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Now you see it, now you don't: Self-deleting apps & spoliation

by Brad E. Haas

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As a litigator in the world of constantly emerging technology, it can be impossible to predict what the future may hold.

Imagine handling a case in which an opposing party has admitted to sending hundreds of relevant pictures, emails and text messages, all of which have since been deleted, not through any affirmative act of the opposing party, but through the normal course of use of a computer application. Welcome to the world of self-deleting applications, where facts similar to those presented above are already beginning to create problems for practitioners and courts alike.

Two of the more popular self-deleting applications available today are SnapChat and Cyber Dust. SnapChat is a social media application which allows users to send photos or video messages that disappear forever within 10 seconds of being opened. The company has been valued at $15 billion, with users sending over 700 million photographs and videos each day.

Cyber Dust was founded by entrepreneur Mark Cuban following his 2013 defense on allegations of insider trading. The application allows users to send "self-destructing" messages and markets itself as a product to be used by people "in a business with a lot of lawsuits" as a means to "save a lot of time and money because nothing sent or received on [Cyber Dust] is discoverable." [1]

Initially, self-deleting applications were largely directed at the younger generation, hoping to increase privacy from parents. However, these applications are increasingly being used by businesses and adults, rather than traditional forms of electronic communication, such as text messaging and email. These applications are now being directly marketed toward the business community for their benefits in protecting sensitive information. The applications promise to provide users with the type of privacy and confidentiality that could have previously only been accomplished through oral conversation.

In the litigation context, these applications create many questions for attorneys and clients with respect to spoliation. Spoliation is a serious issue for attorneys and clients and can lead to sanctions, adverse inferences or other penalties. A party's duty to preserve potential evidence arises at the start of a lawsuit, but may arise even sooner if a party knows or should have known that the evidence may be relevant to future litigation.

Spoliation issues are much simpler when dealing with regular correspondence, photographs or traditional emails. However, with the advent of self-deleting applications, the question becomes whether an attorney or client's mere usage of a self-deleting application can be considered spoliation.

The legal ramifications of self-deleting applications are difficult to forecast as there is very little guidance for courts. Prior cases dealing with spoliation of electronic communication have all dealt with an affirmative act on the part of an individual or entity to delete relevant information. Self-deleting applications are clearly distinguishable as there is no act required for deletion other than the usage of the program. The time and manner in which these applications are used may be a key factor in accessing future spoliation claims.

Prior to a lawsuit commencing or being reasonably anticipated, the use of self-deleting applications would arguably not be violating any duty to preserve. Further, the issue of intent would certainly be considered. There are many companies that could benefit from the use of an application such as Cyber Dust to protect confidential consumer information. Courts may inquire as to whether a party's intent was to destroy potentially relevant information. If a company or individual could demonstrate good faith arguments for its use of a self-deleting application, it would make it difficult for an opponent to argue for spoliation sanctions.

Once litigation has commenced or is foreseeable, the analysis becomes more complicated and unclear. Take, for

example, a personal injury proceeding. Once litigation has commenced, a plaintiff, upon advice from counsel, sends all electronic communication through a self-deleting application. These include photographs and text messages which could potentially mitigate the plaintiff's alleged damages. These types of messages would likely fall under Fed. R. Civ. P. 26(b)(1), permitting discovery of electronically stored information "regarding any non-privileged matter that is relevant to any party's claim or defense." If a court finds that the plaintiff or attorney acted with sufficient culpability by choosing to utilize a self-deleting application, rather than a traditional SMS or MMS, for example, appropriate sanctions could follow.

Self-deleting applications appear to be the most recent platform where technology is outpacing the law. While the courts have yet to consider how to deal with them, the increase in their usage makes an upcoming confrontation inevitable. Litigators from all areas will need to become familiar with this new technology in order to properly handle clients or opponents who use them.

With no current legal rulings or guidance on the matter, the use of these applications should be dealt with cautiously. Counsel and clients must evaluate the risks associated with use of such apps once a preservation obligation arises in order to avoid the potential consequences that come with a spoliation finding. ■

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[1] *Aaron Timms, "Mark Cuban's Plan for Limiting Scope of Discovery in Lawsuits," Inst. Inv., Sept. 10, 2014, http://www.institutional-investor.com/article/3378986/banking-and-capital-markets-trading-and-technology/mark-cubans-plan-for-limiting-scope-of-discovery-in-lawsuits.html#.VJg65QAY.*