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August 26, 2014

Chief Justice Tani Gorre Cantil-Sakauye
The Supreme Court of California
350 McAllister St.
San Francisco, CA 94102-4797

Re: Support for Petition for Review, *PDX, Inc. v. Hardin*, 1st Civ. No. A137035

Dear Chief Justice Cantil-Sakauye:

I am writing pursuant to Rule 28(g) to urge you to accept the Petition for Review filed in this case. I have studied First Amendment law and cyberspace law for 20 years as a law professor here at UCLA, and I have taught and written about tort law as well. I have no financial interest in this dispute or the litigants, and I speak only for myself.

* * *

This case raises an important issue that merits the Court's attention: When may information providers be liable for disseminating *accurate* information that third parties use in misleading ways? Precedent, especially *Winter v. G.P. Putnam's Sons*, 938 F.2d 1033 (9th Cir. 1991) (applying the Ninth Circuit's understanding of California law), and *Rivera v. First DataBank, Inc.*, 187 Cal. App. 4th 709 (2010), suggests that such liability is generally unavailable. The Court of Appeal's decision in this case, though, opens the door for a broad range of such liability. It would be helpful to the public, to distributors, to the bench, and to the bar for the Court to step in to resolve this issue.

PDX is a distributor of factual information. As the court below noted, the relevant "component of its business involves disseminating patient drug education monographs authored by third parties," 227 Cal. App. 4th at 162-63, and in the process editing out certain sections, *id.* at 163. Disseminating and editing monographs is the business of a book and monograph distributor and publisher. (Note that, a speaker may be a publisher for First Amendment purposes but may nonetheless be immune from liability as a publisher under 47 U.S.C. § 230. *See, e.g.*,

Zhang v. Baidu.com Inc., 2014 WL 1282730, *6 (S.D.N.Y. 2014) (search engine editorial decisions are protected by First Amendment); *Jurin v. Google Inc.*, 695 F. Supp. 2d 1117, 1122-23 (E.D. Cal. 2010) (search engines are immune under 47 U.S.C. § 230.)

To be sure, PDX is not a distributor of controversial political opinion. And, in keeping with the times, it distributes its publications electronically, leaving it to others to print them. But in both of these respects, PDX is very similar to many modern information distributors, which are protected by the First Amendment.

Generally speaking, distributors and publishers are not liable under products liability law or negligence law, even when they distribute *false* information, including false information that can kill. That was the holding in *Winter*, where G.P. Putnam's Sons disseminated *The Encyclopedia of Mushrooms*. The book allegedly “contained erroneous and misleading information concerning the identification of the most deadly species of mushrooms,” which led the plaintiff readers of the book to become “critically ill.” (Fortunately, liver transplants saved the readers' lives.) 938 F.2d at 1034.

There are, it is said, old mushroom hunters and bold mushroom hunters, but no old, bold mushroom hunters. Careful mushroom hunters necessarily rely on books such as the *Encyclopedia* to protect their lives.

Yet despite that, the Ninth Circuit concluded that, partly because of the First Amendment and partly because of California tort law, a distributor or publisher could not be held liable in products liability law or negligence even for allegedly false and dangerous statements contained in its book. “[T]he defendant[has] no duty to investigate the accuracy of the contents of the books it publishes.” *Id.* at 1037. “Were we tempted to create this duty, the gentle tug of the First Amendment and the values embodied therein would remind us of the social costs.” *Id.*

Likewise, *Rivera* concluded that an “independent publisher of ‘medication databases’” of medication monographs, much like those involved in this case, was engaged in constitutionally protected speech. 187 Cal. App. 4th at 709, 715-17. And the Court of Appeal held that a claim that the databases were negligently “buried . . . in the fine print,” could not be sustained, partly because “Plaintiffs failed to demonstrate defendant owed them any duty.” *Id.* at 718-19.

The Court of Appeal in this case tried to distinguish the precedents on three main grounds:

1. The court concluded that, “[u]nlike [in] *Rivera*, here there was evidence that the black-box warning had been deleted from the monograph Hardin received with her prescription.” 227 Cal. App. 4th at 167. But distributors and publishers often choose whether to abridge an existing work and, if so, how to abridge it. Indeed, that is one valuable service that such speakers often provide, and it has long been

seen as a constitutionally protected service. *See Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (holding that “[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper” are constitutionally protected); *Pacific Gas & Elec. Co. v. Pub. Util. Comm’n of Cal.*, 475 U.S. 1, 9-18 (1986) (plurality op.) (applying *Tornillo* to non-newspaper businesses).

And here the removal of the warning did not make the disseminated monograph inaccurate. At most, the editing decision made the monograph incomplete—but all works are incomplete in certain respects, and allowing liability for such incompleteness would gravely burden those who edit, publish, and distribute information. Moreover, this is especially so when the distributor reasonably expects that the information that it distributes will *not* be the only source of information that the user consults. As PDX’s Petition for Review notes, PDX undertook to provide a “monograph to *supplement* the pharmacist’s advice and the Medication Guide.” Petn. for Rev. 35. The monograph distributed by PDX expressly stated that it was “[i]mportant to read the Medication Guide before use,” C.T. 131, 147. And PDX knew that the entity that printed the material for readers (Safeway) was legally obligated to provide further warnings. Petn. for Rev. at 38-41.

Exposing a distributor to liability for disseminating material that, in a jury’s view, might be incomplete standing on its own would create a broad new form of liability for distributors and publishers. This is especially so in a situation where the material is accurate, and an intermediate distributor reasonably expects it to be made complete by further information that the ultimate distributor would provide. It would be helpful for this Court to be the one deciding whether such liability ought to be allowed.

2. The court below concluded that *Rivera* did not apply because “it does not address Hardin’s theory that, in undertaking to provide patient drug monographs, PDX assumed a duty of care under the negligent undertaking doctrine.” 227 Cal. App. 4th at 168. “This record sufficiently makes out a claim that PDX assumed a duty of care by undertaking to render services to Safeway ‘of a kind [it] should have recognized as necessary for the protection of third persons....’” *Id.* at 169.

But in this respect, PDX is likewise like many distributors, including the defendant in *Winter*. Book distributors know that readers may rely on their books; certainly the distributor in *Winter* must have realized this.

Yet this alone does not generally suffice to make distributors and publishers liable, even when the distributed material allegedly contains affirmative misstatements on which readers do rely. This result is even more clearly correct when the allegation is simply that the material was incomplete, especially in a situation where the distributor reasonably expected some other entity (here, Safeway) to provide more complete information.

3. The court below took the view that plaintiffs were not really trying to hold PDX liable for distributing *information*; rather, the court relied on the view that plaintiffs were arguing “that *PDX’s software program*, not the information it produces, is the defective product.” 227 Cal. App. 4th at 169 (emphasis in original). But the allegedly defective feature of the software program—that it deleted three sections of the eight-section monograph, *id.*—was simply the way that PDX implemented its editorial decision to abridge the monographs in a particular way. Even if such an editorial decision should sometimes lead to liability, that liability would necessarily be premised on the supposedly “defective” “information” that the distributor or publisher “produces.”

Two sorts of examples help illustrate this, and help show how important such questions are now becoming:

A. News stories on particular topics are increasingly being written by computer algorithms. For instance, two months ago “[t]he Associated Press announced . . . that the majority of U.S. corporate earnings stories for [its] business news report will eventually be produced using automation technology.”¹ Likewise, a March 2014 *Los Angeles Times* article about an earthquake aftershock notes that “this post was created by an algorithm written by the author.”² The algorithm, Quakebot, takes details reported by the U.S. Geological Survey and formats them into English prose.³ Such algorithms naturally select what and how to report it—for instance, to determine which “seismic events [have] a ‘newsworthy magnitude,’”⁴ and often to determine which raw data to include and which to omit.

Say that a similar report at one point causes injury through its alleged incompleteness. This might happen, for instance, if seismology becomes able to predict the likelihood of aftershocks, but a future version of the article-writing software chooses not to include this information in the report; or if reports about

¹ Associated Press, *A Leap Forward in Quarterly Earnings Stories*, June 30, 2014, <http://blog.ap.org/2014/06/30/a-leap-forward-in-quarterly-earnings-stories/> (“The Associated Press announced in an advisory to customers today that the majority of U.S. corporate earnings stories for our business news report will eventually be produced using automation technology.”).

² Ken Schwencke, *Earthquake Aftershock: 2.7 Quake Strikes near Westwood*, L.A. Times, Mar. 17, 2014, <http://articles.latimes.com/2014/mar/17/news/earthquake-27-quake-strikes-near-westwood-california-rdivor>.

³ Andrew Beaujon, *L.A. Times Reporter Talks About His Story-Writing ‘Quakebot’*, Poynter, Mar. 17, 2014, <http://www.poynter.org/latest-news/mediawire/243744/l-a-times-reporter-talks-about-his-story-writing-quakebot/>.

⁴ *Id.*

coming hurricanes or tornadoes are created using similar software; or perhaps if financial reports exclude certain information, and the exclusion leads people to make bad investments.

Whatever one may say about liability for such allegedly incomplete reports, it cannot be enough to say that “[the plaintiff’s] theory is that [the newspaper’s or wire service’s] *software program*, not the information it produces, is the defective product.” After all, the software program would simply embody the newspaper’s or wire service’s editorial choices about what information ought to be included in the article. The same is true for PDX’s software.

B. Google and similar search engines likewise have computerized algorithms that choose what material to include where in the search results—and what to omit—as well as what snippets of that material to display. Say someone searches for drug information, or for mushroom information, gets results that a jury may see as dangerously incomplete (because important pages or excerpts were not included), and acts on those results in a way that causes harm.

Again, whatever one may say about liability for dissemination of such allegedly incomplete information, it cannot be enough to say that “[the plaintiff’s] theory is that [the search engine’s] *software program*, not the information it produces, is the defective product.” The software program embodies the search engine company’s editorial judgment about what information is to be included in the output. Liability based on that output would be liability based on supposedly defective information. *See Zhang*, 2014 WL 1282730, at *6 (holding that a search engine company’s “design[ing] its search-engine algorithms” in a way that excludes certain information is the exercise of First Amendment rights).

* * *

The decision below is therefore mistaken in its treatment of prior precedent and is likely mistaken on the bottom line as well. Moreover, it potentially affects many prospective defendants beyond just PDX and other distributors of pharmaceutical information. The case therefore merits this Court’s more careful review.

Sincerely,

A handwritten signature in cursive script that reads "Eugene Volokh". The signature is written in black ink and is positioned to the right of the typed name below.

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