1984

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Liability Limitations in International Data Traffic: The Consequences of Deregulation

by Tedson J. Meyers*

The growing importance of international data traffic has generated a rich literature to which this volume is added. The issues involved have become part of policy agendas both in the United States and abroad. Initial materials have framed policy and legal concerns for lawyer and scholar alike. Among other topics, these initial analyses have ad-

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1 During the last ten years, the subject of international communication law and policy has benefited from a growing stream of excellent materials, both descriptive and analytical. The following provide a rich variety of viewpoints from which to begin research: U.S. DEP'T OF COMMERCE, THE INFORMATION ECONOMY: DEFINITION AND MEASUREMENT (1977); W. DIZARD, THE COMING INFORMATION AGE (1982); K. LEESON, INTERNATIONAL COMMUNICATIONS, BLUEPRINT FOR POLICY (1983); ISSUES IN INTERNATIONAL TELECOMMUNICATIONS POLICY: A SOURCEBOOK (J. Yurow ed. 1983); Spero, Information: The Policy Void, 48 FOREIGN POL'Y 139 (1982); Feldman & Garcia, National Regulation of Transborder Data Flows, 7 N.C.J. INT'L L. & COM. REG. 1 (1982); Lingl, Risk Allocation in International Interbank Electronic Fund Transfers: CHIPS & SWIFT, 22 HARV. INT'L L.J. 621 (1981); and the invaluable symposia in 16 STAN. J. INT'L L. 1 (1980), and Teleinformatics, 14 CORNELL INT'L L.J. 203 (1981).

2 See generally NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, LONG RANGE GOALS IN INTERNATIONAL TELECOMMUNICATIONS, AN OUTLINE FOR UNITED STATES POLICY, S. REP. No. 22, 98th Cong., 1st Sess. (1983). This report assembles in one place an exceptional array of relevant references and strategic recommendations.

3 Examples for working agendas addressed or to be addressed shortly abroad can be found in ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD), PRELIMINARY PROGRAMMED FOR THE SYMPOSIUM ON TRANSBORDER DATA FLOWS, OECD Doc. No. DSTI/ICCP 83.20 (June 1, 1983). See also OECD, PROGRAMME OF WORK ON THE LEGAL ASPECTS OF TRANSBORDER FLOWS, OECD Doc. No. DSTI/ICCP 82.5 (Jan. 11, 1982); PROBLEMS OF LIABILITY CONNECTED WITH TRANSBORDER DATA FLOWS, OECD Doc. No. DSTI/ICCP 82.28 (Aug. 30, 1982).

4 Students and working lawyers may find Yurow, supra note 1, an especially practical
addressed barriers to the transborder flow of information,\textsuperscript{6} the developing concept of "trade in information,"\textsuperscript{8} the legal status of data and data ownership\textsuperscript{7} and the extraterritorial application of national laws.\textsuperscript{8}

Consistently, these issues have shifted from soft ambiguities to hard realities for U.S. business and government, as foreign administrations have either taken action unilaterally\textsuperscript{9} or developed policy collectively.\textsuperscript{10}

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\textsuperscript{6} See S. Nora \& A. Minc, L'INFORMATIZATION DE LA SOCIETE (1978) (trans. as THE COMPUTERIZATION OF SOCIETY (1980)). This report, made to the President of France, kindled policy interest worldwide in the powerful role computerized information flows now play in commerce and social behavior within and among nations. See also HENDRUS, EMERGING DATA PROTECTION IN EUROPE (1975); Eger, Emerging Restrictions on Transnational Data Flows: Privacy Protection or Nontariff Trade Barriers?, 10 LAW \& POL'Y INT'L BUS. 1055 (1978);


\textsuperscript{7} de Sola Pool \& Solomon, Intellectual Property and Transborder Data Flows, 16 STAN. J. INT'L L. 113 (1980); Robinson, Giving Legal Title to Data (paper presented to the Conference of Swedish and Norwegian Societies for Computers and Law, Stockholm, Jan. 21-22, 1982), reprinted in 5 TRANSNAT'L DATA REP. 153 (1982); OECD, SWEDISH PROPOSAL ON COPYRIGHT ON DATA BASES, OECD Doc. No. DSTI/ICCP 83.27 (June 9, 1983).

\textsuperscript{9} Privacy or data protection laws have been passed in several countries to secure personal information as it crosses international borders. "Persons" are not limited to natural persons in all cases. National privacy laws are in effect in Austria, Canada, Denmark, France, West Germany, Iceland, Lichtenstein, Luxembourg, New Zealand, Norway and Sweden. Privacy laws also protect personal information in the United States. These laws key to natural persons, however, and to discrete kinds of information (educational, financial, etc.) rather than to methods of transfer. Legislation is expected to become law in 1984 in Australia, Belgium, Finland, Spain, Switzerland and the United Kingdom. Draft legislation is under consideration in Brazil, Mexico, Greece and Italy. See Bortnick, INTERNATIONAL INFORMATION FLOW: THE DEVELOPING WORLD PERSPECTIVE, 14 CORNELL INT'L L.J. 333 (1981) (discussion of varied approaches within non-industrialized nations).

Flows of information across national borders are increasingly dense;\textsuperscript{11} preliminary analyses of those flows have been undertaken to establish the kinds of information now transmitted.\textsuperscript{12} Studies now underway are exploring the economic implications\textsuperscript{13} of these transborder data flows while taxes and tariffs for different kinds or classes of information are under discussion.\textsuperscript{14}

\section{Liability: A Growing Concern Abroad}

The subject of liability for errors and omissions in international data transmission is also receiving substantial consideration in international forums.\textsuperscript{16} Studies and staff reports developed under the auspices of the OECD Guidelines and the Council of Europe Convention on the Protection of Individuals with Regard to Automatic Processing of Personal Data, Jan. 28, 1981, Europ. T.S. No. 108, are examples of international agreements promulgated to address privacy and transborder data flows. Austria, Belgium, Greece, Finland, France, West Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United States and the United Kingdom have endorsed the OECD Guidelines. Austria, Belgium, Denmark, France, West Germany, Greece, Iceland, Italy, Luxembourg, Norway, Portugal, Spain, Sweden, Switzerland, Turkey and the United Kingdom have acceded to the Council of Europe Convention. Only France, Norway, Spain and Sweden have ratified the Convention. With the anticipated ratification by either Austria or Luxembourg during 1984, the Convention will come into force. Of particular concern in the United States are the more rigid terms and inflexible application of the Council of Europe Convention as against the voluntary OECD Guidelines. Extensive examination of international policy development, contrasting voluntary and compulsory regimes, is available in materials referenced supra note 1. For a discussion of their differing implications, see Eger, \textit{The Global Phenomenon of Teleinformation: An Introduction}, 14 \textit{Cornell Int'l L.J.} 203, 213-17 (1981).

\textsuperscript{11} Investment in undersea cable, terrestrial and satellite facilities is increasing concurrent with more efficient use of bandwidth.

\textsuperscript{12} In the OECD, a two-phase analysis of international data flows has been undertaken. Phase I culminated in the promulgation of the OECD Guidelines, supra note 10. Phase II addresses the flows of non-personal, corporate and institutional data. As a preliminary step, the analyses of legal and economic issues have been undertaken separately.


\textsuperscript{16} PROBLEMS OF LIABILITY CONNECTED WITH TRANSBORDER FLOWS, supra note 3; OECD, LIABILITY ISSUES RELATED TO TRANSBORDER DATA FLOWS, OECD Doc. No. DSTI/ICCP 83.16 (June 6, 1983).
Organization for Economic Cooperation and Development (OECD) make clear the intensity of interest with which these issues are addressed in industrialized nations. Consistently, these discussions address the proliferation of parties engaged in any one international transaction, with consequent uncertainty of responsibility for error. International data traffic moves through an increasingly complex and automated chain of elements including: telephone ("voice") and hard copy or data ("record") carriage; storage and forwarding of data (and occasional "refiling" to counter traffic overflows), and the collection, processing and automated dissemination of materials, normally by computer. Ultimately, the user, who may in fact be serviced at many foreign addresses or through several intermediate destinations, receives the information in some intelligible form. Regrettably, the variety of participants involved, each with a specialty, as well as the separate national sovereignties enroute, renders complete end-to-end accountability virtually impossible.

Liability for errors related both to the use and the transmission of data is presently under review in the OECD. Its Secretariat observes:

The main problems encountered in determining liability are due to:

(1) the number of transactors involved in data flows and thus the wide range of potentially harmful behavior;

(2) the newness of the technology and the consequent lack of precision as regards liability arising from its use, the difficulty of deciding who is liable and the resulting problems of what evidence is required.

As a result, an OECD study already underway attempts, in part, to

In many OECD countries, public utilities such as PTTs enjoy broad exemptions and immunities under the local law. Many PTTs, however, are beginning to take on a business structure, offering new services or viewdata services. In the former example, a public data network takes on the proprietary aspects of a time-sharing company, offering services in competition with the private sector. In the latter example, the lines blur when one seeks to distinguish between the acts of the viewdata service and the PTT acting as the underlying carrier of the service. How are PTTs addressing liability issues which arise with regard to the new businesses?


16 Programme of Work on the Legal Aspects of Transborder Flows, supra note 3.

17 Liability Issues Related to Transborder Data Flows, supra note 15.


19 Programme of Work on the Legal Aspects of Transborder Flows, supra, note 3, at 2.
"[h]ighlight the acute problems encountered in certain countries, e.g., evidence and the burden of proof, the use of public data networks and the limitation of liability."\textsuperscript{20}

The latter concern, the limitation of liability, addresses the shelter traditionally afforded communications common carriers in the United States and most other nations from consequential damage for errors and omissions.\textsuperscript{21} The desirability and extent of such limitations of liability have weight in the debate abroad.\textsuperscript{22} However, deregulation\textsuperscript{23} of enhanced services\textsuperscript{24} in the United States may be viewed as removing the traditional underpinnings of such limitations of liability from interstate services no longer provided under regulation, exposing the service provider to common law doctrines of liability.\textsuperscript{25} This exposure will also apply to enhanced

\textsuperscript{20} Id at 3.


\textsuperscript{22} OECD, LIABILITY FOR ERRORS IN ELECTRONIC TRANSBORDER DATA FLOWS, OECD Doc. No. DSTI/ICCP 82.23, at 4 (July 12, 1982).

\textsuperscript{23} In re Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 384 (1980), modified, 84 F.C.C.2d 50 (1980), further modified, 88 F.C.C.2d 512 (1981), aff'd sub nom. Computer & Communications Industry Ass'n v. F.C.C., 693 F.2d 198 (D.C. Cir. 1982) [hereinafter cited as Computer II]. This decision was the key ruling eliminating or narrowing F.C.C. regulation of major communications industry segments. The Commission embarked upon the Second Computer Inquiry to:

[Fl]osser a regulatory environment conducive to the stimulation of economic activity in the regulated communications sector with respect to the provision of new and innovative communications-related offerings; and ... enable the communications user to optimize his use of common carrier communication facilities and services by taking advantage of the ever increasing market applications of computer processing technology.

77 F.C.C.2d 384 at ¶ 107.

\textsuperscript{24} Computer II, supra note 23, divided communications services into two categories: "basic" and "enhanced." "A basic transmission service is one that is limited to the common carrier offering of transmission capacity for the movement of information. In offering this capacity, a communications path is provided for analog or digital transmission of voice, data, video, etc. information." 77 F.C.C.2d at ¶ 93. Basic Service remained regulated under the Communications Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064 (as amended). "Enhanced" services, on the other hand, are "services offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information." 47 C.F.R. § 64.702 (1982). Enhanced services as defined in Computer II are not regulated. Id. at subpara. (a).

\textsuperscript{25} The impact of deregulation on tariffed liability limitations are addressed generally in this article. See infra notes 98-99 and accompanying text for specific discussion of these implications.
international services if ultimately they, too, are furnished on an unregulated basis. The implications of such exposure will be discussed in this article. A decision clarifying whether U.S. deregulation principles are to be applied by the Federal Communications Commission (FCC) to international services is long-awaited by interested parties and observers in the United States and overseas. Conclusive determination of this issue becomes more imperative now as pressure mounts abroad for review and revision of traditional limitations on liability for international data transmissions.

Review of these limitations in the context of regulatory change may prove valuable in understanding international trends. Thus they are the subject of this article. Existing U.S. law is emphasized, including evident or anticipated changes resulting from on-going industry restructure. Familiarity with U.S. practice and trends is essential in international deliberation because it is targeted as the source of potential inequities and because it is the regime most routinely to be examined during litigation.

Nevertheless, litigation of cases generated by errors and omissions in international data transfer has been rare. Those cases which have been decided focus on isolated incidents of electronic transfer of funds among banking institutions. Increased dependence on communications for diplomatic relations and international business, together with the advent of competition and the potential for rapid proliferation of service providers, raises the stakes. Thus, traditional treatment of liability for errors and omissions in international data traffic is already the subject of official expressions abroad of both public and private dissatisfaction.

Many of the criticisms expressed address potential problems rather than past or current ones. Data transmissions presently account for a rel-

27 Liability for Errors in Electronic Transborder Data Flows, supra note 18.
28 Id.
29 PROBLEMS OF LIABILITY CONNECTED WITH TRANSBORDER DATA FLOWS, supra note 3, at 2-3.
30 See Evra Corp. v. Swiss Bank Corp., 673 F.2d 951 (7th Cir. 1982); Delbrueck & Co. v. Manufacturers Hanover Trust Co., 609 F.2d 1047 (2d Cir. 1979). The opinion of Posner, J., in Evra is viewed as a significant application of the principles of liability for consequential damages established in the leading common law case of Hadley v. Baxendale, 156 Eng. Rep. 145 (1854), to modern electronic transfers. See also Lingl, supra note 1.
31 "[Q]uestions are beginning to be asked concerning the future. Must one accept this general rule of exclusion or limitation of liability? Must the risks of utilization of new information technologies be left to the final user? Concern is beginning to be expressed and some tentative solutions being put forward." LIABILITY ISSUES RELATED TO TRANSBORDER DATA FLOWS, supra note 18, at 3-4.
LIABILITY LIMITATIONS

Atavistically small share of international communications traffic. Errors have been consigned to the realm of technical failure, and attention paid principally to improvement in facilities rather than to revision of legal regimes.32

Overseas data traffic is generated principally by governments and multinational corporations. Commentators assert that the strong capitalization of such users, their sophisticated understanding of the technology and their familiarity with traditional limitations on carrier liability have led them to accept the risks of errors and omissions, establishing a natural barrier to litigation.33 It is also asserted, however, that the trend is toward attraction of smaller users from all nations to the international data market, users more dependent upon the full variety of specialized service providers to arrange data transfer end-to-end.34 It is argued that these users will be less prepared to deal with the traditional placement of liabilities for errors and omissions or the uncertain locus of responsibility for such failures.35 As the market burgeons with a mix of such smaller users, incidents of lost data or errors in transmission could increase, generating substantial uncovered losses and increased litigation.

II. UNDERLYING REGULATORY CONTEXT

In preparing to consider these issues, U.S. participants should expect to deal with materials written abroad purporting to analyze U.S. treatment of liability. These include studies submitted "to make a point." Thus, lawyers addressing international liability problems should first explore and understand the underlying doctrines in U.S. law. This requires familiarity with the distinctions between telephone and telegraph decisions, as well as differing trends among the states and between state and federal law.

32 For example, in practice, the users of transborder data flows and those who have organised the networks for conveying such flows seem until now to show little interest in problems of liability. This is due to the high technical reliability of the equipment used for transborder data flows and the widespread preference of users and providers of services for improving technical solutions rather than consideration of the possible legal repercussions of errors, alteration or other events for which they may be liable.

PROBLEMS OF LIABILITY CONNECTED WITH TRANSBORDER DATA FLOWS, supra note 3, at 2-3.

33 Id.

34 LIABILITY ISSUES RELATED TO TRANSBORDER DATA FLOWS, supra note 18.

35 Id.

36 European bodies addressing these issues favor legislative solutions characteristic of civil law countries. Omnibus treatments move readily in that environment, all the more so when the problems to be resolved comprise parts of larger political or economic agendas which have greater priority than painstaking analysis of law and fact. For a discussion of contrasting reaction to pressures for legislative solution in the field, see Eger, supra note 5. See also Ramsey, supra note 6.
federal courts. Liability suits entailing interstate telephone service have, in fact, been rare; subscribers evidently prefer to act against their local carrier in state courts.\textsuperscript{37} Litigation against interstate telegraph carriers, therefore, comprises a considerable share of the federal decisions,\textsuperscript{38} including decisions applying relevant federal statutes.\textsuperscript{39} Significant doctrinal distinctions emerge in the results, in part because of the different characteristics of telegraph and telephone information transfer.\textsuperscript{40} The influence of these differences should be traced carefully in dealing with liability issues, as the federal rulings have particular application to international communications common carriers.

Summarizing U.S. experience, it is fair to observe generally that claimants seeking redress from U.S. communications common carriers for errors and omissions in the discharge of their public duties can anticipate only limited recoveries.\textsuperscript{41} In the United States, telephone and telegraph companies have not been held to the “strict liability” generally applied to common carriers.\textsuperscript{42} Thus, they are not insurers of the performance of their respective duties. Rather, telephone and telegraph companies are liable for “such damages and only such as naturally and proximately arise from their negligent performance of their duty as to the transmission and delivery of messages.”\textsuperscript{43} The applicable doctrines may differ in nuance but tend consistently to shelter service providers from massive awards in all states and at the federal level.

\textsuperscript{37} With the notable exception of the earlier operator-related cases, persistent service interruptions predominate as the ground for lawsuits, proceeding in such instances against the local operating company. The preference of claimants to file in state courts against local carriers is striking. This appears to be the case, even where the communications entailed was interstate and the requisite minimum sums were present. See generally Annot., 67 A.L.R.3d 76, supra note 21.


\textsuperscript{39} Id.

\textsuperscript{40} See infra notes 49-56 and accompanying text.

\textsuperscript{41} See generally Annot., 67 A.L.R.3d 76, supra note 21.


\textsuperscript{43} 74 AM. JUR. 2d, supra note 21, at 384.
A. Telephone Carriers: “Suppliers of Conduit”

Addressing first the substantial body of rulings settling the liability of telephone carriers, it is clear that they are obliged to exercise, as a public service, a character and degree of care, diligence and skill commensurate with their undertaking. A line of cases evolved around the early common law recognition of common carrier duties, which addressed liability for breach of those duties and established the concept that negligence is not attributable to the carrier merely because of its presence in the chain of transmission. Further, these early decisions determined that liability will not attach where the relationship between the carrier’s failure and the injury sustained was merely speculative and that damages, to be recovered, must either have been within the contemplation of the carrier and the subscriber when contracting or have been “the product of special circumstances of which the [carrier] had notice and from which the likelihood of the injury in question could reasonably have been inferred.”

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45 Liability in the chain of transmission affects determinations of responsibility in end-to-end services comprising successive independent providers, a configuration typical of international data transmissions. “In determining the duties and liabilities of connecting lines of telegraph companies, the courts are governed to a great extent by the principles applicable in the case of successive carriers of goods.” 74 Am. Jur. 2d, supra note 21, at 393. See also Miller v. East Ascension Tel. Co., 263 So. 2d 360 (La. App. 1972), cert. denied, 262 La. 1121, 266 So. 2d 430 (1972).

46 Southern Bell Tel. & Tel. Co. v. Glawson, 13 Ga. App. 520, 79 S.E. 488 (1913); Amerson v. Southern Bell Tel. & Tel. Co., 303 S.W.2d 279 (Ky. 1957); Lebanon, Louisville & Lexington Tel. Co. v. Lanham Lumber Co., 131 Ky. 718, 115 S.W. 824 (1909). See also Annot., 67 A.L.R.3d 76, supra note 21, at 93. Compare Cumberland Tel. & Tel. Co. v. Carter, 1 Tenn. Civ. App. 750 (1911) (an early “lifeline” decision, imposing liability on the carrier after finding adequate relationship between injuries sustained and the carrier’s failure, even when injuries were to a member of the family other than the telephone subscriber).

47 Annot., 67 A.L.R.3d 76, supra note 21, at 119.

[Recoveries] should be restricted to [incidents] which might fairly and reasonably be considered as either arising naturally, according to the usual course of things, from the breach of the contract seen to exist between the subscriber and the telephone company, or those which might reasonably be supposed to have been in the contemplation of both parties at the time they made the contract . . . .

Id. Common law distinctions were also attempted between contract and tort theories of liability, the contract theory predominating. See Foss v. Pacific Tel. & Tel Co., 26 Wash. 2d 92, 173 P.2d 144 (1946) (raising, as is not uncommon in these telephone and telegraph cases, the doctrines of Hadley v. Baxendale, 156 Eng. Rep. 145 (1854), as dispositive of liability and measurement of damages); Barrett v. New England Tel. & Tel. Co., 80 N.H. 354, 117 A.
Advances in technology have favored the telephone carrier in avoiding judicial imposition of liability. The introduction of automated exchanges eliminated contact with the operator, who was the subscriber's customary "point of notice" to the carrier in early emergencies most likely to generate litigation. Courts have protected telephone carriers in several more contemporary instances, noting that the complexities of advanced telephone exchanges render transmission more vulnerable to unnoticed failure.

Judicial treatment of errors and omissions by carriers in the related area of directory listings may offer some insight as to the carrier's growing role as an information provider. Alphabetic directories and classified directories tend to be differentiated both in administrative regulation and in judicial decisions. Doctrines generated in early cases dealing with transmission and related service failures apply with the same general results to errors and omissions in alphabetical listings. Classified directories, however, generally are treated within areas unaffected by regulation and are thus properly the subject of private contract by the carriers. Errors and omissions in classified directories normally violate no public duty, and clauses limiting liability in such cases tend to be judged by public policies observed in the respective states.


Failure to "wake up the operator" surfaces throughout earlier claims for damages, principally in telephone but also in telegraph cases, prior to installations of automated exchange or message forwarding systems. See, e.g., Southwestern Tel. & Tel. Co. v. Taylor, 26 Tex. Civ. App. 79, 63 S.W. 1076 (1901).


"It was not disputed that the classified directory was outside [the telephone company's] duties of public service and was a 'vehicle to secure advertising.'" McTighe v. New England Tel. & Tel. Co., 216 F.2d 26, 30 (2d Cir. 1954).

Contrasted against this background is judicial disposition of errors and omissions in the delivery of telegraph messages in the United States. It is in the telegraph cases, rather than the telephone cases, that expansive interpretations of the carriers' basic duties are found. Those duties rendered the telegraph carrier liable to the addressee and sender alike—a liability arising not out of the contract between sender and carrier, but out of a broader obligation for public service.

B. Telegraph Carriers: "Deliverers of Content"

Underlying the significant body of law regarding telegraph service is the historic obligation of a telegraph carrier to deliver "hard copy" messages for its customer. A significant factual distinction becomes evident, between telephone and telegraph systems of information transfer: telephone carriers did not customarily undertake to transmit specific messages for their subscribers, but merely undertook to provide raw circuits for their use (on a call-by-call basis in the preponderance of cases, and for extended periods in the case of leased or private lines). Furnishing the communication channel, however, apprised the telephone company of neither the content nor importance of any single message passing through it, and replacement of the telephone operator with automated circuits removed the traditional human intervenor to whom the significance of particular messages was reported.

This "conduit versus content" distinction warrants further examination. It would not be surprising for the new observer to confuse modern high-speed data delivery with the traditional telegraph model. However, data streams destined for hard copy print-out in the United States and overseas bear little resemblance to telegraph traffic. Data traffic, both do-


66 Western Union Tel. Co. v. Milton, 53 Fla. 484, 43 So. 495 (1907).


68 "Millions of calls are made daily, many of which involve matters of enormous monetary amounts, and to subject the Telephone Company to liability unlimited as to damages would expose it to claims which could not be controlled or estimated." Memorandum, Justification for Regulations Limiting the Liability of the Telephone Company, submitted in support of Transmitttal Nos. 13337, 13350, In re American Telephone and Telegraph Company, Proposed Revisions of Tariff F.C.C. No. 260, Tariff F.C.C. No. 267, Tariff F.C.C. No. 259, and Tariff F.C.C. No. 263, 76 F.C.C.2d 195 (1980).

69 Supra notes 47-48 and accompanying text.
mestic and international, occupies channels and is paid for in commercial arrangements characteristic of telephone, not telegraph, service. Sophisticated data systems resemble the distinctively two-way voice communication model. As is normally the case with telephone subscribers, data systems users are in a position to verify delivery, recognize isolated error or system failure and respond.\textsuperscript{60} By contrast, senders of telegraph messages could not be expected to know that a message had been garbled in transmission unless special arrangements were made and a premium was paid for that service which resulted in greater carrier liability.

Whether the "conduit/content" distinction was dispositive in early telegraph carrier liability cases is not clear, and no general separation should be attempted. Yet, the cases do seem to reflect (without pointed delineation) a softer line for a failure to transmit a message accurately than for a failure to get at least some version of the message to its destination, or failing that, to notify the sender of the inability to deliver.\textsuperscript{61}

Advancing technology brought a higher level of responsibility to telegraph carriers as opposed to telephone carriers. The "singularity" of the hard copy telegraph message appears to have carried a heavier responsibility for accuracy and delivery than was generally applied to telephone facilities.\textsuperscript{62}

III. THE LEGISLATIVE MODEL: THE ROLE OF THE REGULATORY AGENCY

State and federal statutes\textsuperscript{63} adopted throughout the late 19th and early 20th centuries establish further grounds for carrier liability. The Communications Act\textsuperscript{64} declares:

> In case any common carrier shall do, or cause to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this chapter required to be

\textsuperscript{60} See Liability for Errors in Electronic Transborder Data Flows, supra note 22, at 14-17.

\textsuperscript{61} See generally, 74 Am. Jur. 2d, supra note 21, at 396-404.

\textsuperscript{62} Unlike the dilution of liability, supra notes 49-50 and accompanying text, with the advent of the automated telephone exchange, it has been observed:

Inasmuch, therefore as this art or science had not then been perfected to anything like the exactness, either mechanically or scientifically, that it now possesses, telegraph companies should be held to a higher degree of care at the present time, with improved, perfected machinery, instruments, equipment, appliances, and competent, careful, and expert operators, than could have been exacted of them in the early days of telegraphy.

74 Am. Jur. 2d, supra note 21, at 385-86. See also Strong v. Western Union Tel. Co., 18 Idaho 389, 109 P. 910 (1910).

\textsuperscript{63} For a discussion of the relative powers of state and federal governments in communications regulation, see 74 Am. Jur. 2d, supra note 21, at 316.

done, such common carrier shall be liable to the person or persons in-
jured thereby for the full amount of damages sustained . . . .

However, neither state nor federal statutes afford users a distinctive advantage, as the same laws and regulations which recognize carrier liability also authorize or ratify a wide variety of limitations upon that liability. Outright exemption from liability is not countenanced. Rather, recovery limits are specified and accounted for in carrier rate planning. State courts normally endorse such limitations as conforming to the provisions of state public utility regulations. Limits are also supported as preventing the discriminatory application of lawful rates. Although judicial tests for reasonableness are often applied, liability limitations are adversely affected only in cases of gross negligence or willful misconduct. State determinations on contract or tariff provisions which attempt to limit a carrier's liability have been divided, but most have opted in favor of carrier-proposed liability limitations.

Efforts to limit liability for gross negligence or willful misconduct, however, normally have been rejected at the state level regardless of authorized contractual or tariff limitations. State courts either interpret tariffs or state regulations as not limiting liability, or they examine the carrier conduct independently and, finding gross negligence, rule that the published limitations are inapplicable to the specific conduct involved.
IV. The Federal (and International) Rule

For interstate and, therefore, international carriage, the federal rule is clear and it is contrary to the state practice. In *Western Union Telegraph Company v. Priester*, the U.S. Supreme Court definitively placed even gross negligence beyond judicial scrutiny for carriers subject to federal jurisdiction, asserting liability limits prescribed under lawful tariffs.\(^7\) Interpreting the Interstate Commerce Act as it existed in 1928, Mr. Justice Stone wrote that a tariffed limitation of liability approved by the Interstate Commerce Commission “became the lawful condition on which messages might be sent.”\(^8\) He added:

> Such being the basis of liability, we do not perceive any adequate ground upon which it may be enlarged merely by application of a “vituperative epithet” to the admitted fault of the petitioner . . . . [W]e may not disregard a lawful exercise of the regulatory power which has made no distinction between degrees of negligence, nor may we, upon any theory of public policy, annex to the rate as made conditions affecting its uniformity and equality.\(^9\)

Fifty-five years later, the application of *Priester* to interstate carrier liability remains undisturbed.\(^10\) Only the carrier’s willful misconduct is beyond the protective limits of liability established under tariffs approved by the FCC,\(^11\) although there is reason to conclude that even that excep-
LIABILITY LIMITATIONS

It may be observed that Priester did not differentiate between "gross negligence" and "willful misconduct" in its enforcement of tariffed limitations of liability. In fact, cases in this field have not arrived at a perfect distinction between the two forms of conduct.

82 It may be observed that Priester did not differentiate between "gross negligence" and "willful misconduct" in its enforcement of tariffed limitations of liability. In fact, cases in this field have not arrived at a perfect distinction between the two forms of conduct.


84 Id. § 203.

85 Id. § 206.

86 Supra note 80.

87 Id.

88 Memorandum, supra note 58.


90 See, e.g., O'Reilly, Ma Bell's Kids Fight for Position, FORTUNE, June 27, 1983.

91 Id.
limitations. For facility interruptions, some version of the AT&T model is followed. For call or message services, the tariffs follow the Western Union model, specifying both a monetary cap on the carrier's liability for standard calls or messages and a formula to ascertain higher levels of recovery for specially valued calls or messages "whether caused by the negligence of its servants or otherwise." This array of liability limits is currently accepted by the FCC. Ca- veat, many such tariffs have been permitted to go into effect under special provisions of the Communications Act while awaiting final action as to their lawfulness. No case has specifically tested the enforcement of

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92 See, e.g., RCA Global Communications Telex Service, Tariff F.C.C. No. 90, § 2.1.7(B):
In the event of an interruption to the service which is not due to the negligence or willful act of the customer, there will be a prorata adjustment of the charges involved for the service and facilities rendered useless and inoperative by reason of the interruption during the time said interruption continues from the time it is reported to the Company or detected by the Company, provided, however, that insofar as it is practical to do so, any interruption during the initial period of service will be compensated for in the form of overtime equal to the interruption time.

See also RCA Global Communications, Tariff F.C.C. No. 79 (Overseas Datel Service), § 6; W.U. Int'l, Tariff F.C.C. No. 5 (Int'l Overseas Telex Service) § 4.7; Tariff F.C.C. No. 11 (Overseas Datel Service), § 4.05; ITT World Communications, Tariff F.C.C. No. 48 (Int'l Datel Service), § 9; Graphnet, Tariff F.C.C. No. 3 (Graphnet Int'l Service), § 4.1.15; Tymnet, Tariff F.C.C. No. 3 (Int'l Data Communication Service), § 4.1.2.

93 At the present time, a $500 limitation is specified in all such tariffs. See, e.g., W.U. Int'l Overseas Telex Service Tariff, supra note 92, at § 4.72. Attorneys in the FCC's Office of General Counsel report that the $500 monetary limitation was prescribed for telephone and telegraph carriers by the Interstate Commerce Commission in 1919.

94 E.g., RCA Overseas Datel Service Tariff, supra note 92, at § 6(c):
(c) Special Provision With Respect to Occasional Service
(1) The liability of the Company for damage arising out of mistakes, omissions, interruptions, delays or errors or defects occurring in the course of furnishing service under this tariff, whether caused by the negligence of its servants or otherwise, shall in no event exceed five hundred dollars for, or in connection with, any call; provided however that in the case of a call rendered with a statement in writing specially valuing such call and for which payment is made of the amount of the regularly established rate plus an additional charge equal to one-tenth of one percent of the amount by which such written valuation shall exceed five hundred dollars, the liability of the Company for damages arising out of mistakes, omission, interruptions, delays or errors or defects occurring in the course of furnishing service under this tariff, whether caused by the negligence of its servants or otherwise, shall in no event exceed the sum at which such call shall be valued.


96 E.g., ITT World Communications, Tariff F.C.C. No. 43 (Overseas Private Line Service), now in effect, has never been the subject of a Commission finding of lawfulness under the Communications Act. In other instances the Commission has found tariffs specifically to be unlawful, yet they have been allowed to remain in effect. See, e.g., AT&T, Tariff F.C.C. No. 259.
liability limits contained in such "interim" tariffs. It is important, therefore, to bear in mind that all cases, including Priester, which establish or reinforce the validity of tariffed liability limitations qualify their rulings by addressing them to tariffs "conforming to regulation," or "approved by the regulatory authority" or "lawful."  

V. CONSEQUENCES OF DEREGULATION

The FCC's landmark carrier deregulation rulings further complicate the treatment of liability. Services previously regulated will no longer be provided to customers under terms and conditions prescribed by federal tariffs. "Detariffing" has already occurred in some instances, although these changes have affected only domestic rather than international services.

The consequences of deregulation on liability limitations for both domestic and international traffic have yet to be fully appreciated. United States-based services which were previously regulated will be governed instead by the common law doctrines of contract and tort liability applicable to like services provided under private contract. It would be reasonable to expect a return to case-by-case, "preregulation" ways of arriving at acceptable limitations of liability in contract clauses. All relevant common law precedents, however, derive from cases which arose out of the earlier technologies. Such precedents will now have to be applied to the burgeoning area of enhanced communications services. Neither the facilities (telephone) model nor the hard copy (telegraph) models which prevailed before regulation under state and federal statutes began, relates to these new services.

Trial and appellate courts can be expected to dominate the development of new rules for liability limitations in contracts entered into by service providers and their customers. Courts will apply state and federal laws, common law doctrines and public policies applicable in their respective jurisdictions. Federal district courts are likely to be the principal arenas for decision making. Gone, however, will be Priester's strong shield barring judicial intervention in the regulatory process. Liability limits will no longer bear the presumption of reasonableness or legality. Instead, distinctions will have to be drawn or established on a case-by-case basis in

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99 For discussion of the jurisdiction of federal courts in communications cases not arising under the Communications Act, see Ivy Broadcasting Co. v. AT&T, 391 F.2d 486 (2d Cir. 1968).
contemporary common law regimes that frown upon contractual provisions which broadly limit liability for negligence. Non-regulated service providers can be expected to resort to contract law as the principal legal regime in which to sustain prevailing liability limitations. Service providers and customers alike, however, will have to reevaluate carefully all contract clauses drafted originally as liability limitations in tariffs for previously regulated communications services. It is by no means certain that carrier protections which flourished under the regulations can or will be imported into contracts providing for the supply of enhanced services.

VI. THE INTERNATIONAL REGIME: PRIVATE CONTRACT V. OMNIBUS TREATMENT

It is not certain, at the international level, that a system of standard or negotiated contracts will comprise an acceptable legal regime for the resolution of liability issues. In the OECD, attention is being given to the cumbersome process of assigning legal responsibility through private contracts between succeeding participants to a single international transaction.\(^\text{100}\)

OECD reports have tried:

[T]o analyse how operators of Transborder Data Flows attribute the risks inherent in the use of Transborder Data Flows through the use of contracts. It was made clear that the "cascade" of contracts needed to arrive at the final service offering prevented a clear sharing of liability. Similarly, the current regime, because of the exclusion or limitation of liability on the part of the data carrier, results in the nonliability or limited liability of the information and computer service providers.\(^\text{101}\)

Efforts at harmonization of legal regimes internationally to address liability issues are now the subject of discussion in the OECD.\(^\text{102}\) Reaction to such efforts is not uniform.\(^\text{103}\) Views may be expected to stiffen, moreover, as international service providers recognize the risk to prevailing protections.

Differences thus generated are not likely to be resolved quickly. Even while international debate over liability moves forward, U.S.-based ser-

\(^{100}\) OECD, LIABILITY FOR ERRORS IN ELECTRONIC TRANSBORDER DATA FLOWS, OECD Doc. No. DSTI/ICCP 82.23 (July 12, 1982).

\(^{101}\) OECD, LIABILITY ISSUES AFFECTING NON-CONTRACTING PARTIES, OECD Doc. No. DSTI/ICCP 83.26 (Nov. 4, 1983). In this study, Dr. F. Gurry of the University of Melbourne presents a useful history and analysis of contract doctrines in the field.

\(^{102}\) Id. See also OECD, LIABILITY ISSUES RELATED TO TRANSBORDER DATA FLOWS, OECD Doc. No. DSTI/ICCP 83.31 (June 28, 1983).

vice providers are forced to await the outcome of a series of critical regulatory and appellate decisions.\textsuperscript{104} Until these cases are resolved, the options available to international service providers will continue to be few. Several cases effectively postpone recognition of, and grappling with, the international liability issues which will emerge after deregulation because they postpone the application of deregulation itself in the international arena. Enhanced services presently internationally provided by U.S. carriers will not be voluntarily detariffed, nor will new unregulated services be initiated until these pressing issues are resolved. Even if such policies become clear in the United States, a favorable reaction must be won from foreign administrations before operating agreements for service abroad can be obtained.

Thus, it is important to examine the cases which must be decided before U.S.-based service providers can fully confront the liability issues generated by new international services.

The ultimate disposition of the FCC’s initiative to apply doctrines of deregulation uniformly to international as well as domestic services\textsuperscript{105} will be far-reaching in both political and economic implications. With few exceptions, foreign communications systems are the province of governments and their appointed agencies.\textsuperscript{106} Principal among the exceptions are the international carriers licensed (in international parlance, “private operating agencies recognized”) by the United States to compete in the field.\textsuperscript{107} United States-based international carriers presently conduct many operations which presumably would be detariffed\textsuperscript{108} if deregulation were made to apply on the same terms internationally as well as domestically. However, without carrier status, the ability of deregulated service providers to obtain operating agreements with foreign administrations could be compromised.\textsuperscript{109} Moreover, under present FCC regulations and international agreements which restrict resale and shared use of international facilities, all service providers would be precluded from leasing or continuing to lease circuits from international carriers for the provision

\textsuperscript{104} See cases cited supra note 26 and infra note 110.

\textsuperscript{105} In re G.T.E. Telenet, 91 F.C.C.2d 232 (1982).

\textsuperscript{106} See Ramsey, supra note 6, at 262.

\textsuperscript{107} International Telecommunications Union Convention, Oct. 25, 1973, art. 31, 28 U.S.T. 2495, T.I.A.S. No. 8572: “Members reserve for themselves, for the private operating agencies recognized by them and for other agencies authorized to do so, the right to make special arrangements on telecommunications matters which do not concern Members in general.”

\textsuperscript{108} E.g., RCA, Tariff F.C.C. No. 100 (Q-Fax Service); ITT, Tariffs F.C.C. No. 66 (Universal Data Transfer Service) and No. 67 (International Worldfax Service).

The long-deferred decision by the FCC of its controversial proposal\textsuperscript{111} to permit such leasing arrangements of international circuits might resolve that barrier domestically, only to generate new ones abroad. Resale and shared use remain illegal under existing international practice,\textsuperscript{112} and the FCC's unilateral proposal for change risks retaliation from foreign administrations.\textsuperscript{113} Critical among retaliatory options available to foreign administrations is the withdrawal from service of those private circuits upon which major users depend for all forms of international communication. Thus, too bold a move by the FCC could "boomerang" against the very element of the market its proposal is intended to help.\textsuperscript{114}

Abroad, study and debate over directions of liability limitations and the placement of responsibility for error is \textit{not} awaiting the outcome of these proceedings.\textsuperscript{115} Overseas interests pressing for legislative solutions have a certain appealing logic to support them. Arguably, as international data flows increasingly among nations, the greater number of mixed specialties end-to-end invites "supranational" rules encompassing all participants. Entry of the smaller user, it is claimed, compels revision of present liability limitations for carriers and restrictions on the right of unregulated service providers to limit recoveries by contract. This shifts the burden of loss to parties best situated either to prevent the damage, or to absorb it. The state of the art and the stage of commercial development, it is also argued, make the present an ideal time to reevaluate traditional limitations of liability and to establish rules which transcend national practices.

Clearly, such issues beckon the participation of interested U.S.-based service providers. However unmistakable those interests would have been before deregulation, the changes in potential exposure noted above make imperative their awareness and participation now. It is not likely that service providers will be responsive, however, until the application of deregulation to international service is clearly established at home, defining the shape of the market and the new risks awaiting its participants.

\textsuperscript{110} Regulatory Policies Concerning Resale and Shared Use of Common Carrier Int'l Communication Services, 77 F.C.C.2d 821 (1980).

\textsuperscript{111} \textit{Id.}

\textsuperscript{112} \textit{Id.}

\textsuperscript{113} \textit{LONG RANGE GOALS, supra} note 2, at 136-42.

\textsuperscript{114} \textit{Id.}

\textsuperscript{115} \textit{Id.}