

NEW YORK UNIVERSITY
JOURNAL OF INTELLECTUAL PROPERTY
AND ENTERTAINMENT LAW

VOLUME 9

SPRING 2020

NUMBER 1

FAILED STRATEGY: USING TRADE SECRET LAWS TO
ASSERT OWNERSHIP OF EMPLOYEES' SOCIAL MEDIA
ACCOUNTS IN THE JOURNALISM INDUSTRY

ANTHONY C. ADORNATO*
ANDREW S. HORSFALL, ESQ.**

It's the policy of an increasing number of news outlets to retain ownership of the professional social media accounts of their reporters. In the first case of its kind in the United States, one media company took a former employee to court over the question of ownership. The Roanoke Times in Virginia filed a suit in 2018 against a former sports reporter, alleging a breach of its social media policy. The reporter, who left his position at The Times for a competing news outlet, took with him the Twitter account he had used as part of his work with the outlet. This article explores a host of uncharted legal implications pertinent to this case and argues that utilizing trade secret laws to assert ownership of an employee's account(s), a strategy used in The Times case and several other lawsuits, is an ill-fitted approach. Social media accounts and their associated followers are not "secret," no matter the industry. A comprehensive policy could prevent legal action in the first place by providing employees with guidelines that address a myriad of issues discussed in this paper. The authors offer provisions of a policy that would protect news outlets while also acknowledging the importance of social media accounts to the livelihood of journalists and to the free flow of information from journalists to the public.

* Roy H. Park School of Communications, Ithaca College, New York, USA.

** Syracuse University College of Law, Syracuse University, New York, USA.

INTRODUCTION.....	63
I. SOCIAL MEDIA IN THE JOURNALISM INDUSTRY	65
A. <i>Technological Disruption in the Journalism Industry</i>	65
B. <i>Use of Social Media by Individual Journalists</i>	68
C. <i>Social Media Policies in Newsrooms</i>	69
II. CASES AND RELEVANT ISSUES INVOLVING SOCIAL MEDIA OWNERSHIP AND WORKERS	72
A. <i>BH Media v. Bitter</i>	73
B. <i>PhoneDog v. Kravitz</i>	77
C. <i>Eagle v. Morgan</i>	79
III. ANALYSIS	81
A. <i>Trade Secrets on Shaky Ground</i>	81
1. <i>Social media followers are not “trade secrets” because they are “generally known” to the public.</i>	81
2. <i>The “value” paradox: social media followers do not derive “independent economic value.”</i>	82
B. <i>Social Media Policies: Balancing the Interests of Employers and Employees</i>	85
C. <i>Other Legal Issues</i>	88
1. <i>Terms of Service</i>	88
2. <i>State Laws Governing Social Media</i>	89
CONCLUSION.....	90

INTRODUCTION

Andy Bitter posted to Twitter almost daily when he was a sports reporter at *The Roanoke Times* in Virginia.¹ Bitter’s tweets kept his thousands of social media followers up-to-date about Virginia Tech sports and gave them an inside look at his reporting.² When Bitter left *The Times* in 2018 to work for another outlet, he took with him the Twitter account he used at *The Times* (@AndyBitterVT).³ BH Media, the parent company of *The Times*, sued Bitter over what the news outlet called a

¹ See Jeff Sturgeon, *Roanoke Times sues former sportswriter over continued use of Twitter account*, THE ROANOKE TIMES (Aug. 7, 2018), https://www.roanoke.com/business/roanoke-times-sues-former-sportswriter-over-continued-use-of-twitter/article_8b425fa5-777c-54d4-b3f2-0e1c6ec34540.html.

² See *id.*; see also Complaint at 3, BH Media Grp., Inc. v. Bitter, No. 7:18-cv-00388-MFU (W.D. Va. Aug. 6, 2018).

³ See *BH Media*, No. 7:18-cv-00388-MFU, at *6 (while working at *The Roanoke Times* the name of the account was @AndyBitter. It was then edited to include ‘VT’ (Virginia Tech) when he began working at another outlet.).

breach of its social media policy, misappropriation of trade secrets, and other claims.⁴ BH Media claimed that the outlet retains ownership of reporters' social media accounts under its policy, and therefore Bitter should have turned over the account before leaving for his new job.⁵

At first glance, the premise of the case may appear straightforward: an employee breached an employer's policy. The suit, though, was centered not on a breach of contract but rather intellectual property laws.⁶ In fact, BH Media asserted in the lawsuit that the account is a protectable interest because Twitter followers are equivalent to a customer list with significant economic value.⁷ Competing factual details about who actually retained control of the Twitter account via access to log-in credentials was also a key element of this case.⁸ Adding to the complexity, there is, as this article will outline, ambiguous legal precedent regarding ownership of social media accounts used by employees in a work capacity, and state lawmakers are taking note of the issue.⁹ Twenty-six states have passed legislation concerning the social media accounts of current and prospective employees, and similar laws are pending in other states.¹⁰

What also makes this case novel is that it is the first known lawsuit in the United States involving a dispute over ownership of a journalist's social media account.¹¹ A journalist's role is to serve the public, and social media provides a conduit to do so.¹² Journalists are often considered public figures in their communities.¹³ They are "followed" on social media because of the value assigned to their personal brands and personas as journalists.¹⁴ While this article frames the

⁴ See Sturgeon, *supra* note 1.

⁵ See *BH Media*, No. 7:18-cv-00388-MFU, at *6.

⁶ *Id.* at *7-10.

⁷ *Id.* at *7-8.

⁸ *Id.* at *4, *6-7; Counterclaim, *BH Media Grp., Inc. v. Bitter*, No. 7:18-cv-00388-MFU, at *18-22 (W.D. Va. Aug. 30, 2018).

⁹ Hugh McLaughlin, *You're Fired: Pack Everything but Your Social Media Passwords*, 13 NW. J. TECH. & INTELL. PROP. 87, 91 (2015).

¹⁰ See *State Social Media Privacy Laws*, NAT'L CONF. OF ST. LEGISLATORS (May 22, 2019), <http://www.ncsl.org/research/telecommunications-and-information-technology/state-laws-prohibiting-access-to-social-media-username-and-passwords.aspx>.

¹¹ See Jonathan Peters, *Lawsuits over journalist Twitter accounts may become more common*, COLUM. JOURNALISM REV. (Sept. 10, 2018), https://www.cjr.org/united_states_project/roanoke-times-twitter.php.

¹² See Taylor Lorenz, *Personal Branding is More Powerful Than Ever*, NIEMANLAB, <https://www.niemanlab.org/2018/12/personal-branding-is-more-powerful-than-ever/>.

¹³ See *id.*

¹⁴ See *id.*

issue of ownership as it relates to the journalism industry, the legal and practical implications discussed are applicable to a myriad of other sectors. Given the dearth of legal and academic scholarship on the topic, this article fills a gap in the literature. It is the first of its kind to analyze a journalism-specific case involving social media ownership.

Section I discusses journalists' use of social media as part of their daily job responsibilities and how it's fundamentally different from the social media practices of employees in other industries that have been the focus of previous cases. The role of social media from a business perspective and newsrooms' social media policies are highlighted. Section II outlines cases relevant to the issue of ownership of employees' social media accounts, with particular attention to the role of trade secret laws. Finally, Section III provides an analysis of relevant legal issues and proposes how employers and employees can best protect their own interests.

I

SOCIAL MEDIA IN THE JOURNALISM INDUSTRY

This section provides context with regard to the impact of social networking platforms on the journalism industry and on individual reporters. In addition, it discusses how evolving journalistic norms associated with social media have led to new policies within newsrooms. This background information is intended to foster readers' understanding of the *BH Media* case and this article's analysis of it, given that the case involves the journalism industry.

A. *Technological Disruption in the Journalism Industry*

The use of social media by journalists is no longer a novelty. All one has to do is look through the latest journalism job postings and they'll notice how frequently social media skills are mentioned.¹⁵ For journalists, social media savviness is now just as important as maintaining fundamental journalistic standards, such as verification, objectivity, and concise writing.¹⁶ Newsroom managers expect their journalists to use social media on a daily basis in three main ways:

¹⁵ Deb Halpern Wenger, Lynn C. Owens & Jason Cain, *Help Wanted: Realigning Journalism Education to Meet the Needs of Top U.S. News Companies*, 73(1) JOURNALISM & MASS COMM. EDUCATOR 18 (2018) (indicating that in a longitudinal study of more than 1,800 journalism job postings there was an increased demand for employee skills in social media and audience engagement).

¹⁶ See Mark Stencel & Kim Perry, *Superpowers: The digital skills media leaders say newsrooms need going forward*, TOW-KNIGHT CTR. FOR ENTREPRENEURIAL JOURNALISM, <https://drive.google.com/drive/u/1/folders/0B51QbGE9zXC5VmJNaTRfVTV6eWc>.

newsgathering, distribution of news, and interacting with the public.¹⁷ Twitter, Facebook, and Instagram are among the most utilized social networking sites by journalists. In its social media guidelines, *The New York Times* underscores the vital role social media plays in contemporary journalism:

On social platforms, our reporters and editors can promote their work, provide real-time updates, harvest and curate information, cultivate sources, engage with readers and experiment with new forms of storytelling and voice. We can effectively pull back the curtain and invite readers to witness, and potentially contribute to, our reporting. We can also reach new audiences.¹⁸

The journalism industry has always been shaped by technology.¹⁹ From the printing press to computers to social media, new technological innovations impact where the public turns for news and how journalists perform their craft.²⁰ The public's shifting news consumption habits, fueled by the emergence of social media, has led to the commonplace use of these tools in journalism.²¹ Social networking sites have disrupted the journalism industry arguably unlike other new technologies. Since the late 2000s, the public has increasingly turned online for news instead of relying on print newspapers.²² In 2018, social media outpaced print newspapers in the U.S. as a news source for adults (18 years and older).²³ The combined loss of print subscriptions and advertising dollars has had a seismic impact on newspapers. For example, between 2007 and 2010 alone, the annual print newspaper advertising revenue was cut nearly in half, plunging from \$42 billion to \$22 billion.²⁴ Broadcast

¹⁷ See Anthony C. Adornato, *A Digital Juggling Act: New Media's Impact on the Responsibilities of Local Television Reporters*, 8(1) ELECTRONIC NEWS 3 (2014).

¹⁸ *The Times Issues Social Media Guidelines for the Newsroom*, N.Y. TIMES (Oct. 13, 2017), <https://www.nytimes.com/2017/10/13/reader-center/social-media-guidelines.html>.

¹⁹ Adornato, *supra* note 17, at 4 (citing Simon Cottle & Mark Ashton, *From BBC Newsroom to BBC Newscentre: On Changing Technology and Journalist Practices*, 5 CONVERGENCE: THE INT'L J. OF RES. INTO NEW MEDIA TECHNOLOGIES 22 (1999)).

²⁰ *Id.*

²¹ See *id.* at 8.

²² See Michael Barthel, *Despite subscription surges for largest U.S. newspapers, circulation and revenue fall for industry overall*, PEW RES. CTR. (June 1, 2017), <https://www.pewresearch.org/fact-tank/2017/06/01/circulation-and-revenue-fall-for-newspaper-industry/>.

²³ Elisa Shearer, *Social media outpaces print newspapers in the U.S. as a news source*, PEW RES. CTR. (Dec. 10, 2018), <https://www.pewresearch.org/fact-tank/2018/12/10/social-media-outpaces-print-newspapers-in-the-u-s-as-a-news-source/>.

²⁴ Michael Barthel, *Newspapers Fact Sheet*, PEW RES. CTR. 24, 27 (Apr. 29, 2015), <http://www.journalism.org/2015/04/29/newspapers-fact-sheet>.

news has also been impacted. From 2006 to 2012, the number of adults under 30 who regularly watched local TV news dropped from 42 percent to 28 percent.²⁵

In order to remain viable, newsrooms have to meet the audience in spaces where they are now active: social media.²⁶ Journalists can no longer expect the audience to come directly to their reporting on a news website, television newscast, or radio broadcast.²⁷ Instead, a news consumer's first point of contact with journalists' reporting is increasingly via social media posts.²⁸ A social media user may then decide to click a link to a story they saw on social media, share a journalist's social media post about a news event or ask a question directly to a journalist on social media.²⁹ The hope is that the public will find value in the work of newsrooms and their reporters, no matter the platform. Keeping the audience coming back for more is important for attracting advertisers.³⁰ All that engagement with a news outlet's journalists and content is financially valuable.³¹ It has the potential to attract digital advertisers and subscribers.³² Armed with data about its social media followers, website traffic, mobile app downloads and subscribers, among other metrics, sales teams at news outlets approach companies focused on digital advertising.³³ Considering print advertising revenue in 2014 was less than half of what it was a decade before that, newspapers are attempting to make inroads

²⁵ *In Changing News Landscape, Even Television is Vulnerable*, PEW RES. CTR. (Sept. 27, 2012), <http://www.people-press.org/2012/09/27/in-changing-news-landscape-even-television-is-vulnerable> (further indicating that the younger demographic (18-29 years old) has all but abandoned broadcast and print news in favor of staying up-to-date online resulting in an underlying business imperative, driven by the public's evolving news consumption habits from TV and print to digital, that has driven newsrooms and their journalists to be active on social media).

²⁶ See Aaron Smith, *Record shares of Americans now own smartphones, have home broadband*, PEW RES. CTR. (Jan. 12, 2017), <https://www.pewresearch.org/fact-tank/2017/01/12/evolution-of-technology> (demonstrating that, as of 2016, 70 percent of U.S. adults were social media users); see also Anthony Adornato, *Mobile and Social Media Journalism: A Practical Guide*, CQ PRESS 13, 26 (Aug. 2017), <https://us.sagepub.com/en-us/nam/mobile-and-social-media-journalism/book253886> (stating that increasingly people end up at a news website by clicking on a link in a social media post, rather than directly typing in the web address, and social referrals—links that are shared on social networks—are a crucial source of website traffic).

²⁷ Adornato, *supra* note 26, at 26.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 42.

³¹ *See id.*

³² *Id.*

³³ *Id.*

with marketers advertising on digital platforms.³⁴ From 2011 to 2017, the percentage of newspaper companies' advertising revenue that came from digital advertising nearly doubled.³⁵

B. Use of Social Media by Individual Journalists

Newsrooms rely on their employees to execute their social media strategy, most notably through the individual journalists' activities on social media accounts that have their own names attached to them.³⁶ The two-way interaction between the public and journalists on social media is a distinguishing element of contemporary journalism. It is a conversation with a "real" person. Other industries rely almost exclusively on "branded" social media accounts to disseminate their messages. A branded account is typically affiliated with a company rather than a person or individual employee.³⁷ For example, @roanoketimes and @CocaCola on Twitter are considered branded accounts. News outlets employ social media editors to manage these branded accounts.³⁸

Individual journalists, though, are responsible for and invested in sharing content on their social media accounts that they use as part of their work with a news organization.³⁹ For example, NBC News White House correspondent Hallie Jackson posts frequently to Twitter and Instagram directly from her own mobile device.⁴⁰ Along with sharing news and showing people a behind-the-scenes look at her reporting process, Jackson periodically shares information about her personal interests and hobbies.⁴¹ Employees who manage NBC News' branded social media accounts may then choose to share what Jackson has posted. The fact that individual employees' activities on their own accounts is such an integral part of the journalism industry sets the *BH Media v. Bitter* case apart from those involving other fields.

³⁴Amy Mitchell, *State of the News Media 2015*, PEW RES. CTR. 4, 6 (2015), <http://www.journalism.org/2015/04/29/state-of-the-news-media-2015>.

³⁵ *Share of newspaper advertising revenue coming from digital advertising*, PEW RES. CTR. (June 13, 2018), <http://www.journalism.org/chart/sotnm-newspapers-percentage-of-newspaper-advertising-revenue-coming-from-digital> (indicating that the percentage increased from 17 to 31).

³⁶ See Adornato, *supra* note 26, at 57-58.

³⁷ See, e.g., *Social Media Policy*, TEGNA, at 2 (May 2017), https://drive.google.com/file/d/1AQMaADAGnKmxHEI_pRN4Vhpc4U8Xr4F8/view.

³⁸ See, e.g., *id.* at 1.

³⁹ See, e.g., Adornato, *supra* note 26, at 17-18.

⁴⁰ *Id.*

⁴¹ *Id.*

The “social” nature of social networking platforms affords journalists the opportunity to create direct connections with the public.⁴² Those relationships are built over time through a journalist’s sustained activity on their individual social media accounts.⁴³ It’s not uncommon for a journalist to amass a social media following because of their work related to a particular story or reporting beat.⁴⁴ This was the case for Andy Bitter: when he worked for *The Roanoke Times*, he covered Virginia Tech athletics, and his Twitter feed was the go-to-source for news about the university’s sports teams.⁴⁵

Prior to the rise of online platforms, journalists needed to be employed by a news organization to build a portfolio of work and reputation.⁴⁶ That’s no longer the case as online platforms, most notably social networking sites, allow journalists to build their brand regardless of their affiliation with a news outlet, whether they’re a freelancer or a full-time newsroom employee.⁴⁷ A journalist’s brand with its associated followers—a tribe—is highly valuable to current and potential employers.⁴⁸ A journalist who builds such a brand is an asset to a newsroom: she not only has a solid journalistic reputation, but also a built-in audience that will follow her under the umbrella of a new newsroom.⁴⁹ Among the questions this scenario raises is whether a reporter who is hired by a news outlet and brings with her a previous account retains ownership of it. After all, she built the following. So, should all that hard work fall under the legal ownership of an employer?

C. Social Media Policies in Newsrooms

Many newsrooms claim ownership of social media accounts used by journalists as part of their job responsibilities.⁵⁰ In a 2017 study, two-thirds of local television news managers in the United States indicated that it is the policy of their outlets to “own” the social media accounts of their reporters.⁵¹ The policies are typically reviewed and signed by employees during the onboarding process.⁵² In some instances, journalists are allowed to create social media accounts on their own

⁴² Adornato, *supra* note 17, at 20-21; Adornato, *supra* note 26, at 20.

⁴³ Adornato, *supra* note 17, at 20-21; Adornato, *supra* note 26, at 61.

⁴⁴ See, e.g., Sturgeon, *supra* note 1.

⁴⁵ See *id.*

⁴⁶ See Adornato, *supra* note 17, at 4.

⁴⁷ See generally Adornato, *supra* note 17.

⁴⁸ See Adornato, *supra* note 17, at 14; see Adornato, *supra* note 26, at 58.

⁴⁹ Adornato, *supra* note 17, at 20-21; see Adornato, *supra* note 26, at 58.

⁵⁰ See Anthony C. Adornato & Suzanne Lysak, *You Can’t Post That!: Social Media Policies in U.S. Television Newsrooms*, 11(2) ELECTRONIC NEWS 80, 94 (2017).

⁵¹ *Id.*

⁵² See Adornato & Lysak, *supra* note 50, at 89.

but are required to submit their passwords to newsroom management. In others, the outlet creates the accounts on behalf of the journalist and provides them the login credentials.

We encounter the question of whether an employee is allowed to keep the account and its followers when employment with an outlet ends. Some policies directly state that the journalist will no longer have access to the account—similar to what happens with a company email address.⁵³ The E.W. Scripps Company, which operates newsrooms in 18 states, makes this clear in its social media policy: “Your professional account is the company’s property and the name and contents remain company property if you leave Scripps. Scripps reserves the right to edit, monitor, promote or cancel a professional account.”⁵⁴

Other news outlets offer flexibility surrounding the issue. Gray Television, owner of stations in nearly 100 local U.S. television markets, allows its station managers to determine on a case-by-case basis whether employees can take social media accounts with them.⁵⁵ Gray Television station’s social media policy indicates that the company owns any employee work accounts.⁵⁶ However, managers can transfer ownership of accounts to a journalist when they leave for a new job, as long as their new employer does not compete against a Gray Television station.⁵⁷ This approach is directed at preventing a competitor from reaping the benefits of an employee who has amassed a social media following. The policy of TEGNA, another U.S. media company, states that the company “has the right to claim and maintain any social media username” that includes the TEGNA corporate brand or that of one of its television stations.⁵⁸ For example, @JohnSmithWZZM and Susan Smith’s KARE-TV Facebook page would fall under this category.⁵⁹ If an employee

⁵³ Adornato, *supra* note 26, at 145.

⁵⁴ Jim Romenesko, *E.W. Scripps Co. Issues Social Media Policy*, POYNTER (June 30, 2011), <http://www.poynter.org/2011/e-w-scripps-announces-social-media-policy-to-staff/137564>.

⁵⁵ See email from Amber Smith, Digital Director of the 10/11 NOW news team, to Anthony Adornato, Associate Professor of Journalism (Jan. 15, 2019) (on file with NYU JIPEL).

⁵⁶ See *Employee Handbook*, GRAY TELEVISION 1, 37 (Apr. 1, 2014) (stating that “All Work Accounts must be

established with an official Company email account (for example, “jsmith@wctv6.com” or “j.jones@kktv.com”).

Existing Work Accounts that were created with an email address other than a work email address should be

transferred, converted, or re-registered with a work email address.”).

⁵⁷ See Amber Smith email, *supra* note 55.

⁵⁸ TEGNA, *supra* note 37, at 2.

⁵⁹ *Id.*

leaves the company, he or she is allowed to take the account(s) with them as long as they remove all branding related to TEGNA and its outlets.⁶⁰

The definition of “professional” can be ambiguous. The E.W. Scripps Company’s policy pertains to its employees’ professional accounts “which are intended to promote and expand the company’s brand, products and activities.”⁶¹

One might argue that if a journalist created an account prior to working at the outlet, the outlet could retain ownership of that account if the journalist uses it for professional purposes. In other words, any account on which you’re sharing information as part of your position with the outlet or representing yourself as a staff member of the outlet could be deemed professional.⁶² Rachel Barnhart learned this lesson when she was a reporter for WHAM-TV in Rochester, New York.⁶³ Barnhart attracted tens of thousands of Facebook and Twitter followers combined.⁶⁴ When Sinclair Broadcasting purchased WHAM-TV, she was faced with a choice: use new company-issued accounts, or continue to use the accounts she had created and risk losing them if her employment with the station ended.⁶⁵ According to Sinclair’s policy, the company owns the social media accounts of its on-air personalities.⁶⁶ Barnhart decided to use new social media accounts for work purposes only.⁶⁷ In a statement to her followers, she wrote: “At this juncture, I am retaining ownership of my existing Facebook and Twitter pages. Therefore, the company has started new social media accounts in my name for me to use during work hours when I am covering stories. The company has administrative control over these accounts.”⁶⁸

⁶⁰ *Id.* (stating “[t]his includes changing the name of your branded social media accounts and removing information from your bio that indicates you are a current employee”).

⁶¹ Romenesko, *supra* note 54.

⁶² GRAY TELEVISION, *supra* note 56, at 37 (“The Company owns any social media accounts and related databases created by employees or by a Station for use primarily in the performance of employee job functions (“Work Accounts”). Employees retain ownership of all social media accounts not created for use primarily in the performance of employee job functions (“Personal Accounts”).”); *see generally* Adornato, *supra* note 17.

⁶³ Diane Marszalek, *Who Owns, Controls Social Media Activity?*, TVNEWSCHECK (Jan. 29, 2013, 10:58AM), <http://www.tvnewscheck.com/article/65102/who-owns-controls-social-media-activity>.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Sinclair Broadcasting ‘Owns’ Social Media Accounts Of Its On-air Talent*, AIRCHECKER, <http://www.airchecker.ca/2013/01/24/sinclair-broadcasting-owns-social-media-accounts-of-its-on-air-talent/>.

II CASES AND RELEVANT ISSUES INVOLVING SOCIAL MEDIA OWNERSHIP AND WORKERS

Case law addressing novel questions of ownership of social media accounts is still in the nascent stages of development. Most judicial opinions are the result of motions to dismiss based on the pleadings or focus only on whether there are triable issues of fact, but not the substantive merits of the legal claims.⁶⁹ In one bench opinion, the court in *Eagle v. Morgan* articulated conclusions of law on only three of eight causes of action alleged by a former employee.⁷⁰ In the meantime, cases settle out of court with the ultimate question unanswered: who owns the social media account?

The landscape is therefore rife for testing various common law and statutory claims. And litigants are casting a wide net, alleging causes of action based on misappropriation of trade secrets, conversion, interference with contractual and economic interests, violations of rights to privacy and publicity, identity theft, and computer crimes, among other claims.⁷¹ Looming over the fate of these theories is the struggle the parties encounter when alleging damages, that is, articulating the value of the social media account, the components that make up one's social media presence (i.e., followers, friends, likes, clicks, traffic, visibility, etc.), and the harm in depriving the account from the purported owner.

It is most notable for this article that existing case law has involved disputes among employees and employers of businesses where the sale of goods or services made up the principle commercial activity of the business.⁷² In these contexts, the followers of social media accounts have been likened to lists of customers, future customers, professional connections, and sales leads through which the business is able to maintain an online relationship that is expected to yield an economic

⁶⁹ See, e.g., *BH Media*, No. 7:18-cv-00388 (Aug. 6, 2018).

⁷⁰ *Eagle v. Morgan*, No. 2:11-cv-04303-RB, 2013 U.S. Dist. LEXIS 34220, at *10-22 (E.D. Pa. Mar. 12, 2013).

⁷¹ See *Eagle*, 2013 U.S. Dist. LEXIS 34220, at *14; see also *BH Media*, No. 7:18-cv-00388 (Aug. 6, 2018); see also *PhoneDog v. Kravitz*, No. 3:11-cv-03474-MEJ, 2011 U.S. Dist. LEXIS 129229, at *1 (N.D. Cal. Nov. 8, 2011).

⁷² *Eagle*, 2013 U.S. Dist. LEXIS 34220, at *1; *PhoneDog*, 2011 U.S. Dist. LEXIS 129229, at *1; *Maremont v. Susan Fredman Design Group, Ltd.*, No. 1:10-cv-07811, 2014 U.S. Dist. LEXIS 26557, at *2 (N.D. Ill. Mar. 3, 2014).

benefit.⁷³ Legal disputes over ownership of one's social media account had not involved the journalism industry until the 2018 lawsuit of *BH Media v. Bitter*.⁷⁴ Discussed in detail below, this case unleashes the question of ownership on an industry whose principal activity is not the sale of goods or services but instead the gathering and dissemination of news for the purposes of educating a public audience through traditional media (i.e., newspaper, radio, and television) and new media (i.e., web-based content, social media, and blogs).⁷⁵ There is undoubtedly vital relevance of social media to the journalism industry, which has seen business models upended and news outlets transformed by the proliferation of smartphones, social media platforms, and the 24-hour news cycle at one's fingertips.

As with similar cases, the parties in *BH Media v. Bitter* settled their dispute, leaving the industry to consider how might a court have resolved issues of ownership between a journalist and a news outlet.⁷⁶ Before discussing the relevant legal issues on the topic, this article looks at cases whose facts and analysis are helpful to advance this inquiry.

A. *BH Media v. Bitter*

In 2011, Andy Bitter was hired to fill a role previously held by a sports journalist who departed *The Roanoke Times*.⁷⁷ Bitter's main responsibility was reporting on Virginia Tech athletics, and he used the Twitter account in question to carry out this function.⁷⁸ It was alleged that the sports journalist who previously held this position at *The Times* created the Twitter account.⁷⁹ Shortly after being hired by *The Times*, Bitter was given access to the account.⁸⁰ He updated the account profile to include his own name.⁸¹ In July 2018, Bitter left *The Times* to work for The Athletic Media Group.⁸² Despite being asked by *The Times* to relinquish the login information of the Twitter account, Bitter refused to do so and continued to use the

⁷³ *Eagle*, 2013 U.S. Dist. LEXIS 34220, at *2; *BH Media*, No. 7:18-cv-00388, at *3 (Aug. 6, 2018); *PhoneDog*, 2011 U.S. Dist. LEXIS 129229, at *1; *Maremont*, 2014 U.S. Dist. LEXIS 26557, at *2.

⁷⁴ See generally *BH Media*, No. 7:18-cv-00388 (Aug. 6, 2018).

⁷⁵ See generally *id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at *3.

⁷⁸ *Id.* at *3-4.

⁷⁹ *BH Media*, No. 7:18-cv-00388, at *2 (Aug. 30, 2018).

⁸⁰ *BH Media*, No. 7:18-cv-00388, at *4 (Aug. 6, 2018).

⁸¹ *Id.*

⁸² *Id.* at *6.

account.⁸³ BH Media Group, which owns *The Times*, filed a complaint against Bitter.⁸⁴ BH Media contends that The Athletic, a sports news outlet, is a direct competitor and that Bitter is working for the outlet in a similar if not identical capacity.⁸⁵ That's where the role of this Twitter account comes into play.

BH Media's suit alleged seven causes of action: misappropriation of trade secrets under the Defend Trade Secrets Act (DTSA), misappropriation under Virginia Uniform Trade Secrets Act (VUTSA), violations of the Computer Fraud and Abuse Act (CFAA), violation of the Stored Communications Act (SCA), violation of the Virginia Computer Crimes Act (VCCA), conversion, and breach of fiduciary duty.⁸⁶ It also filed a temporary restraining order and sought that Bitter relinquish control of the account to BH Media.⁸⁷

BH Media's perceived competitive advantage of owning and maintaining the Twitter account is a key factor in the lawsuit.⁸⁸ It highlighted what it considered the value of the account's list of approximately 27,100 followers.⁸⁹ BH Media outlined how the company promoted its work and generates page views to its websites, including that of *The Times*, through the use of social media.⁹⁰ The company claimed that attracting website visitors depends heavily on BH Media's ability to communicate with current and potential readers, such as Twitter followers, and that advertising revenue is partially dependent on those page views.⁹¹ The loss of advertising revenue because of the alleged misappropriation is difficult if not impossible to calculate, according to the suit.⁹² BH Media estimated it would have to dedicate a full-time employee to build a similar account and re-engage with the followers, with no guarantee that they would be able to recreate the previous configuration.⁹³ This, BH Media alleged, would take seven years and a cost of at least \$150,000 to recreate the account.⁹⁴

⁸³ *BH Media*, No. 7:18-cv-00388, at *3 (Aug. 30, 2018) ("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.").

⁸⁴ *BH Media*, No. 7:18-cv-00388, at *1 (Aug. 6, 2018).

⁸⁵ *Id.* at *6-7.

⁸⁶ *BH Media*, No. 7:18-cv-00388, at *1 (Aug. 6, 2018).

⁸⁷ *BH Media Grp. Inc. v. Bitter*, No. 7:18-cv-00388 (W.D. Va. Aug. 7, 2018).

⁸⁸ *BH Media*, No. 7:18-cv-00388, at *5 (Aug. 6, 2018).

⁸⁹ *Id.* at *8-9.

⁹⁰ *Id.* at *5.

⁹¹ *Id.* at *2-3.

⁹² *Id.* at *8.

⁹³ *Id.* at *8-9.

⁹⁴ *Id.* at *9.

BH Media argues that the account constitutes a trade secret under the federal Defend Trade Secrets Act (DTSA) and the Virginia Uniform Trade Secrets Act (VUTSA) because it derives “independent economic value from not being generally known by and not being readily ascertainable by BH Media’s competitors. . . .”⁹⁵ It also alleged that the manager (or those with rights to access it) of the Twitter account had access to nonpublic information, or trade secrets, including: (i) the list of followers, (ii) the feed of tweets from those followers, and (iii) the ability to direct message them on Twitter.⁹⁶ BH Media asserted that the list of followers is equivalent to a curated client list and subsequently alleged that Bitter is utilizing it for direct marketing on behalf of a direct competitor.⁹⁷ These facts also give rise to BH Media’s claim that Bitter’s alleged misappropriation constitutes a breach of fiduciary duty owed to his employer.⁹⁸ BH Media does not allege the login credentials constitute a trade secret.⁹⁹

BH Media claims it took precautions to protect these trade secrets, which is a requirement under DTSA and VUTSA.¹⁰⁰ One such way, according to the lawsuit, was by limiting individuals with access to the Twitter account in question.¹⁰¹ BH Media also has written policies in its company handbook that include confidentiality obligations for its employees of intellectual property.¹⁰² BH Media alleged that social media accounts provided by BH Media to employees are property of the company.¹⁰³ However, in a counterclaim, Bitter alleged that BH Media was inconsistent in its application of its social media policy, noting that “[n]umerous other reporters and sportswriters have left jobs at BH Media and have continued to maintain the same Twitter accounts they used while employed by BH Media at their new employers.”¹⁰⁴ In addition, the counterclaim asserts that the former employee who set up the Twitter account, not *The Times*’ management, provided him the login information to the account.¹⁰⁵ Bitter maintains that the account was never in

⁹⁵ *BH Media*, No. 7:18-cv-00388, at *7 (W.D. Va. Aug. 7, 2018).

⁹⁶ *BH Media*, No. 7:18-cv-00388, at *4 (W.D. Va. Aug. 6, 2018).

⁹⁷ *Id.* at *7.

⁹⁸ *Id.* at *15.

⁹⁹ Zoe Argento, *Whose Social Network Account? A Trade Secret Approach to Allocating Rights*, 19 MICH. TELECOMM. & TECH. L. REV. 201, 221 (2013).

¹⁰⁰ *BH Media*, No. 7:18-cv-00388, at *7 (W.D. Va. Aug. 6, 2018).

¹⁰¹ *Id.* at *5.

¹⁰² *Id.* at *5-6 (plaintiff contends that on numerous occasions the defendant signed an acknowledgement of receipt of the handbook).

¹⁰³ *Id.*

¹⁰⁴ *BH Media*, No. 7:18-cv-00388, at *17 (Aug. 30, 2018).

¹⁰⁵ *Id.* at *2, *10, *13-14 (Bitter alleged defamation by the plaintiff in its reporting of the lawsuit in *The Times*).

possession of *The Times* because no manager had ever requested login information to the Twitter account and that the former employee who created the account never transferred account ownership to *The Times*.¹⁰⁶ In fact, in its claim BH Media states, “[Bitter] has retained sole access to the Account.”¹⁰⁷ Even if only some of the aforementioned counterclaims are true, it could indicate that BH Media did not take sufficient action to maintain control and oversight of the account (for example, through knowledge of the account’s password), thus failing to protect trade secrets. Additionally, it would be difficult for BH Media to demonstrate how it took measures to protect the list of followers, given that it’s visible to the public. There are also readily accessible tools that allow the download of a user’s followers, a tactic that is utilized by competing businesses.¹⁰⁸

Beyond the misappropriation claims, BH Media alleged five other causes of action.¹⁰⁹ Three surround Bitter’s unauthorized use of and access to BH Media’s computing equipment, software, and information.¹¹⁰ To support its claimed violations of the Computer Fraud and Abuse Act (CFAA), the Stored Communication Act (SCA), and the Virginia Computer Crimes Act (VCCA), BH Media contends that the Twitter account is a protected computer and that Bitter lacked authority to access the accounts after his employment with BH Media terminated.¹¹¹ It’s unclear how Bitter’s access was revoked if BH Media never had control over the account.

By refusing to relinquish the account, BH Media argued that Bitter wrongfully converted the account to his own use.¹¹² In Virginia, where conversion (i.e., the civil claim of theft) of intangible property is recognized, BH Media must prove both ownership or right to possession of the Twitter account at the time of the conversion

¹⁰⁶ *Id.* at *13-14 (Bitter contended there was an email exchange where his predecessor offered to give Bitter the login credentials to the account and noted, “[w]hen Bitter became the sole owner of the Account, it had less than 4,000 followers. Over the last seven years, Bitter has worked tirelessly to grow the Account to its current total of over 27,600 followers . . . Bitter grew the Account through his own efforts. He built a readership among fans of Virginia Tech athletics and college football generally by posting personal insights, opinions, and comments. Bitter posts about Virginia Tech athletics and college football, but he also posts about completely unrelated matters. In fact, many of Bitter’s most ‘liked’ tweets are about being a father.”).

¹⁰⁷ *BH Media*, No. 7:18-cv-00388, at *4 (Aug. 6, 2018).

¹⁰⁸ Sara J. O’Connell, *Can a Reporter’s Twitter Account Be a Newspaper’s Trade Secret?*, PILLSBURY (Aug. 16, 2018), <https://www.internetandtechnologylaw.com/reporter-twitter-account-trade-secret/>.

¹⁰⁹ *BH Media*, No. 7:18-cv-00388, at *10-16 (Aug. 6, 2018).

¹¹⁰ *Id.*

¹¹¹ *Id.* at *11.

¹¹² *Id.* at *14-15.

and the wrongful use or control of the account by Bitter, thus depriving BH Media of possession.¹¹³ While BH Media alleged that it has legal control and ownership of the account, Bitter contended that the disputed facts would likely have created a triable issue.¹¹⁴

As a result of an out-of-court settlement, both sides agreed to drop their claims and no legal precedent based on substantive law was established.¹¹⁵ The settlement allowed Bitter to retain control of the Twitter account.¹¹⁶ Shortly after the hearing, he shared this message with his followers: “The Roanoke Times and I have agreed to drop our claims against each other and get on with our lives. I’ll continue to tweet from my account as I always have since I started covering Virginia Tech. If you’re inclined, consider following my successor at the Roanoke Times, Mike Niziolek, at @VTSportsRT. I look forward to continuing to report Virginia Tech football for The Athletic.”¹¹⁷

B. *PhoneDog v. Kravitz*

BH Media used a strategy similar to that pursued by the employer in the 2011 case of *PhoneDog v. Kravitz*, who also alleged misappropriation of trade secrets over a disputed social media account.¹¹⁸ The subject of the *PhoneDog* case is a Twitter account used by a former employee of PhoneDog, an online cell phone news and reviews website, and the dispute centered on who owns the account, its login credentials, and its followers.¹¹⁹

During the course of his employment as a product reviewer and video blogger for PhoneDog, Noah Kravitz built and cultivated a following of approximately 17,000 Twitter followers using the @PhoneDog_Kravitz handle.¹²⁰ Kravitz used the account to promote PhoneDog’s services on behalf of PhoneDog until he voluntarily

¹¹³ See, e.g., *Fax Connection, Inc. v. Chevy Chase Bank, F.S.B.*, 73 Va. Cir. 263, 264 (Cir. Ct. 2006).

¹¹⁴ *BH Media*, No. 7:18-cv-00388, at *9 (Aug. 30, 2018).

¹¹⁵ See Michael Phillips, *Andy Bitter, Roanoke Times Settle Lawsuit over Virginia Tech Twitter account*, THE ROANOKE TIMES (2018), https://www.richmond.com/sports/college/schools/virginia-tech/andy-bitter-roanoke-times-settle-lawsuit-over-virginia-tech-twitter/article_3ebce8af-ee8f-5a65-82e6-7c3f0c3979bb.html.

¹¹⁶ *Id.*

¹¹⁷ *Id.*; Andy Bitter (@AndyBitterVT), TWITTER (Nov. 15, 2018, 4:34 PM), <https://twitter.com/AndyBitterVT/status/1063183578215931910>.

¹¹⁸ *PhoneDog*, 2011 U.S. Dist. LEXIS 129229, at *2.

¹¹⁹ *Id.* at *1-2.

¹²⁰ *Id.* at *2.

ended his employment in 2010.¹²¹ Kravitz refused PhoneDog's request to relinquish control over the account and instead changed the handle to @noahkravitz.¹²²

PhoneDog's federal lawsuit alleged misappropriation of trade secrets under California's Uniform Trade Secrets Act (UTSA), intentional interference with prospective economic advantage, negligent interference with prospective economic advantage, and conversion.¹²³

In an early motion to dismiss various legal claims, the court found that PhoneDog pled with sufficient particularity misappropriation in violation of the UTSA despite Kravitz's attempt to argue (i) that he, not PhoneDog, initially created the password, (ii) that PhoneDog did not make any reasonable efforts to maintain the secrecy of the password, (iii) that the followers of the account are not secrets because they are publicly available, and (iv) that the password to the account did not derive any actual or potential economic value.¹²⁴ However, the court warned that PhoneDog's original claim could be challenged at future summary judgement by the conclusion of discovery.¹²⁵

PhoneDog's claim of conversion also survived Kravitz's motion to dismiss because it sufficiently alleged that the company owned or had the right to own the account and that Kravitz's act of conversion was done knowingly or intentionally.¹²⁶

PhoneDog successfully reinstated claims for intentional interference with an economic advantage and negligent interference with an economic advantage in an amended complaint that alleged "it had economic relationships with (1) the approximately 17,000 followers of the Twitter account at issue; (2) its current and prospective advertisers; and (3) CNBC and Fox News, and that each of these economic relationships were actually disrupted by Kravitz's conduct."¹²⁷ Similar to BH Media's counterclaims in the *Bitter* case, PhoneDog alleged that Kravitz's Twitter account generated traffic to its website and that a decrease in traffic would

¹²¹ *Id.*

¹²² *Id.*

¹²³ *PhoneDog*, 2011 U.S. Dist. LEXIS 129229, at *2.

¹²⁴ *Id.* at *8-9.

¹²⁵ *Id.* at *10.

¹²⁶ *Id.* at *14.

¹²⁷ *PhoneDog v. Kravitz*, No. 3:11-cv-03474-MEJ, 2012 WL 273323, at *1 (N.D. Cal. Jan. 30, 2012).

cause a drop in the number of visitors, discouraging advertisers from paying for space.¹²⁸

Although PhoneDog settled out of court during discovery, this case is cited in later cases and commentary as an early, albeit 2011, case that sought to refine the contours of ownership of social media accounts in an employment setting.

C. *Eagle v. Morgan*

The 2011 case of *Eagle v. Morgan* provides insightful analysis of claims alleging (i) misappropriation of trade secrets and (ii) tortious interference of a contractual relationship.¹²⁹

The plaintiff, Dr. Linda Eagle, co-founded Edcomm, Inc., “a banking education company that provides services on-line and in person to the banking community.”¹³⁰ In May of 2009, Eagle created her own LinkedIn account using her Edcomm email address.¹³¹ Eagle “was well-published in banking industry publications, was quoted in newspapers and magazines, and presented at industry conferences around the world.”¹³² Eagle, like other LinkedIn users, displayed and promoted her professional experience, achievements, skills, and other details to “connect” and communicate directly with others.¹³³ Edcomm established a policy that encouraged employees to use LinkedIn and provided guidelines regarding online content.¹³⁴ However, Edcomm’s policy was silent on ownership of employees’ LinkedIn accounts.¹³⁵ During the course of her employment, Eagle shared her LinkedIn password with other Edcomm employees so they could respond to invitations to connect and post account updates.¹³⁶

On June 20, 2011, Eagle was involuntarily terminated from Edcomm after the October 2010 sale and relaunch of the company, which named defendant, Sandi Morgan, as interim CEO.¹³⁷ Upon Eagle’s termination, Edcomm employees accessed her LinkedIn account, changed its password, and held exclusive control of

¹²⁸ *Id.*

¹²⁹ *See generally Eagle*, 2013 U.S. Dist. LEXIS 34220.

¹³⁰ *Id.* at *1.

¹³¹ *Id.* at *2.

¹³² *Id.* at *1.

¹³³ *Id.* at *2.

¹³⁴ *Id.* at *2-3.

¹³⁵ *Id.* at *4.

¹³⁶ *Id.* at *4-5.

¹³⁷ *Id.* at *2, *6.

the account until July 7, 2011, at which time LinkedIn intervened and returned exclusive access to Eagle on July 14, 2011.¹³⁸

Eagle sued Morgan, Edcomm, and other defendants alleging 11 causes of action.¹³⁹ Early in the case's pre-trial motion phase, the court disposed of the notion that Eagle's LinkedIn account connections could form the basis of a misappropriation claim by defendants, stating "to the extent [Edcomm] alleges misappropriation of a trade secret, its claim must necessarily fail [because] . . . the LinkedIn account connections [do not] qualify as trade secrets, as [they] are . . . generally known in the wider business community or capable of being easily derived from public information."¹⁴⁰ A claim for misappropriation of trade secrets did not reach the bench trial and final decision of the case.¹⁴¹

Relative to Eagle's claim alleging tortious interference with a contract, the court inferred that Eagle "had in fact entered into a contractual relationship with LinkedIn" vis-à-vis the terms of the User Agreement.¹⁴² Edcomm's position on the ownership of an employee's LinkedIn account does not acknowledge the LinkedIn User Agreement, which states that "[i]f you are using LinkedIn on behalf of a company or other legal entity, you are nevertheless individually bound by this Agreement even if your company has a separate agreement with us."¹⁴³ (As of February 16, 2019, LinkedIn's User Agreement more succinctly stated, "[a]s between you and others (including your employer), your account belongs to you.")¹⁴⁴

The fact that Eagle may have created her LinkedIn profile using her Edcomm email address, on an Edcomm computer, on Edcomm's time, and at Edcomm's direction, did not persuade the court, which stated "the LinkedIn User Agreement clearly indicated that the individual user owned the account."¹⁴⁵ The court also found that Edcomm's conduct of accessing Eagle's account and changing the password was done with purpose or intent to harm Eagle by disrupting her contractual relationship with LinkedIn from continuing.¹⁴⁶

¹³⁸ *Id.* at *5.

¹³⁹ *Id.* at *9.

¹⁴⁰ *Eagle v. Morgan*, No. 2:11-cv-04303-RB, at *23 (E.D. Pa. Dec. 22, 2011).

¹⁴¹ *See id.*

¹⁴² *Eagle*, 2013 U.S. Dist. LEXIS 34220, at *19.

¹⁴³ *Id.* at *2, n.1.

¹⁴⁴ *See User Agreement*, LINKEDIN, <https://www.linkedin.com/legal/user-agreement#rights> (last visited Feb. 16, 2019).

¹⁴⁵ *Eagle*, 2013 U.S. Dist. LEXIS 34220, at *19.

¹⁴⁶ *Id.*

III ANALYSIS

A. *Trade Secrets on Shaky Ground*

Utilizing theories of trade secret protection to assert ownership of a social media account is a risky strategy and would likely not favor the employer asserting the claim. To prevail on a claim alleging misappropriation of trade secrets, a party must show: (i) the existence of a trade secret, and (ii) the acquisition of a trade secret as a result of a confidential relationship, or (iii) the unauthorized use of a trade secret.¹⁴⁷

Under the Uniform Trade Secrets Act (UTSA), in order for information to qualify as a trade secret:

- it must derive independent economic value, actual or potential, from not being generally known to, or readily ascertainable through proper means by, people who can obtain economic value from its disclosure or use,
- and it must be the subject of reasonable efforts to maintain its secrecy.¹⁴⁸

None of the features of a journalist's social media followers or social media accounts conforms to these basic elements, and as a threshold matter, followers on social media are not "trade secrets" for the purposes of the UTSA as detailed below.

1. Social media followers are not "trade secrets" because they are "generally known" to the public.

As a threshold matter, it is difficult to establish that a list of social media followers is a secret. Lists of followers are in the public domain online, not to mention that in the digital marketplace a business has many tools at its disposal to identify competitors' lists of followers and target those followers.

Some practitioners assert that *Veronica Foods Co. v. Ecklin* "held that a customer list was *not* a trade secret under the federal Defend Trade Secrets Act because the company had announced the names of many of its customers and suppliers on its website and social media accounts, meaning that its full customer

¹⁴⁷ See, e.g., Unif. Trade Secret Act prefatory note, 14 U.L.A. 433 (1985) ("For liability to exist under this Act, . . . trade secret must exist and either a person's acquisition of the trade secret, disclosure of the trade secret to others, or use of the trade secret must be improper.").

¹⁴⁸ *Id.*

list was not ‘secret.’”¹⁴⁹ The court in *Eagle* squarely recognized early in that case that LinkedIn account followers are “generally known in the wider business community or capable of being easily derived from public information.”¹⁵⁰ The same should be true of the lists of Twitter followers at issue in the *Bitter* and *PhoneDog* cases. Though a customer list is traditionally considered a protectable trade secret, when the list is public, the information can no longer form the basis of a misappropriation claim.¹⁵¹ In its 2017 *Art & Cook, Inc. v. Haber* order, the United States District Court for the Eastern District of New York noted that misappropriation of a customer list consisting of publicly available information is not likely to give rise to a claim under the DTSA.¹⁵²

Furthermore in the *Bitter* case, BH Media would also have had to show that it took steps to protect Andy Bitter’s list of Twitter followers in order to minimize the risk of that list being acquired by competitors. Implementing such protections is nearly impossible and counterintuitive in the open sphere of social media. *Art & Cook, Inc. v. Haber* further sheds light on this issue. The court’s order denying a preliminary injunction shows that even when information could be considered a secret under DTSA, low-level security measures are not sufficient to afford DTSA protection.¹⁵³

2. *The “value” paradox: social media followers do not derive “independent economic value.”*

Relative to “value,” a paradox exists. There is a clear social value of attracting and accumulating followers on social media platforms. More followers means greater visibility of one’s social profile, the content he or she creates, the products he or she promotes, and the general influence and expertise he or she generates in a specific field. Social value can lead to economic value, and it is undeniable that the

¹⁴⁹ O’Connell, *supra* note 108.

¹⁵⁰ *Eagle*, 2013 U.S. Dist. LEXIS 34220, at *23.

¹⁵¹ *See, e.g.,* Veronica Foods Co. v. Ecklin, 2017 U.S. Dist. LEXIS 101325, at *25-26 (N.D. Cal. June 29, 2017) (citing *Ultimax Cement Mfg. Corp. v. CTS Cement Mfg. Corp.*, 587 F.3d 1339, 1355 (Fed. Cir. 2009)) (determining that a customer list was *not* a trade secret under the Defend Trade Secrets Act because the company had announced the names of many of its customers and suppliers on its website and social media accounts, meaning that its full customer list was not “secret”).

¹⁵² *See Art & Cook, Inc. v. Haber*, No. 17-cv-1634 (LDH) (CLP), 2017 WL 4443549, at *5 (E.D.N.Y. Oct. 3, 2017) (finding plaintiff failed to demonstrate a likelihood of success on the merits with regards to spreadsheets containing the names, phone numbers, and email addresses of customers).

¹⁵³ *Id.* at *7-8.

drive for visibility, engagement, and conversion from social follower to customer has transformed the digital marketing and consumer industries, among others.¹⁵⁴

The value generated through social media is enjoyed by both employer and employee alike.¹⁵⁵ The court in *Maremont v. Susan Fredman Design Group, Ltd. (SFDG)*, a case involving an employee of an interior design company, referenced this value as an employee's "commercial interest" in his or her social media persona and affirmed an individual's right to protect it.¹⁵⁶ Specifically, "[a] social network account not only serves the worker's interest by facilitating contact with her network, but also helps the worker to build her reputation and market herself to potential employers."¹⁵⁷ Social media allows journalists to build their own brand that can attract not only followers, but also future employers.¹⁵⁸ In short, social media can attract job prospects. A reporter's brand—with its built-in audience of followers—is "capital" to some hiring managers. Therefore, journalists have a social and commercial interest in their own social media identity.¹⁵⁹

For purposes of trade secret law, the inquiry turns only on whether the information one claims to be a trade secret derives *independent economic value, which is derived* when secrecy of the information provides a "substantial business advantage."¹⁶⁰ Both the news outlet in *Bitter* and the employer in *PhoneDog* alleged that a follower list on Twitter was information that fell into the definition of a trade secret and that the ancillary information available to the account-holder—such as followers' traits and the ability to direct message them—would have value in the hands of a competitor.¹⁶¹

The trade secret disputes will be centered on whether a list of followers and any ancillary information available provides a "substantial business advantage," and the outcome will likely be determined by the specific facts and circumstances. Is the list of followers, alone, generating economic value to the news outlet or the journalist? Does the mere existence of a list of followers provide companies with a

¹⁵⁴ See Argento, *supra* note 99, at 221.

¹⁵⁵ *Id.* at 222.

¹⁵⁶ *Maremont*, 2014 U.S. Dist. LEXIS 26557, at *7-8 (quoting Argento, *supra* note 99, at 221).

¹⁵⁷ *Id.* at *13 (quoting Argento, *supra* note 99, at 221).

¹⁵⁸ Argento, *supra* note 99, at 221.

¹⁵⁹ See *id.*

¹⁶⁰ See *Morlife, Inc. v. Perry*, 56 Cal. App. 4th 1514, 1522 (Ct. App. 1997); *BH Media*, No. 7:18-cv-00388, at *4 (Aug. 6, 2018); *PhoneDog*, 2011 U.S. Dist. LEXIS 129229, at *8-9.

¹⁶¹ See *BH Media*, No. 7:18-cv-00388, at *4 (Aug. 6, 2018); see also *PhoneDog*, 2011 U.S. Dist. LEXIS 129229, at *8-9.

business advantage over competitors? Or does the value lie in the knowledge and data collected from the followers' activity?

Not to be ignored, especially in the context of the journalism industry, is that a key factor in a court's determination of independent economic value is whether the employer made substantial efforts to create the disputed list.¹⁶² Facts evidencing the amount of time, expenses, and resources in establishing the list can inform whether the employer's efforts to cultivate the list are "substantial."¹⁶³ In the news industry, lists of social media followers exist by virtue of audience members who "opt-in" to follow a journalist. The decision to "follow" is personal and largely the result of journalists' reputation, persona, and brand he or she develops and cultivates over time. The effort, if any, by news outlets to create a list of social media users who follow an individual journalist defies the norms of social media interaction. News outlets don't create lists of social media followers. In fact, no one affirmatively creates a list of followers; but rather, such a list is cultivated by the journalist in the opt-in/opt-out environment of social media.

Courts have routinely acknowledged that lists developed by an employee do not fall into the definition of trade secret.¹⁶⁴ In *Robert S. Weiss Associates, Inc. v. Wiederlight*, the Supreme Court of Connecticut addressed the issue by stating that, "a former employee will not be said to have misappropriated that secret if he or she was in charge of cultivating the information."¹⁶⁵ According to the court, *Wiederlight*, a former employee of an insurance company, did not steal the firm's client list given that it was his direct relationship with the customers on the list that "allowed him to meet their particular needs."¹⁶⁶

PhoneDog also alleged that the password to Kravitz's Twitter account was a trade secret.¹⁶⁷ But courts have found that the methods used to protect trade secrets, like passwords and login credentials, are not themselves trade secrets because their value is derivative of the item that they are intended to protect and therefore have

¹⁶² See *Barney v. Burrow*, 558 F. Supp. 2d. 1066, 1081 (E.D. Cal. 2008) (customer list was not a trade secret where the former employees "built up their clientele through their efforts . . ."); see also *McKesson Med.-Surgical, Inc. v. Micro Bio-Medics, Inc.*, 266 F. Supp. 2d 590, 596 (E.D. Mich. 2003).

¹⁶³ See *id.*

¹⁶⁴ See *id.*

¹⁶⁵ Jasmine McNealy, *Who Owns Your Friends?: PhoneDog v. Kravitz and Business Claims of Trade Secret in Social Media Information*, 39 RUTGERS U. COMPUTER & TECH. L. J. 30, 44 (2013).

¹⁶⁶ *Id.* (citing *Weiss v. Wiederlight*, 546 A.2d. 216 (Conn. 1988)).

¹⁶⁷ *PhoneDog*, 2011 U.S. Dist. LEXIS 129229, at *2.

“no independent economic value.”¹⁶⁸ Also, “[w]here a plaintiff has not alleged that its passwords are the product of any special formula or algorithm that it developed, the passwords are not trade secrets.”¹⁶⁹ Kravitz and Bitter created the passwords to the disputed Twitter accounts, so it cannot be said that they were created as part of a special formula or algorithm.¹⁷⁰

B. Social Media Policies: Balancing the Interests of Employers and Employees

What is striking about the *Bitter* case is that contract law is not the basis of BH Media’s lawsuit, even though the company had a social media policy.¹⁷¹ As an alternative to trade secret claims, companies should turn to contract law—both social media policies and employment agreements—to help resolve issues related to ownership of social media accounts. Comprehensive social media policies could prevent legal action in the first place by providing clear cut guidelines that address a myriad of potential questions and that would guide disputing parties and courts through available policy terms and intentions.

A policy should protect the company while also acknowledging the importance of a social media account to the livelihood of a journalist and to the free flow of information from journalists to the public. A conflict can be avoided by addressing the following items in a policy:

- If a company requires a journalist to maintain a social media presence as part of the job responsibility tied to his or her employment, then the company owns any account used primarily for the performance of the employee’s job functions.
- Accounts that were previously created by an employee, including those that are more personal in nature, can be used as part of a journalist’s professional capacity with the company. However, in these cases, the company will become owner of the account(s). As such, the employee must give login credentials to management. In addition, they must update the email address associated with the account(s) so that the employee’s company email is linked to the account(s). An addendum, which transfers ownership from the

¹⁶⁸ See *Bellwether Cmty. Credit Union v. Chipotle Mexican Grill*, 353 F. Supp. 3d 1070, 1087 (D. Colo. 2018); see also *State Analysis, Inc. v. Am. Fin. Servs. Ass’n*, 621 F. Supp. 2d 309, 321 (E.D. Va. 2009).

¹⁶⁹ *State Analysis, Inc.*, 621 F. Supp. 2d at 321.

¹⁷⁰ *PhoneDog*, 2011 U.S. Dist. LEXIS 129229, at *2; *BH Media*, No. 7:18-cv-00388, at *2.

¹⁷¹ *BH Media*, No. 7:18-cv-00388, at *4.

employee to the employer, to the social media policy is required for these cases.

- “Professional capacity” must be defined.
- Alternatively, if the employee desires to keep his or her previous account, then a separate account is set up for the employee to use in his or her professional capacity. Social media accounts used for professional purposes must be set up with a company email address.
- There should be no ambiguity in terms of who is responsible for the creation of new accounts: either the individual employee or management. To provide consistency, select one or the other but not a mix of both. If an employee is charged with creating the accounts, the employee must immediately deliver the account log-in credentials to management.
- After the account is created, an employee must consult with management if he or she wishes to change the account name, known as a handle. Updated passwords must be given to management immediately upon the change.
- Management is permitted to access employees’ social media accounts, and indeed should access the accounts from time to time, in order to establish shared access. In addition, management is allowed to edit or delete posts, but will first make a reasonable effort to communicate with the employee to discuss the changes (for example, if there is a factual error in a post).
- The company will transfer ownership of a social media account(s) to a departing employee as long as that person is not going to work for a direct competitor. In the case of ownership transfer, the departing employee will remove any reference of the company from his or her account handle so that it is clear the person no longer works for the company.
- In cases in which the employee goes to work for a direct competitor, the company will retain ownership of the account. The employee will no longer be able to access the account(s). This provision applies to any account that was created and/or used by the employee prior to his or her employment at the company and then transferred to the company.
- “Direct competitor” must be defined.

The inclusion of a trade secrets provision is also commonplace in some company employee handbooks.¹⁷² As an example, in the journalism industry, TEGNA and Gray Television both include guidelines about maintaining the privacy of confidential information, including trade secrets.¹⁷³ According to TEGNA's policy, employees "are expected to maintain the confidentiality of TEGNA's trade secrets as well as all non-public information that might be of use to competitors, or harmful to the Company or its customers, if disclosed."¹⁷⁴ This includes information regarding projects employees are working on, business activities, and news content that has not been published.¹⁷⁵ Gray Television's policy explicitly states that sharing of this type of information on social media is forbidden.¹⁷⁶ Neither policy includes social media followers or lists of followers as a confidential item or trade secret.¹⁷⁷ A company could attempt to protect its interests by explicitly doing so in a social media policy and/or employee handbook. However, as previously noted, even a contract provision of this nature would be difficult to defend in a legal case.

Finally, expanding on the question of what happens to accounts when a reporter leaves an outlet, companies should make a good faith effort to balance the interests of employer and employee. If retained by a newsroom once employment ends, reporters' social media accounts become virtually useless for a number of reasons. Chiefly among these is that transitioning a journalist's account to another journalist defies the fundamentals of social media. People follow an individual reporter's social media accounts because of that person. The practical effect of followers being pivoted away from a journalist whom they have chosen to follow is unproductive to the company. Therefore, it would be a shortsighted strategy to transfer one journalist's account to another. Another approach that newsrooms use in handling the social media accounts of a former employee is to let the accounts remain dormant, essentially never to be used again.

A more reasonable practice would be to allow a former employee to retain control of the account as long as he or she does not work for a competitor of the company. As noted previously in this article, Gray Television utilizes this approach.¹⁷⁸ In cases in which a former journalist goes to work for a non-competing outlet, there is no clear cut economic advantage of a news outlet retaining control of

¹⁷² See, e.g., GRAY TELEVISION, *supra* note 56, at 37-42.

¹⁷³ TEGNA, *supra* note 37; GRAY TELEVISION, *supra* note 56, at 40.

¹⁷⁴ TEGNA, *supra* note 37.

¹⁷⁵ *Id.*

¹⁷⁶ GRAY TELEVISION, *supra* note 56.

¹⁷⁷ TEGNA, *supra* note 37; *id.*

¹⁷⁸ GRAY TELEVISION, *supra* note 56.

that account, particularly when one considers that the account could remain dormant and that the list of followers is publicly available. Such an approach undermines an employer's case in claims that are based on the economic imperative of retaining control of a social media account. Furthermore, a journalist who knows that his or her account will be taken from them if they leave a news outlet could feel less compelled to use the account to build a robust following and report important information on it that links back to the outlet's website, thus, undermining a station's stance that retaining control of the account is critical to the company's bottom line.

C. Other Legal Issues

1. Terms of Service

The legal framework of these cases may get more complicated when the terms of service, also called user agreements, form the basis of a contractual relationship between the employee and the social media platform. As seen in *Eagle v. Morgan*, the court interpreted the language of LinkedIn's user agreement to infer that a contractual relationship existed between LinkedIn and Eagle.¹⁷⁹ LinkedIn's user agreement language states that the person who creates the account is entering into a legally binding agreement with LinkedIn even if they are using the service on behalf of a company, and that person retains ownership of said account.¹⁸⁰ Therefore, the court reasoned that Eagle's employer's disruption of her access to her LinkedIn account satisfied the core elements of a claim for tortious interference with a contract.¹⁸¹ Given this type of provision in a user agreement, a social media policy that either requires or recommends an employee transfer their rights of an account to an employer could force an employee to breach the terms of service, leading to a company's tortious interference with contractual relations.

The analysis of a tortious interference claim favored the employer in the 2014 case of *Mattocks v. Black Entertainment Television*.¹⁸² There, Black Entertainment Television ("BET") entered into a contract with the plaintiff, Mattocks, upon taking notice of Mattocks' success in building a robust online community of followers in a Facebook "fan page" and Twitter feed centered around one of BET's television shows. Mattocks gave BET access to the Facebook and Twitter accounts vis-à-vis login credentials, and BET supplied Mattocks with branded content to share online.¹⁸³ In exchange for Mattocks' efforts, BET compensated Mattocks and, at one

¹⁷⁹ *Eagle*, 2013 U.S. Dist. LEXIS 34220, at *19.

¹⁸⁰ See LINKEDIN, *supra* note 144.

¹⁸¹ *Eagle*, 2013 U.S. Dist. LEXIS 34220, at *19.

¹⁸² *Mattocks v. Black Entm't Television L.L.C.*, 43 F. Supp. 3d 1311, 1319 (S.D. Fla. 2014).

¹⁸³ *Id.* at 1316.

point, explored whether to hire Mattocks as a full-time employee.¹⁸⁴ During discussions of Mattock's employment, the relationship began to deteriorate and Mattocks changed the log-in and access information to the accounts.¹⁸⁵ BET successfully persuaded Facebook to migrate page "likes" away from Mattocks' fan page over to BET's page.¹⁸⁶ Litigation followed and Mattocks alleged that BET's intervention with Facebook constituted a tortious interference with the terms of her user agreement with Facebook.¹⁸⁷

When evaluating this claim, Florida's Southern District Court focused on the claim's fourth element to consider "whether any justification or privilege supported BET's requests to terminate the [Facebook] Page and Mattocks' Twitter account."¹⁸⁸ The court reasoned that a defendant's interference is justified when it has a potential financial interest in how a contract is performed.¹⁸⁹ The record showed that BET was not a stranger to Mattocks' user agreements with Facebook and Twitter because Mattocks was hired by BET to promote a television series on the disputed social media accounts.¹⁹⁰ BET exercised control of the content and its economic interests were therefore impacted by Mattocks' use of the account, releasing it from liability under a tortious interference claim.¹⁹¹

2. *State Laws Governing Social Media*

An increasing number of states have passed or are in the process of enacting laws that govern social media in the workplace.¹⁹² The laws include account-access and privacy statutes.¹⁹³ In Virginia, for example, the legislation states that an employer may not require current or prospective employees to turn over login information to their social media accounts.¹⁹⁴ However, this law does not include social media accounts that are (i) opened by an employee at the request of an

¹⁸⁴ *Id.* at 1315-16.

¹⁸⁵ *Id.* at 1316.

¹⁸⁶ *Id.* at 1316-17.

¹⁸⁷ *Id.* at 1317.

¹⁸⁸ *Id.* at 1318-19.

¹⁸⁹ *Id.* at 1319.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² McLaughlin, *supra* note 9, at 91, 109; NAT'L CONF. OF ST. LEGISLATORS, *supra* note 10.

¹⁹³ NAT'L CONF. OF ST. LEGISLATORS, *supra* note 10.

¹⁹⁴ Social Media Accounts of Current and Prospective Employees, VA. CODE ANN. § 40.1-28.7:5 (2015).

employer; (ii) provided to an employee by an employer; or (iii) set up by an employee on behalf of an employer.¹⁹⁵

Similar language is used in a majority of other state laws on the issue. In several states, though, there is a broader definition of social media accounts to which an employer can request access. For example, Oklahoma’s law includes “[a]ny accounts or services provided by the employer or by virtue of the employee’s employment relationship with the employer or that the employee uses for business purposes.”¹⁹⁶ According to this definition, one could argue that employers can legally ask for information to accounts that an employee previously opened and then uses for the purposes of his or her employment.

CONCLUSION

If the *Bitter* case had gone to trial, it would have been unlikely that BH Media could have prevailed on the basis of trade secret laws. Plaintiffs have a high burden of proof in cases of trade secrets, particularly when they involve the question of whether a list of social media followers is equivalent to that of a “secret” curated customer list. We argue that social media followers are not trade secrets, no matter the industry. Therefore, utilizing trade secret laws in order to gain control of a social media account is an ill-fitted legal strategy. Even if someone is the rightful owner of a social media account, the associated followers are not trade secrets. A better approach to establishing and defining ownership—and avoiding litigation in the first place—is through well-articulated policies and practices. A newsroom social media policy should (i) define the terms of ownership while also recognizing social media companies’ user agreements, and (ii) balance the interests of the employer and its employees.

¹⁹⁵ *Id.*; Prohibited Actions Regarding Personal Social Media Accounts, OKLA. STAT. ANN. tit. 40 § 173.2 (West 2014).

¹⁹⁶ OKLA. STAT. ANN. tit. 40 § 173.2.