

## The Missing Link: A Duty to Preservation Imbedded Images & Hyperlinks?

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Paleontologists have searched for the [missing link](#), the remains of an transitional life form, showing a state of evolution. Lawyers today continue the quest for missing links, but not for transitional life forms, but inactive hyperlinks to websites.



The Plaintiff in *Ferron v. Echostar Satellite, LLC*, 2009 U.S. Dist. LEXIS 66637 (S.D. Ohio July 29, 2009), filed an epic 1,300 page Third Amended Complaint alleging that multiple Defendants sent 703 email messages that contained a commercial advertisement for Dish Network in violation of Ohio law. *Ferron, 2*. Assuming the Plaintiff used Times New Roman 12 point font, averaging 300 to 350 words a page, that would be approximately 390,000 to 455,000 words in the complaint. [“War & Peace”](#) has approximately 560,000 words.

### The Email Production

Defendant E-Management Group, Inc., produced a CD-Rom with the email messages (presumably HTML). The Plaintiff claimed the graphic images contained in the emails were visible when they were produced. *Ferron, 2-3*.

### Act 1: Motion for Sanctions

The Plaintiff brought a motion for spoliation against the multiple Defendants and attorneys for failing to “preserve electronically stored information (“ESI”) that is directly relevant to Plaintiff’s claims.” *Ferron, 3*.

The exact claim was that 155 of the emails contained website links to images that were no longer on that website. *Ferron, 3*.

The Court held the issue was not ripe and the parties were to exhaust all extrajudicial means to resolve the issue. *Ferron, 3*.

### Act 2: Searching for the “Missing Links” in the Renewed Spoliation Motion



The Plaintiff brought a renewed spoliation motion, after extensive communications with Defendant E-Management, arguing that

(1) Defendant E-Management failed to preserve the images in 72 emails that it sent or caused to be sent to Plaintiff;

(2) Defendant 411 Web failed to preserve the images in 20 emails that it sent or caused to be sent to Plaintiff; and

(3) Defendant Dish Pronto failed to preserve the images in 25 emails that it sent or caused to be sent to Plaintiff. *Ferron*, 8.

### **The Plaintiff's Arguments**

The Plaintiff claimed the graphic images conveyed “the substance of the Dish Network advertisements at issue,” and that the “unpreserved [electronically stored information]– the imbedded and linked graphic images that are no longer visible within the 117 emails– is the only evidence that Plaintiff is able to use to establish that the contents of the email advertisements violate Ohio law.” *Ferron*, 8-9.

### **Plaintiff's Relief Sought**

The Plaintiff requested the following relief:

(1) Court conduct an evidentiary hearing as to Defense counsel's efforts to maintain “ESI relevant to the Plaintiff's claims”;

(2) Permit an adverse inference that the 117 identified emails contain advertisements that violated the OCSP; and

(3) Award plaintiff attorney's fees and costs associated with the filing of the motion. *Ferron*, 9.

### **Defendant's Claims**

Defendant E-Management fought back, claiming that the Plaintiff violated his own duty to evidence because he failed to “print out” the emails that claimed formed the basis of his claims (Personally, I’d print to PDF instead of printing to paper). *Ferron*, 10. Defendant E-Management sought “reasonable expenses” for their opposition. *Id.*

### **Defendants’ Production & Paper Preservation**

The Plaintiff claimed the “graphic images” were necessary to show the substance of the Dish Network ads, which were critical to the lawsuit. *Ferron*, 12.

Defendant E-Management denied any “malfeasance” in their production over some of the emails having missing images. *Ferron*, 12-13. The Defendant printed their production, which effectively “preserved” the images on paper. *Ferron*, 13. The paper copies were offered to the Plaintiffs, provided the Plaintiffs paid for the production costs. *Id.* (While the opinion does not explain what went into the collection and processing of these email messages, if imbedded media was an issue, converting to TIFF or PDF to preserve the media might have been a cheaper option than printing as paper.)

The Plaintiff claimed that producing the printed images was insufficient, because the printed ESI only conveyed “some of the information contained in an email.” *Ferron*, 13.

The Court disagreed. The Plaintiff did not explain what exactly was contained in the “electronic information” and how it supported their claims. *Ferron*, 13.

Speculation on what might have been in possibly destroyed evidence is not the basis for granting an adverse inference instruction. *Ferron*, 13.

### **Duty to Preserve Web Links?**

The parties disputed which links were disabled before the Defendants reasonably anticipated litigation and whether some of the hyperlinks and websites were under the control of third parties. *Ferron*, 14.

The Court did NOT find Defendant E-Management had a duty to preserve every website link in the produced email messages. *Ferron*, 14.

### **No Missing Link**

The Court found that Defendant E-Management and its attorneys did not engage in any bad faith discovery misconduct, because paper copies of the emails had been preserved and there was no proven duty to preserve the different websites. *Ferron*, 14.

The Court denied the spoliation motion against Defendant E-Management, because of the paper preservation, the lack of a duty to preserve certain websites and a lack of showing what “electronic information” was necessary to support the Plaintiff’s claims. *Ferron*, 14-15.

### **Bow Tie Thoughts**

All of the Defendants in this case avoided sanctions, namely because ESI had been preserved as paper with the at issue images. The Plaintiff also failed to explain why the “electronic information” was necessary to their case.

While there can be fact patterns where “missing links” are the key issue of a lawsuit, this was not one of them. As a practice pointer, if you are dealing with “live” web content that can change because of a third party outside of a party’s control, I would capture HTML emails as PDFs or a similar static image. This should preserve the images at issue that might be lost if the third party website supplying the image becomes inactive. If capturing web content is key, there are a variety of tools for that, including printing as PDF’s, HT Tracker and other screen capture technology.