

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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Court Finds Google Books Project Protected by Fair Use

By Craig Gipson and Brian Flagler

More than 30 million books electronically scanned. Eight years of litigation. Millions of dollars in legal fees. And finally a federal district court has reached a decision: Google's massive book-scanning project is legal -- protected under copyright law's fair use provision. As one of the most important fair use decisions in recent history, the case could have long-lasting effects for rights owners as well as creators of research databases.

It's Been a Long Time...What Was the Case About?

The Google Books case began in 2004 as a lawsuit brought by the Authors Guild and a handful of individual authors. The suit challenged Google's efforts to scan virtually every book it could get its hands on, from university libraries to the Library of Congress, with the goal of creating a massive indexed database of content. In doing so, Google electronically reproduced books still protected by copyright without first obtaining permission from rights owners. Each instance of unauthorized copying, the Authors Guild claimed, constituted copyright infringement. See [October 2012 ECPA Legal Update](#) for further background on this case and the related suit brought by publishers.

What Did the Court Decide?

The court essentially agreed with Google's defense that fair use protected its large-scale copying effort. In examining the legal factors to determine fair use, the court found Google's indexed database to be "highly transformative," noting it "has become an essential research tool" promoting text-mining research, expanding access to books, preserving books, and giving them new life.

Additionally the court found that Google's use does not supersede or supplant the works themselves as it is "not a tool to be used to read books." While Google scans whole books, according to the court, it does not make them available in their entirety. A search query yields only a relevant "snippet" from a book; a "snippet" being one-eighth of a page. At least one snippet on each page is omitted from search results and one page out of every ten is likewise left out.

The court summarily dismissed the Authors Guild objection that multiple searches may be sufficient to access an entire work through snippets: "[it is unlikely] that someone would take the time and energy to input countless searches to try and get enough snippets to comprise an entire book." Strangely, the court also seemed to justify its response to the Authors Guild concern by noting that an individual

would already have to possess a copy of the book in order to piece snippets together in a coherent fashion.

What Does The Case Mean for the Future?

First, the case is not final. Authors Guild Executive Director Paul Aiken has already stated that his organization intends to appeal the decision.[1] And an appeal could have its merits. Under the court's reasoning, the fair use of Google's indexing function would apply to all copyrighted works, not just books. Entertainment attorney Aaron Moss suspects the result may have been different if the case involved an indexed database containing full versions of every movie, television show, and music album ever produced.[2] If interests in other media are threatened, powerful organizations like the Recording Industry Association of America or Motion Picture Association of America could throw their considerable resources behind an appeal.

However, with the 2012 HathiTrust decision (which is also described in the [October 12, 2012 Update](#)) and Google's victory at the district court level, if there is any momentum in these types of cases, it favors the organizations compiling digital databases. And more indexed databases could be on the way. As Paul Alan Levy of Public Citizen noted, the private settlement almost reached by the parties in 2011 would only have applied to Google; this opinion applies to any organization scanning copyrighted works for a similar purpose, and therefore may embolden the creation of other such databases.[3]

[1] Round One to Google: Judge Chin Finds Mass Book Digitization a Fair Use. Guild Plans Appeal, *The Authors Guild*, <http://www.authorsguild.org/general/round-one-to-google-judge-chin-finds-mass-book-digitization-a-fair-use-guild-plans-appeal/> (November 14, 2013).

[2] Aaron Moss, How does the recent Google Books "fair use" decision impact owners of music, video, and other non-book content? *JDSUPRA Law News*, <http://www.jdsupra.com/legalnews/how-does-the-recent-google-books-fair-u-66177/> (November 20, 2013).

[3] Joe Mullin, Google Books ruled legal in massive win for fair use, *ArtsTechia*, <http://arstechnica.com/tech-policy/2013/11/google-books-ruled-legal-in-massive-win-for-fair-use/> (November 14, 2013).



www.ecpa.org
info@ecpa.org

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