

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 35+ 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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Publishers Lose Fair Use Fight Over Electronic Excerpts

By Craig Gipson and Brian Flagler

Publishers suffered another fair use setback in a case involving electronic excerpts for educational use. On March 31, a federal district court once again ruled largely in favor of Georgia State University, determining that its practice of making electronic book excerpts available without a license does not constitute infringement. Publishers received a favorable ruling from a federal appellate court in 2014 but in implementing the appellate court's decision, the trial court still found only four of 48 excerpts to be infringing. Perhaps more concerning is the court's broad view of the impact of such excerpts on the market value of a work.

Background

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, 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. In 2012, a federal court sided with Georgia State. The publishers appealed and obtained a favorable ruling from a federal appellate court (see the [November 2014 ECPA Legal Update](#)), which asked that the original court reconsider its decision under a different standard. The original trial court reconsidered its standard but the result is largely the same.

Effect of the Decision

The decision elicited favorable responses from universities and libraries but it is unclear how wide-reaching a precedent this case will be. The court explicitly limited its applicability to non-transformative uses so it will likely only apply when a non-profit institution is making verbatim excerpts available for educational use. However, if the decision stands, it will lend support to expanded use of content by non-profit institutions without requiring a license.

The decision is concerning for its broad treatment of the market effect of such excerpts. The fourth factor in determining fair use is the effect of the use upon the potential market. The appellate court directed that if the use of excerpts substantially damaged the market for the work such that it would impair the incentive to publish it, the fourth factor should weigh in favor of infringement. However, the original trial court exceeded the appellate court's direction in defining a standard that would be extremely difficult for any publisher to meet. A silver lining may be that the court's broad treatment of market impact could serve

as a reasonable basis for subsequent appeal.

Publisher Action

For now, publishers (especially academic publishers) that license content to libraries and universities should continue to develop existing relationships. Institutions that currently pay licensing fees may be less likely to cease payment for materials already in use and cite this case as support. If your organization uses the Copyright Clearance Center (CCC) for academic licensing, ensure that it makes as many titles available as possible to support a robust licensing program; this will support the value of the licensing market affected by these types of excerpts. While the case applies specifically to non-profit educational institutions, it is also worth being vigilant about use by non-profit ministries and similar organizations.

Related Note: On April 15 the U.S. Supreme Court refused to hear the Authors Guild's appeal of the Google Books fair use opinion. The denial brings the case to its conclusion after a decade of litigation and protects Google's unauthorized scanning of copyright works for the purpose of creating a searchable index. For more, please see the [October 2015 ECPA Legal Update](#).



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