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• PREVENTING SPOLIATION OF SOCIAL NETWORKING PROFILE EVIDENCE IN INSURANCE LITIGATION •

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1. Introduction

Recent years have witnessed the phenomenal growth of social networking websites, such as Facebook and MySpace. Social networking websites are now commonly used by individuals to communicate information about their personal life to other members of their network.[1] As a result, they have become an integral part of the disclosure process in personal injury insurance litigation where plaintiffs put their enjoyment of life, psychological well-being, or ability to work in issue.[2] In these cases, photographs or other materials on a plaintiff's social networking profile may be relevant to demonstrating their ability to engage in work or recreational activities.[3] For these reasons, courts now routinely admit profile material as evidence in insurance litigation.[4]

Few disclosure issues will arise when a plaintiff's profile is publicly accessible because insurers will have access to any relevant material. However, not all material is publicly accessible. Many users now have "access-limited" profiles which permit them to limit access to designated persons.[5] Accordingly, a user's profile will often have a public space and a private space. Because material on a profile's private space will generally not be accessible to insurers, it will often be impossible for insurers to determine whether it contains relevant material. Where an insurer has reason to believe that a plaintiff has not complied with their disclosure obligation, they may move for relief before the courts.[6] Unfortunately, recent cases demonstrate that some

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plaintiffs, if alerted of an insurer's attempts to seek production of access-limited profile evidence, will frustrate those attempts by deleting material harmful to their claims.

Some insurers have attempted to reduce this risk by seeking *ex parte* orders to compel plaintiffs to preserve the contents of their access-limited profiles. Preservation orders are remedies sought to ensure that evidence is preserved and available for the trial of an action where there is a significant likelihood that a party will destroy it once notified of the other's interest in accessing it.[7] This article discusses the risk of spoliation of social networking profile evidence, considers cases in which insurers have sought *ex parte* preservation orders to alleviate that risk, and discusses potential alternatives.

2. Spoliation of Access-Limited Profile Evidence

Access-limited profile evidence is particularly vulnerable to spoliation because it can be easily, instantaneously, and irreversibly deleted or altered. Recent cases demonstrate that there is a significant risk that some plaintiffs, if alerted of an insurer's attempts to seek production of access-limited profile evidence, will frustrate those attempts by deleting content harmful to their claims. This is so despite the fact that the destruction of potential evidence may, if uncovered, expose an offending party to the risk that the trier of fact will draw an adverse inference.

In *Kourtesis v. Joris*,[8] the plaintiff deleted relevant content from her profile after the Court ordered her to preserve it. The plaintiff's claim was based on an alleged loss of enjoyment of life

as a result of injuries suffered in a car accident. However, the insurer found pictures of the plaintiff on a publicly-accessible Facebook profile which showed her engaging in social activities in the post-accident period. It was also apparent that there were similar photographs on the plaintiff's access-limited profile. The insurer presented the discovery to the Court and sought preservation and disclosure of all material on the access-limited profile. Although the Court granted the requested preservation order, the photographs were deleted the following night.

While the Court in *Kourtesis* did not draw an adverse inference against the plaintiff for deleting profile material, the Court in *Terry v. Mullowney*[9] did. In *Terry,* the plaintiff claimed that his social life had been curtailed as a result of injuries suffered in two car accidents. When the insurer accessed the plaintiff's public Facebook profile, it found photographs of the plaintiff attending parties and socializing with friends. After being cross-examined on this material, the plaintiff deleted his profile. He testified that he did so because he did not want "any incriminating information" in Court.[10] The Court concluded that "the Facebook account which [the plaintiff] shut down and some particular messages which he deleted prior to shutting down the account entirely contained information which would have damaged his claim."[11]

Significantly, the courts in *Kourtesis* and *Terry* detected the removal of relevant profile material only because some of the material was previously accessible on the plaintiffs' publicly-accessible profiles. In cases where the material is wholly contained on an access-limited profile, there is a greater likelihood that plaintiffs will be able to remove it without leaving an electronic trail.[12]

3. Ex Parte Preservation Orders

Some defendants have responded to the risk of spoliation by seeking orders on an *ex parte* basis to compel plaintiffs to preserve the content of their access-limited profiles.[13] The reasoning is that once such an order is obtained and the plaintiff's access-limited profile material is preserved, an insurer may move for production of the profile's contents with less risk of spoliation. Although courts are typically cautious when granting *ex parte* preservation orders, they will generally be granted where there is reason to believe that the responding party, if given notice, will take steps to frustrate the process of justice before the motion can be decided.[14]

Courts may grant preservation orders pursuant to the rules of civil procedure or by way of common law interim injunctions.[15] Although the tests differ between approaches and among jurisdictions, courts have generally granted preservation orders in respect of access-limited profiles where there is some evidence that they are likely to contain relevant material at risk of deletion. In most cases, courts have based inferences that an access-limited profile contains relevant evidence on the fact that the plaintiff's publicly-accessible profile contains relevant material. Alternatively, some courts have inferred the existence of relevant material from the nature and purpose of social networking profiles. Two recent cases are worthy of discussion: *Schuster v. Royal & Sun Alliance Insurance Co. of Canada*[16] and *Sparks v. Dubé.*[17]

a. *Schuster*

In *Schuster,* the insurer sought an *ex parte* preservation order pursuant to the applicable rules of civil procedure.[18] The insurer proposed to seek a further order, at a later date, requiring the plaintiff to produce the content of her profile for inspection. The insurer sought the order on the basis of a concern that the plaintiff, once aware of the defendant's intention to seek disclosure of material on the access-limited profile, would delete or alter photographs or text that could be relevant to whether the plaintiff's ability to work and participate in recreational activities was impaired. In the underlying claim, the plaintiff sought damages for injuries resulting from a car accident that allegedly reduced her ability to work and participate in recreational activities. The insurer learned that the plaintiff had an access-limited Facebook profile after examining the plaintiff during discovery.

The Court concluded that the insurer had not met the test for a preservation order because it had not demonstrated the potential for irreparable harm or that the balance of convenience favoured the order sought. Specifically, the insurer failed to establish irreparable harm because it had not "offered any evidence from which [the Court] could conclude that the … [profile] contain[ed] relevant information."[19] The Court also rejected the notion that a preservation order was required on an *ex parte* basis because there was no "reason to conclude that the plaintiff [was] likely to delete content from her Facebook profile pending trial."[20] In the Court's view, it was inappropriate, "in the absence of evidence that the [p]laintiff [had] failed to comply with her obligations" for the Court to issue an *ex parte* injunction interfering with her right to delete documents from her Facebook account.[21]

The Court may have taken an overly strict approach to assessing the potential for irreparable harm. Other courts have inferred the existence of relevant material on access-limited profiles from the nature and purpose of social networking profiles, and the fact that users intend to use them to make personal information available to others.[22] In *Schuster,* the Court declined to follow this trend, and instead concluded that the determinative matter, "when drawing an inference as to whether there is relevant information in the private pages of a litigant's Facebook account is whether there is relevant information in their public profile."[23] In that case, the applicant's publicly-accessible profile did not contain relevant material.

b. *Sparks*

In *Sparks,* the insurer brought an *ex parte* motion for an order compelling the preservation of the contents of the plaintiff's access-limited Facebook profile until a production hearing could be held to determine whether the content should be disclosed. The plaintiff sued the defendant for injuries suffered in a car accident which allegedly caused her to suffer a serious impairment. Unlike in *Schuster,* the plaintiff's publicly-accessible profile contained several photographs of her engaged in a variety of social activities which seemed to contradict her assertion that she suffered the injuries alleged.

The Court began by considering the request for an *ex parte* hearing. The request arose from the

insurer's concern that the plaintiff, if given proper notice of the hearing, might delete access-limited profile material before it could be preserved. The Court recognized that if content were deleted it would be difficult if not impossible to later determine what content had been deleted. Accordingly, this was not a case, like *Schuster*, in which there was "an absence of cogent evidence supporting the granting of the order."[24]

The Court in *Sparks* was satisfied that the insurer had satisfied the burden required for a preservation order pursuant to the applicable rules of civil procedure.[25] In particular, the insurer was required to demonstrate that the material was relevant.[26] The Court held that it was, observing that the plaintiff was "inclined to post photographs of her[self] engaging in social and recreational activities" and that it was "reasonable to infer that behind her privacy settings there [were] other photographs … that [had] 'a semblance of relevance' to the issue of her medium and long term recovery from the accident."[27]

As an alternative remedy, the Court granted a preservation order by way of a common law interlocutory injunction. The Court was satisfied that there was a serious question to be tried regarding the nature of the plaintiff's alleged injuries, that there was a possibility of irreparable harm because the "removal of data from the [profile] virtually assures that no electronically discernable trial will be left behind", and that the balance of convenience favoured the order.[28]

However, the Court in *Sparks* did not stop at granting a basic preservation order. Significantly, it recognized that *ex parte* preservation orders may not always be sufficient to prevent spoliation. Plaintiffs, once alerted that an *ex parte* preservation order has been made, may still have the opportunity to surreptitiously remove content from their access-limited profile in advance of the execution of an order. In response to this concern, the Court required the plaintiff's counsel to engage another lawyer to schedule a meeting with the plaintiff without disclosing its subject matter. Upon meeting, the lawyer was to inform the plaintiff of the preservation order, require her to access her profile and download the material under his supervision, and attest to its completeness.[29] The Court required the plaintiff's counsel to retain another lawyer to supervise the process in order to prevent "serious damage to the solicitor-client relationship" and to avoid placing counsel in the untenable situation of being required to testify regarding the execution of the order.[30] Although the decision was appealed, the insurer settled shortly before the appeal was scheduled to be heard.

The decision in *Sparks* clearly has significant implications for the solicitor-client relationship. One might also question whether the extraordinary order granted by the Court was proportional to the risk of spoliation, particularly given that there was no evidence that the plaintiff had or intended to alter or delete content on her profile. The principle of proportionality underlies the disclosure and preservation obligations provided for in rules of civil procedure. For example, the objective of the rules of civil procedure in British Columbia is to secure the just, speedy, and least expensive determination of every civil proceeding on its merits.[31]

Similarly, the rules of civil procedure in Ontario emphasize that a court`s determination as to whether a party or other person must produce a document depends on whether it would require an unreasonable amount of time or expense, cause the party "undue prejudice", or "unduly interfere with the orderly progress of the action."[32] Accordingly, courts tasked with granting preservation orders are required to take into account the burden and benefit associated with the specific measures sought in each case. Yet, the Court in *Sparks,* in concluding that the extraordinary preservation order was appropriate, appears to have relied primarily on the fact that deletion was possible. Courts in subsequent cases may decline to make such extraordinary orders in the absence of evidence demonstrating a real possibility that relevant profile evidence is at risk.[33]

4. Alternatives

Insurers may have alternatives to reducing the risk of spoliation in the social networking context. In particular, insurers may seek orders compelling non-party social networking service providers to preserve, prevent deletion, or back up the contents of material on plaintiffs' access-limited profiles. Once such an order is obtained and the material preserved, an insurer may be able to safely seek production of the profile content directly from the plaintiff without facing the prospect of alteration or deletion. However, because compelling a non-party to make preservation efforts may involve considerable burden, expense, and disruption to its operations, courts are likely to require insurers to demonstrate not only a real risk of spoliation, but also that the likely benefit of the order sought outweighs the burden that would likely be suffered by the non-party if it were required to preserve the material.[34]

Insurers may also consider seeking *ex parte* orders to require plaintiffs to immediately request a copy of their profile material from their social networking service provider.[35] Many social networking service providers have policies which provide that deleted information may remain in their databases for a period of time after a user deletes it.[36] Accordingly, this approach may provide insurers with another way to ensure that evidence is preserved before a plaintiff has an opportunity to irreversibly alter or delete it. Profile material would likely be considered within the possession, control or power of the user for the purposes of disclosure to the extent that the social networking service provider must produce the information to the user when requested.[37]

These alternatives are likely preferable to seeking an order compelling a social networking service provider to disclose the contents of a plaintiff's profile directly to the insurer. This is because most social networking providers, which are located in the United States, appear to be subject to legislation which prohibits them from producing electronic content information in response to court orders in civil proceedings without a user's consent.[38] Although there have been no cases applying the legislation to social networking service providers, these statutes could apply to them if they disclosed substantive content from user profiles in response to civil court orders.[39] Although there is an exception for the disclosure of customer records or subscription information, the

exception does not extend to photographs, text, and similar content.[40]

[*Editor's note*: Matthew Nied, B.Comm. (Alberta), LL.B. (Victoria) clerked at the Supreme Court of British Columbia in 2010-2011 and is articling in Vancouver. The views expressed are personal opinions and not those of his employer.]

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1 *Frangione v. Vandongen,* [2010] O.J. No. 2337, 2010 ONSC 2823 at para. 33 [*Frangione*].

2 *Sparks v. Dubé,* [2011] N.B.J. No. 38, 2011 NBQB 40 at para. 66 [*Sparks*].

3 See *e.g. Murphy v. Perger,* [2007] O.J. No. 5511 at para. 11 [*Murphy*], where the Court noted that the plaintiff's profile material "might be used by the defendant in order to impeach the plaintiff's credibility regarding the impact of the accident on her life … and might also be useful as a means to assess the value of [the plaintiff's] claim for damages." See also *Wice v. Dominion of Canada General Insurance Co.,* [2009] O.J. No. 2946 at para. 16 (S.C.J.) [*Wice*].

4 See *Leduc v. Roman,* [2009] O.J. No. 681, 308 D.L.R. (4th) 353 at para. 23 (S.C.J.) [*Leduc*], where the Court remarked that it is "beyond controversy" that "a person's Facebook profile may contain documents relevant to the issues in an action". The Court went on to note several cases in which photographs posted on social networking profiles have been admitted as evidence relevant to demonstrating a party's ability to engage in recreational activities where the plaintiff has put his enjoyment of life or ability to work in issue: *Cikojevic v. Timm*, [2008] B.C.J. No. 72, 2008 BCSC 74 at para. 47; *R. (C.M.) v. R. (O.D.)*, [2008] N.B.J. No. 367, 2008 NBQB 253 at paras. 54, 61; *Kourtesis v. Joris*, [2007] O.J. No. 2677 (S.C.J.) at paras. 72-75 [*Kourtesis*]; *Goodridge (Litigation Guardian of) v. King*, [2007] O.J. No. 4611, 161 A.C.W.S. (3d) 984 (S.C.J) at para. 128. See also *Frangione, supra* note 1 at para. 34. For a further discussion of the use of social networking profile evidence in litigation, see Pamela D. Pengelley, "Fessing Up to Facebook: Recent Trends in the Use of Social Network Websites for Civil Litigation" (2009) 7 C.J.L.T 319. See also Ronald Podolny, "When 'Friends' Become Adversaries: Litigation in the Age of Facebook" (2009) 33(2) Man. L.J. 391.

5 For a further discussion of access-limited profiles, see *Frangione, supra* note 1 at para. 33. See also *Sparks, supra* note 2 at paras. 14-17.

6 See *e.g.* Rule 30.02(1) of the Ontario *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194 [*Ontario Rules*], which provides that "[e]very document relevant to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed". Material on social networking profiles is producible as "documents" under the rules of civil procedure in most jurisdictions, and is therefore subject to disclosure like any other document. See *e.g. Leduc, supra* note 4 at para. 27, where the Court remarked that material from social networking sites constitutes "data and information in electronic form" which are producible as "documents" under the *Ontario Rules*.

7 See Christopher Wirth, *Interlocutory Proceedings,* (Aurora, Ontario: Canada Law Book, 2007) at 3-1.

8 [2007] O.J. No. 5539 (S.C.J.). See also *Kourtesis, supra* note 4. This aspect of the case was recently discussed in *Sparks, supra* note 2 at paras. 29-31.

9 [2009] N.J. No. 86 (S.C.) [*Terry*].

10 *Ibid.* at para. 105.

11 *Ibid*.

12 For another example of a plaintiff that failed to comply with their disclosure obligation, see *Bass v. Miss Porter's School,* 2009 WL 3724968 (D. Conn. Oct. 27, 2009), where an *in camera* inspection revealed that a plaintiff had failed to disclose a large amount of relevant images and text from his Facebook profile. The Court responded by ordering production of the plaintiff's entire profile.

13 In many cases, insurers have sought production orders on a non-*ex parte* basis along with accompanying preservation orders to enforce the party's production obligation. However, this approach alerts the plaintiff of the insurer's intention to access the profile material and does not reduce the risk that a plaintiff will remove content from their profile before the hearing of the application or, if successful, the execution of the order. See also *Leduc, supra* note 4 and *Wice, supra* note 3. In those cases, courts granted the insurer defendants

leave to cross-examine the plaintiffs on their affidavit of documents to determine the nature of content posted on the plaintiffs' Facebook profiles, and required the plaintiffs to preserve their profile content in the interim.

[14] See *e.g. Schuster v. Royal & Sun Alliance Insurance Co. of Canada,* [2009] O.J. No. 4518 (S.C.J.) at para. 24 [*Schuster*].

[15] For preservation orders under the common law, see *e.g.* the Ontario *Courts of Justice Act,* R.S.O. 1990, c. C. 43, s. 101(1-2), which provides that an injunction may be granted "where it appears to a judge of the court to be just or convenient to do so" and on "such terms as are considered just." Rule 40 of the *Ontario Rules, supra* note 6 sets out the procedure to be followed in order to obtain an order under s. 101 of the *Courts of Justice Act.* The test for granting an interlocutory injunction was set out in *R.J.R. Macdonald Inc. v. Canada (Attorney General)*, [1994] S.C.J. No. 17, [1994] 1 S.C.R. 311. For preservation orders pursuant to the rules of civil procedure, see *e.g.* Rule 45.01(1) of the *Ontario Rules*, *supra* note 6 which provides that "[t]he court may make an interim order for the custody or preservation of any property in question in a proceeding or relevant to an issue in a proceeding, and for that purpose may authorize entry on or into any property in the possession of a party or of a person not a party." See also *e.g.* Rule 10-4 of the British Columbia *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*B.C. Rules*].

[16] *Schuster*, *supra* note 14.

[17] *Sparks*, *supra* note 2.

[18] The order was sought under Rule 45.01(1) of the *Ontario Rules, supra* note 6. Interestingly, the Court was unclear whether the insurer was seeking direct access to the plaintiff's profile or preservation of the profile's contents. Although the Court proceeded with the application assuming that the insurer was only seeking preservation, the Court noted that it would have declined to grant the insurer direct access to a plaintiff's profile because it would have been an unacceptable intrusion into the plaintiff's privacy, particularly because it would have required the plaintiff to disclose their login information to the insurer, which "would give the [d]efendant access to the [p]laintiff's private e-mail correspondence …, in addition to her profile, pictures, and wall postings." See *Schuster, supra* note 14 at paras. 13-20. Other courts have reached the same conclusion: see *e.g. Ottenhof v. Kingston (City) Police Services Board,* [2011] O.J. No. 976, 2011 ONSC 1430 at para. 3.

[19] *Schuster, supra* note 11 at paras. 27, 31, 49.

[20] *Ibid*. at para. 49.

[21] *Ibid*. at para. 50.

[22] See *e.g. Murphy*, *supra* note 3 at para. 17, where the Court suggested that an inference that an access-limited profile contained relevant photographs could be drawn from the fact that Facebook "is a social networking site where … a very large number of photographs are deposited by its audience." See also *Leduc, supra* note 4 at paras. 31 and 36, where the Court, although unable to infer from the presence of content on the party's public profile that similar content likely existed on the private profile, was nevertheless able to "infer from the social networking purpose of Facebook, and the applications it offers to users such as the posting of photographs, that users intended to take advantage of Facebook's applications to make personal information available to others." Accordingly, the Court was able to conclude, at para. 32, that the plaintiff's "social networking site likely contains some content relevant to the issue of how [the plaintiff] has been able to lead his life since the accident."

[23] *Schuster, supra* note 14 at para. 37.

[24] *Sparks*, *supra* note 2 at para. 35.

[25] The preservation order was sought pursuant to Rules 35.02 and 37.04(2) of the New Brunswick *Rules of Court*, NB Reg 82-73 [*N.B. Rules*]. In the alternative, an interlocutory injunction was sought pursuant to Rules 37.04(2), 40.01(b), and 40.05 of the *N.B. Rules*, and s. 33 of the *Judicature Act of New Brunswick,* R.S.N.B. 1973 Ch. J-2.

[26] In addition, the insurer needed to demonstrate that the profile material sought to be preserved was "property" within the meaning of Rule 35.02 of the *N.B. Rules, ibid*. The Court was satisfied that the plaintiff had a property interest in the data contained on her profile by virtue of the terms of conditions of use imposed by Facebook: *Sparks, supra* note 2 at para. 39-43.

[27] *Sparks, supra* note 2 at paras. 47-48.

[28] *Ibid.* at para. 55.

[29] The extraordinary order in *Sparks* may have been based on an unreported decision of the Court in the

earlier case of *Lodge v. Fitzgibbon*, [2009] N.B.J. No. 418, 2009 NBQB 332. In that case, the Court, in brief oral reasons, ordered defence counsel to attend at the offices of the plaintiff's counsel to view the plaintiff's Facebook profile to determine whether it contained relevant material.

[30] *Sparks*, *supra* note 2 at para. 81.

[31] Rule 1(5), *B.C. Rules, supra* note 15.

[32] Rules 29.2.03 of the *Ontario Rules, supra* note 6. See also Rule 1.04(1).

[33] In support of this proposition, one might draw an analogy to Anton Pillar orders, which authorize a party to enter the premises of an opponent to conduct a surprise search for the purpose of seizing and preserving evidence to further its claim: *Celanese Canada Inc. v. Murray Demolition Corp.*, [2006] S.C.J. No. 35, 269 D.L.R. (4th) 193 at paras. 1, 28-32, 35 (S.C.C.). Before granting Anton Pillar orders, courts have required parties to demonstrate a real possibility that relevant evidence will be destroyed or otherwise made to disappear. Because the nature of the order in *Sparks* is similarly invasive and implicates the same privacy interests as an Anton Pillar order, it may be appropriate for courts to apply the same standard. However, see *Yaghi v. WMS Gaming Inc.,* [2003] A.J. No. 1002, [2004] 2 W.W.R. 657 at para. 79 (Alta. Q.B.), where the defendant sought to set aside an Anton Pillar order allowing the plaintiff to enter his premises to seize computer equipment containing relevant information. In that case, the Court inferred the existence of a real possibility of destruction largely from the nature of electronic data: "[t]here are special difficulties in proving a case that relies on electronic data, and special concerns about the risk of destruction of electronic evidence. Given the transitory nature of computer evidence, the ease with which someone knowledgeable about computers can delete evidence from a hard drive, and the intimidating fashion in which Mr. Yaghi had behaved to this point, I am willing to infer a real possibility of destruction."

[34] See *e.g. Netbula, LLC v. Chordiant Software, Inc.,* 2009 WL 3352588 (N.D. Cal. Oct. 15, 2009) [*Netbula*]. There, the court took these factors into consideration before granting the defendant's motion to compel discovery of the plaintiff's archived web pages from an internet web page archive service.

[35] See *e.g. Carter v. Connors*, [2009] N.B.J. No. 403, 2009 NBQB 317 at para. 46. There, the Court ordered that the plaintiff request from her ISP a history of her past internet use up until the date of the decision, and distribute the material to the defendant insurer.

[36] Facebook's Data Use Policy, September 7, 2011, online: <http://www.facebook.com/full_data_use_policy> states that "[i]t typically takes about one month to delete an account, but some information may remain in backup copies and logs for up to 90 days."

[37] See *e.g. Netbula, supra* note 34, where the Court rejected the plaintiff's argument that copies of web page saved by an internet web page archive service were beyond the plaintiff's control and thus could not be provided in response to a disclosure request. The Court reasoned that the plaintiff had a legal right to obtain the documents on demand.

[38] *Electronic Communications Privacy Act,* 18 U.S.C. s. 2702(c) (2008) [*ECPA*] and *Stored Communications Act,* Pub. L. No. 99-508, 100 Stat. 1848 (1986). Courts have applied this legislation to refuse the enforcement of civil subpoenas served on ISPs for customer information or private communications. For further discussion, see Evan E. North, "Facebook Isn't Your Space Anymore: Discovery of Social Networking Websites" (2010) 58 U. Kan. L. Rev. 1279 at 1304-1307.

[39] MySpace likely accounted for this possibility in *Mackelprang v. Fid. Nat'l Title Agency of Nev., Inc.,* 2007 WL 119149 (D. Nev. Jan. 9, 2007) [*Mackelprang*], when it responded to a subpoena for a party's private messages by providing only limited identifying information about an account holder while refusing to produce the account holder's substantive content.

[40] See *e.g. In re Subpoena Tecum to AOL, LLC,* 550 F. Supp. 2d 606, 609 (E.D. Wa. 2008), where the Court stated that "the plain language of the [*ECPA, supra* note 38] prohibits AOL from producing the [non-party witnesses'] emails, and the issuance of a civil discovery subpoena is not an exception … that would allow an internet service provider to disclose the communications at issue here."