

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: JURY 2

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THE PEOPLE OF THE STATE OF NEW YORK

-AGAINST-

DECISION AND ORDER

Docket No: 2011NY080152

MALCOLM HARRIS

DEFENDANT

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MATTHEW A. SCIARRINO JR., J.:

Twitter, Inc. (“Twitter”) seeks to quash the January 26, 2012 subpoena issued by the New York County District Attorney’s Office and upheld by this court’s April 20, 2012 order. That order required Twitter to provide any and all user information, including email addresses, as well as any and all tweets posted for the period of September 15, 2011 to December 31, 2011, from the Twitter account @destructuremal, which was allegedly used by Malcolm Harris. This is a case of first impression, distinctive because it is a criminal case rather than a civil case, and the movant is the corporate entity (Twitter) and not an individual (Harris). It also deals with tweets that were publicly posted rather than an e-mail or text that would be directed to a single person or a select few.

On October 1, 2011, the Defendant, Malcolm Harris, was charged with Disorderly Conduct (Penal Law §240.20 [5]) after allegedly marching on the roadway of the Brooklyn Bridge. On January 26, 2012, the People sent a *subpoena duces tecum* to Twitter seeking the defendant’s account information and tweets for their relevance in the ongoing criminal investigation (CPL 610; Stored Communications Act [18 USC §2703(c)(2)]). On January 30, 2012, Twitter, after conferring with the District Attorney’s office, informed the defendant that the Twitter account @destructuremal had been subpoenaed. On January 31, 2012, the defendant notified Twitter of his intention to file a motion to quash the subpoena. Twitter then took the position that it would not comply with the subpoena until the court ruled on the defendant’s motion to quash the subpoena and intervened.

On April 20, 2012, this court held that the defendant had no proprietary interest in the user information on his Twitter account, as he lacked standing to quash the subpoena (*See* CPLR 1012 [a], 1013; *People v Harris*, __NYS2d__, 2012 NY Slip Op 22109 [Crim Ct, NY County 2012]). This court ordered Twitter to provide certain information to the court for *in camera* review to safeguard the privacy rights of Mr. Harris.

On May 31, 2012 David Rosenblatt, a member of Twitter’s Board of Directors, was personally served within New York County with a copy of this Court’s April 20, 2012 order, a copy of the January 26, 2012 trial subpoena, and a copy of the March 8, 2012 trial subpoena. Twitter subsequently moved to quash the April 20, 2012 court order. To date, Twitter has not complied with this court’s order.

Discussion:

Twitter is a public, real-time social and information network that enables people to share, communicate, and receive news. Users can create a Twitter profile that contains a profile image, background image, and status updates called tweets, which can be up to 140-characters in length on the website.¹ Twitter provides its services to the public at large. Anyone can sign up to use Twitter’s services as long as they agree to Twitter’s terms. Twitter is a Delaware corporation with its principal place of business in California.

The Stored Communications Act (“SCA”) (18 USC §2701 *et seq.*) defines and makes distinctions between Electronic Communication Service (“ECS”) versus Remote Computing Service (“RCS”), and content information versus non-content information. ECS is defined as “any service that provides the user thereof the ability to send or receive wire or electronic communication.” (*See* 18 USC §2510[15]). RCS is defined as “the provision to the public of computer storage or processing services by means of an electronic communications system.”(*see* 18 USC § 2711[2]). The Wire Tap Act (18 USC §2510[8]) defines content information as “contents, when used with respect to any wire, oral or electronic communication, includes any information concerning the substance, purport, or meaning of that communication.” In contrast,

¹ (*See Guidelines for Law Enforcement*, <https://support.twitter.com/entries/41949-guidelines-for-law-enforcement/> [accessed May 30, 2012].)

logs of account usage, mailer header information (minus the subject line), list of outgoing e-mail addresses sent from an account, and basic subscriber information are all considered to be non-content information.²

While Twitter is primarily an ECS (as discussed in *Harris*, __NYS2d__, at 6), it also acts as a RCS. It collects and stores both non-content information such as IP addresses, physical locations, browser type, subscriber information, etc. and content information such as tweets. The SCA grants greater privacy protections to content information because actual contents of messages naturally implicate greater privacy concerns than network generated information about those communications.³

1. Twitter Users and Standing to Challenge Third-Party Disclosure Request

Twitter argues that users have standing to quash the subpoena. The issue is whether Twitter users have standing to challenge third-party disclosure requests under the terms of service that existed during the dates in question. In *Harris*, (*id.* at 7) the New York City Criminal Court held that a criminal defendant did not have standing to quash a subpoena issued to a third-party online social networking service because the defendant has no proprietary interest. The court's decision was partially based on Twitter's then terms of service agreement. After the April 20, 2012 decision, Twitter changed its terms and policy effective May 17, 2012. The newly added portion states that: "You Retain Your Right To Any Content You Submit, Post Or Display On Or Through The Service." (See Twitter, *Terms of Service*, <https://twitter.com/tos/> [accessed June 11, 2012]).

Twitter argues that the court's decision to deny the defendant standing places an undue burden on Twitter. It forces Twitter to choose between either providing user communications and account information in response to all subpoenas or attempting to vindicate its users' rights by moving to quash these subpoenas itself. However, that burden is placed on *every* third-party

² Orin Kerr, Comment, *A User's Guide to the Stored Communications Act, and the Legislator's Guide to Amending It*, 72 Geo Wash L Rev 1208 [2004].

³*Id.* at 9.

respondent to a subpoena (*see In Re Verizon*, 257 F Supp 2d 244, 257-258 [2003]; *United States v Kennedy*, 81 F Supp 2d 1103, 1110 [2000]) and cannot be used to create standing for a defendant where none exists.

The Stored Communications Act (18 USC §2703 [d]) states:

A court issuing an order pursuant to this section, on a motion made promptly by ***the service provider, may quash or modify such order***, if the information or records requested are unusually voluminous in nature or compliance with such order otherwise would cause an undue burden on such provider. (*Emphasis added*).

In the defense motion they also reference a concurrence by J. Sotomayor who said that "it may be necessary for the court to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties" (*see United States v Jones*, 565 US ___, 132 S Ct 957 [2012]). Publication to third parties is the issue. Tweets are not e-mails sent to a single party. At best, the defense may argue that this is more akin to an e-mail that is sent to a party and carbon copied to hundreds of others. There can be no reasonable expectation of privacy in a tweet sent around the world.⁴ The court order is not unreasonably burdensome to Twitter, as it does not take much to search and provide the data to the court.⁵ So long as the third party is in possession of the materials, the court may issue an order for the materials from the third party when the materials are relevant and evidentiary (18 USC §2703[d]; *People v Carassavas*, 103 Misc 2d 562 [Saratoga County Ct 1980]).

Consider the following: a man walks to his window, opens the window, and screams down to a young lady, "I'm sorry I hit you, please come back upstairs." At trial, the People call a person who was walking across the street at the time this occurred. The prosecutor asks, "What

⁴ In fact, on August 1, 2012 your tweets will be sent across the universe to a galaxy far, far away. (*see* Chris Taylor, Mashable Social Media, *Your Tweets to Be Beamed Across Space. Will ET RT?*, <http://mashable.com/2012/06/26/et-rt/> [June 26, 2012]).

⁵ The general New York rule is that only the recipient of a subpoena in a criminal case has standing to quash it. (*see People v Lomma*, 2012 WL 309327 at *5-6 [Sup Ct, NY County 2012], citing *People v Doe*, 96 AD2d 1018, 1019 [1st Dept 1983] [banking and telephone records]; *People v Crispino*, 298 AD2d 220, 221 [1st Dept 2002] ["defendant, as a customer, has no proprietary interest" in the defendant's bank account records]).

did the defendant yell?” Clearly the answer is relevant and the witness could be compelled to testify. Well today, the street is an online, information superhighway, and the witnesses can be the third party providers like Twitter, Facebook, Instagram, Pinterest, or the next hot social media application.

2. The Court Order, Federal Law and New York State Law

The second issue is whether the court order was a violation of the Fourth Amendment, the Federal Stored Communications Act, or any other New York law.

The Fourth Amendment

To establish a violation of the Fourth Amendment, the defendant must show either (1) a physical intrusion onto defendant’s personal property; or (2) a violation of a defendant’s reasonable expectation of privacy. (*see United States v Jones* (132 S Ct 945, 950 [2012]; *Kyllo v United States*, 533 US 27, 33 [2001] .) In *Jones* (*id.* at 949), the U.S. Supreme Court held that the government’s installation of a Global Positioning System (“GPS”) tracking device on a target’s vehicle to obtain information was a physical intrusion on a constitutionally protected area. In *People v Weaver* (12 NY3d 433 [2009]) the New York Court of Appeals held that the placing of a GPS tracking device inside the bumper of the defendant’s vehicle, by a state police investigator, was a physical intrusion. However, in this case there was no physical intrusion into the defendant’s Twitter account. The defendant had purposely broadcast to the entire world into a server 3,000 miles away. Therefore, the defendant’s account is protected by the Fourth Amendment only if “the government violated a subjective expectation of privacy that society recognizes as reasonable.” (*see Kyllo v United States*, 533 US 27, 33 [2001], citing *Katz v United States*, 389 US 347, 361 [1967]).⁶

The Supreme Court has repeatedly held that the Fourth Amendment does not protect information revealed by third parties. (*see United States v Miller*, 425 US 435, 443 [1976].) Several courts have applied this rationale and held that internet users do not retain a reasonable expectation of privacy. In *Romano v Steelcase Inc.*, (30 Misc 3d 426 [Sup Ct, NY County 2010])

⁶ See also, *People v. Suleman*, (NYLJ July 13, 2011 at *1 [Crim Ct, NY County] [Decided on 6/22/2011]) where the court held that the taxicab owner had no reasonable expectation of the information generated and stored by a GPS device in the cab.

the court held that “users would logically lack a legitimate expectation of privacy in materials intended for publication or public posting.”⁷

If you post a tweet, just like if you scream it out the window, there is no reasonable expectation of privacy. There is no proprietary interest in your tweets, which you have now gifted to the world. This is not the same as a private email, a private direct message, a private chat, or any of the other readily available ways to have a private conversation via the internet that now exist. Those private dialogues would require a warrant based on probable cause in order to access the relevant information.

Interestingly, in 2010, Twitter signed an agreement with the Library of Congress providing that every public tweet from Twitter’s inception and beyond would be archived by the Library of Congress.⁸ Also, Twitter’s Privacy Policy states in part:

Our Services are primarily designed to help you share information with the world. Most of the information you provide us is information you are asking us to make public. This includes not only the messages you Tweet and the metadata provided with Tweets, such as when you Tweeted, but also the lists you create, the people you follow, the Tweets you mark as favorites or Retweet, and many other bits of information that result from your use of the Services. (see Twitter, *Twitter Privacy Policy* <https://twitter.com/privacy> [accessed June 11, 2012].)

⁷Twitter argues that the court should embrace the holding in *United States v Warshak*, (631 F3d 266 [6th Cir 2010]). In *Warshak*, the court found that the defendant had a reasonable expectation of privacy in his e-mails. However, the *Warshak* case is distinguishable from the case at hand because the former deals with private e-mails as opposed to public postings. *Warshak* did not address public communications at all; instead the court held only that “e-mail requires strong protections under the Fourth Amendment.”(*Warshak*, 631 F3d at 286). If such Fourth Amendment protections were to extend to *public* postings, it would undermine the very basis of the *Warshak* holding.

⁸ (See Matt Raymond, Library of Congress, *How Tweet It Is!: Library Acquires Entire Twitter Archive*, <http://blogs.loc.gov/loc/2010/04/how-tweet-it-is-library-acquires-entire-twitter-archive/> [accessed May 30, 2012]). The Twitter community received the initial heads up via their own feed @librarycongress. Twitter has its users’ consent for disclosure to the Library of Congress by virtue of its Private Policy. The Library of Congress’ archives is not yet available due to its high volume of composition of billions of tweets, and with an estimate of 140 million new tweets per day. (see Audrey Watters, *How the Library of Congress is Building the Twitter Archive*, <http://radar.oreilly.com/2011/06/library-of-congress-twitter-archive.html> [accessed June 11, 2012].)

There is no reasonable expectation of privacy for tweets that the user has made public. It is the act of tweeting or disseminating communications to the public that controls. Even when a user deletes his or her tweets there are search engines available such as “Untweetable”, “Tweleted” and “Politwoops” that hold users accountable for everything they had publicly tweeted and later deleted.⁹

Therefore, the defendant’s Fourth Amendment rights were not violated because there was no physical intrusion of the defendant’s tweets and the defendant has no reasonable expectation of privacy in the information he intentionally broadcast to the world.

Stored Communications Act

The SCA’s requirements for a court order states that:

A court order for disclosure under subsection (b) or (c)...shall be issued only if the government entity offers specific and articulate facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or ***the records or other information sought, are relevant and materials to an ongoing criminal investigation.*** (*Emphasis added*) (*see* 18 USC §2703[d]).

The defendant’s anticipated trial defense is that the police either led or escorted him onto the non-pedestrian part of the Brooklyn Bridge, a defense allegedly contradicted by his publicly posted tweets around the time of the incident. In *Harris*, (*id.* at 7-8) the court held that the information sought was relevant. The April 20, 2012 court order was issued to comply with the January 26, 2012 subpoena.

The People are seeking two types of information, non-content information such as subscriber information, e-mail addresses, etc. and content information such as tweets. The SCA

⁹ See <http://untweetable.com>; <http://tweleted.com/> and <http://mashable.com/2012/05/30/poliwoops/>.

protects only private communications¹⁰ and allows disclosure of electronic communication when it's not overbroad.¹¹

In general, court orders have no limitations on the types of information to be disclosed (18 USC §2703[d]). The SCA mandates different standards that the government must satisfy to compel a provider to disclose various types of information (18 USC §2703). To compel a provider of ECS to disclose contents of communication in its possession that are in temporary “electronic storage” for 180 days or less, the government must obtain a search warrant (18 USC §2703[a]). A court order must compel a provider of ECS to disclose contents in electronic storage for greater than 180 days or to compel a provider of RCS to disclose its contents (18 USC §2703[a], [b], and [d]). The law governing compelled disclosure also covers the above mentioned non-content records. The rules are the same for providers of ECS and RCS and the government can obtain a §2703(d) order to compel such non-content information (18 USC §2703 [c][1][B]).

The non-content records such as subscriber information, logs maintained by the network server, etc. and the September 15, 2011 to December 30, 2011 tweets are covered by the court order. However, the government must obtain a search warrant for the December 31, 2011 tweets.

¹⁰ (*See Kaufman v Nest Seekers, LLC*, 2006 WL 2807177 at *5 [SDNY 2006] [Only electronic bulletin boards which are not readily accessible to the public are protected under the SCA]; *Knop v Hawaiian Airlines Inc.*, 302 F3d 868, 875 [9th Cir 2002][“The legislative history of the Electronic Communications Protection Act suggest that Congress wanted to protect electronic communication that are configured to be private, such as e-mail and private electronic communications.”]; *Snow v DirecTV, Inc.*, 450 F3d 1314, 1320-21 [11th Cir 2006] [holding that the SCA does not apply to materials that is readily available to the public.]

¹¹ Orin Kerr, Comment, *A User's Guide to the Stored Communications Act, and the Legislator's Guide to Amending It*, 72 Geo Wash L Rev 1208 [2004].

New York State Law

The scope of a *subpoena duces tecum* is sufficiently circumscribed when: (1) the materials are relevant and evidentiary; (2) the request is specific; (3) the materials are not otherwise procurable reasonably in advance of trial by the exercise of due diligence; (4) the party cannot properly prepare for trial without such a production and inspection in advance of trial and the failure to obtain such inspection may tend unreasonably to delay the trial; and (5) the application is made in good faith and is not intended as a general “fishing expedition” (*People v Carassavas*, 103 Misc 2d 562 [Saratoga County Ct 1980], citing *People v Price*, 100 Misc 2d 372, 379 [1979]). The District Attorney seeks the subpoenaed information to refute Harris’s anticipated trial defense. In *Harris*, (*id.* at 7-8) the court agreed that the *subpoena duce tecum* was sufficiently circumscribed and a court order was issued on April 20, 2012 to comply with the subpoena.

On May 31, 2012 David Rosenblatt, a member of Twitter’s Board of Directors, was personally served within New York County with a copy of this court’s April 20, 2012 order, a copy of the January 26, 2012 trial subpoena, and a copy of the March 8, 2012 trial subpoena. There are no jurisdictional issues and there are no violations of the New York Constitution.

Conclusion:

In dealing with social media issues, judges are asked to make decisions based on statutes that can never keep up with technology.¹² In some cases, those same judges have no understanding of the technology themselves (Stephanie Rabiner, Esq., Technologist, *Do Judges Really Understand Social Media?* <http://blogs.findlaw.com/technologist/2012/05/do-judges-really-understand-social-media.html> [May 9, 2012]). Judges must then do what they have always done - balance the arguments on the scales of justice. They must weigh the interests of society against the inalienable rights of the individual who gave away some rights when entering into the social contract that created our government and the laws that we have agreed to follow. Therefore, while the law regarding social media is clearly still developing, it can neither be said that this court does not understand or appreciate the place that social media has in our society nor

¹² The SCA was enacted in 1986 and mainly applied to the start of e-mails. The SCA was enacted long before the creation of Twitter and the concept of blogging which started in 2006.

that it does not appreciate the importance of this ruling and future rulings of courts that may agree or disagree with this decision. In recent years, social media has become one of the most prominent methods of exercising free speech, particularly in countries that do not have very many freedoms at all.

The world of social media is evolving, as is the law around it. Society struggle with policies, whether they are between student and teacher (NYC Department of Education, *NYC Department of Education Social Media Guidelines*),¹³ or the right of a company to examine an applicant's Facebook page as part of the interview process (Bill Chappell, *State Approves Bill to Ban Employers From Seeking Facebook Login Info*, <http://www.npr.org/blogs/thetwo-way/2012/04/10/150354579/state-approves-bill-to-ban-employers-from-seeking-facebook-login-info>). As the laws, rules and societal norms evolve and change with each new advance in technology, so too will the decisions of our courts. While the U.S. Constitution clearly did not take into consideration any tweets by our founding fathers, it is probably safe to assume that Samuel Adams, Benjamin Franklin, Alexander Hamilton and Thomas Jefferson would have loved to tweet their opinions as much as they loved to write for the newspapers of their day (sometimes under anonymous pseudonyms similar to today's twitter user names). Those men, and countless soldiers in service to this nation, have risked their lives for our right to tweet or to post an article on Facebook; but that is not the same as arguing that those public tweets are protected. The Constitution gives you the right to post, but as numerous people have learned, there are still consequences for your public posts. What you give to the public belongs to the public. What you keep to yourself belongs only to you.

Accordingly, the motion to quash is granted in part and denied in part. The court finds in favor of the People for all non-content information and content information in ECS and RCS from September 15, 2011 to December 30, 2011. However, ECS content information less than 180 days old (tweeted on December 31, 2011) may only be disclosed pursuant to a search warrant, and the court decision in *People v Harris* is so modified. That search warrant should be

¹³ <http://schools.nyc.gov/NR/rdonlyres/BCF47CED604B-4FDDB752DC2D81504478/0/DOESocialMediaGuidelines20120430.pdf>

requested of a judge of competent jurisdiction. However, to avoid any issue of alleged non-impartiality, that warrant should be made to another judge of this court.

Accordingly, it is hereby:

ORDERED, that Twitter disclose all non-content information and content information from September 15, 2011 to December 30, 2011; and it is further

ORDERED, that the materials be provided to this court for *in camera* inspection. The relevant portions thereof will be provided to the office of the District Attorney, who will provide copies to the defense counsel as part of discovery; and it is further

ORDERED, that the clerk of this court notify the Presiding Judge of Jury 2 of the receipt of the materials.

This opinion shall constitute the decision and order of the Court.

Dated: June 30, 2012
New York, New York

/s
Matthew A. Sciarrino, Jr.
Judge of the Criminal Court