

## ***Victor Stanley II: Judge Grimm Synthesizes ESI Preservation Law and Issues Prison Sentence for Spoliation***

**September 22, 2010**

On September 9, Magistrate Judge Paul W. Grimm rendered the sequel to his landmark *Victor Stanley* decision.<sup>1</sup> His opinion in *Victor Stanley, Inc. v. Creative Pipe, Inc. (Victor Stanley II)*<sup>2</sup> provides a detailed and insightful synthesis of the current state of spoliation law as it concerns electronically stored information (ESI).

The core allegations in the underlying case involved claims that Creative Pipe, Inc. (CPI) principal Mark Pappas (Pappas) and others repeatedly accessed Victor Stanley, Inc.'s (VSI's) website under a fictitious name and downloaded VSI design drawings, which CPI then presented as its own in bids against VSI.<sup>3</sup>

In "the single most egregious example of spoliation" that he has encountered, Judge Grimm details Pappas's three-year history of "engag[ing] in a cat and mouse game to hide harmful ESI from production during discovery." In addition to cataloging Pappas's multiple unsuccessful attempts to delete ESI (causing delay but no data loss),<sup>4</sup> Judge Grimm identified eight discrete ways in which Pappas "willfully and permanently destroyed evidence related to the lawsuit." These included failing to implement a litigation hold; deleting ESI soon after VSI filed suit; failing to preserve an external hard drive, files, and emails following receipt of VSI's preservation demand; failure to preserve ESI when replacing CPI's server; and deleting ESI and using programs to erase files after several court-issued preservation orders.

Judge Grimm examined in great detail the technical and other measures<sup>5</sup> used by Pappas to obfuscate and destroy evidence. Based on the evidence of Pappas's "willful, bad faith conduct" (and noting the

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1 *Victor Stanley, Inc. v. Creative Pipe, Inc., et al.*, 250 F.R.D. 251 (D. Md. 2008).

2 *Victor Stanley, Inc. v. Creative Pipe, Inc.*, No. MJG-06-2662 (D. Md. Sept. 9, 2010).

3 Victor Stanley, Inc. filed a complaint on October 11, 2006 against Creative Pipe, Inc., Mark Pappas, and others, alleging, *inter alia*, violations of copyrights, patents, and unfair competition.

4 Noting that "Pappas's zeal considerably exceeded his destructive skill," Judge Grimm dubbed Pappas and his "confederates" the "gang that couldn't spoliolate straight."

5 Among the more outrageous acts described are Pappas's contention that he placed emails in his deleted items folder for storage purposes and his use of insulting acronyms to name files that presumably contained downloads from VSI's website.

defense counsel's partial concession of prejudice and acquiescence in default judgment on one claim), the court presumed the relevance of the destroyed ESI, as well as prejudice to the plaintiff.

Regarding the plaintiff's request for sanctions, the court found that "the facts amply demonstrate the intentional, bad faith permanent destruction of a significant quantity of relevant evidence, to the Plaintiff's detriment" such that default judgment on liability was "clearly appropriate" as to Count I, plaintiff's copyright claim. As to the same count, the court also recommended a permanent injunction.

The court also imposed monetary sanctions in the form of "attorney's fees and costs associated not only with filing this motion, but also with respect to efforts expended throughout this case to demonstrate the nature and extent of Pappas's spoliation." Further, the court ordered that "Pappas's acts of spoliation be treated as contempt of this court, and that as a sanction, he be imprisoned for a period not to exceed two years, unless and until he pays to Plaintiff the attorney's fees and costs that will be awarded."

In Judge Grimm's hands, this unusually clear-cut case of spoliation becomes a vehicle for analyzing the general state of the law regarding preservation. The analytical framework is intended to address the "collective anxiety" among lawyers and institutional, organizational, and governmental litigants regarding "the lack of a uniform national standard governing when the duty to preserve potentially relevant evidence commences, the level of culpability required to justify sanctions, the nature and severity of appropriate sanctions, and the scope of the duty to preserve evidence and whether it is tempered by . . . principles of proportionality." Toward that goal, Judge Grimm proceeds "to synthesize not only the state of the law in [the District of Maryland and the Fourth Circuit], but also to put it within the context of the state of the law in other circuits as well."

## Conclusion

The true value of *Victor Stanley II* lies in its extensive analysis of the law of preservation and spoliation in each circuit, provided in detail throughout the opinion, as well as in a 12-page chart identifying the relevant standards for common issues (including the scope of the duty to preserve, whether conduct can be culpable per se, culpability and prejudice requirements, what constitutes prejudice, and jury instructions on culpability).

Noting that preservation obligations are often viewed as one of the greatest contributors to the disproportionate cost of cases involving ESI, Judge Grimm hopes that his analysis will provide "an analytical framework that may enable [lawyers and their clients] to resolve preservation/spoliation issues with a greater level of comfort that their actions will not expose them to disproportionate costs or unpredictable outcomes of spoliation motions." Judge Grimm's recognition of the uncertainty and "collective anxiety" facing litigants due to disparate preservation and spoliation standards among the circuits, and his resulting practical analysis of these broader issues, are a welcome development in this area of the law.<sup>6</sup>

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6 The full opinion text is available online, at [http://news.bna.com/ddee/DDEWEB/split\\_display.adp?fedfid=17778699&vname=ddeedec&fn=17778699&jd=a0c4d5n5x3&split=0](http://news.bna.com/ddee/DDEWEB/split_display.adp?fedfid=17778699&vname=ddeedec&fn=17778699&jd=a0c4d5n5x3&split=0).

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