

Media and Video Game Consoles: Discovery Just Became More Complicated

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It seems there is simply no avoiding it—social media is everywhere. From PCs to smartphones, for the young and the old, social media pervades every aspect of modern communication.

As of June 2010, Americans spent 22.7 percent of their time online using social networking sites and blogs, representing a 43 percent increase from June 2009.

People are increasingly turning to social networking sites to conduct their day-to-day communications, outpacing other mediums such as text messaging and e-mail. Businesses are also turning to sites such as Twitter, Facebook, and LinkedIn to market their products and strengthen their relationships with consumers.

Google+ Debuts. The realm of social media continues to evolve as a new attempt by Google to jump into the social fray has emerged. Google rolled out the invite-only “field testing” of its new “Plus” social networking service on June 28, 2011. Since then, reports estimate that Google+ has reached 25 million users.

Google+ allows users to connect with and “follow” each other without obtaining the other user’s consent.

Unlike Facebook, Google+ users can organize people into tiered levels of access called “Circles.” Google+ provides preexisting circles (e.g., friends, family, acquaintances, following) and also allows the individual user to create his or her own circles. The information you share on Google+ gets distributed to only those circles that have permission to view it.

Google+ also allows users to maintain a profile where personal information may be posted, including photos and videos, akin to Facebook.

Anything posted by a user is uploaded into a “stream” of posts which is constantly updated to reflect other users’ activity as well. Once the post enters the stream, any other user who has access to view the post may comment on it. This feature is most similar to the newsfeed functionality that Facebook provides.

One of the more novel features of Google+ is the “Hangout” app, which allows people to invite their friends to engage in a group video chat, even while watching the same video uploaded to YouTube.

Another unique component is the “+1” feature that integrates Google+ with all of Google’s search features. Analogous to Facebook’s ubiquitous “Like” button, the +1 allows users to click an icon on a Google search result, news story, or other web item to store it in the +1 section of the user profile.

Stored Communications Act: Barrier to Social Media Access? Google+ joins Facebook, Twitter, LinkedIn, etc. as a potential source for evidence in litigation. Case law is beginning to emerge on this topic, but the question regarding whether there is a distinction between public and private information has yet to be resolved with any sense of finality. However, courts are increasingly ordering production of social media,

which raises important issues regarding the impact of the Stored Communications Act (SCA) that Congress passed in 1986 as part of the Electronic Communications Privacy Act.

The SCA prohibits Electronic Communication Service (ECS) and Remote Computing Service (RCS) providers from knowingly divulging the contents of a communication it stores unless the divulgence is to an intended recipient of such communication, or express permission from the sender is obtained.

Case law relating social media production and the SCA is scarce; however, the Central District of California determined that with respect to private messages, social networking sites acted as both Electronic Communication Service and Remote Computing Service providers, and that the SCA thus prohibited the disclosure of privately stored information.

The court remanded to the trial court for further investigation to determine the plaintiff's privacy settings and the extent of access allowed to his Facebook wall and MySpace comments.

Based on analysis of this case and others, it appears that at most, the SCA likely prohibits production of private social media from social networking site service providers (Facebook, MySpace), but does not prohibit discovery of private information of information contained on these sites from the users.

Video Games and Social Media Combine. Further complicating the delicate social media/litigation relationship is the introduction of other technologies that allow users to upload data to their user profiles.

One such technology is the Xbox Kinect. Xbox Kinect is a "full body gaming" system that allows the user to be the controller. Kinect allows users to play interactive games and records users' activities in the form of pictures and videos that are then stored on the Xbox 360 console. These pictures and videos can then be shared with other users who use Xbox LIVE, or can be posted to a user's Facebook or Twitter accounts. With the capacity of the Xbox 360 console to be connected to a 250 gigabyte hard drive, this medium presents a wealth of potential evidence.

To demonstrate the potential interplay between the Xbox gaming system and social media, consider this example. The plaintiff files a lawsuit following a serious car accident in which he claims to have sustained detrimental physical and psychological injuries. These injuries allegedly limit his ability to sit, walk, stand, ride in a vehicle, and perform other various physical tasks. Further, he also allegedly suffers from depression, anxiety and post-traumatic stress disorder.

Following an investigation into the plaintiff's claims, the defendant accesses the public portions of the plaintiff's Facebook account. Publicly viewable are photographs of the plaintiff riding a motorcycle, laughing with friends, and playing the popular Xbox 360 game Dance Central, which requires rigorous dance moves and physical activity. Counsel then requests access to the private portions of the plaintiff's Facebook page and seeks to access the plaintiff's Xbox 360 to determine if further photographic evidence exists.

This scenario is not as far-fetched as the skeptical litigator may think. The Middle District of Pennsylvania recently addressed this issue—except for the Xbox 360 evidence—determining there was information responsive to the defendant's request on both the public and private portions of the plaintiff's Facebook account after a review revealed photographs and postings that showed the plaintiff continued to ride motorcycles, go hunting, and even ride a mule.

The court ordered production of this information based on its relevance under Federal Rule of Civil Procedure 26.

Managing Social Media. With the concerns regarding social media—and potentially other sources of evidence such as video game systems—rising, practitioners and companies are struggling to determine how to best manage this challenging medium. The best advice is to create, implement, and enforce an organizational policy that addresses what is, and is not, acceptable social media use by employees.

Usage policies should clearly establish that employees have no expectation of privacy and assert the organization's right to monitor social networking done by employees during the workday, or while using company-issued equipment and accounts.

Care must also be taken to update the policy when pertinent. When developing this policy, it is important to remember that no "one size fits all." Organizations can use other companies or firms as guidance, but should take into account the culture and any pertinent industry regulations when crafting the policy.

Further, the policy should intertwine with the organization's data security protocol. Only authorized employees should be allowed to share public company information and all employees should be reminded to not share any nonpublic information in any forum, including social networking sites, blogs and open message boards.

After all, something as simple as a message like "Headed out to meet with a potential acquisition we're considering" followed by "Hello from Alpharetta, Georgia" may reveal the likely acquisition target, taking the matter from highly confidential to public.

Finally, employee training on the policy should be provided on an annual basis with appropriate refresher training provided for new events, acquisitions and mergers. Organizations may even want to implement a social media monitoring team to proactively monitor social media streams and sites.

Conclusion. Social media is the new reality that prudent organizations must proactively address in order to stem the potential liabilities it may pose in terms of regulatory obligations, discovery, and data security.

Further, practitioners and corporations alike should remain plugged in to technology evolutions that may impact discovery in the future. Simply ignoring the issue has never been an effective strategy—especially in the world of electronic discovery—and a proactive approach now will certainly save headaches later.