LEGAL PROBLEMS OF DATA BASE TECHNOLOGY

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As computers become an integral part of court and business procedures, conflicts will arise that cannot be readily solved by traditional legal theories. Lawyers, acting as planners and advisers as well as advocates, must anticipate the potential problems presented by computers and provide a rational basis for their ultimate solution.

Courts are using computers very effectively for record keeping purposes. A computerized system installed in the Missouri Court of Appeals, for example, enabled the Clerk's office to triple its caseload without increasing its workforce. The court's computer writes routine letters, notifies lawyers of due or overdue dates for briefs, and performs other simple tasks previously performed by clerks. Additionally, the computer accumulates new, and potentially troublesome, information: how swiftly and efficiently judges and reporters carry out their work, whether delays are occurring in the appellate process, and who causes the delays. Although this new information aids in managerial and operational decisions, it furnishes credible, but easily distorted, evidence of malfeasance by public officials. Because court records are public records, any interested person can scrutinize and is likely to misread this managerial information. Therefore, courts should perhaps establish a work product exemption for managerial information supplied by the computer.

The use of the computer to record court opinions has resulted in the unique problem of opinion error. In a number of states, three opinions exist: the judge's original written opinion, the official reporter's copy, and the data bank copy. Missouri, Kansas, and many other states load slip opinions directly into Mead Data Central's computer data bank, LEXIS. Although occasionally edited by the judge or a reporter, the data bank opinion is copied verbatim from the judge's written opinion. A judge who discovers a mistake in his original opinion is sometimes

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too annoyed or embarrassed to correct the mistake in the file. If the three opinions do not match, which is the true opinion? In a recent decision, I cited an opinion that had an official and unofficial report which did not agree.[1] Because the discrepancy was important, I was forced to add a footnote to my opinion, explaining the difference. Courts should be cognizant of the need to determine and establish an official copy of the opinion of the court.

Another problem regarding data banks concerns who owns the rights to the bank's design. Data banks contain two essential elements: the data and the coding which accesses the data and performs the functions for which the data bank was prepared. Kansas and Missouri built expensive data banks to store their statutory law, and required the builder of the banks to deposit a copy of the stored data. The state could then use the data bank for purposes other than those for which it was originally designed. When Missouri later attempted to modify the function of the bank, it became apparent that without knowing the design of the coding program, new functions could not be implemented. The program designer eventually agreed to supply a copy of the coding program and the state was able to modify the data bank. In Kansas, however, the designer refused to deliver the coding program, claiming that it was proprietary information. In order to modify the data bank, Kansas had to replace the proprietary codes with costly new codes to perform new functions. To avoid similar privacy and property interest problems in the future, the contract for a data bank should allocate the rights to the program design.

Whoever holds the right to the program design will have difficulty protecting it.[2] Developers of software programs rely heavily upon the trade secrets doctrine for protection of their designs because no other legal doctrine is exclusively applicable to software programs. Unlike copyright and other forms of protection, the trade secret doctrine does not require publication of the program; if published, the software program's design is unprotected because its value rests in its logic, which then could be easily duplicated. Unfortunately, the trade secrets doctrine does not extend to purchasers and is therefore fatally inadequate: every time a software program is purchased the user will necessarily

1. State v. Gibson, 538 S.W.2d 956 (Mo. Ct. App. 1976).

2. Ogden, *Protection of Computer Software—A Hard Problem*, 26 DRAKE L. REV. 180 (1976-77). *See also* Freed, *Products Liability in The Computer Age*, 17 JURIMETRICS J. 270 (1977).

discover the program's design. Clearly, a new legal doctrine must be devised to protect the confidentiality of computer software. Although this issue has not yet been litigated, it will surely arise in the near future, prompted by the popularity of data banks, the expense of stripping and recoding, and the unequal technical knowledge between buyers and sellers.

It is also likely that litigation will occur between users and suppliers of computers (whether by lease or purchase) concerning which party should bear the liability when the computer fails to meet its performance specifications. Traditional theories of indemnity associated with contracts to supply a chattel or service may not apply to the derivative liabilities arising from computer use.[3] Although the courts generally allocate liabilities according to the doctrines of privity or nexus, a different problem is presented by a corporation which, requiring budgeting and accounting information, contracts with a computer service to provide this information. If the software malfunctions and the service company supplies inaccurate information causing the corporation to go bankrupt, who is liable? The computer service may resemble the public weigher in *Glanzer v. Shepherd*[4] and be liable to the creditors of the corporation even though the service had no contract with them. If so, the computer service may be entitled to idemnity from its supplier. Additionally, the supplier who sold the software and hardware to the service company may be liable in tort to the bankrupt corporation.[5] Although there are no answers to these problems, the mechanical application of concepts developed in response to less sophisticated technology may not enable us to effectively control computer technology in the future.

On the other hand, the mere fact that a computer is involved in a transaction should not cause lawyers and judges automatically to seek new and different solutions. In a recent case,[6] the parties concentrated on the existence of computerized credit information to the exclusion of the true issues. Both sides insisted that the loss was caused by com-

3. *See generally* Chandler, *Computer Transactions: Potential Liability of Computer Users and Vendors*, 1977 WASH. U.L.Q. 405.

4. 233 N.Y. 236, 135 N.E. 275 (Ct. App. 1922) (buyer of commodity could sue public weigher for breach of duty even though the contract to weigh the commodity was between the seller and the weigher).

5. *See* Westerhold v. Carroll, 419 S.W.2d 73, 77 (Mo. 1967) (The requirement of privity of contract should be determined on a case-by-case basis.).

6. Price v. Ford Motor Credit Co., 530 S.W.2d 249 (Mo. 1975).

puter failure, yet the record proved otherwise. The missing information was not in the data bank because an employee misplaced a reel of computer tape and, without the tape, the properly functioning computer could not provide the information. The plaintiff analogized the computer to an employee of Ford Motor Credit Company and argued that Ford should be liable. Ford argued that there could be no agency relationship with a computer and that no one was responsible for an unforeseeable mechanical failure. Ultimately, the case turned on the real issue that the missing information was caused by an act of a Ford employee.[7]

The need for new laws to accomodate conflicts caused by the computer is now apparent. Confidentiality protections for managerial information about court procedures, property rights in software design, and proper allocation of contractual liability for computer failure all present formidable challenges to the legal profession. Lawyers must recognize these problems and create new and equitable legal doctrines to meet the challenge.

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7. *Id.*

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