

Liability for Defective Content

Copyright © Cem Kaner, 1996. All Rights Reserved.

With all the storage space on CD-ROMs, many products come with loads of added content, such as books, articles, maps, audio clips, video clips, and clip art. Much of this material is bought cheaply and then copied onto the disk without any testing beyond verification that it installs correctly.

What happens if information provided on these disks is incorrect? Can a software publisher be sued for informational errors? From a legal liability point of view, should you *insist* on testing all of the factual material in the product?

The short answer is, *No*. The longer answer is, *Well, not usually but there are some important exceptions*. I've heard people overgeneralize the general rule. It can be a mistake to conclude that publishers never have liability for informational errors. In this brief article, I want to familiarize you with the general rule and then point out some of the risks.

The General Rule: No Liability

In the case of *Alm v. Van Nostrand Reinhold*¹, Alm bought a how-to book, *The Making of Tools*. He was injured when a tool shattered while he was (allegedly) following the book's instructions for making that tool. He sued the publisher and the author. The Court refused to allow the case to proceed against the publisher. It cited a long series of decisions that newspapers and magazines could publish material written by a third party without fear of being sued for that writer's mistakes. The Court concluded,

*"Plaintiff's theory, if adopted, would place upon publishers the duty of scrutinizing and even testing all procedures contained in any of their publications."*²

Test all the procedures? Oh No! No! Not that!

There *are* serious problems with requiring a publisher to check all of the facts in books or articles submitted to it. For example³, there is the First Amendment problem. The First Amendment to the Constitution of the United States prohibits laws "abridging the freedom of speech, or of the press." How long would it delay the news if the newspaper had to independently check every fact in every article? How much would it add to the cost of newspapers and books? How much would it interfere with the publication of unpopular ideas? How much harder would it be for a new writer or a controversial writer to get published? Could a political or religious group harass and eventually bankrupt a publisher with mistake-alleging lawsuits? In the face of such considerations, American courts have consistently held that a publisher is not liable for errors – not even for errors that cause personal injuries or deaths – that were made by an independent author.

The case of *Winter v. G.P. Putnam's Sons*⁴ provides a second instructive example. G.P. Putnam's Sons bought 10,000 copies of a book that was originally written and published in Britain. Putnam distributed the book in the United States after putting its label on the book, plus some material on the flyleaf that said that the book contained "strongly practical, wide-ranging reference sections" and that the book's reader would be able to identify and classify particular mushrooms "at a glance." Winter and a friend picked and ate mushrooms, relying on the Encyclopedia to distinguish safe from unsafe. Unfortunately, one of the mushrooms they ate was the *amanita phalloides* (a.k.a. *Death Cap*). They became very ill, required liver transplants, and incurred about \$400,000 in medical expenses. They sued.

The Court stated that ideas and expression are "governed by copyright laws; the laws of libel, to the extent consistent with the First Amendment; and the laws of misrepresentation, negligent misrepresentation, negligence, and mistake."⁵

After considering various arguments for imposing liability, the Court stated that "Guided by the First Amendment and the values embodied therein . . . we conclude that the defendants have no duty to investigate the accuracy of the contents of the books it publishes. A publisher may of course assume such a burden, but there there is nothing inherent in the role of publisher . . . to suggest that such a duty should be imposed."⁶

Exceptions

Here are several important exceptions to keep in mind:

- your company might also be the author
- your content might be about your own product
- the content might be defamatory
- your company might have created a warranty of accuracy or safety
- your company might have a special relationship with the reader or user of the content
- your content might be intended to be the sole source of information available to the user, and errors expose the user to great risk.

Each of these issues deserves an article much longer than this one (and you may see some of them in this magazine in the future).

Author Liability

In *Alm v. Van Nostrand Reinhold*, the judge threw out the case against Van Nostrand, but let it go forward against the book's author. The same thing happened in *Jones v. J.B. Lippincott Co.*⁷ In *Birmingham v. Fodor's Travel Publications, Inc.*,⁸ the Court said "No jurisdiction has held a publisher liable in negligence for personal injury suffered in reliance upon information contained in the publication unless the publisher authored or guaranteed the information."⁹

"The balance might well come out differently, however, if the publisher contributed some of the content of the book. The burden of determining whether the content was accurate"¹⁰ would be more reasonable to assign to a publisher that writes what it publishes.

This doesn't mean that your company will be liable for *every* mistake (or even most of them). The rules that govern author liability are complex.

But the point to keep in mind is that your *legal* duty to test content for accuracy is greater if you create it than if you buy it from someone else.

Of course, your customer satisfaction risks are probably the same in both cases – there is more to conducting honest and honorable business than meeting the minimum requirements of the law.

Your Own Product

Statements of fact about your own product can be taken as warranties that the product works as you've described it. See my article, "Liability for Defective Documentation" in Volume 2, #3 of *Software QA*.

Defamation

People and businesses can sue over false statements that damage their reputation. Laws of defamation (libel, slander, etc.) trade off free speech rights against peoples' needs to prevent the spreading of damaging lies about them. These are complex laws, especially complex if you sell the product in several countries.

If you think that some of the content your company is publishing might be defamatory, talk to your company's lawyer.

Warranty of Safety or Accuracy

If you promise that your material is safe or accurate, and if it is to your commercial advantage if people rely on your material, and if you invite people to rely on it, then it would be wise to be right. The classic case is *Hanberry v. Hearst Corp.*¹¹ The plaintiff bought shoes that bore the Good Housekeeping Seal of Approval and was injured. She sued Hearst (Good Housekeeping) alleging that the shoes were dangerously slippery and that Hearst had guaranteed the shoes when it published its approval of them.

Courts are cautious to avoid extending warranties beyond those intended by the publisher. For example, in *Yanase v. Automobile Club of Southern California*, the Court read a AAA Tourbook as rating the cleanliness and comfort of a motel, but not the safety of the motel's neighborhood.¹² And in *First Equity v.*

*Standard & Poor's Corp.*¹³, the Court carefully noted Standard & Poor's caution that it was compiling information from third parties and could not guarantee accuracy.

How does this apply to software? Software publishers sometimes make exaggerated claims, and these might result in a duty to test all of the content on the disk. Here's a purely hypothetical example, suggested to me by a colleague. Several programs on the market display city maps and offer directions from one place to another. Suppose that one such program was marketed with the claim written on the box that the maps are "up to date" and with the promise that the program will provide safe routes through strange cities. And suppose that, in fact, the publisher was using 17-year old maps because they were available very inexpensively. Could someone be injured or mugged as a result of inaccuracies in the map? If so, maybe they could sue.

Your company isn't obliged to make any promises about what it sells, but it is bound by any promises that it makes.

Special Relationship

You might have a special duty to provide accurate information to someone because of a contract or a professional relationship. For example, an accountant is liable to her client for errors in reports (such as audits) that she submits. The rules governing professional liability for misinformation are beyond the scope of this article. Feinman¹⁴ is a useful starting place.

Sole Source of Special Information

If your company publishes navigation charts that will be used in the air by pilots, it will be held liable for errors that cause crashes.¹⁵ If your company publishes warning labels, it will be held liable for accidents that occur because a label that should have said "FLAMMABLE" didn't.¹⁶

If you know that people will count on your product to provide them with accurate information, and that your product will be the primary (and maybe only) source of information that is available to these people, and that errors could result in deaths or injury, then you have to make sure that the information is accurate.

¹ *North Eastern Reporter, Second Series*, Volume 480, p. 1263 (Appellate Court of Illinois, 1985)

² *Alm*, p. 1267.

³ The First Amendment problem isn't the only problem. The *Alm v. Van Nostrand Reinhold* Court was more concerned about the potentially huge but unpredictable size of the class of potential plaintiffs. This is an important problem, but too specialized for this paper. If you're intrigued by it, I recommend Jay Feinman's book, *Economic Negligence*, Little Brown, 1995, Section 1.3.2, "The threat of indeterminate liability."

⁴ *Federal Reporter, Second Series*, Volume 938, p. 1033 (United States Court of Appeals, 9th Circuit, 1991). Some of the details of my description of this case are from Brett Lee Myers' article, "Read at your own risk: Publisher liability for defective how-to books", *Arkansas Law Review*, Volume 45, p. 699, 1992.

⁵ *Winter*, p. 1036.

⁶ *Winter*, p. 1036-37.

⁷ *Federal Supplement*, Volume 694, p. 1216 (United States District Court, District of Maryland, 1988). The plaintiff suffered an injury from treating herself after consulting the *Textbook for Medical and Surgical Nursing*.

⁸ *Pacific Reporter, Second Series*, Volume 833, p. 70 (Supreme Court of Hawaii, 1992).

⁹ *Jones*, p. 75.

¹⁰ *Lewin v. McCreight, Federal Supplement*, Volume 655, p. 282, 284 (United States District Court, Eastern District of Michigan, 1987).

¹¹ *California Appellate Reports, Second Series*, Volume 276, p. 680 (California Court of Appeal, 1969).

¹² *California Appellate Reports, Third Series*, Volume 212, p. 468 (California Court of Appeal, 1989).

¹³ *Federal Supplement*, Volume 670, p. 115 (United States District Court, Southern District of New York, 1987).

¹⁴ *Economic Negligence*, Little Brown, 1995.

¹⁵ For example, see *Halstead v. United States, Federal Supplement*, Volume 535, p. 783 (United States District Court, District of Connecticut, 1982).

¹⁶ *Firkin v. U.S. Polychemical Corporation, Federal Supplement*, Volume 835, p. 1048 (United States District Court, Northern District of Illinois, 1993).