

NOT SO FACEBOOK OFFICIAL—DIVIDING JOINT SOCIAL MEDIA ACCOUNTS DURING DIVORCE

Comment

by Kimberly Elmazi

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I. INTRODUCTION: LOGGING INTO MARRIAGE

A. *A Hypothetical*

Imagine a meet-cute from any famous Hollywood film. John meets Jane in a hectic dorm hall on move-in day of freshman year.¹ He helps her carry a stereo up three flights of stairs to her new dorm room. The pair gets to talking, and John eventually musters up the nerve to ask Jane out. Four years later, the college sweethearts marry in the great state of Texas and become The Mr. and Mrs. John Doe. The rest is history. The Does have two children, a dog, a cat, and a home with a white picket fence.

Then one day, the pair decides they want to document their married life for their friends. John and Jane create several joint social media accounts: a Facebook account under the name JaneAndJohn Doe, an Instagram account with the username janeandjohn, a Twitter account with the name @janeandjohndoe, and a SnapChat account with the username johnjanedoe. The couple lives happily ever after, until one day, they are not so happy after all.

Now, the pair is in divorce proceedings and at the difficult point of divorce—dividing their assets. Who gets what? How do Jane and John split the intangible free assets they acquired during their marriage between them? How do they divide those joint social media accounts on Facebook, Instagram, Twitter, and SnapChat?

B. *Roadmap to a Solution*

The legal community has not addressed the area of dissolution of joint social media accounts upon divorce.² However, it is likely to arise in the near future.³ This comment begins by observing the rise of social media in society today, its incredible prevalence in daily life, and its overwhelming international effect on the world.⁴ Next, the comment will transition into a discussion on the various forms of marital property law.⁵ Then, the focus will shift to the various user agreements of different social media accounts including Facebook, Instagram, Twitter, and Snapchat.⁶ A determination of how joint-holder accounts may violate the terms of service of each social media account raises the question of whether or not the terms of service require change.⁷ Finally, the comment transitions into the proposal of a

1. The hypothetical above was specifically drafted by the author for purposes of this comment.

2. *See infra* Part I.

3. *See infra* Section I.C.

4. *See infra* Section I.C.

5. *See infra* Part II.

6. *See infra* Section III.A.

7. *See infra* Section III.A.

solution for dissolution of joint-holder accounts upon divorce.⁸ The solution includes the classification of intangible property as well as the calculation of the account's value.⁹ Following the classification of the property, a solution includes redrafting the terms and conditions of account to avoid potential issues John and Jane surely face.¹⁰ Depending on the current status of the terms of service, each site's proposed revisions will vary.¹¹

C. The Importance of Social Media Today

While division of intangible digital assets is an unaddressed area of law, it will become one in the very near future.¹² Social media accounts are created every day.¹³ For example, “[i]n 2012, the total number of worldwide social networking accounts [soared] over 2.7 billion.”¹⁴ While this figure may seem high now, it “is expected to grow to over 4.3 billion by year-end 2016.”¹⁵ Furthermore, as of 2012, “[t]he total number of worldwide email accounts is expected to increase from 3.3 billion accounts . . . to over 4.3 billion accounts by year-end 2016.”¹⁶ This number “represents an average annual growth rate of 6% over the next four years.”¹⁷ Currently, Facebook services nearly 1.5 billion users.¹⁸ That means one out of seven people on the planet use the social media website.¹⁹ Instagram boasts more than 400 million active users with 40 billion photos posted daily.²⁰ Twitter now has 313 million active monthly users.²¹ Twitter users post approximately 500 million tweets a day.²² Snapchat, the newest social media website of the four,

8. See *infra* Part IV.

9. See *infra* Part IV.

10. See *infra* Part V.

11. See *infra* Part V.

12. Gerry W. Beyer and Kenneth P. Barzak, *Community (Marital) Property Aspects of Digital Property* at 2–4 (June 19, 2005) (unpublished lecture for the ACTEC Digital Property Task Force in Quebec, Canada).

13. See David Lee, *Facebook has a billion users in a single day, says Mark Zuckerberg*, BRITISH BROADCAST CO. (Aug. 28, 2015), <http://www.bbc.com/news/world-us-canada-34082393> [<http://perma.cc/3LZF-J8JL>]. “Facebook has nearly 1.5 billion users who log in at least once a month. . . the company gained its billionth user in October 2012.” *Id.*

14. *Email Statistics Report*, THE RADICATI GROUP, INC. (2012) available at <http://www.radicati.com/wp/wp-content/uploads/2012/04/Email-Statistics-Report-2012-2016-Executive-Summary.pdf> [<http://perma.cc/CQ5A-DW3U>].

15. *Id.*

16. *Id.*

17. *Id.*

18. See Lee, *supra* note 13.

19. See *id.*

20. Instagram, *Press Page*, (Sept. 22, 2015), <https://instagram.com/press/> [<http://perma.cc/556C-5E55>].

21. Twitter, *Twitter Usage Company Facts*, (June 30, 2016), <https://about.twitter.com/company> [<http://perma.cc/9622-BW8E>].

22. *Id.*

reported 100 million users as of January 2015.²³ However, “that number may actually be closer to 200 million (or beyond).”²⁴ Clearly, social media is a massive part of nearly everyone’s lives.²⁵

II. MARITAL PROPERTY IN THE LAW

A. Introduction

To determine how to divide Jane and John’s social media accounts, an assessment of the traditional forms of marital property is essential.²⁶ There are four classifications of property: (1) earnings; (2) profits; (3) increase in value; and (4) good will.²⁷ Earnings are generally defined as what a spouse produces from the individual’s industry, skills, or efforts.²⁸ Profits are revenue that results from substantial capital investment and a small amount of labor.²⁹ Increase in value is borne out of labor exerted onto the property increasing its worth.³⁰ Finally, goodwill is property that increases in value due to one of the spouse’s reputation, skill, or partnerships.³¹

In the United States, states recognize two major forms of marital property.³² The first form is community property, and the states that recognize this form are known as community property or Civil Law states.³³ The second form is separate property, and the states that recognize this form are known as separate property or American Law property states.³⁴ While dividing property, eight traditional methods exist in the United States.³⁵ The eight methods include: (1) physical division; (2) lottery; (3) rotation; (4) holding in common; (5) subtraction; (6) sale; (7) compensation; and (8) unbundling attributes.³⁶

23. Alyson Shontell, *Snapchat Is A Lot Bigger Than People Realize And It Could Be Nearing 200 Million Active Users*, BUSINESS INSIDER (Jan. 3, 2015, 09:54 AM), <http://www.businessinsider.com/snapchats-monthly-active-users-may-be-nearing-200-million-2014-12> [<http://perma.cc/NP9T-EL7Y>].

24. *Id.*

25. *See supra* Section I.C.

26. *See supra* note 1.

27. Sally Brown Richardson, *Classifying Virtual Property in Community Property Regimes: Are My Facebook Friends Considered Earnings, Profits, Increases in Value, or Goodwill?* 85 TUL. L. REV. 717, 725–34 (2011).

28. *See id.* at 725.

29. *See id.* at 727.

30. *See id.* at 733.

31. *See id.* at 734.

32. *See* Beyer & Barzak, *supra* note 12, at 5.

33. *See id.*

34. *See id.*

35. *See id.*

36. H. Peyton Young, *Dividing the Indivisible*, 38 AM. BEHAV. SCIENTIST 905, 907 (1995).

B. Community Property States

Eight states in the United States apply community property law in divorce proceedings.³⁷ The eight community property states include: Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas, and Washington.³⁸ In these states, couples evenly split the assets acquired during marriage between them upon divorce.³⁹ This comment will primarily focus on Texas as a community property state.⁴⁰ Chapter 3 of the Texas Family Code defines community property as the property that is “possessed by either spouse during or on dissolution of marriage.”⁴¹ Additionally, the code defines community property as “consist[ing] of property, other than separate property, acquired by either spouse during marriage.”⁴² Last, community property in Texas “is subject to joint management, control, and disposition of the spouses unless the spouses provide otherwise by power of attorney in writing or other agreement.”⁴³ Additionally, Texas also follows the Inception of Title Rule.⁴⁴ Inception of Title states “the separate or community character of the asset is determined when the asset is acquired and the character of the asset will not be altered without transfers or commingling.”⁴⁵

C. Separate Property States

Five states in the United States apply the American Law Rule.⁴⁶ These five states include: Arizona, California, Nevada, New Mexico, and Washington.⁴⁷ In separate property states, couples may split ownership.⁴⁸ As a basic classification, all assets earned or acquired after the time of marriage are considered community property.⁴⁹ Separate property of a married persons includes (1) all property the person owned before the marriage; and (2) all property acquired by gift, bequest, devise, or descent.⁵⁰

Additionally, property may also be classified as either Quasi-Community Property or Mixed Property.⁵¹ Quasi-Community Property is defined as “[p]roperty acquired and owned by a decedent while

37. *See* Beyer & Barzak, *supra* note 12, at 4.

38. *See id.*

39. *See id.* at 5.

40. *See id.* at 8.

41. TEX. FAM. CODE ANN. § 3.003 (West 2016).

42. *Id.* § 3.002.

43. *Id.* § 3.102(c).

44. *See* Beyer & Barzak, *supra* note 12, at 8.

45. *Id.*

46. *See id.*

47. *See id.*

48. *See id.*

49. *See id.* at 13.

50. *See id.* at 8.

51. *Id.*

domiciled in a common law state that would have been characterized as community property if the spouses . . . domiciled in a community property state” upon acquiring the property.⁵² “The mere mixing of separate and community assets does not necessarily change the character of the property.”⁵³ “As long as each asset remain identifiable after being somehow mixed, the property will remain either separate or community.”⁵⁴

III. THE USER AGREEMENT INDIVIDUAL

A. *Are Couples With Joint Social Accounts Invalidating Their Own Accounts?*

As the traditional forms of property exist, the next issue to address is how these forms of marital property and martial property division apply to intangible social media accounts.⁵⁵ Each social media website has its own terms of service.⁵⁶ The user agreement for social digital media is a contract between the user and the social media company.⁵⁷

Each term of service for a social media outlet generally contains: what constitutes a violation of the account’s use, jurisdiction for any potential legal issue taken with the terms, an arbitration clause, and a reservation rights by the social media outlet to alter the terms at any point.⁵⁸ In addition, the social media website reserves the right to terminate the user’s account for any impermissible conduct.⁵⁹ Therefore, Jane and John’s actions could violate the following social media outlet’s terms of service.⁶⁰

1. *Facebook’s Current Terms of Service*

4. Registration and Account Security

Facebook users provide their real names and information, and we need your help to keep it that way. Here are some

52. *Id.* at 12.

53. *Id.* at 13.

54. *See id.*

55. Young, *supra* note 36.

56. Facebook, *Statement of Rights and Responsibilities*, (Jan. 30, 2015), <https://www.facebook.com/legal/terms> [<http://perma.cc/NA2F-VHVP>]; Instagram, *Terms of Use*, (Jan. 19, 2013), <https://help.instagram.com/478745558852511> [<http://perma.cc/XFH6-239V>]; Twitter, *Terms of Service*, (Jan. 27, 2016), <https://twitter.com/tos?lang=en> [<http://perma.cc/M2L3-5G5R>]; Snapchat, *Terms of Use*, (Oct. 28, 2015), <https://www.snapchat.com/terms> [<http://perma.cc/276R-GD8Y>].

57. *See* Facebook, *supra* note 56; *see* Instagram, *supra* note 56; *see* Twitter, *supra* note 56; *see* Snapchat, *supra* note 56.

58. *See* Facebook, *supra* note 56; *see* Instagram, *supra* note 56; *see* Twitter, *supra* note 56; *see* Snapchat, *supra* note 56.

59. *See* Facebook, *supra* note 56; *see* Instagram, *supra* note 56; *see* Twitter, *supra* note 56; *see* Snapchat, *supra* note 56.

60. *See* 18 U.S.C. § 1030 (2008).

commitments you make to us relating registering and maintaining the security of your account:

1. You will not provide any false personal information on Facebook, or create an account for anyone other than yourself. . . .

8. You will not share your password (or in the case of developers, your secret key), let anyone else access your account, or do anything else that might jeopardize the security of your account. . . .

9. You will not transfer your account (including any Page or application you administer) to anyone without first getting our written permission

14. Termination

If you violate the letter or spirit of this Statement, or otherwise create risk or possible legal exposure for us, we can stop providing all or part of Facebook to you. We will notify you by email or at the next time you attempt to access your account. You may also delete your account or disable your application at any time. In all such cases, this Statement will terminate, but the following provisions will still apply: 2.2, 2.4, 3-5, 9.3, and 14-18.

15. Disputes

1. You will resolve any claim, cause of action, or dispute . . . exclusively in the U.S. District for the Northern District of California or a state court located in San Mateo County, and you agree to submit to the personal jurisdiction of such courts for the purpose of litigating such claims.

2. If anyone brings a claim against us related to your actions, content or information on Facebook, you will indemnify and hold us harmless from and against all damages, losses, and expenses of any kind.⁶¹

Couples with a joint Facebook account can violate the Terms of Service on four counts.⁶² First, providing names that are not their real names is a violation.⁶³ JaneAndJohn Doe's Facebook account violates the terms of service because their names are not fused together as they indicate to Facebook.⁶⁴ Second, Jane and John are not permitted to create an account for anyone other than themselves.⁶⁵ Therefore, Jane cannot create an account for

61. Facebook, *Statement of Rights and Responsibilities*, (Sept. 22, 2015, 6:37 PM), <https://www.facebook.com/legal/terms> [<http://perma.cc/NA2F-VHVP>] [hereinafter *Facebook Statement*].

62. *Id.*

63. *Id.*

64. *See id.*

65. *See id.*

John, and John cannot create an account for Jane.⁶⁶ However, Jane and John violate the terms when they create an account in which Jane creates and operates the account that shares John's name, and John does the same.⁶⁷ Third, users cannot share their password with anyone else.⁶⁸ As both Jane and John share access to the Facebook account they also must share a password.⁶⁹ The couple violates the terms of services when they give their password to another individual or each other.⁷⁰ Finally, to transfer an account from one user to another, Jane and John need Facebook's written permission.⁷¹ That being said, neither Jane nor John can transfer the account to the other.⁷² The couple violates the Facebook terms of service by allowing their partner access and transferring rights of access between themselves.⁷³

Facebook does, however, distinguish between a Timeline and a Page.⁷⁴ Timelines are Facebook pages for individual use only.⁷⁵ A Timeline may be privatized and personalized to individuals under their name and with a list of their friends.⁷⁶ John Doe's individual Facebook Timeline is an example.⁷⁷ Timelines are distinct from Pages as a Page collects Facebook likes from Facebook Timelines and Pages.⁷⁸ A Facebook Page is not limited to individual use.⁷⁹ Pages can represent companies, couples, individuals, and other entities.⁸⁰ For example, a Facebook Page can represent a TV Show such as Law and Order, a celebrity such as Justin Timberlake, or even an organization such as the Texas Tech *Estate Planning and Community Property Law Journal*.⁸¹ Multiple individuals may control a Page.⁸² While Timelines are for individual use only, Facebook does encourage couples to create Pages.⁸³ In fact, "Facebook invites couples to create branded Pages for their travel blogs, for their artisan pretzel businesses, or for their media

66. *See id.*

67. *See id.*

68. *Id.*

69. *See id.*

70. *See id.*

71. *See id.*

72. Facebook, *How Are Pages Different from Personal Profiles*, (June 2015), <https://www.facebook.com/help/217671661585622> [<http://perma.cc/72X5-CG74>] [hereinafter *Pages*]; *see supra* note 1.

73. *See Pages, supra* note 72.

74. *Id.*

75. *Id.*

76. *Id.*

77. *See id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *See id.*

82. *Id.*

83. Stephanie Buck, *When 'Facebook Official' Isn't Enough*, MASHABLE (Aug. 4, 2013), <http://mashable.com/2013/08/04/social-media-couples/#Wj8kr6zBQOq5> [<http://perma.cc/P7CW-XBA5>].

companies.”⁸⁴ Facebook does not, however, encourage these couples to use a Timeline for these uses, as Jane and John currently do.⁸⁵

2. Instagram’s Current Terms of Service

Basic Terms

3. You are responsible for any activity that occurs through your account and you agree you will not sell, transfer, license or assign your account, followers, username, or any account rights. With the exception of people or businesses that are expressly authorized to create accounts on behalf of their employers or clients, Instagram prohibits the creation of and you agree that you will not create an account for anyone other than yourself. You also represent that all information you provide or provided to Instagram upon registration and at all other times will be true, accurate, current and complete and you agree to update your information as necessary to maintain its truth and accuracy

5. You are responsible for keeping your password secret and secure.⁸⁶

General Conditions

1. We reserve the right to modify or terminate the Service or your access to the Service for any reason, without notice, at any time, and without liability to you. You can deactivate your Instagram account by logging into the Service and completing the form available. . . .

Indemnification

You (and also any third party for whom you operate an account or activity on the Service) agree to defend (at Instagram’s request), indemnify and hold the Instagram Parties harmless from and against any claims, liabilities, damages, losses, and expenses, including without limitation, reasonable attorney’s fees and costs. . . . Governing Law & Venue

These terms of Use are governed by and construed in accordance with the laws of the State of California.⁸⁷

84. *See id.*

85. *See Facebook Statement, supra* note 61.

86. Instagram, *Terms of Use*, (Jan. 19, 2013), <https://help.instagram.com/478745558852511> [<http://perma.cc/XFH6-239V>].

87. *Id.*

There is a great deal of similarities between Facebook and Instagram's terms of service.⁸⁸ The reason is that in 2012, Facebook purchased Instagram from its co-founders, Kevin Systrom and Mike Krieger.⁸⁹ As the same entity now controls the two companies, the terms of service are also parallel.⁹⁰ Thus, the violations of Jane and John's Facebook account parallel the violations of Jane and John's Instagram account.⁹¹ The couple's Instagram account, janeandjohn, also violates Instagram's terms in four instances.⁹²

First, users agree not to transfer or assign rights to their account, unless expressly authorized.⁹³ Jane and John are forbidden from allowing another individual access to their accounts.⁹⁴ However, they both violate the terms by granting each other rights to access the account.⁹⁵ Second, neither Jane nor John can create an account for anyone else.⁹⁶ As with the Facebook account, Jane and John both may access the Instagram account.⁹⁷ Jane cannot create an account for John.⁹⁸ John cannot create an account for Jane.⁹⁹ But, the couple did, in fact, create a joint account.¹⁰⁰ Third, the information provided must be accurate.¹⁰¹ While their joint posts with photos and information may be accurate depictions of their lives, they are acting as one user.¹⁰² While marriage is a union of two individuals into one, Instagram does not view their accounts as such.¹⁰³ Finally, users must keep their passwords secret and secure.¹⁰⁴ Although the terms of service do not explicitly state Jane and John cannot share a password, as Facebook's terms do, they are still responsible for maintaining the account's security.¹⁰⁵ Therefore, when Jane gives John the password or vice versa, they are not maintaining proper security and are violating the terms of service.¹⁰⁶

88. See Facebook, *supra* note 56; see Instagram, *supra* note 56; see Twitter, *supra* note 56; see Snapchat, *supra* note 56.

89. Julian Gavaghan, Lydia Warren, *Instagram's 13 employees share \$100m as CEO set to make \$400m reveals he turned down a job at Facebook*, DAILY MAIL (Apr. 9, 2013, 12:28 PM), <http://www.dailymail.co.uk/news/article-2127343/Facebook-buys-Instagram-13-employees-share-100m-CEO-Kevin-Systrom-set-make-400m.html> [<http://perma.cc/7432-4zxn>].

90. *Id.*

91. *Id.*

92. See Instagram, *supra* note 86.

93. See *id.*

94. See *id.*

95. See *id.*

96. See *id.*

97. See *id.*

98. See *id.*

99. See *id.*

100. See *id.*

101. See *id.*

102. See *id.*

103. See *id.*

104. See *id.*

105. Facebook Statement, *supra* note 61; Instagram, *supra* note 86.

106. See Facebook Statement, *supra* note 61; see Instagram, *supra* note 86.

As Facebook and Instagram’s terms of service are incredibly similar, they share similar shortcomings as well.¹⁰⁷ While both of the terms of service explicitly forbid Jane and John from opening a joint Facebook Timeline or Instagram, the terms of service do not explain what the repercussions are for such an action.¹⁰⁸ Further, no option for Facebook Timelines to convert into Facebook Pages without terminating John and Jane’s account exists.¹⁰⁹ To date, neither Facebook nor Instagram have taken action against violators such as Jane and John.¹¹⁰ Therefore, additional terms are required to address this issue.¹¹¹

3. *Twitter’s Current Terms of Service*

3. Passwords

You are responsible for safeguarding the password that you use to access the Services and for any activities or actions under your password. We encourage you to use “strong” passwords (passwords that use a combination of upper and lower case letters, numbers and symbols) with your account. Twitter cannot and will not be liable for any loss or damage arising from your failure to comply with the above [. . .]

10. Ending These Terms

We may suspend or terminate your accounts or cease providing you with all or part of the Services at any time for any or no reason, including, but not limited to, if we reasonably believe: (i) you have violated these Terms of the Twitter Rules. (ii) you create risk or possible legal exposure for us; or (iii) our provision of the Services to you is no longer commercially viable. We will make reasonable efforts to notify you by the email address associated with your account or the next time you attempt to access your account [. . .]

12. General Terms

B. Controlling Law and Jurisdiction

These terms and any action related thereto will be governed by the laws of the State of California without regard to or application of its conflict of law provisions or your state or country of residence. All claims, legal proceedings or litigation arising in connection with the Services will be brought solely in the federal or state courts located in San

107. See *Facebook Statement*, *supra* note 61; see *Instagram*, *supra* note 86.

108. See *Facebook Statement*, *supra* note 61; see *Instagram*, *supra* note 86.

109. See *Facebook Statement*, *supra* note 61; see *Instagram*, *supra* note 86.

110. See *Facebook Statement*, *supra* note 61; see *Instagram*, *supra* note 86.

111. See *infra* Part V.

Francisco County, California, United States, and you consent to the jurisdiction of and venue in such courts and waive any objection as to inconvenient forum.¹¹²

The Twitter Rules

Impersonation: You may not impersonate others through the Twitter service in a manner that does or is intended to mislead, confuse, or deceive others.¹¹³

Twitter differs from both Facebook and Instagram.¹¹⁴ The Twitter terms of service do not include specific transfer or creation clauses for accounts.¹¹⁵ Therefore, Jane and John's transfer of rights between them does not appear to violate the terms of service.¹¹⁶ However, the terms of service do include a user's responsibility clause to safeguard the account password.¹¹⁷ If Twitter accounts are intended for individual use, it appears that Jane and John are in violation of the terms of service.¹¹⁸ However, the terms do not explicitly forbid the use of more than one individual with access to the account.¹¹⁹ Therefore, the ambiguity in the terms could either endorse Jane and John's joint account or invalidate it.¹²⁰

While Twitter requires individual accounts to have a unique email address, "the network takes no issue with couple profiles."¹²¹ In fact, some [couple profiles] are even verified."¹²² Here, the issue arising out of the terms of service is that, while Twitter verified couple profiles, Twitter's legal team has not incorporated the verification of couple profiles in the terms of service.¹²³ For that reason, Twitter must add additional explicit terms to further supplement its public and informal verification.¹²⁴

4. Snapchat's Current Terms of Service

8. Your Account [. . .]

By using the Services, you agree that, in addition to exercising common sense:

- You will not create more than one account for yourself.

112. Twitter, *supra* note 56.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *See* Buck, *supra* note 83.

123. *See id.*

124. *See infra* Part V.

- You will not create another account if we have already disabled your account, unless you have our written permission to do so.
 - You will not buy, sell, rent, or lease access to your Snapchat account, Live, Snaps, a Snapchat username, or a friend link without our written permission;
 - You will not share your password. and
 - You will not log in or attempt to access the Services through unauthorized third-party applications or clients
- ...

17. Arbitration, Class Waiver, and Jury Waiver . . .

REQUIR[ED] YOU TO ARBITRATE DISPUTES WITH SNAPCHAT, AND LIMIT THE MANNER IN WHICH YOU CAN SEEK RELIEF FROM US . . .

18. Forum and Venue . . .

Both you and Snapchat agree that all claims and disputes in connection with the Terms of the use of the Services will be litigated exclusively in the United States District Court for the Central District of California [. . .]

Account Security:

You are responsible for making sure that you keep your password secure and safe. You agree that you will not share your password with others or do anything that might jeopardize the security of your account, including sharing your password with or logging in through unauthorized third-party applications or clients that attempt to access the Snapchat API.¹²⁵

Snapchat applies similar conditions to Twitter in its terms.¹²⁶ Users agree not to share their passwords with any other people.¹²⁷ Clearly, John and Jane share their password with one another.¹²⁸ By doing so, they violate the terms of service under the account security clause.¹²⁹ However, Snapchat is unique in that users can only use the application from mobile devices, such as cell phones and tablets.¹³⁰ Unlike Facebook, Instagram, or Twitter, a user cannot post or access the user's account from a computer.¹³¹ The application or "app," is solely accessible through a unique number: the user's cell

125. Snapchat, *supra* note 56.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

phone.¹³² That is the individualized way to access the account.¹³³ Furthermore, access from more than one account at the same time is not permitted.¹³⁴ For example, if the user logs into the user's account from one device while already logged into another device, Snapchat will automatically log the user out of the first device.¹³⁵ This is an aspect social media accounts can incorporate into user agreements to limit more than one individual from accessing the account in a joint-holder scenario.¹³⁶

Additionally, similar to Twitter, Snapchat does not specify similar limitations that Facebook or Instagram include.¹³⁷ Snapchat does not explicitly state that accounts are for individual use and non-transferable.¹³⁸ However, unlike Twitter, Snapchat officials do not verify couple accounts.¹³⁹ The terms of service are silent in regards to (1) how many users are authorized to use the account; and (2) whether or not Snapchat officials allow or encourage couple accounts.¹⁴⁰

B. *The User Agreements: Repercussions of Violations*

The terms of service on a social media website is a contract between the user and the company.¹⁴¹ Jane and John's disregard for the terms violates the contract between themselves and the social media site.¹⁴² It is clear from Part A above that users who fail to use their real names, create accounts for anyone other than themselves, transfer their account, or share their passwords violate the terms of service.¹⁴³ Jane and John are in breach of each site's terms of service in some form or fashion.¹⁴⁴

A violation of these terms of service may also constitute a violation of the Computer Fraud and Abuse Act (CFAA).¹⁴⁵ The CFAA is a federal statute that deals specifically with fraudulent actions directly related to computer usage that exceeds the authority or access to information.¹⁴⁶ Translated, Jane and John disregarding the user agreement of a social media website constitutes not only (1) a breach of the contractual agreement with Facebook, Instagram, Twitter, or Snapchat; but also (2) a potential violation

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *See* Facebook, *supra* note 56.

142. *See id.*

143. *See id.*

144. *See* Twitter, *supra* note 56

145. 18 U.S.C. § 1030 (2008).

146. *Id.*

of the CFAA, which could result in federal prosecution.¹⁴⁷ Another federal act in which the users may encounter prosecutorial repercussions is the Stored Communications Act (SCA).¹⁴⁸ The SCA provides the legal parameters for third-party Internet provider's power over the voluntary disclosure of any electronic or stored wire communication.¹⁴⁹ The act makes it illegal to divulge information of another through electronic communication.¹⁵⁰

Therefore, breaching the terms of service may invalidate Jane and John's accounts.¹⁵¹ Should the Facebook, Instagram, Twitter, and Snapchat corporations deem appropriate, any of the social media sites could file federal suit and use the fullest extent of the law against Jane and John and terminate their accounts.¹⁵² Thus, potential prosecution would leave Jane and John with no intangible joint digital asset to divide upon their divorce.¹⁵³ However, it appears unlikely that Facebook would exhaust efforts on a simple scat between two users in a sea of 1.5 billion other users the site must regulate.¹⁵⁴ The same may be argued for Instagram, Twitter, and Snapchat.¹⁵⁵

IV. HOW TO CLASSIFY DIGITAL ASSETS

A. *Virtual Property Characteristics*

Assuming the social media site or the federal government will not pursue legal action against Jane and John, classification of the property is the next most important hurdle to address in determining how to treat intangible assets, such as joint social media accounts.¹⁵⁶ Once the social media account is classified, the ability to divide the account becomes significantly simpler, regardless of whether the state applies a community property or separate property approach.¹⁵⁷ Following classification, a factor that aids in determining the method of dividing marital property is to determine the source of funds used to pay for said property, despite the state's martial property approach.¹⁵⁸ The difficulty arises in division of free accounts, such as Facebook, Instagram, Twitter, and Snapchat.¹⁵⁹ When a user does not use

147. *Id.*

148. *Id.* § 2701-21 (2015).

149. *Id.* § 1030.

150. *Id.* § 2702 (2015).

151. *Id.* § 2701-21.

152. *Id.*

153. *Id.*

154. *See* Beyer, *supra* note 12.

155. *See id.*

156. *See id.*

157. Skype Interview with Gerry W. Beyer, Professor of Law, at Texas Tech University School of Law (Jan. 10, 2016).

158. *Id.*

159. *Id.*

funds to pay for this license to use, how can Jane and John split up their joint social media accounts?¹⁶⁰

To date, the Fifth Circuit addressed classification of virtual property; however, the issue remains unaddressed at a higher judicial level.¹⁶¹ Professor Joshua Fairfield fervently argues that, in fact, virtual property is just like tangible property and must be classified as such.¹⁶² Beyond intangibility, Professor Fairfield argues that no additional articulation of the difference between tangibility and intangibility exists.¹⁶³ However, even this difference of intangibility is inconsequential to many scholars.¹⁶⁴ Professor Fairfield argues many newly developed or developing forms of property are intangible in their very nature.¹⁶⁵ An excellent example includes intellectual property, which people cannot see or touch, but which is legally treated as tangible property.¹⁶⁶ Professor Fairfield further supports his position and applies it to other forms of property, including URLs, email accounts, and even virtual worlds.¹⁶⁷

Professor Fairfield identifies three major characteristics of tangible property and argues that these very same characteristics also exist in intangible virtual property such as an email account.¹⁶⁸ These three characteristics include the property being (1) rivalrous; (2) persistent; and (3) interconnected.¹⁶⁹ To be rivalrous in the physical world, allows “the owner to exclude other people from using owned objects.”¹⁷⁰ For example, if Person A has a pen, then Person B does not.¹⁷¹ Similarly, if Person A has an email account, Person B does not.¹⁷² To be persistent in the physical world is to remain.¹⁷³ For example, if Person A leaves the pen on a table and walks away, the pen remains in its position and continues to exist.¹⁷⁴ Similarly, if Person A opens an email account, virtual property, it remains.¹⁷⁵ Finally, to be interconnected other people must experience the property.¹⁷⁶ Anyone other than Person A may interact with the pen.¹⁷⁷ Professor Fairfield applies

160. *Id.*

161. Lillian Marie Grappe, “Yours, Mine, or Ours?”: *Ownership and Management of Electronic Communications in Community Property Regimes*, 18 TUL. J. TECH. & INTELL. PROP. 161, 175 (2015).

162. Joshua A.T. Fairfield, *Virtual Property*, 85 B.U.L. REV. 1047, 1050 (2005).

163. *Id.*

164. *Id.*

165. *Id.*

166. Grappe, *supra* note 161.

167. *Id.*

168. Fairfield, *supra* note 162.

169. *Id.*

170. *Id.* at 1053.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

his principal to email accounts in which people other than the owner or user of the account may interconnect with the account.¹⁷⁸

Professor Fairfield's argument regarding email accounts is also capable of applying to social media accounts.¹⁷⁹ A social media account, like an email account or virtual world, is rivalrous in that an owner can and does exclude ownership and use of the site from others.¹⁸⁰ Generally, solely the user accesses a profile; therefore, the profile or account satisfies the rivalrous characteristic.¹⁸¹ Additionally, social media accounts, like email accounts or virtual worlds, continue to exist and are persistent.¹⁸² Once a user opens the account, the account continues to exist in cyberspace.¹⁸³ Finally, the social media account interconnects with other mediums through a web of other users and websites called friends and followers.¹⁸⁴ Each friend or follower has access to the account and the ability to connect with the account.¹⁸⁵ Thus, social media accounts also satisfy the characteristic of interconnectivity.¹⁸⁶ Therefore, a social media account, while clearly an intangible piece of property, also shares the same characteristics as tangible property and should be classified as such.¹⁸⁷

B. Categorizing and Evaluating Social Media Accounts as Property

Once social media websites are classified as tangible property, the next question to address in Jane and John's issue is: which of the four categories of property does a social media account fall into?¹⁸⁸ The four categories discussed previously in Part II include (1) earnings; (2) profits; (3) increase in value; and (4) good will.¹⁸⁹ Increase in value is the strongest argument for categorization of social media.¹⁹⁰ By definition, increase in value means that labor exerted on the property increases the property's value over time.¹⁹¹

When applying the increase of value definition to a social media account, it becomes clear that John and Jane exert labor through adding friends, gaining followers, following other accounts, posting photos, liking other posts, retweeting, or even sharing posts.¹⁹² Friends and followers

178. *Id.*

179. *See id.* at 1047.

180. *See id.*

181. *Id.* at 1054.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. Richardson, *supra* note 27, at 727.

189. *Id.*

190. *Id.*

191. Fairfield, *supra* note 162, at 1055.

192. *Id.*

specifically add value to the account, and the more Jane and John have, the more value the account earns.¹⁹³ But, what is the value of a social media friend or follower anyway?¹⁹⁴ Recently, many social media and property blogs calculated the value of Facebook accounts, users, friends, and even each “like” a post receives.¹⁹⁵ The studies suggest that over time, the more users post and interact on social media, parallels the value the account accrues.¹⁹⁶

C. Who Owns It?

Categorizing the account as increase in value, the next question to ask is how to divide the intangible property during Jane and John’s divorce.¹⁹⁷ As Jane and John both have access and control the social media accounts they created during their marriage, the following additional questions arise upon divorce: (1) who controls the account?; (2) who controls the contents of the website?; (3) who controls the intellectual property rights on the social media page?; (4) who has ultimate ownership?¹⁹⁸

Factors to consider when evaluating these questions include whether or not the account is paid for, and who pays for the account?¹⁹⁹ Answers to the questions grow “even more complicated in community property states where the designated legal ownership can be trumped by state law for property acquired by a married individual—it may be classified as community property despite taking title in the name of one of the two individuals.”²⁰⁰ Put plainly, if the funds used to pay for the account are community property funds, then the license rights to the property are also community property.²⁰¹ For example, if Jane uses the money from her job to pay for her and John’s Facebook Timeline to advertise for a particular product, if the money used is earned during the duration of their marriage, then it is community property.²⁰² Therefore, in Texas, a community property state, Jane does not have any more right to the account than John.²⁰³

Rights to the control of the website and its contents are divided between the social media site and the couple.²⁰⁴ By opening the account, Jane and

193. *Id.*

194. Jim Edwards, *What Is a Facebook ‘Like’ Actually Worth In Dollars?* BUSINESS INSIDER (Oct. 11, 2015, 01:18 AM), <http://www.businessinsider.com/what-is-a-facebook-like-actually-worth-in-dollars-2013-3> [<http://perma.cc/MGV6-YNQK>].

195. *Id.*

196. *Id.*

197. Skype Interview with Gerry W. Beyer, *supra* note 157.

198. *Id.*

199. *Id.*

200. Interview with James Lamm, Attorney at Grant, Plant, and Moody, (Nov. 1, 2015).

201. Skype Interview with Gerry W. Beyer, *supra* note 157.

202. *Id.*

203. *Id.*

204. Grappe, *supra* note 161, at 176.

John do not own the actual account profile.²⁰⁵ Social media outlets, such as Facebook, Instagram, Twitter, and Snapchat, simply give users a license to use the account.²⁰⁶ While they do not have ownership rights of the social media account, they do have intellectual ownership rights to their posts, including photos.²⁰⁷ However, this raises the question: what if the account is free?²⁰⁸ Facebook, Twitter, Instagram, and Snapchat do not generally charge users for their account.²⁰⁹ Therefore, community or separate property funds are not used to facilitate use of the accounts.²¹⁰ Dividing a free license to use the account becomes an even more convoluted question.²¹¹

From the Internet service provider's perspective, "ownership" seems to be a term that is interchangeable with "control."²¹² That is to say, "the account owner is an individual who knows both the username and the password for the account" in most scenarios.²¹³ However, an issue arises "when an Internet account gets hacked and the original owner needs to prove that the account rightfully belonged to that individual and not the hacker" or in Jane and John's case, they open the account as a joint account in which passwords are shared between both Jane and John.²¹⁴

D. Calculating the Value of Friends & Followers

While fights for control over social media accounts is a newly developing area, it is clear that the fights will arise with more frequency in the future because social media accounts are increasing in value.²¹⁵ When an Internet account becomes "financially-valuable, the ownership of these accounts will become a problem for courts to deal with."²¹⁶ *PhoneDog v. Kravitz* provides an example.²¹⁷ The employee, Kravitz, created a Twitter account with the same name as his company, but the account existed for his personal use.²¹⁸ The employee "[d]uring the course of his employment, . . . generated approximately 17,000 followers."²¹⁹ Upon leaving the company, PhoneDog sued Kravitz for rights to the Twitter account.²²⁰

205. *Id.*

206. *Id.*

207. *Id.*

208. Skype Interview with Gerry W. Beyer, *supra* note 157.

209. *Id.*

210. *Id.*

211. *Id.*

212. Interview with James Lamm, *supra* note 200.

213. *Id.*

214. *Id.*

215. *PhoneDog v. Kravitz*, 2011 U.S. Dist. LEXIS 129229, 2011 WL 5415612, at *1 (N.D. Cal. Nov. 8, 2011).

216. Skype Interview with Gerry W. Beyer, *supra* note 157.

217. *PhoneDog*, 2011 WL 5415612, at *1.

218. *Id.*

219. *Id.*

220. *Id.*

Kravitz argued the account was his, while PhoneDog argued that its company was entitled to the Twitter account, which was worth about \$340,000 (\$2.50 per follower) to the employer.²²¹ Ultimately, the court determined that power of the account rested with Kravitz.²²²

Currently, no case law has established a monetary value for Facebook friends or other social media account followers.²²³ However, various social media companies and research companies calculated the value of Facebook fans.²²⁴ The estimated worth of a Facebook “like” from users varies from social media research company to research company.²²⁵ In fact, the amount varies greatly.²²⁶ Each research company bases its calculations of a Facebook like for companies, which differ from individual social media pages, on how much Internet traffic the site receives in conjunction with a like.²²⁷ To calculate the value of shares or tweets, companies like Chompon “took the total revenue attributed to each action and divided it by the total number or shares/tweets.”²²⁸ Alternatively, to calculate likes and follows, companies “estimate attribution by looking at . . . traffic references and subtracting out purchases made through shares/tweets as well as purchases made through direct traffic.”²²⁹ Blackbaud, NTEN, and Common Knowledge estimate an average value of \$214.81 for each Facebook like received.²³⁰ Other research companies, like Forrester, determine that a Facebook like is worth nothing at all.²³¹ Rather, likes are “more akin to ‘potential energy’ in an object.”²³² Currently the range is wide and the results differ vastly for the worth of a Facebook like.²³³

221. *Id.*

222. *Id.* at *3.

223. Edwards, *supra* note 194.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. ChompOn, *What is the value of a social action in online commerce?* CHOMPON, (Feb. 2011), available at http://www.chompon.com/chompon_social_action_value.pdf [http://perma.cc/MZZU-88BZ].

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

Comparative Estimated Values of a Facebook “Like” for Companies²³⁴

Company	Estimated Value (USD)
Blackbaud, NTEN, & Common Knowledge	\$214.81
Syncapse	\$136.38
ChompOn	\$8.00
Virtue	\$3.60
Eventbrite	\$1.34
Diamond Candles	\$1.07
Ecwid	\$0.21
Forrester	\$0.00

Furthermore, Facebook itself values its users.²³⁵ As of 2012, each user’s estimated value is about \$81.00.²³⁶ Each Facebook friend that an individual profile or Timeline has is worth about \$0.62.²³⁷ Facebook values each individual profile or Timeline of a user at approximately \$1,800.00.²³⁸ PhoneDog calculated each Twitter follower to be worth \$2.50, based on the company’s estimate of potential profit from advertising.²³⁹ Therefore, the value of the account contains massive potential.²⁴⁰

Depending on the amount of friends or followers that Jane and John have on their various accounts, one would understand why they may fight for primary access to the accounts after divorce because the value of the account is potentially worth something spectacular.²⁴¹ Using the data collected by Blackbaud, NTEN, and Common Knowledge, the chart below exhibits how much Jane and John’s Facebook account alone may be worth.²⁴² While these amounts are simply estimates, this chart makes it highly evident that a social media account generates a great deal of worth and furthers the argument that a solution to the issue must be established sooner rather than later.²⁴³

234. The author created this chart from the comment’s hypothetical and for demonstrative purposes.

235. Doug Laney, *To Facebook You’re Worth \$80.95*, WALL ST. J. (May 3, 2012, 03:36 PM), <http://blogs.wsj.com/cio/2012/05/03/to-facebook-youre-worth-80-95/> [http://perma.cc/D52B-43DQ].

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *See infra* note 245.

243. *See infra* note 245.

JaneAndJohn Doe Facebook Account Information²⁴⁴

Created: March 05, 2009

	Account(s)	Friends	Posts	Likes
Amount	1	837	364	7,644
Worth/Amount (USD)	\$1,800.00	\$0.62	\$0.00	\$214.81
Value/Amount (USD)	\$1,800.00	\$518.94	\$0.00	\$1,642,007.64
Total Value				\$1,644,326.58

JaneAndJohn Doe Facebook Account Information²⁴⁵

Created: March 05, 2009

	Account(s)	Friends	Posts
Amount	1	837	364
Worth/Amount (USD)	\$1,800.00	\$0.62	\$0.00
Value/Amount (USD)	\$1,800.00	\$518.94	\$0.00
Total Value			\$2,318.94

The values calculated in the proceeding charts vary vastly.²⁴⁶ Assuming that John and Jane do not use their Facebook account for advertising of a company they own either jointly or individually, and simply operate these accounts for individual use, it is clear what their account's potential value could be.²⁴⁷ The former chart indicates a higher value Facebook like based on the calculations of various companies, while the latter chart indicates the potential energy value of a Facebook like with no monetary value at all.²⁴⁸ The latter chart is much more indicative of what an individual account would likely be worth, as John and Jane would receive no other monetary benefit from Facebook as a couple who uses the account for business, rather than personal purposes will.²⁴⁹

244. The author created this chart from the comment's hypothetical and for demonstrative purposes. This demonstrative assumes that a Facebook "like" is worth the value of \$214.81 as the value applies to companies.

245. The author created this chart from the comment's hypothetical and for demonstrative purposes.

246. See Laney, *supra* note 235.

247. See *id.*

248. See *id.*

249. See *id.*

V. PROPOSING A SOLUTION: REDRAFTING TERMS AND CONDITIONS

A. *Why Is a Solution Necessary?*

The impact of social media on people's daily lives is immense; however, no current statutory regulations or case law aid Jane and John in resolving their issue with social media.²⁵⁰ A resolution to Jane and John's issue arises out of proposal to revise the social media users agreements for Facebook, Instagram, Twitter, and Snapchat.²⁵¹ The problems arising from the current version of the user agreements begin with the registration process on a social media account.²⁵² Jim Lamm, an attorney at Grant, Plant, and Moody in Minneapolis, Minnesota, explains that social media sites fail to have "a blank to designate the legal owner of the account," which contrasts with other accounts such as a bank account or brokerage account.²⁵³ Rather, "the user selects a username, which might have no relationship to their legal name."²⁵⁴

As indicated in this comment, there are three major approaches to joint accounts: (1) the social media terms of service explicitly forbid joint accounts (Facebook and Instagram); (2) the terms of service and/or social media page endorses joint accounts (Twitter); or (3) the terms of service are silent on joint social media accounts (Snapchat).²⁵⁵ All the social media outlets examined in this comment fall into one of these three categories.²⁵⁶ However, none of the sites examined in this comment (Facebook, Instagram, Twitter, and Snapchat) discuss possible methods to address the division of joint-holder accounts.²⁵⁷ Below this comment's author drafted new clauses for the terms of service of Facebook, Instagram, Twitter, and Snapchat to include what social media companies may do should a couple open a joint social media account.²⁵⁸

B. *Facebook: Redrafting When Joint Accounts Are Forbidden*

The terms of service for Facebook clearly establish that Facebook maintains the right to delete an account for any reason in violation of the terms of service.²⁵⁹ However, it is also unlikely that Facebook will delete

250. *See id.*

251. *See* Interview with James Lamm, *supra* note 200.

252. *See id.*

253. *See id.*

254. *See id.*

255. *See* Facebook, *supra* note 56; *see* Instagram, *supra* note 56; *see* Twitter, *supra* note 56; *see* Snapchat, *supra* note 56.

256. *See supra* note 56.

257. *See* Facebook, *supra* note 56; *see* Instagram, *supra* note 56; *see* Twitter, *supra* note 56; *see* Snapchat, *supra* note 56.

258. *See infra* Sections V.B–E.

259. *See supra* Section III.A.

John and Jane's account or prosecute the couple because Facebook has too much to regulate.²⁶⁰ Therefore, Facebook should draft a clause to establish an opportunity for Jane and John not only to prevent their account from violating the terms of service, but also to provide a manner in which to divide the account.²⁶¹

As Facebook allows couples to operate Facebook Pages, rather than Facebook Timelines, Facebook may also choose to allow laymen such as John and Jane an opportunity to convert their Timeline account into a Facebook Page.²⁶² Rather than deleting the account outright and risking the loss of friends, photos, posts, comments, and likes, this allows couples not only to share an account, but also to prevent breaking the law.²⁶³ The author drafted the clause below as a possible method in which to convert Jane and John's Facebook Timeline to a Facebook Page.²⁶⁴

Any Facebook Timeline created to be used by two individuals, containing each individual's name in the user account name, and in which the two individuals are married, violates the terms of service. However, Facebook will allow for these Facebook Timelines to convert into Facebook Pages; thus, eliminating a violation of the terms of service. Such a transition from a Timeline to a Page may only be done so under the express and written authority of Facebook. Only after such changes are made with Facebook recognize both parties as the owners of the license to use the registered Facebook Page.²⁶⁵

Furthermore, Facebook's terms address how users may file legal complaints against Facebook in its terms of service.²⁶⁶ However, they fail to address how users may address legal complaints amongst other users.²⁶⁷ For example, which state's law would determine how to split Jane and John's property?²⁶⁸ Jane and John created the account in Texas that has both Common Law marriage and divorce.²⁶⁹ But, California state law governs disputes per Facebook's terms.²⁷⁰ Thus, the issue becomes, which state's law will control the property division?²⁷¹

To best preserve John and Jane's rights, and limit Facebook's need for involvement, the best possibility is to allow the state where John and Jane's

260. *See supra* Section III.A.

261. *See supra* Section III.A.

262. *See supra* Section III.A.

263. *See supra* Section III.A.

264. *See supra* Section III.A.

265. *See supra* Section III.A.

266. *See supra* Section III.A.

267. *See supra* Section III.A.

268. *See supra* Section III.A.

269. *See supra* Section III.A.

270. *See supra* Section III.A.

271. *See supra* Section III.A.

marriage occurred to govern the division of the account.²⁷² The terms of service should include a clause that dictates jurisdiction of marital property division.²⁷³ The author suggest the clause read as follows:

In the case of a divorce, a converted Facebook Page owned by a married couple may be divided as an asset under the governing law of the state in which the couple was married.²⁷⁴

The clause would allow Jane and John to avoid any jurisdictional issues while dividing their assets during the divorce.²⁷⁵

C. Instagram: Redrafting When Joint Accounts Are Forbidden

While Facebook and Instagram indeed share a lot of similarities, one thing they do not share is the ability for two different categories for accounts.²⁷⁶ In other words, Instagram does not have both Timeline and Page option for its users as Facebook does.²⁷⁷ Users simply have one account type to post, like, and comment.²⁷⁸ Therefore, a method of conversion of the account is not applicable to Instagram.²⁷⁹

However, many companies and businesses own Instagram accounts as a free way of advertising and to build a stronger following.²⁸⁰ Those companies likely share their account passwords among multiple individuals in violation of the terms of service, like Jane and John.²⁸¹ Instagram should not eliminate accounts for married couples while allowing corporations and businesses to continue using Instagram accounts in violation of the terms of service.²⁸² Rather, Instagram should permit such accounts.²⁸³ Instagram, like Facebook, should state that in the case of joint accounts, the state where the marriage originated should be the prevailing jurisdiction to address division of the asset during divorce.²⁸⁴ The author drafted a similar clause, found below, to resolve the issue of jurisdiction, operating under the assumption Instagram will apply the same rule to married individuals that it applies to corporations and businesses:

272. *See supra* Section III.A.
 273. *See supra* Section III.A.
 274. *See supra* Section III.A.
 275. *See supra* Section III.A.
 276. *See supra* Section III.A.
 277. *See supra* Section III.A.
 278. *See supra* Section III.A.
 279. *See supra* Section III.A.
 280. *See supra* Section III.A.
 281. *See supra* Section III.A.
 282. *See supra* Section III.A.
 283. *See supra* Section III.A.
 284. *See supra* Section III.A.

In the case of a divorce, a joint Instagram account owned by a married couple may be divided as an asset under the governing law of the state in which the couple was married.²⁸⁵

Through the inclusion of a clause such as this one, Instagram may ensure that these arising issues will include a method of resolution, beyond what currently exists.²⁸⁶

D. Twitter: Redrafting When Joint Accounts Are Allowed

Distinguishing itself from both Facebook and Instagram, Twitter implicitly endorses and encourages the use of joint social media accounts.²⁸⁷ However, an official explicit endorsement is absent from the Twitter terms of service.²⁸⁸ For couples like John and Jane, Twitter needs to include a clause endorsing the use of joint accounts.²⁸⁹ The following is an example of a clause that Twitter should add:

Twitter approves the use of a single account by multiple users. Twitter permits and encourages Twitter users to create an account for the purpose of joint use for its legally married users. Joint account users may not share their password with any third party outside of the married users. In the case of a divorce, a joint Twitter account operated by a married couple may be divided as an asset under the governing law of the state in which the couple was married.²⁹⁰

By including this clause, or a similar one, in the Twitter terms of service, Twitter will simply ensure that couples like Jane and John are aware that they are not violating the terms of service and that Twitter explicitly encourages its users to create couple accounts.²⁹¹

E. Snapchat: Redrafting When the Terms of Service Are Silent On Joint Accounts

In Snapchat's case, the terms of service do not truly disallow or allow joint co-owners to operate an account, as in Jane and John's case.²⁹² This ambiguity is a clear issue that will cause problems for both Snapchat and couples like Jane and John in the future.²⁹³ Therefore, Snapchat's terms of

285. See *supra* Section III.A.

286. See *supra* Section III.A.

287. See *supra* Section III.A.

288. See *supra* Section III.A.

289. See *supra* Section III.A.

290. See *supra* Section III.A.

291. See *supra* Section III.A.

292. See *supra* Section III.A.

293. See *supra* Section III.A.

service will need to include an explicit statement granting couples the right to co-own an account, as well as a solution governing the jurisdiction for the dissolution of an account upon the termination of a relationship.²⁹⁴ Similar to Facebook and Instagram, Snapchat's terms of service dictate that California shall serve as the forum state for any legal claims.²⁹⁵ However, for the benefit of couples like Jane and John, for purposes of jurisdiction, the division of the account upon divorce is preferable in the state of marriage.²⁹⁶ The author drafted appropriate language to address the ambiguity in Snapchat's user agreement by the inclusion of the proposed clause below.²⁹⁷

Any Snapchat account created to be used by two individuals, containing each individual's name in the user account name, and in which the two individuals are married, is permitted by the Snapchat terms of service. Beyond these two users, the Snapchat password of this account may not be licensed, transferred, or distributed without consent of both parties.

In the case of a divorce, a joint Snapchat account operated by a married couple may be divided as an asset under the governing law of the state in which the couple was married.²⁹⁸

Clauses, such as the proceeding ones, will only help resolve the arguments divorcing couples face while dividing a joint social media account.²⁹⁹

F. Additional Possibilities: Trusts

Finally, recent developments in the world of trusts indicate the increase in the creation of digital trusts.³⁰⁰ Although the creation of digital trusts exceeds the scope of this comment, recent developments indicate that a new trend for parents is to create social media accounts for their children.³⁰¹ Upon a certain event occurring, for example, the child's eighteen birthday, the child earns control of the trust.³⁰² Perhaps a somewhat parallel circumstance will develop for purposes of divorce, in which John and Jane's social media

294. *See supra* Section III.A.

295. *See supra* Section III.A.

296. *See supra* Section III.A.

297. *See supra* Section III.A.

298. *See supra* Section III.A.

299. *See supra* Section III.A.

300. Amy Webb, *No Posts About the Kids: Why I've Created a Digital Trust Fund for My Daughter*, THE INDEPENDENT 1, 1 (Sept.18, 2013), <http://www.independent.co.uk/life-style/gadgets-and-tech/features/no-posts-about-the-kids-why-ive-created-a-digital-trust-fund-for-my-daughter-8825013.html> [<https://perma.cc/YGW9-U67E>].

301. *Id.*

302. Webb, *supra* note 300; *Estate Planning with Digital Assets*, BROWARD CTY. BAR ASS'N (2013), http://www.snyderlawpa.com/global_pictures2013_Estate_Planning_for_Digital_Assets_-_final_WITH_ATTACHMENTS.pdf [<http://perma.cc/96P4-UM5K>].

accounts are placed into a trust and distributed through the control of a third party trustee that controls the trust in which the accounts are contained.³⁰³

VI. CONCLUSION: LOGGING OUT OF MARRIAGE

Jane and John's counsel sits on either side of a table in the conference room at the John's attorney's firm.³⁰⁴ John, Jane, and their counselors sit there contemplating how to leave both parties in amicable positions after splitting their Facebook, Instagram, Twitter, and Snapchat accounts.³⁰⁵

However, the attorneys at the table are unsure how to proceed.³⁰⁶ One possibility is that Jane and John already invalidated their joint-holder social media accounts because they are in violation of the terms of service.³⁰⁷ Circumventing and resolving this derivative issue of Jane and John's divorce to prevent prosecution would mean redrafting the terms of service for various social media accounts, including social media companies with explicit terms, such as Facebook and Instagram, or more ambiguous terms, such as Twitter and Snapchat.³⁰⁸

Assuming Jane and John are not subject to the invalidation of their accounts and future prosecution, the next step is to move forward and classify the social media accounts under Property Law.³⁰⁹ Once classified, the attorneys and couple must calculate a reasonable value for the account and apply the appropriate state law to divide the social media account as an asset between the couple.³¹⁰

Clearly, this is not an issue simply effecting Jane and John, but it potentially affects billions of social media users.³¹¹ As social media outlets increasingly dominate daily life, it begs the question, how much are you willing to pay for digital ownership of the relationships in your life, when you lose the one relationship you thought would last forever?³¹²

303. See Webb, *supra* note 300; see *Estate Planning with Digital Assets*, *supra* note 302.

304. See *supra* note 1.

305. See *supra* note 1.

306. See *supra* note 1.

307. See *supra* Section III.A.

308. See *supra* Part V.

309. See *supra* Section IV.B.

310. See *supra* Section IV.D.

311. See *supra* Section I.C.

312. See *supra* Part I.