
TABLE OF CONTENTS

Foreword	V
Abbreviations	XV
One Introduction	1
1. Background	1
2. Research questions	6
3. Methodology	8
3.1 Comparative legal analysis	9
3.1.1 Choice of the legal systems to compare	9
3.1.2 Choice of TMO offline equivalents	10
3.1.3 Possible application by analogy of Certification Service Providers liability rules to TMOs	12
3.2 Model of adequate third-party liability for TMOs	13
Two Trust and Trustmarks	17
1. Lack of e-consumer trust in e-commerce	17
2. Top five psychological barriers for e-consumers	18
3. Factors enhancing e-consumer concern	20
4. Information asymmetry as the key issue	23
5. Good news: Trustmarks	26
5.1 Trustmark benefits	28
5.2 Reputation: TMO success key	29
6. Bad news: TMO practice has already been proven to be untrustworthy	30
6.1 A case study	30
6.2 Marketing-based trust	33
7. European TMOs' business model	35
8. A lose-lose situation	37
Three TMO Practice	39
1. A definition of certification	39
2. The certification process	40

2.1	Setting the standards	41
2.1.1	The role of standards	41
2.1.2	Official and de facto standards	41
2.1.3	Pros and cons of official and de facto standards	42
2.1.4	Firms, governments, and users all benefit from standardisation	42
2.2	Evaluation	43
2.2.1	Internal audit based on internal standards	43
2.2.2	Internal audit based on third-party standards	44
2.2.3	External audit	44
2.3	Issuance or denial of the certificate	44
2.4	Monitoring	45
2.5	Confirmation, suspension, or revocation	45
3.	The key elements of a trustworthy certification practice	45
3.1	Certifier independency	46
3.2	Impartiality in the auditing procedure	47
3.3	Active monitoring of the certified company	47
3.4	Certifier enforcement power	47
3.5	Certifier accountability	48
4.	Benchmarked TMOs	48
4.1	American TMOs	49
4.2	European TMOs	50
5.	Evaluation of TMO practice	53
5.1	Assessing TMO independency	53
5.2	Assessing TMO impartiality in the e-merchant auditing procedure	55
5.3	Assessing whether TMOs actively monitor e-merchant practice	57
5.4	Assessing TMO enforcement power	58
5.5	Assessing TMO accountability	60
5.5.1	The information provided in the trustmark ‘is not to be relied upon’	60
5.5.2	The information provided in the trustmark is to be used ‘at your own risk’	61
5.5.3	Slight negligence liability is excluded	61
5.5.4	TMO use ‘AS IS’ warranty	61
5.5.5	TMO invoke an indemnity or hold-harmless clause	62
6.	Conclusions	63

Four	United States	65
1.	Introduction	65
2.	Accountants – third parties: A controversial relationship	66
3.	Possible third-party actions against accountants: Negligence or negligent misrepresentation.	67
4.	Legal standards to determine liability to third parties for negligence	69
4.1	Near privity	69
4.2	Foreseeability	71
4.3	Restatement approach	72
5.	Public policy	74
5.1	Contractarian approach	75
5.2	Relational approach	77
6.	Analysis of the case law potentially applicable to TMOs	78
6.1	The Jaillet line of cases	78
6.1.1	<i>Jaillet v. Cashman</i>	79
6.1.2	<i>Daniel v. Dow Jones & Co.</i>	79
6.1.3	<i>First Equity Corp. v. Standard & Poor's Corp.</i>	80
6.1.4	<i>Gutter v. Dow Jones</i>	81
6.1.5	<i>Gale v. Value Line</i>	81
6.2	The Jaillet ‘safe harbour’	82
6.3	Applicability of the Jaillet rule to TMOs	84
6.4	Possible ways to impose negligent liability on TMOs	85
6.4.1	<i>Hanberry v. Hearst Corp.</i>	85
6.4.2	<i>LaSalle National Bank v. Duff & Phelps Credit Rating Co.</i>	86
6.5	Checking the potential applicability of Hanberry and LaSalle to TMOs	86
6.6	Critical remarks on the possible application of the analysed case law to TMOs	87
7.	If the case law does not apply to TMOs	89
7.1	Near privity standard	89
7.2	Reasonable foreseeability	90
7.3	Restatement	90
8.	Conclusions	91
Five	England	95
1.	Introduction	95
2.	Third-party duty of care in professional negligence cases: a disputed matter	96

3.	Preliminary consideration on TMO third-party liability and focus on the key question	99
4.	Duty of care	102
4.1	Foreseeability of persons	103
4.2	Proximity	104
4.3	Policy	107
5.	Analysis of the case law potentially applicable to TMOs	108
5.1	‘Extended Hedley Byrne liability’ line of cases	109
5.2	Duty’s factors under the ‘extended Hedley Byrne liability’ test	112
5.2.1	Proximity	112
5.2.2	Exclusion and limitation of liability clauses	112
5.2.3	Policy arguments	114
6.	Applicability of the ‘extended Hadley Byrne’ liability rules to TMOs	115
6.1	Proximity	116
6.2	Validity of TMOs’ third-party liability disclaimers	118
6.3	Policy arguments	122
6.3.1	Do TMOs discharge a socially important function?	122
6.3.2	Is it reasonable to require that e-consumers obtain an independent evaluation?	123
6.3.3	Floodgates arguments	123
7.	Parallel TMOs-CSPs: Applicability by analogy of CSPs’ third-party liability rules to TMOs	125
8.	Conclusions	127
Six	Germany	129
1.	Introduction	129
2.	Third-party professional liability for negligent misstatement: The thin line between tort and contract law	129
2.1	Analysis of the relevant tort provisions	132
2.2	Analysis of the relevant contractual or quasi-contractual provisions	135
2.2.1	Contract with protective effects towards third parties (Vertrag mit Schutzwirkung zugunsten Dritter – VmSzD)	136
2.2.2	Implied contract on the provision of correct information (Stillschweigend geschlossener Auskunftsvertrag – sgA)	137

2.2.3	Culpa in contrahendo	138
3.	Impact of tort and contract provisions on third-party TMO liability	139
4.	Case law potentially applicable to TMOs	141
4.1	Case 1: Federal Supreme Court (sixth civil senate) 12 February 1979	142
4.2	Case 2: Federal Supreme Court (fourth civil senate) 2 November 1983	143
4.3	Case 3: Federal Supreme Court (third civil senate) 10 November 1994	145
4.4	Case 4: Federal Supreme Court (third civil senate) 2 April 1998	148
4.5	Some remarks on the cases	149
4.5.1	The contract with protective effect towards third persons – VmSzD – as the residual means to establish third-party cause of action	149
4.5.2	The indeterminate liability issue	150
4.5.3	Third-party contributory negligence	151
4.5.4	Third-party liability also in case of false information received by the professional	151
4.5.5	The relevance of professional – third-party trust relationship	152
5.	Possible influence of the decisions on TMO third-party liability	153
6.	Parallel TMOs-CSPs: Applicability by analogy of CSPs' third-party liability rules to TMOs	155
7.	Conclusions	157
Seven	France	161
1.	Introduction	161
2.	On third-party liability for the provision of information	161
2.1	Obligation of means or obligation of result?	163
2.2	'Reliance' may function as the tongue of the scale between obligation of means and obligation of result	165
2.3	Seemingly no worries for indeterminate liability for negligent misstatements	166
3.	Brief analysis of the relevant rules: Articles 1382 and 1383 Code civil	167

3.1	Damage	168
3.2	Fault	169
3.3	Causal link between fault and damage	170
3.4	Burden of proof	170
4.	Focus on ‘causation’: the major obstacle to claims in tort	171
4.1	Looking for a causation test	172
4.2	Limiting professional liability through causation	172
4.3	Presumption of causation	174
5.	Additional case law potentially applicable to TMOs	175
5.1	Duty to exercise reasonable care in the collection, processing, and provision of information	176
5.2	Client competence may influence the content of the information provider obligation; the nature of the information may not	177
5.3	Occasional qualification of information provider obligation as one of result	179
5.4	Some remarks on the analysed cases	180
6.	Parallel TMOs-CSPs: applicability by analogy of CSPs’ third-party liability rules to TMOs	180
7.	Possible third-party liability for TMOs	182
7.1	Nature and object of TMO obligations	183
7.2	Causation’s issues in TMO liability	185
8.	Conclusions	188
Eight	Comparative Conclusions	191
1.	Introduction	191
2.	De facto absence of third-party liability for TMOs	191
2.1	United States	192
2.2	Europe	194
2.2.1	England	194
2.2.2	Germany	198
2.2.3	France	199
2.2.4	Conclusions	200
3.	Challenging the adequacy of the present TMO third-party liability system	202
4.	Conclusions	204

Nine	Recommendations Towards an Adequate TMO Third-Party Liability System	207
1.	Introduction	207
2.	Law and ethics: two complementary normative sciences	207
3.	Building blocks for a model of adequate third-party liability for TMOs: ‘going from trust to warranted trust’	209
3.1	Basis of liability	210
3.2	The theory of Warranted Trust applied to define the concept of ‘adequacy’	211
3.2.1	Baier’s trust stage	213
3.2.2	Noteboom’s trust stage	214
3.2.3	Bai-boom trust stage	215
3.3	Social, economic, and political value of trustmarks	217
3.4	A model for an adequate TMO liability system	219
4.	Compiling the model: A concrete proposal for an adequate TMO third-party liability system	219
4.1	Step 1: What e-consumers value	221
4.2	Step 2: TMO context of action	222
4.3	Step 3: Social, economic, and political value of trustmarks	224
5.	A possible TMO third-party liability provision	226
6.	Possible impacts of the proposed TMO liability provision	226
7.	Conclusive remarks and recommendations	229
	Literature	233