UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

THREE ANGELS BROADCASTING NETWORK, INC. and DANNY LEE SHELTON, Plaintiffs,	)	
v.	)	**CIVIL ACTION NO. 07-40098-FDS**
GAILON ARTHUR JOY and ROBERT PCKLE, Defendants	)	

FINDING AND ORDER
November 16, 2007

HILLMAN, M.J.

I. Introduction

By Order of Reference dated July 23, 2007, this matter was referred to me by Saylor, J., for a Hearing and Order on electronic discovery requirements. That referral was occasioned by disagreements that the parties voiced to Judge Saylor during their Rule 16 Conference relative to the form of production of electronically stored information, and how that information should be identified and produced. Also, on October 26, 2007, the plaintiff's Motion for Hearing Status Conference (sic) was also referred to me.

II. Background

The plaintiff's four count complaint seeks equitable relief and monetary damages

for infringement of trademark (15 U.S.C. s. 1114), dilution of trademark (15 U.S.C. s. 1125(c)), defamation, and intentional interference with advantageous economic relations. On July 27, 2007, this Court held a telephone status conference during which the parties outlined their respective positions with respect to electronic discovery. I ordered the parties to have their experts meet to determine whether or not they could narrow the issues or resolve the point of contention as to how discoverable, electronically stored information shall be identified and provided. An evidentiary hearing was held on August 7, 2007 to resolve any issues that remained after the experts' consultation.

The Plaintiff called as a witness, Mark Lanterman, who is a computer forensic specialist. He suggested a three step process for the preservation and production of discoverable electronic information: The first would be to create a bit stream image (mirror image) of the subject hard drive; the second would be to subject that mirror image hard drive to a search, using search terms mutually agreed upon by the parties; and third, the work product from that search tool would go immediately to the party from whom discovery is sought, to review the results of the search for relevance, privilege, confidentiality issues, and ultimately to production of responsive information.

The Defendants did not proffer any evidence at the hearing and relied upon their cross examination of the Plaintiffs' witness.[1] At the conclusion of that hearing, I gave

[1]This Court went through a great deal of effort to set-up a video conference so that the Defendant, Robert Pickle could join the hearing from the Federal Courthouse in Fargo, North Dakota. Mr. Pickle was represented by counsel at this hearing who was present (Laird J. Heal, Esquire). The ostensible reason for having the video conference was so that Mr. Pickle could present evidence on behalf of the Defendants acting as the Defendants' expert. After the Plaintiffs rested, the Defendants indicated that they did not intend to present any evidence.

the parties 14 days to submit proposed orders for the production of electronically stored information. All parties submitted those proposed orders.

Thereafter, the plaintiffs learned that the defendant Joy had filed for bankruptcy protection and had listed electronic office equipment as a personal property asset. The plaintiffs sought authority to image Joy's computers' hard drives in anticipation of their sale by the bankruptcy trustee. On November 2, 2007, I issued an order authorizing the copying, and immediate sealing of any hard drives or electronic storage devises under the control of the defendant Joy in an effort to preserve any potentially discoverable electronic evidence.

III. The Parties' Respective Positions

The essence of the disagreement between the parties is the process by which discoverable, electronically stored data shall be identified by the party responding to the respective discovery request ("producing party") and produced to the party requesting discovery ("requesting party").

The Plaintiffs propose that all of the responding party's electronically stored information be reproduced on a mirror image of the respective hard drives or storage devises by a trained, experienced computer forensic examiner ("examiner") hired by the requesting party. The parties would provide the examiner with a list of mutually agreeable terms to use to search the mirror imaged devises for the identification of privileged information, and of relevant, discoverable information. Thereafter, the examiner would conduct a search and prepare a log of all relevant documents together with those documents identifying information, i.e., file name, file extension, deletion status, date and time of creation, date of last access, date of last alteration, file size, and

hard drive location. The examiner would also prepare a second log of relevant e-mail pooled from the first log. That log would serve to identify the e-mail's sender, recipeints, date and time of creation, subject line and the names of any attached files.

Both logs would be provided to all counsel of record and copies of documents listed in either of the two logs would be provided to the producing party for review as to relevance and privilege. Thereafter the producing party would serve upon the requesting party the responsive documents and a privilege log with respect to those documents for which a privilege was claimed. The plaintiff's proposed protocol also provides a 'claw back' provision for retrieval of inadvertently disclosed documents.

At the hearing on this matter the defendants adamantly resisted the plaintiff's suggestion of creating mirror images of hard drives and storage devises. They claimed that giving an expert for the plaintiff access to their information technology infrastructure would compromise the integrity of their system, violate confidences and privacy rights, and will allow a wide-ranging, fishing expedition into data and information that would never be discoverable. The defendants proposed orders filed after the hearing appear to modify that position somewhat.

The defendant Robert Pickle, ("Pickle") through counsel, proposed that the parties make their discovery requests for electronic information in the traditional manner.[2] Pickle proposes that any discoverable electronic data be copied onto a readable medium and produced to the requesting party. If the requesting party feels that the

[2] Pro se defendant Joy also submitted a proposed order which essentially tracks Pickle's proposed order with the exception that he continues to insist that The Sedona Principles have somehow supplanted the Rules of Civil Procedure. The Sedona Principles are a valuable tool for courts and practioners but do not have the force of law. They are a best practices recommendation for dealing with electronic document production

response is incomplete, or otherwise non-responsive and that a complete response can only be made by access to the electronic devise where the data resides, then the requesting party must specify "the data which are required to satisfy the discovery request" and "the electronic access which is contemplated." Thereafter the responding party would be required to specify the location of the electronic information and whether there are privileges claimed. If the responding party claims that there is privileged data they would be required to submit an edited copy to the court with the privileged information removed. A summary of the information removed would be provided to the court for *in camera* review. Pickle's proposed order also provides that "A party claiming privilege or a party desiring to resolve any other dispute may make application to the court to resolve the issue."

Pickle's proposal envisions a process somewhat similar to the plaintiff's wherein the requesting party would hire an examiner to copy and search for electronic data. Pickle, however, proposes that any search of the responding party's electronic devises be done only by agreement of the parties or pursuant to a court order. This position essentially makes the search of an electronic storage devises optional at the responding parties discretion. He further suggests that the examiner not be an expert for the requesting party for the interpretation of electronic data or an employee of the requesting party of their counsel.

Discussion

The Plaintiff's proposal, while thoughtful and comprehensive, fails to take into consideration one of the fundamental precepts of discovery under the Rules of Civil Procedure; that the responding party has the obligation to search his own records to

produce requested data. The discovery process is designed to be extrajudicial and in the absence of a strong showing that the responding party has somehow defaulted in this obligation the courts should not resort to extreme, expensive, or extraordinary means to achieve compliance. Diepenhourst v. City of Battle Creek, Case no. 1:05 cv 734, 2006 U.S. Dist. LEXIS 48551 (June 30, 2006).

In the absence of agreement between the parties, there is nothing in the record at this time that would cause me to order a responding party to make all of their electronically stored information available to the requesting party. Courts have traditionally been cautious in requiring the mirror imaging of computers where the request is extremely broad in nature and the connection between the computers and the claims in the lawsuit are unduly vague or unsubstantiated in nature. Balboa Threadworks, Inc. v. Stucky, 2006 U.S. Dist. LEXIS 29265, 2006 WL 763668, at 3. Without a particularized showing, a party may not inspect the physical hard drives of a computer merely because the party wants to search for additional documents responsive to the party's document request. See McCurdy Group v. Am. Biomedical Group, Inc., 9 Fed. Appx. 822, 831 (10th Cir. 2001); see also Ameriwood Industries, Inc. v. Lieberman, 2006 U.S. Dist. LEXIS 93380 (E.D. Mo. December 27, 2006).

However, discrepancies or inconsistencies in the responding party's discovery responses may justify a party's request to allow an expert to create and examine a mirror hard drive of an image. In cases where a defendant is alleged to have used the computer to commit the wrong that is the subject of the lawsuit, it is easier to establish a sufficient nexus between the plaintiff's claims and the needs to obtain a mirror image of the computer's hard drive. See Ameriwood Industries, *supra.*

Therefore, on the facts presently before me, I am not at this point in the litigation ordering that either party's electronically stored information be reproduced on a mirror image of their respective hard drives or storage devices. The parties are encouraged to continue their free exchange of information in addition to any formal requests that may be made under the appropriate discovery rules. If issues arise wherein either party feels that imaging of storage devises is appropriate they may make application to the court.

I am mindful that on November 2, 2007, I fashioned an order requiring the defendant Joy to provide the plaintiffs and the Court with a listing of all electronic equipment under his care, custody or control, and ordered a mirror image of the storage devices on that equipment to be reproduced and placed under seal. This Order is made in an abundance of caution to prevent the loss of any relevant information and is in no way intended to provide the plaintiffs with access to the defendant Joy's hard drive without a further showing to this Court consistent with the principles elucidated in this opinion.

/s/ Timothy S. Hillman
TIMOTHY S. HILLMAN
MAGISTRATE JUDGE