

Who owns your company's social media accounts?

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When it comes to social media posts written by your employees to promote your business, who owns the content and the social media profile? Although a company's advertising media clearly appears to fall under the rubric of company property, the status of a social media account primarily used by an individual employee may be less clear. A Virginia newspaper recently asked a Virginia federal judge to decide this exact issue and force a former reporter to turn over access and use of what the newspaper claims is its Twitter account.

Newspaper and reporter duke it out over Twitter account

In October 2011, Andy Bitter was hired by the *Roanoke Times* to work as a staff sports writer focusing on Virginia Tech (VT) athletics. Bitter was given access to and the login information for a Twitter account so he could promote the *Times'* coverage of VT sports. He was to use the account to engage current readers and subscribers and solicit future readers and subscribers. He retained sole access to the account, and at some point, he updated the username and password. The *Times'* parent company, BH Media, says it authorized Bitter to access the account on its behalf to disseminate information to promote the *Times*.

In June 2018, Bitter accepted a job at Athletic Media Group as a sports writer focusing on VT athletics. However, he refused to relinquish the Twitter account so it could be transitioned to the *Times'* staff writer who replaced him. He continued to use the account to market and advertise his new employer instead of the *Times*.

To regain ownership of what it asserts is its Twitter account, the *Times* filed suit in Roanoke federal district court. In its lawsuit, the *Times* claims that Bitter's refusal to turn over the account constitutes misappropriation of trade secrets and computer crimes in violation of federal and state law as well as theft and breach of his duty of loyalty to his former employer. According to the *Times*,

Bitter is continuing to use his account handle, @AndyBitterVT, to promote his new employer's competing online sports site, "The Athletic."

Issues raised in the lawsuit

At this point, the federal court hasn't issued any decisions in the lawsuit. To prevail, the *Times* must convince the federal judge that it owns the Twitter account and has the right to prohibit Bitter from using it to benefit his new employer. The *Times* also must establish that the account information qualifies as a trade secret. To do that, it must show that the information:

1. Is not generally known to the public or readily ascertainable;
2. Has independent economic value; and
3. Is the subject of reasonable efforts to maintain its secrecy.

Courts have generally recognized that public tweets do not constitute trade secrets since they are entirely public. Moreover, the login information to a Twitter account isn't protected. Nonetheless, the *Times* maintains that it is seeking to protect a trade secret.

Access to nonpublic information. The *Times* contends that the account gives Bitter direct access to roughly 27,100 followers who have affirmatively indicated an interest in the *Times'* reporting by following the account and consenting to being contacted directly. The account operator has the exclusive right to directly communicate with a curated nonpublic list of followers en masse and directly message individual followers, which creates the opportunity to exchange nonpublic information privately. According to the *Times*, the account also provides exclusive access to its unique Twitter feed, which includes the tweets and retweets of accounts it follows. That information provides invaluable insight into followers' interests and tendencies and general trends across a curated list. None of that ancillary information is publicly available to or readily ascertainable from outside sources. Therefore, the *Times* argues, the account and its various sources of information and channels of communication.

Independent value of the account. The *Times* further argues that it derives independent economic value from the Twitter account's nonpublic information, which is valuable not only because it isn't known to the public but also because it was developed through many years of substantial time, effort, expense, research, and communication with followers. Indeed, the *Times* estimates that it would take an account representative or a staff writer seven years at a cost of at least \$150,000 to recreate the account. And any attempt at recreation would likely never result in the same configuration of followers.

Secrecy of the account information. Finally, the *Times* says it has made extensive efforts to maintain the secrecy of the information by limiting who has access to the Twitter account (only one writer is given access), laying out employees' confidentiality obligations, and establishing strict IT and institutional protections to prevent disclosure of the information. In addition, the company's employee handbook includes comprehensive confidentiality obligations and requires employees to use social media accounts provided by the company to conduct work-related business only. The handbook states that all social media accounts and communications are the property of the *Times*, Bitter was given the handbook and signed an acknowledgment that he received and agreed to be bound by its provisions on a number of occasions.

At this point, it's unclear whether the *Times* has made sufficient allegations in its lawsuit to convince the court that the Twitter account information is a trade secret that Bitter has taken and is using in his new job with a competitor. The law in Virginia isn't clear about whether (or which aspects of) social media accounts constitute an employer's trade secrets. We hope the court will clear up some of those questions with its decision. *BH Media Group, Inc. v. Andy Bitter*, 2018 WL 3768425 (W.D. Va., Aug. 6, 2018).

Bottom line

Social media can be a valuable tool for marketing your business. So what can you do to protect yourself when an employee leaves and takes the social media account he was using to promote your business? Here are a few safeguards you should consider implementing:

- Don't give employees sole access to your social media accounts.
- Require employees to share the account password.

- Prohibit employees from changing usernames and passwords without approval.
- Include your company's name or initials in the handle or username associated with the account so it isn't easily transferred or repurposed by an employee when she leaves.
- Have a written policy that lays out your expectations for the use and ownership of social media products and assets.
- Periodically remind employees of their responsibilities with regard to social media postings.
- Require departing employees to sign a separation agreement that conditions any severance payments on the return of company property, including social media account access information.

Taking those steps may not guarantee that you will prevail in any litigation over a wayward former employee appropriating a company Twitter or Facebook account. However, you will put yourself in a good position to make a case that the former employee has stolen your property and is using it to compete with you.

Because of the importance of the *Times*' lawsuit against Bitter, we will continue to keep you updated on its progress and any decisions from the court.

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