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Like This: Evaluating Social Media Accounts as Property of the Estate

By John G. Loughnane*

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I. Introduction

The term “social media” does not appear in the United States Bankruptcy Code but it is starting to appear in judicial decisions construing the Code. Indeed, the widespread adoption of social media by both businesses and individuals means that bankruptcy courts will need to assess the impact of insolvency on social media accounts with increasing frequency. Fundamental to any insolvency proceeding is the determination of property of the estate. Identifying, recovering and maximizing the value of estate property are essential components of any bankruptcy process. When it comes to social media accounts, parties (including the debtor, creditors, potential asset buyers and others) and courts would benefit from a framework to help make the determination.

The United States Bankruptcy Court for the Southern District of Texas wrestled with issues of ownership of various social media accounts recently in *In re CTLI, LLC*.¹ This article discusses the factors considered in the *CTLI* decision (referred to below as the “CTLI Descriptive Factors”) in determining that the particular social media accounts at issue in that case constituted property of the estate. The article then explores how ownership of social media has been addressed in other contexts such as employer/former employee disputes. Also considered are state legislative initiatives regarding ownership and access. Finally, the article proposes a framework for consideration of additional factors in future determinations of whether a

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social media account constitutes property of the estate of a debtor (referred to below as the “Rights Factors”). Resolution of future disputes about ownership of social media accounts should include not only consideration of the CTLI Descriptive Factors but also an analysis of Rights Factors.

II. Social Media Overview

Social media adoption and usage has exploded in popularity over the past decade. Most businesses, regardless of size, incorporate some amount of social media into their sales and marketing efforts. Businesses benefit from social media usage by forming a closer connection with their customers through the use of two-way direct communication. Businesses that adopt social media strategies also benefit by learning more about the demographics of existing and targeted customers. Individuals use social media to maintain and build relations and to otherwise express their views on matters large and small.

The most common social media platforms today include Facebook, Twitter and LinkedIn. Other popular platforms are Instagram where users can post photos using smartphones; YouTube, where users can share videos; Pinterest, where users can organize images and videos into individualized visual collections, known as ‘pinboards’; and Tumblr, where users can share thoughts and comments through blog posts. New platforms develop seemingly out of nowhere and catch on like wildfire. At the same time, other networks, once seen as vibrant, can lose traction. MySpace is often cited as an example of a platform that has diminished in usage since its early years.

III. CTLI Descriptive Factors

The chapter 11 proceedings of CTLI received some publicity and notoriety in 2015 — and not because of the nation’s sudden rapture with the intricacies of the Bankruptcy Code. Instead, the case received attention due to the arrest and detainment of the former owner of the chapter 11 debtor per order of the United States Bankruptcy Court for the Southern District of Texas. Some time prior to issuing the arrest warrant, the court had determined that certain social media accounts which promoted the gun shop and shooting range business conducted by the debtor constituted property of the debtor’s estate.² The former owner disagreed believing that the accounts were his own personal property and not assets of the chapter 11 debtor. Despite an order requiring turnover of account passwords to two social media accounts, a Facebook page and a Twitter account, the former owner refused to comply. After several weeks in a federal detention center, the former owner reconsidered and complied with the order thus enabling the new owner of the business to access the accounts. The imprisonment of the former owner for failure to divulge social media passwords drew the attention of local³ and national⁴ media as well as other commentators.⁵ Bankruptcy professionals too took notice of the case for the novelty of the topic of social media as property of the estate. Because the decision is certain to be cited in the future on the topic, it is necessary to understand the key background facts and the factors central to the opinion.

A. Background

After CTLI commenced its voluntary chapter 11 proceeding, the court permitted a minority shareholder of the company to propose a plan of reorganization which was subsequently confirmed.⁶ Under that plan, the entire ownership of the debtor's business was transferred to the plan proponent who intended to continue to run the operation as a going concern. The confirmation order required the former majority owner to deliver "possession and control" of the "Debtor's social media accounts including but not limited to Facebook and Twitter" to the new owner of the reorganized business.⁷ At a status hearing held after the confirmation order entered, the court learned that the former majority owner had not complied with that aspect of the order.

The court then took a series of steps to obtain compliance with the confirmation order including entering an order of contempt and conducting a hearing on the issues.⁸ As a result of that hearing, the former majority owner agreed to have a neutral third party attempt to separate "personal aspects" of the accounts from "business aspects." Apparently, however, the former majority owner objected to the particular form of order presented to the court to allow a consensual resolution of the issues through the services of the third party.⁹

With no solution in hand, the court held a further hearing in February 2015 to hear testimony and consider evidence on the ownership issue.¹⁰ The court then, on April 3, 2015, rendered its comprehensive written opinion rejecting the former majority owner's arguments that the Facebook Page and Twitter account at issue were his personal accounts. Instead, the court concluded that the accounts were property of the debtor's bankruptcy estate which the new business owner was entitled to control as assets of the reorganized debtor.

Not persuaded by the court's analysis, the former majority owner turned himself into U.S. Marshals on April 9th and was detained in a federal detention center for failure to comply with the turnover order. At a hearing the following week, the court refused to reconsider its detention order. According to reports, the court remarked: "I don't think I'm doing my job as a judge if I don't enforce my own orders."¹¹ Ultimately, on May 27th, the former majority owner appeared before the court, complied with the turnover order and was released from federal detention the same day.¹²

B. Analysis — CTLI Descriptive Factors

As noted above, the CTLI opinion concluded that the Facebook Page and Twitter account at issue were "business social media accounts" that constituted property of the debtor's estate and were not "individual social media accounts".¹³ In holding the accounts to be property of CTLI, and not personal property of the former majority owner, the court considered a variety of factors including:

- the Facebook Page linked directly to the company's webpage;
- the Facebook Page was used to post status updates relating to, and promoting the business;

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- the former majority owner granted other employees access to the Facebook Page for the purpose of posting business-related status updates;
- pursuant to Facebook terms and conditions, the Facebook Page such as the one in dispute could only be created for “businesses, brands and organizations,” while a Facebook personal profile could be created by any individual; and¹⁴
- the Twitter account was named after the business, contained a description of the business, and was linked to the business’s web page

(collectively, the “CTLI Descriptive Factors”).¹⁵ Largely relying on these factors as the basis for its analysis, the court concluded that the Facebook Page and Twitter account were property of the estate of CTLI (and thus the property of the reorganized business now controlled by the successful plan proponent). The court stated that it need not concern itself with calculating the portion of goodwill resulting from the social media accounts that was attributable to the former majority owner in his individual capacity, from the portion attributable to the business. The court recognized that some of the accounts’ “fans” and “followers” were likely a result of the former majority owner’s professional goodwill, but dismissed the issue, stating that any truly professional goodwill would follow the professional. The court summed up by observing that: “[A]t the core of this dispute is a familiar story of a disgruntled former business partner attempting to stymie his former associate by seizing control of assets that do not belong to him.”¹⁶

While the court’s sentiment is understandable given the particular facts and procedural history of that case, future cases involving disputes over ownership of social media assets will benefit from consideration of additional factors beyond the CTLI Descriptive Factors. Indeed, when looked at in isolation, the CTLI Descriptive Factors would not suffice to resolve future disputes. For example, it is quite simple for an individual to create a social media account which links to the website of any company but doing so should not mean that the company becomes the owner of the individually created account. Instead, the company would need to rely on nonbankruptcy law, such as trademark law, to protect its rights to prevent unlawful usage of its marks.¹⁷ Similarly, the fact that an individual creates a social media account that is used to post status updates relating to or promoting a business should not mean that such account becomes property of the business being mentioned or promoted. Again, the business owner would have rights to protection of its intellectual property such as trademarks and copyrights. An individual does not lose rights to express his or her opinions or positions (perhaps supporting a business; perhaps not) just because such expression takes place on a social media forum. Similarly, if the creator of such a social media account granted access to others for the purpose of posting status updates related to that business, nothing about that delegation of duties should support a conclusion that the account now belongs to the mentioned business. Likewise, just because a social media account is named after a particular business, describes the business and/or links to the business does not

compel the result that the business now owns the social media account. The business owner would have rights to seek to protect its intellectual property from use by the nonaffiliated person, but nothing in the law would allow the business to claim the account as its own.

IV. Ownership of Social Media Accounts in Employer/Former Employee Disputes

Because ownership issues of social media accounts will continue to arise in insolvency proceedings in the future, it is worthwhile to consider how ownership issues have been evaluated in some non-bankruptcy settings. Parties and judges will benefit from the identification of other factors that ought to be considered as a framework for evaluating social media accounts as property of the estate.

This section briefly describes two noteworthy non-bankruptcy decisions involving ownership of social media accounts — one case centers on a LinkedIn account and the second case revolves around a Twitter account. Then, the section provides a brief description of some recent legislative efforts concerning social media account ownership. Because the determination of property ownership for bankruptcy purposes continues to be governed by state law,¹⁸ bankruptcy practitioners can benefit from an understanding of how such accounts have been treated in non-bankruptcy contexts.

A. Employer—Former Employee Dispute over LinkedIn

Ownership of a former employee's LinkedIn account formed the basis for the decision in *Eagle v. Morgan*.¹⁹ The case stems from a familiar fact-pattern: a post-acquisition dispute between the new owner and the entrepreneurial principal/founder of the acquired company. Dr. Linda Eagle was a co-founder of Edcomm, Inc., a company focused on educating and training banking personnel. Edcomm grew and was eventually acquired in the fall of 2010. Dr. Eagle and others remained as executives with the new owner. However, the following spring, the buyer involuntarily terminated Dr. Eagle.

During her time at Edcomm, Dr. Eagle had built a robust LinkedIn profile, which was used as a sales and marketing tool benefitting the company. Dr. Eagle's LinkedIn profile reflected more than 4,000 connections and contained substantive content about her experiences training bankers around the world. To help manage the account, Dr. Eagle had provided her password to others at the company in order to respond to invitations and post content periodically.

After Edcomm terminated Dr. Eagle, company employees entered her account and changed her password. As a result, Dr. Eagle could no longer access her account. That situation lasted for several weeks until Dr. Eagle contacted LinkedIn directly and succeeded in regaining access. Within a week of terminating Dr. Eagle, Edcomm provided public notice that she was no longer affiliated with the company. However, during the time that Dr. Eagle was unable to access her account, Edcomm appears to have altered the LinkedIn account to include the name, photo and other information about the company's newly appointed interim CEO. Searches on LinkedIn and the

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internet for “Dr. Linda Eagle” were directed instead to the account bearing information about the interim CEO.

In addition to contacting LinkedIn to regain control, Dr. Eagle brought suit against Edcomm and various individuals associated with the company. Predictably, that suit resulted in counterclaims against her. The District Court issued a detailed Memorandum Opinion reaching what it described as a “mixed bag” decision. The court dismissed all counts against the individual defendants, certain counts brought against Edcomm and all counterclaims. However, the court did find that Dr. Eagle had sustained her burden on three causes of action against Edcomm: unauthorized use of her name in violation of a state statute, invasion of privacy by misappropriation of her identity, and misappropriation of her right to publicity. The victory on these counts though proved of little value: the court concluded that Dr. Eagle had not introduced sufficient evidence of compensatory damages and also failed to prove any entitlement to punitive damages.

Three aspects of the decision are relevant to the issue of evaluating ownership of a social media account. First, the *Eagle* decision is noteworthy for its observation that the LinkedIn account in dispute was created by Dr. Eagle and not by her employer. In creating the account, Dr. Eagle accepted the LinkedIn “User Agreement” which made clear that the account belonged to her only and that she was bound to the User Agreement individually.

Second, the *Eagle v. Morgan* decision contains an interesting summary of an email conversation between Dr. Eagle and her colleagues well before her own termination — in fact several months before the acquisition — concerning the topic of ownership of a former employee’s LinkedIn account. The exchange reflects an interesting assessment of social media ownership that the courts are now just beginning to see — but which probably exemplifies the pragmatic approach taken by business people in the workaday world. In response to an inquiry about ownership of a LinkedIn account of a former employee, the company concluded that it owned the account:²⁰

[The LinkedIn account] was created with an email account that is ours, on our computers, on our time and at our direction. She [the former employee] cannot use that account because she does not own the email address that opened it. I think as long as we just read from it and do not write to it, we are not breaking any laws. Same thing with her email account — as long as we only read and do not write, we are within our rights to do so.

The above exchange occurred in 2010. Query whether any better understanding exists today of the ownership status of a LinkedIn account or other social media accounts created by employees using company-issued email addresses.²¹

Finally, the *Eagle v. Morgan* decision is interesting for its analysis of Dr. Eagle’s claim of conversion — specifically a claim that by “hijacking” the account, Edcomm should be found liable for the tort of conversion. The court carefully considered the elements of conversion under the applicable state law of Pennsylvania as follows: “[1] the deprivation of another’s right of property, or use or possession of a chattel, or other interference therewith;

[(2)] without the owner's consent; and [(3)] without legal justification."²² The court also noted that "While courts in other states have expanded the tort of conversion to apply to intangible property, in Pennsylvania this expansion was very limited and "items such as software, domain names, and satellite signals are intangible property not subject to a conversion claim."²³ The court concluded that the LinkedIn account was not tangible chattel, but instead an intangible right and thus the claim of conversion could not survive. From a bankruptcy perspective, an interesting question on the facts of *Eagle v. Morgan* is whether, had Dr. Eagle commenced an individual bankruptcy case after leaving the company, would her trustee have been able to compel turn-over of the LinkedIn account from her former employer? Though unable to sustain a claim for conversion under Pennsylvania state law, would she have been able to demonstrate an entitlement to the account under the broad definition of section 541 "property of the estate"? Likely so — and as state laws evolve to address social media issues, the result is likely to become even clearer over time.²⁴

B. Employer- Former Employee Dispute over Twitter

Ownership of a social media account also was in dispute in litigation involving an interactive mobile news and reviews web resource company called PhoneDog and a former employee named Noah Kravitz, based on his continued use of a Twitter account after the termination of his employment. PhoneDog filed suit alleging ownership of the account and its thousands of followers as well as the password used to access the account. Kravitz filed a motion to dismiss the complaint which the court granted in part and denied in part. Thereafter, the parties settled.

The Complaint alleged that PhoneDog used a variety of social media, including Twitter, Facebook, and YouTube, to market and promote its services to users. Mr. Kravitz began working for the company as a product reviewer and blogger and was given use of and maintained the Twitter account "@PhoneDog_Noah". The company alleged that all Twitter accounts utilized by employees formulated as "@PhoneDog_Name" and used by its employees, as well as associated passwords constituted company trade secrets and assets.

After Mr. Kravitz provided notice of his termination of employment the company requested that he relinquish use of the Twitter account. Mr. Kravitz responded by changing the account handle to "@noahkravitz," and continued to use the account and in so doing continued reaching thousands of followers. The company filed suit asserting claims under California law for: (1) misappropriation of trade secrets; (2) intentional interference with prospective economic advantage; (3) negligent interference with prospective economic advantage; and (4) conversion.

The court denied Mr. Kravitz's motion to dismiss the company's misappropriation of trade secrets claim under Rule 12(b)(6). Further, the court concluded that consideration of whether the password and account followers constituted trade secrets was not ripe for decision at the Rule 12(b)(6) stage. With respect to the company's claim for intentional interference with pro-

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spective economic advantage, the court concluded that the company's complaint failed to allege facts regarding the former employee's conduct disrupted its relationships and what economic harm it caused.

The court also granted Mr. Kravitz's motion to dismiss the company's claim alleging negligent interference with prospective economic advantage. The court concluded that the complaint suffered from the same pleading deficiencies of the company's intentional interference claim and failed to allege that the former employee owed the company a duty of care.

Finally, the court denied Mr. Kravitz's motion to dismiss the company's conversion claim. Under applicable state law, the elements of conversion are: (1) ownership of a right to possession of property; (2) wrongful disposition of the property right by another; and (3) damages. The Court determined that at the Rule 12(b)(6) stage, the company adequately alleged that it owned or had the right to possess the account and that Mr. Kravitz' failure to relinquish the account was adequately pled to be knowing or intentional. Although the case ultimately settled and a decision on a Rule 12(b)(6) motion is not a ruling on the merits, it is interesting to posit the same type of hypothetical for the *PhoneDog* case as applied to *Eagle v. Morgan*: if Mr. Kravitz had commenced a personal bankruptcy case after separating from the company, would his chapter 7 trustee have been able to sell the disputed social media accounts? Would his former employer been able to obtain an order compelling the transfer of such accounts to it? Resolving competing claims of ownership would be served by an approach beyond consideration of the CTLI Descriptive Factors as discussed below in Section VI.

V. State Legislation Regarding Social Media Ownership

Various states have enacted laws prohibiting an employer from demanding access to an employee's personal social media account but providing exceptions for "business related accounts." For example, in Oregon a "personal social media account" is a social media account that (1) is used solely for personal purposes unrelated to any business purpose of the employer and (2) is not provided or paid for by the employer.²⁵ In that state, employers may not demand access to employees' or applicants' personal social media accounts and employers are prohibited from requiring an employee or applicant to disclose a username, password, or "other means of authentication that provides access to a personal social media account."²⁶ A number of other states have passed or are considering similar legislation.²⁷

In a different legislative effort, the Uniform Law Commissioners have drafted the Fiduciary Access to Digital Assets Act with the intent to provide a comprehensive structure governing access, after an individual's death or incapacitation, to digital assets, including social media and email accounts. To date, the Act has met with mixed reviews. Although introduced into more than 20 legislatures, only Delaware has enacted the Act into law.²⁸

The Act is intended to make clear that a person's digital assets become part of his or her estate after death in the same fashion that person's tangible assets also become part of his or her estate. As summarized in the Prelimi-

nary Note to the Act: “The general goal of the act is to facilitate fiduciary access while respecting the privacy and intent of the account holder. It adheres to the traditional approach of trusts and estates law, which respects the intent of the account holder and promotes the fiduciary’s ability to administer the account holder’s property in accord with legally-binding fiduciary duties. With regard to the general scope of the act, the Act’s coverage is inherently limited by the definition of “digital assets.””²⁹ One section of the Act, section 3, states that the act does not apply to the digital assets of an employer used by an employee during the ordinary course of business. Of course, whether an account used by an employee is actually property of the employer or the employee raises the issues that confronted the court in CTLI and which are likely to emerge in future cases as well.

In short, state legislatures have begun the process of considering and/or enacting legislation concerning ownership of social media accounts. Though no such effort is likely to provide a definitive solution to bankruptcy courts dealing with ownership issues, parties in bankruptcy proceedings will need to acquaint themselves with these laws and invoke them where they are applicable to a Bankruptcy Court’s determination of ownership.³⁰

VI. Evaluating Social Media Accounts as Property of the Estate Using Rights Factors

As discussed above, the CTLI Descriptive Factors are not likely to suffice to allow determination of social media ownership issues in future cases. The brief examination of ownership issues in the context of employer/former employee cases and the discussion of various state legislative initiatives reveals additional factors which should help in the determination. These factors focus on the rights granted by the social media provider to the account creator, agreements entered into by the account creator with third parties and the applicability of any state laws. Specifically:

- The specific rights bestowed on an account holder from the social media provider through the terms and conditions accepted by the account holder at the time of account creation.
- Whether the account holder’s right to use the account pursuant to the terms of the provider’s terms and conditions is curtailed or restrained by any written policies or agreements with any third parties (such as an employer) to which the account holder is subject.
- Whether any applicable nonbankruptcy law impact the rights conveyed by the provider or agreed to with a third party.

(collectively, the “Rights Factors”). Consideration of these factors should provide a reliable framework for a “property of the estate” analysis under section 541 of the Bankruptcy Code as applied to social media accounts offered by existing service providers and those to come in the future.

A. Social Media Provider Terms and Conditions

An analysis of the particular agreements governing the creation and usage of a social media account should be the starting point for determination of ownership. The *Eagle* court’s review of the particular terms accepted when

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the LinkedIn account at issue in that case was created proved instrumental. An appropriate first step for any analysis of social media account ownership should start with a similar review.³¹

Terms posted by Facebook as of the time of this article confirm that the individual creating a User Profile owns the content posted by such individual: “You own all of the content and information you post on Facebook, and you can control how it is shared through your privacy and application settings.”³² The terms also specifically provide that “You will not transfer your account (including any Page or application you administer) to anyone without first getting our written permission.”³³ As is typical of any software service, including social media accounts, most providers are very clear about the license rights granted to a user through the creation of an account. Specifically, as recounted in one commentator’s note, Google’s Terms of Service provide that “Google gives you a personal, worldwide, royalty-free, non-assignable and non-exclusive license to use the software provided to you by Google as part of the Services” and Twitter’s terms provide that “Twitter gives you a personal, worldwide, royalty-free, non-assignable and non-exclusive license to use the software that is provided to you by Twitter as part of the Services.”³⁴

In short, creators of social media accounts typically own the content they post (subject to any licenses granted to the provider to share such content) and also conditionally enjoy rights as a licensee of the technology that the provider makes available to operate the service. If such content has value, a trustee would be acting prudently to try to maximize the value of that asset. Of course, if the content infringes the rights of others or violates the law, the social media provider’s terms and conditions likely reserves the right to remove the content or disable the account.

B. Agreements and Policies Impacting Rights

Once an analysis of the terms and conditions that control the account is accomplished, the next step would be to evaluate any agreements or policies that restrict or curtail the rights of the account creator.

No investor in an emerging business would advance funds without ensuring that all intellectual property created by founders has been duly assigned to the company. If usage of social media is critical to a company’s operations — a key asset of an organization — the organization and investors should have policies in place focused on addressing these issues. Similarly, if social media ownership is essential to a buyer of a business, then that buyer’s due diligence will include an analysis of a target corporation’s policies and procedures around employee social media practices. As both an investor in the business and then as the plan proponent for the debtor’s assets, an opportunity for diligence by the CTLI minority owner ought to have existed pursuant to which policies (if any) about social media accounts used by the majority owner as the primary manager could have been ascertained. It should come as no surprise that smaller enterprises, like CTLI, likely have given no thought whatsoever to the topic of social media ownership. Creditors or other bankruptcy participants should expect a challenging time

establishing corporate ownership of social media accounts in the absence of an appropriate factual record including evidence of agreements or policies relating to the rights to such accounts created by individuals. The best remedy available in such situations may not involve wresting passwords away after detainment but rather more traditional measures such as actions to cease and desist using trademarks or tradenames of the business in any unlawful way. Failure to comply with that type of order, of course, could still lead an offender back to confinement if necessary for a court to enforce the meaning of its order.

C. Impact of Nonbankruptcy Law

Finally, once the analysis of any agreements or policies restricting rights is completed, evaluating parties should consider the impact of any nonbankruptcy law on the rights held by the debtor. This consideration may limit the ability of a trustee to compel conveyance of a social media account to a third party.³⁵ As noted above, states have begun considering and enacting various laws impacting social media ownership and access. Federal law too must be considered both in its general application³⁶ and when applied specifically to social media issues.³⁷ Beyond those laws, other laws too impact the evaluation of ownership. For example, a debtor (or chapter 11 trustee in the rare case where one is appointed to displace the debtor) has the ability to assume, assume and assign, or reject “executory contracts” pursuant to section 365 of the Bankruptcy Code. One critical exception to the general rule of section 365 regarding assumption and assignment of executory contracts is that assignment is not permitted when applicable non-bankruptcy law excuses a non-debtor party from accepting or rendering performance from a third party. Specifically, section 365(c) of the Bankruptcy Code provides in part that an executory contract may not be assigned when “applicable law excuses a party, other than the debtor, to such contract . . . from accepting performance from or rendering performance to an entity” other than the debtor. Courts have determined that patent, copyright and trademark law also constitute “applicable law” which preclude a debtor from attempting to force its counterparty licensor from accepting performance from a third party licensee.³⁸ Social media providers, who license intellectual property to registered users to enable usage of services, have the ability to object to any attempted assignment to a third party.

VII. Conclusion

Social media providers and services will continue to proliferate. Individuals and business will continue to use social media services to promote business and personal interests and, at times, such usage will create content that has value or attributes (such as followers) that might have value. Terms and conditions from such providers will continue to be refined to make clear the rights conveyed by such providers. Prudent investors and buyers, and good corporate governance, will lead to more sophisticated policies governing employee use of social media accounts. As a result, businesses will continue to add to existing employee policies provisions that address ownership of social media accounts and related content. Laws relating to social media usage will continue to develop.

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Understanding the disputes over ownership occurring in non-bankruptcy cases in the employer/employee context as well as recent state legislative efforts regarding social media accounts should be useful to bankruptcy practitioners in thinking through ownership issues in the context of section 541. A good framework to evaluate ownership of such accounts should include not just the CTLI Descriptive Factors but also the Rights Factors identified above. Beyond issues of ownership, other social media account issues too will continue to develop in future insolvency proceedings and require further consideration including valuation, privacy, and perfection of security interests.

NOTES:

¹In re CTLI, LLC, 528 B.R. 359, 60 Bankr. Ct. Dec. (CRR) 243, 73 Collier Bankr. Cas. 2d (MB) 703 (Bankr. S.D. Tex. 2015).

²Pursuant to section 541 of the Bankruptcy Code property of the bankruptcy estate includes “all legal or equitable interests of the debtor in property as of the commencement of the case.”

³See Katy Gun Store Case Focuses On Ownership Of Social Media Accounts, Houston Chronicle April 16, 2015 (<http://www.houstonchronicle.com/neighborhood/katy/news/article/Katy-gun-store-case-focuses-on-ownership-of-6205205.php?t=26a3c95a2e&cmpid=twitter-premium>).

⁴Ex-Gun Store Owner Chooses to Stay in Jail So He Can Keep Facebook, Twitter Accounts, The Wall Street Journal April 10, 2015 (<http://blogs.wsj.com/bankruptcy/2015/04/10/ex-gun-store-owner-chooses-to-stay-in-jail-so-he-can-keep-facebook-twitter-accounts/>).

⁵Jeremy Alcede Arrested: Refuses to Follow Unlawful Order by Federal Judge, Freedomoutpost.com April 10, 2015 (<http://freedomoutpost.com/2015/04/jeremy-alcede-arrested-refusing-follow-unlawful-order-federal-judge/#XSAUGjx2ffsM8ZTb.99>).

⁶CTLI, 528 B.R. at 362.

⁷CTLI, 528 B.R. at 362.

⁸Andrew C. Helman, Debtor Owns Social Media Accounts Created by Its Former Principal, ABI Journal 26 (July 2015).

⁹Andrew C. Helman, Debtor Owns Social Media Accounts Created by Its Former Principal, ABI Journal 26 (July 2015).

¹⁰Andrew C. Helman, Debtor Owns Social Media Accounts Created by Its Former Principal, ABI Journal 26 (July 2015).

¹¹Federal Judge Refuses To Free Ex-Katy Gun Store Owner Over Facebook Password, Houston Chronicle April 17, 2015 available at <http://m.chron.com/neighborhood/katy/crime-courts/article/Katy-gun-store-case-focuses-on-ownership-of-6206793.php>.

¹²Ex-Katy Gun Store Owner Provides Facebook Access, Freed From Jail, Houston Chronicle May 27, 2015 available at <http://m.chron.com/neighborhood/katy/news/article/Ex-Katy-gun-store-owner-provides-Facebook-access-6289880.php>.

¹³CTLI, 528 B.R. at 367–372.

¹⁴CTLI, 528 B.R. at 365.

¹⁵CTLI, 528 B.R. at 369 (“Nonetheless, [the former owner] and the Debtor are—and always have been—two distinct legal entities, with separate and distinguishable property. The

fact that the Tactical Firearms Facebook Page was created in the name of the business, was linked to the business's web page, and was used for business purposes places it squarely in the category of property of the Debtor's estate (and now property of the reorganized Debtor) and not personal property of [the former owner].").

¹⁶CTLI, 528 B.R. at 378.

¹⁷See Lisa, P. Ramsey, Brandjacking on Social Networks: Trademark Infringement by Impersonation of Markholders, 58 Buffalo L. Rev. 851 (2010) at n. 7 (noting how individuals created a Facebook fan page for Coca-Cola without first obtaining authorization from Coca-Cola, which Page at the time of the article was being maintained in partnership with The Coca-Cola Company).

¹⁸Butner v. U.S., 440 U.S. 48, 99 S. Ct. 914, 59 L. Ed. 2d 136, 19 C.B.C. 481, Bankr. L. Rep. (CCH) P 67046 (1979) ("Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding.").

¹⁹Eagle v. Morgan, 37 I.E.R. Cas. (BNA) 395, 2013 WL 943350 (E.D. Pa. 2013).

²⁰Eagle v. Morgan, 37 I.E.R. Cas. (BNA) 395, 2013 WL 943350 (E.D. Pa. 2013) (bracketed text and italics added).

²¹Many commentators have analyzed the Eagle v. Morgan opinion and offered recommendations to companies for the adoption of policies governing employee use of social media accounts based on that case and others involving similar issues. See Locked Out On LinkedIn: LinkedIn Account Belongs To Employee, Not Employer, 25 No. 6 Intell. Prop. & Tech. L.J. 16; Facebook Firing: The Intersection Of Social Media, Employment, & Ethics Panel 1 — Employment Implications Of Social Media Use, 24 Alb. L.J. Sci. & Tech. 435, 446.

²²Eagle v. Morgan, 37 I.E.R. Cas. (BNA) 395, 2013 WL 943350 (E.D. Pa. 2013).

²³Eagle v. Morgan, 37 I.E.R. Cas. (BNA) 395, 2013 WL 943350 (E.D. Pa. 2013).

²⁴See CDM Media USA, Inc. v. Simms, 2015 I.E.R. Cas. (BNA) 179776, 2015 WL 1399050 (N.D. Ill. 2015) (dispute over ownership of LinkedIn Group between former employer and former employee).

²⁵Or. Rev. Stat. Ann. § 659A.330.

²⁶Or. Rev. Stat. Ann. § 659A.330.

²⁷See National Conference of State Legislatures website with information on legislative efforts on "Access to Social Media Usernames and Passwords" available at <http://www.ncsl.org/research/telecommunications-and-information-technology/employer-access-to-social-media-passwords-2013.aspx>.

²⁸Del. Code tit. 12 § 5001 to 5007.

²⁹http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2014_UFADAA_Final.pdf.

³⁰See No Surfing Allowed: A Review & Analysis Of Legislation Prohibiting Employers From Demanding Access To Employees' & Job Applicants' Social Media Accounts 24 Alb. L.J. Sci. & Tech. 481, 513 and Employee Internet Privacy: A Proposed Act That Balances Legitimate Employer Rights And Employee Privacy 51 Am. Bus. L.J. 779, 802.

³¹Although the *CTLI* decision referenced the need for individuals to create a User Profile with Facebook to have access to the full range of Facebook services, the written decision does not discuss the terms that apply to individuals opting to create such profiles. In evaluating the question of ownership of the particular Facebook Page at issue in *CTLI* the Court focused on the difference between a personal profile on Facebook and a Facebook Page — observing specifically that:

A Facebook Page is created by an individual User to represent an organization or brand, and that

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User becomes the first Page Admin, which enables him or her to customize the Page, post Status Updates and photos, and access other features. Facebook Users can “like” the Page to become Fans who will then see the Page’s posts in their Newsfeeds. The first Page Admin can then grant other Facebook Friends various degrees of administrative access to the Page. Full access grants the new Admin equal powers to the original Admin, including the ability to remove the original Admin.

By focusing on the description of the Facebook Page and how the former majority owner used such Page, the *CTLI* court downplayed an analysis of the rights afforded to the owner by the social media provider.

³² <https://www.facebook.com/legal/terms>.

³³ <https://www.facebook.com/legal/terms>.

³⁴ Smita Gautam, *Bankruptcy: Reconsidering “Property” to Determine the Role of Social Media in the Bankruptcy Estate*, 31 *Emory Bankruptcy Developments Journal* 127 (2014) at n. 90.

³⁵ The *CTLI* case did not involve a section 363 acquisition with assumed and assigned contracts under section 365. Rather, the case involved the confirmation of a plan of reorganization proposed by a minority shareholder. The specific language of section 365 contains a drafting ambiguity that has injected an additional level of complexity into the analysis of assumption and assignment issues — and the rights of nondebtor licensors facing a counterparty’s licensee’s bankruptcy case. Specifically, section 365(c) provides that a debtor or trustee cannot “assume or assign” an executory contract when applicable law would prevent assignment. Some courts have opted to read the three words “assume or assign” literally. That is, such courts have refused to allow a debtor licensee to merely assume a nonexclusive intellectual property license on the grounds that such a license is non assignable under applicable nonbankruptcy law. Four Circuit Courts of Appeal (the Third, Fourth, Ninth and Eleventh) have adopted the hypothetical test and ruled that if a contract cannot be assigned under applicable non-bankruptcy law, then it cannot be assumed or assigned by the debtor-licensee. See *Matter of West Electronics Inc.*, 852 F.2d 79, 18 *Bankr. Ct. Dec. (CRR)* 287, *Bankr. L. Rep. (CCH)* P 72351, 34 *Cont. Cas. Fed. (CCH)* P 75526 (3d Cir. 1988); *In re Sunterra Corp.*, 361 F.3d 257, 42 *Bankr. Ct. Dec. (CRR)* 222, 51 *Collier Bankr. Cas. 2d (MB)* 1276, *Bankr. L. Rep. (CCH)* P 80068 (4th Cir. 2004); *In re Catapult Entertainment, Inc.*, 165 F.3d 747, 33 *Bankr. Ct. Dec. (CRR)* 1058, 41 *Collier Bankr. Cas. 2d (MB)* 858, *Bankr. L. Rep. (CCH)* P 77886 (9th Cir. 1999); *In re James Cable Partners, L.P.*, 27 F.3d 534, 25 *Bankr. Ct. Dec. (CRR)* 1499, 31 *Collier Bankr. Cas. 2d (MB)* 1104 (11th Cir. 1994).

Two other Circuit Courts of Appeal (the First and Fifth) have rejected that view. See *Institut Pasteur v. Cambridge Biotech Corp.*, 104 F.3d 489, 30 *Bankr. Ct. Dec. (CRR)* 221, 37 *Collier Bankr. Cas. 2d (MB)* 588, 41 *U.S.P.Q.2d* 1503, *Bankr. L. Rep. (CCH)* P 77242 (1st Cir. 1997); *In re Mirant Corp.*, 440 F.3d 238, 46 *Bankr. Ct. Dec. (CRR)* 13, 55 *Collier Bankr. Cas. 2d (MB)* 1050, *Bankr. L. Rep. (CCH)* P 80453 (5th Cir. 2006). Instead, these two Circuits have adopted an alternative test known as the actual test. Under the actual test, a debtor licensee is prevented from assuming a license only if it intends to assign it without the consent of the licensor. If the debtor merely plans to assume the license without attempting to assign, then the debtor is authorized to do so. Thus, if the debtor in *CTLI* had been the named licensee under the terms and conditions of any particular social media provider’s agreements, then the debtor would have been able to assume such an agreement given the Fifth Circuit’s adoption of the actual test.

³⁶ See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 109 S. Ct. 2166, 104 L. Ed. 2d 811, 16 *Media L. Rep. (BNA)* 1769, 10 *U.S.P.Q.2d* 1985 (1989) (construing “work made for hire” under the Copyright Act of 1976).

³⁷ See *Maremont v. Susan Fredman Design Group, Ltd.*, 37 *I.E.R. Cas. (BNA)* 1602, 2014 WL 812401 (N.D. Ill. 2014) (interpreting the Stored Communications Act, 18 U.S.C. § 2701 et seq. in the context of a social media ownership dispute).

³⁸ See *Gilson v. Republic of Ireland*, 787 F.2d 655, 658, 229 *U.S.P.Q.* 460 (D.C. Cir.

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1986) (“[i]t is well settled that a nonexclusive licensee of a patent has only a personal and not a property interest in the patent and that this personal right cannot be assigned unless the patent owner authorizes the assignment or the license itself permits assignment.”); See also *In re Catapult Entertainment, Inc.*, 165 F.3d 747, 750, 33 Bankr. Ct. Dec. (CRR) 1058, 41 Collier Bankr. Cas. 2d (MB) 858, Bankr. L. Rep. (CCH) P 77886 (9th Cir. 1999) (nonexclusive patent licenses cannot be assigned by a debtor licensee); *In re XMH Corp.*, 647 F.3d 690, 695, 55 Bankr. Ct. Dec. (CRR) 56, 99 U.S.P.Q.2d 1393 (7th Cir. 2011) (holding that trademarks are personal and thus not assignable under trademark law without the consent of the trademark owner/licensor); *ITOFCA, Inc. v. MegaTrans Logistics, Inc.*, 322 F.3d 928, 941, 40 Bankr. Ct. Dec. (CRR) 266, 66 U.S.P.Q.2d 1014 (7th Cir. 2003) (determining that nonexclusive copyright licenses are personal to transferees who cannot assign it to a third party absent the copyright owner’s consent).