Using An Employee's Personal Social Media Accounts Without Her Authorization To Market Employer May Create Liability Under Trademark And Electronic Privacy Laws

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We've all been taught that our work e-mail and social media accounts are owned by our employers, so watch what you say and realize that you have no expectation of privacy in those accounts. But what happens when an employee uses a personal account to promote her employer? According to one court, the employer's use of these accounts without the employee's authorization can lead to liability under the Lanham Act and the Stored Communications Act. *Maremont v. Susan Fredman Design Group, Ltd.,* Case No. 10 C 7811 (N.D. Ill. Dec. 7, 2011).[1]

The plaintiff, Jill Maremont, was the Director of Marketing, Public Relations, and E-commerce for the defendant Susan Fredman Design Group, Ltd. (SFDG), a prominent interior design firm based in Chicago. As part of a social media marketing campaign for SFDG, Maremont created a blog on SFDG's website. She also promoted SFDG through her personal Twitter and Facebook accounts., including by linking to the SFDG website and blog. She entered and stored all account access information, including passwords for her personal Twitter and Facebook accounts, on the SFDG server. She never gave authority to anyone to access her personal Twitter and Facebook accounts. Maremont's compensation was, in part, based on the overall sales of SFDG, so she had every incentive to promote SFDG.

After suffering a serious accident, Maremont could not work for some time and SFDG decided to continue posting to Maremont's personal accounts to promote SFDG. Once she found out, Maremont asked SFDG to stop – but SFDG did not. After some back and forth about Maremont

[1] Available at http://scholar.google.com/scholar_case?case=16699504013542443452. Additional background here: http://blog.ericgoldman.org/archives/2011/03/employees_twitt.htm.

returning to work for SFDG, she went to another company and sued SFDG over the use of her social media accounts.

Here, SFDG move for summary judgment on all claims, including the Lanham Act and Stored Communications Act claims, as well as claims under the Illinois Right of Publicity Act and a common law right to privacy claim. The Court granted summary judgment on the latter two claims and permitted the Lanham Act and Stored Communications Act claims to proceed to trial.

Maremont's Lanham Act claim was a false endorsement claim. That is, Maremont claimed that SFDG's posts through her personal social media accounts created the impression that was likely to confuse consumers as to the her sponsorship or approval of SFDG. SFDG argued that Maremont had no standing to bring such a claim. The court ruled that to show her standing, Maremont need only "show an intent to commercialize an interest in her identity." The court found sufficient that Maremont had created a sufficient personal Twitter following – 1,250 followers – to satisfy this requirement. SFDG also moved for summary judgment over Maremont's claim for damages under the Lanham Act because Maremont did not suffer financial injury, but the Court decided that it was premature to make a determination on this point. Nevertheless, the Court noted that Maremont would have to show that she lost sales, profits, or (quantifiable) goodwill, or that SFDG was unjustly enriched in order to obtain a monetary award under the Lanham Act.

The Court also found that Maremont could pursue her claim under the Stored Communications Act – so long as she could establish some actual damages by the close of discovery – because "there are disputed issues of material fact whether [SFDG exceeded [its] authority in obtaining access to Maremont's personal Twitter and Facebook accounts."

The Court, however, dismissed the Illinois Right of Publicity Act and common law right to privacy claims. The Court found that SFDG did not pass itself off as Maremont because SFDG had explained Maremont's accident on SFDG's blog and Tweeted a link to this post from Maremont's personal account. This ruling poses a distinction with the false endorsement claim under the Lanham Act: misappropriating the value of Maremont's identity is sufficiently different from creating a likelihood that consumers will believe that Maremont endorsed the SFDG Tweets in her absence. The Court easily found that Maremont's earlier Tweets and Facebook posts directing her followers/friends to the SFDG website eliminated any expectation of privacy.

Ultimately, it is not clear that Maremont will prevail at trial on these facts – or what she will win if she does – both parties indicated that they would be seeking the assistance of damages experts to figure that out. The Court also left open the possibility of another summary judgment motion by SFDG after the close of discovery.

From a practical standpoint, a social media policy would have helped SFDG. Increasingly, businesses rely on social media to promote themselves and it is worthwhile in the long run to have well-established policies for employees involved in these efforts, as well all employees that use social media on behalf of the business. It is all well and good to encourage employees to waive the employer flag, but it is just as important to have policies in place to address problems that may

arise as a result of this personal/business cross-promotion, especially at services firms, such as SFDG, that rely on personal relationships and reputations to help build business.

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