

## CASE PROFILE

### Keithley v. The Home Store

*Lackadaisical attitude toward preservation results in serious sanctions*

#### KEY INFORMATION

<b>Reference No.:</b>	2008 U.S. Dist. LEXIS 61741,WL 605859
<b>Date:</b>	August 12, 2008
<b>Court:</b>	U.S. District Court for the Northern District of California
<b>Judge:</b>	U.S. Magistrate Judge Elizabeth D. Laporte
<b>Sector:</b>	Software/Internet
<b>Type:</b>	Patent Infringement Dispute

#### CASE SUMMARY

In this case, plaintiff alleged his patent for a software system that acquires, displays and tracks real estate information had been infringed upon by defendant. Plaintiff filed a motion for spoliation sanctions, claiming that defendant had destroyed source code, early design documents and computerized reports of website access. This motion followed a court order requiring defendant to produce source code from a year earlier.

In response, defendant argued that nothing had been destroyed and that computerized reports did not exist. However, two months later, defendants produced 480,000 reports from a hard drive with a directory titled "reports." Since technical personnel were not notified of the need to preserve data, backup tapes from the failed computer were written over, resulting in the complete loss of backup information. Two weeks after the sanctions hearing, an employee suddenly recalled he had stored a crashed hard drive at home and was able to produce 220 megabytes of source code. Another employee, who was asked about data availability only after the sanctions hearing, was also able to produce source code.

Judge Laporte said defendant's lack of a written document retention policy, destruction of evidence when computers crashed and material misrepresentations to the court all added up to a "reckless disregard for their discovery obligation." Furthermore, the discovery misconduct by defendant was among the most egregious misconduct situations seen by the court.

#### OUTCOME

The court ordered an adverse inference instruction to the jury against defendant, mandating that if it determined operation of defendant's websites infringed upon plaintiff's patent, then it must also determine that infringement took place from the time the websites were launched.

Finding that defendant did not destroy evidence intentionally, Judge Laporte did not issue terminating sanctions. The court awarded \$1.4 million in sanctions to plaintiff to cover expenses associated with attorney and consulting fees related to spoliation of ESI.

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