Legal Issues for an Integrated Information Center

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The ability to collect, store, retrieve, and combine information in computerized databases has magnified the potential for misuse of the information. The law is only beginning to deal with these new threats by expanding the laws of privacy, copyright, misrepresentation, products liability, and defamation. The laws regarding computerized databases are certain to change rapidly as information technology advances.

An Integrated Information Center (IIC) does not operate solely within a local environment. It also operates within national and international information environments. Laws, regulations, and policies of these larger entities will affect the operation of an IIC by determining what information is available to it and how that information may be used.

Information, when organized and combined with other information, is power. The potential misuse of information that is collected, stored, and disseminated has become a major concern, especially with the increased capabilities made possible by the use of computers. One such concern is the potential for invading the privacy of an individual if details of an individual's life are revealed for the world to see. This interest is protected by the legal "right to privacy." Another concern is the promotion of science and the arts through the protection of expressions of one's ideas. This concern is protected by the law of intellectual property, which covers copyright, trade secrets, and patents. The concern that individuals may be harmed by reliance on information and services provided by another is covered in the law of negligence (malpractice) and products liability. The power of information to destroy a person's reputation is the concern of the law of defamation.

The law has failed to keep pace with technological development, and the legal situation is shifting as new laws are passed and as the courts attempt to interpret existing laws in regard to the effects of the new technologies. The following analysis will identify some of the legal issues raised by an IIC, examines the implications of those laws for an IIC that is both a producer and provider of information in the public university setting, and briefly covers the possible directions the law may take in the future to more adequately protect those concerns. This discussion is intended to examine legal issues and should not be considered legal advice.

Privacy Issues

An IIC may contain information about an individual that he or she may not want collected or released without consent. This raises the issue of the right of the person, known as the "right of information privacy," to exercise control over the collection, storage, dissemination, end use, and accuracy of information about him or herself (Freedman, 1982, p. 1363). Three areas of the law provide some protection for a person's privacy: state and federal statutes, state and federal constitutions, and the common law of privacy. Of these three, only the state and federal statutes and some state constitutions currently provide any real protection for a person's right of information privacy.

Federal and State Statutes

The United States Congress and some states have created limited protection for the privacy of information through statutes passed by the legislature. Much of the federal legislation applies only to federal government agencies. One exception, which is relevant to an IIC in

the context of a public university, is the Family Educational Rights and Privacy Act of 1974. This law is designed to prevent improper disclosure of a student's records and would apply if the IIC placed student records into the database.

Several states have passed privacy legislation that applies to branches of the state government, including public universities (Minnesota Government Data Practices Act, 1988). This type of legislation typically regulates the type of information that may be collected, the use to which that information may be put, the rights of the subject of that information to have access to it, and the length of time the information may be retained. The statutes of the state where the IIC is located will determine the requirements the IIC must meet in the area of privacy.

Constitutional Protection of Information Privacy

While no explicit reference to a right of privacy is found in the federal constitution, the courts have found a right of privacy based on various parts of the constitution (*Griswold v. Connecticut,* 1965; *Roe v. Wade,* 1973). In *Whalen v. Roe* (1977), the only Supreme Court case to truly consider whether the Constitution protects the right of information privacy, the court held that the collection of potentially damaging information about an individual did not violate that person's constitutional right of privacy as long as the state had a legitimate interest in the information and provided adequate protection against improper disclosure. In every similar case the courts have found the government's interest and safeguards against harmful disclosure sufficient to preclude a violation of the federal Constitution's right of privacy.

Several factors, in addition to the easily satisfied requirements of the Constitution's right of information privacy, make it unlikely that the constitution will provide significant protection in the foreseeable future. First, there are indications that the current Supreme Court is more likely to restrict rather than expand the constitutional right of privacy (*Whalen v. Roe,* 1977, pp. 607–609). Secondly, the protection provided by the Constitution applies to federal and state governments and their agencies only, not private entities. An IIC that is part of a publicly funded university would be subject to the requirements of the Constitutional right of privacy while an IIC operated as a private entity would not.

Another source of constitutional privacy law which may apply to an IIC is the right of privacy found in some state constitutions. The constitution of the state in which the IIC operates will govern.

The Common Law and the Right to Privacy

The law developed by the courts, known as the common law or case law, also provides protection of a right of privacy. While it currently does not provide much protection for the information right of privacy, it has the potential of providing significant protection because, unlike the federal Constitution, it applies to private individuals and entities. The right to privacy in the common law has been defined as the right of the individual to be let alone (Warren & Brandeis, 1890). This vague definition was clarified further by William Prosser (1960) who classified invasions of privacy into four categories: an unreasonable intrusion into an area where an individual has a reasonable expectation of being undisturbed; public disclosure of embarrassing private facts about an individual; appropriation of a person's name or likeness for the benefit of the one doing the appropriating; and publicity that places a person in a false light in the public eye.

As interpreted by the courts, none of these four categories protects the individual from the acquisition, storage, and transfer of information about him or herself (Graham, 1987, p. 1412). The category most likely to be applied to the information right of privacy is the public disclosure of private facts tort which protects the individual from the public disclosure of private facts, the disclosure of which would be highly offensive and objectionable to a reasonable person of ordinary sensibilities (Keeton, 1984, 856–57). To protect itself the IIC should avoid releasing any stored information about a person except to authorized persons and should obtain releases signed by the subjects of the information retained in the database.

This area of the law merits close attention since some are suggesting that the courts are taking too narrow a view regarding privacy (Graham, 1987, p. 1419) and even the courts themselves indicate that there may be some broadening of the common law right of privacy (*Tureen v. Equifax, Inc.,* 1978, p. 416).

If the courts create a right of privacy that extends to the collection and use of information about an individual and if an actual invasion of privacy occurs, the question of who is legally liable must be considered. Some states grant their employees immunity from torts committed while the employee was acting within the scope of office or employment. Of those states that have immunity laws, some will pay damages for the tort committed by the employee while others make even the state immune to liability. If the IIC is a part of any state government agency—and most states consider state universities a governmental entity—it may have immunity from being sued for this type of invasion of privacy. If the IIC is a private entity both the persons involved and the legal entity may be liable for an invasion of privacy. The laws of the state in which the IIC operates will determine possible liability.

Intellectual Property Rights

The Constitution of the United States article I, section 8, clause 8, gives Congress the authority to "promote the Progress of Science and useful arts, by

securing for limited times to authors and inventors the exclusive right to their respective Writings and Discoveries." This clause is the foundation for the law of intellectual property, which includes copyright, trade secrets, and patent law. Copyright will be the area of most interest to the IIC since most materials put into a database will be either the written word or computer software, both of which are subject to copyright protection. Copyright protects the tangible expression of an author's ideas by granting the author exclusive control over the reproduction of the material, the preparation of derivative works based upon the work, the distribution of copies of the work, and the right of public display (Copyright Act of 1976, § 102[a]).

As a producer and creator of the written word or computer software that will be made available through the database, the IIC will be able to protect its work through copyright, assuming the material meets the necessary prerequisites (Copyright Act of 1976, § 102[a]). Even though copyright protection exists from the time a work is created and fixed in tangible form, the IIC should follow the procedures of registration, deposit, notice, and recordation to assure full protection. The deposit requirement, which has been a problem for databases, currently requires that one copy of the first and last 25 or equivalent units of the work be deposited (Copyright Registration Guidelines, 1989, § 202.3[b][4][1]).

As a provider of information the IIC will be loading material that is copyrighted by others. It is imperative that the IIC obtain full permission in writing from the copyright holder(s), in the form of a license, to load the data and to exercise any rights given exclusively to the copyright holder(s). The negotiation of a license agreement is an important step that will require legal advice. The IIC must make users aware of the copyright and the exceptions, such as "fair use" (Copyright Act of 1976, § 107).

The IIC may also have a right to copyright a database that consists solely of records that are copyrighted by others when it has contributed originality through the organization of the work. This type of work is referred to as a collective work (Copyright Act of 1976, § 101, 103). The IIC may wish to obtain copyright protection in such cases to afford additional protection to its databases. The owner of the copyright in the collective work has the right to control the reproduction and distribution of the collective work and any revision of that collective work (Copyright Act of 1876, § 201[c]).

Finally, an IIC that is a part of a state-operated university or other governmental entity may be immune by law to being sued for copyright infringement. In a recent court case a public university was found to have immunity in copyright infringement because of the eleventh amendment of the U.S. Constitution (*BV Engineering v. University of California, Los Angeles,* 1988). The court did recognize two situations where the state would not have immunity: where the state consented to be sued in federal court, or where Congress creates a cause of action for damages against an unconsenting state. An IIC will have immunity only if (1) it is a part of a state governmental entity, as defined by the law of the state in which the IIC operates, (2) the state has not consented to be sued for copyright infringement, and (3) the copyright law remains unchanged in this regard.

Misrepresentation

It has long been recognized by the law that false information provided to another could result in harm to the recipient of that information if the recipient acted in reliance on the false information. Within the common law of torts, specifically fraud, legal remedies developed for situations where one was injured by reliance upon false information. Misrepresentation has traditionally applied to accountants and others who are in a position where their clients rely on their statements (American Law Institute [ALI], 1977, §§ 311, 531, 552). It has not usually been applied to those whose main business is information, e.g., authors, book dealers, or information databases. As information becomes more valuable to society and more information specialists achieve greater recognition, misrepresentation may also be applied to this field. An unsuccessful attempt to hold an information provider liable for misrepresentation has already occurred (*Daniel v. Dow Jones & Co., Inc.,* 1987) and more may be forthcoming.

Misrepresentation can occur in at least two forms: where a person represents a falsehood as the truth without knowing whether it is true or false, and where a person represents a falsehood as the truth because he or she did not discover or communicate certain information that the ordinary person in his or her position would have discovered or communicated (*Florenzano v. Olson,* 1986). The latter type of misrepresentation is called negligent misrepresentation and is the most likely cause of action against an IIC.

Negligent misrepresentation can result in two types of harm: physical harm to the person and pecuniary loss. Most states make it harder for the harmed party to win if the loss was only pecuniary in nature by requiring that the information was supplied in the course of business or profession or employment or in any transaction in which the provider of the information has a pecuniary interest and the information was for the guidance of others in their business transactions and the person(s) harmed justifiably relied upon the information (ALI, § 311). To prevent liability an IIC should not make the database a for profit business, and users of the database should be required to sign releases that acknowledge that the IIC does not intend the information to be used for purpose of guiding others in their business transactions.

This area of the law is of concern to an IIC for several reasons. The IIC may download information pre-

pared by another database producer. If the IIC simply loads in the database without altering the content or form of the information contained within the database, liability of the IIC for misrepresentation should be negligible or nonexistent. If the IIC in any way alters or affects the product which the end user sees, for example, adds any other information or alters the way in which it is viewed or retrieved, then the IIC may be liable for the harm caused by the changes, assuming that those changes have created or contributed to the misrepresentation. If the IIC creates its own database for users, it would be responsible for the content and form if it creates a representation that is false or misleading. Another situation of potential liability is when the IIC is involved in extracting information for the production of a report for a user.

Products Liability

The courts in the United States have recognized for years the right by those injured by a product to recover damages from the seller of that product. The theory is that by marketing a product the seller assumes a special responsibility toward any member of the consuming public who may be injured by it (ALI, § 402A, comment c, 1965). This law applies to sellers who are in the business of selling a product which causes physical harm if the product sold was (1) in a defective condition, (2) unreasonably dangerous to the user or consumer, and (3) expected to and did reach the user or consume without substantial change in the condition in which it was sold (ALI, § 402A[1]). It is important to note that this area of the law does not require that the seller be at fault or even negligent; if harm occurs the seller is liable.

This area of the law has normally been applied to power equipment but several cases have made it more likely that producers of databases may be affected. A manufacturer of approach maps to airports has been held liable under this law (*Aetna Casualty and Surety Co. v. Jeppeson,* 1981; *Saloomey v. Jeppesen,* 1983; *Brocklesby v. United States,* 1985; *Fluor Co. v. Jeppesen & Co.,* 1985). The map producer took information supplied by the U.S. Government and created a product for use by airline pilots. Some of the information from the government was inaccurate, making the product by the map producer inaccurate, with the final result being lost lives in plane crashes.

There has been speculation that if a company that took information and produced maps can be found liable under this law it is possible for the producer of a database to be held liable as well (*Soma & Batson,* 1987, pp. 311–313). To hold a database producer liable would require that the producer be in the business of selling the product, the database. The database would also have to be a product. The courts often look to evidence of mass marketing of the item to prove that it is a business and that the item is a product (*Saloomey v. Jeppesen,* 1983, p. 677; *Brocklesby v. United States,* 1985, p. 1295).

Arguments against liability of the producer of the database is that the records are merely republication of information, such as in a journal, and not a product for purposes of this law (*Brocklesby v. United States,* 1985, p. 1298). Also, if the database is not selling its product, it may not be liable. Finally, the doctrine of sovereign immunity, discussed above in the section on the common law of privacy, may preclude liability if the database producer is the state or one of its agencies.

Defamation

The law of defamation, including libel which is defined as defamation expressed by print or writing, is also of interest to any online database. Defamation occurs when a person's reputation is harmed by something written by another. Any medium that prints the written word is potentially liable for defamation, and this area of the law is important for the IIC.

Defamation is a tort, and for this reason the previous discussion of sovereign immunity as applied to the IIC as a part of the University is relevant. Assuming that the IIC could be held liable for defamation, the next question is what types of damages the injured party may recover. This issue has been especially important since the case of *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* (1985). In this case the United States Supreme Court held that a database producer that defamed a party by providing false information through its online system could be held liable for punitive damages, also known as exemplary damages, even though the database producer did not know that the information was false (*Dun & Bradstreet, Inc. v. Greenmoss Builders,* p. 763). Dun & Bradstreet has caused some concern among database producers since it expands the possible liability of database producers for defamation.

Conclusion

This article has examined several areas of the law which can affect an IIC. Some, such as copyright and state, federal statutory law currently apply while others are only in the development stages. The status of the IIC, whether it is a private entity or part of a state government, will affect the potential liability. An attorney should be involved in the creation of an IIC.

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