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How Many #Followers Do You Have?: Evaluating the Rise of Social Media and Issues Concerning *In Re CTL*'s Determination that Social Media Accounts are Property of the Estate

Cover Page Footnote

J.D. Candidate, May 2017, The Catholic University of America, Columbus School of Law; B.A. 2014, Duke University. The author would like to extend her deep gratitude to Professor Megan M. La Belle and Professor Sarah H. Duggin for their invaluable guidance and patience throughout the writing and editing process for this Note. The author is also grateful to her family, friends, and colleagues of the *Catholic University Law Review* for their significant time and effort, and attention to detail in preparing this Note for publication.

HOW MANY #FOLLOWERS DO YOU HAVE?:
EVALUATING THE RISE OF SOCIAL MEDIA AND
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Patricia A. Leeson⁺

The digital era has redefined human interaction and communication—fashioning a connected world in an online environment. Social media applications have become fixtures of daily life, revolutionizing connections and relationships. Partly as a result, businesses now recognize social media as a valuable tool to advertise and promote goods and services.¹

In 2015, U.S. companies generated \$2.4 billion from social media revenue.² By 2016, social media revenue is projected to increase to \$3.3 billion.³ The increased exposure social media provides enables companies to establish a brand by reaching a pool of prospective customers who would be economically impractical to reach through traditional advertising avenues.⁴

Over thirty million small businesses have a presence on Facebook.⁵ Approximately seventy-five percent of Fortune 500 companies utilize Twitter.⁶

⁺ J.D. Candidate, May 2017, The Catholic University of America, Columbus School of Law; B.A. 2014, Duke University. The author would like to extend her deep gratitude to Professor Megan M. La Belle and Professor Sarah H. Duggin for their invaluable guidance and patience throughout the writing and editing process for this Note. The author is also grateful to her family, friends, and colleagues of the *Catholic University Law Review* for their significant time and effort, and attention to detail in preparing this Note for publication.

1. Jayson DeMers, *The Top 10 Benefits of Social Media Marketing*, FORBES (Aug. 11, 2014, 12:24 PM), <http://www.forbes.com/sites/jaysondemers/2014/08/11/the-top-10-benefits-of-social-media-marketing/#3f5c8c7d2a4d> (“92% of marketers in 2014 claimed that social media marketing was important for their business, with 80% indicating their efforts increased traffic to their websites.”).

2. Anne Maguire, *U.S. Local Advertising Revenues to Exceed \$146 Billion in 2016*, BIA/KELSEY (Nov. 2, 2015), [http://www.biakelsey.com/Company/Press-Releases/151102-U.S.-Local-Advertising-Revenues-to-Exceed-\\$146-Billion-in-2016.asp](http://www.biakelsey.com/Company/Press-Releases/151102-U.S.-Local-Advertising-Revenues-to-Exceed-$146-Billion-in-2016.asp).

3. *Id.*

4. See, e.g., ERIK QUALMAN, *SOCIALNOMICS: HOW SOCIAL MEDIA TRANSFORMS THE WAY WE LIVE AND DO BUSINESS* xxii, 262–63 (John Wiley & Sons, Inc. eds., 2011) (articulating ways in which social media provides an avenue for companies to advertise and reach consumers in an effective and efficient manner, at almost no cost).

5. Anthony Ha, *Facebook Says There Are Now 30M Small Businesses with Active Pages, Including 19M on Mobile*, TECHCRUNCH (June 3, 2014), <http://techcrunch.com/2014/06/03/facebook-30m-small-businesses/>.

6. See Craig Smith, *Twitter Business Statistics*, DMR, <http://expandedramblings.com/index.php/twitter-stats-for-businesses/> (last updated Sept. 21, 2016) (finding that approximately twelve percent of American small businesses have and make use of a Twitter account).

Over four million companies have LinkedIn profiles.⁷ Instagram attracts over five-hundred million users per month.⁸ More than fifty million users manage a MySpace account, in which businesses promote their goods and services to “a vibrant audience of 17 to 25-year-olds”⁹

With the rise of social media use among businesses, legal disputes have surfaced with litigants looking to the courts to determine issues of ownership and legal authority. The law has not always kept pace with the ever-changing world of technology,¹⁰ particularly in determining the legal rights associated with social media applications and the data made available from those applications.

In the summer of 2015, a U.S. Bankruptcy Court in Texas was called upon in the case of *In re CTLI, LLC*¹¹ to determine whether social media accounts were “assets” of a business’s bankruptcy estate.¹² The social media accounts involved in the dispute were Twitter and Facebook accounts.¹³ The court addressed an issue many courts have not yet wrestled with: the exact legal status of social media accounts in bankruptcy proceedings.¹⁴ The *CTLI* court held that the Twitter and Facebook accounts were business accounts that belonged to the reorganized debtor as “property interests.”¹⁵ The court justified its finding by

7. Craig Smith, *LinkedIn Company Page and Group Statistics*, DMR, <http://expandedramblings.com/index.php/linkedin-business-page-and-group-statistics/> (last updated Sept. 5, 2016).

8. INSTAGRAM, <https://business.instagram.com/> (last visited Oct. 10, 2016); see Craig Smith, *By the Numbers: 180+ Interesting Instagram Statistics (October 2016)*, DMR, <http://expandedramblings.com/index.php/important-instagram-stats/3/> (last updated Oct. 1, 2016) (establishing that 51.8% of U.S. social media users use Instagram, including 15.5 million teens).

9. Mike Shields, *MySpace Still Reaches 50 Million People Each Month*, WALL ST. J. (Jan. 14, 2015, 8:00 AM), <http://blogs.wsj.com/cmo/2015/01/14/myspace-still-reaches-50-million-people-each-month/>.

10. See *Gillett-Netting v. Barnhart*, 371 F.3d 593, 594 (9th Cir. 2004), *abrogated by* *Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021 (2012) (“Developing reproductive technology has outpaced federal and state laws, which currently do not address directly the legal issues created by posthumous conception.”); see also *United States v. Jones*, 132 S. Ct. 945, 962 (2012) (Alito, J., concurring) (explaining that using traditional legal doctrines to resolve disputes involving new technologies has shifted individual’s expectations of privacy); *Capato v. Comm’r Soc. Sec.*, 532 F. App’x 251, 255 (3d Cir. 2013) (Vanaskie, J., concurring) (urging Congress to act and update the law to address technological advances); *Milo & Gabby, LLC v. Amazon.com*, 144 F. Supp. 3d 1251, 1253 (W.D. Wash. 2015) (“There is no doubt that we now live in a time where the law lags behind technology.”); H.R. REP. NO. 104–795, at 16 (1996) (recognizing that the law regarding FOIA requests needed to be updated in response to the increased use of information technology in government to maintain records); Ameet Sachdev, *Federal Judge Richard Posner Takes on Science and Law*, CHI. TRIBUNE (May 11, 2012), http://articles.chicagotribune.com/2012-05-11/business/ct-biz-0511-chicago-law-20120511_1_judges-law-clerks-7th-circuit-bar-association.

11. 528 B.R. 359 (Bankr. S.D. Tex. 2015).

12. *Id.* at 365.

13. *Id.* at 362–63.

14. *Id.* at 361.

15. *Id.* at 366–67.

comparing business social media accounts to subscriber lists because they provide valuable access to customers.¹⁶

The court's argument was persuasive, but it did not sufficiently address whether additional legal protection should be afforded to social media. It is well-established that customer lists are entitled to trade secret protection.¹⁷ Although *CTLI* addressed the question of whether social media accounts are to be regarded as property in bankruptcy proceedings,¹⁸ it did not address the issue of whether courts should classify the data collected on social media accounts as trade secrets in a manner similar to customer lists. Current trade secret law does not directly address how social media accounts should be treated.¹⁹ Therefore, it may be worthwhile for state legislatures to enact legislation that addresses this issue so courts can respond in an appropriate matter to pressing concerns related to social media. In the absence of legislative action, it will be necessary for the courts to develop jurisprudence in this new and developing area of law.

Scholars, legislators, and lawyers will likely struggle with the implication of assigning legal rights to social media accounts that are just now beginning to be regarded as property. An open question exists as to whether trade protection should be extended to social media and the data it generates. In the absence of a clear legislative standard, courts will continue to struggle to apply a consistent legal standard in proceedings involving social media. This Note will examine the court's classification of social media accounts as customer lists in *CTLI* and explore the possible application of existing legal principles involving trade secrets to social media accounts by reviewing how courts have classified customer lists as trade secrets. Part I defines property in bankruptcy court proceedings, reviews how customer lists have been recognized as property of the estate, and explains the significance of identifying trade secrets as property interests. Additionally, Part I examines trade secret law and how it has been applied to customer lists. In Part II, this Note reviews legal precedent regarding trade secrets and its legal application to social media accounts, including Twitter, LinkedIn, and MySpace. After considering the legal impact social media could have on trade secret law, Part III analyzes the recent court decision in *CTLI*, focusing on the court's ruling that social media accounts are property interests. This Note concludes in Part IV by identifying and examining three legal issues that courts now face with regard to *CTLI*'s holding that social media accounts are property interests, addressing questions of ownership, consumer privacy, and trade secret protection.

16. *Id.* at 367.

17. *See* cases cited *infra* note 51.

18. *CTLI*, 528 B.R. at 374.

19. *See* Courtney J. Mitchell, *Keep Your Friends Close: A Framework for Addressing Rights to Social Media Contacts*, 67 VAND. L. REV. 1459, 1460–61 (2014); *see also* Ari B. Good, *Trade Secrets and the New Realities of the Internet Age*, 2 MARQ. INTELL. PROP. L. REV. 51, 81–82 (1998); Jasmine McNealy, *Who Owns Your Friends?: Phonedog v. Kravitz and Business Claims of Trade Secret in Social Media Information*, 39 RUTGERS COMPUTER & TECH. L.J. 30, 53 (2013).

I. THE LEGAL SIGNIFICANCE OF CUSTOMER LISTS AND SOCIAL MEDIA ACCOUNTS

A. *Bankruptcy Proceedings and Determining the Property of the Estate*

Historically, bankruptcy court decisions have included customer lists in the debtor's "property of the estate."²⁰ Although the Bankruptcy Code defers to state law to define what specifically is included as property, the statutory language provides a broad application to include several kinds of property.²¹

1. *Overview of Bankruptcy Proceedings*

Bankruptcy is a legal proceeding that assists consumers and businesses by eliminating or repaying some of their debts under the protection of the federal court system.²² A bankruptcy proceeding can commence either voluntarily by the debtor or involuntarily by creditors.²³ The debtor or creditor can file for bankruptcy under Chapter 7 or Chapter 11.²⁴ Chapter 7 ceases business operations and requires the business to sell all of its assets.²⁵ By contrast, Chapter 11 permits the individual or business to propose a plan for reorganization.²⁶ Once a business files a bankruptcy petition, Section 541 of the Bankruptcy Code governs what constitutes property included in the bankruptcy estate.²⁷

20. *Krafsure v. UOP (In re El Paso Refinery, L.P.)*, 196 B.R. 58, 70–71 (Bankr. W.D. Tex. 1996) (determining that all customer lists in the possession of El Paso Refinery would be mortgaged property under a foreclosure security agreement order); *United Jersey Bank Cent., N.A. v. Collated Prods. Corp. (In re Collated Prods. Corp.)*, 121 B.R. 195, 197 (Bankr. D. Del. 1990), *aff'd*, *Collated Prods. Corp. v. United Jersey Bank Cent., N.A.*, 937 F.2d 596 (3d Cir. 1991) (finding customer lists to be included as assets in a Schedule of Collateral as property of the estate); *First City Nat'l Bank of Midland v. Mid-West Motors, Inc. (In re Mid-West Motors, Inc.)*, 82 B.R. 439, 442 (Bankr. N.D. Tex. 1988) (holding that the creditor's security interest in customer lists are general intangibles, which are to be included as property of the estate); *Commercial Union Ins. Co. v. Davies Ins. Servs. (In re Davies Ins. Servs.)*, 33 B.R. 252, 252–54 (Bankr. W.D. Pa. 1983) (acknowledging that a debtor has an ownership interest in customer lists).

21. *Equinox Oil Co. v. Official Unsecured Creditor's Comm. (In re Equinox Oil Co.)*, 300 F.3d 614, 618 (5th Cir. 2002) ("Section 541 is read broadly and is interpreted to 'include all kinds of property, including tangible or intangible property . . .'" (quoting *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204–05 n.9 (1983))); *see also* Walter W. Miller, Jr. & Maureen A. O'Rourke, *Bankruptcy Law v. Privacy Rights: Which Holds the Trump Card?*, 38 HOUS. L. REV. 777, 789–90 (2001) ("[The Bankruptcy Code's] wording evinces an intent to include as much as possible in the bankruptcy estate . . .").

22. *See Process – Bankruptcy Courts*, U.S. COURTS, <http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/process-bankruptcy-basics> (last visited Dec. 6, 2016).

23. 11 U.S.C. §§ 301, 303 (2012).

24. *Id.* § 103.

25. *See id.* § 726.

26. *See id.* § 1121.

27. *Id.* § 541(a).

2. Section 541: Defining Property in Bankruptcy Proceedings

The bankruptcy estate is a legal entity, entirely separate from the debtor's legal interests, that grants legal control over property of the estate to a trustee.²⁸ The trustee's control includes the authority to use and sell the property of the estate for the benefit of creditors.²⁹ Since Section 541 defines property as "all legal or equitable interests of the debtor in property as of the commencement of the case[,]"³⁰ which embraces anything that has exchangeable value including obligations, rights, and other intangibles.³¹ Provided that Section 541 does not specifically define legal or equitable interests, the U.S. Supreme Court has deferred the issue of defining property interests in a bankruptcy estate to state legislatures.³² Therefore, the applicable law to determine what constitutes property is governed by the state law where the bankruptcy proceedings will take place.³³ In applying state law, many courts have classified customer lists as property interests.³⁴

28. *Frank v. Mich. State Unemployment Agency (In re Thompson Boat Co.)*, 252 F.3d 852, 853–54 (6th Cir. 2001) ("[T]he Bankruptcy Code allows only a trustee, not debtors, to initiate a preference action to avoid certain transfers, so proceeds recovered are property of the bankruptcy estate, not the debtor.").

29. See 11 U.S.C. § 704(a) (2012); see also U.S. DEP'T OF JUSTICE, HANDBOOK FOR CHAPTER 7 TRUSTEES ch. 6 (2015), <https://www.justice.gov/ust/handbook-chapter-7-trustees> (explaining that a trustee may sell assets only if the sale will result in a meaningful distribution to creditors).

30. 11 U.S.C. § 541(a)(1).

31. *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377–78 (1945). The bankruptcy definition includes any object as property of the estate, which includes tangible and intangible property. *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204–05 n.9 (1983) (explaining that Section 541 must be broadly interpreted to include "all kinds of property, including tangible or intangible property"). A bankruptcy estate may have a strong legal interest in exercising rights over an object, even if the debtor does not possess all of the rights typically associated with ownership, such as the right to possess, transfer, and exclude. See *Ramsay v. Dowden (In re Cent. Ark. Broad. Co.)*, 68 F.3d 213, 214 (8th Cir. 1995) (affirming the trial court's decision that the debtor's radio operating license, which could not be transferred without the approval from the Federal Communications Commission, was a valuable intangible asset that constituted property of the estate); see also *Equinox Oil Co. v. Official Unsecured Creditor's Comm. (In re Equinox Oil Co.)*, 300 F.3d 614, 618–19 (5th Cir. 2002) (holding that the bankruptcy estate has legal interests in all property of the debtor, including intangible or tangible property).

32. *Butner v. United States*, 440 U.S. 48, 55 (1979). Property is not explicitly defined in the Bankruptcy Code, however Section 541(a) sets forth seven categories of property interests that are considered part of the bankruptcy estate. 11 U.S.C. § 541(a). State law governs what is considered property because "[p]roperty interests are created and defined by state law." *Butner*, 440 U.S. at 55 (holding that the law of the state in which the bankruptcy proceedings will take place will define and create property interests).

33. *Butner*, 440 U.S. at 54.

34. See, e.g., *In re Alert Holdings, Inc.*, 148 B.R. 194, 203 (Bankr. S.D.N.Y. 1992) (noting that intangible customer lists and goodwill are property of the estate).

3. *Property of the Estate: Customer Lists and Social Media Accounts*

A leading case in the characterization of customer lists as property is *Newark Morning Ledger Co. v. United States*,³⁵ where the Supreme Court held that a newspaper publisher proved that subscriber lists were amortizable, intangible assets, with a value distinct from goodwill.³⁶ The Court reasoned that subscriber lists were not to be categorized as goodwill because, unlike goodwill, subscriber lists have a limited useful life and are entitled to depreciation.³⁷

In the case of *In re Borders Group, Inc.*,³⁸ the U.S. Bankruptcy Court for the Southern District of New York treated social media accounts as property similar to that of customer lists for purposes of an asset sale order.³⁹ The court permitted the sellers to sell and allocate to the buyer all rights associated with the content of the subscriber lists and social media assets.⁴⁰ The *Borders* court entered an asset sale order, but did not make a determination regarding the legal status of social media accounts.⁴¹

4. *The Intersection of Trade Secrets and Property of the Estate in Bankruptcy*

Pursuant to the Bankruptcy Code, a debtor has the duty to identify all property interests in the estate.⁴² This is accomplished through filing a schedule of assets.⁴³ The official form⁴⁴ references the inclusion of trade secrets as an asset

35. 507 U.S. 546 (1993).

36. *Id.* at 570. Bankruptcy courts have established goodwill as an intangible asset that provides a useful label to value the brand reputation that attracts consumers to the business. While there are multiple forms of goodwill, the purpose of goodwill is “to identify the total of all the imponderable qualities that attract consumers to the business.” *Id.* at 555 (citing *Houston Chronicle Publishing Co. v. United States*, 481 F.2d 1240, 1248 n.5 (5th Cir. 1973)).

37. *Id.* at 554, 570.

38. *In re Borders Grp., Inc.*, No. 11-10614 (MG), 2011 WL 5520261 (Bankr. S.D.N.Y. Sept. 27, 2011).

39. *Id.* at *13. *Borders Group* filed for bankruptcy. The bankruptcy court oversaw a reorganization plan, which included approving the purchase and sale of intellectual property. *Id.* at *1–2. The reorganization plan grouped social media accounts, which included “Internet pages, content/subscriber lists, any related social media assets[.]” in the same category as subscriber lists, without making a specific determination as to whether social media accounts did or did not constitute “property” as determined by the Bankruptcy Code. *Id.*

40. *Id.* at *12–13.

41. *See id.* at *13. The court also did not specifically address the issue of whether social media accounts constitute property of a bankruptcy estate. *Id.*

42. 11 U.S.C. 521(a)(1) (2012); *see also* *Cusano v. Klein*, 264 F.3d 936, 946 (9th Cir. 2001) (reasoning that the Bankruptcy Code places an affirmative duty on the debtor to “carefully, completely, and accurately” schedule all assets and liabilities of the estate (quoting *In re Mohring*, 142 B.R. 389, 394 (Bankr. E.D. Cal. 1992))).

43. FED. R. BANKR. P. 1007(b)(1)(A).

44. *Official Form 6, Schedule B – Personal Property*, U.S. COURTS, <http://www.uscourts.gov/forms/bankruptcy-forms/schedule-b-personal-property> (last visited Oct. 10, 2016).

characterized under intellectual property, but does not define the term “trade secrets.”⁴⁵

B. Trade Secret Law

The Third Restatement of Unfair Competition defines the term trade secret as “any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others.”⁴⁶ Forty-seven states have adopted and codified the Uniform Trade Secrets Act (“UTSA”) as the standard basic principles of trade secrets.⁴⁷ UTSA defines “trade secret” as

information including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.⁴⁸

Courts consider six factors when determining if trade secret protection should be granted:

(1) the extent to which the information is known outside of [the claimant’s] business; (2) the extent to which it is known by employees and others involved in [the] business; (3) the extent of measures taken by [the claimant] to guard the secrecy of the information; (4) the value of the information to [the business] and to [its] competitors; (5) the amount of effort or money expended by [the claimant] in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.⁴⁹

The legal system has interpreted “economic value” and “secrecy” as the cornerstone requirements for trade secret protection.⁵⁰

45. In addition to the absence of a reference to social media as property, the Bankruptcy Code does not define trade secrets. See 11 U.S.C. § 101(35)(A). Relevant bankruptcy law treats trade secrets as intellectual property, which imposes an obligation on the debtor to include them on the schedule of assets. FED. R. BANKR. P. 1007(b)(1).

46. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 (AM. LAW. INST. 1995).

47. *Legislative Fact Sheet - Trade Secrets Act*, UNIF. LAW COMM’N, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Trade%20Secrets%20Act> (last visited Oct. 10, 2016) (finding that forty-eight states, the District of Columbia, and the U.S. Virgin Islands have enacted the Uniform Trade Secrets Act, not including Massachusetts and New York).

48. UNIF. TRADE SECRETS ACT § 1(4) (UNIF. LAW COMM’N 1985).

49. RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (AM. LAW INST. 1939).

50. Good, *supra* note 19, at 64.

1. Trade Secrets: Customer Lists

Courts have generally identified customer lists as trade secrets.⁵¹ A customer list is an invaluable compilation of sensitive contact information that an individual or company can accumulate over an extended period of time to maintain business relationships.⁵² The list may contain basic contact information or meticulously detail the customer's relative position in the market and preferences based on purchase history.⁵³

Customer lists provide the owner the right to include or exclude information, which affords the list independent economic value.⁵⁴ The legal rights associated with a customer list are attached to the list itself, not vested in the corporation that originally formulated the list.⁵⁵ Provided the information is not generally known in the industry, a customer list can be afforded legal protection as a trade

51. See *Guy Carpenter & Co. v. Provenzale*, 334 F.3d 459, 467 (5th Cir. 2003) (noting that a customer list may be a trade secret, subject to the secrecy requirement); see also *AT&T Comms. of Cal., Inc. v. Pac. Bell*, No. 99-15668, 2000 U.S. App. LEXIS 23215, at *7 (9th Cir. Sept. 8, 2000) (noting that the plaintiff's customer account data was the type of information that could qualify for trade secret protection); *Calisi v. Unified Fin. Servs., LLC*, 302 P.3d 628, 633 (Ariz. Ct. App. 2013) (explaining that a customer list will qualify for trade secret protection if the list (i) represents a selective accumulation of detailed, valuable information about customers that a competitor could not easily acquire, or (ii) was compiled as a result of its owner spending a substantial amount of time and effort to identify and cultivate its customer base such that it would be difficult to replicate); *Wyndham Resort Dev. Corp. v. Bingham*, No. 2:10-cv-01566-GEB-KJM, 2010 WL 2720920, at *5 (E.D. Cal. July 8, 2010) ("It is well-established that a customer list may constitute a protectable trade secret." (quoting *Gable-Leigh, Inc. v. N. Am. Miss*, No. CV 01-01019 MMM (SHX), 2001 WL 521695, at *15 (C.D. Cal. Apr. 13, 2001))); see also *Robert Half Int'l, Inc. v. Murray*, No. CV F 07-0799 LJO SMS, 2008 WL 2625857, at *4 (E.D. Cal. June 25, 2008) ("A customer list acquired by lengthy and expensive efforts deserves protection as a trade secret." (citing *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 521 (9th Cir. 1993))).

52. See *Customer List*, THE FREE DICTIONARY, <http://financial-dictionary.thefreedictionary.com/Customer+List> (last visited Oct. 10, 2016). A more formal definition of a customer list is as follows: "A list of previous buyers from a company. The company maintains a customer list in order to continue the business relationship. That is, companies use customer lists to keep up with buyers and to promote customer loyalty." *Id.*

53. See, e.g., *Dwyer v. Am. Express Co.*, 652 N.E.2d 1351, 1353 (Ill. App. Ct. 1995) (detailing how American Express collected extensive information about spending habits of customers by categorizing and ranking card holders based on their spending habits); see also *F.T.C. v. Toysmart.com*, No. 00-11341-RGS, 2000 WL 34016434, at *1 (D. Mass. July 21, 2000) (noting that Toysmart.com collected customer billing information, shopping preferences, and family profiles and offered to sell the personal customer information).

54. *Dwyer*, 652 N.E.2d at 1356 (finding that the value in lists of card holder names stemmed from the aggregation of names collected, not from any individual name); see also Robert W. Hillman, *The Property Wars of Law Firms: Of Client Lists, Trade Secrets and the Fiduciary Duties of Law Partners*, 30 FLA. ST. U. L. REV. 767, 774-75 (2003).

55. *Newark Morning Ledger Co. v. United States*, 507 U.S. 546, 557, 570 (1993) (insisting that the appellate court incorrectly characterized a "paid subscribers" list as just a mere customer list. The "paid subscribers" represented a reliable source of income and the cost of generating a new list of subscribers was irrelevant in determining the correct value and rights associated with the list).

secret.⁵⁶ Courts apply a case-by-case, fact driven analysis to determine when a customer list is afforded trade secret protection.⁵⁷

a. First Element: Secrecy

A court will provide a right of exclusivity through trade secret protection only if the owner took affirmative steps to maintain the confidential nature of the information.⁵⁸ The Supreme Court acknowledged that “the extent of the property right . . . is defined by the extent to which the owner of the secret protects his interest from disclosure to others.”⁵⁹

Absolute secrecy is not necessary to obtain trade secret protection.⁶⁰ However, a company must establish that it made a substantial effort to keep the information confidential.⁶¹ For example, in *Metallurgical Industries, Inc. v. Fourtek, Inc.*,⁶² the Fifth Circuit held that scientific principles generally known in the industry did not undermine the company’s claim of trade secrets because the company limited disclosure of its complex manufacturing process to few

56. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 (AM. LAW. INST. 1995); *see also* N. Atl. Instruments, Inc. v. Haber, 188 F.3d 38, 44 (2d Cir. 1999) (“A customer list developed by a business through substantial effort and kept in confidence may be treated as a trade secret and protected at the owner’s instance against disclosure to a competitor, provided the information it contains is not otherwise readily ascertainable.” (quoting *Defiance Button Mach. Co. v. C & C Metal Prods. Corp.*, 759 F.2d 1053, 1063 (2d Cir. 1985), *cert. denied*, 474 U.S. 844 (1985))); *see also* *Delta Med. Sys. v. Mid-Am. Med. Sys., Inc.*, 772 N.E.2d 768, 781 (Ill. App. Ct. 2002) (holding that Delta’s customer list did not constitute a protectable trade secret because the list could be duplicated with little effort, time, or expense).

57. *See* Kurt M. Saunders, *The Law and Ethics of Trade Secrets: A Case Study*, 42 CAL. W. L. REV. 209, 221 (2006) (“Proving misappropriation [of a trade secret] involves a fact-intensive analysis.”); *see also* Henry J. Silberberg & Eric G. Lardiere, *Eroding Protection of Customer Lists and Customer Information Under the Uniform Trade Secrets Act*, 42 BUS. LAW. 487, 491 (1986) (“Common law trade secret cases involving customer lists and customer information are rooted in the specific facts and evidence presented by the parties.”).

58. Douglas R. Richmond, *Yours, Mine, and Ours: Law Firm Property Disputes*, 30 N. ILL. U. L. REV. 1, 4–5 (2009).

59. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002 (1984) (acknowledging that public knowledge or information generally known in the industry is not a trade secret and if an owner of the information discloses his trade secret then the property right of the trade secret is extinguished).

60. *See* *Metallurgical Indus., Inc. v. Fourtek, Inc.*, 790 F.2d 1195, 1200 (5th Cir. 1986) (“Although the law requires secrecy, it need not be absolute.”); *see also* *AvidAir Helicopter Supply, Inc. v. Rolls-Royce Corp.*, 663 F.3d 966, 974 (8th Cir. 2011) (noting that reasonable efforts are needed for information to be a trade secret, but absolute secrecy is not a requirement).

61. *See* *Kassa Ins. Servs. v. Pugh*, Nos. 31196-1-III, 31300-0-III, 2014 WL 1746059, at *4 (Wash. Ct. App. Apr. 29, 2014) (affirming the lower court’s determination that the company employed reasonable efforts by keeping its client list password-protected and in a protected area); *see also* *Farmers Ins. Exch. v. Steele Ins. Agency*, No. 2:13-cv-00784-MCE-DAD, 2013 WL 2151553, at *6–8 (E.D. Cal. May 16, 2013) (finding a customer list as a trade secret because the plaintiff devoted substantial time and effort to implement company policies, which provided notice to employees of the confidential nature of the information).

62. 790 F.2d 1195, 1200 (5th Cir. 1986).

employees.⁶³ An owner needs to take reasonable security measures to maintain the information's confidential nature,⁶⁴ such as, but not limited to, restricted access,⁶⁵ nondisclosure agreements,⁶⁶ limited internal distribution,⁶⁷ and password protection of computers.⁶⁸ The Eighth Circuit reached the same conclusion in *AvidAir Helicopter Supply Inc., v. Rolls-Royce Corp.*,⁶⁹ finding that efforts do not need to be extravagant to maintain secrecy.⁷⁰ For example, courts have recognized client lists that were established on a website database as trade secrets because the information was available only through the use of a client's username and password, which was strictly limited to specific employees.⁷¹

Other courts have refused to extend trade secret protection to client lists that did not contain sensitive, specialized information.⁷² For example, in *Calisi v. Unified Financial Services, LLC*,⁷³ the appellate court reversed the trial court's determination that a client list was a trade secret because the list did not include valuable information about customers, such as particular preferences or characteristics, that provided the owner with an economic advantage over

63. *Id.* at 1199–1203.

64. UNIF. TRADE SECRETS ACT § 1(4)(ii) (UNIF. LAW COMM'N 1985).

65. *Metallurgical*, 790 F.2d at 1199.

66. *Id.*

67. *Id.* at 1200.

68. *Kassa Ins. Servs. v. Pugh*, Nos. 31196-1-III, 31300-0-III, 2014 WL 1746059, at *4 (Wash. Ct. App. Apr. 29, 2014).

69. 663 F.3d 966 (8th Cir. 2011).

70. *Id.* at 974.

71. *See, e.g., Saturn Sys., Inc. v. Militare*, 252 P.3d 516, 522 (Colo. App. 2011) (noting there was substantial evidence that Saturn employed security measures to maintain the confidentiality of the trade secret by keeping the information password protected, limiting access, and encrypting the website); *see also Kassa*, 2014 WL 1746059, at *4 (noting that the trade secret client list was password-protected); *Movie Gallery US, LLC v. Greenshields*, 648 F. Supp. 2d 1252, 1264 (M.D. Ala. 2009) (holding that the company took reasonable steps to keep information confidential by maintaining a password protected computer system); *A.M. Skier Agency, Inc. v. Gold*, 747 A.2d 936, 941 (Pa. Super. Ct. 2000) (finding that an employer's client directory was a protected trade secret evidenced by the fact that the information was password protected).

72. *See Calisi v. Unified Fin. Servs., LLC*, 302 P.3d 628, 633 (Ariz. Ct. App. 2013); *see also Columbus Bookkeeping & Bus. Servs. v. Ohio State Bookkeeping, LLC*, No. 11AP-227, 2011 Ohio App. LEXIS 5655, *11–13 (Ohio Ct. App. Dec. 30, 2011) (holding that the client list was not entitled to trade secret protection because it did not contain information besides the names of customers and failed to keep the information confidential by permitting employees to have access to the names).

73. 302 P.3d 628 (Ariz. Ct. App. 2013).

competitors.⁷⁴ Also, the district court in *Lillge v. Verity*⁷⁵ held that customer databases must contain more than the identity of customers to constitute a trade secret.⁷⁶

b. Second Element: Independent Economic Value

In addition to the condition of secrecy, trade secret law requires the customer list to derive independent economic value, which provides the owner a demonstrable competitive advantage.⁷⁷

Secrecy and value are interdependent factors because the value of information stems from the confidential nature of the information.⁷⁸ A business distinguishes itself from competitors based on its financial investment in the development and cultivation of a private consumer database.⁷⁹ One element in assessing the value of a customer list as a trade secret is its length and complexity.⁸⁰ The more detailed information the customer list contains, the more valuable it is to the business and competitors, and the more likely it would warrant trade secret protection.⁸¹

Courts have also found customer lists to be valuable trade secrets based on evidence that a competing company was willing to pay money for it.⁸² For example, a former employee's theft and subsequent use of client data can establish independent economic value of the stolen information.⁸³

74. *Id.* at 633. The court went on to hold that the company did not describe "specialized, valuable information about its customers, such as information concerning their financial requirements, tax strategies, investment objectives, and risk and investment preferences," which would entitle it to trade secret protection. *Id.* Personalized customer lists may be entitled to protection if the list includes "selective accumulation of detailed, valuable information . . ." *Id.* at 631.

75. No. C 07-2748 MHP, 2007 U.S. Dist. LEXIS 73543 (N.D. Cal. Oct. 1, 2007).

76. *Id.* at *11–12 (describing that in addition to the names of customers, the customer list included information regarding purchase history, customer preferences, pricing, and business strategies).

77. UNIF. TRADE SECRETS ACT § 1(4)(i) (UNIF. LAW COMM'N 1985).

78. *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 486–87 (1974). Further, the court noted that it would be economically wasteful and a misallocation of resources to abolish trade secret protection if the trade secret holder would have to duplicate the protected information. *Id.*

79. McNealy, *supra* note 19, at 41.

80. Hillman, *supra* note 54, at 774.

81. *Id.*; see also *Miller & O'Rourke*, *supra* note 21, at 783, 787–88 (reasoning that a lengthy, complex customer list likely warrants trade secret protections due to the difficulty of an owner or competitor in recreating it).

82. *Fred's Stores of Miss., Inc. v. M & H Drugs, Inc.*, 725 So. 2d 902, 910 (Miss. 1998) (holding that the pharmacy's customer list was a trade secret because it had economic value in that marketing companies were willing to pay money for the list and could receive compensation for disclosing the list).

83. Eric F. Barton, *Inside Views: The Intersection of Trade Secret Law and Social Media Privacy Legislation*, INTELLECTUAL PROP. WATCH (Aug. 20, 2015), <http://www.ip-watch.org/2015/08/20/the-intersection-of-trade-secret-law-and-social-media-privacy-legislation/> (demonstrating that the theft of client data presumes the high economic value of the information).

Other relevant factors that are used to evaluate the independent economic value in a trade secret case, as delineated in the Restatement, include the time and resources spent on generating a customer list, whether access to the information was strictly limited, and whether it would be difficult to replicate the information included in the customer list.⁸⁴ Courts have given weight to these factors in the analysis of whether social media connections are trade secrets.⁸⁵

II. TRADE SECRET LAW AND ITS POSSIBLE APPLICATION TO BUSINESS SOCIAL MEDIA ACCOUNTS

Social media is defined as a “form[] of electronic communication . . . through which users create online communities to share information, ideas, personal messages and other content”⁸⁶ Social networking applications allow users to create a profile within a bounded system and develop social connections with fellow users.⁸⁷ This framework empowers companies to accrue “social capital” on social media to advance consumer relations.⁸⁸

A. *Twitter*

In *PhoneDog v. Kravitz*,⁸⁹ an employer sued its former employee for misappropriation of trade secrets, intentional interference with prospective economic advantage, negligent interference with economic advantage, and conversion after the employee left the company but continued to use the company Twitter account.⁹⁰ The district court denied the defendant’s motion to dismiss in part, finding that the court was unable to resolve the dispute on the proper valuation of “the Twitter account, password and [17,000] follower list” because the issue required consideration of “a fully-developed evidentiary record.”⁹¹ However, the court recognized that PhoneDog “sufficiently described the subject matter of the trade secret with sufficient particularity” to survive a motion to dismiss with regard to the misappropriation of trade secrets claim.⁹² The court found that PhoneDog sufficiently pled that the former employee’s

84. RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (AM. LAW. INST. 1939).

85. *Cellular Accessories for Less, Inc. v. Trinitas LLC*, No. CV 12-06736 DDP (SHx), 2014 WL 4627090, at *4 (C.D. Cal. Sept. 16, 2014) (noting an immense amount of time and resources spent on creating the list); *Christou v. Beatport*, 849 F. Supp. 2d 1055, 1075–76 (D. Colo. 2012); *Eagle v. Morgan*, No. CIV.A. 11-4303, 2011 WL 6739448, at *10 (E.D. Pa. Dec. 22, 2011).

86. *Social Media*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/social%20media> (last visited Oct. 11, 2016).

87. Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMM. 210, 211 (2008).

88. Jon M. Garon, *Wiki Authorship, Social Media, and the Curatorial Audience*, 1 HARV. J. SPORTS & ENT. L. 95, 99 (2010).

89. No. C 11-03474 MEJ, 2011 WL 5415612 (N.D. Cal. Nov. 8, 2011).

90. *Id.* at *1.

91. *Id.* at *6–8.

92. *Id.* at *7.

interference with PhoneDog's access to followers "interfered with PhoneDog's economic relations with its advertisers, thereby interfering with its 'advantageous relations'" to generate income.⁹³ The *PhoneDog* decision demonstrates that the economic value of a 17,000 follower social media account "lies in the Account's list of [f]ollowers and the traffic that those [f]ollowers generate to the PhoneDog website" because the Twitter account produces revenue from advertisers.⁹⁴ This particular case settled and the court did not make a definitive ruling governing this area of law, except for the preliminary ruling that the plaintiff adequately stated a cause of action.

B. *LinkedIn*

In a subsequent case, *Eagle v. Morgan*,⁹⁵ an employee, pursuant to her employer's request, created a LinkedIn account to promote the defendant employer's business.⁹⁶ The former employee used the account to "foster her reputation as a businesswoman; reconnect with family, friends, and colleagues; and build social and professional relationships."⁹⁷ After firing the employee, the employer changed the password, replaced the account's photo, and changed the name on the account.⁹⁸ The former employee sued.⁹⁹ The defendant employer filed a counterclaim asserting a violation of the Pennsylvania Trade Secrets Act and misappropriation of trade secrets.¹⁰⁰ The court found that the LinkedIn connections were not trade secrets because the employer's customer list was "generally known in the wider business community or capable of being easily derived from public information" and an employer password did not possess economic value.¹⁰¹ Here, the LinkedIn profile and connections belonged to the former employee.¹⁰² However, the court concluded the defendant employer could assert a claim for the misappropriation of an idea because the employer had made a "substantial investment of time, effort, and money into" creating the LinkedIn account.¹⁰³

Other courts have been willing to consider a trade secret argument for social media contacts that are not generally accessible to other LinkedIn users. For example, a California federal district court determined that a LinkedIn social

93. *Id.* at *4.

94. *See, e.g., id.* (illustrating the way PhoneDog was "entitled to damages based upon Mr. Kravitz's interference with its access to and use of the Account" because PhoneDog generated revenue from advertisers based on the amount of individuals who followed the Twitter account).

95. No. CIV.A. 11-4303, 2011 WL 6739448 (E.D. Pa. Dec. 22, 2011).

96. *Id.* at *1.

97. *Id.*

98. *Id.* at *2.

99. *Id.*

100. *Id.* at *4.

101. *Id.* at *10-11.

102. *Id.* at *13.

103. *Id.*

media contact list may qualify for trade secret protection because the information available to the public was only available to the degree the account holder utilized LinkedIn's privacy features.¹⁰⁴

In *CDM Media USA, Inc. v. Simms*,¹⁰⁵ a technology marketing and media company asserted that a LinkedIn group that included 679 names of current or potential customers was a trade secret.¹⁰⁶ The court denied the former employee's motion to dismiss because the plaintiff sufficiently alleged that "the membership list was a valuable secret commodity" due to the limited access and amount of time, effort, and cost the marketing and media company expended to develop the LinkedIn membership list.¹⁰⁷ The court highlighted that in determining whether a social media contact list is a trade secret, the analysis should focus on whether the contents of the list were secret.¹⁰⁸

C. MySpace

Social media as a trade secret was considered in *Christou v. Beatport, LLC*,¹⁰⁹ where the court evaluated a MySpace social media account. In *Christou*, a former employee used login credentials of his former employer to promote his new business: an online marketplace to download music.¹¹⁰ The employer alleged that the former employee misappropriated the company's trade secrets, which included a list of MySpace "friends" and a compiled list of confidential personal cell phone numbers, email addresses, and customer lists.¹¹¹

The district court found that the plaintiff alleged sufficient facts to maintain trade secret protection for the MySpace friend list, using factors employed by the Tenth Circuit to make trade secret determinations.¹¹² These factors are as follows:

- (1) whether proper and reasonable steps were taken by the owner to protect the secrecy of the information;
- (2) whether access to the information was restricted;
- (3) whether employees knew customers'

104. *Cellular Accessories for Less, Inc. v. Trinitas LLC*, No. CV 12-06736 DDP (SHx), 2014 WL 4627090, at *4 (C.D. Cal. Sept. 16, 2014) (denying a former employer's motion for summary judgment that LinkedIn contacts were not trade secrets as a matter of law because there remained issues of material fact as to the LinkedIn information. The parties did not make sufficiently clear as to the extent the former employee's LinkedIn contacts were made publicly available on the internet). It appears some courts refuse to acknowledge LinkedIn's public nature without evidence of the privacy functions.

105. No. 14 CV 9111, 2015 WL 1399050 (N.D. Ill. Mar. 25, 2015).

106. *Id.* at *1–2.

107. *Id.* at *4–5.

108. *Id.* at *5 ("Plaintiff must allege that certain messages—or at least classes of messages—contained trade secrets, setting forth what it is about the messages that plausibly satisfies the applicable definitions.").

109. 849 F. Supp. 2d 1055, 1074–77 (D. Colo. 2012).

110. *Id.* at 1074.

111. *Id.*

112. *Id.* at 1074–75.

names from general experience; (4) whether customers commonly dealt with more than one supplier; (5) whether customer information could be readily obtained from public directories; (6) whether customer information is readily ascertainable from sources outside the owner's business; (7) whether the owner of the customer list expended great cost and effort over a considerable period of time to develop the files; and (8) whether it would be difficult for a competitor to duplicate the information.¹¹³

The court found that the former employee alleged sufficient facts to maintain a trade secret claim by relying on the fifth and sixth factors: that the friends' personal email and contact information—connected to the list of MySpace friends—were not easily ascertainable from public sources.¹¹⁴ As a result of this decision, courts face uncertainty in identifying the legal interests social media applications will be afforded.

III. *IN RE CTLI, INC.*: IDENTIFYING THE APPROPRIATE LEGAL STATUS OF SOCIAL MEDIA ACCOUNTS

In the recent *CTLI* decision, a bankruptcy court addressed with yet another new technology issue involving social media applications.¹¹⁵ The *CTLI* opinion, as a matter of first impression, determined that a business's Twitter and Facebook accounts constituted a property interest of the bankruptcy estate.¹¹⁶ The court dispensed with a technical evaluation of the Facebook and Twitter accounts in favor of analogizing the accounts to subscriber lists.¹¹⁷ The court noted that, just as users may unsubscribe to subscriber lists, Twitter followers and Facebook friends are able to unfollow or unfriend at any time.¹¹⁸ In making this analogy, the court focused on social media accounts as a legal property right that should be afforded legal protection.¹¹⁹

A. *The Dispute Over a Refusal to Give Up on Facebook Friends and Twitter Followers*

Formed as a gun store in Katy, Texas, in 2011, Tactical Firearms, LLC was wholly owned by Jeremy Alcede, Alcede's wife, and Steven Coe Wilson.¹²⁰ Alcede created a Twitter account and a Facebook page to promote Tactical

113. *Id.* (quoting *Hertz v. Luzenac Group*, 576 F.3d 1103, 1115 (10th Cir. 2009)).

114. *Id.* at 1075–76.

115. *In re CTLI, LLC*, 528 B.R. 359, 374 (Bankr. S.D. Tex. 2015).

116. *Id.* at 361.

117. *Id.* at 366–67.

118. *Id.* at 367.

119. *Id.* at 366–67.

120. *Id.* at 362. In 2011, in exchange for a thirty percent membership interest in Tactical Firearms, Alcede recruited his friend, Steven Coe Wilson, to purchase a bigger building for the company. *Id.*

Firearms.¹²¹ Business began to suffer in late 2013 when the Alcedes divorced.¹²² Tactical Firearms defaulted on multiple loans, and the principal creditor of the company posted Tactical Firearms' real property for foreclosure sale.¹²³ In 2014, in connection with a derivative action initiated by Steven Coe Wilson,¹²⁴ a Texas state court approved Wilson's receivership request and ordered the appointment of a receiver for Tactical Firearms.¹²⁵

Before the receiver could take control, Jeremy Alcede filed a Chapter 11 bankruptcy reorganization petition on behalf of Tactical Firearms.¹²⁶ As a result, the automatic stay in the bankruptcy code prevented the state court appointed receiver from taking control of the business and allowed Alcede to remain in management control.¹²⁷

B. Bankruptcy Proceedings

Wilson later proposed his own Chapter 11 plan of reorganization for Tactical Firearms, and the bankruptcy court confirmed Wilson's proposal.¹²⁸ Under the plan, Wilson became the sole owner of the business.¹²⁹ The court order required Jeremy Alcede to hand over control of the business, including passwords to the Facebook and Twitter accounts, to Wilson.¹³⁰ When Alcede failed to hand over control of the social media accounts and objected to Wilson's proposed order, the bankruptcy court held a hearing.¹³¹ Alcede asserted that the Facebook and Twitter accounts used by Tactical Firearms were Alcede's personal property and, as a result, the social media accounts should not be turned over to Wilson.¹³²

C. Social Media Accounts as Property Interests of the Estate

The main issue before the court was whether the Facebook and Twitter accounts constituted property of the estate as defined under Section 541 of the Bankruptcy Code.¹³³ The bankruptcy court was unable to look to state law because no Texas state court had addressed whether ownership of a social media

121. *Id.* at 367–68, 372.

122. *Id.* at 362. Alcede's management relationship with Wilson deteriorated after Wilson began to suspect that Alcede was diverting company assets. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* A receivership request is a court order to have the property placed under the control and dominion of an independent third party known as a receiver. BLACK'S LAW DICTIONARY 1297 (8th ed. 2004).

126. *CTLI*, 528 B.R. at 362.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 363.

132. *Id.* at 363, 368.

133. *Id.* at 366.

account constituted a property interest.¹³⁴ Instead, the bankruptcy court looked to other state court decisions that classified subscriber or customer lists as property interests.¹³⁵ The bankruptcy court reasoned that “[l]ike subscriber lists, business social media accounts provide valuable access to customers and potential customers”¹³⁶ and a user can choose to “opt out” by unfriending or unfollowing a Twitter or Facebook account in a manner similar to that which is done with subscriber lists.¹³⁷

Accordingly, the bankruptcy court determined that the social media accounts were property of the estate under Section 541 of the Bankruptcy Code; therefore, the Twitter and Facebook accounts were transferred to the reorganized debtor as a company asset.¹³⁸ In reaching this conclusion, the court cited *Borders*, which treated social media accounts as property of the estate for purposes of an asset purchase agreement by lumping them together with customer subscriber lists.¹³⁹

Importantly, the *CTLI* court drew a distinction between personal and business accounts.¹⁴⁰ The Texas bankruptcy decision clarified the distinction between business accounts, which are property of the estate, and personal accounts that belong to an individual, which are not property of the estate.¹⁴¹ The court’s ruling recognized the importance social media accounts have to a business’ marketing strategy. The *CTLI* decision provides useful guidance to debtors concerned with valuable intellectual property assets in bankruptcy proceedings.

IV. *CTLI*’S IMPACT FOR SOCIAL MEDIA ACCOUNTS: OWNERSHIP, CONSUMER PRIVACY, AND TRADE SECRET PROTECTION

The *CTLI* court’s approach advances jurisprudence governing social media accounts and helps determine how they should be classified under existing legal structures. The decision does not, however, address the potentially significant legal issues that may arise from its conclusion that social media accounts are business assets.

The first issue is determining ownership. The nature of social media accounts should be of particular concern to parties in a bankruptcy proceeding because a focus in such cases is distribution of the estate assets by vesting ownership rights in the debtor.¹⁴² Second, vesting ownership rights in the debtor raises the issue of consumer privacy. Third, the issue of whether social media should be

134. *Id.*

135. *Id.* (examining courts that had applied New York state law, which held that social media accounts were property).

136. *Id.* at 366–67.

137. *Id.* at 367.

138. *Id.* at 366–67, 374.

139. *Id.* at 366 (citing *In re Borders Grp., Inc.*, No. 11-10614 (MG), 2011 WL 5520261, at *13 (Bankr. S.D.N.Y. Sept. 27, 2011)).

140. *CTLI*, 528 B.R. at 367.

141. *Id.*

142. 11 U.S.C. § 1141(b) (2012).

afforded additional legal protection as a trade secret, similar to customer lists, will need to be addressed. If social media accounts and the data they generate constitute trade secrets, then the trustee or debtor would need to take affirmative steps to ensure that the information remains confidential once the debtor is vested with ownership rights.¹⁴³ Provided that a primary goal of bankruptcy proceedings is to maintain the value of the bankruptcy estate,¹⁴⁴ a court's determination on whether social media accounts receive trade secret protection will greatly affect a debtor's interest in identifying and preserving the social media account.

A. Ownership Issues

Ownership issues are more complex than they appear. Determining who possesses ownership rights is essential because contact information for a professional network is collected and stored within social media accounts.¹⁴⁵ For example in *PhoneDog*, the issue of ownership concerned not only the Twitter account, but also the Twitter followers and other content related to the Twitter account.¹⁴⁶ Individuals who connect with someone on LinkedIn or request to follow a Twitter account cannot be "owned" by those with whom they connect.¹⁴⁷ Social media applications are a medium of social networking and personal expression—they are not channels for consumer purchases or official documents.

With respect to the employer-employee context, the personal connections an employee develops with consumers through social media furthers the employer's desire to build brand recognition and promote business. For example, the employer in *Eagle v. Morgan* enacted a company policy requiring employees to create and maintain LinkedIn accounts.¹⁴⁸ It should be recognized, however, that social media accounts may further not only the employer's personal interest, but also advance the employee's property interest in the network the employee establishes. Employees utilize social media accounts to foster their business reputation and build a personal network to connect with family, friends, and colleagues.¹⁴⁹ The connections are not created exclusively for the employer's benefit. When an employee initiates contact through social

143. UNIF. TRADE SECRETS ACT § 2(c) (UNIF. LAW COMM'N 1985) ("In appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order.").

144. U.S. DEP'T OF JUSTICE, HANDBOOK FOR CHAPTER 7 TRUSTEES ch. 1 (May 7, 2015), <https://www.justice.gov/ust/handbook-chapter-7-trustees> (noting that a trustee in bankruptcy proceedings has the responsibility to administer the cases according to these goals).

145. See *Eagle v. Morgan*, No. CIV.A. 11-4303, 2011 WL 6739448, at *1 (E.D. Pa. Dec. 22, 2011).

146. *PhoneDog v. Kravitz*, No. C 11-03474 MEJ, 2011 WL 5415612, at *3 (N.D. Cal. Nov. 8, 2011).

147. See *id.*

148. See *Eagle* 2011 WL 6739448, at *3.

149. *Id.* at *1.

media, consumers may receive the impression that they are connecting with and possibly establishing a relationship with an actual person, as opposed to communicating with a faceless impersonal organization.¹⁵⁰ In some instances, customers value the employee over the company because the client accredits the company's brand from the interactions the client has with the employee.¹⁵¹

Beyond the legal structure of ownership rights, *CTLI* also demonstrates the difficulty of enforcing judgments with regard to control of social media accounts.¹⁵² Courts have limited authority due to the nature of social media application policies and procedures. The *CTLI* court struggled with the fact that Alcede changed the name of the Facebook page from "Tactical Firearms" to "Jeremy Alcede Entrepreneur," and was limited in compelling Alcede to revert the page's name back because Facebook's policies prohibit owners from changing a business page account's name more than once.¹⁵³ The court recommended that Wilson defer to Facebook for the requested relief.¹⁵⁴

B. Consumer Privacy Issues

Determining the exact legal status of social media will affect businesses involved in bankruptcy proceedings because the characterization of the information will determine how the estate is to be administered. Section 363 of the Bankruptcy Code provides the trustee or debtor the power to enter into transactions to use, sell, or lease estate property.¹⁵⁵ By determining that Twitter and Facebook accounts are property of the estate, the trustee is entitled to sell the social media accounts to the highest bidder.¹⁵⁶ This selling power may raise issues related to unfair business practices and consumer privacy due to the substantial amount of personal data collected on social media applications and the connections the user established.

The Federal Trade Commission (FTC) sent a letter to the Bureau of Consumer Protection to advocate for protection of consumer privacy in the *Borders* bankruptcy proceeding.¹⁵⁷ The FTC was concerned that the court's holding

150. *See id.* at *2.

151. Terry A. O'Neill, *Employees' Duty of Loyalty and the Corporate Constituency Debate*, 25 CONN. L. REV. 681, 703 (1993) ("If the employee has a direct relationship with, and valuable knowledge about, the employer's customers, that is enough to make the employee better able than any other competitor to entice those customers away when he leaves.").

152. *See In re CTLI, LLC*, 528 B.R. 359, 361–63 (Bankr. S.D. Tex. 2015).

153. *Id.* at 371–72.

154. *Id.* at 376–77.

155. 11 U.S.C. § 363(b)(1) (2012).

156. *See* U.S. DEP'T OF JUSTICE, HANDBOOK FOR CHAPTER 7 TRUSTEES ch. 8 (May 7, 2015), <https://www.justice.gov/ust/handbook-chapter-7-trustees>.

157. Press Release, Federal Trade Commission, FTC Seeks Protection for Personal Computer Information in *Borders* Bankruptcy Proceeding (Sept. 21, 2011), <https://www.ftc.gov/news-events/press-releases/2011/09/ftc-seeks-protection-personal-customer-information-borders> [hereinafter Press Release, FTC Seeks Protection]; *see also In re Borders Grp., Inc.*, No. 11-10614 (MG), 2011 WL 5520261 (Bankr. S.D.N.Y. Sept. 27, 2011).

raised privacy issues related to the significant amount of information the Borders Group collected from its customers.¹⁵⁸ Although the Borders Group had a company privacy policy that it would not share customer information without consent, the debtor was entitled to sell or transfer the customer list because it constituted a valuable estate asset.¹⁵⁹

In a similar bankruptcy proceeding, *In re RadioShack Corp.*,¹⁶⁰ the FTC sent a letter to the court-appointed Consumer Privacy Ombudsman recommending that the court place conditions on the sale of consumer information.¹⁶¹ The RadioShack customer list contained over 117 million customer names, mailing addresses, email addresses, and phone numbers.¹⁶²

State legislatures should consider enacting legislation that addresses the issues courts face with regard to the exact legal status of social media. By analogizing social media accounts to customer lists, state legislatures should be aware of the potential value social media accounts might have to business competitors. Moreover, state legislatures should carefully consider who may exercise rights associated with the consumer data collected on social media applications.

C. Additional Legal Protection Issue: Classifying Social Media Accounts as Trade Secrets

CTLI's determination that social media accounts are business assets, and therefore property of the estate,¹⁶³ raises the issue of what additional legal protections should be afforded to social media accounts. If additional legal

158. Press Release, FTC Seeks Protection, *supra* note 157. The FTC addressed the concern that Borders Group collected over 20 million customers' sensitive information, which included purchase history and email addresses. *Id.* Consumer purchase history that Borders Group collected since 2005 included "the merchandise purchased (e.g., books and videos), the location of the purchase (store, kiosk, or internet), Borders Rewards number, and, in some cases, credit card information." *Id.*

159. *Borders*, 2011 WL 5520261, at *5, *7, *13; see Press Release, FTC Seeks Protection, *supra* note 157.

160. 550 B.R. 700, 700 (Bankr. D. Del. 2015). RadioShack filed for Chapter 11 bankruptcy and put up for sale customer lists of names, e-mail addresses, and consumer purchase history. *Id.*; see also Tom Hals, *U.S. Court Should Protect Privacy of Radioshack Customers – FTC*, REUTERS (May 18, 2015, 12:28 PM), <http://www.reuters.com/article/bankruptcy-radioshack-idUSL1N0Y90ZG20150518> (noting that the customer list was auctioned off with intellectual property to help pay RadioShack debts).

161. Press Release, Federal Trade Commission, FTC Requests Bankruptcy Court Take Steps to Protect RadioShack Consumers' Personal Information (May 18, 2015), <https://www.ftc.gov/news-events/press-releases/2015/05/ftc-requests-bankruptcy-court-take-steps-protect-radioshack>; Lesley Fair, *Privacy Promises and Bankruptcy: The Latest Letter*, FED. TRADE COMM'N (May 18, 2015, 10:09 AM), <https://www.ftc.gov/news-events/blogs/business-blog/2015/05/privacy-promises-bankruptcy-latest-letter>.

162. *In re RadioShack Corp.*, Case No. 15-10197-KJC (Bankr. D. Del. Mar. 30, 2015) (finding that the "117 million" figure was admitted to by RadioShack representatives in a deposition).

163. *In re CTLL, LLC*, 528 B.R. 359, 366–67 (Bankr. S.D. Tex. 2015).

protection should be applied, then debtors and trustees may have a duty to exercise reasonable efforts to maintain the trade secret.¹⁶⁴

A trade secret classification may present a unique challenge for courts, because trade secrets are not always tangible and must be kept confidential.¹⁶⁵ *CTLI* and similar cases reveal the difficulty of applying the traditional legal framework of trade secrets to the issue of social media accounts.¹⁶⁶ Although social media accounts do not seamlessly fit into the framework of trade secret law, there are well-reasoned arguments that trade secret protection should be extended to them.

Trade secret law does not rely “upon how the asserted property interest is affected” to provide a legal remedy, but rather focuses on “the nature of the relationship that exists between the trade secret owner and the defendant.”¹⁶⁷ This approach of treating social media accounts as trade secrets would treat connections built from a social media platform in the same manner as customer lists that companies use to solicit consumer business.¹⁶⁸ Although social media is comparable to a Rolodex, in that it provides a vehicle to collect and store valuable personal data, its interactive nature distinguishes it from a customer list, which is subject to trade secret protection.¹⁶⁹

164. See UNIF. TRADE SECRETS ACT § 1(4) (UNIF. LAW COMM’N 1985).

165. See *supra* Sections I.A.3, I.B.1.a.

166. See, e.g., *CDM Media USA, Inc. v. Simms*, No. 14 CV 9111, 2015 WL 1399050, at *4 (N.D. Ill. Mar. 25, 2015) (“[T]oo 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.”); *Cellular Accessories for Less, Inc. v. Trinitas LLC*, No. CV 12-06737 DDP (SHx), 2014 WL 4627090, at *3–4 (C.D. Cal. Sept. 16, 2014) (discussing whether the effort of paying someone to gather LinkedIn connections is “significant” enough to qualify the subsequent contact list for trade secret protection); *Christou v. Beatport LLC*, 849 F. Supp. 2d 1055, 1074 (D. Colo. 2012) (stating that whether misappropriation of MySpace login information constitutes theft of trade secrets is a case of first impression); *Eagle v. Morgan*, No. CIV.A. 11-4303, 2011 WL 6739448, at *4 (E.D. Pa. Dec. 22, 2011); *PhoneDog v. Kravitz*, No. C 11-03474 MEJ, 2011 WL 5415612, at *6–7 (N.D. Cal. Nov. 8, 2011).

167. Sharon K. Sandeen, *Identifying and Keeping the Genie in the Bottle: The Practical and Legal Realities of Trade Secrets in Bankruptcy Proceedings*, 44 GONZ. L. REV. 81, 85 (2009); see also Peter S. Menell, *Bankruptcy Treatment of Intellectual Property Assets: An Economic Analysis*, 22 BERKELEY TECH. L.J. 733, 747 (2007) (the reasonable measures the owner took to protect the trade secret and the means the defendant took to acquire the information is as relevant in affording trade secret protection as the subject-matter of the confidential information).

168. Surveys provide guidance for companies for employing successful social media approaches by enhancing the company’s brand. See Corporate Executive Board, *Driving Business Results with Social Media*, BLOOMBERG (Jan. 21, 2011, 3:55 PM), <https://www.bloomberg.com/news/articles/2011-01-21/driving-business-results-with-social-media>. (“Social media provides a new vehicle for collaborating with your customers.”)

169. Hugh McLaughlin, Comment, *You’re Fired: Pack Everything But Your Social Media Passwords*, 12 NW. J. TECH. & INTELL. PROP. 87, 106 (2015).

1. First Element: Secrecy

Social media accounts, by design, do not always require users to employ a privacy feature; secrecy is not necessarily a crucial element. A social media account accrues its economic value from the spread and consumption of information through interactive channels that lead to user engagement and direct participation.¹⁷⁰ The number of followers, friends, or connections are a key measure of the economic value of a social media account because it demonstrates the ability to access an engaged audience, crowdsource ideas and feedback, and reach an untapped consumer base from the network of people linked to the account.¹⁷¹ Social media users may choose to follow a company based on a fellow connection that is already following the company.

However, this value stems from direct participation due to the public nature of the social media account.¹⁷² The value of a social media account would be potentially diminished by limiting or restricting access to the account as a result of enabling privacy settings.¹⁷³ The publicly available information of an account's contacts does not prevent competitors from using this information to their advantage.¹⁷⁴

Depending upon the number and complexity of social media contacts the owner may have, reconstructing a customer list would likely be a time-consuming, labor-intensive and expensive process.¹⁷⁵ Some courts have analogized social media followers, friends, and connections as customer contact lists, which themselves often contain names, addresses, and telephone numbers.¹⁷⁶ This comparison provides a useful explanation of why social media accounts, similar to customer lists, should be viewed as trade secrets.

It may be difficult to afford publicly accessible information trade secret protection. Courts have readily dismissed claims for misappropriation of trade secrets on the basis that the information was easily accessible and generally known in the industry.¹⁷⁷ Additionally, the legal system has not undertaken any

170. Mitchell, *supra* note 19, at 1473.

171. Indeed, people often pay for followers. See Eric Steuer, *How to Buy Friends and Influence People on Facebook*, WIRED (Apr. 5, 2013, 6:30 AM), <https://www.wired.com/2013/04/buy-friends-on-facebook/> (surveying the market price for followers on Facebook, Pinterest, Twitter, and Youtube).

172. Mitchell, *supra* note 19, at 1468.

173. *Id.*

174. See *id.* at 1472 (“While information that is generally known in an industry may be valuable to all businesses in that industry, it does not give any one business an edge over another and thus does not merit trade secrets protection.” (footnote omitted)).

175. See Mitchell, *supra* note 19, at 1488; see also Hillman, *supra* note 54, at 774.

176. *Christou v. Beatport LLC*, 849 F. Supp. 2d 1055, 1075 (D. Colo. 2012). “Plaintiffs argue that ‘the critical information consisting of these friends’ personal contact information and their permission to be contacted cannot be compiled from publicly available sources.’” *Id.* at 1076.

177. *Eagle v. Morgan*, No. CIV.A. 11-4303, 2011 WL 6739448, at *13 (E.D. Pa. Dec. 22, 2011). The court denied the motion for judgment on the pleading because LinkedIn connections

significant effort to establish a universally agreed upon legal definition of “secret.”¹⁷⁸ As noted above, the economic value of a social media account materializes from the accessible and public nature of the application.¹⁷⁹ Providing trade secret protection in some cases contradicts the purpose of social media: developing networks in a public domain.¹⁸⁰

2. Second Element: Independent Economic Value

A strong argument in refusing to extend trade secret protection to social media accounts is that the accounts do not have independent economic value.¹⁸¹ Competitors can monitor each other’s activity and adopt similar approaches to appeal to a particular consumer demographic because the social media activity is publicly available. However, businesses would not be investing millions of dollars each year into social media if these digital outlets did not yield some economic benefit.¹⁸² The value that companies derive from a customer list can sufficiently prove damages.¹⁸³ Courts have been persuaded that social media connections are similar to “customer lists” and therefore demonstrate an

did not qualify as trade secrets because it is generally known in the business community or capable of being derived from public information. *Id.*

178. *See supra* notes 59–69 and accompanying text.

179. *See supra* notes 170–72 and accompanying text; *see also* McNealy, *supra* note 19, at 50.

180. *See User Agreement*, LINKEDIN, <https://www.linkedin.com/legal/user-agreement> (last updated Oct. 23, 2014) (“Our mission is to connect the world’s professionals to allow them to be more productive and successful.”); *see also* Facebook, Inc., Registration Statement (Form S-1), at 67 (Feb. 1, 2012) (“Facebook was not originally created to be a company. It was built to accomplish a social mission - to make the world more open and connected.”); *see also FAQ*, INSTAGRAM, <https://www.instagram.com/about/faq/> (last visited Oct. 5, 2016) (“We’re building Instagram to allow you to experience moments in your friends’ lives through pictures as they happen. We imagine a world more connected through photos.”).

181. *See Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076, 1090 (9th Cir. 1986) (“To be protectible as a trade secret . . . the confidential material must convey an actual or potential commercial advantage, presumably measurable in dollar terms.” (emphasis in original)).

182. *See, e.g., Facts & Stats*, CMO COUNCIL, <https://www.cmocouncil.org/facts-stats-categories.php?view=all&category=marketing-spend> (last visited Oct. 18, 2016) (“53% [of senior marketers] are spending part of their budget on social media community growth and engagement.”); *see also* News Release, Duke Fuqua Sch. of Bus., The CMO Survey: Social Media Spending High, But Impact Difficult to Prove (Sept. 3, 2014), http://www.fuqua.duke.edu/newscontent/news_releases/cmo-survey-moorman-social-media#.VjrXMberTIW (“[S]ocial media spending is currently nine percent of marketing budgets and is expected to increase to more than 13 percent in the next year. In five years, marketers expect to spend more than 21 percent of their budgets on social media.”).

183. *Palm Springs-La Quinta Dev. Co. v. Kieberk Corp.*, 115 P.2d 548, 551 (Cal. Ct. App. 1941) (stating that the ability of a competitor to use the information on the master index card system would diminish the owner’s ability to sell the information to organizations represented in the index card system). *Palm Springs-La Quinta* recognizes the value in customer lists for companies that acquire them. *See id.* The index card system operates in a similar manner as social media accounts.

economic benefit.¹⁸⁴ Moreover, research has suggested that the use of social media does have a positive effect on businesses that choose to utilize it.¹⁸⁵

Fortunately for debtors and trustees, Section 107 of the Bankruptcy Code provides that, “on request of a party in interest, the bankruptcy court shall, and on the bankruptcy court’s own motion, the bankruptcy court may—(1) protect an entity with respect to a trade secret or confidential research, development, or commercial information.”¹⁸⁶ Section 107(b) has been applied to protect customer lists valuable data. In the case of *In re the Frontier Group, LLC*,¹⁸⁷ the court granted the debtor’s request to seal its creditor’s list of physicians’ names as a confidential customer list to prevent competitors from learning the identities of physicians with whom it contracted.¹⁸⁸ Similarly, the court in *In re Nunn*¹⁸⁹ sealed the debtor’s customer list, limiting the access of a competitor to the names and addresses of its customers.¹⁹⁰ Accordingly, the application of Section 107(b) is an alternative legal theory that may be utilized to protect social media accounts, which are similar to customer lists, as trade secrets.¹⁹¹

Legal disputes will continue to have unpredictable and inconsistent outcomes if state legislatures do not enact legislation that addresses the legal status afforded to social media applications and its corresponding data.

V. CONCLUSION

CTLI demonstrates the complexity of applying the current legal framework of trade secret protection to the digital marketplace. Courts have not uniformly adopted a bright-line test for social media and continue to address these issues on a case-by-case basis. As a consequence, social media ownership and property disputes have unpredictable and inconsistent outcomes. It is important to recognize the trend of social media branding that individuals and companies have utilized to reach the consumer. Businesses continue to invest significant resources in the use of social media accounts,¹⁹² and court decisions that extend trade secret protection to businesses’ social media accounts will have a

184. *Christou v. Beatport, LLC*, 849 F. Supp. 2d 1055, 1075 (D. Colo. 2012).

185. Susan Etlinger, *The Social Media ROI Cookbook: Six Ingredients Top Brands Use to Measure the Revenue Impact of Social Media*, ALTIMETER GRP. (July 24, 2012), <http://www.altimetergroup.com/2012/07/the-social-media-roi-cookbook-how-brands-measure-the-revenue-impact-of-social-media/> (“84% of survey respondents reported that the primary business impact of social media was not revenue generation, but ‘insight that helped us meet customer experience goals.’”).

186. 11 U.S.C. § 107(b)(1) (2012); *see also* FED. R. BANK. P. 9018.

187. 256 B.R. 771 (Bankr. E.D. Tenn. 2000).

188. *Id.* at 773–74. The court granted a Chapter 7 debtor’s motion to seal the hospital’s list of creditors, which contained physicians’ names, because competitors would be able to recruit the physicians away from the debtor. *See id.*

189. 49 B.R. 963 (Bankr. E.D. Va. 1985).

190. *Id.* at 965.

191. Sandeen, *supra* note 167, at 105.

192. *See* Corporate Executive Board, *supra* note 168.

significant impact on the business and legal communities. Although trade secret law offers one method to deal with such issues, it does not completely address all of the novel legal questions that social media account cases will likely generate when litigants battle over ownership and control of social media accounts in the courts.

