


# Social Networking Websites

## Changing the Face of Litigation and Document Production

BY GARY ZIMMERMANN



**S**ocial networking websites are a relatively new phenomena which carry significant potential for parties to all sorts of litigation. For example, the police are now using such sites to locate criminals that have evaded detection for years. Also, the courts in Australia have recently allowed service of a default judgment on defendants by notification posted to Facebook. To this end, it appears as if the use of this new media is limited only by one's ingenuity.

Because many of the claims made by plaintiffs are subjective complaints of pain accompanied by alleged disability, defendants have been looking for ways to verify or refute such allegations for years. Perhaps the best known method is through the use of a private investigator who takes photos or video of the plaintiff engaged in day-to-day activities. Then, when the photos contradict the plaintiff's version of events, his credibility will be brought into question.

Based on the presumption that most of us want to be famous, there is a treasure trove of unused "surveillance" on the terabytes of data stored by User Generated Content (UGC) sites like Facebook, You Tube and MySpace.

Arguably, the most dominant current social networking website is Facebook. As proof of its dominance, it has recently hit 200 million active users. Such a "population" makes Facebook the fifth largest "country" in the world.

While Facebook has many features, each user's account is broken down into four main categories: home, profile, friends and inbox.



Gary Zimmermann

In simple terms, a home page contains a "news feed" which provides information about an individual user or his "friends" (as posted by the "friends"). The profile page will contain a "mini-feed" which provides information about the individual user or his "friends" (as posted by the individual). As such, recent items on one person's profile page will form the basis for the recent items on his friends' home pages.

Typically the information found on home pages and profile pages will include photos and videos. An astounding 850 million photos and eight million videos are uploaded to Facebook monthly. Such photos and videos can be "tagged" with the identities of people contained in them. Then, by clicking one button, you can see all of the photos/videos which contain a specific person.

Further, profile pages include personal information such as marital status, sexual preference, work/education history, favorite activities, interests, and the like.

Finally, profile pages also include status updates, which generally advise a user's "friends" what s/he is doing at any point in time. In fact, Facebook

suggests that at least 20 million users update their status daily. While my Facebook profile would never be able to brag that "Gary ran a marathon today" or "Gary benched 250 lbs", such status updates are common.

Facebook boasts about its customizable privacy settings however, most people don't know how to use them or opt not to use them because to limit the information opposes the concept of "social networking."

While most people do not limit the privacy settings significantly, many do require that one must be a "friend" before seeing their profile. Such accounts are considered "private." With that said, strangely enough, it is common for people to accept friend requests from total strangers. While private investigators may be tempted to "befriend" their subjects (to get access to "private" pages), for reasons that go beyond the scope of this article, it is not recommended.

You Tube is another social networking website. It is devoted to the sharing of video clips. People can upload or view clips that range from personal family videos to commercially produced short films. You Tube suggests that it receives 10 hours of video uploaded every minute. Statistics reveal that over 150,000 videos are uploaded daily. While it too has certain privacy settings, the same are even more remote than those found in Facebook.

Finally, MySpace rounds out the top three social networking websites. It is very similar to Facebook in that users post information for others to view and comment upon. The infor-

mation includes specializing one's web page including reference to moods, blogs, bulletins, videos and pictures.

The amount of UGC available on the Internet is truly amazing. There are hundreds of websites devoted to social networking. The number of non-exclusive conglomerated users is estimated to exceed one billion people!

How then does one get access to this wealth of information if the desired account is "private"?

At its basic level, for information to be producible in a civil action, it must be considered relevant and material to the proceedings. For example, the information found on various social networking websites will be considered irrelevant in a debt action. With that said, counsel for the defendants in a personal injury action will surely argue that where a plaintiff puts his health in issue and claims that injuries have affected his activities of daily living, the candid "lifestyle" information, photos and videos found on the social networking sites is entirely relevant and material.

*Leduc v. Roman*, a personal injury case decided in late February of this year, is one of the few Canadian decisions on the topic of relevance and materiality as it relates to UGC.

In *Roman* the defendant appealed to an Ontario Superior Court Justice who ruled that the Master was correct in stating that "lifestyle" information should be referenced in the plaintiff's Supplemental Affidavit of Records "even if it is contrary to his interests". But (unlike the Master) instead of finding that the defendant was on a fishing expedition, the Justice ruled it was reasonable for the court to infer the Facebook account contained information relevant to the proceedings. While further production was not ordered on appeal, Justice D.M. Brown ruled that the defendant could cross-examine the plaintiff on his Supplemental Affidavit of Records thus ostensibly opening up the door for a further application to compel the Facebook records.

Assuming that the UGC information is relevant, what methods can be used to obtain such information?

First, a plaintiff can disclose print-outs of the relevant pages voluntarily in the initial document exchange. With that said, social networking websites are new and this area of record production is far from settled law. In fact, most counsel on both sides haven't even contemplated the use of social networking information in litigation. As such, their continual absence from a plaintiff's production is the norm and most often goes unnoticed.

Second, a defendant can seek to have records provided through the oral discovery phase of the litigation. In such case, the defendant will want to lay the proper foundation for the relevance and materiality of the peer network information.

The defence counsel will want to ask if the plaintiff has a social networking account. Assuming the plaintiff answers in the affirmative, the defence counsel will want to question the

plaintiff on the contents of such account. Does the plaintiff post pictures, videos, status updates? Have they been tagged in photos or videos? The defence counsel will also want to lock the plaintiff into the information found on the site. To this end, they will want to ensure that the plaintiff is the only person that posts to the individual site and that they are in sole control of the individual accounts.

Once the foundation has been laid, defence counsel should ask for an undertaking to preserve the account in its current state until a printout of each of the relevant pages has been provided to the defendant. Such would include photos, basic information and even relevant emails.

A third method to obtain the documents can occur through an application brought by the defendant for a further and better Affidavit of Records.

Finally, many jurisdictions allow a party to compel production of relevant

and material documents held by third parties, not involved in the litigation. While there are few precedents regarding the application of this principle to UGC websites, it should apply.

By way of example, a subpoena *Duces Tecum* without deposition (an order compelling a witness to provide specified documents, without oral evidence) was recently granted to the State of Florida in their criminal case against Casey Anthony. Some will recall that Casey Anthony was indicted for the first-degree murder of her two-year-old daughter whom she did not declare missing for over one month. In that case, the subpoena provided that MySpace was to hand-over “[a]ny and all internet usage activity of record, whether current or deleted from the internet user’s page, including but not limited to: private messages, page comments, friends, friend requests, blogs, bulletins, IP addresses from visitors viewing profile, etc which pertain

to Casey Marie Anthony.” By analogy, an order should apply to any case where the records are relevant and material.

Because most social networking websites are less than five years old, there is very little case law in Canada (or elsewhere in the world for that matter) related to production of UGC. With that said, the rules of court in most jurisdictions already apply and it is simply a matter of applying the old rules to new technology. Through such process, there is a vast array of information, photos and videos that will go a long way to support or discredit many of the plaintiff’s allegations.



*Gary Zimmermann is an associate with McLennan Ross in Edmonton, Alberta. McLennan Ross is a member firm of the ARC Group of Canada Inc.*