

INTERNET WEB SITES AS PRODUCTS UNDER STRICT PRODUCTS LIABILITY: A CALL FOR AN EXPANDED DEFINITION OF PRODUCT

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I. INTRODUCTION

The purpose of this Note is to analyze the applicability of strict products liability to information sold and distributed online via the World Wide Web. Consider the novice carpenter, who discovers, while browsing the web, *Building Patios for Dummies: The Complete Guide for Beginners*. He purchases the guide and downloads a file containing the information to his computer. Following a diagram in the guide, he builds a covered patio on the back of his house. He completes the patio and as he stands within his new patio admiring his work, the roof collapses on him causing serious injury.

Unbeknownst to the novice, the diagram he followed in building the patio incorrectly displayed the placement for support beams for the roof causing structural weakness, which caused the roof to cave in. The author of the guide had no real carpentry experience, and the web publisher selling the guide over the Internet sold it without ever checking its contents. As it turns out, a more experienced carpenter would have immediately recognized the defect in the diagram, although it was nearly impossible for an amateur, like our novice, to detect. While the most obvious question that arises from this scenario is whether the novice would be able recover damages under any theory for his injuries, I propose another, more specific, question. Can our novice carpenter assert a claim for strict products liability against the web publisher who sold him the guide over the Internet?

Many legal commentators argue that the law fails to adequately protect consumers from the foreseeable risk of harm that results from a

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“reader’s reasonable reliance on ‘defective information’” in books and other written publications.¹ This lack of protection results from two general failures of the courts: (1) the failure to recognize that a valid cause of action arises in such situations; and (2) the erroneous finding that the First Amendment absolutely immunizes publishers from liability in such circumstances.² Yet, despite the current lack of judicial recognition, almost all legal writers analyzing the issue agree that strict products liability can and should be applied to publications that invite reasonably foreseeable reliance and which contain defective information that causes harm.³ This conclusion springs from the general belief that from how-to books to graphic approach charts, there are numerous publications that not only invite reliance, but also result in serious harm when the information relied upon by the reader is inaccurate or otherwise defective.⁴ These commentators have thus far limited their analysis to traditional paper publications such as books.

This Note proposes that the application of strict products liability should not be limited to information published in such tangible media as books or magazines, but should be extended to include information found on the Internet, such as the guide purchased and downloaded by our novice carpenter. Considering that we currently live in the Information Age,⁵ where information that can be rapidly exchanged between various mediums is a precious commodity, it does not really make sense to limit the theory to traditional publication media such as books. In today’s society, it is clear that one driving force of the Information Age is the Internet,⁶ which permits instantaneous action

1. John A. Gray, *Strict Liability for the Dissemination of Dangerous Information?*, 82 LAW LIBR. J. 497, 497-99 (1990); see also Daniel McNeel Lane, Jr., Note, *Publisher Liability for Material That Invites Reliance*, 66 TEX. L. REV. 1155, 1156-57 (1988).

2. See, e.g., *Winter v. G.P. Putnam’s Sons*, 938 F.2d 1033, 1037 (9th Cir. 1991).

3. See, e.g., Lars Noah, *Authors, Publishers, and Products Liability: Remedies for Defective Information in Books*, 77 OR. L. REV. 1195, 1202-03 (1998).

4. See Lane, *supra* note 1, at 1156. This is not surprising considering that the value of information to the consumer is often dependent upon its accuracy and reliability. See Raymond T. Nimmer, *Images and Contract Law—What Law Applies to Transactions in Information*, 36 HOUS. L. REV. 1, 3-5 (1999) (comparing information to goods and analyzing under contract law); Michael L. Rustad, *Commercial Law Infrastructure for the Age of Information*, 16 J. MARSHALL J. COMPUTER & INFO. L. 255, 291-97 (1997) (explaining the warranties of quality under the proposed Art. 2B to the Uniform Commercial Code).

5. See, e.g., Anthony Paul Miller, *Teleinformatics, Transborder Data Flows and the Emerging Struggle for Information: An Introduction to the Arrival of the New Information Age*, 20 COLUM. J.L. & SOC. PROBS. 89, 89 (1986). “We live a period of enormous political, economic, and social change as the United States, together with the other industrialized nations, rushes headlong into a postindustrial, interdependent, information-based age.” *Id.* (quoting Eger, *The Global Phenomenon of Teleinformatics: An Introduction*, 13-14 CORNELL INT’L L.J. 203, 203 (1981).

6. Terms such as “the Internet,” “the Net,” “Cyberspace,” “the World Wide Web” or “the Web” may be used interchangeably throughout this Note to denote the current worldwide interlinkage of computer networks commonly known and referred to as the World Wide Web. For an introduction to the basic terms and concepts associated with the Internet and the World Wide Web, see *Reno v. ACLU*, 521 U.S. 844, 848-53 (1997); *ACLU v. Reno*, 929 F.Supp. 824 (E.D. Penn. 1996); see also Matthew Edward Searing, Note, *What’s in a Domain Name? A Critical Analysis of the National and International Impact on Domain Name Cybersquatting*, 40 WASHBURN L.J. 110, 111-15

and interaction that previously was impossible and unthinkable.⁷ However, the inherent shapelessness of the Internet presents a challenge to the traditional legal rules that govern transactions in the paper and ink realm.⁸

As a result of the poor fit between the traditional legal rules and online transactions and because of judicial resistance to change, there are many uncertainties in the law concerning information sold and exchanged online.⁹ The relative lawlessness of the Internet makes it the "Wild West of the information age."¹⁰ Against this backdrop, it is not surprising that many legal scholars and commentators have attempted to address the seemingly limitless legal issues surrounding the Internet.¹¹ However, none have yet analyzed the applicability of strict products liability principles to the Internet.

Considering the importance and volume of transactions that occur over the Internet,¹² it is important to determine whether strict products liability is applicable to publications and information sold and distributed online. No one doubts the importance and significance of the Internet as an increasingly popular and widely-used medium for the purchase and sale of information. When that information is inaccurate

(2000); Tracey Laquey, *The Internet Companion: A Beginner's Guide to Global Networking* (2d ed. 1994). For an in depth explanation of what the Internet is and how it works, see Michael A. Geist, *The Reality of Bytes: Regulating Economic Activity in the Age of the Internet*, 73 WASH. L. REV. 521, 525-30 (1998). For a detailed history of the Internet and other useful facts about the Internet, see Hobbes' Internet Timeline v5.1, at <http://info.isoc.org/guest/zakon/Internet/History/HIT.html> (frequently updated, last visited October 25, 2000); see also Internet Society Site, at <http://www.isoc.org/internet-history> (last updated October 24, 2000, last visited October 25, 2000); The Living Internet, at <http://www.livinginternet.com> (updated weekly, last visited October 25, 2000).

7. See Jonathan D. Bick, *Why Should the Internet Be Any Different?*, 19 PACE L. REV. 41, 42-43 (1998).

8. See *id.* at 45 (arguing that legal issues should not be handled differently simply because they relate to the Internet).

9. See Aron Mefford, Note, *Lex Informatica: Foundations of Law on the Internet*, 5 IND. J. GLOBAL LEG. STUD. 211, 212-13 (1997) (arguing that when traditional law ultimately proves ineffective an "autonomous body of law [will] evolve[] on the Net"); see also David R. Johnson & David Post, *Surveying Law and Borders: Law And Borders - The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996) (arguing Cyberspace will require its own distinct set of laws); Timothy Wu, *Application-Centered Internet Analysis*, 85 VA. L. REV. 1163, 1163-64 (1999) (arguing that the diversity of technology of what we call the Internet cannot be made to fit into one generalization and that the analysis should therefore be user driven).

One commentator provides another explanation for this uncertainty, stating:

American judges have approached on-line services in much the same way a group of blind men approach an elephant. According to the parable, one blind man feels the elephant's trunk and pronounces that he has found a snake, a second feels a leg and declares he is standing next to a tree, a third feels the elephant's ear and opines that he is touching the wing of a large bird. From limited observation, each man deduces an erroneous conclusion.

Alex Alben, *What Is an On-line Service? (In the Eyes of the Law)*, 13:6 THE COMPUTER LAWYER 1, 1 (June 1996).

10. Amy Harmon, *The Law Where There is No Land*, N.Y. TIMES, Mar. 16, 1998, at D1.

11. See, e.g., Adam R. Kegley, *Regulation of the Internet: The Application of Established Constitutional Law to Dangerous Electronic Communication*, 85 KY. L.J. 997, 997-98 & nn.1-13 (1997) (giving a sampling of some of the issues covered and articles about the Internet).

12. See *Internet Retailing Revealed: Bricks & Sticks vs. Cursors & Clicks*, 3:12 REAL ESTATE/PORTFOLIO STRATEGIST 1 (1999) (showing importance of Internet sales and stating they are only expected to rise), available at, <http://www.ppr-research.com/services/reprs-example-article.pdf>.

or otherwise defective, and injury results, however, should liability be imposed upon the publishers or disseminators of such defective information? Should web site operators be allowed to reap the rewards of selling their information without concern for the injuries that result when that information is defective? Most people would probably say that some liability should be imposed, but courts, so far, have generally rejected the idea of holding publishers liable for disseminating defective information that causes injury.

This Note will analyze whether strict products liability is applicable to publications and information sold and distributed over the Internet in terms of whether that information should be considered a product under the law of product liability.¹³ As suggested above, it is not difficult to understand that different types of publications invoke varying degrees of reliance from readers.¹⁴ This Note proposes that when a publication invites a large degree of reliance from a consumer to use information without further investigation, strict products liability should apply.

Part II of this Note provides a historical legal background that details the various types of claims that have been lodged against publishers, and the viability of those claims in holding the publishers liable for inaccurate or defective information. In Part III, this Note first reviews the rationale courts employ in finding that information is not a product under a theory of strict products liability, and then contrasts that rationale with analyses where courts have found liability for defective information. Part IV.A. analyzes the soundness and inconsistencies of these various decisions and concludes that information can be a product under certain circumstances. Further, Part IV.B. discusses what should be considered a product, and provides a proposed definition of “informational product.” Part IV.C. applies the theory to the Internet and addresses additional issues that arise due to the unique nature of the Internet. This Note ultimately concludes that information distributed over the Internet can be found to be an “informational product.”

II. LEGAL BACKGROUND

There are many different theories alleged against publishers for defective information, but for the most part, they have proven unsuccessful.¹⁵ The main theories used to establish liability for

13. This Note does not take up the First Amendment issues that necessarily will arise if information is considered a product under strict product liability as the issue has been fully explored by others. See notes 173-74 *infra*.

14. See Lane, *supra* note 1, at 1182.

15. See Richard C. Ausness, *The Application of Products Liability Principles to Publishers of Violent or Sexually Explicit Material*, 52 FLA. L. REV. 603, 611-23 (2000) (reviewing cases and finding reluctance in courts to permit tort liability).

publication of defective information include negligence;¹⁶ incitement or encouragement to action;¹⁷ and strict liability.¹⁸ It is important to understand how courts treat publisher liability under the related theory of negligence in order to fully appreciate how those same concepts sometimes inexplicably creep into courts' analyses under strict products liability claims. In the following section, the general legal landscape in the area of publisher liability for defective information is explored.

A. Negligence

One popular theory for recovery alleged by people who suffer injury from defective information is negligence.¹⁹ Generally, negligence claims fall into the following categories: (1) negligent publication;²⁰ (2) failure to warn;²¹ and (3) negligent misrepresentation.²² Negligence is a traditional theory of tort liability that is alleged for defective information in published materials because it "appl[ies] to [such] a vast range of acts and omissions."²³ "In order to establish negligence, a plaintiff must prove the existence of a duty, a breach of that duty, an injury, and proximate cause, that is, a causal connection between the duty breached and the injury suffered."²⁴

While success in a negligence action requires proof of all elements, the primary bar to recovery in a negligence claim, irrespective of the manner in which it is framed, is whether a duty was owed to the injured

16. Generally, negligence theories include: (1) negligent use of words or publication, *see generally* Eimann v. Soldier of Fortune Magazine, Inc., 880 F.2d 830 (5th Cir. 1989); Herceg v. Hustler Magazine, Inc., 565 F. Supp. 802 (S.D. Tex. 1983); (2) failure to warn, *see generally* Way v. Boy Scouts of Am., 856 S.W.2d 230 (Tex. App. 1993); Cardozo v. True, 342 So. 2d 1053 (Fla. Dist. Ct. App. 1977); and (3) negligent misrepresentation, *see generally* Gutter v. Dow Jones, Inc., 490 N.E.2d 898 (Ohio 1986); Alm v. Van Nostrand Rheinhold Co., 480 N.E.2d 1263 (Ill. App. Ct. 1985). *See generally*, Gerald R. Smith, Note, *Media Liability For Physical Injury Resulting From the Negligent Use of Words*, 72 MINN. L. REV. 1193 (1988).

17. *See* Rice v. Paladin Enterprises, Inc., 128 F.3d 233, 265 (4th Cir. 1997) (holding book publisher can be held liable for civil aiding and abetting, and the First Amendment is not implicated by such liability), *cert. denied*, 523 U.S. 1074 (1998). *See generally*, Jeffrey Haag, Comment, *If Words Could Kill: Rethinking Tort Liability in Texas for Media Speech That Incites Dangerous or Illegal Activity*, 30 TEX. TECH. L. REV. 1421 (1999).

18. *See* Birmingham v. Fodor's Travel Publications, Inc., 833 P.2d 70, 79 (Haw. 1992); Winter v. G.P. Putnam's Sons, 938 F.2d 1033, 1036 (9th Cir. 1991). *See generally*, Noah, *supra* note 3; Andrew T. Bayman, Comment, *Strict Liability for Defective Ideas in Publications*, 42 VAND. L. REV. 557 (1989).

19. *See generally*, Sandra Davidson, *Blood Money: When Media Expose Others to Risk of Bodily Harm*, 19 HASTINGS COMM. & ENT. L.J. 225, 230-56 (1997) (delineating cases for negligence against media defendants).

20. *See* Eimann, 880 F.2d at 838; Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1026 (1987); Jones v. J.B. Lippincott Co., 694 F. Supp. 1216, 1216-17 (D. Md. 1988); Way, 856 S.W.2d at 237; Alm, 480 N.E.2d at 1267.

21. *See* Herceg, 814 F.2d at 1026; Way, 856 S.W.2d at 233-34; Cardozo, 342 So. 2d at 1053.

22. *See* Gutter v. Dow Jones, Inc., 490 N.E.2d 898 (Ohio 1986); Alm, 480 N.E.2d at 1263.

23. 1 MARSHALL S. SHAPO, THE LAW OF PRODUCTS LIABILITY ¶5.01, at 5-2 (3d ed. 1994).

24. Davey v. Hedden, 920 P.2d 420, 422 (Kan. 1996), *accord* Greater Houston Transp. Co. v. Phillips, 801 S.W.2d 523, 525 (Tex. 1990) (citing El Chico Corp. v. Poole, 732 S.W.2d 306, 311 (Tex. 1987)).

party.²⁵ Generally, courts do not impose liability for negligence on publishers, finding either that the publisher owes no duty to the reader,²⁶ or that the First Amendment prevents imposition of civil liability.²⁷

1. General Duty of Care

Liability for negligence hinges on whether the defendant breached a duty that is owed to the plaintiff. In order to put the duty of care owed by a publisher in context, it is first necessary to understand how courts generally analyze the duty of care owed under the law of negligence. The law of negligence imposes a fundamental duty upon a person to act as a reasonably prudent person would under the circumstances.²⁸ There are several ways to express exactly how to determine the duty owed by a person in a given situation. A late nineteenth century English case provides the general negligence formulation and, in a famous passage, emphasizes the relational aspects of negligence, providing:

[W]henver one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.²⁹

Judge Learned Hand fashioned a more modern approach for determining the duty owed by an individual, which courts frequently employ. In Judge Hand's formula, duty is a function of three variables: (1) the probability of harm; (2) the gravity of any resulting injury; and (3) the burden imposed to try to prevent the harm.³⁰ Under this formulation, "liability depends upon whether B [the burden] is less than

25. See, e.g., *Eimann*, 880 F.2d at 838; *Herceg*, 814 F.2d at 1017; *Jones*, 694 F. Supp. at 1216; *Way*, 856 S.W.2d at 237; *Alm*, 480 N.E.2d at 1267.

26. See *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1037 (9th Cir. 1991) (holding publisher has no duty to exercise due care); *Eimann*, 880 F.2d at 838 (holding that the publisher did not violate the "required standard of conduct"); *Davidson v. Time Warner, Inc.*, No. Civ.A. V-94-006, 1997 WL 405907, at *10 (S.D. Tex. Mar. 31, 1997) (holding that the media defendants had no duty to prevent the distribution of an music album); *Way*, 856 S.W.2d at 237 (holding that the publisher owed no duty to the plaintiff); *Cardozo*, 342 So. 2d at 1053 (holding that that a book publisher has no duty to investigate the book's contents or to warn its readers of potential dangers arising from the book's contents).

27. See *Herceg*, 814 F.2d at 1023 (holding that the publisher was not liable because the published article was protected by the First Amendment); *Davidson*, 1997 WL 405907, at *22 (holding that an album was protected by the first amendment). See also *DeFilippo v. National Broadcasting Co.*, 446 A.2d 1036, 1042 (R.I. 1982) (holding first amendment protection of free speech bars recovery for negligent use of words); *Olivia N. v. National Broadcasting Co.*, 178 Cal. Rptr. 888, 890-91 (Cal. 1981) (same); *Walt Disney Prods. v. Shannon*, 276 S.E.2d 580, 581 (Ga. 1981) (same); *Hyde v. City of Columbia*, 637 S.W.2d 251, 253 (Mo. Ct. App. 1982) (same), *cert. denied*, 459 U.S. 1226 (1983); *Smith v. Linn*, 414 A.2d 1106, 1109 (Pa. 1980) (same); *Zamora v. Columbia Broadcasting Sys.*, 480 F. Supp. 199, 200 (S.D. Fla. 1979) (same).

28. See RESTATEMENT (SECOND) OF TORTS § 283 (1965).

29. *Heaven v. Pender*, 11 Q.B.D. 503, 509 (Q.B. 1883).

30. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

L [the injury] multiplied by P [the probability]; i.e., whether $B < PL$.”³¹

Courts sometimes abandon this formulation of duty in favor of the Second Restatement’s more concise, but also more abstract, definition, which provides that “negligence is conduct which falls below the standard established by law for the protection of another against the unreasonable risk of harm.”³² As is shown below, regardless of the formulation of duty courts use, they typically make only a superficial effort to determine whether the defendant owed such a duty in a given case. This lack of reasoned decision-making is one of the primary causes of the failure of the courts to find a valid cause of action for defective information.

2. *Negligent Publication*

Claims for negligent publication are simply claims against a publisher for “the publication of information that results in physical harm to another.”³³ These claims arise in a number of different circumstances. A scan of case law reveals that claimants have filed negligent publication claims for publication of advertisements of products that are defective;³⁴ advertisements and other published materials that are likely to incite dangerous activities;³⁵ information about a crime victim or witness before the suspect is in custody;³⁶ and inaccurate, incomplete or misleading information.³⁷ Since this Note is primarily concerned with consumer expectations with respect to published information, the focus of discussion will be on cases alleging injury as a result of a publication of inaccurate, incomplete or

31. *Id.*

32. RESTATEMENT (SECOND) OF TORTS § 282 (1965).

33. Ausness, *supra* note 15, at 618.

34. See *Walters v. Seventeen Magazine*, 241 Cal. Rptr. 101, 103 (Cal. 1987) (finding magazine not liable for negligent publication of advertisement concerning defective tampons because it had no duty to plaintiff); *Hanberry v. Herst Corp.*, 81 Cal. Rptr. 519, 521 (1969) (finding publisher liable where it endorsed the product which turned out to be defective).

35. See *Way v. Boys Scouts of Am.*, 856 S.W.2d 230, 237 (Tex. App. 1993) (finding publisher not liable for alleged negligent publication of advertising supplement); see also *Eimann v. Soldier of Fortune Magazine, Inc.*, 880 F.2d 830, 838 (5th Cir. 1989) (finding magazine not liable for “gun for hire” advertisement); *Norwood v. Soldier of Fortune Magazine, Inc.*, 651 F. Supp. 1397, (W.D. Ark. 1987) (holding magazine liable for hired gun advertisement).

36. See *Risenhoover v. England*, 936 F. Supp. 392, 410-11 (W.D. Tex. 1996) (finding enough evidence to make question of material fact as to whether publisher is liable for premature publication of raid on compound that allowed suspects to fortify position and resulting in death of officers); see also *Hyde v. City of Columbia*, 637 S.W.2d 251, 253 (Mo. Ct. App. 1982) (finding publisher liable for publishing name of kidnapping victim prior to arrest of abductor).

37. See *Birmingham v. Fodor’s Travel Publications, Inc.*, 833 P.2d 70, 75 (Haw. 1992) (finding no liability for inaccurate information in travel brochure). See also *Winter v. G.P. Putnam’s Sons*, 938 F.2d 1033, 1037 (9th Cir. 1991) (finding no liability for inaccurate information in book); *Jones v. J.B. Lippincott Co.*, 694 F. Supp. 1216 (D. Md. 1988) (finding no liability for incomplete information in medical textbook); *Lewin v. McCreight*, 655 F. Supp. 282 (E.D. Mich. 1987) (finding no liability for incomplete information); *Cohen & Co. v. Dun & Bradstreet, Inc.*, 629 F. Supp. 1425 (D. Conn. 1986) (finding no liability for inaccurate credit report).

misleading information.³⁸

Despite the fact that many different publications invite reliance in varying degrees from their readers,³⁹ case law is fairly firm in finding that, absent some special circumstances, a publisher is not a guarantor of the information published and, as such, does not have to exercise due care in publication.⁴⁰ A publisher can assume the duty to “investigate the accuracy of the contents” of the publication, “but there is nothing inherent in the role of a publisher or the surrounding legal doctrines to suggest that such a duty should be imposed.”⁴¹ Accordingly, courts uniformly refuse to impose a duty on a publisher to investigate and verify the accuracy or check the sufficiency of materials provided to it by a third person.⁴² Courts hold that the risk of harm, even if reasonably foreseeable, is generally outweighed by the heavy burden that would be placed upon the publisher to verify whether the information is completely safe.⁴³

In *Alm v. Van Nostrand Reinhold Co.*,⁴⁴ for example, the court found that to place a duty upon a publisher to verify information contained in a book would severely burden publishers, requiring them to “scrutinize and even test procedures contained in any of their publications.”⁴⁵ Some courts expand this justification much further by finding any imposition of a duty on the publisher as impermissibly interfering with the publisher’s “right to publish free of fear of liability [as] guaranteed by the First Amendment . . . and the overriding societal

38. It should be noted that there are a number of law journal articles that fully set out and analyze the breadth of the case law in these areas that may assist the reader in fully understanding this area of the law. See generally, Ausness, *supra* note 15; Haag, *supra* note 17; Davidson, *supra* note 19; Smith, *supra* note 16.

39. See generally Lane, *supra* note 1.

40. See *Winter*, 938 F.2d at 1037-39 (stating and citing cases for proposition that “no publisher has a duty as a guarantor”).

41. *Id.* at 1037.

42. See *id.* (holding publisher has no duty to check or verify accuracy of publication); see also *First Equity Corp. v. Standard & Poor’s Corp.*, 869 F.2d 175, 179-80 (2d Cir. 1989) (finding publishers of inaccurate financial publications has no duty to guarantee accuracy); *Lewin v. McCreight*, 655 F. Supp. 282, 283-84 (E.D.Mich.1987) (finding publisher had no duty to verify accuracy of the material in a book on metalsmithing); *Birmingham*, 833 P.2d at 75 (finding “no duty to investigate”); *Gutter v. Dow Jones, Inc.*, 490 N.E.2d 898, 902 (Ohio 1986) (finding Wall Street Journal had no duty to verify accuracy of description of certain corporate bonds); *Alm v. Van Nostrand Reinhold Co.*, 480 N.E.2d 1263, 1267 (Ill. App. Ct. 1985) (finding publisher had no duty to verify the information contained in book on how to make tools); *Roman v. City of New York*, 442 N.Y.S.2d 945, 948 (N.Y. Sup. Ct. 1981) (finding Planned Parenthood not liable for misstatement in contraceptive pamphlet); *Cardozo v. True*, 342 So. 2d 1053, 1056 (Fla. Dist. Ct. App. 1977) (finding no duty to check accuracy); *Smith v. Linn*, 563 A.2d 123, 126 (Pa. Super. 1989) (finding publisher of diet book had no duty to verify sufficiency of diet in book), *aff’d*, 587 A.2d 309 (Pa. Ct. App. 1991); *Yuhas v. Mudge*, 322 A.2d 824, 825 (N.J. Super. 1974) (finding magazine publisher had no duty); but see *Carter v. Rand McNalley*, No. 76-1864-F (D. Mass. 1980) (unreported case cited in Arthur Swartz, *You Can’t Judge a Book by Its Cover*, TRIAL, Nov. 1981, at 89, 110).

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

44. 480 N.E.2d 1263 (Ill. App. Ct. 1985).

45. *Id.* at 1267; see also *Lewin*, 655 F. Supp. at 284.

interest in the untrammelled dissemination of knowledge.”⁴⁶

Case law provides that an exception to the general no duty rule arises when the publisher voluntarily assumes the duty to investigate by guaranteeing, warranting, or endorsing the publication.⁴⁷ For example, in *Hanberry v. Hearst Corp.*,⁴⁸ the court imposed liability on Good Housekeeping magazine for injuries sustained by a person injured as a result of wearing “slip-proof” shoes advertised in the magazine and given the “Good Housekeeping Seal of Approval.”⁴⁹ The court held that the endorsement created a duty to investigate the safety of the product and accuracy of the advertisement because of the reliance it induced.⁵⁰

Another exception to the no duty rule occurs when the publisher co-authors the published material instead of merely publishing the work of a third party. In that instance, a duty to investigate the material published is imposed on the publisher.⁵¹ However, courts distinguish authoring from editing. Serving as an editor to a third party and providing comments that the author is free to follow or disregard does not constitute enough control to make the publisher a co-author, and thus subject to any type of liability.⁵²

Courts have fashioned a further exception to the general no duty rule that applies when a publisher is charged with the task of providing or voluntarily assumes the role of provider of vital information, such as charts or maps. Courts have held that in this situation the publisher assumes the duty of due care in publishing this material in a non-negligent manner.⁵³ This exception applies most often to aeronautical charts, as courts have allowed claims against the government for injuries stemming from the use of defective charts.⁵⁴ These courts hold that the

46. *Demuth Dev. Corp. v. Merck & Co., Inc.*, 432 F. Supp. 990, 993 (E.D.N.Y. 1977).

47. *See Winter*, 938 F.2d at 1035; *Cardozo*, 342 So.2d at 1053; *Yuhas*, 322 A.2d at 825.

48. 81 Cal. Rptr. 519 (Cal. 1969).

49. *Id.* at 521. The “Good Housekeeping Seal of Approval” carried with it the following certification: “We have satisfied ourselves the products and services advertised in Good Housekeeping are good ones and the advertising claims made for them in our magazine are truthful.” *Id.* at 522.

50. *See id.* at 521.

51. *See Birmingham v. Fodor’s Travel Publications, Inc.*, 833 P.2d 70, 75 (Haw. 1992) (citing cases for the proposition that a publisher owes no duty “unless the publisher authored or guaranteed information”).

52. *See Jones v. J.B. Lippincott Co.*, 694 F. Supp. 1216, 1216-17 (D. Md. 1988).

53. *See Sullivan v. United States*, 299 F. Supp. 621, 625 (N.D. Ala. 1968), *aff’d*, 411 F.2d 794 (5th Cir. 1969) (finding that undertaking to supply vital information creates a duty of “due care”); *see also Reminga v. United States*, 631 F.2d 449, 452 (6th Cir. 1980) (finding duty of “due care” in publication of aeronautical chart); *De Bardeleben Marine Corp. v. United States*, 451 F.2d 140, 148 (5th Cir. 1971) (holding government had duty of “due care” in publication of chart but finding not liable because notice of new chart containing correct information was published before accident)

54. *See Reminga*, 631 F.2d at 452; *see also Brocklesby v. United States*, 767 F.2d 1288, 1297 (9th Cir. 1985), *amended*, 767 F.2d 1288 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 882 (1986); *Saloomey v. Jeppesen & Co.*, 707 F.2d 671 (2d Cir. 1983), *aff’g*, *Halstead v. United States*, 535 F. Supp. 782 (D. Conn. 1982); *Aetna Cas. & Sur. Co. v. Jeppesen & Co.*, 642 F.2d 339, 342 (9th Cir. 1981), *rev’g* on other grounds, 463 F. Supp. 94 (D. Nev. 1978).

publisher must exercise due care in the publication of vital information due to the role of the publisher in providing vital information and in inducing reliance thereon, and the danger involved when that information proves defective.⁵⁵ These exceptions to the general no-duty rule provide some of the theoretical framework for finding that strict products liability can be applied to other types of information. Also, as will be shown, the same reasons courts use for declining to recognize a valid cause of action in negligent publication cases are the same as the rationale they employ for denying recognition of a failure to warn cause of action.

3. Failure to Warn Cases

Many persons injured after following instructional information in books allege that publishers have an affirmative duty to warn about the possibility of inaccuracies or about the inherent risks involved in relying on the publication.⁵⁶ “A failure to warn claim is narrower than a negligent publication claim because the plaintiff does not seek to hold the defendant liable for publishing particular information, but only for failing to warn about the risks associated with its publication.”⁵⁷ While technically these two causes of action comprise separate categories of negligence, claimants usually allege both failure to warn and negligent publication. Historically, courts uniformly rejected failure to warn theories employing the same reasons that they used to reject negligent publication claims.⁵⁸

One of the major concerns of courts is holding the publisher liable for defective ideas when those ideas were first written by some third-party author over which the publisher has little control.⁵⁹ For instance, in *Cardozo v. True*,⁶⁰ while acknowledging that the author of a

55. See *Sullivan*, 229 F. Supp. at 621 (finding that undertaking to supply vital information creates a duty of “due care”); see also *Reminga*, 631 F.2d at 449 (finding duty of “due care” in publication of aeronautical chart); *De Bardeleben Marine Corp.*, 451 F.2d at 140 (holding government had duty of “due care” in publication of chart but finding not liable because notice of new chart containing correct information was published before accident); *Murray v. United States*, 327 F. Supp. 835 (D. Utah 1971) (finding government had duty for published material to accurately represent runway lighting), *modified*, on other grounds, 463 F.2d 208 (10th Cir. 1972); but see *Brown v. United States*, 790 F.2d 199, 201-02 (1st Cir. 1986) (rejecting due care standard with regards to weather service observation buoy because “a weather forecast is a classical example of a prediction of indeterminate reliability), *rev’g*, 599 F. Supp. 877 (1984) (finding where weather service had undertook to provide forecasting system and then induced reliance on that system, it was obligated to use due care in its operation), *cert. denied*, 107 S. Ct. 938 (1987).

56. See *Birmingham*, 833 P.2d at 75 (finding no duty to warn of the accuracy of the contents of a publication); see also *Winter v. G.P. Putnam’s Sons*, 938 F.2d 1033, 1038 (9th Cir. 1991) (stating “such a warning is unnecessary given that no publisher has a duty as a guarantor”); *Lewin v. McCreight*, 655 F. Supp. 282 (E.D. Mich. 1987) (rejecting duty to warn).

57. Ausness, *supra* note 15, at 619.

58. See *Winter*, 938 F.2d at 1038 (rejecting both theories because a publisher is not a considered a guarantor).

59. See *Lewin*, 655 F. Supp. at 283.

60. 342 So. 2d 1053 (Fla. Dist. Ct. App. 1977).

cookbook may have been negligent for failing to warn readers not to eat raw a plant that is poisonous when uncooked, the court found it unreasonable to impose a duty on the publisher to warn readers about the possibility of inaccurate information.⁶¹ Such a finding, courts reason, would force book publishers to verify the accuracy or sufficiency of everything stated in all the books they published.⁶² Courts find this to be a clearly unreasonable burden to place on publishers.⁶³ As is shown, this rationale is also cited by courts in negligent misrepresentation cases.

4. Negligent Misrepresentation

Apparently noting the general reluctance of courts to hold publishers liable for negligent publication, some persons injured by published information attempt to bypass this obstacle by using a theory of negligent misrepresentation in order to recover from publishers for their injuries.⁶⁴ Generally, in order to establish a claim for negligent misrepresentation, a person must prove: (1) a misrepresentation of a material fact; (2) that the representor either knows or should have known was false or makes without knowledge as to its truth or falsity; (3) that the representor intends to induce someone to act based upon the representation; and (4) that someone justifiably relies on to his or her detriment on the misrepresentation.⁶⁵ However, this theory may prove unsuccessful in a number of states that limit negligent misrepresentation suits to claims involving economic loss and exclude suits based upon personal injury claims.⁶⁶

Although most negligent misrepresentation claims have involved pecuniary loss,⁶⁷ a few also included physical harm.⁶⁸ In *Alm v. Van*

61. See *Cardozo v. True*, 342 So. 2d 1053, 1055, 1057 (Fla. Dist. Ct. App. 1977). See also *Jones v. J.B. Lippincott*, 694 F. Supp. 1216, 1216-17 (D. Md. 1988). The general rule is that "[i]f a publisher serves the function of publishing the contents of an author, other than one of its own employees for whom it would be liable under the doctrine of respondeat superior, it has no duty for the contents." *Id.* (citations omitted).

62. See *Birmingham v. Fodor's Travel Publications, Inc.*, 833 P.2d 70, 76 (Haw. 1992).

63. See *id.*; cf. *Walter v. Seventeen Magazine*, 241 Cal. Rptr. 101, 102-03 (Cal. Ct. App. 1987) (stating expected results that a finding of a duty to investigate every product advertised in publication would too severely burden the industry to justify any good that may come from such a rule).

64. See *Alm v. Nostrand Rheinhold Co.*, 480 N.E.2d 1263, 1265 (Ill. App. Ct. 1985).

65. See W. PAGE KEATON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 105 (5th ed. 1984); see also Steven J. Weingarten, Note, *Tort Liability for Nonlibelous Negligent Statements: First Amendment Considerations*, 93 YALE L.J. 744, 754 (1984).

66. See, e.g., Lane, *supra* note 1, at 1182.

67. See *Barden v. Harper Collins Publishers, Inc.*, 863 F. Supp. 41, 42-45 (D. Mass. 1994); *First Equity Corp. of Florida v. Standard & Poor's Corp.*, 670 F. Supp. 115 (S.D.N.Y. 1987); *Pittman v. Dow Jones & Co., Inc.*, 662 F. Supp. 921 (E.D. La. 1987); *Gale v. Value Line, Inc.*, 640 F. Supp. 967 (D.R.I. 1986); *Demuth Dev. Corp. v. Merck & Co.*, 432 F. Supp. 990, 992 (E.D.N.Y. 1977); *Gutter v. Dow Jones, Inc.*, 490 N.E.2d 898, 902 (Ohio 1986); *Ramon v. New York*, 442 N.Y.S.2d 945, 947-48 (N.Y. Sup. Ct. 1981); *Jaillet v. Cashman*, 139 N.E. 714 (N.Y. 1923).

68. See *Alm*, 480 N.E.2d at 1263; see also *MacKown v. Illinois Publishing & Printing Co.*, 6 N.E.2d 526, 526 (Ill. App. Ct. 1937).

Nostrand Rheinhold Co.,⁶⁹ for instance, the plaintiff suffered injuries when a tool shattered after following the instructions in the “how-to” book, *The Making of Tools*.⁷⁰ The court held that the defendant owed no duty of care to the plaintiff.⁷¹ The court rejected foreseeability alone as a basis for liability, finding that nearly all harm seems foreseeable looking back.⁷² Instead, the court found that other factors weighed against liability, stating that courts should consider the likelihood of harm, the difficulty of guarding against such harm, and the possible consequences of burdening the defendant with liability.⁷³ As will be shown below, most courts incorrectly employ a similar rationale for declining to recognize a valid cause of action in strict products liability without exploring the theoretical differences between negligence and strict products liability.⁷⁴

III. STRICT PRODUCTS LIABILITY

The theory of strict products liability was first adopted by the California Supreme Court in *Greenman v. Yuba Power Products, Inc.*,⁷⁵ where the court held that “a manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.”⁷⁶ Two years after *Greenman*, Section 402A of the

69. 480 N.E.2d 1263 (Ill. App. Ct. 1985).

70. *See id.* at 1264.

71. *See id.* at 1265. Plaintiff had urged the adoption of Section 311 of the RESTATEMENT (SECOND) OF TORTS, which imposes a duty to provide adequate instructions. *See id.* at 1264. The RESTATEMENT (SECOND) OF TORTS § 388 (1965) 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 person as the actor should expect to be put in peril by the act taken.

(2) Such negligence may consist of failure to exercise reasonable care

(a) in ascertaining the accuracy of the information, or
in the manner in which it is communicated.

72. *See Alm*, 480 N.E.2d at 1265.

73. *See id.*; *see also MacKown*, 6 N.E.2d at 526.

74. At least one commentator has argued that it is these problems of theory confusion that should lead to the abolition of strict product liability. *See William Powers Jr., A Modest Proposal to Abandon Strict Products Liability*, 1991 U. ILL. L. REV. 639 (1991).

75. 27 Cal. Rptr. 697 (Cal. 1963). The birth of products liability law is credited to *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. Ct. App. 1916), where the court placed a duty of care in the design, inspection, and fabrication of a product on manufacturers of the product who owed the duty to all persons who might foreseeably come into contact with such product.

76. *Greenman*, 27 Cal. Rptr. at 700. Adoption of the theory by *Greenman* is credited to a number of events including the abandonment of the privity barrier by the New Jersey Supreme Court in *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 77 (N.J. 1960), allowing consumers to sue manufacturers directly for breach of implied warranties and Dean Prosser's scholarly work both academically and as a reporter in the drafting of Section 402A of the Second Restatement. *See* 1 MARSHALL S. SHAPO, THE LAW OF PRODUCTS LIABILITY ¶7.01[2], at 7-4 to 7-5 (3d ed. 1994). In addition, prior to his writing the decision in *Greenman*, Justice Traynor first put forth the argument for adoption of strict product liability nineteen years earlier in his concurrence on another case. *See Escola v. Coca-Cola Bottling Co.*, 150 P.2d 436, 440-41 (Cal. 1944) (Traynor, J., concurring).

Second Restatement was drafted, which provides liability for “sell[ing] any product in a defective condition unreasonably dangerous to the user or consumer,” with such liability being imposed even if “the seller has exercised all possible care.”⁷⁷ Strict liability typically applies to manufacturing defects (physical defects of a product); design defects; and informational defects about a product (lack of or inadequate warnings about inherent risks of a product).⁷⁸

The rationales for the adoption of a theory of strict products liability are wide and varied.⁷⁹ In *Greenman*, the court stated that the primary purpose of the theory is “to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.”⁸⁰ This rationale resulted from the judicial belief that the public expects and should receive safe products.⁸¹ Strict liability appears especially appropriate due to a consumer’s difficulty in proving fault or negligence on the part of the manufacturer and the expectations of the public.⁸²

This rationale created a loss-shifting and spreading effect as courts adopted “the theory that of two innocent parties, the producer is more able to provide for the loss than the individual who is damaged.”⁸³ Moreover, courts reasoned that strict products liability should work as a deterrent to the production of unsafe products, and as an incentive for the production of safe ones.⁸⁴ Thus, a final rationale for the theory is that the person who participates in the reaping of profits from the product should bear some of the risk created by placing its product in the stream of commerce.⁸⁵ As shown below, courts fail to adequately

77. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

78. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §§ 1-2 (1998).

79. See generally AM. LAW PROD. LIAB. 3d § 16:4 (1999).

80. *Greenman*, 27 Cal. Rptr. at 701; see also *Clary v. Fifth Ave. Chrysler Center, Inc.*, 454 P.2d 244 (Alaska 1969). The Second Restatement provides that the manufacturer or seller undertakes a “special responsibility toward any member of the consuming public who may be injured” as the result of a product it markets. RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (1965).

81. See RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (1965). “[T]he public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods.” *Id.* The language of this comment has been criticized for its ambiguity as to whether marginal merchants are also governed by the rule and for apparently mixing the ideas of “needs” and “wants.” 1 MARSHALL S. SHAPO, *THE LAW OF PRODUCTS LIABILITY* ¶7.05[2], at 7-31 to 32 (1994).

82. See *Escola v. Coca-Cola Bottling Co.*, 150 P.2d 436, 440-41 (Cal. 1944) (Traynor, J., concurring).

83. *Reilly v. King County Central Blood Bank, Inc.*, 492 P.2d 246, 248 (Wash. 1971); see also *Passwaters v. General Motors Corp.*, 454 F.2d 1270, 1277 (8th Cir. 1972) (designating the manufacturer as “the party financially best able to afford the cost of injuries”). This rationale does not go without its criticism. See, e.g., *Polius v. Clark Equip. Co.*, 802 F.2d 75, 81 (3d Cir. 1986) (criticizing this rationale as not particularly applicable to smaller manufacturers); *Stang v. Hertz Corp.*, 490 P.2d 475 (N.M. Ct. App. 1971) (expressing similar point of view).

84. See *Escola*, 150 P.2d at 440-41 (Traynor, J., concurring) (stating that manufacturers could “anticipate some hazards and guard against the recurrence of others, as the public cannot”).

85. See *Connelly v. Uniroyal, Inc.*, 389 N.E.2d 155, 163 (Ill. 1979), cert. denied, 444 U.S. 1060

address whether defining certain information as a product is consistent with a theory of strict products liability; instead, courts sidestep the issues and employ a rationale similar to the one used in rejecting a negligence cause of action.

A. *Most Information Found Not to be a Product*

Strict products liability is a favored theory for those injured by published information because it essentially provides for liability without fault.⁸⁶ However, in addition to the obvious First Amendment concerns, the major barrier to establishing liability for defective information arises when courts consider whether information is a product for purposes of strict products liability.⁸⁷ In this regard, courts prove reluctant to find information to be a product relying primarily on three reasons: (1) information lacks the tangibility needed to be a product; (2) lack of publisher control obviates liability; and (3) defining information as a product would have a chilling effect on the exercise of free speech.⁸⁸ These three reasons courts cite for finding that information is not a product are thoroughly explored below. And, as will be shown, as a result of incorrectly using a negligence rationale instead of exploring the policies behind strict products liability, these opinions are not very persuasive in completely eliminating all information from the protection of products liability law.

1. *Tangibility*

Courts that reject the idea that information comes within the definition of a product, and deny the applicability of strict products liability, have primarily based their determination on the proposition that products liability only applies to items in the tangible world.⁸⁹ For example, although framed as an implied warranty claim, *Cardozo v.*

(1980) (finding licensor who is “an integral part of the marketing enterprise” liable for “its participation in the profits reaped by placing a defective product in the stream of commerce”); see also *Suvada v. White Motor Co.*, 210 N.E.2d 182, 186 (Ill. 1965) (finding that “losses . . . should be borne by those who have created the risk and reaped the profit”). Professor Shapo believes that “there is [also] a representational rationale that stands behind strict liability.” 1 MARSHALL S. SHAPO, *THE LAW OF PRODUCTS LIABILITY* ¶7.05[3], at 7-32 (1994) (citing Marshall S. Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109 (1974)).

86. See Robert B. Schultz, *Application of Strict Product Liability to Aeronautical Chart Publishers*, 64 J. AIR L. & COM. 431, 433 (1999). “[S]trict product liability eliminates the plaintiff’s need to prove fault or culpable conduct of the defendant manufacturer or seller.” *Id.*

87. See Ausness, *supra* note 15, at 622 (citing Noah, *supra* note 3, at 1203); see also Brett Lee Myers, Case Note, *Read at Your Own Risk: Publisher Liability for Defective How-To Books*, 45 ARK. L. REV. 699, 721 (1992). Myers stated that “[i]t would be fatal for a court to determine in any products liability action that the item at issue is not a product” because “[s]ection 402A applies only when a product is involved.” *Id.*

88. See Roy W. Arnold, *The Persistence of Caveat Emptor: Publisher Immunity From Liability For Inaccurate Factual Information*, 52 U. PITT. L. REV. 777, 783-867 (1992).

89. See *Winter v. G.P. Putnam’s Sons*, 938 F.2d 1033, 1034 (9th Cir. 1991).

*True*⁹⁰ distinguished between the tangible book and the intangible ideas expressed therein.⁹¹ The *Cardozo* court found that the publisher “impliedly warranted the tangible, physical properties of the book;[sic] i.e., printing and binding,” but not the ideas and thoughts within.⁹² It distinguished the book’s tangible properties from “the ideas conveyed thereby,” and thus immunized the seller of the book from liability for the words and ideas contained in the book.⁹³

While *Cardozo* technically involved an implied warranty claim, it provided the basis for the later decision in *Walter v. Bauer*,⁹⁴ where the court expanded the premise to immunize publishers from strict products liability.⁹⁵ In rejecting the plaintiff’s claim of strict liability, the *Walter* court noted plaintiff “was not injured [using] the book for [the purpose for] which it was designed, i.e., to be read,”⁹⁶ and thus, found that information in a book does not qualify as a product for purposes of strict products liability.⁹⁷ Courts deciding whether information is a product under strict products liability cite *Cardozo* for the proposition that it is not.⁹⁸

One of the clearest statements of this principle comes from the more recent case of *Winter v. G.P. Putnam’s Sons*,⁹⁹ where the court stated that “[p]roducts liability law is geared to the tangible world,” and that “[t]he language of products liability law reflects its focus on tangible items.”¹⁰⁰ Like *Cardozo*, the *Winter* court distinguished between physical characteristics of the book and the ideas and expressions within.¹⁰¹ In an analogy, the court stated that “[a] book containing Shakespeare’s sonnets consists of two parts, the material and print

90. 342 So. 2d 1053 (Fla. Dist. Ct. App. 1977), *cert. denied*, 353 So. 2d 674 (Fla. 1977).

91. *See id.* at 1054.

92. *Id.* at 1056.

93. *Id.* It should be noted that at least one court found that the contents of a book can be a “good” and would possibly find them to be a product. *See Kercsmar v. Pen Argyl Area School District*, 1 Pa.D. & C.3d 1, 7 n.7 (Pa. 1976). The court stated “[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.” *Id.* *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); *but see* *Smith v. Linn*, 563 A.2d 123, 126-27 (Pa. Sup. Ct. 1989) (finding no other court to adopt the *Kercsmar* view and specifically rejecting the case).

94. 439 N.Y.S.2d 821 (N.Y. Sup. Ct. 1981), *modified*, 451 N.Y.S.2d 533 (N.Y. App. Div. 1982).

95. *See id.* at 822.

96. *Id.*

97. *See id.*

98. *See* *Birmingham v. Fodor’s Travel Publications, Inc.*, 833 P.2d 70, 72 (Haw. 1992). The court stated that “[t]he purposes served by products liability are focused on the tangible world and do not take into consideration the unique characteristics of ideas and expressions.” *Id.* *See also* *Winter v. G.P. Putnam’s Sons*, 938 F.2d 1033, 1034 (9th Cir. 1991) (same); *Jones v. J.B. Lippincott Co.*, 694 F. Supp. 1216, 1217-18 (D. Md. 1988) (finding 402A does not extend to the dissemination of an idea of knowledge); *Herceg v. Hustler Magazine, Inc.*, 565 F. Supp. 802, 803-04 (S.D. Tex. 1983) (holding contents of magazines not within meaning of 402A).

99. 938 F.2d 1033 (9th Cir. 1991).

100. *Id.* at 1034.

101. *See id.* at 1034-35.

therein, and the ideas and expression thereof. The first may be a product, but the second is not.”¹⁰²

The court remarked that Section 402A provides a list of covered products in which all listed “products” are tangible items,¹⁰³ and the American Law Institute did not give any indication that intangibles are covered.¹⁰⁴ In addition, the court found “[t]he purposes served by products liability law also are focused on the tangible world and do not take into consideration the unique characteristics of ideas and expression.”¹⁰⁵

In addition to the rationale of the *Winter* court, some commentators argue that a more thorough tangibility argument can be made. For instance, Professor Ausness proposes that an argument can be made as to the drafter’s intent to limit products to the tangible world due to the placement of Section 402A in the chapter entitled “Suppliers of Chattels.”¹⁰⁶ He argues that “[s]ince chattels are defined as a species of property that are tangible and moveable, one could infer that the drafters intended Section 402A to apply only to the sale of such goods.”¹⁰⁷ However, Ausness acknowledges that “[m]any courts and commentators . . . have rejected tangibility as an essential criterion, and instead look to see whether subjecting a seller to strict liability will promote accident cost avoidance, risk-spreading, or other policies associated with modern products liability law.”¹⁰⁸

102. *Id.* at 1034. The court further stated:

The latter, were Shakespeare alive, would be governed by copyright laws; the laws of libel, to the extent consistent with the First Amendment; and the laws of misrepresentation, negligent misrepresentation, negligence, and mistake. These doctrines applicable to the second part are aimed at the delicate issues that arise with respect to intangibles such as ideas and expression. Products liability law is geared to the tangible world.

Id.

103. The relevant comment to Section 402A provides:

The rule stated in this Section is not limited to the sale of food for human consumption, or other products for intimate bodily use, although it will obviously include them. It extends to any product sold in the condition, or substantially the same condition, in which it is expected to reach the ultimate user or consumer. Thus the rule stated applies to an automobile, a tire, an airplane, a grinding wheel, a water heater, a gas stove, a power tool, a riveting machine, a chair, and an insecticide. It applies also to products which, if they are defective, may be expected to and do cause only “physical harm” in the form of damage to the user’s land or chattels, as in the case of animal food or a herbicide.

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

104. *Winter*, 938 F.2d at 1034.

105. *Id.* at 1034-35 (citing examples of those purposes as loss shifting, spreading costs, accident prevention, and difficulty in proving fault or negligence).

106. See Ausness, *supra* note 15, at 622 (citing Susan Lanone, Comment, *Computer Software and Products Liability*, 20 SAN DIEGO L. REV. 439, 444-56 (1981)).

107. *Id.* See also RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 19 (1998); but see David W. Lannetti, *Toward a Revised Definition of “Product” Under the RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY*, 35 TORT & INS. L.J. 845, 880-89 (2000) (criticizing the Third Restatement for limiting the definition of product to tangible items).

108. Ausness, *supra* note 15, at 622 (footnote omitted).

2. *Absence of Publisher Control*

As with negligent publication claims,¹⁰⁹ courts reject the imposition of strict products liability on publishers partially due to the lack of publisher control.¹¹⁰ Again, *Cardozo* provides a good example of this principle. The *Cardozo* court, in discussing the difficulty of asserting control over an author's intangible ideas, commented:

It is unthinkable that standards imposed on the quality of goods sold by a merchant would require that merchant, who is a book seller, to evaluate the thought processes of the many authors and publishers of the hundreds and often thousands of books which the merchant offers to sale. One can readily imagine the extent of potential litigation. Is the newsdealer, or for that matter the neighborhood news carrier, liable if the local paper's recipes call for inedible ingredients? We think not.¹¹¹

The court reasoned that the specter of liability without fault is not proper because the publisher does not have the opportunity to investigate the ideas being published.¹¹² In essence, the court refused to impose liability because of the inequity of imposing such liability on a seller who had no control over the publication or substance of the information.

Like the tangibility argument, courts expanded the lack of publisher control rationale, effectively immunizing publishers from strict products liability.¹¹³ In *Lewin v. McCreight*,¹¹⁴ the court found the lack of editorial control by the publisher over the contents of the book to be dispositive, as the publisher merely printed and bound the book.¹¹⁵ The court noted, however, that had the publisher contributed more of the ideas in the book, the case may have turned out differently.¹¹⁶ In *Jones v. J.B. Lippincott Co.*,¹¹⁷ the court went one step further, stating that "author liability for errors in the content of books, designs, or drawings is not firmly defined and will depend on the nature of the publication, on the intended audience, on causation in fact, and on the foreseeability of damage."¹¹⁸ While the court failed to expressly state that the lack of publisher control constitutes a valid reason for denying liability, it certainly suggested as much, finding that a publisher has "no duty for

109. See discussion II.A.2. *supra*.

110. See *Cardozo v. True*, 342 So.2d 1053, 1056 (Fla. Dist. Ct. App. 1977), *cert. denied*, 353 So.2d 674 (Fla. 1977).

111. *Id.*

112. See *id.*

113. See *Lewin v. McCreight*, 655 F. Supp. 282, 284 (E.D. Mich. 1987); *cf.* *Jones v. J.B. Lippincott Co.*, 694 F. Supp. 1216 (D. Md. 1988) (implying no publisher control as reason for denying liability).

114. 655 F. Supp. 282, 284 (E.D. Mich. 1987).

115. See *id.* at 283.

116. See *id.* at 284. The court also found that a publisher "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.*

117. 694 F. Supp. 1216 (D. Md. 1988).

118. *Id.* at 1216-17.

the contents” of a book if the publisher merely “serves the function of publishing the contents of an author.”¹¹⁹

3. *Chilling Effect on Speech*

The reason most often cited by courts for rejecting a theory of products liability that includes information is the “chilling effect” that liability “would have on the First Amendment” and the freedom of expression.¹²⁰ Courts use the chilling effect rationale both as a public policy reason for not defining information as a product,¹²¹ and as a defense to a products liability claim.¹²² Irrespectively of the manner in which one frames the issue, courts tend to reject products liability claims against publishers because such claims could chill expression, which is not consistent with the fundamental purpose of the First Amendment.¹²³

One oft-quoted passage from *Cardozo* illustrates the rationale as follows:

[I]deas hold a privileged position in our society. They are not equivalent to commercial products. Those who are in the business of distributing the ideas of other people perform a unique and essential function. To hold those who perform this essential function liable, regardless of fault, when an injury¹²⁴ results would severely restrict the flow of the ideas they distribute.

Essentially, courts find that “[w]e place a high priority on the unfettered exchange of ideas . . . [and] [t]he threat of liability without fault . . . could seriously inhibit those who wish to share thoughts and theories.”¹²⁵ In effect, “[e]ven if liability could be imposed consistently with the Constitution, . . . the adverse effect of such liability upon the public’s free access to ideas would be too high a price to pay.”¹²⁶ Thus, courts typically hold that there are sufficient public policy reasons to exclude information from the definition of product and, therefore, never

119. *Id.*

120. *Walter v. Bauer*, 439 N.Y.S.2d 821, 823 (N.Y. Sup. Ct. 1981); *see also Winter v. G.P. Putnam’s Sons*, 938 F.2d 1033, 1034 (9th Cir. 1991); *Jones v. J.B. Lippincott Co.*, 694 F. Supp. 1216, 1217-18 (D. Md. 1988); *Herceg v. Hustler Magazine, Inc.*, 565 F. Supp. 802, 803-04 (S.D. Tex. 1983); *Birmingham v. Fodor’s Travel Publications, Inc.*, 833 P.2d 70, 72 (Haw. 1992).

121. *See Winter*, 938 F.2d at 1037 (rejecting liability and noting the “the gentle tug of the First Amendment and the values embodied therein”); *cf. Jonathan M. Hoffman, From Random House to Mickey Mouse: Liability for Negligent Publishing and Broadcasting*, 21 TORT & INS. L.J. 65, 82-89 (1985) (arguing in negligent publication context that courts should use the First Amendment values in terms of duty analysis rather than as a First Amendment defense).

122. *See, e.g., Jones*, 694 F. Supp. at 1217; *cf. Hammerhead Enterprises, Inc., v. Brezenoff*, 707 F.2d 33, 40 (2d Cir. 1983) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974) in holding that “the Constitution does not permit the imposition of liability for expressing so-called ‘false ideas’”), *cert. denied*, 464 U.S. 892 (1983).

123. *See Jones*, 694 F. Supp. at 1217 (citing *Gertz*, 418 U.S. 323).

124. *Cardozo v. True*, 342 So. 2d 1053, 1056-57 (Fla. Dist. Ct. App. 1977). *Cf. Smith, supra* note 16, at 1199-1200 (arguing a slightly different formulation of the First Amendment values at play).

125. *Winter*, 938 F.2d at 1035; *see also Watters v. TSR, Inc.*, 904 F.2d 378, 383 (6th Cir. 1990); *Alm v. Van Nostrand Reinhold Co.*, 480 N.E.2d 1263, 1267 (Ill. App. Ct. 1985).

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

reach the constitutional determination of whether the First Amendment bars such an action.¹²⁷ While tangibility, absence of publisher control, and the possible chilling effect on speech have been used by many courts to determine that information is not a product to which liability can attach, there is an opposing, yet well established, line of cases that recognize the application of strict products liability to graphical charts.

B. Information That is Found to be a Product

Despite the above rationale, there is a line of cases that have found that graphical charts, most notably those in the aeronautical industry, are products subject to the doctrine of strict products liability.¹²⁸ For the most part, these cases have all involved aeronautical charts of one manufacturer, Jeppesen & Co.,¹²⁹ who is essentially the sole publisher of such charts.¹³⁰ While this fact alone may make the situation sufficiently anomalous as to weaken its precedential value,¹³¹ the underlying rationale for holding chart publishers liable is important, as it is essentially the same as that proposed in other cases alleging defective information.¹³²

The first court to hold a publisher liable for a defective aeronautical charts was *Aetna Casualty & Surety Co. v. Jeppesen & Co.*,¹³³ which “assumed, without discussion, that [Jeppesen’s] portrayal of Federal Aviation Administration flight data on its charts is a

127. See e.g., *Winter*, 938 F.2d at 1035.

128. See *Brocklesby v. United States*, 767 F.2d 1288, 1294-98 (9th Cir. 1985); see also *Aetna Cas. & Sur. Co. v. Jeppesen & Co.*, 642 F.2d 339, 342-43 (9th Cir. 1981); *Saloomey v. Jeppesen & Co.*, 707 F.2d 671, 676-77 (2nd Cir. 1983), *affg.*, *Halstead v. United States*, 535 F. Supp. 782 (D. Conn. 1982); *Fluor Corp. v. Jeppesen & Co.*, 216 Cal. Rptr. 68, 71-72 (Cal. Ct. App. 1985); cf. *Reminga v. United States*, 631 F.2d 449, 451-52 (6th Cir. 1980) (holding government could be liable for negligent publication of aeronautical chart); *Bardeleben Marine Corp. v. United States*, 451 F.2d 140, 148 (5th Cir. 1971) (holding government could be liable for negligent publication of marine navigational chart); *Wirtz v. A.S. Giometti & Assoc.*, 399 F.2d 738 (5th Cir. 1968) (finding maps are goods within meaning of the Fair Labor Standards Act); *K-Mart Corp. v. Midcon Realty Group of Conn.*, 489 F. Supp. 813 (D. Conn. 1980) (finding architect’s plans could be a product under 402A, but due to the individualized nature of the plans in this case, “substantially unchanged” requirement not met); *Miller v. Rand McNally & Co.*, 595 So. 2d 1367, 1368 (Ala. 1992) (finding in products liability claim brought by trucker against publisher of road map that trucker had failed to provide enough evidence of defect, but apparently assuming claim would otherwise have been viable); but see *Times Mirror Co. v. Sisk*, 593 P.2d 924, 927 (Ariz. Ct. App. 1978) (stating that it had “serious misgivings about whether [a suit against an aeronautical chart publisher] is a products liability case” but not deciding issue).

129. See *Brocklesby*, 767 F.2d at 1294-98; *Saloomey*, 707 F.2d at 676-77; *Aetna Cas. & Sur. Co.*, 642 F.2d at 342-43; *Fluor Corp.*, 216 Cal. Rptr. at 71-72.

130. See David L. Abney, *Liability for Defective Aeronautical Charts*, 52 J. AIR L. & COM. 323, 323 (1986). Jeppesen receives the information in the charts from the United States and translates that information into charts and maps. See *Halstead*, 535 F. Supp. at 789. For general information about aeronautical charts, see Schultz, *supra* note 86, at 431.

131. To at least one commentator this line of cases is not just anomalous, it is wrong. See Schultz, *supra* note 86, at 431.

132. See *Winter*, 938 F.2d at 1035-36.

133. 642 F.2d 339 (9th Cir. 1981).

‘product’ for strict liability purposes.”¹³⁴ In that case, the court sustained a products liability claim against Jeppesen for its presentation of graphical information in the chart which “‘radically departed’ from the usual presentation of graphics in . . . other Jeppesen charts”¹³⁵ The court upheld the trial court’s finding “that the conflict between the information conveyed by words and numbers and the information conveyed by graphics rendered the chart unreasonably dangerous and a defective product.”¹³⁶

In *Saloomey v. Jeppesen & Co.*,¹³⁷ the Second Circuit agreed with the *Aetna Casualty & Surety Co.* conclusion and, in dispelling Jeppesen’s argument that its charts are a service, not a product, found that “[t]he charts, as produced by Jeppesen and supplied to [the user], reached [such user] without any individual tailoring or substantial change in contents—they were simply mass-produced.”¹³⁸ The court found that “[t]hough a ‘product’ may not include mere provision of architectural design plans or any similar form of data supplied under individually-tailored service arrangements, . . . the mass production and marketing of these charts requires Jeppesen to bear the costs of accidents that are proximately caused by defects in the charts.”¹³⁹ As a result, Jeppesen was found to undertake special responsibility to prevent harm to consumers who use their products by their publication and selling of the charts.¹⁴⁰ The court stated “[t]his special responsibility lies upon Jeppesen in its role as designer, seller and manufacturer.”¹⁴¹ The court thus encouraged Jeppesen to cover the liability by insurance as a cost of production.¹⁴²

In another case, *Brocklesby v. United States*,¹⁴³ the Ninth Circuit again had to determine whether one of Jeppesen’s charts qualifies as a product. However, this time the defect did not concern a graphical display on the chart, but rather involved a defect that resulted from a defective instrument approach procedure.¹⁴⁴ While Jeppesen attempted to argue that the instrument approach procedure was not a product, the court stated that this argument missed the point, and found that the issue was “whether Jeppesen’s chart is a product, not whether the

134. *Saloomey*, 707 F.2d at 676 (citing *Aetna Cas. & Sur. Co.*, 642 F.2d at 342-43).

135. *Aetna Cas. & Sur. Co.*, 642 F.2d at 342.

136. *Id.* at 342-43.

137. 707 F.2d 671 (2d Cir. 1983).

138. *Id.* at 676.

139. *Id.* at 677 (citations omitted).

140. *See id.* at 676-77. In addition, the court found that the Restatement “envision[ed] strict liability against sellers of such items in these circumstances.” *Id.* at 676.

141. *Id.* at 677 (citing *Pust v. Union Supply Co.*, 561 P.2d 355, 359 (1976), *aff’d*, 583 P.2d 276 (1978) (en banc) and RESTATEMENT (SECOND) OF TORTS § 402A cmt. f (1965)).

142. *See id.* (citing RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (1965)).

143. 767 F.2d 1288 (9th Cir. 1985).

144. *See id.* at 1295.

instrument approach procedure is a product.”¹⁴⁵

The *Brocklesby* court, relying on *Aetna Casualty & Surety Co.*, found the graphic approach chart which graphically portrayed the instrument approach procedure promulgated by the FAA was a product.¹⁴⁶ The court then held that Jeppesen, as a seller of a product, was strictly liable for the defect in the graphical depictions of the flight procedure even though the “procedure was beyond its control” because the instrument approach procedure was unreasonably dangerous to its user.¹⁴⁷ Finally, in dispelling Jeppesen’s public policy argument that the court was unfairly holding them liable for accurately republishing the government regulation, the court found that Jeppesen did “more than a republication of the text of the government’s procedures [as it] converts a government procedure from text into graphic form and represents that the chart contains all necessary information.”¹⁴⁸

In *Fluor Corp. v. Jeppesen & Co.*,¹⁴⁹ noting that other courts held the charts at issue to be products, the court found that “[t]hese holdings are entirely consistent with the fundamental policies which underlie the strict products liability doctrine”¹⁵⁰ The court found that the purposes and policies behind products liability support finding the charts to be products.¹⁵¹ This finding is important because the courts that have found that published information is not a product have not adequately analyzed this issue, making instead only a superficial analysis. A more reasoned approach, like the one employed in *Flour Corp.*, should be employed by courts to hold that information that invites reasonable reliance should be considered a product under strict products liability.

145. *Id.* at 1294.

146. *Id.* at 1294-95.

147. *Id.* at 1295-97 (noting that while the concept of fault has persisted, all of the policy reasons of RESTATEMENT (SECOND) OF TORT § 402A cmt. c (1965) applied).

148. *Id.* at 1298. The court also found that Jeppesen’s catalog had stated:

When pilots compare approach plates . . . for information, for readability [sic] . . . they choose Jeppesen. Why? Because the format of Jeppesen charts was designated by pilots, for pilots, and has been time-tested and proven by instrument pilots throughout the world. Every necessary detail is clearly indicated Jeppesen approach plates include . . . EVERYTHING you need for a smooth transition from enroute to approach segment of your flight.

Id. at 1298-99.

149. 216 Cal. Rptr. 68 (Cal. Ct. App. 1985).

150. *Id.* at 70-71.

151. *See id.* at 71. The court stated that “characterizing [the] instrument approach charts as ‘products’ serves ‘[T]he paramount policy to be promoted by the [doctrine],’ i.e., ‘the protection of otherwise defenseless victims of manufacturing defects and the spreading throughout society of the cost of compensating them.’” *Id.*

IV. WHAT INFORMATION SHOULD BE CONSIDERED A PRODUCT

A. Responding to the Courts' Arguments

In response to the *Winter* court's assertion that products liability law only applies to the tangible world,¹⁵² legal commentators argue that there are many products that are not of the tangible types alluded to by the court.¹⁵³ In fact, case law shows that most courts prefer a much more fluid definition and, rather than applying a rigid definition of a product, these courts perform a review on a case-by-case basis, guided primarily by the public policy considerations underlying strict liability.¹⁵⁴ As this Note will demonstrate, public policy clearly tilts in favor of applying strict liability in instances where unreasonably dangerous information is marketed to consumers with the full knowledge that the information will be used without any further investigation.¹⁵⁵

One of the policies behind products liability provides that loss allocation is best placed on those with the ability to prevent harm and to spread the costs, and that loss allocation justifies the elimination of proof of manufacturer fault.¹⁵⁶ This policy obviates the argument that lack of publisher control is of any great concern, as the publisher is in a better position than the consumer to recognize a risk and guard against it, and can in turn try to seek indemnification from the author.¹⁵⁷ The publisher can market the publication in such a way to reduce or prevent unwarranted reliance or otherwise warn consumers as to the level of reliance the product merits. In addition, the risk of loss can be spread more broadly by including it as a cost of production and it can also be covered by insurance.

In any event, courts have greatly misrepresented the actual control exerted by a publisher. As one legal writer, critical of the lack of legal analysis employed by the courts, stated, courts have not:

[A]cknowledged the actual and ultimate control that the publisher exercises over the contents of a book—whether or not a particular work will be published at all. Moreover, publishers already check manuscripts for factual accuracy, both to improve the book's quality and to minimize potential defamation liability. Thus, publishers exercise more control

152. See *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1034 (9th Cir. 1991).

153. See Noah, *supra* note 3, at 1206-07 (noting aeronautical charts with faulty information are products); see also Arnold, *supra* note 88, at 796-99 (showing that products liability law has been applied to several different intangibles such as metered electricity, computer software and aeronautical charts).

154. See *Fluor Corp.*, 216 Cal. Rptr. at 71; see also *Kaneko v. Hilo Coast Processing*, 654 P.2d 343, 349 (Haw. 1982); *Lowrie v. City of Evanston*, 365 N.E.2d 923, 928 (Ill. App. Ct. 1977).

155. See Jonathan B. Mintz, *Strict Liability for Commercial Intellect*, 41 CATH. U.L. REV. 617, 632 (1992) (stating the basis policies behind tort law are compensation for cognizable loss and allocation of that loss to public).

156. See RESTATEMENT (SECOND) OF TORTS § 402A.

157. See Arnold, *supra* note 88, at 802-04.

over the content and design of a book than the paradigmatic seller of a defective product. If the seller's lack of control has not prevented the imposition of liability for other defective products, it should not immunize publishers exercising considerably more control over books' contents.¹⁵⁸

Additionally, the lack of editorial control is not an especially persuasive factor as to whether liability should be imposed. Products liability law applies to "one who sells," whether that seller be the ultimate seller, distributor, or manufacturer.¹⁵⁹ Courts justify this sometimes-harsh rule on public policy.¹⁶⁰ According to the drafters of the Restatement:

The justification for strict liability [is] that the seller, by marketing the 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 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 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.¹⁶¹

In this regard, publishers stand in the same place as manufacturers by putting the information in a form that can be used by the consumer, and, therefore, should be held liable for the harm caused by defective products they sell.

While the *Winter* court acknowledged that chart publishers properly were liable under strict products liability,¹⁶² its attempt to distinguish *The Encyclopedia of Mushroom* from the aeronautical charts is unpersuasive. The *Winter* court found:

Aeronautical charts are highly technical tools. They are graphic depictions of technical, mechanical data. The best analogy to an aeronautical chart is a compass. Both may be used to guide an individual who is engaged in an activity requiring certain knowledge of natural features. Computer software that fails to yield the result for which it was designed may be another. In contrast, *The Encyclopedia of Mushrooms* is like a book on how to use a compass or an aeronautical chart. The chart itself is like a physical "product" while the "How to Use" book is pure thought and expression.¹⁶³

158. *Id.* at 795 (footnotes omitted).

159. RESTATEMENT (SECOND) OF TORTS § 402A & cmt. f. (1965).

160. *See* AM. LAW PROD. LIAB. 3D Vol. II, § 16:4, at 15-17 (2000).

161. RESTATEMENT (SECOND) OF TORTS § 402A cmt. c. (1965).

162. *See Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1036 (9th Cir. 1991).

163. *Id.*; *see also Way v. Boy Scouts of Am.*, 856 S.W.2d 230, 238-39 (Tex. Ct. App. 1993). In *Way*, the court attempted to distinguish aeronautical charts from other publications, stating that "the charts were physically used in the operation of the aircraft at the time of the accident. The inaccurate data directly caused . . . the accidents in question in the same manner in which a broken compass or inaccurate altimeter would have caused a plane to crash." *Id.*

The plaintiff in *Winter* argued that the distinction between physical properties and intangible ideas is artificial under the *Fluor* rationale,¹⁶⁴ as the intangible ideas caused the injury, not the physical properties of the product.¹⁶⁵ The court responded that “the injury does not have to result . . . from the physical properties of the item . . . [for example,] the injury does not have to result because the compass explodes in your hand, but can result because the compass malfunctions and leads you over a cliff.”¹⁶⁶ Without further analysis, the court found “[t]his is quite different from saying that liability can be imposed for such things as ideas which have no physical properties at all.”¹⁶⁷

Many commentators criticize the *Winter* analysis because *The Encyclopedia of Mushroom*, like the aeronautical chart, provided a guide to its users in the conduct of an activity that the publisher should reasonably have expected.¹⁶⁸ In addition, the *Winter* decision apparently finds that the information expressed in the words and figures on the aeronautical chart were somehow lost in the translation to a graphic representation.¹⁶⁹ Since both the words and the graphic representation into which they were translated were essentially the same intangible “idea,” i.e., how to approach the landing, the court’s distinction on the basis that the idea was put in a form other than words is nonsensical. This is a really a distinction without a difference.¹⁷⁰ Since the marketing of information to the consumer invited reliance, and the publisher fully appreciated this fact, strict products liability should apply to informational products marketed to consumers.¹⁷¹

Similarly, courts’ attempt to prevent the imposition of strict liability for defective information based upon some First Amendment freedom of speech ideal, is similarly unpersuasive.¹⁷² Most courts typically

164. The *Fluor* court stated that:

[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.

Fluor Corp. v. Jeppesen & Co., 216 Cal. Rptr. 68, 71-72 (Cal. Ct. App. 1985).

165. See *Winter*, 938 F.2d at 1036 n.4.

166. *Id.*

167. *Id.*

168. See Noah, *supra* note 3, at 1208; see also Arnold, *supra* note 88, at 800-01; Meyers, *supra* note 87, at 722-23.

169. See *Winter*, 938 F.2d at 1036. The court in *Aetna Casualty & Surety Co.* explained: While the information conveyed in words and figures on the Las Vegas approach chart was completely correct, the purpose of the chart was to translate this information into an instantly understandable graphic representation. This was what gave the chart its usefulness[sic] this is what the chart contributed to the mere data amassed and promulgated by the FAA. It was reliance on this graphic portrayal that Jeppesen invited.

Aetna Cas. & Sur. Company v. Jeppesen & Company, 642 F.2d 339, 342 (9th Cir. 1981)

170. The same analysis could be used to say that the word “STOP” was not a product while a red octagon is, even though both express the same information.

171. See Mintz, *supra* note 155, at 635-44.

172. See Sandra K. Ross, *The Imposition of Tort Liability on Publishers Who Fail to Warn*, 39 WAYNE L. REV. 261, 284-91 (1992).

express the values of the First Amendment as preventing liability without any legal authority or meaningful analysis.¹⁷³ Others cite Supreme Court cases expressing general principles of First Amendment jurisprudence, but still fail to provide a meaningful analysis of those principles.¹⁷⁴ The purpose of this Note is not to advocate a new theory of First Amendment applicability to defective information, a topic already well covered by legal commentators.¹⁷⁵ Nor is the purpose to describe the application of First Amendment principles to information sent or displayed over the Internet, which is likewise well covered.¹⁷⁶ However, sufficient reasons do exist to prevent a First Amendment bar to defining information as a product.¹⁷⁷ The most significant reason is that this information is being sold to a consumer who is justifiably relying on the information to his or her detriment.¹⁷⁸ In such a situation, it is doubtful that the First Amendment would protect such information.¹⁷⁹ In any event, it is clear that the judiciary needs to make a more in-depth inquiry rather than merely glossing over the issue, thereby unjustifiably immunizing publishers.

B. Definition of Informational Product

The problem with any legal definition is the danger of it being either under- or over-inclusive. Many legal commentators have attempted to define what information should be considered a product for purposes of Section 402A.¹⁸⁰ One commentator would define information as a product when it is “commercial intellect,” which the author defines 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

173. See, e.g., *Winter*, 938 F.2d at 1037. In rejecting a duty on the part of the publisher, the *Winter* court stated that if it were “tempted to create such a duty, the gentle tug of the First Amendment and the values embodied therein would remind us of the social costs.” *Id.*

174. See *Jones v. J.B. Lippincott Co.*, 694 F. Supp. 1216, 1217 (D. Md. 1988) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) for the proposition that the First Amendment does not permit imposition of liability without fault).

175. See generally Lisa A. Powell, Note, *Products Liability and the First Amendment: The Liability of Publishers for Failure to Warn*, 59 IND. L.J. 503 (1984); Weingarten, *supra* note 65; Andrew B. Sims, *Tort Liability for Physical Injuries Allegedly Resulting From Media Speech: A Comprehensive First Amendment Approach*, 34 ARIZ. L. REV. 231 (1992); Smith, *supra* note 16.

176. See generally Kegley, *supra* note 11; Sarah Beckett Boehm, *A Brave New World of Free Speech: Should Interactive Computer Service Providers Be Held Liable for the Material They Disseminate*, 5 RICH. J.L. & TECH. 7 (1998); David Wiener, Comment, *Negligent Publication of Statements Posted on Electronic Bulletin Boards: Is There Any Liability Left After Zeran?*, 39 SANTA CLARA L. REV. 905 (1999); Francis M. Buono & Jonathan A. Friedman, *Limiting Tort Liability for Online Third-Party Content Under Section 230 of the Communications Act*, 52 FED. COMM. L.J. 647 (2000).

177. See Mintz, *supra* note 155, at 635-44; see also Ross, *supra* note 172, at 284-291.

178. See Meyers, *supra* note 87, at 699.

179. See Mintz, *supra* note 155, at 635-44.

180. See, e.g., Arnold, *supra* note 88, at 800-01.

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 the same matter, and as opposed to merely pondered and appreciated.¹⁸¹

This definition effectively catches the core of that information that should be considered a product, however it is somewhat confusing and complicated. In this author's view, it is possible to create a better definition for what information should be considered a product. This author suggests the inclusion within the definition of "product" under Section 402A a subcategory known as "informational product," which would be defined as:

Any readily usable description, methodology, or other information that is marketed to consumers in such a way as can reasonably be expected to invite reliance thereon without further investigation by the consumer or ultimate user.

This proposed definition is similar to the one suggested above only slightly broader, and much clearer about what is covered. It sets out more clearly that a product includes "information" as opposed to "intangibles," which is a vague description that could be confusing. In addition, the definition explicitly provides a consumer-based perspective, which is at the core of strict products liability.¹⁸²

C. Problems with Applicability of Definition of Informational Product to Internet Web Sites

If information that invites reliance is considered a product, and tangibility is not a prerequisite to that finding, it would appear that no valid reason exists to prevent informational products sold and displayed (or sampled) over the Internet from being covered by strict products liability.¹⁸³ However, there is still one remaining argument that could be made to prevent the imposition of liability for Internet web sites under a theory of strict products liability. An argument can be made that Internet web sites are providing a service, rather than a product. This is an important distinction because products liability law applies to products and "[s]ervices cannot be the basis for a strict products liability claim."¹⁸⁴

Courts use a variety of different criteria in determining if something is a product versus a service. Generally, if the item is custom-tailored to a particular customer, then a court is most likely to find it is a service.¹⁸⁵ On the other hand, if it is mass-produced and distributed,

181. Mintz, *supra* note 155, at 644.

182. See 1 MARSHALL S. SHAPO, *THE LAW OF PRODUCTS LIABILITY* ¶7.05[2], at 7-31 (1994).

183. See discussion Part IV.A. & B. *supra*.

184. Mintz, *supra* note 155, at 630. See generally E. C. Cowley, Jr., Annotation, *Application of Rule of Strict Liability in Tort to Person Rendering Services*, 29 A.L.R.3d 1425.

185. See *Held v. 7-Eleven Food Store*, 438 N.Y.S.2d 976 (N.Y. Sup. Ct. 1981).

then a court is more likely to find the item is a product.¹⁸⁶ This determination is important because liability will be imposed without fault only if the item is found to be a product.

The courts' treatment of the aeronautical charts is a good starting point for determining when information displayed over the Internet is a product or a service. For instance, one of the major reasons for a finding that charts were a product in such cases as *Saloomey*, was that the charts were mass-produced, and any loss as a result of a judgment could be spread over the public as a whole and treated as a cost of production.¹⁸⁷ Information displayed on the Internet, however, technically is not mass-produced as the charts were. In fact, information displayed on the Internet need only be produced once, then uploaded to a server for further use by the consumer. Of course, a type of mass reproduction occurs in the aggregation of each time a consumer downloads the information to a personal computer. In effect, this method of distribution enables the uploader to market his or her "product" without much overhead.

To demonstrate the difficulty of distinguishing between Internet products and services, consider the following hypothetical. First, assume that information is uploaded to an Internet web site and remains unchanged during distribution to the consuming public. It is, in a sense, mass-produced, when users download the exact same information time after time. Next, consider a situation where an Internet publisher easily revamps the information by uploading replacement pages on the server and continually correcting mistakes on the previous page. While presumably the consumer is only accessing the information once when the information is purchased, the same information is not really being mass-produced as the information is undergoing continual change. Under the second hypothetical, the web site would bear more similarities to a service provider of information, rather than to a seller of information as a product. While most web sites will fall somewhere between these two extremes, it is for this reason that there is uncertainty whether a court would find information contained on an Internet web site to be a product, or whether it would find the provision of such information to be a service. Where information is of a type that would not be updated regularly, i.e., of the type to be used by the consumer without further investigation, then principles of products liability law would count in favor of applying the doctrine to the information.¹⁸⁸ This would necessitate a case by case determination, which would turn on the

186. See *Kaplan v. C. Lazy U. Ranch*, 615 F. Supp. 234 (D. Colo. 1985).

187. See *Saloomey v. Jeppesen & Co.*, 707 F.2d 671, 676-77 (2nd Cir. 1983), *aff'g* *Halstead v. United States*, 535 F. Supp. 782 (D. Conn. 1982).

188. See *Held*, 438 N.Y.S.2d at 977.

facts of each individual case. Even so, at least consumers injured by defective information would have a chance at some recovery for their injury if they could prove it was a product, which is not possible under current law.

One commentator, however, points out another, more problematic, distinction between a finding that information conveyed is a service rather than a product.¹⁸⁹ That author points out that while the physical characteristics of the aeronautical charts may be mass-produced, or for that matter, while a type of mass-production occurs when the computer bytes are downloaded from the Internet, “the information that is the basis for liability is [not] mass produced.”¹⁹⁰ In terms of the Internet, though, this argument misses the point.¹⁹¹ The argument fails to recognize that products liability law applies to both manufacturing and design defects.¹⁹² A design is only produced once and in that respect not mass-produced, but products liability law applies to defects in a design nonetheless, by applying to the products of that defective design which were mass-produced.¹⁹³ Like a design, information distributed over the Internet is only produced once; but, because the distribution of the information over the Internet will always be tied to the physical medium through which it is disseminated, the information is, in effect, mass-produced through distribution.

If information must be mass-produced in order to be found to be a product, and the Internet’s physical medium satisfies the mass-production requirement, the more difficult question that arises is whether a speech or demonstration can be considered a product without being tied to such a physical medium. Is there any real difference between a situation where a person gives a series of identical demonstrations versus videotaping one such demonstration and selling copies of the videotape to consumers, beside the fact that the videotape fixes the demonstration in a tangible medium of expression? While this issue ultimately is beyond the scope of this Note, this conundrum raises real questions about the viability of applying strict products liability law to information in general, and its application to the Internet in particular.

V. CONCLUSION

The purposes behind strict products liability law support its

189. See Schultz, *supra* note 86, at 431.

190. *Id.* Of course, this argument assumes most cases arise where the underlying information is defective and not where the defect is due to production or publication problem.

191. See Brocklesby v. United States, 767 F.2d 1288, 1294 (9th Cir. 1985).

192. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §§ 1-2 (1998).

193. See *id.*

application to published information under certain circumstances. The strongest circumstances for applying strict products liability occur when published information induces reliance by the consumer and the publisher of the information reasonably anticipates that the consumer will so rely without conducting further investigation. Whether these events occur online or in a book, the same reasons for finding liability apply, and courts should allow the doctrine of strict products liability to protect consumers harmed by such defective information.