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ESI Bottom Line: Facebook Gets a Do-Over

Authors: Clinton P. Sanko
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Even the largest and most well-known social media site, Facebook, can be wrong in e-discovery. In providing information to an opposing party in a recent case, Facebook was found to have unduly restricted the quality of the data produced and the opposing party's ability to use it. As such, in *In re: Facebook PPC Advertising Litigation*, No. C09-03043, 2011 WL 1324516, * 1 (N.D. Cal. April 6, 2011), a federal judge in California ordered Facebook to produce information again.

Most understand that e-discovery is largely defined by disputes that occur in the context of lawsuits. The underlying lawsuit addressed the quality of Facebook's "click filters, which are systems that Facebook applies to screen out certain clicks that do not meet certain requirements . . . so these clicks are not billed to advertisers." In seeking information, the opposing party claimed that Facebook was not cooperating and was not providing the information it produced in a useful way. This puts one of the most basic principles of discovery in play:

When you get sued (or sue), you must give the person that sued you (or you sued) information that relates to the lawsuit.

While certainly not without limitations, Basic Principle # 1 is well-established. This has been the rule for many years. When companies operated predominantly in paper, a litigant would duly make and produce copies of the paper documents. But, as we all know, electronically stored information (ESI) comes in a variety of electronic forms and can be changed into a variety of forms. Those forms are not all created equal. Getting a .pst container file of email is almost always more useful than getting copies of the same emails printed to .PDF files – you have the metadata, which gives you more robust organization and search capabilities.

The case does not list any examples of Facebook failing to give information, so it did not directly violate the principle. Rather, Facebook was essentially found to have violated the spirit of Basic Principle #1 by providing its ESI in a form that was, essentially, *degraded* from what it would be in its native format. The court cited two examples.

First, the court noted that Facebook's opponents "produced an 18,000-page customer complaint database in PDF format even though Facebook does not maintain the database in that format." After converting to PDF, "Facebook redacted [or removed] the names of the complaining customers without including any other identifying information."

This issue is relatively simple. Facebook started with an eminently searchable and dynamic structured database. The information could be organized; it could be sorted and searched; its presentation format and report format could likely be changed. Facebook then printed that database, on a date certain, into a PDF report that it provided to the opposing party. Apparently referring to this example, and implicitly finding that this degraded the other party's ability to meaningfully use the data, the court found "Facebook shall re-produce [or re-provide] to Plaintiffs, in a searchable format, any documents that were produced in an unsearchable format."

Second, Facebook did not directly provide the documents to the opposing party. Instead, Facebook provided access to the documents in a restricted cloud access database. Facebook "uploaded certain documents to a website, Watchdox.com, that allows Facebook to restrict Plaintiffs' ability to review the documents in certain ways."

Watchdox.com is a Software-as-a-Service (SAAS) document sharing website. The website states that "[a]s the document owner, WatchDox allows you to *restrict document recipients from copying, editing, printing or forwarding them*. It gives you the ability to track all interactions, whether the documents are shared with individuals, or published to a large-scale audience." See watchdox.com, Secure Document Sharing, at *www.watchdox.com/secure-document-sharing* (visited July 18, 2011). In other words, plaintiffs were restricted as follows: (a) reviewing only on the Internet; (b) reviewing only electronically (no printing to paper); and (c) the documents were rendered "non-searchable [and] nonannotatable." Moreover, Facebook could track what the lawyers on the other side were looking at.

The court found that Facebook's production added unnecessary steps that "make the discovery process less efficient without providing any real benefit." Facebook was prohibited from "further use of Watchdox.com" and was required to produce documents directly to the plaintiffs.

In considering how you are providing information to an opposing party, you must ask yourself the following questions:

- Will the way that I am providing this information make it substantially less searchable?
- Will the production format restrict the ability of the opposing party and lawyers to review the data, whether in terms of its time, functionality or privacy?
- Do I have an express agreement with the opposing part allowing me to produce the information in this way? For more guidance, click here to see Rule 34(b)(2)(E)(ii)

For more guidance, see Rule 34(b)(2)(E)(ii) of the *Federal Rules of Civil Procedure*, which provides that "If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms…."

The bottom line is this: while a company has a right to protect the security and integrity of its data in litigation, it must do so in a way that does not degrade the functionality of the information to the opposing party.