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Jurisdictional, Procedural, and Economic Considerations for Non-Party Electronic Discovery

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JURISDICTIONAL, PROCEDURAL, AND ECONOMIC CONSIDERATIONS FOR NON-PARTY ELECTRONIC DISCOVERY

ABSTRACT

Despite the 2006 amendments targeted to accommodate electronic discovery, the Federal Rules of Civil Procedure do not recognize the unique differences between electronic discovery and the discovery of traditional media. One particularly troubling area is the discovery of electronically stored information that is proprietary to a non-party. The Federal Rules provide only for the production of electronically stored information in the "possession, custody, or control" of both parties and non-parties. This Comment explores the application of this standard to electronic networks existing between a party and a non-party. It questions the expansive scope of discovery of data retrievable from such networks and recommends an alternative to protect the interests of non-parties in the discovery process.

Existing case law, developed for the discovery of traditional media, broadly defines the "possession, custody, or control" of discoverable information as that which a party or non-party has the "ability to access." The effects of this interpretation are inconsequential for the discovery of traditional media—for example, a written memo located in the desk of an employee. With electronic discovery, however, a broad scope of discovery may deprive a non-party of an opportunity to contest the production of its proprietary information by a party in litigation when that non-party would otherwise have no involvement. From a party's perspective, a broad discovery standard also complicates the ability to preserve electronically stored information at the onset of litigation.

This Comment proposes that the ability-to-access test should not be applied to the discovery of electronically stored information. A party should instead only be obligated to produce data from a non-party that are directly related to a transaction or occurrence in litigation. Any broader discovery should instead be obtained through a subpoena served on a non-party.

INTRODUCTION

A plaintiff sues a defendant over an intellectual property dispute, alleging that products marketed and sold by the defendant infringe several patents held by the plaintiff. To determine the extent, if any, of the defendant's infringement, the plaintiff needs discovery of the defendant's materials relating to the design and development of the defendant's products. The defendant did not create the allegedly infringing products on its own, however. It collaborated on the product's design and development with a non-party corporation affiliated with the defendant but which the plaintiff chose not to name as a defendant.[1] To facilitate more efficient communication and sharing of data about this and other products, the defendant and the non-party had created a computer network.[2] The plaintiff now seeks information from that computer network, including data that are proprietary to the non-party.[3] Burdened by the broad scope of discovery and having minimal interest in opposing the plaintiff's discovery request on behalf of the non-party, the defendant retrieves the non-party's data from the network and produces it to the requesting party without consulting the non-party or seeking a protective order.

Electronically stored information (ESI) is now a fundamental fixture of commercial litigation, and courts face the task of adapting the Federal Rules of Civil Procedure (Federal Rules) to this unique method of discovery.[4] In response, the Rules Advisory Committee acknowledged in adopting the 2006 amendments to the Federal Rules that electronic data involve necessary

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[1] Some possible reasons why a plaintiff in this hypothetical situation might not name the non-party as a defendant might include the following: the plaintiff saw a strategic advantage in excluding the non-party from the litigation, the plaintiff could not state a viable legal claim against the non-party, or the plaintiff could not secure personal jurisdiction over the non-party.

[2] For an arrangement of parties in a case similar to the one hypothesized in this Comment, see *Viacom Int'l, Inc. v. YouTube, Inc.*, No. C-08-80211 MISC. JF (PVT), 2009 WL 102808 (N.D. Cal. Jan. 14, 2009). Here, Viacom sued YouTube seeking relief for the posting of Viacom's copyrighted material online. *Id.* at *1. Viacom contracted with BayTSP, a third party, to use its crawler software to find unauthorized Viacom clips posted on YouTube. *Id.* at *2. During discovery, YouTube sought electronic discovery from BayTSP and requested a third-party subpoena to obtain it. *Id.* This Comment explores the legal implications of Viacom hypothetically having access to BayTSP's computer network and being able to retrieve and produce the requested discovery on its own.

[3] For the purposes of this Comment, whether the proprietary information is owned by the non-party is irrelevant. What is important is that the non-party is not involved in the litigation at the time its proprietary data, materials, or information is produced. This Comment uses discoverable "data," "materials," and "information" interchangeably.

[4] *See* FED. R. CIV. P. 34 advisory committee's note to 2006 amendments.

differences from traditional discovery.[5] Yet despite being tailored specifically to electronic discovery, these amendments only changed existing laws that addressed discovery of traditional media.[6] As with most changes to procedure,[7] this approach ignores the full extent to which new technology impacts existing legal frameworks.[8]

Electronic networks now provide the predominant forum for interaction between people, businesses, or both.[9] These interactions inevitably result in litigation that involves electronic discovery of information held by non-parties.[10] Unfortunately, the Federal Rules remain ill-suited for the discovery of this uniquely situated ESI.[11] Consequently, courts and the Rules Advisory Committee should reexamine the approach taken toward electronic discovery involving non-parties. This Comment argues that courts should be limited in their ability to compel a party to disclose a non-party's proprietary information to which the party has electronic access. In such cases, a party should only be obligated to disclose the ESI that is directly related to a transaction or occurrence implicated in the litigation.[12] For discovery of any additional ESI from that non-party, a requesting party should have to subpoena the non-party.[13]

Accommodating the unique nature of ESI through this approach is analogous to the change that personal jurisdiction doctrine underwent during the Industrial Revolution.[14] Advances in transportation created a more mobile society, so courts went beyond the traditional limits of territoriality to establish

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[5] *See id.* 26 advisory committee's note to 2006 amendments.

[6] One of the central arguments of this Comment is that under Rule 34 and Rule 45, determining a party's "possession, custody, or control" of ESI is problematic, if not impossible. *See infra* Part I.D.

[7] *See* Orna Rabinovich-Einy, *Beyond Efficiency: The Transformation of Courts Through Technology*, 12 UCLA J.L. & TECH. 1, 3 (2008).

[8] *See infra* Part II.

[9] Orin S. Kerr, *The National Surveillance State: A Response to Balkin*, 93 MINN. L. REV. 2179, 2180–81 (2009); *see also Data, Data Everywhere*, ECONOMIST, Feb. 27, 2010, at 3, 4 ("Between 1990 and 2005 more than 1 billion people worldwide entered the middle class. As they get richer they become more literate, which fuels information growth . . . . The results are showing up in politics, economics and the law . . . .").

[10] *See* Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 7 SEDONA CONF. J. 1, 26 (2006); *see also Data, Data Everywhere*, *supra* note 9, at 5 ("The data-centered economy is just nascent . . . . You can see the outlines of it, but the technical, infrastructural and even business-model implications are not well understood right now." (quoting Craig Mundie, head of research and strategy at Microsoft) (internal quotation marks omitted)).

[11] *See infra* Part II.

[12] *See infra* Parts II.A, III.A.

[13] *See infra* Parts II.B, III.B–III.C.

[14] *See infra* Part III.A.

jurisdiction[15] and began to examine a defendant's contacts with a forum to determine personal jurisdiction.[16] This Comment's approach similarly relies on the contacts between a party and a non-party to justify a party's discovery obligations.[17]

Part I of this Comment examines the current state of electronic discovery under the Federal Rules and explores concerns of cost and data preservation unique to electronic discovery. Part II explores the dilemma that arises in complex litigation where non-parties become implicated in discovery. Part III analyzes the effects of this Comment's proposed approach on jurisdictional, procedural, and economic considerations for electronic discovery.

I. PROCEDURE IN A DIGITAL AGE

Electronic discovery amplifies problems that seem minor or irrelevant in the discovery of traditional media.[18] To understand these issues, a synopsis of the current state of the Federal Rules and the issues arising in their application to electronic discovery is necessary.[19] Section A provides a summary of the Federal Rules as they relate to electronic discovery. Section B discusses cost concerns presented by electronic discovery. Section C discusses the preservation of electronic data. Finally, section D applies the Federal Rules in their current form to non-party discovery.

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[15] *See* Scott D. Irwin, Note, Burnham v. Superior Court of California*: The Final Word on Transient Personal Jurisdiction?*, 53 OHIO ST. L.J. 613, 618–19 (1992).

[16] *See id.*

[17] *See infra* Part III.A.

[18] *See* Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 566 (2001) (concluding that electronic discovery deserves treatment different from traditional forms of discovery because it "more often or more severely" gives rise to problems encountered in traditional discovery).

[19] This Comment evaluates the implications of non-party electronic discovery from the perspective of the Federal Rules. For discovery from an international entity, the procedure established by the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters may also be used. *See* Erica M. Davila, *International E-Discovery: Navigating the Maze*, 8 U. PITT. J. TECH. L. & POL'Y 5, 17 (2008). In practice, however, the difficult application of the Hague Convention combined with the Supreme Court's decision in *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court*, 482 U.S. 522 (1987), has led to the abandonment of its use in American litigation. *See* Davila, *supra* at 17. The difficulty in using the Hague Convention for discovery explains parties' use of Rule 34 for document production from a related, but non-party, foreign entity. *See id.* To further complicate matters, many foreign countries have enacted privacy laws, blocking statutes, and secrecy laws to prevent the international transmission of electronic data in American litigation. *See id.* at 6–15. While certainly important, these international issues are beyond the scope of this Comment.

A. The Federal Rules and Electronic Discovery

Despite the 2000 amendments to the Federal Rules, which purported to lessen the burden of discovery on parties,[20] the scope of discovery still remains quite broad, as the materials sought need only be nonprivileged and relevant to a claim or defense.[21] Even if discoverable information is not admissible at trial, production to a requesting party is still required if it is "reasonably calculated to lead to the discovery of admissible evidence."[22] As a result, parties to litigation face potentially enormous discovery obligations.[23] Production of ESI often results in the production of millions of pages of documents at considerable expense,[24] all occurring with minimal court involvement.[25]

The 2006 amendments to the Federal Rules attempted to tailor the existing rules to the needs of electronic discovery.[26] In so doing, they added "electronically stored information" to the list of discoverable items under Rules 34 and 45.[27] Rule 34 thereby allows a requesting party to compel another party to produce relevant ESI within its "possession, custody, or control."[28] Likewise, Rule 45 allows a requesting party to secure a subpoena to compel a non-party to produce ESI within its "possession, custody, or control."[29]

The 2006 amendments also encourage greater contact between parties to litigation to anticipate and resolve discovery disputes without resorting to

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[20] Arguably, the wording changes made by the 2000 amendments have no effect on the scope of discoverable evidence. *See* Henry S. Noyes, *Good Cause Is Bad Medicine for the New E-Discovery Rules*, 21 HARV. J.L. & TECH. 49, 62–63 (2007). Regardless of the intended effect of the 2000 amendments, the "good cause" standard creating two tiers of discoverable information has no practical effect on curbing large production obligations. *See id.*

[21] FED. R. CIV. P. 26(b)(1).

[22] *Id.*

[23] *See* Noyes, *supra* note 20, at 62–63.

[24] Mia Mazza et al., *In Pursuit of FRCP 1: Creative Approaches to Cutting and Shifting the Costs of Discovery of Electronically Stored Information*, 13 RICH. J.L. & TECH. 1, 6–7 (2007).

[25] Shira A. Scheindlin & Jonathan M. Redgrave, *Special Masters and E-Discovery: The Intersection of Two Recent Revisions to the Federal Rules of Civil Procedure*, 30 CARDOZO L. REV. 347, 384–85 (2008).

[26] *See* FED. R. CIV. P. 34 advisory committee's note to 2006 amendments; *id.* 45 advisory committee's note to 2006 amendments.

[27] *See* FED. R. CIV. P. 34 advisory committee's note to 2006 amendments; *id.* 45 advisory committee's note to 2006 amendments.

[28] FED. R. CIV. P. 34(a)(1)(A).

[29] *Id.* 45(a)(1)(C).

procedural formalities.[30] Many judges, in contrast, regard discovery as a process solely between parties and choose to avoid becoming involved unless an irresolvable dispute arises.[31] Parties therefore feel obligated to arrange for the production of ESI among themselves without court intervention.[32] Consistent with this attitude, Rule 26 requires that parties meet and confer early in litigation to devise a plan to conduct the discovery process as efficiently as possible.[33]

B. Cost Considerations Under the Federal Rules

The 2006 amendments created a two-tiered approach to discoverable information.[34] A party may not be obligated to produce ESI if that discovery is not "reasonably accessible" and production would cause the party "undue burden or cost."[35] Upon such a showing, a court may still order that party to produce discovery but only upon a showing of "good cause" by the requesting party.[36] This provision creates a de facto two-tiered approach which limits discovery based on proportionality—weighing the potential benefits of the discoverable ESI against the burden its production is likely to impose.[37] Some

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[30] *See id.* 26(f) (requiring that parties meet and confer before the scheduling conference to resolve logistical problems for electronic discovery).

[31] Carla Messikomer, *Ambivalence, Contradiction, and Ambiguity: The Everyday Ethics of Defense Litigators*, 67 FORDHAM L. REV. 739, 765 (1998); *see also, e.g.*, Mirbeau of Geneva Lake LLC v. City of Lake Geneva, No. 08-CV-693, 2009 WL 3347101, at *5 (E.D. Wis. Oct. 15, 2009) ("[T]he parties need to genuinely communicate with each other, as discovery is supposed to be self executing. The Court cannot be expected to be cast in the role of babysitter at the slightest discovery problem."). The 2006 amendments recognized the need for court involvement in electronic discovery, but courts remain hesitant to involve themselves fully in the process. Scheindlin & Redgrave, *supra* note 25, at 384–85.

[32] Scheindlin & Redgrave, *supra* note 25, at 384.

[33] *See* FED. R. CIV. P. 26(f).

[34] *See id.* 26(b)(2) advisory committee's note to 2006 amendments.

[35] *Id.* 26(b)(2)(B).

[36] *Id.*

[37] Panel Discussion, *Managing Electronic Discovery: Views from the Judges*, 76 FORDHAM L. REV. 1, 9 (2007) (remarks of Hon. Lee H. Rosenthal). The Advisory Committee's note to Rule 26 identifies seven factors for consideration under the proportionality test:

> (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.

FED. R. CIV. P. 26(b)(2) advisory committee's note to 2006 amendments.

courts use cost shifting as a method to ease the burden of electronic discovery on parties and non-parties alike.[38]

C. Preservation Obligations Under the Federal Rules

Even before the onset of formal litigation, parties may be required to preserve any physical documents or electronic data that may be subject to discovery during the litigation.[39] Any electronic data in a party's "possession, custody, or control" may be subject to production in litigation.[40] As an exception, courts cannot impose sanctions under Rule 37 for the loss of electronic data that occurs because of the "routine, good-faith operation of an electronic information system."[41] As this Comment argues, however, this safe harbor provision does nothing to cure the fundamental defects of Rule 45's production standards.[42] In addition, the "ephemeral" nature of electronic data makes such standards governing a party's duty to preserve ESI difficult to apply.[43]

Sanctions may be imposed after a requesting party has secured a court order to compel discovery and the opposing party fails to comply.[44] Possible sanctions include: directing that matters or facts must be established as claimed by the non-sanctioned party, prohibiting the sanctioned party from supporting or opposing designated claims or defenses, striking pleadings, staying proceedings, dismissing the action or proceeding, rendering default judgment

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[38] Laura E. Ellsworth & Robert Pass, *Cost Shifting in Electronic Discovery*, 5 SEDONA CONF. J. 125, 125 (2004).

[39] *See* FED. R. CIV. P. 37(f) advisory committee's note to 2006 amendments ("A preservation obligation may arise from many sources, including common law, statutes, regulations, or a court order in the case."); *see, e.g.*, Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., No. 05 Civ. 9016(SAS), 2010 WL 184312, at *4 (S.D.N.Y. Jan. 15, 2010) (recognizing a common law duty to preserve relevant evidence upon reasonable anticipation of litigation). The problem identified by this Comment occurs regardless of the time at which a duty to preserve discoverable information becomes effective. *See infra* Part II.B.

[40] *See, e.g.*, *In re* Flash Memory Antitrust Litig., No. C-07-00086-SBA, 2008 WL 1831668, at *1 (N.D. Cal. Apr. 22, 2008).

[41] FED. R. CIV. P. 37(e).

[42] *See infra* Part II.B.

[43] *See* Rae N. Cougar, *Managing Information: Meeting the Requirements of Electronic Production*, 45 IDAHO L. REV. 377, 379–82 (2009) ("Electronic records are different than paper records. . . . Effective management of information requires understanding of its relevant business uses, legal retention requirements, types of information systems, and the limitations of those systems. . . . In order to effectively manage information, an organization must identify all the systems that create, receive, store, and retain the information, plus any information that is retained on old media—created by systems no longer in use. . . . As new technologies are created, information owners must determine their best use for the overall management of corporate informational assets." (footnotes omitted)).

[44] *See* FED. R. CIV. P. 37(b).

against the sanctioned party, finding the sanctioned party in contempt of court, or requiring payment of expenses by the sanctioned party.[45] In addition to citing the Federal Rules for the authority to impose sanctions, courts also justify sanctions as being part of their "inherent power to oversee litigation."[46]

D. The Federal Rules and Electronic Discovery Involving Non-Parties

To compel a non-party located in the United States to produce discovery, a party must obtain a subpoena from a district court where production from the non-party is to be made—not from the district court where the case is being litigated—and serve it in accordance with the Federal Rules.[47] Difficulties arise, however, from lacking or inconsistent precedent.[48] Precedent guiding the resolution of discovery disputes in a particular jurisdiction is often limited or even nonexistent.[49] Judges enjoy a wide degree of discretion in determining whether to grant a motion to compel discovery.[50] This discretion, combined with the interlocutory nature of discovery rulings, rarely provides litigants with an incentive to appeal what they consider an adverse decision.[51] As a practical matter, cases often settle in an effort to avoid the substantial cost involved in discovery, further preventing discovery decisions from being challenged.[52] Thus, the shortage of case law for discovery allows district courts the freedom to stretch the extent of a party or non-party's possession, custody, or control of ESI necessary to compel production.

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[45] *Id.* 37(b)(2).

[46] Quintus Corp. v. Avaya, Inc. (*In re* Quintus Corp.), 353 B.R. 77, 92 (Bankr. D. Del. 2006).

[47] FED. R. CIV. P. 45(a)(2)(C).

[48] Barbara A. Caulfield & Zuzana Svihra, *Electronic Discovery Issues for 2002: Requiring the Losing Party to Pay for the Costs of Digital Discovery*, 2 SEDONA CONF. J. 181, 181 (2001) ("Due to the absence of a coherent body of law, courts seem to decide digital discovery disputes based on an amalgamation of their own armchair knowledge of technology and precedent from traditional forms of discovery disputes. While this precedent does provide some degree of guidance, the issues that arise concerning electronic discovery result in unique problems that never surfaced in traditional discovery settings.").

[49] Shira A. Scheindlin & Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 up to the Task?*, 41 B.C. L. REV. 327, 351 (2000). This problem with precedent can largely be attributed to a "publication bias" in which few published decisions regarding discovery exist and unpublished decisions contain fewer details and weaker reasoning. *See* Scott A. Moss, *Litigation Discovery Cannot Be Optimal but Could Be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 DUKE L.J. 889, 949–50 (2009). Published cases that are followed are often federal district court cases, so the extent of their authority also is not uniform. *See id.* at 901–02 (providing, as an example, the limited adherence to *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003)).

[50] *See* 8B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2215 (3d ed. 1999).

[51] *See* Caulfield & Svihra, *supra* note 48, at 182; Scheindlin & Rabkin, *supra* note 49, at 351.

[52] *See* Caulfield & Svihra, *supra* note 48, at 181 (discussing the shortage of precedent for discovery disputes and the frequency with which parties settle to avoid discovery costs).

When courts do resolve electronic discovery disputes, they tend to adapt existing case law out of convenience.[53] Under the Federal Rules, a party seeking discovery bears the burden of establishing an opposing party or non-party's possession, custody, or control of the requested materials.[54] Courts look for a substantive legal relationship between a party and non-party in light of the subject matter of what is sought, or they assess a party's practical ability to access the requested materials in the same context.[55]

In line with the American model of discovery, courts have expanded the "legal right" test to include a "practical ability" or ability-to-access approach to determine "possession, custody, or control."[56] Under the ability-to-access test, courts look not to whether a party has a legal right to discovery of information proprietary to a non-party but to whether a party has the practical ability to access that information.[57] In essence, courts disregard any legal relationship between a party and non-party and instead focus on the possibility of producing discoverable information.[58] If a party has access to the non-party's discoverable information—regardless of a specified legal right to obtain and

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[53] Because of the "extrajudicial" nature of discovery, this Comment relies on the use of unreported case law to conduct an adequate "field survey" of court decisions in this area. *See* Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 48 F.R.D. 487, 489 (1970).

[54] Camden Iron & Metal, Inc. v. Marubeni Am. Corp., 138 F.R.D. 438, 441 (D.N.J. 1991).

[55] Courts often narrow the scope of "possession, custody, or control" to documents that are highly relevant to the subject matter of the litigation. *See, e.g.*, Cohen v. Horowitz, No. 07 Civ. 5834(PKC), 2008 WL 2332338, at *2 (S.D.N.Y. June 4, 2008). While ordinarily any relevant materials are required to be produced, in this context courts may narrow the degree of relevance to the transaction at issue in the litigation. *See* U.S. Int'l Trade Comm'n v. ASAT, Inc., 411 F.3d 245, 253–56 (D.C. Cir. 2005) (determining a subsidiary party's control of discoverable information possessed by its parent by examining the use of the requested information in the ordinary course of business between the two entities and the extent to which the subsidiary marketed the product at issue); *In re* Rubber Chem. Antitrust Litig., 486 F. Supp. 2d 1078, 1083 (N.D. Cal. 2007) (finding that a party's access to discovery was "not dispositive" because the documents bore no relation to the subject matter of the litigation); Afros S.P.A. v. Krauss-Maffei Corp., 113 F.R.D. 127, 131 (D. Del. 1986) ("[A] non-party's participation in a transaction, and its consequent possession of related documents, must be considered in determining control for Rule 34 purposes.").

[56] *See, e.g.*, Nat'l Union Fire Ins. Co., v. Midland Bancor, Inc., 159 F.R.D. 562, 566 (D. Kan. 1994) ("The ability to obtain documents on demand 'is not affected by the source's retention of ownership or its unilaterally imposed restriction on disclosure.'" (quoting Resolution Trust Corp. v. Deloitte & Touche, 145 F.R.D. 108, 110 (D. Colo. 1992))).

[57] *See, e.g.*, Cooper Indus., Inc. v. British Aerospace, Inc., 102 F.R.D. 918, 920 (S.D.N.Y. 1984).

[58] *See, e.g.*, *In re* NTL, Inc. Sec. Litig., 244 F.R.D. 179, 195 (S.D.N.Y. 2007) ("Under Rule 34, 'control' does not require that the party have legal ownership or actual physical possession of the documents at issue; rather, documents are considered to be under a party's control when that party has the right, authority, or practical ability to obtain the documents from a non-party to the action." (quoting Bank of N.Y. v. Meridien BIAO Bank Tanz. Ltd., 171 F.R.D. 135, 146–47 (S.D.N.Y. 1997) (internal quotation marks omitted)).

produce that information—courts will compel discovery under this model.[59] For discovery of traditional media, this framework for determining an obligation to produce discovery has largely gone unnoticed and likely has not been criticized because it is in line with the American model of discovery.[60]

The narrower approach taken for evaluating a party's possession, custody, or control examines a party's "legal right, authority, or ability" to obtain documents from a non-party.[61] While many courts base their analysis on little more than a general assertion that a party has a legal right to discovery from a non-party, others isolate specific conditions of substantive law that facilitate the party's right to the discovery sought. The existence of a statute,[62] contractual relationship,[63] or agency relationship[64] might establish a party's

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[59] *See, e.g.*, *Cooper Indus.*, 102 F.R.D. at 920; Autery v. SmithKline Beecham Corp., No. 05-0982, 2010 WL 1489968, at *2 (W.D. La. Apr. 13, 2010) ("Rule 34 is broadly construed and documents within a party's control are subject to discovery, even if owned by a nonparty. Thus federal courts have consistently held that documents are deemed to be within the 'possession, custody, or control' of a party . . . if the party has actual possession, custody, or control, or has the legal right to obtain the documents on demand or has the practical ability to obtain the documents from a nonparty to the action. . . . [A]t a minimum, [the defendant] has the practical ability to obtain the documents from [an] outside source." (internal quotation marks omitted) (citations omitted)).

[60] *See* Japan Halon Co. v. Great Lakes Chem. Corp., 155 F.R.D. 626, 629 (N.D. Ind. 1993) ("[I]t is unlikely that the legal system in the United States . . . is likely to change in any significant way in the immediate future . . . . The direction of the law is clear and the rule is for expansive discovery. . . .").

[61] *In re*: Citric Acid Litig., 191 F.3d 1090, 1107–08 (9th Cir. 1999) (concluding that all circuit courts to have addressed the issue have adopted the "legal control" test and rejecting the plaintiff's suggestion that the "practical-ability-to-obtain-documents test" be used).

[62] *See, e.g.*, Tomlinson v. El Paso Corp., 245 F.R.D. 474, 477 (D. Colo. 2007) (finding that the defendant was in possession of pension and welfare records because it was required under ERISA regulations to maintain those records).

[63] *See, e.g.*, Flagg v. City of Detroit, 252 F.R.D. 346, 354 (E.D. Mich. 2008) (finding that the defendant had control over cell phone text messages through a contractual relationship with a cell phone service provider).

[64] In disputes involving business entities, a party may take the position that it has no possession, custody, or control of documents because those documents are held by a related non-party corporate entity—a parent, subsidiary, sister corporation, or affiliate, for example. In this situation, courts must determine whether the relationship between the party and non-party is such that it should disregard the formal corporate distinctions between the two for purposes of discovery. To do so, courts adapt existing law concerning corporate liability to find the extent of a party's possession, custody, or control of the documents at issue. *See, e.g.*, Addamax Corp. v. Open Software Found., Inc., 148 F.R.D. 462, 467 (D. Mass. 1993). Courts generally draw upon three areas to justify disregarding corporate formalities. First, courts compel parties to produce documents or ESI if management overlaps between the party and non-party entities to a significant degree. *See* Camden Iron and Metal, Inc. v. Marubeni Am. Corp., 138 F.R.D. 438, 443–44 (D.N.J. 1991). Second, parties are obligated to produce discovery from a related corporate non-party if the non-party exercises what, in the court's view, is sufficient control over the party. *Id.* Finally, courts examine the contact between the party and non-party, especially with regard to the underlying transaction at issue. *Id.* Equitable considerations may also find their way into agency analyses largely in cases where a court's formal examination of party and non-party entities,

constructive "possession, custody, or control" over a non-party's discovery sufficient for a court to compel production. Regardless of the specific justification, courts base decisions about the ultimate production of discovery on the legal relationship between the information sought and the party from which discovery is requested.[65]

II. THE IMPLICATIONS OF NON-PARTY ELECTRONIC DISCOVERY

Before the movement to amend the Federal Rules in 2006, both scholars and practitioners predicted disputes over adapting existing procedural doctrine to evolving technology.[66] Even with the 2006 amendments, non-party electronic discovery rules are still in need of revision. This Part examines the implications of the broad discovery obligations under the ability-to-access standard as it relates to parties having access to non-party ESI. It isolates two areas—jurisdiction and procedure—needing consideration. Section A discusses the jurisdictional impact of excluding a non-party from litigation in which that non-party's proprietary ESI is produced by a party that is able to access the data. Section B then examines the procedural impact of requiring a party to preserve, at the onset of litigation, non-party data which that party may later be required to produce in discovery.

A. Jurisdictional Implications

Under the Federal Rules, with limited exceptions, courts are not expected to treat the discovery of traditional media any differently from discovery of ESI.[67] The 2006 amendments addressed the inclusion of ESI as a distinct entity of discoverable information, yet the Rules Committee's declaration that ESI stands on "equal footing with . . . paper documents"[68] has led courts to treat both media in the same manner.[69] The ability-to-access test thus finds its way into the resolution of disputes involving electronic discovery of non-parties.[70]

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standing alone, is insufficient in its view to justify production. *See, e.g.*, Goh v. Baldor Elec. Co., No. 3:98-MC-064-T, 1999 WL 20943, at *3 (N.D. Tex. Jan 13, 1999).

[65] *See, e.g.*, *In re: Citric Acid Litig.*, 191 F.3d at 1107–08.

[66] Scheindlin & Rabkin, *supra* note 49, at 341.

[67] *See* FED. R. CIV. P. 34 advisory committee's note to 2006 amendments.

[68] *Id.*

[69] *See, e.g.*, Ferron v. Search Cactus, LLC, No. 2:06-CV-327, 2008 WL 1902499, at *2 (S.D. Ohio Apr. 28, 2008).

[70] *See, e.g.*, *In re* NTL, Inc. Sec. Litig., 244 F.R.D. 179, 195–96 (S.D.N.Y. 2007) (finding that a party had the "practical ability" to obtain relevant documents from a corporate affiliate).

Under this standard, non-parties are deprived of the right to be served with a subpoena to compel them to produce discovery. Take, for example, *Sedona Corp. v. Open Solutions, Inc.*[71] In this case, the plaintiff, Sedona, claimed that the defendant, Open Solutions, had breached a software licensing agreement.[72] To build its case, Sedona requested discovery relating to the development of the software at issue.[73] Open Solutions responded that much of the development had been completed by a non-party, R Systems, with which Open Solutions had contracted.[74] As a result, Open Solutions contended that it did not have possession, custody, or control of much of the discovery sought by the plaintiff.[75] In ruling on the dispute, the court ignored any interest maintained by R Systems and ordered that Open Solutions produce the requested discovery itself to the extent that it could access R Systems's data.[76] R Systems might have challenged the production of that data, or at the very least requested a protective order, but it never had a chance to do so.[77]

Although courts have not addressed the issue in the specific context of commercial litigation, the right to be served with and subsequently challenge a subpoena has been declared a fundamental tenet of due process in other contexts.[78] Further, the proper exercise of jurisdiction over a non-party with regard to discovery is also a requirement for due process.[79] A non-party in a civil proceeding should therefore enjoy the same right to receive and challenge a subpoena requiring discovery of its electronic data as a non-party in any other type of proceeding. After all, the Fifth Amendment protects against deprivation of property without adequate due process.[80] At the very least, a non-party should be able to confirm that it has no objection to the production of its electronic data.[81] At most, a non-party should be able to object to the

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71 249 F.R.D. 19 (D. Conn. 2008).

72 *Id.* at 21.

73 *Id.* at 21–24.

74 *Id.*

75 *Id.* at 21.

76 *Id.* at 22.

77 *See id.* at 24–25.

78 *See* United States v. Morton Salt Co., 338 U.S. 632, 642 (1950) ("The judicial subpoena power not only is subject to specific constitutional limitations . . . such as . . . due process of law, but also is subject to those limitations inherent in the body that issues them because of the provisions of the Judiciary Article of the Constitution.").

79 *Id.*

80 U.S. CONST. amend. V.

81 *See In re* Subpoena Duces Tecum, 228 F.3d 341, 348 (4th Cir. 2000) ("A subpoena . . . commences an adversary process during which the person served with the subpoena may challenge it in court before complying with its demands.").

potential disclosure of trade secrets or other proprietary information or seek to have a protective order entered on its behalf.[82]

More generally, procedural due process protections have been applied to civil procedure. *Mathews v. Eldridge* marked the Supreme Court's articulation of three considerations determinative of whether administrative procedures adequately provide for due process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[83]

The Court then extended the application of these considerations to judicial procedure in *Connecticut v. Doehr*.[84]

Application of these factors to non-party electronic discovery is therefore a natural extension of this precedent.[85] Under the ability-to-access test, a non-party risks its proprietary data being produced in litigation without first receiving notice and the opportunity to object or request a protective order. Without the non-party's involvement, no guarantee exists that the non-party's interests will be protected during discovery. Although in many cases the interests of the non-party and the party that produces the non-party's ESI may be aligned, the producing party does not necessarily have an incentive to protect the non-party's interests. As a consequence, the first two *Mathews* factors provide courts with a foundation for protecting the due process rights of non-parties whose proprietary data are subject to discovery.

Finally, consider the Second Circuit's recent opinion in *Shcherbakovskiy v. Da Capo Al Fine, Ltd.* overturning a district court's sanctions against a plaintiff claiming to be unable to access the documents of a related foreign non-party entity.[86] Here, the usual discussion about a party's possession,

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[82] *See id.*

[83] 424 U.S. 319, 335 (1976).

[84] 501 U.S. 1, 10–11 (1991).

[85] Recent commentary has argued that the Supreme Court's decision involving heightened pleading standards in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), functionally applies the *Mathews* factors to discovery. *See* Andrew Blair-Stanek, Twombly *Is the Logical Extension of the* Mathews v. Eldridge *Test to Discovery*, 62 FLA. L. REV. 1, 17–22 (2010).

[86] 490 F.3d 130, 140 (2d Cir. 2007).

custody, or control of discovery for purposes of production included the "fairly obvious" assertion that "a party [from which documents are requested] . . . need not seek . . . documents from third parties if compulsory process against the third parties is available to the party seeking the documents."[87] In cases where a party seeking discovery is able to compel a non-party to produce discovery directly, the Second Circuit seems to require a subpoena instead of allowing discovery through an opposing party.[88] Yet there is no consensus among lower courts as to the application of this statement. One court has followed the Second Circuit and required a party seeking discovery to compel a non-party directly.[89] Another recognized the rationale for compelling a non-party to produce the requested information, yet still ordered the party to produce the information within its practical control.[90] And a third court has labeled this aspect of the opinion as dicta.[91] Regardless of these divergent views, the proposition underlying the Second Circuit's pronouncement serves as an important reminder of the jurisdictional analysis inherent in discovery.[92]

B. Procedural Implications

The deficiencies of the ability-to-access test are further revealed through an examination of a party's duty to preserve ESI. Electronic discovery has presented new challenges to courts in determining the extent to which a party should be obligated to preserve discoverable data upon anticipation of

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[87] *Id.* at 138 (citing *In re* NASDAQ Market-Makers Antitrust Litig., 169 F.R.D. 493, 530 (S.D.N.Y. 1996)).

[88] *See id.* at 138–39. The court indicated that, should a party have the "practical ability" to access discovery, that party might be compelled to produce discovery if a requesting party could not access that discovery through the use of a subpoena or otherwise. *See id.* at 138 (citing *In re NASDAQ Market-Makers*, 169 F.R.D. at 530).

[89] *See* M'Baye v. N.J. Sports Prod., Inc., Nos. 06 Civ. 3439(DC), 05 Civ. 9581(DC), 2008 WL 1849777, at *3–4 (S.D.N.Y. Apr. 21, 2008).

[90] *See* Cohen v. Horowitz, No. 07 Civ. 5834(PKC), 2008 WL 2332338, at *2 (S.D.N.Y. June 4, 2008).

[91] *See In re* Lozano, 392 B.R. 48, 57–58 (Bankr. S.D.N.Y. 2008). Because *Shcherbakovskiy* was an appellate decision determining the legitimacy of the district court's sanctions against the plaintiff, the *Lozano* court found that the analysis in the *Shcherbakovskiy* opinion pertaining to non-party discovery was not necessary to the holding of the case. *Id.* at 57–58.

[92] Outside the Second Circuit, at least one district court has noted this proposition yet declined to follow it in much the same fashion as the court in *Tomlinson*. In *Verigy US, Inc. v. Mayder*, No. C07-04330 RMW (HRL), 2008 WL 4786621, at *2 (N.D. Cal. Oct. 30, 2008), the court noted the need for a subpoena to obtain discovery from a non-party internet service provider (ISP) because a party to the litigation did not have "exclusive control" over the discovery sought. Nevertheless, the court compromised this declaration by ordering the party to obtain the materials at issue from the ISP for subsequent production to the requesting party. *Id.* at *3.

litigation.[93] By and large, courts resolve this dilemma by correlating what a party must preserve with what it ultimately might be obligated to produce—ESI within its possession, custody, or control.[94] The logic of this relationship is that what a party ultimately might have to produce should be what is preserved when the duty to preserve is triggered.[95] However, by allowing "possession, custody, or control" of discoverable materials to dictate the scope of a party's obligation to preserve, courts fail to recognize the limitations inherent in the broad spectrum of electronic discovery.[96]

What a party may "access" is not necessarily the same as what a party can "control."[97] What a party can access but not control, therefore, may be subject to spoliation between the onset of litigation and the time a discovery request is made.[98] The extension of the ability-to-access test to electronic discovery thereby removes the consistency between the ESI a party is obligated to preserve and what that party may ultimately be obligated to produce. With the continued use of the practical ability test, courts might find themselves in the undesirable position of applying divergent definitions of "possession, custody, or control" to determine a party's duty to preserve data and that party's duty to produce data held by a non-party.[99] As a practical matter, then, production of ESI should only be required if a party has the ability to preserve the ESI at the onset of litigation.

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[93] *See, e.g.*, Thomas Y. Allman, *Managing Preservation Obligations After the 2006 Federal E-Discovery Amendments*, 13 RICH. J.L. & TECH. 1, 5 (2007) ("A number of unique attributes make the execution of preservation obligations particularly difficult when ESI is involved.").

[94] *See, e.g.*, Goodman v. Praxair Servs., Inc., 632 F. Supp. 2d 494, 514 (D. Md. 2009); *In re* Flash Memory Antitrust Litig., No. C-07-00086-SBA, 2008 WL 1831668, at *1 (N.D. Cal. Apr. 22, 2008).

[95] *See In re Flash Memory*, 2008 WL 1831668, at *1.

[96] *See* THE SEDONA CONFERENCE WORKING GROUP ON ELEC. DOCUMENT RETENTION & PROD. (WG1), THE SEDONA CONFERENCE COMMENTARY ON NON-PARTY PRODUCTION & RULE 45 SUBPOENAS 7 (Alan Blakely et al. eds., 2008) (finding that a non-party's preservation obligation typically only begins upon receipt of a subpoena and that "[t]he duration of a non-party's duty to preserve is not coextensive with a party's duty to preserve").

[97] Moreno v. Autozone, Inc., No. C-05-4432 CRB (EMC), 2008 WL 906510, at *1 (N.D. Cal. Apr. 1, 2008) ("Control is generally defined as the legal right to obtain the documents on demand and at times has been construed more broadly to include the practical ability to obtain the documents sought upon demand.").

[98] Perhaps the safe harbor provision of the Federal Rules would protect a party in the event that ESI out of the party's immediate control is deleted before it was requested for production. *See supra* Part I.B. Given judges' broad discretion, there is no guarantee that courts would interpret this provision in that manner. *See supra* Part I.D.

[99] These conflicting interpretations will prove problematic as statutory construction should strive to maintain consistency. *See* David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 937 (1992) (discussing "the importance of reading a new statute against the legal landscape and . . . recognizing the value of minimal disruption of existing arrangements consistent with the language and purpose of the new law").

III. INTEGRATING NON-PARTIES INTO ELECTRONIC DISCOVERY

This Comment proposes that requesting parties may only obtain ESI that is proprietary to a non-party from a party if that ESI is related to a transaction or occurrence involved in the litigation. A requesting party may only obtain anything additional—ESI that is discoverable but not directly related to litigation—through a non-party subpoena. Narrowing the scope of discovery for non-party data would ensure adequate jurisdiction over a non-party for purposes of discovery, making certain that discoverable ESI matches what must be preserved, and reducing the overly burdensome cost of electronic discovery. Section A explains the jurisdictional benefits of this proposal and compares them to the development of personal jurisdiction doctrine in response to technological advances. Section B describes the procedural continuity that this approach would create for discoverable ESI. Section C then examines this approach from a cost perspective.

A. Jurisdictional Benefits

Concerns over jurisdiction and due process highlights the need to change the procedural framework used for non-party electronic discovery. Recent scholarly analysis examining courts' exercise of personal jurisdiction over corporate entities based on the contacts between related business entities and the litigation forum demonstrates the benefits of this proposed approach.[100] As technological change has revolutionized communication and the exchange of information, it may be helpful to assess the developments in non-party electronic discovery relative to changes previously undergone in personal jurisdiction. Such a comparison may better illustrate the jurisdictional implications of non-party electronic discovery. However, before conducting such an analysis, it is necessary to determine whether this comparison should be made in the first place. That is, one should first assess whether a court serving a subpoena upon a non-party has the same power as a court serving process upon a defendant.

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[100] *See generally* Lonny Sheinkopf Hoffman, *The Case Against Vicarious Jurisdiction*, 152 U. PA. L. REV. 1023 (2004) (rejecting the use of veil-piercing to establish personal jurisdiction over a business entity lacking sufficient contacts to the forum of a litigation); John A. Swain & Edwin E. Aguilar, *Piercing the Veil to Assert Personal Jurisdiction over Corporate Affiliates: An Empirical Study of the* Cannon *Doctrine*, 84 B.U. L. REV. 445 (2004) (analyzing the variables inherent in establishing jurisdiction over corporate affiliates in light of the *Cannon* doctrine); Jennifer A. Schwartz, Comment, *Piercing the Corporate Veil of an Alien Parent for Jurisdictional Purposes: A Proposal for a Standard that Comports with Due Process*, 96 CAL. L. REV. 731 (2008) (examining the use of veil-piercing to establish personal jurisdiction over a foreign parent via the contacts of its domestic subsidiary).

Properly assessing this comparison reveals much about the approach that should be taken by courts to non-party electronic discovery. If personal jurisdiction considerations apply to non-parties served with subpoenas in litigation in the same manner as they do to a defendant, then a court should apply those same considerations when compelling a non-party to produce discoverable information. To be sure, all personal jurisdiction cases examined by the United States Supreme Court have involved jurisdiction over parties,[101] and some of the underlying considerations involved in establishing personal jurisdiction are less relevant in the context of non-party discovery.[102] Further, personal jurisdiction over a defendant potentially results in a judgment against the defendant as a party,[103] while refusing to comply with a subpoena will, at worst, result in contempt of court being imposed upon an uncooperative non-party.[104]

Notwithstanding these arguments, a subpoena still signifies a court's power over a non-party.[105] Whether entering a judgment against a defendant or holding a non-party in contempt, a court is exercising its judicial enforcement

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[101] Ryan W. Scott, Note, *Minimum Contacts, No Dog: Evaluating Personal Jurisdiction for Nonparty Discovery*, 88 MINN. L. REV. 968, 975–77 (2004). One commentary contends that *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), is dispositive with regard to the issue of personal jurisdiction over non-parties through a subpoena. Scott, *supra*, at 975–77. However, *Phillips Petroleum* concerned a court's jurisdiction over plaintiffs represented in a class action proceeding which would ultimately have a preclusive effect on any future claims. *See Phillips Petroleum*, 472 U.S. at 805. In light of this fact, and the fact that the central issue in *Phillips Petroleum* involved jurisdiction over plaintiffs and not a defendant, the case should be distinguished from those involving non-party subpoenas. *See id.*

[102] Discovery from a non-party is necessarily more limited in scope and time than discovery from a party, and statutory provisions in the Federal Rules limit the scope and potential cost of discovery to non-parties. *See* FED. R. CIV. P. 26(b)(2)(B). A non-party may have little stake in the outcome of a case, which further reduces the burden for which personal jurisdiction limitations are designed to account. Not only does a judgment against a defendant have an obvious direct effect on that defendant, it also can bar subsequent litigation by a plaintiff.

[103] *See id.* 54–63.

[104] *See id.* 45(e).

[105] The Supreme Court has hinted that a court's subpoena power should correspond to the extent of its jurisdiction. U.S. Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72, 76 (1988). Although the decision in *U.S. Catholic Conference* rested on the lower court's subject matter jurisdiction and not its personal jurisdiction over the defendant, the Court's analysis may also apply to personal jurisdiction. *See id.* at 77 ("[C]ourts have finite bounds of authority, some of constitutional origin, which exist to protect citizens from the very wrong asserted here, the excessive use of judicial power."). Thus, if subpoena power is allowed up to the extent of a court's jurisdiction, the territorial restrictions on subpoenas in Rule 45 represent a statutory—not a constitutional—limitation. *But see* Willy v. Coastal Corp., 503 U.S. 131, 138–39 (1992) (distinguishing *U.S. Catholic Conference* and finding a distinction between the purpose of a civil contempt order and sanctions imposed on a party).

power.[106] Further, if a court can establish personal jurisdiction over a defendant based solely on a defendant's contacts with a forum, then a court should be able to subpoena discoverable materials from a non-party based on the same minimum contacts test without territorial limitation. A court's jurisdictional reach with respect to discovery should therefore include all territory where production of discovery is reasonably certain to take place.[107] Many scholarly commentators agree and favor subpoena power based on personal jurisdiction over a non-party.[108] Aligning subpoena power with the scope of personal jurisdiction helps justify a fundamental change in the rules for non-party electronic discovery.[109]

On a basic level, personal jurisdiction involves a court's power to exercise its authority over an entity. Perfecting such jurisdiction can be achieved either through an entity's presence in, or minimum contacts with, the forum.[110] The Court first addressed the issue of personal jurisdiction based on a defendant's presence in a forum in the seminal case *Pennoyer v. Neff*.[111] There the Supreme Court set the foundation for a territorial approach to personal jurisdiction, allowing a court to exercise jurisdiction over a defendant served with process when present in the state.[112] This presence-based approach continued until the proliferation of corporations and the increase in interstate travel made it unworkable.[113] Then, in *International Shoe Co. v. Washington*, the Supreme Court went beyond the presence-based approach of *Pennoyer* and

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[106] *See* Rhonda Wasserman, *The Subpoena Power:* Pennoyer*'s Last Vestige*, 74 MINN. L. REV. 37, 105 (1989) (discussing Whitley v. Lutheran Hosp., 392 N.E.2d 729 (Ill. App. Ct. 1979)). *Compare* Hanson v. Denckla, 357 U.S. 235, 246 n.12 (1958) ("A judgment *in personam* imposes a personal liability or obligation on one person in favor of another."), *with* 18 U.S.C. § 401 (2006) ("A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority . . . as [d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command.").

[107] *See* Wasserman, *supra* note 106, at 105. (discussing *Whitley*, 392 N.E.2d 729).

[108] *See id.* at 91; Scott, *supra* note 101, at 970.

[109] Even if non-party subpoena power was an assertion of judicial authority distinct from personal jurisdiction, the very nature of a court's subpoena power would still require some legal restraint under the Due Process Clause. *See supra* Part II.A. As a result, if this comparison is not legitimate, the problem identified and solution proposed by this Comment remain sound.

[110] *See* Irwin, *supra* note 15, at 621–28 (discussing the changes in personal jurisdiction beginning with the "minimum contacts" test in Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945)).

[111] *See generally* Pennoyer v. Neff, 95 U.S. 714 (1877). For a discussion of the origins of English personal jurisdiction law, which American law ultimately adopted, see Wasserman, *supra* note 106, at 43–51.

[112] *Pennoyer*, 95 U.S. at 733. In *Shaffer v. Heitner*, 433 U.S. 186 (1977), the Court questioned the sufficiency of presence alone as a basis for personal jurisdiction, but its subsequent plurality decision in *Burnham v. Super. Ct.*, 495 U.S. 604 (1990), reaffirmed that presence is sufficient for establishing personal jurisdiction.

[113] Wasserman, *supra* note 106, at 52–53.

allowed the exercise of jurisdiction over an entity not present in the forum but instead with such minimum contacts that "maintenance of [a] suit" would not offend "traditional notions of fair play and substantial justice."[114] Thus, while territorial limitations originally provided the basis for personal jurisdiction over a defendant, a need for greater flexibility caused American law to adopt a minimum contacts analysis to better accommodate evolving technology and business conducted across state lines.[115]

Despite these new tools for exercising personal jurisdiction over a defendant, subpoenas compelling a non-party to produce discoverable materials maintain their original territorial limitations.[116] As the Federal Rules currently stand, the ability to compel a non-party to produce discovery hinges solely on that non-party's physical presence and bears no relationship to the contacts it maintains with the litigation forum.[117] While courts have not made accommodations for evolving technology to find jurisdiction over a non-party for discoverable information,[118] they have expanded their characterization of a party's possession, custody, or control of discoverable information to circumvent these territorial limitations.[119] Commentary on this subject has already pointed to the need to reevaluate the territorial limitations of subpoenas.[120]

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[114] *Int'l Shoe*, 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940) (internal quotation marks omitted)). In *World-Wide Volkswagen Corp. v. Woodson*, the Court expanded upon *International Shoe*, identifying five factors for consideration in conjunction with a defendant's minimum contacts:

> [(1)] the burden on the defendant, . . . [(2)] the forum State's interest in adjudicating the dispute[,] . . . [(3)] the plaintiff's interest in obtaining convenient and effective relief[,] . . . [(4)] the interstate judicial system's interest in obtaining the most efficient resolution of controversies[,] . . . and [(5)] the shared interest of the several States in furthering substantive social policies.

444 U.S. 286, 292 (1980) (citations omitted). In addition to balancing these interests, courts must consider whether a defendant could reasonably expect to be haled into court in the forum. *Id.*

[115] Wasserman, *supra* note 106, at 52–53.

[116] These limitations have been criticized as adhering to an "antiquated view of state court power." *Id.* at 39. Advances in technology justify an expansion of the scope of subpoenas beyond territorial limits. *Id.* at 65. In addition, any subpoena of a non-party must comply with due process. Scott, *supra* note 101, at 992–93.

[117] Wasserman, *supra* note 106, at 41.

[118] *Id.*; *see also* Cathaleen A. Roach, *It's Time to Change the Rule Compelling Witness Appearance at Trial: Proposed Revisions to Federal Rule of Civil Procedure 45(e)*, 79 GEO. L.J. 81, 90 (1990) (noting that "rigid adherence to the letter of the rule" despite advances in technology "can produce absurd results").

[119] Because judges maintain great discretion over discovery disputes, they are able to overcome limitations on non-party subpoenas by simply compelling an opposing party to produce the discovery. *See supra* Part I.A.

[120] *See generally* Wasserman, *supra* note 106 (rejecting the territorial limitation of subpoenas as inconsistent with the evolution of personal jurisdiction).

In the context of electronic discovery, the failure to adapt procedural law to changes in technology leads courts to apply makeshift remedies, which only furthers the tension between broad discovery and due process.[121] Compelling document production under both Rule 34 and Rule 45 presupposes the existence of a court's power over the entity from which discovery is sought.[122] To compel a party to produce discoverable information, a court need not take any additional action to assert its jurisdiction[123]—that party has already been brought under the court's jurisdiction and must produce anything within its possession, custody, or control.[124] To compel a non-party to produce documents, however, the court must issue a subpoena to the non-party.[125] Service of a subpoena thus perfects a court's authority over the non-party and ensures that the obligation to produce discoverable information comports with due process.[126]

Where a court does not issue a subpoena and a party produces discovery based on its ability to access a non-party's electronic data, the traditional jurisdictional and due process considerations inherent in a subpoena are not applied.[127] Under the approach this Comment suggests, a party's ability to discover information from a non-party should therefore be limited. Similar to a party's expectations for being subject to suit in a particular forum, a non-party should expect that the data it shares with another entity will be discoverable to the extent that the data are relevant to that litigation. The requesting party should therefore only be entitled to the discoverable data that are directly related to the litigation.[128]

The alternative to securing a subpoena that this Comment proposes—production by a party of a non-party's material only when that material is related to a transaction or occurrence in the litigation—is analogous to the minimum contacts test for personal jurisdiction.[129] In such cases, if a non-party maintained electronic contact with a party that later became involved in

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121 See *supra* Part II.A.

122 *See In re* Uranium Antitrust Litig., 480 F. Supp. 1138, 1145 (N.D. Ill. 1979).

123 8B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2208 (3d ed. 1999).

124 *Id.*

125 *See* FED. R. CIV. P. 34(c) (citing *id.* 45).

126 Scott, *supra* note 101, at 993–97.

127 *See supra* Part II.A.

128 *See, e.g.*, Mintel Int'l Group, Ltd. v. Neerghen, No. 08 CV 3939, 2009 WL 249227, at *6 (N.D. Ill. Feb. 3, 2009). This dependence on the potential relevance of the discoverable materials is consistent with the Federal Rules' two-tiered approach to electronic discovery. *See supra* Part II.B.

129 *Cf.* Hanson v. Denckla, 357 U.S. 235, 251–52 (1958) (requiring that minimum contacts with a forum state be related to the transaction or occurrence at issue in litigation).

litigation, the non-party could reasonably expect that its electronic data might be relevant to a litigation involving the party. Further, this alternative requirement is in line with the Advisory Committee's commitment to narrowing the burdensome scope of discovery as well as the approach courts sometimes adopt under existing case law.

Although the proposed framework lowers restrictions on jurisdiction over a non-party, it still limits the scope of discoverable information and therefore is consistent with the Advisory Committee's concerns. Only the data that a non-party could expect to be used in a litigation—those which relate directly to a transaction or occurrence at issue in the litigation—would be subject to production. The remainder of this Part will explain the procedural and economic benefits of this approach.

B. Procedural Benefits

This Comment aims to eliminate the discrepancy that exists under the ability-to-access test between what a party is obligated to produce and what it must preserve in reasonable anticipation of litigation. Otherwise, parties may be held responsible for producing data that were outside of their control when litigation seemed reasonably likely to occur. Narrowing the scope of discovery for non-party ESI would limit a party's exposure to this inconsistency.

The preservation standard for ESI is one of the most contentious issues in electronic discovery.[130] Courts struggle to determine when a party's failure to preserve ESI should result in sanctions.[131] Courts impose sanctions when they conclude that a party acted in bad faith or with indifference with respect to its discovery obligations and that a requesting party was prejudiced as a result.[132]

Sanctions represent a manifestation of a court's jurisdiction over a party.[133] They discourage indifference to litigation holds or bad faith conduct during discovery. Put another way, sanctions deter parties from acting adversely to a court's assertion of jurisdictional authority. Although sanctions function as a deterrent, they should not discourage efforts to obtain discoverable information

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130 *See* Allman, *supra* note 93, at 5–6.

131 *See id.* The safe harbor provision in the Federal Rules prohibits a court, absent "exceptional circumstances," from imposing sanctions on a party for discovery lost "as a result of the routine, good-faith operation of an electronic information system." FED. R. CIV. P. 37(e).

132 *See* Thomas C. Tew, *Electronic Discovery Misconduct in Litigation: Letting the Punishment Fit the Crime*, 61 U. MIAMI L. REV. 289, 297 n.36 (2007).

133 *See* Allman, *supra* note 93, at 6–7.

from non-parties in litigation.[134] Sanctions are not available against non-parties under the Federal Rules, but contempt of court serves an analogous function.[135] Thus, if and when a party serves a subpoena upon a non-party to compel discovery, an enforcement mechanism ensures the non-party's compliance.[136]

C. Economic Benefits

Under the proposal this Comment suggests, shifting some of the burden of discovery to non-parties might reduce litigation costs.[137] Although this approach adds a transaction cost to litigation by requiring that a party secure a subpoena over a non-party, it should promote litigation efficiency in several respects. First, it will encourage parties to limit their discovery requests. With the added effort required to secure a subpoena over a non-party, a requesting party might not do so if the discovery sought is only tangentially relevant to the case.[138] Second, because parties themselves would be obligated to produce less than required by the current interpretation of Rule 45, they would have less incentive to settle cases solely because of the cost of the discovery process. As a result, parties would have less reason to initiate a meritless claim.[139] Ultimately, this should discourage frivolous litigation brought with the anticipation that the opposing party is likely to settle to avoid discovery costs.[140] Finally, shifting discovery burdens to non-parties that maintain

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134 *See id.*

135 *See* FED. R. CIV. P. 37(b)(2), 45(e).

136 *See id.* Additionally, a court could still hold a party accountable if it found the party to have failed to take adequate measures to ensure the preservation of its own data at the hands of a non-party. *See* THE SEDONA CONFERENCE WORKING GROUP ON BEST PRACTICES FOR ELEC. DOCUMENT RETENTION & PROD., THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 31 (Jonathan M. Redgrave et al. eds., 2004) ("Many organizations outsource all or part of their information technology systems or share data with third parties for processing or other business purposes. In contracting for such services, organizations should consider whether there is a provision for the types of activities, such as preservation or collection of data that may be required by electronic discovery . . . . This concern arises out of Fed. R. Civ. P 34, which allows discovery of documents in the possession, custody or control of a party.").

137 *See* Robert D. Cooter & Daniel L. Rubinfeld, *Reforming the New Discovery Rules*, 84 GEO. L.J. 61, 70 (1995).

138 *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 598 (7th ed. 2007) (finding that the difference in parties' predictions of the outcome of a lawsuit "will depend on the cost of litigation relative to that of settlement").

139 *See* Kindall C. James, Comment, *Electronic Discovery: Substantially Increasing the Risk of Inadvertent Disclosure and the Costs of Privilege Review—Do the Proposed Amendments to the Federal Rules of Civil Procedure Help?* 52 LOY. L. REV. 839, 842 (2006).

140 *See id.*

electronic data encourages more efficient gathering and production of data.[141] Because a non-party that maintains data presumably is better acquainted with the data storage and retrieval systems than a party that simply has access to the data, the non-party will be the least burdened producing it.

Justifying a non-party's absorption of costs for litigation in which it has no stake requires some explanation, however. Non-parties have a strong argument that there is no reason they should be responsible for expenses associated with litigation in which they have no stake. To justify imposing the costs of discovery on a non-party with no stake in the outcome of litigation, one must consider the non-party's position relative to the parties to the litigation. Cost shifting in electronic discovery disputes usually arises in the context of commercial litigation.[142] In such cases, a non-party possessing discoverable information presumably has enjoyed a pecuniary interest in maintaining an electronic network with one of the parties to the litigation.[143] Accordingly, one would expect the non-party to be required to turn over the electronic data to a court if a party with which the non-party interacts is involved in litigation. This expectation is no different from what non-parties might expect in litigation involving discovery of traditional media. In fact, non-parties may actually avoid costs to the extent that a requesting party chooses to limit its discovery requests to those parties with access to a non-party's ESI.[144]

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[141] *Cf.* John S. Wilson, Comment, *Myspace, Your Space, or Our Space? New Frontiers in Electronic Evidence*, 86 OR. L. REV. 1201, 1213–14 (2007) (finding that shifting costs to requesting parties will encourage more efficient storage of data for eventual production in litigation).

[142] Jessica Lynn Repa, Comment, *Adjudicating Beyond the Scope of Ordinary Business: Why the Inaccessibility Test in* Zubulake *Unduly Stifles Cost-Shifting During Electronic Discovery*, 54 AM. U. L. REV. 257, 281 (2004).

[143] Examples may include ISPs, intranet arrangements between corporate affiliates or subsidiaries, supply-chain managers, or any other independent company, distinct from a party, that provides electronic database services to the party. *See generally*, *A Different Game*, ECONOMIST, Feb. 27, 2010, at 6–8 (discussing the growth of the information technology industry). For three recent examples, consider first the non-party software developer BayTSP that assisted Viacom in finding copyrighted material on YouTube in preparation for an eventual copyright suit. Viacom Int'l, Inc. v. YouTube, Inc., No. C-08-80211 MISC.JF (PVT), 2009 WL 102808, at *1 (N.D. Cal. Jan. 14, 2009). Second, a suit between two software corporations involved a non-party, R Systems, that had assisted the defendant in developing its software. Sedona Corp. v. Open Solutions, Inc., 249 F.R.D. 19, 22 (D. Conn. 2008). Finally, in a suit involving Allstate Insurance Company, discoverable information was held by a non-party, MS/B, that had assisted Allstate in developing its pricing model for building or dwelling losses claimed by beneficiaries. Opperman v. Allstate N.J. Ins. Co., Civil No. 07-1887 (RMB), 2008 WL 5071044, at *2 (D.N.J. Nov. 24, 2008).

[144] Under this framework, a party need only seek discovery directly from a non-party when that discovery is not related to a transaction or occurrence involved in the litigation. Otherwise, the requesting party may still obtain the discovery from a party who has the ability to access it. As a result, requesting parties will be forced

Further, non-parties might simply pass that cost along to their customers. This is not traditional cost shifting where the non-party pays the costs of discovery incurred by another entity. Rather, the non-party is the entity that bears the burden of producing the discoverable data.[145] While the costs of litigation will never be allocated perfectly, this framework would ease the burden on parties thereby reducing the tendency to settle litigation solely to avoid discovery costs.

CONCLUSION

The continued application of the Federal Rules in cases involving non-parties's ESI invites a host of legal and practical considerations. Courts and the Federal Rules Advisory Committee must acknowledge the differences between electronic data and traditional discovery media before issues involving electronic discovery can be adjudicated effectively and efficiently. Just as personal jurisdiction law underwent a radical change in response to technological change and increased mobility, so should discovery law reflect the unique dynamics and tremendous volume of electronic data.

Continuing the makeshift remedy that courts have created to address discovery of data held by non-parties will only encourage inefficient discovery at the expense of non-parties whose data are subject to discovery. Encouraging non-party subpoenas or, in the alternative, narrowing the scope of discovery for non-party data that is accessible to a party in litigation, will reduce the undue burdens of electronic discovery while protecting the interests of non-parties. Such an approach will allocate costs more efficiently and uphold the due process required for discovery in a digital age.

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to narrow their requests to parties and only seek discovery directly from non-parties when they expect that discovery to be of great important to their case.

145 Unfortunately, under this arrangement the non-party will have to absorb some costs of litigation in which it is not involved. However, a party and a non-party would be free to contract to have the party indemnify the non-party for any costs incurred, such as for privilege review. *See, e.g.*, *Viacom Int'l*, 2009 WL 102808, at *5; *see also* SEDONA CONFERENCE WORKING GROUP, *supra* note 136, at 31 (discussing the possibility of such arrangements between parties and non-parties).

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