

# Recent CF Case Law

Computer Forensics and Electronic  
Discovery Conference 2008





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- ❖ 12 Years as software developer, implementation consultant and project manager
- ❖ Started doing computer forensics in 2002
- ❖ Member of HTCIA
- ❖ Professional certificate in computer forensics from Oregon State University and NTI
- ❖ Trained in EnCase and AccessData



# Presentation Overview

## ❖ 5 categories of cases

- Discoverability
- Production of Data
- Costs
- Spoliation
- Sanctions



# Selection of Cases

- ❖ Notable increase in CF-related cases recently
- ❖ Looking at recent cases
- ❖ Not exhaustive



# Goals

- ❖ Increase awareness
- ❖ Offer some simple lessons (hopefully)



# Discoverability

## ❖ *Kasten v. Doral Dental USA, LLC*

- Dispute between LLC and one of its members
- Trial court determined email were not “company records” or “documents”

## ❖ From Trial Court

- *“I guess I have the most problem with the e-mails. They're not documents or records. They're just communications. It's like notes or a telephone call. I mean it's — e-mails in my view are certainly entirely different...”*
- *“I don't think that emails fall under the definition of documents. They just don't. They're communications. It's like asking someone to provide a summary of a telephone conversation. It may be memorialized electronically, but it clearly in my view is not a document...”*

## ❖ *Kasten v. Doral Dental USA, LLC*

- Wisconsin Supreme Court reversed
- *“For most businesses, e-mail has all but replaced hardcopy correspondence and memoranda. [...] A categorical holding that e-mail is never a “Company document” under Wis. Stat. § 183.0405(2) would be blind to the day-to-day volume of e-mail in the modern business setting and the business-related purposes for which e-mail is used.*



# Discoverability

## ❖ *Koninklijke Philips Elec. N.V. v. KXD Tech., Inc.*

- Trademark dispute – defendant argued against having to produce electronic data because it was “damaged” and not available
- Court was not persuaded – warned that it could conduct a computer forensic examination of computers and imposed sanctions based on investigation

## ❖ *Koninklijke Philips Elec. N.V. v. KXD Tech., Inc.*

- \$3.5 million in sanctions
- 30-day incarceration for company's executive for failure to pay sanctions



# Discoverability

## ❖ Lesson

- Some courts get it and others still don't
- You may have to educate

## ❖ *Williams v. Taser Int'l Inc.*

- Wrongful death suit – parties could not agree on production of some ESI
- Court disagreed with both sides and imposed its own solution (down to specific search terms) with a relatively short timeframe
- Court also ruled that Taser's hiring and training of an IT employee to manage discovery process was not adequate



# Production of Data

## ❖ *Thielen v. Buongiorno USA, Inc.*

- Dispute involving the sending of text messages to a cell phone – plaintiff argued against having to produce his computer
- Court ordered examination of computer by a CF expert

## ❖ Lesson

- Failing to agree on electronic discovery can result in the court imposing its own solution
- Solution might not be preferred by *either* side

## ❖ *PSEG Power New York, Inc. v. Alberici Constructors, Inc.*

- Plaintiff produced emails in electronic format but, as a result of a technical problem, attachments were not properly associated with their corresponding email
- 211,000 hard-copy pages (750 GB of data)
- Court ordered plaintiff to reproduce evidence in proper format and at plaintiff's cost

## ❖ *Best Buy Stores, L.P. v. Developers Diversified Realty Corp.*

- Defendant argued that some data was not reasonably accessible because of cost
- Judge disagreed
- Defendant produced cost and time estimates and requested extension
- Court denied extension

## ❖ Lesson

- Be conscientious in production of electronic data
- Parties are expected to reasonably preserve data in a way that allows for production
- Technical glitches or difficulties will not protect parties from production costs



# Spoliation

- ❖ *Teague v. Target Corp.*
- ❖ *Padgett v. City of Monte Sereno*
  - “Crashed” hard drive resulted in lost data
  - Court ordered sanctions



# Spoliation

- ❖ *Thompson v. Jiffy Lube Int'l, Inc.*
  - “Crashed” hard drive resulted in lost data
    - Small amount of data
    - Data recovery had been attempted
    - Drive was presumably still available
  - Court denied sanctions at that time
    - Issue may be revisited



# Spoliation

## ❖ Lesson

- Courts considering efforts taken to restore data and/or preserve hardware even if it has “crashed”



# Sanctions

- ❖ *Qualcomm, Inc. v. Broadcom Corp.*
  - Patent Infringement suit – plaintiff and plaintiff’s counsel “participated in an organized program of litigation misconduct and concealment...”
  - Qualcomm lost case – patents unenforceable
  - Qualcomm may have to pay defendant’s attorneys’ fees
  - Attorneys may be personally sanctioned

## ❖ *Wingnut Films, Ltd. v. Katja Motion Pictures Corp.*

- Contract dispute – defendant did not fully comply with discovery
- Defendant ordered to retain an outside vendor to fulfill discovery
- \$125,000 sanction for attorneys' fees and other expenses

## ❖ Lesson

- Electronic evidence can no longer be avoided
- Less-than-diligent efforts can result in severe penalties



# Summary

- ❖ Electronic Information – You can't avoid it
- ❖ Some people get it, some don't, so be prepared for either
- ❖ Be thorough during discovery – manage client, vendors, etc.
- ❖ Try to come to agreement with opposing side



# Conclusions

- ❖ Lessons are simple
- ❖ Interpretation and implementation will be more difficult



# References

- ❖ Electronic Discovery and Computer Forensics Case Law, <http://www.krollontrack.com/legalresources/topic.pdf>
- ❖ Kasten v. Doral Dental USA, LLC, 2007 WL 1791226 (Wis. June 22, 2007).
- ❖ Koninklijke Philips Elec. N.V. v. KXD Tech., Inc., 2007 WL 879683 (D. Nev. Mar. 20, 2007).
- ❖ Williams v. Taser Int'l Inc., 2007 WL 1630875 (N.D.Ga. June 4, 2007).
- ❖ Thielen v. Buongiorno USA, Inc., 2007 WL 465680 (W.D. Mich. Feb. 8, 2007).
- ❖ PSEG Power New York, Inc. v. Alberici Constructors, Inc., 2007 WL 2687670 (N.D.N.Y. Sept. 7, 2007).
- ❖ Best Buy Stores, L.P. v. Developers Diversified Realty Corp., 2007 WL 333987 (D. Minn. Feb. 1, 2007).



# References (cont.)

- ❖ Teague v. Target Corp., 2007 WL 1041191 (W.D.N.C. Apr. 4, 2007).
- ❖ Padgett v. City of Monte Sereno, 2007 WL 878575 (N.D. Cal. Mar. 20, 2007).
- ❖ Thompson v. Jiffy Lube Int'l, Inc., 2007 WL 608343 (D. Kan. Feb. 22, 2007).
- ❖ Qualcomm, Inc. v. Broadcom Corp., 2007 WL 2900537 (S.D.Cal Sept. 28, 2007).
- ❖ Wingnut Films, Ltd. v. Katja Motion Pictures Corp., 2007 WL 2758571 (C.D.Cal. Sept. 18, 2007).