

An increasing reliance on recorded oral communication along with stricter industry regulations make searching and reviewing audio data complex. This white paper discusses the challenges that exist and offers practical guidance to help achieve appropriate handling of audio evidence, while containing costs and complying with myriad regulations.

WHAT IS AUDIO EVIDENCE?

Audio evidence, like documentary evidence, can be pivotal to a legal-case and a failure to deal with this evidence effectively and efficiently can leave businesses open to judicial criticism, damaging publicity and searing fines from regulators.

WHICH INDUSTRIES ARE UNDER FIRE?

Businesses from many sectors have been affected. JP Morgan, for example, was investigated by the Financial Conduct Authority in 2013 following rumours the bank was sitting on large losses. Investigators uncovered internal documents and calls which showed that the Chief Investment Office was “in crisis mode” as managers realised that multi-billion dollar hedges meant to protect the bank had lost almost all their worth.¹ The ‘London Whale’ loss resulted in fines of \$920 million; the second-largest fine ever imposed by the city regulator.²

In the energy sector, the US Federal Energy Regulatory Commission threatened oil giant BP with fines of nearly \$29 million for manipulating the market. BP responded by saying that the regulator misinterpreted a phone call between two of its traders and that the assertions were unfounded.³ In addition, UK regulator Ofgem instructed Scottish Power to pay customers £8.5million after the company was found to have misled customers when selling over the telephone and door-to-door. The investigation in October 2013 identified that staff were not adequately trained or monitored and that regulations were not followed.⁴

And in the telecommunications sector, TalkTalk was fined £750,000 by Ofcom in April 2013 for making an excessive number of abandoned or silent calls. The company made about 9,000 such calls to potential customers in 2011 through two call centres.⁵

During litigation and regulatory investigations such as these, those making or defending legal claims are often required to disclose audio evidence. The definition of “electronic document” in the Civil Procedure Rules⁶ includes electronic communications such as voice mail and communication recorded on mobile phones and other electronic devices and media. Litigants are required to identify, preserve and disclose the pertinent parts of their audio evidence, along with other forms of evidence, as soon as litigation proceedings are contemplated, with the threat of adverse inferences being drawn if such evidence is deliberately withheld. Litigators have traditionally shied away from disclosure of audio evidence, on grounds of proportionality, complexity and the perceived inadequacy of existing technical solutions. However, the disclosure of all types of electronic evidence, including telephone recordings, is now very much embedded in the litigation process.

1 ‘JP Morgan ‘misled’ information from regulators’ Daily Telegraph, 19 September 2013

2 ‘JPMorgan rocked by second-biggest fine ever imposed by City regulator - £572million’ London Evening Standard, 19 September 2013

3 ‘Regulator threatens BP with \$29m in fines’, The Independent, 6 August 2013

4 ‘Scottish Power to pay customers £8.5m after Ofgem probe’ BBC News, 22nd October 2013

5 ‘Silent calls: TalkTalk fined £750,000 by Ofcom’, BBC News, 18 April 2013

6 Practice Direction 31B, part (3).

The cases outlined above indicate that many regulatory authorities recognise the compelling nature of audio recordings. In the U.K., the Financial Services Authority (FSA) introduced rules in 2008 requiring firms regulated by the FSA record all telephone conversations and electronic communications relating to client orders and the conclusion of transactions in the equity, bond, and derivatives markets. In November 2011 this requirement was extended to cover mobile phone conversations that relate to client orders and transactions. Similar rules have either been introduced or are under consideration by regulators across the globe. Whilst IT departments of regulated businesses have taken technical steps to comply with these obligations, their review systems have been designed around the need to provide a small-scale sampling of a particular individual's calls over a short period of time, rather than a comprehensive and defensible collection over an extended period, as typically required for litigation or a major regulatory investigation.

WHAT CHALLENGES EXIST WHEN DEALING WITH AUDIO EVIDENCE?

Much discussion has centred upon the increased difficulty involved in searching and reviewing audio evidence. As with all electronic evidence, the place to start is with information governance and efficient data storage. Being able to effectively log calls, to provide custodians and telephone numbers on a specific date (and export the data in a consistent and defensible manner), can allow effective triage of data and save time further downstream.

Matters are complicated by the fact that different business sectors use different modes of telecommunication. For example, trading desks will often make recordings not just of direct telephone calls, but also of “hoot and holler” boxes which involve permanent open circuits between two or more parties conducting multiple conversations, including hours of silence. Thinking about how to collect data and filtering out redundant recordings before review is a significant challenge.

When it comes to review, the traditional method of reviewing audio evidence is by linear review where reviewers — usually lawyers — listen to audio recordings and review them as they listen. The benefits of this method are obvious: the reviewer is able to identify speech, understand nuance and meaning and make professional judgements based on relevance.

However, this approach is not scalable. It is not unusual to be faced with tens of thousands of hours of conversations. The review of audio evidence is potentially much more labour-intensive than other types of electronically stored information because of the need to listen not only to the words but tone, expression and other subtle nuances of speech which may hold evidential clues. Regional accents and individual conversation styles add to the difficulty. Commentators suggest that it takes approximately four hours of human time to review each hour of audio evidence. The variety of devices onto which voice can be recorded makes retrieving the evidence complex and can affect the recordings' quality and the speed at which the reviewers can assess the evidence. As a result, the cost of reviewing audio evidence can quickly become prohibitive and is proportionate in only the most valuable of cases.



Foreign languages can add further challenges to a review. It is not always possible to source native speakers within the timeframes and budgets available and there may be multiple languages to review. Identifying foreign language content and allocating the calls to appropriate reviewers is not a simple task, so a high level of quality control is therefore required to produce a repeatable (and hence defensible) process.

HOW CAN THESE CHALLENGES BE RESOLVED?

Phonemic search technologies are a relatively new entrant to the world of ediscovery, but are gaining rapid acceptance. Using phonetic audio search engines, forensic data search is conducted across multiple sound file types to find relevant material quickly. Phonetic search technology transforms audio recordings into a phonetic representation, rather than written words. It includes a model for the way in which words are pronounced and is therefore not limited to only searching for words in a dictionary. Audio recordings are then indexed by identifiable units of sound — the building blocks of human speech known as ‘phonemes.’ Extensive research goes into building these phoneme algorithms, and they are structured around various languages — so for example U.S. English is slightly different than U.K. English and Latin American Spanish is different to Spanish spoken in Spain. It is also possible to run several language packs across the same data sets, so that, for instance, one can search for both English and German terms.

Once the recordings are processed in this way, the audio files are available for search and analysis by expert reviewers. This presents a new challenge to lawyers, since it involves a twist on the conventional key word approach. Within text, a given keyword will render a 100 percent success rate, so long as the word is spelt correctly within the document. However, with sounds, some sounds are simply too generic. As such there is a need to fine tune the process by identifying context. Once the lawyers are confident in a search/filtering strategy, the data can be filtered effectively and potentially relevant documents made available for conventional review via standard review platforms. This process is best undertaken through an iterative approach (new terms may arise while listening) and a statistically sound sampling of non-responsive documents. The benefit of this solution is that it enables a responsive set of audio to be produced from a collection in a streamlined manner — which can significantly reduce the burden of traditional linear review.

CONCLUSION

This is still a new area. The technologies and techniques which are available to deal with audio evidence are evolving rapidly, and it is important for lawyers to keep abreast of these developments. Dealing with audio evidence efficiently, such that the cost remains proportionate to the overall cost of the legal exercise, is a challenge. However, it will be increasingly difficult for businesses to complain that audio evidence is too complex to deal with. As ever, while the technologies are crucial to providing a solution, a well thought through plan and consideration of the available options will stand those who are required to search, review and disclose audio evidence in good stead.