⁸ *Id.* (citing *PhoneDog v. Kravitz*, No. C 11-03474 MEJ, 2012 WL 273323, at *1-2 (N.D. Cal. Jan. 30, 2012)).

²⁹⁹ Mitchell, *supra* note 138, at 1489.

³⁰⁰ *Id.* at 1488. A shop right exists when an employee invents something, and the employer is granted a “nonexclusive, nontransferable royalty-free license to use the invention in the business.” *Id.* at 1485 (internal citations omitted). When there is a shop right, “the employer can use the invention in the course of running the business, even after termination of employment, without the risk of an infringement suit and without paying a royalty.” *Id.*

³⁰¹ *Id.* at 1488.

³⁰² *Id.*

³⁰³ *Id.* at 1490.

information, such as a real estate broker who systematically posts status updates about upcoming open houses, or a retail clerk who frequently tweets about new inventory or upcoming sales.”³⁰⁴ The same is true when there are high-ranking executives or other employees who have strong connections with their employers and use social media tangentially to their employment.³⁰⁵ In these scenarios, it is also possible for the employee’s social media use to bring in business for their employers, which means that the employer would have to expend resources related to the employee’s social media account.³⁰⁶

A shop right in this social media context would also consider the nature of the employee’s job as it relates to whether the employee is using the social media account “on the clock.”³⁰⁷ The final factor, whether the employee would allow the employer to use the invention, could also be utilized in the social media setting.³⁰⁸ Courts would consider, for instance, whether the account has the employer’s marks or links to the employer’s website.³⁰⁹ When an employee uses their previously established account for work purposes and gives the employer their password, “this should weigh even more strongly in favor of granting a shop right, since it directly manifests the employee’s willingness for the employer to use and control the account.”³¹⁰ Therefore, under such an analysis, Edcomm would be granted a shop right in Linda Eagle’s LinkedIn account.³¹¹

Bitter and BH Media would likely diverge when deciding whether the Account deserves hired-to-invent or shop-right

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 1491 (describing when “employees who are strongly identified with their companies, such as high-ranking executives, use social media only incidentally to their employment, for example, a company executive who maintains a personal Facebook account or has a LinkedIn account listing his or her complete work and educational history”).

³⁰⁶ *Id.* at 1490–91.

³⁰⁷ *Id.* at 1492 (“Some employees are so closely associated with their occupations that it is hard or impossible to dissociate them from their professional identities or to say that they ever are ‘off the clock.’ This would likely be the case with a company executive high enough in rank to owe fiduciary duties.”).

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *See id.* at 1494.

analysis.³¹² BH Media would claim that Bitter was hired pursuant to the hired-to-invent doctrine. So, Bitter’s ability to access the Account would end with his resignation.³¹³ BH Media could bolster its hired-to-invent claim with the argument that Tucker started the Account in the course of his employment and “managed it at the Times’s direction.”³¹⁴ Therefore, to BH Media, the Account’s “primary purpose . . . is to generate interest in the Times, and by proxy, generate advertising revenue . . . [by] tweet[ing] links to articles published on the Times’s website directing users to the Times.”³¹⁵ BH Media could compare this situation favorably to *PhoneDog*, because the @PhoneDog_Noah “account’s purpose was ultimately to attract new customers and produce advertising revenue for PhoneDog.”³¹⁶ BH Media would consider Bitter’s efforts in growing the Account’s followers as part of his job and pursuant to the “contractual quid pro quo” that is crucial to the hired-to-invent doctrine.³¹⁷

Bitter, on the other hand, would likely argue first that BH Media does not even have a shop right in the Account. Such an argument would likely rely on Bitter’s insistence that the Account was started as Tucker’s personal account, and then the transfer was a personal decision between Tucker and Bitter as individuals.³¹⁸ Alternately, Bitter could argue that his use of the Account while employed by BH Media is akin to a shop right. Thus, Bitter’s use of the Account would be analogous to “scenarios in which employees have pre-existing personal social media accounts to which they actively and regularly post work-related information”³¹⁹

³¹² See *id.* at 1488.

³¹³ See *id.* (“[T]he employee’s rights to access the account to communicate with its contacts would terminate with her employment.”).

³¹⁴ *Plaintiff Reply Memo*, *supra* note 158, at 2–3.

³¹⁵ *Complaint*, *supra* note 139, at 5.

³¹⁶ Mitchell, *supra* note 138, at 1489 (citing *PhoneDog v. Kravitz*, No. C 11–03474, 2012 WL 273323, at *1 (N.D. Cal. Jan. 30, 2012)). Mitchell considers *PhoneDog* a hired-to-invent scenario. See *id.*

³¹⁷ See *id.* (describing the “contractual quid pro quo”); see also text accompanying note 299.

³¹⁸ See *Opposition Memo* *supra* note 177, at 2.

³¹⁹ Mitchell, *supra* note 138, at 1490.

As support, Bitter could point to his former employer's silence regarding the Account when he was hired.³²⁰ In addition, Bitter could argue that reporters were "strongly encouraged" to use personal social media accounts "in conjunction with their work at BH Media."³²¹ Since the use of personal social media accounts was not required by BH Media, Bitter could argue that a shop right was created, since the "employees['] duties . . . do not expressly, or even impliedly, include maintaining social media accounts."³²² Ultimately, a finding that BH Media has a shop right in the Account is the most sensible. As mentioned above, there is a shop right when an employee's account benefits the employer, and when use of the employer's resources also helps boost the popularity of an employee's account.³²³ The court could note that the Account's original handle contained the newspaper's name,³²⁴ and that Bitter frequently linked to his articles published by the Times while using the Account in connection with his job following Virginia Tech football at BH Media.

Finding a shop right would fit with both parties' general expectation that a journalist will use a social media account,³²⁵ and would be aligned with what is more likely viewed as industry standard.³²⁶ This solution could help employers as they replace the social media impact of a former employee, because finding a shop

³²⁰ See *Opposition Memo*, *supra* note 177, at 2–3 ("Bitter has never signed or been asked to sign any document transferring ownership of his count or giving BH Media any information about his Account . . . Neither his employment offer letter from the Pilot, nor any subsequent agreement with any entity, assigned ownership of his Account to the Pilot or granted the Pilot, or any other entity, any rights whatsoever in his Account.") (internal citations omitted).

³²¹ See *id.* at 8.

³²² Mitchell, *supra* note 138, at 1490.

³²³ See *id.* at 1490–91; see also text accompanying note 303.

³²⁴ See *Plaintiff Reply Memo*, *supra* note 158, at 3–4; see also text accompanying note 214 (noting that the handle was @KyleTuckerVP).

³²⁵ See Mitchell, *supra* note 138, at 1490. Included in this determination would be the parties' expectations when entering the employment relationship.

³²⁶ See *Opposition Memo*, *supra* note 177, at 5 (citing *Adande Testimony*, *supra* note 181); see also *Adande Testimony*, *supra* note 181, at 2.

right could allow the employer to contact the account’s followers to, perhaps, follow the account of the former employee’s successor.³²⁷

D. Trade Secret

Professor Zoe Argento’s article proposed that courts should deem a social media account’s password to be a trade secret.³²⁸ Argento advocated for a trade secret framework because a password’s inherent intended secrecy “qualifies for narrow trade secret protection and provides a legal basis for asserting a right of exclusive access to the account itself.”³²⁹ As such, the password “must satisfy three requirements to qualify for trade secret protection.”³³⁰

First, the password “must not be generally known or readily ascertainable to those who might obtain economic value from its use.”³³¹ As Argento noted, treating a password like a trade secret renders it somewhat unconventional because “login information for a given account can be changed repeatedly.”³³² Therefore the “secret of access” would lie with the “information necessary to access the account at any time,” not with “one specific set of alphanumeric strings or other combination of information.”³³³ A consistent effort to keep an account’s log-in information secret should suffice.³³⁴

Second, “the information must derive independent economic value from being secret.”³³⁵ Argento noted that one could economically benefit from the ability to gain access to a popular account.³³⁶ At the same time, however, Argento acknowledged that a password lacks inherent value.³³⁷ Because follower lists are often

³²⁷ See Mitchell, *supra* note 138, at 1488 (“[T]he employer would have access to the contacts for purposes of furthering the business both during and after the employee’s term of employment.”).

³²⁸ See Argento, *supra* note 122, at 249.

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.* (citing UNIF. TRADE SECRETS ACT, 14 U.L.A. 433 (1985)).

³³² *Id.*

³³³ *Id.*

³³⁴ *Id.* at 250.

³³⁵ *Id.* at 249 (citing UNIF. TRADE SECRETS ACT, 14 U.L.A. 433 (1985)).

³³⁶ *Id.* at 252 (“Many parties would gain economic benefit from accessing a widely followed account.”).

³³⁷ *Id.* at 253 (describing that a “password has no intrinsic value”).

public, this narrow trade secret protection “would only grant the rights holder exclusive use of links from the account,” which include exclusively and efficiently communicating to the account’s followers.³³⁸ Given the time and effort it would take to re-establish an account’s potential large number of followers, Argento opined that this could signify an economic value.³³⁹ Ultimately, “the password to a social network account derives independent economic value because it is secret.”³⁴⁰

Finally, the third factor specifies that “the information must be subject to reasonable efforts to maintain its secrecy.”³⁴¹ When the owner of a trade secret precludes someone from sharing information by way of a confidentiality agreement, it has been found that a reasonable effort has been made to sufficiently keep the information secret.³⁴² This third factor is often implicit when considering the first factor.

Professor Argento began the trade secret analysis by stating that “the party that does the work of creating the account should, by default, have the rights to the account.”³⁴³ In this context, Bitter could reiterate his contention that the Account passed from Tucker to Bitter “in an unbroken chain of ownership that does not include BH Media.”³⁴⁴ Given Bitter’s framing of the responsibility for growing the account,³⁴⁵ he could point to Argento’s distinction that creating an account “should not be defined as merely the trivial work of opening the account, . . . but as the substantial investment of time and energy needed to develop the links in the account.”³⁴⁶

³³⁸ *Id.* at 223 (“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.”). A user is linked to another’s account when, on Twitter for example, one selects to follow another. *Id.*

³³⁹ *See id.* at 255–56 (describing the benefit in the context of *PhoneDog*).

³⁴⁰ *Id.* at 255.

³⁴¹ *Id.* at 249 (citing UNIF. TRADE SECRETS ACT, 14 U.L.A. 433 (1985)).

³⁴² *Id.* at 251 (citing *Learning Curve Toys, Inc. v. PlayWood Toys, Inc.*, 342 F.3d 714 (7th Cir. 2003)).

³⁴³ *Id.* at 263 (internal citations omitted).

³⁴⁴ *See Opposition Memo, supra* note 177, at 1–2 (describing the “unbroken chain”).

³⁴⁵ *See id.* at 2 (describing that the account of the growth was “[t]hrough [Bitter’s] own efforts”).

³⁴⁶ Argento, *supra* note 122, at 263.

In response, BH Media would likely argue that “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.”³⁴⁷ To that point, BH Media could repeat their claims that Tucker, and then Bitter, used the Account under an implied agreement.³⁴⁸ Bitter could counterargue that he was never asked to sign anything related to the Account, and that BH Media policies ask reporters to use personal accounts when breaking news.³⁴⁹ In addition, Bitter could echo Argento’s recognition that using a social media account “on the employer’s behalf does not end the analysis.”³⁵⁰ Therefore, “the fact that a worker agreed to use [his or] her social network account to benefit the employer . . . does not necessarily imply that the parties agreed that the account itself belongs to the employer.”³⁵¹ Argento specifically noted that a social media account used by an employee can be for mutually beneficial purposes—when an employee shares their work hosted on an employer’s platform, it creates publicity for the employee while pointing to employer’s interest as publisher and host of the employee’s content.³⁵²

Although the analysis favors Bitter, it is not a straightforward case where the employee is ordered to make social media accounts for the employer to use.³⁵³ It is prudent to also look to “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.”³⁵⁴ As part of this analysis, Argento argued that the account’s content can speak to the

³⁴⁷ *Id.*

³⁴⁸ See *Opposition Memo*, *supra* note 177, at 1–2.

³⁴⁹ See *id.* at 2–3, 8 (citing BH Media’s 2015 “Professional Standards and Content Policies,” which “show that BH Media ‘strongly encouraged’ reporters to use their *personal* social media accounts in conjunction with their work at BH Media.”) (internal citation omitted).

³⁵⁰ Argento, *supra* note 122, at 266.

³⁵¹ *Id.*

³⁵² *Id.* at 267.

³⁵³ *Id.* at 266–67.

³⁵⁴ *Id.* at 267. “An employer’s dedication of resources to help workers develop social network accounts, such as guidance, training, and evaluation, would also indicate agreement.” *Id.*

purpose for which the account was formulated and utilized.³⁵⁵ As for the burden of proof in determining the parties' intent, Professor Argento noted that "the employer should bear a heavy burden" in demonstrating that the parties had agreed that the employer would control a social media account.³⁵⁶

When considering industry custom in the BH Media case, Bitter could rely on J.A. Adande's testimony,³⁵⁷ and the experience of many journalists employed by ESPN.³⁵⁸ Conversely, BH Media could analogize to instances of journalists abandoning their previous accounts because they were "associated with their beats rather than their names."³⁵⁹ However, the Account has always contained the user's name in some capacity.³⁶⁰ Despite this, given that Bitter predominantly tweeted about Virginia Tech football with the Account, it is likely that the "relation to the employer's business" factor would likely tip toward BH Media.

For the next consideration, a court would probably find that the "employer's dedication of resources" tips toward BH Media. BH Media might note that the Account's popularity was boosted because the employer's main Twitter account would retweet the Account.³⁶¹ Bitter could counter that it was BH Media's stated policy for journalists to use their personal accounts,³⁶² which could demonstrate an understanding that retweets from corporate accounts could benefit a reporter individually. BH Media could also note that

³⁵⁵ *Id.*

³⁵⁶ *Id.* at 266.

³⁵⁷ See generally *Opposition Memo*, *supra* note 177, at 5–7 (describing (1) J.A. Adande's opinion that Bitter should own his personal social media account absent a contract stating otherwise, and (2) given Adande's reputation, how his opinion is reflective of the industry standards); see also *supra* text accompanying notes 59–65.

³⁵⁸ See *supra* Part II.B; see also *Adande Testimony*, *supra* note 181, at 4–6 (describing additional examples).

³⁵⁹ Fry, *supra* note 55; see also text accompanying note 55. Examples include Adam Rubin and Brian Windhorst.

³⁶⁰ See, e.g., *Opposition Memo*, *supra* note 177, at 1.

³⁶¹ See *Complaint*, *supra* note 139, at 5 ("Likewise, the Roanoke Times's main Twitter account then retweets the Account's tweets (or vice versa). This utilization of Twitter drives traffic to the Times's website and generates advertising revenue for the Times based on the number of clicks it receives on its various original stories and content.").

³⁶² See *Opposition Memo*, *supra* note 177, at 8.

Bitter was aided by employer-issued equipment and access to “areas and press conferences not normally available to the public”³⁶³

Argento also suggested courts examine “the name of the account, exclusivity of access, the type of account, and whether the account preexists the employment relationship.”³⁶⁴ BH Media could point to fact that the Account’s original handle included the newspaper’s name.³⁶⁵ In addition, they could point to their accounting of the circumstances surrounding the Account’s transfer to Bitter, highlighting that the account predated Bitter’s employment at BH Media.³⁶⁶

In response, Bitter could note that even after he began working for only one newspaper, the account’s handle did not change.³⁶⁷ In addition, Bitter could cite to Adande’s testimony, which explained that employers should only own accounts “created and controlled by the employer (e.g., @espn or @NYTSports)”³⁶⁸ Given industry custom and that Bitter did not change the Account’s handle after beginning to work for a single newspaper, this factor would likely weigh toward Bitter.

The “exclusivity of access” factor would likely tip toward Bitter because after the transfer, he never shared the login information and was the only person to use the Account.³⁶⁹ Similarly, the type of account at issue would also likely weigh in Bitter’s favor;³⁷⁰ the Account’s name did not feature any employer, and instead contained information that followers would associate with Bitter.

As for the final consideration, whether the account preexists the relationship, it is undisputed that the Account pre-existed Bitter’s

³⁶³ *Plaintiff Reply Memo, supra* note 158, at 8.

³⁶⁴ *Argento, supra* note 122, at 268.

³⁶⁵ *Plaintiff Reply Memo, supra* note 158, at 3–4.

³⁶⁶ *See id.* at 6.

³⁶⁷ *See id.* at 7 (describing the Account’s handle as Bitter began to utilize it); *see also, e.g., Opposition Memo supra* note 177, at 16 n.12, (providing links, as the 9/17/18 filing, showing the Account’s name remaining).

³⁶⁸ *Adande Testimony, supra* note 181, at 2–3. Adande also talks about leaving his affiliation off of his handle because he views the Twitter account as a piece of his personal brand. *Id.* at 3.

³⁶⁹ *See Opposition Memo supra* note 177, at 2–3.

³⁷⁰ As discussed previously, businesses can make their own Twitter accounts separate from individuals. *See text accompanying notes 184–86.*

employment with BH Media and the company's predecessor.³⁷¹ Bitter would respond by noting that Tucker created the Account because he viewed Twitter "as a new and interesting way to connect with people," and that "[t]he Pilot did not ask Tucker" to create the Account.³⁷² Bitter could further contend that when he controlled the Account, he was not asked to transfer the Account, nor was he told that the Account belonged to his employer.³⁷³

As demonstrated, aspects of this analysis favor both sides. Ultimately, though, the trade secret framework would likely favor Bitter. Given the confusion in the record, and the "heavy burden" BH Media needs to overcome, it does not seem likely that a court would find that BH Media sufficiently "made clear its expectation" to Bitter that they would control the Account upon his departure.³⁷⁴

E. Publicity-Right Framework

Professors Park and Abril suggested a framework for social media disputes that stems from publicity rights.³⁷⁵ Working from the four elements for a right of publicity claim outlined in the Restatement (Third) of Unfair Competition, Park and Abril developed a five-part analysis which could be used by courts to determine ultimate ownership of a social media account that was used for professional and non-professional purposes.³⁷⁶ The "five overarching themes" underlying this analysis are: (1) the purpose and nature of the employment relationship; (2) the purpose and nature of the social media account, including its creation; (3) the employer's access or control of the social media account; (4) the degree to which the employee's persona is infused in the forum; and (5) the injury caused by the employer's alleged infringement.³⁷⁷

³⁷¹ See *Plaintiff Reply Memo*, *supra* note 158, at 7.

³⁷² *Opposition Memo*, *supra* note 177, at 3 (internal citations omitted).

³⁷³ See *id.* at 2–3.

³⁷⁴ See Argento, *supra* note 122, at 267.

³⁷⁵ See Park & Abril, *supra* note 99, at 581–98.

³⁷⁶ *Id.* at 588. Per the Restatement, "[a] claimant must show that (1) the defendant used the plaintiff's identity (2) for the defendant's commercial (or other) advantage (3) without the plaintiff's consent, (4) causing injury." RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (AM. LAW INST. 1995).

³⁷⁷ *Id.* at 588. See *id.* at 596–98 (Appendix A) for a larger list of questions that will also be considered with greater depth in Part III.

The first theme, “purpose and nature of employment relationship,” is fairly self-explanatory. For instance, if someone was hired to manage a company’s social media accounts, this factor supports the employer maintaining possession.³⁷⁸ Conversely, when an employee uses an account created for personal purposes to sporadically promote an employer’s business, and social media was not explicitly part of the employee’s job description, that would weigh in favor of the employee retaining the account.³⁷⁹

For the second theme, “purpose and nature of the social media account,”³⁸⁰ Park and Abril suggest that courts would examine whether the employer or employee created the account, whether the employee’s previously established social media following was a consideration in hiring, and whether that audience migrated when the employee was hired.³⁸¹ The reasons and timing for an account’s creation, particularly in relation to hiring, would also be considered.³⁸² Additionally, Park and Abril emphasized the registration information connected to the account,³⁸³ i.e., if the account is set up in the employee’s name.³⁸⁴

Park and Abril’s third factor is “employer access and control.”³⁸⁵ Under this prong, a judge would consider the extent to which the employer controls the account.³⁸⁶ Here, courts would determine if the employee was told or directed to post or not post certain content to the account in question.³⁸⁷ Under this factor, courts would also consider who had control and knowledge of the account’s login information.³⁸⁸

³⁷⁸ *Id.* Park and Abril believe this factor would weigh toward PhoneDog and against Kravitz. *Id.*

³⁷⁹ *Id.*

³⁸⁰ *Id.* at 589. See *id.* at 591 for more of the questions.

³⁸¹ *Id.* at 589–90.

³⁸² *Id.*

³⁸³ *Id.* at 590. If the account is set up in the employee’s name, that would weigh toward the employee. *Id.*

³⁸⁴ *Id.*

³⁸⁵ *Id.* at 592. See *id.* at 593 for questions that will be delved into further in Part III.

³⁸⁶ *Id.* at 592 (describing how “courts will look at the level of authority the employer maintains over the accounts in question”).

³⁸⁷ *Id.*

³⁸⁸ *Id.* at 592–93.

Under the fourth factor, “employee persona,”³⁸⁹ courts would consider “the employee’s online . . . presence.”³⁹⁰ For instance, courts could look to the employee’s online “individual expressions of personality, wit, expertise, or flair” as a non-job-related reason that the employee gained a following.³⁹¹ The greater the presence of identity is on social media, the stronger the presumption is that the employee should retain the account.³⁹² This factor evokes publicity rights, because this presumption points to a value associated with the employee’s online persona that should “prevent the employer from trading on or misappropriating the employee’s identity.”³⁹³

For the final factor, “degree of injury”, Park and Abril argued “that the measure of damages for a publicity rights violation is the ‘fair market value of the property right in plaintiff’s identity which defendant has used without permission.’”³⁹⁴ The fair market value is often determined by evaluating amounts received by similarly situated persons for comparable uses.³⁹⁵ To broaden the context of this analysis, Park and Abril suggested using a similar calculus for noncelebrities.³⁹⁶

For the first factor, nature and purpose of employment relationship, it is likely, as discussed, that BH Media would rely on their understanding of an implied relationship that was started with Tucker and continued with Bitter.³⁹⁷ Meanwhile, Bitter would likely distinguish his use of social media as a journalist from someone in a role such as social media manager. The additional questions that Park and Abril raised further indicate that this factor tips toward Bitter. For instance, they recommended courts ask whether “building or maintaining a social media presence on behalf of the employer [is] a critical part of the employee’s job description . . . [or] did the employee promote the company on social media as a

³⁸⁹ *Id.* at 593. See *id.* at 594 for questions that will be delved into further in Part III.

³⁹⁰ *Id.* at 593.

³⁹¹ *Id.* at 593–94.

³⁹² *Id.* at 594.

³⁹³ *Id.*

³⁹⁴ *Id.* at 595 (quoting *Jordan v. Dominick’s Finer Foods*, 115 F. Supp. 3d 950, 957 (N.D. Ill. 2015)).

³⁹⁵ *Id.*

³⁹⁶ *Id.*

³⁹⁷ See *Opposition Memo*, *supra* note 177, at 1–2; see also text accompanying note 373.

secondary consideration or out of loyalty to the employer?”³⁹⁸ Bitter could frame his social media use in a similar fashion as suggested in the Adam Schefter hypothetical from Moore’s piece.³⁹⁹ On the other side, BH Media would likely rely on their belief that the Account’s primary purpose was to drive interest to the employer’s website.⁴⁰⁰ Park and Abril posited that courts would ask whether “the employee [was] hired with the understanding that she [or he] would contribute or import her [or his] existing social media presence to the company?”⁴⁰¹ As discussed previously, the parties clearly have differing viewpoints on the understandings that undergirded their employment relationship.⁴⁰² Ultimately, therefore, it is likely that courts would weigh this factor toward Bitter due to the factual ambiguities.⁴⁰³

The second factor, the purpose and nature of the social media account, also has arguments for both sides. BH Media could note the Account’s handle under Tucker’s management was @KyleTuckerVP.⁴⁰⁴ The company could then note the discussion after Bitter started using the Account regarding the rationale for not including a reference to BH Media in the handle.⁴⁰⁵ BH Media could also distinguish this dispute from one where an employee was hired because of their already established social media audience.⁴⁰⁶ Then, BH Media could raise the argument that Bitter had not used the Account prior to his hiring, and that he allegedly cited his social

³⁹⁸ Park & Abril, *supra* note 99, at 589.

³⁹⁹ See Moore, *supra* note 70, at 516.

⁴⁰⁰ See *Complaint*, *supra* note 139, at 5.

⁴⁰¹ Park & Abril, *supra* note 99, at 589.

⁴⁰² See *supra* text accompanying notes 353–56 (explaining in trade secret portion about how the understandings were not the same, and the burden would likely be on the employer).

⁴⁰³ See *supra* text accompanying notes 374–76. A court could weigh this factor toward Bitter because the account was not *created* by Bitter at all, and the fact that the Account benefited the employer only appears secondary in the purpose of the account. See *supra* text accompanying notes 374–76.

⁴⁰⁴ See *Plaintiff Reply Memo*, *supra* note 158, at 3–4; see also *supra* text accompanying note 190.

⁴⁰⁵ See *Plaintiff Reply Memo*, *supra* note 158, at 6.

⁴⁰⁶ See Park & Abril, *supra* note 99, at 589 (“[I]f an employee’s existing account(s) and social media audience were important factors in her hiring . . . , then the presumption would be that the employee is entitled to keep the administrative rights to the profile and its associated audience when employment ends.”).

media skills in an interview.⁴⁰⁷ In noting that the Account pre-dated Bitter's employment, BH Media could note Park and Abril's assertion that "[i]f the employee's job required maintenance of an account that had been set up before employment began, that would weigh in favor of the employer's continued right to the audience associated with it."⁴⁰⁸

Conversely, Bitter could note that the Account was created under Tucker's personal email address, and private account-related details were passed via personal email addresses.⁴⁰⁹ As noted in the analysis for the previous framework, Bitter did not change the Account's handle to include a reference to the employer publication.⁴¹⁰ In addition, Bitter could point to the Account being transferred without involvement from BH Media.⁴¹¹ Park and Abril also suggested analyzing whether the social media account was "predominantly" used for professional or personal purposes.⁴¹² Bitter could refer to the fact that some of his most popular posts on the Account were about his personal life.⁴¹³ Conversely, BH Media would probably note that Bitter almost exclusively used the Account to share information about Virginia Tech football.⁴¹⁴ Based on the predominance of tweets about Virginia Tech football and the other arguments laid out above, courts would likely find that this factor narrowly tips toward BH Media.

The third factor, employer access and control, would clearly favor Bitter because once he received the Account's information from Tucker, he never shared the password with his employer, and never allowed another BH Media employee to post on the

⁴⁰⁷ See *Plaintiff Reply Memo*, *supra* note 158, at 6.

⁴⁰⁸ Park & Abril, *supra* note 99, at 589.

⁴⁰⁹ See *Opposition Memo*, *supra* note 177, at 2 (citing *Tucker Testimony*, *supra* note 178); see also text accompanying notes 256–59.

⁴¹⁰ See *supra* Part II.A.4.

⁴¹¹ *Opposition Memo*, *supra* note 177, at 1–2.

⁴¹² Park & Abril, *supra* note 99, at 591.

⁴¹³ See *Counterclaim*, *supra* note 141, at 14.

⁴¹⁴ See *Plaintiff Reply Memo*, *supra* note 158, at 9 ("This is shown by Mr. Bitter's prolific (daily) tweeting about Virginia Tech athletics (which was his job) and his usages of the Account for almost no other reason.").

Account.⁴¹⁵ Bitter could also claim that BH Media had not tried to control what Bitter posted on the Account by noting that BH Media encouraged (rather than demanded) reporters to use their personal social media accounts to promote their work.⁴¹⁶ As to employer control, Park and Abril argued that “[e]mployees should have a strong claim to social media they created and infused with their own identity . . . for the purposes of socialization or personal networking.”⁴¹⁷ While BH Media could point to Bitter predominantly tweeting about Virginia Tech football as support their argument,⁴¹⁸ Bitter could counter that the Account’s audience grew through his own efforts.⁴¹⁹

Even if the vast majority of Bitter’s tweets on the Account were work-related, Park and Abril’s proposed analysis tips in favor of Bitter,⁴²⁰ as Bitter was not “writing anonymously or pseudonymously on behalf of the employer”⁴²¹ Further, Bitter wrote or created the majority of the content featured on the Account,⁴²² which he could cite as support for the argument that his work on the Account granted him notoriety independent of BH Media.

The final Park and Abril factor, “degree of injury,”⁴²³ is inconclusive as to whether it favors BH Media or Bitter, given

⁴¹⁵ See *Opposition Memo*, *supra* note 177, at 2; see also *supra* text accompanying note 393.

⁴¹⁶ See *Opposition Memo*, *supra* note 177, at 8–10.

⁴¹⁷ Park & Abril, *supra* note 99, at 593. This factor considers “the employee’s online persona and presence,” by looking at the employee’s “individual expressions of personality, wit, expertise, or flair” *Id.* at 593–94. Expressions of individuality can be deemed non-work-related reasons that an employee has built a social media audience. *Id.*

⁴¹⁸ See *Plaintiff Reply Memo*, *supra* note 158, at 9 (“This is shown by Mr. Bitter’s prolific (daily) tweeting about Virginia Tech athletics (which was his job) and his usages of the Account for almost no other reason.”).

⁴¹⁹ See *Opposition Memo*, *supra* note 177, at 1–2 (“Through his own efforts over the past 7 years, Bitter now has nearly 28,000 followers.”) (internal citation omitted).

⁴²⁰ See Park & Abril, *supra* note 99, at 594 (listing the proposed questions).

⁴²¹ See *id.*

⁴²² See *id.* (“Did the employee write or create the majority of his or her own content?”); see also *Opposition Memo*, *supra* note 177, at 1–2 (“Since Tucker gave him the Account, Bitter alone has (1) maintained ownership and control of his Account; (2) accessed and posted to his Account; (3) possessed login information for his Account; and (4) created all the content on his Account, including content relating to Virginia Tech football and personal insights and opinions about unrelated matters, all subject to his sole and absolute discretion.”).

⁴²³ See Park & Abril, *supra* note 99, at 594–96.

courts' reticence to address the issue.⁴²⁴ Bitter could possibly claim an injury based on the time and effort spent to build the Account's following.⁴²⁵ On the other hand, BH Media alleges that "The Account would cost at least \$150,000 to recreate"⁴²⁶ Park and Abril readily acknowledged that courts have not allowed damages for employees, even if "they successfully make a prima facie showing of a violation to their publicity rights."⁴²⁷ Due to courts' eagerness to settle matters, the Western District of Virginia's decision to send *BH Media v. Bitter* to a magistrate judge for settlement means that there is still no precedent set for calculating injury and damages in these types of cases.⁴²⁸ With one factor inconclusive, three factors tipping toward Bitter, and one factor weighing in favor of BH Media, a court utilizing this framework would likely find that Bitter should maintain control of the Account. Part III will advocate for adopting the publicity-rights framework proposed by Professors Park and Abril.

III. ENDORSING A PUBLICITY RIGHTS APPROACH

A. *Why A Publicity Framework Is Preferable to the Other Frameworks Discussed*

First, this Part demonstrates why the right of publicity framework most efficiently captures compelling elements from the other frameworks discussed, and how it could be seen as a path of least resistance for courts. Then, this Part explains that a publicity-rights-based framework will be particularly useful in employment contexts for journalists and others in public-facing positions who rely on social media and post content onto an employer's forum.

⁴²⁴ See *supra* Part I.C. (providing discussion of the cases).

⁴²⁵ *Opposition Memo*, *supra* note 177, at 24–25.

⁴²⁶ *Complaint*, *supra* note 139, at 15.

⁴²⁷ Park & Abril, *supra* note 99, at 595.

⁴²⁸ See *Eagle v. Morgan*, No. 11–4303, 2013 U.S. Dist. LEXIS 34220, at *6 (E.D. Pa. Mar. 12, 2013).

1. Theories Involving *In re CTLI*

While both Jamel and Moore’s suggested frameworks were sufficiently applicable to the conflict between BH Media and Andy Bitter, there are several reasons why a publicity-rights-based framework would be more suitable. Both Jamel and Moore advocated for looking to the pertinent social media platform’s terms of service.⁴²⁹ However, because people generally avoid looking at terms of service before signing an employment agreement,⁴³⁰ it would seem more just and fair if courts do not rely on this fine print when determining who controls a social media account.

As to the property argument, given non-bankruptcy courts’ hesitation to declare a property interest in a social media account,⁴³¹ it would be sensible for courts to avoid using such a framework. Similarly, it would be more efficient for courts to use a framework in which they do not have to assign a tangible value to a social media account.

At the same time, however, aspects of both Jamel and Moore’s suggested frameworks overlap with Park and Abril’s publicity rights approach. For instance, Jamel’s first factor, the employee’s use of the account,⁴³² is covered by Park and Abril’s first and second factors.⁴³³ As to Moore, the tests he proposed to determine the presumptive licensee⁴³⁴ can be found in Park and Abril’s first, second, and fourth factors.⁴³⁵ Further, in determining an account’s content and use from Moore’s framework, the first four factors of Park and Abril’s framework would be addressed.⁴³⁶

⁴²⁹ See *supra* Part II.A.

⁴³⁰ See, e.g., Caroline Cakebread, *You’re Not Alone, No One Reads Terms of Service Agreements*, BUS. INSIDER (Nov. 15, 2017, 7:30 AM), <https://www.businessinsider.com/deloitte-study-91-percent-agree-terms-of-service-without-reading-2017-11> [<https://perma.cc/79MY-Y5M4>].

⁴³¹ See *supra* Part I.C.

⁴³² See Jamel, *supra* note 160, at 595 (“How does how the individual account holder use the account?”).

⁴³³ See Park & Abril, *supra* note 99, at 588 (“(1) the purpose and nature of the employment relationship; (2) the purpose and nature of the social media account, including its creation”).

⁴³⁴ See Moore, *supra* note 70, at 515–16 (citing *In re CTLI, LLC*, 528 B.R. 359, 372 (Bankr. S.D. Tex. 2015)); see *supra* Part II.A.

⁴³⁵ See *supra* Part II.A.

⁴³⁶ See *id.*

2. CFAA

As with the bankruptcy analyses, courts applying the CFAA framework would run into the concern of concretely determining a monetary loss from losing access to a social media account.⁴³⁷ In addition, the CFAA framework, as described by Miao, may be too rigid and inapplicable for journalists. As demonstrated in the previous section, when there are questions of fact regarding the CFAA elements,⁴³⁸ courts may have trouble applying that framework. Finally, utilizing Park and Abril's scheme avoids the extra work of differentiating between different jurisdictional standards of proof when deciding if an element of a claim has been satisfied.⁴³⁹ However, some overlap exists between Miao's framework and Park and Abril's, as Miao's suggestions of how a court might find value⁴⁴⁰ could be utilized by courts in determining Park and Abril's fifth factor.⁴⁴¹

3. Hired-to-Invent and Shop Right Theories

Mitchell's proposed framework could adequately cover disputes such as that between BH Media and Bitter. However, the determination of a hired-to-invent versus a shop right could lead to unnecessary hurdles in litigation because the differences between the two doctrines determine who should get ultimate control of a social media account.⁴⁴² Instead, courts can avoid this potentially superfluous dispute through Park and Abril's framework, which adequately investigates the key aspects of the hired-to-invent⁴⁴³ and

⁴³⁷ See *supra* Part I.C.

⁴³⁸ See *supra* Part II.B.

⁴³⁹ See *supra* text accompanying notes 301–03 (showing subtle differences between the *Citrin* and *Brekka-Nosal* standards).

⁴⁴⁰ See Miao, *supra* note 138, at 1059–60; see also *supra* text accompanying note 309.

⁴⁴¹ Miao, *supra* note 138 (internal citations omitted).

⁴⁴² See *supra* text accompanying notes 333–43 (proposing how a dispute between Bitter and BH Media might look if courts embraced a model using the hired-to-invent and shop-right doctrines).

⁴⁴³ In the hired-to-invent analysis, Mitchell proposes that courts might ask whether “a company hires someone specifically to manage its social media accounts,” which would point toward a contractual *quid pro quo* based on the “maintenance of a creative social media presence in exchange for compensation.” See *supra* text accompanying notes 315–16 (quoting Mitchell, *supra* note 138, at 1489). These questions are covered by Park and Abril's first (“the purpose and nature of the employment relationship”), second (“the

shop-right⁴⁴⁴ doctrines. At the same time, however, it could make sense for employers to borrow from the shop-right doctrine and contract for the ability to reach out to the relevant account’s followers following the employee’s departure.⁴⁴⁵

4. Trade Secret

As with the other approaches, Professor Argento’s trade secret analysis would be covered by Park and Abril’s publicity right factors.⁴⁴⁶ To that end, the specific factors outlined in Park and

purpose and nature of the social media account, including its creation”), and possibly fourth (“the degree to which the employee’s persona is infused in the forum”) factors. *See supra* text accompanying notes 399–406 (citing Park & Abril, *supra* note 99, at 588–92) (describing the first and second factors); *see also supra* text accompanying notes 411–15 (citing Park & Abril, *supra* note 99, at 593–94) (summarizing the fourth factor).

⁴⁴⁴ In the shop-right analysis, Mitchell’s discussion highlights “scenarios in which employees have pre-existing personal social media accounts to which they actively and regularly post work-related information,” and whether the employee uses (or created) the relevant social media account “on the clock.” *See supra* text accompanying notes 325, 328 (citing Mitchell, *supra* note 138, at 1490, 1491) (describing the shop-right doctrine). Pursuant to the shop-right doctrine, Mitchell considers “consent to the employer’s use,” at least in part by considering whether the social media account refers to the employer, and whether the employer allows the employer to access the account. *See supra* text accompanying notes 329–31 (citing Mitchell, *supra* note 138, at 1492). The shop-right analysis highlights Park and Abril’s third factor (“the employer’s access or control of the social media account”), in addition to the factors that are touched by the hired-to-invent elements. *See supra* text accompanying notes 407–10 (citing Park & Abril, *supra* note 99, at 592–93) (summarizing the third factor).

⁴⁴⁵ Whether or not Bitter was asked or forced to do so, Bitter seemed to have done this. *See* Andy Bitter (@AndyBitterVT), TWITTER (Nov. 15, 2018, 4:34 PM), <https://twitter.com/AndyBitterVT/status/1063183578215931910> [<https://perma.cc/6JSK-MKGX>] (“If you’re inclined, consider following my successor at the Roanoke Times, Mike Niziolek, at @VTSportsRT.”).

⁴⁴⁶ Argento notes how “the party that does the work of creating the account should, by default, have the rights to the account.” Argento, *supra* note 122, at 263; *see also supra* text accompanying note 364. This could be covered with Park & Abril’s second factor (“the purpose and nature of the social media account, including its creation”). *See* Park & Abril, *supra* note 99, at 589–92 (describing the second factor); *see also* text accompanying notes 401–06 (summarizing the same). Argento also describes how “the fact that a worker agreed to use her social network account to benefit the employer . . . does not necessarily imply that the parties agreed that the account itself belongs to the employer.” *See supra* text accompanying note 351 (quoting Argento, *supra* note 122, at 266). She also argues that “the employer should bear a heavy burden in demonstrating that the parties had agreed that the employer would control a social media account.” *See supra* text accompanying note 376 (quoting Argento, *supra* note 122, at 266). This would be covered by, at least, the first, second, and fourth factors. *See supra* text accompanying notes 397–406 (citing Park &

Abril's article allow for courts to uniformly apply a process, while Professor Argento's piece does not necessarily present a consistent approach.⁴⁴⁷ In addition, looking at Park and Abril's approach would allow courts to avoid affirmatively designating that a password is a trade secret.⁴⁴⁸

5. Right of Publicity

There are several advantages to Park and Abril's approach, as touched on in the discussions of the other frameworks. The publicity right's straightforward criteria, with many possible questions for each factor, is adaptable to various employment situations and social media platforms. Perhaps most notably, this approach would not

Abril, *supra* note 99, at 588–92) (describing the first and second factors); *see also supra* text accompanying notes 411–15 (citing Park & Abril, *supra* note 99, at 593–94) (summarizing the fourth factor). Then, Argento's discussion of customs could implicate those same factors, as well as the third factor (“the employer's access or control of the social media account.”). *See supra* text accompanying notes 408–10 (citing Park & Abril, *supra* note 99, at 592–93) (summarizing the third factor). Questions regarding the “nature of the content” on the relevant social media account would implicate the second and fourth factors. *See supra* text accompanying note 368 (quoting Argento, *supra* note 122, at 267) (describing the “nature of the content” element); *see also* Park & Abril, *supra* note 99, at 589–92 (describing the second factor); *see also* text accompanying notes 403–07 (summarizing the same); *see also supra* text accompanying notes 412–16 (citing Park & Abril, *supra* note 99, at 593–94) (summarizing the fourth factor). Then, the “dedication of resources” consideration can be covered by the first, second, and fourth Park & Abril factors. *See supra* text accompanying notes 400–07 (citing Park & Abril, *supra* note 99, at 588–92) (describing the first and second factors); *see also supra* text accompanying notes 412–16 (citing Park & Abril, *supra* note 99, at 593–94) (summarizing the fourth factor). Finally, Argento suggests that courts look to “the name of the account, exclusivity of access, the type of account, and whether the account preexists the employment relationship.” *See supra* text accompanying note 386 (quoting Argento, *supra* note 122, at 268). These considerations are covered, at a minimum, by Park & Abril's second and third (“the employer's access or control of the social media account,”) factors respectively. *See* Park & Abril, *supra* note 99, at 589–92 (describing the second factor); *see also* text accompanying notes 401–06 (summarizing the same); *see also supra* text accompanying notes 408–10 (citing Park & Abril, *supra* note 99, at 592–93) (summarizing the third factor).

⁴⁴⁷ *See, e.g.,* Argento, *supra* note 122, at 268 (“Finally, the fact that an account preexists the employment relationship obviates the need to analyze ownership under the work-made-for-hire doctrine.”).

⁴⁴⁸ *See, e.g.,* Mitchell, *supra* note 138, at 1489–90 (“The court would not have to grapple with whether a public list could be considered ‘secret’ by virtue of containing seventeen thousand names. Nor would it have to determine whether the value of the contacts derived independent value based on that secrecy, let alone what that value was.”).

require courts to make the intellectual-property or computer-crime related affirmations that have frustrated courts in previous cases and in the some of the works that this Note cites.

B. A Publicity Rights Framework Is Preferable for the Media Industry

Utilizing a right of publicity framework translates well to those in public-facing careers who might use social media, particularly the fourth factor in Park and Abril’s framework, which investigates the “Employee Persona.”⁴⁴⁹ This factor allows courts to recognize the long-standing importance of a social media account in building one’s own brand and following.⁴⁵⁰

A publicity framework could create a scenario where accounts with an individual’s name, even if made at the direction of their employer, would ultimately belong to the employee. This result accords with the industry custom that has seemingly developed thanks to figures such as Bill Simmons, Michelle Beadle, Marc Stein, and J.A. Adande.⁴⁵¹ However, such a policy would run counter to long-standing recommendations for how journalists use social media⁴⁵² and to BH Media’s own stated policy for how journalists use personally named social media accounts.⁴⁵³

A publicity right framework also accounts for the fact that handles can easily be changed, which suggests that it is not hard to disassociate the individual from the former employer even when that individual continues to use the same social media account. When a potentially disputed account changes its handle, this signals to the

⁴⁴⁹ See Park & Abril, *supra* note 99, at 593; see also *supra* Part II.A.

⁴⁵⁰ See Betancourt, *supra* note 21 (indicating that Twitter accounts allow journalists to “engage with their audience, connect with sources and continue building their personal brands”).

⁴⁵¹ See, e.g., Adande Testimony, *supra* note 181, at 4–6 (describing the experiences of himself and other figures wherein they changed jobs and maintained control of the Twitter accounts they had been using).

⁴⁵² See Betancourt, *supra* note 21 (advising journalists how to use Twitter in 2009); see also Peters, *supra* note 30 (“By sharing the work of others, you’re letting your readers discover new sources of information that they can trust, because they already trust you (a huge thing in the age of fake news), and you’re helping your colleagues find a new audience with whom to engage.”).

⁴⁵³ See *Opposition Memo*, *supra* note 177, at 8.

consumer that the previous author has left their position. Such an implied change can be cemented by a note to follow a successor. Therefore, a publicity rights framework properly eradicates consumer confusion about an individual's professional affiliation when the individual switches jobs but maintains control of the relevant social media account.

By considering the individual's persona, a right of publicity framework also accounts for scenarios in which the employer's resources might be used in promoting the account. For instance, in the aforementioned Adam Schefter hypothetical, a journalist could be using social media to link to their employer's website to benefit the individual.⁴⁵⁴ However, such linking also drives traffic toward the employer's website or platform, thus creating a mutually beneficial arrangement for both employee and employer.

If a court found for BH Media, it could lead to negative outcomes for media outlets and hurt journalists individually. Journalists might resist using their personal accounts to share their work for an employer, in case their employer may try to claim ownership of their account at a later time.⁴⁵⁵ The individual could also resort to using a branded account, with no personality and flair,⁴⁵⁶ potentially damaging the reporter's credibility.⁴⁵⁷

A policy echoing BH Media's claims in the case could stifle other media outlets' recruitment of employees who already have large social media audiences because such individuals might be discouraged from working with that employer. Such a policy could also adversely affect an employer's marketability to consumers, as consumers might be introduced to a company because of an individual's "particular expertise and musings."⁴⁵⁸

⁴⁵⁴ See Moore, *supra* note 70, at 516.

⁴⁵⁵ See *Opposition Memo*, *supra* note 177, at 25–26 ("The public likewise has an interest in protecting employees' personal social media accounts from claims of corporate ownership, particularly when, as here, the employer failed to provide employees with notice their personal accounts may be subject to a later claim of corporate ownership if used in connection with their employment.").

⁴⁵⁶ See Park & Abril, *supra* note 99, at 593–94.

⁴⁵⁷ See Stroud, *supra* note 46.

⁴⁵⁸ See Park & Abril, *supra* note 99, at 586.

A continuance of the implied policy that employees can keep personally named accounts, even if those accounts are created at the employer’s direction, ultimately helps both parties and suits the modern workforce—studies show that millennials tend to switch jobs more often, and the “gig economy” is increasingly prominent.⁴⁵⁹

With a more elastic workforce, it stands to reason that employers would prefer someone with an already established audience. Employees with large followings would not want to use that audience to promote work for their employer if they cannot keep growing that audience or keep the audience once they change job.⁴⁶⁰ Ultimately, all these issues can simply be avoided with clearer employee contract language.⁴⁶¹

For the foregoing reasons, employer policies that allow individual employees to maintain their social media accounts after concluding their tenure with that employer are advisable, even if such social media accounts were used to promote their work product. In this way, all stakeholders benefit, as individual employees are incentivized to build their own brand and such employer policies keep in line with modern relevant industry and general workforce trends.

⁴⁵⁹ See, e.g., Jean Chatzky, *Job-Hopping Is on the Rise. Should You Consider Switching Roles to Make More Money?*, NBC NEWS (Apr. 24, 2018, 2:15 PM), <https://www.nbcnews.com/better/business/job-hopping-rise-should-you-consider-switching-roles-make-more-ncna868641> [<https://perma.cc/Y9HJ-AM3W>]; Nancy Dahlberg, *The Gig Economy Is Big and Here to Stay: How Workers Survive and Thrive*, CHICAGO TRIBUNE (Sept. 6, 2017, 9:15 AM), <https://www.chicagotribune.com/business/ct-gig-economy-workers-20170906-story.html> [<https://perma.cc/WVG3-JWTR>]. The journalism industry itself has also been very volatile recently, and has seen considerable layoffs in early 2019. See Alexander Kaufman (@AlexCKaufman), TWITTER (Feb. 1, 2019, 1:59 PM), <https://twitter.com/AlexCKaufman/status/1091410831919796225> [<https://perma.cc/NK8C-2GNW>] (highlighting that there were over one thousand layoffs across the journalism industry in January 2019 alone).

⁴⁶⁰ See *Opposition Memo*, *supra* note 177, at 25–26 (“The public likewise has an interest in protecting employees’ personal social media accounts from claims of corporate ownership, particularly when, as here, the employer failed to provide employees with notice their personal accounts may be subject to a later claim of corporate ownership if used in connection with their employment.”).

⁴⁶¹ See Kramer, *supra* note 11 (“A well-drafted agreement can often be the silver bullet in these types of cases . . .”).

CONCLUSION

When a dispute arises between a media outlet and a journalist over the journalist's Twitter account, a right of publicity approach, as proposed by Park and Abril, provides the most appropriate framework to determine who retains ultimate control of a social media account. The right of publicity approach is preferable because it avoids reading into a platform's often ignored terms of service, and avoids putting courts in a difficult position of making expensive and time-consuming declarations involving arbitrary judgments based on various intellectual property doctrines that are not directly applicable.

Under the recommended publicity rights approach, the efforts and resources of both employer and former employee are appropriately recognized while also reflecting the current realities of employment relationships. Further, this approach is best-suited to respond to the modern journalism and media industries, and properly recognizes that a social media following might be a reason to hire someone, and not solely the result of the employment. Finally, this approach recognizes that contemporary consumers and social media followers often are more interested in the individual's work due to the individual, and not due to their employer.