

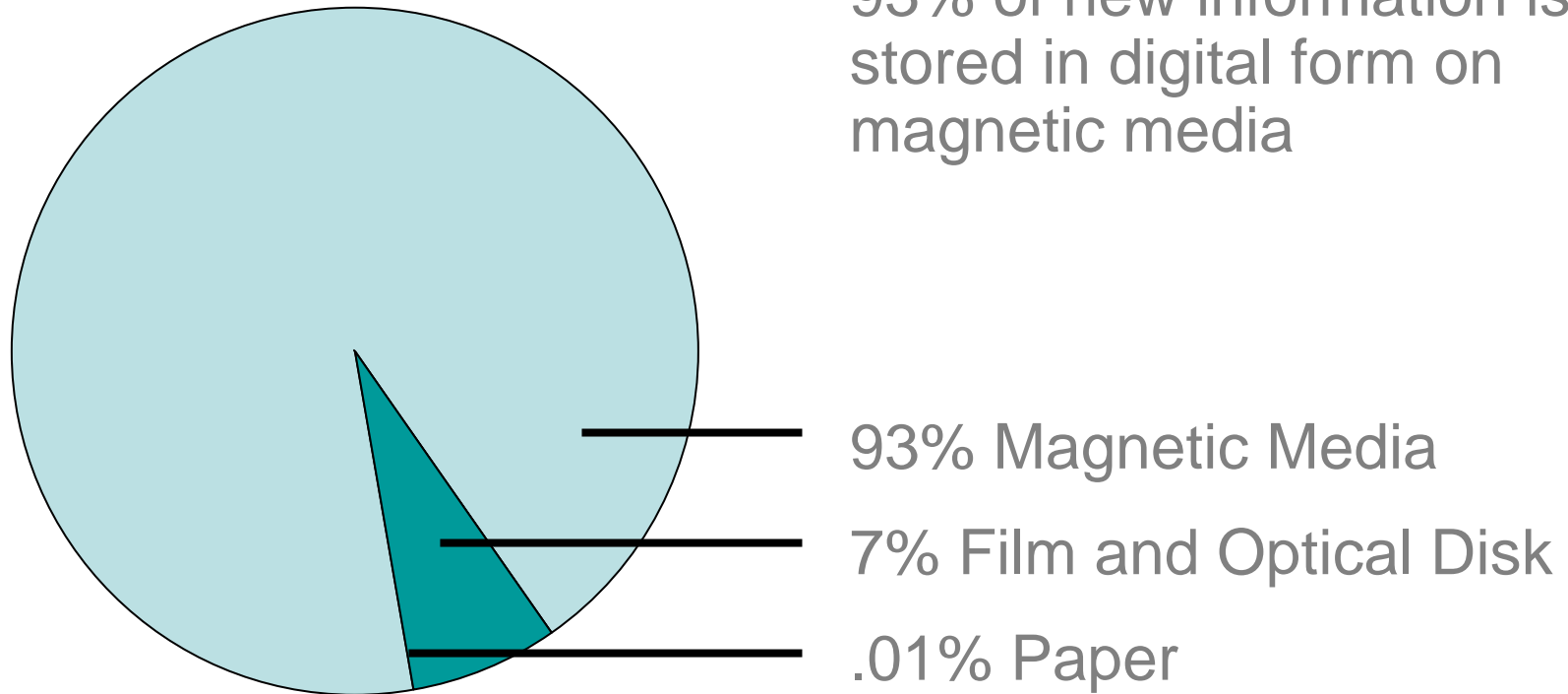
The Future is Now

“Data Clouds” and Social Websites

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The world is digital ...

93% of new information is stored in digital form on magnetic media

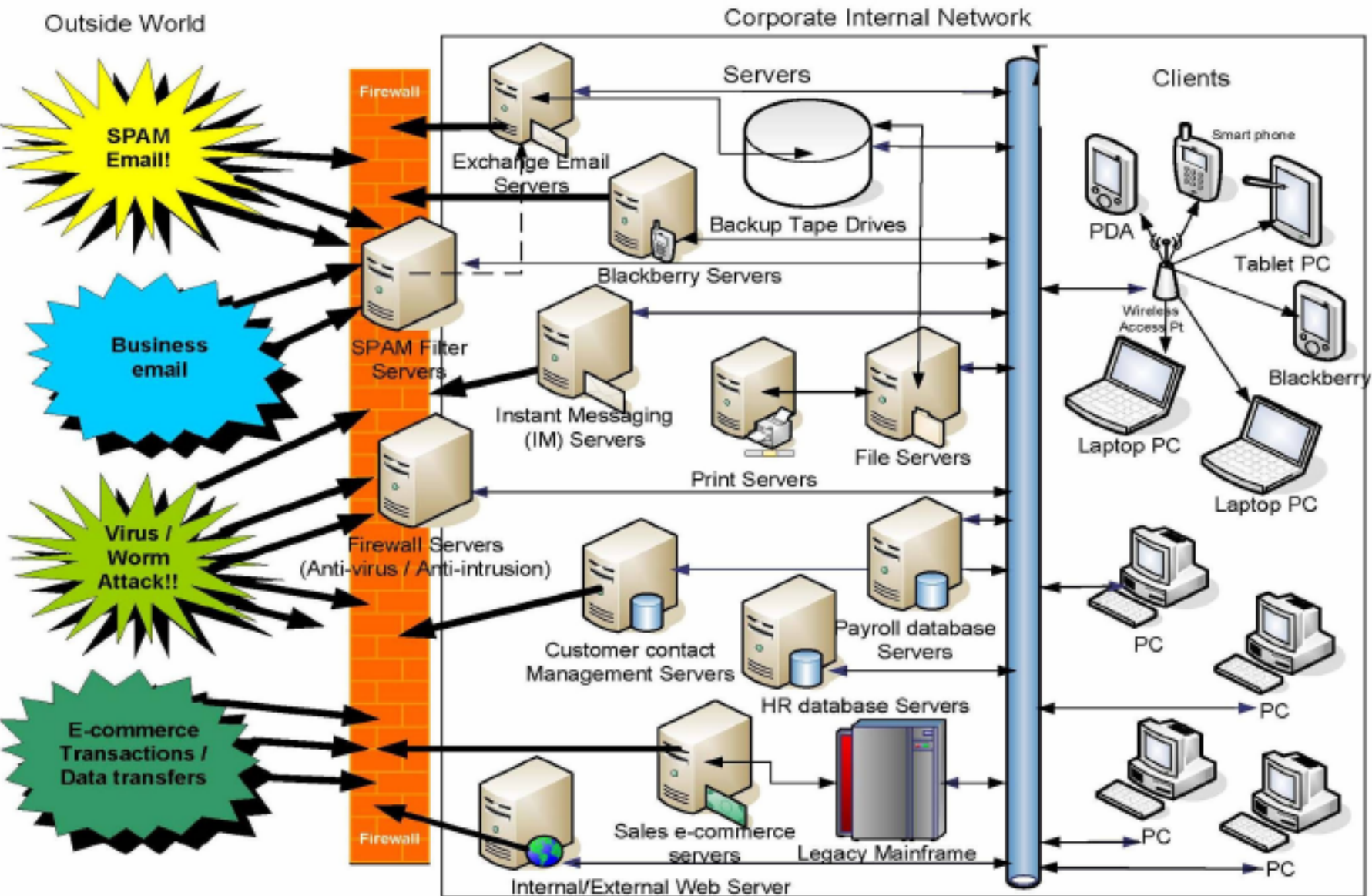


<http://www2.sims.berkeley.edu/research/projects/how-much-info-2003>

What Makes ESI Different?

- Voluminous and distributed
- Capable of taking many forms
- Contains non-apparent information
- Fragile yet persistent
- Created and maintained in complex systems

Client Server Architecture Diagram



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Microsoft Submission to Federal Rules Committee

And Even More Places to Look...

- Random Access Memory (“RAM”)
- Slack space
- Residual data
- System data

And (Always) Becoming More Complex*

- “How VOiP Phone Service Can Save Your Business a Bundle” - “using the Internet ...to carry voice traffic just as it does data traffic.”
- “These multifunction pens digitally record up to 64 hours of sound ... they can also transfer 2 GB of data and play up to 1,000 songs”
And the pens can record “discreetly without a light.”
- Kitchen appliances.
- “the first and only reusable insulin pen that records the date, time
And amount of your last 16 [insulin] doses.”
- Images on cell phones. *Smith v. Café Asia*, 246 F.R.D. 19 (D.D.C. 2007).

* A disclaimer: This presentation, unless otherwise noted, addresses federal case law and rules.

And Toward the Future ...

- Blogs
- Web Sites
 - Corporations being encouraged by the SEC to use Web sites as tools for communicating “Public Information.”
- Virtual Environments
 - Avatars
- Etc.

Recurring Problems

- Preservation
- “Discovery”
- “Inspect, copy, test, or sample”
- Accessibility
- Proportionality
- Form of production
- Cost-shifting
- Privilege
- Spoliation
- Admissibility
- Subpoenas
- Ethics

Preservation

- *Sedona Principle 5*: “The obligation to preserve electronically stored information requires reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation. However, it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant electronically stored information.”
- Compare *Rambus, Inc. v. Infineon Technologies AG*, 220 F.R.D. 264 (E.D. Va. 2004) with *Hynix Semiconductor, Inc. v. Rambus, Inc.*, 2006 WL 565893 (N.D. Cal. 2006)
- *Toussie v. County of Suffolk*, 2007 WL 4565160 (E.D.N.Y. Dec. 21, 2007) (contemplation by “substantial number of key personnel”)
- *Disability Rights Council of Greater Washington v. Washington Metro. Transit Auth.*, 242 F.R.D. 139 (D.D.C. 2007)
- *Cache La Poudre Feeds, LLC v Land O’ Lakes, Inc.*, 244 F.R.D. 614 (D. Colo. 2007) (failure to follow up to preserve hard drives of former employees and to monitor compliance)

Preservation (cont'd)

- Does preservation require restoration? *Cf. Best Buy Stores, L.P. v. Developers Diversified Realty Corp.* 247 F.R.D 567 (D. Minn. 2007) (costs)
- *Great American Ins. Co. v. Lowry Dvlpt., LLC*, 2007 WL 4268776 (S.D. Miss. Nov. 30, 2007) (duty to preserve hard drive whether or not in working order)

What is “Not Reasonably Accessible?”

- *Sedona Principle 2*: “When balancing the cost, burden, and need for electronically stored information, courts and parties should apply the proportionality standard embodied in Fed. R. Civ. P. 26(b)(2)(C) and its state equivalents, which require consideration of the technological feasibility and realistic costs of preserving, retrieving, reviewing, and producing electronically stored information, as well as the nature of the litigation and the amount in controversy.”

What is “Not Reasonably Accessible?” (cont’d)

- *Sedona Principle 8*: “The primary source of electronically stored information for production should be active data and information. Resort to disaster recovery backup tapes and other sources of electronically stored information that are not reasonably accessible requires the requesting party to demonstrate need and relevance that outweigh the costs and burdens of retrieving and processing the electronically stored information from such sources, including the disruption of business and information management activities.”

Resources

- The Rules and Committee Notes themselves
www.uscourts.gov/rules/EDiscovery_w_Notes.pdf
- Managing Discovery of Electronic Information:
A Pocket Guide for Judges (FJC: 2007) www.fjc.gov
- R. J. Hedges, *Discovery of Electronically Stored Information: Surveying the Legal Landscape*
(BNA: 2007)
- The Sedona Principles, Second Edition (2007)
www.thesedonaconference.org

Protective Orders and Public Access

- Presumption of public access to court records and proceedings
 - Common law
 - First Amendment
- 21st century privacy concerns given the Internet
 - CM/ECF and PACER
 - Rule 5.2
- Discovery: Rule 26(c) protective orders available upon showing of “good cause”
 - The “Sunshine in Litigation” Act
- Filings and proceedings: sealing orders available upon showing of “compelling need”
- Privacy? “We got over it”

Resources

- The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality and Public Access in Civil Cases (2007)
www.thesedonaconference.org
- See Ronald J. Hedges, “On Access or Confidentiality: The Sunshine in Litigation Act of 2008”, LexisNexis Emerging Issues Law Center,
<http://law.lexisnexis.com/commentary/Emerging-Issues>

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