Who Owns Likes, Posts, Pages And Tweets In Bankruptcy?

Related Attorneys

Jackie Ford

Related Services

Bankruptcy, Restructuring and Distressed Situations

Labor and Employment

AUTHORED ARTICLE | 5.14.2015
Law360

Jackie Ford, partner in the Vorys Houston and Columbus offices, authored an article for *Law360 on* whether traditional definitions of property and ownership include social media accounts. The full text of the article is included below.

Who Owns Likes, Posts, Pages And Tweets In Bankruptcy?

According to the online "Urban Dictionary," the phrase “own it” refers not just to traditional concepts of property or possession, but to the idea of “taking pride in what you got.” In other words, “owning” something — whether it’s an idea, a decision or your devotion to your favorite losing sports team — is both personal and, potentially, emotional.

Just as the word “own” itself appears to have a somewhat evolving cultural meaning, so the more traditional concept of ownership continues to evolve in the world of online communications. As a bankruptcy case currently playing out in Texas illustrates, courts, businesses and individual users are struggling to determine who “owns” Facebook, LinkedIn and Twitter accounts of employees and their employers. As seems so often be the case in Texas, the unfolding dispute is outsized — not just in the court’s detailed analysis of the relevant issues, but in its decision to send a man to jail for refusing to hand over the keys to his former company’s social media accounts.

Ownership and property are, of course, not new concepts in bankruptcy law. The Federal Bankruptcy Code broadly defines the property of a bankruptcy estate to include any interest of the debtor in property, regardless of who holds the property and regardless of where it is located. With a small number of exceptions, that property becomes part of a bankruptcy estate upon the filing of a bankruptcy petition. While federal law establishes what property is included in a bankruptcy estate, state law guides the consideration of whether or not a debtor has an interest in property in the first instance.

Courts both in bankruptcy cases and other contexts are now asking whether traditional definitions of property and ownership include social media accounts. Last year, for example, a federal court in Florida considered whether “likes” on a Facebook page could constitute a form of property. (“Liking” something on Facebook is described as “an easy way to let someone know that you enjoy” particular content.)

The plaintiff in Mattocks v. Black Entertainment Television LLC, a former employee of a television entertainment company, alleged the company’s transfer of the “likes” from a Facebook page she controlled (and had created before she came to the company) to a company-sponsored site constituted conversion. Applying Florida law, the court dismissed the conversion claim, finding the “likes” did not constitute property of the “owner” of the Facebook page. Among other things, any user who “liked” the page was also free to “unlike” it at any time, undercutting any claim that the owner of the page has a property interest in the “likes” of others.

While “likes” may not be a form of property, social media pages themselves (and the passwords used to access them) may be. That was the conclusion of the federal court in Ardis Health v. Nankivell, in which an employee created social media content for her employer but refused to turn over passwords to the sites following her termination. The court found that, under New York law, the passwords were the property of the company and that failure to return them produced irreparable harm sufficient to support immediate injunctive relief.

In the current matter pending in Houston, the U.S. Bankruptcy Court for the Southern District of Texas held a debtor’s social media accounts constituted property of the Chapter 11 bankruptcy estate. In In re CTLI Inc., the debtor — CTLI — had, prior to the bankruptcy, run a gun store and shooting range called "Tactical Firearms." The company’s founder, Jeremy Alcede, had operated Twitter and Facebook accounts promoting Tactical Firearms. The court ordered Alcede to turn over passwords for the Twitter and Facebook accounts to CTLI. Alcede refused, saying the accounts were personal to him and not the property of the company, and that the company-related information on the sites was inextricably intertwined with his personal information. The court disagreed, ruling that “business social media accounts are property interests.”

Unlike the court in the Mattocks case, the Texas court did not view a customer’s ability to “unlike” a page as negating the fundamental nature of the page itself and supported that conclusion with an analogy to subscriber lists, which have often been considered property of a business. “Just as Facebook users can 'unlike' a page at any time,” the court noted, “subscribers to email lists can also, by federal law, opt out at any time.”

After acknowledging the social media pages at issue focused in part on Alcede personally (both in relationship to Tactical Firearms and in highlighting his own persona), the court nevertheless concluded the pages were business sites, not personal ones. Among other factors, Alcede’s decision to title the Facebook page “Tactical Firearms,” the use of the page to advertise company sales and inventory, the links from the page to the company’s own web page and the use of phrases such as “on behalf of myself and the Tactical Firearms family” all supported the conclusion that the page was property of the company and placed the page “squarely in the category of property of the debtor's estate (and now property of the reorganized debtor) and not personal property of Mr. Alcede.”

The court reached a similar conclusion regarding the Twitter account, based on similar indicators that the account was operated for the benefit of the business. As described by the court, "The name assigned to the Twitter account was originally 'Tactical Firearms' and the Twitter Handle was '@tacticalfirearm.' … The summary provided for the Twitter account was 'We are a local gun store with the best prices, knowledge, and customer service available.'" Recalling Alcede's prior description of himself as a "PR genius," the court dryly observed that his "political messages on the store's marquee and via social medial were a manifestation of this genius," further underscoring the business nature of the accounts.

The case took a decidedly unusual turn when Alcede refused to comply with the court's order to turn over the passwords for the social media accounts. Alcede attempted to frame the issue as one of First Amendment rights — his First Amendment rights — rather than property rights (i.e., the company's). Ultimately, the court rejected Alcede's argument, and found him in contempt. At last report, Alcede was still being held in a federal detention center in Houston.

Conclusion

Other than perhaps illustrating the dangers of refusing to comply with a court order, what lessons can be learned from the Alcede case?

First, before launching their first Facebook or Twitter accounts, businesses should research and study each platform, its terms of service and related information governing its use. Many applications have tools available to help businesses coordinate multiple pages or multiple administrators (or both). Using those tools can both simplify the administration of the page and clarify the business (rather than personal) nature of the site.

Second, companies using individuals as representatives should clarify the terms and conditions of their online presence. Any social media page purporting to represent the company should be clearly identified as such, and passwords for the site should be recorded in a form readily accessible to all those in the company who may need to use them.

Finally, the company needs to, as they say, "own it" — that is, to see its social media presence as a potential asset to be managed rather than a department to be left to run itself.