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Instant Headache

Alexi Oreskovic
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In today's always-on business world, instant messaging is the ultimate way to stay in touch. Millions of workers rely on the software, which, if you don't have any teens at home, is a stripped-down sort-of e-mail that lets computer users swap pop-up notes at lightning speed.

But instant messaging (IM) carries its own set of legal implications for in-house law departments. Although many people think of IM as a fleeting conversation, similar to a telephone call, it's legally considered a document, and subject to the same retention policies that cover other business records.

But according to a January 2005 study by the Association for Information and Image Management and Kahn Consulting, only 28 percent of companies have written policies in place for instant messaging that cover things like acceptable use and data retention. And with workers sending instant messages to colleagues and friends, the electronic notes are playing a role in everything from sexual harassment cases to trade theft investigations.

Information technology experts say that IM is also one of the prime ways that music or film files make their way to Internet file-sharing networks. IM use "is really something that has skyrocketed in the corporate setting in the last year or two," says Michele Lange, a staff attorney at Kroll Ontrack Inc., a Minneapolis-based computer forensics and electronic discovery firm.

Lange has sifted through instant messages within corporations for internal investigations and lawsuits. She says that "from 2003 to 2004 we saw a 50 percent increase in cases that involved IM evidence."

Roughly 106 million people in North America use instant messaging products from the three top providers -- Microsoft Corp., Yahoo! Inc., and America Online Inc. -- according to Palo Alto market research firm The Radicati Group Inc. Many of these people use the software at work -- 85 percent of corporations in North America have some IM activity within the company, according to Radicati Group.

However, unlike e-mail and other business software that's placed on computers by a company's technology department, instant messaging products are often downloaded and installed by individual workers without their employers' knowledge or consent. This ignorance can expose a company to liability for what their employees say, especially if they make harassing or racist comments.

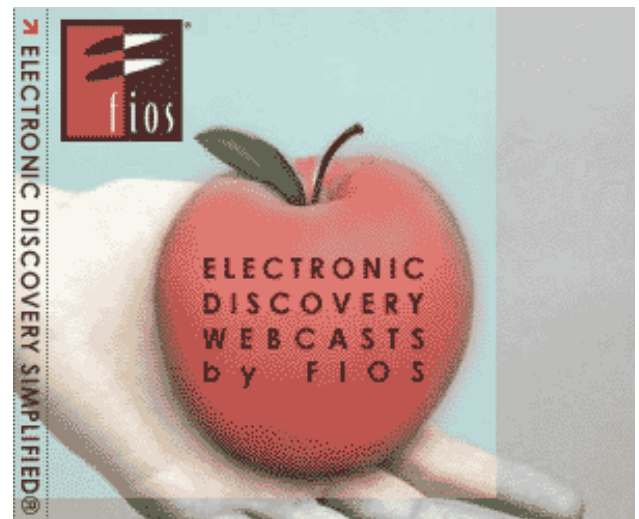
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Employees can get in trouble, too: A Delaware state court last November upheld the discharge of a Comcast Cablevision of Delaware, Inc., employee who made sexual and racially derogatory remarks in instant messages. (Comcast declined to comment.) According to a customer survey conducted by IMlogic, a Waltham, Mass.-based vendor of instant messaging management software, roughly one-third of employees used instant messaging because they knew that it wasn't overseen as rigorously as e-mail.

At one IMlogic customer, a film production studio, workers used instant messaging to send scripts and movie clips that were too large to send through the company's e-mail system, which capped file attachments at 3 megabytes. In that case, says Art Gilliland, a product manager at IMlogic, IM use was for a legitimate business purpose. But the same technical capabilities could put a company's IP or trade secrets at risk, as employees circulate digital content surreptitiously to file-sharing networks. "When you see scripts or movie clips show up on the Internet, there's no way to track where that came from," says Gilliland.

Some companies are seeking to curb IM use or ban it outright. Cox Communications Inc., the Atlanta-based cable provider, alerts its workers that instant messages are not private when they log on to the software, according to Heather Housen, a senior paralegal in the company's legal division.

Other companies, like Citigroup Inc. in New York, have reportedly opted to ban instant messaging; a Citigroup spokesperson declined to comment. According to a news article, the financial services concern ordered its traders not to use the instant messaging function of their Bloomberg computer terminals due to regulatory compliance concerns, such as maintaining an audit trail.

Other financial firms have banned IM because of similar concerns, says John Loder, an attorney at Ropes & Gray, though he declined to name the firms. "Some of the technologies aren't very well adapted to systematic preservation to these kinds of messages," says Loder, whose practice focuses on investment management firms. For regulated financial service firms like brokers, this is no minor detail, as federal regulations require that they preserve all business-related communications.

Public companies outside the financial sector aren't subject to the same requirement. But the Sarbanes-Oxley Act states that businesses have a duty to preserve electronic records sent or received in connection with an audit for five years.

Given the nature of IM, the problem for companies is how to preserve the communications. Popular consumer programs don't offer a centralized way to store messages, though they allow individual users to save transcripts. However, enterprise-level IM software, like IBM's Lotus Instant Messaging and Web Conferencing, allow companies to retain copies of instant messages.

A number of vendors, including IMlogic, San Diego's Akonix Systems Inc., and Foster City, Calif.'s FaceTime Communications Inc., offer add-ons to consumer products to centrally store and manage IM traffic.

Still, this isn't always enough. Peter Sloan, an attorney who specializes in records management and compliance at Kansas City, Mo.'s Blackwell Sanders Peper Martin, says companies need to come up with IM policies that clearly state who can use the technology, and which types of messages should be saved. Such policies are still a rarity.

A spokesperson for Murray Hill, N.J.'s Lucent Technologies Inc., for example, says that while its 32,000 employees do have access to an instant messaging program, the company does not have any instant messaging-specific guidelines because the software is not a strategic part of its operation. "It's not something that we're concerned about," says Lucent spokesperson John Skalko.

That attitude could change as instant messaging gains recognition as a standard communications tool in the workplace.

Lange, the staff attorney at Kroll Ontrack, says discovery requests for instant messages are only likely to increase in the future. Failing to retain instant messages that relate to pending litigation, for instance, could be construed as destruction of evidence. "We have yet to see a judge write an opinion sanctioning a corporation for negligent instant message preservation," Lange says. But, she adds, "I think that day is right around the corner."

Alexei Oreskovic is a freelance writer based in San Francisco.

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