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## Intellectual Property & Life Sciences

### Business Networking Sites: A Question of Chaining Down Your Confidential Consumer List Or Setting It Free

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The issue of customer and contact lists is one of the most frequently litigated intellectual property questions that employers face. Employers one day implement all manner of programs, policies and procedures to protect such customer and contact lists as common-law trade secrets or contractually bounded confidences, and the next day may wish to argue that a new employee violates no legal obligations in bringing with him/her, literally or figuratively, the same customer and contact list that he/she was just using while employed by a competitor. So, like the Promethean flames described by the Greek poet, this intellectual property can represent for employers both “their chief resource” and the “teacher of all arts” or “the hidden spring of stolen fire,” the misuse or misappropriation of which must carry with it a “penalty” of “fast riveted . . . chains.” Aeschylus, “Prometheus Bound.” Whichever side of the debate that an employer finds themselves on today, business networking sites such as LinkedIn present further possibilities and complications that one must address now to avoid being scorched tomorrow. Thus, this article opens as Prometheus concludes one speech, “Ha! Ha! What now?”

Simply stated, employers now risk

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endangering the confidentiality of their own client information and abdicating to departing employees control over such information if such employers do not review and update their programs, policies and procedures in light of these networks. To understand how this is so, one needs to understand what sites like LinkedIn are. One also needs to understand how the law has struck a balance between an employer’s protectible interest and an employee’s right to the accumulated experience and contacts of a career. Interestingly, though there are not yet any reported U.S. cases, state or federal, on this issue, an English court has already addressed these questions in a live, litigated controversy, and employers around the world should begin preparing now for the inevitable repetition of such issues in other jurisdiction. See *Hays Specialist Recruitment (Holdings) Limited and Another v. Ions and Another*, 2008 EWHC 745 (April 16, 2008).

What is LinkedIn? According to its Web site, “LinkedIn is an online network of more than 25 million experienced professionals from around the world, representing 150 industries.” LinkedIn also expressly advertises itself as a site that allows one to find, or be found by, “former colleagues, clients, and partners.” It expands one’s accessible list of potential business contacts by linking “your connections, your connections’ connections, and the people they know,” thereby “linking you to thousands of qualified professionals.” Its goal is to “open doors to opportunities using the professional

relationships you already have.” It begins through a simple process of uploading one’s own credentials, and then inviting others to join by adding their names and e-mails to a list on the Web site. E-mails are then generated by site to one’s invitees, and if they accept they “linked in” to the network as it were. After acceptance, invitees fill out their own profiles as well, and those résumés are reviewable by anyone then or later joined as a contact into that network. Because of the rapid manner in which connections can proliferate, many professionals and sales people have joined LinkedIn, and many of their employers have encouraged them to use the site’s robust capabilities to expand company business opportunities and relationships.

While the employee/employer relationship exists and is going well, little mind is often paid to whether such contacts are those of company or its personnel. That is because the use to which they are being put by the person defines the use in the company’s interest. But, when an employee departs or prepares to depart, those interests and uses diverge. Now the question of ownership and control becomes important. This was at the heart of *Hays*, where an employee (Mark Ions) in the professional recruitment field had used LinkedIn extensively on behalf of his employer (Hay’s Specialist Recruitment Ltd.). But he had also loaded onto LinkedIn numerous contacts learned from, or while employed at, Hays so that would be accessible to Ions after he left Hays to start Exclusive Human

Resources Ltd., his own competing professional recruitment firm. Because he had signed with Hays an agreement requiring that he maintain as confidential all trade secrets and all client databases and that he also refrain from soliciting Hays' clients with whom he had dealt, the status of the LinkedIn loaded information became an important one.

Traditionally, the law, in New Jersey and elsewhere, has struck a balance of such interests. Where customers are known in an industry, or easily discernible or taken from job to job, an employee cannot be restricted from using his experience in the industry as a basis to earn a living. *Subcarrier Comm., Inc. v. Day*, 299 N.J. Super. 634, (App. Div. 1997); *Haut v. Roszbach*, 128 N.J. Eq. 77, 78 (Ch. Div. 1940); *Abalene Exterminating Co. of N.J., Inc. v. Elges*, 137 N.J. Eq. 1, 3 (Ch. Div. 1945). But, where "a substantial measure of secrecy" exists and has been maintained, *Lamorte Burns Inc. v. Walters et al.*, 167 N.J. 285, 299 (2001), or an employer has made a substantial investment in creating or supporting a client or referral network, *The Community Hospital v. More*, 193 N.J. 36 (2005), the law will not allow employees to claim as their own that which their employer employed them to create and exploit solely for the employer's purposes.

Now the questions arise as to how LinkedIn gets dealt with by employers.

By its very nature and design, one's LinkedIn network follows the employee, and could provide that employee with all of his/her clients and contacts without having to copy a single file, list or database from

an employer as the employee departs. Consequently, if an employer knows that an employee is using LinkedIn, and is adding to LinkedIn contacts learned during present employment, that employer would do well to make sure that programs, policies, procedures, and agreements extend to cover the network thus created as property of the employer, and not the employee. While some indulgent courts might, as the UK court did in *Hays*, state that "Even if he uploaded them with authority, it is difficult to imagine that the authority was not limited to using them in the performance of his duties as an employee," it is best to state such limitations affirmatively and expressly. In framing such provisions expressly, an employer may also be able to reach beyond the *Hays*' limitation of the employer's rights to only that which was done "from the Applicants' [i.e. Hay's] computer network" and only those "business contacts uploaded by Mr. Ions to LinkedIn while he was employed by Hays." The keys are the forethought to cover it and drafting skill to carry out that thought. With such forethought and the aid of experienced counsel, an employer can protect its rights in this area.

Employers may in fact want to consider dissuading employees from using LinkedIn to facilitate the employer's business, however. That is because there is language in the LinkedIn user agreement that may be argued to cede control over uploaded information to somebody other than the employee and the employer: "if you choose to submit something ..., you

actually grant a non-exclusive, irrevocable, worldwide, ...unlimited, right to us to copy, ...distribute, publish, ...use and commercialize, ... anything that you submit to us..." The *Hays* court actually addressed this language, when Ions argued that such language, combined with Hays' knowledge of what Ions was doing while employed, would waive any confidentiality that the information may have had, and therefore freed him to use it in the future to compete. Though the *Hays* court ultimately found that such an argument "breaks down at the first stage" because questions of fact remained as to whether Hays expressly or impliedly consented and as to the purposes for which Hays understood Ions to be acting, this may not be a risk that many employers wish to run. Again, effective planning with guidance of counsel can help a company protect the truly confidential aspects of the information in its client database, while perhaps still allowing its sales people to take advantage of the attributes and services of LinkedIn and other networking sites.

In the end, one of the more valuable intellectual property assets that any company has is its client and contacts database. LinkedIn and other networking sites can, used wisely, be an effective tool in increasing the value of such information. But their use cannot be unbound — for like fire itself, use of these networks can represent the harnessed power to light the way to success for one's business or it can represent an element that, uncontained, can burn that business. ■