Social media rights

How to protect ownership rights to your social media accounts when employees leave

Interviewed by Chelan David

Many companies are expanding their marketing presence in social media outlets. However, not all companies are taking appropriate steps to ensure that they "own" their social media accounts when the employees who create them leave, says Richard Douglass, a partner with Novack and Macey LLP.

"It is important for companies that use Twitter or other social media as part of their marketing campaign to clearly define what rights, if any, the employees who tweet on their behalf have to the social media accounts and content," says Douglass.

Smart Business spoke with Douglass about who owns a social media account and how to protect your business when social media employees depart.

Richard Douglass
Partner
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What ownership rights are there in a social media account?

A social media account has two parts. First is the account itself. This includes login information and the people who have signed up to receive messages posted to the account. It is this aspect of an account that typically provides most of the value to the owner. For example, a Twitter account with 10,000 followers should be worth more than an account with 1,000 followers because 10 times as many people are reading the messages.

Second is content, messages posted to the account by an employee to share with the public. Rights to the content are generally governed by the same copyright principles that govern other written material produced by an employee. A question surfacing now regarding corporate Twitter accounts is not who owns the content but who has the right to control the account.

Have the courts decided who owns that right?

Not yet. The issue of who controls user rights to a Twitter account has not been widely litigated, but two decisions rendered last fall provide guidance.

A U.S. District Court in New York issued a preliminary injunction requiring a former employee to turn over to her employer all passwords and other login information for the company's social media accounts that she used during her employment. The court relied on a fairly generic copyright work product agreement to support its decision. And, probably because of the agreement, the employee did not dispute that the employer owned the accounts.

Because ownership was not disputed, the court did not have to engage in an in-depth analysis of whether the user rights to the accounts and the subscribers were covered by the work product agreement. This decision signaled that courts will likely be willing to enforce agreements requiring former employees to turn over the keys to social media accounts when they leave.

On the other hand, a U.S. District Court in California was faced with a dispute over the ownership of a Twitter account, but it appears the employer and employee did not have any agreements concerning ownership of the account or the content. As such, the employer was forced to rely on other legal theories to assert control rights.

While employed by the plaintiff, the employee used the account to promote the plaintiff's website to increase traffic and increase advertising revenue. When he left, the Twitter account was alleged to have 17,000 followers. The employer claims it asked the employee to turn over the account after he left, but he refused. Instead, he changed the name on the account to remove reference to his former employer and now uses the account to post messages on behalf of his new employer. As of February, the account had more than 24,000 followers.

Without a written agreement as to ownership and control over the account, the employer is asserting claims based on other legal theories. First, it claims the list of account followers is a trade secret. This argument seems doomed to fail given that follower lists are available on Twitter's website. The employer also claims the account password is a trade secret. That, too, seems to be misguided, as the employer does not gain value from the password itself and it could be changed at any time by the ex-employee.

Second, the employer claims the ex-employee is interfering with its business relationships by not turning over the account. This claim, however, does not seem to answer the relevant question — who owns the user rights to post messages on the account. These claims start from the assumption that user rights belong to the employer and assert that the ex-employee wrongfully refused to turn them over. Yet, if the ex-employee owns those rights, then he did nothing wrong. The employer's claims have survived motions to dismiss, but the litigation is likely far from over.

How can companies protect their rights to social media accounts after an employee leaves?

Express agreements defining who owns company social media accounts. The New York case shows that courts likely will enforce agreements over the rights to access, just as they enforce agreements governing ownership of the intellectual property rights to the content.

In essence, the collection of people subscribed to the account is a direct byproduct of the content, so one could argue that an agreement regarding content also covers the account. Nevertheless, the account itself is a sufficiently unique asset that it should be separately addressed.

The easiest solution is to require employees using social media on behalf of their employer to sign an agreement granting all user rights to the accounts to the employer, specifying that it will retain such rights after the employee leaves. The agreement should identify the accounts for which the employee is responsible and state that, when employees leave, they will turn over account passwords and relinquish all rights to access subscribers.

Taking this precaution at the start of an employment relationship should avoid disputes later. And, if disputes do arise, they put the employer in a strong position in any litigation. <<

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