airspace and is shot down. In either case, the system failure may be attributed to a badly designed Alpha operator amplifier. John’s heirs point out that it’s not his fault that Alpha made bad op amps, adding that John had received no notice from Alpha that its defective products could risk his life. Between totally innocent John and unknowing Alpha (who does not specifically foresee the exact harm to John when an imperfect op amp fails), who should bear the cost of the loss? Especially when Alpha has the deeper pockets? In fact, John’s heirs might argue that the “life support” notice is evidence that Alpha knew its product might kill John; yet, Alpha went ahead and sold the product anyway. Readers will figure out for themselves how courts and juries are likely to work that one out.

Perhaps the systems house, Beta Corp., is in a different position. It was actually warned, if it ever saw the application note.1 Because Alpha gave notice to Beta that it specifically disclaims liability for life support systems, a court would probably say that Alpha is not liable for consequential damages resulting from chip malfunction.2 In contracts between businessmen—rather than between a businessman and a consumer—courts usually let the parties allocate the economic risks of a sale by bargaining, at least in the absence of some type of oppression. Moreover, in the sale of goods between businessmen, the assumption is that the seller will not be liable for consequential damages resulting from risks of a type or magnitude that the seller cannot foresee. By using the disclaimer, Alpha is trying to avoid a factual controversy with Beta over what Alpha should have foreseen.

What about the provision that customers like Beta “agree to fully indemnify Alpha for any damages” from sale or use? In theory, this means that Beta agrees to reimburse Alpha for any damages that John Q. Public or his heirs collect from Alpha for pacemaker failure. Probably, such a disclaimer is no more than a lawyer’s theory, or whistling in the dark. A notice on an application note is not a contract, even if Beta admits to reading it. In some states, a manufacturer might be able to get away with such a disclaimer by putting it on the back of the invoice for the chips, but a disclaimer on an application note is probably ineffective in any state.


default

In contracts between businessmen, the parties usually allocate the economic risks of a sale by bargaining. The seller is not considered liable for unforeseeable damages.

All of the foregoing discussion has been directed to a chip manufacturer’s notice. Readers no doubt have seen similar notices, and more sweeping ones, on documentation accompanying software.3 Subject to limited qualification, the same principles apply to software and hardware alike. Software marketers may argue that principles like implied warranties of fitness that apply to goods do not apply to software, which is a “service” or an “intangible,” but courts do not put too much stock in that argument anymore. Whether the software or the chip sends the pacemaker haywire or dispatches the airplane to Siberia, the legal problem will probably be the same.

References

1. Beta’s personnel will probably deny seeing the notice. It might have been a better idea to put the notice on all of Alpha’s invoices, which Beta would find harder to deny having seen (unless Beta buys indirectly from a distributor or a jobber). Certainly, Alpha cannot fit either of those notices on the chip itself.

2. A more general disclaimer might be ineffective in some states, where courts would take the position that the chip should possess good merchantable quality and be reasonably fit for its intended purpose (whatever that is). Other states might even allow a general disclaimer of any responsibility for bad chips beyond replacement cost of the chips, but again perhaps only between businessmen.

3. Provisions of this kind are typical in “shrink-wrap licenses,” which are printed provisions accompanying disks, wrapped inside shrink-wrap plastic. Typically, they state that tearing open the plastic to get at the disk constitutes user “agreement” to the terms of the license. A recent decision in Louisiana held a shrink-wrap licensing clause unenforceable. The State of Louisiana passed a law making shrink-wrap licenses enforceable. Vault (the proprietor of the Prolok copy-protection system) sued Quaid (the proprietor of the CopyWrite program) for defeating copy protection. Quaid allegedly aided consumers to unprotect third parties’ programs protected with Prolok, in violation of the third parties’ shrink-wrap licenses forbidding consumers to copy the programs. Quaid also disassembled Vault’s Prolok to analyze it and by reverse engineering developed a part of CopyWrite to overcome Prolok. In so doing, Quaid allegedly violated a provision in Vault’s Prolok shrink-wrap license that forbade disassembly. The Louisiana shrink-wrap licensing law expressly authorized shrink-wrap licensing that prohibited “translating, reverse engineering, decompiling, [and] disassembling” computer programs.

The court held that the allegedly illegal copies of third-party software were none of Vault’s business: Any complaints about violation of rights in such programs should be asserted by the proprietors of the programs, not Vault. The court then turned to the Prolok shrink-wrap license. First, the contract would be unenforceable as a “contract of adhesion” (overbearing contract), were it not for the Louisiana law favoring it. It was therefore necessary to decide whether the Louisiana law was valid. The court then held that the Louisiana law was not valid because it interfered with the operation of the federal copyright law. Accordingly, Vault was free to disassemble Prolok without liability despite the prohibitions in the shrink-wrap license.

Reader Interest Survey

Indicate your interest in this department by circling the appropriate number on the Reader Interest Card.

Low 171 Medium 172 High 173