

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.

(541) 549-8401
brian@flaglerlawgroup.com

ECPA PUBLISHERS LEGAL HOTLINE:

For new ECPA members and smaller ECPA houses that do not currently have access to experienced publishing counsel, ECPA offers the ECPA Publishers Legal Hotline. In partnership with Flagler Law Group, the Hotline is available to assist these members as they establish publishing procedures, navigate rights issues, and encounter other questions within the Scope of Service. Subscribers may pose questions to publishing counsel by telephone or email and receive the Hotline discount: Flagler Law Group makes up to five (5) hours of its publishing attorneys' time available to each eligible subscriber at 30 percent off of their regular rates. **Visit the ECPA.org website for more information.**

June 2014

Court Upholds Digital Scanning of Books for Database

By Craig Gipson and Brian Flagler

The Authors Guild continues to fight but the argument over electronically scanning copyrighted works for archival purposes may be all but over. In a case similar to the Google Books decision [[Nov. 2013 ECPA Publishers Legal Update](#)], a federal appellate court influential in copyright matters ruled that the fair use doctrine protected HaithiTrust's efforts to create a searchable full-text database of works in copyright.

The HaithiTrust is a research library collective from several universities. In 2008, the libraries agreed to allow Google to electronically scan the books in their collections, resulting in a massive repository of books capable of being indexed and searched. In 2011 a group of authors and The Authors Guild sued the HaithiTrust, claiming its unauthorized scans constituted copyright infringement. A year later, a federal district court ruled in favor of HaithiTrust [[Oct. 2012 ECPA Publishers Legal Update](#)].

The appellate court agreed with earlier court decisions that the creation of digital databases was "a quintessentially transformative use" that, in the words of the district court, was "an invaluable contribution to the progress of science and cultivation of the arts." The Authors Guild argued that the use was not transformative, but instead it jeopardized any market authors may have to license their works for digital search. The court dismissed the argument as a misunderstanding of fair use: as a "transformative use," the court discounted any claim of potential economic harm to the copyright owners because a transformative use does not serve as a substitute for the original. And only when the use is a substitute for the original, the court found, will it consider such economic harm. This precedent is a concerning development for publishers seeking to protect future digital licensing markets for their works. The court also seemed to give weight to the database's ability to make such works available to the print disabled and to digitally preserve so many works.

The line of cases such as Google Books and HaithiTrust only apply in instances when the unauthorized scans are used to create a searchable database. It is unclear whether such a database may display "snippets" of the work in response to search queries (Google's commercial project does so; the HaithiTrust's educational project does not). But in any case, the databases do not display the entire text of the work such that it may be read in its entirety. The U.S. Supreme Court precedent in *New York Times v. Tasini* still stands: publishing organizations and database providers may not include the full-text of a

work for display electronically if they have not acquired the rights to do so.

The Authors Guild has appealed the similar Google Books decision, but unless the court distinguishes Google's commercial scanning from the nonprofit purposes of HaithiTrust's research library, it looks to be a losing battle.



www.ecpa.org
info@ecpa.org

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.

For more information about ECPA programs, contact us at 480-966-3998 or consult our website at www.ecpa.org. ECPA members may subscribe to Legal Updates by contacting stoomb@ecpa.org.

To unsubscribe, please [click here](#).

Having trouble reading it? [Read it online](#).