



Telecom Today Managing Risk in a Multimedia World

By David M. Finz

Twenty years ago, the nation's telecommunications industry urged Americans to "reach out and touch someone." Now, it seems the industry touches everything. With voice, data and Internet services already up and running, and with paid television in the queue, the major telecom players are positioned to become a one-stop media source for the nation's homes and businesses. The advent of information and entertainment content providers specifically geared to wireless devices holds the promise of even greater market penetration.

However, as with any endeavor this bold, there are risks associated with competing in this new arena. The success of the telecommunications industry will depend in no small way upon how well it is able to anticipate and manage the risks inherent in its new role as a creator and purveyor of content. This paper will examine the evolution of the industry and the risks that telecom companies face, focusing primarily on the exposures these companies confront in the areas of professional liability and intellectual property.

From Bells and Whistles To Clicks and Ringtones

It wasn't long ago that service providers in the telecommunications industry had clear marching orders: phone companies

provided voice communications (including wireless), cable and satellite companies offered paid television programming, and Internet Service Providers ("ISP's") catered to the needs of personal and business computer users. Consequently, risk management for each type of company was also fairly straightforward. The professional liability exposures related to voice communications centered around third-party losses associated with interruptions in service. ISP's were concerned with this type of loss scenario, as well as with privacy and security issues, and cable networks faced exposures similar to those of broadcast television, such as defamation of character, copyright infringement, and plagiarism.

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Today, these worlds are converging as providers offer a multiplicity of services to customers. Telephone companies have already become content providers through the Internet, and are going head to head with cable companies in the

realm of paid television programming.¹ ISP's now offer voice services to their subscribers, and cable firms are joining forces with mobile communications outfits to gain a foothold in the wireless market by bundling services for residential customers.

Beyond the cross-selling of products, there is the evolution of the technology itself. In the past few years, the rollout of Web-enabled Personal Digital Assistants has afforded users access to their office computer in real time, fostering greater productivity while on the road. More profoundly, the transformation of the "cell phone" into a digital genie is already underway, and holds the promise of bringing personal computing, streaming video and MP3 technology to the handheld device.² This rapid advance in technology is creating its own set of challenges. Already, we see the advent of content providers dedicated to the mobile market, and the resulting difficulty carriers face in maintaining control over what content is offered to subscribers (to say nothing of who receives the fees for these downloads). Additionally, as they become more sophisticated repositories for data, handheld devices are fast becoming targets of spam, viruses and other forms of cyber-attacks that have historically plagued personal computers.

Press Pound for More Options

All of this puts the tech-savvy business in a precarious position; to survive in the digital age requires innovation,

¹ See Lowry, Tom, and Spencer E. Ante, "Verizon's Video Vision," BusinessWeek, May 2, 2005, at 77.

² See Brown, Erika, "Coming Soon to a Tiny Screen Near You," Forbes, May, 2005 at 64.

diversification and flexibility, yet such an approach carries with it exposures that a company might not have encountered with its previous lineup of products and services. Suppose, for example, that an ISP operating a new paid television programming service were to contract with a music channel it counts among its offerings to design and operate a website to tally viewers' online and telephonic votes during a live nationwide broadcast of a talent search.

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Now suppose that unexpectedly high traffic sends the server crashing, leaving votes uncounted and the show's producers unable to announce a winner. In the weeks that follow, ratings decline, advertisers cancel for the next season, and the incident becomes fodder for late night talk shows. The music channel sues the ISP for damages on grounds that it failed to anticipate the level of web traffic the broadcast generated.

The scenario just described is an example of how the multimedia approach can increase the likelihood that a failure to perform a service as promised could result in liability for the company, because the company now has to be concerned not only with keeping its ISP, television and phone systems functioning smoothly but also with integrating these functions seamlessly in order to ensure a real-time, interactive broadcast.

“Don’t Shoot the Messenger”

Another type of exposure manifests from a company becoming involved in the delivery of content. Take, for example, a telecommunications concern that launches a news channel as part of its foray into paid programming. Let’s say that a journalist at the news channel, acting upon what she considers a “reliable source,” reports that a criminal defense attorney is passing blueprints of Federal courthouses and prisons to reputed terrorist cells. A transcript of the report is uploaded on to the news channel’s website. The attorney denies the allegation, demanding a retraction. The journalist claims that revealing her source would compromise his personal safety. The attorney sues her and the company for slander (for the broadcast) and libel (for the transcript uploaded to the website). In the past, the company might have viewed coverage for defamation as something incidental to its Errors and Omissions policy, since a lawsuit would likely not have arisen in this area, save for the remote possibility of a competitor’s claim that something in the company’s advertising was defamatory. However, as a content provider, the company needs to reassess its exposure to these types of claims.

Down on the Pharm

Security and privacy are related concerns that have long held the attention of every ISP. Software design flaws sometimes allow for “bugs” that leave an entryway for hackers to break into a server and redirect users to a phantom web page, say, for example, when they attempt to shop online. Once users are on the phantom web page, they may unwittingly release personal

information to the hacker, thinking they are dealing with the online retailer. This security breach can result in widespread identity theft. With a little help from a creative plaintiffs’ attorney, one can envision users instituting a class action against the ISP for failing to adequately safeguard its server to prevent such “pharming” of its network by hackers.³

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The above examples have related chiefly to professional liability claims. But with the proliferation of digital technology, intellectual property disputes may also arise. As cable companies merge with or acquire wireless phone services, they may wish to link these technologies in order to leverage the availability of in-house content and generate brand loyalty. Imagine such a company developing a system that allows subscribers to download trailers of movies currently being featured on the company’s movie channel to their handheld device. Were another company to step forward and allege that it holds a patent for the design of such a system, a court could grant an injunction halting the use of this technology by the defendant cable company, and order money damages on grounds of patent infringement.

³ For more on this latest threat to cyber-security, see Delaney, Kevin J., “‘Evil Twins’ and ‘Pharming,’” The Wall Street Journal, May 17, 2005 at B1.

Conclusion

A telecom or other technology company branching out into new forms of media may face a broad range of claims where the failure to provide services, adequately safeguard subscriber data, or verify the accuracy of content may be at issue. Risk management professionals can help identify gaps in existing coverage in light of the new exposures, determine the company's tolerance for risk retention, and devise the right solution to protect shareholder value and long-term profitability. Such a solution may involve more broadly worded professional liability and IP policies, formation of a captive insurance company, or a non-insurance instrument such as a suretyship (bond) or other financial transaction. It may even involve some combination of these.

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