Stealing time: it's in the electronic mail!
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Introduction

The nifty invention called electronic mail is what Marshall McLuhan must have had in mind when he wrote this. Those of us who have email wonder what we would do without it. We can compose or copy text and graphics and send them across the world to many people in seconds. McLuhan also said that "perfection of the means of communication has meant instantaneity" (Culture without Literacy, Explorations., 1953). We do not have to worry about long distance charges, fax reception, time zones, or telephone tag. Email permits flexible work arrangements. One's place of work can be anywhere. Little wonder the use of email is in phenomenal growth in business.

Physical face-to-face oral expression inherently makes one immediately accountable for what is said, and body language is a major component of the communication. However, all of us have sent email that we wish we could have later retracted and expunged. Without the immediacy and body language, our guard is down and we say things by email, that we would never do face-to-face, or even on paper. Once dispatched, email is out of our control. It can be forwarded to the hundreds of millions of people on the Internet. It can be printed out and archieved indefinitely. Most utility software can recover email messages, and originators can be traced. Crackers and email-list managers can intercept messages and read stored ones. Email is a very public medium indeed. Sending an electronic message to someone may risk sending it to everyone.

Thus, we frequently hear about the embarrassment and ramifications of email gone public. We have heard about the words used by a television reporter to student protesters of the APEC conference, of high-ranking school administrators exchanging pornographic material, employees using company email to ridicule co-workers and supervisors, or confidential information leaked to the wrong people. Undoubtedly, Canadian workers have already been fired for inappropriate use of corporate email systems.

The legal control over email in employment includes many issues. How are the commercial interests of the employer balanced with the privacy interests of the employee? Who has ownership or property in the email message?

Earlier Law Now articles on privacy and communications have noted that telephone messages may be legally intercepted if either the receiver or the sender agrees. For private parties such as employers and employees, the "one party consent" rule applies to email as well. The email message can be intercepted if sender or recipient consents. This is not likely to occur often when the employer is conducting surveillance on employees' use of email at work. If a crime is suspected, the employer might persuade the police to obtain a warrant to intercept email, but this too is uncommon. In general, the employer simply wants to monitor employee use of email.

Employer Monitoring of Email

Most employers today offer Internet and email access at the workplace because these facilities prove useful or indispensable for business. Some employees have personal access at home, but many only have access at work. In any event, prudent employers will have a clear policy on who can use the Internet on the job and what sites can be visited. This can be monitored and data centrally collected periodically to detect abuse. Policies on email transmissions may be similar to the telephone and fax machine policies. Essentially, email must be professional and for business purposes only.

First, let us examine why employers may wish to monitor employee email. This may all be reduced to the need to protect the employer's competitive interests. Inappropriate email sent from the employer's server, with the employer's signature and letterhead, could create a negative external corporate image. Employees are agents of the employer in their communications at work. To the outside world, the employer and its employees are the same entity. They speak with the same voice.

Frivolous use of email may be disruptive within the company, as for example when some employees use it for personal announcements and discussions.

Personal use of email on the job also wastes productive time for which the employee is paid to work. One can look busy at the workstation and not be working for the employer at all. Similarly, we have all made personal telephone calls from work, used the copy machine for a recipe or a personal document, or gossiped around the proverbial water cooler. To some extent, employers accept that kind of nominal leakage. But personal email can steal considerable time from work.

Another reason is the need to preserve confidential and commercially valuable information, which may be one of the employer's most precious assets.

At the other end of the spectrum, individual privacy legislation (FOIP) and the recognition of the vulnerability of employees are increasing. As we have seen recently in this magazine, the courts have expanded the concept of good faith and fair dealing toward employees, particularly with respect to treatment and procedures. Our work goes far in defining who we are, and it is an important social outlet. Employers must treat workers well, as the catalogue of employee protections, freedoms, and rights grows.

Who Owns Employment-Generated Communications?

Employer monitoring of completed email activity raises the question of who owns email communications sent and received from the employer's equipment. The answer is not surprising: email sent and received on corporate equipment on employer-paid time belongs to the employer. Although of an intangible nature, email is employer property in the same way as personal effects at home belong to their owner. Fruits of paid service to the employer belong to the employer.
The law of inventions (patents) and literary creations (copyrights) recognize first rights of ownership in the employer.

Thus, courts have found that the employee must surrender documents produced and received on the job. In Edwards v. Lawson Paper Converters Ltd. (1984) documents that came into the employee's possession during the course of his employment were ordered returned to the employer. This applies even for clinical notes describing patients (Peters v. Palmer 1985). What the employee produces by the "strength of his arm, or the skill of his hand" (and one might add today, by the creation of one's intellectual gifts), in the normal course of business, becomes the property of the employer (Sterling Engineering Co. v.
Patchett, 1955).

Therefore, as in all forms of property, the employer may lawfully exercise ownership and control over employee email communications. Breach of company policy on email use or other corporate embarrassment may result in discipline.

Personal Email at Work

An issue arises as to whether unauthorized personal emails are "in the ordinary course of employment". Their content may be so personal in nature that no recipient could confuse them as business communications. Perhaps they are mixed personal and business, or sent outside of paid working hours. If they were not employment-related, and even if they were sent from the employer's equipment, a reasonable claim to employee ownership and privacy may be asserted.

The most common scenario here will be completely personal messages on employer equipment and paid time.

The law expects that employees will work for the employer while being paid. This is referred to as the employee duty of fidelity, since they are not allowed "to use the time for which [they are] paid by the employer in furthering [their] own interests" (Wessex Dairies Ltd. v. Smith, 1935) Employees are not to apply employer resources for personal consumption unless they are specifically authorized to do so as part of their taxable remuneration.

In serious circumstances, personal email use may be seen as habitual neglect of duty. Spending undue periods of time on the www and email for personal purposes is not inadvertent or caused by misunderstanding. Employees, in their work, are in their employer's trust that they will work diligently and continuously for the employer. The fact that personal email is easy to do and hard to detect, does not render it legally excusable.

Another ground for discipline is the breach of employer's policy on email use, an obedience issue. While the old master and servant characterization has fallen out of favour, replaced by a more compassionate model of employee rights, the employer's reasonable and lawful expectations of employees will still be enforceable. To constitute cause for summary dismissal, the corporate email policy and rules must be reasonable; the employee must have been clearly aware of them and know that breaking them will engender serious consequences.
Some occasional personal use of the www, email, and telephone on the job is likely to be universally tolerated by employers, but a periodic reminder and consistent enforcement of the policy in serious cases is required.

Conclusion

The marvel of electronic mail has come at a cost. We are probably at the point where there is no reasonable expectation of privacy in email communications. We know this when we contemplate the unlimited ways others can publicize our email messages and how powerless we are in this medium to control the distribution of our communications. So much of what is created is copied, downloaded, batched, printed, forwarded, revised, and stored over time. It seems that everything that comes across the www and by email is firmly ensconced in the public domain.

Much advice is offered in the media about email etiquette, how and when to send and receive, and how long email messages should be. The technical aspects of the software may be mind-boggling. It is important to know this is a written medium that, ephemeral as it may seem, is capable of permanence. The embarrassing high profile cases serve to remind us of our error in thinking that this is a secure and anonymous environment. As reliance on this convenient electronic medium increases, so will the horror stories of unintended recovery and disclosure.

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