An Effective Analysis to Determine Employer Ownership of Social Media Accounts

Kaine Hampton*

Abstract

As the use of social media platforms increase, employers have recognized the monetary value of using various social media accounts such as Twitter and Instagram, for effective marketing. In cases where an employee operates a social media account for the benefit of their employer at the employer’s place of business, and it is not facially clear who owns the account, the question of ownership of the social media account and its contents becomes complex. This is mainly because this new market is ever changing and intellectual property rights and the judicial system have not been able to keep up with the social media revolution. Thus, there is not an established legal framework to apply to these issues. In the United States, the Electronic Communications Privacy Act provides a framework for adjudicating privacy violations as it relates to employer’s accessing employee’s email accounts. This framework should be expanded and used to resolve social media account disputes as well.

1. Introduction

Over the past ten years, social media platforms, such as MySpace, Facebook, Twitter, Instagram, and Vine, have emerged and changed the way in which people communicate, but more specifically, the way businesses communicate with both potential and existing customers. The birth of MySpace marked the revolution of the social media industry. The site played a

* Kaine Hampton is a J.D. Candidate, May 2015, American University Washington College of Law; B.A. Finance, 2010, University of Houston. His interests encompass both intellectual property and corporate finance. Many thanks to Professor Perry Wallace for providing invaluable insight on this topic and the legal background. Further, I want to extend my appreciation to my family and friends for providing me with countless hours of support throughout the research and writing process. I would like to specially note my parents, Annie M. Carmon and Arlette Hampton, and siblings, Ken and Kendra for their patience and assistance. Your contributions were not overlooked.
powerful role in the social events, as well as the social media industry.\(^1\) Its successors, Facebook, Twitter, Instagram, and Vine have had much success as well.\(^2\)

There is no doubt that this new means of communication has provided an avenue for what appears to be low cost advertisement.\(^3\) Most social media platforms allow for users to sign up without paying a registration fee, giving the user access to a global population with the click of a button. This emerging method of advertising allows both volume-driven companies and margin-driven companies to enter the marketplace with lessened barriers.\(^4\) If used effectively, there is a realized value attached to business accounts on these public platforms.\(^5\)

Although there may not be a substantial monetary cost to engaging in this form of communication, the legal implications are numerous. Many of them have been highlighted in Phonedog v. Kravitz.\(^6\) This case introduces a dispute between an employee and an employer, over the ownership rights of a Twitter account created by employer or employee and at work or at home. This ownership dispute will undoubtedly set a precedent and impact the responsibilities that companies give to employees with social media platform operations.

This case raises the question of what framework the court should use in adjudicating these ownership disputes. The legal issues are important mainly because this new market is ever changing, the judicial system has not been able to keep up with the social media revolution. This Note aims to decipher the ambiguity surrounding this intricate issue and provide an easy application to use in adjudication.


\(^3\) Rachel Sadon, *There’s Big Opportunity in Lower-Cost Ads*, ENTREPRENEUR (Jul. 4, 2010), http://www.entrepreneur.com/article/207314 (last accessed 29 May 2015) (advising business owners that social media marketing on Twitter is a free or low cost way of reaching the masses).

\(^4\) Steve McKee, *What Should You Spend on Advertising?*, BLOOMBERG BUSINESSWEEK (Feb. 10, 2009), http://www.businessweek.com/smallbiz/content/feb2009/sb20090210_165498.htm (last accessed 29 May 2015) (explaining that margin-oriented companies typically spend a large amount of money on marketing, while volume-driven companies tend to spend less).

\(^5\) Sadon, supra note 3 (providing companies that have experienced rapid growth and revenue increase by engaging in social media marketing).

\(^6\) PhoneDog v. Kravitz, 2011 U.S. Dist. LEXIS 129229,*2-3* (N.D. Cal. Nov. 8, 2011) (demonstrating a dispute between an employee and an employer about the ownership of a twitter account).
Section II of this Note introduces the growth of social networking and the legal issues that have arisen for employers, specifically in PhoneDog v. Kravitz\(^7\). Additionally, Section II addresses the inadequate legal frameworks that have been used, to date, to adjudicate this issue, while providing the reader with background information on the Electronics Communication and Privacy Act (ECPA).\(^8\)

Section III addresses the ECPA and why this framework should be expanded to govern disputes between employers and employees, over social media account ownership. This analysis discusses why the ECPA should be applied to Phonedog v. Kravitz and the probable outcome. Section IV of this Note addresses the importance of employers drafting relevant and timely social media policies that speak to new innovations.

2. The Non-stop Growth of Social Media Presence and Its Effect on the Judicial System

Social media platforms allow companies to engage with a target audience, with the click of a button. As companies start experimenting more and more with social media, they are realizing the value affixed to joining this revolution.\(^9\) By engaging in new ventures, companies expose themselves to legal risks. Currently, there is an insufficient legal framework that protects employers from employees that hijack company-related social media accounts. Although courts have cited the Computer Fraud and Abuse Act (“CFAA”) as a means to administer justice in these scenarios, this law does not acknowledge the positive relationship between a company’s profit and their social media presence.\(^10\) To determine an effective legal framework, employers should understand the different social networking formats that are available. With 1.15 billion people currently active on Facebook, business-savvy companies have migrated to social

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\(^7\) *Id* (demonstrating a unique case in which an employer and an employee dispute over the ownership of a twitter account).


networking. Currently 77% of Fortune 500 companies keep active twitter accounts and seventy percent have Facebook pages.

2.1. The Parts of the Electronic Communications Privacy Act

Historically, the Electronic Communications Privacy Act ("ECPA") has provided direction to employers on the basic rights of employees in their electronic communications. The ECPA is divided into several parts. The two most relevant provisions to employee’s electronic communication are commonly referred to as the Wiretap Act and the Stored Communications Act.

2.1.1 The Wiretap Act

The first provision, the Wiretap Act, focuses on the employee’s electronic communications and prohibits an employer from intercepting any electronic communication. An interception should be interpreted as acquiring any electronic communication while 1) being composed by or stored for transmission by the sender, 2) in transit to the recipient, 3) stored before being opened by the recipient, 4) being opened by the recipient, and 5) being stored by the recipient for a reasonable time period after opening the communication.

There are three exceptions to this prohibition: the consent exception, provider exception, and the ordinary course of business exception. The consent exception allows an employee to give consent to the employer’s interception of any electronic communication, precluding the employer from being in violation of the Wiretap Act. The provider exception allows

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14 S. REP. NO. 99-541 (1986) (stating the legislative intent is "to protect against the unauthorized interception of electronic communications").
15 Ariana R. Levinson, Toward a Cohesive Interpretation of the Electronic Communications Privacy Act for the Electronic Monitoring of Employees, 114 W. VA. L. REV. 461, 485 (2012) (explaining that these two titles are important means of protecting the privacy of employees’ electronic communications).
19 18 U.S.C. § 2511(2)(d)2006)("It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communications where such person or where one of the parties to the communication has given consent to such interception...").
employers to intercept employee’s electronic communications if doing so is a part of the employer’s job responsibilities.20 The ordinary course of business exception allows employers to intercept electronic communications as part of their normal procedures and day-to-day operations.21 The ECPA is not designed to interfere with routine procedures nor employer’s production so employers are allowed to access employee’s information if doing so is within the ordinary course of business.22

2.1.2 The Stored Communications Act

The second key provision, the Storage Communications Act (SCA)23 focuses closely on stored communications such as email messages and posts on password-protected webpages that remain on the employer’s system, even after the recipient has received the message.24 When an employer takes ownership of a stored communication medium without a legitimate business purpose, then the employer is in violation of the SCA.25 The legitimate business purpose exception has been extended to encompass an individual’s use of media that they are contractually authorized to use.26 If granted access to use the employer’s medium, there is not sufficient liability under the SCA.27 To determine whether there is a violation of the SCA, the

20 18 U.S.C. § 2511(2)(a)(i)(2006)(“It shall not be unlawful under this chapter, for an operator of a switchboard, or an officer, employee, or agent of a provider of wire or electronic communication service, whose facilities are used in the transmission of a wire or electronic communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service...”)
21 18 U.S.C. § 2501(5)(a)(i)(providing “electronic, mechanical, or other device” means any device or apparatus which can be used to intercept a wire, oral, or electronic communication other than any ... instrument, equipment or facility, or any component thereof, furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business); see also Freedom Calls Found. v. Bukstel, 2006 U.S. Dist. LEXIS 19685, *27 (E.D.N.Y. Mar. 3, 2006) (illustrating the court’s deference to the employer under the ordinary course of business exception, because the employer was serving the interest of the company).
22 Briggs v. American Air Filter Co., 630 F.2d 414, 419 (5th Cir. Ga. 1980) (holding an employer was justified in listening to an employee’s phone calls because he believed that the employee was disclosing company secrets, which is a legitimate concern of a business owner).
25 Monson v. Whitby Sch., Inc., 2010 U.S. Dist. LEXIS 77702, *15-16 (D. Conn. Aug. 2, 2010)(affirming that if an employer exceeds the authority provided by their role, then the employer has violated the ECPA).
26 State Analysis, Inc., 621 F. Supp.2d at 318 (explaining that because the defendant was contractually allowed to access information, the party can not be held liable under the Stored Communications Act for doing so).
27 Lasco Foods, Inc. v. Hall & Shaw Sales, Mktg., & Consulting, 600 F.Supp 2d 1045, 1049 (E.D. Mo. 2009)(defining intentional access, for purposes of the Stored Communications Act, as exceeding authorization from the proper party).
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court also looks at the intent of the alleged offender.\textsuperscript{28} The SCA expressly prohibits intentional interception of electronic communications.\textsuperscript{29} Comprehensively, these factors incorporate the needs of employers to retain a social media presence, while still ensuring employees are protected from over-zealous employers.

\textbf{2.2 LinkedIn’s Impact on Professionals}

In 2003, LinkedIn launched a social networking site geared towards professionals, and currently holds the world’s largest professional network on the Internet with more than 238 million members in over 200 countries and territories.\textsuperscript{30} Users subscribe to LinkedIn at a rate of two members per second.\textsuperscript{31} Differentiating it from other social media sites, LinkedIn promotes members to build professional profiles and gain insight to assist them in their workplace production.\textsuperscript{32} LinkedIn’s fastest growing demographics are college students and recent graduates; over thirty million of its users fall into one of these categories.\textsuperscript{33} With more updates and an expanded outreach, it is likely that LinkedIn will continue to grow at a rapid rate.\textsuperscript{34} The success of the site has not prevented employers from facing similar legal questions, as those presented in PhoneDog.\textsuperscript{35} In Eagle v. Morgan, an employee sought damages from her former employer after the employer accessed her LinkedIn account.\textsuperscript{36} Citing the CFAA, the question of ownership was left for the court to decide.\textsuperscript{37}

\textsuperscript{28} Larson v. Hyperion Int’l Techs., 494 Fed. Appx. 493, 497 (5th Cir. Tex. 2012)(disclosing that in order to violate the Stored Communications Act, there must be intentional conduct that intercepts electronic communication, as expressly required by the statute).
\textsuperscript{29} 18 U.S.C. § 2701(a); see also Larson, 494 Fed. Appx. 493, 497.
\textsuperscript{31} Id (conveying there are over 259 million registered users around the globe).
\textsuperscript{32} Business Solutions, LinkedIn, http://press.linkedin.com/business-solutions (last accessed 29 May 2015) (explaining that LinkedIn enables enterprise customers to identify the right people, engage them with content that is compelling, and then spur them into action).
\textsuperscript{33} LinkedIn, supra note 30.
\textsuperscript{34} Jill Duffy, LinkedIn, PC MAG (Nov. 1, 2012), http://www.pcmag.com/article2/0,2817,2143275,00.asp (last accessed 29 May 2015) (arguing that LinkedIn is the most developed business-and-career-oriented networking site, and one of the most important resources for people to find new jobs and opportunities).
\textsuperscript{35} PhoneDog v. Kravitz, 2011 U.S. Dist. LEXIS 129229, *2-3 (N.D. Cal. Nov. 8, 2011) (demonstrating a dispute between an employee and an employer about the ownership of a twitter account).
\textsuperscript{36} Eagle v. Morgan, 2013 U.S. Dist. LEXIS 34220 *14, *42 (E.D. Pa. Mar. 12, 2013) (stating the plaintiff initiated eleven causes of action, including: violation of the Computer Fraud and Abuse Act, invasion of privacy by misappropriation of identity, misappropriation of publicity, identity theft, conversion, tortious interference with contract, civil conspiracy, and civil aiding and abetting; the plaintiff prevailed on three of her claims against the defendant, due to the court’s finding of tortious and statutory wrongdoing).
\textsuperscript{37} Eagle, 2012 U.S. Dist. LEXIS at *14-15 (deciding that none of the plaintiff’s allegations created a genuine issue of material fact under the CFAA because the plaintiff failed to meet the CFAA’s threshold to prove cognizable damages).
2.3 Twitter Carries the Social Media Baton

More recently developed social media outlets are Twitter, Instagram, Pinterest, and Vine. Twitter’s primary function is the ability to publish 140-character status updates to public news feeds. Users are able to post videos or photos to their news feed, and others are able to “retweet” it to their own news feed, allowing content to easily go viral through the application. A tweet may start as a simple post and can eventually make it to a television broadcast because of the retweeting and search capabilities. Twitter has been such an effective tool that the site retains a heavy presence from journalist and news publications.

2.4 The Monetary Value of Operating a Twitter Account

The vast amount of users on social media has gained the attention of social media analysts, who recognize there is a correlation between social media subscribers and company profit. SumAll, a data visualization and analytics company, analyzed the potential revenue that a user can earn from operating a Twitter account. SumAll found that retweets generally averaged around $20.37 each, a diminished value in relation to an original tweet. The first tweet generates the most return and it takes about six to eight tweets a day to double the revenue earned.

Tvalue is a website dedicated specifically to calculating the worth of individual’s twitter accounts. The site assesses: the number of followers a user has, the amount of people they

44 Id (asserting that users can expect their first tweet of the day to provide a return of about $25.62).
45 Id.
follow, the amount of “list” a user participates in, and the rate at which the user gains subscribers to their account.\textsuperscript{47} Recently, this realized potential revenue, has spurred litigation in the Northern District of California.\textsuperscript{48}

\textbf{2.5 Twitter in the Workplace: PhoneDog v. Kravitz}

On July 15, 2011, PhoneDog filed a lawsuit against one of its former employees, Noah Kravitz, for his continued use of a Twitter account that PhoneDog alleges it authorized him to operate during the course of his employment.\textsuperscript{49} The parties dispute whether the account was created by PhoneDog and given to Kravitz to use, or if Kravitz created the account himself, to benefit the company.\textsuperscript{50} Kravitz also denies that PhoneDog requested that he relinquish control of the account. Instead, Kravitz alleges the company asked him to “tweet on their behalf from time to time and [he] said sure, as [they] were parting on good terms.”\textsuperscript{51}

PhoneDog reviews mobile products and services and provides users with resources needed to research, compare prices, and shop from mobile carriers.\textsuperscript{52} Kravitz was responsible for publishing both written and video content that promoted PhoneDog services, via the Twitter account, @PhoneDog_Noah.\textsuperscript{53} During Kravitz’s operation, the Twitter account generated approximately 17,000 Twitter followers.\textsuperscript{54}

Upon leaving the company, PhoneDog requested that Kravitz surrender control of the twitter account, but instead, Kravitz changed the twitter handle to @noahkravitz and continued to use the account.\textsuperscript{55} Realizing the value in the new subscribers to the company’s twitter, PhoneDog sued for $340,000 in damages.\textsuperscript{56} The Plaintiff asserted that each follower of its twitter account was worth $2.50 per month, to the company; PhoneDog argued that this valuation

\textsuperscript{47} Id (allowing users to input their twitter account credentials and produce results based off the explained criteria).
\textsuperscript{48} PhoneDog v. Kravitz, 2011 U.S. Dist. LEXIS 129229,2-3 (N.D. Cal. Nov. 8, 2011)(demonstrating a dispute between an employee and an employer about the ownership of a twitter account).
\textsuperscript{49} Id. at 11 (illustrating the facts of the case).
\textsuperscript{50} Id. at 11 (explaining that even if Kravitz created the account, he did so at the request of the company).
\textsuperscript{52} See PhoneDog, 2011 U.S. Dist. LEXIS 129229, *2 (explaining that Noah Kravitz’s job title was product reviewer and video blogger for PhoneDog).
\textsuperscript{53} Id. at 2.
\textsuperscript{54} Id. at 3
\textsuperscript{55} Id. at 3.
\textsuperscript{56} Id. at 2 (stating PhoneDog asserted claims under California law for: (1) misappropriation of trade secrets; (2) intentional interference with prospective economic advantage; (3) negligent inference with prospective economic advantage; and (4) conversion).
complies with the industry standards.\textsuperscript{57} The District Court dismissed PhoneDog’s claim because it did not sufficiently allege actual disruption of the relationship between PhoneDog and its users nor economic harm caused by Kravitz.\textsuperscript{58} PhoneDog filed an amended complaint on November 29, 2011, in which the court decided it cured the deficiencies present in the initial complaint.\textsuperscript{59}

The Phonedog v. Kravitz case introduces some complex issues to be decided upon.\textsuperscript{60} As much as some companies are inexperienced in social media use, the judicial system is too. Because the social media market is ever changing,\textsuperscript{61} as new programs are created, the court finds difficulty in adjudicating on related issues, while the specific social media program is still popular. Moving towards a cohesive ownership analysis, the Court needs a framework that assesses: whether the employer gave consent to the employee to operate the account, the control that the employer retains over the account, and how related the social media account is to the goals of the business.\textsuperscript{62}

3. Expanding the Electronics Communications Privacy Act to Social Media Account Ownership

The ECPA protects the employer’s interest and still provides protection to the employee, making this a comprehensive framework to adjudicate the ownership issue.

\textsuperscript{57} PhoneDog v. Kravitz, 2012 U.S. Dist. LEXIS 10561, *8 (N.D. Cal. Jan. 30, 2012) (articulating Kravitz’s calculation as 17,000 followers multiplied by $2.50 to determine damages of $42,500 per month he used the account).

\textsuperscript{58} Id. at *2 (explaining the court dismissed PhoneDog’s claims for intentional interference with prospective economic advantage and negligent interference with prospective economic advantage with leave to amend).

\textsuperscript{59} Id. at *2-3 (explaining that the Court previously dismissed the two claims at issue because PhoneDog had not sufficiently alleged which economic relationships were actually disrupted by Kravitz's alleged conduct and that Kravitz actually owed PhoneDog a duty of care, required to establish intentional interference with prospective economic advantage and a negligent interference claim, respectively) (citing CRST Van Expedited, Inc. v. Werner Enters., 479 F.3d 1099, 1108 (9th Cir. 2007); see also PhoneDog v. Kravitz, 2012 U.S. Dist. LEXIS 10561 at *6 (illustrating the deficiencies in the first complaint were corrected because PhoneDog asserted that because of Kravitz's alleged conduct, there is decreased traffic to the website through the Twitter account, which in turn discourages advertisers from paying for ad inventory on PhoneDog's website; to rectify the negligent interference claim, PhoneDog's asserted that defendant owed a duty of care to PhoneDog as an agent of PhoneDog).

\textsuperscript{60} PhoneDog, 2011 U.S. Dist. LEXIS 129229 at *2 (stating PhoneDog’s claims against Kravitz, which focus on disputed ownership of the Twitter account).

\textsuperscript{61} Supra Part II. B-I-D (charting the rapid growth and fast-paced nature of social media creation).

\textsuperscript{62} 18 U.S.C. § 2511 (expanding this legal framework and its factors, provides the most comprehensive assessment for this ownership issue).
3.1 The ECPA Framework and Litigation Regarding Email Disputes

The ECPA has been cited in numerous cases where an employer has accessed an employee’s email account.63 Recent litigation suggests that courts are interpreting the ECPA as a safeguard for employees from employers that intentionally open email messages that are obviously personal.64 Historically, the ECPA has not been applied in adjudication of social media account ownership.65 Yet, its current framework provides a useful means to resolve privacy disputes related to both business and personal email accounts.66

The ECPA is composed of both the Wiretap Act and the SCA; this combination provides an all-encompassing analysis to determine whether an employer has the right to access an employee’s email account and the contents of the account.67 Separately, each of these frameworks provides different rules to apply in adjudicating privacy issues.68 While the Wiretap Act provides the consent exception, provider exception, and ordinary business purpose exception, the Stored Communications Act provides the legitimate business purpose analysis.69

3.2 The Parallel between Email and Social Media Accounts

Email is the most used form of electronic communication in the workplace.70 Comparable to social media applications, email messages allow users to share electronic messages with someone else.71 Replying on Twitter and through email is an important feature for both.72 On Twitter, you can reply to anyone publicly, by simply adding their username in a

63 E.g., Brahmana v. Lembo, 2009 U.S. Dist. LEXIS 42800, 6 (N.D. Cal. May 20, 2009) (applying the ECPA to a claim that an employer captured an employee’s personal email password by using software and hardware monitoring tools).
64 Id. 2009 U.S. Dist. LEXIS 42800,*7-8 (administering the ECPA to the plaintiff’s claim that his employer accessed his personal email account and read personal messages.
65 Id (detailing a case where the analysis was applied to an email dispute).
66 Id (applying the ECPA framework to an employer-employee e-mail dispute).
67 Levinson, supra note 15 (narrowing the focus of the ECPA to the Wiretap Act and the Stored Communications Act).
69 Levinson, supra note 15, at 487; see also State Analysis, Inc., 621 F. Supp.2d at 318 (finding an employer that was contractually allowed to access an employee’s information, is protected under the legitimate business purpose exception).
70 Bill Miltenberg, E-Mail Still the Most Popular Digital Communication Platform, PR NEWS (Mar. 28, 2012), http://www.prnewsonline.com/water-cooler/2012/03/28/e-mail-still-the-most-popular-digital-communication-platform/ (last accessed 29 May 2015) (declaring social networking usage continues to lag behind e-mail in every country; 85% of the 19,216 adults from twenty four countries surveyed, cited e-mail as their top online activity).
71 Naomi Whitmore, Understanding Twitter: Why Twitter is Less Like Facebook and More Like Email, BIZNIK (Mar. 20, 2009). On file with the Author (recognizing that interaction on Twitter is very similar to email).
72 Id (comparing the reply features of both Twitter and email and the usefulness of the feature).
post and sending. Similar to email, there is also an option to message someone privately, which is accomplished through a direct message. The direct messaging service is a feature that allows messages to remain accessible to only the sender and recipient. Twitter is also known for its retweeting function, which serves the same purpose as the forward function in email. If someone posts something interesting that a user would like to share with their subscribers, they are able to do so by retweeting.

Users can also retweet with comment, which is similar to forwarding an email with a new message attached. This feature allows companies who are present on social media to build a personality with their brand. By engaging with users and contributing to discussion, companies are able to attach their personality to their brand. Lastly, the hashtag function on Twitter is analogous to an email’s subject line. Using a hashtag is optional when operating a Twitter account, but it allows users to easily track the use of a topic or subject. By doing this, the user allows Twitter to catalog all posts ever made on the application with that subject.

3.3 The Inability of the CFAA to Adequately Address Social Media Account Ownership

The court in Eagle v. Morgan was presented with a dispute over a LinkedIn Account. The plaintiff asserted a claim under the CFAA. To succeed under a CFAA claim, the injured party must be able to prove that he suffered a “loss” as “any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service.”

The employee in Eagle, claimed that part of her “loss” was derived from missed opportunities

73 Id (establishing how to use the reply feature on Twitter).
74 Id. (conveying that a direct message is a private message that users can send to each other without the public’s view).
75 Id (describing the direct message function).
76 Id (demonstrating the similarities between Twitter’s retweet function and the forwarding function in email messaging).
77 Sadon, supra note 3 (elaborating on how companies are able to build fan bases by engaging in social media).
78 Id.
79 Whitmore, supra note 71 (explaining that users can add a hashtag by typing the # symbol, followed by your tag word or term of choice without a space).
80 Id (maintaining hashtag is a method to “tag” a tweet, in order to make it easier to find by searching).
82 Eagle, 2012 U.S. Dist. LEXIS 143614, *8-9 (citing 18 U.S.C. § 1030(g))(stating “any person who suffers damage or loss by reason of a violation of this section may maintain a civil action against the violator”) (requiring a plaintiff to allege 1) intentional access; 2) of a protected computer; 3) without authorization; 4) that causes damage; and 5) loss).
because her former employer had taken control of her LinkedIn account, preventing her from maintaining important business relationships.\textsuperscript{83} The claim failed because the statute does not take reputational damage in account.\textsuperscript{84} Similarly, in Clinton Plumbing & Heating of Trenton, Inc.,\textsuperscript{85} the plaintiff’s claim under the CFAA partly failed because his alleged losses were related to consequential and reputational damage arising from the defendant’s alleged conduct.\textsuperscript{86} “This is not the type of loss envisioned by the drafters of the CFAA.”\textsuperscript{87}

As it relates to social media account disputes, the CFAA’s definition of loss is a shortcoming that places employers at a disadvantage.\textsuperscript{88} The court needs a framework that realizes the monetary loss that an organization experiences from an interruption in social media operation. There is a stronger nexus between revenue lost and employer’s inability to effectively communicate with its potential customers, than the CFAA acknowledges.\textsuperscript{89} Business development is a vital part of growing an organization, thus it is important for employers to maintain and establish relationships with potential client groups.\textsuperscript{90} Nowadays, communicating with subscribers on Twitter serve a legitimate purpose for companies, it is a method to advertise, establish networking connections, and develop new customers.\textsuperscript{91}

\textsuperscript{83} Eagle, 2012 U.S. Dist. LEXIS 143614, *11 (asserting the plaintiff’s claim she suffered damages in connection with (1) her efforts to regain control of her LinkedIn account; (2) her legal fees, including drafting the Complaint necessary to regain control of her account; (3) her inability to respond to inquiries and maintain relationships; and (4) missed professional opportunities).
\textsuperscript{84} Id. at *15 (dismissing the plaintiff’s response to the defendant’s summary judgment motion because under the CFAA, cognizable damages do not include the loss of potential business opportunities or the harm to business relationships).
\textsuperscript{86} Id. at *23 (denying the plaintiff’s alleged damages, which included loss of assets; overdraft fees; returned check fees; late fees; reputational damages arising from a damaged credit score; and termination of certain contracts due to insufficient funds for payment; because the losses were consequential of the alleged fraudulent transactions committed by the defendant).
\textsuperscript{87} Id. at *25 (determining the plaintiff did not set forth plausible facts allegations regarding the damages and loss elements of a CFAA claim).
\textsuperscript{88} Id. (exposing the high threshold that a party must prove losses under the CFAA, forcing the plaintiff to fail on the damages claim).
\textsuperscript{89} Sadon, supra note 3 (discussing the financial advantages that companies gain from social media presence).
\textsuperscript{91} Kerr, supra note 12 (explaining that some Fortune 500 companies use social media to engage its vendors, partners, customers, and others in ways they could not image when their corporations began).
3.4 Expanding the ECPA to Govern Social Media Accounts

In cases that involve email accounts, the ECPA analysis assess: whether employees provided consent to their employer to access their account, whether the employer’s access to the account is incidental to the employer’s role, whether the employer needs access to the account to fulfill the business goals, whether the employer has a legitimate business interest that would benefit from having continued access to the account, and the employer’s intent. As for social media accounts, this analysis should be expanded to assess: whether employers provided consent to an employee to operate the account, whether the operation of the account is within the employee’s job description, whether operating the account fits within the ordinary scope of business, whether the employer retains legitimate business interest in the ownership of the account, and the employer’s intent.

This ECPA expansion provides a workable framework for the core ownership issue in PhoneDog. By applying the case facts to the legal framework, the court should rule in PhoneDog’s favor and the company should retain ownership of the twitter account.

3.4.1 The Consent Analysis

Under the first part of the analysis, the court would assess whether PhoneDog gave consent to Kravitz to operate the account. If it is determined that PhoneDog did give consent, this factor should weigh in PhoneDog’s favor because it validates PhoneDog’s alleged ownership of the account before Kravitz’s use. For email privacy, the court has held that judicial order is not necessary when one party consents to interception by use of electronic equipment.

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92 Levinson, supra note 15, at 487 (detailing the analysis provided by the Wiretap Act); see also State Analysis, Inc., 621 F. Supp.2d at 318 (discussing the SCA’s focus on a legitimate business interest).
93 Cf. 18 U.S.C. § 2511 (expanding the following ECPA factors: consent, provider, ordinary course of business, and legitimate business purpose, allows the framework to govern social media accounts).
94 PhoneDog, 2011 U.S. Dist. LEXIS 129229.
95 18 U.S.C. § 2511(2)(d)(providing the consent analysis under the ECPA, which precludes a party from ECPA violation if they can prove they were given consent to access the electronic device).
96 Cf. 18 U.S.C. § 2511(2)(d)(following the application of the consent exception in analyzing disputed email violations, if an employee consents to an employer’s use, there is no violation).
97 E.g. People v. Patrick, 46 Mich. App. 678, 683 (Mich. Ct. App. 1973)(explaining that if an employee consents to the use of the electronic communication the employer is precluded from being in violation of the statute); See 18 USCS § 2511(2)(c)(stating “it shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception”).
Power Boot Camp, it was determined that when a manager requests an employee to perform a function, employees have the opportunity to refuse or withdraw consent to such functions.98

Consenting to an interception is a method for employees to notify the employer they are aware of the possible interception.99 If an employee has an issue with the employer’s access to their email account, they are allowed to deny or withdraw consent.100 By withdrawing consent, the employee has rejected the duty and divorced themselves from the responsibility.101 Without giving consent to their employer, an employee is not bound to the regulations and the supervision of their employer in operating a social media account. Thus the account is not a business account. Instead it is a personal account.102

For purposes of PhoneDog, the court needs to determine whether PhoneDog gave consent to Kravitz to operate the twitter account.103 Although the facts of the case detail a dispute between PhoneDog and Kravitz over who created the account, both parties acknowledge that PhoneDog authorized Kravitz’s use of the account.104 Also, both parties acknowledge that PhoneDog was aware of Kravitz’s operation of the account during his employment.105 Because Kravitz consented to operating the account, under the authorization of PhoneDog, the facts support PhoneDog’s claim that it owned the account.106 The twitter account was used to help develop the personality of PhoneDog’s brand and provide advertisement for the company. Kravitz accepted this responsibility when he began to tweet and post on behalf of and for the benefit of PhoneDog. Following the rationale in Pure Power Boot Camp, PhoneDog and Kravitz both agreed to Kravitz’s Twitter use, thus Kravitz consented to PhoneDog’s supervision.107

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98 Pure Power Boot Camp, 587 F. Supp.2d 548, 562 (explaining that employees have a right to refuse or withdraw consent to monitoring).
99 Id. at 562 (supporting the assertion that if you refuse or withdraw consent, you must be aware of the interception).
100 Id. at 562.
102 Id. at 680-83(examining the importance of gaining a person’s consent, if the party does not have authorization to the interception).
103 Id. at 680-83.
104 PhoneDog, 2011 U.S. Dist. LEXIS 129229, *2 (explaining that Noah Kravitz was responsible for publishing reviews and other content on the @PhoneDog_Noah Twitter account).
105 Tom Klein, Kravitz v PhoneDog Twitter lawsuit-The Real Story PhoneDog, PHONEDOG, (Jan. 3, 2012 5:00PM), http://www.phonedog.com/authors/tkdog/ (last accessed 29 May 2015) (clarifying that both PhoneDog and Kravitz was aware of the twitter operation to benefit the company).
107 Cf. Pure Power Boot Camp, 587 F. Supp.2d 548, 562 (discussing the threshold for consent, which requires clear knowledge of what an employer will access).
Kravitz’s deference to PhoneDog in operating the twitter account, weighs in favor of PhoneDog’s ownership claim.

3.4.2 The Provider Analysis

The second factor to weigh is whether the employee’s operation of the social media account is within the employee’s job description. This question cannot always be answered easily. The analysis is an expansion of the provider exception of the Wiretap Act, which acknowledges that some employer control of electronic communication is incidental to the employer’s role of providing that communication. Because every employee does not sign an employment contract, nor have a written list of their duties and responsibilities, determining whether an action is within an employee’s duties can be complex. Also, many cost-efficient companies are constantly revising employee’s duties to prevent having to hire a new employee, invest in more training, and allocate more company resources.

To establish whether an action is within an employee’s job duty, the court should evaluate whether the employee was being compensated for the action. Thus, if an employee is compensated for operating a social media account, the employee is performing an act that is considered a job duty, allowing the employer to retain regulation and authorization rights. If the employee is compensated for their operation, the second factor of this analysis would weigh in favor of the employee’s ownership, per the expansion of the provider exception. If the employee was not being compensated for their operation of the account, it strengthens the employee’s argument that he was not bound to any employer restrictions in operating the

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108 Cf. Berry v. Funk, 146 F.3d 1003, 1009 (D.C. Cir. 1998)(holding that an employer did not fall within the course of business exception because there was no evidence that monitoring the employee’s call was a standard practice nor was the employees put on notice).

109 18 U.S.C. § 2511(2)(a)(i)(2006)(“It shall not be unlawful under this chapter, for an operator of a switchboard, or an officer, employee, or agent of a provider of wire or electronic communication service, whose facilities are used in the transmission of a wire or electronic communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service...”)


111 Cf. 18 U.S.C. § 2511(2)(a)(i)(providing an employer is not in violation of the ECPA if the employee’s use of the intercepted communication is incident to employment).

112 18 U.S.C. § 2511(2)(a)(i)(articulating the provider exception, ”It shall not be unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of a provider of wire or electronic communication service, whose facilities are used in the transmission of a wire or electronic communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the provider of that service...”).
account, because there was not a provider involved.\textsuperscript{113} Thus, the employee has the ownership rights and autonomy over the control of the account. Here, Kravitz was a compensated employee of PhoneDog.\textsuperscript{114} Kravitz’s compensation was based on various responsibilities. He was compensated for both published and unpublished articles that he wrote on behalf of the company and for the company.\textsuperscript{115} Kravitz accused PhoneDog of bringing the ownership litigation to court in retaliation to this claim.

Although this issue is still being litigated, it clouds the question of whether Kravitz was compensated specifically for operating the social media account. Kravitz had numerous job responsibilities, thus different fulfillments for compensation.\textsuperscript{116} His initial motion to dismiss does not allege that the unpaid wages are derived from his Twitter operation; he just accused PhoneDog of withholding some of his earned wages.\textsuperscript{117} PhoneDog did not acknowledge it failed to pay wages to Kravitz for his time of employment. Based off the length of time Kravitz worked for PhoneDog and the language in Kravitz’s motion to dismiss, it is likely that the court would find that Kravitz was compensated for his operation of the twitter account.\textsuperscript{118} This factor would then weigh in the favor of PhoneDog; finding that PhoneDog did compensate Kravitz for his Twitter operation affirms managing the account was a part of Kravitz’s job responsibilities.

### 3.4.3 Ordinary Scope of Business Analysis

The third factor to consider is whether the account use fits within the ordinary scope of business. This part of the analysis is an expansion of the Wiretap Act’s ordinary course of business exception.\textsuperscript{119} This exception was put in place to affirm that businesses would not be handicapped because of regulations against intercepting employee’s email accounts.\textsuperscript{120} By

\begin{itemize}
  \item \textsuperscript{113} Id (defining provider as a person whose facilities are used in the transmission of a wire or electronic communication in the normal course of employment).
  \item \textsuperscript{114} PhoneDog, 2011 U.S. Dist. LEXIS 129229, *2 (explaining Kravitz’s job duties while at PhoneDog).
  \item \textsuperscript{115} Id. at *2 (alleging that in addition to Kravitz’s base salary, he was given a monthly fee for other works he did on behalf of the company; he received a percentage of PhoneDog’s revenue and profits the company made).
  \item \textsuperscript{116} Id. at *2 (listing Kravitz’s job duties as reviewing mobile products and providing users with resources needed to research, compare prices, and shop from mobile carriers).
  \item \textsuperscript{117} Id. at *4 (referencing Kravitz Mot. to Dismiss) (alleging that he was owed “substantial unpaid wages and profits” which he unsuccessfully attempted to resolve outside of the judicial system with PhoneDog).
  \item \textsuperscript{118} Id. at *2-*4 (detailing Kravitz was employed with PhoneDog for over four years).
  \item \textsuperscript{119} 18 U.S.C. § 2501(5)(a)(i)(providing the ordinary scope of business exception, which means the use of any intercepted electronic communication service in the ordinary course of its business is not a violation of the ECPA).
  \item \textsuperscript{120} S. REP. NO. 99-541 (1986) (stating the legislative intent is "to protect against the unauthorized interception of electronic communications", not to disable employers from meeting operational needs).
\end{itemize}
applying this factor to the issue of social media account ownership, the court can prevent employers from being handicapped in reaching their ordinary business objectives.

In conducting this analysis, the court has to calculate how the use of the social media account assists the company in reaching its ordinary business objectives. PhoneDog’s CEO Tom Klein, says the website was developed “to provide the consumer with un-biased reviews and interesting mobile-tech content.” During the time of the dispute with Kravitz, PhoneDog was in the “stages of becoming the personality-driven mobile tech review site it is today.” PhoneDog’s website allows users to comment and share articles from the website onto their social media pages. These goals and objectives emphasize the importance of PhoneDog’s ability to maintain a social interface with its consumers.

There are numerous companies and individuals that provide reviews and feedback on products. Because this industry is very competitive and has a wide range of providers, companies and individuals have to distinguish themselves in order to secure loyal consumers. For the blogging field, the industry standard has moved towards taking advantage of social media and all that it has to offer. In order to remain relevant and popular amongst consumers, social media access is pertinent. PhoneDog’s website is constructed to allow users to comment, and share articles onto their social media pages, including Twitter and Facebook. Tweeting and commenting on the website’s articles is within the technical capabilities of the site and also an essential activity for PhoneDog to measure their product and the consumer’s reception. PhoneDog would be handicapped if they were not permitted to use social media as an avenue to relay information to consumers. PhoneDog’s competitors would still be able to communicate and advertise via social media, which would put PhoneDog at an even further

121 Cf. Freedom Calls Found. v. Bukstel, 2006 U.S. Dist. LEXIS 19685 at *27 (assessing whether an employer’s behavior was within the ordinary scope of business by focusing on whose interest is being served).
122 Tom Klein, supra note 105 (illustrating PhoneDog’s desire to differentiate itself from other companies by providing quality technology reviews).
123 Id. (quoting CEO and Founder of PhoneDog, Tom Klein as he describes the developmental stage of PhoneDog when Kravitz handled the Twitter operation).
125 Paul Glazowski, 10+ Sites for Product Reviews from Experts and Consumers, MASHABLE (Jul. 18, 2008), http://mashable.com/2008/07/18/product-reviews/ (last accessed 29 May 2015) (listing some of the most used websites for product reviews).
127 Sadon, supra note 3.
129 Id.
disadvantage. The court looks to prevent these types of negative effects that disenfranchise businesses and their operations.\(^{130}\)

Instead, PhoneDog should be able to reach their goals and objectives of the business without interference.\(^{131}\) Because the twitter operation is so integral to PhoneDog’s goals of being a personality-driven and top provider of un-biased reviews in mobile technology, the court would likely evaluate the twitter account as an operation within the ordinary scope of business.

### 3.4.5 Legitimate Business Interest

The court would likely find that PhoneDog retains a legitimate business interest in ownership of the twitter account. This analysis is an expansion of the Stored Communications Act’s legitimate business interest exception.\(^{132}\) Following the ordinary scope of business analysis, PhoneDog’s need for social media presence hinges on the product they are providing. Technology reviews are only useful if consumers actually read or watch them.\(^{133}\) Without traffic to the company’s website, the company’s mission of providing consumers with quality reviews, is not reached. The legitimate business purpose here is to connect consumers with the reviews provided by PhoneDog. The twitter account was a legitimate business interest because it was a vehicle to satisfy the company’s objectives.\(^{134}\) During Kravitz’s operation of the account, the twitter account gained 17,000 followers.\(^{135}\) PhoneDog would benefit tremendously from turning those 17,000 followers into loyal consumers that advertise their website for them. The Twitter use helps make this goal a lot more attainable for PhoneDog. By actively engaging in Twitter, PhoneDog has been able to gain more traffic to their website and in turn gain more loyal consumers.\(^{136}\) Thus, Kravitz’s operation of the account was in furtherance of PhoneDog’s legitimate business interest.\(^{137}\)

\(^{130}\) Cf. Briggs v. American Air Filter Co., 630 F.2d 419 (illustrating the court’s protection of an employer with genuine business objective).

\(^{131}\) Id.


\(^{133}\) Glazowski, supra note 125.

\(^{134}\) Briggs v. American Air Filter Co., 630 F.2d 419 (illustrating the court’s goal of protecting an employer with genuine business objective).

\(^{135}\) PhoneDog, 2011 U.S. Dist. LEXIS 129229, *3 (asserting the growth of followers to the Twitter account, under Kravitz’s operation).

\(^{136}\) Kerr, supra note 12 (discussing the positive correlation between social media use and gathering a fan-base).

Also, under the SCA analysis, the court views the intent of the employer in accessing the email accounts of employees. If that employer was acting knowingly, without authorization, the court is likely to decide in favor of the employee. If the employer was not exceeding their authorization, the court would likely view the interception in favor of the employer.

Expanding this analysis to social media account ownership, the court needs to assess whether the employer intended to give account access to the employee, outside the scope of employment. If the employer intended to let the employee continue to use the social media account, after they left the company, then the employee has some ownership interest. Here, Kravitz claims that PhoneDog gave him permissions to use the account after he left the company. He further claims that PhoneDog asked him to make certain posts after he left the company, acknowledging that they were aware of his continued use of the account. PhoneDog denies these allegations and asserts that upon him exiting the company, they requested he relinquish control of the account, in which he did not. The court would likely have difficulty in assessing the intent of PhoneDog from the facts alleged, therefore, the decision would be adjudicated with a large emphasis on the other four factors.

Under this expanded ECPA analysis, the court in Phonedog v. Kravitz would likely conclude that the employer retained ownership to the twitter account. Expanding the use of the ECPA to ownership disputes of social media accounts will provide the judicial system with a cohesive and timely framework to adjudicate this emerging issue.

4. Necessary Steps for Employers to Prevent Ownership Disputes

To prevent these ownership disputes, employers have several options. Firstly, it is imperative that employers assume corporate responsibility and conduct a formal risk assessment of the risk and rewards of having an employee operate a company-related social media account. Secondly, employers should provide their employees with all encompassing social media

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138 Larson v. Hyperion Int’l Techs., 494 Fed. Appx. At 497 (disclosing that in order to violate the Stored Communications Act, there must be intentional conduct that intercepts electronic communication, as expressly required by the statute).

139 Id. at 497 (stating unauthorized access to electronic communication is a violation of the ECPA).

140 Id. at 497.


142 Id. (expressing Kravitz’s view of what happened when he departed from PhoneDog).
policies within their employment contracts, to prevent ownership disputes. The employee contract should address current, emerging, and future social media programs.

In such an innovative society as ours, it is imperative that employers keep up with new means of electronic communication. Social media helps drive companies revenue, thus it requires great attention and strategic planning from management. Employers can instruct their legal or business development teams to actively research newly developed social media programs to identify any potential legal implications. Through active subscriptions and participation in organizations that focus on social media startup companies, employers can keep their eye out on this unstable prism. It is important to carefully select which employees are allowed to operate a social media account, for the benefit of the employer. This person has a very powerful role within the company, and will have the ability to single-handedly promote or destroy the company’s brand.

Some employers demand employees to give them access to their social media accounts so they can monitor speech inside and outside the workplace. States have begun to pass legislation that outlaws this behavior because of free speech concerns. Therefore the most concrete ways to administer the company’s brand are to thoroughly evaluate the employee and provide strict guidelines.

Employers need to draft stronger social media policies to safeguard their ownership rights. The language in these contracts should clearly inform the employee that the company owns any social media account that is used on behalf of the company, as the account and the subscribers are the property of the company and not the employee. Because social media information has the ability to spread rapidly, not addressing social media use or hoping it will not affect the employer’s business is risky.

Social Media policies need to carefully define standards of an employee’s duties and conduct, and explain whether an employee has the ability to speak on behalf of the company,

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143 Ann C. McGinley & Ryan P. McGinley-Stempel, Beyond the Water Cooler: Speech and the Workplace in an Era of Social Media, 30 Hofstra Lab & Emp. L.J. 75, 80 (2012) (discussing the debate amongst employers and lawyers on whether employers have the right to request employees hand over the credentials for their personal social media accounts).
144 Id. at 80 (articulating, States as well as the National Labor Relations Board have taken the position that the National Labor Relations Act protects some employees from discipline for employee’s speech on social media).
145 Susan C. Hudson & Karla K. Roberts, Business Leadership Symposium: Drafting and Implementing an Effective Social Media Policy, 18 Tex. Wesleyan L. Rev. 767, 768 (2012) (discussing the vulnerability of employers who do not have a social media policy in place).
while listing any restrictions to that ability. Consequently, this will help avoid the question of ownership because although the account is employee-operated, it is employer-controlled.

Employer’s policies and procedures should be reflected in the drafting of the social media policy to instill the company’s values and culture is preserved. Employers should also reference specific social media accounts that the company use or plan to use. There should be clear limits described in the policy that protects employee’s rights while still balancing the need for employers to retain their ownership interest. The policy should be developed, monitored and enforced by management.\(^\text{146}\) Companies, such as Microsoft have created social media FAQ’s for their employers to reference when participating in a social media account for the benefit of the employer. Their guidelines expressly require employees to get approval before setting up an account that is on behalf of the company or sub group in the company.\(^\text{147}\)

As part of the development process, the employer should train its employees on the policy and ensure they understand what the policy says and how it applies to their job.\(^\text{148}\) To avoid liability, the employer should also ensure the Human Resources department is proficient with the policy’s rules since they are tasked with making employment decision and guidance in the training process.\(^\text{149}\) Disciplinary actions should be put in place for those that deviate from the policy, to disincentive employees from behaving outside of the operation guidelines.

Employers are tasked with striking the balance between lowering their risk exposure and accomplishing their goals. If an employer is receiving the benefits of having a social media presence, they should be prepared to minimize the possible legal consequences of participating in the revolution. It is important to remain aware of changing laws and the developing social media formats. It is the responsibility of the company to advocate in their own interest and create an impermeable structure that would discourage rogue behavior.

\(^{146}\) \textit{Id.} at 791 (advising employers on methods to ensure that the entire workplace has a cohesive understanding of the social media guidelines).

\(^{147}\) Social Media Governance. On file with the Author.

\(^{148}\) \textit{Id.} at 769.

\(^{149}\) \textit{Id.} at 792 (explaining the importance of having hiring and training personnel on the same page, as it relates to instituting policies).
5. Conclusion

The ECPA analysis should be expanded to employer disputes over social media account ownership; this expansion will remedy the judicial system’s inability to keep up with litigation related to the rapid-changing social media market. Social media is a great resource for all businesses, but nonetheless, employers have to protect their brand and their property accordingly. With a cohesive legal framework, companies can operate their social media accounts within the necessary boundaries and still reap the benefits of social media.