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# E-Mail Disclaimers: Scant Protection at Best

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"Confidentiality notices can help show that you took measures to protect the confidentiality of the contents of an e-mail which can be important to establish compliance with confidentiality agreements and with state trade secrets laws," David C. Keating, attorney and partner in the technology practice of Alston & Bird, told the E-Commerce Times.

Considering putting an e-mail  disclaimer at the end of the e-mail that says, in effect, "Hey, don't read this!" is every bit as effective as a park flasher telling you not to look -- how much protection does that overly verbose threat actually carry?

"The e-mail disclaimer is more of a back-up plan for that OMG moment when you send an e-mail to the wrong person by mistake," Ben Finley, managing partner of the law offices of The Finley Firm, told the E-Commerce Times. "It shows intent to keep the information confidential."

## Jail for E-Mail Peeping?

However, it's not a genteel "Oh, gee, my bad, please forgive and forget" message; generally the e-mail disclaimer reads more like a loan shark's demand for payment. Indeed, the thing does have some teeth. "Enforcement may include simple demands to correct the issue, requiring the recipient to delete onward delivery of messages, to litigation and claims of damages," Brian Leslie, associate general counsel; WAS counsel and global legal process at [Verint Systems](#), told the E-Commerce Times.

Does that mean we could end up in jail for e-mail peeping? The verdict simply isn't in yet.

"I don't know of any U.S. courts that have heard a claim like this yet, much less a claim based on an e-mail disclaimer where a nondisclosure agreement does not exist," says Finley. "Certainly the e-mail disclosure carries some weight; the question is how much. It's unknown what the courts will do with it."

If you are using the World Wide Web to, say, send an e-mail world wide and end up a country or two off from your intended recipient, the question gets a little trickier.

"The answer depends on the territorial law," Pieter A. Dorsman, manager of product marketing for [T-Systems](#) in the Netherlands, who also holds a masters degree in commercial law, told the E-Commerce Times. "For example, you can legally protect anything you like in the U.S., Europe and so-called globally, but in Russia you stand nowhere anyway."

## **To Disclose or Not**

For the e-mail disclosure to really bite, it must have the razor teeth of another legal document behind it.

"In general, the e-mail disclaimer points out that, when there is a nondisclosure agreement (NDA), the information in the e-mail is to be considered as confidential as referred to in the NDA. The legal consequences will in that case be mentioned by the NDA," recites Dorsman.

"If there is no NDA, the disclaimer should be read as a warning that, if any damage is caused by violation, the recipient can no longer claim he was using the information in good faith, not knowing the information was confidential," he added. "This means that in most western countries you can still be sued if damage arises. Finally, it still rests with a judge."

However, even with a NDA gone MIA, that nasty little tag on the end of an e-mail still has a reason for being there.

"Confidentiality notices can help show that you took measures to protect the confidentiality of the contents of an e-mail which can be important to establish compliance with confidentiality agreements and with state trade secrets laws," David C. Keating, attorney and partner in the technology practice of [Alston & Bird](#), told the E-Commerce Times. "In addition, it may be advisable to include certain notices in business e-mails pursuant to recent developments in federal tax law."

## **When to Disclaim the Disclaimer**

That is not to say, however, that tacking on that troublesome threat to every e-mail is a good idea.

"As a best practice approach, you should use e-mail disclaimers to protect either information that is confidential and/or trade secret, and for any information you want to protect as privileged," says Leslie. "For all other correspondence, you should avoid using e-mail disclaimers. Avoiding indiscriminate use can bolster an argument that the disclaimer is [or] should be enforceable."

"The frequent use of confidentiality notices in e-mails suggests that they sometimes are 'boilerplate' and may not always reflect the sender's intent," concurs Keating. "But that is not a reason to discontinue using them."

## How to Threaten People (or, Writing a Disclaimer)

If you must use legal mumbo jumbo to scare the daylight out of people you didn't mean to e-mail at all, how's the best way to write the thing so they know for sure you're out to get them if they dare read your e-mail?

"The notice should be brief and to the point," advises Keating. "It should state that the e-mail and its contents are confidential and provide instructions for an unintended recipient, such as not to read the contents of the e-mail, to delete it, and to contact the sender."


However, isn't telling them not to read the e-mail after they just read the e-mail to get to the disclaimer at the end akin to locking the door after the burglar leaves with the goods? That very well could be, since it's impossible to "un-look" after you just looked.

"The most effective confidentiality notice is the one the sender writes directly either in the e-mail's subject field or at the top of the message," says Keating. "That may show more clear intent and will more effectively put recipients on notice."

In the end, the protection your e-mail disclaimer offers may not amount to much.

"The power of the disclaimer is only as good as the steps you are willing to take for known violations," says Leslie.

Even if you are willing to march every violator to court, you have to eventually bear the brunt for your e-mail mistakes as well.

"After all, when you shared the confidential information with someone without having an NDA in place beforehand, you do have to accept your own responsibility," says Dorsman. 

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