

Northern District of California Issues Adverse Inference Instruction for Inadequate Preservation

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As the patent infringement trial between Apple and Samsung got underway in the Northern District of California, the court handed down a decision that serves as a strong reminder of the importance of litigation hold procedures and preservation practices. In-house discovery teams for corporate defendants should heed the Northern District's comments and be aware of the negative inference instruction Samsung received as a result of its preservation practices, particularly when a corporation employs an uncommon (e.g., not Microsoft Outlook) email program.

Samsung's Preservation Efforts

At issue in the motion was Samsung's preservation practice for its employees using Samsung's proprietary "mySingle" email program. *Apple Inc. v. Samsung Electronics Co., LTD*, Case No.: C 11-1846 LHK (PSG), Slip Op. (N.D. Cal. July 25, 2012). The program employed an auto-delete feature whereby users' emails were deleted every two weeks. Employee users could save their emails to their local computers by either clicking a "save all" button or by saving only certain emails. Notably, the preservation procedures for those portions of the company using Microsoft Outlook were not implicated. *Id.* at 1 n.3. In fact, the court noted those employees who used Outlook produced many thousands of emails, while employees who used mySingle produced only a handful. *Id.* at 21.

In August 2010, Apple notified Samsung of its concern about possible infringement of certain Apple patents. *Id.* at 21. Shortly thereafter, Samsung issued a litigation hold notice to 27 custodians advising them to preserve any documents potentially relevant to the dispute. *Id.* at 12 & n.60. Samsung took no further action until Apple filed a lawsuit in April 2011. *Id.* at 13. At that time, Samsung issued litigation hold notices to more than 2,700 employees. *Id.* After the lawsuit was filed, Samsung proactively updated the recipients and contents of the litigation hold; sent counsel to Korea to assist with educating employees about preservation obligations; and engaged in other training efforts for its employees. *Id.* at 13-15.

Sanctions for Failing To Preserve Documents

The Northern District reiterated the basic preservation obligations: a party has a duty to preserve evidence once litigation is "reasonably anticipated," which is when the party "knew or should have known of impending litigation." *Id.* at 4-5. Failure to employ proper preservation procedures may result in sanctions, dismissal of claims, or negative inference instructions to a jury. *Id.* at 3.

The sanctions “should be designed to: (1) deter parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore ‘the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party.’” *Id.* at 4 (citations omitted).

Samsung’s Preservation Duty Arose in August 2010

While Samsung argued that its preservation duty arose in April 2011, when the complaint was filed, the court concluded the duty arose in August 2010, when Apple first notified Samsung of the potential infringement. *Id.* at 15. In fact, the litigation hold that Samsung issued in August 2010 noted that “there is a reasonable likelihood of future patent litigation between Samsung and Apple unless a business resolution can be reached,” which amounted to a “plain” admission that preservation obligations began at that time. *Id.* at 16.

Samsung Acted with “Conscious Disregard” of Its Preservation Duty

Though the court did not go so far as to say Samsung acted in bad faith, it noted that Samsung’s corporate behavior amounted to a “conscious disregard of its obligations.” *Id.* at 18. Samsung’s conscious disregard was evidenced by:

1. Failure to disable the 14-day automated delete policy on mySingle;
2. Failure to verify whether employees were complying with preservation requirements when the 14-day automated delete program was in place;
3. Failure to send litigation hold notices to more than “a select handful of employees” when the preservation obligation arose in August 2010; and
4. Failure to follow-up (training, compliance advice, etc.) on litigation hold notices for more than seven months.

Id. at 19.

Ultimately, Samsung failed to comply with its preservation obligations because: “(1) Samsung did not suspend mySingle’s automatic biweekly destruction policy; (2) Samsung failed to issue sufficiently distributed litigation hold notices after Samsung itself admitted that litigation was ‘reasonably foreseeable,’ and to follow up with the affected employees for seven months as it later showed it knew how to do; and (3) at all times Samsung failed to monitor its employees’ preservation efforts to ensure its employees were at all compliant.” *Id.* at 23.

As a result, the court ordered that the jury receive the following instruction:

Samsung has failed to prevent the destruction of relevant evidence for Apple's use in this litigation. This is known as the "spoliation of evidence."

I instruct you, as a matter of law, that Samsung failed to preserve evidence after its duty to preserve arose. This failure resulted from its failure to perform its discovery obligations.

You also may presume that Apple has met its burden of proving the following two elements by a preponderance of the evidence: first, that relevant evidence was destroyed after the duty to preserve arose. Evidence is relevant if it would have clarified a fact at issue in the trial and otherwise would naturally have been introduced into evidence; and second, the lost evidence was favorable to Apple.

Whether this finding is important to you in reaching a verdict in this case is for you to decide. You may choose to find it determinative, somewhat determinative, or not at all determinative in reaching your verdict. *Id.* at 24.

Practice Pointers and Lessons Learned

This case may be read to suggest that companies must affirmatively monitor their employees to confirm that employees comply with litigation hold notices. However, when thousands of employees are subjected to several litigation holds at any particular time, such a compliance-monitoring requirement may seem virtually impossible. Short of actually watching each employee save relevant documents, the *Apple* case suggests several best practices companies may consider incorporating into their document retention and litigation hold procedures.

First, regardless of the program used for company email, but especially if a proprietary program is used, disable automated delete policies for users under a litigation hold. Present throughout *Apple* is the suggestion that additional steps might not have been necessary had Samsung simply suspended its 14-day automated delete procedures. *Id.* at 18 ("In light of its biweekly automatic destruction policy, Samsung had a duty to verify whether its employees were actually complying with the detailed instructions Samsung claims it communicated to them"); see also *id.* at 23 ("In effect, Samsung kept the shredder on long after it should have known about this litigation, and simply trusted its custodial employees to save relevant evidence from it.").

Second, when reasonable anticipation of litigation arises, ensure comprehensive steps are taken to identify relevant custodians throughout the company and distribute litigation hold instructions accordingly. As *Apple* indicates, merely identifying a few custodians at the outset and months later identifying thousands of additional custodians with potentially relevant information, will likely not satisfy a company's obligation to "identify, locate, and maintain information" potentially relevant to reasonably foreseeable litigation. *Id.* at 5.



Third, once a litigation hold notice is issued, take proactive steps to educate recipients about the notice, the requirements, the importance of compliance with instructions in the notice, and the litigation process in general. Proactive training is particularly helpful for custodians who have not been part of litigation before or who are unfamiliar with the discovery process. This outreach may also help foster relationships with key witnesses whose assistance may be necessary during later stages of the litigation process.

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