

PUBLIC CITIZEN LITIGATION GROUP

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BY TELECOPIER (650-384-4701)

February 22, 2012

Mimi Rupp, Esquire
Kenyon and Kenyon
Suite 210
1801 Page Mill Road
Palo Alto, California 94304

Dear Ms. Rupp:

I write in response to your demand to elisha8779, contending that her sale of a used copy of the Kaplan United States Medical Licensing Examination Lecture Notes, Step 1, infringes the copyright belonging to your client, Kaplan, Inc.

In fact, elisha8779 is a medical student who bought a used copy of the notes from another student. Regardless of whether Kaplan might have a contract action against that seller, Kaplan has no copyright claim against anybody, and it certainly has no claim against elisha8779. This issue was conclusively determined by the Supreme Court of the United States in *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908), a case that is still good law, even if there is a common-law exception for software. *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1112, 1114 (9th Cir. 2010). Consequently, in response to your “cease and desist,” elisha8779 will not return any books in her possession and she is certainly not going to send you \$300 dollars for having exercised her statutory first-sale rights. She has ended the Ebay sale and will no longer be selling her books pending resolution of this controversy with you.

Beyond that, you and your client should be ashamed of yourselves for trying to intimidate students into giving up their first-sale rights. elisha8779 is not planning to file a class action for a declaratory judgment of non-infringement—she wants to get on with her life—but we are going to be looking for other clients who may not be so charitable toward Kaplan. I strongly suggest that you stop sending these frivolous demands.

Sincerely yours,


Paul Alan Levy