Subpoena Twitter Accounts - New York Court Says "Yes!"

An interesting decision came out of New York recently. It is a criminal matter involving an Occupy Wall Street protestor who was arrested for disorderly conduct as he marched across the Brooklyn Bridge. While the case was resolved on unique procedural grounds (briefly discussed below -- I only do a little white collar criminal law so I'm not particularly familiar with some of the intricacies of criminal procedure in other states), it does present some solid information for practitioners with respect to the ability to subpoena information from a user's Twitter account.

Let me start with the end. The case is *People v. Harris*, Case No. 2011NY080152, 2012 WL 1381238 (N.Y Crim Ct. Apr. 20, 2012). And in that case, the court denied the defendant's attempt to quash a subpoena on grounds that: (1) defendant did not have standing for the motion to quash because criminal defendants (in New York at least) do not have standing to quash a subpoena issued to a third party (the court analogized to prior rulings regarding subpoenas to banks); and (2) the defendant didn't have the right to "intervene" in the action between the government and Twitter in order to challenge the subpoena. With that in mind, here are the more interesting aspects of the decision.

In this case, the government subpoenaed all tweets from 9/15/11 to 12/31/11 and the associated email address for the @destructuremal account. Upon receipt of the subpoena, Twitter informed @destructuremal, and the following day, @destructuremal informed Twitter of his intent to challenge the subpoena. Here is the **first** noteworthy point. Twitter, like any good third-party in receipt of a challenged subpoena, took the position that it would not comply with the subpoena until the court ruled on @destructuremal's challenge (from here on out, I'm going to refer to @destructuremal as Harris, since that is who he is). I would expect Twitter to take the same position in the future.

Second, the court did a surprisingly good job of summarizing what Twitter is:

> Twitter is an online social networking service that is unique because it enables its users to post (“Tweet”), repost (“Retweet”), and read the Tweets of other users. Tweets can include photos, videos, and text-

> based posts of up to 140 characters .3 Users can monitor, or “follow” other users’ Tweets, and can permit or forbid access to their own Tweets. Besides posting Tweets or reposting other users’ Tweets, users may also use the more private method to send messages to a single user (“Direct Message”).

That is as probably the best judicial description of Twitter I have come across. Moving on, **third**, for you EULA / Clickwrap junkies, the court relied heavily on Twitter's Terms of Service, recognizing that "checking the box" was sufficient to invoke the terms:

> In order to sign up to be able to use Twitter’s services, you must click on a button below a text box that displays Twitter’s Terms of Service (“Terms”). (See https://twitter.com/signup). By clicking on a button on the registration web page, you are agreeing to all of Twitter’s Terms, including the Privacy Policy (see https://twitter.com/privacy). The Privacy Policy informs users about the information that Twitter collects upon registration of an account and also whenever a user uses Twitter’s services.

The court than gives what amounts to a "shout out" to the Twitter folks:

> By design, Twitter has an open method of communication. It allows its users to quickly broadcast up-to-the-second information around the world. The Tweets can even become public information searchable by the use of many search engines. Twitter’s Privacy Policy informs the users that, “[w]hat you say on Twitter may be viewed all around the world instantly.” (See https://twitter.com/privacy). With over 140 million active users and the posting of approximately 340 million Tweets a day (see http://blog.twitter.com/), it is evident that Twitter has become a significant method of communication for millions of people across the world.

Fourth, the court held that "the defendant has no proprietary interests in the @destructuremal account’s user information and Tweets between September 15, 2011 and December 31, 2011." The court based this holding on Twitter's TOS, which state:

> By submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive, royalty-free license to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods (now known or later developed).

Since Harris agreed to those terms, every time he used Twitter, he was granting Twitter a license to distribute his Tweets to anyone, for any purpose. "Twitter's license to use the defendant's Tweets means that the Tweets the defendant posted were not his." That is a pretty significant ruling; while many correctly recognized that this was the case, we now have some additional judicial authority establishing this.

Fifth, the court disregarded the "reasonable expectation of privacy" argument." This court finds that defendant's contention that he has privacy interests in his Tweets to be understandable, but without merit. Part of the Terms agreement reads: "The Content you submit, post, or display will be able to be viewed by other users of the Services and through third party services and websites. The size of the potential viewing audience and the time it can take to reach that audience is also no secret, as the Terms go on to disclose: What you say on Twitter may be viewed all around the world instantly ... [t]his license is you authorizing us to make your Tweets available to the rest of the world and to let others do the same."

> While a Twitter account's user information and Tweets contain a considerable amount of information about the user, Twitter does not guarantee any of its users complete privacy. Additionally, Twitter notifies its users that their Tweets, on default account settings, will be available for the whole world to see. Twitter also informs its users that any of their information that is posted will be Twitter's and it will use that information for any reason it may have.

And **Finally**, in another interesting twist, the court required that the subpoena responses be submitted *in camera* review. First, it recognized that the Stored Communications Act (the "SCA"). "While this court holds that the defendant has no standing to challenge the subpoena as issued, once the subpoena is brought to a courts attention, it is still compelled to evaluate the subpoena under federal laws governing internet communications."

The court proceeded to hold that Twitter is a service provider of electronic communications for purposes of the SCA. Next the court recognized that the SCA "permits the government to compel disclosure of the basic subscriber and session information listed in 18 U.S.C. § 2703(c)(2) using a subpoena." Following this reasoning, the court held that the government complied with the subpoena requirements under the SCA.

The court required *in camera* review in order to protect Harris's privacy concerns.

So what does it all mean (**read this part if you don't want to read the rest**)? First, Twitter acted appropriately in the face of a challenged subpoena. Second, some courts actually understand Twitter (or more likely, the judge's clerks understand Twitter) and can describe it fairly well. Third, courts (at least this court) had no problem with EULA / TOS "click and accept" approach. Fourth, the court held that the defendant had no proprietary interest in his Tweets and that, based on Twitter's TOS, "the Tweets the defendant posted were not his." Fifth, the court held that the defendant had no reasonable expectation of privacy in his Tweets. And finally, the court analyzed the subpoena under the Stored Communications Act and ultimately required *in camera* review.

Significant applause to the author of this opinion. It is well written and provides an excellent explanation of what Twitter is, how it works, and why users do not have ownership, propriety interests, or reasonable expectations of privacy in what they post. These are definitely issues that all practitioners should be aware of.

Now go subpoena Twitter and have some fun! If you have a public domain copy of this opinion, send it my way and I will get it posted on the site.