



## FALL 2014 E-NEWSLETTER

At Digital Mountain we assist our clients with their computer forensics, e-discovery and cybersecurity needs. One of our primary areas of growth is social media preservation and monitoring. With the increasing popularity of social media usage and its content as admissible evidence in court, we chose to theme our Fall 2014 E-Newsletter on the topic.

### DIGITAL MOUNTAIN'S GUEST CONTRIBUTOR SCOTT MALOUF

#### TIPS FOR WINNING SOCIAL MEDIA CASES

Social media cases present unique substantive and evidentiary issues. I highlight some key challenges below and provide practice pointers you can implement immediately.

##### **Beware pyrrhic victories**

Using social media well is laborious and return on investment is far from certain. As a result, clients who lose control of a social media account, particularly one that is useful or valuable, deeply feel the pain of loss. Such clients also rightly fear that the current account operator will undermine the social media account's value or harm a corporate brand through misuse of the account. Thus it is often surprising to clients, and their counsel, how challenging it can be to remedy wrongs related to misuse of such accounts by third parties.

In *Eagle v. Morgan*, 2013 U.S. Dist. LEXIS 34220 (E.D. Pa. March 12, 2013), the defendant changed the password, name, picture and credentials on a corporate executive's LinkedIn account as part of an employment dispute. The LinkedIn account returned to the plaintiff's control after approximately three weeks. Subsequently, the plaintiff asserted 11 state and federal claims eventually winning on 3 state claims (Unauthorized Use of Name, Invasion of Privacy by Misappropriation of Identity & Misappropriation of Publicity). Despite this seeming victory, the court awarded plaintiff no compensatory or punitive damages because she could not prove the lost access to her LinkedIn account resulted in lost business opportunities.

Similarly, *Mattocks v. Black Entertainment Television, LLC* (S.D. Fla. August 20, 2014), exemplifies the current uncertainty regarding "ownership" rights in social media. Here, the plaintiff created and maintained a Facebook "fan page" devoted to a TV show owned by BET. While working with BET, the plaintiff grew Facebook "likes" for the page from 2 million to 6 million. After a dispute with the plaintiff, BET asked Facebook to migrate the "likes" from the plaintiff's page to an official page controlled by BET. Among other causes of action, the plaintiff asserted a conversion claim. The court ruled that Facebook "likes" were not property subject to a conversion

claim. Since Facebook users could “unlike” (i.e. sever the connection to) the plaintiff’s fan page at any time, any ownership of the likes resided with the individual Facebook users, not the plaintiff.

**Settings on social media accounts may be relevant to claims. How are you going to prove those account settings support your claims?**

The case of *Cellular Accessories For Less, Inc. v. Trinitas LLC* 2014 U.S. Dist. LEXIS 130518 (C.D. Cal. September 16, 2014) picks up where *Eagle* left off regarding LinkedIn connections as a trade secret and highlights the challenge of asking a court to take judicial notice of settings. At the motion to dismiss stage, *Eagle* found that LinkedIn account connections were not trade secrets because they were generally known in the wider business community or could have been easily derived from public information. For example, the defendant corporation in *Eagle* listed over 1,000 customers on its website.

In *Cellular Accessories*, the parties disputed whether the LinkedIn connections of a former Cellular Accessories salesman who started a competing company were widely viewable. Plaintiff claimed that only the account holder (i.e. the salesman) would have been able to see his LinkedIn connections (unless he had opted otherwise), while defendants claimed that all of the account holder’s LinkedIn connections would have been able to see all of his other connections. As neither side offered proof of the relevant account settings and the court refused to take judicial notice of how LinkedIn displayed such information, there remained genuine issues of material fact precluding summary judgment. If this case goes to trial, it will be interesting to see how the parties demonstrate LinkedIn functionality.<sup>i</sup> See also *People v. McClellan*, 2014 Ill. App. Unpub. LEXIS 2116 (Ill. Ct. App. Sept. 24, 2014), (appellate court refused to take judicial notice that an Internet search performed in 2014 would have yielded similar results in 2008).

A recent appellate decision highlights the challenge of using a lay witness to describe how settings operate. In *State v. Buhl* 152 Conn. App. 140, 2014 Conn. App. LEXIS 354 (August 12, 2014), the defendant appealed a conviction for harassment and breach of the peace stemming from mailing a hard copy of the victim’s diary to her residence and posting similar material, including copies of diary pages, on a personal Facebook profile. The breach of the peace charge required that the offending material be posted in a “public” place. The appellate court overturned the breach of the peace conviction, finding the state failed to carry its burden that the material was publicly posted. Specifically, the state’s only witness as to whether the posts were publically visible was the victim and her testimony was insufficient for several reasons. The state failed to demonstrate the victim was qualified to testify about how Facebook’s privacy settings operated. Nor was the victim qualified to testify about Facebook policy in general (in fact, the trial court specifically prohibited the victim from testifying as to Facebook policy). Finally, the victim’s testimony regarding the visibility of the profile was contradictory.

Despite the appellate court’s concerns over lay witness testimony in the instant matter, *Buhl* does not announce a standard requiring expert witness testimony to prove site functionality. Perhaps anticipating future appeals, the court specifically disclaimed the need for a social media expert to prove how a site operates.<sup>ii</sup>

**You can’t escape settings, even in death**

Although privacy expectations appear to dominate current cases where settings are at issue,

future cases will likely have broader scope. For example, the Uniform Fiduciary Access to Digital Assets Act (UFADAA), enacted in Delaware and under review in several other states, allows fiduciaries, such as an executor, full access to an individual's online account unless the account holder has made a conspicuous choice that no access should be granted to that account. One way to make that choice is via a UFADAA-compliant account setting stating whether access should be granted.

### Takeaways

1. Before discussing options with a client, know whether the client has a well-defined right and remedy in subject social media accounts. Explain that social media claims are a developing area of the law that may entail higher costs and risks.
2. If there is a remedy, determine how you will prove damages for the loss of something as hard to quantify as the value of social media connections.
3. If settings are important, memorialize them.
4. Know how you will prove what settings were selected: expert witness, lay witness, documentary evidence or other means.
5. Know whether your judge understands social media technology and case law.<sup>iii</sup>
6. Look at the settings of your online accounts. Think about the kinds of issues where settings might be relevant (privacy expectations, intent, custody or control of an account, etc.)

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<sup>i</sup> Currently, LinkedIn offers two options: your connections can be visible only to you or available to all of your connections. Depending upon your business, you may wish to change your settings. Read more in [this article from LinkedIn](#).

<sup>ii</sup> See *Buhl* at footnote 9.

<sup>iii</sup> The *Buhl* trial court notified the parties it lacked familiarity with Facebook and would need assistance on matters related to Facebook. It may be useful to raise social media acumen with the court as soon as possible or ask other attorneys about the judge.

*Scott L. Malouf, Esq. is a social media attorney. He helps litigators turn social media into court-ready evidence while reducing the cost of social media discovery. He also assists corporate and business attorneys in creating social media programs that achieve business, compliance and legal objectives.*

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## UPCOMING INDUSTRY EVENTS

October 2014

Association of Corporate Counsel Annual Meeting: October 28-31

**November 2014**

The Sedona Conference All Voices Meeting 2014: November 4-7

LawTech Miami: November 5

Georgetown Law's The Advanced EDiscovery Institute: November 20-21

[\*\*Click here to see more upcoming events and links\*\*](#)



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