

Bankruptcy Court Provides Guidance on Social Media Account Ownership

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The U.S. Bankruptcy Court for the Southern District of Florida created a three-factor test to help determine the ownership interests of social media accounts. The court in *In re Vital Pharm*^[1] found that (1) documented property interests, (2) control over access, and (3) use, each play a role in establishing ownership over social media accounts. The case is significant because it provides clear guidance to help organizations develop social media policies.

Background

Vital Pharmaceuticals was once the third largest energy drink manufacturer in the U.S. and the owner of the Bang Energy brand. After multiple lawsuits, including a \$293 million judgment against the company for false advertising, Vital Pharma filed for bankruptcy owing more than \$500 million to unsecured creditors. It entered into a sale agreement with its largest unsecured creditor. The sale included the company's most popular product, Bang. Vital Pharma attributed much of Bang's success to social media marketing.

The company manages numerous social media accounts across social media platforms. Three of these accounts led to this dispute: 1) an Instagram account: @bangenergy.ceo; 2) a TikTok account: @bangenergy.ceo; and 3) a Twitter account: @BangEnergyCEO. The three CEO accounts refer to Jack Owoc, Vital Pharma's sole shareholder, founder, and former CEO. Owoc's personality had been a core element of the brand. Vital Pharma sought to include the social media accounts in the sale of the company. Owoc contested the inclusion and claimed ownership to the accounts, stating that they market his persona as an "explosive, high-intensity, unstoppable leader."

Analysis

Vital Pharma successfully persuaded the court to hold in its favor, granting ownership of the social media accounts to Vital Pharma and not Owoc. To reach its conclusion, the court developed a three-factor test. First, the court reviewed if there was a *documented property interest* in the account. Second, the court reviewed who had *control over access* to the account. These factors create a presumption of ownership. If both are met, then the third factor is not reviewed. However, the presumption of ownership created by meeting only one of these factors can be overcome by an analysis of the *use* of the account.

A documented property interest in a social media account could be evidenced by language in an employer's

social media policy or employee handbook that gives an organization ownership of accounts. Analyzing control over access involves reviewing 1) if a person has exclusive access to the social media account; 2) if that person can prevent access from others; and 3) if that person can identify as having exclusive control of the account. The third factor, use, is not determined by a fixed set of qualifications. Use is determined by considering evidence that looks to the purpose of the account. Courts will review evidence of who created the account, the account's name, the number of businesses promoted on the account, the account's use as a tool to promote a persona, and what aspects are fundamental to the nature of the account.

Outcome

In *In re Vital Pharm*, the court reviewed all three factors. First, the court did not find a clearly documented property interest in the accounts by either Vital Pharma or Owoc. Vital Pharma claimed that it had a documented property interest in the account, referring to its handbook, which granted Vital Pharma ownership of "all inventions" created by employees. The court did not extend this definition to include social media accounts because the term "inventions" was not defined in the handbook. Second, the court held that Owoc did not have exclusive control over access to the accounts because Owoc's passwords were shared with employees and employees created content for numerous posts. Lastly, it was found that the accounts were used primarily for the promotion of Bang products. Owoc claimed the primary use of the accounts was to promote his persona. The court disagreed and held that the accounts were overwhelmingly used to promote Bang. Owoc occasionally posted personal content, including pictures of his family during holidays. However, 75% of the posts explicitly marketed Bang and an additional 15% subtly marketed Bang.

Significance and Considerations

Social media is a powerful marketing tool. Accounts are valuable and involve strategic development to reach large audiences. To protect these accounts, users should be proactive in establishing rights to their social media accounts. There is no specific law that provides steps for securing these rights, but the holding in *In re Vital Pharm* gives commonsense guidance for establishing social media policies.

Organizations should maintain clear policies that claim ownership rights to social media accounts. Creating a model that allows team-based control of accounts, which prevents a single user from controlling all content, also implies that ownership is based with the organization. Accounts should be primarily used for the promotion of the organization, avoiding overly personal posts with no business purpose.

[1] *In re Vital Pharm.*, No. 22-17842-PDR, 2023 WL 4048979, (Bankr. S.D. Fla. June 16, 2023).

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