

# Use of disclaimers

Warren Singer explores the issues that surround disclaimers, exclusion clauses and warning notices in technical documents

## What is a disclaimer?

Disclaimers, limitation clauses, indemnity clauses, caveats and waivers are an attempt by manufacturers of products to exclude limit liability for financial loss, damage or injury that may occur as a result of the use of their product or errors in the product documentation. A disclaimer attempts to specify or delimit the scope of rights and obligations that may be exercised and enforced by parties in a contractual relationship.

In an ideal world, if the documentation has been correctly prepared and a user follows the instructions provided, it should be almost impossible for the product to cause harm. For example, if you bought a lawnmower and followed the instructions, you would expect the product to be safe to use. However, if you failed to read the documentation or ignored the instructions for safe usage, this could result in damage or personal injury.

One of the premises behind the use of disclaimers is that if users have been warned about omissions or limitations in the documentation, they should be able to take steps to mitigate or prevent loss or damage. By proceeding to use the product described in the document, they have accepted the restrictions outlined in the disclaimer clauses.

Since the possible legal implications of any disclaimer are complex, it is advisable to leave their drafting to professionals with the relevant legal skills.

## Where should disclaimers be included?

Disclaimers should be prominent and visible, so that users are aware of them, before using the product.

Disclaimers for user guides are often included on the back of the first page of a document, along with any copyright and patent information. Sometimes disclaimers may be included on the front page, or any place where they will be

prominent.

In online documentation, disclaimers may be included in a legal or terms and conditions section. In other cases it might be appropriate to include a disclaimer in a specific section or page.

## What should they say?

Disclaimers must be suitable for the document in which they are to be used. They should be relevant to the user.

Clauses in disclaimers should be clear in meaning and unambiguous – unclear wording could lead to problems in enforcement. Consider carefully how the disclaimer can be applied and whether the wording could be misunderstood or interpreted to imply something else.

Disclaimers should be factual and reflect legitimate business circumstances. Disclaimers in standard form contracts intended for non-business users (consumers) must be written using plain and easily understandable language (see reg. 7(1) in the **Unfair Terms in Consumer Contracts Regulations 1999**).

## Disclaimer examples

Consider the following examples.

### Disclaimer for a prototype

The following disclaimer comes from a guide for a prototype product that is still under development: *The content of this document is furnished for informational use only, is subject to change without notice, and should not be construed as a commitment by [Company]. [Company] assumes no responsibility or liability for any errors or inaccuracies that may appear in the content of this guide.*

This disclaimer would not be appropriate for a document that users will need to rely on for more than informational use. Think of the example of the lawnmower user guide: how much confidence would you have in the manual (and product) if you read the above disclaimer?



*A disclaimer is an attempt to exclude limit liability for financial loss, damage or injury*

*Disclaimers should be prominent and visible*

## Website disclaimer

The following disclaimer comes from a company website:

*The material and information contained on this website are for general information purposes only. You should not rely upon the material or information on the website as a basis for making any business, legal or any other decisions. Whilst we endeavour to keep the information up to date and correct, [Company] makes no representations or warranties of any kind, express or implied about the completeness, accuracy, reliability, suitability or availability with respect to the website or the information, products, services or related graphics contained on the website for any purpose. Any reliance you place on such material is therefore strictly at your own risk.*

It is typical for websites to include a caveat that usage is at the user's own risk. This sort of disclaimer is often seen on websites where there is no contractual relationship with users. However, for websites that sell products or services directly, a visitor may indeed need to rely on the information to make a decision. In a liability case, this clause might not be enforceable.

## Disclaimer for a support site

Although documentation is often prepared with the best of intentions, information may sometimes be out of date or inaccurate, in which case a disclaimer would be appropriate. See the following example from a support site:

*Whilst [Company] makes every attempt to ensure the accuracy and reliability of the information contained in the documents stored, served and accessed on this site, this information should not be relied upon as a substitute for formal advice from [Company].*

This disclaimer has the unintended implication that users should call technical support to resolve issues, which may not be what the company wants or what users expect. This demonstrates that attention to wording is essential when preparing disclaimers.

## Disclaimer clause about changes

It would be advisable to include a disclaimer in a user guide that information may change without notice, as in most circumstances it would not be practical to advise users each time a change is made. See the following example:  
*[Company] reserves the right to revise this documentation and to make changes in*

*content from time to time without obligation on the part of [Company] to provide notification of such revision or change.*

The next example illustrates that disclaimers can be quite specific and detailed in their wording (which is often required to avoid ambiguity in their interpretation).

*This publication could include technical or other inaccuracies or typographical errors. Changes are periodically added to the information herein; these changes will be incorporated in new editions of the publication. [Company] may make improvements and/or changes in the services or facilities described in this publication at any time.*

## Disclaimer regarding warranty

User guides for products may include disclaimers of warranty, as illustrated in this example.  
*[Company] provides this documentation without warranty, term, or condition of any kind, either implied or expressed, including, but not limited to, the implied warranties, terms or conditions of merchantability, satisfactory quality, and fitness for a particular purpose.*

*[Company], its employees and agents will not be responsible for any loss, however arising, from the use of, or reliance on this information.*

However, consider whether this disclaimer might be overridden by other warranty terms (express or implicit) in the sale of the product.

## Clause indicating legal jurisdiction

The disclaimer section in a contract should contain a clause that indicates the relevant legal jurisdiction that applies (in the case of disputes with customers). For example:

*This disclaimer will be governed by and construed in accordance with English law, and any disputes relating to this disclaimer will be subject to the [non-]exclusive jurisdiction of the courts of England and Wales.*

The 'home' jurisdiction – where the company issuing the disclaimer is situated – is usually (although not always) selected. If no jurisdiction is specified, this could result in conflicting laws from different countries being applied, which could have a significant impact on whether the disclaimer is enforceable.

## Disclaimers to prevent libel

A document that contains examples and names might contain a clause along the following lines: *The example companies, organisations, products, names, e-mail addresses, people, places, and events depicted herein are fictitious. No association with any real company, organization, product, name, email address, person, places, or events is intended or should be inferred.*

Of course, you should be using fictional information in your examples, and not just seek to absolve yourself of responsibility by stating this in the disclaimer.

## Should a business rely on disclaimer clauses?

Not solely. Simply having a disclaimer in a document does not necessarily mean that the courts will enforce it in the event of a dispute. For example, if a customer needs to rely on the information provided by a business, either to make a decision or do something (such as buying, installing, using or configuring a product), a general disclaimer in a document may not be enforceable. This is especially true if it would impose an unreasonable restriction on the user in the circumstances.

## How does the law treat disclaimers?

Firstly, it is important to note that a disclaimer contained in a user document does not necessarily become a contractual term, so it is important that any disclaimers on which you wish to rely are expressly incorporated into the contract or end-user licence agreement.

Secondly, when interpreting disclaimer clauses, the courts will generally apply the *contra proferentem* rule, where clauses are strictly interpreted against the party intending to rely on it if there is any ambiguity in their meaning. Therefore extra care should be taken with the drafting of the wording, to ensure that they are clear.

Finally, it would be that it is unwise to rely on a single all-embracing disclaimer clause, because if it goes too far in one point, it may fail entirely. It is much safer to separate out the elements into sub-clauses, so that failure of one part would not necessarily invalidate the entire clause. Typically, contracts will contain a clause to the effect that the

striking out by the courts of any part (as being unenforceable) does not affect the validity of the remaining parts.

In any dispute between a business and its customer, the contractual relationship between the parties is important. However, even where the parties are not in a contractual relationship, the law of negligence and statutory provisions on product liability may apply.

Whether the contract is between businesses or between a business and a consumer affects the legal outcome if the disclaimer is to be enforced in UK courts. Consumers are afforded greater protection (via the statutory provisions mentioned below) but business-to-business transactions are essentially unregulated and are subject to the general common law of contract.

When a user accepts the terms and conditions of a contract, these are generally binding unless it can be proved that:

- The relationship between the parties was unequal, and
- The conditions are particularly onerous and unfair on one of the parties, or
- There are other express or implied terms that contradict or overrule the disclaimer clauses (some of these terms may be implied by statute, such as the **UK Sale of Goods Act 1979**, the **Supply of Goods and Services Act 1982** and the **Unfair Contract Terms Act 1977**).

In particular, a clause purporting to exclude liability for death or personal injury caused by negligence is rendered void by section 2(1) of the **Unfair Contract Terms Act 1977**.

Consumer contracts in the UK are subject to the **Unfair Terms in Consumer Contracts Regulations 1999**, which are intended to ensure that businesses cannot rely on unfair disclaimers or exclusion clauses to protect themselves from liability to users. A disclaimer could be considered unfair if it attempts to absolve a business of its legal responsibilities towards its customers.

You should consider these points before releasing any documentation to customers. Disclaimers will not protect your business if the documentation that a user needs to rely on is faulty, missing key information or misleading.

One of the best ways to prevent injury to users and protect your business from liability is to ensure that you have the appropriate quality control procedures in place and that the manual is

*Businesses should not rely on solely on disclaimers*

written by someone qualified to write it and reviewed thoroughly for errors by the company prior to release.

As a final line of protection, the business should ensure that appropriate insurance is in place.

### What about the release of a draft version?

Sometimes information that has not been fully reviewed needs to be sent to a customer to meet a product deadline or agreed delivery date. Consider carefully the circumstances in which you are prepared to release draft versions:

- How significant are the updates?
- How confident are you in the information currently supplied?
- Have you conducted a risk assessment of the likely impact of an error in the documentation on the client's business? Figure 1 shows a risk matrix.

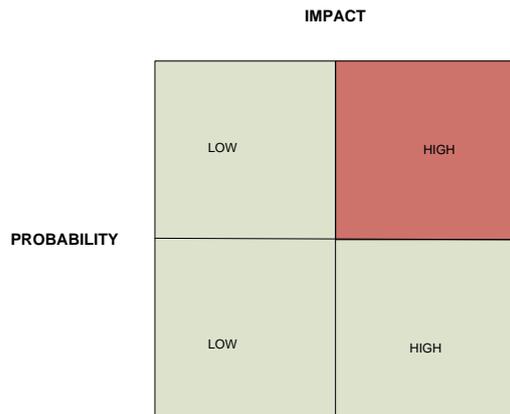


Figure 1. Risk matrix

- **Probability.** How likely are there to be errors in the document?
- **Impact.** What would be the significance of the error on the customer?

If the risk of an error is high and this is likely to have a significant impact on the customer (see red area in Figure 1), the document should not be released.

### If the information in a document is inaccurate and unreliable, should it be released to customers?

When releasing draft documents to customers, you should include disclaimers that:

- Make it clear that this is a draft
- Clarify the circumstances under which the draft

can be relied on and the manner in which it should be used

- Indicate any sections that are inaccurate or that the customer should not rely on.

### What can customers do about faulty documentation?

To understand the impact of disclaimer clauses and their ability to prevent liability for faulty documentation, it helps to understand the legal remedies available to a customer to redress any grievances. These depend on the nature of the grievance and on the relationship between the business and its customer. Here are some examples of what customers might do if the product documentation were faulty:

- Request the return of their money
- Ask for compensation for lost revenue or business
- Where injury or serious damage results from use, sue for negligence.

Consider the following examples:

- **Case 1:** A customer is frustrated by the general poor quality of an installation guide, which doesn't fully explain how to use the product. He contacts the company and requests his money back.
- **Case 2:** The sales documentation on the website promises a number of key product features and, on the basis of this, a client purchases the product and integrates it into other systems. However, some of the key features promised are either unavailable or do not work as advertised. The client complains that they were mis-sold the product and suffered financial loss as a result.
- **Case 3:** A consumer using a heating appliance suffers severe scalding and there is fire damage to a living room. The documentation failed to warn adequately about safe usage of the product.

Would disclaimers and exclusion clauses be effective in these cases? The short answer is probably not.

## What are the implications for suppliers of technical documentation?

A common question asked by technical communication contractors and suppliers is whether they may be held liable for any faults in the technical documentation they supply to clients.

Firstly, it is important to note that the relationship between a technical communicator and a client is a business relationship, not a consumer relationship.

From a legal perspective, their clients' businesses would always be directly answerable to their own customers for any legal actions. It is unlikely that the businesses would seek redress from suppliers of technical documentation unless it can be proved that the suppliers acted in a negligent manner in producing the documentation.

Sole authors often do not have control over the contractual arrangements between themselves and their clients. In most circumstances, the contract is given to them on a take-it-or-leave-it basis. In these circumstances, they should:

- Keep a record of e mail reviews and reviewed copies to ensure that they can demonstrate that they followed due process in drafting and reviewing the documentation
- Request formal sign-offs from authorised business representatives before releasing documentation
- Consider indemnity insurance to protect their businesses.

Remember, contractually, if the relationship between supplier and client is not on an equal footing (for example, the client dictated the contract terms and conditions), the client may not be able to hold the supplier accountable for particularly onerous clauses.

## Use of warning notices

Warning notices and caveats function like disclaimers in some ways. The objective of including them is to mitigate against the risk of damage or harm to users by pointing out:

- Defects or flaws in the product that may cause harm
- Restrictions or limitations on the use of a product
- Important notifications for safe usage of the

product

- Types of use for which the manufacturer accepts no liability.

Warning notices are the result of due process in testing and quality control of the product before it is released to the customer. Testing should cover all likely scenarios in which the product will be used.

In order for warnings to be effective, they must be prominent and visible, and used only to warn. Notes and tips should use a different style.

Conclusion

Disclaimers and similar devices are useful features in documents for limiting the risk of liability.

However, their usage should comply with some basic principles. They must be:

- Prominent and visible
- Drawn to the customer's attention before use of the product (or risk not being effective in law)
- Appropriate for the document and relevant to the user
- Factual and descriptive
- Clear and easy to understand
- Free of onerous or unreasonable conditions on users
- State the legal jurisdiction that applies to their interpretation

The inclusion of a disclaimer may not necessarily protect your business from liability. It is best to ensure that the product and documentation have gone through rigorous quality control, that instructions are provided to ensure safe assembly and usage of the product and that adequate insurance is in place.

## Discussion and conclusions

I hope that this article has shed some light on the use of disclaimers and warning notices.

While their use in technical documentation is essential, businesses should not rely on them to protect or exclude their business from potential liability. The best approach is to combine their use with rigorous product testing, to ensure that the product or service is safe to use and of a suitable quality.

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