"HOLY COPYRIGHT, HOLY GRAIL – the Theme behind the Judgment behind the Code"

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The protection of intellectual property rights including copyright has recently received further judicial interpretation if not divine intervention (as the plaintiffs may have hoped for) at the hands of the English High Court. Many worldwide readers, myself included, have enjoyed reading the novel, *The Da Vinci Code (DVC)* and eagerly wait the May release of the film version featuring the Hollywood star, Tom Hanks, which is based on the best seller. However, we may have been forced to hold onto our chalices had the recent London High Court challenge by the authors of another book, a non-fiction work *Holy Blood, Holy Grail* (HBHG), written by Michael Baigent and Richard Leigh ("Claimants") in the case of *Baigent & Anor -v- Random House Group Ltd (The Da Vinci Code)* [2006] EWHC been successful. These two authors claimed a breach of copyright on the basis that Dan Brown, the author of DVC plagiarised the "architectural edifice of ideas" or the complex structure of their book and put it into DVC. The case which attracted world-wide media attention has now been heard before the High Court in London and the parties have received the decision by Justice Peter Smith who presided over three weeks' of Hearings to deliver his judgment. While the action was brought against Random House Ltd (which is the publisher for both parties) in reality the case was between the Claimants and Brown. In relation to the law of copyright as it is understood in both England and to an extent in Australia, this decision essentially maintains the *status quo* but a consideration of the judgment especially in light of a 'non-textual copyright infringement' case raises a number of salient issues the least of which illustrates that commercial litigation may bear strategic fruits other than just having one's claim upheld.

The proceedings – the Central Theme

At the heart of the English proceedings was the claim by the authors of HBHG that Dan Brown had, in effect, stolen their idea for the essential theme ("Central Theme") to DVC by alleging in this pseudo-history a claim that Jesus married Mary Magdalene and had descendants and this is the blood line which forms the Holy Grail. The Claimaints submitted that the Central Theme of HBHG contained 15 Original Themes (which are set in a table at the end of the judgment and which are attached as an appendix at the end of this article). In the claim a number of Original Themes were enumerated which were alleged by the Claimaints to "all work together to form the architecture of our book". It was further alleged that these themes were not numerically significant but were inter-related in different ways.

His Honour noted that the Central Theme as drafted was a construct for the purposes of the litigation only but nevertheless it formed the basis of the primary case for the Claimaints being that the Central Theme is to be found in HBHG; that it was 'the bridge' between HBHG and DVC and that an extraordinary amount of skill and effort had been expended by the Claimants to establish in writing HBHG and the Central Theme. In short, the Claimants central contention was that there was little left to HBHG without the Central Theme and as DVC reduces the Central Theme, its reproduction was therefore an infringement of the copyright in the existing HBHG.

Non-textual infringement case

His Honour concluded that the case before him was based on an alleged copyright infringement action involving the copying of something other than the text. Further, that the Central Theme acted as the 'bridge' between the two works. While the Claimants asserted that the test of infringement was a comparison of what was expressed in DVC compared to with that which was expressed in HBHG in light of the Central Theme, his Honour went further. In his view the Central Theme must first be found in HBHG and it must be "that that which must be copied and found in DVC" (at p128). Brown's position was that while he admitted that he made use of HBHG at some stage in the writing of DVC, he did not copy a substantial part of HBHG nor did he copy the Central Theme as identified and submitted by the Claimants.

In his defence, Brown claimed that HBHG was not integral to his work which incorporated research from 38 other books and countless documents. On this basis, Brown maintained that while he consulted HBHG he only did so at the end of writing his book and while acknowledging its influence in the DVC he described it as being "incidental to his work". From a more technical legal approach, his defence consisted of the following propositions: it was denied that there was any Central Theme to HBHG; if there was it cannot be readily found or if there is any Central Theme as was alleged or even whether HBHG has any Central Theme at all. On this point, his Honour observed that the Central Theme as set out in the Claimaints pleadings did not include all the themes contained in DVC but rather represented more or less a selective approach by the Claimants to suit their claim against Brown. The Defendants went further contending that the Central Theme was

> "… an artificial creation dovetailed to what can be found in DVC. Thus it is submitted that large parts of essential elements to HBHG are jettisoned from the Central Theme because they do not appear in the DVC and are thus inconvenient for the purpose of present play." (p 187)

Brown further submitted his Synopsis (in January 2001) of DVC and gave evidence that he had not seen HBHG prior to that submission.

Legal Matters

His Honour then went on to consider the legal matters raised by the case. He considered the requirements under the *Copyright Design & Patents Act 1988* ("CDPA") in relation to the statutory regime governing copyright protection. His Honour considered the requirements under the CDPA for the works by the Claimants be original. In reference to a case involving *Hawkins -v- Hyperion Records Limited (2005)* 1 WLR 3281 he noted that a work need only be original in a limited sense that the author originated it by his own efforts rather than slavishly copying it from the work produced from the efforts of another person. On this basis, his Honour concluded that originality for the purposes of the CDPA does not equate to novelty but that it does relate to the relevant form of expression. However, the law does not prevent the use of the information, thoughts or emotions expressed in the copyright work, nor does it prevent another person from coincidentally creating a similar work by his own independent effort.

His Honour then considered some of the relevant case law which related to the present case before the Court. He identified the most important case in the area of the present litigation *Ravenscoft -v- Herbert [1980]* RPC 193. This was a claim by an author of a non-fiction book called *The Spear Of Destiny* against the First Defendant, the well known author, James Herbert, for writing a novel entitled *The Spear*. The central feature of both books related to a spear head which forms part of the Hapsburg Treasure located in Vienna. This is described as The Holy Lance which is venerated on the grounds that it is allegedly the lance with which the side of Jesus was pierced at the crucifixion. On this basis, the spear has been carried into important battles and is seen as an emblem and many victories have been attributed to its power.

In *Ravenscroft* the plaintiff alleged that Mr Herbert made extensive use of the plaintiff's non-fictional work in order to paint a back-cloth of apparent truth for his own fictional story and the basis of which was narrated. In this case it was clear that there were numerous examples of significant textual copying (up to 50). Further, the Judge concluded that Mr Herbert had the Plaintiff's book in front of him when he was writing his own book. In that case the first question to be addressed was whether it had been, in fact, copied and secondly, whether the copying had been substantial.

While the *Ravenscoft* decision went in favour of the Plaintiff, his Honour in the HBHG case before him concluded that *"merely because an author of the work of non-fiction successfully sued an author of fiction based on his non-fiction book provides me with no assistance*

whatsoever" (p 167). His Honour further indicated that both the Claimant and the Defendant drew on passages from the Judgment from the *Ravenscoft* decision to support their respective arguments in the present case before him. His Honour concluded that first it was accepted that an author has no copyright in facts nor in his idea, but only in the original expression of such facts or ideas; second, the purpose of copyright law is to protect the skills and labour employed by the Plaintiff in the protection of his or her work; and third, in the case of works that are not original in the proper sense of the term but taken from compilations from materials which are open to all, the fact that one person produces such a work does not take away from anyone else the right to produce another work of the same kind and in so doing, use all the materials available to him or her. The point that his Honour emphasised is that an author cannot avail himself of the labours of another author.

In relation to the architecture approach, his Honour went further and stated that while facts and themes and ideas cannot be protected, the way in which those facts, themes and ideas are put together (in other words, the 'architecture argument') can be. As a result it follows that the Claimaints had the burden of proof to show that it was the putting together of facts, themes and ideas by them as a result of their efforts and it was that which Mr Brown copied in relation to the DVC. Plus, it is interesting to note that, his Honour did not reject an argument in favour of protecting copyright based on the 'architecture' of a book but referring to the facts before him in the case involving HBHG and DVC the particular argument in relation to the alleged architecture (in reference no doubt to the Central Theme) did not succeed.

Following a further consideration of the application of legal principles to the facts and some comments in relation to the absence of Brown's wife Blythe Brown from the trial in relation to giving what would have been, in his Honour's view, important evidence; the deliberations of his Honour resonated in relation to his analysis and conclusions made in relation to the Central Theme as alleged by the Claimaints. It was his view that the Central Theme was not a genuine central theme of HBHG and he did not accept that the Claimaints should genuinely believe it as such. In his view it was an artificial contrivance designed to create an illusion of a central theme for the purposes of lending infringement of a substantial part of HBHG. His Honour then gave his reasons for rejecting the central theme argument as proposed by HBHG.

His Honour surmised that if HBHG did have a central theme it was the one averted to by Mr Leigh, namely that the merger of the Merovingian blood line with the royal blood line of Mary Magdalene. On this basis, his Honour suggested it was self-evident that an idea of such a

general level of abstraction was incapable of protection under the CDPA. Nor in his view was there any architecture or design in HBHG if that were the theme which can be said to have been appropriated.

Finally, it appeared that His Honour's conclusions in relation to the central theme of the book were inconsistent with the Central Theme expressed, as such by the Claimants, in relation to HBHG in the proceedings before him. His Honour then went through the 15 Original Themes one by one and made his comments in relation to each of them.

Litigation outcomes – judgment -v- commercial

Published in 1982, HBHG was a best seller, but its sales of 2,000,000 copies are nowhere near the colossal success that DVC has enjoyed with sales presently tracking at over 40,000,000 copies worldwide. In the event that Baigent and Leigh were successful, there would have been serious implications and far reaching consequences for fiction writers who would be forced to re-assess the practice of their age old art, no to mention that they may also be able to delay the release of the Hanks film while a deal was done in relation to royalties and rights.

It may have been approaching Orwellian dimensions for any Court in any land to assert that there is copyright protection for an idea prior to it being expressed in a material form. It was the preliminary view of this author (and many others) that success for the Claimaints appeared unlikely, at least in their legal battle, on the basis that there was considerable legal difficulty in the enforcement of the protection of general ideas despite any arguments in favour of protecting the 'architecture' of a work.

It is interesting to note that on no less than two occasions in his judgment his Honour noted that it may have been a testament to the 'cynicism of our times' that there were suggestions that the action was nothing more than a collaborative exercise designed to maximise publicity for both books. There is no doubt that book sales of both books have soared as a result of the Trial. In the case of HBHG, it is said that there has been a ten fold increase in the sale of books. Given that the Claimaints were faced with legal costs of £1,000,000.00, in light of the publicity being generated not only by the trial but the forthcoming release of the film; maybe it is not out of the question to surmise that these legal costs may have been but a small price to pay in light of the renewed focus and vigorous debate which has surrounded both texts. If this case is perhaps also illustrative of a more strategic approach to copyright litigation where it may be more commercially beneficial for the Claimaints in terms of re-activating curiosity in their work and as a result an increase in the sales of the book, HBHG –

then maybe some commentators (this author included) have already joined the inner circle of cynical copyright clerics.

Given the dimensions of this case, perhaps the final word perhaps rests with the judge, His Honour Justice Peter Smith. In an interesting twist to the final tale, the Judge has admitted that he has inserted his own 'code' into the Judgment by using a series of apostrophes and punctuation marks. He has, in effect, created a code within the code. There are a number of legal experts in the United Kingdom poring over the judgment trying to crack His Honour's very own code and while the forthcoming film based on DVC will no doubt generate further controversy it may well be in other areas apart from the law of copyright.

Appendix

Central Theme Points (1-15)

1. Jesus was of royal blood, with a legitimate claim to the throne of Palestine

2. Like any devout Jew of the time, and especially like a Rabbi and any royal or aristocratic claimant, he would have been married.

3. As expected of any Jew at the time, he would have children.

4. At some time after the crucifixion, Jesus' wife, the figure known as Mary Magdalene, fled the Holy Land and found refuge in one of many Judaic communities then scattered around the south of France. When she fled the Holy Land, the Magdalene might have been pregnant with Jesus' offspring, or such offspring might already have been born and brought with her. We concluded from studying the Grail Romances and early manuscripts that Mary Magdalene fled the Holy Land with the Sangraal and that by turning Sangraal into 'Sang Raal' or 'Sang Réal' we suggested that Mary Magdalene fled with the royal blood.

5. We considered what the Holy Grail was, whether the Holy Grail was a cup or whether the Grail was in some way related to Mary Magdalene and the Sang Real. We concluded that the Grail would have been at least two things simultaneously. On the one hand it would have been Jesus's bloodline and descendants and it would have been quite literally the vessel that contained Jesus's blood. In other words it would have been the womb of the Magdalene and by extension the Magdalene herself.

6. In a Judaic community in the South of France, the bloodline of Jesus and the Magdalene would have been perpetuated for some five centuries - not a particularly long time, so far as royal and aristocratic blood lines are concerned.

7. Towards the end of the 5th century, Jesus' bloodline intermarried with that of the royal line of the Franks. From this union, there issued the Merovingian dynasty.

8. In the meantime, the Roman Empire in the fourth century AD, under the auspices of Constantine, had adopted "Pauline" Christianity as its officially sanctioned and tolerated form of Christianity. This was done as a matter of convenience to foster unity; and once "Pauline" Christianity became the official orthodoxy, all other forms of Christianity became, by definition, heresies. By the end of the century Christianity had become the official religion of the Roman Empire. The Church's dogmatic religious stance thus benefited from the support of secular authority.

9. When the Merovingian dynasty grew weaker under Clovis' successors, the Church reneged on its pact and colluded in the assassination of Dagobert II, last of the Merovingian rulers. Although Dagobert died and the Merovingians were deposed, Dagobert's son, Sigisbert, survived and perpetuated the Merovingian bloodline through a number of noble houses. Towards the end of the 11th century, the Merovingian blood line emerged on the central stage of history in the person of Godfroi de Bouillon, Duke of Lorraine.

10. When Godfroi embarked on the first crusade in 1099, he was, in effect seeking to reclaim his birthright and heritage, the throne of Palestine to which his ancestors had possessed a claim a thousand years before.

11. Godfroi surrounded himself with a circle of counsellors, who were endowed with the Abbey situated on Mount Sion in Jerusalem and became known as the Ordre de Sion, or, subsequently, the Prieuré de Sion (Priory of Sion).

12. The Ordre or Prieuré de Sion created the Knights Templar as their administrative and executive arm.

13. In the mid-12th century, members of the Ordre de Sion established themselves in France, from where they subsequently spread out to own properties across the whole of Europe. When the Holy Land was lost, France became the Prieuré's primary base and headquarters.

14. The Prieuré continued to act as protectors and custodians of the Merovingian bloodline, the "blood royal" or "sang réal", the so-called "Holy Grail".

15. During its early history - until the 14th century - the Grand Masters of the Prieuré were drawn from a network of interlinked families, all of whom could claim Merovingian descent. From the 14th century on, the Prieuré (according to its purported statutes, which Brown would appear not to have seen) would, for complicated reasons, move outside the family. Grand Masters would then be, on occasion, illustrious names - Leonardo, for example, Botticelli, Sir Isaac Newton, Victor Hugo, Debussy, Cocteau. Sometimes, however, the names would be rather more obscure, like Charles Nodier. In any case, all "outsiders" listed as Grand Masters still have close connections with the network of families claiming Merovingian descent.