The Whitmar case and social media lessons for employers

The struggle between an employer and a number of ex-employees over the ownership of LinkedIn groups and their contacts in the case of Whitmar Publications Ltd v. Gamage & Ors highlights the legal ambiguity caused by the proliferation of social media in a business context. Ashley Hurst and Jack Gilbert of Olswang LLP analyse the case so far and the practical solutions for companies to protect their social media assets.

An estimated 11 million people in the UK now use LinkedIn to network with fellow colleagues and customers online. The exponential rise in the use of this social media at work has led to a number of unresolved legal questions, chiefly who owns social media accounts and what companies can do to prevent social media misuse by former employees. The recent case of Whitmar Publications Ltd v. Gamage & Ors [2013] EWHC 1881 (Ch)[1] sheds some light on these issues. However, we will have to wait for an English court to fully consider these issues.

The Whitmar case

In the case, the Defendants set up a rival publishing company, Earth Island, whilst still employed by Whitmar. In addition to setting up a rival company, they had taken business cards that belonged to Whitmar, as well as databases of its customers. Whitmar's LinkedIn groups also appeared to have been used to email a large number of individuals to attend an Earth Island event at a bar in Leicester Square.

In his judgment, Mr Peter Leaver QC commented that: "Ms. Wright [one of the defendants] was responsible for dealing with the Linked-In groups as part of her employment duties at Whitmar. Those groups operated for Whitmar's benefit and promoted its business, and Ms. Wright used Whitmar's computers to carry out her work on the Linked-In groups."

Even though none of the three Defendants had any contractual post-termination restrictions on dealing with Whitmar's clients, the judge granted an injunction restraining the Defendants from dealing with any of the contacts whose names appeared on the business cards. He also ordered the defendants to facilitate "exclusive access, management and control" of various LinkedIn Groups to Whitmar and not to access or do anything which inhibited or prevented Whitmar from accessing the LinkedIn Groups.

The judge did not however go into any great legal explanation for his decision other than that the claimant was more likely than not to succeed at trial on the basis that the company databases being used amounted to confidential information.

Whilst only an interim decision, this decision follows a similar approach taken in Hays Specialist Recruitment (Holdings) Limited v. Ions [2008] where the court ordered the defendant, a recruitment professional who had left Hays to set up a rival business, to disclose LinkedIn business contacts that he had acquired during his employment at Hays and was using to contact clients and customers from Hays' confidential database.

What does ownership of social media accounts mean?

To consider this, it is necessary to break down the component parts of social media accounts.

Firstly, there is the hosting platform, which is of course owned and operated by the social media platform operator (for example, LinkedIn or Twitter). The platform's terms of use govern the basis on which users open and use social media accounts and such accounts can generally be closed at will by the platform operator. In this respect, the property of the social media account belongs to the platform.

So, for example, LinkedIn's terms of use state that 'The profile you create on LinkedIn will become part of LinkedIn and except for the information that you licence to us is owned by LinkedIn. However, between you and others, your account belongs to you.' They also prevent users of LinkedIn from permitting others to use the account and from selling, trading or transferring their LinkedIn accounts to another party.

If employees use LinkedIn on behalf of their employers, the LinkedIn terms of use also provide that the individual as well as the company is bound by the terms. However, this does not affect the fact that, ultimately, the property in a LinkedIn account belongs to LinkedIn.

Secondly, there are account usernames and passwords. These are not property as such but can amount to confidential information, protectable both through the equitable doctrine of confidence and through contract.

Thirdly, there is the content of material uploaded or posted on to the social media account. Much of this material, including even some tweets, will be protected by copyright, which will be owned by the user or the company or person that commissioned the content. However, most social media platforms provide a very wide licence for the platform and often allow other users to make use of this content.

Fourthly, and perhaps most complex of all, is who owns the

contacts or followers generated by the social media user. Whilst there is no property right in individual contacts or followers, a database of contacts or followers may be protectable as a copyright work under section 3 (a) of the Copyright Designs and Patents Act 1988 or as a '*sui generis*' database right under Regulation 13 of the Copyright and Rights in Databases Regulations 1997, both of which implement the EU Database Directive.

The claimant in the Whitmar case relied on these database rights, although the injunction appears to have been granted more on the basis of confidentiality and so we will have to wait for another day to get some full guidance on those issues. And so there is no clear answer to who owns a social media account. The answer for companies is therefore to impose restrictions on social media use through the employment contract.

These problems are of course not unique to the UK. In the 2011 US case of PhoneDog v. Kravitz, mobile phone website PhoneDog sued former employee Noah Kravitz alleging that he had improperly taken both the control of his Twitter account and approximately 17,000 followers with him when he left the company. During his employment with PhoneDog, Kravitz's Twitter handle was '@PhoneDog_Noah,' which he changed to '@noahkravitz' upon leaving. Despite Kravitz's claims that he had done so with the blessing of his former employer, a dispute over back pay led to PhoneDog bringing proceedings and seeking damages of $2.50 per follower per month.

Whilst the claim ultimately settled, it provides a clear warning to employers about the problems that can arise if social media ownership provisions do not form part of the employment contract. After announcing the settlement, Kravitz said, "If anything good has come of this, I hope it's that other employers and employees can recognize the importance of social media...good contracts and specific work agreements are important, and the responsibility for constructing them lies with both parties."

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Blurred lines

Although contractual provisions can help, it will of course not always be obvious which social media accounts are operated for the benefit of the company and which are purely personal. Many Twitter accounts in particular will be a combination of the two. This distinction is likely to become increasingly blurred as employers embrace flexible working arrangements and BYOD schemes.

The practical solution for companies is to take proactive steps to identify social media assets that are potentially valuable to the business, and put appropriate frameworks in place so that employer and employee know where they stand. Employers may wish to consider the following:

- Introducing appropriate policies concerning when employees may set up accounts in their own name or use the business name (for e.g. in a Twitter handle).
- Many professionals use networking sites to develop a large network of contacts, clients and customers, often from a combination of employers. It may be impractical to prevent all employees from taking these networks with them upon exit, but employers can at least put practices in place to ensure contacts developed whilst employed by the company are copied onto the business's own databases.
- Whilst disclaimers will have little relevance to the liability of companies for material posted by their employees in the course of their employment, disclaimers which disassociate the company from the views expressed by the individual can be useful in at least distancing the company from any errant views expressed. This will not always be appropriate, however, particularly when social media accounts are used to speak on behalf of the company.
- If employees administer social media groups or accounts purely for the benefit of the company, the company should retain the right to ensure that usernames and passwords are retained within the company and changed upon the exit of the employee. Further, whilst it is common for employees to identify their employer in their LinkedIn and Twitter profiles, employers should have contractual provisions requiring employees to take steps to make clear if they've left the company and, if appropriate, remove copyright material posted during their employment.

Conclusion

Examples of litigation on these issues may be few and far between at present but many cases are brewing. The key point is that it becomes much harder to enforce social media ownership after employees leave than when they are still employed, and harder still if clear contractual provisions are not in place which survive the employee's exit. There is therefore no better time for employers to put steps in place to ensure that they really own their online presence.

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1. http://www.bailii.org/ew/cases/EWHC/Ch/2013/1881.html