

Social Media Law Update

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[What You Wish Your Lawyer Had Told You About Social Media](#)

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The setting is the week before trial and the company has been ordered by the court to attend a final settlement conference. The company Kris Kringle Inc. is suing a former employee for taking the customer list and setting up a competing business for video games. Kris Kringle is also suing for deceptive trade practices and arguing that the defendant is getting business by confusing consumers and also posting disparaging comments about its video games.

You are attending as general counsel for the company with the president Kris Kringle. Up to now, the lawyer representing the company has told you what a great case the company has. That is very good news since the company has spent about \$1 million in attorney fees and expects to spend almost half of that through trial. Based on the attorney's advice and your experience, you encouraged Kris Kringle to file and pursue the case.

The settlement conference begins with the defendant Grinch, president and owner of Chris Crinkle, telling the court that he is serving a trial subpoena for the Facebook posts of Kris Kringle, and also wants to know the login and password on Facebook for Kris Kringle. It seems that Kris Kringle was posting some highlights of the case on his Facebook page in order to reassure customers and investors that the lawsuit would be behind the company soon and legal counsel is confident that the company will prevail.

First, Kris Kringle said that its attorney hired a private investigator who found proof that the Grinch, a disgruntled former employee, took the customer lists. And, second, the attorney said not to worry that the customer list Kris Kringle worked so hard to compile is information that can be built up using Twitter lists and followers of other video game companies, and LinkedIn.

This is when things went terribly wrong for Kris Kringle, Inc. The settlement judge turned to Kris Kringle and said you may want to settle for Grinch's last settlement offer and this is why.

1. Discovery of Social Media Including Login Names and Passwords.

The e-discovery rules are being extended to social media with more courts allowing discovery of social media accounts and web sites. If defendant Grinch can demonstrate that Kringle has public posts on social media that are relevant to the claims or defenses in this action, Grinch may get discovery of Kringle's posts, login name and password. See, e.g., [McMillen v. Hummingbird Speedway, Inc.](#), No. 113-2010 CD (Pa. Sept. 9, 2010).

Notwithstanding the "friends only" privacy setting that Kringle used in sharing to his 300 plus friends on Facebook, courts are not recognizing a "friend privilege" on social media, and have specifically rejected this privilege claim in several cases. Thus, the "privacy" settings are not necessarily a shield from discovery requests

in litigation.

2. Clients May Waive The Attorney-Client Privilege With Social Media Posts.

The settlement judge said the second piece of bad news concerns those posts in which you were trying to reassure your vendors and customers with some reasons for why your attorney thinks you will win. The Grinch is planning to call you and your attorney as witnesses at trial and question you about those discussions. The Grinch also plans to subpoena the private investigator's report and some discovery concerning the investigator's work.

The trial judge may allow some discovery into the areas you discussed in your social media posts, and the settlement judge referred your attorney to [Lenz v. Universal Music Corp.](#), 2010 WL 4286329 (N.D. Cal. Oct. 22, 2010) (in which the plaintiff was suing Universal for giving YouTube allegedly improper notice that the video of her toddler dancing to a Prince song was an unauthorized use, and then she discussed the case and discussions with her legal counsel on her blog site and in Gmail chats with friends).

3. The Merits of Your Case May Be Undercut By Social Media and the Internet.

The third piece of advice for why Kris Kringle may want to settle is the wealth of information on the Internet and social media is changing how courts are deciding cases on the merits. As Kris Kringle admitted in those social media posts, the customer list can be reconstructed through Twitter and LinkedIn and, therefore, it will be harder to demonstrate an essential element of the company's misappropriation of trade secrets claim. The settlement judge referred Kris Kringle, Inc. to [Sasqua Group, Inc. v. Courtney](#), 2010 WL 3613855 (E.D. N.Y. Aug. 2, 2010) in which the magistrate judge held the customer list was no longer a protected trade secret.

"The information in Sasqua's database concerning the needs of its clients.... may well have been a protectable trade secret in the early years of Sasqua's existence when greater time, energy and resources may have been necessary to acquire the level of detailed information to build and retain the business relationships at issue here. However, for good or bad, the exponential proliferation of information made available through full-blown use of the Internet and the powerful tools it provides to access such information in 2010 is a very different story."

Similarly, the court in a deceptive trade practices case considered comments made on defendant's web blog to determine if consumers were affected by the disparaging comments defendant posted on its blog about plaintiff QVC's competing vitamin products. The court denied plaintiff's application for a TRO because plaintiff did not demonstrate a likelihood of success on the merits. Generally, a plaintiff demonstrates consumer confusion through consumer surveys or expert testimony, but *QVC, Inc. v. Your Vitamins, Inc.*, 714 F. Supp. 2d 291 (D. Del. 2010) is an example of courts considering Internet evidence in deciding cases.

Conclusion

Social media and the Internet are changing how cases are being litigated, and how courts are applying the relevant law. Businesses and their corporate counsel should consult with legal counsel that is knowledgeable in social media law and litigation so they can make informed business decisions in deciding how to handle business disputes.

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