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NEW YORK STATE E-DISCOVERY LAW

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Expectation of Privacy in Electronic Communications

In this age of the Internet, New York state courts often have to make judgments as to a party's reasonable expectation of privacy relating to the use or disclosure of electronic communications.¹

This can be seen in two recent trial court opinions concerning the "cloning" or "mirror imaging" of computer hard drives that addressed the issue of what electronic information of a party or nonparty is discoverable and who should have access to such information. Another trial decision issued recently ruled on the propriety of sealing court documents, where it was found that the movant had no expectation of privacy over the allegedly scandalous electronic communications.

Other newly rendered decisions in the context of allegedly improper postings on Web sites are protective of, for instance, a party's photograph used without permission, purported libelous comments and graphics concerning a party, and an "innocent" Web site on which supposed defamatory comments were posted. However, recent authority is less-protective of individuals who affirmatively utilize electronic communications, but then sue when electronic communications later allegedly cause harm.

Hard Drive 'Cloning'²

In *Karim v. Natural Stone Industries Inc.*,³ the issue in a labor law action was the "employability" of an allegedly "gravely injured" plaintiff. A third party sought to compel the "cloning" of plaintiff's computer claiming that the contents of the computer would be "highly relevant" and "critical to the question of whether plaintiff was 'gravely injured.'"⁴ The court denied the motion, stating that the "computer hard drive is not relevant and material⁵ to plaintiff's ability to return to employment. Given the computer's accessibility by several members of plaintiff's household, it would not be possible...to discern plaintiff's



computer usage beyond the use plaintiff testified at the deposition."⁶ The court observed that "the hard drive has private communications and actions of the plaintiff and family that have nothing to do with the limited issue of plaintiff's employability."⁷ The court observed that notwithstanding any limiting orders regarding items copied from the hard drive to the clone, "it would be improperly invasive to order this discovery."⁸

In the *Matter of Maura Jr.*,⁹ the claim was made that a prenuptial agreement was not authentic and that it was "somehow altered."¹⁰ A nonparty law firm involved in drafting the prenuptial agreement was subpoenaed for its computer records. The court directed that a "clone" of the law firm's hard drive be made, but the court declined to permit the forensic expert to be chosen by the movant. Nor would the court shift the costs of the "cloning" to the nonparty law firm.¹¹ The court allowed the nonparty law firm to choose its own computer forensic expert, but permitted counsel for the parties to be present when the computer was "cloned." The court required that relevant documents be provided to the court under seal and the law firm could interpose objections on privilege grounds or otherwise to prevent the release of such documents to requesting counsel. On reargument, movant asserted, among other things, that the "court's direction regarding access to the hard drive of [the law firm's] computer is 'problematic'" because the attorney who drafted the prenuptial agreement

may have been "complicit in fraud."¹² Movant argued that the law firm should not control the hiring of the forensic expert, and that the court's direction "fail[ed] to assure that [the] search will be conducted in a fair and impartial manner."¹³ The court denied reargument finding there was "no evidence...submitted...that the attorney-drafts[persons] engaged in any misconduct by way of changes to the prenuptial agreement and under the circumstances the retention of a court-appointed expert is not warranted."¹⁴ The court further noted that it had "expressly considered the costs and expenses associated with the production of the computer discovery sought and eschewed a share of the costs on [the nonparty]."¹⁵

Sealing of Scandalous E-Mails

In *IDX Capital LLC v. Phoenix Partners Group LLC*,¹⁶ defendants sought to seal motion papers on the grounds that the proposed pleading contained "irrelevant scandalous and prejudicial material."¹⁷ This material consisted of e-mails and instant messages, and defendants asserted that because news agencies are interested in such matters, "there is a danger of publication of the material."¹⁸ The court held that there was "no reasonable expectation of privacy," where the information was movant's own e-mails and instant messages that were communicated over the Bloomberg messaging system.¹⁹ The court also found that the public interest weighed in favor of not sealing information.

Web-Site 'Republication'

In *Geary v. Town Sports International Holdings Inc.*,²⁰ plaintiff discovered that he had been photographed and that the photo had been used for advertising purposes without his consent at various sports clubs owned by defendant. The photograph later appeared on defendant's Web site. The court was asked to determine whether use of the photograph on defendant's Web site constituted "republication," thereby "retriggering" the one-year statute of limitations for a cause of action alleging violation of a right of privacy under §§51 and 52 of New York's

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Civil Rights Law.²¹ The court noted that where the “material at issue is republished in a new format intended to reach a new audience, the statute of limitations will run anew from the date of republication.”²² In denying defendant’s motion to dismiss, the court noted that the “Web site is presumably directed at a far wider audience primarily comprised of those who are not members and whom defendant is seeking to attract as new members,” and found that “republishing” had thus occurred.²³

‘Electronic’ Emotional Pain

In *Kaisman v. Fernandez*,²⁴ plaintiff alleged that defendants caused plaintiff’s name to be improperly linked to pornographic Web sites appearing on certain Internet search results. The court dismissed plaintiff’s claim for intentional infliction of emotional distress on the basis that he had sent “pornographic images, sounds and video files as e-mail attachments [which] contradict[] a finding that he suffered severe emotional distress from learning his name was linked to pornography.”²⁵

On reargument, plaintiff alleged that the court misconstrued the potential effect the Internet search results “might have on him personally and professionally contending that his sending a few private e-mails with ‘disputed’ contents does not defeat his claim to being damaged when his name becomes publicly linked to hardcore pornography.”²⁶ Plaintiff submitted the results of a subpoena issued to Google that showed “that the same Internet Protocol (IP) address (and therefore, the same computer used by one or a limited number of individuals) was responsible for creating the Internet Search Results over a period of a few days in September 2007.”²⁷ These inquiries apparently showed that the “IP address is owned by a Texas company, which sub-licensed it to a company based in the Ukraine, which ‘seems willing to cooperate’ in further investigation.”²⁸

The court, however, noted that plaintiff did not submit anything “linking this data to defendants.”²⁹ As such, the court ruled that plaintiff’s “name appear[ing] in the Internet Search Results after an online periodical reported the content of the publicly available court records of a sexual harassment lawsuit filed against him does not support his allegation that defendants caused those results.”³⁰

Libel Per Se

• **Electronic Communications and Graphic Images.** In *Leser v. KarenKooper.com*,³¹ the court had previously upheld plaintiff’s cause of action for libel per se, but required plaintiff to plead

with greater specificity as it related to alleged defamatory statements based on plaintiff’s claim that her picture was wrongfully posted by defendants on a pornographic Web site. On defendants’ motion to dismiss and plaintiff’s cross-motion to amend, the court sustained plaintiff’s libel per se cause of action on the basis that she quoted the libelous statements and included “graphic pictorial evidence [from Web sites] allegedly used by the defendants in conjunction with [such] statements.”³² The court also denied defendants’ motion seeking to strike the allegedly scandalous and prejudicial materials from the amended complaint since “the graphic images and words relate directly to plaintiff’s libel claim.”³³

Web-Site Owner

In *Chelsea Fine Custom Kitchens v. Apartment Therapy LLC*,³⁴ plaintiff alleged commercial disparagement on the basis that a Web site contained false and misleading information concerning the quality of plaintiff’s services and the competitiveness of its pricing. Defendant moved to dismiss under the Communications Decency Act,³⁵ alleging that Web site owners are absolutely immune for statements made by third parties. In granting dismissal, the court found that the complaint “fails to allege any facts beyond mere speculation showing that defendant created any of the comments posted in the name of third parties.”³⁶

Conclusion

In sum, the use of electronic communications is going to increase and the issue of whether one has a reasonable expectation of privacy in e-mails, text messages, digital photographs or electronically stored business records will be the subject of future litigation. Similarly, comments posted online without a party’s permission or links connecting a party to a Web site made without such party’s consent will more and more provide grist for lawsuits. And in many of these cases, the issue of whether a person has a reasonable expectation of privacy in such electronic communications will be in the forefront of a court’s decision making process when asked to rule on the propriety of disclosure or use of such electronic communications.

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1. See generally *Morano v. Slattery Skanska Inc.*, 18 Misc3d 464, 470-72, 846 NYS2d 881, 885-87 (Queens Co. Sup. Ct. 2007); *Scott v. Beth Israel Med. Ctr.*, 17 Misc. 3d 934, 939-942, 847 N.Y.S.2d 436, 441-443 (N.Y. Co. Sup. Ct. 2007).

2. In *Melcher v. Apollo Med. Fund Mgmt.*, 52 AD3d 244, 245, 859 NYS2d 160, 162 (1st Dept. 2008). The First Department addressed the issue of “cloning” a computer hard drive in a case of first impression:

In view of the absence of proof that plaintiff intention-

ally destroyed or withheld evidence, his assistant’s testimony that she searched his computers, and the adequate explanation for the nonproduction of two items of correspondence, the court improperly directed the cloning of plaintiff’s computer hard drives.

3. 19 Misc3d 353, 855 NYS2d 845 (Queens Co. Sup. Ct. Jan. 18, 2008).

4. Id. at 355, 855 NYS2d at 846.

5. In *Etzion v. Etzion*, 19 Misc. 3d 1102(A), 859 N.Y.S.2d 902, 2008 WL 682507*4 (Nassau Co. Sup. Ct. Jan. 15, 2008), the court noted that “in matrimonial matters, parties are entitled to full disclosure of all financial information concerning marital assets held during the marriage, including business records, real estate transactions, examinations of accounting procedures, financial records, both hard copy and computer stored data.” (Emphasis added.)

6. Id. at 356, 855 NYS2d at 847.

7. Id.

8. Id.

9. 17 Misc. 3d 237, 842 N.Y.S.2d 851 (Nassau Co. Surr. Ct. June 28, 2007).

10. Id. at 247.

11. Id. See also *Art and Framing Source, LLC v. Seaton Galleries Inc.*, Index No. 019541/06 (Nassau Co. Sup. Ct. July 2, 2007) (plaintiff ordered to “permit access by defendant’s expert technician to copy or clone at defendant’s expense, all data from the subject business computer at its customary location.”); *Ignolia v. Barnes & Noble College Booksellers Inc.*, Index No. 05-3002 (Nassau Co. Sup. Ct. Oct. 25, 2006) (court clarifies prior decision “to the extent that plaintiff shall bear the cost for the production by the defendant of a copy of the ‘mirror image.’”).

12. File No. 326728, at 3 (Nassau Co. Surr. Ct. Aug. 6, 2008).

13. Id.

14. Id.

15. Id.

16. Index No. 102806/07 (N.Y. Co. Sup. Ct. Aug. 5, 2008).

17. Id. at 1.

18. Id. at 3.

19. Id.

20. Index No. 104345/08 (N.Y. Co. Sup. Ct. Aug. 25, 2008).

21. Id. at 1.

22. Id.

23. Id. at 2.

24. Index No. 114829/07 (N.Y. Co. Sup. Ct. March 14, 2008).

25. Id. at 4.

26. Index No. 114829/07, at 5 (N.Y. Co. Sup. Ct. June 12, 2008).

27. Id.

28. Id.

29. Id.

30. Id. at 8.

31. Index No. 104005/07, at 9-12 (N.Y. Co. Sup. Ct. Jan. 16, 2008). This decision was previously discussed in Mark A. Berman, “Changes in Laws on Electronically Stored Information,” *NYLJ*, Feb. 14, 2008.

32. *Lesser v. Perido*, Index No. 104005/07 at 8 (N.Y. Co. Sup. Ct. July 23, 2008).

33. Id. at 9.

34. Index No. 603554/07 (N.Y. Co. Sup. Ct. July 1, 2008).

35. 47 U.S.C. §230.

36. Id. at 4.

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