



DESTROYING ELECTRONIC STORED INFORMATION CAN FACE SANCTION AND CHARGE

Recently, the Southern District of New York (SDNY) imposed monetary sanctions and an adverse inference jury charge against a plaintiff who allowed electronically stored information (ESI) to be destroyed because it failed to issue a timely and comprehensive litigation hold (both internally as well as to its outside ESI vendor). See *Sekisui Am. Corp. v. Hart*, 12 CIV. 3479, 2013 WL 4116322 (S.D.N.Y. Aug. 15, 2013). Initially, Magistrate Judge Frank Maas declined to award sanctions because the ESI was destroyed during a 15-month window between plaintiff contemplating litigation and commencing suit, finding instead that the plaintiff's failures constituted gross negligence (at most) as the defendant could not demonstrate prejudice. District Judge Shira Scheindlin (who authored the landmark *Zubulake* opinions on e-discovery sanctions a decade

ago) rejected that reasoning and ruled that a party is not required to show prejudice when ESI is destroyed through willfulness or gross negligence. Instead, she held that prejudice is subject to a rebuttable presumption, where the party who failed to preserve the ESI (*i.e.*, the spoliating party) bears the burden of proving that the deleted ESI will not prejudice an adversary. Upon its codification in 2014, an amended Fed.R.Civ.P. 37(e) may lessen the impact of *Sekisui* on spoliation law; but, until then, businesses contemplating or engaged in litigation in New York would be well-advised to note that, under *Sekisui* and *Zubulake*, potentially dispositive sanctions can result from a party's negligence in discharging its preservation obligations, even where no prejudice to another party is reasonably foreseeable or readily apparent.

NEWS, MEDIA, AND UPDATES:

Marty Schwimmer is speaking on a panel at the Fordham Intellectual Property, Media, and Entertainment Law Journal (IPLJ) Symposium on November 8th. The discussion is titled "Recent Developments in U.S. Trademark Law: the Courts, the TTAB and the USPTO." See <http://goo.gl/ENFLRR>.

Marty Schwimmer spoke on a panel for the New York City Bar Association to discuss 3D printing and the potential impact of open source manufacturing on intellectual property on October 17th. See <http://bit.ly/1e7lQu9>.

Dr. Susie Cheng addressed how patents can help grow research and business at the 21st annual meeting of Chinese Association for Science and Technology's ("CAST-USA") at Yale University on October 6th. See <http://goo.gl/jMRLZW>.

Dr. Susie Cheng and Elizabeth Barnhard presented an interactive workshop on the America Invents Act for the Women in

Licensing Group at the NYU Langone Medical Center on September 25th.

Mel Garner facilitated a town-hall style discussion for the New York Intellectual Property Association Presidents' on October 9th. The discussion was styled "What to do about NPEs: Do we Risk Throwing the Baby Out with the Bath Water?" See <http://goo.gl/vdET4U>.

On September 17th, Yuval Marcus spoke on a panel of business experts at an event sponsored by The Business Council of Westchester. Yuval discussed how companies can utilize trademark law to effectively create strong and valuable brands.

We represented Honeywell International Inc. in a successful UDRP proceeding to obtain transfer of the domain names honeywellthermostat.com and honeywell-thermostat.com. A copy of the decision is posted on the National Arbitration Forum website at <http://goo.gl/VJRogg>.

The October edition of Westchester magazine includes the list of Super

Lawyers for 2013. Leason Ellis has four out of the nine IP attorneys listed! Melvin Garner and Peter Sloane are listed under intellectual property in general and Paul Fields and Yuval Marcus are listed under intellectual property litigation.

We welcome Rebecca Rothkopf, Deirdre Clarke, and Jarryd Werts as first years to Leason Ellis. Rebecca, who has a background in mathematics and who worked at the firm as a summer associate last year, has joined our patent and litigation practices. Deirdre, who previously has in-house experience at Pfizer, has joined our trademark and copyright practice. Jarryd, a former medical writer, is working in our patent group.



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