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# 2nd Circ. Ruling Will Guide Social Media Account Ownership

By **Joshua Glasgow** (February 16, 2024, 4:53 PM EST)


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Cases involving noncompete agreements often pull other claims into court on the coattails of a restrictive covenant.

In many noncompete cases, employers also allege that departing employees misappropriated trade secrets or otherwise converted company property. Increasingly, those related claims involve social media accounts.

Although some courts have adopted a multifactor test for determining whether an employer or a former employee own such accounts, a Jan. 17 opinion from the U.S. Court of Appeals for the Second Circuit in JLM Couture Inc. v. Gutman[1] holds that ownership must be resolved using a traditional property law analysis.

This important decision will guide employers and employees alike in future cases, and underscores the importance of express agreements in establishing ownership of social media accounts.

**The Development of Social Media Law**

Despite the steady growth of social media, relatively few cases have addressed the ownership of social media accounts.

As the U.S. Bankruptcy Court for the Southern District of Florida put it in In re: Vital Pharmaceuticals last year, "social media has infiltrated our daily lives so rapidly that the law — as is often the case — has simply been unable to keep pace."[2]

The dramatic rise in the use of social media platforms for business purposes, however, "has magnified the importance of what to date has been an obscure legal issue: How is ownership of the rights to a social media account determined?"[3]

One can certainly imagine various factual scenarios in which ownership of a social media account would, as a matter of basic fairness or common sense, be attributed to either an employer or an employee.

At one end of the spectrum, it would be difficult to argue that an employee's personal Facebook page, created prior to employment and consisting overwhelmingly of personal posts, is owned by an employer — even if the employee occasionally mentions her work.

On the other end, most would expect that an account created as part of an employee's duties, named after a business and used exclusively for business purposes is owned by the employer.

Of course, the cases that have been litigated present circumstances somewhere in the middle. Early decisions on this issue reached differing results, with relatively little analysis.

In 2011, in perhaps the first decision on the point, PhoneDog v. Kravitz, the U.S. District Court for the Northern District of California denied a motion to dismiss an employer's conversion and related claims regarding a Twitter, now known as X, account controlled by a former employee.[4]

Two years later, the U.S. District Court for the Eastern District of Pennsylvania in Eagle v. Morgan held that a LinkedIn account was intangible property not subject to conversion under Pennsylvania law, but found an employer's use of a LinkedIn account supported claims related to misappropriation of identity.[5]

A 2015 decision from the U.S. Bankruptcy Court for the Southern District of Texas, In re: CTLI LLC,[6] proved influential in filling this gap. That case addressed whether social media accounts were property of a debtor corporation or the personal property of its former principal.

The court determined the accounts were corporate property, relying on a number of facts, including:

- The accounts were linked to the business's webpage;
- Many of the posts were business related;
- The accounts' login information was shared with employees of the business, who also made company-related posts; and
- The accounts were titled with the name of the business.[7]

In 2020, the U.S. District Court for the Eastern District of Kentucky in International Brotherhood of Teamsters Local 651 v. Philbeck relied on the CTLI framework in holding that a set of Facebook pages belonged to a union, rather than its former president, because the accounts "were created to communicate with Union members, held out as official Union pages, promoted on business cards and the official website, and other members of the Union had administrative privileges."[8]

As described in greater detail below, the district court in JLM adopted the same approach.[9]

But not all courts have followed the CTLI framework. In Vital Pharmaceuticals, the court noted that CTLI "was decided eight years ago (an eternity given the explosive growth and evolving nature of the use of social media), [and] predates the emergence of the social media influencer, among other changes in use."[10]

That court held that "[t]he test for determining ownership of the rights to social media accounts should focus on the existence of a documented property interest, control over access, and use."[11] Applying its own multifactor analysis, the court held that certain accounts belonged to a debtor corporation rather than its former CEO.[12]

Finally, although this article focuses on ownership, it is worth noting cases involving social media accounts and departing employees may give rise to claims that do not depend on a specific property

interest. The Eagle decision allowed several claims related to misappropriation of identity to proceed.[13]

And in 2022, the U.S. District Court for the District of Maryland held in Pan 4 America LLC v. Tito & Tita Food Truck LLC that a "Facebook page is not intangible property that can be converted under Maryland law," but denied a motion to dismiss as to Lanham Act, unfair competition and tortious interference claims related to the renaming of a Facebook page by a former manager.[14]

The court there explained that "due to the nature of Facebook," prior posts, followers and events were switched from the name of the plaintiff to the name of the defendant's new business, leaving the impression that the new business was "associated with or endorsed by [the plaintiff] as a successor."[15]

**JLM Couture's Traditional Property Approach**

The Second Circuit's decision in JLM Couture in many respects breaks with this existing case law. That case concerned disputed ownership of social media accounts as between social media influencer Hayley Paige Gutman and her prior employer, JLM Couture.

Gutman entered into an employment agreement with JLM in 2011 to design a bridalwear line. The agreement included several restrictive covenants.[16] Shortly thereafter, she created Pinterest and Instagram accounts using her personal name, phone number and email address.[17] Although JLM did not direct Gutman to create the accounts, she used them to showcase JLM products, provide information about JLM promotional events and respond to sales inquiries.[18]

In 2019, Gutman and JLM attempted to renegotiate their agreement, but were unsuccessful.[19] Gutman then changed the passwords to the accounts and refused to provide JLM access.[20] JLM filed suit, alleging Gutman had breached her employment agreement and engaged in conversion and trespass with respect to the social media accounts.[21]

The U.S. District Court for the Southern District of New York acknowledged the novelty of the issue of social media account ownership.[22] Relying on CTLI and Philbeck, the district court applied a six-factor test, considering:

(1) whether the account handle reflects the business or entity name; (2) how the account describes itself; (3) whether the account was promoted on the entity's advertisements or publicity materials; (4) whether the account includes links to other internet platforms of the entity; (5) the purpose for which the account was used, including whether it was tied to promotional or mission-oriented activities of the entity; and (6) whether employees or members of the entity had access to the account and participated in its management.[23]

Based on these factors, the district court held that JLM's right to control the social media accounts was superior to the rights of Gutman and that JLM was likely to succeed on its conversion claim.[24]

The Second Circuit reversed. It held that "[d]etermining the ownership of social-media accounts is indeed a relatively novel exercise, but that novelty does not warrant a new six-factor test."[25] Given that our legal system has frequently addressed new technologies under preexisting legal rules, it concluded that the ownership of social media accounts should be determined using traditional property law.[26]

The Second Circuit remanded for additional fact-finding, but offered guidance regarding the proper inquiry.

The first step in the analysis is to determine the original owner of an account.[27]

Relying on the rule of first possession — and citing two venerable law school favorites: the New York Supreme Court of Judicature's 1805 ruling in Pierson v. Post[28] and Blackstone's Commentaries — the Second Circuit ruled that if Gutman created the accounts "using her personal information and for her personal use, then those rights belonged to her, no matter how the Disputed Accounts may have been used later."[29]

The court further noted that original ownership could turn on any terms of service governing the use of specific social media applications.[30]

After determining original ownership, the second step is to consider whether ownership was validly transferred pursuant to an agreement between the parties.[31]

The court cautioned that this contractual analysis should not turn on use of the accounts, holding it should not "ordinarily matter to the question of ownership whether an account owner permits others to assist in managing the account, or whether one or the other party holds itself out as owning it."[32]

The employment agreement at issue provided that various materials developed by Gutman were "works for hire" owned by JLM.[33] But the court interpreted this clause as referring only to Gutman's work as a designer and did not include social media accounts.[34]

The Second Circuit summarized its test as follows:

The analysis of social-media-account ownership begins where other property-ownership analyses usually begin — by determining the account's original owner. The next step is to determine whether ownership ever transferred to another party.[35]

**Conclusion**

The Second Circuit's decision in JLM Couture will likely pose significant obstacles for employers claiming ownership of social media accounts created by their employees.

By analogizing social media accounts to the fox from Pierson v. Post, the Second Circuit endorsed the rule of first possession under which an employee who creates an account is likely to have original ownership. This default rule makes employment agreements all the more important in determining who owns social media accounts.

For employers, the JLM Couture decision should prompt a review of existing employment agreements and an assessment of any social media accounts that are essential to ongoing business. Employment agreements should specify the ownership accounts in as much detail as possible, and will ideally identify particular accounts by name.

In light of the Second Circuit's holding that an express "works for hire" clause covering substantive creations did not govern social media accounts, a general property clause will likely be insufficient.

Employers should also consider whether their employment agreements provide sufficient guidance regarding the use of personal social media accounts in promoting their businesses. A personal account through which a significant amount of business flows may well fall outside an employer's control if a key employee departs.

Requiring that promotion, advertising or sales occur through employer-owned accounts can help avoid disputes should an employee move to a competitor.

For departing employees and their new employers, JLM Couture requires a careful analysis of key documents. A social media company's terms of service may establish whether an employee owned the account at creation.

And employees should maintain documentation relating to their creation of any accounts over which they intend to assert personal ownership. The use of personal information and credentials at creation could prove determinative in establishing original ownership.

Finally, careful review of any employment agreements should inform whether ownership of an account was, or will be, transferred.

While JLM Couture will not be the last word on this point, both employees and employers must carefully consider explicit agreements on the ownership of social media accounts, especially when those accounts are integral to an employer's business or an employee's livelihood.

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[1] __ F.4th __, No. 21-2535, 2024 WL 172609 (2d Cir. Jan. 17, 2024).

[2] In re Vital Pharm., 652 B.R. 392, 396 (Bankr. S.D. Fla. 2023).

[3] Id.

[4] No. C 11-03474, 2011 WL 5415612, at *6-9 (N.D. Cal. Nov. 8, 2011).

[5] No. CIV.A. 11-4303, 2013 WL 943350, at *10, *17 (E.D. Pa. Mar. 12, 2013).

[6] 528 B.R. 359 (Bank. S.D. Tex. 2015).

[7] Id. at 368.

[8] 464 F. Supp. 3d 863, 872 (E.D. Ky. 2020).

[9] JLM Couture, Inc. v. Gutman, No. 20-CV-10575, 2023 WL 2503432, at *9 (S.D.N.Y. Mar. 14, 2023), ), aff'd in part, vacated in part, remanded, No. 21-2535, 2024 WL 172609 (2d Cir. Jan. 17, 2024).

[10] 652 B.R. at 406.

[11] Id. at 407 (underline omitted).

[12] Id. at 413.

[13] 2013 WL 943350, at *6-8.

[14] No. DLB-21-401, 2022 WL 622234, at *5-8, *9 (D. Md. Mar. 3, 2022).

[15] Id. at *4.

[16] JLM Couture, 2024 WL 172609, at *1.

[17] Id. at *2.

[18] Id.

[19] Id. at *1.

[20] Id.

[21] Id.

[22] JLM Couture, 2023 WL 2503432, at *9.

[23] JLM Couture, 2023 WL 2503432, at *10.

[24] Id. at *15.

[25] JLM Couture, 2024 WL 172609, at *7.

[26] Id.

[27] Id.

[28] 3 Cai. 175 (N.Y. 1805).

[29] JLM Couture, 2024 WL 172609, at *7.

[30] Id. at *7 n.6 (citing Eagle, 2013 WL 943350, at *11).

[31] Id.

[32] Id.

[33] Id. at *8 (citation omitted).

[34] Id.

[35] Id.