INFORMATION LAW

THE HAZARDS OF MANAGING A 21ST CENTURY INFORMATION BUSINESS WITH A 19TH CENTURY LEGAL SYSTEM

by Peter A. Marx, Esq.

On November 21, 1980, eight fishermen in two 50-foot lobster boats left Hyannis, Massachusetts for Georges Bank, 100 miles offshore. Relying upon a National Weather Service forecast of fair weather, the men spent the night at sea. The following day they were hit by 100 mph gusts and waves as high as 60 feet. Four crewmen drowned. The families of three of the men sued the government for $3.2 million.

The fishermen did not pay for the faulty forecast. They were, however, induced to rely upon it.

Should the government have been held liable for this inaccurate information, especially given that weather prediction is such an inexact science? If so, on what basis? Strict liability? Negligence? Would it have mattered had the fishermen paid for the weather report?

This is the emerging field of information law.

How it Happened

Computer and communications technologies have radically enhanced man's capacity to create, distribute, and use information. They have also given rise to much legal uncertainty. Information law, which is a product of the interaction between traditional legal concepts and information technology, has failed to keep pace with rapid changes in the information industry. As a result, existing legal rules and concepts, developed to serve the needs of a prior age, frequently offer little or no guidance to executives in the information business.

Legal rules are derived from two primary sources of law: *statutes* (or statutory law) and *case law* (or precedent). Statutes are enacted by the U.S. Congress and the various state legislatures and usually create general rules of law. General rules are interpreted and applied by the courts in particular cases, producing case law. Taken together, these legal rules facilitate the resolution of disputes and serve as a guideline for lawful conduct.

Because computer and communications technologies are advancing so quickly, neither the U.S. Congress nor the various state legislatures have adopted legislation capable of resolving the multitude of questions posed by the information age. In consequence, many important information-related problems are being "solved" by the courts on a "case-by-case" basis without legislative guidance.

This "case-by-case" development of information law may prove to be problematical. First, the application of antiquated rules to contemporary information-related problems could frustrate a healthy, growing information industry. Second, it will take some time before a coherent, reliable body of law is developed. And third, as the following examples illustrate, lacking comprehensive legislative and judicial guidance, managers in the information industry will be uncertain about their legal rights and obligations. As a result, new market opportunities may be overlooked or purposely neglected.

Examples: Product or Service Liability?

The extent to which the law will hold a provider of information liable for inaccurate information is likely to have a profound effect upon the development of the information industry and may also force some companies out of certain markets.

Under present law, a commercial distributor of information may be held liable for inaccurate information which results in economic or physical loss. As the following cases demonstrate, however, the law is unclear as to the legal classification of information (as a *service* or a *product*), the potential basis of liability (*strict liability* or *negligence*), and the circumstances under which liability may ensue.

Who is Liable?

On September 8, 1973, a World Airways aircraft crashed into a mountain near Cold Bay, Alaska. All six crew members were killed. The cause of the crash was a flawed chart which portrayed instrument approach procedures in graphic form. Produced by Jeppesen and Co., the chart accurately depicted defective information published by the Federal Aviation Administration.

Both the government and Jeppesen were sued. The court examined three possible bases of liability: strict liability (liability if information is defective, regardless of fault), negligence (liability only where information is defective because of unreasonable conduct) and breach of contract.

In deciding against the government and Jeppesen, the jury rendered a general verdict (for more than $12 million) which did not distinguish between the various theories of liability offered at the trial. The decision was appealed and affirmed by the Court of Appeals. "What was the basis of liability?", Jeppesen asked. "Was it just because the chart was flawed? Or was it because we acted 'unreasonably' when we neglected to double-check the government's figures?"

"Liable either way," said the Court of Appeals.

When will the test be strict liability and when negligence? The court declined to offer guidance.

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Information is a Product

The Court of Appeals further held that the information is a "product"; it ruled this way despite a string of cases going the other way. When will information be treated as a service, as opposed to a "product" (where liability would be strict rather than based on negligence)? Again, the court neglected to provide a guiding rule.

The Jeppesen case may be appealed to the U.S. Supreme Court.

Consider the case of the faulty weather forecast referred to earlier. Here, the families contended that the government had acted negligently by failing to repair a weather buoy, which would have increased the accuracy of the weather report.

The federal court agreed with the families. The inaccurate weather prediction was the result of negligence, and therefore the government was held liable for $1.25 million for the deaths. Unlike Jeppesen, the court held that the information is a service.

The government has indicated that it intends to appeal the decision.

Although these cases offer sketchy guidance as to the possible basis and extent of liability, unanswered questions are legion: What is the classification of information? What degree of fault is required? Who may claim damages? The purchaser of the information? Or anyone who reads or hears it? Should the provider be covered by product liability insurance or professional liability insurance? What duty does a secondary publisher of information have to independently check its accuracy? At what point do limitations on the information industry undercut freedom of speech under the U.S. Constitution?

Without governing legislation, or a clear pronouncement of principles by the courts, answers to these questions will only be available on a case-by-case basis.

You, as a member of the industry, may inadvertently be involved in such a case at some time in the future.

Libel Standards

Distributors of inaccurate information may also be sued for libel. The likely basis and extent of potential liability, however, is unclear.

Generally, a successful libel suit requires a false statement, negligently, recklessly, or maliciously made, which results in damage. A libelled litigant is entitled to compensatory damages (e.g. for economic loss, or emotional distress) and sometimes punitive damages.

So as to promote "uninhibited, robust, and wide open" debate, some speech (which includes dissemination of information) is considered to be "privileged" and given special protection under the First Amendment to the U.S. Constitution. When speech is classified as "privileged", a claimant cannot recover compensatory and punitive damages unless the allegedly libelous speech was motivated by "actual malice."

What is and is not to be classified as "privileged" has been the subject of much contention. In the case of Greenmoss Builders v Dun & Bradstreet, the U.S. Supreme Court recently grappled with this question.

In 1976, Dun & Bradstreet hired a seventeen-year-old researcher to extract bankruptcy information from court records in Vermont to produce a credit report on Greenmoss Builders, Inc., a residential and commercial contractor. Erroneously, the researcher attributed a bankruptcy application of a former Greenmoss employee to Greenmoss itself. This information was passed along to a bank, an insurance company, and other interested parties.

Greenmoss sued Dun & Bradstreet for libel and sought damages asserting a tarnished reputation and financial loss. The trial court held that Dun & Bradstreet's inaccurate information was libelous and awarded Greenmoss $50,000 in compensatory damages and $300,000 in punitive damages.

The U.S. Supreme Court considered three questions of considerable importance to the information industry. What speech is privileged under the First Amendment to the U.S. Constitution? Did Dun & Bradstreet's information satisfy the criteria? And finally, if they were not to be accorded First Amendment protection, were they liable to pay punitive damages; absent a showing of "actual malice"?

Unlike the Vermont Supreme Court, the U.S. Supreme Court declined to rely upon a media/nonmedia distinction to determine whether particular speech was to be "privileged". As Justice William Brennan noted, this dichotomy was rapidly becoming anachronistic due to computer-communications technology.

The New Standard

In Greenmoss, the court adopted a new standard: only matters that are of "public concern" will enjoy First Amendment protection. Applying this test, a divided Supreme Court affirmed the lower court's judgment. When will information be of public concern? Lamentably, as Justice Brennan concluded, the court offered "almost no guidance as to what constitutes a protected 'matter of public concern.' "

Because of the nature of the information industry, it may be more difficult for non-media companies to prove that the information they publish is a matter of public concern.

One way or the other, it will likely be some time before these issues are determined by the lower courts.

Copyright Concerns

In addition to the prospect of multi-million dollar law suits, a provider of information should be mindful of the legal system's uncertain ability to protect property interests. Why? Because computer-communications technology is wreaking havoc with traditional copyright laws.

Consider, for example, the rule requiring publishers to register commercial electronic data bases with the U.S. Copyright Office before they can rely upon the legal protection and remedies of copyright laws.

This long-standing requirement poses unique problems for the information industry. Electronic data bases are constantly changing. **To fully benefit from the law, a commercial publisher must redeposit all or part of the data base each time it is updated.** If the data base is modified on a daily basis, reflecting changing economic circumstances for instance, the whole work would have to be reregistered with the government continually. Full compliance with this rule would be onerous (if not unworkable), costly, and an administrative nightmare.

The U.S. Copyright Office is aware of the difficulties caused by this requirement and has initiated a regulatory inquiry on the subject. It will be some time, however, before the changes are agreed to and implemented.

What is Fair Use?

Just because a data base has been copyrighted does not mean that only the proprietor can legally reproduce it. Courts are required by federal law to

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allow for a "fair use" exception when considering whether the exclusive rights of a copyright holder have been breached. **This exemption is arguably the most imprecise concept in copyright law.** In determining whether a use is a "fair use", the courts are required by statute to weigh at least four variables: the purpose and character of the use (e.g. commercial or non-profit); the nature of the work (e.g. factual as opposed to creative); the extent of the copying; and the effect of the use on the value of the work.

The courts have yet to apply the "fair use" doctrine to a case involving data base copyright infringement. As such, many questions remain unanswered. Is it, for instance, a "fair use" when a copyrighted work, utilizing public information, is employed to create a new work without the permission of the proprietor? Can a customer or competitor ever reproduce or otherwise use a copyrighted data base? Until the courts directly consider questions such as these, the scope of this doctrine will remain open to speculation.

Workable answers to these questions are further complicated by the dramatically increasing number of privately owned computers, access terminals, printers, and mass storage devices which provide the capability to download data bases locally. However, the same copyright rules apply regardless of the medium on which the data base is stored, including floppy disks, laser disks and CD-ROMS.

Throughout this discussion, the right to copyright electronic data bases in the future has been assumed. Even this is uncertain. **Copyright protection was intended for the expression of information, not information per se.** Because a data base falls into the gray area, somewhere between information and form, its status is ambiguous. The U.S. Congress' Office of Technology Assessment is now preparing a report on this and other related questions.

Frontiers of Electronic Filing

Copyright information comes from many sources. Because of its regulatory and enforcement role, the federal government is the largest source of financial, demographic, and economic information.

Faced with greater budgetary constraints, unmanageable paper filings — the Securities and Exchange Commission alone processed over 6 million filings last year — and the desire to have full-text data bases, various federal agencies, such as the SEC, are developing "electronic filing" systems. Under these systems, regulated businesses would transmit the required reporting information over electronic on-line communications to an agency computer.

Electronic filing could eventually become a reality for all federal and state agencies.

For publishers and data base suppliers, electronic filing may mean greater access to information. This depends, however, upon how the government ultimately organizes the system. At present, various governmental agencies are considering barter-type arrangements in which a private company would finance, develop, and operate an agency electronic filing system in return for the right to market the information.

Although electronic filing is an exciting innovation, its impact upon competition in the information industry is unclear. Will those who purchase information from the agency contractor have the right to resell that information at a reduced price? Will the same apply to value-added government information? If so, then how will the agency contractor be able to realize a return?

Given existing legal rules, answers to these questions will not be easy. Under federal copyright law, for example, public data is not subject to copyright. Further, the Freedom of Information Act gives any person the right to obtain government data at cost.

Both the Government Information Committee of the U.S. Congress and the Office of Management and Budget are now considering these difficult questions.

A Few Other Headaches

The issues discussed above are not the only areas where information law is uncertain. Information-related questions involving taxation, protection of know-how, anti-trust, and many other areas of the law have yet to be resolved by the legal system.

- **Taxation.** Most states tax products and not services. Could information services be taxed as a product? Although the law is unclear, it is certainly possible; especially given increased pressure at both the state and local level for additional sources of revenue.
- **Know-how.** Of particular interest to the information industry is the extent to which employees are legally prohibited from independently using knowledge gained on the job. Can an employer, for instance, legally protect know-how concerning the gathering, organizing, and marketing of information? The law offers no clear answers.
- **Anti-trust and Unfair Competition.** Information technology is increasingly being used as a sales tool and a competitive weapon. A major airline, for example, which agrees to book reservations for a regional carrier on its nationwide computerized reservation system, could analyze information on flight routes and fares of the smaller carrier and then engage in competitive pricing and service action. Because the regional carrier does not have access to similar data on the major airline, it is at a decided competitive disadvantage. Could such a use of information result in an anti-trust violation or unfair competition? It might. But because the legal system has yet to struggle with anti-trust-related questions in the context of the information industry, it is too early to tell.

What Can You Do?

Although there are relatively few statutes and little case law on information law at present, this situation is likely to change. For the next three to five years, however, the information industry will continue to outpace developments in information law. What can you do to adapt?

(1) **Make certain you have expert legal guidance about the information industry and your business.** Your corporate counsel must understand how your business operates today and how it is likely to change in the future. When developing a new product, customer agreement, operational procedure, or quality control standards, consult with your attorney. Prospective legal advice is generally more cost-effective.

(2) **Be sensitive to the imprecision of legal rules.** Because there are so many gray areas in information law, don't expect black and white answers. Aim for general legal guidelines on running your business and planning for the future. And keep up to date on decisions and legislation.

(3) **Remember, information law in the future will most likely reflect prevailing values.** As you plan for growth or new markets, you must consider the interplay of economic, political, and social implications of information technology. You will have to monitor two vital topics: protection of privacy

and freedom of information.

Something that is lawful today could be prohibited tomorrow. None of us can predict changes or decisions, but the political and economic climate can tell you which way the wind is blowing. The revolution in computer and communications technologies has not reached information law. As an executive in the information industry you are in the difficult position of having to manage a 21st century business with a 19th century legal system. What's worse, you have to plan without a clear picture of your rights and liabilities. ■

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