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Bryan M. Carson

Western Kentucky University, bryan.carson@wku.edu

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LEGAL ISSUES



Section Editors: **Bruce Strauch** (The Citadel) <strauchb@citadel.edu>
Bryan M. Carson, J.D., M.I.L.S. (Western Kentucky University) <bryan.carson@wku.edu>
Jack Montgomery (Western Kentucky University) <jack.montgomery@wku.edu>

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

by **Bryan M. Carson, J.D., M.I.L.S.** (Associate Professor, Coordinator of Reference and Instructional Services, Associated Faculty — Library Media Education Program, Western Kentucky University Libraries, 1906 College Heights Blvd. #11067, Bowling Green, Kentucky 42101-1067; Phone: 270-745-5007; Fax: 270-745-2275) <bryan.carson@wku.edu>

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; and
- why it is a bad business model to sell reference works “as is.”

The release of the 6th edition of the *Publications Manual of the American Psychological Association* turned into a nightmare of bad publicity. The manual was released with a large number of errors, mostly in the examples (which are the parts that most students use).¹ Luckily the publisher took their responsibilities seriously and replaced the defective works with a corrected 2nd printing.² However, this incident brought to the forefront the question of legal implications for defective reference works.

Generally, it is fairly easy for librarians to escape legal liability if a client claims that he or she was harmed by the information in a book or a database. After all, librarians didn’t create the erroneous information. As I pointed out in chapter 8 of my book *The Law of Libraries and Archives*,³ there have been no cases involving this type of liability. In fact, a similar case from a video store found that there was no liability for defective information in videos.⁴

Interestingly, however, the courts have tended to see books, videos, and other forms of intellectual property as being “goods” in

the same fashion as automobiles, widgets, or other forms of tangible property. There is no doubt that a book or video constitutes intellectual property. But does it also constitute a good? Under Article 2 § 105 of the **Uniform Commercial Code (UCC)**, goods are defined as being “all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action.”⁵ By this definition, books would indeed be considered goods.

The main U.S. case involving the provision of information is *Brocklesby v. Jeppesen*.⁶ The court ruled that maps are goods, although the case was decided using product liability rather than contract law.

Jeppesen was a company that published maps for the aviation industry. Their maps were based on FAA data, which was released in chart form. The company sold a map that failed to show a mountain. The original mistake was in the FAA data, but **Jeppesen** was found to be liable under a products liability theory. The court found that the charts were mass-produced, and emphasized that “Jeppesen had a duty to test its product and to warn users of its dangers.”⁷ This case established a precedent for using products liability law to deal with defective intellectual property.

Do Publishers Owe Any Legal Duties to their Customers?

This may appear to be a loaded question for publishers, chipping away at their normal business model. However, an objective analysis shows that *any* transaction, particularly in terms of sales, does involve *some* duties, including warranties.

There are two types of warranties. *Express warranties* consist of bargains included in contracts as the result of negotiation. An example would be the purchase of a new car

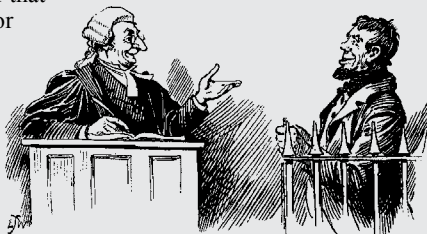
which comes with a five-year, 50,000-mile warranty. This express warranty is included in the contract — in writing — and can be legally enforced. On the other hand, the legal system itself attaches a series of *implied warranties* to all sales of goods.

There are several types of warranties which are implied by law. It is possible for these to be limited or disclaimed by the seller. However, this must be expressly done in an unambiguous manner. If the seller does not disclaim or limit implied warranties, they are still applicable. Warranties implied by law include:

- **Warranty of Title.** The seller promises that (a) the title conveyed shall be good, and its transfer rightful; and (b) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.⁸
- **Warranty of Merchantability.** The seller promises that the goods are indeed what the contract specifies they are to be; “are of fair average quality within the description...are fit for the ordinary purposes for which such goods are used; and...conform to the promise or affirmations of fact made on the container or label if any.”⁹
- **Warranty of Fitness for Particular Purpose.** “Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.”¹⁰

Publishers do indeed owe duties to their customers. However, goods can be sold with the implied warranties excluded. In order to exclude the warranty of merchantability, the **UCC** requires that the limitation language specifically mention “merchantability” as being excluded. The **UCC** is even more strict with regard to the warranty of fitness for a particular purpose. In order to limit fitness, the exclusion

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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 goods 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 party 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. Library 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.¹⁷ 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.”¹⁸ 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*.¹⁹ (Full disclosure: I was a member of the **Facebook** group and passed along information to a number of library discussion lists.²⁰) 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 an issue under antitrust law. (Think about **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** “[reveals] a Ludlow-like snobbery towards **Wikipedia** that is becoming ever harder to justify as the site itself improves.”²¹

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 won’t even guarantee is accurate? Collection development money is

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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

1. **Howard, Jennifer.** Hot type: Psychological association offers to replace error-ridden copies of style guide. *Chronicle of Higher Education* (October 27, 2009).
2. *id.*
3. **Carson, Bryan M.** *The Law of Libraries and Archives*. Lanham, MD: Scarecrow Press, 2007. See my discussion of the duty of care owed to clients by the information professional on pages 194-196.
4. *EWAP v. Osmond*, 153 Cal. App.3d 842, 200 Cal. Reporter 674 (1984).
5. **Uniform Commercial Code** Article 2 § 105, available at <http://www.law.cornell.edu/ucc/2/2-105.html> (hereinafter "UCC").
6. *Brocklesby v. Jeppesen*, 767 F.2d 1288 (9th Cir. 1985), cert. denied, 474 U.S. 1101 (1986).
7. **Martha J. Dragich**, "Information Malpractice: Some Thoughts on the Potential Liability of Information Professionals," 8-3 *Information Technology and Libraries* 265, 270 (September 1989).
8. **UCC** Article 2 § 312, available at <http://www.law.cornell.edu/ucc/2/2-312.html>.
9. **UCC** Article 2 § 314, available at <http://www.law.cornell.edu/ucc/2/2-314.html>.
10. **UCC** Article 2 § 315, available at <http://www.law.cornell.edu/ucc/2/2-315.html>.
11. **UCC** Article 2 § 316, available at <http://www.law.cornell.edu/ucc/2/2-316.html>.
12. 28 U.S. Code § 1332 (2005).
13. American Jurisprudence, Monopolies § 46 (2009).
14. **Hovenkamp, Herbert.** (2005, Winter). "Exclusion and the *Sherman Act*." *University of Chicago Law Review*, 72: 147-164.
15. 26 Stat. 209 (1890), codified at 15 U.S.C. § 1-7. The *Sherman Antitrust Act* was later expanded in 1914 by the *Clayton Antitrust Act*, 38 Stat. 730 (codified at 15 U.S.C. § 12-27, 29 U.S.C. § 52-53) and the *Federal Trade Commission Act*, 38 Stat. 717 (codified at 15 U.S.C §§ 41-58). The *Robinson-Patman Act*, 49 Stat. 1526 (codified at 15 U.S.C. § 13), further expanded antitrust law in 1936.
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19. See, e.g., **Epstein, Jennifer.** (2009, October 13). "Correcting a style guide." *Inside Higher Education*. Retrieved November 29, 2009, from <http://www.insidehighered.com/news/2009/10/13/apa>.
20. See, e.g., **Carson, Bryan M.** (2009, October 22). *Dealing With Defective Copies of the APA Manual*. Retrieved November 29, 2009, from Libref-L. <http://listserv.kent.edu/cgi-bin/wa.exe?A2=ind0910D&L=LIBREF-L&P=R2&I=-3&m=32811>.
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