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## Facebook, MySpace Messages Are Protected: Judge

By Elaine Meyer

Law360, New York (May 27, 2010) -- A district judge has reversed a magistrate judge's ruling that fashion house Christian Audigier Inc. can subpoena the Facebook Inc. and MySpace Inc. communications of an artist who sued the designer for copyright infringement, finding that messages on the social networking sites are protected information.

In the first case to address the issue, Judge Margaret Morrow of the U.S. District Court of Central California held Wednesday that private communications through social networking sites, as well as Web hosting services, are protected under the Stored Communications Act.

The privacy dispute arose out of a copyright suit filed by artist Buckley Crispin against Christian Audigier.

"What makes this case exciting is that a court has previously not determined whether social networking websites can qualify for protection under the SCA," said attorney Regina Yeh of Doniger Burroughs APC, who represents the plaintiff.

Crispin granted fashion designer Christian Audigier limited use of some of his artwork for the designer's streetwear apparel through an oral agreement, but Audigier used the graphics on other products without crediting the artist, according to the suit.

Audigier also allegedly sublicensed Crispin's work without consent, allowing it to appear on many items beyond apparel, including watches and wine bottles.

Christian Audigier and several of the defendant sublicensing companies subpoenaed Facebook and MySpace and Web hosting service Media Temple Inc. for communications between Crispin that referred or related to Audigier.

The defendants argued that the communications were relevant to determining the nature of Crispin's agreement with Audigier, but Crispin contended that the subpoenas sought communications that Internet service providers are prohibited from giving up under the SCA, part of the Electronic Communications Privacy Act of 1986.

Crispin filed an ex parte motion to quash the subpoenas, which was denied by Magistrate Judge John E. McDermott.

Judge McDermott concluded that Facebook, MySpace and Media Temple, as third-party businesses, were not “electronic communication services” that are protected under the SCA. Judge Morrow heard Crispin's appeal of that decision.

Whether the communications were protected centered around whether the social networking and Web hosting sites could be considered remote computing services under the SCA or electronic communication services, according to Judge Morrow.

The law offers stricter protections for the latter, allowing a government agency to obtain communications from an ECS only in a criminal matter, whereas the government can obtain communications from an RCS in a civil suit.

Judge Morrow disagreed with Judge McDermott's holding that to be considered ECS providers, Facebook, MySpace and Media Temple had to “provide Internet access or operate as conduits for the transmission of data from one location to another,” similar to a holding on text messaging services in the 2009 ruling *Quon v. Arch Wireless Operating Co.*

Judge McDermott had said the websites' messaging services did not meet this threshold because they were used only for public display.

But Judge Morrow found that the magistrate judge had misinterpreted the nature of the Web services' messaging functions, not realizing Facebook and MySpace have private messaging services and that Media Temple provides webmail — which all constitute ECS.

It still must be resolved through evidence whether Crispin intended semipublic communications on Facebook's wall function or MySpace's comments section to be private information, Judge Morrow said, ordering the magistrate judge have an evidentiary hearing on the plaintiff's privacy settings.

Crispin is represented by Doniger Burroughs APC.

Christian Audigier is represented by Browne Woods George LLP.

The case is *Buckley H. Crispin v. Christian Audigier Inc. et al.*, case number 2:09-cv-09509, in the U.S. District Court for the District of Central California.