Eusidic research project 1989 : questions of liability in the provision of information services

Triaille, Jean-Paul

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EUSIDIC RESEARCH PROJECT 1989

Questions of Liability in the provision of Information Services.[1]

INTRODUCTION

Nowadays the total number of databanks is increasing every year and on-line information providers are benefiting from quasi-unlimited opportunities to expand their services both on a national and international level. Unfortunately for databank producers this also means increasing the risk of liability as the number of potential users and uses of the information is growing. This research project is the result of the growing concern of on-line information providers as to their potential liabilities.
It seems unreasonable to invest huge sums of money to develop new technologies without knowing the extent of potential liability. Liability is no fiction. The user expects the information he receives to be reliable and accurate. In case of errors or omissions etc., he will blame the provider.
This study gives an overview of the different formulation theories of liability applicable to dissemination of information : Negligence, Breach of Contract and Strict Liability, illustrated with examples of litigation relating to traditional means of providing information. In the light of these principles, the study ends with a few guidelines to avoid or limit this liability.

At first, **Part I** of the study describes the main functions and actors involved in the on-line provision of information. It is important to have in mind a clear structure of the information market to determine precisely who might be held responsible for defaults in the information provided .
Part II, looks into the U.S.law and the relevant principles of negligence are summarized and illustrated with examples of case law.
Part III examines liability law in Europe and the existing case law dealing with liability of the traditional information services, such as the press, the information agencies etc. Part III ends with some general concluding remarks and with a few recommendations to avoid liability.

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[1] This study is realized by S.DENIS (Part I-III-IV), J. Derenne (Part II) and J.P. Triaille (Part IV), researchers at the Centre de Recherches Informatique et Droit, F.N.D.P.-Namur, Belgium.

Part IV concentrates on the applicability of the EC Directive on product liability to the on-line provision of information.
In the final part of this study, **Part V**, a few examples of contractual disclaimers of liability will be examined in the different contractual relationships between the parties in the light of the general principles of U.S.- and European contract law.

PART IV : THE E.E.C DIRECTIVE OF JULY 25, 1985 ON PRODUCT LIABILITY AND ITS APPLICATION TO DATABASES AND INFORMATION

INTRODUCTION

The question that we shall examine is whether the EEC Directive of July 1985 on liability for defective products[1] applies to the providing of information services and to the producers of databases. More generally, we shall examine the possibilities for the application of the directive to information as such, since it seems logical that the same principles should hold true for printed information, as for broadcasted information or for information included in a database.

The EEC Directive, as we shall see, establishes a system of liability regardless of fault of the part of the producer. So, if we come to the conclusion that it applies to the field of information, it means that in the 12 countries of the European Community information services providers could be held liable on the basis of a system of liability without fault in cases of damages resulting from "defective information". If that was the case, it would then mean that the trend which exists in some U.S. case law towards establishing a strict liability system for information[2] would clearly have to be considered as actual legislation in Europe.

Whether such hypothesis is valid will be examined hereunder. Before that, we shall first give some information about the directive itself.

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[1]Council Directive of 25 July, 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, OJ., n° L 210, p.29

[2]A. LAPLANTE, "Liability in the Information Age", Infoworld, Aug.18, 1986, p.37

CHAPTER I : THE E.E.C DIRECTIVE

A. SOME FACTS ABOUT THE DIRECTIVE

After many years of discussions, a European directive on product liability was adopted in 1985 [1].

As available figures indicate that as many as 40 to 45 millions of persons are injured and 30.000 to 45.000 persons die each year in the Community due to what is sometimes called consumers accidents[2], the initiative taken by the European Commission should prove useful to those injured consumers.

By establishing a system of "liability regardless of fault" for producers of defective products, the Council Directive tries to achieve a balanced equilibrium between the interests of both consumers and producers. The idea behind its adoption is that even when the producer cannot be blamed for the damages caused (i.e. even if there has been no negligence whatsoever) it would be unfair for the victim to be left with no legal remedy. The solution of the directive is a provisional shift of the risks on to the producer; it is only provisional, indeed, because the producer should include the price of insurance in his production costs, which are in turn included in the market price; so it is eventually the whole group of consumers of one type of product which bears the costs of an improved protection.

The liability of the producer, as it is organized by the directive, is not based on negligence, nor does it depend upon the existence of a contract.

The Member States should have introduced the directive in their national law by July 30, 1988; up until now, only a few of them have complied with that obligation (Italy, United Kingdom, Luxembourg and Greece).

B. LEGAL BASIS OF THE DIRECTIVE

When making its proposal to the Council for the adoption of the draft directive, the E.C. Commission gave several reasons to justify its initiative of harmonization of legislations. A first question is thus whether those reasons remain valid when applied to information services.

1 The legal divergences in the laws of the Member States lead to a distortion of competition by imposing unequal burdens on industry and trade of certain Member States; stricter rules of liability for the producer mean higher production costs (insurance premiums, reserves of cash to face possible lost trials)[3].

> First, I think that one can find a contradiction in the reasoning of the Commission: on one side it is said that divergences in strictness of liability rules entail differences in the costs of production; but at the same time, in order to reassure industrial circles, the Commission stresses the fact that the introduction of a system of

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[1] A "directive" is an original legal instrument of EEC Law : it imposes upon the Member States a goal that has to be achieved, but leaves it up to the States to decide the legal form and the means appropriate to reach the said objective.

[2] Th. BOURGOIGNIE, "Responsabilité des produits, arguments connus pour un nouveau débat", Revue Européenne de Droit de la Consommation, 1987, p. 7.

[3] Memorandum on the approximation of the laws of Member States relating to product liability, Bulletin of the EC, supplement 11/76.

> liability regardless of fault (as is set up by the directive) should not have any significant consequence on the price of insurance premiums[1].
> Secondly, when applied to information, the supposed effect on competition seems more unlikely; if distortions of competition do exist for databases and information services providers in the Common Market, they are most probably to be found elsewhere that in the strictness or looseness of liability rules.

2 Those legal divergences are also said to affect the free movement of goods: both producer's decisions to export to other Member States and consumers' choices regarding products might be influenced, so it is sustained, by legal considerations (i.e. by local laws on liability) instead of by economic ones (which should exclusively be determinant in the idea of a single market).

> First, it may be a too optimistic view to think that the average consumer is aware or even interested in those issues of liability.
> Secondly, and more generally, is the providing of information and the cross-border flow of data a matter involving the free movement of goods[2] ? A supplementary reference to the free movement of services would be appropriate (if not necessary).

3 The differences in the rules of liability in the Member States entail a different degree of protection of the consumer, and that is considered by the Commission as not compatible with a "common market for all consumers".

> As we said, available figures indicate that a large number of accidents (resulting in personal injuries or death) occurs every year in the Community; most of them, if not all, are caused by "traditional goods" (i.e. household appliances, food, cars, etc...): only rarely will such accidents result from "defective information". Also, it is not clear whether national legislations differ very much in those cases of liability for information and whether harmonization would be useful[3].

From the three grounds given above, consumer protection is the most important one, and the two other justifications are more formal. The objective of harmonization has not been fully achieved by the adoption of the directive, and has been altered by mechanisms used by the Commission and which were more in favour of consumer protection: first, some options had to be left to national legislators on three issues. Secondly, the directive does not replace the existing national laws but it only adds a new legal instrument in the hands of the victims (article 13 of the directive). This is a clear indication that the main objective of the directive is the protection of consumers, and that harmonization only comes second[4]. If references to effects on competition and on the free movement of goods were deemed necessary to justify the initiative of harmonization by the Commission, the real purpose of the adoption of the directive is to achieve a better protection of consumers throughout the Community.

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[1] This second statement has been repeatedly endorsed by insurance companies, and is based on a comparison with European countries where liability regardless of fault already exists; see J.G. COWELL (Deputy Secretary General, Comité Européen des Assurances), in "La directive communautaire Produits: les deux prochaines années", Revue Générale des Assurances Terrestres, 2-1986, p. 181. Additional costs are likely to amount to a fraction of 0,1 % of turnover; see P.E., 57/516/Ann. 2/ def. , p.45, and also, Th. BOURGOIGNIE, "Responsabilité du fait des produits, arguments connus pour un nouveau débat", Revue Europeéenne de Droit de la Consommation, 1987, n°1, p.21.

[2] cfr. infra, the "product or service" discussion

[3] This question is presently being discussed by the Legal Advisory Board (LAB), with the D.G. XIII of the European Commission.

[4] The words "consumer protection" come up 11 times in the preamble of the directive, whereas "competition" and "free movement of goods" each appear only once.

Examining whether such objective of improvement of consumer protection has been achieved is outside the scope of this paper[1]; however, it may be interesting to make an analysis of the objectives of the directive because of a possible interpretation of its provisions, both by legislators and by courts: as we said earlier, guidelines for interpretation will be useful for matters which were not explicitly included in the scope of the directive. In such cases, could one sustain that since the real objective of the directive is the protection of consumers, a sort of teleological interpretation of its provisions permits its application to subjects not envisaged by EEC officials, so long as such interpretation serves the interests of consumers?

Or, on the contrary, should the proclaimed objectives of harmonization play an equally important role, and forbid that interpretations by courts or legislators lead to diverging results ? After all, the directive also tries to achieve "a fair apportionment of the risks inherent in modern technological production"[2] between the injured person and the producer. Therefore, interpretation of the text in one particular direction rather than in another might amount, so it could be argued, to giving to the directive a unilateral character that it does not want nor pretend to have. It may also be noted that other drafts were making clear that Member States were free to enact stricter rules for the protection of consumers; the draft finally adopted does not contain a similar provision, thereby leaving the door open for discussions[3].

As a conclusion to this first part, the legal basis invoked for the directive can only be said to apply to a limited extent to the providing of information (esp. distortion of competition and free movement of goods). As we shall see, this is only a first objection to the application of the directive to information; we will indicate that there are many more objections to such solutions. Before that, we shall first give a description of the content and of the main principles of the directive.

C. SUMMARY OF THE DIRECTIVE

1 Principle of liability regardless of fault

The producer shall be liable for damages caused by a defect in his product (article 1 of the directive); the victim will have to bring evidence of the damage suffered, of the defect in the product and of the causal link between defect and damage (article 4). The directive thus establishes a system of liability of the producer even in the absence of any fault or negligence on his behalf, and there lies the principal innovation brought about by the directive.

2 Scope of application as regards products

Are covered by the directive all movables, with the exception of primary agricultural products and game, even when incorporated into another movable (e.g. tyres of a car) or into an immovable (e.g. bricks of a wall). It is not necessary that the product be for sale (e.g. a bottle of soda); it is sufficient that it is at the disposition of the public at large for

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[1] The answer will largely depend on the options taken by the national legislators on the three optional issues, but it is possible that in some countries, the directive entails a step backwards for consumer protection.

[2] Preamble, para. 2.

[3] Legal controversies on the "minimal" or "maximal" character of the directive may be found in J.G. COWELL, "The European Product Liability Directive, some first impressions", Product Liability International, Aug. 1985, p.144; also in Th. BOURGOIGNIE, op. cit., p. 19, and in H. DUINTJER TEBBENS, "De Europese Richtlijn Produktaansprakelijkheid", Nederlands Juristen Blad, March 1986, p. 373.

"consumption" (e.g. a ferry-boat). The definition includes "all movables which can be subject of economic activity"[1].

From that definition, one can deduct that a.o. immovables are excluded, as well as services; as we shall see, questions will arise concerning immaterial goods.

3 Persons who may be held liable

The directive gives the victim a legal remedy against (article 3):

- the real producer (of a finished product, of defective raw materials or of a defective component part);
- "any person who, by putting his name, trademark or other distinguishing feature on the product presents himself as its producer"
- "any person who imports into the Community a product for sale, hire, leasing or any form of distribution in the course of his business"[2];
- the supplier of anonymous products, unless he informs the injured person, within a reasonable time, of the identity of the producer or of the importer in the EEC.

When several persons may be held liable for the same damage, they will be held jointly and severally liable (article 5).

4 Persons who may rely on the directive

The directive does not give any definition of the injured person, so that any person who can fulfill the requirements concerning evidence (i.e. proof of damage, of defect and of causal link between the two) may start an action. The existence of a contract between the person held liable and the injured consumer is irrelevant.

5 Definition of defect

A product is considered to be defective "when it does not provide the safety which a person is entitled to expect" (article 6); this notion should not be confused with the fitness for use (involving contractual liability and settled according to contractual terms -we have said earlier that the existence of a contract was irrelevant). The words "a person" is to be understood as meaning "the public at large" (preamble, para. 6).

Producers should pay much attention to the quality of their products, for judges are expressly invited to take all circumstances into account, including the presentation of the product (symbols warning against dangers, user's manual accompanying the product), the use to which it could reasonably expected that the product would be put (e.g. children put toys in their mouth) and also the time when the product was put into circulation (the buyer of a second-hand product cannot expect the same degree of safety as the purchaser of a brand new one).

Finally, a product will not be considered defective for the sole reason that a better product is subsequently put into circulation (article 6).

6 Damages covered by the directive:

While the definition of product was rather large and the list of actionable persons rather long, the definition of the damages covered limits to an important extent the possibilities for applications of the directive (article 9). It covers only:

- the damages caused by death or by personal injuries;

- the damages to items of property other than the defective product itself[3]. For the compensation of those damages, the directive provides for two cumulative conditions and for one reduction of the amount: first, the damaged item must be of a type ordinarily

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[1] L. KRAMER, EEC Consumer Law, Droit et consommation, Ed. Story-Scientia, 1986, (chapter on the 1985 Directive), p.249; article 3.2 mentions " ...for sale, hire, leasing or any form of distribution".

[2] This enables the victim to find in every case a person to sue within the EEC.

[3] Damage to the product itself is compensated on the basis of contractual terms.

intended for private use (objective condition) and must have been used by the victim mainly for his own private use (subjective condition); secondly, a lower threshold has been set up, so that compensation will in every case be reduced by an amount of 500 ECUs.

7 Existence of a causal link between defect and damage

After having established a defect in a product and a damage (of a type covered by the directive), the plaintiff has to bring evidence of a causal relationship between defect and damage.

The directive does not give any explanation about the causal relationship. Questions can arise for indirect damages; in 1976, it was thought not to be an important issue: "This question of remoteness of damages is a matter for the courts in each Member State to decide. Research into the comparative law on the subject has shown that in practice, however, the amount of damages awarded in individual cases will not differ substantially"[1]; this point of view has been criticized, as leaving out of harmonization a crucial point of many product liability cases[2].

Different theories of causality are used in the Member States: "adequate causality" (France, among others), "aquilian relativity" (Germany and the U.K.), "causa proxima" (Italy), equivalence of conditions (Portugal and Belgium)[3].

8 Exclusions from liability

The directive provides for a limitative list of grounds of exclusion from liability (article 7). All of those possibilities of exemption but one are in fact logical deductions from the basic principles of the system, which requires that a product that is defective at the time when it is put into circulation entails liability of its producer for damages caused by the defect, regardless of any fault on his behalf. For example, the producer will not be held liable if he can prove that he did not put the product into circulation, or that the defect came into being after the putting into circulation of the product.

The only real exception to the principle set out above is what is usually called the "development risks defence": the producer will not be held liable if he can prove that "the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the product to be discovered" (article 7.e). In this respect, the impossibility to find the defect must have been absolute in order for that defence to be accepted by the judges[4]; arguments relating to costs necessary to find the defect are in no way decisive. This ground of defence is one of the options left to national legislators; they remain free to exclude it , if they so wish.

9 Interdiction of exemption clauses

One of the important provisions of the directive is the article which forbids contractual variations to the principle of liability which the directive establishes (article 12).

One can however see two limits to the provision of this article. First, it only concerns "the liability of the producer arising from this directive"; we have seen that the other systems and rules of the law of liability remained unaffected by the directive (article 13); for those grounds of liability, contractual clauses remain licit (if they can still be of any use at all). Secondly, those clauses are only forbidden "in relation to the injured person"; so contractual exemptions are licit between the different links of the production and distribution chain, but they cannot be used against the final consumer.

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1 Memorandum, op. cit., p. 17.

2 F.A. ORBAN, "Product liability: a comparative legal restatement - Foreign national law and the EEC Directive", Georgia Journal of International and Comparative Law, 1978, p.378.

3 J.L. FAGNART, "La directive du 25 juillet 1985 sur la responsabilité du fait des produits", Cahiers de Droit Européen, 1987, p.36.

4 H.C. TASCHNER, "La future responsabilité du fait des produits défectueux dans la Communauté européenne", Revue du Marché Commun, May 1986, p.261.

10 Limits to the bringing of an action

Actions must be brought within two different limits that are both to be respected at the same time:

- a three years limitation period, starting the day on which the plaintiff became aware or should reasonably have become aware of three things: the damage, the defect and the identity of the producer (article 10);
- a ten years extinction period, starting the day on which the producer put into circulation the product which caused the damage (article 11).

11 Limits to the amount of compensation

We have seen earlier that a lower threshold diminishes the compensation by 500 ECUs.

Another limit can be set up to the liability of the producer; if the national legislator wants it[1], a financial ceiling can be imposed, but of no less than 70 million ECUs, for damages resulting from death or personal injuries and caused by identical items with the same defect. Such high minimum renders the many discussions about it rather theoretical, since it has been said that even in case of mass damages, it would not very likely come into play [2].

D. SOME GENERAL REMARKS ON THE DIRECTIVE

The introduction of the principles of the directive in the laws of the Member States will bring about changes of varying importance: in some countries, the evolution will be very important (Greece, Spain, Portugal); in some others, it will amount to a codification of the existing and recent case-law, and in some others (France, Belgium), the answer as to whether it will prolong the trends favored by the judges (and thereby entail a step forward for consumer protection) will largely depend upon the options taken by the national legislators.

As such, the acceptance in all the Member States of the principle itself of liability regardless of fault is a very important achievement.

Total harmonization could not be achieved at this stage, but a review procedure has been set up, in order to reexamine the need to keep the options open[3].

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[1] Article 16.1 of the directive; this is a second option left to the Member States. As we said, the first one concerned the development risks defence; for the sake of completeness, let us mention that the third one concerns the inclusion of agricultural products in the scope of the directive.

[2] H.C. TASCHNER, op. cit., p.259; Consommateurs Actualités, 31-5-1985, p.2

[3] Report by the Commission to the Council every five years, accompanied, as the case may be, by appropriate proposals for further harmonization (article 21); discussions about the developments risks defence and the financial ceiling in 1995 (article 15.3 & 16.2).

CHAPTER II : THE APPLICABILITY OF THE E.E.C. DIRECTIVE TO DATA BASES AND INFORMATION

A. DOES A DATABASE FALL UNDER THE SCOPE OF APPLICATION OF THE DIRECTIVE?

I. Is a database a product or a service ?

When the "producer" of a database makes the latter available to users, is he providing a service or is he delivering a product to the consumer ?

The question is important because, as we said earlier, the directive does not apply to defective services as such[1]; and the fact that it will probably take much time to adopt a directive on that subject (if a directive on liability for defective services is ever adopted at all) does not per se justify an extension of the present directive to such domain.

Quite clearly, providing information to somebody is a service and information as such should not be considered as a product in the sense of the directive[2]. However, if it is to be transmitted to another person and if it is meant to be available for a certain period of time, information necessarily has to be incorporated on a material support; this support can be a book, a catalogue, a videotape, a CD ROM, etc...

In such case, the providing of the service is, as it is often the case, accompanied by the delivering of a product; we said that the directive did not apply to services as such, but it does apply to products delivered in the context of a service; indeed, the mere fact that a good is used in such context does not mean that its producer would escape from the system of liability without fault set up by the directive. For instance, restaurants do provide services, but the food they "serve" remains a product[3]; travel agencies provide another type of service, but the coach hired for the transportation of the travellers is a product in the sense of the directive (i.e. a movable good).

As regards the providing of information, we shall examine later on when the support of information could be defective, and what damages it could cause; but as one can see, we cannot at this stage exclude the application of the directive to the providing of information, since it usually involves the delivering of a support (product).

But **what about the case of on-line databases** ? In such case, no product is transferred and no support is delivered to the user. Does that mean that such example is a pure-service (no-product) situation ? In our opinion, the answer is negative : the directive does not require that a product be physically transferred; in fact, "any form of distribution for economic purpose"[4] of the product is sufficient. So in the case of on-line databases, there still exists, on one location, a material support on which the data are introduced. This support is not transferred to the user of the database, but it is made available to them, and as such it is thus "put into circulation" in the sense of the directive : on-line distribution of data is just one form of distribution among others, by which a material support containing data is made accessible to users[5]. Therefore, we do not have to treat it as a separate category.

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[1]Calewaert's Report, European Parliament 57516/def., p. 37; it was said during the discussions in Parliament that another directive would be drafted at a later stage for the field of defective services

[2]Cfr. infra, the "tangible or intangible" discussion.

[3]G. VANDENBERGHE, "Software bugs, a matter of life and liability", Celim Conference, 27-28 June 1987, Brussels, p. 5.

[4]Article 7 c of the directive.

[5]The same reasoning can be followed for the case of telesoftware, see L.DOMMERING-van RONGEN, "Produktaansprakelijkheid en software", Computerrecht, 1988/5, p. 229.

II) Is a database tangible or intangible ?

The question is important only if the directive makes the distinction between tangible goods and intangible ones, and if it only applies to tangible goods :

1) Does the directive only apply to tangibles ?

The comparison of the words used in the different versions of the directive does not give a clear answer, neither will an analysis of the most common meaning of the words used.

> It was explicitly provided in article 2 of the directive that electricity was to be considered as a product; can any argument be deducted from that ? It is sometimes sustained that if an express provision proved necessary for such a borderline case as electricity (which is, to a certain extent, tangible), it means that all the other "intangibles" are not included. In fact, the reason for such express mention is that electricity in some countries is considered as energy but not as a good or as a product[1]; therefore the argument a contrario cannot necessarily be used.

However, from the provisions of the directive, and from the text of its preamble, it is at least clear that the drafters did not have incorporeal goods in mind. If they were to be included, many provisions would become difficult to understand:

> What would be the meaning of raw materials used in their production process (article 3) ?
> Who would be the producer of immaterial goods ?
> How could they be imported and exported ?
> How could one affix its trademark on it (article 3) ?
> What would be a component part of an incorporeal good ?
> What would be meant by the "presentation" of it ?
> When is it put into circulation ?
> Why would the text mention "manufactured products" (article 7) ?
> What could be the design of such good (article 7) ?
> And what about the definition of damage to "any item of property other than the defective product itself" (article 9) ?

All those questions indicate that incorporeal goods were not in the minds of the drafters. All the difficulties that their inclusion would entail (see the list of questions above), are as many reasons to consider, we think, that incorporeal goods should be left aside, so long as there is no EEC initiative in this field[2].

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[1] H.C. TASCHNER, op.cit., p. 259.

[2] Such statement leaves aside the question of advisability of such initiative; we are only saying that since such application had not been envisaged, other rules may have to be applied to those goods, and the decision to apply strict liability in such case should come from the EEC legislator, not from legal scholars; for similar opinions on the issue of inclusion of incorporeal goods, see L.DOMERGING VAN RONGEN, op.cit., p. 228; also see comments by A.J.O. VAN WASSENAER en J. STUYCK in Produktenaansprakelijkheid, veiligheid en verzekering, ed. H. COUSY en H. CLAASSENS (Vijfde Leuvense verzekeringsdagen), Maklu uitgevers, Antwerpen, 1987; for an opposite view, see G. VANDENBERGHE, "Software bugs ...", op.cit., p. 6.

2) What then about a database and about any support of information ?

Again, one must draw a distinction between the support (a) and its content (b):

(a) The **support of information** on which the data are incorporated is a tangible good, be it a book, a tape or a CD ROM.

(b) But **the information contained in that support** is not tangible, even if that information may be of very practical use. Information and data are immaterial, be they addresses, pharmaceutical formula, list of prices or cooking recipes. Only when a human being decides to use them, e.g. to prepare a meal, that information will have some impact in the real world, and then only by the intermediary of a user.

As we said, information which has to be transmitted and has to remain available for a certain time has to be put on a material support[1]; it is possible to draw a distinction between what is material (the support) and what is not (the information).

> Independently from its support, information which has to be transmitted is always given a certain form : letters, figures, sounds, pictures. This form may well be "tangible" for the human being (indeed, it is precisely the function of such form), since it will only reach the person's mind through his senses (sight, hearing), but it does not render the information itself tangible; this form is only made of conventional signs addressed to the mind, and that is the only function it has. The reasoning is different for the case of a computer program which is made of instructions for a robot or a machine : in that case, the instructions themselves have a material impact on the machine, and they do not have to be first understood by a human being. Therefore, this reasoning about a "tangible" form given to information cannot be used as an argument to try to have information as such included in the scope of the directive.

We should now examine the consequences of the limited application of the directive (i.e. limited to the support) to databases and see the significance in this context of the notion of defectiveness, of damages and of causality.

B. APPLICATION OF THE DIRECTIVE TO THE SUPPORT OF INFORMATION

This support, as being a material good, clearly falls under the scope of application of the directive. However, damages caused exclusively by such support (and not by its content) are not very likely to happen : a book can cause physical injuries if e.g. the type of ink used for its printing was poisonous and therefore dangerous when the reader brings his finger to his mouth before turning to the next page (see the story of "The Name of the Rose" by Umberto ECO); similar types of damages could occur with books read by children, and at least in theory with other types of support of information (due to their physical characteristics, such as e.g. cutting edges). Those damages are in fact more theoretical than real, but are given to help in drawing the distinction between the support and its content and between the type of damages that each can cause.

Such support will considered **defective** "if it does not provide the safety which a person is entitled to expect" (article 6 of the directive). The person who suffered **damages** of a type covered by the directive will obtain compensation after establishing the existence of those damages, of a defect in the material support of information and of a **causal link** between the defect and the damage (article 4).

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[1] When there is no such support,e.g. in the case of oral information passed on from one person to another, nobody would even think of considering that information as a product, and no one would sustain that liability without fault should apply to the case.

However, a particular type of defect could arguably be said to belong to the support rather than to the information, and could be attributed to the producer of the support, i.e. a **typing error**. What if e.g. a 25 % of a component of a medical formula was printed as 25 % ?[1] It can be sustained that this is a different situation than when the researcher himself makes such mistake : in the latter case, the printer has reasonably no power of control over the information and only passes it on. But if the final error is due to the printing or editing only (typing errors, omission of a part of the author"s text, etc...), this might be a normal case of defect in the sense of the directive (in this case, the "producer" could clearly be designated)[2].

C. APPLICATION OF THE DIRECTIVE TO THE INFORMATION ITSELF

I) The principle:

We could easily terminate this study by saying that since information is intangible and since the directive in our opinion only applies to tangible goods, the directive does not apply to information. And indeed, it has been suggested -rightly do we think- to exclude strict liability to the case of published ideas[3]; as a result, strict liability would not be applied to books, and to information in general[4]. Product liability was indeed first intended for products directly causing damages (household appliances, cars, etc...), whereas information could only cause any damage it is first understood and then "implemented" by a person.

One could say that the intended use of a book is its reading and that such activity should not cause any material damage (personal injury or damage to property) to the user : to sum up the argument one could say that poisonous ink used for printing could be harmful, but not the mere reading of a poisonous recipe. In the first case, the situation involves the delivery of a product ; in the second case, it concerns the providing of a service. (Similarly, the intended use of database would be its consulting?...)

However, one must admit that such reasoning has certain limits to it : the more the information is "practically oriented", the more likely it is that the reader will use it in a concrete manner. And indeed, there is little difference between the case of a "do-it-yourself" guide which is sold independently from any tool and the case where a tool is sold together with instructions for use[5].

But since it is not unanimously accepted that it only applies to tangible goods[6], we should examine that statement (opposite to ours). If it not limited to those material goods, the door may be open for considering a no-fault liability system for "defective information".

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[1] H.C. TASCHNER, Produkthatftung, C.H. Beck'sche Verlagsbuchhandlung, Munich, 1986, p. 84

[2] On this issue, see A. de la PORTE, "Een onderzoek naar de toepasselijkheid van de EEG Richtlijn van 25 Juli 1985 op drukfouten in boeken", research paper, University of Amsterdam.

[3] Idem, about a U.S. court decision (carbozo v. True, 1977).

[4] It is true however that in another U.S. court decision (Brocklesby v. U.S. 735 F, 2d 794, 800, n° 9th Cir. 1985), fly charts were considered as products, but the Court in that case also relied to a certain extent on the notion of negligence.

[5] In the U.S.A., an error in the user's manual accompanying a power-saw lead to physical injury to a user; the Court refused to make a distinction between the support (a product) and the information contained therein; see Sears, Roebuck & Co v. Employers Insurance of Wausau, 585 F. Suppl. 734, N.D. Ill. 1983

[6] G. VANDENBERGHE, op.cit., p. 6 et sq.

II) The opposite thesis; and the reasons why this thesis should not be considered as valid:

We shall hereunder try to demonstrate that the thesis according to which the directive could apply to information should not be accepted.

First, in the American case law, even when strict liability for information is called upon, it seems that judges feel the need to also base their decision on the fact that there has been some negligence (be it to a very limited extent), as if strict liability was not a sufficient ground for decision.

However, what would be the situation in Europe (once the directive will have been implemented), if one considers that the directive does apply to information as such ? As we shall see, such solution would create difficulties:

(1°) Application of the notion of "defect" to information:

If information is to be considered as a product, it will be defective "when it does not provide the safety which a person is entitled to expect". The application of the notion of defectiveness to information should not raise any particular problem, and one could indeed sustain that everyone expects a certain degree of safety from the information received. However, it is obvious that is would sometimes be difficult for the judge to determine the degree of safety that one was entitled to expect when the product was put into circulation : is one entitled to 100 % accurate information ? Should the price paid to obtain the information be taken into consideration ? How strict should the judge be regarding the updating of the information ? On this latter point, databases producers would probably be expected to afford a high degree of updating as this is one of the interesting aspects of on-line information as compared to printed information. Which criteria would or should a judge use before deciding that some information is defective ? According to article 6, the presentation of the information, the use to which it could reasonably be expected that information would be put and the time when the information was put into circulation would a.o. have to be taken into consideration. Those are the type of questions which would have to be raised if one sustained (as some authors seem to do) that information as such could fall under the scope of the directive.

(2°) Application of the notion of "damages" to the field of information:

Damages of a type covered by the directive (i.e. personal injuries or damage to private items) can be caused by "defective information"; examples can be given (e.g. wrong weather forecast on which fishermen will rely and resulting in the boat and the crew drowning- the case occurred in the U.S.; physician relying on a pharmaceutical database to prescribe certain medicines). But financial or economic damages caused to an enterprise by wrong information given about it and resulting in a drop of the price of shares (see the case "La commande électronique" in France) are not covered by the directive. Also, immaterial damages caused to one's reputation are not covered. It means that many cases of damages would be left out, even it if was established that the directive did apply to information as such.

So "defect" and "damages" should not cause particular problems if one wanted to include information in the directive. What then about the requirement of causality ?

(3°) Requirement of causality in the field of information:

As this stage, it might be useful to again make a comparison with computer programs.

> In that respect, it seems possible to draw the following distinction :
>
> On the one hand, some programs are incorporated in "machines" (in the broad sense : robots in a manufacturing process, airplanes, etc...), and the running of the program in those cases brings the machine to move and work. The human intervention is normally limited to starting the program; once that is done, the software directs the machine in performing certain tasks involving physical and material changes in the environment : the plane cas take off, the robot can lift objects, etc... If some damage arises, it will bu due (as the case may be) to a defect in the product and will have been directly caused by the product itself (the machine being the product, the software being one of its component parts).
>
> On the other hand, some software programs are only used to provide users with useful informations or of perform tasks that are specific to the office environment. The running of the program only brings the computer and the printer to work. Human intervention in those cases is more important and takes place in as sort of dialogue with the machine.
>
> In both cases, the instructions contained in the program have the same material characteristic (electric impulses), but their function is different.
>
> - in the case of the program used in a robot, *the software plays the same role as any other mechanical device* : the instructions it contains are written for the machine ans, as such, do not have any value as informations for a human user. The instructions contained on the support could be compared to the material characteristics of a mechanical device (its shape, its size, its solidity); therefore, they may have a direct impact on the material environment : a direct causal link will clearly be established between the defect in the software and a possible damage;
>
> - in the other case, *the software plays the role of a source of information for the user;* the instructions it contains may have to be first used by the computer (in order to have them displayed on the screen), but the ultimate user for which they have been written is a human being (and not a machine). Therefore, there is a new and crucial element intervening in the chain of causality between the defect of the software and a possible damage, i.e. a human decision, followed by an action.

We gave this example about software because the distinction between the two different types of programs enlightens the very function of information as being a message addressed to a person's mind and having by its own no possible impact on the material world. Before it can bring about any change to the environment, information first has to be "processed" by a person's mind. This processing necessarily involves certain changes to the information, so that the information which leaves its provider is not exactly the same as the information received by its recipient. Before any damage may arise, somebody will have taken a decision on the basis of the information received : only in the course of implementation of that decision some damages may occur. And the more this human factor proved important, the less a causal link between a defect in the information and a damage is established? In all those cases, the personal (or professional) liability of the user may be involved : for instance, when a patient suffers damages because his doctor relied on a pharmaceutical database in which there were some errors, his damages do not immediately originate from the database, but from the doctor's prescription : the latter could therefore, as the case may be, be held liable on a traditional scheme of liability based on fault or negligence[1].

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[1] See for an application to the case of expert systems, A. ZOPPINI, "Les systèmes experts et la responsabilité civile", Droit de l'Informatique et des Télécoms, 1989/1.

An objection to our opinion (i.e. non applicability of the directive to the providing of information) could be taken from the provision of article 8.1. of the directive which states that "the liability of the producer shall not be reduced when the damage is caused both by a defect in product and by the act or omission of a third party". At first sight, this could mean that the producer of a book or of a database would be liable (without fault) if a third party (e.g. a physician) causes damages to individuals by using erroneous information contained in the book or in the database.

However, this does not invalidate the objections we had in the first place against the application of the directive to information : information is intangible, the providing of information is a service; only damages caused by the support (and not by the information itself) may be compensated on the basis of the directive. If the directive does not apply to information, as we sustain, article 8.1. does not apply to our case either. And more basically, we do not think that the mere inclusion in the directive of a provision dealing with a case of double causality (i.e. article 8.1.) would constitute a sufficient ground for considering that information as such is covered by the EEC legislation.

We see that even if one wanted to include information in the scope of the directive (contrary to our opinion), the causal link would have to be carefully examined before awarding compensation for damages. If the notion of causality was understood in a broad sense, the introduction of a no-fault liability system for information could have far reaching consequences : what about the legal advice given by a consultant or a lawyer[1] ? As such, it can be considered as information (and it will usually be printed on paper). What about the plans and designs of an architect ? Such examples indicate that including information in the scope of the directive would result in applying a no-fault liability system for many traditional services.

We are not saying that such solution would *per se* be undesirable, but it is clear that such result was not in the mind of the drafters of the directive. If a no-fault liability system was to be applied to services -which would amount to a very important evolution in most Member States- we strongly believe that such reform should be the object of new legislation (and follow the normal EEC legislative procedure), but it should not result from academic interpretation.

Besides the difficulties concerning this requirement of causality another important -and more basic- question would be to determine who is the "producer" of the information[2].

(4°) Determination of the producer of the information:

Many different situations my be envisaged :

- for the case of information which is largely distributed, who will be the producer: the author, the editor, the printer ?
- for information which is only given to a few people, or to one client, the producer would be the author (e.g. the doctor, the lawyer);
- in some cases, the information was given added value by an "author" who transformed it in a personal way; will he be considered as the producer, or should the editor still be liable (even if he had no control over the content of the information) ?

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[1]The directive also applies to custom-fitted products : indeed contrary to what the preamble provides, the directive itself does not require the "product" to be industrially produced. In an Answer to Parliament about the applicability of the directive to software, the Commission has expressly said that the directive also applied to products of crafts and art, see Written Question n° 706/88 (July 5, 1988), and Answer by Lord Cockfield on behalf of the Commission (November 15, 1988), O.J. n° C/144, May 8, 1989.

[2]The directive mentions "the manufacturer" (of a finished product of a component part or of raw materials); such wording also seems to indicate that only material goods were thought of by drafters.

- in the other cases, the information does not have the characteristics of ideas being expressed (e.g. a directory of addresses). Who should be their producers ?

Those questions show the very wide variety of "information"; in fact each information is given in a particular context, and the persons involved may be related in many different ways. This indicates, in our opinion, that it is impossible to treat information as a single category, to which one would apply a unique rule; in this respect the no-fault liability system is rather rigid and clear-cut. Considering information as a product appears to be very artificial. Instead, one should in each case consider the whole context in which the information was provided and of which the information is only one element in order to decide which system of liability should be applied.

(5°) Effects on the general freedom of expression

The problem of determining the producer of the information (who should ultimately be held liable) brings with it some concerns about the general freedom of expression : would it be wise, for instance, to hold the editor of a book liable on a no-fault basis ? Would that not discourage dissemination of information[1] ?

If one decided to apply strict liability to providers of supports of information for damages caused by "defects" in the information itself, it would mean a.o. that the writer of a medical book (or of a medical expert system) would be held strictly liable in situations where a doctor would only be liable if proven negligent; whether such solution is desirable will not be discussed, but we wanted to draw the reader's attention to it.

Another argument has been raised against the application of a strict liability system to expert systems and it can be applied to databases: almost inevitably expert systems (like all computer programs) contain errors; applying a no-fault liability system to such new "products" could hinder their technological and commercial development[2].

III) Conclusion: Inapplicability of the directive to information:

As a conclusion, one can say that after taking into consideration all the difficulties and disadvantages raised by the application of strict liability to information such solution should not be accepted, unless the legislator decides otherwise in the future. Those arguments do reinforce our first objection, i.e. that the directive does not apply to immaterial goods (such as a.o. information).

IV) Possible alternatives to no-fault liability

Since we think that the directive should not apply to information, we shall try to show that two alternatives might prove more appropriate for the case of liability for defective information[3] :

(1) A **system based on negligence** can be a more opportune instrument; this might be all the more true since traditional product liability in Europe, while still being based on negligence, can sometimes result in decisions very similar to no-fault case law. But in front of the wide variety of situations involving "defective information", the criterion of negligence may show more adaptability that a rather clear-cut no-fault system.

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[1] We only wanted to mention that issue (without commenting any further); but one must recognize that the freedom of expression is never absolute, and has to respect other values (like the persons' health and privacy).

[2] A. ZAPPINI, op. cit., p.58

[3] This part would deserve further developments, but those would not fit in the context of this research

For example, the criterion of negligence could be applied in a stricter manner when the information at stake is of a type intended to be "implemented" by the user : it is quite clear, for instance, that a Do-it-yourself guide is not bought by the customer because he would like to read it, but because he intends to bring it to practice : it is very foreseeable that he will follow the indications of the book when repairing some furniture or placing electric cables. The criteria will also be stricter when the information was prepared by and given to non-professionals. But exemption clauses would remain valid (within the existing limits established by the case law of the Member States).

(2) But there might be another alternative to strict liability than traditional negligence; and the courts might indeed be more and more inclined to use the criterion of **the legitimate expectations of the public**. This criterion has the advantage of being applicable both to products and to services[1]. In fact the directive itself refers to a similar notion when stating that a product is defective "when it does not provide the safety which a person is entitled to expect"[2]. Such criterion might be more favourable to victims than a standard of negligence. Even if it is very similar to the notion of defectiveness of the directive, it does not amount to applying the directive to services; indeed, exemption clauses regarding liability would still be valid (within the limits existing in the Member States), since the user in such case cannot have so many "legitimate expectations" towards the service. Also, the judges would probably consider that the user's expectations would not be legitimate if the latter was expecting a perfect service (100 % correct information) in all circumstances.

As a conclusion on this part , it is our opinion that the directive in its present version should not be applied to information; if one still tries to apply it, arguments related to the issue of causality and to the determination of the producer indicate that other schemes of liability (negligence, or legitimate expectations of the public) may offer more appropriate solutions to a very wide variety of situations than a uniform application of liability regardless of fault.

> It should be noted that the U.K. Department of Trade and Industry has taken the view that information had to be left out of the scope of the directive[3] : printed material is not included, except for the case of instructions for use of a product; and design consultants will not be liable (on a no-fault basis) for an error in the designing of a product which proved later on to be defective[4] : in such case, the final producers of the product would be strictly liable for the designed object.

D. INFORMATION AS COMPONENT PART OF THE PRODUCT. THE STATUS OF INFORMATION IN THE TEXT OF THE DIRECTIVE

Could the information integrated in a material support be considered as a component part of that support ? If information as such is not a product, could it however be a component part of a material product (i.e. the support) ? In this case, the product itself would be rendered defective if one of tis component parts (in this case, the information) was defective; and the producer of the product would be liable (on a no-fault basis) due to a defect in one of the component parts (along with the producer of that component part, whoever it may be for the case of information). The interest of such thesis is that one arrives at the same result as by considering information itself as a product.

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[1]On this notion, see Th. BOURGOIGNIE, in Eléments pour une théorie du droit de la consommation, Story Scientia, Droit et Consommation, 1988, pp. 294 et sq.

[2]Article 6.1. : in French, "Quand il n'offre pas la sécurité à laquelle on peut légitimement s'attendre".

[3]Guide to the Consumer Protection Act, 1987, issued by the department of Trade and Industry

[4]Conclusions of the U.K. Department, as given in C. STUURMAN, "Product liability for software in Europe. A discussion of the EC Directive of 25 July 1985" in Advanced Topics of Law and Information Technology, ed. G. VANDENBERGHE, Kluwer, Computer/Law Series, n° 3, p. 133.

Such reasoning, in our opinion, cannot be followed for a simple reason; component parts like the products themselves, have to be tangible; the same reasoning may be held as for the products themselves, and the same questions can be asked[1]; also the directive mentions "the manufacturer" of a component part (article 3) and the fact that the component should "fit" in the product itself[2] (those words indicate that only material components were thought of).

> It has been sustained that the instructions accompanying a product could be considered as a component of it[3]. We do not think that this reasoning can be followed : it is true that the presentation of the product will be taken into account when deciding about its defectiveness (article 6.1.a), and that this presentation includes the instructions for use. But the presentation is not a component part of the product; it is only a circumstance that the judge has to consider, like he also has to take into account a.o. the reasonable use of the product and the time when it was put into circulation (article 6). If that presentation was not appropriate, the product itself will be considered defective (but in principle not the presentation); the judge will consider that the product itself caused the damages (and not that the instructions caused them), and only the producer of the product will be held strictly liable, but not the "producer" of the instruction (whoever that may be)[4]. The discussion may seem rather academic, but we are trying to demonstrate that the directive itself did not establish in any of its provision some kind of strict liability for information.
>
> And even if the opposite had to be admitted it would then only apply to instructions accompanying a product; but that does not yet entail that the directive established a general principle of (strict) liability for "defective information". The information contained in a book or in a database have a different function and a different nature than the instructions for use of a particular product, and have no relation to the support of information itself, whereas instructions for use are totally product-oriented (that has been the reason for the provision of article 6.1.a which obliges the judge to take the presentation of the product into account).
>
> As a **conclusion to this,** we can say that the argument taken from article 6.1.a of the directive is not a sufficient basis to conclude that strict liability for information can from now on be considered as a general rule of law in the EEC countries. Again, sustaining the contrary would amount to interpreting the provisions of the text much too far and to decide about options which should be left to legislators.

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[1]Cfr. supra.

[2]For a similar opinion, see E. EKKER, "Geen risico-aansprakelijkheid voor (informatie) produkten", Computerrecht, 1989/1, p. 30; also, M. SCOTT, "Who is liable for software errors? Proposed new Product Liability law in Australia", The Computer Law and Security Report, May-June 1989, p.28

[3]J. SCHMIDT-SALZER & HALLMANN, "Kommentaar EG Richtlinie Producthaftung", Band I, Heidelberg, 1986, quoted in G. VANDENBERGHE, op.cit., p. 6.

[4]Prof. VANDENBERGHE says that the printer will normally not be held liable "because the producer of a spare part is not liable if he faithfully realized the spare part according to the instructions of the producer" (article 7 f) in G. VANDENBERGHE, op.cit., p. 9. What would happen if he did not follow the instructions of the producer ? If he was the producer of a component part (i.e. of the instructions accompanying the product), he could be held strictly liable for damages caused by the product itself. If information is not a component part (as we think), the printer would only be held liable towards consumers on a negligence scheme (but he would also be liable on contractual terms towards the producer).

E. CONSEQUENCES OF THE INAPPLICABILITY OF THE DIRECTIVE

First, a practical consequence of the inapplicability of the directive is that **disclaimers of liability** remain valid[1].

However, the validity of such exemption clauses is not unlimited in the Member States : the legislators and the courts have established certain rules which set some barriers to their use. So the fact that the directive does not apply to the providing of information does not entail that all liability can be waived[2].

Secondly, and more basically, it entails that **the principle of a no-fault liability does not apply to providers of information.** The national law of each Member State will still determine in the future who is liable, on which grounds, towards whom and for which damages.

However, this statement holds more truth in theory than it does it practice, for two reasons :

First, because if one comes to the conclusion that the traditional negligence scheme should be used, we have seen that the case law based on negligence has evolved in some Member States and has come quite close to solutions which in practice amount to applying a no-fault rule. A negligence criterion, because it has the advantage of being very flexible, can be an efficient remedy in the hands of the victim, if the judge decides to apply the rule in the favour of the victim.

Secondly, as we said earlier, another criterion might be available : the criterion of the legitimate expectations of the public. This can lead to solutions and court decisions being very close to the solutions derived from the provisions of the directive (without amounting to a full application of it : exemption clauses would remain valid in principle).

F. CONCLUSION

To conclude this research, one can say that the importance of the inapplicability of a no-fault principle to providers of information should not be overestimated. The situation will largely depend upon the way in which the judges in the Member States will interpret the notions of negligence and of legitimate expectations when applied to services in general.

Finally, we would like to precise the scope of our conclusion in the following manner : we tried to demonstrate that the EEC directive on product liability was not applicable to information. We do not pretend that a strict liability rule would *per se* be inapplicable to or undesirable for the field of information (even if we think that it would create difficulties). We only say that if such result is to be achieved, it could only be done by legislators (be they national legislators or EEC authorities); it would first have to be largely discussed by all actors involved, and it should not be introduced "through the back door", by using a directive which was never meant to apply to services as such.

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[1] See in favour of this solution, A. BERTRAND, "L'intelligence artificielle, la robotique, les systèmes-experts et le droit (droit français et américain)", Expertises, 1987, p.231

[2] For an overview on E.E.C. countries, see the extensive repport "Le contrôle des clauses abusives dans l'intérêt des consommateurs dans les pays de la C.E.E.", Revue Internationale de Droit Comparé, 1982, pp. 508 to 1113.