



Ephemeral Data Meets Hard Law

Will a one-off discovery ruling become the norm as technology advances?

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Not long ago, the case of *Columbia Picture Inc. v. Bunnell*, 245 F.R.D. 443 (C.D. Cal. 2007), caused a stir among watchers of electronic discovery by deeming a computer's random access memory (RAM) discoverable.

Commentators observed not only that so-called "ephemeral" data – data of a short-lived or transitory nature – had become fair game in litigation, but that a federal court, in a discovery order it described as "quotidian," required a litigant to record this kind of data and then produce it to its opponent.

Thus far, the ruling in *Columbia Pictures*, handed down in June 2007, has stood alone and has not been followed in any published decisions. This raises the question: Is ephemeral data such as RAM just a blip on the screen? The answer is probably not. With technology on the march, the issues raised in *Columbia Pictures* may well become quotidian.

The case pitted Hollywood studios against Internet bandits who facilitated the free downloading and exchange of movies and TV shows in violation of the studios' copyrights, much like the endless battles between recording studios and those who enable music to be freely downloaded on the Internet. Hollywood had a problem, though. It lacked proof that illegal downloading was taking place. When the studios sought production of the electronic data files being exchanged over the defendants' TorrentSpy web site, along with other information such as customers' Internet Protocol addresses and trans-action dates, the defendants were able to respond: "We don't have it." Indeed, they had intentionally kept the dirt off their hands by disabling a logging function in Torrent-Spy's web server program, meaning that the data existed only temporarily in its computers as RAM, short-term memory that is lost when the computers turn off, just as one's conscious thoughts cease when one goes to sleep. After the lawsuit was filed, the defendants took the additional step of routing customer communications to a third-party vendor named Panther, which itself claimed not to log data passing through as RAM.

Not so fast, said the Central District court. Delving into the mechanics of data preservation, U.S. Magistrate Judge Jacqueline Chooljian found the defendants had the ability to collect the information easily and without much expense by disengaging from Panther and enabling the logging function of their own server. Judge Chooljian, therefore, took the rational step of fashioning a "preservation" order which required the defendants to start logging the RAM file-sharing information and then to produce samples of logged data to the studios, while masking the identity of TorrentSpy's users.

The court's holding that ephemeral data such as RAM should be treated for purposes of discovery just like a paper document or any other recorded information marked a new frontier of sorts. Fleeting computer phenomena like RAM had not been addressed in much depth by the courts. (See, for example, *Phillips v. Netblue Inc.*, 2007 WL 174459 (N.D. Cal. Jan. 22, 2007), which rejected as "absurd" an argument that hyperlinks should have been preserved). Still, the decision in *Columbia Pictures* that RAM is discoverable was not altogether surprising. Given the relative ease with which lawyers and judges have formed a consensus that information found within the bowels of computer systems is conceptually no different than a handwritten note, it would have been surprising instead for the court to state a contrary rule – that a computer's passing thoughts are somehow off-limits to traditional discovery.

What made the *Columbia Pictures* case exceptional is that the court ordered the defendants to record information that would not otherwise have been recorded and then produce it.

Was the decision correct? On the facts, it was fair. But the decision, frankly, was not in keeping with the way lawyers and judges have always done business. Neither the California Rules of Civil Procedure nor the Federal Rules of Civil Procedure, not even the new federal rules for e-discovery, call for the creation of data to be produced. While Federal Rule 34 permits electronically stored information to be sampled or tested, that is not the same as corraling information as it comes in. The fact that it was easy and cheap for the defendants in *Columbia Pictures* to "flip the switch" and log server data is beside the point. It is easy, for example, to tape-record phone calls but have courts ordered civil litigants to record future phone conversations – and then produce the recordings? Are there any discovery orders out there requiring a business to videotape its dubious meetings with customers, even perhaps a business that already has security cameras installed?

Charitably, the *Columbia Pictures* court was simply ahead of its time. All indications are that commerce will increasingly depend on electronic, if not more ethereal – er, ephemeral – means of data transmission that today are the stuff of science fiction. One wonders whether such information will always be preserved as zealously as the e-data we generate today, which still remains a novelty to many of us. Haven't businesses, including law firms, already become so burdened with storage and manipulation of e-data that the goal has become to let it go? Commercial litigants now augment their case budgets with a beefy line item for data review, just to meet the initial disclosure requirements of Federal Rule of Civil Procedure

26. Litigants also face sanctions for deletion of stored data that only potentially will be relevant to a future lawsuit.

There may be many businesses like TorrentSpy that stand to gain by data loss, but surely there are many more for whom preservation of the e-winds blowing through their servers simply makes little economic sense.

All of which leads to a prediction: Civil procedure will expand beyond the fiction of a "preservation" order in cases like *Columbia Pictures* in order to serve what may become an ordinary need for the creation of discoverable information.

About the Author

Robert B. ("Bob") Mullen maintains a broad commercial litigation practice. He has tried jury and bench trials to verdict, conducted binding and non-binding arbitrations, handled appeals to state and federal appellate courts, and frequently represents clients in mediation.

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