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Legally Speaking: Legal Implications of Reference Books for Publishers and Consumers

Bryan M. Carson

Western Kentucky University Libraries, bryan.carson@wku.edu

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Every year large numbers of reference books are published. It is inevitable that some of these books will contain factual or other types of errors. The existence of errors brings up a number of legal issues, both for publishers and for customers. This article will attempt to answer some of the questions related to erroneous reference books, including:

- Are books considered “goods” under the Uniform Commercial Code?
- do publishers owe any legal duties to their customers?
- what legal remedies are available to consumers?
- are there legal risks faced by consumers?
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must be in writing and be conspicuous.11 Yet a statement that goods are being sold “as is” does act to limit all implied warranties. (I’ll discuss later whether that is a wise business decision.)

Although selling a good “as is” allows the seller to disclaim warranties, this does not let sellers off the hook for deliberate errors. For example, suppose company X publishes auto repair guides. X also owns company Y, which sells automobile tires. In its guide for the 2002 Subaru Outback, X tells consumers that the only tires that fit the vehicle are made by company Y—even though X knows that many other companies make matching tires. This is not an honest error or oversight; rather, it is fraud. In this situation the consumer, the Federal Trade Commission, and/or state Attorneys General could sue X for fraudulent and deceptive trade practices.

Applying these principles to reference books, it is clear that a book falls within the definition of a good under the UCC. Therefore, the warranties of title, merchantability, and fitness for a particular purpose would apply, unless publishers specifically disclaim them. As long as the books were not sold “as is,” consumers who purchase a defective reference product file breach of warranty lawsuits under the Uniform Commercial Code.

This is a matter of state law, and would properly be filed in state courts. The rules of each state vary on how class actions are construed, but in some states it might be possible to certify all purchasers of a defective work as a class. This would allow one trial to determine the outcome for all potential plaintiffs. However, the amount of damages that could be recovered by each plaintiff would be limited to the purchase price of the good (plus applicable shipping.)

By the way, note that a lawsuit in federal court would probably not be available for most defective reference works. Although the concept of “diversity jurisdiction” allows a case to be filed in federal court if the parties live in different states, the amount in controversy must be higher than $75,000 for an individual or $5,000,000 for a class action.12 I doubt that there would be many defective reference works which would make it over that threshold. For example, recovery on the APA Publication Manual would have only constituted $17 per copy plus shipping costs.

Are There Legal Risks Faced by Consumers?

The first reaction of a consumer, when faced with a defective product, is to organize a boycott: call your friends, tell your colleagues, and start a movement. This seems to be a natural reaction to a perceived problem. However, if not done properly, consumers may face a risk of running afoul of antitrust law. An organized boycott is not necessarily illegal, but it can cross the lines established by the Sherman Antitrust Act. In situations where a restraint has (or is intended to have) “an effect upon prices in the market or otherwise to deprive purchasers or consumers of advantages that they derive from free competition,”13 the law considers boycotts to be “concerted refusals to deal.”14

The Sherman Antitrust Act was adopted in 1890,15 and makes agreements or boycotts in restraint of trade illegal. The statute reads as follows: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

The key to proving an illegal combination in restraint of trade is that (1) there is an agreement among the players, and (2) this agreement causes an effect on the price or market for goods. It is for this reason that libraries cannot decide that they are going to band together and refuse to subscribe to any journals from publisher X until the cost is lowered. Librarians consortia are legal because they do not have the power to ban their members from subscribing to particular products. They are free to ask for discounts, but not to prevent their members from subscribing if a discount is refused. There is a tension between antitrust laws and the Free Speech clause of the First Amendment. Suggesting that a product not be used falls within free speech. However, libraries and librarians can in fact violate antitrust law by agreeing together not to purchase (or license) a particular product.

The recent brouhaha over subscription increases at Scientific American is a good example of how to stay within the law. On October 13, 2009, the Chronicle of Higher Education reported that 50 college library directors had sent a letter of protest to the Nature Publishing Group.16 As the cost of Scientific American rose from $39.99 to $299 ($1,500 for online subscriptions), many libraries have had to cancel their subscriptions. The letter to the publisher stated that the price increase “hinders our ability to meet the information needs of our library users,” especially in a serious recession when libraries are cutting budgets. However, the letter does not threaten to cancel subscriptions. Rather, the letter states that this price increase “[is] likely to result in many libraries canceling subscriptions, thus threatening the future of a historically important magazine.”17 Those who sign the letter are free to cancel or to retain their subscriptions, so it does not constitute a “concerted refusal to deal.” Rather, it is a free speech-based warning to the publisher that their actions may result in some libraries canceling their subscriptions.

The APA snafu provides another good example of action that is legal. Once the APA realized the magnitude of the problem, they agreed to replace the defective copies. Before that announcement, however, John Foubert, a counseling professor at Oklahoma State University, created a Facebook group to persuade APA to make their consumers whole.

Dr. Foubert wrote a series of principles about the APA Publication Manual which were posted online, distributed by email, and discussed in Inside Higher Ed and the Chronicle of Higher Education.18 (Full disclosure: I was a member of the Facebook group and passed along information to a number of library discussion lists.)19 The Foubert Principles read as follows:

1. We agree to cease all purchases of the APA publication manual, present and future, until APA agrees to refund the purchase price of the first printing of the 6th edition or exchange copies for the corrected second printing to all those who purchased the first edition.

2. If we teach, and if we require APA format to be used for assignments in our classes, we will continue to use the 5th edition guidelines until this issue is resolved.

3. We encourage academic journals to use a format other than the APA 6th edition until this issue is resolved.

The Foubert Principles are clear, fair, and avoid violating antitrust law. Instead of dropping the APA entirely, consumers would simply continue to use the previous edition. Since consumers are always free to use older editions instead of “upgrading,” this type of action is not in violation of antitrust law. It is based on Microsoft’s debacle with Windows Vista, and how many people simply remained on XP.) The Foubert Principles are forward-looking, and do not go beyond the time when the dispute is resolved. In fact, they anticipate “upgrades” once the issue is taken care of. These principles provide a good model for future disputes over defective reference works.

Why It Is a Bad Business Model to Sell Reference Works “As Is”

As noted above, publishers can avoid liability for defective reference works by selling their goods “as is.” However, I believe that this would not necessarily be a wise business decision. Use of reference works (both print and online) has diminished substantially. Many students prefer the ease of Wikipedia and other online sources. Even as distinguished a publication as the Times of London Online has stated that not allowing students to use Wikipedia “revels a Ludlow-like snobbery towards Wikipedia that is becoming ever harder to justify as the site itself improves.”20

It is the reputation of quality and reliability that keeps reference publishers in business. They are able to provide something that Wikipedia doesn’t — namely, an indication that their work is reliable. Suppose a publisher put clear notices on their works (as the UCC requires) stating that “This work is sold ‘as is,’ and no guarantees are made as to the accuracy of the work.” Who is going to purchase a work that the publisher will not even guarantee is accurate? Collection development money is...
better on works from a company that is willing to guarantee its products. Otherwise, I can just tell everyone to log onto Wikipedia for free.

Of course, minor errors do not make a reference work defective. (It was the fact that there were 80 pages with errors that made the APA Publication Manual a real problem.) While guaranteeing the quality of a reference work sounds like a potential issue for publishers, in reality this is what distinguishes reference materials from the open Internet. Therefore, I strongly believe that it is in a publisher’s best interest to guarantee their work, admit their errors, and fix problems that arise. The APA has done just that with its second printing. Rather than being a sign of weakness, this is a sign of the true strength of reference publishing, and the real reason why libraries and individuals continue to buy reference works in the digital age.

Disclaimers: Please note that I am dealing with legal matters in a general way, and am not commenting on the laws of a particular jurisdiction. I think I got all the errors, but forgive me if you find a mistake. While the information in this article is correct as of the date of publication, new cases are decided every day. At this time I am only actively licensed in Kentucky, and am inactive in Ohio. I am not intending to establish an attorney-client relationship — even if we discuss the article via email. If you have a legal issue, do yourself a favor and consult the lawyer for your company, school board, municipality, university, etc. Both you and your counsel will be glad you did. — BC

Endnotes
2. id.
17. id.
18. id.

Questions & Answers

QUESTION: What criteria are used to determine whether an organization is a nonprofit educational institution as part of the fair use exception? Does a not-for-profit community based teaching hospital meet the criteria?

ANSWER: The Copyright Act contains no criteria for determining what constitutes a non-profit educational institution, but the common understanding among most lawyers is that the status is determined by how the institution is organized under the U.S. tax code. The institution described is a hospital and not a school but it does have a teaching “pice.” This means that the reproduction of copyrighted items for general patient care, etc., is treated just as if it were in a non-teaching nonprofit hospital. Any copying done for classes, however, would be treated under the nonprofit educational exceptions in the Act, but only that activity.

QUESTION: A state agency library often has attorneys general (AG) who argue cases on behalf of the agency. Sometimes they need a copy of an industry standard for their case. They want a copy of the entire standard which can cost from $40.00 to over $200.00 for each depending on who created them (American Ladder Institute, American Society of Safety Engineers, etc.). May the library reproduce them for the AG? If not, then is it permissible to check out the library’s copy of the standard to the AG and let them do what they will as long as the library gets its copy back? Is there any exception to copyright law that allows attorneys to make photocopies for court cases without the restrictions of copyright?

ANSWER: According to Nimmer on Copyright, if the material is going to be introduced into evidence in a court proceeding, reproducing it for this purpose is fair use. But if the standard is used only for preparation for the trial and will not be introduced into evidence, it is infringement to reproduce the entire standard. If the AG staff reproduces the standard it still may be infringement, but the agency library has avoided liability. The state has not, however.

QUESTION: A librarian has created a children’s promotional video that uses the song by The Jacksons from 1978 called “Blame It on the Boogie.” The video will be used only for non-profit purposes. Is there continued on page 54