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

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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. Twitter and News and Journalism Employment ................................................................. 329
   B. Post-Employment Control of a Former Employee’s Social Media Account .................. 333
      1. PhoneDog v. Kravitz ................................................................. 337
      2. Eagle v. Norman ................................................................. 338
      4. Other Notable Cases ................................................................. 343
   C. Judicial Decisions on Post-Employment Ownership of Social Media Accounts .......... 336
      1. PhoneDog v. Kravitz ................................................................. 337
      2. Eagle v. Norman ................................................................. 338
   D. Legal Academic Landscape for Social Media Disputes ................................................. 345
      E. An Overview of BH Media v. Bitter ................................................................. 347

II. OVERVIEW OF THE LANDSCAPE REGARDING EMPLOYER-EMPLOYEE DISPUTES OVER SOCIAL MEDIA ACCOUNTS ................................................................. 357
   A. Theories Involving In re CTLI ................................................................. 357
   B. CFAA ................................................................................................................. 364
   C. Hired-to-Invent and Shop Right Theories ................................................................. 368
   D. Trade Secret ............................................................................................................. 373
   E. Publicity-Right Framework ......................................................................................... 378

III. ENDORSING A PUBLICITY RIGHTS APPROACH ...... 384
   A. Why A Publicity Framework Is Preferable to the Other Frameworks Discussed .......... 384
      1. Theories Involving In re CTLI ................................................................. 385
      2. CFAA ................................................................................................................. 386
      3. Hired-to-Invent and Shop Right Theories ................................................................. 386
      4. Trade Secret ............................................................................................................. 387
INTRODUCTION

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

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 brands and public utilities. In addition, businesses can use platforms such as Twitter to cultivate a unique online presence.

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/ (“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 (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 (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.

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.\(^13\)

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\(^8\) 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.


\(^12\) See id.

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

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%).
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

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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/2MU3-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”).


infancy, journalists recognized that Twitter could allow them to connect with consumers and sources while building a personal “brand.”

For journalists, Twitter can also be used to break news, share colleagues’ work, or, as demonstrated by the Washington Post’s David Fahrenthold, as an effective crowdsourcing tool. 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.” As Greg Galant, CEO of Muck Rack, stated, Twitter “just lends itself perfectly to news.”

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

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.

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. 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.” 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. 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. In addition, fans can use Twitter to interact with beat reporters about the team, which creates a type of community in the process. Rule writes that watching sports has “an added element now: Checking social media.” Twitter has clearly massively changed how people watch sports.

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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

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\(^{39}\) 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.
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).
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 Explores!!!, AWFUL ANNOUNCING (Sept. 26, 2013), https://awfulannouncing.com/2013/the-crossover-explores.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-espn-s-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/sports/2015/06/26/espn-michelle-beadle-takes-twitter-trolls/29186535/ [https://perma.cc/6NXX-B67T] (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.\footnote{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].} 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 . . . .”\footnote{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.}

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.\footnote{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].} 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. *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

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\(^62\) Id. at *1.


\(^64\) *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, with Kravitz maintaining control of the account, 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. 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.

2. **Eagle v. Norman**

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 LinkedIn account. 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.” Per LinkedIn’s user agreement, the account belonged to

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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”).


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. After making the account, Dr. Eagle allowed Edcomm employees to access the account, to make updates on it, and to maintain correspondence. 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. Therefore, Edcomm exclusively controlled the account for about two and a half weeks. Dr. Eagle sued Edcomm, setting forth eleven causes of action, while Edcomm brought counterclaims of misappropriation and unfair competition.

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

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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.
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

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.
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 Television100

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

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95 See id. at *42, *44.
96 Id. at *14.
97 Id. at *37–38.
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.” 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.” 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 “entitle[ng] BET to ‘full access’ to the Page ‘in every respect.’”

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 . . . .” 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.” BET successfully took similar action with Twitter for a promotional account that Mattocks had also made.

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

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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.”

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. Finally, the court rejected the idea that Mattocks could assert a business or “property interest in the ‘likes’ on the [Facebook] Page.” 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.” Therefore, the court reasoned, “if anyone can be deemed to own the ‘likes’ on a Page, it is the individual users responsible for them.”

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.

In favor of the argument that the accounts constitute a trade secret,
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. 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.” 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. 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.

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.

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

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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.
in 2015 in *In re CTLI* 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

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. 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.” 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. 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.” Ultimately, Balasubramani suggests that the issue can be circumvented with a clearly worded contract.

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.” 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.” Meanwhile, some law journal articles set forth risk mitigation strategies and “suggest some precautionary measures for both employers and employees to take in order to safeguard their use of social media websites.”

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

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129 See, e.g., Roberts, supra note 51.
130 Id.
131 Id.
132 Id.
133 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. However, first this Note will highlight a recent case 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.

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”). 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. When Bitter began in 2011, he started using a

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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 INT’L. 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 CTLI, 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 CTLI, 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).


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. After resigning on July 6, 2018, Bitter continued to use the Account as he joined the subscription-based online outlet The Athletic.

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-ZRXM]. 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_27df746-6336-11e8-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].

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).

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.”).

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.”).

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 “[i]ke 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/dcsportsblog/status/101920783097
After Bitter denied BH Media’s request to relinquish the Account, BH Media filed suit on August 6, 2018. BH Media brought the following claims:


III. “Violation of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, et seq.”,

IV. “Violation of the Stored Communications Act, 18 U.S.C. § 2701, et seq.”,


VI. “Common Law Conversion”, and

VII. “Breach of Fiduciary Duty.”

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,” and Bitter came to use the Account as part of Bitter taking over Tucker’s position. According to BH
Media, therefore, Bitter “managed [the Account] at the Times’ direction.” 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. 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.

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. 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.” 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 . . . .”

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

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

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. BH Media implicated both state and federal trade secrets claims because the Account had followers located in Virginia, other states, and internationally. According to BH Media, Bitter’s post-resignation use of the Account to solicit subscribers to the Athletic amplified the misappropriation.

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.” BH Media relied on a Fourth Circuit holding that an employee’s authorization to access a computer is based on the employer’s assent.

BH Media’s other computer crime claims similarly hinged on an assertion that Bitter was not allowed to access the Account upon his resignation.

BH Media’s common law allegations also depended on BH Media’s assertion that it authorized Bitter to use the Account. 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. When describing

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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

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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. 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.

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. 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.” According to Bitter’s filing, BH Media’s position could “induce reporters to unwittingly forfeit ownership of personal accounts . . . .” In addition, the BH Media Employee Handbook distinguished “accounts provided by the Company” from other accounts.

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. 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, 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 See Exhibit 5, 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).
Unless 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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{194} BH Media therefore proclaimed that the public interest favors an injunction because it would help protect local newspapers in a changing business environment.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{197} In further support of denying the motion, the court

\textsuperscript{191} \textit{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)).

\textsuperscript{192} \textit{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.”).

\textsuperscript{193} \textit{Id.} at 13.


\textsuperscript{195} \textit{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.”).

\textsuperscript{196} See \textit{Order, supra} note 13, at 2.

\textsuperscript{197} \textit{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 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 . . . .”

Further, Jamel notes that users must access a Page through a personal account, and that Facebook allows users to convert their personal profiles into a Page. 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.”

Meanwhile, Twitter, as Jamel explained, “specifically allows for the creation of a business profile by the business,” without an associated individual account. This decision by Twitter allows it to “avoid[] Facebook’s problematic lack of a clear distinction between individual accounts and business Pages.” 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 . . . .”

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

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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]).
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-VVR5]).
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-JSR7] [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.\textsuperscript{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.”\textsuperscript{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?”\textsuperscript{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.”\textsuperscript{221} The third factor in the balancing test is whether the social media accounts “have value.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{225}

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

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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.”).
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

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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. 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. 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. 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.

Because Moore deemed Twitter’s Terms of service ambiguous, he found that courts should look to a framework similar to In re CTLI. 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. 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.”

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

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

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. 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. This approach would “bypass the difficult and slippery trade secrets analysis,” which can be especially messy for accounts with large followings. 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 . . . .” 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.” A court would invoke the hired-to-invent doctrine if someone were expressly hired to maintain an employer’s social media presence. 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.” Further, Mitchell opines that this arrangement would maintain the incentive structure for both employer and employee.

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

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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. 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.” 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.”

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. 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.” 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.

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.” 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.
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. 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. 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.

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.” The final factor, whether the employee would allow the employer to use the invention, could also be utilized in the social media setting. Courts would consider, for instance, whether the account has the employer’s marks or links to the employer’s website. 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.” Therefore, under such an analysis, Edcomm would be granted a shop right in Linda Eagle’s LinkedIn account.

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.
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. 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.” 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.” 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.” 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.

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. 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 . . .”

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.”).
315 Complaint, supra note 139, at 5.
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. In addition, Bitter could argue that reporters were “strongly encouraged” to use personal social media accounts “in conjunction with their work at BH Media.” 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.” 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. The court could note that the Account’s original handle contained the newspaper’s name, 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, and would be aligned with what is more likely viewed as industry standard. 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 follow-
ers.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 infor-
mation 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 con-
sidering 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 Tuc-
ker 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.” To that point, BH Media could repeat their claims that Tucker, and then Bitter, used the Account under an implied agreement. 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. In addition, Bitter could echo Argento’s recognition that using a social media account “on the employer’s behalf does not end the analysis.” 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.” 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.

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. 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.” 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. 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.

When considering industry custom in the BH Media case, Bitter could rely on J.A. Adande’s testimony and the experience of many journalists employed by ESPN. Conversely, BH Media could analogize to instances of journalists abandoning their previous accounts because they were “associated with their beats rather than their names.” However, the Account has always contained the user’s name in some capacity. 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. Bitter could counter that it was BH Media’s stated policy for journalists to use their personal accounts, 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 . . . .”

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.” BH Media could point to fact that the Account’s original handle included the newspaper’s name. 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.

In response, Bitter could note that even after he began working for only one newspaper, the account’s handle did not change. 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) . . . .” 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. Similarly, the type of account at issue would also likely weigh in Bitter’s favor; 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
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
dfive-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 overarch-
ing 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.
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. 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.

For the second theme, “purpose and nature of the social media account,” 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. The reasons and timing for an account’s creation, particularly in relation to hiring, would also be considered. Additionally, Park and Abril emphasized the registration information connected to the account, i.e., if the account is set up in the employee’s name.

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

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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,” courts would consider “the employee’s online presence.” 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. The greater the presence of identity is on social media, the stronger the presumption is that the employee should retain the account. 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.”

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.’” The fair market value is often determined by evaluating amounts received by similarly situated persons for comparable uses. To broaden the context of this analysis, Park and Abril suggested using a similar calculus for noncelebrities.

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. 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

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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?" Bitter could frame his social media use in a similar fashion as suggested in the Adam Schefter hypothetical from Moore’s piece. 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. 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?" As discussed previously, the parties clearly have differing viewpoints on the understandings that undergirded their employment relationship. Ultimately, therefore, it is likely that courts would weigh this factor toward Bitter due to the factual ambiguities.

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. 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. BH Media could also distinguish this dispute from one where an employee was hired because of their already established social media audience. 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 Bletter 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

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 as 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.”).
courts’ reticence to address the issue. Bitter could possibly claim an injury based on the time and effort spent to build the Account’s following. On the other hand, BH Media alleges that “The Account would cost at least $150,000 to recreate . . . ” 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.” 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. 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.
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’ hesitance 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.
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

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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-right 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.

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. To that end, the specific factors outlined in Park and Abril’s publicity right factors, 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).

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).

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.”).

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 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. In addition, looking at Park and Abril’s approach would allow courts to avoid affirmatively designating that a password is a trade secret.

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
require courts to make the intellectual-property or computer-crime related affirmations that have frustrated courts in previous cases and in 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.” This factor allows courts to recognize the long-standing importance of a social media account in building one’s own brand and following.

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. However, such a policy would run counter to long-standing recommendations for how journalists use social media and to BH Media’s own stated policy for how journalists use personally named social media accounts.

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. 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. The individual could also resort to using a branded account, with no personality and flair, potentially damaging the reporter’s credibility.

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.”

See Moore, supra note 70, at 516.

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.”).

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

See Stroud, supra note 46.

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.\footnote{See, e.g., Jean Chatzky, \textit{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, \textit{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).}

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.\footnote{See \textit{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.”).} Ultimately, all these issues can simply be avoided with clearer employee contract language.\footnote{See Kramer, \textit{supra} note 11 (“A well-drafted agreement can often be the silver bullet in these types of cases . . . .”)}

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.
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.