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Happy Hunting: Recent Second Circuit Decision Spells a Fox Hunt for Social Media Rights

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Who was the first to plant their flag on it? This appears to be the analysis used by the Second Circuit Court of Appeals in its recent decision, *JLM Couture, Inc. v. Gutman*, Nos. 21-2535, 22-1694, 2024 U.S. App. LEXIS 1050, at *1 (2d Cir. Jan. 17, 2024) in which the Court decided an appeal from the Southern District of New York over ownership rights to several social media pages.

In that case, Hayley Paige-Gutman (“Gutman”), a fashion designer, challenged the Southern District of New York Court’s award of control of her social media accounts to JLM Couture, Inc. (“JLM”), Gutman’s former employer.

Background:

While employed by JLM, Gutman, on her own accord, created social media accounts on Pinterest and Instagram using a derivative of her name as the account name on each social media account. Gutman’s name, contact information, and personally created passwords were used to set up the two social media accounts.

JLM argued that Gutman created the two social media accounts to advertise for JLM because her employment contract required her to assist with company advertising and marketing. There was no dispute that Gutman used both accounts, at various times, to feature JLM products. While, initially the accounts featured more personal posts from Gutman, over time the accounts developed into “critical advertising platforms” for JLM products. Eventually, in addition to Gutman, other JLM employees had access to the two social media accounts.

The Second Circuit held that the District Court incorrectly applied a six factor test, including “(1) whether the account handle reflects the business or entity name; (2) how the account describes itself; (3) whether the account was promoted on the entity's advertisements or publicity materials; (4) whether the account included links to other internet platforms of the entity; (5) the purpose for which the account was used, including whether it was tied to promotional or mission-oriented activities of the entity; and (6) whether employees or members of the entity had access to the account and participated in its management,” to determine the ownership of the accounts. The District Court did not consider whether Gutman owned the accounts when they were created, and opted instead for this more fact-intensive and nuanced approach.

Stating that “[t]he law has long accommodated new technologies within existing legal frameworks,” the Second Circuit concluded that social media accounts should “be treated in the first instance like any other form of property. This includes determining the original owner.” *JLM Couture, Inc. v. Gutman*, Nos. 21-2535, 22-1694, 2024 U.S. App. LEXIS 1050, at *18 (2d Cir. Jan. 17, 2024).

In reaching this conclusion, the Court cited the archaic case often studied by law students early in their first year of law school property law classes *PIERSON v. POST*, 3 Cai. R. 175, 177, a case discussing that pursuit of a fox while the parties were on a hunt is not sufficient to establish ownership. Rather, possession, in some form, is required. Thus with social media accounts, as the court determined in *PIERSON*, the inquiry is not a multi-faceted analysis of several factors capable of demonstrating ownership, but who first possessed the accounts (or the fox, as you will).

The Second Circuit concluded its analysis by stating that if Gutman owned the accounts at their creation, then an analysis needs to be conducted by the District Court to assess whether JLM subsequently assumed ownership over the accounts by way of contract.

Takeaways:

Employers and companies should be cautious with respect to the creation and establishment of their social media presence given the Second Circuit’s adoption of a “first in time” approach to ownership of social media accounts or ensure that a written agreement clearly establishes their rights to such accounts. Delegation of administrative use of accounts or account creation to employees or social media managers may endanger a business’s “ownership” of the account or create some sort of ambiguity that could result in needless and costly disputes.[1]

This “first in time” approach may also result in a “mad dash” to claim the right of ownership to those social media accounts that have not yet been claimed. To the extent a conflict arises, the parties will have to litigate issues of intent and purpose when opening an account. Those who are first to strike, however, may find themselves in an enviable negotiating position when the true owner in interest seeks an assignment of the account ownership rights.

Another takeaway is that, upon formation, businesses should create their social media pages, even if they do not intend or foresee a use initially. The creation of the account right off the bat is a low cost way to avoid costly and needless disputes down the line.

[1] This analysis sets aside entirely whether a user or account holder of a social media account “owns” the account under the terms and conditions of the platform. An issue for another court on another day, apparently.

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