Whose Friends Are They? Protecting Rights to Social Media Contacts

By Mary Knoblauch

As businesses embrace the potential for social media to grow their market share, they often overlook the need to update their confidentiality policies and employee agreements. This could be catastrophic if a key employee were to leave and retain exclusive access to company accounts on Facebook, LinkedIn, Twitter and the like. Trade secret litigation addressing ownership rights to social media contacts can provide guidance to employers fashioning new policies and agreements.

This past spring a federal court in Illinois addressed an employer's ownership interest in social media group membership lists and communications. In *CDM Media Inc. v. Robert Simms,* the employer asserted a trade secret misappropriation claim against its former employee, Simms, for refusing to complete the paperwork needed to change the contacts for a LinkedIn group with 679 members, and keeping the LinkedIn group membership list and communications. Simms had been the point person for the LinkedIn group, which was a private online community of chief information officers and IT executives. The court ruled that the employer had adequately pled a misappropriation claim as to the LinkedIn group membership list but had not done so for the LinkedIn group's communications. Even for the LinkedIn group membership list though, the court was guarded in its ruling, simply saying "too little is known about the contents, configuration, and function of the LinkedIn group at this time, to conclude as a matter of law that its list of members did not constitute a trade secret." In other words, this employer needed to prove a number of critical facts to succeed on this claim.

In another 2013 case, *Eagle v. Morgan,* a federal court in Pennsylvania held that, absent a social media policy, a LinkedIn profile and all of its connections belonged to a former employee. In contrast, in a 2011 case, *PhoneDog v. Kravitz,* a former employee took control of a Twitter account with 17,000 followers by changing the name of the Twitter handle. A federal court in California held that the employer's alleged trade secrets – the account followers and Twitter password – were pled with enough particularity to state a trade secret claim.

The good news for employers is there are ways to avoid the risk and expense of fact-intensive litigation. The key is to focus on protecting the company's trade secrets at the time of hiring new employees.

First, employers should incorporate specific social media language into standard employee agreements (confidentiality, non-competition, non-solicitation, work-

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for-hire, separation agreements) so that company "ownership" of social media accounts, content and membership lists cannot be disputed. Standard agreements and a social media policy should inform employees that the company owns any social media content employees develop on the job or with company resources. Employees who use social media to promote the company need to be informed that the content they contribute is within the scope of their employment and may not be used for any purpose other than the company's benefit.

Second, employers need to identify in standard agreements and in a social media policy the categories of information the company considers to be trade secret and confidential. Keep in mind the overriding requirements necessary to prevail in trade secret litigation. Nearly every state, including Minnesota, has enacted the Uniform Trade Secrets Act. To prevail on a UTSA misappropriation claim, a company must be able to show that the trade secret provides value to the company because it is, in fact, secret and the company has taken reasonable measures to protect its secrecy.

Third, do not overlook the particulars of social media accounts. When social media accounts are set up, the company name should be in the account's page name, handle or username. Always maintain access to passwords. Make sure the company's agreements require employees to provide the information necessary to transition employer social media accounts in the event the employee leaves. If employees are permitted to connect with customers on their own LinkedIn accounts, their list of contacts should be set to private so that other LinkedIn users cannot view them, and if an employee leaves, all customer information needs to be deleted immediately from personal social media sites.

Fourth, when drafting new policies and agreements, be aware that there are new laws in some states prohibiting employers from requesting personal social media account-related information from employees. Policies also need to stay clear of interfering with employees' rights to discuss terms and conditions of employment under section 7 of the National Labor Relations Act. However, as long as an employer remains focused on its own property rights, neither state laws nor the NLRA need be obstacles to protecting valuable trade secrets.

Being proactive about an employer's social media assets at the outset of employment not only sets clear expectations for employees but could make all the difference between winning or losing someday in court.