Keep Your 'Friends' Close: Social Media Contacts as Trade Secrets

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Introduction

Businesses put significant effort into developing customer contacts and often treat customer or client lists as confidential information. A number of state legislatures and courts have agreed that such lists may qualify as trade secrets. Now, with the advent of the internet and web-based business activity, many businesses are developing contact lists on social media platforms such as LinkedIn, Twitter, and Facebook. Can businesses protect these social media-generated contacts as trade secrets? Recent case law suggests the answer may be yes.

Frequent use of social media by employees has begun to blur the lines between professional and personal online networking activity. This article discusses recent guidance regarding ownership of social media activity. First, it discusses recent case law indicating when businesses may protect social media-generated contact lists under trade secret law. Courts generally apply the factors considered in evaluating traditional customer lists but have begun to place less emphasis on the availability of individual contacts on social media. Second, it discusses efforts to protect individual rights to social media accounts. Because trade secret disputes typically arise in the context of former employees maintaining social media accounts or contacts developed while employed by a business, these cases typically consider only when a business has rights to social media accounts. Simultaneously, however, some courts and legislatures have begun protecting individual employees from blurring the lines between social networking on a professional and personal level.

Traditional Contact Lists as Trade Secrets

Trade secrets in the United States are governed predominantly by state law, leading to significant variation among jurisdictions. However, every U.S. state except Massachusetts and New York has adopted a version of the Uniform Trade Secrets Act ("UTSA"). These states generally define a trade secret as information (1) possessing value due to its secret nature and (2) protected by reasonable efforts to maintain its secrecy.

Traditional customer lists may, but do not always, qualify as trade secrets within this definition. *See, e.g.*, *Guy Carpenter & Co., Inc. v. Provenzale*, 334 F.3d 459, 467 (5th Cir. 2003); *Hollingsworth Solderless Terminal Co. v. Turley*, 622 F.2d 1324, 1333 (9th Cir. 1980); *Hertz v. Luzenac Grp.*, 576 F.3d 1103, 1115 (10th Cir. 2009). Courts considering such lists often focus on the economic value factor of the trade secret analysis and typically find that "information which is readily obtainable through public sources such as directories do[es] not derive the independent economic value necessary to the existence of a trade secret." *See, e.g.*, *Scott v. Snelling & Snelling, Inc.*, 732 F. Supp. 1034, 1044 (N.D. Cal. 1990); *see also Guy Carpenter*, 334 F.3d at 467; *Hollingsworth*, 622 F.2d at 1333-34; *Hertz* 576 F.3d at 1115. A simple list of names and contact information may not be sufficient. *Id.* Courts generally find traditional customer lists are trade secrets only where such lists are developed using substantial efforts and are not easily reconstructed by others. *See, e.g.*, *Defiance Button Mach. Co. v. C & C Metal Products. Corp.*, 759 F.2d 1053, 1063 (2d Cir. 1984) ("A customer list developed by a business through substantial effort and kept in confidence may be treated and protected at the owner's instance against disclosure to a competitor, provided the information it contains is not otherwise readily ascertainable."). If the list can easily be recreated using public information, there is insufficient economic value in its secrecy. *Id.*

When Are Social Media Accounts Trade Secrets?

Social media-generated contact lists feature two unique characteristics that add tension to the economic value analysis of traditional customer lists. First, social media contacts are often publicly accessible. Where a company has a "friend" list, an individual friend might have public settings such that an unrelated third party could identify his name and send him a message through the social media platform. This public accessibility is precisely what often negates the economic value of traditional customer lists for trade secret purposes. However, a second feature of social media is its networking component, which arguably provides additional value: the ability to reach out to these willing customers. A contact on social media has agreed to be contacted, which provides certain otherwise difficult to ascertain knowledge about the contact's willingness to buy goods or participate in services. It also adds a degree of difficulty in reconstructing the list; there is no guarantee that these contacts will agree to join another's contact network.

Although no court has yet issued a final decision on the merits, a number of courts have indicated that social media-generated contact lists may qualify as trade secrets owned by a business. These courts generally apply a similar analysis as for traditional customer lists: social media-generated lists may be trade secrets where such lists are developed using substantial efforts and not easily reconstructed by others. However, recent courts analyzing social media-generated contact lists appear to focus less on whether individual customer information is publically available. Although economic value must still exist based on the secret nature of the information, these courts suggest that social media-generated contact lists may have inherent supplementary value.

The public nature of social media contacts typically would negate the economic value of a traditional contact list. For example, in 2010, a judge opined that social media and related 21st century research techniques reduced the value of a traditional customer list by rendering such contacts easier to identify. *Sasqua Group, Inc. v. Courtney*, No. CV 10-528(ADS)(AKT), 2010 WL 3613855 (E.D.N.Y. Aug. 2, 2010). A consulting business sued one of its former employees for stealing confidential customer lists when she left the business and began contacting members within the list. The defendant argued that the lists were not confidential because the contact information was readily available on Bloomberg, LinkedIn, Facebook, or other publicly available databases. The judge noted that information containing client needs, preferences, hiring practices, business strategies, and network connections may have been protectable trade secrets at a different time when considerable effort and resources were expended to develop the information. "However, for good or bad, the exponential proliferation of information made available through full-blown use of the Internet and the powerful tools it provides to access such information in 2010 is a very different story."

More recent cases, however, indicate that social media-generated contacts should be treated as having inherently greater value than traditional contact lists. For example, one court reasoned that social media-generated lists are inherently more difficult to reconstruct because the networking aspect requires the contact to be a willing participant. *Christou v. Beatport LLC*, 849 F.Supp. 2d 1055 (D.Col. 2012). The Colorado court applied the Tenth Circuit's factors for evaluating customer lists as trade secrets and denied a motion to dismiss a trade secret claim involving a nightclub founder's publicly visible MySpace contacts. The former employee argued that the account merely hosted a list of people's names, which any member of the public could see. However, the court held that "[t]he trade secret is not merely the list of names but their email and contact information as well as the ability to notify them and promote directly to them via their MySpace accounts [. . .] The names themselves, readily available to the public, are not the important factor. The ancillary information connected to those names cannot be obtained from public directories and is not readily ascertainable from outside sources, and thus this militates in favor of trade secret classification." Although the defendant might be able to recreate a list of names through the public MySpace profiles, the account would be difficult to duplicate particularly because some individuals might not grant the defendant's friend requests.

Other recent courts have focused more on the nature of the social media-generated list *as a whole* instead of the private nature of *individual* contacts on the list. A California court reasoned that social media contact lists may qualify as trade secret because the account holder has the ability to limit who can see the list. *Cellular Accessories for Less Inc. v. Trinitas LLC*, CV 12-06737, 2014 WL 4627090 (C.D. Cal. Sept. 16, 2014). This case indicates that social media-generated contact lists may be trade secrets even where each individual social media contact is generally viewable by the public. An online wireless phone accessory vendor alleged its former sales manager misappropriated trade secrets under the California Uniform Trade Secrets Act where the former employee maintained contacts on a LinkedIn account he created while employed by the company. The defendant argued that the company had encouraged him to create and use a LinkedIn account, and such LinkedIn contacts were not private because they would have been viewable by any other contact. In turn, the plaintiff argued that the contact list was sufficiently private because "[it] is only available to the degree the user chooses to share it." The California court found genuine issues of material fact, holding that maintaining these LinkedIn contacts may have misappropriated the company's trade secrets.

An Illinois court further emphasized that a key inquiry for social media-generated lists is whether the *compilation* is private instead of whether the *individual* contacts are private. *CDM Media USA, Inc. v. Simms*, No. 14 CV 91111, 2015 WL 1399050 (N.D. Ill. March 25, 2015). A B2B technology marketing and media company alleged violation of the Illinois Trade Secrets Act where a former employee refused to transfer control of a LinkedIn group after leaving the company. During his employment, the defendant was the plaintiff's point person for a private LinkedIn group that included chief information officers and senior IT executives interested in participating in or speaking at the company's events. After the defendant resigned, he allegedly refused to return the group and its communications. The plaintiff alleged that the membership contacts within the LinkedIn Group constituted valuable trade secrets. The court denied the defendant's 12(b)(6) motion to dismiss because "the complaint plausibly allege[d] that the membership list was a valuable secret commodity." In its opinion, the court focused on whether the list itself might be sufficiently secret. The court emphasized that knowledge of the group's *existence* is irrelevant. Instead, the question is whether the *contents* of the membership list are secret.

Individual Rights to Social Media

Companies often use employees to develop social media contacts during their employment. However, this leads to blurring between personal and professional roles on social networking accounts. In social media, users understand a single account to be a proxy for a single entity, which may be an individual or a company. When a company posts under an account featuring only its name, the public may associate that account with the company. But where an individual employee posts on behalf of the company, or within a company-run group or network, the public may be less certain. Additionally, employees often create and maintain lists of contacts independently, which may or may not overlap with their employers' customer lists. Were these contacts developed through permissible personal networking? Or are they confidential and owned by the former employer? The question of ownership has become increasingly important as individuals struggle to set boundaries between their personal and professional social networking activity. Recently, courts and legislatures have begun to protect individual networking accounts from employers claim rights to these contacts or accounts.

In each of the cases discussed above, an employer had asserted rights in accounts created by a former employee at an employer's suggestion or direction. Thus, courts suggesting these contact lists qualify as trade secrets suggest such contacts are owned by the employers. However, at least one case suggests that social media accounts should be owned by the individual, regardless of whether they are created at the employer's suggestion. In 2013, a Pennsylvania court held that a LinkedIn account created by a former employee during her employment did not belong to the company where it was used, at least in part, for personal relationships. *Eagle v. Morgan*, No. 11-4303, 2013 WL 943350 (E.D. Penn. March 12, 2013). During her employment, the plaintiff created and used a LinkedIn account to (1) promote her employer's services; (2) foster her reputation as a businesswoman; (3) reconnect with personal relationships; and (4) build social and professional relationships. She had shared the password to this

LinkedIn account with the company in order to update the account and respond to certain matters such as invitations. After her termination, the company kept control of the LinkedIn account and the plaintiff alleged misappropriation. Although the court found the company misappropriated the LinkedIn account, it also found the plaintiff could not show any damages. Because trade secrets require independent economic value, it logically follows that even if the employer had owned the contacts, it would have been unable to assert the account included trade secrets.

Additionally, some legislatures have begun to place statutory limits on an employer's ability to claim ownership of social media accounts created by employees. For example, the Illinois' Right to Privacy in the Workplace Act attempts to delineate ownership of personal and professional social media accounts. 820 ILCS § 55/10 (2014). The Act prohibits employers from requesting or requiring that employees or applicants provide passwords or related social media account information, or provide access to their profile on a social networking website. However, a 2014 amendment placed a new limit on this prohibition. Employers can now require access to "professional accounts," which are accounts, services, or profiles used or accessed by employees for business purposes of the employer. These provisions have not yet been challenged in court, but they indicate a growing recognition that the ownership of social networking activity must be clarified.

Conclusion

Trade secret law continues to evolve as technological advances drive companies to modify their business strategies. Even as trade secret law increasingly recognizes the value of social media contact lists, courts and legislatures have demonstrated strong interest in delineating professional and personal social media activity. Moving forward, businesses must carefully frame access to their social media accounts in order to gain trade secret and other legal protections. In particular, businesses should implement practices that establish clear divisions between individual employees' social media accounts and contacts.