



THE LEGAL IMPACT OF SOCIAL MEDIA NETWORKS – INTERNATIONAL TRENDS

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INTRODUCTION

Social media cannot be ignored.

There has been a rapid proliferation of social media channels for corporate communication and an increasing number of public companies are using social media to communicate with their shareholders and the investing public¹.

This trend has resulted from changing demographics, attitudes and work styles. For the first time four generations (Traditionalists, Baby Boomers, Generation X and Generation Y) are working together in the same environment which presents new workplace dynamics and challenges.

It is clear that social media will permeate all areas of law. That being said, at present it is still largely uncertain how the courts will deal with issues arising out of social media usage.

This technical paper will, based on accessible case law and legislation, attempt to address the following topics:

- > Should communications with persons through electronic media be legally valid and binding?
- > Is substituted service of court processes through social networking channels such as Facebook, LinkedIn, Twitter, etc a possibility?

- > Do employers in some jurisdictions run the risk of becoming vicariously liable for posts by employees on social media networks, and could a post on any of the social media networks therefor also constitute an act of insolvency?
- > Should social media be used to locate debtors, creditors, witnesses or other persons of interest?
- > Does the discovery of electronic information include posts on social networks?
- > Does a person have the right to request that a publication about that person on electronic media be removed, and what are the implications thereof?

COMMUNICATION BY COMPANIES WITH STAKEHOLDERS THROUGH ELECTRONIC MEDIA

Although communicating and transacting through electronic media is not something one considers unusual in this day and age, there are only six parties to the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2007): the Congo, Dominican Republic, Honduras, Montenegro, the Russian Federation and Singapore.

This Convention establishes the general principle that communications are not to be denied legal validity solely on the grounds that they were made in electronic form². Specifically, given the proliferation of automated message systems, the Convention allows for the enforceability of contracts entered into by such systems, including when no natural person reviewed the individual actions carried out by them³.

* The views expressed in this paper are the views of the authors and not of INSOL International, London.
1 US Securities and Exchange Commission Report Release No. 69279 / April 2, 2013.

2 Article 8
3 Article 12

Interestingly, the Convention further clarifies that a proposal to conclude a contract made through electronic means and not addressed to specific parties amounts to an invitation to deal, rather than an offer whose acceptance binds the offering party⁴.

Although the Convention does not have a great number of parties who have acceded to it, other jurisdictions have enacted laws with similar principles. For example, in Australia, on 10 December 1999, the Electronic Transactions Act 1999 came into force. Section 15 of Electronic Transactions Act 1999 is similar to articles 11 and 12 of the Convention. The spirit of this Act was embraced by the Australian Stock Exchange (“ASX”), which published guidelines for notices of meetings in August 2007⁵. These guidelines provide that companies should endeavour to send notices of meeting to shareholders by electronic means if requested, and should place the full text of notices and accompanying explanatory material on the company website.

Another example is New Zealand’s Electronic Transactions Act 2002 and Electronic Transactions Regulations 2003 (SR 2003/288) which came into force on 21 November 2003. The Act and Regulations set out the rules to facilitate the use of email and other electronic technology, both in business and for interaction between government and the public. The main feature is that it allows businesses to use electronic technology, if they wish, to comply with various legal requirements for producing, giving or storing information in writing, provided the person who is given or receives the information (if there is one) consents to this.

On 1 May 2011, the South African Companies Act 71 of 2008 was established. It provides that if, in terms of that Act, a notice is required or permitted to be given or published to any natural or corporate person, it is sufficient if the notice is transmitted electronically directly to that person⁶. The Companies’ Regulations restrict the manner in which such notice may be published electronically to sending the notice by electronic mail. The South African High Court however, may authorise a different means of giving or publishing such a notice by way of substituted service⁷.

The South African Companies Act also provides that if, in terms of that Act, a document, record or statement, is to be published, provided or delivered, it is sufficient if an electronic original or reproduction of that document, record or statement is published, provided or delivered by electronic communication via electronic mail or as the High Court may otherwise authorise⁸.

It is therefore suggested that communications and contracts through social media, as another form of electronic media, should not be denied legal validity solely on the grounds that they were prepared in electronic form. The mechanics and requirements however, to render electronic documents binding should be left for each jurisdiction to determine independently.

SUBSTITUTED SERVICE

Substituted service is the alternative that allows one to seek the court’s permission to serve notices in a different manner than the normal forms of personal service.

In 2008, in what is believed to be a world-first decision, an Australian Supreme Court allowed a lender to serve a default judgment on the borrowers via the social networking site, Facebook, after conventional means of

contacting the borrowers had failed⁹.

On 3 August 2012, the means for service in South Africa of legal court notices were modernised when the South African High Court allowed a legal court notice to be served on a defendant using Facebook¹⁰.

A word of caution, Courts may refuse permission where there is doubt that the person who created a particular page on a social networking site is in fact the person on whom the document or notice must be served¹¹.

As such, it is suggested that, substituted service through social media should be considered only in circumstances where normal forms of personal service is impossible, and where there is no doubt that the person who created the social media page is in fact the person on whom service must be rendered. Ultimately, however, it must be left to each court (having regard to applicable laws in its jurisdiction) to determine if substituted service through social media will be appropriate.

VICARIOUS LIABILITY OF EMPLOYERS FOR POSTS BY EMPLOYEES ON SOCIAL MEDIA NETWORKS

Most employers are not aware, or concerned, that amongst other things, they can be held vicariously liable for the statements posted by employees on online networks and social media, if such posts take place “in the course of employment”. The question as to whether an employer may be held liable for statements made by their employees on social media remains untested in many jurisdictions.

In the United Kingdom, on 8 May 2012 in the case of *Otomewo v The Carphone Warehouse Ltd [2012] EqLR 724* two employees posted a status update on the claimant’s Facebook page, without his permission or knowledge. The status update read: “*finally came out of the closet. I am gay and proud.*” The court found that this statement was posted in the course of those employees’ employment, because the employees’ actions took place during working hours and it involved dealings between staff and a manager. As such the employer was found vicariously liable for the conduct which amounted to harassment on the grounds of sexual orientation.

Similarly, in the United States of America, in *Blakey v. Continental Airlines Inc. 992 F.Supp. 731 (D.N.J. 1998)* the Court found an employer vicariously liable for harassment. In this case the plaintiff claimed that she was sexually harassed by fellow pilots who posted defamatory and false statements about her on an electronic bulletin board used by the employer’s pilots.

Employers can also be held vicariously liable for the actions of employees that take place outside the workplace and out of working hours¹², if it concerns the employer and/or employees.

To limit an employer’s exposure, it is suggested that clear guidelines should be made available to employees on the extent to which employees may use the internet and social media during work hours, and such guidelines should detail what is and what is not appropriate content. In addition, the employer should make it clear to employees that by using social media on work provided equipment and/or during work hours, employees waive any rights to privacy so that monitoring can take place.

4 Article 11

5 http://www.asx.com.au/documents/asx-compliance/guidelines_notices_of_meeting.pdf, accessed 18-12-2014

6 Sections 6(10) of the South African Companies Act 71 of 2008

7 Companies Regulations of 2011, regulation 7 read with Table CR3

8 Sections 6(11) of the South African Companies Act 71 of 2008, read with regulation 7 of the Companies Regulations of 2011 and Table CR3

9 *MKM Capital Pty Ltd v Corbo & Poyser*, an unreported judgment of Master Harper of the ACT Supreme Court

10 *CMC Woodworking Machinery (Pty) Ltd v Peter Odendaal Kitchens 2012 (5) SA 604 (KZD)*

11 *Citigroup Pty Ltd v Weerakoon [2008] QDC 174; Flo Rida v Mothership Music Pty Ltd [2013] NSWCA 268*

12 *Teggart v TeleTech UK Ltd [2012] NIIT 00704/11; Gosden v Lifeline Project Ltd ET/2802731/2009*

ACTS OF INSOLVENCY

Social media presents a specific risk to employers who may be obligated to prevent their employees from disseminating defamatory, confidential or unlawful information connected with their employment.

Social media has created boundless opportunities for individuals and corporations to communicate any information whatsoever anywhere and at any time. That being said, it remains untested and unclear whether statements posted on social media, to the effect that an employer or a person is unable to pay their debts, could amount to acts of insolvency.

For instance, it is uncertain what the outcome will be if an overwhelmed employee stationed within an employer's finance department posts a statement on Facebook that the employer cannot pay its creditors or employee. Such a statement could trigger a contractual event of default, an acceleration event, and eventually the insolvency of the employer.

It is therefore suggested that employees sign confidentiality agreements which prevents the employee from disclosing any information whatsoever pertaining to the employer and which prohibits the association of the employer with any personal communications (including, without limitation, on social media) by the employee.

SOCIAL DISCOVERY AS INVESTIGATIVE TOOLS

Social discovery applications, such as Tinder and Sonar.me, and social media sites, such as Facebook and Twitter, allow a person to reveal their whereabouts in real time to anyone who cares to look at their profiles. Other sites such as LinkedIn can provide a good indication of a person's personal details, such as his or her place of employment, and contact information. Social media can as such be used to locate debtors, creditors, witnesses and other persons of interest.

As this class of electronic media develops and becomes mainstream, it will surely be used more frequently (and successfully) to trace persons of interest.

DISCOVERY OF ELECTRONIC MEDIA

Most legal systems recognise the need for discovery of electronic media and therefore require that emails and computer files be preserved in anticipation of litigation. The requirements for determining what information may be discovered will differ from jurisdiction to jurisdiction.

Statements posted on social media networks are in essence just another form of electronic media that may contain relevant information. Therefore, similar to other forms of electronic discovery, information posted to social media sites such as Facebook, Twitter or LinkedIn can also be subject to discovery¹³. In fact, discovery of social media should be embraced as part of the "new normal", because posts on social media is just another way for individuals and corporations to communicate¹⁴.

Social media sites however, are often used in a personal capacity and consequently contain private, non-public information. As a result, broad requests for information on social media may invade an individual's right to privacy.

Of relevance in this regard is the case of *Equal Employment Opportunity Commission (EEOC) v. Simply Storage Management LLC*, 270 F.R.D 430 (S.D. Ind. May 11, 2010), where the claimant filed a sexual harassment complaint on behalf of two employees against the defendant (the employer).

The employer required discovery of the employees' social networking sites in order to obtain information about the employees' emotional health, and the claimant objected. The court held that discovery of social media or other electronically stored information is not unique, and concluded that the claimant's privacy concerns were outweighed by the fact that the claimant had already shared the discoverable information with at least one other person through private messages or a larger number of people through posting¹⁵. The court emphasized that the material requested must be relevant to a claim or defence in the case, and consequently the court limited the employer's requests, while still allowing significant social media discovery. This decision is in line with a growing body of case law emanating from the United States of America that shows that information posted on social networking sites is, at least in part, discoverable¹⁶.

A word of caution, however, from the American courts¹⁷: If discovery of electronic media on a social media network is required, then that request should not be made to the social media network, as such networks are considered to be electronic communication service providers who are subject to the provisions of the Stored Communications Act ("SCA"), 18 U.S.C. 2701. That is, without the consent from the network's customer, the social media network could violate the SCA, which prohibits electronic communication service providers, from intentionally accessing, without authorisation or exceeding authorisation, electronic media held in an electronic storage facility for its customers. Effectively, the electronic media must be sought directly from the customer concerned.

It is therefore suggested that, although the requirements for determining what electronic information may be discovered will differ from jurisdiction to jurisdiction, posts on social media networks generally be viewed as just another form of electronic media that may contain relevant and discoverable information. Each jurisdiction will also determine from whom such information may be gained.

THE RIGHT TO BE FORGOTTEN

Internet search engines are software systems that are designed to search for information on the World Wide Web. The search results are generally presented in a line of results often referred to as search engine results pages. The information may be a mix of web pages, images, and other types of files. Some search engines also mine data that are available in databases or open directories. Unlike web directories, which are maintained only by human editors, search engines also maintain real-time information by running an algorithm on a web crawler¹⁸.

The "Right to be Forgotten" is therefore relevant to persons who may find that there is undesirable electronic information linked to their name on internet search engines. In other words, the "Right to be Forgotten" relates to the legal recourse a person has in order to ensure that undesirable electronic information is removed or "forgotten".

On 13 May 2014 in a matter between *Google Spain SL, Google Inc v Agencia Espanola de Proteccion de Datos ("AEPD")* (case no C-131/12, 13-5-2014) the Court of Justice of the European Union handed down a landmark judgment on the right to privacy in relation to personal data on the Internet.

In this matter the complainant, namely Mr Gonzalez, requested the AEPD (the Spanish Data Protection Agency) to instruct Google Spain or Google Inc to remove all personal data relating to him so that his personal data ceased to be included in search results. The AEPD upheld Mr Gonzalez's request, as it found that operators of internet search engines are subject to data protection laws, as such operators are involved in the activity of data processing and therefore

13 <http://www.mondaq.com/unitedstates/x/290640/disclosure+electronic+discovery+privilege/Social+Media+EDiscovery>, accessed 27-01-2015

14 <http://www.millercanfield.com/resources-317.html>, accessed 26-01-2015

15 As one judge observed, "Facebook is not used as a means by which account holders carry on monologues with themselves". Leduc, 2009 CanLII 6838, at P 31.

16 See also *Ledbetter v. Wal-Mart Stores, Inc.* (D. Colo. 2009), *Mackelprang v. Fidelity Nat'l Title Agency of Nevada, Inc.* (D. Nev. 2007) and *Beyev. Horizon Blue Cross Blue Shield* (D. N.J. 2006).

17 *Romano v. Steelcase Inc.*, 907 N.Y.S.2d 650 (Sept. 21, 2010); *Crispin v. Christian Audigier, Inc* C.D. Cal. (May 26, 2010)

18 http://en.wikipedia.org/wiki/Internet_search_engines, accessed 18-12-2014

subject to data protection laws. That is, the AEPD ruled that it could oblige Google to delete personal data, without also requiring the websites where the data originally appeared to be deleted (provided that any such publication on the third party websites was made lawfully).

Google Spain and Google Inc consequently brought separate decisions against the AEPD's ruling, which eventually resulted in the ruling by the Court of Justice of the European Union. This Court considered the Data Protection Directive 95/46/EC of the European Union and confirmed that the operations of Google involves data processing as defined therein, and that Google is required to remove the information collected from third party websites.

Google has accepted the court's views and in June 2015 announced that it will delist revenge porn from its search results at a global level¹⁹. This decision by Google was preceded by policies taken by other social media sites. In February 2015, Reddit banned revenge porn, and in March 2015 Twitter and Facebook banned users from posting intimate photos without consent²⁰.

Even though the above decision is confined to the European Union, it may assist the courts and persons in other jurisdictions in interpreting and developing their laws relevant to the protection of personal information.

For instance, in South Africa the Protection of Personal Information Act 4 of 2013 ("POPI") is similar to the provisions of the Directive 95/46/EC in that it regulates data processing of personal information of individuals. It may be argued therefore that South African citizens like their European counterparts, also enjoy the "Right to be Forgotten".

In the United States of America, California's privacy laws resemble the European approach to privacy protection. For example, the data security law (Cal. Civil Code §1798.81.5) requires businesses to implement and maintain reasonable security procedures to protect personal information from unauthorised access, destruction, use, modification, or disclosure. The United States of America's First Amendment however, will restrict the ways in which American businesses can be obligated to ensure data protection rights²¹. That is, the United States of America will likely not be able to mimic data correction and erasure as is the case in the European Union²².

It is suggested that the right to privacy should include the right by any persons to have undesirable information, which can for instance harm autonomy, reputation, and emotional well-being, removed from search engine results pages. It must be noted, however, that if such publication on third-party website was made lawfully, then such information will be hard to find but may not be destroyed. That is, it may still be accessible to someone who knows the direct web address.

CONCLUSION

Social media is transforming the legal industry and law practice. For instance, in addition to being a marketing tool, in several jurisdictions electronically stored information, whether conventional e-mails or posts on social media networks, has become discoverable in court proceedings²³. This procedure is colloquially referred to as e-Discovery.

Another emerging trend is substituted service of legal documents via social media networks²⁴ where personal service is not possible.

Moreover, the speed at which information posted on social media networks can be re-published and disseminated, and the proliferation of that information, is something over which both people and companies alike can exercise very little control. In fact, in some jurisdictions employers run the risk of being held vicariously liable for discrimination, harassment and defamation on social media networks where an employee's conduct occurs 'during the course and scope of employment'²⁵.

That being said, the Court of Justice of the European Union ruled in May 2014 that Google must comply with the European Union's Data Protection Directive (informally referred to as the Right to be Forgotten), even if much of its data processing occurs in other countries. That means that Google will be required to remove links when requested by individuals to do so.

Many of the legal trends discussed above revolve around civil litigation, particularly with respect to employment related matters. However, the legal principles will no doubt, in time, filter through other areas of law as well, and will eventually find application in insolvency matters.

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¹⁹ <http://googlepublicpolicy.blogspot.com/2015/06/revenge-porn-and-search.html>, accessed on 08-07-2015

²⁰ http://bits.blogs.nytimes.com/2015/06/19/google-to-remove-revenge-porn-images-from-search-results/?_r=2, accessed on 08-07-2015

²¹ http://www.washingtonpost.com/business/technology/right-to-be-forgotten-vs-free-speech/2014/05/14/53c9154c-db9d-11e3-bda1-9b46b2066796_story.html, accessed 08-07-2015

²² <http://www.theguardian.com/technology/2015/jun/25/googles-revenge-porn-opens-right-forgotten-us>, accessed 08-07-2015

²³ For Example: US' Federal Rules of Civil Procedure (FRCP); Part 31 of the Civil Procedure Rules in England and Wales; South African Electronic Communications Act no. 36 of 2005

²⁴ For Example: Australian case of *MKM Capital Pty Ltd v Corbo & Poyser*, an unreported judgment; Lawyers to serve notices on Facebook, Sydney Morning Herald, December 2008; Australia police serve court order via Facebook, Sydney Morning Herald, October 2010; South African case of *CMC Woodworking Machinery (Pty) Ltd v Peter Odendaal Kitchens (JOL 290203) KZD*; Canadian case of *1280055 Alberta Ltd. v. Zaghoul*, 2012 ABQB 10 (*CanLII*)

²⁵ United Kingdom case of *Otomewo v Carphone Warehouse Ltd* [2012] EqLR 724

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