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List-Serve: Looking for Privacy in all the Wrong Places

By Andrew J. Weill, *Weill & Mazer*

Many of the members of NADC find the list-serve to be a valuable tool for the exchange of information. Because members are communicating with colleagues sharing similar values, they often feel free to be candid in assessing legal strategies, witnesses, courts, etc. However, the users of the list-serve should be aware that these communications may be subject to discovery and other unwanted consequences.

Generally speaking, a person does not have an expectation of privacy in any information that they voluntarily post on a public website or list-serve. In a federal civil rights case, *McCarthy v. Barrett,* 804 F. Supp.2d 1126, 1145 (W.D. Wash. 2011), plaintiffs alleged that their private affairs were disturbed in violation of state law when police officers monitored plaintiffs' participation on internet list-serves. The court held, "Plaintiffs had no privacy interest in any information that they voluntarily posted on public websites or list-serves, and it is disingenuous for them to claim that their private affairs were disturbed when law enforcement monitored their *public* postings." (Emphasis in original.) Note, however, that the court did not deal with the expectation of privacy associated with a private list-serve.

Privacy of electronic communication has evolved from privacy considerations determined through challenges to letter correspondence, and cases on the latter may be analogous. Typically, the sender's expectation of privacy regarding letters ordinarily terminates upon delivery, even if the sender asked the recipient to keep the matter private. *U.S. v. King,* 55 F.3d 1193, 1196 (6th Cir. 1995). This principle was applied to email communications in Guest v. Leis, 255 F.3d 325, 333 (6th Cir. 2001).

An interesting analysis of the issue can be found in a reported court-martial decision involving the validity of the Government's seizure of stored email communications from a computer. The court in *U.S. v. Maxwell,* 45 M.J. 406, 419 (C.A.A.F. 1996) stated: "Messages sent to the public at large in the "chat room" or e-mail that is "forwarded" from correspondent to correspondent lose any semblance of privacy. Once these transmissions are sent out to more and more subscribers, the subsequent expectation of privacy incrementally diminishes. This loss of an expectation of privacy, however, only goes to these specific pieces of mail for which privacy interests were lessened and ultimately abandoned." The court found that an expectation of privacy existed in email transmissions made on the AOL service, and concluded that a private email communication had been improperly seized.

A further matter of interest is the expectation of privacy regarding private material on a system or bulletin board. A workplace policy disclaimer stating that there is no expectation of privacy for the user regarding internet usage, emails and file transfers has been upheld in the workplace. *U.S. v. Simons,* 206 F.3d 392, 398-399 (4th Cir. 2000) The court noted that "whenever one knowingly exposes his activities [or effects] to third parties, he surrenders Fourth Amendment protections' in favor of such activities or effects" (alteration in original) (quoting *Reporters Committee for Freedom of the Press v. AT&T,* 593 F.2d 1030, 1043 (D.C.Cir.1978). See also, Guest v. Leis, supra, 255 F.3d 325, 333 ("disclaimer defeats claims to an objectively reasonable expectation of privacy").

However, to the extent that a list-serve is considered the equivalent of a private bulletin board service, there is a body of law that BBS contents are subject to the Stored Communications Act (the "SCA") of the Electronic Communications Privacy Act ("ECPA"), found at 18 U.S.C. §§ 2701 to 2712. *U. S. v. Steiger,* 318 F.3d 1039, 1049 (11th Cir. 2003) ("Thus, the SCA clearly applies, for example, to information stored with a phone company, Internet Service Provider (ISP), or electronic bulletin board system (BBS)"); *Konop v. Hawaiian Airlines, Inc.,* 302 F.3d 868, 875 (9th Cir. 2002) ("The legislative history of the [SCA] suggests that Congress wanted to protect electronic communications that are configured to be private,

such as email and private electronic bulletin boards"); *Steve Jackson Games, Inc. v. U.S. Secret Service,* 36 F.3d 457, 462 (5th Cir.1994) (holding that the SCA "clearly applies" to the seizing of information on a BBS); *Becker v. Toca,* No. 07-7202, 2008 WL 4443050, at *4 (E.D. La. Sept. 26, 2008) ("Courts have interpreted the statute to apply primarily to telephone companies, internet or e-mail service providers, and bulletin board services"); *Kaufman v. Nest Seekers, LLC,* No. 05 CV 6782(GBD), 2006 WL 2807177, at *5 (S.D.N.Y. Sept. 26, 2006) ("An electronic bulletin board fits within the definition of an electronic communication service provider"); *Inventory Locator Service, LLC v. Partsbase, Inc.,* No. 02-2695 MA/V, 2005 WL 2179185, at *24 (W.D. Tenn. Sept. 6, 2005) (finding that the SCA not only applied to entities that provide gateway access to the Internet, but also applied to a password-protected website containing an electronic bulletin board and a web-based forum where parties could communicate). See also, *Crispin v. Christian Audigier, Inc,* 717 F.Supp.2d 965, 980 (C.D. Ca. 2010), where the judge refused to allow a subpoena of personal Myspace and Facebook postings because they were protected by the SCA: "Facebook wall postings and the MySpace comments are not strictly 'public,' but are accessible only to those users plaintiff selects."

While the law is not completely settled, most courts have found that the SCA operates to preclude civil discovery directed at electronic communications within its scope. *Thayer v. Chiczewski,* No. 07 C1290, 2009 WL 2957317 at *5 (N.D. Ill. Sept. 11, 2009) ("most courts have concluded that third parties cannot be compelled to disclose electronic communications pursuant to a civil--as opposed to criminal--discovery subpoena")

A recent California case, *Muniz v. United Parcel Serv., Inc.,* No. C-09-01987-CW (DMR), 2011 WL 311374 (N.D. Ca. Jan 28, 2011) dealt with the issue of whether list-serve communications can be subject to discovery during litigation. The plaintiff's attorney had sent out messages through a list-serve sharing his thoughts about that case (and in particular some unflattering references to the judge). The defendant's attorney subpoenaed the list-serve records, claiming that those records were relevant to the attorneys' fees motion that was pending before the court. The attorney's association that hosted the list-serve was outraged and considerable ink was devoted to the discoverability of the list-serve communications. The district court considered all of these arguments and did what courts do best: it ducked the tough issue, finding that the communications sought were irrelevant to the attorney's fees motion.

While there may be arguments to resist discovery directed at list-serves, there is certainly no guarantee. One should use common sense in making postings on a list-serve. There are matters that are far best reserved for communications with assurances of confidentiality that may not exist on a list-serve. In drafting the NADC list-serve guidelines, we have been mindful of the above lessons. The old saying continues to be true: discretion is the better part of valor.

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