



# NY Appellate Division Says Cost/Benefit Analysis Must be Conducted for Third-Party ESI

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**Tener v. Cremer, 2011 NY Slip Op 6543 (N.Y. App. Div., Sept. 22, 2011)**

The action underlying this dispute concerned a defamatory statement made by an anonymous poster on Vitals.com. Through the discovery process, the plaintiff traced the IP address of the computer from which the alleged defamatory post originated. The IP address belonged to a computer that was in the custody and control of a third-party, New York University (“NYU”).

The plaintiff then served a subpoena on NYU seeking the identity of all the people who accessed the Internet from NYU’s computers on the day that the post was published. NYU did not, however, produce the information and the plaintiff moved for contempt. The New York County Supreme Court denied the contempt motion and found that NYU did not have the ability to produce the materials the plaintiff demanded. The plaintiff appealed, and the Appellate Division reversed the lower court’s decision.

In reviewing the decision, the Appellate Division noted that although the CPLR is silent as to the discovery of ESI, “the Uniform Rules of the Trial Courts, several courts, as well as bar associations, have addressed the discovery of ESI and have provided working guidelines that are useful to judges and practitioners.” As such, the Court determined that the [Commercial Division, Nassau County, Guidelines for Discovery of ESI](#) (“Nassau Guidelines”) is “appropriate in cases, as here, where a nonparty’s data is at issue.”

The Nassau Guidelines do “not rule out the discoverability of deleted data, but rather suggests a cost/benefit analysis involving how difficult and costly it would be to retrieve” the data. Based on the facts of this case, the Appellate Division determined that the Nassau Guidelines would provide a “practical approach” to determine whether the deleted data should be produced:

*To exempt inaccessible data presumptively from discovery might encourage quick deletion as a matter of corporate policy, well before the spectre of litigation is on the horizon and the duty to preserve it attaches. A cost/benefit analysis, as the Nassau Guidelines provide, does not encourage data destruction because discovery could take place regardless. Moreover, similar to [FRCP] 26(b)(2)(C)(iii), the approach of Nassau Guidelines, has the benefit of giving the court flexibility to determine literally whether the discovery is worth the cost and effort of retrieval.*

The Court further held that although these particular “cache” files which plaintiff seeks are difficult to access since they may be “unallocated” data or somewhere in a backup data, the plaintiff’s “only chance to confirm the

identity of the person who allegedly defamed her may lie with NYU.” Therefore, the plaintiff has demonstrated “good cause,” necessitating the need to perform a cost/benefit analysis.

Ultimately, however, the court ruled, “the record is insufficient to permit this court to undertake a cost/benefit analysis.” Thus, the case was remanded to the lower court in order to (1) whether the identifying information was written over, as NYU maintains, or whether it is somewhere else, such as in unallocated space as a text file; (2) whether the retrieval software plaintiff suggested can actually obtain the data; (3) whether the data will identify actual persons who used the internet on April 12, 2009 via the IP address plaintiff identified; (4) which of those persons accessed Vitals.com and (5) a budget for the cost of the data retrieval, including line item(s) correlating the cost to NYU for the disruption.

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