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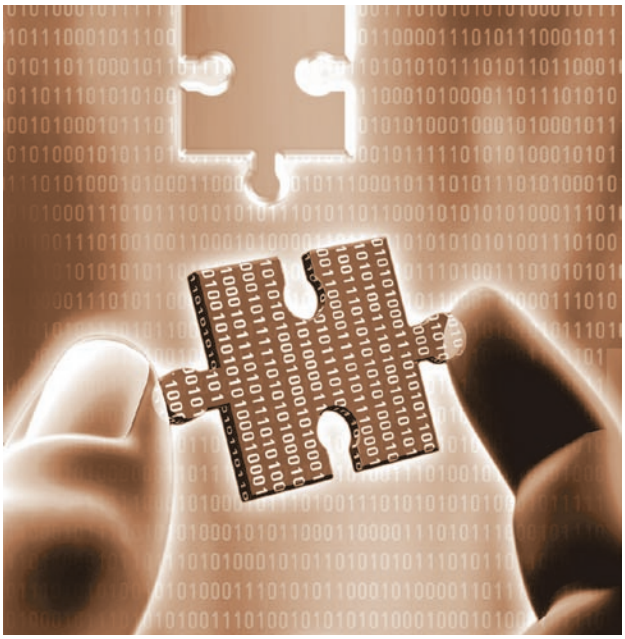

BIGSTOCK

Oh No, Ephemeral Data!

After 'Bunnell,' the sky has not yet fallen.

BY JENNIFER H. REARDEN AND FARRAH PEPPER

IN 2007, *Columbia Pictures v. Bunnell* sent shockwaves through the legal community with its conclusion that random access memory (RAM) data, a form of "ephemeral data" with a temporary life span, was discoverable electronically stored information (ESI). Ephemeral ESI has certain defining characteristics: It is automatically created by a computer system, without the knowledge or conscious actions of the user, and it has a presumptively temporary life span.[1]

In response to *Bunnell*, legal commentators portended a discovery doomsday in which responding parties would regularly be required to preserve and produce such data at great expense.

In hindsight, it can be said that the immediate post-*Bunnell* concerns were somewhat reminiscent of the old fable of Chicken Little, who loudly proclaimed to one and all that "the sky is falling" after a mere acorn had hit his head. As the case law on this subject is still developing, however, it may not yet be safe to stop scanning the sky for cascading objects.

Ephemeral data represents a subset of "outlier" ESI that parties are more likely to overlook during the discovery process, given that it may exist "out of sight" or "out of mind."[2] Moreover, relatively few court decisions have addressed the preservation and production requirements of outlier ESI in litigation, and, of those, only a handful consider ephemeral data.

Ephemeral data is subject to the traditional framework for analyzing the obligations to preserve and produce ESI. Under that framework, the threshold issues are whether the data in question is relevant and under the responding party's custody or control. If so, then whether the data is "not reasonably accessible" on account of undue burden or cost must be considered.[3]

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If the data is deemed not reasonably accessible, then the presumption becomes that such data need not be produced, and the burden shifts to the requesting party to demonstrate that good cause for production nonetheless exists.[4]

Arguably, the unique characteristics of ephemeral data should weigh against finding such material reasonably accessible. The relative permanence, or lack thereof, of ephemeral data may impact the analysis. At least one court has opined that, absent a court order requiring preservation, the transitory nature of data not routinely stored for business purposes counsels against imposing sanctions for spoliation in the event that such data is not preserved for litigation.[5]

The Opinion That Made the Waves

In *Bunnell*, the plaintiffs sought the preservation and production of defendants' RAM files, a form of ephemeral data.[6] RAM is the "'working memory' of the computer into which the operating system, startup applications and drivers are loaded when a computer is turned on or…a program subsequently started up is loaded, and where thereafter, these applications are executed."[7] RAM storage is both automatic and temporary.[8]

As a preliminary matter, the court held[9] that RAM is a storage unit and, therefore, any data it contained would constitute ESI "under the plain meaning of the unambiguous language of Rule 34."[10]

In deciding to order the preservation and production of RAM data, the court assessed a number of factors.

First, the plaintiffs "did not specifically request that defendants preserve Server Log Data temporarily stored only in RAM."[11]

Second, the court determined that storage was possible, no matter how short the window of opportunity.[12]

Third, the RAM at issue was within the defendants' control.[13]

Finally, there was "a lack of other available means to obtain it."[14]

For these reasons, the court ordered the defendants to preserve and produce their RAM files, although the court did not penalize them for any earlier failure to preserve.

Bunnell's ultimate conclusion that the RAM before it was discoverable created concern that the proverbial

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floodgates had been opened to extremely burdensome discovery. Significantly, however, the court did not hold that the general duty to preserve applies to all RAM. The court expressly noted that its decision "does not impose an additional burden on any website operator or party outside of this case," and also affirmatively disclaimed any prospective effect.[15]

In addition, although this ruling initially was controversial, it is not inconsistent with the Federal Rules of Civil Procedure, which contemplated an expansive reading of the definition of ESI over time to encompass "future changes and developments" in technology.[16]

Few cases have addressed ephemeral data since *Bunnell*, and no decisions have specifically analyzed RAM data. The decision in *Healthcare Advocates*[17] was issued between the two *Bunnell* opinions and considered a number of the same factors.

In *Healthcare Advocates*, the plaintiff moved for a spoliation inference based on the defendants' failure to preserve Internet cache files, a form of ephemeral data. A cache is a "temporary storage area where frequently accessed data," such as Web addresses, "can be stored for rapid access."[18] Depending on the setting applied, the Web browser may empty the Internet cache automatically, and "[s]ome cache files are discarded after only twenty-four hours."[19]

The cache files that the plaintiff sought related to copyrighted computer images that had been viewed by the defendants, an act which the plaintiff alleged constituted "hacking."

The court held that a spoliation inference was not warranted. In reaching this conclusion, it focused on five factors.

First, the court held that the defendants had no reason to anticipate a lawsuit alleging "hacking" for their use of a public Web site to view images from another public Web site, or to expect that the cache files would be sought.

Second, because the files were deleted automatically, the defendants were not responsible for their loss. In fact, according to the court, "[t]he most important fact regarding the lost evidence is that the [defendants] did not affirmatively destroy the evidence."[20]

Third, the files were temporary, and may have been deleted numerous times before plaintiff specifically requested them; they "might [even] have been lost the second another website was visited."[21]

Fourth, the plaintiff never specifically requested the cache files.

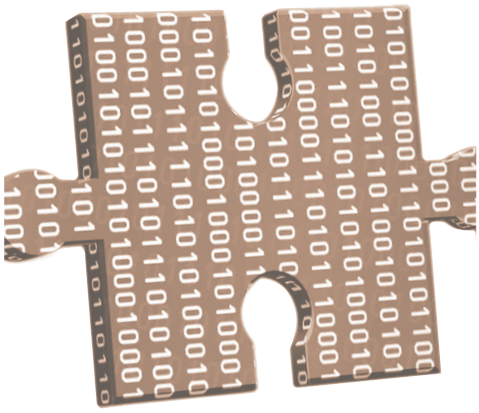
Finally, the plaintiff was able to obtain the information it needed through alternative means.

Similar Issues in Southern District

Most recently, the Southern District of New York evaluated similar issues in *Arista Records v. Usenet.com*.

In that case, the plaintiffs successfully sought sanctions against the defendants for their failure to preserve usage data files that the plaintiffs alleged were relevant to their copyright infringement claims. Usage data consists of "pre-existing records from Defendant[s'] computer servers reflecting actual requests by Defendant[s]' paid subscribers to download and upload digital music files using Defendant[s'] service."[22] Like other ephemeral data, usage data files are created automatically by the computer system and not by any individuals.[23]

In deciding to issue an adverse inference against the defendants, the *Arista Records* court weighed a series of factors, including evidence that the defendants had acted in bad faith when they failed to preserve and produce the usage data files.[24] Many of these factors overlapped with those considered by the courts in *Healthcare Advocates* and *Bunnell*.



First, the court noted that the files had been specifically requested.[25] Second, the defendants had active control over the data. Third, the defendants' usage data was able to be stored for significant periods of time. In fact, the defendants' change in the configuration of their systems (which, in essence, was an attempt to make the data more ephemeral) shortened the retention time of these files. Finally, the data was highly relevant to the parties' underlying dispute, and the information sought could not be more readily obtained from another source.

Conclusion

In light of the relatively sparse post-*Bunnell* case law, and the court's limitation of its holding to the unique facts of that case, the borders of the ephemeral data landscape remain unclear.

Though none of the many versions of the Chicken Little fable indicate that the protagonist had any legal training, his approach may have merit in this context. While the heavens above are still intact, it may make sense to continue watching for any falling acorns, in the form of cases applying the principles of *Bunnell*, that could further refine discovery obligations with respect to ephemeral data.[26]

1. Ephemeral data is "created by the computer system as a temporary by-product of digital information processing, not consciously created, viewed, or transmitted by the user…. The data are ephemeral to the extent that they are not intended to be stored for any length of time beyond their operational use and may be susceptible to being overwritten at any point during the routine operation of the information system." See Kenneth J. Withers, "'Ephemeral Data' and the Duty to Preserve Discoverable Electronically Stored Information," 37 U. Balt. L. Rev. 349, 367 (2008).

2. See Farrah Pepper, "Honey, I Forgot the Cell Phone: The 411 on 'Outlier' ESI," Law.com (Jan. 27, 2010). Available at http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202439544884.

3. See FED. R. CIV. P. 26(b)(2)(B). Whether data that is not reasonably accessible must nonetheless be preserved is a fact-specific inquiry. FED. R. CIV. P. 26(b)(2) Advisory Committee's Notes (2006).

4. See FED. R. CIV. P. 26(b)(2)(B).

5. See *Convolve Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162, 177 (S.D.N.Y. 2004) (Francis, Mag. J.) (distinguishing between semi-permanent data, which is "transmitted to others, stored in files, and are recoverable as active data until deleted," and ephemeral data, which has a fleeting life span that ends upon routine operations of a computer system). In addition, the Sedona Conference® has proposed that inaccessible data be evaluated based on factors such as the transient nature of the data. The Sedona Conference® Commentary on Preservation, Management and Identification of Sources of Data That Are Not Reasonably Accessible, 10-12 (July 2008).

6. *Columbia Pictures Inc. v. Bunnell*, 245 F.R.D. 443 (C.D. Cal. 2007), denying rev. of *Columbia Pictures Indus. v. Bunnell*, No. CV 06-1093FMCJCX, 2007 WL 2080419 (C.D. Cal. May 29, 2007) (Chooljian, Mag. J.).

7. "The Sedona Conference Glossary: E-Discovery & Digital Information Management," 43 (2d ed. 2007).

8. *Bunnell*, 245 F.R.D. at 446.

9. In reaching its holding, the *Bunnell* court relied on Ninth Circuit precedent defining RAM data as "fixed" for purposes of copyright law. *Bunnell*, 2007 WL 2080419, at *5 (citing *MAI Sys. Corp. v. Peak Computers Inc.*, 991 F.2d 511, 518-19 (9th Cir. 1993)). The Second Circuit, however, subsequently read the same precedent in a more expansive manner, such that RAM data could be a "fixed" copy but is not necessarily always so. The U.S. Supreme Court denied certiorari. *Cable News Network Inc. v. CSC Holdings Inc.*, 536 F.3d 121 (2d Cir. 2008), cert. denied, No. 08-448, 2009 WL 1835220 (June 29, 2009).

10. *Bunnell*, 245 F.R.D. at 447 (citing FED. R. CIV. P. 34(a)(1)(A) ("Any party may serve on any other party a request…to produce…any designated documents or electronically stored information…stored in any medium from which information can be obtained")).

11. *Bunnell*, 2007 WL 2080419, at *4 (also noting that the plaintiffs did "not point to any other preservation request which specifically addresses data temporarily stored in RAM.").

12. In pre-*Bunnell* cases that evaluated ephemeral data, a key inquiry was whether the data was stored, or even could be stored, in the ordinary course of business. See *Malletier v. Dooney & Bourke Inc.*, No. 04 Civ. 5316 RMB MHD, 2006 WL 3851151, at *2 (S.D.N.Y. Dec. 22, 2006) (Dolinger, Mag. J.) (refusing to award sanctions against defendant for failure to preserve messages in a customer service chat room, when it did not already preserve them in the ordinary course of business and did not have the capability of preserving such messages during the relevant period); *Convolve*, 223 F.R.D. at 177 (refusing to award sanctions against defendant for failure to preserve wave forms generated on an oscilloscope, when the wave forms "exist only until the tuning engineer makes the next adjustment, and then the document changes," "[n]o business purpose ever dictated that [the wave forms] be retained," and "the preservation of the wave forms in a tangible state would have required heroic efforts far beyond those consistent with [the responding party's] regular course of business"). At least one court implied that if ephemeral data is stored in the general course of business, it might need to be preserved upon notice of pending litigation. *Convolve*, 223 F.R.D. at 177 n.4.

13. *Bunnell*, 245 F.R.D. at 448.

14. *Bunnell*, 245 F.R.D. at 448.

15. *Bunnell*, 245 F.R.D. at 448; *Bunnell*, 2007 WL 1080419, at *13 n.31 ("The court emphasizes that its ruling should not be read to require litigants in all cases to preserve and produce electronically stored information that is temporarily stored only in RAM. The court's decision…is based in significant part on the nature of this case, the key and potentially dispositive nature of the Server Log Data which would otherwise be unavailable, and defendants' failure to provide what this court views as credible evidence of undue burden and cost").

16. "Such clear evidence that Rule 34(a)'s scope was intended to be as broad as possible…leaves no room to interpret the Rule to categorically exclude information written in a particular medium simply because that medium stored information only temporarily." *Bunnell*, 245 F.R.D. at 447 (citing FED. R. CIV. P. 34(a)(1) Advisory Committee's Notes (2006)).

17. *Healthcare Advocates Inc. v. Harding, Earley, Follmer & Frailey*, 497 F. Supp. 2d 627 (E.D. Pa. 2007).

18. *Healthcare Advocates*, 497 F. Supp. 2d at 640.

19. *Healthcare Advocates*, 497 F. Supp. 2d at 640.

20. *Healthcare Advocates*, 497 F. Supp. 2d at 641.

21. *Healthcare Advocates*, 497 F. Supp. 2d at 642.

22. *Arista Records LLC v. Usenet.com Inc.*, 608 F. Supp. 2d 409, 416 (S.D.N.Y. 2009) (Katz, Mag. J.) (internal quotations omitted).

23. *Arista*, 608 F. Supp. 2d at 431 (noting that usage data "is transitory in nature, not routinely created or maintained by defendants for their business purposes, and requires additional steps to retrieve and store").

24. The plaintiffs listed a number of alleged delay tactics by the defendants, including an offer to provide the plaintiffs with direct access to the data, which was subsequently withdrawn, and a commitment to extract and produce data that was then affirmatively destroyed. *Arista*, 608 F. Supp. 2d at 416 n.6, 417, 431.

25. *Arista*, 608 F. Supp. 2d at 431 ("[O]nce defendants had actual notice that plaintiffs were requesting the data, defendants had the obligation to preserve it, if possible, or at least negotiate in good faith what data they could produce"). The failure to specifically request data is an important factor weighing against the imposition of sanctions against the responding party for failure to preserve or produce such data. In *Arista Records*, the defendants cited both *Convolve* and *Healthcare Advocates* to support their arguments that they had no duty to preserve "transient electronic data." The court deemed both cases distinguishable because, unlike in *Arista Records*, the usage data files had not been specifically requested up front. *Arista Records*, 608 F. Supp. 2d at 432. The *Arista Records* court also noted that *Bunnell* had denied sanctions for the destruction of RAM data, in part, because the data had not been specifically requested. *Arista Records*, 608 F. Supp. 2d at 433 n.36.

26. Litigants should be aware that efforts are underway in at least one circuit to quell any uncertainty about the discoverability of ephemeral data. The Seventh Circuit has an Electronic Discovery Pilot Program, which is currently in its first phase of implementation through May 1, 2010. Accompanying the Pilot Program is a set of Principles Relating to the Discovery of Electronically Stored Information, which includes a presumption that RAM and other ephemeral data are generally not discoverable.