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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

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Three Cases for Christian Content Creators

1) **Avoiding Online Copyright Infringement**
2) **A Victory for Backlist Ebook Rights**
3) **The Contraception Mandate Goes Back to Washington (Hobby Lobby)**

By Craig Gipson and Brian Flagler

1) Online Copyright Infringement

Online service providers hosting user-posted content breathed a sigh of relief as Google and Viacom settled their copyright infringement suit. The settlement leaves an April 2013 federal court opinion in favor of Google-owned YouTube on the books.

What was the case about?

In short, the case was about videos posted online; especially those videos containing copyrighted content owned by Viacom (owner of such media giants as CBS, MTV, and Paramount Pictures). The primary issue concerned whether a website operator has a duty to patrol and remove allegedly infringing content. In April 2007, Viacom sued YouTube for displaying a multitude of infringing videos. At stake was the interpretation of a "safe harbor" provision in the Copyright Act protecting online service providers from infringement liability if they follow certain steps.

The court noted YouTube's faithfulness in promptly removing content after receiving a Digital Millennium Copyright Act (DMCA) notice informing it of a specific infringing item. However, Viacom argued that YouTube had "actual knowledge" of infringing content or was "aware of facts or circumstances from which infringing activity is apparent," such that it should be removing copyrighted content before it receives a DMCA notice for each item.

The court's decision and its effects

The court sided with YouTube. YouTube pointed out that some Viacom-owned content was posted to its site by Viacom employees: how was it to know what it should take down and what was posted lawfully? The court found that Viacom had the burden to prove YouTube possessed actual knowledge of infringing content. The only fail-safe way to prove actual knowledge is to provide a DMCA notice to an online service provider about a specific piece of content.

For organizations that allow users to post content on their websites, the court's decision may be helpful. There is no affirmative duty to patrol user-posted content in search of infringing material. But, site owners must promptly respond to any DMCA notices they receive

regarding allegedly infringing content. For rights owners, the case means only that they retain the sole burden of policing infringement. Rights owners cannot rely on websites to identify and remove copyrighted content; they must provide notice to such websites and request removal.

2) A Victory for Backlist Ebook Rights

An influential federal district court found that a 1971 publishing contract included a grant of electronic rights. Although the ruling is encouraging for publishers, cases of this type will turn on specific language in each applicable contract.

The court's decision in *HarperCollins v. Open Road* relied on two provisions in the contract at issue: (1) the grant of rights section; and more significantly, (2) a subsidiary rights provision. HarperCollins published the bestselling children's book *Julie of the Wolves* in 1973. The contract with author Jean Craighead George granted HarperCollins the exclusive right to publish the work "in book form." The court found it significant that the language did not include the limiting term "print." The well-known court opinion on this issue, *Random House v. Rosetta Books*, found that the language "print, publish, and sell the works in book form" did not include electronic formats such as ebooks. The judge in *HarperCollins* wrote that the term "print," present in the *Rosetta Books* case, "has a limiting effect and a strong connotation of paper copy" but was not included in Ms. George's contract.

The court seemed to give even greater weight to a subsidiary rights provision in the contract. In a clause inserted by Ms. George's agent, HarperCollins was prevented from granting a license without author approval for uses such as "storage and retrieval and information systems . . . or other electronic means now known or hereafter invented." As University of Maryland law professor James Grimmelmann pointed out to *Publishers Weekly*, the section would not "make sense unless Harper Collins had some relevant rights for electronic media."

The court acknowledged that its opinion may have limited applicability due to its dependence on fact-specific contractual language. But for publishers that include similar language in their agreements (e.g. "other electronic means now known or hereafter invented"), the decision could provide a boost to support the right to distribute backlist titles in new technology formats. In any case, the opinion highlights the importance of rights language in publishing and licensing agreements.

3) The Contraception Mandate Goes Back to Washington (Hobby Lobby)

We will soon have an answer to the question of whether religious for-profit businesses have to comply with the Affordable Care Act's ("ACA") controversial contraception mandate [See February 21, 2013 *Legal Update*; and October 4, 2013 *Legal Update*]. On March 25, the U.S. Supreme Court heard oral arguments from the federal government, Hobby Lobby Stores, Inc., and Conestoga Wood Specialties Corp. regarding whether a corporate entity may assert religious free exercise rights as the basis of an exemption from the law.

Hobby Lobby and Conestoga Wood Specialties claim the ACA's mandate requiring that they provide certain drugs and devices which

may cause an abortion violate their rights under the Religious Freedom Reformation Act. The government essentially argues that a for-profit corporate entity cannot exercise religious rights. The Court is expected to issue its opinion in late June.

www.ecpa.org
info@ecpa.org