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Facebook E-Discovery Ruling Only Tip Of The Iceberg

By **Ryan Davis**

Law360, New York (June 08, 2010) -- A judge's recent decision to quash subpoenas seeking messages sent through Facebook Inc. and MySpace Inc. in a copyright suit involving fashion house Christian Audigier Inc. marks an important development in e-discovery law involving social networks, but many more issues remain unresolved, experts say.

The May 26 ruling by Judge Margaret Morrow of the U.S. District Court of Central California was one of the first to clearly spell out some of the e-discovery implications of social networking sites, lawyers said, yet it dealt only with the narrow issue of subpoenas to third-party social networking companies.

"This case highlights that there is a lot left to be litigated and resolved about social networks and e-discovery," said Jonathan Redgrave, a partner at Nixon Peabody LLP. "We're hardly into the beginning of the book, much less the end of the book, in terms of how this plays out."

Daniel Brown, partner at Sheppard Mullin Richter & Hampton LLP, said that there had yet to be a comprehensive set of rulings dealing with the e-discovery requirements for social networks along the lines of the 2003 opinions issued by Judge Shira Scheindlin of the U.S. District Court for the Southern District of New York in the *Zubulake v. UBS Warburg LLC* case.

The *Zubulake* rulings were widely adopted as the definitive word on a number of general e-discovery issues, including the duty to preserve electronic evidence, the duty of lawyers to monitor their clients' compliance with data preservation and

sanctions for spoliation.

None of those matters — as they relate to Facebook or other social networking sites — was conclusively addressed in Judge Morrow's ruling, however.

"Eventually, a judge will have to issue a ruling on how to preserve all the information on social networks," Brown said.

The decision in the Christian Audigier case focused mostly on the use of the private message function on Facebook and MySpace, and concluded that for the purposes of discovery, those messages were no different from e-mail under the Stored Communications Act, which governs disclosure requirements for electronic data held by third parties.

As a result, the judge ruled that the social networking sites did not have to produce the messages.

In quashing the subpoenas served on Facebook and MySpace, she reversed a magistrate judge's finding that messages sent through the site were not protected under the law because they were public communications. That finding, Judge Morrow ruled, failed to take into account that both sites allow users to send private messages to each other that are not available to all users.

Shannon Capone Kirk, e-discovery counsel at Ropes & Gray LLP, said that "the judge absolutely got it right," by understanding that the private messaging function of social networking sites is akin to e-mail, which electronic communications providers are not required to divulge under the Stored Communications Act.

Kirk said that the ruling highlighted the fact that despite their sheen of novelty, social networks are really just amalgamations of services that have existed for some time. Private messages are no different from e-mail, and postings on a Facebook wall resemble electronic bulletin boards, for which there is a body of case law, she said.

"For me, it's very simple and it's always been simple," Kirk said. "There's nothing new about social networks; they just put many existing technologies all in one spot."

But the broader applicability of the ruling is limited by the fact that it addresses only subpoenas to Facebook and MySpace, lawyers said. Christian Audigier, which served the subpoenas, could still make a direct request for the documents at issue from the plaintiff in the case, who accuses the designer of copyright infringement.

In such a direct request, where the court could order the plaintiff to consent, the Stored Communications Act would not apply, so the ruling doesn't mean that the e-mails are not subject to discovery at all, Brown said.

The judge conclusively ruled that private messages on social networks are protected under the law, but did not resolve the question of whether wall postings, available to the friends of a social networking site user, are covered, remanding that issue to the magistrate for further proceedings.

She ruled that resolving that question required an examination of the privacy settings the plaintiff had on his Facebook and MySpace accounts to determine whether the general public had access to the information or it was limited to only a few people.

Kirk said privacy settings represent one of the major unanswered questions about taking discovery on social networks. If users allow anyone online to view the entirety of their Facebook page, there is no expectation of privacy, she said, but it remains to be seen how courts will treat users who only allow friends to access their page, yet have many friends.

"When you have 700 friends, can you really expect privacy?" she said. "That's an issue the courts will ultimately have to tackle."

Brown said he believed privacy settings should be irrelevant for the purposes of discovery, because "if it's relevant, you have to produce it."

If courts were to rule otherwise, he said, parties in litigation could make critical information unavailable to the court simply by adjusting the privacy settings on their Facebook page.

In addition to privacy controls, other social network discovery matters that have not

yet been addressed in court rulings include the legal obligation to retain social network data, how companies like Facebook are legally required to respond to discovery requests and the proper uses of social network data in court, lawyers said.

For instance, John Browning, a partner at Thompson Coe Cousins & Irons LLP pointed to an example of a criminal case in which prosecutors attempted to introduce references to guns and crime on a defendant's MySpace page into evidence to show a modus operandi, but the judge ruled that the information couldn't be admitted because it was improper character evidence.

Courts around the U.S. will eventually have to issue rulings on those issues, but in the meantime, the Sedona Conference think tank is preparing a white paper designed to offer best practices for discovery involving Web 2.0 applications.

Redgrave, who helped found the Sedona Conference, said that the document was expected to be released in a public comment version next spring and would try to offer guidance for courts and lawyers by balancing privacy concerns with the need for information in litigation.

While the case law on social network discovery will certainly continue to develop, Judge Morrow's ruling suggests that the current law might be limited, said Browning, author of the upcoming book "The Lawyers' Guide to Social Networking."

The Christian Audigier case illustrates the "fluid, dynamic nature of the law" as it relates to electronic communication, where issues often arise that no one could have anticipated a few years before, he said.

"The frontiers of computing are very different now than they were when the Stored Communications Act was enacted in 1986," Browning said. "As social media evolves, we may see a need to update the SCA itself."

As lawyers await further court rulings on the e-discovery implications of social networks, they should hope future opinions are as clear and useful as Judge Morrow's, Kirk said.

"To me, it was obvious before it came out," she said of the decision. "But what's

great is that now that it's here, judges who don't really understand Facebook have a very long and detailed opinion they can rely on."

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