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## The Twenty-Seventh Annual John Marshall Law School International Moot Court Competition in Information Technology and Privacy Law: Summary of Bench Memorandum, 26 J. Marshall J. Computer & Info. L. 259 (2008)

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**THE TWENTY-SEVENTH ANNUAL**  
**JOHN MARSHALL**  
**INTERNATIONAL MOOT COURT**  
**COMPETITION**  
**IN INFORMATION TECHNOLOGY AND**  
**PRIVACY LAW**  
**OCTOBER 23-25, 2008**  
**BENCH MEMORANDUM**

ROBIN FICKE  
JAMES LAI  
STEVEN TSENG  
PANAGIOTA KELALI

## IN THE SUPREME COURT OF THE STATE OF MARSHALL

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ALEX ROMERO,	)	
Petitioner,	)	
	)	
v.	)	No. 08-1701
	)	
WINDBUCKET ENTERTAINMENT, LLC,	)	
Respondent.	)	

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## I. INTRODUCTION

Petitioner, Alex Romero (“Romero”), appeals to the Marshall Supreme Court from an order granting summary judgment in favor of Respondent, Windbucket Entertainment, LLC (“Windbucket”). Romero’s lawsuit alleged that Windbucket and a third party (not a party to the present appeal) were liable to him for invasion of privacy by intrusion upon seclusion. Romero then sought discovery sanctions against Windbucket for violations of Marshall Rule of Civil Procedure 37.

The issues in this case concern whether a subscriber to an Internet-based, multiplayer computer game can state a valid invasion of privacy claim against the game’s publisher, when liability is based on another subscriber’s actions, which occurred wholly within the virtual world of a computer game. The case also concerns the extent to which a computer game publisher should be required to keep identifying information of users who log into its computer systems via the Internet and whether the publisher can be held liable for deleting its records when faced with litigation.

## A. PROCEDURAL HISTORY

Alex Romero’s original complaint, filed December 27, 2007 in the District Court of Cyrus County, alleged Windbucket invaded Romero’s privacy when it sold access to a special feature of its Eden computer game that allowed another Eden player, known only by his online alias “LEETDUDE,” to surreptitiously gain access to a private virtual area that Romero had created within the Eden virtual universe. Romero’s original complaint also alleged Windbucket failed to monitor players’ conduct in Eden. Romero simultaneously served Windbucket with a discovery request seeking the identity of LEETDUDE. Windbucket failed to produce the information sought by Romero. After obtaining two motions to compel discovery, Romero motioned the district court to compel production a third time. The district court then ordered Windbucket to produce the information or show cause for its failure to produce.

Windbucket stated that it destroyed information of players' identity, pursuant to its Data Retention Policy. Romero then moved for sanctions under Rule 37 of the Marshall Rules of Civil Procedure based upon Windbucket's failure to comply with the court's discovery orders and Windbucket's destruction of evidence. Romero requested the court enter a default judgment against Windbucket, or that the alleged invasions of privacy be taken as established. The district court denied Romero's motion, but ordered Windbucket to pay Romero reasonable expenses caused by its failure to comply with discovery orders. Windbucket then moved for summary judgment on Romero's intrusion upon seclusion claim. The district court granted the summary judgment motion to Windbucket and held that Romero failed to state a claim of invasion of privacy.

Romero appealed to the Fourth Circuit Court of Appeals for the State of Marshall, and sought review of the trial court's entry of summary judgment in favor of Windbucket on his intrusion upon seclusion claim and refusal to impose sanctions against Windbucket for spoliation of evidence. The court of appeals affirmed the district court's grant of summary judgment in favor of Windbucket regarding the intrusion upon seclusion claim and held that virtual avatars cannot suffer invasions of privacy. The court of appeals also affirmed the decision of the district court on the issue of spoliation of evidence. In light of the conclusion that Romero did not suffer any actionable harm, the court of appeals held that any error in denying Romero's motion for sanctions was harmless.

Romero petitioned for leave to appeal to the Supreme Court of the State of Marshall. The Supreme Court granted leave to appeal the summary judgment order and the order denying Romero's motion for sanctions. The parties now appear before the Supreme Court of the State of Marshall to present their arguments.

## B. BACKGROUND INFORMATION

The parties have stipulated that the court of appeals decision shall serve as the record on appeal. The court of appeals decision sets forth the facts of the case as follows:

Windbucket is in the business of developing and publishing computer games. The science fiction themed game of Eden, released in 2005, has been Windbucket's most successful game to date. Eden is a massively multiplayer online role-playing game, or "MMORPG." An MMORPG is not like a traditional computer game. Instead of installing the entire game on the player's computer, MMORPG players install software that allows their computers to access Windbucket's computer systems and play the game over the Internet. Playing the game on the Internet allows players to interact and play with other Eden players.

Eden has a significant player base within the gaming community; there are millions of Eden players. Each player pays a subscription fee to Windbucket of approximately \$15 per month. Windbucket requires all players to agree to its End User Licensing Agreement (“EULA”) and Terms of Use Agreement (“TOU”) upon starting the game. Eden players must also create a user name that grants them access to Windbucket’s computer systems and design an avatar, an animated character that represents the player in Eden’s virtual world. Players control their avatars’ actions within Eden’s simulated game environment and may use them to interact with other players’ avatars and simulate real-life actions within the game.

Eden’s game play includes simulated ground and space combat as well as direct interaction between players’ avatars. Avatars visually represent players within Eden’s computer animated virtual universe. As Eden players participate in the game, their avatars evolve. They may improve in-game abilities and may also acquire personalized virtual property such as game money (“credits”) and personalized private locations within the Eden universe.

Windbucket regularly updates the Eden software, which in turn makes changes to the game’s virtual environment. A previous version of Eden included a feature called “Zero Being” mode as a means of promoting subscriber retention. Under Zero Being mode, players who stopped paying monthly subscription fees would experience reduced game functionality. Their avatars would become invisible to other players, rendering them unable to interact with other Eden players. Zero Being avatars were also unable to advance in the game and could not accumulate virtual property or money.

Some players intentionally allowed their subscriptions to lapse so that they could become invisible and spy upon other players’ avatars without their knowledge. These players referred to themselves as “ZBs” or “zombies.” The zombies’ avatars were able to gain access to restricted zones within the Eden virtual environment, including private locations created by other Eden players. Some zombie players established an independent website entitled “Zombies of Eden,” where they posted details about other avatars and events that they had witnessed while in Zero Being mode.

After learning of the Zombies of Eden site (and having found Zero Being mode ineffective for its intended purpose), Windbucket discontinued the use of Zero Being mode in July 2006. As another experiment, however, Windbucket created a new mode called “Voyage-Enhanced Unrecognizability,” or “Voyeur” mode. Players who purchased access to Voyeur mode could make their avatars invisible to other Eden subscribers. They could also gain access to any location within the game environment, including ordinarily private, player-created locations, which were

normally accessible only to their creators and authorized guests. A subscriber could enable Voyeur mode for his or her avatar by paying an additional monthly fee to Windbucket. Windbucket did not publicize the experimental Voyeur feature, but would inform subscribers about its availability if they inquired about the discontinued Zero Being mode. Windbucket discontinued Voyer mode in its November 2007 update of the Eden software after receiving numerous subscriber complaints.

Romero is an Eden player who lives in the State of Marshall and works from his home as an investment day-trader, enabling him to spend significant time online. He has played the game since its release in early 2005. Romero's avatar is named "PWNED," and he has invested a significant amount of time and money into playing Eden. As of November 2007, he had amassed approximately 75 million credits, and created several private space stations accessible only to his own avatar and the avatars of some of his friends. Romero's virtual space station serves as a virtual gated community of large homes that he leased to other players for their own avatars' use in exchange for in-game credits. At the center of the station was a large mansion that Romero built for his own avatar. Upon completion of the mansion Romero conducted nearly all of his affairs in Eden from within the mansion. Romero's mansion was designated a private location, ordinarily accessible only to PWNED and the avatars of players authorized by Romero to access the mansion.

In late July 2006, a player known only by the avatar name "LEETDUDE" activated Voyeur mode for his or her account. On or before November 30, 2007, LEETDUDE posted to the Zombies of Eden site numerous images consisting of screen shots<sup>1</sup> captured from LEETDUDE's game sessions in Voyeur mode. Many of these screen shots depicted private areas normally accessible only to the Eden players who had created them and their invited guests. Some of the images depicted avatars engaged in simulated sexual acts with one another. Among the images posted by LEETDUDE were the following:

- (1) A high-resolution screen shot of the interior of the master bedroom on the second floor of PWNED's mansion. No avatars are visible in the image, although various custom clothing items and other virtual personal effects are visible.
- (2) A high-resolution screen shot depicting a group of six or seven avatars engaging in simulated sexual acts in a large ornamental fountain in front of PWNED's mansion. The avatars are obscured in such a way that none of their identities can be ascertained by viewing the image, although the parties have stipulated that PWNED is among the avatars depicted.

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1. A screen shot is an image of the visual items displayed on the computer monitor.

Romero filed a complaint against Defendant-Appellee Windbucket Entertainment, LLC, and LEETDUDE on December 27, 2007. The complaint alleges that Windbucket and LEETDUDE are liable to Romero for invasion of privacy by intrusion upon seclusion. Romero alleged that his privacy was invaded when LEETDUDE intruded upon his seclusion, as evidenced by the screen shots that were posted on the Zombies of Eden site. Romero also alleged that Windbucket intruded upon his seclusion by selling access to Voyeur mode and thus enabling LEETDUDE to gain access to his private virtual property and by failing to monitor LEETDUDE's conduct.

Romero simultaneously served Windbucket with a discovery request seeking the identity of LEETDUDE. Windbucket stated in response that Eden subscribers are permitted to pay online via credit card, or to purchase subscriptions with prepaid cards purchased at retail stores. Users who subscribe to Eden with the prepaid cards are required only to input the code from the prepaid card. Windbucket does not ask for additional information such as a name or a credit card number. Windbucket stated that it does not maintain any identity information on persons who funded their subscriptions solely using prepaid cards. Windbucket also stated that LEETDUDE had always paid for his or her account with prepaid cards and that as a result, Windbucket possessed no way of identifying LEETDUDE's real identity.

Following this disclosure, Romero submitted discovery requests to Windbucket seeking its server authentication logs for the months of September, October, and November 2007. The logs would contain information that Romero could use to identify LEETDUDE because the records would indicate LEETDUDE's Internet service provider and the unique information assigned to LEETDUDE's computer. Windbucket refused to produce the logs, claiming a privilege of trade secret.

Romero obtained a discovery order from the district court to compel production of the logs. Windbucket was unresponsive to the order, citing failure of its attorneys. Romero requested a second order to compel production of the logs. Windbucket produced authentication logs for its website server and not the game server as requested by Romero. On the third attempt by Romero to compel production, Windbucket responded by providing copies of its server authentication logs for December 2007 and January 2008, and not for the months Romero originally requested. The district court then ordered Windbucket to produce the requested data or show cause for its failure to do so. Windbucket responded on February 4, 2008, with a statement that it no longer retained the requested information because, pursuant to its Data Retention Policy, Windbucket deletes player log-in information after 60 days. Windbucket also provided copies of its Data Retention Policy dated February 2, 2008, and a superseded version from November 1, 2004. Windbucket stated

that the policy was revised in February 2008 because the prior version failed to reflect existing practice within Windbucket, and the newer version conformed the policy to practice and alleged technology limitations.

Romero moved for sanctions under Rule 37 of the Marshall Rules of Civil Procedure based upon Windbucket's failure to comply with the district court's discovery orders and its destruction of evidence. Romero requested that the district court render a default judgment against Windbucket on his invasion of privacy claim, or in the alternative enter an order directing that Windbucket's participation in the alleged invasions of privacy be taken as established for purposes of the action. The district court denied Romero's motion for sanctions, but ordered Windbucket to pay reasonable expenses caused by its failure to obey the discovery orders.

Windbucket then moved for summary judgment on Romero's claim against it, on the grounds that Romero did not suffer an actionable invasion of privacy, because he had no expectation of privacy in an Internet game. Romero opposed the motion, arguing *inter alia*, that Windbucket and LEETDUDE acted in concert in invading his privacy because Windbucket provided the instrumentality that was used to invade his privacy and induced and intended LEETDUDE would use Zombie mode to intrude upon Romero's seclusion. Romero argued that Windbucket's actions in enabling the invasion of privacy were at least negligent or reckless; and Windbucket intentionally misled Romero into believing that he had an expectation of privacy in his activities in Eden. The district court granted Windbucket's motion for summary judgment and dismissed Windbucket as a defendant to the action.

## II. ISSUES PRESENTED

There are two issues raised on this appeal before the Supreme Court of Marshall: (1) whether the district court erred in granting Windbucket's motion for summary judgment on Romero's invasion of privacy claim against Windbucket; and (2) whether the district court erred in denying Romero's motion for sanctions based upon Windbucket's spoliation of evidence and failure to comply with the court's discovery orders.

## III. ANALYSIS OF ISSUES

### A. STANDARD OF REVIEW

Summary judgment is a procedural device that enables a court to dispose of part or all of a case prior to trial. In the State of Marshall, summary judgment is governed by Rule 56 of the Marshall Rules of Civil Procedure. Under this rule, summary judgment is proper only if there is



no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.<sup>2</sup> The court considers the pleadings, depositions, answers to interrogatories, admissions, and affidavits in assessing whether summary judgment is proper.<sup>3</sup> A genuine issue of material fact exists only if "a fair-minded jury could return a verdict for the [non-moving party] on the evidence presented."<sup>4</sup>

An appellate court reviews a grant of summary judgment *de novo*, applying the same standard as the trial court.<sup>5</sup> The reviewing court determines whether a genuine issue of material fact exists by viewing the evidence in the light most favorable to the non-moving party and drawing all reasonable and justifiable inferences in favor of that party.<sup>6</sup> The moving party has the burden of identifying the material facts which are without genuine dispute and support the entry of summary judgment in favor of the moving party.<sup>7</sup> The non-moving party, for its part, must identify which material facts raise genuine issues of dispute.<sup>8</sup> Because the entry of summary judgment "is a drastic means of disposing of litigation,"<sup>9</sup> it should be granted only when the moving party's right to relief is "clear and free from doubt."<sup>10</sup> However, the mere fact that there exists "some alleged factual dispute between the parties"<sup>11</sup> or "some metaphysical doubt as to the material facts"<sup>12</sup> is insufficient to defeat a motion for summary judgment.

#### B. INTRUSION UPON SECLUSION CLAIM AGAINST WINDBUCKET

Marshall courts have consistently applied section 652B of the Restatement (Second) of Torts (1977), which recognizes that an action lies for intrusion upon seclusion if the plaintiff can show four elements: (1) there was an unauthorized intrusion or prying into his seclusion; (2) the intrusion was offensive or objectionable to a reasonable person; (3) the matter intruded upon was private; and (4) the intrusion caused anguish and suffering.<sup>13</sup> Thus, to defeat Windbucket's summary judgment motion on his intrusion upon seclusion claim, Romero must show that a genuine issue of material fact exists for any element of the tort.

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2. MARSHALL R. CIV. P. 56(c) (cited at R. 1). Rule 56(c) is similar or identical to the corresponding provision of the federal rules, Fed. R. Civ. P. 56(c).

3. FED. R. CIV. P. 56(c).

4. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

5. *Delta Sav. Bank v. United States*, 265 F.3d 1017, 1021 (9th Cir. 2001).

6. *Anderson*, 477 U.S. at 255.

7. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

8. *Id.* at 324.

9. *Purtill v. Hess*, 489 N.E.2d 867, 871 (Ill. 1986).

10. *Id.*

11. *Anderson*, 477 U.S. at 247 (emphasis omitted).

12. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

13. *Melvin v. Burling*, 49 N.E.2d 1011, 1012 (Ill. App. 1986).

## 1. *Direct Liability*

In order to defeat Windbucket's summary judgment motion with respect to his direct liability claim, Romero must allege conduct by Windbucket that satisfies each of the four Restatement elements.

### *i. Unauthorized Intrusion or Prying into Romero's Seclusion*

The first element of the intrusion upon seclusion tort is an unauthorized intrusion. The Restatement states that the intrusion does not need to be of the physical variety; it can also be sensory, so long as an individual's privacy has been impinged.<sup>14</sup> Finally, courts have held that a plaintiff must show that ". . .the defendant penetrated some zone of. . . privacy surrounding. . . or obtained unwanted access or data about the plaintiff."<sup>15</sup>

Windbucket is likely to argue that it was LEETDUDE, not Windbucket, who intruded into Romero's seclusion. Windbucket will likely argue that its sole connection to the acts forming the basis of Romero's claim is the creation and sale of Voyeur mode and that since LEETDUDE was the one who used Voyeur mode to gain unauthorized access to PWNED's mansion, Windbucket itself has committed no intrusive acts.

Windbucket may also cite the Terms of Use Agreement ("TOU"), which gives Windbucket the right to monitor all aspects of the Eden virtual world, and argue that Romero had consented to any intrusions that it performed.<sup>16</sup> Windbucket may also assert that once Romero had given his consent to the intrusion, even outright deception by defendants as to the reasons for recording Romero's activity will not negate his consent to monitoring.<sup>17</sup> Thus, Romero's consent to monitoring in the TOU may be a defense for Windbucket against Romero's claim of intrusion upon seclusion.<sup>18</sup>

Romero is likely to argue that in addition to creating and promoting Voyeur mode, Windbucket's conduct is so closely tied to and contemporaneous with LEETDUDE's actions that it should be considered an actor in the allegedly intrusive conduct as well. Romero may argue that, in addition to creating and selling Voyeur mode, Windbucket owns and operates the computers that Eden subscribers access to play the game.

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14. RESTATEMENT (SECOND) OF TORTS § 652(b) (1977).

15. *Shulman v. Group W. Prod.*, 955 P.2d 469, 490 (Cal. 1998).

16. *R.* at 8, 12.

17. *Ouderkirk v. PETA*, No. 05-10111, 2007 U.S. Dist. LEXIS 29451 (E.D. Mich. Mar. 29, 2007) (explaining that a misrepresentation as to the reason for recording footage of a chinchilla farm's operations did not defeat plaintiffs' consent to allowing PETA members to film farm operations).

18. *Lewis v. LeGrow*, 258 Mich. App. 175 (2003).

Windbucket also creates the game environment and animates the characters, including the game elements that are the subject of the intrusion claim.<sup>19</sup> Windbucket transmits those images to players (including LEETDUDE); and Windbucket at least had the capability and contractual right to monitor those transmissions.<sup>20</sup> Thus, Romero could assert that Windbucket is a joint actor in the intrusion committed by LEETDUDE because Windbucket furnished and profited from the method that LEETDUDE used to gain surreptitious access to PWNED's mansion.<sup>21</sup>

Romero may counter Windbucket's consent argument by comparing Windbucket's use of its monitoring right as a means to sell Voyeur mode to an intrusion upon matters to which his consent would not reasonably have been expected to extend.<sup>22</sup> Finally, Romero may argue that regardless of whether Windbucket actually used Voyeur mode to observe the communications that took place inside PWNED's mansion, the mere creation of Voyeur mode amounted to the installation of a monitoring device that itself constituted an intrusion regardless of whether Windbucket actually obtained any information from its use.<sup>23</sup>

*ii. Intrusion Offensive or Objectionable to a Reasonable Person*

The second element of the tort requires the plaintiff show the intrusion was offensive or objectionable to a reasonable person.<sup>24</sup> The Restatement requires any intrusion to be "highly offensive to the ordinary reasonable [person], as the result of conduct to which the reasonable [person] would strongly object."<sup>25</sup> This element of the tort applies to how the information was obtained as well as what information was

19. R. at 4, 8.

20. R. at 4, 8, 12.

21. R. at 4-5. *See also* RESTATEMENT (THIRD) OF TORTS: Apportionment of Liability, § 15 (1998) (noting concerted actors are jointly and severally liable for tortious conduct; one who directs tortious conduct by another, even though not technically the employer of the tortious actor, may be subject to joint and several liability for injury).

22. RESTATEMENT (SECOND) OF TORTS, § 652(b), cmt. c (1977).

23. *See Harkey v. Abate*, 346 N.W.2d 74 (Mich. Ct. App. 1983) (reversing a grant of summary judgment for a roller rink operator in an intrusion case based on the installation of see-through panels in the ceiling of the women's restroom, and holding that the installation of hidden viewing devices in and of itself could constitute a sufficient intrusion that would allow recovery); *Hamberger v. Eastman*, 206 A.2d 239 (N.H. 1964) (holding that a secret installation of a listening device in another's home is an invasion of privacy, without regard to whether it was actually utilized). *See also* *Huntingdon Life Sciences v. Stop Huntingdon Animal Cruelty USA*, 129 Cal. App. 4th 1228 (2005); *Miller v. National Broadcasting Company*, 69 A.L.R.4th 1027 (Cal. App. 1986) (noting that to prove an intrusion into a private place, conversation, or matter, the plaintiff must show that the defendant penetrated some zone of privacy or obtained unwanted access to data).

24. *Melvin*, 49 N.E.2d at 1012.

25. RESTATEMENT (SECOND) OF TORTS, § 652B, cmt. d ("There is likewise no liability unless the interference with the plaintiff's seclusion is a substantial one, of a kind that

obtained.<sup>26</sup>

Windbucket may attack Romero's ability to prove offensiveness by claiming that as between Windbucket and Romero, there was no expectation of privacy in communications that Romero made using Windbucket's own computers and software with other Eden players, all of which Windbucket had a right to monitor.<sup>27</sup> Therefore, Windbucket may argue, the intrusion cannot reach the standard of "highly offensive to the reasonable person."<sup>28</sup>

In order to establish offensiveness, Romero may point to the record, which establishes that one of Eden's features is that it allows users to create locations normally accessible only to themselves and other invited players.<sup>29</sup> Romero may argue that creating Voyeur mode and secretly profiting from it by selling it to Eden players like LEETDUDE would be offensive to a reasonable person because Windbucket knew that the previous Zombie mode had been abused in order to spy on paying Eden players.<sup>30</sup> Romero could characterize Windbucket's conduct in selling Voyeur mode to LEETDUDE as highly offensive because it demonstrates Windbucket's intent to profit from known abusive conduct that had occurred with respect to the Zombie mode and its intent to deceive Eden users about the ostensibly private character of player-created locations.<sup>31</sup> Romero could compare Windbucket's actions to recording of private conversations and unauthorized installation of recording devices, which have been found to constitute intrusions upon seclusion.<sup>32</sup> Romero could argue that, upon the record, Windbucket gave him the right

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would be highly offensive to the ordinary reasonable man, as the result of conduct to which the reasonable man would strongly object.").

26. *Tobin v. Mich. Civil Service Comm.*, 331 N.W.2d 184 (Mich. 1982).

27. R. at 8, 12.

28. *Thygeson v. U.S. Bancorp*, No. 03-647, 2004 U.S. Dist. LEXIS 18863 (D.C. Or. Sept. 15, 2004). A former employee's intrusion upon seclusion claim against former employer failed. *Id.* An employee was discharged for excessive Internet usage discovered when sexually inappropriate e-mails were found in his personal folder on the company's network did not violate employee's privacy because employee had no reasonable expectation of privacy when using his work computer and the company's Internet so employer's actions were not offensive. *Id.*

29. R. at 4.

30. *Id.*

31. *Id.*

32. *Harkey*, 346 N.W.2d at 74 (holding installation of hidden viewing devices in a women's restroom was highly offensive even absent evidence of their use). See also *Kaul v. Raina*, No. 244045, 2004 Mich. App. LEXIS 663 (Mar. 4, 2004) (explaining that evidence of unauthorized recording of conversations of an intimate sexual nature was sufficient to overcome a motion for summary judgment on intrusion claim); *Hamberger v. Eastman*, 206 A.2d 239 (N.H. 1964) (discussing tenants' allegation that landlord had installed a listening device in their bedroom sufficiently stated intrusion upon seclusion claim despite no allegation that anyone overheard any sounds from tenants' bedroom using the device).

to exclude Eden users from his private virtual locations and that the creation and sale of Voyeur mode was a highly offensive recording of his intimate conversations and a highly offensive installation of unauthorized listening devices.

*iii. Intrusion Upon Private Matter*

The third requirement for intrusion upon seclusion is that the matter intruded upon must be private. The privacy of the matter is a threshold issue because without private facts, the other three elements of the tort are irrelevant.<sup>33</sup>

Windbucket may repeat some of its arguments relative to the first and second prongs of the intrusion analysis. Specifically, Windbucket can reference the TOU in support of the argument that Romero waived any expectation of privacy with respect to Windbucket by consenting to allow Windbucket to monitor all aspects of the Eden virtual world, including Romero's otherwise private locations.<sup>34</sup> Windbucket may analogize Romero's use of its computers to play Eden with an employee's use of his employer's computers for Internet access and compare the creation of private spaces in Eden to the use of password protection and personal folders on a company's intranet system, which some courts have found to be insufficient to create a reasonable expectation of privacy.<sup>35</sup> Windbucket may also compare Eden to an online chat room, an electronic forum where users can communicate with each other directly in real time via text, which some courts have found to be open systems not subject to a reasonable expectation of privacy, even in instances where they are supposedly private.<sup>36</sup>

Romero may rely on the record to show that Windbucket specifically led him to believe that he could create private areas within the Eden environment that were not generally accessible to uninvited users. Romero may point out that Windbucket's knowledge of abuses arising out of the Zombie mode feature establish that he had a reasonable expectation that Windbucket would not allow unauthorized players to circum-

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33. *Busse v. Motorola, Inc.*, 351 Ill. App. 3d 67, 72 (2004).

34. *R.* at 8, 12.

35. *Garrity v. John Hancock Mut. Life Ins. Co.*, No. 00-12143, 2002 U.S. Dist. LEXIS 8343 at \*5 (D. Mass. May 7, 2002) (citing *McLaren v. Microsoft Corp.*, 1999 Tex. App. LEXIS 4103 (May 28, 1999)).

36. *United States v. Charbonneau*, 979 F. Supp. 1177 (S.D. Ohio 1997) (holding that the "openness" of a "private" chat room diminished defendant's expectation of privacy in statements he made there) (citing *United States v. Maxwell*, 45 M.J. 406 (Ct. App. Armed Forces 1996) (noting the more open the method of transmission [of a message], such as the chat room, the less privacy one can expect. . . messages sent to the public at large in a chat room lose any semblance of privacy)).

vent the access restrictions he had placed on his private areas.<sup>37</sup> Romero may attempt to distinguish chat room cases on the basis of his ability to exclude uninvited users from his private areas. Specifically, the record establishes that Windbucket allowed Romero to create private areas accessible only to himself and to his invited guests.<sup>38</sup> He may argue that this feature factually distinguishes his online areas from the chat rooms described in the case law, which, though designated private, were actually accessible to anyone.<sup>39</sup> Romero may also attempt to compare his private areas on the Eden system to real-world rented property, which is subject to an expectation of privacy that the owner/landlord may not violate with recording devices.<sup>40</sup>

Romero may also argue in favor of the doctrine of limited privacy, which some courts, including those of California (a jurisdiction that has adopted the Restatement rules governing privacy torts), have adopted. The doctrine states that an individual who reveals private information about himself to one or more persons may retain a reasonable expectation of privacy that the recipients of that information will not disseminate it further.<sup>41</sup>

*iv. Anguish or Suffering*

The fourth requirement for intrusion upon seclusion is that the intrusion must cause anguish and suffering. The anguish and suffering of the alleged victim must be a result of the intrusion itself. For example, this element looks to the discomfort caused when someone enters a person's bedroom, opens his or her mail, or makes repeated and unwanted telephone calls.<sup>42</sup> A plaintiff can establish anguish or suffering by establishing actual injury in the form of, for example, medical care, an inability to sleep or work, or a loss of reputation and integrity in the

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37. R. at 4.

38. *Id.*

39. *Charbonneau*, 979 F. Supp. at 1177.

40. *Hamberger*, 206 A.2d at 239.

41. Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919 (2005) (citing *Sanders v. ABC*, 20 Cal. 4th 907 (finding that in an office or other workplace to which the general public was not invited had a limited expectation that conversations and interaction with colleagues would not be secretly videotaped, even if those conversations were not completely private.)); *Y.G. v. Jewish Hosp. of St. Louis*, 795 S.W.2d 488 (Mo. App. 1990) (finding that in vitro fertilization patients who attended a party with other in vitro fertilization patients had a limited expectation of privacy that made disclosure of footage of them attending the party on the news an invasion of privacy.); *Multimedia Wmaz v. Kubach*, 212 Ga. App. 707 (1994) (holding that an AIDS patient who disclosed his illness to certain friends, family members, and people in a support group retained a limited right of privacy that entitled him to damages when a television station violated it by failing to sufficiently digitally mask his likeness during a television interview.).

42. *Thomas v. Pearl*, 998 F.2d 447 (7th Cir. 1993).

community.<sup>43</sup> For example, in *Schmidt v. Ameritech Illinois*, 768 N.E.2d 303 (Ill. App. 2002), evidence that the plaintiff was infuriated and emotionally upset because the defendant had broken the trust she placed in the company was sufficient to support a finding of anguish and suffering even though the plaintiff never sought medical or psychological assistance.<sup>44</sup>

The district court specifically declined to hold that a fictional avatar could be a victim of such an intrusion, implicitly because a virtual avatar cannot suffer.<sup>45</sup> Thus, Windbucket may argue that the record does not show that Romero has experienced any actual injury as described in *Schmidt*, and that the lower court properly affirmed the grant of summary judgment in its favor.

Romero may argue that evidence of the substantial time, money, and energy he committed to Eden showed his trust in Windbucket. Romero will point to the record in order to establish that Windbucket violated that trust by knowingly selling and profiting from a feature that Windbucket had previously disabled due to player complaints and policy concerns.<sup>46</sup> Romero could also argue that Windbucket further breached his trust by selling access to Voyeur mode to LEETDUDE, which allowed LEETDUDE to circumvent the access restrictions that Romero had placed on his mansion.<sup>47</sup> Romero may claim that these facts raise at least a genuine issue of material fact as to whether he experienced anguish and suffering.

## 2. *Vicarious Liability*

Romero also appeals the appellate court's determination that Windbucket could not be held liable for the acts of a third party, an Eden player known only as LEETDUDE.<sup>48</sup> Windbucket could be vicariously liable for the acts of LEETDUDE if it gave substantial assistance to LEETDUDE in accomplishing a tortious result, and Windbucket's own conduct, separately considered, constituted a breach of duty to Romero.<sup>49</sup> Romero must therefore show that (1) LEETDUDE committed a tortious act; (2) that Windbucket provided substantial assistance to LEETDUDE; and (3) that Windbucket's own conduct, separately considered, breached a duty to Romero.

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43. *Schmidt v. Ameritech Illinois*, 768 N.E.2d 303 (Ill. App. 2002).

44. *Id.*

45. R. at 7.

46. R. at 4-5.

47. R. at 5.

48. R. at 6.

49. RESTATEMENT (SECOND) OF TORTS § 876(c) (2008); *Larsen v. Philadelphia Newspapers*, 602 A.2d 324 (Pa. Super. 1991).

*i. Tortious Conduct of LEETDUDE*

Romero's original complaint alleged that LEETDUDE intruded upon his seclusion.<sup>50</sup> Thus, Romero must point to facts showing that LEETDUDE: (1) intruded or pried into his seclusion without his consent; (2) the intrusion was offensive to or objectionable to a reasonable person; (3) the matter intruded upon was private; and (4) the intrusion caused anguish and suffering.<sup>51</sup>

With respect to the first requirement, Romero may point to evidence that LEETDUDE could only have learned about Voyeur mode by asking Windbucket about the discontinued Zero Being mode, which had been used to spy on Eden players without their consent.<sup>52</sup> Romero may also show that LEETDUDE used Voyeur mode to access PWNED's private mansion without Romero's consent.<sup>53</sup>

Windbucket may argue that the facts do not establish an intrusion, because Romero had no expectation of privacy in a computer system that he did not own and that Romero's use of Windbucket's computers to play Eden is analogous to an employee's use of an employer-owned computer, in which there is no reasonable expectation of privacy.<sup>54</sup>

The parties' arguments as to the remaining requirements are likely to be identical to their arguments on these elements with respect to Windbucket's direct liability. On the subject of offensiveness, Windbucket is likely to repeat its expectation of privacy argument, and assert that intrusion into a computer system in which Romero had no expectation of privacy is not offensive.<sup>55</sup> Romero will emphasize how the record shows that Windbucket led Romero to believe that uninvited Eden users could not access his private areas, and that Windbucket deceived him for profit and allowed LEETDUDE to do exactly that through the use of Voyeur mode.<sup>56</sup>

The third element will turn on whether Romero had any expectation of privacy. Windbucket will argue that the mere designation of PWNED's mansion as private is insufficient to create a reasonable expectation of privacy. Romero will argue that even if Windbucket could monitor all areas of Eden that did not mean that LEETDUDE, as a player, could access those areas. Romero will assert that regardless of Windbucket's rights, he had an expectation of privacy from intrusions by

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50. R. at 5.

51. *Melvin*, 49 N.E.2d at 1012.

52. R. at 4.

53. R. at 5.

54. *Garrity v. John Hancock Mut. Life Ins. Co.*, No. 00-12143, 2002 U.S. Dist. LEXIS 8343 (D. Mass. May 7, 2002).

55. *Thygeson v. U.S. Bancorp*, No. 03-647, 2004 U.S. Dist. LEXIS 18863 (D.C. Or. Sept. 15, 2004).

56. R. at 4.



third parties with no such monitoring rights. Arguments for the fourth element are likely to be identical.

*ii. Windbucket's Substantial Assistance to LEETDUDE*

Five factors relevant to whether Windbucket substantially assisted LEETDUDE's conduct include: (1) the nature of the wrongful act; (2) the kind and amount of the assistance; (3) the relation of the defendant and the actor; (4) the presence or absence of the defendant at the occurrence of the wrongful act; and (5) the defendant's state of mind.<sup>57</sup>

With respect to the first factor, courts focus on whether the allegedly tortious act is the type of highly dangerous, deviant, or anti-social group activity which was likely to cause serious injury or death to a person or certain harm to a large number of people.<sup>58</sup> Romero may argue that Windbucket's repeated problems concerning unauthorized spying on Eden players, as shown by its decision to disable Zero Being mode after learning of the Zombies of Eden website and its decision to discontinue selling Voyeur mode due to policy concerns, combined with evidence that unauthorized access to private areas impacted more users than himself, shows that this factor should weigh in his favor.<sup>59</sup> On the other hand, Windbucket may argue that this factor is aimed at preventing manifestly dangerous activities like illegal car racing and other activities involving a high degree of risk to others, and that this factor should thus weigh in its favor.<sup>60</sup>

As to the second factor, Romero is likely to argue that in addition to creating and selling Voyeur mode, Windbucket owns and operates the computers that Eden players access to participate in the game. It also creates the game environment and animates the characters, including the game elements that are the subject of the intrusion claim.<sup>61</sup> Windbucket transmits those images to players (including LEETDUDE). Romero will likely argue that Windbucket at least had the capability and contractual right to monitor those transmissions.<sup>62</sup> Thus, Romero could conclude that Windbucket's assistance was crucial to enabling LEETDUDE's conduct and that this factor should weigh in his favor.

Windbucket will likely argue that despite its ownership of the Eden computer systems and the software that creates the graphical environment where the alleged torts occurred, its actual assistance to LEETDUDE consisted solely of selling him access to a software feature,

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57. *Juhl v. Airington*, 936 S.W.2d 640 (Tex. 1996).

58. *Id.* at 645.

59. R. at 4-5.

60. *Juhl*, 936 S.W.2d at 640.

61. R. at 4, 8.

62. R at 4, 8, 12.

without any encouragement or instruction as to how it could be used, which should weigh against Romero.<sup>63</sup>

Romero should argue that the third factor favors him because the record shows that Windbucket had a contractual right to monitor LEETDUDE's actions and to enforce the rules of the game as stated in the TOU, and that LEETDUDE's actions at least arguably violate those same rules.<sup>64</sup> Windbucket may assert that, while it reserves the contractual right to do so, the TOU imposes no obligation on Windbucket to affirmatively monitor player conduct for abuse and that this factor should favor Windbucket.

Concerning the fourth and fifth factors, Romero may point out that since Windbucket monitors user activity on the Eden computers, owns and operates the game, and creates all the graphics that players see, including the pictures in question,<sup>65</sup> Windbucket was by definition present at the site of LEETDUDE's acts. Romero may also emphasize that Windbucket knew that Zombie mode had led to problems with unauthorized player spying but chose to profit from it by selling Voyeur mode.<sup>66</sup> Windbucket should argue that it was not present because its involvement in creating the game environment is largely automated. Windbucket may also argue that it should have the right to expect LEETDUDE to comply with the TOU and thus it had no intent to harm Romero.<sup>67</sup>

*iii. Windbucket's Duties Regarding LEETDUDE*

If LEETDUDE's actions were tortious and Windbucket provided substantial assistance, it may be vicariously liable to Romero if Windbucket breached a duty to Romero through its conduct vis à vis LEETDUDE.

There is no general duty to control the conduct of another unless a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct.<sup>68</sup> A special relationship may be employer and employee, parent and child, and independent contractor and contractee, where there is right to control the contractor's work.<sup>69</sup> Romero may argue that Windbucket had a duty to control the actions of LEETDUDE on the basis that there existed a contractual relationship between Romero/Windbucket and LEET-

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63. *Juhl*, 936 S.W.2d at 640.

64. R. at 9, 12.

65. R. at 4, 8.

66. R. at 4-5.

67. *Juhl*, 936 S.W.2d at 640.

68. RESTATEMENT (SECOND) OF TORTS § 315 (2008).

69. *Mitchell v. Archibald & Kendall, Inc.* 573 F.2d 429 (7th Cir. 1978); *Boyd v. Racine Currency Exchange, Inc.* 306 N.E.2d 39 (1973).

DUDE/Windbucket established from the TOU contract that required Windbucket to monitor users for maintenance of community standards. Moreover, Romero may argue that Windbucket's control of the Eden game environment is to a degree that requires a special relationship between the company and the players. Romero may argue that with the growth of virtual crimes players are frequently without recourse when they lose virtual items because of the strict controls placed upon them by TOA and other agreements.<sup>70</sup> From this, they should be treated as a pseudo-government in a "company-town" and held to the same standards of protection of constitutional rights because the private corporation has usurped the traditional role of the state.<sup>71</sup> In permitting this special relationship and creating legal duty on game developers, the court may address the growth of virtual crimes by placing the onus of policing virtual worlds upon the creators themselves.

Windbucket may counter that the contract provisions in the TOU should be enforced as written. Windbucket would argue that the court is not to recreate the contract, but give the terms and provisions the plain meaning of the words. "Words and other conduct are interpreted in light of all circumstances, and if the principle purpose of the parties is ascertainable it is given great weight."<sup>72</sup> The provisions in the TOU give Windbucket the right to monitor Eden in order to protect the game from being impacted by player actions, but Windbucket may argue that this does not extend to protecting players from each other. Windbucket may assert that the TOU does not create third-party beneficiary rights in other users. Windbucket may argue that the TOU represents a means to protect the game system, and thereby Windbucket's revenue stream and the collateral benefits that other players may experience from the enforcement of the TOU upon other players are superfluous. Furthermore, while Windbucket does have contractual relationships with all parties involved, such contractual relationships were not contemplated within the meaning of the Second Restatement Torts, section 315, upon which Romero relies. Windbucket will argue that these contractual relationships are not the type of special relationships through which liability may attach to a third party such as Windbucket. Typically courts have extended exceptions solely where there is a significant relation between the parties, and Windbucket may assert that extending protection under section 315 to these contractual relationships would be unsound.<sup>73</sup>

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70. Jacob Rogers, *A Passive Approach to Regulation of Virtual Worlds*, 76 GEO. WASH. L. REV. 405, 410 (2008).

71. *Id.*

72. RESTATEMENT (SECOND) OF CONTRACTS § 202(1) (2008).

73. *See Johnson v. Board of Jr. College Dist. No. 508*, 334 N.E.2d 443, 445 (Ill. App. 1975) (holding, without precedent, that although defamatory statements were made against certain faculty members by students, the faculty, administrators, or board mem-

*iv. Immunity under Section 230 of the Communications Decency Act*

Windbucket may rely on section 230 of the Communications Decency Act (“CDA”),<sup>74</sup> as a shield against liability for LEETDUDE’s actions. Section 230 provides that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”<sup>75</sup> Section 230(f) defines an interactive service provider as “any information service, system or access software provider that provides or enables computer access by multiple users to a computer server.”<sup>76</sup> In effect, section 230 immunizes interactive service providers from tort liability when they publish the content generated by the users of their services.<sup>77</sup> Windbucket may argue that despite the elaborate technology used in creating an online world with three-dimensional avatars, the game of Eden essentially remains a means of speech communicated by a player through an avatar. In other words, content is generated by a user, not Windbucket. Windbucket may assert that the forum of the online world of Eden is what Congress sought to protect when it enacted the CDA because Congress intended broad protection for interactive service providers on the Internet from tort-based lawsuits.<sup>78</sup>

The hurdle Windbucket may face in attempting to find shelter under section 230 immunity is whether it properly may be defined as an interactive computer service. Windbucket may point to the fact that the players, not Windbucket, published the content at issue. Windbucket can cite to *Carafano v. Metrosplash.com*, where the Ninth Circuit held that the website operator was immune from liability for threatening communications that an actress received as a result of a false personal advertisement.<sup>79</sup> The court, in *Carafano*, held that a website operator was immune under section 230 so long as a third party creates the essential published content.<sup>80</sup> Thus, Windbucket should argue that because

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bers of the educational institution had no duty to prevent students from making statements about faculty members or taking over their classes); *Weltzin v. Cobank, ACB*, 633 N.W.2d 290 (Iowa 2001) (holding a bank and loan officer were not liable for negligence and breach of fiduciary duty in a shareholders class action suit because there was no fiduciary relationship and the bank was not obligated to protect the shareholders from misfeasance of its manager).

74. 47 USC § 230 (2006).

75. 47 USC § 230(c)(1) (2006).

76. 47 USC § 230 (f)(2) (2006). Arguably, Windbucket may fit the definition.

77. *Id.*; *Zeran v. America Online, Inc.*, 129 F.2d 327 (4th Cir. 1997), cert denied, 524 U.S. 937 (1998); *Fair Housing Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157 (9th Cir. 2008); *Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist*, 519 F.3d 666 (7th Cir. 2008).

78. 47 USC § 230(b) (2006).

79. 339 F.3d 1119 (9th Cir. 2003).

80. *Id.* at 1124.

LEETDUDE performed the alleged intrusion and posted the pictures at issue, section 230 should protect Windbucket as a service provider.

Romero may attack Windbucket's attempt at immunity and argue that Windbucket is responsible for creating or developing content. Romero may cite *Fair Housing Council of San Fernando Valley v. Roommates.com*, where the court held that Roommates.com did not fit the definition of an interactive service provider because it required users to complete specific forms that directed the nature of the content users generated.<sup>81</sup> Thus, Roommates.com was not acting merely as a forum where it passively displayed information posted by users, but was responsible for the creation or development of content that violated federal law.<sup>82</sup> The court relied upon Roommates.com's creation of content through its questionnaire to deny Roommates.com classification as an interactive service provider.<sup>83</sup>

Romero could argue that, like Roommates.com, Windbucket both actively elicited illegal conduct by offering to sell Voyeur mode and by making use of it while conducting its business.<sup>84</sup> While Windbucket does not force Voyeur mode players to commit illegal acts, Romero could argue that the only use of Voyeur mode is to invade the privacy of others. Thus Windbucket actively elicited illegal activity by its players when it provided specific tools that were aimed at encouraging unauthorized spying on Eden players by other players using Voyeur mode. Romero could argue that, as in *Roommates.com*, immunity for Windbucket should not arise under section 230 of the CDA.

### C. EVIDENCE SPOILIATION SANCTIONS

#### 1. *Generally*

The recent amendments to the Federal Rules of Civil Procedure, which address electronic discovery issues, are reflected in the corresponding Marshall Rules of Civil Procedure. The intent of the new amendments to the discovery rules is to provide "full disclosure in a context where potential access to information is virtually unlimited and in which full discovery could involve burdens far beyond anything justified by the interests of the parties to the litigation."<sup>85</sup> In the instant case, the amendments to Rule 26(b)(2)(B) and Rule 37(e) are particularly rele-

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81. 521 F.3d 1157 (9th Cir. 2008).

82. *Id.* at 1169-1170.

83. *Id.* at 1164.

84. *Roommates.com*, 521 F.3d at 1171.

85. *Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure*, 22 (Sept. 2005), available at <http://www.uscourts.gov/rules/Reports/ST09-2005.pdf>.

vant.<sup>86</sup> Rule 26(b)(2)(B) allows courts to limit the production of electronically stored information (“ESI”) “not reasonably accessible because of undue burden or cost.”<sup>87</sup> Under Rule 37(e), sanctions are not appropriate for a party’s failure to produce ESI due to the “routine, good-faith operation of an electronic information system.”<sup>88</sup> However, the comment to Rule 37(e) states that the Rule is “not intended to provide a shield for parties that intentionally destroy information because of its relationship to litigation.”<sup>89</sup> Under this rule parties are afforded safe harbor only when they act in good faith, which may require a party to cease routines that may alter or destroy ESI when litigation is pending or reasonably anticipated.<sup>90</sup>

Spoilation of evidence may result in sanctions under the Marshall Rules of Civil Procedure, as under the Federal Rules of Civil Procedure. Under the Marshall Rules of Civil Procedure, it is well settled that the court has the ability to sanction parties for the destruction or non-production of evidence if the evidence is relevant and discoverable.<sup>91</sup> Generally, ESI is discoverable as documentary information.<sup>92</sup> Sanctions should be proportionate to the infraction and determined upon the particular facts of the case.<sup>93</sup>

While the law is still yet unsettled, competitors may point to common factors used by courts to determine the appropriate sanctions for spoliation of evidence.<sup>94</sup> Common factors may include: (1) whether the non-spoliating party suffers prejudice as a result; (2) whether the prejudice may be cured; (3) the degree of fault of the spoliating party; and (4) the availability of lesser sanctions. Dispositive sanctions should be used only where the spoliating party’s misconduct is egregious or extreme.<sup>95</sup> Courts favor disposition of the case on the merits, with only willfulness, bad faith, and fault justifying terminating sanctions.<sup>96</sup> Default judgment is “a weapon of last resort, only appropriate when a party willfully disregards pending litigation.”<sup>97</sup> Dismissal is the most “draco-

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86. *Id.*

87. FED. R. CIV. P. 26(b)(2).

88. FED. R. CIV. P. 37(e).

89. FED. R. CIV. P. 37(e) Comment.

90. *Id.*

91. *Shaffer v. RWP Group, Inc.* 169 F.R.D. 19 (E.D.N.Y. 1996).

92. *Crown Life Insurance Co. v. Craig*, 995 F.2d 1376 (7th Cir. 1993).

93. *Salgado v. Gen. Motors Corp.*, 150 F.3d 735, 740 (7th Cir. 1998).

94. *E.g.*, *United Medical Supply Co. v. United States*, 77 Fed. Cl. 257, 266-267 (Fed. Cl. 2007) (There is, in fact, a division of authority among the circuits on this issue.).

95. *In re Thomas Consolidated Industries, Inc.* 456 F.3d 719, 724 (7th Cir. 2006).

96. *Id.*

97. *Sun v. Board of Trustees of University of Illinois*, 473 F.3d 799, 811 (7th Cir. 2007) (citing *C.K.S. Engineers, Inc. v. White Mountain Gypsum Co.*, 726 F.2d 1202, 1205 (7th Cir. 1984)).

nian” sanction and requires vigilant review by the courts.<sup>98</sup>

The National Center for State Courts has also issued guidelines for the imposition of sanctions for destruction of ESI: (1) whether there was a legal obligation to preserve the information at the time of its destruction; (2) whether the destruction was the inadvertent result of the routine, good-faith operation of an electronic information system; and (3) whether the destroyed information was relevant to a claim or defense and a reasonable trier of fact could find it would support that claim or defense.<sup>99</sup>

Discovery sanctions are reviewed for an abuse of discretion.<sup>100</sup> Abuse of discretion is found where the decision of the trial court is “fundamentally wrong”<sup>101</sup> or is “clearly unreasonable, arbitrary, or fanciful.”<sup>102</sup>

*i. Duty to Preserve and the “Routine, Good-Faith Operation”*

Romero may argue that the district court should properly have awarded him a default judgment because Windbucket repeatedly refused to comply with a discovery order. He will likely argue that Windbucket’s non-responsive answers to discovery orders were in bad faith and that Windbucket willfully destroyed the authentication logs when it failed to preserve them for litigation. Romero may further assert that that the purported Data Retention Policy does not meet the requirements of “good-faith operation of an electronic information system” because it is not overly prohibitive to maintain data logs in excess of one month. A further indicator of bad faith is that the Data Retention Policy was created after the start of the litigation. Romero may argue that the initial failures to comply were attempts to delay production of the authentication logs until they actually were destroyed, and production of the Data Retention Policy after the fact does not shield Windbucket from sanctions. Romero may point out that Windbucket’s duty to preserve the authentication began at the point that it could reasonably anticipate litigation.

Romero will likely cite a wide swath of cases in support of sanctions when there is destruction of ESI prior to litigation. For example, in *Anderson v. Sotheby’s Inc. Severance Plan*, the court determined that the duty to preserve evidence exceeds standard information retention and

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98. *Marrocco v. Gen. Motors Corp.*, 966 F.3d 220, 223-24 (7th Cir. 1992).

99. Conference of Chief Justices Working Group on Electronic Discovery, Conference of the Chief Justice Guidelines for State Trial Courts Regarding Discovery of Electronically Stored Information (2006), available at <http://www.ncsconline.org/images/EDiscCCJGuidelinesFinal.pdf>.

100. *Maynard v. Nygren*, 372 F.3d 890, 892 (7th Cir. 2004).

101. *Anderson v. United Parcel Serv.*, 915 F.2d 313, 315 (7th Cir.1990).

102. *Bell v. Lakewood Eng’g and Mfg. Co.*, 15 F.3d 546, 551 (6th Cir. 1994).

destruction policies.<sup>103</sup> When a securities trading company failed to preserve telephone recordings typically used to aid in settling broker disputes, the court applied sanctions and held that the “communications of the traders would have been highly relevant in the investigation of a possible fraudulent scheme.”<sup>104</sup> Romero may argue by analogy that the server authentication logs are typically kept for auditing and technical support purposes and that such logs would have been particularly relevant in his negligence claim. Furthermore, Romero may argue, as in *Lewy v. Remington Arms*, that a document retention policy with different levels of retention may be used to preserve different documents in anticipation of litigation, and that server authentication logs should have been preserved on a different schedule than other data.<sup>105</sup> In *Rambus, Inc. v. Infineon Technologies AG*, the document retention policy suggested by the defendant was viewed by the court as specifically intended to destroy ESI with the expectation that Rambus would be involved in litigation.<sup>106</sup> Here, Romero is very likely to argue that Windbucket’s subsequent change to its data retention policy was specifically directed toward the destruction of the server authentication logs.

Windbucket will argue that the district court did not err in its refusal to grant sanctions because it could no longer comply with the discovery order due to the deletion of information pursuant to the “routine, good-faith operation” of its game servers. Windbucket relies on Rule 37(f) in its argument, that it could not have preserved the data as the game server operations typically overwrite the authentication logs as time passes. Windbucket may argue that, under *Rambus*, there is a duty to preserve ESI in anticipation of litigation, but the specter of litigation in this situation was too far to reasonably anticipate. Therefore there was no duty upon Windbucket to preserve the authentication logs. Windbucket will likely argue that the change in the Data Retention Policy was not an attempt to craft a policy directed at the destruction of ESI discoverable in litigation as in *Rambus*. Instead, Windbucket may argue, the change was a good-faith attempt to demonstrate that it was complying with the discovery order as best it could because the later Data Retention Policy reflected actual practices of data destruction within the corporation. Under the previous Data Retention Policy, the

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103. *Anderson v. Sotheby’s Inc Severance Plan*, 2005 WL 2583715 at \*3 (S.D.N.Y. Oct. 11, 2005) (quoting *Turner v. Hudson Transit Lines, Inc.* 142 F.R.D. 68, 73 (S.D.N.Y. 1991)). See also *Rambus, Inc. v. Infineon Technologies AG*, 220 F.R.D. 264 (E.D.Va. 2004).

104. *E\*Trade Securities LLC v. Deutsche Bank AG*, 230 F.R.D. 582, 589 (D. Minn. 2005).

105. *Lewy v. Remington Arms Company*, 836 .2d 1104, 1112 (8th Cir. 1987).

106. *Rambus, Inc. v. Infineon Technologies AG*, 220 F.R.D. 264, 281-291 (E.D. Va. 2004).



ESI should have been preserved; however, actual practice, which included routine operations, precluded the data from being preserved.

*ii. Appropriate Sanctions for Spoliation of Evidence*

Windbucket may argue that if the court does find that there was an obligation to retain the authentication logs for discovery, that the sanction of default judgment on the intrusion claim would be unduly severe. Sanctions should be proportionate to the infraction and determined upon the particular facts of the case.<sup>107</sup> Appropriate sanctions for spoliation of evidence may be determined by: (1) whether the non-spoliating party suffers prejudice as a result; (2) whether the prejudice may be cured; (3) the degree of fault of the spoliating party; and (4) the availability of lesser sanctions. Windbucket may argue that the destruction of the authentication logs, while potentially supportive of Romero's claim, does not prejudice Romero to such a degree that requires an adverse inference or default judgment. Windbucket may argue that to the degree Windbucket may be at fault, it is not to a level of willfulness or bad faith. Furthermore, Windbucket may assert that the safe harbor of Rule 37(f) prohibits the imposition of sanctions where the ESI was lost due to "routine, good-faith operation" of the game servers.

Romero will likely argue that the court should grant a default judgment on his claim of intrusion upon seclusion because Windbucket's conduct was egregious and in bad faith. Windbucket had an original data retention policy and it failed to adhere to that data retention policy, which resulted in the loss of the data. The subsequent data retention policy, which Windbucket claims better reflects actual company practices, was provided only in attempt to obtain safe harbor of Rule 37(f). Windbucket should not be permitted safe harbor under the rule, because Windbucket fails to provide evidence that the server lost the data as a function of "routine, good-faith operation," notwithstanding the data retention policy. Romero may argue that Windbucket's spoliation of data was egregious or extreme because Windbucket failed to comply with the district court's discovery order multiple times, and still fails to comply through its destruction of the server authentication logs. Romero will argue that while default judgment is "a weapon of last resort, only appropriate when a party willfully disregards pending litigation," it is appropriate in this case because Windbucket has conducted itself in bad-faith and has prevented Romero from properly pursuing his claim.<sup>108</sup>

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107. *Salgado v. Gen. Motors Corp.*, 150 F.3d 735, 740 (7th Cir. 1998).

108. *Sun v. Board of Trustees of University of Illinois*, 473 F.3d 799, 811 (7th Cir. 2007) (citing *C.K.S. Engineers, Inc. v. White Mountain Gypsum Co.*, 726 F.2d 1202, 1205 (7th Cir. 1984)).