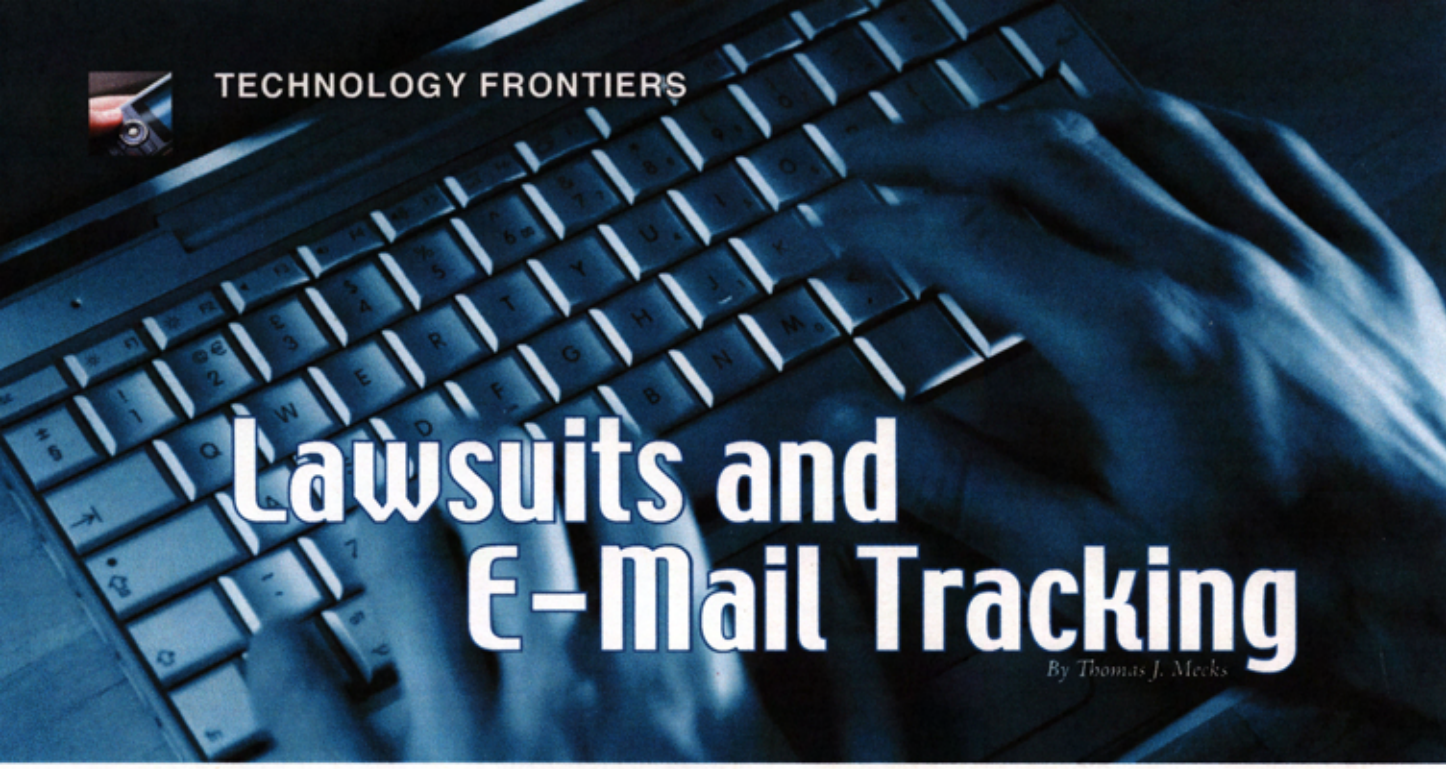

Lawsuits and E-Mail Tracking

By Thomas J. Meeks

If your small business is sued for copyright infringement, restraint of trade or employment discrimination, having an e-mail tracking system in place is critical to defending your case.

New federal rules, effective Dec. 1, 2006, create a legal obligation for businesses of all sizes to store their e-mail messages and other electronic documents and to be able to produce those files on demand. The rules are mandatory in all federal cases, including copyright or trademark infringement matters, securities or antitrust claims, and Americans with Disabilities Act (ADA) or other employment lawsuits.

Under the new rules, both parties in a lawsuit must disclose their electronic data, or "electronically stored information" (ESI), early in the case, along with any other materials they plan to use to prove their cases. That means a business needs to know exactly what ESI stored in its network, individual computers and electronic archives can be used to support its position.

Unlike most Fortune 500 and multinational corporations, small businesses typically have not invested in a companywide e-mail search application. Nor do they have access and retrieval software to examine their archived data – although the cost of such a system is far less than the financial impact of losing just one lawsuit.

Today, most of the evidence that both plaintiffs and defendants rely on to win their cases exists only in electronic form – primarily in e-mails and attachments, such as spreadsheets and presentations. And under the new rules, businesses can no longer use the excuse that they have not been able to go through their e-mail archives in time for the initial disclosures. Therefore, the failure to produce information may prevent the business from using that information — which may be the best evidence in its favor — at the trial.

Even worse, a plaintiff who can convince a judge or jury that the defendant deliberately "lost" important information after the lawsuit was filed is almost assured of a courtroom victory.

To prevent that scenario, many national companies have "litigation hold" procedures in place to preserve relevant electronic information if the company is the target of a lawsuit or if it files a lawsuit as the plaintiff.

Holding and reviewing the electronic data does not necessarily mean that every file is delivered to the opposing attorney. That depends on the legal strategy in the case. But preserving electronic data prevents the opposing attorney from arguing that the business allowed vital evidence to be destroyed.

The new federal rules also require both parties to discuss how evidence in the case should be preserved. But you have to be ready to talk to the other side. If it is difficult to access your archived files (perhaps stored on old backup tapes or in outdated formats), the court can give your business extra time to produce the evidence or require the other side to pay the additional expense.

In today's legal environment, it is vital for every small business to track its electronic information, store the data in an accessible format and install tools to retrieve those files. Companies should consult with legal counsel in advance on how to access this potential evidence, rather than having to respond to a lawsuit and risk having important evidence excluded.

In summary, what companies must understand is that all the e-mails and electronic files transmitted through the company's network and the public Internet are now potential evidence in a federal lawsuit. Having effective processes in place to preserve and access this data is now one of the fundamental elements of any successful courtroom strategy.

Meeks is a partner at Zuckerman Spaeder law firm's Miami office. He focuses on complex business cases. For more information, visit www.zuckerman.com.