

The newsletter for the publishing sector



Contents

Obscenity in the UK	01
The Google Books settlement	02
Digital rights management	04

OBSCENITY IN THE UK

A civil servant from Newcastle has been cleared of obscene publication offences over the publication, on an erotic fantasy website, of a short story entitled *Girls (Scream) Aloud*. The prosecution of Darryn Walker, who is in his mid-thirties and lives with his parents, collapsed when the prosecution offered no evidence against him at trial.

Welcome to the Autumn issue of FairCopy. We hope you find it relevant and interesting, and welcome any feedback or suggestions for other topics you would like to see addressed in future issues.

Manches can help you get the most out of your IP through a combination of protective measures, creative contracts and intelligent enforcement. We deal with the exploitation process from the development of an idea through to its realisation and secondary use. We also handle the IT issues that are central to the media and entertainment industries in the digital age.

Mr Walker's story is about the five members of the popular band Girls Aloud and graphically imagines their abduction, sexual torture, mutilation and murder. The details are probably only of interest to the prurient. However, the unsuccessful attempted prosecution under the Obscene Publications Act ("the Act"), after it had laid dormant for nearly two decades, is of significance to the legal landscape surrounding the written word and its regulation by the state.

The Act (in fact a series of obscenity laws from the mid-nineteenth century, late 1950s and mid-1960s) was brought about to protect the public from material that would "*tend to deprave and corrupt*" its readership. It has enjoyed a high profile history, being the cause of action in the infamous prosecution of Penguin Books for the publication of *Lady Chatterley's Lover* in 1960. (This was, of course, the trial in which the chief prosecutor asked the joyously archaic question "Is it a book that you would even wish your wife or your servants to read?"). Other famous trials included the successful prosecution of *Last Exit to Brooklyn* in 1966 (for its depiction of drug use, violence, gang rape and homosexuality), the *Oz* kids' edition in 1970 (for its depiction of a pornographic Rupert the Bear cartoon strip) and *The Love that Dare Speak its Name* (a poem published in the now-defunct *Gay News* which imagined the love of a centurion for Christ at the crucifixion).

It was widely believed that the effective power of the Act had come to an end when *Inside Linda Lovelace*, an authorised biography of a pornographic filmstar, was held not be obscene in law by the High Court in 1973. Commentators were of the opinion that if this publication was not obscene then very little else would be. Prior to the charges brought against Mr Walker, the last time the Act had been wielded was in the banning of David Britton's *Lord Horror*, a novel described as founding the (mercifully rare) "Holocaust horror" genre.

The decision to prosecute Mr Walker was based on the claim that the material in question would be easily accessible to a particularly vulnerable group – young people interested in Girls Aloud. However, the defence argued that the article could only be found by searching a specific interest site that fans of the band would be unlikely to stumble upon. The defence also argued that there was no evidence that the material would "*deprave and corrupt*" and that it was written as an adult celebrity parody for a like-minded audience.

The trial of Mr Walker for his macabre erotic fantasy represents something of a departure from the state's *laissez faire* attitude towards obscene material, although it has ultimately resulted in nothing more than another example of a failed prosecution under the Act. The outcome has been welcomed by some as a

victory for free speech and criticised by others as an example of the law failing to prevent incitement to sexual violence. It will be interesting to see whether this use of the Act represents a new age of censorship of extreme material or is merely an anomalous aberration.

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THE GOOGLE BOOKS SETTLEMENT

The emergence of recorded music and radio in the early twentieth century challenged traditional copyright laws based on written music and led to collection societies as a way of resolving that challenge. The emergence of Google Books in the early twenty-first century appears to be having a similarly dramatic effect.

Google's "Library Project" has been converting into digital form the contents of significant libraries in the US and elsewhere since 2004. Over 7 million books, many of which are both under copyright and in print, have been digitised under agreements with libraries, but not authors or publishers. This contrasts with a similar project undertaken by Microsoft and the British Library, which only copied books published before 1850 (and thus clearly out of copyright).

Google has been cheered and denounced in equal measure. Its supporters cite benefits to readers, who will be able to access more books than ever before. Access to foreign language and "orphaned" works (out-of-print books whose authors cannot be found) will be expanded. Benefits are also claimed for authors and publishers, because readers can preview texts and purchase online, sales opportunities increase.

However, many argue that the market for paid-for texts might ultimately be undermined by free searches of those texts online. Copyright infringement has of course been at the heart of the resulting class-action law suit against Google.

The Litigation

In 2005, the Authors' Guild joined publishers including Wiley, Simon & Schuster and Penguin, in bringing US proceedings against Google. The rights holders sought damages, an injunction and legal fees from Google, on the basis of unlawful reproduction of public-domain works and works still under copyright. Google denied it was in breach of US copyright law. An out-of-court agreement ("the Settlement") was reached between the claimants and Google in October 2008.

The 356-page full-text Settlement is available at http://www.googlebooksettlement.com/r/view_settlement_agreement.

In summary:**Compensation**

Google will make cash payments to rights holders whose works have been digitised without permission as at 5 May 2009. Payments will range from \$60 to \$300 for a book, less for an insert (material such as tables or text from a book). A minimum of \$45mn compensation will be paid.

Book Rights Registry

A registry will be established which will pay authors for the use of their works, record authors' rights and handle requests regarding the use of works (see below). The Registry, although funded by Google (initially with \$34.5mn), is intended to be neutral and independent.

Continued Digitisation

Google will continue to digitise works covered by the Settlement and will be able to earn advertising revenues from linked web pages. Rights holders can continue to earn income from third party exploitation of digitised works as Google's rights are non-exclusive.

Two types of use for digitised works are provided for, with revenues divided 63%/37% between the Registry (for distribution to rights holders) and Google:

- **Display Uses** including previews of books purchasable online, access to sections of works which can be copied and printed, selling database access to institutional subscribers and full online access to books held in some libraries.
- **Non Display Uses** in which the content of a work is not available online, but bibliographic and indexing information are.

UK Based Rights Holders

UK based rights holders will need to be aware of the terms of the Settlement:

- Millions of works will be covered as a result of Google's extensive library access.
- The Settlement will cover UK based rights holders if they are parties (knowing or otherwise) to the class action – this in effect means all rights owners (or their licensees or assigns) with a US copyright interest in a book or insert as at 5 January 2009. A work will be covered if published or distributed to the public and either published in the US and registered with the US Copyright Office, or published in a country with copyright relations with the US (this will include the UK, as a fellow member of the Berne Convention on copyrights).

- For out-of-print works, Google is deemed to automatically have rights to Display and Non Display Uses. For each work, the rights holder may opt-out of any Display Uses at any time, but can only opt-out of Non Display Uses if they opt-out from the Settlement by April 2011.
- Google cannot use in-print works for Display Uses without the rights holders' consent. Google can use in-print works for Non Display Uses and, again, the rights holder can only opt-out of Non Display Uses if they opt-out from the Settlement provisions by April 2011.
- Rights holders may wish to opt-in to the Display Uses and take advantage of any commercial opportunities Google Books may offer. Alternatively, a rights holder may wish to accept Settlement compensation but wholly or partly opt-out of the uses.
- If a rights holder does not wish to be bound by the Settlement they will need to specifically opt-out. This can be done at the Google Books webpage (<http://books.google.com>). A rights holder who opts-out remains free to sue Google.
- If the Settlement is approved by the Court, a rights holder will be able to search the Registry's online database to establish which rights, if any, are affected.

Further Implications

The Settlement will not apply in the UK and is based on US copyright law. UK copyright law does provide limited exceptions to the general prohibition on reproducing protected works, in order to allow some copying for personal or research use. However, UK law does not contain the generous US "fair use" exemptions.

Google relied upon US "fair use" exemptions in its defence against charges of copyright infringement. Google argued that only small extracts were available for viewing when it had rights owner agreement and when it had no such agreement no more than catalogue or index information was available: this could not constitute a commercial threat or meaningful disclosure of the body of a work and therefore was a "fair use".

The recent "Gower Review" of UK intellectual property law recognised the greater flexibility offered by US copyright law to the likes of Google, but recommended only limited expansion of UK "fair use" exemptions. Google could not have made the same arguments based on UK law as it did in the US.

Nevertheless, the Settlement will be examined around the world as a possible way of resolving the apparent clash of traditional copyright laws and new digital media.

Final Twist - Competition

Court approval of the Settlement is scheduled for November 2009. However, as of July 2009 the US Justice Department is investigating the Settlement for potential breaches of competition law. The Settlement has been criticised for giving Google preferential rights and a potential monopoly in the digitisation of millions of books. The Settlement may thus be blocked or, more likely, amended before coming into effect. Competition questions raised in the US would be repeated in any replication of the Settlement in the UK.

Conclusion

Google Books and the Library Project highlight the limitations of traditional copyright law, in the US, UK and elsewhere, in dealing with an emerging new format for literary works. The success or otherwise in implementing the Settlement may well provide a model for other jurisdictions, including the UK.

Watch this space for further details...

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DIGITAL RIGHTS MANAGEMENT

This area is of increasing importance to publishers in the digital age. On 16 June the Government published its Digital Britain report. Part of this report, which includes the aim of broadband for all in the UK as one of its objectives, puts forward the government's latest thinking on how to combat digital piracy.

The Government wants to see ISPs dramatically cut illegal file-sharing on their networks and is giving additional powers to Ofcom in order to bring this about. New legislation has been proposed which would see offenders given a written warning and provide for the compilation of a database of repeat offenders. Information gathered about serial infringers would be handed over to rights holders, who could then issue a court order. Punishments, such as blocking the sites from which material has been illegally downloaded, capping internet speeds and filtering content have also been suggested, although such measures will only be enforced if the written warning system does not ultimately prove effective.

Also of interest in this area is the successful initial prosecution in April of the operators of the notorious file-sharing site <thepiratebay.org> ("the Site"). The Swedish website, which provided links to downloadable torrents by way of a searchable database, had long held itself out as being unassailable due to the nature of copyright law in Sweden and the fact that it was merely facilitating (by way of links) and not actually storing copies of copyright works. The Site was notorious for its flagrant promotion of free access to copyright-protected material through file-sharing and its aggressive stance towards correspondence from aggrieved copyright holders (taking particular delight in publishing letters from lawyers together with a taunting and invariably salty reply).

Following a nine-day trial, the buccaneers behind the Site were each found guilty of assisting copyright infringement and sentenced to a custodial sentence and a fine. It should be noted, however, that under Swedish law this verdict will invariably be subject to appeal and may yet be overturned.

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