

Legal Update from Flagler Law Group



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Brian Flagler founded Flagler Law Group in the spring of 2006 to serve the legal needs of publishers, designers, producers, and distributors of Christian media. With a combined 20+ years in the industry, we know Christian publishing. We believe that our experience handling matters for a diverse variety of Christian publishers, ministries, and other organizations from the publishing perspective significantly contributes to the value that we offer our clients.

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A New Era for Fair Use: Court Changes Fair Use Law in Google Decision

By Craig Gipson and Brian Flagler

The picture of what constitutes fair use in the digital age is coming into focus thanks to the ruling in the landmark *Authors Guild v. Google* case. On October 16, a federal appellate court sided with Google in finding that fair use protected the technology giant's electronic scanning of millions of copyrighted books. Unless the Supreme Court grants an unlikely reversal on appeal, the decision ends more than a decade of litigation over the controversial Google program that makes the text of books searchable through a massive database.

Background

The Authors Guild originally filed this case in 2004 so a quick refresher may be in order: as we wrote in a [November 2013 Legal Update](#), the lawsuit challenged Google's efforts to scan virtually every book it could get its hands on, from university libraries to the Library of Congress, with the goal of creating a massive indexed database of content. In doing so, Google electronically reproduced books still protected by copyright without first obtaining permission from rights owners. Each instance of unauthorized copying, the Authors Guild claimed, constituted copyright infringement. Google countered that its search function was a "transformative use" under the doctrine of fair use and that its display of only a snippet of copyrighted works in response to a search query did not violate a copyright owner's rights.

The Court's Decision

The key factor in this case is the "transformative" nature of Google's search function. Generally, copyright law has achieved its goal of expanding public knowledge by granting copyright owners an exclusive right of reproduction, "giving them a financial incentive to create informative, intellectually enriching works for public consumption." Under this decision, that exclusive right of reproduction gives way to the purpose and character of the unauthorized reproduction, namely, is the use transformative?

The court found that the indexed database of works and provision of snippets "adds important value to the basic transformative search function." The court also distinguished the amount of each book copied versus the amount made accessible to the public. Despite Google copying 100 percent of each work, the court found that the snippet view displayed by Google made it almost impossible to reconstruct extended passages of the books. Essentially, the court ruled that Google's use will not damage the market for any work because snippet views will not serve as a substitute for the scanned book.

What Does This Mean for the Future?

The court's analysis alters how publishers and lawyers evaluate fair use. Before this decision, not only was the nature and purpose of the

use to be considered but also the nature of the original work (published versus unpublished, etc.) and the amount of the original work taken. Now, the nature of the original work and the amount used matter less than the purpose for which it is being used. A “transformative” use seems to trump all.

The Authors Guild could appeal this decision to the U.S. Supreme Court but the majority of legal commentators do not think the high court will hear the case. Well-regarded intellectual property professors Pamela Samuelson and James Grimmelman each wrote that this is the end of litigation related to Google’s scanning of copyrighted works. In the digital age, reproduction of a copyrighted work in its entirety is no longer exclusive to the copyright owner and exclusive licensees. Technology has disrupted a century -old understanding of fair use and copyright law is gradually adjusting to the new reality.



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