

How Discoverable Is Social Media Content?

By Perry Viscounty and Jennifer L. Barry

A single photo or e-mail can often determine the outcome of litigation. Last month, a New York state appellate court issued a ruling that could affect the discoverability of hundreds of billions of photos, messages, and other documents. How? By addressing whether the information on Facebook, MySpace, and other social networking sites can be discovered.

Data from users' social networking sites has become a potential goldmine of powerful evidence. Photos can be used to contradict personal injury damages, posts can be used to impeach testimony, and friend lists can be used to show bias. While the laws governing such data are woefully outdated, courts are beginning to address some of the complex issues surrounding these popular Web sites.

Recently the appellate division of the New York Supreme Court affirmed an order denying a motion to compel disclosure in a personal injury action. In *McCann v. Harleysville Insurance Company of New York*, Kara McCann sought damages for injuries caused by the defendant's insured driver, 2010 N.Y. App. Div. LEXIS 8396 (Nov. 12, 2010). Harleysville sought authorization to access McCann's Facebook account information and posted pictures. In confirming the trial court's denial of Harleysville's motion to compel such discovery, the appellate court reasoned:

"[Defendant] failed to establish a factual predicate with respect to the relevancy of the evidence. Indeed, defendant essentially sought permission to conduct a 'fishing expedition' into plaintiff's Facebook account based on the mere hope of finding relevant evidence."

While it denied access, the appellate court reversed the trial court's issuance of a protective order for McCann that would have prevented Harleysville from ever seeking the Facebook data. Thus, it seems that the motion to compel failed because Harleysville did not provide a specific reason for its request. This ruling thus suggests that social networking data may be available to litigants who can articulate the relevance of, and need for, the data.

McCann is notable for the lack of clarity regarding the right to access this type of data. The reason is simple: social networking Web sites have only recently achieved mainstream cultural status, and the courts and the law have not caught up to the technical and social implications of these sites.

Six years ago, Facebook had less than 1 million users. Today, that number is over 500 million. Five years ago, there were 8 million YouTube videos watched per day. Today, that number is 2 billion. Five years ago, Twitter didn't exist. Today, there are over 65 million "tweets" on that site.

The law has been very slow to adapt to this change, and only recently have litigants begun to seek discovery of information from social networking sites. As more and more litigants realize the potential value of information contained on such sites, the requests will increase markedly. Fortunately, the courts have provided some preliminary guidance.

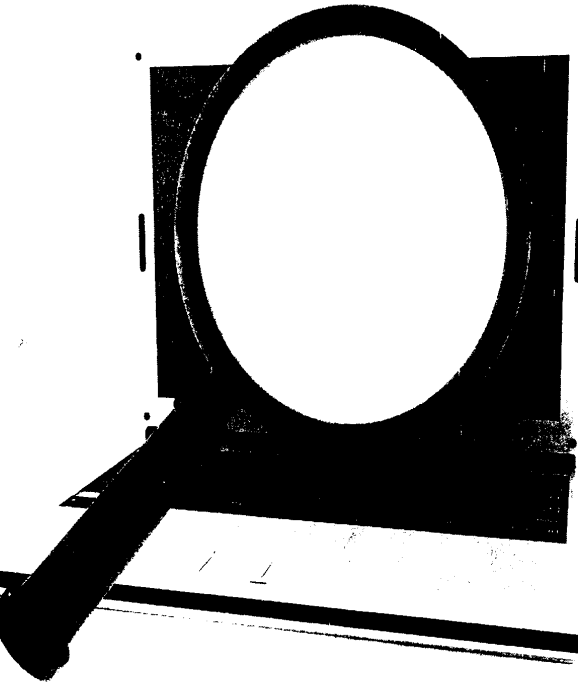
The majority of the case law holds that information from a person's social networking page is generally discoverable, but may depend on the context in which the information is sought. In September 2010, for example, a New York trial court held that private information from the plaintiff's Facebook and MySpace pages is discoverable. *Romano v. Steelcase Inc.*, 907 N.Y.S.2d 650 (2010). Here, the plaintiff sought

damages for personal injuries and loss of enjoyment of life, arguing that she could barely leave her home. The defendant found evidence in the plaintiff's public postings on social networking sites that she was traveling and happy, and sought access, through discovery requests, to the private portions of those sites. The court granted the request, noting that the defendant had a reasonable basis for the request (based on the publicly available postings), the material was relevant, and the plaintiff had no reasonable expectation of privacy based on the sites' warnings that the Web sites are considered a public space. Notably, the court's order went beyond merely forcing the plaintiff to provide copies of the materials; the plaintiff was ordered to give the defendant direct access to log in and view her Facebook and MySpace accounts.

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Courts in Colorado and California have issued rulings providing similar guidance. In *Leobetter v. Wal-Mart Stores Inc.*, which involved claims of personal injury and loss of consortium, the Colorado District Court denied the plaintiffs' motion for a protective order for their Facebook, MySpace, and Meetup.com pages. It reasoned that the plaintiffs had put their personal physical and mental states at issue, and the confidentiality protective order entered in the case would adequately address any potential privacy concerns. 2009 U.S. Dist. LEXIS 126859, at *4-5 (D. Colo. Apr. 21, 2009). In *Moreno v. Hanford Sentinel Inc.*, while not specifically addressing the discoverability of the posting, the California Court of Appeal deemed the plaintiff's MySpace post public even though she had deleted it shortly after posting it, thus she could not maintain an invasion of privacy suit against the defendant, who had republished the posting. 172 Cal. App. 4th 1125, 1130-31 (2009).

Not all cases, however, have found social network information discoverable, at least when sought via a third party subpoena. In *Crispin v. Christian Audigier Inc.*, out of the Central District of California, the court partially quashed subpoenas issued to Facebook and MySpace. 2010 U.S. Dist. Lexis 52832 (2010). The court analyzed the subpoenas solely under the Stored Communications Act (SCA), and determined that the plaintiff's private messages on those services were immune from disclosure. The court remanded the question of whether the plaintiff's wall postings and comments were sufficiently private to fall under the



SCA. Crucially, the court made no finding about the general discoverability of this type of information.

In 2007, the U.S. District Court in Nevada issued a ruling that most closely aligns with McCann. In *Mackelprang v. Fidelity National Title Agency of Nevada Inc.*, the plaintiff alleged extensive sexual harassment while employed by the defendant, forcing her to quit and subsequently driving her to make several suicide attempts. 2007 U.S. Dist. LEXIS 2379 (D. Nev. Jan. 9, 2007). The defendant discovered that the plaintiff had created two MySpace accounts after she quit her job, contemporaneous with one of her suicide attempts. The defendant learned (in response to a subpoena) that the plaintiff had listed herself as single when she was in fact married. The defendant argued that the plaintiff may have used those accounts to engage in extramarital affairs or sexually explicit communications, which would affect her credibility, and sought to force the plaintiff to allow direct access to her accounts. The court refused, finding that the defendant was engaging in a "fishing expedition" since at this time it has nothing more than suspicion or speculation as to what information might be contained in the private messages. The court went on to note, however, that the defendant was entitled to seek, via normal discovery mechanisms like document requests, any relevant statements or communications the plaintiff may have made in her MySpace messages.

All of these cases leave open important questions about the discoverability of social networking data. For example, this data may be discoverable in cases involving physical and mental injuries (like *Romano* and *Leobetter*), but the relevance of such data may be more tenuous in cases involving business-related claims like breach of contract or intellectual property claims. Also, it is unclear whether discoverability is dependent on how the party seeks to acquire it. Is the data discoverable if sought directly from the opposing party (via requests for production and interrogatories, like in *Romano*) but not discoverable (or discoverable with some restrictions) when sought via a third party subpoena to the social networking site? How does a confidentiality protective order affect the determination of discoverability? Is such a protective order a prerequisite to allowing discovery? Finally, would the defendants in McCann and Mackelprang have fared better if they had first conducted discovery to determine the general content of the social networking materials, and then sought to gain access by arguing a stronger case for its relevance?

McCann and its predecessors are not entirely consistent, but this is to be expected when dealing with any new issue in the law, particularly one driven by rapidly changing technology and social norms.

McCann can be viewed, though, as supporting the general idea that litigants may be entitled to social networking materials, provided that the discovery request is proper in method and scope, and the data sought is relevant and reasonably particularized. Mere fishing expeditions into the social network accounts of others will likely always fail.

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