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Questions & Answers -- Copyright Column

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Music Contract - Rap Wannabe Learns His Limitations

Clarence Holmes v. Willard Smith, Jr. aka Will Smith; Will Smith Enterprises; Jeffrey Townes; A Touch of Jazz, Inc.; Willesen Music Inc., aka Zomba Songs, United States Court of Appeals For the Third Circuit, 2004 U.S. App. LEXIS 7462 (2004).

Clarence Holmes claimed to have an oral recording contract with **Will Smith** and sued him on a *quantum meruit* theory.

How It All Began

Sometime before 1986 — *it's always hazy with these music types* — **Will Smith** and **Jeffrey Townes** formed "DJ Jazzy Jeff and the Fresh Prince." **Holmes** performed with them as "Ready Rock C."

Townes is Jazzy Jeff, and if you're thinking as I was that Fresh Prince was a trademark problem, read on.

On July 26, 1986 **Smith** and **Townes** signed an actual contract with Word Up Record Co. — *which is why we actually know the date. Smith* was a minor at the time so his father signed as his guardian.

At an unknown day in September, **Smith** and **Holmes** were walking towards the home of the CEO of Word Up when **Smith** allegedly promised **Holmes** to cut him in for an equal one-third share. And they executed an addendum to the Word Up contract to this effect.

Problem is, the undated hand-written "contract" doesn't really say one-third, does not refer to the original contract and — whups — neither **Smith** nor **Townes** signed it. And the name of the company is misspelled. Not what you'd call great evidence.

In 1990, **Holmes** dropped out. He ran into **Smith** in a Philadelphia auto shop (*all these details are of course designed to add verisimilitude*) and enquired about money owed him. **Holmes** claims **Smith** said "you gonna have to sue me." **Smith** says he denied owing any money.

Holmes' life began going downhill replete with financial problems and eviction. Running into **Smith** once more, he claimed **Smith** acknowledged the debt.

At this point — incredibly — **Smith** gave **Holmes** checks (!!) totalling \$26,000! **Holmes** of course claimed this was part of the debt owed while **Smith** said — you guessed it — it was a gift!

Yes, happy birthday!

So the parties were joined. The district court granted summary judgment to **Smith**.

Of course I'm Mr. Ignoramus when it comes to Rap Music. So at this point, I was thinking "who are these bozos?" But out of curiosity, I applied the magic of Google and it turns out **Will Smith** is indeed **Will Smith** of "Fresh Prince of Bel Air" and "I Robot" TV and movie fame.

And Smith and DJ Jazzy Jeff do have mu-

sic. A lot of it. So having a checking account with \$26,000 lying in it is not so absurd.

So What's This Quantum Meruit?

Right. Let's stick to what we supposedly know about. Quantum Meruit — "as much as he deserves" — is a common law remedy for an implied contract. Someone renders services or materials to another who accepts them and under normal circumstances would expect to have to pay for them.

Under our facts, provable services were rendered, but the "contract" as you've seen was an oral shambles.

The statute of limitations accrues on the date the relationship of the parties is ended and runs four years. 42 Pa. Cons. Stat. § 5525(a)(4); *Kenis v. Perini Corp.*, 452 Pa. Super. 634 (Pa. Super. Ct. 1996). And four years had run.

This case was in federal court due to diversity of citizenship, but the law of Pennsylvania — the place of the making of the contract — applies.

Holmes argued the statute was tolled by **Smith** acknowledging his debt. *See United States v. Hemmons*, 774 F. Supp. 346, 351 (E. D. Pa. 1991). This case dealt with a loan payment acknowledging an outstanding debt.

But you can see the catch. The loan was evidenced by a writing. And the payment was in the correct amount for a payment.

Huntington Finance Corp. v. Newtown Artesian Water Co., 442 Pa. Super. 406, 659 A.2d 1052, 1054 (Pa. Super. Ct. 1995) requires the acknowledgment "be plainly referable to the very debt upon which the action is based; and

also must be consistent with a promise to pay on demand and not accompanied by other expressions indicating a mere willingness to pay at a future time."

If the last bit is confusing you, remember we're reviving a debt that was absolved by the creditor's failure to sue within four years. So it's not enough that the debtor says "Gee, I'm sorry I stiffed you, and I'd sure like to pay you back if I could. But here's ten percent of what I owed."

One of those little balancing of equities between slothful creditor and deadbeat debtor.

The upshot of this is that *Huntington* requires precision which was not met. And the Third Circuit affirmed the summary judgment.

But of course you're flabbergasted. Someone hands out \$26,000 and the court assumes one logical interpretation is it's a gift! Or you're saying — oho! — RAP music. It could be a payment for something nefarious.

The court just sort of dumps the whole thing saying the district court — whose opinion is of course not reported — adequately provided the reasons for refusing to apply acknowledgment to the case.

So, your diligent researcher went to *Huntington Finance* and finds they really want an unequivocal acknowledgment. I mean really.

In *Huntington*, the four year limitation had run. Without legal obligation, debtor paid over principal but no interest. Creditor sued for the interest. The court held the payment not an admission of owing interest.

They say the public policy behind the acknowledgment doctrine is creditor gets some payment on an otherwise unenforceable debt, and debtor unburdens himself of a moral obligation and improves his credit. Because debtor is opening himself up to suit on what might be a staggering amount of interest, then his acknowledgment must be precise. Otherwise he wouldn't pay over anything at all. 🐼

Questions & Answers — Copyright Column

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QUESTION: *A college library has offered electronic reserves for four years. Should it now revise its electronic reserves policies based on the TEACH Act?*

ANSWER: An amendment to the **Copyright Act of 1976**, the **TEACH Act** revised the section of the law that deals with distance education. It covers performances and displays in distance education that are transmitted in any form in which the course is offered or online, including online components of face-to-face courses. Institutions that wish to qualify for the exemptions offered under **TEACH**, must meet many requirements. Traditional reserves do not deal with performance or display — instead,

reserves deal with the reproduction of articles, book chapters, etc., to support the classroom. These works are copied and because of their nature are not performed or displayed. Works that are typically performed include audiovisual works, musical works and sound recordings; works that are generally displayed include slides, photographs, charts, etc. Thus, for printed works, the **TEACH Act** simply does not apply. Therefore, revising the e-reserves policy is not needed for printed works.

For a reserve collection that consists of sound recordings that are streamed, the **TEACH Act** is applicable since these works are performed.

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It is also possible to rely on fair use for providing access to this material. The **TEACH Act** would allow performance of entire nondramatic musical works, but it is unclear whether it covers sound recordings that embody the musical work. Therefore, fair use may be a better choice. Moreover, many musical works are dramatic such as opera and musical comedy and therefore cannot be performed online in their entirety without a license. Images that may be displayed via e-reserves also may be covered by either the **TEACH Act** or fair use.

Video that is streamed for electronic reserves is not as common, and it too could fall under the **TEACH Act** because videos are works that are performed. **TEACH** does not permit the performance of entire audiovisual works without a license but only a "reasonable and limited portion" of a work. Placing an entire, lawfully acquired DVD on reserve does not implicate **TEACH**. Copying the entire copyrighted video would constitute an unlawful reproduction. Reproducing a reasonable and limited portion for e-reserves would be permitted by **TEACH** if all of the requirements are met. Thus, for streaming music and video and for displaying images, a library may wish to update its e-reserves policy.

QUESTION: *A faculty member has transferred an 8mm film that he owns to videotape for his own personal use. He now wants to*

donate this videotape to the library for its collection. The tape contains two Disney short films, the first of which the library already owns on DVD. The second is not available for purchase in any form although it is still under copyright. Since it is not available for purchase, and the library does not have the technology to show an 8mm film, may the library accept this donation and add it to the collection?

ANSWER: If the library receives a title by gift, it is just the same as if it purchased the work. Should the faculty member have given the library the 8mm film itself, the library could convert it to VHS because, under section 108(c) of the **Copyright Act**, the 8mm format is considered obsolete. First, the library would have to make a reasonable effort to purchase the work at a fair price. If it is not available, then the library may convert the format. In this situation, the faculty member has already done the conversion from an obsolete format that the library would have been able to do for itself. So, there should be no difficulty in accepting the already converted VHS copy.

This answer would not apply had the original work been in VHS format, the faculty member converted it to DVD for his personal use and then sought to donate that to the library. VHS is not yet an obsolete format so the library should not accept the hypothetically proffered DVD.

QUESTION: *In a government research library, the agency routinely purchases trans-*

lations of foreign language articles. These foreign articles were published in the open literature. The library now wants to digitize the English translation and put the full text version on its local area network. The translation itself is not copyrighted, but would this be an infringement of the original language copyright? Since the English translation is technically speaking a "government work" would this be considered in the public domain?

ANSWER: Making these translations available on the network equals publication, and copyright owner's right to prepare derivative works includes making or authorizing translations of their work for publication. When the agency has one copy translated for internal use, that is not a problem. But this wider distribution on the LAN infringes the exclusive rights of the copyright holder by publishing the article within the agency. Under various treaty obligations, the United States gives foreign works the same protection as it provides for works published in this country.

The English translation is not a public domain work because the original work was not a government publication. The copyright is in the article, not the translation. Should the copyright holder authorize a translation to be published, that work would be copyrighted by the article's author as a derivative work.

QUESTION: *In keeping with the copyright law, an academic library gets an interlibrary loan request to copy more than one article from*

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Biz of Acq — Book Vendor Evaluation from a Small Academic Library's Perspective

by **Cynthia Hsieh** (Head of Technical Services, University of the Pacific Library, 3601 Pacific Avenue, Stockton, California; Phone: 209-946-2571) <chsieh@pacific.edu>

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Column Editor's Note: *How do acquisitions librarians determine what vendors to use? Do they evaluate their vendors' performance? According to Cynthia Hsieh of University of the Pacific Library, these processes often are impressionistic and highly subjective. Hsieh describes a proactive and more objective vendor evaluation and selection project that was undertaken at one academic library. —AF*

Abstract

This paper describes the process of conducting a firm order vendor evaluation at a small academic library in California. As indicated in *ALA's Guide to Performance Evaluation of Library Materials Vendors*,¹ acquisitions procedures vary widely from library to library; therefore, it is more beneficial to share the process rather than the final results.

Introduction

Due to limited human and material resources, small libraries do not usually have the luxury or feel the need to conduct a thorough vendor evaluation. Instead, the majority of smaller libraries select vendors based on the staff's subjective impressions and their past experiences with individual vendors. This was how the acquisitions unit at the **University of the Pacific Library (Pacific Library)** operated for years.

University of the Pacific is a small, predominantly undergraduate, independent aca-

demic institution located in California's central valley. **Pacific Library** has an annual monograph budget of \$125,000, and only 1 FTE acquisitions staff member who runs the entire acquisitions operation. Except for a few standing order titles, the majority of **Pacific Library** acquisitions are firm orders.

Although **Pacific Library** had vendor agreements with several vendors throughout the years, in order to take advantage of the high discounts, a decision was made by the former Head of Technical Services to use a single vendor for all of its firm orders except some specialized science titles. This single vendor approach worked adequately for many years, and the acquisitions staff maintained an amiable relationship with the vendor's representative.

In March 2003, after **Pacific Library's** migration from a proprietary system to an integrated library system with a more open architecture, the need to re-adjust workflows was very much felt in every unit of the Technical Services Department. Taking advantage of high discounts was no longer the only consideration for the acquisitions unit in selecting a firm order vendor.

The pressure from **Pacific Library** administration for a more cost-effective and streamlined Technical Services Department added to the urgency in conducting a formal vendor evaluation for its firm order operation.

Planning Process

To accommodate the changing needs and

challenges faced by **Pacific Library**, rather than looking at vendor evaluation from the perspective of "what are we getting from our vendors," we decided to follow **Lynne C. Branche Brown's** advice² to look at vendor performance proactively, asking, "What do we expect from a vendor?" How do we define our expectations? **Brown** suggested conducting customer interviews.

For the acquisitions unit, the primary customers are the nine reference librarians/bibliographers at **Pacific Library**. Through interviewing reference librarians/bibliographers, a detailed evaluation plan emerged. An overall goal, three objectives, and four major criteria to evaluate vendor performance were developed.

The overall goal for the evaluation was to replace the current single vendor approach with a new model that consists of one primary vendor and several supplementary vendors. The decision was based on the fact that, even for a small academic library like **Pacific Library**, no one vendor is capable of supplying all the materials requested in the most cost-effective fashion. The other benefit of the new multi-vendor approach is to avoid sudden unexpected business failures of vendors.

The assessment plan also identified three objectives. They were 1) To maximize **Pacific Library's** purchasing power; 2) To provide better and more timely services to patrons; 3) To investigate vendors' technological currency.

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the same journal issue. It copies only one article and sends the other requests back unfilled, explaining the copyright law to the borrowing library. A borrowing library insists this is incorrect and that if it (the requesting library) is going to pay copyright royalties, and they say they are, then the lending library should copy for them whatever they ask. Which library is correct?

ANSWER: The borrowing library is correct in this instance. Section 108 is written so that a library does not have to pay royalties. If it goes beyond the exemption provided in the statute, then the library should seek permission and pay royalties, if requested. Here, the borrowing library is paying royalties, so the lending library is not limited to one article per issue for the borrowing library. Moreover, the one article restriction applies to an individual user not a library borrowing for users. It is the borrowing library that is responsible for enforcing the one article per issue for a user or for paying royalties in order to provide more than one article per issue to a single user.

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The format of each chapter is very appealing. The illustrations—both drawings and photographs—are mostly taken from the time period. If possible, they include representations of the people who made the leap toward equal treatment. There is an immediacy to each story seeing these people and getting a clearer idea of the time in which lived. A good example is the textile mill strike in Lowell, Massachusetts in 1912. Now nearly a hundred years old, the news photos are quite striking and moving. One sees the large demonstrations and parades, but also, there are photos showing children working in the mills themselves. Within each essay are sidebars containing primary documents and other shorter articles further illustrating—perhaps with another example—the inequality described within that particular essay.

Although the book is published by the **Oxford University Press**, it appears to be more of a project of the **Southern Poverty Law Center's** section called **Teaching Tolerance**. Its purpose is to provide support for school programs teaching a respect for individual differences and giving students an appreciation for diversity. **Maria Fleming**, compiler and contributor of *A Place at the Table*, was formerly associated with **Teaching Tolerance** as a staff writer. **Teaching Tolerance** is a natural extension of the **SPLC's** original mission of racial equality and justice.

This is a good book. It works on many different levels. It is a good read and it teaches some worthwhile truths, all at once. Don't let the "juvenile" label deter you from reading it and adding it to your collection. Reading and learning about injustice and inequality (and the people who have fought against it) isn't just for kids.