

Professional liability of indexers

by Glenda Browne

Discusses professional liability for indexers, particularly with respect to electronic information services, and how risk may be assessed and minimised. Offers an international overview, based on Australian, British, European and United States journal articles. This paper should be taken as an overview of the area, and not as legal advice.

Many professional groups are used to accepting professional liability for negligent acts. Traditionally medical professionals, architects, engineers, and accountants have been aware of the risks, have maintained professional liability insurance, and have reflected the costs of this in their fees.

Indexers, like other professionals, are responsible for harm caused to someone by their negligence under the law of torts. They may be liable for breach of contract (depending on the clauses of the contract). And if indexing work is considered to be a product rather than a service, strict product liability law applies.

The aim of this article is to discuss the implications of professional liability for indexers, particularly with respect to electronic information services, and to assess the risk, and possible ways of minimising the risk. Other legal issues such as copyright are not covered. The purpose of this article is not to give legal advice; for this you should consult a lawyer familiar with the law in your own country, and its relevance to your own situation.

Sources

My major source of information is journal articles identified in searches of *LISA* and *Library Literature* done by staff of the State Library of New South Wales.

Types of legal liability

Law of torts

Torts are private or civil wrongs or injuries. The tort of negligence has been developed through case law, and depends on proof of fault. Under the tort of negligence you are judged according to the standard of a competent professional in your field.

For a successful action for negligence it must be shown that:

- the defendant owed the plaintiff a "duty of care".
- that duty was breached.
- damage occurred.
- the damage was a direct and reasonably foreseeable result of the breach (Jones 1990).

I have found no cases of negligence involving database indexing. However these cases in similar areas may be relevant:

Defamation of a company in a database:

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985)

Dun & Bradstreet is a credit reporting agency which provides financial information about businesses. Dun & Bradstreet sent an incorrect report to their client stating that Greenmoss Builders had filed a voluntary petition for bankruptcy. Greenmoss Builders sued for damages. They won compensatory (US\$50,000) and punitive (US\$300,000) damages despite the fact that Dun & Bradstreet had

acted without reckless disregard (Dragich 1989).

Dun & Bradstreet argued that they could not be held liable on the basis of the First Amendment principle of freedom of speech; however, the court held that information in databases is not protected by the First Amendment if it does not concern the general public interest (Denis & Poulet 1990). As access to databases is more limited than to a printed newspaper or magazine, they may be considered "private concerns", thus not protected by the First Amendment. This may lead in future to an increase in litigation (Tarter 1986).

In previous cases in the United States courts had stressed the 'chilling effect' of liability for misrepresentation, and it was considered that users cannot expect information to be 100% reliable. In the Dun & Bradstreet case the market was supposed to provide the incentive for accuracy. It is possible that electronic reporting will be held more liable than traditional forms of publication because the market gives it the incentive to expand despite potential liability (Denis & Poulet 1990).

Three cases in which book publishers were sued for incorrect information are:

Robert Maxwell book index

Hazel Bell (1996) discusses a defamation case concerning an index, in which "Robert-Maxwell-no-relation sued the publishers of a book whose index merged his own blameless references with those of his infamous namesake" (reported in *The Independent*, 24 May 1989). Even though the error was in the index, it was the publisher who was sued.

German medical book:

BGH NJW 1970, p. 1963

The German publisher of a medical book was sued by a patient who was treated with a 25% NaCl infusion instead of 2.5%, due to a missing decimal point. The court stated that publishers should use all suitable techniques to avoid misprints especially in mathematical or medical information, but that readers cannot expect a complete absence of misprints in 'normal' print products. The claim was rejected as it was considered that any medically educated person should have noted the misprint (although obviously the person who treated this patient didn't!) (Denis & Poulet 1990).

French translation of German guide to edible plants: *Gribinsky v. Nathan T.G.I. 1er, 28-5-1986, p. 1987 IR, 3R.*

A person using a French translation of a German guide to edible plants died after eating poisonous hemlock as the book didn't distinguish between edible wild carrot and the very similar hemlock. The French publisher was held liable for not taking sufficient

precautions to avoid the negligence of the author, as it had a duty to make sure that the readers could rely on the contents of the book. The German publisher and author were also held liable.

Denis & Poulet (1990) conclude that "In the case of an online information provider such obligation would be almost impossible regarding the amount and speed at which the information is transferred".

Strict liability law (for products)

Strict product liability laws mean that producers of goods may be found liable even if it is shown that they were not negligent. If a database or other means of information provision is considered to be a product rather than a service, then reasonable care is not an adequate defense if a defect in the database causes serious damage.

Strict liability laws apply in Europe, the United States, and Australia. The European Commission's Product Liability Directive of July 1985 provides for no fault liability if a defect causes material damage to private property, personal injury or death. Economic loss or damage to one's reputation are not covered. With information service providers, economic loss (caused, for example, by a failure to update currency rates quickly enough) is more likely than physical damage (Jones 1990). Also, strict liability for information was not an aim of the EEC directive, so liability should remain based on negligence (Denis & Poulet 1990). An EC preliminary draft proposal from 1989 for a Directive on "liability for services with a safety defect" was never published (Jones 1990).

In Australia the Trade Practices Amendment Bill (No 2) which has similar provisions to the EC Product Liability Directive of 1985, was introduced into the Senate in 1991. A substantially revised substitute, the Trade Practices Amendment Bill (1992) was introduced into the Senate in May 1992. In this Bill, strict liability is confined to goods "ordinarily acquired for personal, domestic or household use or consumption" (McCorquodale 1993).

In the United States, strict product liability has been applied to Jeppesen, an information provider which creates navigational charts from Federal Aviation Administration (FAA) data (see below). Soma & Batson (1987) consider that it is "not unlikely [that] a court would apply strict liability to a database".

Defective navigational charts: *Salomey v. Jeppesen 707 F.2d 671 (1983)*

Jeppesen, an information service which creates navigational charts from FAA data, has been found liable under strict product liability law for damage caused by faults in their charts (but without any negligence on their part). Their charts are considered to be a product, not a service, as they are mass-produced, and reach the pilot without individual tailoring (Denis & Poulet 1990). If their charts were considered to be a service then negligence would have to be proven.

If this case sets a precedent, in the United States information will be considered as a product when it is widely diffused by the 'information seller' in the form of a product (e.g. CD-ROM) and when the user uses it without any change to the content. But in other cases the courts have held information to be a service. Denis and Poulet (1990) conclude that: "Law seems to be made on a case-by-case basis following the circumstances and the impression of the situation by judges".

Brocklesby v. Jeppesen 767 F.2d 1288 (9th Cir 1985), cert. den., 474 U.S. 1101 (1986).

In another case Jeppesen was required to pay US \$12 million to survivors of crew members killed in an aeroplane crash caused by a faulty chart, although the inaccuracies were contained in the original tabular data received from the FAA, and were not created by Jeppesen. Again the court applied strict product liability laws because the charts were mass produced, and not developed at the request of an individual client, and found that Jeppesen had a duty to test its product (they did not suggest how this could be done) and warn users of its dangers. Liability increases as the information provider is more active in synthesising raw data into a conceptually different package (Dragich 1989).

Jeppesen's argument that they should not be held strictly liable because the chart was based on FAA information from which Jeppesen could not legally deviate was denied. Because the product was unreasonably dangerous to the user, the seller was liable even when they had exercised all possible care (Soma & Batson 1987).

Soma and Batson (1987) consider that strict product liability could easily be applied to databases as:

- they commonly represent data in a different format from the one in which it was initially acquired.
- they mass-market their data.
- database data is not generally compiled for a specific instance.

Since databases are continually adding large volumes of data, strict liability would place a significant burden on them to ensure accuracy.

Law of contract

Under the law of contract, liability is determined by the terms of the contract, which may impose additional requirements, and the actions of the parties. A contract requires an offer, an acceptance, and a consideration (that is, both parties must provide something of value) (Jones 1990). It need not be written.

Siebel (1996) analyses two contracts in detail and writes: "I have since seen two ...contracts containing unusual and disturbing obligations for the performance of contracts for [indexing] services".

Standard forms contracts can be useful in saving time, but can be difficult to read and understand and may be used inappropriately. Siebel (1996) found on examining two contracts for indexing services that "The offerors have not recognised the completely different nature of indexing services" and that "the 'standard form' of contract is inappropriate for indexing services".

The process of negotiating a contract can itself be useful. It enables both parties to the contract to "check assumptions and account for tasks and decisions that may have been ignored or tabled during initial discussions". It can also be an early indication of the quality of communication (Strauss 1995).

Each party to the contract is usually aiming to reduce their own overall liability, although ideally each party should carry the risk for the areas over which they have control. Siebel (1996) discusses a contract which an Australian indexer was expected to sign, in which the indexer was required to carry \$5 million dollars worth of liability insurance.

In Australia Information Technology (IT) suppliers are also concerned about liability. The Australian Information Industry

Association has preferred that an IT suppliers' liability under contracts with the Commonwealth be limited and capped, and that the amount of the cap should be no more than the value of the contract (McCorquodale 1993).

In some countries there is an Unfair Contracts Act (e.g. UK Unfair Contract Terms Act 1977 (Jones 1990)) which means that liability under the law of contract may be reduced or nullified if the courts consider that the parties to the contract had uneven bargaining power. If a condition in a contract is imposed by a dominant party (e.g. the government) against an individual this may make the consent of the indexer not a "voluntary consent". If so, the contract might be declared void, or this clause severed (Siebel 1996). In New South Wales the Industrial Relations Act (NSW) 1995 S275(1) covers unfair, harsh, or unconscionable contracts. Of course, mounting even a successful defence may be financially ruinous.

The law of contract only applies to direct parties to a contract (this is known as the doctrine of privity), so in a database service there is no contractual relationship between the initial information provider and the end user. The users' only contractual remedy is with the service provider (Denis & Pouillet 1990) who in turn has a contract with the information provider.

Liability for electronic information provision

Electronic databases

Liability for damage caused by the use of information from a database is more complex than liability for traditional information provision as:

- there are more parties involved in data creation and distribution.
- there is little precedent for the assignment of responsibility for the quality of the database.
- there is more information available.
- provision of information electronically generates higher expectations.
- charging a fee generates higher expectations (Tarter 1986).

Parties involved in database provision, and therefore those with potential liability, include the initial information provider (authors of the information) and the service provider (responsible for dissemination of information) as well as network providers. Users and information professionals who do a database search also have input into the quality of the search result (Denis & Pouillet 1990).

To improve accuracy database producers should ensure that they provide:

- adequate documentation and user training.
- thorough training of indexers and abstractors.
- procedures and standards which are consistently applied.
- correction processes for errors found after publication.

The scope and coverage of the database should be clearly defined, especially in the fields of law and medicine (Tarter 1986).

Electronic publishing and the World Wide Web

Charlesworth (1995) discusses legal aspects of electronic publishing on the World Wide Web (WWW). Problems include the facts that:

- many individuals have published on the WWW "in utter ignorance of the potential legal implications of their actions".
- the law has not kept pace with the technology.
- WWW publishing may be affected by the law in countries

other than the country of publication.

Of most significance to indexers is the suggestion that "the creator of a link to a defamatory WWW page may be liable [for libel] where that link will have the effect of spreading the defamation" (Charlesworth 1995). Walker (1996) quotes Mike Middleton from QUT as saying that links from users' home pages on the WWW are a simple index. One possible role for indexers on the Internet is the creation of 'indexes' by adding links to information sources relevant to a certain subject or user need. It is hard to see how indexers could fully check all the material they create links to and keep track of all changes which are made after the links have been created.

Risk minimisation

How much risk is there? The risk of professional liability for an indexer may depend on:

- the quality of work done.
- the country in which the work is done, or the information is provided.
- the medium of indexing (for example, paper-based, CD-ROM, or Internet).
- the discipline involved.
- specialised nature of audience or information.
- the extent to which users depend on the index.
- claims and disclaimers made about the product.
- the amount of indexing work done.
- the amount the indexer is paid.
- wording of contracts, especially liability clauses.

Compared to professions such as medicine, the risk of an indexer being successfully sued is probably very low. However, depending on the nature of the work done, and the indexer's personal attitude to risk, there are certain risk minimisation options which may be appropriate.

Option 1: No action beyond basic care

The simplest, but riskiest, option is to assume that the risk is low, and to take no precautions beyond basic care with the work. This is probably the option taken by the majority of book indexers.

Option 2: Appropriate contracts

Contracts should include as much detail as possible. Some indexers try to minimise risk by carefully wording contracts and using disclaimers for the work they do. Others will not have the option to choose the wording of the contract themselves, and might find that the party with whom they are signing a contract is trying to minimise risk by directing it towards the indexer. They then have the option to try and negotiate the wording of the contract, or to refuse to sign it.

A lawyer can help with the writing or analysis of a contract, and can identify significant features of the contract.

Option 3: Professional liability insurance

The third option is to pay for professional liability insurance (in some places also known as malpractice insurance). It differs from general business liability insurance because of the specialised nature of the work. The insurer pays all damages that the insured is legally obligated to pay, and must conduct a court defense (so that professionals have a chance to defend their name), in which the insured must cooperate (New Encyclopaedia Britannica 1990).

Professional indemnity insurance is expensive, and works on a claims made basis, which means insurance must be held at the

time when the claim is made. This means that for full protection you have to be insured not only at the time you do the work, but for years afterwards. In Australia "statutory limitations set a period of 6 years after which no action can be taken for breach of contract; in the case of negligence the period is 6 years after the loss is suffered" (Siebel 1996). So if a database index, for example, is in use 50 years after its construction, the indexer will still be legally liable if a relevant claim is successful.

Steele (1995) discusses liability insurance from the point of view of librarians and compares four liability policies.

Option 4: Incorporation

The fourth option is to become an incorporated company, and to do all your work through the company. This means that if there was any problem it would be the company that was sued, and not you as an individual. (although the Corporations Law now imposes some personal liabilities on directors). You could lose all the assets of the company (and you can control how many assets it has) but not your personal assets such as your house. It is, however, expensive to form a company, and to comply with legal requirements of a company. In Australia, for example, you will be responsible for Workers' Compensation Insurance, Superannuation payments, and annual tax returns. The courts may also deal more strictly with a company than with an individual (Siebel 1996).

Edmonds (1990) and Gray (1988) have discussed company formation as an option for information brokers.

Conclusion

With the general increase in litigation against professionals, the increased perception of the value of information as a commodity, a change in contract requirements by employers of indexers, and the move of publishing from print to electronic media, some indexers are becoming more concerned about legal liability for the work they do.

With respect to information service providers, Jones (1990) has concluded that: "as long as care is taken in defining the terms under which the service is provided, undue liability should not be incurred", and Gray (1988) considers that for information brokers "large awards are unlikely".

Case law in related areas can give an idea of trends in legal thought. To assess the risk indexers must imagine the possible harm that indexing could cause someone, and assess the likelihood that the indexer would be sued and that a court would find against the indexer. Indexers can then choose the risk minimisation strategy that they consider appropriate. These strategies include avoiding negligence, paying for professional liability insurance, incorporating, and using contracts which describe their service and allocate risk appropriately. If in any doubt, discussions with a lawyer can point the indexer towards an appropriate strategy.

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new international newsletter for legal indexers

Specialist indexers tend to be found in ones and twos, geographically scattered throughout their countries. While law indexers in a particular jurisdiction may be able to get together occasionally at general indexing conferences, there is little chance of their being able to hold meetings themselves. Thus a newsletter is their only opportunity to keep in regular touch.

Togetherness need not be confined to any one jurisdiction. Although there are many differences in law and in legal publications throughout the English-speaking world, there is much in common.

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