Magazine Publishers of America

September 11, 2000

Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

Re: P994413—Public Forum on Warranty Protection for High Tech Products and Services

The Magazine Publishers of America (MPA) appreciates the opportunity to comment on the Commission's High-Tech Warranty Project.[1] MPA is the trade association for consumer magazines. Established in 1919, the MPA represents more than 200 US-based publishing companies with more then 1,200 titles; more than 75 international companies; and more than 90 associate members providing services to the industry. MPA writes to voice its concern about the possibility that the warranty concepts embodied in the Magnuson-Moss Act ("the Act") become inadvertently extended to expression protected by the First Amendment.

MPA's members were among the first to recognize the potential of the Internet as "a vast platform from which to address and hear from a world wide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can "publish" information." *American Civil Liberties Union v. Reno*, 521 U.S. 853, 886 (1997). The overwhelming majority of MPA's membership offers online versions of their printed magazine, and the growth of digital networks has enabled MPA's members to get more news and information to a wider audience than ever thought possible just a few years ago.

The exchange of computer information enabled by the Internet has made the First Amendment's goal of a true "marketplace of ideas" an everyday reality. Digital networks give the individual pamphleteer an immediate global audience, enabling her to compete with even the most established media outlets. Comparative shopping and consumer web sites have resulted in more sophisticated buyers, making the marketplace for a whole host of goods and services more competitive.[2] Even the casual Internet user cannot fail to come across scores of web sites dedicated to almost any political or commercial topic imaginable. Though currently healthy, the vociferous, wide open and robust exchange of information that occurs via chat rooms, Usenet groups, bulletin boards, web sites, and email distribution lists is a delicate creature. "When dealing with values as fragile and precious as those contained in the First Amendment, special care is required." *FEC v. Hall-Tyner Election Campaign Commission*, 678 F.2d 416, 424 (2d Cir. 1989).

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1 *See* 65 Fed. Reg. 30411 (2000).

2 Of course, it is beyond cavil that the First Amendment's protections extend to commercial speech. *See, e.g., Central Hudson Gas and Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 570 (1974).

MPA therefore urges the Commission to keep First Amendment concerns well in mind when examining "warranty protection for software and *other computer information products and services*."[3] First Amendment concerns have not thus far arisen under the Magnuson-Moss Act because it only governs the application of warranties to "consumer products," defined as "*tangible personal property* which is distributed in commerce and which is normally used for personal, family or household uses." 15 U.S.C. § 2301(1) (emphasis added).[4] The plain language of the Act makes clear that it simply does not apply to the intangible ideas or expression housed within tangible personal property such as books, magazines, newspapers, motion pictures, or other published works.

The continued health of the online marketplace for information depends on the maintenance of the distinction between protected expression and the media or form in which it is distributed. Irrespective of whether the Magnuson-Moss Act does or should apply to the purely functional aspects of computer software[5] —an issue on which MPA has no opinion—it is vital that the law continue to distinguish between the technology enabling the perception of protected speech and the protected speech itself. For example, in the world of paper and ink, the courts have historically declined invitations to expand the definition of "product" or "good" to the information or ideas contained in books, magazine articles, and the like, or to extend any implied duty or warranty to a publisher of information. *See, e.g., Way v. Boy Scouts of America*, 856 S.W. 2d 230, 238 (Tex. 1993) (rejecting plaintiff's argument that magazine article was a "product" for purposes of product liability law); *Winter v. GP Putnam's Sons*, 938 F.2d 1033, 1035 (9th Cir. 1991) (declining to find the information in a cookbook a "product" for purposes of product liability law).[6] "The common theme running through these decisions is that ideas hold a

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[3] 65 Fed. Reg. at 30411 (emphasis added).

[4] The Act does not mandate that the producer of a computer product issue a warranty, but to ensure that when issuing a warranty, that warranty meets certain minimum standards. *See* H.R. Rep. No. 93-1107, *reprinted in* 1974 U.S.C.A.A.N. 7702, 7703.

[5] MPA could find no case applying Magnuson-Moss to computer programs.

[6] *See also Cardozo v. True*, 342 So. 2d 1053, 1056-57 (Fla. App. 1977) (refusing to apply the UCC's implied warranty of merchantability or fitness for a particular purpose to a cookbook); *Jones v. JB Lippencott Co.*, 694 F. Supp. 1216, 1217-18 (D. Md. 1988) (refusing to treat a nursing textbook as a product); *Herceg v. Hustler Magazine*, 565 F. Supp. 802, 804 (S.D. Texas 1983) (publisher not liable for damage allegedly caused by article on autoerotic asphyxiation); *Smith v. Linn*, 563 A.2d 123, 126 (Pa. 1989) (rejecting publisher liability arising out of diet book on theory of negligent misrepresentation); *Birmingham v. Fodor's Travel Pubs., Inc.*, 833 P.2d 70, 74 (Haw. 1992); *MacKown v. Ill. Pub. and Printing Co.*, 6 N.E. 2d 526, 528 (1937) (refusing to extend liability to a newspaper for harm allegedly arising out of the use of a dandruff cure recommended in an article).

The sole category of published material that courts have held to be a "product" involves navigational charts on which pilots must place complete reliance to steer their planes or their ships. *E.g., Brockelsby v. United States*, 767 F.2d 1288, 1294-95 (9th Cir. 1999); *Flour Corp. v. Jeppenson & Co.*, 170 Cal. App. 3d 468, 476-77 (1985); *Saloomey v. Jeppensen & Co.*, 707 F.2d 671, 676 (9th Cir. 1982); *DeBardelben Marine Corp. v. United States*, 451 F.2d 140, 149 (5th Cir. 1971). These cases differ from ordinary, mass-market publications in that "extremely technical and detailed materials were involved, upon which a limited class of persons imposed absolute trust having reason to believe in their unqualified reliability." *Smith*, 563 A.2d at 127. Even the cases that have found liability for published information recognize that "[i]f a newspaper prints incorrect information, if a scientist publishes careless statements in a treatise, or if an oil company prints an inaccurate road map, they cannot be [**25] "liable" to those of the

privileged position in our society. They are not equivalent to commercial products." *Cardozo v. True*, 342 So. 2d 1053, 1057 (Fla. App. 1977). A CD-ROM version of a magazine receives no less First Amendment protection by virtue of the fact that it consists of "computer information."

The potential chilling effect wrought by the improper extension of implied warranties to "computer information" significantly motivated MPA's involvement in the development of the Uniform Computer Information Transactions Act (UCITA). Although MPA neither supports nor opposes UCITA's adoption, we do believe that it attempts to respect First Amendment principles by not extending implied warranties of merchantability or fitness for a particular purpose to "published informational content."[7] MPA asks that the Commission observe this conceptual distinction during the course of its examination and any subsequent events.

In closing, MPA acknowledges that the Request for Comment takes no position on how the Magnuson-Moss Act might be extended to the purely functional aspects of computer programs, much less computer information of any stripe. Nonetheless, because of the critical importance of the First Amendment to its members' activity, MPA sounds this cautionary note early in the study process in the hope that it will guide the Commission's consideration of these issues.

Thank you again for the opportunity to present our views. MPA would be pleased to elaborate on its concerns at the Commission's upcoming public forum.

Respectfully submitted,

Christopher A. Mohr
Meyer & Klipper, PLLC
923 15th Street NW
Washington, D.C. 20005
voice: 202-637-0850
fax: 202-637-0851
email: meyerklipper@mindspring.com

on behalf of
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general public who read their works absent some special relationship between writer and reader." *DeBardelben Marine*, 451 F.2d at 146. Thus, if "a pilot had used the [defective landing] procedure as printed in a trade journal, the journal would be immune." *Brockelsby*, 767 F.2d at 1288.

[7] *See, e.g.*, UCITA. §§ 404, 405 (refusing to extend warranties to published informational content, and a cause of action based on aesthetics, appeal, suitability to taste, or subjective quality).