

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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Author Sues for Higher Ebook Royalty Under License Provision; Supreme Court Punts on Religious Liberty

By Craig Gipson and Brian Flagler

Is an ebook transaction a sale or a license? And how does that affect author royalties? A class action lawsuit filed in New York on May 19 may finally provide some guidance on some of digital publishing's most pressing legal questions. The author who filed suit claims Simon & Schuster underpaid him and other authors on "sales" of their ebooks. According to the suit, the publisher paid its authors a royalty at the rate corresponding to a "sale" of the ebook when each ebook transaction should have entitled the authors to income as a subsidiary rights license—a significantly higher percentage.

The claim is similar to a music industry lawsuit decided in 2010. [1] Rap artist Eminem's management company sued his record label, claiming digital downloads of Eminem's songs triggered the royalty rate for master copy licenses, which was 50 percent. The record label had been paying the artist a royalty based on record sales, which ranged from 12 to 20 percent. A federal appellate court ruled that the license provision applied and the label owed Eminem a 50 percent royalty on past and future digital downloads.

Many publishers have already taken steps to ensure that their publishing agreements specify an electronic royalty rate regardless of the nature of the transaction. But for older publishing agreements and agreements that have not been updated, this case could impact the royalty rate authors receive for electronic "sales."

As a class action, the case against Simon & Schuster could involve the individual contracts of hundreds of authors. Its outcome may hinge on very specific contractual language. [2] Whatever the result, ECPA publishers should examine their own publishing agreements to avoid ambiguous royalty provisions or provisions that do not account for electronic transactions in all forms. Doing so can minimize the risk of a potential increase in owed royalties. Options exist to address past publishing agreements but publishers should at least update their publishing agreement template to minimize the royalty risk for future projects.

The case has the potential to draw the interest of author groups and agents. Flagler Law Group will track its progress as it moves through the court system and as similar cases arise.

Religious Liberty Decision

A divided Supreme Court awarded a partial victory to religious liberty advocates arguing the government over-reached with certain healthcare requirements. [3] In 2011 the U.S. Department of Health and Human Services issued regulations requiring that all

contraceptives approved by the Food and Drug Administration be included in employee health plans. A number of religious universities, schools, social-services agencies, and ministries responded by filing suit. After conflicting federal appellate decisions, the Supreme Court took up the case and handed down an ambiguous but generally positive decision.

For non-profit religious organizations, the key takeaway from the opinion is that the Court would not accept the government's efforts to define what violates the objectors' religious liberty rights. While the court refrained from explicitly ruling on the merits of the case, it ordered federal appellate courts to find a way to "accommodate petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans receive full and equal health coverage, including contraceptive coverage." Essentially, the Court determined that there should be a way for the government to achieve its objective while accommodating those with religious objections.

In conjunction with the *Hobby Lobby* decision, this ruling continues to support the premise that the law will accommodate religious objections of conscience except in rare circumstances. Flagler Law Group will continue to follow this case as it is implemented by lower courts.

[1] *F.B.T. Productions, LLC, et al. v. Aftermath Records*, 621 F.3d 958 (9th Cir. 2010).

[2] There may be a procedural deficiency in the lawsuit that prevents it from moving forward but it is likely to be refiled once the proper parties are identified.

[3] *Zubik v. Burwell*, 578 U.S. ____ (2016)



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This update is provided as an informational service of ECPA to its members and does not serve as, and should not be understood to provide, legal advice. Please contact [Brian Flagler](#) or your attorney if you would like to discuss application of this update to the specific circumstances of your publishing organization.

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