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Mobile Messaging Making E-Discovery Messy: Mobile Messaging and Electronic Discovery

by

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Ah... do you remember when there were “two-party phone lines” or when a melodious-voiced operator would ring your phone and say, “Please hold, there is a long distance call for you”?

Well, those halcyon days are over, and the entire world of communications, as you well know if you are over 45 years old, is on a kind of “rocket to the stars” where your voice, through instant messaging (IM), Twitter[®] or email, seems to careen wickedly fast through the star-studded universe to arrive at an intended destination. All of this occurs now without the use of a cordless or mobile phone, or even a computer. Welcome to the world of mobile messaging.

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The constantly evolving universe of mobile messaging now has, and will in the future have, a significant impact on litigation in the area of mobile electronic discovery (“e-discovery”). We have indeed reached a new frontier. Software programs such as the feature-rich Windows Mobile and Microsoft® Office Mobile applications help deliver a desktop-like experience to small devices. Powerful processors, cheap availability of large amounts of random access memory (RAM), and memory storage to prevent data loss make the mobile device a robust business tool.

While laws concerning electronic discovery are front and center, their application to mobile communications, which merges oral and data communications, presents a new frontier that raises a litany of unique issues regarding privacy, data retention, and production. This article examines those issues.

Mobile messaging refers to the ability to send and receive short, text-based messages via mobile phone using the Short Message Services (“SMS”) function offered by mobile network providers. As mobile network systems and mobile handsets advance, it will be possible to send more complex data.

The convenience and simplicity of SMS, combined with the evolution of pricing models (especially unlimited SMS bundles), have contributed to a significant growth of the SMS market in the U.S. and Europe over the past few years. According to a June 2009 Nielsen study of cell-phone usage, the average number of monthly texts for a U.S. mobile teen is 2,899.¹ One California teenager (apparently unafraid of parental authority) received national publicity for racking up 14,528 text messages in a single month.²

The main application of SMS has been the exchange of text messages between mobile users. Predating mobile application stores, SMS also remains today the de facto method for delivering binary mobile content to the end user. This is accomplished via a premium SMS where a user sends a request, via SMS, to a short-code belonging to the content owner. The price of this premium SMS is determined by the content owner as the message price primarily reflects the price of the content delivered (e.g., ringtone). Revenue is shared between the content provider and the operator. Thanks to the simplicity of this model, a rich ecosystem of content providers has evolved with the

1. Nielson Company, *How Teens Use Media*, June 2009, http://blog.nielsen.com/nielsenwire/reports/nielsen_howteensusemedia_june09.pdf.

2. Susannah Cahalan, *This Kid's a Text Maniac*, N.Y. POST, Jan. 11, 2009 at 8, available at www.nypost.com/seven/01112009/news/nationalnews/this_kids_a_text_maniac_149614.htm.

offering spanning a variety of services, including: personalization of mobile phones (e.g., tones, logos, screen savers); directory services; dictionaries; premium alerts regarding news, sports, finance, and entertainment; chat rooms; dating services; and social network messaging (e.g., Facebook or MySpace activity updates). In short, the SMS-based content delivery method has significantly expanded the availability of, and enhanced an average user's access to, a wide variety of mobile content and services. Innovation will likely continue to increase the scope and complexity of mobile messaging and thus lead to more frequent and complex mobile messaging e-discovery issues.

As one reads this article, a natural question is, "How does this mobile messaging work?" On the macro-scale, it is pretty straightforward: the message from the sending mobile is stored in a central SMS center, which then forwards the message towards the destination mobile.³ A recipient mobile, possibly offline, could also have the SMS stored in the SMS center and available to be delivered later.⁴ It is also possible to specify the period (often referred to as the validity period) after which the SMS message would be deleted from the SMS center, so that the SMS message would not be forwarded to the recipient mobile phone when it goes online.⁵

Originally standardized and implemented in "Global System for Mobile Communications" ("GSM") networks, SMS networks that integrate with fixed networks have now been introduced as well.⁶ With personal communication system networks ("PCS") based on all three mentioned technologies that support SMS—GSM, "Code Division Multiple Access" ("CDMA"), and "Time Division Multiple Access" ("TDMA")—digital messages can be readily sent or received concurrently with data, fax, or voice communications.⁷ Additionally, the technology for Voice over Internet Protocol ("VoIP") is proceeding like a lightning bolt, further widening the frontier. VoIP is a technology by which oral communications can be transferred from circuit-switched networks to Internet Protocol networks, and

3. Developer's Home Page, *What is an SMS Center/SMSC?*, http://www.developershome.com/sms/sms_tutorial.asp?page=smcsc (last visited May 25, 2009).

4. Developer's Home Page, *Basic Concepts of SMS Technology*, http://www.developershome.com/sms/sms_tutorial.asp?page=basicConcepts (last visited May 25, 2009).

5. *Id.*

6. S. Collesei, P. Di Tria & G. Morena, *Short Message Service Based Application In The GSM Network*, 3 IEEE INTERNATIONAL SYMPOSIUM IEEE/ICCC 939, 940 (1994).

7. Moe Rahnema, *Overview of the GSM System and Protocol Architecture*, 31 IEEE COMMUN. MAG. 92, 99 (1993).

vice versa.⁸ It transforms standard oral telephone signals into compressed data packets that are then sent over the Internet via an Internet Protocol.⁹ VoIP's ability to originate or receive short messages (PC to device, device to PC, i.e., email to SMS and vice versa) blurs the once clear line between oral and data communications, further complicating the world of e-discovery.

E-discovery is now found on almost every constellation of human communication. Litigants appearing before a court seeking mobile discovery must clearly define and identify the relevant e-discovery, and then address the cost and burden of the compliance.¹⁰

Since 1970, courts have struggled to integrate digital production's highly variable cost structure into the Federal Rules' traditional discovery principles.¹¹ This struggle reached crisis mode in the past decade with federal courts attempting to align e-discovery with technological advances in such cases as *McPeek v. Ashcroft*,¹² *Rowe Entm't, Inc. v. William Morris Agency, Inc.*,¹³ and *Zubulake v. UBS Warburg, LLC*.¹⁴ Under these decisions, as well as others, corporations have been ordered to produce, sometimes at considerable expense, computerized information, including e-mail messages, support systems, software, voice mail systems, computer storage media, and backup tapes and telephone records.¹⁵

In December 2006, the Federal Rules were broadly amended in another attempt to guide discovery and production of electronic

8. See THE OECD WORKING PARTY ON TELECOMMUNICATIONS AND INFORMATION SERVICES POLICIES, POLICY CONSIDERATIONS OF VOIP 6, available at <http://www.oecd.org/dataoecd/59/55/36316212.pdf>.

9. *Id.*

10. FED. R. CIV. P. 26. See also Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 48 F.R.D. 487, 527 (1970).

11. See, e.g., *Anti-Monopoly, Inc. v. Hasbro, Inc.*, 1995 WL 649934 at *1 (S.D.N.Y. 1995).

12. 202 F.R.D. 31, 35 (2001) (holding that the DOJ will have to search in the restored e-mails for any document responsive to any of plaintiff's requests for production of documents, and then file a sworn statement to the expense and time used for the search).

13. 205 F.R.D. 421, 433 (S.D.N.Y. 2001) (holding that "plaintiffs shall designate one or more experts who shall be responsible for isolating each defendant's e-mails and preparing them for review. The defendants shall have the opportunity to object to any expert so designated.").

14. 217 F.R.D. 309, 324 (S.D.N.Y. 2003) (holding that because the cost-shifting analysis is so fact-intensive, it is necessary to determine what data may be found on the inaccessible media, and requiring the responding party to restore and produce responsive documents from a small sample of the requested backup tapes is a sensible approach in most cases).

15. *Id.* See also *McPeek*, 202 F.R.D. 31; *Rowe*, 205 F.R.D. 421.

information in litigation.¹⁶ The new rules added the term “Electronically Stored Information,” or “ESI,” and set out a series of requirements and obligations for parties to identify ESI at the start of litigation.¹⁷ ESI is described in Federal Rule 34(a) as “data or data compilations—stored in any medium from which information can be obtained directly or, if necessary, after translation by the responding party into a reasonably usable form. . . .”¹⁸ This would presumably include data received or transmitted by mobile devices. Courts have responded to these new rules by actively requiring all parties to a case, whether corporate or individual, to preserve, identify, disclose, and produce any relevant information on an electronic device.¹⁹ Failure to comply in good faith could result in sanctions from the court.²⁰

Among the amendments was the creation of a limited safe harbor provision from sanctions arising from the loss of electronically stored information as a result of the “routine, good faith operation of an electronic information system.”²¹ Application of this rule requires that the producing litigant demonstrate that it tried to preserve evidence it knew or should have known to be relevant to the litigation.²² Mobile discovery usually requires the participation of third party telecommunication companies, for which this safe harbor

16. FED. R. CIV. P. 26, 34, 37.

17. FED. R. CIV. P. 34(a).

18. *Id.*

19. *See, e.g.,* Arista Records LLC v. Usenet.com, Inc., 608 F. Supp. 2d 409, 440 (2009) (imposing attorneys fees, costs, and adverse inference sanction for defendant’s failure to preserve usage data and digital music files from its servers). *See* Fox v. Riverdeep, Inc., No. 07 Civ. 13622, 2008 U.S. Dist. LEXIS 101633 (E.D. Mich. Dec. 16, 2008) (awarding sanctions where defendant failed to preserve evidence, including emails, once it received cease and desist letter); Gordon Partners v. Blumenthal, 244 F.R.D. 179, 200–01 (S.D.N.Y. 2007) (imposing adverse inference spoliation sanction in securities fraud action because defendant corporation had the practical ability to obtain documents it needed from a non-party corporation and defendant corporation’s failure to preserve e-mails relevant to plaintiffs’ claims was grossly negligent); Cache La Poudre Feeds, LLC v. Land O’Lakes, Inc., 244 F.R.D. 614, 636 (D. Co. 2007) (imposing monetary sanctions and requiring defendant to bear the cost of a second review of its computer files and website for relevant ESI).

20. FED. R. CIV. P. 37(e). The good faith requirement of Rule 37(e) means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that the party is required to preserve. Nonetheless, the requirement is not explicit. Rather, it allows for failure to produce discoverable evidence only when the failure is due to honest, unforeseeable circumstances that are unrelated to the litigation, or if, through no fault of their own, the party is unable to produce the specified information.

21. *Id.*

22. *Id.*

provision could apply to shield litigants who have difficulty producing documents from third parties in response to mobile discovery requests.

In 1928, Justice Brandeis, in his dissent in *Olmstead v. United States*, anticipated that technological advancement would enable the government to employ surveillance tools extending far beyond wiretapping.²³ Justice Butler, also dissenting, asserted that Fourth Amendment protections must be interpreted broadly to safeguard against new abuses that had not been previously envisioned.²⁴ Thus, Brandeis sought to protect the individual's "right to be let alone" without regard to the different technologies that might be employed by the government to compromise that right.²⁵ Justice Brandeis' forward-looking focus on individuals' underlying privacy interests presents a compelling perspective that often differs from the courts' treatment of data collected and retained by businesses. Since *Katz v. United States* in 1967, federal courts have routinely forbidden third parties from tapping or monitoring oral communications.²⁶

Oral and data communications are now propelled like rockets over the same wires simultaneously, encapsulated in digital data packets. With the convergence of oral and data information into a single transmission medium, the courts, like computers, can have difficulty adequately distinguishing between oral and data communications. The digital age and the use of the mobile and analogous technologies has muddled the legal distinctions that used to guide the courts, rendering the rules of e-discovery confusing to administer. Not only do voice and data communications blend, but mobile devices are frequently used for both personal and business reasons, which creates privacy issues like the ones Justice Brandeis mentioned in *Olmstead*.²⁷ This convergence of electronic documents, oral communications, and written messages together with varied cost structures and the differing policy concerns applicable to each causes a break down in the current production framework for litigation.

In their efforts to understand the starburst of technologies, courts need to recognize that, because of the distributed and expansive nature of most mobile communications, the costs of identifying, preserving, and producing mobile communications such as SMS are

23. 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting).

24. *See id.* at 488 (Butler, J., dissenting).

25. *See id.* at 478 (Brandeis, J., dissenting).

26. 389 U.S. 347, 359 (1967) (holding that "[w]herever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures.").

27. *Olmstead*, 277 U.S. at 471-79 (Brandeis, J., dissenting).

significant. Production and preservation often involves third party telecommunication service providers, such as Verizon, Sprint, T-mobile, and AT&T. These generally higher costs of preservation and production, combined with the greater protections traditionally provided to private, non-business communications, support the supposition that courts should continue to apply scrutiny when evaluating the necessity and scope of mobile discovery requests, and should apply the safe harbor provision of Rule 37(e),²⁸ or its state equivalents, more liberally when evaluating mobile communication discovery disputes.²⁹ This would enable the courts to address the unique privacy concerns applicable to the mobile medium, and provide an efficient and cost-effective legal protocol for litigants and the court.

An alternative to this liberal application of the safe harbor provision is for the Advisory Committee to the Federal Rules, or the federal and state courts, to carve out a new, specific mobile discovery rule that balances cost versus reasonableness. Courts, or the Advisory Committee, should consider and balance the need for the requested discovery and grant a litigant's mobile discovery requests with caution (particularly where oral communications are sought) when the litigants are unable to avail themselves of the information through an alternative source. The above suggested approach is necessary to appropriately balance the substantial costs, burdens, and policy concerns attendant to mobile electronic discovery. Failure to do so may result in litigants and courts riding an out of control missile of e-discovery, seemingly ricocheting off satellites, without a melodious-voiced operator saying, "Please hold on, there is a long distance call for you."

28. FED. R. CIV. P. 37(e).

29. *Compare* Disability Rights Counsel of Greater Wash. v. Wash. Metro Transit Auth., 242 F.R.D. 139, 148 (D.D.C. 2007) (compelling production of the defendant's backup tapes containing electronically stored information where the defendant did not suspend its routine e-mail deletion process, leaving only the backup tapes, which the defendant then argued were not reasonably accessible).

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