

The impact of developing technology on litigation discovery

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Publication: Los Angeles Daily Journal

Date: August 23, 2011

The growing social media landscape continues to pressure the evolution of litigation discovery and corporate information policy. Reaching a global audience, social networking sites allow users to spread information quickly and with increasing precision, provide businesses with new avenues to promote services and conduct innovative marketing campaigns. However, social networking sites also represent an ever evolving and growing source of potential evidence for the informed attorney.

Google recently jumped into the social media fray by rolling out an invite-only field-testing of its new "Plus" social networking service on June 28. According to recent reports, Google+ has already reached 25 million users, predominantly in the United States and India.

Google+ is similar to Facebook and Twitter in several respects. It allows users to "follow" other users (following does not require consent, unlike the Facebook equivalent, "friending"). However, a key difference - and perhaps Google+'s defining feature - is that users have the ability to tier levels of access through the concept of "circles." Google+ users assign followers to these circles, which are either Google's preexisting designations (friends, family, acquaintances, following) or self-created to supplement Google's standards. Whenever users then share information on Google+, they choose which circles may view it.

Similar to Facebook, Google+ allows users to maintain a profile on which they can post personal information - job history, education, places lived, etc. Users can also upload photos and videos. Like existing social networking sites, user-generated posts are central to Google+. However, whereas Facebook users have a "wall" upon which they or any of their friends can post (subject to possible later deletion), and Twitter users respond to one another using the @ sign, Google+ forges a middle ground. Rather than a wall, Google+ relies on a "stream" of posts similar to the Facebook newsfeed. Once a user makes a post to the stream, any other user with permission to see the stream may reply.

Google+ joins other social networking sites as a potential source of evidence in litigation. Case law is beginning to emerge on this topic, but questions remain about what precisely is public vs. private information and the legal significance, if any. Recent case law suggests a lack of privacy for social networking information, with several cases citing the inherent purpose of sharing behind sites such as Facebook and MySpace, noting that individuals who voluntarily post pictures, commentary and information on social websites do so with the obvious intention of exposing the information to others, and thus cannot later claim any expectation of privacy.

However, the Central District of California, in *Crispin v. Christian Audigier Inc.*, 2010 WL 2293238 (C.D. Cal. May 26, 2010), determined that under the Stored Communications Act (SCA), messages sent on Facebook and MySpace were private and upheld a motion to quash a third-party subpoena for such records in a civil lawsuit. Further, "wall postings" could also be private, depending on users' account settings. In so holding, the court classified social networking sites as both electronic communication service providers and remote computing service providers, with the SCA prohibiting the disclosure of privately stored information. The court remanded the issue of whether the plaintiff's privacy settings and the extent of access allowed to his Facebook wall and MySpace comments made such information "privately-stored."

Further expanding the potential discovery landscape are technologies that allow users to capture new information and upload it to the social network accounts. One such technology is Xbox Kinect, which is a "full body gaming" system that records users' activities as pictures and videos stored on the Xbox 360 console. This data can be shared with other Xbox Live users, or can be posted to Facebook or Twitter accounts.

Consider the possibility of defendants in personal injury lawsuits finding publicly-available gaming records on plaintiffs' social networking site profiles (i.e. pictures of a claimant playing the popular Dance Central game available on the Xbox Kinect system.) This game involves full body movement and rigorous dance moves. For a plaintiff suing for loss of enjoyment of life as a result of physical injuries sustained on a defendant's premises, the uploaded and shared information will not only be discoverable, but will also point the defendant to another potential source of discovery in the possession of the plaintiff, the console itself. The Xbox 360 is compatible with up to a 250 gigabyte hard drive, which would make a potentially wealthy source of evidence in a matter involving claims of physical injury.

The Xbox Kinect example illustrates the rapid pace at which the electronic discovery space continues to evolve. Other potentially-ripe sources of evidence already emerging from existing technology include: expanded use of GPS or location-tracking data, greater use of and access to voice, photo, televideo and video surveillance recordings, and large scale migration of user applications and data to the cloud. Companies are well advised to continue to review and update their information use and storage policies to reflect social media and other technology use by employees, and practitioners need to stay aware of technology advancements and potential impacts on discovery as a matter of professional competence.

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