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Friending, Tagging and Tweeting:
Social Media Overview

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Anthony Ramirez
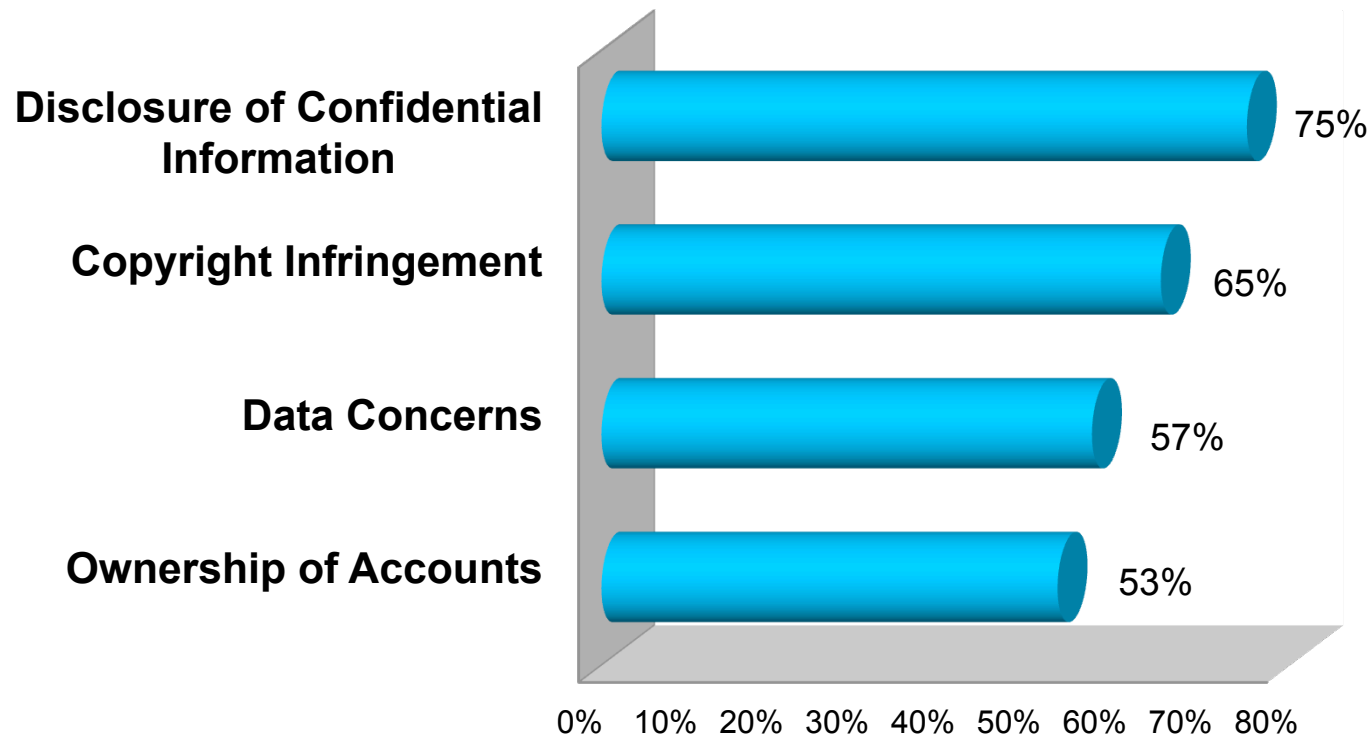**Morrison & Foerster LLP**

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Overview

1. **Explosive Growth of Social Media**

2. **Rules of the Road: Social Media Contracts**

3. **Relevant Social Media Issues**

Survey of Corporate Concerns

A recent survey of UK companies revealed the following issues to be the top concerns arising from social media use:

Concern	Percentage
Disclosure of Confidential Information	75%
Copyright Infringement	65%
Data Concerns	57%
Ownership of Accounts	53%

0% 10% 20% 30% 40% 50% 60% 70% 80%

Explosive Growth
of Social Media

Growth of Social Media

Key Social Media Statistics

Facebook now has over *1 billion* monthly active users, *with 7.9 new members joining per second*

Twitter has *over 500 million accounts*, sending *over 400 million tweets per day*, with 11 new accounts created per second

Google reports that users view *over 4 billion YouTube videos per day*

LinkedIn reports *over 175 million members, with more than 2 new members joining every second*

Growth of Social Media (cont.)

Facebook Facts

- Facebook just turned *9 years old* (on 2/4/13)
  - Just over 6 years have passed since Facebook opened its business to the general public
- *Facebook was the top-visited website by US users* during 2012
  - 79.1 billion total US visits (versus 78.5 billion visits for Google)
- *2.5 billion* content items are shared on Facebook *per day*
- *300 million* photos are uploaded to Facebook *per day*; by some estimates, *1 in every 5* photos taken is uploaded to Facebook
- *50%* of active Facebook users log in on *any given day*

Weekly Market Share of Visits to Facebook.com & Google.com

*Source: Experian.com, December 20, 2012

Growth of Social Media (cont.)

Twitter Facts

- Founded in 2006 – only six years old
- Twitter users conducted over *1.6 billion* search queries daily during 2012
- Typical Twitter activity is *4,600* tweets per second, but activity skyrockets during live events:
    - TV screening of the Japanese animated movie *Castle in the Sky* (12/9/11) set per second volume record set at *25,088 Tweets/second*
    - President Obama's re-election (11/6/12) resulted in per minute record of *327,000 tweets/minute*
- Bieber vs. Gaga: The battle continues

Growth of Social Media (cont.)

YouTube Facts

- YouTube reports that *72 hours* of new video are added every minute – that's *103,680 hours* every day...

- ... the equivalent of Hollywood releasing *483,840 movies a week*!

- In 2011, YouTube had over *1 trillion views*

- Two of the most viewed works in history?

1 | PSY - GANGNAM STYLE (강남스타일)...
by officialpsy — 1,061,626,608 views

7 | Charlie bit my finger - again !
by HDCYT — 500,652,458 views

- In December, PSY's "Gangnam Style" became the first YouTube video to reach over *1 billion views*

Growth of Social Media (cont.)

Pinterest

– In January 2012, Pinterest received over *11.7 million* unique monthly U.S. visitors, *crossing the 10 million mark faster than any other standalone website in history*

– In December 2012, Pinterest received *48 million global user visits*, up from *9 million one year earlier*

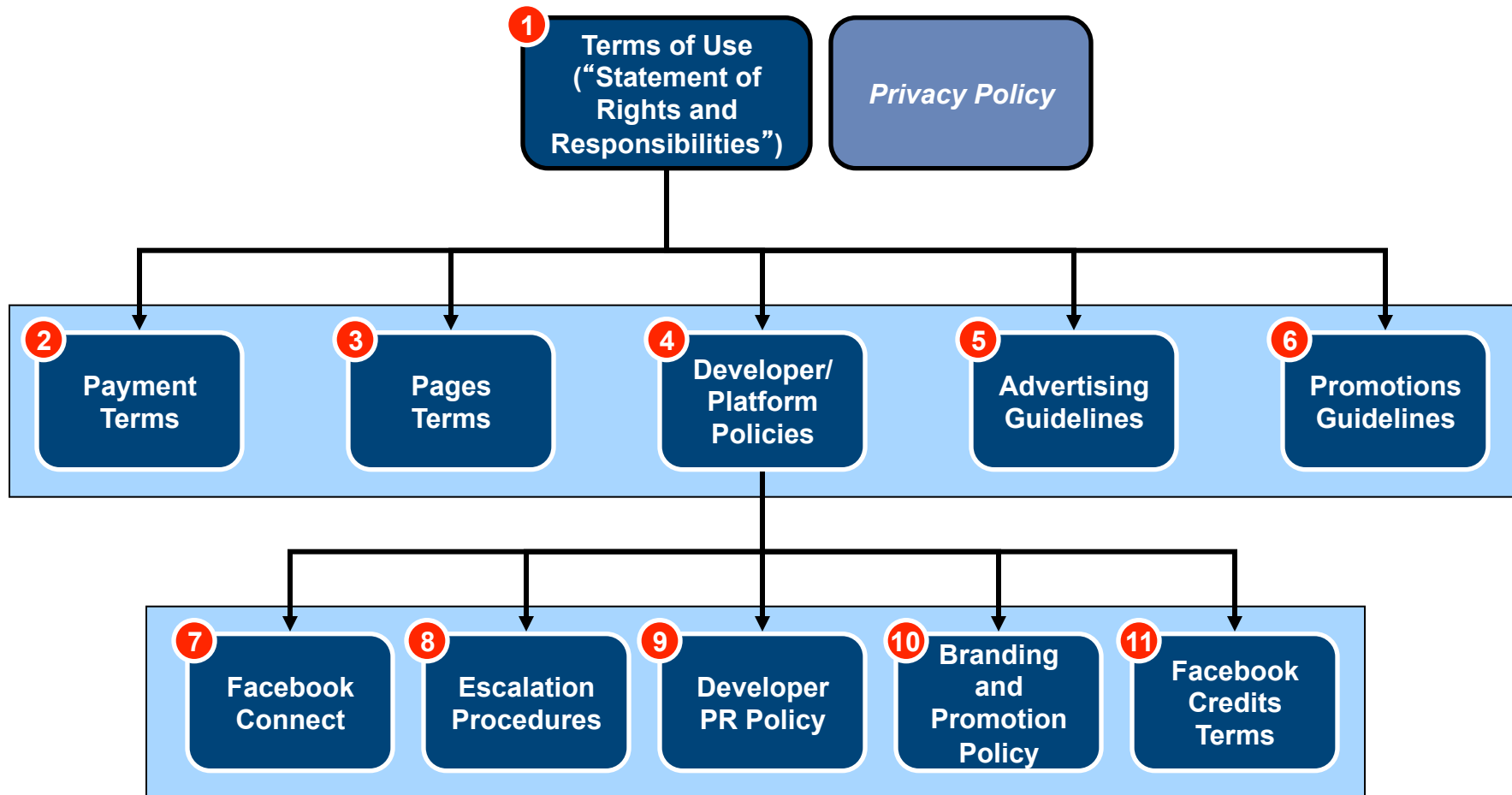– Pinterest is now the third largest social media site as measured by monthly unique visitors

Rules of the Road:
Social Media Contracts

Would You Sign This Contract?

- You are the company's General Counsel. An employee informs you that she is entering into a contract on behalf of the company – the contract includes the following terms:

  - Grants a *sub-licensable, transferable, royalty-free, worldwide license* to your company's IP

  - Other party can *monetize company's IP* by running ads against it, without compensation to your company

  - Other party can issue a press release about the new relationship, *featuring the company's trademarks*, with *no input* from the company

  - The contract terms can be *changed at any time* by the other party.

  - Your company must *indemnify* the other party from all claims, with *no limitations on liability*

Facebook's Terms of Use: Detailed View

1 Terms of Use ("Statement of Rights and Responsibilities")

Privacy Policy

2 Payment Terms

3 Pages Terms

4 Developer/Platform Policies

5 Advertising Guidelines

6 Promotions Guidelines

7 Facebook Connect

8 Escalation Procedures

9 Developer PR Policy

10 Branding and Promotion Policy

11 Facebook Credits Terms

This agreement was written in English (US). To the extent any translated version of this agreement conflicts with the English version, the English version controls. Please note that Section 17 contains certain changes to the general terms for users outside the United States.

Date of Last Revision: December 11, 2012.

Statement of Rights and Responsibilities

This Statement of Rights and Responsibilities ("Statement," "Terms," or "SRR") derives from the Facebook Principles, and is our terms of service that governs our relationship with users and others who interact with Facebook. By using or accessing Facebook, you agree to this Statement, as updated from time to time in accordance with Section 14 below. Additionally, you will find resources at the end of this document that help you understand how Facebook works.

1. **Privacy**

   Your privacy is very important to us. We designed our Data Use Policy to make important disclosures about how you can use Facebook to share with others and how we collect and can use your content and information. We encourage you to read the Data Use Policy, and to use it to help you make informed decisions.

2. **Sharing Your Content and Information**

   You own all of the content and information you post on Facebook, and you can control how it is shared through your privacy and application settings. In addition:

   1. For content that is covered by intellectual property rights, like photos and videos (IP content), you specifically give us the following permission, subject to your privacy and application settings: 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). This IP License ends when you delete your IP content or your account unless your content has been shared with others, and they have not deleted it.

   2. When you delete IP content, it is deleted in a manner similar to emptying the recycle bin on a computer. However, you understand that removed content may persist in backup copies for a reasonable period of time (but will not be available to others).

   3. When you use an application, the application may ask for your permission to access your content and information as well as content and information that others have shared with you. We require applications to respect your privacy, and your agreement with that application will control how the application can use, store, and transfer that content and information. (To learn more about Platform, including how you can control what information other people may share with applications, read ou

   4. When you publish conten[...]ok, to access and use that information, and to a[...]

   5. We always appreciate your feedback or other suggestions about Facebook, but you understand that we may use them without any obligation to compensate you for them (just as you have no obligation to offer them).

Facebook's Core Terms of Use ("Statement of Rights and Responsibilities")

What Is an API?

- ***API*** = ***A***pplication ***P***rogramming ***I***nterface

- A ***software-to-software interface*** that enables applications, such as a client application (*e.g.,* a Twitter client) and a server application (*e.g.,* Twitter) to talk to one another in a manner that is essentially invisible to end users

- Using a social network's APIs is likel to be subject to ***even more rules***:
  - *Software* rules
  - *Contractual* rules – additional terms and conditions

There's no place like 127.0.0.1

Sample API Terms

2. **Commercial Use**. You agree not to use the YouTube API for any of the following commercial uses unless You obtain YouTube's prior written approval:

- the sale of the YouTube API, API Data, YouTube audiovisual content or related services, or access to any of the foregoing;
- the sale of advertising, sponsorships, or promotions placed on or within the YouTube audiovisual content or player; or
- the sale of advertising, sponsorships, or promotions on any page of the API Client containing YouTube audiovisual content, unless other content not obtained from YouTube appears on the same page and is of sufficient value to be the basis for such sales.

XI. Additional Policies Governing Facebook Connect

 A. Login/Connect

 2. When Facebook Connect is used to allow a user to "sign in" or authenticate with your website, the Facebook Connect option must be presented at least as prominently as the most prominent of any other sign in or authentication method on your site, and not as a secondary option.

REST API Rate Limiting

The default rate limit for calls to the REST API varies depending on the authorization method being used and whether the method itself requires authentication. In a perfect world your requests would count against the authenticated limit even on calls not requiring authentication. Unfortunately, this is not currently the case but will likely be rectified soon.

- Anonymous calls are based on the IP of the host and are permitted 150 requests per hour. This classification includes unauthenticated requests (such as RSS feeds), and authenticated requests to resources that do not require authentication.
- OAuth calls are permitted 350 requests per hour.

Terms of Use: Managing the Risks

Takeaways for companies building on social networking platforms:

- **Review the platform's terms of use** – carefully *review* the platform's terms of use (including all incorporated terms) and *monitor* them for changes

- **Inform users of your own terms of use** – seek to impose *your* terms of use on end users; consider how and where to make them available

  - *Beware*: Do not run afoul of your obligations under the platform operator's terms of use

  - *Practice Tip*: Customize your terms of use for the particular platform!

- **APIs** – if accessing a platform's *APIs*, review all terms applicable to those APIs, and note any limits (*e.g.*, frequency of calls to APIs)

- **Backup plan** – irrespective of the applicable terms, a platform could always limit use, block access, or otherwise pull the rug out from under you; if no negotiated agreement, *consider your backup plan*

TREND ALERT: COMPANIES ARE INCREASINGLY ADOPTING INTERNAL POLICIES GOVERNING ENTRY INTO ONLINE CONTRACTS

Terms of Use: Managing the Risks (cont.)

Enforceability of Terms:

- **Use clickwraps** rather than browsewraps where possible

- **Include a prominent notice** that cannot be skipped by users

- **Provide easy access** to the full text of the terms of service

- **Make terms easy to read and understand**

- **Clearly identify** any particularly important terms

- **Beware of particularly abusive terms** (e.g., retroactive implementation of new provisions)

- **Pay close attention to notification process for updates**

- **Don't overlook international law considerations**

Relevant Social Media Issues

Facebook: Privacy-Related Terms

These and other contractual restrictions apply to applications integrated into one's Facebook page, as well as to websites that interact with Facebook via the Facebook Platform:

- In general, for any data received from Facebook, "you must *obtain explicit consent from the user who provided the data to us before using it for any purpose other than displaying it back to the user on your application*."

- "You will *only request the data you need* to operate your application"

- "You will *have a privacy policy* that tells users what user data you are going to use and how you will use, display, share, or transfer that data."

- "You will *not directly or indirectly transfer any data you receive from us*, including user data or Facebook User IDs, to (or use such data in connection with) any ad network, ad exchange, data broker, or other advertising or monetization related toolset, *even if a user consents to such transfer or use*."

NOTE: Restrictions apply to *all* data received from Facebook, not just personal information.

Facebook: Privacy-Related Terms (cont.)

- "You will not sell or purchase any data obtained from us by anyone. *If you are acquired by or merge with a third party*, you can continue to use user data within your application, but *you cannot transfer data outside your application*."

- "You *cannot use a user's friend list outside of your application, even if a user consents to such use*, but you can use connections between users who have both connected to your application."

- "You will *delete all data* you receive from us concerning a user *if the user asks you to do so*, and will provide an easily accessible mechanism for users to make such a request."

- "You will *not include data you receive from us concerning a user in any advertising creative, even if a user consents* to such use."

NOTE: Restrictions apply to *all* data received from Facebook, not just personal information.

Facebook: Using Social Features

The use of Facebook's "Like" button is subject to several restrictions:

- "Your advertisements must not include or be paired with any Platform integrations, including social plugins such as the Like button, without our written permission."

- "You *must not sell or purchase placement of our Social Plugins*, and must not facilitate or participate in any like exchange program."

- "You *must not incentivize users to Like any Page other than your own site or application*, and any incentive you provide must be *available to new and existing users* who Like your Page."
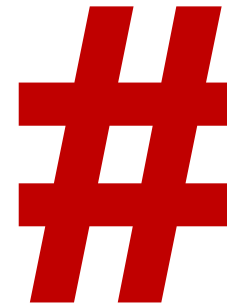
Uses of other "social channels" are further restricted:

- "You *must not incentivize users to use (or gate content behind the use of) Facebook social channels*, or imply that an incentive is directly tied to the use of our channels."

- Social channels include any "feature of a user profile or Facebook communication channel … through which an application can provide, display, or deliver content directed at, on behalf of, or by permission of a user."

Twitter and Instagram: Using Hashtags

Many companies wish to run *marketing promotions based on the hashtags used on Twitter and Instagram*. For example:

- A website may wish to pull and display all Twitter and Instagram content using a hashtag related to the marketing promotion.

- A company may wish to invite customers to submit photos for a promotion by using a specific hashtag.

- A company may wish to design an advertisement incorporating Twitter or Instagram content that uses a specific hashtag.

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Any problems?

Twitter and Instagram: Using Hashtags (cont.)

Instagram content is available through the Instagram API, *but companies are responsible for securing the rights to use the content!*

- "Remember, Instagram doesn't own the images - Instagram users do. Although the Instagram APIs can be used to provide you with access to Instagram user photos, *neither Instagram's provision of the Instagram APIs to you nor your use of the Instagram APIs override the photo owners' requirements and restrictions, which may include "all rights reserved" notices* (attached to each photo by default when uploaded to Instagram), Creative Commons licenses or other terms and conditions that may be agreed upon between you and the owners. *In ALL cases, you are solely responsible for making use of Instagram photos in compliance with the photo owners' requirements or restrictions*."

Twitter and Instagram: Using Hashtags (cont.)

Twitter content is available through the Twitter API for use by companies, subject to certain restrictions, such as:

- *"Get the users' permission before … creating an advertisement that implies the sponsorship or endorsement on behalf of the user* … or using content in a manner that … would require the user's permission under applicable law, including without limitation uses of Twitter Content that features the name, likeness, or identifying persona of a person."

- The display of Twitter Content must meet specific *Display Requirements*.

Twitter and Instagram: Using Hashtags (cont.)

Agence France Presse v. Morel (S.D.N.Y. Jan. 14, 2013)

- Daniel Morel, a photographer, uploaded photographs of the Haiti earthquake to his Twitter account through TwitPic.

- Agence France Presse ("AFP") uploaded the photos onto AFP's system for distribution by AFP to its subscribers and licensees.

- Court determines that AFP is liable for copyright infringement, *rejecting AFP's argument that, once Morel posted the photos to Twitter, Twitter's terms of service gave AFP a license to use the photos*.

Ownership of Social Media Accounts

HMV Employees Live-Tweet Firing

- On January 31, disgruntled staff of HMV *used the company's Twitter account* to live-tweet the firing of 60 people from the company's HR department.
- The tweets were sent to HMV's 63,000 followers, and the first tweet was retweeted over 1,300 times before being taken down.

hmvtweets hmv
We're tweeting live from HR where we're all being fired! Exciting!! #hmvXFactorFiring
16 days ago ↩ Reply ⇄ Retweet ☆ Favorite 💬 1,385

hmvtweets hmv
There are over 60 of us being fired at once! Mass execution, of loyal employees who love the brand. #hmvXFactorFiring
16 days ago ↩ Reply ⇄ Retweet ☆ Favorite 💬 873

hmvtweets hmv
Just overheard our Marketing Director (he's staying, folks) ask "How do I shut down Twitter?" #hmvXFactorFiring
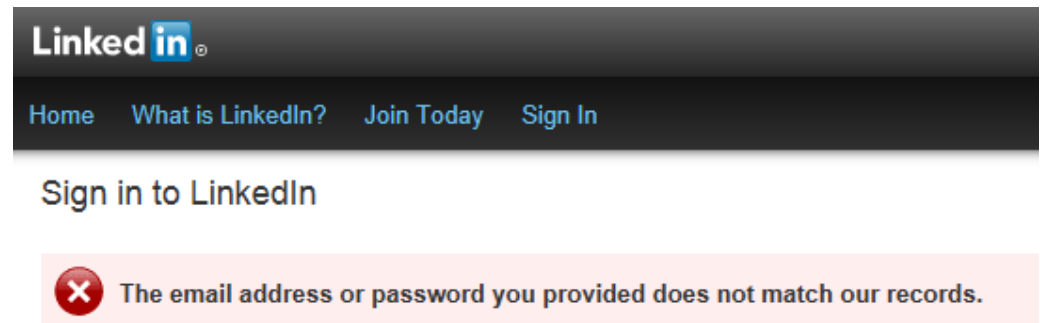16 days ago ↩ Reply ⇄ Retweet ☆ Favorite 💬 282

Ownership Issues: *PhoneDog v. Kravitz*

- While working for PhoneDog, employee Noah Kravitz used an employer-created Twitter account—@PhoneDog_Noah—to link to and promote mobile phone reviews.
- The account had attracted *over 17,000 Twitter followers*.
- Mr. Kravitz left PhoneDog and eventually began working for one of PhoneDog's competitors.
- When Mr. Kravitz left PhoneDog, however, *he kept the Twitter account*, changing the handle to @noahkravitz.
- PhoneDog sued Mr. Kravitz, alleging that he *wrongfully used the Twitter account to compete unfairly* against PhoneDog.
- Parties eventually settled; news reports indicate that Mr. Kravitz has kept the Twitter account and associated followers.

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Ownership Issues: *Eagle v. Edcomm*

- Employee, Linda Eagle, was a co-founder of defendant company, Edcomm.
- Dr. Eagle established a LinkedIn account while at Edcomm, and used the account to promote the company and build her network.
- *Edcomm personnel had access to her LinkedIn password and helped to maintain the account.*
- Dr. Eagle was terminated, and, *following her termination, Edcomm allegedly changed the password and profile of her LinkedIn account*.
- The new profile displayed the new interim CEO's name and photograph instead of Dr. Eagle's.
- Apparently, "individuals searching for Dr. Eagle were routed to a LinkedIn page featuring [the new CEO]'s name and photograph, but Dr. Eagle's honors and awards, recommendations, and connections."

Linked in.
Home   What is LinkedIn?   Join Today   Sign In

Sign in to LinkedIn

❌ The email address or password you provided does not match our records.

Ownership Issues: Minimizing Disputes

- *Address account ownership issues* in company's social media policy or guidelines
- *Company name or brands* ideally should be used in company account names, and not in personal account names
- *Employees' names* should not be used in company account names
- *A designated company representative ideally should open company accounts, and should create and have access to account passwords*
- Company accounts should be *used exclusively for business purposes*, not for individual employees' personal purposes
- *Train employees* regarding company's social media policy or guidelines
- *Avoid the blurring of lines* between personal and work-related social media accounts
- If encouraging employees to use their personal social media accounts for work-related posts and tweets, don't expect to obtain ownership over such accounts
- *Monitor* use of the company's work-related social media accounts

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