The kamikaze case

Lawyer David Hooper assesses the fall-out from the *Da Vinci* trial

Copyright protects works that are original. The plausibility or scholarship was not an issue. Many lawyers felt that Richard Leigh and Michael Baigent's case might have had a better chance if they had asserted that their book was fiction. As it was, *Holy Blood, Holy Grail* (HBHG) started as a historical work but by the end of the trial it seems to have been downgraded to "historical conjecture". Missing from the trial was the source of much of this conjecture – the judge mentioned but did not adopt *Private Eye*'s word "tosh" – namely Pierre Plantard, self-styled descendant of Dagobert II, a Merovingian king. He would certainly have added colour to the trial, with jail sentences for anti-Semitism and anti-masonry (quite an achievement in wartime France), dishonesty and abuse of minors.

Baigent and Leigh cannot have received encouraging legal advice as to their chances of success. True, a similar claim had succeeded against James Herbert's book *The Spear* for breach of copyright of Trevor Ravenscroft's *The History of the Spear*. Herbert had produced an historical novel based on the spear said to have lanced the crucified Christ. But there the judge had found fifty instances of textual copying and ruled that Herbert had done no real research of his own. Leigh and Baigent could prove no such thing in relation to the *Da Vinci Code* (DVC). It had not helped Herbert that the judge had not cared for his book: "One must not underestimate the commercial attraction of the rubbish I have attempted to describe".

Baigent and Leigh had to prove that Brown had copied a substantial part of HBHG. Their problem was that they could not establish any significant textual copying. They had no copyright in the facts or ideas of HBHG, only in the *original expression* of such facts or ideas. Brown was entitled to produce another work of the same kind and to use all available sources. What he could *not* do was to appropriate their labour and skill in writing HBHG. The claimants, in their attempt to show that Brown had copied the way they had put together the facts, themes and ideas of HBHG were driven to argue that Brown had copied the *central theme or architecture* of HBHG. Sensibly their co-author, Henry Lincoln, wanted no part of this. The claimants were unable to establish convincingly what the fifteen or so central themes of HBHG were. The judge considered four or five of them were absent from both HBHG and DVC. He considered the central theme argument was an artificial contrivance created for the trial. If the claimants could not say in a coherent way what the central theme was, how, the judge wondered, could they claim Brown had copied it? The judge's dissection of HBHG's scholarship – without revealing the ending of DVC – was a tour de force. While he had some doubts about Brown's downplaying of his use of HBHG as a source and while he felt that Blythe Brown's absence from the trial was probably due to the fact that she had used HBHG more extensively in her researches than Dan Brown cared to admit, he was satisfied that there was no copying and that these shortcomings made no difference to the end result.

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The law therefore is as everyone thought it was. Unless you copy the means of expression of facts and ideas, you do not breach copyright. Nor do you do so, if you simply consult somebody's material and then do your own research. Had the judge decided differently, adaptations of others' works would have become distinctly perilous. The concept of unlawfully taking someone's central theme or ideas would be dangerously vague, leading to costly legal vetting for writers of historical fiction. Copyright is after all a monopoly right. The law has to strike a fair balance between protecting the rights of the author and allowing literary development.

The judge's criticism of Baigent was particularly searing. He was, as his own counsel admitted, a poor witness, but that, the judge felt, did not do justice to the inadequacy of his performance. He "exaggerated his evidence for effect". His evidence was "completely useless" and "he wriggled in the witness box". Leigh fared a little better but not much. "He wanted to fight over something and was clearly disappointed with the shortness of his cross-examination. I did not find his evidence of significant use".

The claim was roundly rejected. They must pay their own and 85% of Random House's costs – not much change from £2 million – with the first £350,000 due in May. They are unlikely to get far with an appeal, the judge having turned down their application for permission to appeal.

Why then this kamikaze litigation? The evidence of former Transworld Publisher Patrick Janson-Smith suggested that Leigh gave the impression of wanting to extract money from Brown. But, as the judge commented, such a motive would have been folly and a very dangerous exercise. It is, however, puzzling that they sued only Random House and neither Dan nor Blythe Brown. Did they perhaps hope that Random House would dip into their brimming coffers to settle? But a publishing house could not for commercial reasons settle a claim which would have destroyed the reputation of Dan Brown, casting him as a plagiarist. The judge examined the "cynical view" that the case was a publicity stunt, but the cost of such litigation would easily outweigh even the large additional sales of HBHG. The judge rejected their claim that they sued because Brown gave their work insufficient acknowledgement. They had received a genuine and handsome recognition of their work in DVC and had benefited substantially from DVC's success.

All that we know is that Baigent and Leigh made an unwise and ruinous decision to accuse Brown of plagiarism. The judge's ruling has its own literary merit, starting with "Setting the scene" and concluding with "Endgame". He could see the merit of DVC as a thriller. He did, however, comment that Doubleday's Steve Rubin's enthusiasm for the book knew no bounds. He was not sure it was that good. HBHG he felt, however, should be truly categorised as fiction.

The winners? Dan Brown; Random House, publishers of both HBHG and DVC, Henry Lincoln who receives increased royalties for HBHG but no legal bills and the film of DVC with its worldwide pre-launch free publicity – and, of course, the lawyers.