

Ch. 11 Ruling Informs on Social Media Ownership Rights

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Social media users now have useful guidance regarding ownership rights to their social media accounts after a recent ruling by the U.S. Bankruptcy Court for the Southern District of Florida in *In re: Vital Pharmaceuticals Inc.*^[1]

The court created a three-factor test to determine the ownership interests of social media accounts, such as messaging apps like Snapchat and platforms such as TikTok. The three factors to determine ownership are documented property interests in the accounts at issue, control over access to such accounts, and use of such accounts.

This test addresses modern trends in social media, specifically the rise of the social media influencer. The test is a welcome update for savvy influencers looking to protect their brands, and for businesses seeking to extend their online audience.

Social media influencers are media personalities that are employed to promote businesses on social media platforms such as Instagram. The influencer may review a product or simply wear a garment.

In either case, the business seeks to use the influencer's platform to advertise to an audience. There are more than 4.75 billion social media users around the world.^[2] Social media accounts are valuable commodities due to an account's potential reach.

The court in *Vital Pharmaceuticals* rejected the existing precedent that it considered outdated in the current social media era in which influencers blur the line between business and life by often concurrently promoting a persona and a business. The three-factor test created in *In re Vital Pharm* establishes a framework that allows influencers to promote businesses while maintaining ownership of their personal accounts and, by extension, their brand.

The framework is a commonsense approach to the issue and rejects the notion that advertised content alone could create a presumption of ownership for the advertised business.

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 Pharmaceuticals 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 Pharmaceuticals attributed much of Bang's success to social media marketing.

The company manages multiple social media accounts across several social media platforms. Three of these accounts led to this dispute:

An Instagram account, @bangenergy.ceo;
A TikTok account, @bangenergy.ceo; and
A Twitter account, @BangEnergyCEO.

The three CEO accounts refer to Jack Owoc, Vital Pharmaceuticals' sole shareholder, founder and former CEO.

Owoc's personality had been a core element of the brand. Vital Pharmaceuticals sought to include the social media accounts in the sale of the company as a source of value to monetize.

Owoc contested the inclusion and claimed ownership to the accounts, stating that the accounts market his persona as an "explosive, high-intensity, unstoppable leader."

Analysis

The U.S. Bankruptcy Court for the Southern District of Texas established precedent in determining social media account ownership in *In re: CTLI LLC* in 2015.^[3]

There, the court recognized social media accounts as either personal or business-oriented. Social media could be used to promote a persona or a business, but not both.

This framework may have been appropriate in the era of static social media such as websites. However, in the influencer era, it is simplistic.

For example, a beauty and wellness influencer only drinks a certain brand of water in all her personal social media posts because she is being employed by the company that owns the water brand to do so.

Under CTLI, the bottled water company could claim ownership of the wellness influencer's personal social media account because the posts promoted its water, even if drinking bottled water is an important part of the influencer's persona as a healthy individual and regardless of whether the account promoted the influencer herself together with the water.

Further, where social media influencers promote multiple brands, this framework could lead to confusion over the ownership of social media accounts, not only between the business and influencer, but between businesses.

The court in *Vital Pharmaceuticals* rightly rejected the framework put forth in CTLI. The court granted ownership of the social media accounts at issue to Vital Pharmaceuticals, and not Owoc, by developing 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 two 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 third factor — 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.

Control over access is determined by reviewing if a person has exclusive access to the social media account, if that person can prevent access to the account from others and if that person can identify as exclusively controlling the account.

The third factor, use, is not determined by a fixed set of qualifications. However, the court provided a list of items that can be analyzed to determine the purpose of the account, such as:

- 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 *Vital Pharmaceuticals*, the court analyzed all three factors.

First, the court did not find a clearly documented property interest in the accounts at issue by either Vital Pharmaceuticals or Owoc.

Vital Pharmaceuticals claimed that it had a documented property interest in the accounts, referring to its handbook, which granted Vital Pharma ownership of all inventions created by employees. The court did not extend the definition of inventions 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. Although Owoc maintained account passwords, the passwords were shared with employees who had access to the accounts.

These employees created content for numerous posts. Owoc did not approve all of the posts.

Lastly, the court 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

Vital Pharmaceuticals takes a modern approach to social media account ownership and, in essence, asks if the persona can be separated from the business.

Owoc's explosive personality promoted Bang, but this persona was overly connected to Bang. There was no contracted-for separation between the persona and the brand. Owoc's accounts were too intermingled with the company to award him ownership of the accounts.

The three-factor test is a useful approach for establishing ownership interests in social media accounts, and is more reflective of modern trends in social media than prior precedent.

The framework is a nondisruptive approach to the issue. Because most social media influencers will exercise control over access, influencers need only to contract for a documented property interest.

If an influencer does not have the power, especially early in their career, to negotiate with employers, the influencer should diversify the account's use of past advertising for a single business to remain an account's owner. Alternatively, the influencer should not be too strongly associated via their posting with only one product.

Conversely, businesses concerned with establishing rights to social media should diversify use of their social media accounts across company teams and establish rights to those accounts in corporate policies.

Business-based social media accounts should also be used in a manner that mostly promotes the business. For example, a business could contract an influencer to post content exclusively to the business's accounts, in order to retain control over certain posts.

The holding in *Vital Pharmaceuticals* is unlikely to cause problems in social media marketing but may introduce clearer corporate policies and more bargaining between influencers and businesses.

The court suggested that it may be time for the legislature to address this issue. But social media's rapid development could lead it to outpace statutes before the laws are finalized.

Contracting for ownership and a fact-based analysis of an account's purpose may be the best and simplest way to establish ownership rights.

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

[2] <https://datareportal.com/reports/digital-2023-global-overview-report>.

[3] *In re CTLI, LLC*, 528 B.R. 359, 362 (Bankr. S.D. Tex. 2015).

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