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In the

United States Court of Appeals

For the

Ninth Circuit

COLUMBIA PICTURES INDUSTRIES, INC., DISNEY ENTERPRISES, INC., PARAMOUNT PICTURES CORPORATION, TRISTAR PICTURES, INC., TWENTIETH CENTURY FOX FILM CORPORATION, WARNER BROS. ENTERTAINMENT, INC., a Delaware Corporation, UNIVERSAL CITY STUDIOS, LLP and UNIVERSAL CITY STUDIOS PRODUCTIONS, LLP, Delaware Limited Liability Partnerships,

Plaintiffs-Appellees,

v.

JUSTIN BUNNELL, FORREST PARKER, WES PARKER, Individuals, and VALENCE MEDIA, LLC, a Limited Liability Company,

Defendants-Appellants.

Appeal from a decision of the United States District Court for the Central District of California, No. 06-CV-01093 · Honorable Florence-Marie Cooper

BRIEF AMICI CURIAE OF THE ELECTRONIC FRONTIER FOUNDATION, THE CENTER FOR DEMOCRACY & TECHNOLOGY, AND PUBLIC KNOWLEDGE IN SUPPORT OF NEITHER PARTY, URGING VACATUR OF THE AUGUST 24, 2007 ORDER DENYING DEFENDANTS' MOTION FOR REVIEW

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amici Curiae* the Electronic Frontier Foundation, the Center for Democracy & Technology, and Public Knowledge (collectively, "*Amici*") state that none of *Amici* have a parent corporation and that no publicly held corporation owns 10% or more of the stock of any of *Amici*.

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INTRODUCTION

This brief addresses the August 24, 2007 Order Denying Defendants' Motion for Review (the "Server Log Data Order"), ER 57–62, which itself followed Defendants' Objections to and Motion for Review of Order Regarding Server Log Data. The Server Log Data Order reached an important question of first impression: Does digital data that exists only temporarily in a computer's random access memory ("RAM") qualify as "electronically stored information" ("ESI") subject to preservation and production under Rule 34 of the Federal Rules of Civil Procedure? The district court, in error, answered that question "yes." *Amici* ask this Court to vacate that order.

Hard cases make bad law.[1] Defendants stand accused of enabling, inducing, and profiting from widespread copyright infringement. Concluding that Defendants had engaged in willful spoliation of evidence, the district court granted Plaintiffs' motion for terminating sanctions, entered Defendants' default, and ultimately entered a massive default judgment against Defendants.

The central issue on appeal is the district court's December 13, 2007 Order Granting Plaintiffs' Motion for Terminating Sanctions (the "Terminating Sanctions Order"). Excerpts of Record ("ER") 27–42. *Amici*, however, express no view on whether the district court properly found that Defendants' conduct during

[1] *See Northern Sec. Co. v. United States,* 193 U.S. 197, 364 (1904) (Holmes, J., dissenting).

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discovery was "obstreperous"; that Defendants engaged in "widespread and systematic efforts to destroy evidence"; that the resulting prejudice to Plaintiffs "weighs strongly in favor of terminating sanctions"; and "no lesser sanctions [than terminating sanctions] would be appropriate or effective." ER 41; *Anheuser-Busch, Inc. v. Natural Beverages Distribs.,* 69 F.3d 337, 348 (9th Cir. 1995) (discussing factors that must be considered prior to ordering terminating sanctions).

Instead, *Amici* limit their arguments to the Server Log Data Order. The district court concluded that data in RAM qualifies as ESI, and ordered Defendants to record and produce extensive data about customers' conduct that previously had been held only temporarily in RAM. ER 47–51. If followed by other courts, the district court's ruling would create an unusual and onerous distinction between how discovery addresses "old fashioned" documents versus electronic information.

Virtually every business in the United States relies on digital technologies for all kinds of communications. And virtually every function carried out by those technologies depends on and results in the temporary creation of RAM data that is not ordinarily retained. The data that travels through RAM could potentially include every keystroke and mouse click that a user makes, inadvertently accessed web pages, and digital telephone conversations. Thus, the Server Log Data Order threatens actual and potential litigants with the spectre of having to capture and

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compile an avalanche of RAM data that would otherwise be automatically overwritten in the ordinary course of computer processing.

Neither the text of the Federal Rules of Civil Procedure nor the purpose behind the 2006 amendments that address ESI dictate this outcome. The Server Log Data Order should be vacated.

I. STATEMENT OF INTEREST OF AMICI

Amici file this brief pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, with the consent of all parties.

The Electronic Frontier Foundation ("EFF") is a non-profit, membership-supported civil liberties organization working to protect consumer interests, innovation and free expression in the digital world. As technologists, innovators, consumers and litigators, EFF and its over 14,000 dues-paying members have a strong interest in promoting fair and sensible rules for electronic discovery.

The Center for Democracy & Technology ("CDT") is a non-profit public interest group that seeks to promote free expression, individual liberty and technological innovation on the open, decentralized Internet. CDT advocates balanced policies that support the democratizing potential of new digital technologies and media. CDT believes that the discovery ruling below could harm the development and deployment of new digital technology, especially within companies and government agencies that are frequently parties to lawsuits.

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Public Knowledge ("PK") is a Washington, D.C. based not-for-profit public interest advocacy and research organization. PK promotes balance in intellectual property law and technology policy to ensure that the public can benefit from access to knowledge and the ability to freely communicate and innovate in the digital age. PK has a strong interest in ensuring that the rules that apply to electronic discovery do not unjustifiably shift this balance and result in harm to the public.

II. SUMMARY OF ARGUMENT

The district court's Server Log Data Order, issued less than four months before the court granted Plaintiffs' motion for terminating sanctions, erroneously held that data held in RAM is ESI within the meaning of the 2006 amendments to the Federal Rules of Civil Procedure.

The district court's analysis runs contrary to a central intent of the 2006 amendments: to design discovery rules that favor neither analog nor digital information. The holding that RAM is ESI creates an insupportable distinction in the scope of discovery that depends solely on whether information is managed using an analog or digital device. Far from putting electronic discovery on equal footing with traditional discovery, treating RAM as ESI would create a two-tier system of discovery that runs contrary to the intent of the law, and would impose unprecedented and cumbersome burdens on litigants.

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Indeed, the district court's interpretation effectively reads the "S" out of "ESI." Information in RAM is not "stored" in the sense intended by Rule 34, which refers to information stored in a "medium," *see* FED. R. CIV. P. 34(a), not information in volatile memory.

Although the district court suggested that the Server Log Data Order was a narrow order, *see* ER 41, its fundamental misreading of the phrase "electronically stored information," if allowed to stand, has broad implications that threaten to mislead other courts and sow uncertainty for counsel. The scope of ESI defines parties' obligations from the outset of each case. *See* FED. R. CIV. P. 26(f). Erroneously interpreting ESI to include data that exists solely in RAM could increase the burdens imposed by electronic discovery beyond any reasonable limits.

Although this brief takes no position on the question of materiality, the Server Log Data Order may well have been part of the basis of the later Terminating Sanctions Order. *See* ER 40–41 (discussing prior discovery rulings against Defendants, and relying upon "further examination of the history of this case"). Accordingly, as part of its review of the Terminating Sanctions Order, this Court should evaluate whether the district court erred in its Server Log Data Order (and for the reasons herein should hold that it did), and then address the Terminating Sanctions Order in light of the erroneous prior order. And even if this

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Court concludes that the Server Log Data Order was *not* material to the Terminating Sanctions Order, it should nonetheless address the Server Log Data Order so that district court's erroneous analysis does not mislead other courts and litigants wrestling with their electronic discovery obligations.

III. ARGUMENT

A. Although discovery orders are reviewed for an abuse of discretion, a decision based on an error of law is *per se* an abuse of discretion.

Trial courts have wide latitude in controlling discovery, and on appeal a discovery ruling is reviewed for an abuse of discretion. *State of California v. Campbell,* 138 F.3d 772, 779 (9th Cir. 1998). But where a trial court bases its decision on an erroneous conclusion of law, it abuses its discretion. *See United States v. Berberian,* 767 F.2d 1324, 1324 (9th Cir. 1985).

B. RAM data is transient data essential to the functioning of virtually every digital device.

To understand the implications of the Server Log Data Order, it is crucial to understand the role that RAM plays in digital devices. Virtually every computer and digital device employs transient RAM "buffers" to hold both data and applications while data processing is carried out. Those RAM buffers are generally not used to store or record data; rather, they constitute a working area where data and applications are manipulated during a computing process. For example, as a

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user types at her keyboard, every stroke (including those that are immediately deleted as "typos") is momentarily represented in RAM, where it is processed by software that is also held in RAM, before being sent to the computer's display. Due to the sheer volume of data processed through RAM, that data is constantly overwritten by new data during the course of a computer system's operations, sometimes within fractions of a second. *See* James Boyle, *Intellectual Property Policy Online: A Young Person's Guide,* 10 HARV. J. L. & TECH. 47, 90 (1996) ("RAM is volatile; it is constantly rewritten while the computer is being used"). Indeed, the very purpose of having RAM is so that data can exist temporarily for processing without being stored in a medium such as a magnetic drive or an optical disc.

Thus, RAM is inherently transient. "It is a property of RAM that when the computer is turned off, the copy of the program recorded in RAM is lost." *Apple Computer, Inc. v. Formula Int'l, Inc.,* 594 F. Supp. 617, 622 (C.D. Cal. 1984). And RAM is ubiquitous.[2] Almost all digital devices, including computers, cell phones, personal digital assistants ("PDAs"), compact disc players, fax machines, and

[2] *See* Kristen J. Mathews, Note, *Misunderstanding RAM: Digital Embodiments and Copyright,* 1997 B.C. INTELL. PROP. & TECH. F. 41501, ¶ 42 ("Any electronic device that has anything more than an on-off switch usually contains some form [of] RAM.").

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digital televisions, could not function without creating and manipulating data in RAM for a transitory period of time.[3]

Given the ubiquity of transient RAM data in digital technologies, courts should treat with skepticism claims that such data is equivalent to paper documents and, therefore, subject to preservation and production under Rule 34. Information that exists solely in ephemeral form in RAM is simply not the same as information that is "stored" for later retrieval.

C. The Server Log Data Order is inconsistent with the mandate that "discovery of electronically stored information stand[] on equal footing with discovery of paper documents."

The district court's analysis defies both common sense and the purposes of the 2006 amendments to the Federal Rules of Civil Procedure. The 2006 amendments were intended to "confirm that discovery of electronically stored information stands on equal footing with discovery of paper documents." FED. R. CIV. P. 34(a) advisory committee's note. That is, ESI should be no *less* discoverable than non-electronic documents—but also no *more.*

At least before the Server Log Data Order issued, no litigant would assume that erasing a whiteboard might violate a duty of preservation. Similarly, no court

[3] *See generally* Niels Schaumann, *Copyright Class War,* 11 UCLA ENT. L. REV. 247, 266 (2004) ("For it is not just software that is loaded into a computer's RAM: all content accessed digitally is transferred to RAM before it is made perceptible to humans.").

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would ask a litigant to record all telephone calls, to videotape all staff meetings, or to outfit every potential witness with a GPS tracking device in order to create a record of their locations at every moment.

To be sure, objections based on burden, privacy, and attenuated relevance could be raised in those hypothetical situations. But the more basic point is that discovery simply does not reach such ephemera, even if highly relevant and easily collected (snapping photos of whiteboards is simple; many digital telephone systems can readily be configured to record calls; inexpensive video cameras now have massive storage capabilities; free programs allow one to track location via GPS features built into many modern cell phones). Yet that type of discovery is precisely what the Server Log Data Order contemplates, solely because the electronic equivalent of such ephemeral communications will necessarily involve the creation of a temporary snapshot that could, in theory, be preserved.

The scope of Rule 34 should not vary based on whether information was created using digital or analog technology. The history and text of the revisions to Rule 34 do not contemplate this type of discrimination, nor do they endorse the radical expansion in the scope of discoverable documents that such a distinction would produce. Rather, the revisions were designed to ensure that civil discovery would remain neutral, so that the discoverability of information would *not* turn

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on the way it was maintained. *See* THE SEDONA CONFERENCE, THE SEDONA PRINCIPLES: BEST PRACTICES, RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 8 (Jonathon M. Redgrave et al. eds., 2004).

D. Server data in RAM is not electronically "stored" information.

It is well established that parties cannot be compelled to create new documents solely for their production.[4] The 2006 amendments to Rule 34 were not intended to undermine this principle. *See* FED. R. CIV. P. 34(a) advisory committee's note. Instead, they were intended to put electronic documents "on equal footing" with traditional documents. *Id.* Thus, as amended, Rule 34(a) provides that a party may request documents or "electronically *stored* information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations *stored in any medium* from which information can be obtained . . . and which are in the possession, custody or control of the party upon whom the request is served." FED. R. CIV. P. 34(a) (emphasis added).

The district court's Server Log Data Order effectively reads "stored" out of the above definition, thereby subjecting ephemeral digital information to discovery

[4] *See* 8A CHARLES A. WRIGHT, ARTHUR R. MILLER, & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2210 (2d ed. 1994); *Alexander v. FBI,* 194 F.R.D. 305, 310 (D.D.C. 2000); *Paramount Pictures Corp. v. Replay TV,* No. CV 01-9358, 2002 WL 32151632, *2 (C.D. Cal. May 30, 2002).

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obligations that have no corollary in traditional discovery. The order then compounds the problem by substituting "fixation," a concept drawn from copyright law, for Rule 34(a)'s requirement that the information be "stored in any medium."

1. The use of the term "stored" in "electronically stored information" imposes a requirement of some degree of permanence.

There is no doubt that the phrase "electronically stored information" must be broadly construed. As the Advisory Committee noted, "the rapidity of technological change[] counsel against a limiting or precise definition of electronically stored information. . . . The rule . . . encompass[es] future developments in computer technology." FED. R. CIV. P. 34(a) advisory committee's note. The Advisory Committee plainly was seeking to avoid unnecessarily precise language that might accidentally read out of Rule 34(a) some as-yet unknown technology.

But RAM was a well-known and ubiquitous technology at the time of the 2006 amendments, and the Advisory Committee did not mention it *even once* in the 2006 amendments or the accompanying notes. Indeed, explaining the issues that might arise under the amendments, the Advisory Committee noted that "[u]sing current technology, for example, a party might be called upon to produce word processing documents, e-mail messages, electronic spreadsheets, different image or sound files, and material from databases." FED. R. CIV. P. 34(b) advisory

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committee's note. Surely if the amendments were intended to encompass RAM, it would have been mentioned in this discussion of "current technology"—or at least *somewhere* in the amendments and notes. Instead, the notes offer a myriad of examples—"word processing documents, e-mail messages, electronic spreadsheets, different image or sound files, and material from databases"—that all describe electronic information stored in *non-volatile* media.

Further, the Advisory Committee's notes to the 2006 amendments state that, as amended, Rule 34 "covers . . . information 'stored *in any medium*' . . . ." FED. R. CIV. P. 34(a) advisory committee's note (emphasis added); *see also* FED. R. CIV. P. 34(a) (Rule 34 applies to data "stored in any medium"). As used with computers, a medium is "material used for storage of information. Magnetic disks, tapes, and optical disks are examples of storage media."[5] Unmentioned in that definition is RAM, or any other form of volatile memory. Instead, each is an example of a means of permanent storage that, unlike RAM, does not disappear at the flick of a power switch. The plethora of contrasting examples demonstrates that the omission

[5] BARRON'S DICTIONARY OF COMPUTER AND INTERNET TERMS 295 (7th ed. 2000); *see also* MICROSOFT COMPUTER DICTIONARY 332 (5th ed. 2002) ("media" is "[t]he physical material, such as paper, disk, and tape, used for storing computer-based information"); WEBSTER'S NEW WORLD COMPUTER DICTIONARY 350 (9th ed. 2001) ("storage medium" is, "[i]n a storage device, the material that retains the stored information (such as the magnetic material on the surface of a floppy disk).").

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of any mention of RAM in the advisory committee notes was no accident. Rather, it shows that the Committee, sensibly, did not consider volatile memory to be ESI.

2. Case law interpreting the "fixation" requirement under the Copyright Act does not inform the meaning of "stored" under the Federal Rules of Civil Procedure.

The district court erred in relying on *MAI Systems Corp. v. Peak Computer, Inc.,* 991 F.2d 511 (9th Cir. 1993),[6] in support of its conclusion that data in RAM is sufficiently permanent to qualify as ESI. *MAI Systems* analyzed the fixation requirement in copyright law, not the scope of discovery. *See* 991 F.2d at 518–19. That definition is distinct, and serves a very different purpose, from Rule 34(a)'s requirement that electronic information be "stored." Under the Copyright Act, a work is "fixed" when its "embodiment in a copy" is "sufficiently permanent or stable to permit it to be perceived, reproduced or otherwise communicated for a period of more than transitory duration." 17 U.S.C. § 101. The concept of "storage" appears nowhere in the Copyright Act's definition. The definition of fixation, moreover, must be understood as part of the detailed statutory scheme created by the Copyright Act, which grants exclusive rights to copyright owners,

[6] Many copyright commentators have called into question the reasoning in *MAI Systems*. *See, e.g.,* MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.08[A][1] (Matthew Bender 2005) (noting that the *MAI System* holding that RAM copies are fixed for copyright purposes has been "contentious"); *see also* R. Anthony Reese, *The Public Display Right: The Copyright Act's Neglected Solution to the Controversy Over RAM Copies,* 2001 U. ILL. L. REV. 83, 122–38.

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balanced by an extensive array of statutory limitations and exceptions. *See* 17 U.S.C. §§ 106–123.

The federal discovery system rests on very different premises—it does not convey to a litigant any "exclusive right" to an adversary's property, nor does it provide statutory "limitations and exceptions" to offset such an expansive grant of rights. The notion that the drafters of the 2006 amendments to Rule 34 drew their conceptions of "electronically stored information" from the Copyright Act is, to say the least, unusual. In short, the definition of "fixation" under the Copyright Act sheds no light on the meaning of "stored" in Rule 34(a).[7]

E. Treating data in RAM as ESI is not workable.

In an attempt to cabin the effect of its order, the district court noted that:

> this decision does not impose an additional burden on any website operator or party outside of this case. It simply requires that the defendants in this case, as part of this litigation, *after* the issuance of a court order, and following careful evaluation of the burden to these defendants of preserving and producing the specific information requested in light of its relevance and the lack of other available means to obtain it, begin preserving and subsequently produce a particular subset of the data in RAM under Defendants' control.

ER 51. The district court's order, however, is based on the holding that data in RAM is ESI. *See* ER 48–51. That holding has far-reaching repercussions.

[7] Moreover, *MAI Systems* did not hold that data in RAM is always fixed for purposes of copyright law. *See Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 127–30 (2d Cir. 2008) (discussing *MAI Systems*).

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If RAM is ESI, then it follows that an accident of technological fate can have drastic and unexpected results on the scope of discovery in a case. For example, calls made over digital business phone systems, which are commonplace today,[8] or via Voice over Internet Protocol ("VoIP") technology, a method of routing voice signals over the Internet, necessarily pass temporarily through RAM and could be retained through the use of simple software designed to log them. Under the reasoning of the Server Log Data Order, every call made on a digital phone system must be recorded by a party subject to a "litigation hold," while calls made using analog phone systems need not. Similarly, a security system using digital video cameras would create voluminous quantities of ESI, while an analog system would not.[9] Surely a decision about the technology used to implement these sorts of systems should not have these effects. *See* FED. R. CIV. P. 34(a) advisory committee's note (discovery of electronically stored information should "stand[] on equal footing" with traditional discovery).

Moreover, at the outset of every case subject to the initial disclosure obligations of Rule 26, the parties must meet and confer regarding "any issues about disclosure or discovery of electronically stored information." FED. R. CIV. P.

[8] Even cordless telephones for residential use are often based on digital technology today.

[9] Indeed, companies considering transitioning from an analog intercom to a digital system would then be well advised to weigh the possible increased costs of discovery.

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26(f). If RAM is ESI, this means that in addition to needing a data map of all potentially discoverable *persistently* stored electronic information, parties must keep track of all potentially relevant data they possess in RAM, so that they can meet their obligations under Rule 26(f). The difficulties companies have faced trying to map their *persistent* data have been enormous. *See, e.g.,* Clayton L. Barker & Philip W. Goodin, *Discovery of Electronically Stored Information,* 64 J. Mo. Bar 12, 14 (Jan.–Feb. 2008) (discussing best practices for the preservation and collection of ESI). Requiring them to track ephemeral information as well raises this burden to an entirely new and untenable position. *See Convolve, Inc. v. Compaq Computer Corp.,* 223 F.R.D. 162, 177 (S.D.N.Y. 2004) (holding that preservation of ephemeral data would require "heroic efforts far beyond those consistent with [a party's] regular course of business.").

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IV. CONCLUSION

For the foregoing reasons, *Amici* urge the Court to hold that electronic data that exists only temporarily in RAM is not ESI, and to vacate the Server Log Data Order.

Respectfully submitted,

Date: February 12, 2009

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, I hereby certify that the foregoing brief complies with the 7,000-word volume limitation of Rule 29(d) of the Federal Rules of Appellate Procedure. I make this representation based upon the word count generated by the word processing software used to prepare this brief, which reflects that this brief contains 3,719 words, excluding those portions exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure. The font used for this brief is Times New Roman in 14-point type.

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DECLARATION OF SERVICE

I hereby certify that on February 12, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Stephen Moore