Questions of Liability in the Provision of Information Services

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Questions of Liability in the Provision of Information Services

by Sabine Denis and Yves Poullet

Today the total number of databanks is still increasing, and on-line information providers are facing almost unlimited opportunities to expand their services both on a national and international level. Unfortunately for database producers, this also means increasing the risk of liability as the number of potential users and kind of uses of the information is growing. This risk of liability is not a fiction. The user expects the information received to be reliable and accurate. In case of unreliability or inaccuracy, blame will fall on the person who provided the information.

Though everybody may be convinced the question of liability is an important one, suprisingly, up to now, very few cases have been brought before the courts concerning the liability of on-line information services. Therefore one has to refer to liability law regarding more traditional means of providing information such as the printed press. Although there is a temptation to view automated information services as a new and distinct type of industry, there seems to be no basis to distinguish these types of services — as reading data from a computer screen is really little different from reading it in a newspaper. The information provider may then be seen as the author of the work and the service provider fulfills the function of publisher, normally just collecting and transmitting the information. The scope of this paper will be limited to the liability of the electronic information provider and service provider.

Suprisingly, up to now, very few cases have been brought before the courts concerning the liability of on-line information services

Liability law

Basically, liability law emanates from three important sources: the law of torts, the law of contracts and strict liability law.

Contract law occurs when a contractual relationship exists between two parties. Regarding the provision of on-line information services, contract law will apply whenever the parties are linked directly by a written agreement. The liability wil be determined by the terms of the contract.

Tort law (or negligence) on the other hand, applies to those persons who are not in a contractual relationship. In principle, the person causing damages due to his or her own fault or negligence, will be liable for these damages.

Strict liability may be imposed in exceptional cases, without proof of fault, against a manufacturer or seller of goods sold with a defect which is unreasonably dangerous to a customer. The essential distinction between this and tort law is that the absence of negligence on the side of the producer will not as such excuse liability.

Before getting on to a more detailed examination of these different liabilities, we would like to stress the fundamental distinction that should be made between liability of a technical nature and liability linked to the content of the information. Basically, on-line information services involve two main functions: the production function and the provision function. Generally, the production function is covered by the database producer or information provider, who could be considered the manager of the information system, responsible for the content of the product offered to the public. Once the database is created, the producer may decide to licence it to an on-line service provider. The service provider is the person or organization offering the final information product to the user. The provision function embraces the material and technical provision of the information to the end-user and the commercialization of the information (marketing, billing of the service). Finally, provision necessarily implies carriage of the information . The carriage function is often separated from the provision function strictly speaking, because it generally involves two distinct partners. It should be noted that production function and provision function are quite commonly exercised by one and the same person, called the integrated information provider.

Production function and provision function are quite commonly exercised by one and the same person

Responsible parties

The variety of actors involved is of prime importance in respect of the issue of liability, as the obligations of the actors vary according to each specific function.

All the actors involved in the provision of the information to the end-user could be potential defendants in liability suits :

■ *The information provider:* the author of the information will almost certainly be named as defendant in a suit for inaccurate information liability. The author could be the information provider himself, if primary information had been stored in the database or another person, author of the original work being reproduced in the database. Liability will mainly concern the quality of the information stored in the database (accuracy, completeness and legality), though it may sometimes extend to the quality of the service rendered. Up till now there have been only a very few cases in which the liability of on-line information providers has been upheld, such as in the case of *Dun & Bradstreet* v. *Greenmoss Builders* (472 US 749 (1985)), in which the credit reporting agency was found liable for inaccurately reporting in an information service that Greenmoss had voluntary filed for bankruptcy.

■ *The service provider:* the service provider merely disseminates the information but has no part in its generation. He will be liable for the errors which occur within the system, such as data entry, editing and dissemination mistakes as well as the quality of the service rendered (response time, availability *etc*). As far as we know, no electronic service provider has yet been held liable.

■ *The software developer:* where automated information services are concerned, the software programmer plays an important role. If negligent programming produces inaccurate or misleading information, although possibly unavoidable, the end-user may well have an action against the software programmer. In the US, for instance, a software developer was found liable for the death of a cancer patient due to an overdose of X-rays, which had been caused by a "software-bug" in the computer calculating the X-rays.

■ *The network provider:* the public network provider offers the means by which the information may be transferred and also plays a significant part in the electronic information provision. Data loss or modifications are often caused by a technical fault attributable to the network. In Italy, for instance, the Italian Constitutional Court has recently ruled that services such as the PTT (post office and telecommunications service) should operate as enterprises and would probably be liable in cases of negligence (Constitutional Court, March 17, 1988, (decision 303) and Constitutional Court, December 20, 1988 (decision 1104). However, in most European countries, the liability of the PTT is completely excluded by the law or, as in Germany or in France, limited to certain circumstances.

With respect to the provision of on-line information, the regulations of copyright law are of prime importance to the provider of secondary information

■ *The user or end-user:* the part played by the (end)-user, to whom the information is supplied, is often far from neutral. The user is involved in the searches made — participating in the process by dint of the data the user supplies in the search, so that it is sometimes very difficult to determine the original cause of the loss. Moreover, the user will be responsible for the use he or she makes of the information once it has been obtained.

A broker or intermediary may also be liable if, due to an inadequate search, the client suffers losses. In Germany, for instance, a court held a specialized (patent and engineering) information service responsible for not having used updated materials. The court came to the conclusion that the information service had grossly infringed on its duties towards its clients (the so-called "Doppelparker-case" (OLG Karlsruhe GRUR 1979 p 267)).

The information and service providers

Within the limits of this study, we have only examined liability for the provision of inaccurate, incomplete or out-of-date information. But the question of responsibility may arise in several other situations.

Even accurate information may cause damage when infringing the lawful rights of another person, such as copyrights or privacy rights. With respect to the provision of on-line information, the regulations of *copyright law* are of prime importance to the provider of secondary information. The legal copyrights of the authors of the information stored in the database must be respected. If one stores personal information in a database, the *privacy laws* are important. But because of the variety of regulations involved, as well as the lack of harmonization within the different countries , an examination of the penal and copyright liabilities with respect to the provision of information is beyond the scope of this article. It must be stressed, however, that these liabilities do exist — and the sanctions are considerable.

Liability in tort

Liability in tort, based on proof of fault, primarily applies to those situations where the persons involved have no contractual relationship, even if in some countries actions in tort and actions for breach of contract may concur. The most striking point within this field of study is the total absence of any case law of direct relevance to the provision of

information systems. We have therefore examined existing case law concerning more traditional means of providing information such as paper editing and press.

Dun & Bradstreet, Inc* v *Greenmoss Builders, Inc

Dun & Bradstreet is well known as the credit reporting agency which provides financial information about businesses. On the request of one of its clients, the agency sent a report, indicating that a company named "Greenmoss Builders" had filed a voluntary petition for bankruptcy. While discussing the possibility of future financing with its bank, Greenmoss was told that the bank had received the bankruptcy report. Greenmoss questioned Dun & Bradstreet, who apologised for their mistake due to an error committed by a student working for them over the summer. This mistake had not been corrected by Dun & Bradstreet before reporting it.

Greenmoss, however, considered that an apology was not sufficient, and it sued the credit agency for punitive damages as it considered that D&B had not only been negligent but reckless (472 US 749 (1985)). Dun & Bradstreet argued that on the basis of the First Amendement principle of freedom of speech, it could not be held liable for defamation, as the information was confidential and only revealed to the subscribers of the service.

The court held that the First Amendement principle only applies in "matters of public concern", whereas "speech on matters of purely private concern is of less First Amendment concern". With regard to databases, the information will not be protected by the first amendement if it does not concern the general public interest.

Before this case, the American courts had, on several occasions, stressed the "chilling effect" of liability for misrepresentation which would impede a business's expansion, for instance for errors committed by the Wall Street Journal (*Gutter* v *Dow Jones Inc.*, 490 N.E. 2d 898 (Ohio 1986)) as it considered that the user cannot blindly rely on the information and cannot expect this information to be 100 percent reliable.

However, in the Greenmoss case the court considered that there would be no such chilling effect since the market puts a hefty onus on the credit reporting agencies to be accurate. For database producers, this could result in a troublesome distinction being made between traditional means of reporting and electronic ones, the electronic ones being more easily liable because the market offers to those services sufficient incentive to expand despite potential liability.

Saloomey* v *Jeppesen

This case is important insofar as it is the first case in which the principle of strict liability has been applied to an information service. It concerned a very experienced pilot who flew an aircraft which was equiped with navigational charts produced by Jeppesen. Three types of charts are generally furnished: enroute charts, area charts and approach charts. The pilot decided to change his airport destination to an airport for which he had only an area chart and not a detailed approach chart. The Jeppesen's area chart said the airport chosen by the pilot contained a full instrument landing system, though it did not. The plane crashed in unclear circumstances and the occupants were killed. No evidence of aircraft malfunction or pilot infirmity was discovered and the company sued Jeppesen for negligence and strict product liability (707 F.2d 671 (1983)).

Jeppesen's main argument was that navigational charts are services rather than products and therefore not subject to a strict product liability claim. The court, however, defined the chart as a product, stating that the charts "reach (the pilot) without any individual tailoring or substantial change in contents — they are thus simply massproduced (...). By publishing and selling the charts, Jeppesen undertook a special responsibility, as seller, to ensure that consumers will not be injured by the use of the charts". The court concluded that Jeppesen had to bear the costs of accidents caused by defects in the charts.

If this case is to be a precedent for future cases, information would be considered as a product when it is widely diffused by the "information seller" in a product aspect chart, database contained on disk, CD-ROM, *etc*, and when the user uses it without any change to the content. However, one can not draw a general conclusion from this case as American courts often have circumstantial reactions — and in other cases, information similarly supplied was deemed a service. The law seems set on a case-by-case basis following the circumstances and the judges' impression of the situation.

Decimal point mistake case

The first European case, was in Germany (BGH NJW 1970, p 1963) — the publisher of a medical book was sued by a victim of malpractice, who nearly died from a misprint. A decimal point was missing in one of the medical formulae (the advice to inject a "2.5 percent NaCl infusion" read a "25 percent NaCl infusion"). The court stated first that readers can never expect a complete absence of misprints in the field of "normal" print products. However, publishers have a special obligation to use all suitable techniques to avoid misprints, especially with regard to special information such as mathematical or medical information. In this particular case however, every medically-educated person should have noticed the misprint and therefore the publisher was under no duty to take extraordinary preventive measures to avoid misprints. The claim was therefore rejected.

Gribinsky* v *Nathan

This French case is important because of the court's severe attitude towards the publisher. A practical German guide was translated and published in France under the title "Fruits et plantes comestibles". The book described the wild carrot as being edible but unfortunately a person died as a result of confusing the

wild (edible) carrot with the very similar but poisonous hemlock. The court held that the French publisher of the book committed a fault, as he has a duty to make sure before the publication of a book on edible fruits and plants, that the readers could fully rely on the contents of the book (T.G.I. 1er, 28-5-1986, D. 1987 IR, 3R). The publisher was found liable for not taking enough precautions to get round the author's negligence, as a fatal accident was caused directly by a confusion between an edible and a poisonous plant. The French publisher was held liable, along with the German publisher of the original copy, and the German author, who were all under the same duty to verify the quality of a book before publishing it. This seems to be a very extensive obligation for the publisher, who has no power of control over the information but merely passes it on to the public. In the case of an on-line information provider, such an obligation would almost be impossible regarding the amount of information on offer, and the speed at which it is transferred.

The prognosis

When examining the above mentioned case-law, the courts seem to make distinctions based on the content of the information provided. General information services such as , newspapers or broadcasting services, considered differently from other services that supply specialized data intended to meet the needs of professionals.

As a matter of principle, the general information services have a duty to give correct information and to check the information for errors. Even the principle of freedom of information does not discharge the information services from the general duty of care imposed on everyone. The situation seems to be slightly different in the common law countries, such as the US, where there is an obligation to show "actual malice" of the press to prove its liability.

With regard to misstatements which are not grossly negligent, courts seem more reluctant to accord the liability of public information services. Undetected minor errors or mere oversights during testing will not usually be sufficient to establish damage, if proper and reasonable procedures have been followed.

The services that supply specialized information, on the other hand, to a limited group of persons, seem to be subject to a higher duty of care to avoid negligence. Commercial information agencies, such as credit information agencies, should be careful, especially when dealing with information about another person, and check the information carefully. Their liability will be upheld if the victim can prove a fault (or negligence) on the part of the credit agency, which, had the agency done sufficient research, would not have happened. It would not be enough for the professional information provider to show that all reasonable measures to avoid errors have been taken, but will have to prove that he or she has acted the way a reasonable information provider would act when placed in the same circumstances, regarding the nature of the information provided (scientific, medical or other sensitive information), the expectations of the users (*ie* whether they are professional or not, the price paid for the services, *etc*), the type of damages suffered (personal injury or economic loss), and so on.

Generally, information services of this kind are provided on a contract basis, and the parties will use contractual remedies whenever information is wrong or incomplete. The nature of the obligation of the information providers will depend upon the contractual terms, which are here examined.

Contractual liability

Despite developments in the law of tort and product liability, when a question of liability arises with regard to the on-line provision of information, it will generally be in the context of a contractual relationship concluded with the end user. Contrary to the principle of liability of tort which is based on a general duty towards even third parties, contractual liability requires breach of specific contractual obligations. We have examined a number of contracts to trace the chain of liability from the information provider to the end user and clauses concerning their respective liabilities. Generally, the contractual framework

seems to be characterized by two features, the first often being the lack of any contractual relationship between the initial provider of information and the end user. Empirical analysis shows that most of the user's contracts are stipulated only with the service provider so that the user's only contractual remedy lies against the latter. As such the only course of action against the information provider will be in tort (negligence) as contracts are only enforceable between contractual parties. A contract cannot confer rights or impose obligations on third parties. For instance, the end user cannot benefit from any provision of the agreement between information provider and service provider which should result in a supplementary liability of the service provider, not explicitly provided for in the original agreement. Similarly, the information provider will not be bound by any obligation in the contract between service provider and the end-user.

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However, the doctrine of privity can be circumvented if, for example, the service provider refers, in the contract with the end user, to the obligations contracted by the information provider in a separate contract between information provider and service provider. By virtue of such explicit contractual reference, the end-user will be entitled to invoke the terms of the agreement between service and information provider, to which the user is not an original party. Such an explicit reference is therefore always advisable, as the contracts are part of a "group" of contracts and the obligations of, for instance, the service provider will largely depend upon the corresponding obligations contracted by the information provider. The fact that we are facing a group of contracts raises the question of the consequences of the invalidity of one contract on the other ones. It also affects the question of liability of each party with regard to the general service rendered. Therefore, quite often one single party will be liable — the responsibility being instead shared between the different parties involved.

The second striking point when examining existing contracts is the widespread use of standard form contracts. Most of these contracts are difficult to read and understand, and tend to deal with as many aspects as possible, generally without real structure or plan. The increase in the use of certain contractual disclaimers could be viewed by the end-user as a way for the information provider to avoid total liability. The user has the uncomfortable feeling that the information provider won't support any liability for the service provided.

In our opinion the main reason for these contractual disclaimers is that the service providers and the information providers have not, as yet, clearly identified the different risks they incur when disseminating information on-line. Therefore, the information and service providers should first :

- Identify the risks;
- Define the means by which they can, certainly not eliminate, but at least reduce the risks;
- Make specific committments to implement this solution;
- Provide for a well-balanced financial remedy in case such solutions are not successful.

For example, even if the information and service provider cannot guarantee to have complete and accurate data on a specific topic, they can make a specific committment about the way or the means they will use to search and select the data.

Validity of exemption clauses

The common law countries

By virtue of the principle of contractual freedom, parties are free to stipulate whatever they want. Although primarily the terms of the contract are those expressly agreed by the parties, the contract may also contain terms which are implied, either because of the presumed intention of the parties, or by operation of law. With regard to these implied terms of a contract, the UK Supply of Goods and Services Act 1982 could influence standard information service contracts, insofar as the obligation to carry out the service with reasonableness would be considered as automatically implied in every contract, subject to exclusion or variation by express agreement.

Under common law, the basic principle is that all clauses contained in a valid contract would be given effect as between the parties according to their tenor, even liability for a fundamental breach of contract may be excluded. However both the US and the UK have enacted specific laws that affect the validity of certain contractual terms. The UK Unfair Contract Terms Act 1977 certainly affects the validity of exemption clauses *vis-à-vis* the customers. First it prohibits exemption for liability for personal injury, defects or statutory warranties. Other exemption clauses are subject to the requirement of reasonnableness. With regard to these provisions, exemption clauses for negligence

The information provider will not be bound by any obligation in the contract between service provider and the end-user

or mispresentation in the provision of information services will be regarded as invalid with regard to personal injury and presumed to be unreasonable with regard to damages other than personal injury. The person invoking the clause will have to prove that the requirement is satisfied and that the clause consequentially should be considered valid. The criterion to determine reasonableness is not specified, except for clauses limiting the liability to a certain monetary amount. For these clauses, the court has to consider the resources available to the person invoking the limitation and the insurability of the risk. If the supply of information is assimilated to the supply of goods, the courts should then consider the respective bargaining position of the parties, the availability of other terms of supply and the customers' knowledge of the terms.

The law in the US is different from UK law. Courts in the United States are quite ready to invalidate exemption clauses in contracts on the grounds of public policy. Manufacturers and distributors of products are held strictly liable in tort for the physical harm they cause by being defective. The picture is naturally rather complex. This is partly because the speed of development of consumer protection law has varied from state to state, partly because the Uniform Commercial Code is quite ununiform in certain salient respects, and partly because interrelationship of contract and tort is understood differently in different jurisdictions.

Case law in the UK concerning the application of the Unfair Contract Terms Act to traditional information services is still uncertain. In one case (*Smith* v. *Eric S Busch* (1987) 3 AII ER 179), the court ruled that it could not be fair and reasonable for a professional expert, who knew that the information would be relied upon by the client who paid for it, to avoid liability on the basis of a general disclaimer. In another similar case (*Harris and Another* v. *Wyre Forest District Council and Another* (1988) 1 AII ER 691), the court held that the expert owed no duty of care because of the disclaimer in the contract signed by the clients. Since in this case there was no duty of care, the requirement of reasonableness did not apply. Hence the disclaimer succeeded in preventing the duty of care from arising with respect to the negligent mis-statement.

The "Code Napoléon" countries

In the so-called Code Napoléon countries (France, Luxembourg, Spain, Belgium, Italy, Greece and Portugal), a contractual agreement requires two corresponding acts: offer and acceptance.

Manufacturers and distributors of products are held strictly liable in tort for the physical harm they cause by being defective

By virtue of the principle of contractual freedom, parties are free to stipulate whatever they want within the limits of public policy and good morals, and provided they respect the law. There are no specific legal requirements concerning the provision of automated information systems. It should be noted that liability may arise before the signature of the agreement as a result of negligence in the course of contracting or negotiating the contract.

With regard to liability clauses it is, as a general rule, forbidden in these countries to exonerate intent or gross negligence. In France, the courts do not accept exoneration for intent or for gross negligence. The 1978 Act on consumer protection and information stipulates that clauses are considered unfair if they have the objective or effect of blocking or reducing the non-professional's or consumer's right to damages, in cases when the professional does not carry out his obligations. A professional who uses a service which is outside his field of competence is considered a consumer. Recent case law seems to limit the application of the act to sales contracts, in which case it might not apply to information provision contracts. In countries such as Luxembourg and Spain, they have similar legislation. In Belgium, the courts have developed a theory that allows exoneration clauses as a matter of principle, but forbids them to annihilate the essence of the contract itself.

The "good faith" countries

In the Netherlands, the Supreme Court has stated that clauses that limit liability have to be evaluated on the basis of good faith. The Dutch Supreme Court has formulated a number of circumstances that are to be taken into account for the evaluation of good faith, *eg* the nature and the content of the contract, the social position and the mutual relations of the parties, and the extent to which the opposing party was aware of the content of the liability clause.

In Germany, the 1976 standard business terms law regulates contracts. It covers almost all types of contractual agreements, and applies regardless of whether or not foreign law is applicable to the contract. As a general principle, the law states that provisions in standard business conditions are invalid if they put the contracting party at an unreasonable disadvantage (principle of good faith). The law mentions clauses that are invalid *per se* without the possiblity of evaluation, and clauses which are not necessarily prohibited but may be viewed as subject to a "reasonableness test". Moreover the law excludes exoneration of liability for gross negligence. The German Civil Code (*idem* Greece and Portugal) provides exoneration without prejudice for a person who gives advice or recommendations. In France the opposite tendency exists. There it is considered normal that customers can rely on the knowledge and experience of professionals.

Strict liability

The final issue is whether the EC Directive of July 1985 on liability for defective products applies to databases and to

information providers. At first sight, it may seem strange to consider a database as a product, but it seems that more and more producers include their databases on CD-ROMS, which are then delivered to the users. Contrary to what happens with on-line distribution of information, actual material is delivered to the users. This circumstance has lead some authorities to consider that the EC Directive should apply to such cases.

The directive introduces in Europe the principle of liability without fault for defective products, which is similar to a certain extent to the situation in the US. And secondly, the directive prohibits the recourse to disclaimers of liability, so that all exemption clauses are to be considered as invalid in relation to the injured person.

In France... it is considered entirely normal that customers can rely on the knowledge and experience of professionals such as bankers, legal advisers, etc

If the directive does apply in these cases, it may have very significant ramifications for the information and service provider. In certain US courts' decisions, judges have come quite close to applying strict liability to "information products" and to defective information (see for instance the Jeppesen case, explained above). If the directive is applicable to databases in Europe (and to other sources of information, such as books), the situation would be even clearer than it is in the US, with a well-established principle of strict liability for information.

The directive

Very briefly, the directive institutes the following points of law:

- It establishes liability irrespective of any fault or negligence on the part of the producer of defective products;
- It applies to all moveables which can be subject to economic activities (very broad definition);
- It prohibits liability disclaimers in relation to the consumer;
- The fact that there is a contractual relation between the producer and the victim may be disregarded.

Some factors do limit the sphere of application of the directive:

- First, it only applies to products not to services;
- Secondly, it only covers material damages to private items of property, as well as damages resulting from death or personal injuries. So for example, financial damage, economic damage suffered by an entreprise or damage to one's reputation are not covered.

So there are doubts as to whether the directive applies to databases and to information providers (such as publishers) in general. The primary objection to such an application is that the directive only applies to products, and not to services — and the providing of information as such, is a service. However, information is generally supplied in a material form, on a material medium such as a book, a tape, a film, a map, a CD-ROM — and such medium is a product to which the directive applies. What about on-line databases? In such case, there is no transfer of a material medium to users. However, all the information is integrated on a medium which is in turn located, for example, on the producer's premises. That medium is not delivered, but is made available to users, like books are available in a library. And the directive does not require any physical transfer, but only the "putting into circulation" of a good. So on-line distribution, it can be sustained, is just one form of "putting into circulation" of a product. We do not think that the directive applies to intangible goods (such as an on-line database), however, because otherwise many of its provisions would become difficult to understand: raw materials, component parts, importer, trademark affixed on it, presentation of the product, *etc.* More basically, as regards the provision of information, there is the problem of who would be the producer as defined in the directive — the author or the publisher? One can see that applying the directive would create many difficulties: if information is included in the definition of products, where do we stop: a lawyer gives "information" to his or her clients, so does an architect and the doctor?... Should the fact that the information is printed on a medium change anything? The present authors do not think so.

Since the directive does not, therefore, apply to information, the liability remains based on negligence. And concretely speaking, it also means that disclaimers of liability (which are forbidden by the directive) remain valid for information providers. However, court decisions in member states indicate that even the criterion of negligence can be very hard on producers and that there are already certain limits to the validity of exemption clauses.

We cannot examine here the question itself of the advisability of imposing strict liability for information. What is clear is that it was never one of the objectives that EC officials and legislators had in mind. And since the question involves important policy issues, it should first be discussed by all parties concerned and the answer should only come from the legislator.

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