

# In Defense of the DELETE Key

*James M. Rosenbaum*

**I**T IS BECOMING widely known that a computer's DELETE key represents an elaborate deception. The deception is pure, and inheres in the key's name: When the DELETE key is used, nothing is deleted.<sup>1</sup> It is now clear that relatively simple devices can recover almost everything that has been "deleted." This durability of computerized material compounds itself, because once a computer file is generated – let alone disseminated – internal and external copies proliferate. And each is impervious to deletion.

In practice, this once-arcane fact has spawned a new legal industry: the mining of e-mails, computer files, and especially copies of hard drives to obtain deleted material.

Knowing these facts leads me to two thoughts: one, we have now placed an electronic recording device over every office door;

and two, we should not stand for it. Finally, I suggest a possible remedy.

## THE ELECTRONIC RECORDER

There was a time when people spoke casually "off the record" amongst themselves. That time has passed. At this earlier time, two people could easily say something – even, perhaps, something politically incorrect – simply between themselves. They might even have exchanged nasty notes between themselves. And when they had moved past this tacky, but probably innocent, moment, it was truly gone.

Their words either vanished into the air, or the note was wadded up and thrown into a wastebasket. From there, the note was removed to a "delete" device called an incinerator. Once there, it was destroyed forever. The computer, and its evil spawn the e-mail, have

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<sup>1</sup> For those with little knowledge, and less interest, a computer's DELETE key acts somewhat like a thief who steals a card from the old library's card file. When the card was in place, the librarian could decode the library's filing system and find the book. If the card was gone, or unreadable, the book was still in the library, but it could no longer be found amidst the library's stacked shelves. In a computer, the "lost" book can be found with very little effort.

ended this earlier time forever. For many of us, e-mail and the computer now substitute for those doorway conversations and those idle notes. But unlike those notes, they are not easily thrown away.

In the computer, the conversation lingers, and the note persists. In my view, this is wrong.

### A PRECEPT @ SOME THOUGHTS ON THE LAW

None of us is perfect. But the preservation and persistence of evidence of our imperfections does not prove we are wrong, vile, venal, or even duplicitous. It just proves we are human – perhaps even farther beneath the angels than we might have wished – but lower nonetheless.

Today, legal discovery deep-sea fishes for snippets of deleted e-mails and deleted files in search of proof of imperfections. And the fish which are caught are thrown, as proof, into courtrooms throughout the land. In my view, they are just fish, and as valueless as the same fish might be if allowed to rot as long as the finally-recovered file has been deleted.

Sometimes people just have bad ideas, or might just pass an idle – if imperfect – thought. This does not mean the person is vile. Mere evidence that a person who has done “A,” but once expressed “B,” does not prove that the person is lying or deceitful. The fallacy in the “truth” of the recovered e-mail or computer file is that it might just have been a bad idea, properly rejected, and consigned to an imperfectly labeled wastebasket. The problem is that on the computer’s hard drive, it looks like more.

The second part of the fallacy is the almost universal – and I argue almost universally wrong – idea that finding this deleted material is the electronic equivalent of finding the inculpatory “second set of books.” The evil of

the second set of books lies not in the fact of their conception, but that they were used. The fact that one conceives of something – even something improper – does not necessarily mean it was acted upon.

The preservation and discovery of computer-deleted material has forced companies and prudent individuals to severely curtail the practice of using e-mails for all but the most innocuous materials. Any other course of action subjects the computer user to long term liability for idle thoughts.

### THE LARGER RISK

In some ways, the greater risk in the preservation and discovery of computerized material lies in the knowledge that things will not be expressed, and ideas will not be exchanged, out of a pernicious – but valid – fear that their mere expression will be judged tantamount to the act. This is dangerous indeed.

One of the United States Constitution’s many geniuses lies in its lofty protection of free speech. Legally, it protects the speaker only from state rather than private regulation. But the Constitution’s words express a higher ideal: The First Amendment’s premise is that a society is freer and in less danger when the wrong, the venal, the potentially evil is expressed and subjected to the light of day and to the “marketplace of ideas.” Conversely, but importantly, is the negative concept: the marketplace of ideas and expression is impoverished and demeaned when it is deprived of ideas which may be discussed and tested, and ultimately, perhaps, rejected. Knowledge of the computer’s awesome power to always remember, and never forget, a bad idea once expressed erodes and endangers this powerful concept.

People who recognize that whatever you say on a computer “can and will be used against you,” prudently avoid saying anything “dangerous” via computer. But does

## A PROPOSAL

anyone believe that people are “thinking” more perfect thoughts simply because they are increasingly reluctant to express them? I seriously doubt it.

We are, instead, enforcing a dangerous self-censorship over our ideas and expressions. And we do not restrict this censorship to ourselves. Businesses and organizations regularly adopt restrictions on the words and ideas which can be input into the company’s or organization’s computers. Why? Because of the intersection of legal developments and technology.

Once upon a time, liability was based on objective acts done or omitted. Did the person threaten violence [assault]; did he or she strike a victim [battery]; did he or she fail to act reasonably under the circumstances [negligence]? If so, the actor was liable for the consequent act. Unless the actor’s intentions were objectively manifest, however, no liability accrued. In the 1950s, the song “Standing on the Corner” was correct: “Brother, you can’t go to jail for what you’re thinking, or for the ‘ooh’ look in your eye. You’re only standing on the corner, watching all the girls go by.”

This is, unquestionably, a new century. And since the end of the last, the song’s proposition has been somewhat modified. At least in some cases, there has been a shift to subjective proof. In these areas, courts and the law consider the recipient’s perception of the actor’s behavior. But even here, purely subjective views do not alone suffice – there must be some outward manifestation of the impure thoughts.

Into this classic legal environment comes the computer. It never forgets, and never forgives. An idle thought “jotted” onto a calendar, a tasteless joke passed to a once-trusted friend, a suggestive invitation directed at an uninterested recipient, if done electronically, will last forever. Years later, it can subject its author to liability.

While recognizing the difficulties inherent in such a suggestion, I recommend a cyber statute of limitations. This limitation recognizes that even the best humans may have a somewhat less than heavenly aspect. It acknowledges that anyone is entitled to make a mistake and to think a less than perfect thought. I suggest that, barring a pattern of egregious behavior, or an objective record of systematic conduct – absent, if you will, a real “second set of books” – that the courts recognize the existence of cyber trash. This is the stuff, which, in less electronic times, would have been wadded up and thrown into a wastebasket. This is what the DELETE button was meant for, and why pencils still have erasers.

The length of this cyber statute of limitations can be set as arbitrarily as any other. In light of the free expression risks I perceive, I suggest the length should be short – perhaps 6 months for an isolated message. If an idea was merely a lousy one, or was an isolated cyber utterance, and the actor/author did not objectively manifest some untoward behavior, he or she would be considered presumptively human, and – at least for the law’s purposes – DELETE would mean delete. If, to the contrary, there was an objective continuation of the challenged conduct, or a continuing pattern of wrongful acts, the cyber statute of limitations would be tolled as any other.

This suggestion is feasible. Computers internally record the date on which a “document” was created. Once the limitations period has passed, documents should be legally consigned to the cyber wastebasket.

My solution is imperfect. But so are humans. If perfect recall defines perfection, computers have achieved it. But their operators have not achieved it with them, and humans are unlikely to do so. A legal system which demands human perfection, and which

penalizes a momentary failing, cannot operate in the real world.

### THE ULTIMATE FLAW

This suggestion recognizes that the computer is, itself, flawed. Its permanent memory is a flaw which undermines its value and endangers its users. Its inability to forget weakens and undermines the very ideas it permanently holds. The real flaw is that the computer lies: it lies when it says DELETE. This mechanical lie ought not to debase and degrade the humans who are, and ought to be, its master. *JB*