

1. An order from the U.S. District Court for the Southern District of New York denying spoliation sanctions and declining to extend the Defendants’ preservation obligations to require them to create new documents by recording content streaming over social media applications that was not otherwise recorded.

In *Walkie Check Productions, LLC v. ViacomCBS Inc.*, No. 21 Civ. 1214 (KPF), 2023 WL 5154416 (S.D.N.Y. July 24, 2023), U.S. District Court Judge Katherine Polk Failla addressed whether spoliation sanctions could be awarded against a party that failed to record video content livestreamed over social media after receiving notice of Plaintiff’s intent to file litigation regarding the video content.

In this copyright infringement action, Plaintiff alleged that Defendants’ series of livestreamed episodes called *House Party* infringed on Plaintiff’s copyright for the same name. *Id.* at *1. Plaintiff owned the copyright for *House Party*, the concept of a broadcast of an “exclusive and engaging” afterparty with both musicians and celebrities in a New York City brownstone. *Id.* at *6. Plaintiff pitched the *House Party* idea to Defendants, including the Black Entertainment Television network (BET), but BET passed on the idea twice. In 2020, during the global COVID-19 pandemic, BET developed a streaming series called *House Party*, which involved guests who were frequently alone or in small pods of people and were often working from their own homes to bring content to others quarantined at home.

The BET series, which ran from March 29, 2020 to January 20, 2021, did not appear on television — rather, each episode was livestreamed to Instagram Live and/or Facebook Live. *Id.* at *3. Many of the episodes of the BET series were not recorded because they were debuted via livestreaming platforms that do not automatically record streamed video content.

When Plaintiff learned about the BET series, it began to record some of the episodes as they streamed. On July 2, 2020, an attorney representing one of the Defendants was copied on an email that referred to Plaintiff’s intention to bring a lawsuit for copyright infringement against Defendants. This same attorney received another email on July 15, 2020, regarding Plaintiff’s potential claims, and on the same day Defendants received a demand letter from Plaintiff regarding Plaintiff’s intent to file suit for copyright infringement.

During discovery, Plaintiff argued that Defendants should be sanctioned through an adverse inference because Defendants failed to record various episodes of the BET series as they were being livestreamed and thus produced only 39 of the approximately 90 BET series’ episodes that streamed. Plaintiff argued that because it notified one of Defendants’ attorneys that it intended to bring claims against Defendants relating to the BET series, each episode after that notice that was not recorded and preserved was a failure to comply with Defendants’ preservation obligations and should be subject to spoliation sanctions. *Id.* at *7.

Judge Failla began her analysis with a survey of the relevant rules regarding spoliation, defined as “the destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.” *Id.* at *5. She explained that Rule 37(b)(2) allows for sanctions for failure to comply with a discovery order, while Rule 37(e) allows for sanctions when a party has failed to preserve electronically stored information (ESI). She added that “[e]ven in the absence of a discovery order, a court may impose sanctions on a party for misconduct in discovery under its inherent power to manage its own affairs.”

Judge Failla next set out the standard for assessing whether spoliation sanctions were warranted: “The party seeking discovery sanctions on the basis of spoliation must show by a preponderance of the evidence: (i) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (ii) that the records were destroyed with a culpable state of mind; and (iii) that the destroyed evidence was relevant to the party’s claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.” She added that “[f]or spoliation sanctions to be appropriate it is necessary that the sought-after evidence actually existed and was destroyed.” *Id.* at *6.

Applying these standards, Judge Failla found that Plaintiff had failed to show that Defendants violated a preservation obligation. She noted that Plaintiff did not dispute Defendants' assertion that "because many of the episodes were not recorded when they were livestreamed, they are no longer available." *Id.* at *7. She explained that given the nature of the technology at the time, "Defendants would have had to take an extra, affirmative step to record the livestreams being broadcast over social media platforms."

Judge Failla concluded that she was unwilling "to extend Defendants' preservation obligations" to require recording of the streaming episodes. She explained that "preservation obligations are exactly that — obligations to preserve potential evidence that, by definition, must already exist," and "a failure to create records — as opposed to the destruction of records that were kept — is not spoliation." Because preservation obligations do not include an affirmative duty to produce new records, she held that Defendants' failure to implement a practice of recording the BET series' livestreams, even after receiving the alleged infringement notice from Plaintiff, could not be the basis for spoliation sanctions.

Judge Failla next distinguished the case law that Plaintiff cited to support its spoliation argument. First, she noted that *Moody v. CXS Transportation, Inc.*, 271 F.Supp.3d 410 (W.D.N.Y. 2017), involved a litigant's alleged mishandling of data that was automatically recorded (and thus created) by a locomotive's event recorder system, whereas Plaintiff did not allege that the livestreams of Defendants' show were automatically recorded. Second, *Aktas v. JMC Development Co.*, 877 F.Supp.2d 1, 14-15 (N.D.N.Y. 2012), *aff'd*, 563 F. App'x 79 (2d Cir. 2014), centered on a litigant's demolition of the opposing party's work product on a construction site. She concluded that neither case supported Plaintiff's argument that a party has an affirmative duty to create new records as part of its preservation obligations.

Judge Failla recognized that "the increased proliferation of livestreamed content may make it less likely that information relevant to litigation is memorialized," but she explained that Plaintiff did not provide "a compelling reason why livestreamed content should be treated differently than other situations in which potentially relevant information exists in some temporary form but is not, as a matter of course, automatically condensed into a record that may be either maintained or destroyed." She concluded that she would not create an exception for livestreamed content to the general rule that parties have no obligation to affirmatively create new records.

Finally, Judge Failla explained that even if she were to find that Defendants had an obligation to record the livestreams after receiving notice from Plaintiff's counsel, she would conclude that sanctions were not warranted on this record, because Defendants were negligent at most in failing to take measures to record the livestreams after July 2020, and negligence was insufficient to warrant the sanctions Plaintiff sought. *Id.* at *8. In addition, she found that an adverse inference would not be warranted because Plaintiff could not establish Defendants' failure to preserve the livestreams with a culpable state of mind. In that context, she noted that the record evidence demonstrated that there was no substantial similarity between the Plaintiff's and Defendants' works, so production of the unrecorded livestreams in discovery would not have generated a genuine dispute of material fact sufficient to defeat Defendants' motion for summary judgment.