

# e-commerce law & policy

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# Retention and storage of temporary user data

A recent US district court decision has mandated that a website retain and present user data temporarily stored in the RAM of its servers, rejecting the defendant's arguments on privacy policies, constitutional issues and conflicts of laws. In this article, Michael Vatis, a partner in the New York office of Steptoe & Johnson LLP, sets out the court's findings and its wider implications for companies that conduct business online.

Data privacy and data retention are hot issues these days. While American and European legislatures and regulators wring their hands over how to balance the interests of privacy, law enforcement, and commercial imperatives, courts are not hesitating to step into the breach in unexpected ways. This past May, in *Columbia Pictures Indus. v Bunneli*, the US District Court for the Central District of California ordered TorrentSpy, a website that offers dot-torrent files for download by users, to preserve and produce information about users' interaction with the site, even though this information is purposely not logged but only stored temporarily in the RAM of either the TorrentSpy server, located in the Netherlands, or of servers controlled by a third-party middleman, located around the world. The ruling was based on the Federal Rules of Civil Procedure (FRCP) which require litigants to retain and produce 'electronically stored information' relevant to a case. The court rejected the defendants' various arguments for why retention and production should not be required, including costs, the website's privacy policy, the Stored Communications Act (SCA), the Wiretap Act, the pen register statute, the First Amendment to the US Constitution, the potential loss of users' good will, and conflicts with Dutch data protection law. If this ruling becomes the norm in discovery, it could lead to much greater retention and production

of communication records, website logs, and search terms during litigation. More broadly, if courts routinely order data retention during discovery, even where such retention is not part of a company's normal business practices, the slope leading to a broad data retention mandate seems likely to get a lot more slippery.

The plaintiffs, companies with ties to the movie and sound recording industries, alleged that the defendants, through their TorrentSpy website, committed contributory infringement, secondary infringement, and inducement by encouraging users to search for and download dot-torrent files pointing to copyrighted content. During discovery, the plaintiffs asked the court to order the defendants to preserve and produce: "(a) the IP addresses of users . . . who request 'dot-torrent' files; (b) the requests for 'dot-torrent files'; and (c) the dates and times of such requests (collectively 'Server Log Data')." The defendants do not store this data, and state in their privacy policy that TorrentSpy will not 'collect any personal information about you [the user] except when you [the user] specifically and knowingly provide such information'. However, the operation of the website requires the temporary storage of this data, either in the RAM of the defendants' server in the Netherlands, or in the RAM of servers around the world operated by 'Panther,' a third party recently

hired by the defendants to serve as a 'middleman' in the transfer of dot-torrent files to users.

The court found that the Server Log Data was clearly relevant to the plaintiffs' copyright claims, since it spoke to whether primary infringement - a 'necessary predicate' to the plaintiffs' legal theories - had occurred. And the data was subject to discovery under FRCP Rule 34(a), because data stored in RAM is 'electronically stored information' within the meaning of that rule. The court relied on the ruling of the US Court of Appeals for the Ninth Circuit in *MAI Systems Corp. v Peak Computer Inc.* which found that software copied into RAM is 'sufficiently permanent ... to be perceived, reproduced, or otherwise communicated' for the purposes of the Copyright Act. In addition, the data was 'in the possession, custody or control' of the defendants even when it was temporarily stored in Panther's RAM, since the defendants retained 'the ability to manipulate at will how Server Log Data is routed'. And, the court reasoned, preservation and production of the data would not require the creation of new data, but only the logging of data that was already stored, albeit temporarily.

The court further found that requiring the defendants to turn on their web server's log function would not result in 'undue burden or cost' (FCRP Rule 26(b)(2)(B)), since it would not require the storage of a large volume of data. Moreover, the defendants' privacy policy did not bar the requested discovery, since it was within the power of the defendants to change the terms of the policy, and the order required IP addresses to be masked. The redaction of IP addresses, in the court's view, also obviated any First Amendment problems. Nor were the Stored

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Communications or Wiretap Acts obstacles, since both statutes permit intended recipients of data (such as the defendants) to consent to the disclosure thereof, and the Wiretap Act 'only prohibits interceptions during transmission (not while in electronic storage, i.e., RAM)'. The pen register statute's prohibition against capturing IP addresses was also no bar, since that statute exempts 'pen register and trap and trace devices used by providers of electronic communications services relating to the operation and maintenance of such service'.

The court also gave short shrift to the defendants' conflict-of-laws argument. The court rejected the defendants' suggestion that retention and production would violate the Netherlands' Personal Data Protection Act. The court reasoned that since Panther has 'over 25' US servers and the defendants retain the ability to manipulate the routing of the Server Log data, the 'defendants' expressed international concerns no longer appear valid'. (This somewhat cryptic remark appears to mean that if *TorrentSpy* routed the data to Panther servers in the US, the Dutch Act would not be applicable. Of course, Dutch authorities might well take a different view, at least if the data involved Dutch residents.) The court also opined that it was not clear that the Dutch Act protected IP addresses, which identify a computer rather than a specific user of that computer.

Since the defendants' contention that logging would cause them to 'lose business and good will of customers and advertisers' was 'conclusory and speculative', and was outweighed by the 'key relevance and unique nature of the Server Log Data ...', the lack of a reasonable alternative means to obtain such data, and the

limitation imposed by the court regarding the masking of IP addresses', the court ordered the defendants to preserve and produce the Server Log Data. While the court emphasized that its ruling 'should not be read to require litigants in all cases to preserve and produce electronically stored information that is temporarily stored in RAM', that could end up being the result in many cases, given that data held in servers' caches may often play a 'key and potentially dispositive' role, especially in cases involving search engines and other websites. Companies that do business online therefore should watch developments in this area closely. More broadly, if other courts evince similar willingness to require parties to retain and produce such data, even where a company purposely takes steps not to retain the data beyond temporary RAM storage, it could create an environment in which legislators and regulators become more aggressive in pursuing data retention mandates.

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1. 991 F.2d 551, 518-19 (9th Cir. 1993).



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