

# Catholic University Law Review

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Volume 41  
Issue 3 *Spring 1992*

Article 3

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1992

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Jonathan B. Mintz

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### Recommended Citation

Jonathan B. Mintz, *Strict Liability for Commercial Intellect*, 41 Cath. U. L. Rev. 617 (1992).  
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# STRICT LIABILITY FOR COMMERCIAL INTELLECT

*Jonathan B. Mintz\**

## I. INTRODUCTION

Courts have almost uniformly refused to classify written words or an idea as a "product" for purposes of imposing the various forms of products liability. By creating artificial distinctions between the intellectual or intangible component of a product, such as a recipe in a cookbook or computer software on a disk, and the product's tangible characteristics, courts have often left plaintiffs without any redress, whether the claims sounded in negligence, warranty, or strict liability.<sup>1</sup>

*Cardozo v. True*<sup>2</sup> best exemplifies the artificial analytical distinctions employed by the courts in this context. In *Cardozo*, the plaintiff used the defendant's cookbook to prepare a recipe calling for the Dasheen plant root, poisonous to humans when consumed uncooked.<sup>3</sup> She was injured when she tasted the root while preparing the dish.<sup>4</sup> The court rejected the plaintiff's warranty claim against the publisher.<sup>5</sup> "[B]ooks are goods,"<sup>6</sup> the court allowed, "[b]ut, at this point it becomes necessary to distinguish between the tangible properties of these goods and the thoughts and ideas conveyed thereby."<sup>7</sup> Accordingly, warranty liability was disallowed on the grounds that it could extend only to "the physical properties of such books and . . . not . . . to the material communicated by the book's author or publisher."<sup>8</sup>

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\* Visiting Assistant Professor of Law, IIT Chicago-Kent College of Law. J.D. 1988, Cornell Law School. I gratefully acknowledge the assistance of Prof. Clifford Shapiro, for the concept, the encouragement, and the last-minute obliteration; Prof. James Henderson, for the interest and the feedback; Darlene Vorachek, for the occasionally polite yet essentially brutal input; Mary Nasenbenny, for the unerringly humble slave labor; Prof. Stephen McJohn, for injecting a healthy note of apathy; and Prof. Anita Bernstein, for the early and good-naturedly cynical commentary.

1. See, e.g., *Watters v. TSR, Inc.*, 904 F.2d 378, 381 (6th Cir. 1990) ("As far as we have been able to ascertain . . . strict liability has never been extended to words or pictures.").

2. 342 So. 2d 1053 (Fla. Dist. Ct. App. 1977).

3. *Id.* at 1054.

4. *Id.*

5. *Id.* at 1057.

6. *Id.* at 1056.

7. *Id.*

8. *Id.* at 1057.

Courts make an unprincipled distinction by recognizing compensable damage resulting from, for example, an unreasonable risk of paper cuts from a cookbook,<sup>9</sup> rather than the hazardous, and eminently foreseeable, consumption of one of the ingredients specifically called for in a recipe therein. Moreover, such artificial distinctions unnecessarily limit and often completely deny recovery to injured consumers. Furthermore, they needlessly shield suppliers of defective goods from the normative influences of the American system of strict liability.<sup>10</sup>

Courts have their reasons for straining to avoid the imposition of liability when the intellectual or intangible aspects of a product cause injury. Most courts are wary of the potential chilling effects on First Amendment<sup>11</sup> rights that could accompany holding a party liable in implied warranty, negligence, or strict liability under Section 402A of the Restatement (Second) of Torts,<sup>12</sup> for that party's disseminated words or ideas.<sup>13</sup> Courts and commentators have feared the burdens that might be placed upon publishers of products that contain words or ideas which could cause injury, including the pressure to independently investigate the characteristics of the words or ideas sold to a potentially "indeterminate class" of plaintiffs who might sustain injury for an "indeterminate time."<sup>14</sup>

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9. In response to a petition to regulate textbooks containing inadequate instructions for science experiments, the Consumer Product Safety Commission noted that the books were clearly "consumer products," but the Commission's jurisdiction could not extend beyond the properties of a book that might cause physical injury, such as sharp edges, to the contents of the books themselves. 40 Fed. Reg. 10,227 (1975).

10. For a brief review of European law's treatment of this subject area, see Simon Whittaker, *European Product Liability and Intellectual Products*, 105 LAW Q. REV. 125 (1989).

11. The First Amendment provides: "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." U.S. CONST. amend. I.

12. RESTATEMENT (SECOND) OF TORTS § 402A (1965) provides:

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
  - (a) the seller is engaged in the business of selling such product, and
  - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it was sold.
- (2) The rule stated in Subsection (1) applies although
  - (a) the seller has exercised all possible care in the preparation and sale of his product, and
  - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

*Id.*

13. See *infra* notes 30-69 and accompanying text.

14. See *Ultramares v. Touche*, 174 N.E. 441, 444 (N.Y. 1931); see also *Lewin v. McCreight*, 655 F. Supp. 282, 284 (E.D. Mich. 1987); *Demuth Dev. Corp. v. Merck & Co.*, 432 F. Supp. 990, 992-93 (E.D.N.Y. 1977); *Alm v. Van Nostrand Reinhold Co.*, 480 N.E.2d 1263,

In addressing these claims, however, courts have failed to properly adjudicate the tort and products liability considerations presented by the plaintiffs, never substantively addressing the threshold question of whether or not what caused the injury must be categorized as a product. Moreover, these courts' sweeping deference to unsubstantiated free speech concerns is inconsistent with traditional First Amendment analysis. This Article contends that the imposition of liability in this context would be both appropriate and consistent with tort and products liability jurisprudence. By implementing the doctrine put forward in this Article, the imposition of such liability would also be constitutionally sound.

Accordingly, this Article proposes the creation of a "commercial intellect products liability" doctrine which would allow for the equitable and constitutional imposition of strict liability where the intellectual aspects of a product introduced into the stream of commerce proximately cause physical injury. More specifically, the commercial intellect products liability doctrine, proposed herein, would define a product,<sup>15</sup> for purposes of strict liability,<sup>16</sup> as:

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1267 (Ill. App. Ct. 1985); Andrew T. Bayman, Note, *Strict Liability for Defective Ideas in Publications*, 42 VAND. L. REV. 557, 576 (1989); *infra* note 45 (discussing *Lewin*); *infra* text accompanying notes 31-34 (discussing *Demuth*); *infra* text accompanying notes 38-45 (discussing *Alm*).

15. While this doctrine specifically defines "product," courts tend to characterize the underlying policy rationales of tort and products liability and then determine whether a particular item is a product on a case-by-case basis. See James P. Maloney, *What Is or Is Not a Product Within the Meaning of Section 402A*, 57 MARQ. L. REV. 625, 627 (1974); Bayman, *supra* note 14, at 562.

Only eleven states have statutorily defined "product" for purposes of strict liability. All have relied upon the general notion of tangibility. See ARIZ. REV. STAT. ANN. § 12-681 (1982); ARK. CODE ANN. § 16-116-102 (Michie 1987); DEL. CODE ANN. tit. 18, § 7001 (1989); IDAHO CODE §§ [6-1402], 6-1302 (1990); ILL. REV. STAT. ch. 110, para. 13-213 (1983); IND. CODE ANN. § 33-1-1.5-2 (West Supp. 1991); LA. REV. STAT. ANN. § 9:2800.53 (West 1991); MD. CODE ANN., CTS. & JUD. PROC. § 5-311 (1988); OHIO REV. CODE ANN. § 2307.71 (Anderson 1991); TENN. CODE ANN. § 29-28-102 (1990); WASH. REV. CODE ANN. § 7.72.010 (West 1991).

16. This Article introduces the doctrine of commercial intellect products liability in the context of strict liability. Many of the cases which have previously considered such products also arose in the contexts of warranty products liability and negligence products liability. The carry-over effect of this Article's recategorization of certain items as products could naturally impact upon negligence products liability, including negligent misrepresentation, which is currently limited to unpublished representations. See Steven J. Weingarten, Note, *Tort Liability for Nonlibellous Negligent Statements: First Amendment Considerations*, 93 YALE L.J. 744, 756 (1984).

To the extent that the commercial intellect doctrine might also affect warranty liability by virtue of altering the definition of a good, most of the analysis in this Article would apply. The application of commercial intellect products liability to the Uniform Commercial Code is, however, beyond the scope of this Article.

Any item introduced into the stream of commerce, including the intangible (or intellectual) aspects of the item, where those aspects: (1) contribute to the product's economic value, and (2) are reasonably expected by an ordinary consumer to be an integrated method or blueprint that is directly useable, as opposed to indirectly useable only after further input on that same matter, and as opposed to merely pondered and appreciated.

With this proposed definition, this Article first reviews those cases that involved what this Article has defined as a "commercial intellect" product and reviews their reception in products liability.<sup>17</sup> This Article then details the courts' and commentators' First Amendment concerns with liability in this context.<sup>18</sup> Next, this Article defends commercial intellect products liability as constitutional, viable, and essential, and sets out the appropriate analytical framework in tort, products liability, and First Amendment jurisprudence.<sup>19</sup> Finally, this Article delineates the mechanics of commercial intellect liability, applying the product definition to demonstrate what is and what is not a "product" under the doctrine<sup>20</sup> and explaining how "defect" is to be defined in this context.<sup>21</sup>

## II. A SURVEY OF COMMERCIAL INTELLECT CASES AND THEIR EMPIRICAL RECEPTION IN PRODUCTS LIABILITY

With few exceptions,<sup>22</sup> courts have failed to employ traditional methods of principled adjudication when faced with commercial intellect product cases (that is, cases involving products whose injury-producing characteristics are based upon words or ideas rather than tangible attributes). A survey of these cases highlights their analytical deficiencies.

### A. *The Exception: Instances of Intangible Products Liability*

There have been two contexts wherein courts have imposed or at least impliedly accepted the imposition of products liability for words or ideas. The first context is limited to those cases involving aeronautical charts.<sup>23</sup> The California Court of Appeals, for example, stated:

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17. See *infra* text accompanying notes 22-69.

18. See *infra* text accompanying notes 70-98.

19. See *infra* text accompanying notes 99-184.

20. See *infra* text accompanying notes 185-93.

21. See *infra* text accompanying notes 193-97.

22. See *infra* text accompanying notes 23-29.

23. See *Brocklesby v. United States*, 753 F.2d 794 (holding air instrument approach chart to be a product for § 402A purposes), *amended on other grounds*, 767 F.2d 1288 (9th Cir. 1985), *cert. denied*, 474 U.S. 1101 (1986); *Halstead v. United States*, 535 F. Supp. 782 (D. Conn. 1982) (same), *aff'd*, *Salomey v. Jeppesen & Co.*, 707 F.2d 671 (2d Cir. 1983); *Aetna Casualty & Sur. Co. v. Jeppesen & Co.*, 463 F. Supp. 94 (D. Nev. 1978) (same), *vacated and*

[A]lthough a sheet of paper might not be dangerous, per se, it would be difficult indeed to conceive of a salable commodity with more inherent lethal potential than an aid to aircraft navigation that, contrary to its own design standards, fails to list the highest land mass immediately surrounding a landing site.<sup>24</sup>

These cases have never been followed in other commercial intellect contexts. Typically, these other contexts are summarily distinguished with no principled analysis.<sup>25</sup>

The only other case that has allowed liability for commercial intellect is *Kercsmar v. Pen Argyl Area School District*.<sup>26</sup> In *Kercsmar*, a Pennsylvania court held that a claim for failure to warn could be brought against the publisher, printer, and seller of a high school chemistry textbook.<sup>27</sup> This cause of action was based on a chemistry experiment in the book.<sup>28</sup> The court stated in a footnote that “[a] book, such as that which is the subject of a portion of this lawsuit, might well prove to be a defective product within the ever-expanding field of products liability.”<sup>29</sup>

While these cases represent logical approaches to commercial intellect claims, they are decidedly an exception to the general rule barring liability.

### *B. The Rule: Artificial and Unprincipled Distinctions Denying Liability for Intellectual Products*

With the narrow exceptions discussed above, courts have not applied the various forms of products liability when addressing commercial intellect products that have caused injury. These opinions are remarkable for their lack of reasoned analysis within the traditional products liability rubric, which enforces legislatively-mandated methods of adjudication for all products alleged to have caused injury. The opinions typically begin with the

*remanded on other grounds*, 642 F.2d 339 (9th Cir. 1981); *Times Mirror Co. v. Sisk*, 593 P.2d 924 (Ariz. Ct. App. 1978) (same); *Fluor Corp. v. Jeppesen & Co.*, 216 Cal. Rptr. 68 (Cal. Ct. App. 1985) (same).

24. *Fluor Corp.*, 216 Cal. Rptr. at 71-72.

25. See, e.g., *Jones v. J.B. Lippincott Co.*, 694 F. Supp 1216, 1217-18 (D. Md. 1988) (“No case has extended Section 402A to the dissemination of an idea or knowledge in books . . . . Accordingly [this] [c]ourt will not . . . .”).

Perhaps the best explanation for the courts refusal to apply the rationale of the chart cases to other commercial intellect product cases centers on the nature of the defect. The chart cases present a compellingly verifiable manufacturing defect. The concept of defect in the context of warnings accompanying a recipe in a cookbook, for example, is admittedly more problematic.

26. 1 Pa. D. & C.3d 1 (1976); see also *K-Mart Corp. v. Midcon Realty Group*, 489 F. Supp. 813 (D. Conn. 1980) (assuming, *arguendo*, that an architectural plan could be considered a product).

27. *Kercsmar*, 1 Pa. D. & C.3d at 8.

28. *Id.* at 2.

29. *Id.* at 7 n.7.

unsupported conclusion that products liability in that context is unacceptable, with little or no reasoning concerning the threshold question of whether what is alleged to have caused injury is really a product. The most frequent and troubling setting in which these cases arise involves tortious injury allegedly caused by the written word in a product.<sup>30</sup>

The first reported case to have encountered a commercial intellect claim appears to be *Demuth Development Corp. v. Merck & Co.*,<sup>31</sup> which was decided in 1977. *Demuth* rejected a negligence claim for liability where the injury resulted from the use of an encyclopedia of chemicals and drugs which allegedly misstated the toxicity of a chemical.<sup>32</sup> The court failed to address whether the information in the encyclopedia was a product. Instead, the court focused on the issues of reliance and duty, declaring, without further explanation, that even an expectation of reliance upon the written word in a commercial context failed to satisfy privity concerns and establish a duty of due care to those proximately affected by errors.<sup>33</sup> The court deferred to other authorities that had refused to hold liable disseminators of allegedly defective words used in the commercial context and warned of "[t]he specter of unlimited liability, with claims devastating in number and amount."<sup>34</sup>

Subsequently, a New York trial court in *Walter v. Bauer*<sup>35</sup> rejected a young student's strict liability claim for eye injuries sustained while attempting to perform a science experiment involving a ruler and a rubber band described in the defendant's textbook.<sup>36</sup> The court distinguished the contents of the book from the book itself, saying only:

[The textbook] cannot be said to be a defective product, for the infant plaintiff was not injured by use of the book for the purpose for which it was designed, i.e., to be read. More importantly perhaps, the danger of plaintiff's proposed theory is the chilling effect

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30. A second group of cases in which courts have refused to characterize words or ideas in the stream of commerce as products is found in the incitement context. While these opinions do not always consider imposing products liability, per se, commercial intellect liability was arguably at issue. For example, in *Herceg v. Hustler Magazine, Inc.*, 565 F. Supp. 802, 803 (S.D. Tex. 1983), the plaintiffs brought an action which included strict liability claims against the publisher of an article detailing the practice of autoerotic asphyxiation. The plaintiffs' son and brother were found dead of asphyxiation under circumstances strongly suggesting adherence to the details in the defendant's article. *Id.* The court rejected the plaintiffs' claim, stating only: "The Court is aware of no court which has held that the content of a magazine or other publication is a product within the meaning of § 402A of the Second Restatement of Torts." *Id.*

31. 432 F. Supp 990 (E.D.N.Y. 1977).

32. *Id.* at 995.

33. *Id.* at 993.

34. *Id.* (quoting WILLIAM L. PROSSER, LAW OF TORTS 708 (4th ed. 1971)).

35. 439 N.Y.S.2d 821 (Sup. Ct. 1981), *modified*, 451 N.Y.S.2d 533 (App. Div. 1982).

36. *Id.* at 822.

it would have on the First Amendment—freedoms of speech and press. Would any author wish to be exposed to liability for writing on a topic which might result in physical injury, e.g., how to cut trees; how to keep bees?<sup>37</sup>

Similarly, in *Alm v. Van Nostrand Reinhold Co.*,<sup>38</sup> a plaintiff sought relief against the author and the publisher of a "How To" book entitled *The Making of Tools*.<sup>39</sup> The plaintiff was injured when a tool shattered while he allegedly was following the instructions in the book for making that tool.<sup>40</sup> Referring to a number of cases that had rejected products liability in the context of the written word,<sup>41</sup> the Illinois Court of Appeals would not apply section 311 of the Restatement (Second) of Torts<sup>42</sup> to establish liability based

37. *Id.* at 822-23. See also *Beasock v. Dioguardi Enters., Inc.*, 494 N.Y.S.2d 974, 976 (Sup. Ct. 1985), *rev'd on other grounds*, 499 N.Y.S.2d 558 (App. Div. 1986), in which the court began with the proposition that intellect could not constitute a product and thus rejected strict product liability, conduct-based negligence, *id.* at 978, and warranty liability. *Id.* The plaintiff in *Beasock* brought suit alleging injuries caused, in part, by incorrect dimensional standards for tires, tire rims, and associated parts published by one of the defendants. *Id.* The court distinguished the contents of the publication from the product, holding:

The only products TRA is responsible for placing in the stream of commerce are its publications. Although these publications contained the dimensional specifications for the tire and rim in question, the publications themselves did not produce the injuries and thus cannot serve as the basis for the imposition of liability under a theory of either strict products liability or breach of warranty.

*Id.* at 978.

38. 480 N.E.2d 1263 (Ill. App. Ct. 1985).

39. *Id.* at 1264.

40. *Id.*

41. See *Cardozo v. True*, 342 So. 2d 1053 (Fla. Dist. Ct. App.) (holding book publisher not liable when cookbook purchaser was injured by consuming poisonous ingredient listed in recipe), *cert. denied*, 353 So. 2d 674 (Fla. 1977); *MacKown v. Illinois Publishing & Printing Co.*, 6 N.E.2d 526 (Ill. App. Ct. 1937) (holding newspaper not liable for injury caused by use of product recommended in an article); *Yuhas v. Mudge*, 322 A.2d 824 (N.J. Super. Ct. App. Div. 1974) (ruling that magazine was not liable for injury caused by fireworks advertised therein); *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931) (holding accountant not liable to third party who relied on balance sheet to loan money to company that later defaulted); *Jaillet v. Cashman*, 189 N.Y.S. 743 (Sup. Ct. 1921) (finding no liability for monetary loss caused by reliance on erroneous broker's report), *aff'd*, 194 N.Y.S. 947 (App. Div. 1922), *aff'd*, 139 N.E. 714 (N.Y. 1923)

42. RESTATEMENT (SECOND) OF TORTS § 311 (1965), entitled "Negligent Misrepresentation Involving Risk of Physical Harm," provides:

- (1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results
  - (a) to the other, or
  - (b) to such third persons as the actor should expect to be put in peril by the action taken.
- (2) Such negligence may consist of failure to exercise reasonable care
  - (a) in ascertaining the accuracy of the information, or
  - (b) in the manner in which it is communicated.

*Id.*



on the theory of negligent misrepresentation.<sup>43</sup> The court rejected the idea that publishers owe a duty to consumers for information supplied by third parties<sup>44</sup> and cited the potential chilling effect upon First Amendment rights if publishers were required to scrutinize or test all procedures contained in their publications.<sup>45</sup>

In *L. Cohen & Co. v. Dun & Bradstreet, Inc.*,<sup>46</sup> the plaintiff brought a products liability claim for damages resulting from dissemination of an allegedly inaccurate credit report issued by the defendant. The federal district court rejected the applicability of products liability law, distinguishing between intangible products and "products of a more tangible nature."<sup>47</sup> To support this distinction, the court noted the absence of case law and state statutory law categorizing the intellectual content of an item as a "product" for purposes of products liability.<sup>48</sup> As in *Walter* and *Alm*, the court expressed First Amendment concerns, stating that liability in this context "would be just a short step from the imposition of liability without fault on an investigative reporter, a political columnist or a documentary filmmaker."<sup>49</sup>

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43. *Alm*, 480 N.E.2d at 1267.

44. *Id.* at 1266; *see also* *Jones v. J.B. Lippincott Co.*, 694 F. Supp. 1216 (D. Md. 1988). In *Jones*, the court rejected the liability claim of a nursing student who was injured when she relied upon information published in a nursing textbook. The court reasoned that because the defendant merely published the text, it had "no duty of care to plaintiff with respect to the content of the book." *Id.* at 1217.

45. *Alm*, 480 N.E.2d at 1267; *see also* *Lewin v. McCreight*, 655 F. Supp. 282 (E.D. Mich. 1987), where the plaintiff was injured by an explosion allegedly resulting from following the mixing directions in the book *The Complete Metalsmith*. The court held that the publisher owed the reader no duty regarding the intellectual product aspects of the book. *Id.* at 283-84. The court analyzed the strict liability and negligence claims by addressing the duty of a publisher to the reading public. *Id.* at 283. The court adopted the rationale of *Alm* and emphasized that the publisher had "merely printed and bound a book, the contents of which were written by a third-party author." *Id.* Citing excessive burdens on a publisher in this context and "potentially unlimited liability," *id.* at 284, the court held that, upon "a balancing of the societal interest involved," *id.*, the imposition of a duty of due care was inappropriate. *Id.* Inexplicably, the court added that:

The [duty] 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. Similarly, publishers may have greater responsibilities where the risk of harm is plain and severe such as a book entitled *How To Make Your Own Parachute*.

*Id.*

46. 629 F. Supp. 1425 (D. Conn. 1986).

47. *Id.* at 1430; *see also* *First Equity Corp. v. Standard & Poor's Corp.*, 869 F.2d 175, 180 (2d Cir. 1989) (holding that publisher of summary of terms of securities package could not be held to be liable for negligent misstatements); *Jaillet v. Cashman*, 194 N.Y.S. 947 (App. Div. 1922) (ruling that disseminators of financial information are immunized from tort liability for non-defamatory negligent misstatements).

48. *L. Cohen*, 629 F. Supp. at 1430.

49. *Id.* at 1431.

In a Pennsylvania case, *Smith v. Linn*,<sup>50</sup> the plaintiff alleged that his wife's death was caused by her strict adherence to the protein diet program espoused in the defendant's book, *The Last Chance Diet*.<sup>51</sup> After considering two other cases that distinguished the tangible and intangible aspects of a product,<sup>52</sup> the court held that the contents of the diet book did not constitute a product, stating that "no appellate court in any jurisdiction has held a book to be a product for purposes of section 402A."<sup>53</sup> The court distinguished contrary language in *Kercsmar*,<sup>54</sup> summarily declaring that the chemistry textbook case was "not dispositive" because the discussion in that opinion had centered upon the U.C.C. classification of a "good."<sup>55</sup> The *Smith* court declared that it was not bound by the *Kercsmar* view, which, it noted, no other court had accepted.<sup>56</sup>

Recently, the United States Court of Appeals for the Ninth Circuit also rejected the imposition of liability in the commercial intellect context. In *Winter v. G.P. Putnam's Sons*,<sup>57</sup> the plaintiffs brought suit for injuries allegedly resulting from picking and eating poisonous mushrooms after relying upon information in a mushroom encyclopedia published by the defendants.<sup>58</sup> The court, in a comparatively thoughtful opinion, rejected liability, holding that a "product" for purposes of strict liability could not include published words and ideas.<sup>59</sup> The court supported its opinion with examples of items listed in the comments to Section 402A of the Second Restatement, noting that all of them are tangible items.<sup>60</sup>

The plaintiffs proposed that California courts decline to draw a line between physical products and the intangible ideas incorporated therein and cited *Fluor Corp. v. Jeppesen & Co.*,<sup>61</sup> a case dealing with liability for the

50. 563 A.2d 123 (Pa. Super. Ct. 1989), *aff'd*, 587 A.2d 309 (Pa. 1991) (per curiam).

51. *Id.* at 125.

52. *Herceg v. Hustler Magazine, Inc.*, 565 F. Supp. 802 (S.D. Tex. 1983); *Cardozo v. True*, 342 So. 2d 1053 (Fla. Dist. Ct. App. 1977), *cert denied*, 353 So. 2d 674 (Fla. 1977).

53. *Smith*, 563 A.2d at 126.

54. 1 Pa. D. & C.3d 1 (1976); *see supra* text accompanying notes 26-29.

55. *Smith*, 563 A.2d at 127.

56. *Id.*

57. 938 F.2d 1033 (9th Cir. 1991).

58. *Id.* at 1036.

59. *Id.* at 1034. The court also rejected the imposition of negligence liability:

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 is nothing inherent in the role of publisher or the surrounding legal doctrines to suggest that such a duty should be imposed on publishers.

*Id.* at 1037 (footnote omitted). Applying the same analysis, the court also rejected plaintiffs' contention that defendants should have warned readers of the incompleteness of the information in the encyclopedia and specifically disavowed any guarantee of accuracy. *Id.* at 1037-38.

60. *Id.* at 1034-35 (quoting RESTATEMENT (SECOND) OF TORTS § 402A cmt. d (1965)).

61. 216 Cal. Rptr. 68 (1985).

contents of aeronautical charts.<sup>62</sup> The court rejected the argument. In its footnote response, the court emphasized the physical property components of the aeronautical chart cases.<sup>63</sup> It explained that aeronautical charts are actually tools which graphically depict technical and mechanical data.<sup>64</sup> In contrast, the court continued, an encyclopedia is a book on how to *use* technical tools.<sup>65</sup>

Finally, the court explained its First Amendment concerns, noting "a high priority on the unfettered exchange of ideas,"<sup>66</sup> and added that society was willing to accept the attendant risks.<sup>67</sup> The court then rejected the plaintiffs' argument that First Amendment concerns "would be groundless were strict liability rules applied only to books that give instruction on how to accomplish a physical activity and that are intended to be used as part of an activity that is inherently dangerous."<sup>68</sup> Referring to unexplained barriers to drawing "such a bright line," the court declared the plaintiffs' limitation analysis "illusory."<sup>69</sup>

### III. FIRST AMENDMENT OBJECTIONS TO THE IMPOSITION OF COMMERCIAL INTELLECT PRODUCTS LIABILITY

The United States Supreme Court's decision in *Gertz v. Robert Welch, Inc.*<sup>70</sup> is often cited as one of the great constitutional barriers to liability in cases arguably falling within the commercial intellect context.<sup>71</sup> In *Gertz*, the Court held that, in the context of defamation, states are free to "define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual,"<sup>72</sup> but only so long as such liability was not imposed without fault.<sup>73</sup> The argument that courts and commentators have derived from *Gertz* is that strict liability,

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62. *Winter*, 938 F.2d at 1036 n.4 (citing the *Fluor* case, wherein plaintiffs alleged plane crash was attributable to erroneous altitude specifications of hills surrounding airport); see *supra* notes 23-24 and accompanying text.

63. *Id.*

64. *Id.* at 1036.

65. *Id.* (emphasis in original). In a puzzling aside, the court also noted that computer software may be another example of a "tool" word or idea, rather than a "product" word or idea. *Id.*

66. *Id.* at 1035.

67. *Id.*

68. *Id.*

69. *Id.*

70. 418 U.S. 323 (1974).

71. See, e.g., *Hammerhead Enters., Inc. v. Brezenoff*, 707 F.2d 33, 40 (2d Cir.), *cert. denied*, 464 U.S. 892 (1983) (citing *Gertz*, 418 U.S. at 339-40, in holding that "the Constitution does not permit the imposition of liability for expressing so-called 'false ideas'"); see also *Jones v. J.B. Lippincott Co.*, 694 F. Supp. 1216, 1217 (D. Md. 1988); *supra* note 44.

72. *Gertz*, 418 U.S. at 347.

73. *Id.*

which is at least formally considered liability without fault,<sup>74</sup> cannot be applied constitutionally to words or ideas.<sup>75</sup>

Another First Amendment objection is that authors and publishers in a free society should be entitled to express and advocate their ideas without being required to disclaim them via warnings and instructions.<sup>76</sup>

Similarly, the United States Supreme Court, in the landmark decision *New York Times Co. v. Sullivan*,<sup>77</sup> held that civil liability awards cannot impermissibly restrict First Amendment rights. The Court stated:

What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards under a rule such as that [civil libel law] invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute.<sup>78</sup>

The "editorial intrusion" rule of *Miami Herald Publishing Co. v. Tornillo*,<sup>79</sup> can also be used to object to products liability for commercial intellect. In *Tornillo*, the U.S. Supreme Court ruled unconstitutional a Florida "right of reply" statute that imposed misdemeanor liability for publishers that failed to grant political candidates equal access to their newspapers.<sup>80</sup> The Court held that the Florida statute intruded into the editorial process, violating the First Amendment's guarantee of free press.<sup>81</sup> The *Tornillo* objection to commercial intellect products liability is that, to the extent such liability might compel a newspaper defendant to include additional material (e.g. warnings or instructions) with its product, the state would be intruding upon its editorial function.<sup>82</sup>

Perhaps the most significant class of objections in the commercial intellect context concerns the burdens, and thus arguably the indirect chilling effect, placed upon authors and publishers who would be faced with a duty to in-

74. See, e.g., *Chotin Transp., Inc. v. United States*, 819 F.2d 1342, 1351 n.5 (6th Cir.), cert. denied, 484 U.S. 953 (1987) ("[I]t is generally characterized as liability without fault because there is no burden placed upon the plaintiff to prove negligence to impose liability since negligence is not an issue.").

75. See, e.g., *Hammerhead*, 707 F.2d at 40; *supra* note 71; see also *Walter v. Bauer*, 439 N.Y.S.2d 821, 822-23 (Sup. Ct. 1981), *aff'd as modified*, 451 N.Y.S.2d 533 (App. Div. 1982); *supra* text accompanying notes 36-37.

76. Jonathan M. Hoffman, *From Random House to Mickey Mouse: Liability for Negligent Publishing and Broadcasting*, 21 TORT & INS. L.J. 65, 87 (1985).

77. 376 U.S. 254 (1964).

78. *Id.* at 277 (citing *City of Chicago v. Tribune Co.*, 139 N.E. 86, 90 (Ill. 1923)).

79. 418 U.S. 241, 258 (1974).

80. *Id.* at 244.

81. *Id.* at 258; see also *Memphis Publishing Co. v. Leech*, 539 F. Supp. 405, 409-11 (W.D. Tenn. 1982) (following *Tornillo* under similar circumstances).

82. See, e.g., *Quincy Cable TV, Inc. v. F.C.C.*, 768 F.2d 1434, 1453 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986) ("Forcing an editor to print that which he otherwise would not . . . was a restraint the First Amendment simply would not tolerate.").

investigate the substantive characteristics of their disseminated words or ideas. Courts have uniformly rejected such a duty in various contexts.<sup>83</sup>

For example, in *Pittman v. Dow Jones & Co.*,<sup>84</sup> the Eastern District of Louisiana rejected the argument that a newspaper publisher could be held liable for a fraudulent advertisement it ran.<sup>85</sup> The court declared:

A newspaper has no duty, whether by way of tort or contract, to investigate the accuracy of advertisements placed with it which are directed to the general public, unless the newspaper undertakes to guarantee the soundness of the products advertised . . . . To impose the burden of investigating the accuracy of every ad would, under ordinary circumstances, be too onerous.<sup>86</sup>

Two years later, in *Eimann v. Soldier of Fortune Magazine, Inc.*,<sup>87</sup> a plaintiff unsuccessfully sought to impose civil liability on the publisher of a "gun for hire" advertisement.<sup>88</sup> The Court of Appeals for the Fifth Circuit again denied this "duty to investigate" claim, citing the excessive burdens that would result if a publisher were held accountable for the content of what he or she published.<sup>89</sup>

83. See *infra* text accompanying notes 84-98.

84. 662 F. Supp. 921 (E.D. La. 1987), *aff'd*, 834 F.2d 1171 (5th Cir. 1987).

85. *Id.* at 921-22.

86. *Id.* at 922.

87. 880 F.2d 830 (5th Cir. 1989), *cert. denied*, 493 U.S. 1024 (1990).

88. *Id.* at 831. The advertisement, which ran in the September, October, and November 1984 issues of the defendant's magazine, read: "EX-MARINES—67-69 'Nam Vets, EX-D1, weapons specialist—jungle warfare, pilot, M.E., high risk assignments, U.S. or overseas." *Id.*

89. A standard of conduct that imposes tort liability whenever the advertised product "could reasonably be interpreted as an offer to engage in illegal activity"—or might "relate to" criminal conduct—imposes an especially heavy [investigative] burden. . . . Relatedly, the publication's editorial content would surely feel the economic crunch from loss of revenue that would result if publishers were required to reject all ambiguous advertisements.

*Id.* at 837; see also *Yuhas v. Mudge*, 322 A.2d 824, 825 (N.J. Super. Ct. App. Div. 1974) (rejecting the imposition of liability on a magazine publisher for allegedly defective products it advertised). The court in *Yuhas* rejected plaintiffs' duty to investigate theory, stating: "To impose the suggested broad legal duty upon publishers of nationally circulated magazines, newspapers and other publications, would not only be impractical and unrealistic, but would have a staggering adverse effect on the commercial world and our economic system." *Id.* at 825; see also *Suarez v. Underwood*, 426 N.Y.S.2d 208, 211 (Sup. Ct. 1980) (refusing to impose liability on a newspaper publisher for paid advertisements it ran for a hair implantation process), *aff'd*, 449 N.Y.S.2d 438 (App. Div. 1981). Deferring to the analytical framework for the tort of false advertising, the *Suarez* court stated that a "newspaper is only liable if it publishes a false advertisement maliciously or with intent to harm another or acts with total reckless abandon. . . . 'Nor should the onerous burden be placed upon newspapers under ordinary circumstances to conduct investigations in order to determine the effect of a questioned advertisement.'" *Id.* at 210 (quoting *Goldstein v. Garlick*, 318 N.Y.S.2d 370, 376 (Sup. Ct. 1971)).

In *Walters v. Seventeen Magazine*,<sup>90</sup> a California court rejected publisher liability for the advertisement of a defective tampon.<sup>91</sup> The court stated that the magazine did not endorse the product advertised, and therefore the publisher was not liable for its defects.<sup>92</sup>

The final objection in the commercial intellect field focuses on the concept of privity. Although the law has formally abolished privity as a requirement for recovery in tort,<sup>93</sup> many courts addressing tort liability for the written word have expressed concern for, in the words of a court still struggling under the confines of the historic privity rule, "liability in an indeterminate amount for an indeterminate time to an indeterminate class."<sup>94</sup> The court in *Yuhas v. Mudge*<sup>95</sup> also expressed these concerns in rejecting liability for a magazine publisher who allegedly advertised defective products.<sup>96</sup> Similarly, in *Roman v. New York*,<sup>97</sup> a New York court denied liability in the context of a Planned Parenthood booklet discussing sterilization, stating: "One who publishes a text cannot be said to assume liability for all 'misstatements,' said or unsaid, to a potentially unlimited public for a potentially unlimited period."<sup>98</sup>

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90. 241 Cal. Rptr. 101 (1987).

91. *Id.* at 102.

92. *Id.* at 102-03. The court held:

Seventeen did not in any way sponsor or endorse products advertised in its pages. . . . In the absence of any cause of action supported by traditional theories, we are loathe to create a new tort of negligently failing to investigate the safety of an advertised product. Such a tort would require publications to maintain huge staffs scrutinizing and testing each product offered. The enormous cost of such groups, along with skyrocketing insurance rates, would deter many magazines from accepting advertising, hastening their demise from lack of revenue. Others would comply, but raise their prices beyond the reach of the average reader. Still others would be wiped out by tort judgments, never to revive. Soon the total number of publications in circulation would drop dramatically.

*Id.*

93. See, e.g., *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916).

94. *Ultramares v. Touche*, 174 N.E. 441, 444 (N.Y. 1931) (liability rejected for incorrect accounting balance sheets); see, e.g., *Gutter v. Dow Jones, Inc.*, 490 N.E.2d 898 (Ohio 1986); *Yuhas v. Mudge*, 322 A.2d 824, 825 (N.J. Super. Ct. App. Div. 1974).

95. 322 A.2d 824 (N.J. Super. Ct. App. Div. 1974); *supra* note 89.

96. *Id.* at 825.

97. 442 N.Y.S.2d 945 (Sup. Ct. 1981).

98. *Id.* at 948.

IV. RESPONDING TO THE OBJECTIONS: A DEFENSE OF COMMERCIAL  
INTELLECT PRODUCTS LIABILITY FROM THE PERSPECTIVE OF  
TORT, PRODUCTS LIABILITY, AND FIRST  
AMENDMENT JURISPRUDENCE

The constitutional and practical implications of holding the disseminator of a word or idea liable merely in negligence, let alone in strict liability, have appalled many courts<sup>99</sup> and commentators.<sup>100</sup> Admittedly, advocating civil liability for what could be termed "defective words or ideas" must give one pause. Nevertheless, an analysis of the First Amendment objections, juxtaposed with the existing limitations on the ambit of First Amendment protection and the demands of a fair and essential system of products liability, leads to the conclusion that products liability for commercial intellect is both analytically appropriate and constitutionally sound.

Although most of the objections leveled against liability in this context are based on First Amendment considerations, this Article first analyzes tort and products liability. This is an appropriate sequence given that free speech considerations are not properly considered in a vacuum, but rather analyzed in the context of the countervailing principles at hand.<sup>101</sup>

A. *Support in Tort and Products Liability Jurisprudence*

In order to build a case for the propriety of commercial intellect products liability in the context of the existing law of tort and products liability, it is necessary to first establish that this Article's definition does not denote services, as opposed to products. Services cannot be the basis for a strict products liability claim.<sup>102</sup> This Article concludes that no item falling within the definition of commercial intellect would be considered a service per se.

In order for a transaction to qualify as a service, there must be some personal or direct interaction with the consumer.<sup>103</sup> For example, while a med-

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99. See *supra* text accompanying notes 30-98.

100. See, e.g., Hoffman, *supra* note 76, at 87.

101. *New York v. Ferber*, 458 U.S. 747, 764 (1982); see *infra* text accompanying notes 132-83, see also *Eimann v. Soldier of Fortune Magazine, Inc.*, 680 F. Supp. 863, 865 (S.D. Tex. 1988), *rev'd*, 880 F.2d 830 (5th Cir. 1989), *cert. denied*, 493 U.S. 1024 (1990) ("the Court must balance the free speech concerns of the First Amendment against the interest" asserted by the plaintiff in tort); Kimberly Caswell, *Soldiers of Misfortune: Holding Media Defendants Liable for the Effects of Their Commercial Speech*, 41 FED. COMM. L.J. 217, 222 (1989) (asserting that free speech concerns are properly adjudicated by balancing them against state interests associated with plaintiffs' claims).

102. John C. Wunsch, *The Definition of a Product for the Purposes of Section 402A*, 50 INS. COUNS. J. 344, 354 (1983); see, e.g., *Kohr v. Johns-Manville Corp.*, 534 F. Supp. 256, 260 (E.D. Pa. 1982).

103. See Dana Shelhimer, *Sales-Service Hybrid Transactions & the Strict Liability Dilemma*, 43 SW. L.J. 785, 793 (1989).

ical doctor may write a diet book, the law would not classify the sale of that book as a "service" because the doctor neither directly nor personally interacted with the reader. Professional involvement in the creation of an item, even where the professional normally offers his or her services in related contexts, does not automatically qualify the item as a service.<sup>104</sup> Moreover, that the item itself provides a service or can be incorporated into the provision of a service does not defeat its categorization as a product.<sup>105</sup>

The product/service distinction becomes more problematic in traditional products liability cases, as well as in commercial intellect cases, when the item in question includes both a commercial component and some direct service component. Such items are referred to as "hybrids."<sup>106</sup> For example, a computer software company may sell a software package and offer accompanying installation, consultation, or repair services. Nevertheless, this hybrid will generally be classified as a "product."<sup>107</sup> The key to hybrid

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104. See *Salomey v. Jeppesen & Co.*, 707 F.2d 671, 676-77 (2d Cir. 1983) (noting that, because of mass-production, charts are not individually-tailored service arrangements).

105. As one commentator analogized: "The ultimate purpose of [a] car is transportation, but the transaction involved is for the purchase of the item itself, not the transportation." Susan Lanoue, Note, *Computer Software & Strict Products Liability*, 20 SAN DIEGO L. REV. 439, 452 (1983).

106. Maloney, *supra* note 15, at 635-40.

107. Few cases have addressed products liability for computer software, and none in the context of products liability. Most software categorization cases have arisen in the Article 2 Uniform Commercial Code context, focusing solely on whether software programs were goods or services. See, e.g., *Advent Sys. v. Unisys Corp.*, 925 F.2d 670, 675-76 (3d Cir. 1991) (declaring that, for U.C.C. purposes, software programs are goods, as they are tangible, moveable, and available in the marketplace); *RRX Indus. v. Lab-Con, Inc.*, 772 F.2d 543, 546 (9th Cir. 1985) (holding that computer software at issue was a good, not a service, where service-type characteristics of the sale were merely incidental); *Systems Design & Management Info., Inc. v. Kansas City Post Office Employees Credit Union*, 788 P.2d 878 (Kan. Ct. App. 1990) (holding software transaction to be a purchase of goods). But see *Wharton Management Group v. Sigma Consultants, Inc.*, 1990 Del. Super. LEXIS 54 at \*5 (holding, in circumstances nearly identical to those in *Advent*, that the transaction involved a service for U.C.C. purposes since "the means of transmission is not the object of the agreement"), *aff'd* 582 A.2d 936 (Del. 1990); *Data Processing Servs. v. L.H. Smith Oil Corp.*, 492 N.E.2d 314, 318-19 (Ind. Ct. App. 1986) (holding same, given the custom nature of software and lack of simultaneous sale of hardware); *Micro-Managers, Inc. v. Gregory*, 434 N.W.2d 97, 100 (Wis. Ct. App. 1988) (holding that contract for development of custom computer programming primarily involved a service for U.C.C. purposes).

For useful articles addressing this subject, see Michael Gemignani, *Product Liability & Software*, 8 RUTGERS COMPUTER & TECH. L.J. 173 (1981); Lanoue, *supra* note 105; David A. Hall, Note, *Strict Products Liability & Computer Software: Caveat Vendor*, 4 COMPUTER/L.J. 373 (1983).

Other software cases have arisen in the tax context, where the goods vs. services distinction invokes sales/use tax consequences. See, e.g., *Comptroller of the Treasury v. Equitable Trust Co.*, 464 A.2d 248, 259 (Md. 1983) (holding prepackaged software programs to be tangible for purposes of sales/use tax issue); see also John Wei-Ching Kuo, *Sales/Use Taxation of Software: An Issue of Tangibility*, 2 HIGH TECH. L.J. 125 (1987).



characterization is the determination of whether the product or service component predominates the transaction.<sup>108</sup>

The definition of a commercial intellect product does not, itself, refer to items which are inherently services, even if hybrids are occasionally included. Therefore the traditional body of law regarding the product/service distinction would and should be applied as always.

Accordingly, this Article now turns to a discussion of the policies underlying torts in general and strict liability specifically. The aim of tort law is to compensate individuals for losses they suffer through violations of their legally recognized interests.<sup>109</sup> Tort law is concerned with allocating losses arising out of human activities.<sup>110</sup> These general policy interests should apply equally to tangible products and commercial intellect products. Therefore, courts' refusals to allow liability in this context directly frustrate those basic principles.

In addition, the policy concerns underlying strict liability, expressed in the comments to section 402A of the Restatement (Second) of Torts, appear to apply equally to both tangible products and commercial intellect products.

On whatever theory, the justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely<sup>111</sup> upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who

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While tort liability for software defects would likely be relatively rare, software used in medical services are potentially tort-inspiring. See Joseph P. Zammit & Mario A. Savio, TORT LIABILITY FOR HIGH RISK COMPUTER SOFTWARE, PLI Patents, Copyrights, Trademarks & Literary Prop. Course Handbook series No. 239 1987), available in WL, PLI database, 239 PLI/Pat \*373, \*375 (discussing products liability suits involving allegedly defective computerized therapeutic radiation machine and malfunctioning software causing truck, train, or plane collisions); see also *Scott v. White Trucks*, 699 F.2d 714 (5th Cir. 1983) (regarding a products liability suit involving computer-controlled anti-lock brakes on truck).

108. *RRX Indus.*, 772 F.2d at 546; see also *Dixon v. Four Seasons Bowling Alley*, 424 A.2d 428, 431 (N.J. Super. Ct. App. Div. 1980) (holding that the use of a bowling ball in bowling lanes was "incidental to the use of defendant's premises" and, as such, the ball was not a product for purposes of strict liability).

109. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 1, at 5-6 (5th ed. 1984).

110. *Id.* at 6.

111. The reliance referred to here is a general, societal reliance. As the comments later explain, "The rule stated in this Section does not require any reliance on the part of the consumer upon the reputation, skill, or judgment of the seller who is to be held liable, nor any representation or undertaking on the part of that seller." RESTATEMENT (SECOND) OF TORTS § 402A cmt. m (1965).

market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.<sup>112</sup>

The comments also refer to:

the special responsibility for the safety of the public undertaken by one who enters into the business of supplying human beings with products which may endanger the safety of their persons and property, and the forced reliance upon that undertaking on the part of those who purchase such goods.<sup>113</sup>

That the comments to Section 402A list only tangible items as examples of applicable products, as noted by the Ninth Circuit in *Winter v. G.P. Putnam's Sons*,<sup>114</sup> is not dispositive. The list was not represented as exhaustive. Furthermore, the list was published more than twenty years ago, before serious efforts had been undertaken to impose any form of products liability for words or ideas. Moreover, the underlying principles of Section 402A are clearly structured as generally applicable and, as such, should apply equally and forcefully to an actor engaged in the business of disseminating an automobile and one disseminating an encyclopedia.

In addition, the comments to Section 402A can be interpreted as *already* supporting the inclusion of commercial intellect items in the ambit of strict liability. In its discussion of product defect, the official comments declare: "No reason is apparent for distinguishing between the product itself and the container in which it is supplied; and the two are purchased by the user or consumer as an integrated whole."<sup>115</sup> Applying this language to a products liability claim based upon the intellectual content of a "How To" book is instructive. The features of that item, including the manner in which its consumers would both perceive and use the book, reasonably speak to categorizing the physical book as the "container," leaving the words and ideas included within that container to be fairly categorized as the true "product." While this interpretation lacks previous support, the underlying principle is sound: the "product" is the part or parts of an item which render value.

The imposition of products liability for commercial intellect is also wholly consistent with the underlying policy considerations generally articulated by the courts discussing strict liability. Those policy considerations, best cata-

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112. *Id.* at cmt. c (footnote added).

113. *Id.* at cmt. f.

114. 938 F.2d 1033 (9th Cir. 1991); *supra* text accompanying notes 57-69.

115. RESTATEMENT (SECOND) OF TORTS § 402A cmt. h (1965).

logued in and often cited from the dissenting opinion of *Lechuga, Inc. v. Montgomery*,<sup>116</sup> include:

- (1) The manufacturer can anticipate some hazards and guard against their recurrence, which the consumer cannot do.
- (2) The cost of injury may be overwhelming to the person injured while the risk of injury can be insured by the manufacturer and be distributed among the public as a cost of doing business.
- (3) It is in the public interest to discourage the marketing of defective products.
- (4) It is in the public interest to place responsibility for injury upon the manufacturer who was responsible for its reaching the market.
- (5) That this responsibility should also be placed upon the retailer and wholesaler of the defective product in order that they may act as the conduit through which liability may flow to reach the manufacturer, where ultimate responsibility lies.
- (6) That because of the complexity of present day manufacturing processes and their secretiveness, the ability to prove negligent conduct by the injured plaintiff is almost impossible.
- (7) That the consumer does not have the ability to investigate for himself the soundness of the product.
- (8) That this consumer's vigilance has been lulled by advertising, marketing devices and trademarks.<sup>117</sup>

These policy concerns represent interests equally apparent in cases involving, for instance, a science textbook experiment resulting in foreseeable injury, or a published recipe calling for a poisonous mushroom without appropriate warning or instruction, and cases involving a swimming pool without apparent depth information or a stepladder without appropriate warnings. The legislative decision to place responsibility upon manufacturers and others in the commercial chain is no less compelling or appropriate simply because the product in question involves commercial intellect, rather than a tangible characteristic. Clearly, those in the commercial chain responsible for the sale of a "How To" publication, especially the author and the publisher, are in a far better position to know of the dangers associated with their instructional piece,<sup>118</sup> and are generally in a far superior position to design away, warn or instruct against, and insure or otherwise pay for injuries proximately associated with those dangers.<sup>119</sup>

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116. 467 P.2d 256 (Ariz. Ct. App. 1970); see, e.g., *Brandenburger v. Toyota Motor Sales*, 513 P.2d 268, 272 (Mont. 1973); *Stang v. Hertz Corp.*, 497 P.2d 732, 734 (N.M. 1972).

117. *Lechuga*, 467 P.2d at 261-62 (Jacobson, J. concurring) (citations omitted); see also RESTATEMENT (SECOND) OF TORTS § 402A cmt. c.

118. Indeed, it is this superiority which generally underlies such a piece's marketing.

119. See also Jim Prince, *Negligence: Liability for Defective Software*, 33 OKLA. L. REV. 848, 851 n.43 (1980).

That the current trend in tort law is a movement away from, rather than toward, additional avenues of strict liability, especially for middlemen,<sup>120</sup> is of little relevance to the propriety of imposing commercial intellect products liability under the products liability system as it exists today. Even those who would radically alter the strict liability rubric do not argue that it should be applied inconsistently and arbitrarily.

The concept of consumer expectations lends additional support in tort and products liability law for the characterization of commercial intellect as a product for purposes of strict products liability. For example, in *Ransome v. Wisconsin Electric Power Co.*,<sup>121</sup> the Supreme Court of Wisconsin held that electricity was a product for purposes of products liability, and approached the question of what constituted a product by assessing consumer expectations.<sup>122</sup> The court referred to "the contemplation of the ordinary user" as determinative.<sup>123</sup> The same inquiry into consumer expectations is appropriate for determining products liability in the commercial intellect context. The ordinary purchaser of a recipe book, as in *Cardozo*,<sup>124</sup> would undoubtedly contemplate that his or her purchase encompassed the content of the recipes, not just the physical book in which they were found.

Finally, the inability of courts to legitimately distinguish those cases which have already imposed strict products liability in the realm of commercial intellect<sup>125</sup> also supports the appropriateness of this doctrine.<sup>126</sup> Because courts have not and can not legitimately distinguish those cases from their own "nonproduct" categorizations,<sup>127</sup> these cases must be considered, in at least a limited sense, "good law."

### B. Support in First Amendment Jurisprudence

Rather than engaging in traditional constitutional analysis, courts that have rejected commercial intellect products liability on First Amendment grounds have deferred to essentially unexplored principles.<sup>128</sup> Even when

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120. See, e.g., James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263 (1991).

121. 275 N.W.2d 641 (Wis. 1979).

122. *Id.* at 643.

123. *Id.*

124. 342 So. 2d 1053 (Fla. Dist. Ct. App. 1977); see also *supra* text accompanying notes 2-8.

125. See *supra* text accompanying notes 23-29.

126. But see Bayman, *supra* note 14, at 573 (arguing that the chart cases are wrongly decided).

127. See, e.g., *supra* text accompanying notes 50-56 (discussing *Smith v. Linn*, 563 A.2d 123 (Pa. Super. Ct. 1989), *aff'd*, 587 A.2d 309 (Pa. 1991) (per curiam)).

128. See discussion *supra* text accompanying notes 30-69.

employing a fault-based standard, these courts have voiced as their central First Amendment concern the potential chilling effect generated by civil liability for the content of words or ideas.<sup>129</sup> Courts have opined that the potential for liability in this context is substantially greater than that for tangible products, which would contribute further to any chilling effect.<sup>130</sup> This concern has yet to be quantified in commercial intellect cases.<sup>131</sup> This Article seeks to provide a reasoned framework with which courts can properly and substantively analyze the First Amendment implications of commercial intellect products liability.

There is no doubt that the imposition of commercial intellect products liability would result in some incursion into the realm of the First Amendment.<sup>132</sup> However, First Amendment protections are by no means absolute. In fact, there are several recognized forms of civil and criminal liability which restrict free speech. In *New York v. Ferber*,<sup>133</sup> the United States Supreme Court established that, when considering whether a category of speech falls outside of the protections of the First Amendment, a court should not simply defer to vague and unexplored concerns but must instead engage in a three-step balancing of the competing interests involved.<sup>134</sup>

The First Amendment to the U.S. Constitution is clearly one of this nation's most cherished freedoms.<sup>135</sup> Nevertheless, other significant federal

129. See *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033 (9th Cir. 1991); *Lewin v. McCreight*, 655 F. Supp. 282 (E.D. Mich. 1987); *L. Cohen & Co. v. Dun & Bradstreet, Inc.*, 629 F. Supp. 1425 (D. Conn. 1986); *Demuth Dev. Corp. v. Merck & Co.*, 432 F. Supp. 990 (E.D.N.Y. 1977); *Alm v. Van Nostrand Reinhold Co.*, 480 N.E.2d 1263 (Ill. App. Ct. 1985); *Ultramares v. Touche*, 174 N.E. 441 (N.Y. 1931); *Walter v. Bauer*, 439 N.Y.S.2d 821 (Sup. Ct. 1981), *aff'd as modified*, 451 N.Y.S.2d 533 (App. Div. 1982); see also *supra* text accompanying notes 57-69 (discussing *Winter*); *supra* note 45 (discussing *Lewin*); *supra* text accompanying notes 46-49 (discussing *L. Cohen*); *infra* note 157 (same); *supra* text accompanying notes 14, 31-34 (discussing *Demuth*); *supra* text accompanying notes 38-45 (discussing *Alm*); *supra* note 94 (discussing *Ultramares*); *supra* text accompanying notes 35-37 (discussing *Walter*).

130. See *Lewin*, 655 F. Supp. at 282; *Demuth*, 432 F. Supp. at 990; *Alm*, 480 N.E.2d at 1263; *Ultramares*, 174 N.E. at 441; see also *supra* note 45 (discussing *Lewin*); *supra* text accompanying notes 14, 31-34 (discussing *Demuth*); *supra* text accompanying notes 38-45 (discussing *Alm*); *supra* note 94 (discussing *Ultramares*).

131. See generally *supra* text accompanying notes 70-98.

132. But see Lisa A. Powell, Note, *Products Liability and the First Amendment: The Liability of Publishers for Failure to Warn*, 59 IND. L.J. 503, 518 (1984) (asserting that the author's theory of liability, which addressed published speech that induced reliance and dissuaded verification, is "free of the constitutional problems associated with the simple negligence theory, because it does not impose liability on the basis of the content of the published material. Liability is based on the material omitted, that is, the warning").

133. 458 U.S. 747 (1982).

134. *Id.* at 764 (balancing of competing interests declared to be the appropriate constitutional inquiry in decision as to whether child pornography was to be declared a new category of unprotected speech).

135. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 21-1 at 576 (1978) (the First Amendment is "the Constitution's most majestic guarantee").

and state interests invariably and often intersect with First Amendment protections, necessitating legislative or judicial compromise after appropriate inquiry.<sup>136</sup> In the words of Richard A. Posner:

Only dogmatists believe that the First Amendment should be interpreted literally. It is permissible to limit speech if the reasons for doing so are strong enough, and they need not be reasons found in the Constitution. The interests in liberty and security reflected in state tort law . . . are entitled to substantial consideration in determining whether a challenged law violates the First Amendment, whether or not those interests are independently protected by the Constitution against governmental invasion.<sup>137</sup>

There are, in fact, several specifically recognized exceptions to First Amendment protection, many of which are torts. They include obscenity, incitement, defamation (including libel and slander), invasion of privacy (including disclosure of private facts, intrusion, false light, and commercial exploitation), injurious falsehood (including the ancient torts of slander of title and trade libel), disruption of the classroom, misrepresentation, interference with business relations (including interference with contract and interference with prospective advantage), negligent and intentional infliction of emotional distress, alienation of affections, malicious prosecution, product disparagement, conspiracy, complicity and other accomplice liability, antitrust violations under the Sherman Act, trade secret violations, crimes of omission, solicitation of illegal activity, extortion or blackmail, criminal misrepresentation and criminal fraud, and contempt of court.<sup>138</sup>

Each of these forms of criminal and civil liability indisputably involve speech interests, but speech interests which have been deemed to be less compelling than the various federal and state interests also at stake.<sup>139</sup> In the words of the U.S. Supreme Court in *Chaplinsky v. New Hampshire*,<sup>140</sup> "it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."<sup>141</sup> More recently,

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136. See *infra* notes 140-83 and accompanying text.

137. Richard A. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 209 n.97; see also Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 914 (1963) (stating that absolutists do not take the "extreme and obviously untenable position" that "all words, writing and other communications are, at all times and under all circumstances, protected from all forms of government restraint").

138. See David A. Anderson, *Tortious Speech*, 47 WASH. & LEE L. REV. 71, 72 (1990).

139. *Id.*

140. 315 U.S. 568 (1942).

141. *Id.* at 571-72 (footnotes omitted).

the Supreme Court has noted that “[e]ven a cursory reading of [our First Amendment] opinions reveals that at times First Amendment values must yield to other societal interests.”<sup>142</sup>

The *Ferber* balancing test for the establishment of an exception to the First Amendment begins with the recognition and characterization of the state interests motivating the proposed liability.<sup>143</sup> Commercial intellect products liability is grounded in two state interests. The first interest is to guarantee the physical safety of the state’s citizens. The second state interest is to guarantee its citizens’ right to redress for injuries suffered in that jurisdiction. The United States Supreme Court has characterized these interests as substantial.<sup>144</sup>

According to *Ferber*, the second step considers the nexus between the state interests asserted and the proposed liability.<sup>145</sup> Applying the first state interest in support of commercial intellect products liability, a state’s interest in assuring the physical safety of its citizens is furthered through increased product safety. Liability in this context would effect risk avoidance and risk minimization to the extent that it would result in safer designs or enhanced warnings and instructions. Applying the second interest, a state can more readily provide its citizens with a right to redress for injuries by expanding products liability to include commercial intellect. As detailed above, consumers injured by commercial intellect products are currently left without any redress.<sup>146</sup>

Finally, the *Ferber* balancing test mandates a substantive inquiry into the degree of constitutional infringement by the proposed exception.<sup>147</sup> The most troubling First Amendment incursion of commercial intellect products liability is the so-called “duty to investigate” on the part of a publisher.<sup>148</sup> The argument is that if a publisher were held liable for the content of its publications, prudence would necessitate some level of investigation into the

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142. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981).

143. *New York v. Ferber*, 458 U.S. 747, 756-57 (1982).

144. *Farmer v. United Bd. of Carpenters & Joiners*, 430 U.S. 290, 302 (1977); *see also* *International Paper Co. v. Ouellette*, 479 U.S. 481, 502 (1987); *Forty-Eight Insulations, Inc. v. Johns-Manville Prods. Corp.*, 472 F. Supp. 385, 392 (N.D. Ill. 1979); *Ohralik v. Ohio State Bar Ass’n.*, 436 U.S. 447, 460 (1978) (holding that state interest of preventing harm from coming to its public, even in commercial realm, was “particularly strong”).

145. *Ferber*, 458 U.S. at 759.

146. *See supra* text accompanying notes 1-8, 30-69.

147. *Ferber*, 458 U.S. at 761-64.

148. The alleged “duty to investigate” burden on the part of the *author* is noticeably absent in such discussions. Perhaps this lack of concern is procedural, given the infrequency with which authors are defendants in the reported cases. Or perhaps the lack of concern is substantive, including either a perceived insignificance of that burden when placed at the author’s doorstep or a general sense of the fairness behind imposing such a burden on the author of the allegedly injurious material.

hazards posed by such publications.<sup>149</sup> Courts addressing the issue have uniformly rejected, with little or no substantive exploration, such a duty to investigate as impermissibly chilling and deterring speech.<sup>150</sup>

Admittedly, a *de facto* duty to investigate would most likely follow adoption of the commercial intellect products liability doctrine. Publishers clearly would face some additional incentive to assess the substance of what they publish and its potential risks. To some extent, however, this duty could be minimized or avoided through enhanced marketing information such as instructions or warnings regarding the use of appropriate additional input regarding the use of the product. Essentially, such a tactic would attempt to expressly shift the investigative burden to the product consumers. Still, instructions or warnings cannot always deflect strict products liability for what must be said to be a defective design.<sup>151</sup> For example, an author or publisher could effectively warn that a mushroom called for in a recipe can only be safely eaten after it is cooked; he or she could not likely "warn away" liability for a book on how to build a chair which failed to describe a safe blueprint. Publishers thus would be unable to avoid some duty to investigate. In addition, for those publishers who, whether for marketing purposes or otherwise, would choose not to warn against reliance on what they are publishing, some duty to investigate would admittedly be their safest, albeit voluntary, course of action.

Given this admitted duty, the *Ferber* analysis then asks whether such a limited duty to investigate, to the extent it might chill or deter speech, would outweigh the state interests involved so as to offend the Constitution.<sup>152</sup> A substantive exploration of the likely magnitude of this duty and the attendant constitutional implications suggests that it would not.

First, the law should not ignore the extent to which both an author and a publisher *already* perform some measure of investigation into the verity, effectiveness, or comprehensiveness of the publications involved in this inquiry.<sup>153</sup> Natural incentives, including profit and self-respect, ensure this

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149. See *supra* text accompanying notes 83-98.

150. See, e.g., *Eimann v. Soldier of Fortune Magazine, Inc.*, 880 F.2d 830 (5th Cir. 1989), *cert. denied*, 493 U.S. 1024 (1990); *Pittman v. Dow Jones & Co.*, 662 F. Supp 921 (E.D. La. 1987); *Walters v. Seventeen Magazine*, 241 Cal. Rptr. 101 (1987); *Yuhas v. Mudge*, 322 A.2d 824 (N.J. Super. Ct. App. Div. 1974); *Suarez v. Underwood*, 426 N.Y.S.2d 208 (Sup. Ct. 1980); see also *supra* text accompanying notes 87-89 (discussing *Eimann*); *infra* note 191 (same); *supra* text accompanying notes 85-86 (discussing *Pittman*); *supra* text accompanying notes 91-92 (discussing *Walters*); *supra* note 89 (discussing *Yuhas* and *Suarez*); *supra* text accompanying notes 95-96 (discussing *Yuhas*).

151. See *Micallef v. Miehle Co.*, 348 N.E.2d 571, 577 (N.Y. 1976) (even a product whose dangers are open and obvious can have a defective design).

152. *New York v. Ferber*, 458 U.S. 747, 764 (1982).

153. It is apparently not uncommon for an author to sign a contract with a publisher which includes an indemnification clause warranting, among other things, that "any recipe, formula



measure of investigation. To the extent that the author or publisher does not so investigate, or fails to investigate at the same level as he or she would if faced with products liability for commercial intellect, how factually significant is that supplementary burden?

At this point, the duty to investigate can be analyzed only theoretically, rather than empirically, since the practical burdens attributable to commercial intellect products liability would vary among publishers and among products. As stressed in *Ferber*, if "the evil to be restricted so overwhelmingly outweighs the expressive interests . . . at stake, . . . no process of case-by-case adjudication is required."<sup>154</sup> This supplementary burden might be characterized, in the words of *Walters*,<sup>155</sup> as requiring "publications to maintain huge staffs scrutinizing and testing each product offered."<sup>156</sup> However, this "staff" may already exist to one degree or another. Even if not, this additional staff would most likely not have to perform excessively burdensome research. Publishers and authors are, at least minimally, already equipped to examine the reasonably foreseeable ramifications of their own wares. But even to the extent they are not, a court should note that these actors would certainly be in a far better position to investigate than most of the product's consumers, both in terms of information and resources. Courts must also keep in mind that these issues will only arise when an author and publisher have introduced into the stream of commerce some form of intellect, reasonably expected to be relied upon as a blueprint and in fact deriving its value to the author and publisher because of that reliance, which intellect unreasonably and proximately causes harm.

The final analytical step concerns the extent to which this practical burden would chill and deter speech so as to offend the Constitution. This determination is best analyzed through a basic review of the United States Supreme Court's treatment of commercial speech. This Article does not suggest that commercial intellect products, motivated in at least large part by financial gain, are properly classified as commercial speech since they go beyond the mere proposal of a commercial transaction.<sup>157</sup> Still, the two doctrines share a number of common, relevant attributes which make analogy instructive.

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or instruction contained in the work is not injurious to the user." Kathleen McDermott, Note, *Liability for Negligent Dissemination of Product Information: A Proposal for Assuring a More Responsible Writership*, 18 FORUM 557, 569 n.58 (1983) (quoting Spieser, *Insuring Authors: A New Proposal*, PUBLISHERS WEEKLY, May 5, 1982 at 28).

154. *Ferber*, 458 U.S. at 763-64.

155. 241 Cal. Rptr. 101 (1987).

156. *Id.* at 102.

157. See *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 664 (1989); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67 (1983) (even the most inclusive of definitions of commercial speech requires advertising form in addition to profit motive and specific content requirements); *Olivia N. v. National Broadcasting Co.*, 178 Cal. Rptr. 888, 891-92 (1982).

The Supreme Court has consistently held that the First Amendment can well abide the regulation of commercial speech,<sup>158</sup> which is generally defined as "expression related solely to the economic interests of the speaker and his audience,"<sup>159</sup> and "does 'no more than propose a commercial transaction.'" <sup>160</sup> The rationale for this incursion into the First Amendment is based on the characterization that commercial speech possesses both "greater objectivity and hardiness" than traditional speech.<sup>161</sup> As a result, the Court has noted, these attributes "may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker. They may also *make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive.*"<sup>162</sup>

The reasoning that constitutionally permits commercial speech liability holds true for commercial intellect products liability as well. Commercial intellect products, as entrants into the stream of commerce, are also motivated in large part by the same profit motive which is said to make commercial speech so "hardy."<sup>163</sup> Moreover, a commercial intellect defect can be more objectively determined than would be possible with "core" speech: that is, the underlying question before the trier of fact would be whether or not the product "blueprint" failed to "work" such that it could be found to be defective.

Thus, as with commercial speech, the chilling effect in the context of commercial intellect will be substantially less than in "core" speech contexts. Indeed, in *Brocklesby v. United States*,<sup>164</sup> an aeronautical chart case, the Court of Appeals for the Ninth Circuit declared that requiring a chart man-

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One commercial intellect product which can also be characterized as involving commercial speech is a credit report. See, e.g., *L. Cohen & Co. v. Dun & Bradstreet, Inc.*, 629 F. Supp. 1425, 1431 (D. Conn. 1986).

158. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770-72 (1976); see also *Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 445, 456 (1978) (commercial speech is afforded a "limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values"); *Central Hudson Gas & Elec. v. Public Svc. Comm'n.*, 447 U.S. 557, 563 (1980) (citing same); *Bolger*, 463 U.S. at 67-68 (same); *Board of Trustees v. Fox*, 492 U.S. 469, 477-80 (1989) (same).

159. *Central Hudson*, 447 U.S. at 561.

160. *Virginia State Bd. of Pharmacy*, 425 U.S. at 762 (quoting *Pittsburgh Press Co. v. Human Relations Comm'n.*, 413 U.S. 376, 385 (1973)); see also *Ohralik*, 436 U.S. at 454; *Virginia State Bd. of Pharmacy*, 425 U.S. at 762; *Eimann v. Soldier of Fortune Magazine, Inc.*, 680 F. Supp. 863, 865 n.1 (S.D. Tex. 1988), *rev'd*, 880 F.2d 830 (5th Cir. 1989), *cert. denied*, 493 U.S. 1024 (1990).

161. *Virginia State Bd. of Pharmacy*, 425 U.S. at 772 n.24.

162. *Id.* (emphasis added, citations omitted).

163. *Id.*

164. 753 F.2d 794 (9th Cir. 1985), *amended on other grounds*, 767 F.2d 1288 (9th Cir. 1985), *cert. denied*, 474 U.S. 1101 (1986).

ufacturer to produce a safe product would not significantly chill free speech, even assuming that the case involved commercial speech.<sup>165</sup> In addition, since commercial intellect liability would likely result primarily in greater attention to warnings and instructions, it is worth noting that manufacturers' directions sold with his or her product have never been held to merit First Amendment protection.<sup>166</sup>

Furthermore, the Supreme Court gives commercial speech regulation a great amount of deference. State regulations were originally bound by the narrow test put forward by the Court in 1980 in *Central Hudson Gas & Electric v. Public Service Commission*,<sup>167</sup> which read:

If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.<sup>168</sup>

However, in 1989, the Court clarified and substantially eased the "least restrictive" and "direct" relationship requirements between the state interest and the regulation in question, now requiring only "a 'fit' between the legislature's ends and the means chosen to accomplish those ends."<sup>169</sup> Moreover, this "fit" was characterized as

not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' that employs not necessarily the least restrictive means but, . . . a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.<sup>170</sup>

Given the level of deference now afforded state regulation of commercial speech, the amount of chilling and deterring of speech in the commercial

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165. *Id.* at 803.

166. McDermott, *supra* note 153, at 572.

167. 447 U.S. 557 (1980).

168. *Id.* at 564.

169. Board of Trustees v. Fox, 492 U.S. 469, 480 (1989).

170. *Id.* (citations omitted).

intellect products liability context would most likely pass constitutional muster.

The potential "intrusion" into the editorial function of publishers associated with products liability for commercial intellect is an additional concern raised by the Court in *Miami Herald Publishing Co. v. Tornillo*.<sup>171</sup> *Tornillo* is readily distinguishable from the commercial intellect context, however, because it involved "core" speech, not commercial speech. *Tornillo* involved a "right-to-reply" statute granting political candidates a right to equal space to reply to criticism and attacks on their record published by newspapers.<sup>172</sup> However, one year earlier, the Supreme Court had reached the opposite holding when it reviewed the issue of editorial intrusion in the commercial speech context. In *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,<sup>173</sup> the Court held that an ordinance which had been construed as generally prohibiting newspapers from carrying "help-wanted" advertisements in gender-designated columns did not violate the First Amendment.<sup>174</sup>

Nothing in *Tornillo* vitiates the holding of *Pittsburgh Press*.<sup>175</sup> Thus, some degree of editorial intrusion in the context of commercial speech, and, by analogy, commercial intellect, is constitutionally permissible.<sup>176</sup> Moreover, newspaper publishers and editors, by virtue of their position, are not likely to find themselves to be defendants in a commercial intellect case since neither news and feature articles nor advertisements would be classified as products.<sup>177</sup>

In addition, the contours of the commercial intellect doctrine, itself, conform to the Supreme Court's preferences for the manner of restriction employed. In those instances when the Constitution is said to sanction "the prevention and punishment" or other regulation of speech, courts have granted heavy preference to those limitations which are well defined, generally applicable, and as unobtrusive as is feasible. In *New York v. Ferber*, the Court supported liability for child pornography where the criminal statute had "adequate definitions."<sup>178</sup> In *Linmark Associates v. Township of Wil-lingboro*,<sup>179</sup> the Court reiterated that "laws regulating the time, place, or manner of speech stand on a different footing from laws prohibiting speech

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171. 418 U.S. 241, 254-58 (1974); see *supra* text accompanying notes 79-82.

172. *Id.* at 244.

173. 413 U.S. 376 (1973).

174. *Id.* at 391.

175. See *News & Sun-Sentinel Co. v. Board of County Comm'rs*, 693 F. Supp. 1066, 1071 (S.D. Fla. 1987).

176. *Id.*

177. See *infra* text accompanying notes 181-92.

178. 458 U.S. 747, 764 (1982).

179. 431 U.S. 85 (1977).

altogether.”<sup>180</sup> Recently, in *Cohen v. Cowles Media Co.*,<sup>181</sup> the Supreme Court allowed a state’s promissory estoppel law to apply to the press, emphasizing that the law was constitutionally permissible since it was one of general applicability and it did not target or single out the press.<sup>182</sup>

Accordingly, commercial intellect products liability is an appropriately tailored exception to the First Amendment. First, the doctrine would not prohibit speech, but would only indirectly affect the manner and perhaps the place in which affected speech is exercised by subjecting its disseminators to liability only if their speech proximately causes injury. Second, as a tort, it is a law of general applicability, exposing both private citizens and publishers, not exclusively the media, to liability. Finally, the doctrine contains complete and adequate definitions.<sup>183</sup>

## V. THE CONTOURS OF THE COMMERCIAL INTELLECT PRODUCTS LIABILITY DOCTRINE

### A. “Product” Defined

This Article proposes defining commercial intellect as:

Any item introduced into the stream of commerce, including the intangible (or intellectual) aspects of the item, where those aspects: (1) contribute to the product’s economic value, and (2) are reasonably expected by an ordinary consumer to be an integrated method or blueprint that is directly useable, as opposed to indirectly useable only after further input on that same matter, and as opposed to merely pondered and appreciated.

While case-by-case determinations of whether an item is classified as a product for purposes of this doctrine naturally must be made as a matter of law, the list of items would most likely include: skill or advice books, videotapes and manuals; computer software; cookbooks; recommended experiments in scientific and educational publications; navigational charts; architectural plans; technical encyclopedias and manuals; credit reports; and any portion of a publication which included any of the above products for its consumers’ use. The intellectual substance of these goods is, by its very nature, intended to be directly useable without the need for further input within the ambit of that particular “blueprint.” The disseminator of one of these goods must reasonably expect a fundamentally different response from its consumers than does the disseminator of, for example, a work of fiction

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180. *Id.* at 93 (holding that ordinance prohibiting the posting of real estate “for sale” and “sold” signs violated the First Amendment).

181. 111 S. Ct. 2513 (1991).

182. *Id.* at 2515.

183. See *infra* text accompanying notes 181-92.

because these goods engender, and the disseminator must reasonably expect, reliance. More importantly, these goods are generally purchased by consumers with the reasonable expectation that they are "blueprints" which can be directly relied upon (concepts of comparative fault notwithstanding) to function in a nondefective manner for the reasonably foreseeable purposes engendered by their disseminators' marketing schemes.

As one example, in the case of a cookbook, the economic value of the good is a function of both the physical characteristics of the book itself and the intellectual content of its recipes. A recipe is reasonably expected by a consumer to be directly useable without additional and potentially supplanting input, rather than only being capable of being read and contemplated as information for information's sake. In contrast, that part of a published work that advocates corporal punishment would only be useable indirectly, and thus would not be a product for purposes of this doctrine. A consumer would not reasonably foreseeably rely upon such information or opinion as an integrated "final word" on corporal punishment and mechanically follow it as a plan or blueprint. Rather, a reasonable consumer would only read and intellectually process that information before, if at all, using it indirectly, subsequent to the assimilation of other input on that same subject.

A more complex example is a book like *Final Exit*,<sup>184</sup> the best-seller which not only advocates the right to suicide in instances of terminal illness, but details several ways in which to accomplish it. Under the commercial intellect doctrine, that portion of the book which advocates the right to die would not be considered a product, as intellectual advocacy, itself, is not reasonably foreseeably a blueprint. However, that portion of the book which provides detailed instructions on how to accomplish suicide *would* be considered a product. Those instructions are reasonably expected by an ordinary consumer to be an integrated method or blueprint that is directly useable. Such detailed "how to" instructions are certainly not received by consumers as material to be merely pondered and appreciated or even as indirectly useable, only after further instruction.

Still more complex examples include the "self-help" variety "How To" books. Particularly compelling titles include: *How to Make a Man Fall in Love With You: The Fail Proof, Fool Proof Method!*,<sup>185</sup> *How to Sell Anything to Anybody*,<sup>186</sup> *How to Create Your Own Fad and Make a Million*

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184. DEREK HUMPHREY, *FINAL EXIT* (1991).

185. TRACY CABOT, *HOW TO MAKE A MAN FALL IN LOVE WITH YOU: THE FAIL PROOF, FOOL PROOF METHOD* (1984).

186. JOE GIRARD, *HOW TO SELL ANYTHING TO ANYBODY* (1977).

*Dollars*,<sup>187</sup> and *How to Fire Your Boss*.<sup>188</sup> Whether these books will be adjudged products depends upon the nature of the particular book. If the book merely gives advice and suggestions (e.g., "talk about sports and wear lots of makeup"), rather than a blueprint, it would most likely not be categorized as a product by a court.

It is also useful to delineate what is *not* a product under this doctrine, despite certain similarities. This list includes those items which are entered into the stream of commerce, contain words or ideas which contribute to the item's economic value, and are reasonably foreseeably useable by its consumers. The difference with this list, however, is that consumers do not reasonably use these items *directly*. That is, the reasonable consumer does not expect these items to be integrated or "final" information which is useable without further input on the subject addressed by the contents of the item. Examples include purely informational, fictional, or opinion-based items, publications, or purchased broadcasts,<sup>189</sup> traditional advertisements, and certifications or "seals of approval." For example, a magazine or newspaper article reporting on (not just substantially reprinting) excerpts from the suicide book *Final Exit*, would not constitute a product. The reasonably foreseeable function of such a report would be informational, rather than directly useable.

Disseminators of items in this list can still be subject to liability, of course. However, given that these items cannot appropriately be considered products because their only reasonable use is indirect, the proper theory of liability would likely fall under the established tort of incitement. Incitement generally includes speech which is "directed to inciting or producing imminent lawless action and [is] likely to produce such action."<sup>190</sup> That type of

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187. KEN HAKUTA, *HOW TO CREATE YOUR OWN FAD AND MAKE A MILLION DOLLARS* (1988).

188. CHRIS MALBURG, *HOW TO FIRE YOUR BOSS* (1991).

189. For example, in a science textbook, that portion of the book which purely provides information (e.g., a chapter on ontogeny) is not a product subject to commercial intellect products liability, where that part of the same textbook which proposes an experiment *is* a commercial intellect product. The same would be true for a magazine with both feature articles and recipes. That portion of the magazine including feature articles which purely provide information, fiction, or opinions would not be a product subject to commercial intellect products liability while the recipes would be so categorized.

190. *Herceg v. Hustler Magazine, Inc.*, 565 F. Supp. 802, 804 (S.D. Tex. 1983), *rev'd on other grounds*, 814 F.2d 1017 (5th Cir. 1987) (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam)).

For examples of cases which do not fit into the commercial intellect products liability doctrine but are more properly litigated in the context of incitement, see *Olivia N. v. National Broadcasting Co.*, 178 Cal. Rptr. 888 (Cal. Ct. App. 1981) (addressing plaintiff's allegation that defendant's television broadcast of particular form of sexual assault in film drama incited assailants to similarly assault her), *cert. denied*, 458 U.S. 1108 (1982); *Sakon v. PepsiCo, Inc.*, 553 So. 2d 163, 166 (Fla. 1989) (holding television advertiser has no duty to viewers for cola

speech is used only indirectly, since a person swayed by the speech reasonably takes into account additional information before acting.<sup>191</sup>

Once an item is classified as a product, section 402A of the Restatement (Second) of Torts applies as always. That is, the seller must be engaged in the business of selling such a product and the product is expected to and actually reaches the user or consumer without substantial change in the condition in which it was sold.<sup>192</sup>

### B. "Defect" Defined

Having explored the analytical framework for determining what is and what is not a product under this doctrine, the next step is to define "defect" in relation to that part of a product subject to liability as commercial intellect. Subjecting the expanded category of products proposed in this Article to strict liability would not require a new measure or expanded definition of product defect. The traditional notions of product defect<sup>193</sup> should apply in their current form in commercial intellect products liability cases.

Defect in the context of commercial intellect products would be defined within the accepted definitions of defect already supplied by modern prod-

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commercial depicting jumping over a lake with a bicycle); *Watters v. TSR, Inc.*, 904 F.2d 378, 379 (6th Cir. 1990) (addressing a suit against manufacturer of the game "Dungeons & Dragons" for alleged causal link between themes of game and youth's suicide); *Yuhas v. Mudge*, 322 A.2d 824 (N.J. Super Ct. App. Div. 1974) (addressing suit against magazine publisher who placed paid fireworks advertisement in one of its magazines where codefendants purchased fireworks after seeing advertisements, and injured plaintiff bystanders when fireworks exploded); *Eimann v. Soldier of Fortune Magazine, Inc.*, 680 F. Supp. 863, 864 (S.D. Tex. 1988) (addressing suit against publisher of "gun for hire" advertisement where husband of the deceased plaintiff read and subsequently contracted to have the deceased murdered), *rev'd*, 880 F.2d 830 (5th Cir. 1989), *cert. denied*, 493 U.S. 1024 (1990); *Hanberry v. Hearst Corp.*, 81 Cal. Rptr. 519 (Cal. Ct. App. 1969) (addressing suit against certifier responsible for "Good Housekeeping Seal" of approval where plaintiff purchased allegedly defective shoes certified by this seal); *Howard v. Poseidon Pools, Inc.*, 506 N.Y.S.2d 523, 524 (Sup. Ct. 1986) (addressing suit against certifier of swimming pools and equipment where plaintiff purchased allegedly defective pool approved by defendant), *aff'd in part & rev'd in part*, 522 N.Y.S. 2d 388 (App. Div. 1987).

191. For example, a person in a crowd listening to an exhortation to storm the local jail necessarily incorporates other information into his or her decision to participate. Such additional input could include his or her own thoughts and values as well as the opinions of others. In contrast, a person following a recipe in a recipe book would *reasonably* not incorporate additional input when following that recipe, even if such additional input were available. Again, the difference is clearest when focusing on whether consumers would *reasonably* apply the speech without additional input.

192. RESTATEMENT (SECOND) OF TORTS § 402A(1)(a-b) (1965).

193. "Traditional" defect analysis includes whatever theory a given jurisdiction already utilizes, including risk-benefit defect analysis, *see, e.g.*, *Gomulka v. Yavapai Mach. & Auto Parts, Inc.*, 745 P.2d 986, 990 (Ariz. Ct. App. 1987), consumer expectation defect analysis, *see, e.g.*, *Falk v. Keene Corp.*, 782 P.2d 974, 980 (Wash. 1989), or a combination thereof, *see, e.g.*, *Barker v. Lull Eng'g Co.*, 573 P.2d 443, 455-56 (Cal. 1978).



ucts liability law. Comment g to section 402A of the Restatement (Second) of Torts defines defect as "a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him."<sup>194</sup> Comment i defines "unreasonably dangerous" as "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."<sup>195</sup> Courts often combine or replace this "consumer expectation" approach with a risk-utility test for defect, which, in various forms, essentially compares the risk or danger of the product's alleged defect with the costs of avoiding that risk.<sup>196</sup>

Putting aside the traditional issues of causation and injury for this discussion, a commercial intellect product which fails to perform according to reasonable expectations must be said to be defective. That the product is intellectually based would be immaterial to establishing defect. Courts can and should apply the appropriate defect approach to the intellectual aspect, rather than the physical aspect, of the product alleged to be defective.

Since the question of defect is primarily one for the finder of fact,<sup>197</sup> the determinations of defect in most cases must be left to individual litigation. For example, consider most skill or craft advice books, which are commonly referred to as "How To" books. These publications generally promise that, upon use of the author's blueprint, some goal can be achieved by the user/reader. A book entitled *How To Build A Chair* should be considered defective if strict adherence to the author's instructions unreasonably fails to produce a functional chair, and proximately causes an injury compensable in tort. Once verified factually, a finder of fact would likely find that this product was defective as defined within each jurisdiction. The same approach may be used to determine the defectiveness of recipes in a cookbook. For example, in easy cases, tortious injury may be proximately caused by the defect of calling for poisonous ingredients. The more difficult, but nonetheless perfectly manageable, cases involve recipes which fail to warn of the need to thoroughly cook pork before consumption.

There are no analytical barriers to applying standard defect analysis to products included in the rubric of commercial intellect liability. As always, defendants would still have the opportunity to establish adequate marketing, either warnings or instructions, or nondefective design. For example, a publisher of a diet book could argue that the book came with sufficient warnings

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194. RESTATEMENT (SECOND) OF TORTS § 402A cmt. g (1965).

195. *Id.* at cmt. i.

196. *See, e.g.,* Pennington v. Vistron Corp., 876 F.2d 414, 420 (5th Cir. 1989).

197. *See, e.g.,* Habecker v. Clark Equip. Co., 942 F.2d 210, 213-14 (3d Cir. 1991); Brooks v. Eugene Burger Management Corp., 264 Cal. Rptr. 756, 764 (Cal. Ct. App. 1989). *But cf.* Linegar v. Armour, Inc., 909 F.2d 1150, 1153 (8th Cir. 1990).

regarding consultation with a physician (marketing) or that the diet, when properly adhered to, was not injurious (design). Even manufacturing defects, for example, substantive mistakes or typographical errors, can be litigated in this context just as traditional manufacturing defects are litigated. The emphasis in a commercial intellect products liability defect inquiry simply shifts the traditional defect focus to the intellectual, rather than the physical, component at issue.

## VI. CONCLUSION

The equitable imposition of strict liability, in itself, is an appropriate objective. A consumer physically injured by words or ideas sold as a product is as much injured, and as much deserving of recompense, as someone injured by a tangible aspect of a product. Likewise, an actor who sells words or ideas as a product should not be able to insulate himself or herself from strict liability when those words or ideas cause an otherwise compensable injury simply because of the communicative nature of that product. The doctrine of commercial intellect liability constitutionally encompasses the eminent right of a state to provide redress to its injured citizens and the traditional rights of those injured citizens to seek redress through a principled rule of law.

