

## Termination of Distribution Agreement Does Not Affect Licenses to Cloud-Based Access

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After finding that a copyright infringement question analyzed by the district court was more properly a contract interpretation issue, the US Court of Appeals for the Second Circuit affirmed the district court's decision that termination of a distribution agreement did not require termination of the licenses granted under that agreement. *Smith v. Barnesandnoble.com, LLC*, Case No. 15-3508 (2d Cir., Oct. 6, 2016) (Jacobs, J).

Plaintiff Cheryl Smith is the widow of Louis Smith, who authored and copyrighted a book titled *The Hardscrabble Zone*, and in 2009 entered into a distribution agreement with an online ebook distributor, Smashwords, to market his book. The contract gave Smashwords "the right to distribute samples of the Work in any form of media" and stated that "[t]hese samples will be licensed for free, non-commercial use, duplication and sharing." Smashwords subsequently offered the book for sale and sampling to its retail partners, including Barnes & Noble, which listed the book for sale on its website, bn.com, and made free samples available to customers.

While there were never any sales of *The Hardscrabble Zone*, one Barnes & Noble customer acquired a free digital sample of the book from bn.com. When a customer downloads a free sample using Barnes & Noble's digital locker system, the content is stored in a cloud-based bookshelf associated with the customer's digital locker account. Thus, when the customer downloaded the free sample of *The Hardscrabble Zone*, it was stored in that customer's cloud-based bookshelf.

In 2011 Louis Smith terminated his agreement with Smashwords. The book was removed from bn.com, but because the customer had validly obtained the free sample prior to termination of the distribution agreement, the sample remained in the customer's cloud-based bookshelf. Cheryl Smith alleged that this residual access to the book provided by Barnes & Noble infringed her late husband's copyright.

The district court granted Barnes & Noble's motion for summary judgment that the conduct at issue—*i.e.*, allowing access to the legally downloaded free sample—did not amount to direct or contributory infringement. Cheryl Smith appealed.

On appeal, the Second Circuit affirmed but based its decision on an alternative ground. Instead of addressing the issue of infringement, the court found that Barnes & Noble's conduct was authorized

by contract. Specifically, the Court found that the distribution agreement allowed for distribution of samples with a license but no “provision to terminate the license for samples already distributed in the event the distribution agreement itself [wa]s terminated.”

The Second Circuit analogized the case to a customer who had obtained a free sample in a hard copy rather than an ebook under a distribution agreement. The customer would not have to return the hard copy in the event the distribution agreement was terminated. Similarly, if a customer purchased the ebook prior to termination of the distribution agreement, he or she would not be required to return the ebook once the contract was terminated. Thus, because the license to access the free sample was no more restrictive or limited than the license to access the book itself after purchase, and because there were no other contractual restrictions, the Court found that Barnes & Noble’s conduct was consistent with the terms of the distribution agreement.

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