Summary of Recent Caselaw on Social Network Site Discovery

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With social media and social networking websites exploding in popularity, courts have been slow to catch up with the legal issues posed by discovery requests for information posted and stored on websites such as Facebook and MySpace. There are currently only a scattering of cases across the country which have dealt with these issues. At this point in time, rulings and their reasoning lack consistency, with different jurisdictions reaching various conclusions in this growing area of the law. The following is a summary of how various jurisdictions have dealt with discovery requests for social networking site ("SNS") media. Hopefully, a review of these cases will provide some guidance on how to address this relatively new area of law.

INDIANA

Federal courts in Indiana have held that content on Facebook and MySpace are discoverable when it is relevant to a claim or defense in the case. On May 11, 2010, the District Court for the Southern District of Indiana considered the issue of discovery requests seeking content contained on social networking sites in *Equal Employment Opportunity Comm'n v. Simply Storage Management, LLC*, 270 F.R.D. 430 (S.D. Ind. 2010). In this case, the EEOC brought a Title VII action on the behalf of two employees against their employer, alleging sexual harassment by a supervisor. *Id*. at 432. The employer sought copies of the claimants' Facebook and MySpace profiles and all photos posted by claimants or anyone on claimants' behalf on Facebook or MySpace starting from the time the alleged harassment began. *Id*. at 432-33. The EEOC objected, arguing that the requests were "overbroad, not relevant, and unduly burdensome because they improperly infringe on claimants' privacy, and will harass and embarrass the claimants." *Id*. at 432-33. The employer argued that the posts were not "private" because they were made on a public website and that the information was relevant because the plaintiffs had placed their emotional health at issue. *Id*. at 433. The EEOC argued for a narrow definition of discoverable material, while the employer claimed that, with specific emotional injuries alleged, all social communications were implicated. *Id*. at 434.

The court first determined that social networking site ("SNS") content was not excluded from discovery due to their "private" or "locked" nature, stating, "[A] person's expectation and intent that her communications be maintained as private is not a legitimate basis for shielding those communications from discovery." *EEOC*, 270 F.R.D. at 434. The court found that protective orders offer adequate protection for privacy or confidentiality interests and that such an order was already entered in this case. *Id*.

The real issue was whether the SNS content was relevant to the claims made in the case. The court reasoned that, while general allegations of emotional distress do not automatically make all SNS communications relevant, specific allegations of emotional trauma and psychiatric care can bring SNS evidence into play. *Id*. at 434-35. The court cited three cases from other jurisdictions concerning the discoverability of SNS content in sexual harassment claims, *Bass v. Miss Porter's School*, No. 3:08-cv-1807, 2009 WL 3724968 (D. Conn. Oct. 27, 2009); *Mackelprang v. Fidelity Nat'l Title Agency of Nevada, Inc.*, No. 2:06-cv-00788-JCM-GWF, 2007 WL 119149 (D. Nev. Jan. 9, 2007); and *Rozell v. Ross-Holst*, No. 05 Civ. 2936(JGK)JCF, 2006 WL 163143 (S.D.N.Y. Jan. 20, 2006).

In *Mackelprang*, the defendants obtained the public information from the plaintiff's MySpace profile after she filed sexual harassment claims against them by subpoenaing MySpace for the plaintiff's account records, but MySpace refused to produce private messages without a search warrant or consent of the plaintiff. 2007 WL 119149, at *1-2. The court denied defendants' motion to compel the plaintiff to produce all E-mail communications on two MySpace accounts, but instructed the defendants to serve upon the plaintiff "properly limited requests for production of *relevant* E-mail communications" exchanged with third parties that contain information regarding the sexual harassment allegations or alleged emotional distress. *Id*. at *8.

In *Rozell*, the District Court for the Southern District of New York rejected the defendants' claim that a plaintiff who alleged sexual harassment should produce all E-mail communications. 2006 WL 163143, at. *3. In that case, when the plaintiff complained about her supervisor, he retaliated by hacking into her E-mail account and diverting several messages. *Id*. at *2. The court limited the E-mails the plaintiff was required to produce to only intercepted E-mails, stating, "To be sure, anything that a person says or does might in some theoretical sense be reflective of her emotional state. But that is hardly justification for requiring the production of

every thought she may have reduced to writing or, indeed, the deposition of everyone she might have talked to." *Id*. at *2-3.

The *EEOC* court followed the guidance contained in the *Mackelprang* and *Rozell* and required production of "any profiles, postings, or messages (including status updates, wall comments, causes joined, groups joined, activity streams, blog entries) and SNS applications" for the claimants from the time the alleged harassment began to the present time "that reveal, refer, or relate to any emotion, feeling, or mental state, as well as communications that reveal, refer, or relate to events that could reasonably be expected to produce a significant emotion, feeling, or mental state." 270 F.R.D. at 436. The same standard for relevance applied to photographs and videos posted on the claimants' profiles because they may reveal the claimants' emotional or mental status at the time they were taken. *Id*. at 436. The court also held that third-party communications to the claimants that placed the claimants' communications in context must be produced. *Id*. In response to the claimants' privacy concerns, the court noted that the inevitable result of alleging "these sorts of injuries" is that broad discovery can reveal private information that may embarrass the claimants and any such concerns are outweighed by fact that the information has already been shared by the claimants with at least one other person through private messages or a larger number of people through postings. *Id*. at 437.

TENNESSEE

A federal magistrate for the District Court for the Middle District of Tennessee took a novel approach to the issue of social networking site content discoverability in *Barnes v. CUS Nashville, LLC*, 2010 WL 2265668, No. 3:09-cv-00764 (M.D. Tenn. June 3, 2010). In *Barnes*, the plaintiff brought suit alleging injuries from falling off the bar at a "Coyote Ugly" saloon and the defendant subpoenaed Facebook for content from the plaintiff's account, including photographs of the plaintiff and her friends dancing on the bar. The court quashed the defendant's subpoenas to Facebook because the information sought was covered under the Stored Communications Act, 18 U.S.C. §§2701 to 2712. To obtain the information, the defendant then subpoenaed the plaintiff's friends, listed as witnesses in the case, for photographs posted on Facebook by the plaintiff and her friends from the night of the incident. The magistrate denied the defendant's motion to compel the plaintiff's friends to produce the photographs because the Tennessee district court had no jurisdiction over the defendant's

subpoenas to the plaintiff's friends because they were issued from district courts in Colorado and Kentucky. 2010 WL 2265668, at *2.

However, as an interesting compromise position, the magistrate judge proposed that he create a Facebook account, send a friend invitation to the plaintiff's friends/witnesses, giving them the option to accept him as a "friend" for the sole purpose of reviewing photographs and comments from the Coyote Ugly incident. If these friends/witnesses choose to accept the judge's friend request, he would then promptly review the Facebook information *in camera* and disseminate any relevant information to the parties. After the review is complete the Magistrate Judge would then close his Facebook account. *Id*. at *1. Unfortunately, there are no follow-up comments in the case to see if this approach actually worked.

CALIFORNIA

The District Court for the Central District of California addressed the practice of one party serving subpoena duces tecum upon social networking sites for profile content and messages of another party involved in a lawsuit in *Chrispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965 (C.D. Cal. 2010). In *Chrispin*, the plaintiff filed an action against the defendants alleging breach of contract, copyright infringement, and breach of covenant of good faith and fair dealing, all related to the licensure of his artwork for use in clothing manufacturing. *Id*. at 968. Defendants served subpoenas to third-parties Facebook, Media Temple, Inc., and MySpace, Inc. seeking subscriber information, all communications between the plaintiff and tattoo artist Bryan Callan, and all communications that referred to or related to defendants. *Id*. at 968-69. The plaintiff moved to quash the subpoenas because (1) the requested electronic communications were protected from third-party disclosure under the Stored Communications Act (SCA); (2) the subpoenas were overbroad and infringed on the plaintiff's privacy rights; and (3) the subpoenas sought irrelevant information. *Id*. at 969.

The *Crispin* court carefully examined the SCA to see if this twenty-five year old law applies to today's social networking sites. The SCA "prevents 'providers' of communication services from divulging private communications to certain entities and individuals." *Id*. at 971-72. The SCA "limits the government's right to compel providers to disclose information in their possession about their customers and subscribers" and "limits the right of an Internet Service Provider ("ISP") to disclose information about customers and subscribers to the government

voluntarily." *Id*. at 972. The SCA contains exceptions for obtaining this information via administrative, grand jury, or trial subpoenas, but not civil subpoena duces tecum. *Id*. at 974-75.

The *Crisipn* court concluded that the SCA prevented disclosure of the requested information. The fact that Congress chose not to include an exception for obtaining information under the SCA via civil subpoena was instrumental in its ruling:

> Among the Act's most significant, although understated, privacy protections is the ability to prevent a third party from using a subpoena in a civil case to get a user's stored communications or data directly from an ECS or RCS provider. Courts interpret the absence of a provision in the Act for compelled third-party disclosure to be an intentional omission reflecting Congress's desire to protect users' data, in the possession of a third-party provider, from the reach of private litigants.

Id. at 975, quoting William Jeremy Robison, Note, *Free at What Cost? Cloud Computing Privacy Under the Stored Communications Act*, 98 Geo. L.J. 1195, 1208-09 (2010).

Further, the court found that all three websites were "electronic communication service ("ECS") providers" subject to the SCA's disclosure prohibitions because they provided private messaging or E-mail services analogous to a private electronic bulletin board, which was intended to be covered by the SCA based on the SCA's legislative history and case law. *Id*. at 980-81. The court held that all three websites were also "remote computing service ("RCS") providers" subject to the SCA's disclosure prohibitions because they provided temporary, immediate storage of messages, wall postings, and comments. *Id*. at 987-90. The court therefore quashed the subpoenas to Media Temple, Facebook, and MySpace that sought private messaging. *Id*. at 991.

However, the *Crispin* court distinguished between private messaging on Facebook and MySpace that was "inherently private" and Facebook wall posts and MySpace comments that may or may not have been publicly accessible. With wall posts and comments, the court ordered a review of the Plaintiff's privacy settings to determine if his posts and comments were made to the general public or to a select number of friends. If the public had access to these posts and comments, then they would be discoverable, if relevant to the issues at hand. *Id*. at 991.

NEW YORK

In contrast to the limitations placed on the discovery of social networking site content by federal courts, a New York Superior Court recently granted access to a plaintiff's "current and historical Facebook and MySpace pages and accounts, including all deleted pages and related information[.]" *Romano v. Steelcase Inc. et al.*, 30 Misc. 3d 427, 435 (N.Y. Sup. Ct. 2010). In *Romano*, the defendant moved for an order granting it access to the plaintiff's current and historical Facebook and MySpace accounts, arguing that the plaintiff placed information on the sites that is inconsistent with her claims regarding the nature and extent of her injuries, particularly the loss of enjoyment of life. *Id*. at 427. The defendant served upon the plaintiff notice for discovery and inspection requesting authorization to obtain full access to the plaintiff's Facebook and MySpace accounts but the plaintiff refused her consent. *Id*. at 429.

The court granted the defendant's motion for access to the Facebook and MySpace pages and accounts, stating,

> The information sought by defendant regarding plaintiff's Facebook and MySpace accounts is both material and necessary to the defense of this action and/or could lead to admissible evidence. In this regard, it appears that plaintiff's public profile page on Facebook shows her smiling happily in a photograph outside the confines of her home despite her claim that she has sustained permanent injuries and is largely confined to her house and bed. In light of the fact that the public portions of plaintiff's social networking sites contain material that is contrary to her claims and deposition testimony, there is a reasonable likelihood that the private portions of her sites may contain further evidence such as information with regard to her activities and enjoyment of life, all of which are material and relevant to the defense of this action. Preventing defendant from accessing plaintiff's private postings on Facebook and MySpace would be in direct contravention to the liberal disclosure policy in New York State.

Id. at 430. The court went on to address the plaintiff's privacy concerns, holding that any such concerns were outweighed by the defendant's need for the information. *Id*. at 432. First, the court noted that "[t]he Fourth Amendment's right to privacy protects people, not places" and that the Second Circuit has held that individuals do not have an expectation of privacy in Internet postings or E-mails that have reached their recipients. *Id*. at 433, citing *Katz v. United States*, 389 U.S. 347, 351 (1967); *United States v. Lifshitz*, 369 F.3d 173, 190 (2d Cir. 2004). The court

also found that "neither Facebook nor MySpace guarantee complete privacy" so the plaintiff had "no legitimate reasonable expectation of privacy." *Romano*, 30 Misc. 3d at 434. The court stated,

> [W]hen plaintiff created her Facebook and MySpace accounts, she consented to the fact that her personal information would be shared with others, notwithstanding her privacy settings. Indeed, that is the very nature and purpose of these social networking sites, else they would cease to exist. Since plaintiff knew that her information may become publicly available, she cannot now claim that she had a reasonable expectation of privacy.

Id. at 434. Last, the court recognized the defendant's efforts to obtain the requested information via other means (depositions, notice for discovery), which plaintiff's counsel has hindered and to which plaintiff has refused to answer. *Id*. at 434-35.

CONCLUSION

From this sampling of cases across the country one thing is clear: Nothing is clear when it comes to the discovery of social networking site material. There will likely continue to be confusion in this area of the law for the near future. Perhaps the best advice for lawyers is that clients need to be educated on the potential ramifications of posting on social networking sites. However, when discovery requests for Facebook postings do hit your door, hopefully the caselaw detailed above will provide some avenues for protecting your client's privacy.