

RealNetworks, Inc. v. DVD Copy Control Association: Preservation Triggers and Terminated Employees

June 22, 2009

On May 5, the U.S. District Court for the Northern District of California, in *RealNetworks, Inc. v. DVD Copy Control Association*, 2009 WL 1258970 (N.D. Cal. May 5, 2009), granted DVD Copy Control Association's (DVD CCA's) motion for sanctions for spoliation of evidence for RealNetworks' failure to preserve notebooks containing potentially relevant information that had belonged to an employee who had been terminated right before RealNetworks' action. This case is of interest because it discusses two key issues in discovery—when the obligation to preserve is triggered and how to preserve records created by employees who have separated from the company by the time the preservation obligation arises.

RealNetworks filed an action on September 30, 2008 seeking declaratory judgment that they had not breached a license agreement with DVD CCA. That same day in another jurisdiction, some of the DVD CCA defendants filed an action against RealNetworks alleging breach of the same licensing agreement. Later, DVD CCA filed a motion for sanctions against RealNetworks alleging spoliation of evidence.

The court first addressed the issue of when RealNetworks had a duty to preserve. DVD CCA asserted that the duty to preserve arose once RealNetworks knew litigation was inevitable, which DVD CCA believes occurred in early 2007. However, RealNetworks did not issue a preservation memorandum until October 6, 2008. To bolster its claim that the preservation obligation was triggered in early 2007, DVD CCA relied on some presentations by RealNetworks that contained slides referring to "risks" and "threats" and "legal action by Hollywood." Additionally, DVD CCA also relied on discussions between RealNetworks' employees regarding possible litigation about the product at issue. The court, however, stated that "a **general apprehension** of lawsuits does not create a duty to preserve all documentation related to the alleged software product sold and distributed by RealNetworks. . . . The cited statements do not rise to a **probability** that the instant litigation by or against Studio defendants [DVD CCA] would result" (emphasis added).

The court instead stated that the duty to preserve was triggered in early September 2008 when RealNetworks had notice that DVD CCA objected to RealNetworks' product release and expressed concern that the product violated the license agreement. Additionally, one of the DVD CCA defendants sent a letter to RealNetworks stating that it "intended to file a lawsuit against Real

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