Cracking the code

Random House's lawyer Ian Kirby of Arnold & Porter reflects on the recent Da Vinci Code copyright litigation

The case

(1) Michael Baigent and (2) Richard Leigh v The Random House Group Ltd
UK High Court, Chancery Division
7 April 2006

The Claimants, Baigent and Leigh, alleged that Dan Brown's novel The Da Vinci Code (DVC) infringed their copyright in the book The Holy Blood and the Holy Grail (HBHG)[1]. The defendant was The Random House Group Limited, coincidentally the entity responsible for publication of both HBHG and DVC in the UK. Dan Brown was not a party, but effectively he was also on trial.

HBHG is a work of non-fiction or, as the Claimants put it, "historical conjecture". It was very successful when first published in 1982, generating controversy over suggestions that Jesus survived the Crucifixion, was married to Mary Magdalene, and founded a bloodline which continues to the present day, protected by a mysterious secret society called the Priory of Sion. The ideas in the book inspired a number of authors, including Picknett & Prince, Umberto Eco, and of course Brown.

Brown read about some of these ideas in several books, including HBHG. He then created his blockbuster novel. As well as developing some of the ideas common to HBHG, DVC wove into the plot of a thriller references to art, codes, puzzles, symbology, goddess worship, the history of the Bible, nature's grand design and evidence for the existence of God. Whilst writing the book Brown used HBHG as one of many sources, and his wife made some notes from the book. Later in the writing process a character, Leigh Teabing, was introduced, whose name was an obvious anagram of Baigent and Leigh's names.

DVC quickly became a bestseller, and like HBHG before it generated considerable controversy. The Claimants observed the growing success of the book, and also noted third party comment which spoke of the similarities between the two books[2]. A lawyers' letter was sent and, shortly after the announcement that DVC was to be made into a film, legal proceedings followed.

The Claimants alleged that their book had a "Central Theme" which by the time of trial could be split into 15 points[3], a few of which were: Jesus was a Jew, he was married to Mary Magdalene, they had a child and the bloodline survives to this day, protected by a secret society called the Priory of Sion. The Claimants did not claim textual infringement; rather, that Brown had copied the 'architecture' of HBHG, which they sought to demonstrate via the reproduction in DVC of the Central Theme.

From the outset the Claimants sought to rely on what they said was a parallel case, in which the court held that copyright infringement had occurred[4]. The facts of that case shared some superficial similarities with the facts under consideration – a novelist wrote a book using a non-fiction source. However, the similarities were only skin deep, and unable to withstand any serious scrutiny: in Ravenscroft the novelist used one source, Brown used many; in Ravenscroft there were over 50 incidents of significant language copying, in this case the Claimants did not rely on any language copying, save for a few fragments of sentences which, they said, demonstrated only that Brown had used HBHG as a source (something he admitted). The Defendant's argument was that Ravenscroft supported its position.

Drawing the line

It is sometimes said that in English law there is no copyright in an idea but only in the expression of an idea – a misleading sound bite which has gained fame because of repeated use, not because it is an accurate summary of the law.

Any literary work contains a combination of ideas, thoughts, arguments and information. A translation of a book infringes copyright in the original text. Therefore, language alone cannot be the limit of the protection. It follows that what can be protected is the collection of ideas, thoughts and information. It is for the judges to decide where one draws the line between concepts that are too abstract and those which have sufficient detail so as to be capable of copyright protection.

A detailed collection of ideas, or pattern of incidents, or compilation of information which forms the basis of a work of fact or fiction, will attract copyright protection. This collection or compilation can be thought of as the structure, or skeleton of a book; the flesh being the actual language used (in this case the Claimants' referred to the "architecture" of HBHG). English copyright law says that copyright is infringed if: (a) there has been actual copying; and (b) a "substantial part" of the work has been taken. Continuing the analogy, copyright can be infringed if the skeleton has been taken. What amounts to a "substantial part" is a question of fact and degree and will differ from case to case.

At the heart of this case was the search for the definitive answer to the question: how far can ideas be protected? This question was being posed in the context of a non-textual infringement case which concerned two books, one a work of non-fiction and one a novel. Of course, it was not possible for the judge to give a definite answer. Instead, he referred to the well known authorities (e.g. Harman v. Osborne (1967), Ravenscroft v. Herbert (1980), and Designers Guild (2001)). Noting that the parties had not challenged the legal principles in those cases, the judge confirmed that whilst copyright protection is not confined to the

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literal text in a literary work, at the other end of the spectrum, it will not protect against the borrowing of an idea. In cases such as these, he averred that the line to be drawn is one which will enable "a fair balance to be struck between protecting the rights of the author and allowing literary development". The judge, in particular, endorsed arguments put forward in Ravenscroft which he thought had been accepted by the judge in that case:

> *"First it seems to me that it is accepted that an author has no copyright in his facts nor in his ideas but only in the original expression of such facts and ideas. …where a book is intended to be read as a factual historical event and that the Defendant accepts it as fact and did no more than repeat certain of those facts the [Claimant] cannot claim a monopoly in those historical facts. It is accordingly perfectly legitimate for another person to contrive a novel based on those facts as otherwise a Claimant would have a monopoly of the facts."*

Later in his judgment the judge said that:

> *"It would be quite wrong if fictional writers were to have their writings pored over in the way DVC has been pored over in this case by authors of pretend historical books, to make an allegation of infringement of copyright. I accept that if that was allowed to happen it would have a serious impact on writing."*

Of course, at some point what is taken will exceed general ideas and historical facts and move closer to a coherent and definable whole, even if that whole is a skeleton or structure as opposed to every word of the literary work. The judge next considered whether the alleged Central Theme was a collection of concepts too abstract to attract protection, or whether the alleged themes had sufficient detail so as to be capable of copyright protection. As part of the assessment of the level of abstraction the judge was clear that there must be certainty in the subject matter of the monopoly given by copyright in order to avoid injustice to the rest of the world; if it were otherwise, how would an observer know what could be freely taken?

On this point, the judge thought that the Claimants had tried to monopolise themes too general to be capable of protection by copyright law. He thought the so-called Central Themes were developed purely as a tool for the litigation, working back from DVC:

> *"It seems to me (and this is what the Defendants submit) that the Central Theme is not a genuine Central Theme of HBHG and I do not accept that the Claimants genuinely believe it is as such. In my view it is an artificial contrivance designed to create an illusion of a Central Theme for the purposes of alleging infringement of a substantial part of HBHG."*

In his view, HBHG had no Central Theme. Moreover, as the Claimants were not claiming literal copying of the text, copyright infringement could only be found if the structure and architecture of HBHG had been copied, and it had not. In fact, no such architecture could be found in HBHG:

> *"[The Claimants] acknowledged…that ideas and facts of themselves cannot be protected but the architecture or structure or way in which they are presented can be. It is therefore not enough to point to ideas or facts that exist in the Central Themes that are to be found in HBHG and DVC. It must be shown architecture or structure is substantially copied. The only structure that has been identified in this case is the presentation of the 15 Themes in a chronological order. A single textual theme has no structure; it is just a piece of text…."*

Accordingly, the claim failed at this preliminary stage: the Central Theme did not exist and so could not possibly be protected by copyright; the matters that were alleged to have been taken were at a general level of abstraction and the ideas and facts were without any of the surrounding architecture. In reaching this conclusion, the judge had clearly been influenced by the fact that the Claimants' case had chopped and changed and, even at the close of the trial, remained hard to discern:

> *"The fact that the Claimants had difficulty formulating their own Central Theme which was allegedly always in their minds when they wrote HBHG is incredible."*

He rejected a submission from the Claimants' counsel that the evidence of Baigent was of no assistance whatsoever as it was a matter for the Court to decide whether or not there was a Central Theme:

> *"Faced with the patent inadequacy of Mr Baigent's evidence the Claimants … retreated to the stance that his evidence on the Central Themes was irrelevant anyway as it was a matter for the Court to decide as to whether or not there was a Central Theme.…I am entitled to see whether or not the Claimants' evidence about their Central Theme is credible. At the end of the day if they are unable to say in a coherent way what their Central Theme is that is strongly supportive of the proposition that there is no such Central Theme as alleged."*

Creative freedom

Every advance in science, art and any creative act is inspired by past accomplishments. Nothing comes from nothing. "Public policy demands that general ideas and principles, even if new - which they seldom are - should be in the public domain. Were it otherwise, creativity in literature, drama, music and the fine arts would be impossible, for there can hardly be a work in existence which does not owe something to what has gone before."[5] This case confirms that general principle, and puts it in the context of the creative industries of books and films[6]. It should result in increased certainty in the publishing world, in addition to preventing a welter of spurious claims (had the case gone the other way). It has also more clearly defined the parameters within which one may use in a novel facts and ideas contained in non-fiction sources.

Notes

1 A third author, Henry Lincoln, chose not to take part in the litigation.
2 As to the relevance of third party comment, see *Poznanski v. London Film Productions Ltd* (1937) MacG.Cop.Cas 107 at 110. It is no basis for an action.
3 The number went up and down in the run up to trial.
4 *Ravenscroft v. Herbert* [1980] RPC 193
5 Laddie, Prescott & Vitoria, The Modern Law of Copyright, Sweet & Maxwell.
6 If the Claimants had succeeded, their next target would surely have been the film-makers.

About the author

Ian Kirby is a partner in Arnold & Porter's London office, specialising in intellectual property litigation and dispute resolution. He has significant trial experience both in the appeals courts and in the specialist IP sections of the High Court and the Patents County Court.

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