

# Back to the Wild West of Social Media: Who Owns the Accounts?

09.22.14 | Linda J. Rosenthal, JD



There's a good reason why even social media experts describe this phenomenon as an "untamed wild west."

Social media is a new form of communication relayed across cutting-edge technological platforms. And the power to communicate has become more democratic: individuals, rather than just big organizations, have access to the medium as well as the message.

Nonprofits – along with businesses and government – are embracing the social media revolution, and disputes are bubbling to the surface. Some issues are specific to the nonprofit field, while others – including, particularly, employer-employee matters – apply across all sectors.

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At this point in the social media development process, it is hard to anticipate all a nonprofit's policies that will be needed in the next three to five years. But the board of directors must act soon on issues such as privacy [and] use of the nonprofit's accounts . . . [and] become aware of any personal or organizational liabilities that can arise through the increased use of social media, . . . [or] frivolous or unlawful use of the tools.

*A Threshold Issue: Who "Owns" an Account?*

An interesting and important question that has already erupted into litigation is the matter of ownership of social media accounts.

The unique nature of social media lends a special complexity to the definition of "ownership." For instance – just to list a few: Who owns the account name? Who has the right to access the account? Who created or authorized the creation of the account? Who has the ultimate control in connection with the account? Who owns all or specific parts of the content? Who owns the followers and more intangible "relationships" established through social media interaction? Who contributed to the content or growth of the account?

Often, the business or nonprofit has its own accounts on various social media channels. But many organizations deliberately and actively encourage putting a "human" rather than a corporate face to the message.

At the same time, many individuals (employees, officers and directors, and others connected to the organization) have their own social media accounts, on which the organization is actively promoted or discussed. And, often, an employee uses a social media account for both professional and personal branding or promotion.

#### ***Recent Cases Illustrate Possible Issues***

This issue has popped up where former employees – who claim to have contributed in various ways to an organization's social media presence – asserted ownership of the Twitter followers, the Facebook account, or the added value of new LinkedIn connections.

Even when the employer specifically directs or encourages employees to create accounts or write content, or pays the employees specifically for social media activities, it's not clear in all cases who owns the account. The employer may assume that it is the owner, but there is no firm or settled law yet on this tricky issue.

In two recent high-profile cases that occurred in the for-profit arena, but whose lessons apply to nonprofits equally well, that's the hard lesson that the employer learned.

#### ***PhoneDog v. Kravitz***

PhoneDog, a Northern California mobile news and review resource company hired Noah Kravitz as a product reviewer, editor, and video blogger. His duties included regularly posting opinions and reviews of products and services.

PhoneDog markets its services through Twitter, Facebook and YouTube. A Twitter account was established as @phonedog\_noah. It was wildly successful, attracting some 17,000 followers.

PhoneDog did not have a social media policy. It also did not have any agreements with employees regarding the business social media accounts.

Mr. Kravitz left the firm in 2010, along with the @phonedog\_noah account and all of its followers. PhoneDog sued him, claiming misappropriation of trade secrets, interference with prospective economic advantage, and conversion. The company sought damages based on a \$2.50 per Twitter follower value.

Under a confidential settlement in late 2012, Mr. Kravitz was allowed to keep and maintain his Twitter account and the 17,000 followers – on condition that he change the name to @noahkravitz. No one except the parties knows if, or how much, this former employee may have paid to Phone Dog.

“The PhoneDog dispute might have been avoided if the company had written policies and ownership agreements consistent with privacy laws,” writes one legal observer. “Spell out who owns what. If you have employment agreement, make it clear that the employer owns the account. In certain circumstances, an employee gets to keep certain accounts, so make sure those are carved out in writing.”

And “(c)ourts have suggested that the absence of a written agreement or clear policy may leave the employer with limited recourse against a departing employee who chooses to exercise control over the account.”

***Eagle v. Morgan***

In this case – which did make it to trial and final court ruling, here – a key employee disputed ownership of a LinkedIn account after she was involuntarily terminated following a business restructuring.

Dr. Linda Eagle was a co-founder and CEO of a Pennsylvania business named Edcomm. Her key colleague thought that “LinkedIn was awesome” for marketing, and Dr. Eagle created her own LinkedIn account using the business email address. Under the LinkedIn User Agreement, though, the account belonged to her alone.

In the ruling that is highly fact-specific, the judge summarizes facts that he decided were established and relevant to the lawsuit.

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Over time, it became the policy for Edcomm not only to urge employees to create LinkedIn accounts, but also to become involved in the account content...To this end, Edcomm developed employee policies covering on-line content. Notably, however, Edcomm did not require that employees have LinkedIn accounts... Moreover, at no time did Edcomm pay for its employees' — including Dr. Eagle's — LinkedIn accounts...In other words, although Edcomm did not require employees to maintain LinkedIn accounts or subsidize the maintenance of such accounts, it provided guidelines if an employee wanted to participate... It is also clear that Edcomm became concerned about LinkedIn accounts and former employees.

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While these emails and other Edcomm actions evidence an intense interest in the issue involving ownership of LinkedIn accounts, it is clear that [on the date she was terminated] no policy had been adopted to inform the employees that their LinkedIn accounts were the property of the employer. Whether such a policy would be legally valid under the contract created between LinkedIn customer and an individual user is obviously not an issue before the Court in light of the finding made in this case that no such policy existed.

The judge continued:

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Sometime prior to her termination, Dr. Eagle gave her password to the LinkedIn account to certain Edcomm employees...The primary purpose of sharing her password seems to have been 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...When Dr. Eagle was terminated, Edcomm employees accessed her LinkedIn account and changed its password, effectively locking her out of the account. The parties stipulated that [for 3 weeks] Edcomm had full control of the account...On July 7, 2011, LinkedIn took over the account and, by July 14, 2011, Dr. Eagle had regained access to the account...[after which she continued to have full access and control over the account...]

Although this former employee regained control of the account, she filed a lawsuit in connection with the three weeks after her termination in which Edcomm had obtained and controlled the LinkedIn account. She raised eight separate claims, of which eventually she prevailed on three: unauthorized use of name in violation of Pennsylvania law; invasion of privacy by misappropriation of identity; and misappropriation of publicity. The court ruled, though, that the damages were too speculative for any award.

Edcomm filed counterclaims related to misappropriation and unfair competition, but lost. The trial judge emphasized in his ruling that the lack of a social media policy as well as a written agreement between Edcomm and Dr. Eagle concerning the ownership or use of social media accounts was critical in finding against the company.

One legal observer summarized some important lessons from this case:

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A solid agreement defining company ownership rights could have eliminated [this] litigation. . . Companies can protect their content and brand with a written agreement setting forth who has what ownership rights in their social media accounts and content, including electronic-access information, such as passwords and login data . . .The extent of the employer’s involvement in the creation, development and supervision of social media content can be a critical factor in determining ownership of that content. . .

Particularly where the process is standardized and a system has been implemented to assist employees in the creation and development of these accounts, the company has a far better chance of success.

***Conclusion***

Cases like these emphasize that organizations – including nonprofits, of course – should immediately consider and adopt social media policies and agreements concerning employee use of social media accounts and put in place agreements protecting themselves from potential misuse and abuse.