Liability for Defective Content

Cem Kaner
Florida Institute of Technology
150 West University Blvd.
Melbourne, FL 32907
321-674-7137
kaner@kaner.com

ABSTRACT

Software publishers and information service providers publish information about their own products and about other products and people. Additional content might be incidental, such as discussion of the practice of accounting in documentation of a bookkeeping program. Or it may relate to a publisher's product, such as papers on the nature of a disease at the Web site of a manufacturer of a device used to diagnose that disease. Other content is irrelevant to the product, such as political articles on a company's Web site. In all of these cases, the publisher's technical publications or quality control staff might wonder whether they should check accuracy and tone of this content that is not direct documentation of the product under development. This article considers a variety of potential legal grounds for holding publishers accountable for content errors.

Categories and Subject Descriptors

K.5m [**Legal Aspects of Computing**]: Miscellaneous, D.2.7 [**Software Engineering**]: Distribution, Maintenance and Enhancement – *documentation.*

General Terms

Documentation, Legal Aspects, Verification.

Keywords

Documentation, professional liability, information liability, negligence, defamation, libel, warranty, Web content

1. INTRODUCTION

On March 23, 1980, William Alm was injured while attempting to make a woodcarving tool according to the instructions in a consumer how-to book, *The Making of Tools*. [2] He sued, claiming the instructions were wrong (defective) and the cause of his injury. The Court refused to allow the case to proceed against the publisher. It 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. The scope of liability would extend to an undeterminable number of potential readers. [2, p. 721]

Test all the procedures? Oh, no! No! Not That!

In another important case, G.P. Putnam's Sons bought 10,000 copies of a book originally published in Britain [23]. Putnam distributed the book in the United States after putting its label on the book, plus material on the flyleaf that said 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 [35]." Winter and a friend picked and ate mushrooms, relying on the Encyclopedia to distinguish safe from unsafe. Unfortunately, two pictures were switched and so the plaintiffs picked and ate *amanita phalloides* (a.k.a. *Death Cap*) mushrooms. They became very ill, required liver transplants, and incurred about $400,000 in medical expenses. They sued.

Like the Court in *Alm*, the *Winter* Court rejected the lawsuit against G.P. Putnam's Sons.

The *Alm* and *Winter* cases are two examples in a long series in which Courts refused to hold publishers liable for injury-causing errors in their books.

Publishers of software include a lot of content in user manuals, product help, and Web sites. *Do we get a free ride for errors? Can we count on the courts to shield us from liability?*

This article reviews this question in terms of American law. In that context, there is a default answer with several key exceptions.

The default rule is this:

- American courts will be highly protective of the right of authors and publishers to express themselves, even when they make mistakes.

The key exceptions are:

- Vendors can be held accountable for false statements about their own products.
- Authors can be held accountable for consequences of intentionally false statements.
- Authors and publishers can be held accountable for false, defamatory statements.
- Authors and publishers can be held accountable for the failings of products they endorse.
- Publishers have been held accountable for false statements that result in personal injury in some cases in which they knew that the reader would rely on them as authoritative guides to performance of a dangerous task. This is an example of the application of strict products liability to speech.

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- Authors (but not non-author publishers) might be held accountable for negligently false statements that result in personal injury.
- Authors (and perhaps non-author publishers) can be held accountable for negligently false statements that result in economic injury to a person who had a special relationship of trust with the author.

The structure of this paper follows the list above. That is, after asking how this ties to software documentation, the paper considers the default rules and the key exceptions in order.

2. Relevance to Software Documentation?

At last year's SIGDOC, I presented a paper on the software publisher's liability for defective documentation [29]. This year's SIGDOC paper focuses on the additional content that software companies and other software or information service providers give to customers or Web site visitors.

Here are some examples of content. Suppose a publisher's product is a bookkeeping system:

- The user documentation might include statements about the practice of bookkeeping, the practice of accounting, or the local tax system. These are statements about the world, not about the publisher's product.
- The documentation might include detailed procedures for troubleshooting another product that has to interoperate with the publisher's product.
- The publisher might feature a specific customer's use of the product. Now we have information about the customer's industry, the customer's company, and if we are using the customer's forms, examples, and explanations, then we have whatever else that person was writing about.
- The publisher might have a corporate Web site that features a far wider variety of content.

Suppose that you or your group take care of the technical editing and fact-checking of your company's user documentation. Should you also be testing content that is not focused on your company's product, that your company might not have authored, but that will appear in your manuals, your marketing collaterals, or on your Web site? This paper provides legal context for that question.

3. The Default Rule: No Liability

The present paper is an update to a brief article that I wrote in 1996. [28] Based on comments sent to me about that article, I know that some engineers and some technical writers don't think that it is impractical for a publisher to test every statement in its books. Consider the costs. For the publisher's review to be worth anything, it must be done by an expert. Publishers do often retain experts to do a technical review of a book, but (having edited for and been edited by several publishers, and having represented several other book authors, I speak from some experience in this), these reviews are superficial. This is not the level of review that would be needed to prevent Alm's injury (the reviewer would have to test every procedure, with careful attention to the ways in which novice readers might understand instructions differently from experts) or Winter's (the expert would have to review every picture in the final, laid-out book). Apart from the money cost, such reviews take time and impose publication delays.

- Books or articles critical of a new product might be delayed until after that product has enjoyed most of its initial sales cycle.
- Books or articles critical of a political view might be delayed until it is too late to influence the election.
- Books or articles critical of a draft standard might be delayed until after balloting for the standard.

Even if the author or publisher does extensive reviews, the threat of litigation can be used to intimidate publishers of critical works or works that favor a competitor's product. If the publisher has a *duty* to thoroughly check what it publishes, then that publisher faces a risk of being hauled into court to prove, at significant expense, that it did in fact meet its duty. Even if the publisher wins, it loses.

In the United States, the legal policies regarding the extent to which a software publisher can be liable for bad content stem directly from the First Amendment to the Constitution of the United States:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

This would be an empty guarantee if it was easy to sue authors for their mistakes. To silence an author espousing an unpopular view, you could sue every time s/he made a mistake (or something that could be argued to be a mistake). Even if the author prevails, s/he will have paid the legal defense costs of money, time, anxiety, and mental effort. For the First Amendment to have force, it must be very difficult to use the court system as a weapon to shut down speech.

The most direct way to protect the publisher from this risk is to decide, as a matter of law, that the publisher does not have such a duty in the first place. What it does not have to do, it does not have to justify having done well enough.

Thus, to explain (and enforce) the implications of the Constitution, the Supreme Court tells us

> The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty -- and thus a good unto itself -- but also is essential to the common quest for truth and the vitality of society as a whole.[5, p. 503-504]
>
> In order to advance society's interest in free and open discussion on matters of public concern and to avoid undue self-censorship by the press, the First Amendment establishes a broad zone of protection within which the press may publish without fear of incurring liability on the basis of injurious falsehood.[4, p. 1041]

These two quotes are from defamation cases: In *Blatty v. New York Times* [4], the Court refused to hold the Times liable for failing to include one of Blatty's books on its list of best sellers (thereby causing Blatty lost sales). In *Bose Corporation v. Consumers Union* [5], the Court rejected a product disparagement (trade libel) suit—even if Bose could show that one of Consumer Report's criticisms of Bose's

speakers was completely wrong, Bose also had to prove actual malice on the part of Consumer Reports.

For statements that are false but not defamatory (see defamation section below), the same protective attitude applies. The broad general rule is that publishers have no duty to check the statements made by a non-employee author. We saw that applied already above: the Courts in *Alm* [2] and *Winter* [23] both pointed out the impracticality of forcing a publisher to check every statement made by an author. To show the breadth of the rule, here are short summaries of a few more famous cases that illustrate the rule: *Birmingham v. Fodor's Travel Publications* [3] (plaintiff decided where to vacation and body surf using *Fodor's Hawaii 1988* which recommended what turned out to be a very unsafe place; publisher not liable for plaintiff's injuries), *Boyd v. Keyboard* [6] (*Keyboard* magazine had no duty to investigate the contents of what turned out to be a fraudulent advertisement), *Jones v. J.B. Lippincott* [16, p. 1216-1217] (plaintiff injured giving herself an enema, following instructions in the *Textbook for Medical and Surgical Nursing*: "If a publisher serves the function of publishing the contents of an author, other than one of its own employees . . . it has no duty for the contents"), *Lacoff v. Buena Vista Publishing* [17] (publisher had no duty to investigate the contents of of its bestselling investment advice book), *Lewin v. McCreight* [18, p. 284] (publisher not liable for an explosion that occurred while plaintiffs were mixing a mordant according to instructions in *The Complete Metalsmith*. "Given the tremendous burden such a duty would place upon defendant publishers, the weighty societal interest in free access to ideas, and potentially unlimited liability, it would be unwise to impose a duty to warn of 'defective ideas' upon publishers of information supplied by third party authors"), *Libertelli v. Hoffman-La Roche* [19] (publisher of the Physicians Desk Reference had no duty to investigate drug maker's claims about Valium or provide warnings beyond those from Valium's manufacturer), and *Smith v. Linn* [22, p. 351] (publisher of *The Last Chance Diet* was sued by families of people who died allegedly as a result of the diet: the publisher "owed no duty to the members of the general public with respect to the contents of one of its publications. Thus, there is no cause of action against a publisher for negligent publication or misrepresentation under the facts as alleged."). This is just a sampling of the cases. Smith [22] summarizes many more, stretching back to 1928. For more extensive reviews, see Day [25] and Noah [36].

Protection of speech is not so central to many other legal systems. As a result, some of the errors that are not actionable under American law can be actionable under other law. False statements made on Web sites might be read by people in many different countries, exposing the publisher to risk of liability under many different legal rules.

4. Statements About Your Own Product

Vendors can be held accountable for false statements about their own products. I have nothing new to report on this since the last SIGDOC. To summarize that paper [29]:

- Statements of fact (statements that can be proved true or false) about the product, from the seller to the buyer, create warranties. A warranty is an enforceable promise about the capabilities or quality of the product. If the product doesn't live up to the promise, the customer can sue for breach of warranty.
- Intentional misstatements can be the basis of a prosecution or civil suit for fraud.
- A repeated course of statements that give readers a false impression can be the basis for prosecution or suit for deceptive trade practices, even if the statements are not literally false and even if the vendor did not know they were false.

There are circumstances under which your company can avoid liability for false statements about its own products, but I encourage you to think of these as technical defenses to be used by lawyers as a last resort, not as shields that you can plan on hiding behind.

5. Intentionally False Statements

Sometimes, people make false statements about other people, other people's products, ideas or things. According to the classic text on tort law, *Prosser & Keeton on Torts*:

> The elements of the tort cause of action in deceit . . . frequently have been stated as follows:
>
> 1. A false representation made by the defendant. In the ordinary case, this representation must be one of fact.
>
> 2. Knowledge or belief on the part of the defendant that the representation is false—or, what is regarded as equivalent, that he has not a sufficient basis of information to make it. . .
>
> 3. An intention to induce the plaintiff to act or refrain from action in reliance upon the misrepresentation.
>
> 4. Justifiable reliance upon the representation on the part of the plaintiff, in taking action or refraining from it.
>
> 5. Damage to the plaintiff, resulting from such reliance.[30, p. 728]

This extends beyond statements about your own product. If you lie to someone about anything, and they can prove damages (lost money or personal injury) as a result of this fraud, they can recover their losses from you, along with an additional penalty (punitive damages).

Additionally, if Person 1 makes intentionally false statements to Person 2 and those cause damages to Person 3, then Person 3 can probably sue Person 1.

Being successfully sued for fraud is so damaging to one's reputation that courts require "clear and convincing" evidence of fraud, that is, more and better evidence than you normally need to prove most things in a civil suit. A defendant who faces that level of evidence is unlikely to get much sympathy from the judge.

As a practical matter, the best working assumption is that intentionally false statements will subject the author to liability. If the author is an employee of the publisher, or if the publisher knows the statements are false but publishes them anyway, the publisher can be held liable too.

For statements that are false but not defamatory (see next section), the general rule applies that publishers have no

duty to check statements of a non-employee author, and therefore the publisher would not be liable.

6. Defamation

In this general class, I include false statements that harm the reputation of a person or a product. This includes slander (oral statements that harm the reputation of a person), libel (published statements, including written ones and taped oral ones), and product disparagement.

> Under our Constitution there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. Nevertheless, there are categories of communication and certain special utterances to which the majestic protection of the First Amendment does not extend because they are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. Libelous speech has been held to constitute one such category. [5, p. 504, citations omitted]

Intentionally false defamatory speech is not protected by the First Amendment. However, to recover damages for defamation, a public figure (such as a famous person or a public official) must prove that the false statement was made with "'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not." [20, p. 280] The Court's *Bose* [5] decision clarified that widely advertised products can be treated as equivalent to public figures. The original speaker or a subsequent publisher can be held liable for defamation. There is also wide protection if the subject matter of an article is of public concern (a topic that would normally be considered newsworthy.[10] However, if the victim is a private individual, and the defamatory statement is about something that is not a matter of public concern (such as the victim's credit report), the First Amendment's protection of controversial speech is less deeply implicated and the plaintiff need not prove actual malice in order to recover damages.[10]

The balancing act between First Amendment protection of speech and the rights of the defamed person is complex. However, I can simplify it for people writing documentation about products or processes. If you make negative statements about a person or product (especially a competitor's product), you expose yourself or your company to risk.

If you intend to publish negative statements about some other person or product, make sure your facts are accurate and that you have credible evidence to support them. If you think they might offend or anger that person (or vendor of the product) or if you are publishing outside the United States, carefully consider passing them by your or your company's lawyer. (If someone outside the U.S. views a Web site, that might be sufficient for "publication outside the United States.")

Truth of your statements is an absolute defense to a lawsuit for defamation in the United States, but not in all other countries. Other countries can be much less protective of a person whose false defamatory statements were the result of good faith error on her or his part, rather than malice.

7. Endorsements

Publishers (and probably authors) can be held accountable for the failings of products they endorse. The leading cases are *Hanberry v. Hearst* [12] and *Hempstead v. General Fire Extinguisher* [13]. In *Hanberry*, the Court ruled that Hearst could be held accountable for giving the Good Housekeeping Seal of Approval to shoes that were allegedly defectively designed. The Court's rationale:

> Since the very purpose of respondent's seal and certification is to induce consumers to purchase products so endorsed, it is foreseeable certain consumers will do so, relying upon respondent's representations concerning them, in some instances, even more than upon statements made by the retailer, manufacturer or distributor. … Having voluntarily involved itself into the marketing process, having in effect loaned its reputation to promote and induce the sale of a given product . . . in voluntarily assuming this business relationship, we think respondent [publisher] has placed itself in the position where public policy imposes upon it a duty to use ordinary care in the issuance of its seal and certification of quality so that members of the consuming public are not unreasonably exposed to the risk of harm.[12, p. 684]

In *Hempstead*, similar reasoning was applied against Underwriters Laboratories for an allegedly defectively designed fire extinguisher.

These two cases are from the 1960's. There have been few recent, published cases that consider this issue. However, *Hanberry* and *Hempstead* continue to be continue to be widely cited as currently applicable statements of the law.[39]

Simple praise for someone else's product is not enough to count as an endorsement for liability purposes. There are so few cases that it is very hard to lay out the borders of the concept. I have given legal advice on this matter to independent test labs—a rough summary of that advice would be that if you stand to gain any level of commercial advantage from being an endorser, and the endorsement you give can be used in the promotion of the endorsed product, then you are at risk of liability for defects in that product. You are also assuming a risk of liability if you can enforce a standard or mark a product as conforming to that standard, and one would normally expect customers to look for that mark.[11]

As a specific example of interest to writers, suppose your company makes Product X and someone else publishes "The Official Guide to Product X" with (accurate) statements on the cover that your company approved or authorized the book. Your company might be accountable for injuries caused by defects in that book. (It could also be argued that your endorsement turns statements in the book about the characteristics of the product into warranties.) As another example, if you certify a product as Product-X-compatible, then compatibility defects in the product might be held against you as much as against the maker of the product.

If it comes to a lawsuit, there are cases that your lawyer can rely on that hold that a certifier cannot be held accountable for a defect if it was not involved in the products manufacture or distribution. (See [14] for example.)

8. Strict Products Liability

Most products liability cases involve an allegation of *negligence*, of faulty practices on the part of the manufacturer or distributor that caused the product to be defective and unreasonably dangerous. In a *strict liability* case, we skip the question of manufacturer's fault. If the product is defective, and the defect causes the product to be unreasonably dangerous, the manufacturer is accountable even if it took great care in the design and manufacturing of the product.[24, 30]

Ten or fifteen years ago, this would have been a long and carefully drafted section of this paper. The courts were holding makers of aeronautical charts strictly liable for errors in the charts [1, 7, 21, 40]. In *Brocklesby v. United States*, the court held the publisher liable even though the underlying error had been made by the United States Federal Aviation Authority. The underlying assertion, repeatedly made in the aeronautical chart cases, is that authors and publishers should be held accountable for false statements that result in personal injury if they know that the reader will rely on them as authoritative guides to performance of a dangerous task.

Through the 1980s and early 1990s, plaintiff after plaintiff, and article after article argued that aeronautical chart decisions should be extended to other products or that some variation of strict liability should be crafted for situations in which defective information (like the errors in *Alm* and *Winter*) lead to injury. Mintz [34] is a good example of a scholarly article from that time.

In most of the cases that I cited in Section 3 (above), and dozens of others, plaintiffs lawyers tried—without success—to convince judges to extend strict liability to other information products. There are still a few calls in the law journals for strict liability for information products (such as [33]) and I still hear people at technical (computing) meetings using the air chart examples and a brief remark in *Winter* to back up dire warnings of strict liability for errors. But I think the dust has settled the other way. My reading of the cases, including every published lawsuit that has cited the main aeronautical chart cases and every published lawsuit that has cited *Winter*, agrees with Schultz's conclusion, that

> Aeronautical charts are the only communication media ever judged by any court [in the United States] to be "products" and the only communication media ever deemed subject to "strict product liability." That is, while publishers may be held strictly liable for publishing certain harmful and damaging information, such as defamatory falsehoods regarding private persons or publications that infringe a copyrighted work, such publications were never considered products subject to products liability. [40, p. 431]

The ALI (American Law Institute) recently published a Restatement of Products Liability. [24] The Restatements are treated by most appellate courts as authoritative summaries of the common law. The Restatements are not statutes—judges are not bound to follow them, and many judges disagree with specific statements or reach a different conclusion based on statutes or precedents in their jurisdiction. However, quotes from the Restatements routinely appear in court decisions as if they were final statements of the law. They are very persuasive for many judges because they are drafted by an organization that is itself dominated by judges and law professors in a thorough, scholarly, widely-reviewed process that extends over many years. After extensive discussion of this issue, the ALI addressed strict liability for information products as follows:

> Plaintiffs allege that the information delivered was false and misleading, causing harm when actors relied on it. They seek to recover against publishers in strict liability in tort based on product defect, rather than on negligence or some form of misrepresentation. Although a tangible medium such as a book, itself clearly a product, delivers the information, the plaintiff's grievance in such cases is with the information, not with the tangible medium. Most courts, expressing concern that imposing strict liability for the dissemination of false and defective information would significantly infringe on free speech have, appropriately, refused to impose strict products liability in these cases. One area in which some courts have impost strict products liability involves false information contained in maps and navigational charts. In that context the falsity of the factual information is unambiguous and more akin to a classic product defect. However, the better view is that false information in such documents constitutes a misrepresentation that the user may properly rely on.[24, Section 19, note d.]

This part of the Restatement has been criticized in a well-written article [36], but at this time, I do not believe that strict liability is a viable approach for seeking recovery for the consequences of non-defamatory false statements.

9. Negligent Misrepresentation Resulting in Injury

Many of the court opinions that rejected publisher liability for negligently false statements that resulted in personal injury specifically did *not* reject author liability.

For example, in *Lewin v. McCreight*,[18] the Court rejected publisher liability for an explosion that occurred while plaintiffs were mixing a mordant according to instructions in the publisher's book, *The Complete Metalsmith*. The Court concluded its opinion, however, with the following:

> 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 would be less than in the present case.

The "burden" that the Court refers to is the burden of checking everything in the book to make sure that it is accurate. This may be too high a burden for the publisher (see Section 3, above), but an author who lacks the skill and knowledge to check his own work probably shouldn't be writing the book.

The Court also specifically distinguished between the author (who was not dismissed from the case when the publisher was) in Alm v. Van Nostrand Reinhold [2], Smith v. Linn [22] and Jones v. J.B. Lippincott [16] ("Author liability for errors in the content of books, designs, or drawings is not firmly defined and will depend on the nature of the publication, on the intended audience, on causation in fact, and on the forseeability of damage" [16, p. 1216]).

The normal analysis of negligence involves four factors: (a) duty owed by the defendant to the victim; (b) breach of the duty by the defendant; (c) a personal injury or property damage that was (d) caused by the breach of the duty.

Several of the cases that concluded that the publisher owed no duty of accuracy to the public involved a publisher who was also the author of the work, such as *Daniel v. Dow Jones.*[9] The First Amendment concerns that cause us to reject duty for the publisher apply at least as much to authors (who rarely have as much money as publishers, or publishing-expert lawyers, or author/publisher liability insurance policies, and so who are even more likely to be intimidated or bankrupted by litigation). This is a good argument for your lawyer to try if you are ever sued for negligent misrepresentation resulting in injury, but as a practical matter, you might not want to rely on it when planning what to say in the first place, because several courts will not accept it.

Assume for now that you have a duty to either stay silent or provide information that is not unreasonably likely to be both wrong and dangerous. Under a traditional negligence standard, you would breach that duty if you knew that what you were writing was incorrect or you should have known—a reasonably cautious writer would have taken normal steps that would have resulted in their discovery—that it was incorrect. Some authors advocate a "recklessness" standard instead (such as [32]). Under such a standard, you would recklessly breach the duty if you knew that what you were writing was incorrect or you had no idea whether it was correct or not and had taken no reasonable steps to inform yourself.

If you write false (erroneous) statements, with the expectation that the reader will rely on them in performing a dangerous task or in making a decision that carries a risk of injury, the more it appears that your error was intentional or reckless, the more likely a judge and jury would be to find you negligent and liable for a victim reader's injuries. It is specifically for that reason that counsellors to publishers recommend that they require freelance authors to sign indemnification clauses in their publishing contracts.[38, Volume 1]

On this issue, I think the best advice is the most obvious. If you are writing about something that could be dangerous to the reader, and you give specific instructions on how to do something risky or how to identify something dangerous or how to make a risky decision, then you would be wise to take reasonable care to get your facts straight when you write your manuscript and to check that the publisher's editing or layout staff didn't introduce error in the process of readying your manuscript for publication.

10. Negligent Misrepresentation Involving a Special Relationship

Authors (and perhaps non-author publishers) can be held accountable for negligently false statements that result in economic injury to a person who had a special relationship of trust with the author.

The classic description of this type of lawsuit comes from a 1927 case, *International Products Company v. Erie Railroad Company*:

> Liability in such cases arises only where there is a duty, if one speaks at all, to give the correct information. And that involves many considerations. There must be knowledge or its equivalent that the information is desired for a serious purpose; that he to whom it is given intends to rely and act upon it; that if false or erroneous he will because of it be injured in person or property. Finally the relationship of the parties, arising out of contract or otherwise, must be such that in morals and good conscience the one has the right to rely upon the other for information, and the other giving the information owes a duty to give it with care. [15, p. 338]

Typical examples of the special relationships involved are lawyer, doctor, accountant—any profession who is giving you professional advice.

In general, a publisher does not have this relationship with the readers of its publications. However, the publisher might have two relationships with a reader, one as publisher and the other as professional service provider. For example, in the case of County of Orange v. McGraw Hill Companies, the court ruled that McGraw Hill could be held liable to the county not as a publisher of incorrect information but as a rating service (Standard & Poor's) that failed "to competently perform the rating services [giving] rise to tort liability in the form of professional malpractice." [8, p. 2]

With the rise of medical advice on the Net, there is extensive discussion of potential medical malpractice liability (See, for example, [27, 31, 37, 41, 42]) and of potential liability of lawyers, auditors (and so on) publication of advice on the Net.

Over the past two decades, there has been a firestorm of discussion and political work involving liability of auditors and other professionals to the public when, for example, they certify that a company (think of Enron) is following accepted accounting practices. These debates are far beyond the scope of this article. For analysis of liability of professionals to non-clients who read their opinions or receive (via publication) their advice, start with Feinman [26].

11. CONCLUSION

Software development groups, including documentation writers, are under tremendous pressure to reduce cost and release products sooner. Those products often include third party content or content about third party products or about other topics. Information service providers are under pressure to add new material to their Web sites every day (or every few minutes). If you are an editor or quality control specialist working for a publisher, you will probably not be given the time you would need to thoroughly eheck every fact. However, you might be able to argue for time to skim these documents, searching for instances of writing that appears to offer professional advice or advice or instructions about risky decisions or tasks or that appears to be making factual negative statements about a person or product. These statements might be a small subset of what your company publishes, and there is value in getting them right—or at least in taking reasonable steps to check their accuracy.

12. REFERENCES

[1] Aetna Casualty & Surety Co. v. Jeppesen & Co., *642 F.2d 339*: United States Court of Appeals (Ninth Circuit), 1981, pp. 339.

[2] Alm v. Nostrand Reinhold Co., *134 Ill. App. 3d 716*: Appellate Court of Illinois, 1985, pp. 716.

[3] Birmingham v. Fodor's Travel Publications, *73 Haw. 359*: Supreme Court of Hawaii, 1992.
[4] Blatty v. New York Times Co., *42 Cal. 3d 1033; 728 P.2d 1177; 232 Cal. Rptr. 542*: Supreme Court of California, 1986, pp. 1033.
[5] Bose Corporation v. Consumers Union, *466 U.S. 485*: Supreme Court of the United States, 1984, pp. 485.
[6] Boyd v. Keyboard, *2000 U.S. Dist. LEXIS 2904*: United States District Court (Northern District of California), 2000, pp. 2904.
[7] Brocklesby v. United States, *767 F.2d 1288*: United States Court of Appeals (Ninth Circuit), 1985, pp. 1288.
[8] County of Orange v. McGraw-Hill Companies, Inc., *1998 U.S. Dist. LEXIS 6072*: United States District Court (Central District of California), 1998, pp. 6072.
[9] Daniel v. Dow Jones & Co., *137 Misc. 2d 94*: Civil Court of the City of New York, 1987, pp. 94.
[10] Dun & Bradstreet v. Greenmoss Builders, *472 U.S. 749; 105 S. Ct. 2939; 86 L. Ed. 2d 593*: Supreme Court of the United States, 1985, pp. 749.
[11] FNS Mortgage Service Corp. v. Pacific General Group, Inc.,, *24 Cal. App. 4th 1564; 29 Cal. Rptr. 2d 916*: Court of Appeal of California, 1994, pp. 1564.
[12] Hanberry v. Hearst Corp., *276 Cal. App. 2d 680; 81 Cal. Rptr. 519; 39 A.L.R.3d 173*: Court of Appeal of California, 1969, pp. 680.
[13] Hempstead v. General Fire Extinguisher Corp., *269 F. Supp. 109*: United States District Court (Delaware), 1987, pp. 109.
[14] Howard v. Poseidon Pools, Inc., *133 Misc. 2d 50; 506 N.Y.S.2d 523*: Supreme Court of New York, 1986, pp. 50.
[15] International Products Company v. Erie Railroad Company, *244 N.Y. 331; 155 N.E. 662*: Court of Appeals of New York, 1927, pp. 331.
[16] Jones v. J.B. Lippincott Co., *694 F. Supp. 1216*: United States District Court (Maryland), 1988, pp. 1216.
[17] Lacoff v. Buena Vista Publishing, Inc., *183 Misc. 2d 600; 705 N.Y.S.2d 183*: Supreme Court of New York, 2000, pp. 600.
[18] Lewin v. McCreight, *655 F. Supp. 282*: United States District Court (Eastern District of Michigan), 1987, pp. 282.
[19] Libertelli v. Hoffman-La Roche, Inc., *1981 U.S. Dist. LEXIS 11049*: United States District Court (Southern District of New York), 1981, pp. 11049.
[20] New York Times Co. v. Sullivan, *376 U.S. 254; 84 S. Ct. 710; 11 L. Ed. 2d 686*: Supreme Court of the United States, 1964, pp. 254.
[21] Saloomey v. Jeppesen & Co., *707 F.2d 671*: United States Court of Appeals (Second Circuit), 1983, pp. 671.
[22] Smith v. Linn, *48 Pa. D. & C.3d 339*: Common Pleas Court of Montgomery County, Pennsylvania, 1988, pp. 339.
[23] Winter v. G.P. Putnam's Sons, *938 F.2d 1033*: United States Court of Appeals (Ninth Circuit), 1991, pp. 1033.
[24] ALI, *Restatement of the Law Third, Torts: Products Liability*. St. Paul, MN: American Law Institute Publishers, 1998.
[25] Day, T. R. Publications that Incite, Solicit, or Instruct: Publisher Responsibility or Caveat Emptor?, *Santa Clara Law Review*, *36*, (1995), 73.
[26] Feinman, J. M., *Professional Liability to Third Parties*. Chicago, Il: American Bar Association, 2000.
[27] Gable, J. K. An Overview of the Legal Liabilities Facing Manufacturers of Medical Information Systems, *Quinnipiac Health Law*, *5*, (2001), 127-151.
[28] Kaner, C., Liability for Defective Content, in *Software QA*, vol. 3, 1996, pp. 56. http://www.kaner.com/pdfs/content.pdf.
[29] Kaner, C., Liability for Defective Documentation, *Proceedings of the 21st Annual International Conference on Documentation (SIGDOC '03)*, (San Francisco, CA, October 12-15, 2003). ACM Press, New York, NY, 2003, 192 - 197.
[30] Keeton, W. P., Dobbs, D. B., Keeton, R. E., and Owen, D. G., *Prosser & Keeton on The Law of Torts*, 5th ed. St. Paul, MN: West Publishing, 1984.
[31] Lamkin, B. H. Medical Expert Systems and Publisher Liability: A Cross-Contextual Analysis, *Emory Law Journal*, *43*, (1994), 731-770.
[32] Lane Jr., D. M. Publisher Liability for Material that Invites Reliance, *Texas Law Review*, *66*, (1988), 1155-1193.
[33] Leadstrom, N. D. Internet Web Sites as Products Under Strict Products Liability: A Call for an Expanded Definition of Product, *Washburn Law Journal*, *40*, (2001), 532-560.
[34] Mintz, J. B. Strict Liability for Commercial Intellect, *Catholic University Law Review*, *41*, (1992), 617-649.
[35] Myers, B. L. Read at Your Own Risk: Publisher Liability for Defective How-To Books, *Arkansas Law Review*, *45*, (1992), 699.
[36] Noah, L. Authors, Publishers, and Products Liability: Remedies for Defective Information in Books, *Oregon Law Review*, *77*, (1998), 1195-1228.
[37] Noah, L. Medicine's Epistemology: Mapping the Haphazard Diffusion of Knowledge in the Biomedical Community, *Arizona Law Review*, *44*, (2002), 373-466.
[38] Perle, E. G., Williams, J. T., and Fischer, M. A., *Perle & Williams on Publishing Law*. New York: Aspen Publishers, 2004.
[39] Rockwell, H. P. Products Liability of Endorser, Trade Association, Certifier or Similar Party Who Expresses Approval of Product, *American Law Reports 5th*, *1*, (1992 (Updated 2001)), 431.
[40] Schultz, R. B. Application of Strict Product Liability to Aeronautical Chartpublishers, *Journal of Air Law and Commerce*, *64*, (1999), 431-458.
[41] Smalley, R. E. Will a Lawsuit a Day Keep the Cyberdocs Away? Modern Theories of Medical Malpractice as Applied to Cybermedicine, *Richmond Journal of Law & Technology*, *7*, (2001), 29-50.
[42] Terry, N. P. Cyber-Malpractice: Legal Exposure for Cybermedicine, *American Journal of Law & Medicine*, *25*, (1999), 327-366.