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Mixing Business With Pleasure: Evaluating the Blurred Line Between the Ownership of Business and Personal Social Media Accounts Under § 541(a)(1)

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**MIXING BUSINESS WITH PLEASURE: EVALUATING THE
BLURRED LINE BETWEEN THE OWNERSHIP OF BUSINESS
AND PERSONAL SOCIAL MEDIA ACCOUNTS UNDER
§ 541(A)(1)**

ABSTRACT

The 2005 BAPCPA amendments to the Bankruptcy Code did not address whether social media accounts constitute property of the estate. While social media use was not widespread in 2005, several widely used platforms are household names today. Despite the current popularity of social media, however, few courts have addressed the ownership rights in social media accounts. Fewer still have addressed whether a social media account is considered property of the estate.

*In a case of first impression in 2015, the Bankruptcy Court for the Southern District of Texas in *In re CTLI, LLC* held that a chapter 11 debtor's social media accounts were property of the estate. Specifically, the court concluded that the debtor's Twitter and Facebook accounts fell under property of the estate because the social media accounts had a mixed personal and business use.*

This Comment argues that social media accounts should not automatically fit within the broad scope of § 541(a)(1). Rather, courts should apply a factor-driven, case-by-case analysis to determine whether social media accounts constitute property of the estate. This Comment then proposes a three-prong analytical framework to guide courts' classification of a debtor's social media accounts.

This proposed solution seeks to accomplish two primary goals. First, it will help courts clarify the ownership rights in social media accounts and provide guidance to the over one billion users of social media who may face this issue. Second, because many social media accounts do not have an ascertainable value, this Comment will shed light on an appropriate valuation method of social media accounts in the bankruptcy context.

INTRODUCTION

As of 2017, grandparents, children, and everyone in between seem to have some sort of digital footprint—be it on Facebook, Twitter, or Instagram. Businesses are also becoming increasingly active on social media, using various platforms to respond to customer complaints, advertise their goods and services, and connect with customers.¹ Social media has become an essential, intangible asset of a business.² With over one billion active users of social media (businesses and individuals), and its integration into everyday life, it is only more likely that the Internet will become an integral part of day-to-day life and business as the Millennial generation ages.

Despite individuals' and businesses' familiarity with social media throughout the United States,³ Congress has not yet categorized social media accounts within § 541 of the Bankruptcy Code (the "Code").⁴ While understanding how social media accounts fit within the scope of the Code is crucial, clarifying the extent of users' ownership rights of social media accounts is even more crucial because unlike ownership in the traditional sense of property law, a person cannot "own" a social media account.⁵ If a clear distinction exists between how a social media account is used—for business or personal use—ownership issues do not arise. Significant ownership issues arise, however, when an account has a mixed business and personal use. These underlying ownership issues turn on whether the account belonged to the business or to the person who created the account.

Additionally, the ownership rights of *content* posted to social media platforms are muddled.⁶ Facebook's "Statement of Rights and Responsibilities" states that the owner of the account is the owner of the

¹ See generally Megan Conley, *A Beginner's Social Media Guide for Small Businesses*, SOCIALMEDIA EXAMINER (Apr. 24, 2014), <http://www.socialmediaexaminer.com/social-media-guide-small-businesses/>.

² See *id.*

³ As of September 2015, there were over 1.5 billion active users on Facebook alone. See *Newsroom*, FACEBOOK, <http://newsroom.fb.com/company-info/> (last visited Jan. 23, 2016).

⁴ *In re* CTLI, LLC, 528 B.R. 359, 361 (Bankr. S.D. Tex. 2015).

⁵ This Comment will address various user accounts created through social media platforms, mainly those created using Twitter and Facebook.

⁶ See *Twitter Terms of Service*, TWITTER, <https://twitter.com/tos> (last visited Mar. 17, 2017); *Statement of Rights and Responsibilities*, FACEBOOK, <https://www.facebook.com/legal/terms> (last updated Jan. 30, 2015); *User Agreement*, LINKEDIN (Oct. 23, 2014), <https://www.linkedin.com/legal/user-agreement>; *Terms of Service (Effective November 1, 2016)*, PINTEREST, <https://about.pinterest.com/en/terms-service> (last visited Mar. 17, 2017).

content posted to Facebook through the account.⁷ But Facebook’s “Statement of Rights and Responsibilities” also states that Facebook has “a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook.”⁸ The conflicting policies may make the ownership rights of the account and content unclear in the context of bankruptcy.⁹

When businesses operate social media accounts, the discrepancy between social media websites’ ownership polices generates the question: who owns the various social media accounts a business operates?¹⁰ This issue becomes particularly important when a business enters bankruptcy, where a business’s assets are integral to a successful reorganization.

The Bankruptcy Court for the Southern District of Texas recently confronted this issue in *In re CTLI, LLC*.¹¹ There, the court held that a business’s social media accounts were property of the estate because the debtor’s social media account had a mixed personal and business use.¹² In reaching this conclusion, the court recognized that the issue of social media is “mostly uncharted in bankruptcy.”¹³ However, the court left questions about social media account ownership unanswered.¹⁴

The court’s decision in *In re CTLI, LLC* can potentially have a large impact on future bankruptcies and the legal implications of social media because, on average, 120 businesses filed for bankruptcy each day in 2015.¹⁵ While social media accounts have been classified as intangible property,¹⁶ the holding of *In re CTLI, LLC* cannot be broadly applied in a “one-size-fits-all” manner.

⁷ See FACEBOOK, *Statement of Rights and Responsibilities*, *supra* note 6.

⁸ See *id.*

⁹ See *id.*

¹⁰ See *id.* (stating that if an individual selects a username or similar identifier for his account or Facebook Page, Facebook reserves the right to remove or reclaim the selection in “appropriate” circumstances (such as when a trademark owner complains about a username that does not closely relate to a user’s actual name)).

¹¹ 528 B.R. 359 (Bankr. S.D. Tex. 2015).

¹² *Id.* at 374.

¹³ *Id.* at 378. While the court recognized that ignoring the value of the social media assets “would do injustice to both debtors and creditors,” the court found that with respect to business accounts “the principles that have been developed to deal with the myriad forms of property passing through bankruptcy provide clear guidance as to how to treat such assets.” *Id.*

¹⁴ *Id.*

¹⁵ AM. BANKR. INST., *Bankruptcy Statistics: March 2017 Bankruptcy Statistics- State and District*, <http://www.abi.org/newsroom/bankruptcy-statistics> (last visited May 1, 2017).

¹⁶ See, e.g., *Eagle v. Morgan*, No. CIV.A. 11-4303, 2013 WL 943350, at *10 (E.D. Pa. Mar. 12, 2013) (noting that although a LinkedIn account is intangible property, it could not be the subject of a conversion

Although modern technology has made it easy to stay in touch with people, communicate, and foster technological relationships in both a personal and professional manner,¹⁷ the rapid development of technology and social media has created a widening gap with other areas of law. As a result, only a few courts have shed light on issues related to social media.¹⁸ Moreover, these cases involved other areas of the law, such as employment and privacy law. Prior to *In re CTLI, LLC* in 2015, social media accounts were not considered in the context of bankruptcy. Thus, bankruptcy courts are relying on employment law cases on social media use in the workplace and district court cases for guidance.¹⁹ The determination of social media as a property right is applied at the state level. Courts will therefore continue to have difficulty applying the law consistently in the bankruptcy context. These issues are multi-faceted and rely on heavily on factual determinations; bankruptcy courts relying on, for example, employment law decisions about social media, face a task not unlike attempting to force a round peg through a square hole,²⁰ resulting in a further state of confusion in the bankruptcy.

This Comment will address the court's holding in *In re CTLI, LLC* in two principal ways. First, it will argue that the court in *In re CTLI, LLC* over-generalized the role of social media accounts in bankruptcy proceedings.²¹ Courts should not consider social media accounts to be property of the estate when the social media account: (1) has a mixed business and personal use; and (2) is not primarily used to promote the debtor's business.

claim under Pennsylvania law); *see also* David A. Bell, *Social Media Accounts and Ownership Rights*, 33 CORP. COUNS. REV. 1, 5–15 (2014) (providing an overview of social media disputes).

¹⁷ *See* Laura Harrison, *How to Keep in Touch with Family and Friends When you Move Away*, <http://www.socialnomics.net/2014/01/14/how-to-keep-in-touch-with-family-and-friends-when-you-move-away/>.

¹⁸ *See, e.g.*, *Bland v. Roberts*, 730 F.3d 368, 385 (4th Cir. 2013); *Mattocks v. Black Entm't Television LLC*, 43 F. Supp. 3d 1311, 1321 (S.D. Fla. 2014).

¹⁹ *See generally* Bell, *supra* note 16, at 5–15 (examining several notable cases discussing social media and ownership rights).

²⁰ *See* Joshua A. Mooney, *Locked Out on LinkedIn: LinkedIn Account Belongs to Employee, Not Employer*, INTELL. PROP. & TECH. L.J., June 2013, at 16, 18 (“The ultimate merit of such claims will be fact intensive.”); Steve Cosentino, *Contracting and Compliance in a Web of Data Security Regulations*, ASPATORE, Mar. 2013, at 1 (“Unfortunately, because there is no central authority for these issues, lawyers must wade through a tangled mess of laws, regulations, and standards to provide effective counsel to our clients.”); *See also* Steve Jobs, *Stanford Commencement Speech*, STANFORD REPORT (discussing the importance of thinking different).

²¹ *See In re CTLI, LLC*, 528 B.R. 359, 378 (Bankr. S.D. Tex. 2015) (holding that business social media accounts can be property of the estate in the case of a business debtor).

Second, this Comment will directly address the holding in *In re CTLL, LLC* and show why the bankruptcy court's holding is contradictory to the underlying policy of a debtor's fresh start. Bankruptcy courts will need to evaluate future cases on a case-by-case basis. Unlike the Internet, which is evolving at an exponential rate, Internet-related case law is developing much more slowly.²² Courts must therefore be proactive in implementing a process to eliminate ambiguity, which will help deter unnecessary litigation in the future.

This Comment proceeds as follows. First, it will analyze Facebook and Twitter as examples of applicable social media accounts. The background of this Comment will provide an overview of five topics: (1) the history of social media; (2) relevant common law and modern property principles; (3) § 541(a)(1) of the Code, which defines property of the estate; (4) users' ownership rights of social media accounts created through Facebook and Twitter; and (5) recent case law involving social media account ownership.

Then, the analysis of this Comment will propose a three-factor test that will help courts determine whether a social media account should constitute property of the estate. This analysis also highlights other subsidiary consideration that courts should take into account, such as quasi-property rights and social media account valuation techniques. Finally, this Comment applies its proposed factor test to the facts on *In re CTLL, LLC* and demonstrates why the court should not have concluded the social media accounts at issue constituted property of the estate.

I. BACKGROUND

A. *The Rise of Social Media*

The rise of social media accounts began in 1997 with the launch of Six Degrees, the first social media network.²³ Websites like Myspace and Friendster gained momentum in the early 2000s, Facebook launched in 2004 as

²² See *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (addressing the broad implications of expanding the current case law to account for the interrelation of law and technology).

²³ Six Degrees allowed users to create an online profile. Drew Hendricks, *Complete History of Social Media: Then and Now*, SMALL BUSINESS TRENDS (May 8, 2013), <https://smallbiztrends.com/2013/05/the-complete-history-of-social-media-infographic.html>.

a Harvard only website, and, on July 15 and September 26, 2006, respectively, Facebook and Twitter became available to users around the globe.²⁴

Despite social media's rapid growth, Congress remained silent on a social media account's status in bankruptcy in 2005 after the passing of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA").²⁵ Congress's silence on the term is understandable because social media use was in its infancy.²⁶ However, after the court's decision in *In re CTLI, LLC* lawmakers may now be grappling with new questions arising from the ambiguity of this issue and its inevitable application in bankruptcy.²⁷

B. *Historical Overview of Property*

Under common law, property was viewed as a "tangible thing over which one person had the absolute, indivisible right to use, sell, give away, leave idle, or destroy."²⁸ Today, however, modern property is viewed as a "bundle" of rights, which includes the right to use something, the right to prevent others from using the thing, and the right to transfer an interest to someone else.²⁹ Property rights empower "individuals to control the flow of their data, and by extension the revenue associated with it."³⁰

Courts have also recognized a quasi-property right in intangibles like patents, copyrights,³¹ and even corporate goodwill.³² Quasi-property rights in

²⁴ *Id.*

²⁵ Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 113(a)(4)(A) & (B), 119 Stat. 23. In fact, the BAPCPA created a broader scope by including post-petition property. *See* 11 U.S.C. § 541 (2012); *id.* § 1115.

²⁶ In 2004, "Thefacebook" was launched in the dorm rooms of Harvard University and did not launch to the public as "Facebook" until 2006. *See* Biography.com Editors, *Mark Zuckerberg Biography*, THE BIOGRAPHY.COM WEBSITE (Mar. 9, 2017), <http://www.biography.com/people/mark-zuckerberg-507402>.

²⁷ *See In re CTLI, LLC*, 528 B.R. 359 (Bankr. S.D. Tex. 2015).

²⁸ A. Mechele Dickerson, *From Jeans to Genes: The Evolving Nature of Property of the Estate*, 15 BANKR. DEV. J. 285, 287 (1999).

²⁹ *Id.*

³⁰ Diana Liebenau, Note, *What Intellectual Property Can Learn from Information Privacy, and Vice Versa*, 30 HARV. J.L. & TECH. 285, 295 (2016).

³¹ Within the scope of intangible property, § 541 also includes intellectual property, trademarks, copyrights, patents, and trade secrets. *See* 11 U.S.C. § 541 (2012); *see also* Dickerson, *supra* note 33, at 288–92 (further noting that courts recognize a property interest in trademarks and trade secrets).

³² Smita Gautam, Comment, *#Bankruptcy: Reconsidering "Property" to Determine the Role of Social Media in the Bankruptcy Estate*, 31 EMORY BANKR. DEV. J. 127, 131 (2014) (arguing that social media should be considered in the bankruptcy context as property of the estate). While Smita Gautam provides an enlightening discussion of this topic, this Comment is distinguishable because Smita Gautam discusses social media's applicability as property of the estate prior to *In re CTLI, LLC*.

intangibles have expanded to websites as well.³³ Courts and Congress have struggled, however, to keep up with the pace at which modern technology has developed.³⁴

One hundred years ago, the personal computer was not even a thought, the Internet was not yet imagined, and Facebook was not even a possibility. It has been nearly impossible for Congress to keep pace with the incredible rate of modern technology development.³⁵ Thus, with regard to property rights in social media accounts, it is important to consider the nature of ownership and the extent to which a property right exists.³⁶

C. *What Is Property of the Estate?*

The act of filing a bankruptcy petition automatically creates an estate under § 541(a)(1).³⁷ Section 541(a)(1) broadly defines what constitutes property of the estate.³⁸ According to § 541(a)(1), the estate includes “all legal or equitable interests of the debtor as of the commencement of the case,” including “tangible and intangible [forms of property], causes of action, and all other forms of property.”³⁹

The Code does not explicitly define what constitutes “property,” allowing courts to construe the term broadly “to include everything of value the debtor possesses even if the property, or the debtor’s interest in that property, is ‘novel.’”⁴⁰ For example, in *In re Yonikus*, the Seventh Circuit interpreted

³³ See Mark A. Lemley, *The Surprising Virtues of Treating Trade Secrets as IP Rights*, 61 STAN. L. REV. 311, 334 (2008). See generally *Int’l News Serv. v. Assoc. Press*, 248 U.S. 215, 236 (1918) (treating as quasi-property “material out of which [a] part[y] . . . seek[s] to make profits”).

³⁴ Dickerson, *supra* note 33, at 298.

³⁵ *Id.* (“Because of advances in technology, people now own or control ‘things’ that did not exist when Congress enacted either the Act or the Code.”).

³⁶ See Adam Walker, *Phonedog vs. Kravitz: In the World of Social Media, Who Really Owns What?*, PRACTICAL LAWYER, June 2012, at 49, 50–51 (explaining that the courts are split on the issue of whether ownership rights can extend to intangible property).

³⁷ 11 U.S.C. § 541 (2012); DAVID G. EPSTEIN ET AL., *BANKRUPTCY: DEALING WITH THE FINANCIAL FAILURE FOR INDIVIDUALS AND BUSINESS* 55 (4th ed. 2015).

³⁸ See 11 U.S.C. § 541.

³⁹ *Id.*; 5 COLLIER ON BANKRUPTCY ¶ 541.03 n.4 (Alan N. Resnik & Henry J. Sommer eds., 16th ed.) (“Business social media accounts were held to be property of a limited liability company’s estate in *In re CTLI, LLC*, 528 B.R. 359 (Bankr. S.D. Tex. 2015). The court also discussed the difficult problems that arise with respect to such property when the debtor is an individual.”).

⁴⁰ Dickerson, *supra* note 33, at 287 (citing *Parker v. Saunders (In re Bakersfield Westar)*, 226 B.R. 227, 233–34 (B.A.P. 9th Cir. 1998)).

property of the estate as “every conceivable interest of the debtor, future, nonpossessory, contingent, speculative, and derivative”⁴¹

An estate generally inherits all of the rights and obligations of the debtor under contract and includes only the property that the debtor possessed at the time of the filing of a petition.⁴² Collier on Bankruptcy explains that § 541(a)(1) “provides the framework for determining the scope of the debtor’s estate and what property will be included in the estate, [but] it does not provide any rules for determining whether a debtor has an interest in the property in the first place.”⁴³ Importantly, “[p]roperty interests are created and defined by state law,”⁴⁴ unless a federal interest requires a different result.⁴⁵

When a business entity files for bankruptcy under chapter 11, property of the estate is somewhat different. A chapter 11 debtor must include a schedule of executory contracts⁴⁶ and unexpired leases in its bankruptcy petition.⁴⁷ Additionally, licenses and permits may be considered property of the estate under applicable non-bankruptcy law.⁴⁸

Chapter 11 allows the debtor to propose a plan of reorganization and keep its business alive while paying its creditors over a period of time set forth in the plan.⁴⁹ Chapter 11 cases generally enable the debtor to remain in

⁴¹ *In re Yonikus*, 996 F.2d 866, 869 (7th Cir. 1993) (citing *In re Anderson*, 128 B.R. 850, 853 (D.R.I. 1991)). Other courts have adopted this interpretation. *See, e.g.*, *Watson v. H.J. Heinz Co.*, No. 03-1433, 2004 U.S. App. LEXIS 11251, at *5 (Fed. Cir. June 8, 2004); *Amerson v. King (In re Amerson)*, No. CO-14-045, 2015 Bankr. LEXIS 2930, at *16 n.33 (B.A.P. 10th Cir. Sep. 2, 2015); *Azbill v. Kendrick (In re Azbill)*, No. 06-8074, 2008 Bankr. LEXIS 527, at *20 (B.A.P. 6th Cir. Mar. 11, 2008); *Harris v. hgregg, Inc.*, No. 1:11CV813, 2013 U.S. Dist. LEXIS 45394, at *18 (M.D.N.C. Mar. 29, 2013); *In re Miller*, 224 B.R. 913, 916 (Bankr. D.N.D. 1998).

⁴² 11 U.S.C. § 541 (2012). Property of the estate includes all property, wherever located and by whomever held. *Id.*

⁴³ 5 COLLIER ON BANKRUPTCY, *supra* note 44, ¶ 541.03 (explaining that the gap left in the Code is intended to be filled by nonbankruptcy law).

⁴⁴ *Butner v. United States*, 440 U.S. 48, 54 (1979); *see also* 11 U.S.C. § 541. Congress has intentionally left this gap for the determination of property rights to state law. *See* 5 COLLIER ON BANKRUPTCY, *supra* note 44, ¶ 541.03.

⁴⁵ EPSTEIN ET AL., *supra* note 42, at 55 (citing *Butner v. United States*, 440 U.S. 48 (1979)); 5 COLLIER ON BANKRUPTCY, *supra* note 44, ¶ 541.03.

⁴⁶ 3 COLLIER ON BANKRUPTCY, *supra* note 44, ¶ 365.02.

⁴⁷ FED. R. BANKR. P. 1007(b)(1)(C); BANKR. JUDGES DIV., ADMIN. OFFICE OF U.S. COURTS, BANKR. BASICS 11 (rev. 3d ed. 2011), <http://www.uscourts.gov/sites/default/files/bankbasics-post10172005.pdf>; *see also* *Moody v. Amoco Oil Co.*, 734 F.2d 1200, 1212 (7th Cir. 1984) (stating that the termination of executory contracts “must be complete and not subject to reversal under the terms of the contract or under state law”).

⁴⁸ *See In re Nat’l Cattle Cong., Inc.*, 179 B.R. 588, 593 (Bankr. N.D. Iowa 1995).

⁴⁹ “The main thrust of § 70a(5) [the precursor to section 541(a)(1) of the Code] is to secure for the creditors everything of value the bankrupt may possess in alienable or leviable form when he filed his petition.

possession of the property of the estate as a “debtor-in-possession” and continue the operation of the business.⁵⁰ In cases relating to small businesses,⁵¹ a trustee is responsible for the management of the property of the estate and operating the debtor’s business.⁵²

D. An Overview of Social Media

As of the end of 2016, an estimated 2.34 billion people around the world are “social media users.”⁵³ As of January 2017, approximately 1.87 billion people were “active monthly users” of Facebook.⁵⁴ Another widely known social media platform, Twitter, boasted 319 million “monthly active users” during the fourth quarter of 2016.⁵⁵

The largest age group of social media users is Millennials⁵⁶ because technology shaped their upbringing, and they are therefore more connected to technology than previous generations.⁵⁷ Millennials have changed the way modern day society communicates and interacts with each other. Studies show that more than three-quarters of Millennials have a social media account, compared with only half the members of Generation X and less than a third of the Baby Boomers.⁵⁸

To this end the term ‘property’ has been construed most generously and an interest is not outside its reach because it is novel or contingent or because enjoyment must be postponed.” EPSTEIN ET AL., *supra* note 42, at 55; BANKR. JUDGES DIV., ADMIN. OFFICE OF U.S. COURTS, *supra* note 52, at 7. A reorganization is used by commercial enterprises that desire to continue operating the business and repay creditors at the same time. *See id.*

⁵⁰ In chapter 11, the Code gives a “debtor-in possession” the same powers as a Trustee. 11 U.S.C. § 1107 (2012); *see* BANKR. JUDGES DIV., ADMIN. OFFICE OF U.S. COURTS, *supra* note 52, at 7.

⁵¹ FED. R. BANKR. P. 1020.

⁵² BANKR. JUDGES DIV., ADMIN. OFFICE OF U.S. COURTS, *supra* note 52, at 11. In a small business proceeding, the U.S. Trustee will monitor the activities of the small business debtor during the case in order to help the debtor, because small business debtors may, for example, have difficulty obtaining filing extensions.

⁵³ *Number of Social Network Users Worldwide from 2010 to 2020 (in Billions)*, STATISTA, <https://www.statista.com/statistics/278414/number-of-worldwide-social-network-users/> (last visited Mar. 18, 2017).

⁵⁴ *Number of Monthly Active Twitter Users Worldwide from 1st Quarter 2010 to 4th Quarter 2015 (in Millions)*, STATISTA, <https://www.statista.com/statistics/282087/number-of-monthly-active-twitter-users/> (last visited Mar. 18, 2017).

⁵⁵ *Id.*

⁵⁶ THE COUNCIL OF ECON. ADVISERS, EXEC. OFFICE OF THE PRESIDENT, 15 ECONOMIC FACTS ABOUT MILLENNIALS (2014), https://obamawhitehouse.archives.gov/sites/default/files/docs/millennials_report.pdf. Millennials are the cohort of Americans born between 1980 and the mid-2000s, and they are the largest generation in the United States. *Id.* This is the first generation to have access to the Internet during their formative years. *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

Businesses are also increasingly starting to use social media. For example, Facebook recently reported over 40 million small business pages, representing over 41% of small businesses in the United States on Facebook.⁵⁹ This growth can likely be attributed to businesses' desire to reach more Millennials and give them information about products and services.⁶⁰ Millennials in turn can show support of a businesses by "following" a company's Facebook Page ("Page").

The main reason why Millennials⁶¹ "follow" a brand or company on Facebook is to support the brand.⁶² When an individual account holder follows, or "likes" a Page, they can elect to follow that Page to receive updates through statuses that notify the user of any new postings.⁶³ Regardless of age, social media is practical in everyday life and business.

1. *A Look at Individual Facebook Accounts and Business Pages*

At the simplest level, Facebook offers two types of profiles: (1) individual profiles; and (2) Pages. The individual Facebook account is the standard account Facebook offers.⁶⁴ Creating an individual Facebook account is remarkably simple. It only takes a few clicks of the mouse, a few entries into text boxes, and the clicking of a large green button to create a Facebook account and enter into a binding contract with Facebook.⁶⁵ More specifically, users must verify that they are at least 13 years old; use their real name; and agree to create only one account.⁶⁶ According to Facebook, a personal profile, which is created through a personal account, is for a non-commercial use and

⁵⁹ *By the Numbers: 90 Amazing Facebook Page Statistics*, DMR (Feb. 1, 2017), <http://expandedramblings.com/index.php/facebook-page-statistics/2/>.

⁶⁰ THE COUNCIL OF ECON. ADVISERS, *supra* note 61.

⁶¹ Millennials are the generation born in 1982 and approximately twenty years after, and they are defined as the millennial generation, or generation Y. See Juliet Lapidus, *Wait, What, I'm a Millennial?*, N.Y. TIMES (Feb. 4, 2015), <https://www.nytimes.com/2015/02/05/opinion/wait-what-im-a-millennial.html>.

⁶² DMR, *supra* note 64; see also Shea Bennett, *10 Reasons Why Millennials Follow Brands on Facebook, Twitter and Pinterest*, ADWEEK (Feb. 6, 2015), <http://www.adweek.com/digital/millennials-brands-social-media/> (noting that millennials favor supporting brands because they want to show support in a sense because the Millennials grew up with an entrepreneurial drive).

⁶³ An individual account holder may "like" a page to show support to the page. See FACEBOOK, <https://www.facebook.com/legal/terms> (last visited Nov. 1, 2015).

⁶⁴ *See id.*

⁶⁵ *See id.*

⁶⁶ FACEBOOK, *Statement of Rights and Responsibilities*, *supra* note 6.

represents an individual person.⁶⁷ A personal account can have up to 5,000 Facebook friends.⁶⁸

Facebook allows individual users to create accounts to connect with other Facebook users.⁶⁹ Individual accounts are referred to as “personal” accounts because only a person with a “real name” and birthdate can create a Facebook profile.⁷⁰ Facebook, as a social media platform, encourages individual users of personal accounts to communicate with each other through sharing pictures, posting statuses, and posting on other users’ timelines.⁷¹ By creating a Facebook account, users agree to Facebook’s Statement of Rights and Responsibilities.⁷² Individuals likely do not consider the legal issues that accompany this seemingly simple process, including the name used in creating the account, the Terms, the Data Policy, and the Cookie Use.⁷³

Businesses, in contrast, do not have Facebook profiles. Rather, they have Pages.⁷⁴ A local business, company, organization, band, artist, public figure, or

⁶⁷ *Why Should I Convert My Personal Account to a Facebook Page?*, FACEBOOK, <https://www.facebook.com/help/217671661585622> (last visited Mar. 18, 2017).

⁶⁸ *Should I Create a Page or Allow People to Follow My Public Updates from My Personal Account?*, FACEBOOK, <https://www.facebook.com/help/203141666415461> (last visited Mar. 18, 2017).

⁶⁹ *Facebook Principles*, FACEBOOK, <https://www.facebook.com/principles.php> (last visited Feb. 15, 2017).

⁷⁰ See FACEBOOK, *Statement of Rights and Responsibilities*, *supra* note 6.

⁷¹ FACEBOOK, *supra* note 68.

⁷² See FACEBOOK, *Statement of Rights and Responsibilities*, *supra* note 6.

⁷³ See FACEBOOK, *supra* note 68; FACEBOOK, *Statement of Rights and Responsibilities*, *supra* note 6.

⁷⁴ See FACEBOOK, *Statement of Rights and Responsibilities*, *supra* note 6 (“Facebook users provide their real names and information, and we need your help to keep it that way. Here are some commitments you make to us relating to registering and maintaining the security of your account:

1. You will not provide any false personal information on Facebook, or create an account for anyone other than yourself without permission.
2. You will not create more than one personal account.
3. If we disable your account, you will not create another one without our permission.
4. You will not use your personal timeline primarily for your own commercial gain, and will use a Facebook Page for such purposes.
5. You will not use Facebook if you are under 13.
6. You will not use Facebook if you are a convicted sex offender.
7. You will keep your contact information accurate and up-to-date.
8. You will not share your password (or in the case of developers, your secret key), let anyone else access your account, or do anything else that might jeopardize the security of your account.
9. You will not transfer your account (including any Page or application you administer) to anyone without first getting our written permission.
10. If you select a username or similar identifier for your account or Page, we reserve the right to remove or reclaim it if we believe it is appropriate (such as when a trademark owner complains about a username that does not closely relate to a user’s actual name.”).

cause can create a Page.⁷⁵ A Page is created when a person registers for a personal Facebook account and uses that account to create a Page.⁷⁶ A business could not, for example, create a personal Facebook account and use the account in the name of the business without violating Facebook's Statement of Rights and Responsibilities.⁷⁷ The Statement of Rights and Responsibilities provides that a Page can only be created through an existing individual account and states: "You'll manage your Page from your personal account, but your info (ex: your name, email) won't appear on your Page unless you choose to add it."⁷⁸ Further, a personal Facebook account that exceeds 5,000 friends can continue to operate as an individual profile (capped at 5,000 friends), or the user can convert the profile into a Page.

A Facebook user can create and manage multiple Pages, but an individual cannot create multiple accounts.⁷⁹ Further, Facebook prohibits users from creating personal accounts in the name of a business by adding in a function that runs the profile name through an algorithm type of database.⁸⁰

Facebook's website states that "if your goal is to represent your business, brand or product on Facebook, create a Page."⁸¹ However, if the goal is to share updates from a personal Facebook account, individual accounts can follow up to 5,000 people,⁸² and the account enables unlimited people to become followers.

While Facebook does not offer much assistance by way of rules or frequently asked questions, it does offer a forum for help called the Help Center, where users can pose question to members of the Facebook Help

⁷⁵ *Create a Page*, FACEBOOK, https://www.facebook.com/pages/create/?ref_type=registration_form (last visited Mar. 18, 2017).

⁷⁶ See FACEBOOK, *Statement of Rights and Responsibilities*, *supra* note 6.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ FACEBOOK, *Why Should I Convert My Personal Account to a Facebook Page?*, *supra* note 72.

⁸⁰ See *What Names Are Allowed on Facebook?*, FACEBOOK, <https://www.facebook.com/help/112146705538576> (last visited Mar. 18, 2017) ("Facebook is a community where people use their authentic identities. We require people to provide the name they use in real life; that way, you always know who you're connecting with. This helps keep our community safe."); FACEBOOK, *Why Should I Convert My Personal Account to a Facebook Page?*, *supra* note 72 (Personal profiles are for non-commercial use and represent individual people. Pages look similar to personal profiles, but they offer unique tools for businesses, brands and organizations.").

⁸¹ FACEBOOK, *Should I Create a Page or Allow People to Follow My Public Updates from My Personal Account?*, *supra* note 73.

⁸² For example, people means any Facebook user. *Id.*

Team.⁸³ For example, when one user asked, “[h]ow do I create a business [P]age not connected to my personal [P]age?”, a Facebook representative responded: “Pages aren’t separate Facebook accounts and do not have separate login information.”⁸⁴

The distinction between the two types of accounts, however, is not particularly clear. Users are required to log in through their personal account to create a business Page.⁸⁵ Facebook’s Statement of Rights and Responsibilities does not allow users to create multiple accounts or create accounts with a false name.⁸⁶ Facebook has a setting for business Pages where a user can “appoint” an administrator to have access to the business Page without the ability to see what is in the creator’s personal account.⁸⁷ This process is Facebook’s attempt to separate the two accounts, but they are not separate accounts. The business Page cannot exist without the individual Facebook account;⁸⁸ therefore, they cannot be considered two distinct accounts.

Facebook allows a person to convert his or her personal account to a Page and will even do all the work for the user.⁸⁹ According to Facebook, “when you are ready to convert your personal account to a . . . Page” follow four easy steps.⁹⁰ Does the conversion of a personal account to a Page change the purpose of the Facebook account?⁹¹ While a Facebook Page may be used “for business purposes,” this Comment will later argue that a line needs to be drawn to differentiate a business Page and a Page used for “business” purposes.

⁸³ FACEBOOK, *supra* note 68.

⁸⁴ *Id.*

⁸⁵ FACEBOOK, *Why Should I Convert My Personal Account to a Facebook Page?*, *supra* note 72.

⁸⁶ FACEBOOK, *Statement of Rights and Responsibilities*, *supra* note 6 (“We will only process name changes and migrations that do not result in a misleading or unintended connection.”).

⁸⁷ *Id.*

⁸⁸ See FACEBOOK, *Create a Page*, *supra* note 80.

⁸⁹ See *How Do I Convert My Personal Account to a Facebook Page?*, FACEBOOK, <https://www.facebook.com/help/116067818477568> (last visited Mar. 18, 2017).

⁹⁰ Directions to Receive an Error Message, FACEBOOK, www.facebook.com (click “Create a Page” hyperlink; then click on the type of Page to create; fill in the required information; then click “Get Started.”). See *Log in to Create your Page*, FACEBOOK, <https://www.facebook.com/help/116067818477568> (last visited Mar. 13, 2016) (“To continue creating a Page, you’ll need to log into Facebook. You’ll manage your Page from your personal account, but your info (ex: you name, email) won’t appear on your Page unless you choose to add it”); Screenshot <https://drive.google.com/file/d/0BxGfjKllqqJIVUQ5RFhPT2VPWFk/view?usp=sharing>.

⁹¹ This case involved a personal Facebook account that was converted into a business Facebook account. *In re* CTLI, LLC, 528 B.R. 359, 373 (Bankr. S.D. Tex. 2015). The court held that the account was property of the business because it was in the name of the business when owner filed the petition. *Id.*

2. Ownership Rights in the Terms and Conditions

“What’s in a name? . . . A rose by any other name would smell as sweet.”⁹² The word “ownership”—not so much. When examining the context of the word “owner” with respect to social media accounts, there are measurable differences in the definition of the word and the proper application to property law. According to the Restatement (First) of Property, the “owner”⁹³ is defined as the person who has one or more interests.⁹⁴

With regard to a social media account holder’s contractual obligations, determining whether an individual or business is the account holder is crucial. This distinction is critical when accepting the seemingly innocuous terms and conditions because many users blindly click “accept” or “agree” without understanding that different terms may apply to businesses and individuals. Therefore, even if social media is considered property under state law, depending on the respective ownership rights in terms and conditions of the social media platform, that property may or may not be property of the business debtor.

a. Facebook’s Contractual Rights

Many Internet users believe that they have an ownership right in content posted on the Internet. The reality is this area of the law is quite unclear. In a sense, the author does exclusively own the content, but that exclusive ownership interest is short-lived.⁹⁵ In fact, the author probably has exclusive ownership of the content until the millisecond before the author pushes “post” on Facebook or “tweet” on Twitter. Once the content is posted, it is available for all the person’s digital friends and strangers to see.⁹⁶

According to Facebook’s Statement of Rights and Responsibilities, which can change at any time,⁹⁷ posting on Facebook automatically grants Facebook “a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that [a user] post[s] on or in connection with Facebook

⁹² “What’s in a name? That which we call a rose / By any other word would smell as sweet.” WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 2, sc. 2.

⁹³ RESTATEMENT (FIRST) OF PROP. § 10 (AM. LAW INST. 1936).

⁹⁴ *Id.* (defining interests to include a “right, power, privilege, or immunity or any two or more of these things”).

⁹⁵ FACEBOOK, *Statement of Rights and Responsibilities*, *supra* note 6.

⁹⁶ *Id.*

⁹⁷ *Id.*

(IP License).⁹⁸ This IP License ends when [the user] delete[s] [his or her] IP content or [his or her] account unless the content has been shared with others, and they have not deleted it.”⁹⁹

Facebook’s overly broad terms suggest that the account holder has ownership rights to the account, but that Facebook can use the content posted to that account in whatever manner it sees fit.¹⁰⁰ Facebook does not specifically state that it owns the individual accounts, but the terms and conditions make it clear that these accounts are not the exclusive property of the account holder.¹⁰¹ If a Facebook user does not comply with Facebook’s Statement of Rights and Responsibilities, then the user loses the right to access the website.¹⁰²

The content the user posts on Facebook may constitute intellectual property and the account holder therefore has an ownership interest in the content.¹⁰³ A person or business essentially gives up the exclusive right to control the content they post on Facebook by agreeing to Facebook’s Statement of Rights and Responsibilities.

Facebook’s “Statement of Rights and Responsibilities” states that Facebook will notify users before making changes to the terms of its “Statement,” but it does not state how or when it will do so.¹⁰⁴ It further states: “Your continued use of the Facebook Services, following notice of the changes to our terms, policies or guidelines, constitutes your acceptance of our amended terms, policies or guidelines.”¹⁰⁵

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* (“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 setting. In addition: For content that is covered by intellectual property rights, like photos and videos (IP content), you specifically give us the following permission . . . you grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook (IP License)”).

¹⁰¹ *See id.* As discussed above, the language of the Statement of Rights and Responsibilities essentially strip away any right a user has “[f]or content that is covered by intellectual property rights, like photos and videos (IP content), you specifically give us the following permission. . .you grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook (IP License)”).

¹⁰² *See id.*

¹⁰³ *See* 17 U.S.C. § 102 (2012).

¹⁰⁴ FACEBOOK *Statement of Rights and Responsibilities*, *supra* note 6.

¹⁰⁵ *See id.*

Further, Facebook has not, so far, explained the difference in ownership rights between a Facebook account and a Page. It is impossible for users to create a Page without first creating a personal Facebook account.¹⁰⁶ As a result, it is not clear whether the party entering an agreement with Facebook by creating a Page is the business entity that the Page represents, or the individual user whose account was used to create the business's Page. Because users consent to the terms contained in the Facebook "Statement of Rights and Responsibilities" upon creating a personal Facebook account, however, the individual account holder is the party that entered a contractual relationship with Facebook; the business entity represented by a Page later created by that individual user has not contracted with Facebook at all.¹⁰⁷ As referenced above, an individual may consent to the Statement of Rights and Responsibilities while entering into a contract on behalf of the business, whereas the business is not the consenting party, opening another set of agency related issues, which this Comment will not address.

This distinction is imperative. If the business is not bound by the contract, then the business could not have agreed to Facebook's Statement of Rights and Responsibilities. Thus, the business's ownership interests of the content posted on its Page is unclear.

b. Twitter's Contractual Rights

Unlike Facebook, Twitter specifically allows for the creation of a business profile *by* the business; an individual person does not need to be associated with a business account on Twitter.¹⁰⁸ By allowing business entities to create their own accounts, Twitter avoids Facebook's problematic lack of a clear distinction between individual accounts and business Pages.

¹⁰⁶ See *supra* notes 79–84 and accompanying text.

¹⁰⁷ But see FACEBOOK, *Statement of Rights and Responsibilities*, *supra* note 6, which provides that the Statement "governs [Facebook's] relationship with users *and others who interact with Facebook . . .*," suggesting that Facebook anticipates contractual relationships governed by the terms in the Statement not only with users that create personal accounts, but with all individuals and entities that "interact with Facebook." Further, the Statement provides: "By using or accessing the Facebook Services, you agree to this Statement, as updated from time to time in accordance with Section 13 below." *Id.* By operating a Facebook Page, then, business entities may enter a contractual relationship with Facebook governed by the Statement of Rights and Responsibilities, despite the fact that the account used to create the page was initiated by an individual distinct from the entity. See *id.*

¹⁰⁸ *Create a Twitter Business Profile*, TWITTER, <https://business.twitter.com/basics/create-a-profile-for-your-business> (last visited Feb. 7, 2017).

Twitter provides specific guidance to businesses seeking to create a Twitter account, recommending that “[e]very element [of your business profile] should . . . accurately reflect your *business identity*.” Business profiles can even have a unique “Bio,” or biography, section that further explicitly identifies the business itself as the account owner and operator. According to Twitter’s Terms and Conditions, “your @username, also known as your handle, is your business’ unique identifier on Twitter.”¹⁰⁹

Twitter accounts specifically created for a business purpose and used to promote a business may be properly considered property of the estate for a business. For example, Twitter’s Terms of Service clearly states: “All right, title, and interest in and to the Services . . . are and will remain the exclusive property of Twitter.”¹¹⁰ While the Terms does not expressly state that Twitter owns the rights to the accounts, it does strongly indicate that the rights are not rights of the individual or the business, but are the rights of Twitter, the “Service.”¹¹¹ Each and every time a user tweets, Twitter’s terms grants Twitter a license to use the content posted by the user in anyway it sees fit.¹¹² Thus, because the user has an inability to preclude Twitter’s use of his or her content, the user does not have an exclusive ownership interest in the content.

The difference between Facebook and Twitter is more significant than it might seem on the surface. A Facebook account created for personal use and used in the context of business is not the same as creating an account strictly for business. Therefore, the two should not be classified as the same in a bankruptcy proceeding. A Facebook account used for business necessarily has a mixed personal and business use, while a Twitter account may be created solely for business purposes and it is easily distinguishable as such.¹¹³

E. Recent Case Law as it Relates to Social Media Accounts

1. Property of the Estate and In re CTLI, LLC

In 2015, the Bankruptcy Court for the Southern District of Texas attempted to fit social media accounts within the broad context of property of the estate in

¹⁰⁹ *Id.*

¹¹⁰ See TWITTER, *Twitter Terms of Service*, *supra* note 6.

¹¹¹ See *id.*

¹¹² *Id.* (“All right, title, and interest in and to the Services (excluding Content provided by users) are and will remain the exclusive property of Twitter and its licensors.”).

¹¹³ TWITTER, *Create a Twitter Business Profile*, *supra* note 113.

In re CTLI, LLC.¹¹⁴ Jeremy Alcede and his then wife formed and wholly owned Tactical Firearms, a gun store and shooting range in Katy, Texas.¹¹⁵ When the business began having financial trouble, Mr. Alcede recruited his “wealthy friend” to build the “finest indoor firing range in the country.”¹¹⁶ As a result of this transaction, Mr. Alcede gave up a 30% membership interest in his business.¹¹⁷

Tactical Firearms defaulted on several loans, and on June 10, 2014, Icon Bank of Texas, N.A., Tactical Firearms’ largest creditor, foreclosed on Tactical Firearms’ real property.¹¹⁸ After the foreclosure, Tactical Firearms filed a chapter 11 bankruptcy petition, which allowed Mr. Alcede to stay in control of Tactical Firearms as a debtor-in-possession.¹¹⁹ In a case of first impression, the debtor’s social media accounts were addressed to determine if these accounts fit within the broad scope of “property” under § 541(a)(1).¹²⁰

The Court’s order confirming the debtor’s plan for reorganization required Mr. Alcede to “deliver possession and control” of “passwords for the Debtor’s social media accounts, including, but not limited to, Facebook and Twitter.”¹²¹ Mr. Alcede claimed that the accounts belonged to him personally and not to the debtor, Tactical Firearms.¹²² The account ownership issue arose and became pertinent in this case because Mr. Alcede converted his personal account into a business Page once he realized that his personal account was over the allowed number of 5,000 “friends.”¹²³ Mr. Alcede had to convert his account if he wanted to maintain his Facebook account with over 5,000 “friends.” Mr. Alcede posted content on his individual account when it was in his name, and he continued to post similar content when he converted his personal account to Tactical Firearms’ Page.¹²⁴ Although converting a personal

¹¹⁴ 528 B.R. 359 (Bankr. S.D. Tex. 2015).

¹¹⁵ *Id.* at 362.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *See id.*

¹¹⁹ *See id.*

¹²⁰ *Id.*; 11 U.S.C. § 541(a) (2012).

¹²¹ *In re CTLI, LLC*, 528 B.R. at 362.

¹²² *Id.*

¹²³ *Id.* at 373; *How can I add more 5000 friends?* FACEBOOK, <https://www.facebook.com/help/community/question/?id=492434414172691> (last visited May 2, 2017). Amy Jones from the Facebook Help Team states, “[p]eople can’t have more than 5,000 friends on their Facebook timelines, but Pages can have more than 5,000 fans. If you’re using your Facebook timeline as an account for your business or something similar, you might consider converting your personal account to a Page.”

¹²⁴ *In re CTLI, LLC*, 528 B.R. at 367–68.

Facebook account to a business Page is simple, it was a costly mistake in this case.¹²⁵

In response to the Court's order, Mr. Alcede stated that sharing the control of the accounts with the debtor would violate his privacy as an individual account holder.¹²⁶ Although bankruptcy courts look to the underlying state law to determine property interests, no Texas state court had addressed the ownership of social media accounts as an interest in property.¹²⁷

The Court held that, because the Page was in the debtor's possession at the time of filing its petition, the social media accounts belonged to the debtor and were therefore property of the estate.¹²⁸ The Court disagreed with the debtor's position that, because the Facebook account and Page were functionally Mr. Alcede's own personal accounts, the Court should not consider them property of the estate.¹²⁹ The Court classified the once-personal Page as property of the business because the Page was used to "promote" the business.¹³⁰

In reaching its conclusion, the Court considered two decisions from other circuits that addressed whether social media accounts were "property": (1) *Mattocks v. Black Entertainment Television, LLC*;¹³¹ and (2) *In re Borders Group, Inc.*¹³²

In *Mattocks v. Black Entertainment Television LLC*, the District Court for the Southern District of Florida applied Florida law and held that the plaintiff did not have a property interest in the "likes" on a Page.¹³³ The court reasoned that Facebook users could unlike the Page at any time, and the creator of the Page did not have any ownership interest in the "likes."¹³⁴

In *In re Borders Group, Inc.*, the Bankruptcy Court for the Southern District of New York applied New York state law in categorizing social media

¹²⁵ *Id.* at 373.

¹²⁶ *Id.* at 362.

¹²⁷ *Id.* at 366.

¹²⁸ *Id.* at 371.

¹²⁹ *See id.* (holding that the Facebook account was property of the estate because it was in the name of the debtor, even though at the time the account was turned over to the U.S. Trustee's office it was in the name of the business owner).

¹³⁰ *Id.* at 363 (stating the original Facebook page was called Jeremy Alcede Entrepreneur).

¹³¹ 43 F. Supp. 3d 1311 (S.D. Fla. 2014) (applying Florida law).

¹³² No. 11-10614 (MG), 2011 Bankr. LEXIS 4606 (U.S. Bankr. S.D.N.Y. Sep. 27, 2011) (applying New York state law).

¹³³ 43 F. Supp. 3d 1311, 1321 (S.D. Fla. 2014).

¹³⁴ *Id.*

accounts as property because it analogized social media accounts with subscriber lists.¹³⁵ However, that case involved a dispute over the transferring of assets pursuant to a licensing agreement.¹³⁶ The court looked at the asset purchase agreement in dispute, which defined “all interests of the seller” to include “the social media accounts set forth on Schedule 1.2(b), including related Internet pages, content and contact/subscriber lists, and any related social media assets.”¹³⁷

While informative, these two cases are distinguishable from *In re CTLL, LLC*. In *In re CTLL, LLC*, while Mr. Alcede had some business-related posts on the Page, such as new inventory for the store or a promotion, Mr. Alcede used Tactical Firearms’ Page to post status updates about his personal views on gun control.¹³⁸ Even if Mr. Alcede’s views had in some way indirectly promoted his products, he maintained that the purpose of creating this Page was not to generate revenue.¹³⁹ The fact that Mr. Alcede’s account contained posts promoting the business was sufficient for the court to characterize Mr. Alcede’s Facebook account as property of the business.¹⁴⁰ Therefore, his property rights as an individual and a debtor were mixed in the process of running Tactical Firearms’ Page.¹⁴¹

By relying on *Mattocks* and *In re Borders Group, Inc.*, the court in *In re CTLL, LLC* did not delve deeply enough into the underlying issue of account ownership.¹⁴² While these cases are applicable in determining whether social media accounts were property of the estate, determining what constitutes property itself is rooted in state law. Rather, *In re CTLL, LLC* merely provides an instructive analytical approach that courts should consider when confronted with social media in bankruptcy.

¹³⁵ No. 11-10614 (MG), 2011 Bankr. LEXIS 4606, at *13 (U.S. Bankr. S.D.N.Y. Sept. 27, 2011).

¹³⁶ *Id.* at *38.

¹³⁷ *Id.*

¹³⁸ *In re CTLL, LLC*, 528 B.R. 359, 371 (Bankr. S.D. Tex. 2015) (stating his posts were “[o]n behalf of myself and the Tactical Firearms Family”).

¹³⁹ *Id.* at 368.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 366.

2. Additional Case Law and Social Media

Several courts have confronted issues relating to the right an individual may assert over social media accounts, albeit outside of bankruptcy. These cases are instructive when determining the ownership interests in social media.

In *Mattocks v. Black Entertainment Television, LLC*, the District Court for the Southern District of Florida held that a former employee could not assert an ownership interest in the “likes” on a Page.¹⁴³ Ms. Mattocks, a social media freelancer, created a Page for a TV series that aired on Black Entertainment Television (“BET”) and later claimed an ownership interest in the 6.2 million “likes” the page received.¹⁴⁴

The court held that Ms. Mattocks could not establish that she had a property interest in the “likes” the Page received (or by content published on a Page) because “liking a Facebook page simply means that the user is expressing his or her enjoyment or approval of the content. At any time, moreover, the user is free to revoke the like by clicking an unlike button.”¹⁴⁵

In *In re CTLL, LLC*, the court reached the opposite conclusion of *Mattocks*, holding that social media accounts created to promote a business are assets of the business despite creating the account in the business owner’s name. The court in *Mattocks* should have held that it could not establish that the debtor owned a property interest in Facebook “likes,” or in the Page itself. Because another person had the exclusive power and exclusive right to easily destroy the “property” that the plaintiff claimed to own (i.e., the “likes”), the court reasoned that the “property interests” asserted by the plaintiff did not exist. Even if a user had a property interest, that interest is likely protected through copyright, privacy, or contract rights (i.e., terms and conditions).

In *Eagle v. Morgan*, the District Court for the Eastern District of Pennsylvania determined that continued use of a former employee’s identity to run a LinkedIn account was a violation of Pennsylvania law.¹⁴⁶ In *Eagle*, the defendant took control of a LinkedIn account after Dr. Eagle, the former president and co-founder of Edcomm, Inc., resigned.¹⁴⁷ Dr. Eagle created a

¹⁴³ 43 F. Supp. 3d 1311, 1321 (S.D. Fla. 2014).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*; see also *Bland v. Roberts*, 730 F.3d 368, 385 (4th Cir. 2013) (holding that the public employee’s “like” of a political campaign was a protected form of free speech and expression).

¹⁴⁶ No.11-4303, 2013 U.S. Dist. LEXIS 34220, at *17–24 (E.D. Pa. Mar. 12, 2013).

¹⁴⁷ *Id.* at *11.

LinkedIn account in 2009 to promote the company, foster her reputation in the industry, and build a network of professional contacts.¹⁴⁸ After she resigned, Edcomm believed that the company retained the right to claim ownership in the LinkedIn account after the employee's resignation as long as they replaced the employee's name and identification information with a new account holder's information.¹⁴⁹ The company seized control of the LinkedIn account, and the court held that Edcomm had used Dr. Eagle's name without her authorization in violation of Pennsylvania law, misappropriating her identity, and tortuously invading her privacy.¹⁵⁰

Applying this case to the facts of *In re CTLLI, LLC* may seem reasonable. However, this case is distinguishable. The court in *Eagle* analyzed both the lack of the employer's social media policy and in LinkedIn's definition of account ownership.¹⁵¹ The application of *Eagle* to *In re CTLLI, LLC* resulted in the court attempting to use common law doctrine and state statutes to form the basis of its decision.¹⁵² In *Eagle*, the court compared the LinkedIn account to other intangible objects such as domain names or satellite signals.¹⁵³ The comparison of the account to a satellite signal may have been an accurate parallel when the Internet first emerged, but today it is clear the two are not similar. A comparison of the two is inaccurate because a satellite signal is not like a social media account.

In the next section, this Comment will seek to untangle the issue of mixed personal and business use of social media accounts and lay the groundwork to set a standard for future disputes in ownership of various social media accounts. This Comment will seek to prove that social media accounts do not fit within the broad scope of property of the estate based on the proposed value of the social media account, the ownership of the social media account, recent case law, and the negative implications of *In re CTLLI, LLC*.

¹⁴⁸ *Id.* at *16.

¹⁴⁹ *Id.* at *1.

¹⁵⁰ *Id.* at *17.

¹⁵¹ *See id.*

¹⁵² *See In re CTLLI, LLC*, 528 B.R. 359 (Bankr. S.D. Tex. 2015); *Eagle*, 2013 U.S. Dist. LEXIS 34220, at *17 (“[T]he outcome of this case results in somewhat of a mixed bag for both sides.”).

¹⁵³ *Eagle*, 2013 U.S. Dist. LEXIS 34220, at *10.

II. ANALYSIS

To determine whether a chapter 11 debtor's social media accounts constitute property of the estate, courts should balance the following three factors: (1) how the individual account holder uses the account; (2) the ownership interests based on the terms and conditions; and (3) whether the social media account at issue has value. The balancing of these three factors should provide clarity in the account ownership and the interests affected, which in turn will ensure the underlying policy of a debtor's fresh start in a bankruptcy proceeding.

The first factor, which is subjective, seeks to satisfy an important distinction between an individual who created an account for personal use and an individual who created an account for a business. It requires the disclosure of the business structure because the outcome will likely differ based upon whether the business is a sole proprietorship, a partnership, an LLC, or a corporation. This disclosure will help answer the question: does the business who arguably entered into the "contract" with the social media website own the content, or would the person who actually generated (or otherwise created) the content own it?

The second factor, which is objective, defers to the social media platform to interpret the terms and conditions the user agreed to upon creating the account. The second factor may raise concerns because the terms and conditions on the various social media websites are constantly changing with little notice to the user.¹⁵⁴ Therefore, it is possible that the user agreed to terms and conditions at the time of creating the account that are no longer applicable today.¹⁵⁵

The third factor, which is also subjective, allows a user to establish how to value the account. The third factor arguably leaves ambiguity as to the proper valuation technique and a valuation's timing: should the account be valued when the user created it? Or when the bankruptcy occurred? The burden rests on the individual or the business to ascertain the underlying value of the account based on its current and future use. Courts can better determine whether a social media account is property of the estate by assessing and balancing these three factors.

¹⁵⁴ See FACEBOOK, *Statement of Rights and Responsibilities*, *supra* note 6.

¹⁵⁵ As referenced above, Facebook's Statement of Rights and Responsibilities state that Facebook will notify the user of any changes to its terms, but it does not specify when or how this information will be delivered to the user. *Id.*

A. *A Social Media Account Should Not Automatically Be Considered Property Under § 541*

At best, a social media account is a pseudo-property interest. Considering property under common law and the “bundle of rights” concept, a social media account may fit within the broad definition of property because the account holder has the right to use it and exclude others from using it.¹⁵⁶ This bundle of rights, however, does not freely allow an account holder to transfer the account to another person or entity because of the contractual obligations Facebook and Twitter set forth in their terms.¹⁵⁷ Social media accounts should not automatically be included as property of the estate because courts need to determine: (1) how the individual account holder uses the account; (2) the ownership interests based on the terms and conditions; and (3) whether social media accounts have value. Through balancing these three factors, the court can distinguish the ownership interest as perceived by the user, the ownership interest as determined under the terms and conditions, and if the account holds any value.

Social media accounts contain copyrightable material, which, in some instances, includes protectable trademarks.¹⁵⁸ Social media accounts fall within the broad category of intellectual property and are defined as intangible property.¹⁵⁹ Because intangible property interests may be considered property under property of the estate, social media accounts may come into the bankruptcy proceeding.¹⁶⁰ The court in *In re CTLI, LLC* included social media in the broad definition of property of the estate, but the question is: should it have?

¹⁵⁶ See 11 U.S.C. § 541 (2012).

¹⁵⁷ *Id.* § 365(a).

¹⁵⁸ Lisa P. Ramsey, *Brandjacking on Social Networks: Trademark Infringement by Impersonation of Markholders*, 58 BUFF. L. REV. 851, 851–52 (2010).

¹⁵⁹ BLACK’S LAW DICTIONARY 930 (9th ed. 2009).

¹⁶⁰ A social media account or blog can arguably be considered *tools of the trade* for a person such as a blogger or a coder who uses these accounts in carrying out his or her day-to-day business. Even if a court rejected this argument because of how narrow the exemptions are, it could still be possible to include a social media account as exempt if it meets the exemption amount in the bankruptcy case. This exemption, however, only applies to individual debtors. Therefore, in a case like *In re CTLI, LLC*, this argument would not apply because the debtor was a business. Thus, this Comment will argue that certain protections need to be implemented to safeguard a business debtor. In the alternative, this Comment will argue that a social media account should not qualify for a § 522 exemption in the case of an individual debtor because a social media account is not property of the estate.

The uncharted territory of social media accounts adds a new wrinkle in defining property rights and ownership. The ownership rights to the account as a property right play an integral role in determining a person's right in their intellectual property and social media accounts.¹⁶¹ The contractual relationship between the social media account holder and the social media platform, however, would ultimately govern this distinction.¹⁶² If an account is considered property, it is possible that the account holder may not have a property interest based on the governing terms and conditions. Therefore, Social media accounts should therefore not be considered property under § 541(a)(1).

B. Social Media as an Ownership Interest of the Individual, the Business, or Facebook

1. Ownership Rights in the Creator

Social media accounts cannot be property of the business debtor's estate because the individual account holder—not the business entity—owns the content posted to the account.¹⁶³ The owner of content posted through a purely personal account is clear.¹⁶⁴ Conversely, the owner of content posted through an account used for business is unclear: is the owner the individual that generated the content? Or is it the business entity? It is possible that the person who created the account is not the person contributing the content. Therefore, the distinction of whether an account is personal or business is important to discern ownership rights in the creator.

This Comment argues that the designation of social media accounts as property of the estate should not be based on their classification as individual or business social media accounts, but rather should be determined on a case-by-case basis. The social media platform an account is created on is relevant, for example, because a business entity cannot create a Facebook account, only

¹⁶¹ Christopher Hopkins, *Bankruptcy Court "Right-Swipes" Debtor's Property Interest in Its Social Media Accounts*, WEIL BANKRUPTCY BLOG (Apr. 21, 2015), <http://business-finance-restructuring.weil.com/property-of-the-estate/bankruptcy-court-right-swipes-debtors-property-interest-in-its-social-media-accounts/>.

¹⁶² Compare FACEBOOK, *Statement of Rights and Responsibilities*, *supra* note 6, with TWITTER, *Twitter Terms of Service*, *supra* note 6.

¹⁶³ See FACEBOOK, *Statement of Rights and Responsibilities*, *supra* note 6; TWITTER, *Twitter Terms of Service*, *supra* note 6.

¹⁶⁴ *Creating an Account*, FACEBOOK https://www.facebook.com/help/570785306433644/?helpref=hc_fnav (last updated May 2, 2017).

a Page.¹⁶⁵ The different accounts that a user can create leaves a gap in the reasoning to determine how a business could create its account if it does not create it through either a current user's account or a fictitious account.¹⁶⁶ Further, because a Facebook user must provide his or her "real name and information,"¹⁶⁷ there will necessarily be an overlap of a personal account with a business account created solely for business purposes.

Facebook's recent update offers an individual user on a Page the choice to like and comment as an individual or as a Page the user manages.¹⁶⁸ If an individual user with access to a Page opts into using the Page's account, then the same individual who is posting on behalf of his personal Facebook account is also posting on behalf of the business entity. Facebook even identifies the Page the individual manages on the top right-hand portion of the screen called "your pages."¹⁶⁹

The identification of "your page" signifies that this medium is not the business's Page, but a Page the personal, individual account holder operates in the name of the business. Thus, this proves Facebook's intermingling of personal accounts and business Pages. Not only does Facebook allow a user to switch back and forth between the two while logged into a personal account, but an instructive notification window also guides the user through the entire process.¹⁷⁰

The court in *In re CTLI, LLC* distinguished a personal account from a Page as "a different type of property" because of its *persona* property interest.¹⁷¹ Arguably, a Facebook account or Page is a *persona* property right, eligible for protection under the Copyright Act of 1976.¹⁷² A *persona* is recognized as a property interest because of the idea that the interest of the individual is

¹⁶⁵ FACEBOOK, *Statement of Rights and Responsibilities*, *supra* note 6.

¹⁶⁶ If the user creates a fictitious account to circumvent this issue, it seemingly creates a second issue given the fact that creating a fictitious user account does not fit within Facebook's terms and conditions. FACEBOOK, *supra* note 68.

¹⁶⁷ FACEBOOK, *Statement of Rights and Responsibilities*, *supra* note 6.

¹⁶⁸ *Id.*

¹⁶⁹ FACEBOOK, *supra* note 68.

¹⁷⁰ Directions to Switch from a Facebook account to a Facebook Page, FACEBOOK, www.facebook.com (click "Log In" hyperlink; then click on downward triangle; "Use Facebook As"; then click on the Facebook Page name).

¹⁷¹ *In re CTLI, LLC*, 528 B.R. 359, 371 (Bankr. S.D. Tex. 2015).

¹⁷² The Copyright Act of 1976 provides protection to original works of authorship. *See* 17 U.S.C. § 102 (2012).

separate from its identity.¹⁷³ A Page may be protected under the Copyright Act if the business's post is an original work of the author.¹⁷⁴

In theory, considering social media as property makes sense. These accounts do have a pseudo-property interest,¹⁷⁵ but what creates the property interest? This interest is the driving force behind the account; it is the person behind the screen. In a case where a business owner had a Facebook account used in the course of the business, it treads a thin line between it being property of the business or property of the individual. Therefore, the individual creator of the content has an ownership interest in the accounts and not the business.

2. *Ownership in Executory Contracts*

To file a voluntary bankruptcy petition under chapter 11, the debtor must include a schedule of executory contracts¹⁷⁶ and unexpired leases.¹⁷⁷ While the context of the terms and conditions a user enters into in creating an account is constantly changing, the on-going relationship between the account holder and the social media platform continues throughout the life of the account. For example, Facebook's Statement of Rights and Responsibilities states, "[y]our continued use of the Facebook Services . . . constitutes your acceptance of our amended terms, policies or guidelines."¹⁷⁸ Similarly, Twitter provides, "by continuing to access or use the Services after those revisions become effective, you agree to be bound by the revised Terms."¹⁷⁹

In bankruptcy proceedings, § 365 gives the Trustee the ability to "assume, assign or reject any executory contract."¹⁸⁰ *Moody v. Amoco Oil Co.* suggests that the rejection or termination of executory contracts "must be complete and not subject to reversal under the terms of the contract or under state law."¹⁸¹ Even if Facebook and Twitter allows an account holder to "de-activate" and temporarily put their on-going relationship on hold, deactivation does not appear to fit within the "termination" of an executory contract because a

¹⁷³ See, e.g., *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1396 (9th Cir. 1992).

¹⁷⁴ 17 U.S.C. § 102; *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 56 (1884).

¹⁷⁵ See Gautam, *supra* note 37, at 131.

¹⁷⁶ FED. R. BANKR. P. 1007(b)(1)(C); see 3 COLLIER ON BANKRUPTCY, *supra* note 44, ¶ 365.02.

¹⁷⁷ BANKR. JUDGES DIV., ADMIN. OFFICE OF U.S. COURTS, *supra* note 52, at 11.

¹⁷⁸ FACEBOOK, *Statement of Rights and Responsibilities*, *supra* note 6.

¹⁷⁹ TWITTER, *Twitter Terms of Service*, *supra* note 6.

¹⁸⁰ See 11 U.S.C. § 365(a) (2012).

¹⁸¹ *Moody v. Amoco Oil Co.*, 734 F.2d 1200, 1212 (7th Cir. 1984).

temporary termination does not actually terminate the contract. Therefore, the account holder would have to ensure the deletion of the account without the possibility of “re-activating” the account before the executory contract could terminate it.

While the terms of the contract may change, the user remains bound by the contract, including the new terms, so long as the user continues to use the social media account.¹⁸² Through agreement, the user becomes a licensor of his or her intellectual property to the social media platform and a licensee of the social media platform to license the content in any matter it sees fit.¹⁸³ Thus, if the debtor is a licensor of a right to intellectual property, the Trustee may encroach on the licensor’s right through a breach of contract.¹⁸⁴ Facebook or Twitter reserves the right to delete the account in the event of a breach of contract.¹⁸⁵ A breach of contract may arise if, for example, a user transfers any rights or obligations to “anyone else” without Facebook’s consent or if the user attempts to confer any third party beneficiary rights.¹⁸⁶

Even if a Trustee could assert control over the social media account, a debtor would possibly maintain its contract with the social media platform post-petition. Consequently, any activity on the account after it is transferred to

¹⁸² See, e.g., FACEBOOK, *Statement of Rights and Responsibilities*, *supra* note 6; TWITTER, *Twitter Terms of Service*, *supra* note 6.

¹⁸³ See, e.g., FACEBOOK, *Statement of Rights and Responsibilities*, *supra* note 6 (“When you publish content or information using the Public setting, it means that you are allowing everyone, including people off of Facebook, to access and use that information, and to associate it with you.”); TWITTER, *Twitter Terms of Service*, *supra* note 6 (“You agree that this license includes the right for Twitter to provide, promote, and improve the Services and to make Content submitted to or through the Services available to other companies, organizations or individuals who partner with Twitter for the syndication, broadcast, distribution or publication of such Content on other media and services, subject to our terms and conditions for such Content use.”).

¹⁸⁴ 11 U.S.C. § 365(n); H.R. 3491, 134th Cong. (1988).

¹⁸⁵ FACEBOOK, *Statement of Rights and Responsibilities*, *supra* note 6 (“If you violate the letter or spirit of this Statement, or otherwise create risk or possible legal exposure for us, we can stop providing all or part of Facebook to you.”); TWITTER, *Twitter Terms of Service*, *supra* note 6 (“We may suspend or terminate your accounts or cease providing you with all or part of the Services at any time for any or no reason, including, but not limited to, if we reasonably believe: (i) you have violated these Terms or the Twitter Rules, (ii) you create risk or possible legal exposure for us; or (iii) our provision of the Services to you is no longer commercially viable.”).

¹⁸⁶ See FACEBOOK, *Statement of Rights and Responsibilities*, *supra* note 6 (“You will not share your password (or in the case of developers, your secret key), let anyone else access your account, or do anything else that might jeopardize the security of your account. You will not transfer your account (including any Page or application you administer) to anyone without first getting our written permission.”).

a Trustee may impose a liability in which the debtor would be legally bound to the contract and responsible for a breach.¹⁸⁷

An executory contract cannot become property of the estate because of the debtor's interest as a licensee. For this reason, courts have not treated domain names as property of the estate, since the debtor's interest in the domain name as an executory contract.¹⁸⁸ A domain name is often characterized as a license and posting content on Facebook should be treated similarly.¹⁸⁹

For example, in *In re Alexandria Surveys Int'l, LLC*, the United States District Court for the Eastern District of Virginia determined that users of telephone numbers or domain names did not have a property interest in the telephone number or domain name they used because their right to use the telephone number or domain name was contractual in nature (i.e., their right was a "contractual right" rather than a "property right").¹⁹⁰ The court concluded that it is a contractual right because the domain name or telephone number cannot exist without its respective service provider.¹⁹¹ Because neither would survive without the other, the court held that a domain name is not a property right, but "a product of contract for services."¹⁹² Similarly, a Facebook or Twitter account cannot exist without the platform in which it was created. It is therefore a product of contract for services and not a property right.

Without proper compliance, a trustee, or creditor may cause the debtor to breach its contract with the social media platform. Facebook and Twitter reserve the right to delete the content. Further, the debtor's status as a licensor does not provide for an executory contract to become property of the estate.

¹⁸⁷ See *id.* ("You will not share your password (or in the case of developers, your secret key), let anyone else access your account, or do anything else that might jeopardize the security of your account. You will not transfer your account (including any Page or application you administer) to anyone without first getting our written permission."); TWITTER, *Twitter Terms of Service*, *supra* note 6 ("[y]ou are responsible for your use of the Services, for any Content you provide, and for any consequences thereof, including the use of your Content by other users and our third party partners.").

¹⁸⁸ 11 U.S.C. § 365(a) (2012).

¹⁸⁹ See FACEBOOK, *Statement of Rights and Responsibilities*, *supra* note 6; see also Gautam, *supra* note 37, at 137 ("However, in posting the content, a license is created for the service to use and reproduce that same content. Because social media services' terms of service expressly state that users have ownership over self-generated content, it is possible that this content could be included in the *bankruptcy* estate.").

¹⁹⁰ 500 B.R. 817, 822 (E.D. Va. 2013).

¹⁹¹ *Id.*

¹⁹² *Id.*

The next section will show that social media accounts provide no ascertainable value to a creditor, court, or trustee.

C. Economics: Ascertaining Value in Social Media Accounts

1. How to Value a Social Media Account

Applying the above interpretation of property of the estate to *In re CTLI, LLC* leaves a lingering question: what purpose does a social media account serve in a potential liquidation of the debtor's assets if the social media account does not have an inherent and ascertainable value? The answer is that a social media account serves no purpose to a creditor or trustee in a potential liquidation without an ascertainable value. In a hypothetical chapter 7 liquidation, a majority of companies will estimate recovery for intangible assets to be zero.¹⁹³

Notably, while the plain meaning of § 541(a)(1) does not consider value in determining whether an asset becomes property of the estate, with an asset with a quasi-property right, the value should become a determining factor.¹⁹⁴ Value could deter the frivolous claims against worthless assets, thus preventing those assets from not only becoming property of the estate, but also remaining property of the estate.¹⁹⁵ A worthless asset serves no financial purpose to the creditor and preventing the debtor from utilizing it only hinders the debtor from its fresh start. While financially worthless, the debtor can continue to operate its account as a going concern and generate revenue or goodwill.

Assuming a court did include social media accounts within the bankruptcy estate, that court would have to determine the social media account's value somehow. Valuation of social media accounts is especially difficult because a uniform valuation technique does not exist.¹⁹⁶

Financial experts often value intellectual property with either the cost approach or the market approach.¹⁹⁷ The cost approach measures value by

¹⁹³ See *Bankruptcies and Liquidations*, PWC, https://www.pwc.com/us/en/cfodirect/assets/pdf/accounting-guides/pwc_guide_bankruptcies_and_liquidations_2014.pdf ("Generally, financial statements after the adoption of the liquidation basis of accounting would not reflect goodwill because it usually does not have any realizable value in a liquidation.").

¹⁹⁴ 11 U.S.C. § 541 (2012).

¹⁹⁵ See *id.* § 506.

¹⁹⁶ WESTON ANSON, IP VALUATION AND MANAGEMENT 109–10 (2010).

¹⁹⁷ *Id.*

analyzing the expenditures necessary to replace the existing asset.¹⁹⁸ While the cost method often looks to the historical cost to develop the intellectual property, this approach is more commonly used to value assets with no identifiable market application.¹⁹⁹ However, a social media account does not have an identifiable market application because no single valuation approach exists. This cost could be, for example, in a large corporation, the cost to replace the social media employee or expense to recreate the social media presence.²⁰⁰

Alternatively, the market approach values intangible assets through a comparison in which recent transactions or sales involving similar assets in similar markets are used.²⁰¹ Nevertheless, the market approach requires arm's-length transactions with a high level of similarity to draw this comparison.²⁰² In an attempt to qualify the market approach, one study shows a value of "\$0.33 per Facebook like, \$0.30 per Twitter mention, \$8 per retweet and \$6 per Twitter follower,"²⁰³ while another study shows a value of "\$8 per Facebook like, \$14 per Facebook share, \$5 per tweet and \$2 per follow."²⁰⁴ The problem in the market approach is that the value indicators used to quantify this information are based upon different variables; therefore, these results are unreliable.²⁰⁵

While neither of these methods provide a certain valuation, it is also possible that different factors may be considered, resulting in competing valuation calculations. For example, a social media account may be valued based upon the number of likes or followers it has. A social media account may also be valued (to some) based upon the number of unique website hits over a certain period of time. However, the concept of economic value suggests a social media account is ultimately worth the amount that a person on the open market is willing to pay for it.²⁰⁶

¹⁹⁸ Kevin Bendix, *Copyright Damages: Incorporating Reasonable Royalty from Patent Law*, 27 BERKLEY TECH. L.J. 527, 529 (2012).

¹⁹⁹ *Id.*

²⁰⁰ David A. Haas, Brad J. Sarna & Jordan R. Salins, *Valuation of Social Media Data: What's a Like/Follower/ Retweet Worth?*, STOUR RISIUS ROSS 1, 3 (Fall 2015), <https://www.srr.com/assets/pdf/valuation-social-media.pdf>.

²⁰¹ Bendix, *supra* note 203, at 529.

²⁰² *Id.*

²⁰³ Haas, Sarna & Salins, *supra* note 205, at 3.

²⁰⁴ *Id.*

²⁰⁵ *See* Bendix, *supra* note 203, at 529.

²⁰⁶ *See* John G. Loughnane, David Plastino & Evan Altman, *Valuation of Social Media Assets*, AM. BANKR. INST. J., Dec. 2015, at 1, 2–3.

A company's Internet presence is one of the most valuable assets it may own.²⁰⁷ A social media account is an accessible way for a company to promote its brand on the Internet and to reach potential customers.²⁰⁸ Even if the company's Internet presence is not a valuable asset to the company, the company would have no way of knowing the value of this asset if it did not go through the burdensome task of finding a buyer or an appraiser. Each social media account and platform has the opportunity to become worth something, or nothing. There are several variables that could play into this valuation. For example, the number of likes, the number of friends, the URL, and the amount of website hits are just a few of these variables.²⁰⁹

When a business entity files for bankruptcy, the corporation has to ascertain a value for both the entity and its assets.²¹⁰ This notion becomes particularly problematic for businesses that operate exclusively on the Internet. Most businesses today rely heavily on the Internet in some way or another, whether it be for e-mail, an e-commerce platform, or a social media account.²¹¹ Many businesses operate solely online and own primarily intangible property. Without a uniform valuation method for social media accounts in general, a business will be unable to successfully determine the value of one of its biggest assets. This becomes particularly troublesome in the bankruptcy context when a debtor has to ascertain the value of its assets in proposing a chapter 11 plan of reorganization.

Courts may find it difficult to ascertain a value for a certain amount of Twitter followers or Facebook users because there is no fixed dollar amount to place on an account. Additionally, the court could not accurately prove how the company's social media accounts affect the economic success or failure of a business. Therefore, "[i]n calculating a value on a social media account and

²⁰⁷ NEWTEK - YOUR BUSINESS SOLUTIONS COMPANY, *How Much Is Online Presence Helping Small Business?*, FORBES (Nov. 25, 2013, 11:19 AM), <https://www.forbes.com/sites/thesba/2013/11/25/how-much-is-online-presence-helping-small-business/#2bb0b5d62cb6>.

²⁰⁸ Aaron Agius, *The 4 Essentials to Building Your Brand on Social Media*, ENTREPRENEUR (Apr. 23, 2015), <https://www.entrepreneur.com/article/244677>.

²⁰⁹ Haas, Sarna & Salins, *supra* note 205, at 3.

²¹⁰ See Loughnane, Plastino & Altman, *supra* note 211, at 2-3.

²¹¹ *Growing Business Dependence on the Internet*, BUSINESS ROUNDTABLE 1, 1 (Sept. 2007), http://businessroundtable.org/sites/default/files/200709_Growing_Business_Dependence_on_the_Internet.pdf.

its connections, one thing is certain: delegating an arbitrary value to each friend, follower, or connection is not logical.”²¹²

The numerous variables involved in ascertaining the value of a social media account make the process complex. A definitive valuation calculation does not yet exist for social media accounts. Thus, without a uniform valuation for social media accounts, it is possible that an asset of this type would not have value to a creditor or a trustee.

2. *A Second-Hand User May Diminish Any Existing Value*

Turning over a social media account, whether to a trustee, to a creditor, or to the court would cause more harm to the debtor than good.²¹³ A social media account is volatile²¹⁴ and constantly evolving, resulting in “unpredictable spikes or troughs in popularity.”²¹⁵ Turning over a Facebook account or a Twitter account seems to frustrate the policy behind a “fresh start” when a business makes a faithful attempt to create a plan to reorganize. The business cannot continue to generate revenue or gain exposure on social media if the account is considered property of the estate and transferred to a second-hand user.

A business’s Page does not have inherent value to a creditor when the Page was used to promote personal messages and not the business itself. For example, Tactical Firearms used its business Facebook Page, which was once a personal account, to promote the gun store owner’s beliefs on gun control, not the store’s products.²¹⁶ To maintain the account as it was prior to filing a bankruptcy petition, a second-hand user would, for example, have to post Jeremy Alcede’s belief on gun control through Tactical Firearms’ Facebook Page.²¹⁷

²¹² Michael Furlong, *Putting a Price on Friendship: Examining the Ownership Battle Between A Business’ Social Media Networks, and the Humans and Operate Them*, 47 J. MARSHALL L. REV. 745, 765 (2013).

²¹³ Trustee, creditor, or court hereinafter “second-hand user.”

²¹⁴ A social media account can be deleted at any time. The social media platform reserves the right to delete the account in the event of a breach of the terms and conditions. See FACEBOOK, *Statement of Rights and Responsibilities*, *supra* note 6; TWITTER, *Twitter Terms of Service*, *supra* note 6.

²¹⁵ Haas, Sarna & Salins, *supra* note 205, at 3.

²¹⁶ *In re CTLLI, LLC*, 528 B.R. 359, 373 (Bankr. S.D. Tex. 2015).

²¹⁷ This reasoning is to ensure the “account’s value” stays the same, through the content posted, amount of followers, and unique hits. See *generally id.*

A person may follow an Instagram account that posts pictures of great food with witty captions simply for the content of its posts. He or she is therefore following this account because they like what is being posted. The followers are following the “author.” If the author of the account disappears or when these accounts become dormant, people unfollow them which makes the account worthless.²¹⁸

Therefore, if a second-hand user (a third-party creditor or trustee) does not maintain the social media account in a way in which the original user would, then the account will likely reduce its existing value (if any). The reason is because the followers may “unfollow” the account if the account becomes dormant, or if the content differed.²¹⁹ If the social media account is valued based upon followers, for example, then turning over an account to a second-hand user may diminish its value.

A follower of a small business is unlike a person following a celebrity on Instagram, or a person who is “instafamous.”²²⁰ A person who is “instafamous” is followed because of recognition and the amount of followers the account has.²²¹ These “insta-celebrities” might have value to a creditor because they are paid by third party advertisers to generate revenue for advertisers.²²²

If, for example, the social media account was already maintained by a staff of social media employees, then a second-hand user may continue to employ them. This would not likely result in a diminishing value because the account would be maintained in the way in which it was before bankruptcy. Alternatively, business owners without a large following on their social media accounts essentially offer nothing to the creditors in terms of value.

The problem that lingers behind the reasoning in *In re CTLI, LLC* is that Twitter and Facebook accounts likely have little to no value to the creditor.²²³ A second-hand user would have to either (1) continue using the social media

²¹⁸ Liz Carlson, *The Do's and Don'ts of Instagram*, YOUNG ADVENTURESS (Dec. 19, 2014), <http://youngadventuress.com/2014/12/how-to-gain-followers-on-instagram.html>.

²¹⁹ For example, if a gun store's Facebook Page began posting pictures of food a person following the account for information on firearms may not be interested in this new content.

²²⁰ Caitlin Dewey, *Inside the World of the 'Instafamous'*, WASH. POST (Feb. 19, 2014), <https://www.washingtonpost.com/news/style-blog/wp/2014/02/19/inside-the-world-of-the-instafamous/>.

²²¹ *Id.*

²²² Michael Zhang, *Top Instagram Users Making Thousands Per Photo by Promoting Products*, PETAPIXEL (Mar. 6, 2015), <http://petapixel.com/2015/03/06/top-instagram-users-making-thousands-per-photo-by-promoting-products/>.

²²³ *In re CTLI, LLC*, 528 B.R. 359, 373 (Bankr. S.D. Tex. 2015).

account to potentially generate revenue, if, for example, the account had promotional material or advertisements, or (2) sell the account. If a creditor cannot ascertain a value through a hypothetical chapter 7 liquidation, the policy implications of providing a debtor with a fresh start are frustrated.

Thus, social media accounts do not have an ascertainable value. At best, social media accounts are valued at an amount someone on the open market is willing to pay. Turning over a social media account would impede the debtor's fresh start by further diminishing any existing value. Therefore, social media accounts should not become property of the estate.

III. PROPOSAL: A NEW APPROACH FOR DETERMINING OWNERSHIP OF SOCIAL MEDIA ACCOUNTS FOR PURPOSES OF BANKRUPTCY

Applying the proposed three factors to *In re CTLI, LLC*, with respect to the Facebook account, the court would have to analyze each factor in light of the facts at hand. In satisfying this test under this case, three questions need to be answered: (1) How does the individual account holder use the account? Jeremy Alcede converted his personal Facebook account to a Page to promote Tactical Firearms. (2) What are the ownership interests based on the terms and conditions? Facebook's Statement of Rights and Responsibilities state, "[y]ou 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."²²⁴ However, it does not analyze the interpretation of the terms and conditions when an account is mixed, with personal and business uses. (3) Do the social media accounts have value? Arguably, they do not have value. Without an ascertainable value, it is unclear how this would enable a creditor to financially recover while hindering the debtor's fresh start.

When analyzing the three-factor test in light of *In re CTLI, LLC*, this test shows that Jeremy Alcede created his Facebook account for personal use, it has no ascertainable value, and Facebook's Statement of Rights and Responsibilities indicate that Jeremy Alcede is the owner of the content and information posted on Facebook.²²⁵ Facebook's Statement of Rights and Responsibilities further shows that Jeremy Alcede owns the content, not Tactical Firearms.²²⁶ Thus, all three factors would weigh in favor of Jeremy

²²⁴ See FACEBOOK, *Statement of Rights and Responsibilities*, *supra* note 6.

²²⁵ See *id.* But see *In re CTLI, LLC*, 528 B.R. at 368–69.

²²⁶ See FACEBOOK, *Statement of Rights and Responsibilities*, *supra* note 6.

Alcede as the owner of the content, and not Tactical Firearms. Therefore, the accounts are not property of the estate because Tactical Firearms does not have an ownership interest in the property.

However, these factors may raise some opposition, leaving the court with the same ambiguity it is facing today. For example, applying this test under Twitter's Terms of Service may indicate a different outcome because of Twitter's structure and the ease of access for a business user to create an account.²²⁷ Applying the three-factors with Twitter would show: (1) How does the individual account holder use the account? Tactical Firearms was created by Jeremy Alcede for the sole use of the business as a business account. (2) What are the ownership interests based on the terms and conditions? Twitter's Terms of Service clearly state, "[a]ll right, title, and interest in and to the Services. . . are and will remain the exclusive property of Twitter."²²⁸ (3) Do the social media accounts have value? Arguably, they do not have value.

Therefore, applying this test with respect to a Twitter account, the court may find a different result.²²⁹ When analyzing the three-factor test in light of *In re CTLL, LLC*, this test shows that Jeremy Alcede created his Twitter account for business use, and Twitter's Terms of Service indicate that Tactical Firearms is the owner of the content and information posted on Twitter.²³⁰ Twitter's Terms of Service further shows that Twitter owns the content, not Tactical Firearms.²³¹ Due to the lack of ascertainable value, Tactical Firearms would benefit from remaining the owner of the Twitter account. Factor one and three weigh in favor of Tactical Firearms, while factor two weighs against it. Therefore, the accounts may be property of the estate because Tactical Firearms does have an ownership interest in the property.

Thus, comparing the two social media accounts side-by-side may provide two different outcomes. Courts should apply this proposal narrowly to social media accounts and balance the factors in determining whether a social media account is property of the estate.

²²⁷ See TWITTER, *Twitter Terms of Service*, *supra* note 6.

²²⁸ *Id.*

²²⁹ TWITTER, *Twitter Terms of Service*, *supra* note 6.

²³⁰ *Id.*

²³¹ *See id.*

CONCLUSION

Social media accounts should not automatically fit within the broad scope of § 541(a)(1). The number of social media users is increasing at an exponential rate. Therefore, as time passes, it is only going to increase the possibility that an individual or business filing for bankruptcy has a Facebook account or Page eligible to come into the bankruptcy estate. Implementing a process now will provide clarity in bankruptcy courts in the future.

The differences among the social media platforms and the scope of the individual use is critical in this determination. An individual creates a Page for the use of a business, while an individual creates a Facebook account for personal use. The lines are blurred when it comes to understanding what rights, if any, a business has when it has a mixed personal and business use. A Twitter account may be created for individual use or for business use. Thus, social media accounts should be evaluated on a case-by-case basis, subject to the following limitations.

First, a social media account should not automatically be considered property of the estate under § 541(a)(1) because the property interest is a pseudo-property interest at best. Social media accounts cannot be property of the business debtor's estate because the individual account holder—not the business entity—owns the content posted to the account.

Second, in the alternative, if it is considered a property interest, the property interest created is enmeshed in the contractual rights that Facebook and Twitter set forth in their terms and conditions. Even if a right in property existed, it is likely that Facebook and Twitter bar any existing rights of the user through its power to license the content. Therefore, the designation of social media accounts as property of the estate should not be based on their classification as individual or business social media accounts, but rather should be determined on a case-by-case basis.

Third, a social media account does not have an ascertainable value. Without an ascertainable value, a social media account would provide a Trustee or court without a liquidation value. This result is problematic because it does not benefit the creditor or the trustee. Further, transferring an account to a creditor, trustee, or court would likely diminish, or even eliminate, any existing value. Thus, including social media as property of the estate may impede a debtor's fresh start.

Fourth, the balancing of these three factors should provide clarity in the account ownership and the interests affected, which in turn will ensure the underlying policy of a debtor's fresh start in a bankruptcy proceeding.

Thus, *all* social media accounts should not fall into the broad category of property under 11 U.S.C. § 541(a)(1) property of the estate.

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