

Legal Update from Flagler Law Group



Our Mission is to serve the legal needs of Christian publishing organizations by leveraging focused expertise into practical solutions.

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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Apple's Supreme Court Appeal and the Future of Ebook Distribution

By Craig Gipson and Brian Flagler

The U.S. Supreme Court will decide early in 2016 whether to hear the case of *Apple v. United States*. Well publicized throughout the publishing industry, the case will decide whether Apple's agency agreement with publishers violated federal antitrust law. But the legal effect of the case could influence the future of how publishers distribute books electronically.

What is the case about?

At its heart, the case is about whether the actions of Apple and five publishers are per se illegal or if the broader competitive effects of their actions should be taken into account. In 2012, the U.S. Department of Justice alleged that Apple and a group of publishers entered into a conspiracy to fix the price of ebooks. Apple instituted the well-known agency model in its agreements with publishers, allowing the publishers to set retail prices. These prices were typically above Amazon's standard \$9.99 price point. Soon after their agreements with Apple, the publishers sought a similar agency arrangement with Amazon. Amazon contacted the Federal Trade Commission, asserting that the simultaneous demands of the publishers exhibited signs of illegal collusion. The government brought suit against Apple for its involvement and obtained a judgment against Apple that was upheld on appeal.

Why is Apple appealing to the Supreme Court?

If Apple lost at trial and lost its first appeal, why is it appealing to the Supreme Court? Apple still believes it can win because of a 2007 Supreme Court case called *Leegin v. PSKS*. Essentially, the judgment against Apple found that its actions with the publishers were "per se" illegal—Apple orchestrated a vertical and horizontal price-fixing scheme and no further examination of the facts is needed. The *Leegin* case found that when the issue in the case is a *vertical* price restraint (such as Apple's agreement to distribute ebooks), courts should examine the parties' actions under the so-called "rule of reason" rather than find them illegal per se. Under the rule of reason, actions are only illegal if their effect is to unreasonably restrain trade. In this case, Apple argues that the effect of its actions was *pro-competition* due to Amazon's ebook market share at the time. Seven of the current Supreme Court justices heard the *Leegin* case and five of those ruled in favor of a position that would support Apple. Apple is betting those five justices will rule the same way again. And Apple is not alone. On December 2, seven briefs were filed with the Supreme Court by third parties including software trade associations, app developers, and economics professors, all arguing in Apple's favor.

What will the outcome mean for publishers?

A decision that the “rule of reason” governs vertical agreements for electronic distribution similar to Apple’s would be a victory for publishers. Commentators arguing for Apple’s position note that the “per se” rule works well for established industries but that digital content distribution is still so new and changing so rapidly that it is best served by a broader examination of facts. The rule of reason would lessen the risk of antitrust liability for publishers entering into similar agreements with electronic content distributors. A publisher’s actions would still be subject to scrutiny but would only be illegal when viewed in light of the effect on the broader marketplace. Flagler Law Group and ECPA will continue to track this case as it progresses.



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