

CAN I SUBPOENA FACEBOOK?

COMPELLING PRIVATE SOCIAL MEDIA CONTENT

by Chelsa Thompson

You may have heard this story before. You, a legal professional, find yourself embroiled in a case necessitating the admission of electronically stored information (ESI) into evidence, specifically social media content. However, you are unsure as to the exact nature and extent of the content due to the user's privacy settings. Moreover, opposing counsel has stood firm that the content in question is not relevant to the case, or perhaps insists it does not exist at all, and the judge is not inclined to compel your opponent on a hunch. One of the most common questions investigators are asked by our clients is: "Can I subpoena private social media content?" The answer is maybe – but probably not.

STORED COMMUNICATIONS ACT

The protections afforded to social media platforms by the Stored Communications Act (SCA) remains a point of heated discussion in legal circles. In part, the SCA protects ESI, such as emails and all communications understood to be "private," from subpoena of a third-party. However, the implications of the SCA on social media platforms which function both as a public and private platform remain uncertain.

In the seminal case, *Crispin v. Christian Audigier, Inc.* (2010), defense counsel attempted to subpoena content from multiple social media platforms, including Facebook, to obtain "all communications" between the defendant and the plaintiff.ⁱ This matter arose as part of discovery requests in private litigation, when defendant Christian Audigier, Inc. served subpoenas on Facebook and MySpace for access to communications between the plaintiff and a third party. The Central District of California held that the requested ESI fell under the Stored Communications Act, 18 U.S.C. 2701 (SCA) and therefore could not be compelled. Prior to this case, the SCA protected domestic emails and private messages from discovery, but not necessarily communications posted to social media sites in the form of "comments" and "wall posts". The court's broad interpretation of the Act curtailed access to data on social media sites, reasoning that, because the content is "temporarily" stored for "backup protection purposes" it was protected under subsection 17 (A) and (B) respectively of the SCA. The Act defines "electronic storage" as follows:ⁱⁱ

- A** any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and
- B** any storage of such communication by an electronic communication service for purposes of backup protection of such communication;"

In most jurisdictions this has been interpreted to mean that while a judge can compel a user to deliver specific content to opposing counsel, social media platforms are generally immune from such orders.ⁱⁱⁱ

FACEBOOK POLICY

Most notably, Facebook, anchored in the precedent set by Crispin, considers itself to be prohibited from sharing user content with any non-governmental entity without a subpoena. Moreover, once a subpoena is acknowledged, Facebook will turn over only “basic subscriber information” (i.e. information used to create an account), not content such as status updates, comments, photos, and the like.^{iv} Facebook instead created an archiving tool which enables users to download the entirety of their Facebook timeline. This process can be conducted on both public and private (and the various levels of privacy settings in between) accounts at any time by going to “General Account Settings” and selecting the hyperlink “Download a copy of your Facebook data” (assuming the account has not been deleted in the past 90 days). Below is language pulled directly from Facebook’s “General Account Settings” section defining the function of their tool:

“Download Your Info: This includes a lot of the same information available to you in your account and activity log, including your Timeline info, posts you have shared, messages, photos and more. Additionally, it includes information that is not available simply by logging into your account, like the ads you have clicked on, data like the IP addresses that are logged when you log into or out of Facebook, and more. To download your information, go to your Settings and click Download a copy of your Facebook data.”^v”

It is important to note that downloading such content requires the cooperation of the user.

BEST PRACTICE

The malleable application of the SCA’s protections means compelling a social media platform to turn over user data is difficult if not futile.^{vi} Social media continues to be the platform on which the general public feels comfortable sharing details of their lives, and the data shared on these platforms is becoming more relevant to legal professionals every day. For now, the optimal standard practice remains to gather, authenticate and preserve open source intelligence (OSINT); i.e. information available to the public and therefore not protected by a user’s privacy settings. Given the complexity of the task, engaging a trusted third-party service provider is almost always best practice.

- i. “eDiscovery Case Law: Crispin v. Christian Audigier Inc.” Doug Austin. December 30, 2010. Accessed via: <https://www.ediscovery.co/ediscoverydaily/case-law/ediscovery-case-law-crispin-v-christian-audigier-inc/>
- ii. “18 U.S. Code 2510.” Cornell Law School. Legal Information Institute. 1992. Accessed via: <https://www.law.cornell.edu/uscode/text/18/2510>
- iii. “Don’t Ask For Too Much: Court Strikes Balance in Addressing Dispute Over Discoverability of Social Media.” Scott J. Etish. July 11, 2017. Accessed via: <https://www.ediscoverylawalert.com/2017/07/11/dont-ask-much-court-strikes-balance-addressing-dispute-discoverability-social-media/>
- iv. “Facebook Doesn’t Care Much About Your Lawyerly Subpoena.” Ernie Svenson. August 24, 2011. Accessed via: <http://ernietheattorney.net/facebook-doesnt-care-much-about-your-lawyerly-subpoena/>
- v. “Download a copy of your Facebook data.” Facebook. Accessed via: <https://www.facebook.com/settings>
- vi. “Crispin v. Christian Audigier, Inc.: Stored Communications Act Protects Facebook and MySpace Users’ Private Communications.” Kathryn Freund. June 11, 2010. Jolt Digest. Accessed via: <http://jolt.law.harvard.edu/digest/crispin-v-christian-audigier-inc>