

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.
(541) 549-8401
brian@flaglerlawgroup.com
FlaglerLawGroup.com

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Fair Use or Infringement: Library Electronic Reserves Make Content Available Without Permission

By Craig Gipson and Brian Flagler

In the ongoing evolution of fair use in the digital age, a current case addresses the question: do libraries and universities need permission to make electronically-stored excerpts of copyrighted works available or are these excerpts protected by fair use?

What is the case about?

In 2008, three academic publishers sued Georgia State University for making excerpts of course materials available in the university's e-reserve system. Students could access the excerpts online without the university owing a license fee to the rights holders of the works. (For further background, please see the [June 4, 2012 ECPA Legal Update](#).) The publishers claimed such a use required a license, just as the university obtained for copyrighted materials in printed course packets. Georgia State responded that the defense of fair use protected its e-reserves.

What was the outcome?

In May 2012, the court ruled in favor of Georgia State. Under the factors of fair use, the judge ruled that the university's e-reserves served a nonprofit educational purpose, contained primarily scholarly factual works, generally made available less than 10 percent of the text of such works, and no market existed to allow universities to readily attain electronic rights to the applicable excerpts.

On appeal, the decision was overturned by a three-judge panel but not in the manner publishers would have liked. Even in a kind of victory, the publisher's arguments were largely rejected. The appellate court did not approve of the way in which the trial court reached its conclusion but it did not disagree with that conclusion. For example, the appellate court struck down the mechanical determination of fair use when 10 percent or less of a work's text was used; such a bright-line rule does not exist. But it agreed with the trial court in finding that the nonprofit educational nature of the use and absence of an accessible market to acquire the relevant rights weighed in favor of a fair use finding. At its conclusion, the opinion instructed the trial court to rule on the case once again in accordance with the appellate decision.

Not content with a hollow victory (and one unlikely to last), the publishers have appealed the appellate decision. They argue for a broad review of the university's methods: a systemic practice of violating the rights of publishers and authors. Further, they hope to persuade the court that Georgia State's actions damage a *potential market* for licensing these kinds of rights, even if such a user-friendly

market does not currently exist. While the publishers are unlikely to win a sweeping victory on appeal, there are signs that they could gain some ground back. One judge in the first appellate decision wrote that Georgia State had “not even come close” to establishing a fair use defense and that “[t]he use of a copyright-protected work that had previously required the payments of a permissions fee does not all of a sudden become fair use just because the work is distributed via a hyperlink instead of a printing press.”

What is the potential impact of the case?

The case carries both legal and financial ramifications. From a legal perspective, the court could still issue guidance on making future fair use determinations. While the easy-to-apply “10 percent rule” will not stand, the court could give an indication as to the amount of text that may be used without permission. It may also describe the allocation of weight the law should give to each of the four fair use factors. Financially, the decision may impact licensing income and academic sales. If universities may make excerpts available to students under fair use, publishers will not receive a license fee for that content. Universities may also encourage their faculties to make use of e-reserve systems rather than requiring students to purchase books in their entirety. Like much of the publishing industry, fair use law may be undergoing its own digital disruption.



www.ecpa.org
info@ecpa.org

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