On Her Majesty's copyright

David Hooper is alarmed by the Government's new legal weapon which threatens the freedom of speech

A BOOK by ex-SAS soldier Andy McNab, Immediate Action, will be published next month, four weeks late. Its sales are likely to eclipse the one million plus for his previous book, Bravo Two Zero, thanks to publicity over the Ministry of Defence's ill-considered attempts this summer to stop publication.

On August 2, the MOD went to the High Court to get an *ex parte* injunction halting publication. *Ex parte* means they acted without warning McNab or his publishers, Transworld, though they had been in contact with them for weeks. A month later, after McNab produced a barrage of evidence suggesting not just that MOD was economical with the truth but had disregarded the *actualité*, the MOD decided the book could, after all, be published with minor changes without grave damage to national security.

This legal own goal has highlighted a potential threat to freedom of speech in the abuse of the D-notice procedure — the system under which a committee headed by a high-ranking officer issues guidance on whether publication of information threatens national security. It shows how arbitrary is the decision by the MOD as to which books go through on the nod, and which are taken to court.

The case has also exposed a potentially more sinister threat to freedom of speech. There was a claim — dropped in this case but going ahead in another — that the Crown owned the copyright on Immediate Action. The MOD tried not just to kill the golden goose, but to kill it at birth, *pour décourager les auteurs*. This could mean that the Crown receives not just the profits from a book it pursues, but every penny it earns gross.

The first scandal of the McNab case is that it was ever brought at all. Unlike many SAS books, Immediate Action had been voluntarily submitted to the D-notice committee to agree changes the MOD might reasonably request. McNab had done this with Bravo Two Zero, and had made changes to avoid damage to SAS operations. Immediate Action is about the experience of being in the SAS; it does not name names, and McNab took care not to reveal important details which might jeopardise future operations. He had told the MOD about it in April, and sent it to them in June. He had expected to meet them as he had over Bravo Two Zero, but they shot off to court without notice. There is much to be said for people who have held sensitive jobs having their books vetted, and for a competent committee to be set up to do this within a fixed timetable. The issue was not whether an SAS soldier could write such a book, but whether it would damage SAS operations. That was a perfectly reasonable concern and he had no wish to damage the SAS.

But McNab's experience shows that authors and publishers cannot trust the D-notice procedure. The present system is arbitrary, chaotic and unsatisfactory. People who play by the rules may be injuncted on the basis of inadequate and unfair evidence. Authors who do not go voluntarily to the committee — such as Chris Ryan, author of The One Who Got Away, the imminent publication of which was revealed by the Sun — are in a better position because the MOD has to react very quickly before publication.

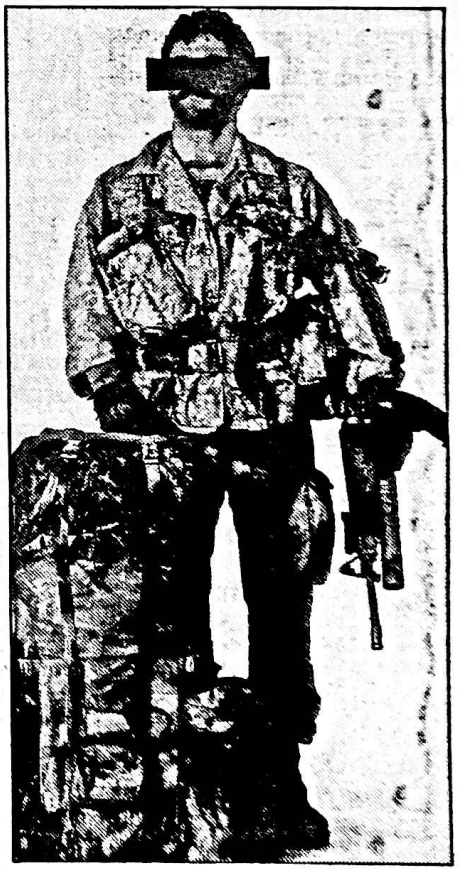
A number of such books have not been vetted at all. The Gulf war commander, Sir Peter de la Billière, declined to make 50 per cent of the changes requested for his books, Desert Storm and Looking For Trouble, which were then published without difficulty.

The origin of the claims for Crown copyright, not pursued in McNab's case, were certain comments by some of the judges hearing the litigation over Spycatcher, the memoirs of the former MI5 officer, Peter Wright. A claim of copyright has the advantages of tapping into the profits which the author and publisher may make and of controlling the use which can be made of copyright material.

The alarming concept of Crown copyright of Government information is lumbering unopposed to the court in the case of spy George Blake. This relates to the advance of £150,000 for his book No Other Choice, published in 1990. Blake is on the run from a 42-year jail sentence for his treachery and the legal aid fund understandably has shown no enthusiasm for the case. His solicitor, Benedict Birnberg, was unable to persuade the court to release any part of the £90,000 held by Blake's publishers, Jonathan Cape, to fund the defence of what is a crucial issue of freedom of speech, however distasteful the activities of the author. The events Blake describes are well over 30 years old and widely reported. The Crown may have a good argument that he should not profit from his crimes, but that is a different point.

THE highly controversial entitlement of the Crown to claim copyright in such books will therefore be uncontested, and the case will revolve on how the proceeds are to be split between Her Majesty and Jonathan Cape. The recent pronouncement by Lord Hoffman, the law lord, that freedom of speech is the trump card that always wins — and the acceptance of the principle in the Spycatcher case that even where there has been a breach of confidence by a Government official, the Government must prove it is in the public interest to stop publication — looks like being undermined. The law of copyright must not be used as a weapon to attack freedom of speech.

David Hooper is a solicitor specialising in media law who acted for Transworld in the McNab case



Andy McNab, as discreet as requested