



Did I Really Hear That?

Audio Takes a Seat in the Corporate Compliance and Risk Management Office

by Jeff Schlueter

As chief risk officers—and corporate counsel charged with compliance and risk management responsibilities—continue to grapple with the sheer quantities of electronic documents, few have considered the ever-growing volumes of audio content amassed within their organizations.

Why Audio?

Now that Rule 34(a) of the Federal Rules of Procedure clearly incorporates “sound recordings” in the definition of electronically stored information, forward-thinking risk management professionals need to arm themselves with the tools to know exactly what is contained in voicemails, call center recordings, web conferences, and other audio content that is part of their corporate operations.

The Fourth Annual *Litigation Trends Survey Findings*, Fulbright & Jaworski L.L.P., reports that 40% of all companies surveyed retain voice mail, and 54% of U.S. companies reported involvement in one or more internal investigations and/or regulatory inquiries or investigations. It is likely that many, if not all, of these investigations and inquiries will start to include critical audio content. So where in the corporation is this audio most often found?

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Sources of Audio Content in the Enterprise

Trading Floor Recordings. The financial and energy trading industries have long been required by regulation to record the telephone conversations of their traders. Some of these recordings have featured in well-documented investigations, leading to federal charges and class-action litigations by stockholders. In one recent investigation, the Federal Energy Regulatory Commission reviewed thousands of hours of Energy Transfer Partners, L.P.'s trading floor calls. The result: a finding of fraud and an Order to Show Cause and Notice of Proposed Penalties. The Order and Notice seeks \$70.1 million in disgorgement of profits, plus interest, and \$97.5 million in civil penalties.

According to the FERC news release¹:

The investigation uncovered voice recordings that show senior managers at ETP were aware of the situation and directed the company's manipulative strategy to suppress fixed-price gas at the Houston Ship Channel.

In one such recording... the company officer in charge of trading at the hub told at least one trader that "as long as we sell as much as we can sell, it ought to push Ship down." The phrase "push Ship down" means to suppress the price at the Houston Ship Channel... hereby increasing the value of its financial derivative positions.

As the regulatory agencies start to pay more attention to these recordings, proactive risk management and compliance officers must look for solutions to identify potential risks and exposures in audio content before investigations occur.

Voice Mail and Unified Messaging. Recently, technology advances in voicemail and unified messaging (UM) have increased the exposure for these recordings to the same level as email and other forms of ESI. Increasingly, courts are ordering parties to preserve and produce voicemail.² In 2006, Judge Carol E. Higbee of the New Jersey Superior Court in Atlantic County ordered Merck to preserve all existing Vioxx-related voicemails.³ In *E*Trade Secs. LLC v Deutsche Bank AG*,⁴ the court imposed spoliation sanctions for failure to retain and preserve audio recordings.

Call Centers. In many enterprises, a large exposure lies in the volumes of audio created in their customer support call centers. These recorded conversations may contain a gold mine of damning information, particularly when it is found that the corporation had access to information regarding defective products or inappropriate behavior and failed to take appropriate action.

While call logging has been used for many years in call centers, its primary application was to manage quality and provide training to service representatives. However, the advent of speech analytics tools has allowed call centers to record a greater percentage of their calls, and to keep these recordings for longer periods of time. This can be a potent source for product liability, or other corporate malfeasance information, and one that corporate compliance managers must now recognize.

Compliance, Risk Management, Litigation Readiness—A Proactive Approach

Proactively managing the retention and disposition of corporate records, including audio, requires a shift in corporate philosophies. For the past several years, corporate legal managers have learned that they can stay well ahead of the costs of litigation and electronic discovery by developing litigation readiness programs that provide early warnings and control the costs of electronic discovery.

Federal Reserve System Governor Mark W. Olson, in his address to the Fiduciary and Investment Risk Management Association's Twentieth Anniversary Conference, stated:

The fiduciary and investment world has not been immune to problems caused by ineffective controls. Well-publicized accounts of late trading and market timing at mutual fund firms, and related investigations, have touched many businesses including banking, securities, and insurance firms. These types of compliance failures result in sanctions or financial loss and adversely affect the reputation and franchise value of a firm. As a result, we are seeing an increasing focus on enterprise-wide compliance-risk management systems.⁵

Clearly, large corporations are increasingly grappling with regulatory compliance, regulatory and internal investigations, and litigation issues. Corporate leaders, corporate counsel, and risk management officers need enterprise-wide tools to evaluate risk and reduce cost, and audio is no exception.

Does Audio Review need to be Costly?

Traditional audio review has required human listeners to hear each minute of content to determine relevancy and privilege. Alternatively, audio content has been transcribed into text documents allowing for document search at a later date. But both processes are time-consuming (one hour of audio requires approximately four hours to process in either of these two methods), expensive, and subject to human fatigue and inaccuracies. Studies have proven that human review is not as effective in locating relevant documents as auto-categorization. And neither human review nor transcription allows high-level reviewers the opportunity to quickly access and assess the content in its original form.

Just as documents and emails are no longer copied and manually reviewed, the enterprise needs similar technology permitting fast, efficient, cost-effective analysis of audio and video content.

The Answer: Speech Analytics (and it may be right under your nose)

Phonetic speech analytic software can index audio content at up to 340 times faster than real-time, making hundreds or thousands of hours of content almost instantly available for review. Using a phonetic search engine, speech analytics software analyzes the most basic form of language, phonemes, and creates an index of the content that provides the most accurate

means of searching within it. The software is widely available now, and can be configured to handle nearly any audio compliance requirement.

What's more, those corporations using phonetic speech analytics software in their trading floor and call center operations may have already invested in the infrastructure necessary to implement compliance and risk management reviews. Once the content is indexed (often virtually in real-time), the search engine can immediately notify compliance and risk management officers of potential issues.

Conclusion—Don't forget about your audio

As electronic documents continue to pervade the corporate enterprise, compliance officers and risk managers are constantly evaluating the risks of corporate email, instant messages, and documents. Now audio can be added to the list of data types that must be managed. It's important to know what your audio exposure will be, but equally important to know the appropriate procedures to handle it.

1. www.ferc.gov/news/news-releases/2007/2007-3/07-26-07.asp.
2. *See, e.g.*, In re: Zyprexa Prods. Liability Litig., 2006 WL 3821491 (E.D.N.Y. Dec. 28, 2006) order for expert to preserve all voicemail).
3. The order is available at www.judiciary.state.nj.us/mass-tort/vioxx/vioxx_voicemail_091106.pdf
4. E*Trade Securities LLC v. Deutsche Bank AG, 230 F.R.D. 582 (D. Minn. 2005)
5. Speech, Governor Mark W. Olson, Board of Governors of the Federal Reserve System, April 10, 2006.

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