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Questions & Answers -- Copyright Column

Laura N. Gasaway

University of North Carolina-Chapel Hill School of Law, laura_gasaway@unc.edu

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Cases of Note

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Which under contract law might be taken as an offer. But it also says “If the above terms are acceptable to you we will begin drafting a formal agreement. Of course for both of our protection, no contract will exist until both parties have executed a formal agreement.”

“Ah, simple contract law. Not an offer then.

The second one said: “Here is our agreement to proceed and the remaining issues and understandings which we need to resolve prior to signing a formal document.”

Not even a counteroffer.

And then the unfortunate third document of Big Idea’s. “Net of all this — when we told Tim Clott (of Lyric) we accepted his proposal and we would go forward on that basis, and they have printed catalogs, represented our products and gotten them on television, designed plush, and paid for some research, I would say that we have an agreement in force.”

And the 9th Cir Agrees with Strauch for Once

The two faxes do not show an exclusive license agreement. Section 204(a) mandates language of finality. Radio Television Espanola, 183 F.3d at 928. And there was continuing debate over the final draft contracts.

But What About That Pesky Memo That Turned Up In Discovery?

There are two 9th Circuit cases that deal with post-transfer letters. In the first, two movie producers orally contracted with famed vampire author Anne Rice to write a story they called a “Bible” that would be used to produce derivative works. No written contract was signed, but she delivered a story, got $50,000, and later wrote The Mummy as a novel. The producers were not able to exercise their rights and sued.

Case dismissed for lack of writing under 204(a).

Under the Statute of Frauds, they would have been in court.

But headstrong Rice — doubtless without knowledge of her horrified attorney — took it upon herself to write the producers and tell them that even though the contracts were never signed, she “honored them to the letter.”

The producers tried to reopen the case via the letter. But the 9th Circuit said the letter was written three and a half years after the alleged oral contract. It was not “substantially contemporaneous with the oral agreement.” And “Rice’s letter — though ill-advised — was not the type of writing contemplated by section 204 as sufficient to effect a transfer of the copyright to THE MUMMY,” Koningsberg International, Inc. v. Rice, 16 F.3d 355, 357 (9th Cir. 1994).

Questions & Answers — Copyright Column

Column Editor: Laura N. Gasaway (Director of the Law Library & Professor of Law, Law Library, CB #3385, University of North Carolina, Chapel Hill, NC 27599; www.unc.edu/~uncbg/gasaway.htm

QUESTION: Academic libraries often subscribe to publications which they retain for only a few months and do not bind. Is there a problem in giving discarded issues to another department on campus? For example, the library subscribes to Paris Match which it retains only for three months. The Foreign Language department wants the discarded issues.

ANSWER: It is perfectly permissible to give away department discarded materials. The Copyright Act states in section 109(a), the “first sale doctrine,” that anyone who has lawfully acquired a copy of a work may dispose of that copy in any way. The library subscribes to journals, purchases materials and receives others as gifts. It may lend these items to users, give them away, sell them, etc. Royalties go to the copyright holder only for the first sale, i.e., the library’s subscription. The first sale doctrine does not permit the reproduction of those copies, however.

QUESTION: Is it permissible to copy sheet music for school use? Some state-wide music teacher’s organizations have agreements with ASCAP.

ANSWER: There are published guidelines on the educational uses of music that are voluntary guidelines that were negotiated in 1976. They are published in the House Report that accompanied the Act (House Report 94-1376). These guidelines recognize the difference in a performable and a non-performable unit. For a non-performable unit, either single or multiple copies of sheet music may be made but the excerpt may not exceed 10% of the total work.

Performable units such as an aria, section or movement may be reproduced for a teacher for either scholarly research or preparation for teaching if: (1) there is confirmation from the copyright owner that the work is out of print or (2) the unit is not available except in a larger work.

Any agreement with the American Society of Composers, Authors and Publishers (ASCAP) or Broadcast Music Inc (BMI) deals with performance and not with reproduction of sheet music. The copyright holder for sheet music is normally the composer or the music publisher. ASCAP and BMI are licensed by the composer to collect royalties for public performance of their works. So, a music teacher association agreement with them would be for choir and band performances to which the public is invited and which does not qualify as a section 110(4) non-profit performance.

QUESTION: The corporate library is in the process of updating its Website and wants to have hot links to many different industry resources, associations, etc. Is permission needed to deep link? Some competitor Websites have these links and use the logos from the companies to which they are linking as the link. Is this infringement?

ANSWER: When the Web was new, courts often did not understand linking and some held that a link actually reproduced the work. Over time, this has changed as courts better understand the fact that a link is simply a pointer or cross reference. Whenever a company or association creates an open Website that is not password protected or otherwise controls access to it, then the common understanding is that a link is not a problem. Some scholars call publication on the web an

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ATG Special Report —
ILL Purchase Express

by Barbara M. Coopey (Assistant Head of Access Services, Pennsylvania State University Libraries, Pattee Library and Paterno Library, Curtin Road, University Park, PA 16802; Phone: 814-865-9697) <bmc4@psulias.psu.edu>

and Ann M. Snowman (Head of Access Services, Pennsylvania State University Libraries, Pattee Library and Paterno Library, Curtin Road, University Park, PA 16802; Phone: 814-865-9697) <ams32@psulias.psu.edu>

Abstract: The authors describe criteria, problem analysis, pilot project, and implementation of Penn State’s ILL Purchase Express program to convert interlibrary loan requests to rush-orders acquisition via the approval plan. Significant in the process is that no selector intervention is required. ILL and Acquisitions staff facilitate the entire process aided by e-portable data.

Key words: access, acquisitions, approval plan, e-portable, interlibrary loan.

As the use of technology has flourished in the operation of the library, processes have grown more efficient. An interesting by-product of so much e-portable data has been to associate processes that were formerly unaccompanied. We see online reference services crossing over into the circulation realm and partnerships that made sense but were too cumbersome to manage now find efficient collaboration. ILL Purchase Express, Penn State’s response to the access vs. ownership debate is one such partnership.

Penn State University Libraries formed a task force in August 2001 to examine the possibility of rush purchasing materials that were being requested through interlibrary loan. Could we purchase materials to enhance our collection while simultaneously meeting the users’ urgent need? This project was undertaken based on the University of Wisconsin-Madison’s “Book Express” and Purdue’s “Books On Demand” successful book purchasing programs.

The task force was comprised of representatives from the Interlibrary Loan Department, the Acquisitions Department, and the Collection Development Team, all stakeholders in the process to determine if a similar purchasing program would be a viable option for Penn State. Analysis of request samplings resulted in a unique purchasing model called “ILL Purchase Express” which melded collection development guidelines with ILL requests by rush ordering books which ostensibly would eventually be acquired through the Libraries’ major approval plan vendor.

Literature Review
Currently, there are several ILL offices using some model of purchase-on-demand service. Some purchase any title priced below a set threshold, while others ask collection specialists to evaluate an order.
Williad Public Library purchases out-of-print books requested through their ILL system because items were hard to find from other libraries and out-of-print bookstores offered reasonable prices. University of Virginia Library provides a “Purchase Request” link from their homepage offering users a choice to have the Library purchase the material instead of asking for an ILL. University of Hong Kong found it more cost effective to purchase material instead of requesting an ILL from overseas. Purdue began a practice to purchase recent English imprints within an established cost range rather than borrow them. University of Wisconsin-Madison purchases books from Amazon, Barnes and Noble, or directly from a publisher, when ILL requests meet their chosen criteria.

Background
Penn State University is comprised of 24 campus locations with 40,000 students at the main campus, University Park, and 40,000 at other campuses. Both Interlibrary Loan and Acquisitions are centralized at the University Park campus. Books owned by any of the Penn State Libraries are requested through the CAT, the online catalog, via the Sirsi Unicorn Demand Management module. Books are shipped between campuses daily. For books not owned by Penn State, there are several options. Users can request through ILLiad, the OCLC ILL management system or they can request books directly through a local consortium’s catalog called E-ZBorrow (http://www.letu.edu/~inpaloc/) and continued on page 47