Published in:
Law Technology News February 17, 2012

Google's EDD Search Blunder in Oracle Case: the $1 Billion Mistake?

By Henry Kelston

On Feb. 6, the Federal Circuit denied Google's sixth attempt to claim attorney-client privilege (or confidential status) for a potentially devastating email that the company inadvertently produced during electronic data discovery in Oracle's $1 billion patent infringement suit over Google's Android platform.

Google engineer Tim Lindholm wrote the now-famous missive after meeting with the company's senior counsel and general counsel to formulate a response to Oracle's infringement claims about two weeks before the complaint was filed. The critical part of Lindholm's email said: "What we've actually been asked to do (by Larry and Sergei) is to investigate what technical alternatives exist to Java for Android and Chrome. We've been over a bunch of these, and think they all suck. We conclude that we need to negotiate a license for Java under the terms we need."

In discovery, Google withheld the last draft and the "sent" version of the email as privileged and listed the two documents on its privilege log. Those versions had been marked by Lindholm as "Attorney Work Product" and "Google Confidential," and Google's senior counsel, Ben Lee, was shown as a recipient on the "cc" line.

Unfortunately for Lindholm and Google, eight additional drafts of the email had been automatically saved on Lindholm's computer before he added the work product and confidential designations and the names of the addressees. The search methodology used by the world leader in online search failed to flag those drafts even though their content was nearly identical to the two versions Google's lawyers had already identified as privileged.

Afterwards, lawyers for Oracle referred to the Lindholm email at a Daubert hearing and read part of it into the record. Google promptly clawed back all of the drafts in Oracle's possession and moved, unsuccessfully, to have the portions of the transcript referring to the email redacted or sealed. Oracle then moved to compel production of all drafts and the sent email, arguing that the content was not privileged because it "was directed to Google's pursuit of a license to the patents on their best terms as opposed to assisting [the senior counsel] in his investigation into the infringement suit."

Magistrate Judge Donna M. Ryu, of the District Court for the Northern District of California, agreed with Oracle. The court ruled that because in-house counsel is frequently involved in a

company's business affairs as well as its legal matters, a party claiming privileged status for internal communications involving in-house counsel must make a "clear showing" that the communication was made "for the purpose of obtaining or providing legal advice." Finding that Google had failed to make such a showing, Ryu specifically noted the failure of attorney Lee, the only lawyer to receive the Lindholm email, to testify that he actually reviewed the email and that it related to work that he requested from Lindholm as part of the provision of legal advice.

U.S. District Judge William Alsup upheld the Ryu's decision, noting that it is common practice for company officers and employees to copy counsel on business communications "as an attempt to cloak a business message in privilege. Adding the name of a lawyer to a list of business recipients is exceedingly easy and is very often done without any intention that it be used to frame legal advice." Judge Alsup added that the "clear showing" standard adopted by the magistrate "makes considerable sense and addresses real-world practices."

Google then moved serially to have the Lindholm emails labeled "HIGHLY CONFIDENTIAL -- ATTORNEYS' EYES ONLY" and to preclude their use in the upcoming jury trial. Each motion was denied by Alsup. Google next filed a petition for a writ of mandamus with the U.S. Court of Appeals for the Federal Circuit in Washington, D.C., seeking to have the appeals court overrule Alsup's decision permitting Oracle to use the email as evidence in the trial.

On Feb. 6, the Federal Circuit agreed with Alsup's ruling that the email is not privileged and denied Google's mandamus petition. The appeals court observed that the email was written at the request of nonlawyers (Google's co-founders, Larry Page and Sergey Brin), addressed primarily to a nonlawyer, at the direction of a nonlawyer and did not refer specifically to legal advice or the senior counsel's investigation.

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