

**I. *Dollars for Followers? Difficulties in Proving Damages for Harms Involving Social Media Accounts of Businesses***

**A. Introduction**

For businesses today, a strong social media presence is invaluable.<sup>1</sup> At least eighty-eight percent of brands in the U.S. that have one hundred or more employees are engaged in social media marketing and advertising.<sup>2</sup> Such businesses are utilizing various social media platforms such as Facebook, Twitter, LinkedIn, and Instagram in order to perform “core business functions” and further promote their product or brand.<sup>3</sup> On a global level, social media advertising held an estimated worldwide valuation of at least \$17 billion in 2014 (and almost certainly holds a larger valuation in 2019).<sup>4</sup> With such significance found in social media accounts for businesses, disputes have arisen in the past decade over their control and alleged misuse.<sup>5</sup> Claims have come to the fore between businesses and former employees, independent contractors, former business partners, and third parties tasked with managing the social media accounts.<sup>6</sup>

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<sup>1</sup> Shea Bennett, *88% of Brands Will Use Social Media Marketing in 2014 [STUDY]*, ADWEEK (Nov. 14, 2013), <http://www.adweek.com/digital/smm-2014/> [perma.cc/9HC8-QWBP].

<sup>2</sup> *Id.* See also Nora Ganim Barnes & Ava M. Lescault, *The 2014 Fortune 500 and Social Media: LinkedIn Dominates as Use of Newer Tools Explodes*, U. MASS. DARTMOUTH CHARLTON COLL. BUS. CTR. FOR MKTG. RES., UNIV. OF MASS. DARTMOUTH (2014), <http://www.umassd.edu/cmr/socialmedia/research/2014fortune500/> [perma.cc/LZ2Y-8R3R].

<sup>3</sup> See Bennett, *supra* note 1.

<sup>4</sup> Joan Lindsey-Mullikin & Norm Borin, *Why Strategy Is Key for Successful Social Media Sales*, 60 BUS. HORIZONS 473, 473–74 (2017).

<sup>5</sup> Kathleen McGarvey Hidy, *Business Disputes over Social Media Accounts: Legal Rights, Judicial Rationales, and the Resultant Business Risks* 2018 COLUM. BUS. L.R. 426, 432 (placing business’s social media accounts in the litigation context). See Hugh McLaughlin, *You’re Fired: Pack Everything but Your Social Media Passwords*, 13 NW. J. TECH. & INTELL. PROP. 87, 90 (2015) (citing Carrie Pixler Ryerson & John Balitis, Jr., *Social Media’s Lessons: Employers Adapt as Viewers, Publishers*, 48 ARIZ. ATT’Y 17 (Apr. 2012) (“[M]ore and more employers are using social media . . . . Employers now are embroiled in litigation against former employees over the issue of *who* owns social media pages and accounts.”)

<sup>6</sup> See Hidy, *supra* note 5, at 431.

In litigation pertaining to alleged harms from business' social media accounts, plaintiffs have struggled to successfully assert a quantitative financial harm to prove damages.<sup>7</sup> Regardless of the parties and the nature of the claims, a common issue presents itself regarding valuations for proving damages.<sup>8</sup> Courts have recognized that social media accounts present a "marketable commercial interest."<sup>9</sup> As Xavier University Professor Kathleen McGarvey Hidy explains, "legal scholars as well as courts acknowledge the difficulty in assessing the valuation of social media accounts."<sup>10</sup> Professor Hidy further acknowledges this problem as a "substantial hurdle in the proof of damages in litigation disputes over control of business social media accounts."<sup>11</sup>

This article seeks to explore the processes and methodologies that litigants, legal scholars, and courts have considered in determining the valuation of social media accounts. Section B introduces the issue by discussing a recent case where the court could not determine an objective value for a social media account and the tortious conduct involving the account. Section C examines a separate case where the plaintiff successfully alleged three separate causes of action involving the use of a social media account, but subsequently failed to prove any damages stemming from the harms. Section D presents the conclusions of certain legal scholars who provide a potential solution to this issue through the lens of intellectual property. While there is no clear solution, an examination of different valuation methodologies used by businesses and former employees in two recent cases, *PhoneDog v. Kravitz* and *Eagle v. Morgan* help to illuminate the issue.<sup>12</sup> Additionally, legal and business professionals have posited various solutions to accurately value social media accounts, including a valuation which

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<sup>7</sup> See *id.* at 483–86 (positing the inherent difficulties of proving damages from harms derived from business's social media accounts and analyzing several cases that dealt with the subject).

<sup>8</sup> *Id.*

<sup>9</sup> *Maremont v. Susan Fredman Design Grp.*, No. 10-C-7811, 2014 WL 812401, at \*4 (N.D. Ill. Mar. 3, 2014). (acknowledging that social media accounts contain value and can be monetized).

<sup>10</sup> Hidy, *supra* note 5, at 483.

<sup>11</sup> *Id.*

<sup>12</sup> *Eagle v. Morgan*, No. 11-4303, 2013 WL 943350 (E.D. Pa. Mar. 12, 2013); *PhoneDog v. Kravitz*, No. C-11-03474-MEJ, 2011 WL 5415612 (N.D. Cal. Nov. 8, 2011) (introducing the two pivotal cases in the development article that provide the backdrop for proving damages from social media accounts of businesses).

positions social media accounts as intangible assets in the context of intellectual property.<sup>13</sup> Section E concludes the article.

### **B. PhoneDog v. Kravitz Social Media Account Valuation**

*PhoneDog v. Kravitz* involved PhoneDog, an online media company that rates, reviews, and critiques mobile devices and cell phone carriers, and Noah Kravitz, a former PhoneDog employee.<sup>14</sup> While employed at PhoneDog, Kravitz maintained a Twitter account titled “@PhoneDog\_Noah” from which he would relay content and media on behalf of his employer.<sup>15</sup> By the time Kravitz ultimately left PhoneDog to seek new employment, the Twitter account had amassed around 17,000 followers.<sup>16</sup> After leaving the company, instead of providing the Twitter account passwords and other related information, Kravitz ultimately renamed the account handle to “@noah kravitz” and assumed complete and exclusive control of the account for approximately eight months.<sup>17</sup> After this period of time, PhoneDog brought suit to enjoin Kravitz’s use of the account.<sup>18</sup> In its filings against Kravitz, PhoneDog alleged misappropriation of trade secrets, intentional interference with prospective economic damage, negligent interference with prospective economic advantage, and conversion.<sup>19</sup>

In total, PhoneDog asserted that Kravitz’s conduct surrounding the Twitter account had resulting in \$340,000 in damages for alleged harms to the business.<sup>20</sup> PhoneDog valued its damages by multiplying the number of the account’s followers (17,000) by \$2.50—the “industry standard” for valuing each follower for a business’s social media account.<sup>21</sup> Thus, each month that the social media account was being used under a different twitter handle, the company alleged that it suffered \$42,500 in damages, amounting to

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<sup>13</sup> John G. Loughnane et al., *Valuation of Social Media Assets*, AM. BANKR. INST. J. 36, 36 (2015) (introducing the study which describes the possibility of social media account valuations being akin to intangible assets).

<sup>14</sup> *PhoneDog*, 2011 WL 5415612, at \*1.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at \*3 (showing how PhoneDog’s alleged damages were calculated).

\$340,000 for eight months of harm.<sup>22</sup> In its complaint, PhoneDog did not explain where the “industry standards” came from or how it determined that a single Twitter follower was worth \$2.50.<sup>23</sup>

In response to the suit and alleged damages, Kravitz moved to dismiss the case for a lack of subject matter jurisdiction in federal court.<sup>24</sup> Kravitz asserted that PhoneDog’s claims did not reach the required \$75,000 threshold for subject matter jurisdiction in federal court.<sup>25</sup> Further, Kravitz countered that the social media account should be valued by considering several factors, including “(1) the number of followers; (2) the number of tweets; (3) the content of the tweets; (4) the person publishing the tweets; and (5) the person placing the value of the account.”<sup>26</sup> This valuation places more emphasis on Kravitz himself providing value to the social media account, and thus would likely significantly reduce any alleged harm to PhoneDog.

Despite the competing methodologies from PhoneDog and Kravitz for properly valuing the Twitter account, the court determined the account to be PhoneDog’s property because of the time and expense the business put into developing and maintaining the account over time.<sup>27</sup> Following this determination, the parties eventually settled for an unknown amount.<sup>28</sup> Due to the settlement, the court did not have to express a monetary valuation for the Twitter account, though it noted that PhoneDog’s self-assessed damages “is [not] in bad faith” nor does it “appear[] beyond a legal certainty that the claim is really for less than [\$75,000].”<sup>29</sup>

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at \*4 (asserting a lack of evidence or basis in PhoneDog’s damage methodology); *cf.* Steve Adcock, *How Much is a Twitter Follow Worth?* THINKSAVERETIRE (June 10, 2017), <https://thinksaveretire.com/much-twitter-follow-worth/> [perma.cc/F85C-QLE5] (arguing that a single tweet from a Twitter account arguably provides approximately .0033 cents per follower; moreover, an account that has 100,000 followers may provide up to \$333 per tweet).

<sup>24</sup> *See PhoneDog*, 2011 WL 5415612, at \*2.

<sup>25</sup> *Id.* at \*3.

<sup>26</sup> *Id.* at \*4 (arguing for a broader valuation method for any alleged damages).

<sup>27</sup> Hidy, *supra* note 5, at 484 (explaining the Court’s findings).

<sup>28</sup> Stipulation for Dismissal After Settlement, *Phonedog v. Kravitz*, No. 3:11-cv-03474-MEJ, 2013 WL 207773 (N.D. Cal. Jan. 13, 2013) (relaying the conclusion to the litigation).

<sup>29</sup> *See PhoneDog*, 2011 WL 5415612, at \*5 (contending that PhoneDog’s valuation method may have exceeded subject matter jurisdiction requirement).

### C. *Eagle v. Morgan Social Media Account Valuation*

*Eagle v. Morgan* presents a similar issue as *PhoneDog*, albeit with a starkly different outcome. Dr. Linda Eagle co-founded EdComm Inc. (EdComm), a company that focused on providing banking education services through online platforms.<sup>30</sup> Through her work with EdComm, Eagle personally operated a successful LinkedIn page that contained 4,000 contacts that she used to generate business and further promote EdComm.<sup>31</sup> EdComm was subsequently acquired by a company named Sawabeh Information Services Company (SISCOM), and SISCOM involuntarily terminated Eagle shortly thereafter.<sup>32</sup> After Eagle's termination, SISCOM proceeded to change the password for Eagle's LinkedIn account and effectively locked her out of the account.<sup>33</sup> Eagle regained access to the account approximately twenty-five days later; for seventeen days SISCOM had exclusive control of the account, followed by a week-long period where LinkedIn took control over the account following Eagle's complaints.<sup>34</sup> But even then, Eagle did not have access to the messaging component of her account between June 20 and October 7.<sup>35</sup> Altogether this represented a complete loss of access to Eagle's LinkedIn account for over three weeks, and a partial loss for a three-month period.<sup>36</sup>

Following this dispute over the account, Eagle filed eight claims against SISCOM<sup>37</sup> and asserted damages of \$248,000.<sup>38</sup> Eagle presented the court with her personal findings in reaching this figure, along with the account's valuation.<sup>39</sup> These findings were as follows: Eagle's personal sales to EdComm amounted to an average of \$3

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<sup>30</sup> *Eagle v. Morgan*, No. 11-4303, 2013 WL 943350, at \*1 (E.D. Pa. Mar. 12, 2013) (describing the history of the employee's relation to the business).

<sup>31</sup> *Id.* at \*4 (providing the details of the social media account in the case).

<sup>32</sup> *Id.* at \*1.

<sup>33</sup> *Id.* at \*3.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> The claims are as follows: (i) unauthorized use of name; (ii) invasion of privacy by misappropriation of identity; (iii) misappropriation of publicity; (iv) identity theft; (v) conversion; (vi) tortious interference with contract; (vii) civil conspiracy; and (viii) civil aiding and abetting. *Id.*

<sup>38</sup> *Id.* at \*4 (asserting the amount of damages derived from employer's conduct).

<sup>39</sup> *Id.* (introducing Eagle's valuation method).

million a year.<sup>40</sup> Moreover, Eagle's sales to existing clients comprised around seventy percent of EdComm's entire revenue.<sup>41</sup> Using those figures, Eagle then posited that at least \$1 million of services were likely provided to the Account's 4,000 contacts.<sup>42</sup> Eagle then divided \$1,000,000 by 4,000 to reach a number of \$250 in sales per year per account contact.<sup>43</sup> After identifying a fixed annual value per account contact, Eagle determined that the proportional value for three months is approximately \$62 per account contact.<sup>44</sup> Finally, Eagle took the \$62 three-month value per contact and multiplied by the number of contacts (4,000), arriving at \$248,000 of total damages representing three months without complete access to the account.<sup>45</sup>

Although Eagle successfully alleged three causes of action, including unauthorized use of name or likeness, invasion of privacy by misappropriation of identity, and misappropriation of publicity, the court took a sharp and critical approach to Eagle's valuation methodology.<sup>46</sup> The court first explained that any claim for damages must be "supported by a reasonable basis for calculation" and that "mere guess or speculation is not enough."<sup>47</sup> Additionally, the court found that Eagle failed to prove that she lost a contract, client, or deal during the period that she did not have access to the account because she could not show a single lost opportunity.<sup>48</sup> The court also hypothesized that even if Eagle had maintained complete control over the account following her termination, she nonetheless may not have engaged in any business agreements with account contacts.<sup>49</sup> That possibility alone precluded Eagle from realizing factual damages within a "fair degree of probability."<sup>50</sup> The court ultimately determined that the damages amount was "nothing more than creative guesswork based on

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at \*5 (attributing an average dollar value per account contact based on yearly revenues and total number of contacts).

<sup>44</sup> *Id.* (prorating the average annual value of each Account contact to the time period where Eagle did not have complete access to the account).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at \*13.

<sup>47</sup> *Id.* (quoting *Stevenson v. Econ. Bank of Ambridge*, 413 Pa. 442, 197 A.2d 721, 727 (Pa.1964)).

<sup>48</sup> *Eagle*, 2013 WL 943350 at \*5.

<sup>49</sup> *Id.* at \*14 (contending that Eagle's valuation methodology contains inherent flaws).

<sup>50</sup> *Id.* at \*13.

mere speculation,” with the damages calculation being the result of a “methodology that seemingly has no basis in general accounting principles.”<sup>51</sup> With Eagle having failed to legally prove any damages, her compensatory damages stemming from her former employer’s liability amounted to \$0.<sup>52</sup>

#### **D. Proposed Valuation Method: Social Media Accounts as Intangible Assets**

While there is an apparent lack of consensus between courts for properly valuing damages derived from tortious conduct related to social media accounts, legal scholars and business experts have pondered several solutions, one of which views social media accounts through an intellectual property lens.<sup>53</sup> In 2015 John G. Loughnane et al. proposed this idea, and discussed how a social media account may be viewed as an intangible asset similar to patents, trademarks, and protected customer lists.<sup>54</sup> There are a few different identified frameworks for valuing intangible assets, including what is known as the “cost approach,” “market approach,” and “income approach.”<sup>55</sup>

##### *1. Cost Approach*

Generally speaking, there are three types of cost approaches: (i) the “historical cost approach” which focuses on the original cost of acquiring the intangible asset; (ii) the “replacement cost approach” which examines the cost to create a comparable product or account; and (iii) the “reproduction cost approach” which measures the cost of creating an exact replica of the intangible asset in question.<sup>56</sup> Loughnane et al. explain that in the context of social media accounts, it appears that only a combination of the replacement and reproduction

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<sup>51</sup> *Id.* \*14.

<sup>52</sup> *Id.* at \*15. See McLaughlin, *supra* note 5, at 104 (“Although some privacy rights recognize the inherent value in an individual’s name and reputation, imposing such a high threshold for certainty of damages likely precludes recovery for most claimants in this context, even after proving a clear privacy violation.”)

<sup>53</sup> Loughnane et al., *supra* note 13, at 36 (introducing a possibility for proving damages from harms involving business’s social media accounts).

<sup>54</sup> *See id.*

<sup>55</sup> *See id.*

<sup>56</sup> *Id.* at 37.

cost approaches could be useful, since there is typically no cost associated with creating a social media account online, and it would be mere speculation to place a cost on the amount of time and effort placed into building a social media platform.<sup>57</sup> That said, the cost approach has its limitations, including a lack of focus toward any considerations of future earnings and business.<sup>58</sup> Viewed as a method to calculate damages, the authors write that a court could examine the annual salaries for business employees involved with the social media account, the fees paid to third party consultants such as public relations firms, and the cost for promoting posts on the social media platforms.<sup>59</sup>

## 2. Market Approach

The market approach looks to the market value of similarly situated intangible assets in order to determine an approximate value for the asset in question.<sup>60</sup> In the intellectual property context, experts often use the “sales-transaction method” in the marketplace to view how other unrelated market participants valued the intangible assets.<sup>61</sup> A common example is the sale of a patent for a new pharmaceutical drug or medical device.<sup>62</sup> Similarly, Loughnane et al. argue that an arm’s length transaction involving a social media account with a significant following could provide other analysts and businesses with a relevant valuation of the social media account, and could further assist courts in calculating damages stemming from harms involving social media accounts.<sup>63</sup> Commentators have asserted that this valuation method may present difficulties as applied to social media accounts because such accounts present “newly defined assets with limited transaction history.”<sup>64</sup> This challenge is exacerbated through

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<sup>57</sup> *Id.* See Robert F. Reilly, *Valuing Intangible Assets: Cost Approach Methods and Procedures*, 22 J. MULTISTATE TAX’N & INCENTIVES 18, 26 (identifying intangible assets particularly suitable for the cost approach).

<sup>58</sup> Loughnane et al., *supra* note 13, at 37.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* (using as an example an account with 100,000 followers).

<sup>64</sup> David Haas, *Valuation of Social Media Data: What’s a Like, Follower, Retweet Worth?*, STOUT RISIUS ROSS, LLC (Sept. 1, 2015), <https://www.stout.com/en/insights/article/valuation-social-media-data-whats-follower-retweet-worth/> [perma.cc/B6PK-AVAU] (explaining the difficulties of using the market approach for valuing a social media account).



“underlying differences in demographics, spending habits, and ‘conversion values’ (i.e., the percentage of followers that can be converted into customers) among social media user bases.”<sup>65</sup>

### 3. *Income Approach*

The income approach can be likened to a business valuation of a company; it looks at projected growth and discounted future cash flows from the use or licensing of intangible assets.<sup>66</sup> With regard to social media accounts, Loughnane et al. maintain that the income approach “directly addresses the future value that can be created by social media for the business.”<sup>67</sup> Further, relevant considerations for valuing a social media platform under this method include determining the projected growth of the account (in followers or “likes”) and the number of online users who would access the social media accounts for information.<sup>68</sup> They note that an inherent problem with this approach is determining an appropriate discount rate for the cash flow calculations.<sup>69</sup> For example, should the future cash flows of a social media account be considered in perpetuity?<sup>70</sup> Technically the social media account could exist forever, but it is difficult to determine whether the future cash flows will remain stable.<sup>71</sup> Consider Myspace, which, following its meteoric rise in the early 2000s, was sold to News Corp. for \$580 million, and failed to increase in value and compete against other emerging social media platforms.<sup>72</sup> Ultimately, Myspace was re-sold just six years later for \$35 million.<sup>73</sup> Any business’s social media account on Myspace would have been unable to safely rely on the income approach for valuation, which further underscores the volatility among social media platforms. In sum, most courts would

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<sup>65</sup> Loughnane et al., *supra* note 13, at 99.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* (showing the relevance of the income approach for valuing social media accounts).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* (illustrating a difficulty with the income approach).

<sup>71</sup> *Id.* (using the perpetuity example to highlight the problems with the income approach).

<sup>72</sup> Nicholas Jackson, *As Myspace Sells for \$35 Million, a History of the Network’s Valuation*, ATLANTIC (June 29, 2011), <https://www.theatlantic.com/technology/archive/2011/06/as-myspace-sells-for-35-million-a-history-of-the-networks-valuation/241224> [perma.cc/G86Q-S2WF].

<sup>73</sup> *Id.*

likely refuse to attach value for what they view to be an “indeterminate reputational matter or an impermanent asset.”<sup>74</sup>

### E. Conclusion

Parties today consistently struggle to prove damages based off of alleged harms involving social media accounts, an issue which speaks to the difficulty of accurately valuing a social media account for businesses and their employees.<sup>75</sup> It is uncontested that social media provides immensely significant value in marketing and advertising for most—if not all—thriving businesses today.<sup>76</sup> As evinced through *PhoneDog* and *Eagle*, employees and businesses alike have been unsuccessful in proving damages in court based off of valuing their respective social media accounts.<sup>77</sup> A holistic rule-based approach has not yet emerged to calculate and value a business’s social media account that can apply to a broad spectrum of diverse businesses.<sup>78</sup> However, there are lessons that could help identify a framework for courts to evaluate business’s social media accounts on a case by case basis, such as viewing social media accounts as intangible assets from an intellectual property perspective.<sup>79</sup>

Seth Abrams<sup>80</sup>

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<sup>74</sup> Susan Park & Patricia Sánchez Abril, *Digital Self-Ownership: A Publicity-Rights Framework for Determining Employee Social Media Rights*, 53 AM. BUS. L.J. 537, 580 (2016).

<sup>75</sup> See generally *Eagle v. Morgan* No. 11-4303, 2013 WL 943350 (E.D. Pa. Mar. 12, 2013); *PhoneDog v. Kravitz* No. C-11-03474 MEJ, 2011 WL 5415612 (N.D. Cal. Nov. 8, 2011); Hidy, *supra* note 5, at 431.

<sup>76</sup> See Lindsey-Mullikin & Borin, *supra* note 4, at 473.

<sup>77</sup> *Eagle*, 2013 WL 943350; *PhoneDog*, 2011 WL 5415612 (recapitulating the two illustrative cases which demonstrate the difficulties of proving damages from valuing social media accounts of businesses).

<sup>78</sup> Loughnane et al., *supra* note 13, at 36 (arguing for a different methodology for valuing social media assets).

<sup>79</sup> *Id.*

<sup>80</sup> Student, Boston University School of Law (J.D. 2020).