

The Intellectual Property Centre Of Excellence Student Law Reports



Issue 3

Pro Bono Week Special

June 2006

Inside this issue:

<i>Has someone taken a bite out of Apple?</i>	1
<i>Freedom of Information Act Forum</i>	2
<i>Idiots guide to intellectual property,</i>	4
<i>Weird and Wonderful Inventions</i>	6
<i>Faking It?</i>	8
<i>Code Breakers</i>	9

[Has Someone Taken a Bite Out of Apple?](#)

Apple Corps, the Beatles' record company, whose logo is an apple cut in half and Apple Computer, who use the logo of an apple with a bite taken out of it, have returned to the courts after a legal dispute of 26 years. In 1981 a deal was made between the parties to the effect that Apple Computer could not enter into the music business.

In 1991 litigation between the companies ran for 116 days in the High Court during an attempt to establish who could use the Apple name and logo and in what context. It resulted in a trademark agreement which, while the actual details are confidential, is reported to have involved around \$26million passing from Apple Computer to Apple Corps.

The companies returned to court in March of this year when Apple Corps

claimed Apple Computer had breached the 1991 trademark agreement. The agreement is said to restrict what Apple Computer can do regarding the operation of computer delivery systems, while prohibiting them from selling music. Apple Corps is claiming the computer company's online music store iTunes is selling music by way of the downloads available on the website which contains around 3.7 million tracks, and that using their logo for this is a breach of the 1991 agreement. Apple Computer however claim that iTunes is a software delivery system which supplies the music and is operating within the terms of the agreement. A key aspect of trademark law is that customers should be able to distinguish companies. Even if the areas are not considered identical if the marks are similar, and there is a likelihood of confusion there may be an infringement. Whether customers would be confused about the origin of music supplied by iTunes would be a matter the judge needed to consider.

It was suggested in the evidence given in the current case that the chief executive of Apple Computer, Steve Jobs, was attempting to avoid litigation when he offered \$1m to buy Apple Corps' mark just before the launch of iTunes. Had this offer been accepted Apple Corps' logo would have been assigned to Apple Computer who would have been able to use the Apple mark as they wished without the need for a legal dispute.

Judgment was entered on 8 May. The court found that Apple Computer was not in breach of the 1991 trademark agreement and could continue to use the Apple mark and name in association with iTunes. The judge ruled that the use of the mark was "fair and reasonable...in connection with the service (of data transmission) provided by Apple Computer" and that the use of the mark was in connection with the online store which "[did] not suggest a connection with the creative work". The suggestion that the word iTunes is used in association with the music more than the Apple logo was a factor in the judge's decision.

Apple Corps has stated an intention to appeal and were given leave to do so by the trial judge, with Apple Computer's request for a £1.5million interim payment refused.

The full judgment can be found cited as **Apple Corps v Apple Computer [2006] EWHC 996 (Ch)**.

IP Centre of Excellence Forum

“Freedom of Information Act 2000: Fifteen Months On”

Ibrahim Hasan, Freedom of Information Specialist, Proprietor of ‘Act Now Training’

Gerrard Tracey, Assistant Information Commissioner

Under the Freedom of Information Act 2000 (FOIA) an individual can make a request for any recorded information held by a public authority. Much material has been requested and disclosed although some material remains confidential, such as information about the events surrounding Dr David Kelly’s death.

All public authorities and publicly owned companies (those wholly owned by a public authority, such as the Leeds-Bradford Airport) are subject to the requirements of FOIA. Public authorities must implement a publication scheme, whereby information is brought into the public sphere, and must have a record management system. Furthermore, public authorities have to provide a right of access to material when requested.

As part of the duty to provide a right of access public authorities have to confirm or deny whether they hold requested material. Requested material is not restricted to documents and can include CCTV footage, manuscript notes and audio recordings. Public authorities also have the duty to communicate this information.

Under s9 FOIA public authorities should not charge for the communication of information provided the request costs less to meet than the prescribed limit. The prescribed limit for information held by central government is £600 and the limit for information held by other authorities is currently £450. Requesters have to pay disbursements incurred by public authorities in meeting the request. If the request is more expensive than the prescribed limit the public authority does not have to disclose the information. There have been suggestions that a fee scheme may be implemented at some point in the future to increase efficiency and to reduce the amount of vexatious requests but the Assistant Commissioner indicated that the implementation of such a fees scheme would probably require legislation, and there are no bills currently in issue.

If the public authority is not prepared to disclose the requested information it must give a reason for refusal within 20 days of receipt of the application. The refusal notice can state:

- the information is not held by the public authority;
- the request is vexatious;
- the request is repeated;
- the costs of meeting the request are over the prescribed limit; or
- a Part 2 exemption applies.

The Part 2 exemption is set out at ss21 to 44 FOIA and includes absolute and qualified exemptions. The public interest test asks whether the interest in disclosing the information outweighs any benefit gained if the information is kept secret. This is a qualified exemption. Other qualified exemptions relate to national security, defence, international relations, commercial interests, communications with the Royal family and honours.

Absolute exemptions apply to information held by security bodies, information that is reasonably accessible by other means, information subject to parliamentary privilege and information relating to the effective conduct of public affairs. Court records are also subject to an absolute exemption.

S21 FOIA relates to information which is accessible by other means and is thus subject to an absolute exemption. Information is accessible even if a fee is payable to enable inspection. Material that is accessible can include that which is made available through a legislative provision or through public authorities' publication schemes.

A personal data exemption is provided by s40 FOIA. There is an absolute exemption on the disclosure of 'own information' and an exemption on the disclosure of information about a third party which was described as being 'absolute-ish'. Disclosure of third party information will be permitted when it is lawful and fair. Public authorities cannot use the s40 exemption to avoid their responsibilities under FOIA. They may still have to disclose personal information about the roles and spending of their employees.

FOIA has been abused by trivial requests being made by requesters. These requests undermine FOIA as they cause delay to the processing of genuine requests and a fee system may be implemented in the future to discourage such requests.

S43 protects commercial information and can limit disclosure of information which constitutes a trade secret or which is likely to prejudice the commercial interests of some person (including a public authority) if it is disclosed. Public interest can also impact upon the disclosure of some information. Public interest may apply to accountability for public money spent, the protection of the public and can apply to competition issues. If a document is intended for future publication the public authority need not disclose it. The closer the date of intended publication, the more realistic chance this exemption has of applying to the information.

FOIA was brought into force on 1 January 2006. In March 2006 the Information Commission began to receive complaints relating to alleged failures by public authorities to disclose information or comply with requests. The Information Commission is responsible for promoting FOIA and for reviewing existing policies and drafting new policies and guidance for organisations, businesses and the public. The Information Commission also consults with relevant authorities when formulating such guidance and policy.

FOIA has enjoyed a high media profile since its enactment with local and national media and press focussing on FOIA. This has encouraged increased public consideration of the effects of FOIA throughout society.

Although the Information Commissioner has endeavoured to meet the demands relating to FOIA in terms of promoting awareness of FOIA and in handling complaints about public authorities perceived failure to disclose information, there is still room for improvement. The Information Commission intends to reduce the amount of time taken to deal with cases and hopes to streamline the internal review procedures that are linked to FOIA.

FOIA has enabled disclosure of information, indicating it has enjoyed a measure of success. Examples of information disclosed under FOIA include the links between CJD and school dinners, guests at Chequers and the performance rates of heart surgeons. The press has been influential in determining the public's perception of this information and has helped lessen the impact of the disclosure of such sensitive information by placing it in an appropriate context.

A recent survey indicated that 98% of public authorities were aware of FOIA and that 90% of them had made changes to ensure compliance with FOIA. Improvements still need to be made to the system. Requests need to be clarified and public authorities should ensure communication with the requester. Public authorities should also be aware of the time frames for disclosure of information and should know the limits of the public interest defence. Some public authorities could also increase the amount of detail they put on refusals to ensure the requester is properly informed as to why the information is not suitable for disclosure. Public authorities could also conduct internal reviews to monitor the amount of time taken to process requests.

In 2005 the Information Commission received 2385 complaints about the alleged failures of public authorities to disclose information. It resolved 1060 complaints in that year and closed a further 319 in January and February 2006. It aims to build on these figures this year.

Idiots Guide To Intellectual Property, Part III

Trade Marks

In the UK trade marks are largely governed by the Trade Marks Act 1994.

Under section 1 of the act, a trade mark is “any sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings”.

In practice, this can mean for example

- a picture;
- a slogan (“Just do it”);
- a logo (the McDonald’s arches);
- packaging (the Coca Cola bottle);
- any combination of the above.

In certain circumstances, this can be extended to:

- a colour scheme (Cadbury has tried to register the colour purple, BP the colour green);
- a smell (a Dutch company has registered the smell of cut grass for tennis balls);
- a sound (the Direct Line insurance jingle).

Trade Mark Registration

In order to properly protect a proposed trade mark in the UK, it must be registered. An application for trade mark registration can, however, be **rejected** on absolute or relative grounds.

Absolute

- the mark is too descriptive of the goods or services for which it is to be registered (eg ToysDirect - this does no more than describe the product category and distribution method);
- the mark is devoid of any distinctive character (a slogan such as “The one for you” would fail as it is widely used);
- the mark is contrary to public policy or accepted principles of morality.

Relative

- the mark is identical or similar to a mark someone has already registered or applied to register for the same or similar products/services (e.g. the famous United Biscuits’ Penguin challenge on Asda’s Puffin chocolate biscuits).

Geographical Coverage

A successful application filed with the UK Patent Office will only protect the mark within the UK jurisdiction. However a Community Trade Mark (CTM) can be registered with the Office for Harmonisation within the Internal Market (OHIM) and will protect the mark in all 25 countries of the EC. It is not possible to obtain a worldwide trade mark registration, although you can apply (via the UK Patent Office) to register a trade mark through the international “Madrid Protocol” system which covers 78 states around the world.

In the UK, it costs £200 to file an application, which lasts for 10 years. In the EC it costs 900 euros to file a basic CTM application (there is a 150 euros discount for electronic registration) plus 850 euros to register the mark. The registration is also for a period of 10 years.

Trade Mark Protection

Companies spend many thousands or even millions of pounds promoting and advertising their trade-marks. In order to maintain the value of this intellectual property, it is essential to protect it on an ongoing basis to ensure that it does not become abandoned, either intentionally or unintentionally or become “genericised” (much vaunted examples such as biro, aspirin, escalator and Hoover have lost their registered trademark status over time)

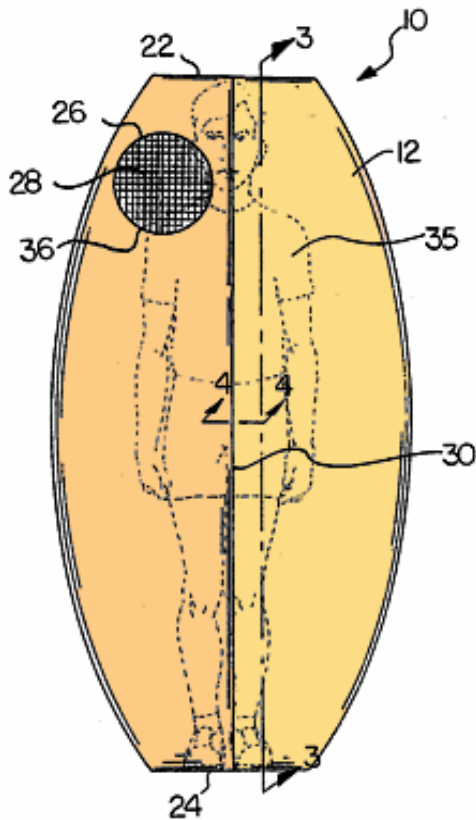
The following are examples of some practical steps that companies can take to protect their trade marks.

1. Give notice of their rights
 - unregistered marks can be highlighted with the ™ symbol. However, once registered, companies should use the ® symbol (note it is a criminal offence to use the ® symbol for an unregistered mark).
2. Use the trade mark distinctively
 - in written communication, companies should always put a trade mark in CAPITALS, *italics* or “inverted commas” to differentiate the mark from other text. This is important for consistency and will also protect against “genericide”.
3. Educate all staff to use the trade mark correctly, for example:
 - use the specific colours or font required by the company
 - use the mark as an adjective (sellotape sticky tape), never a noun (I have some sellotape) or a verb (sellotape up a parcel);
 - avoid hyphenating the trade mark (Worldport-enabled software) or using it in the possessive form (a Kodak’s camera);
 - avoid using a pictorial logo as part of a sentence;
 - avoid using a proprietary trade mark in close association with other trade marks.
4. Monitor and police the use of the trade mark by third parties
 - license with caution (always use a comprehensive written agreement containing guidelines for its use);
 - advising any other approved third parties (such as distributors, agents) that failure to use the trade marks correctly will lead to termination of any agreement;
 - file complaints or even threaten legal proceedings (eg the Oxford English dictionary, which contains several hundred proprietary brand names, is contacted many times a year by trade mark owners concerned about their brand’s definition).
5. Take prompt action for potential infringement
 - even if action is unsuccessful (Penguin’s challenge to Puffin) it shows that a company means business and may deter other would-be infringers.

A Little Bit of History Part I

Copyright was given its first formal footing in the Statute of Anne 1709. The Licensing Act 1662 preceded it, but didn’t deal directly with copyright, merely regulating and protecting the new printing industry of the time. Before the 15th century copyright was less of a problem due to the low levels of literacy and the high costs of copying by hand, although common law gave limited protection. The first recorded copyright appeared in ancient Greece giving a non-economic right to all writers.

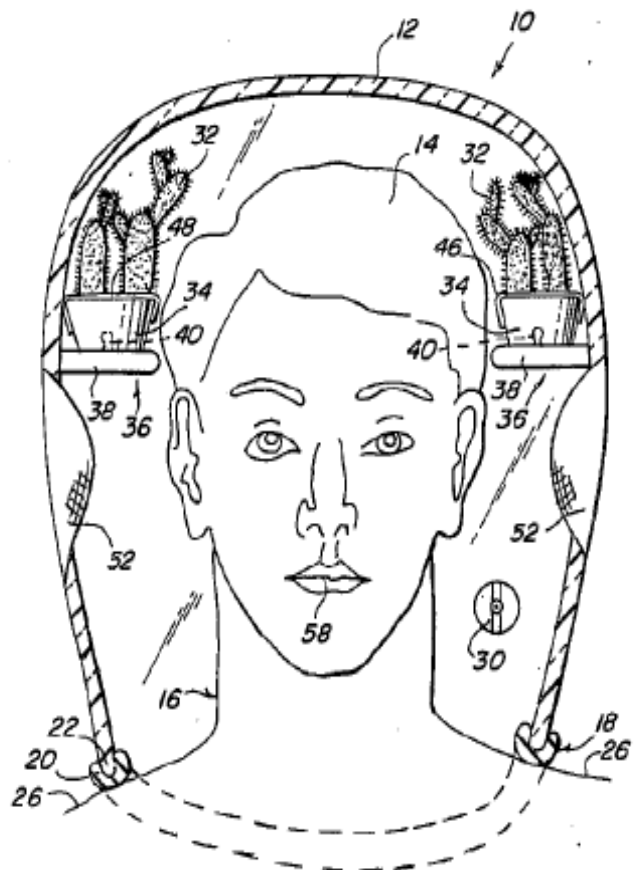
Weird and Wonderful Inventions



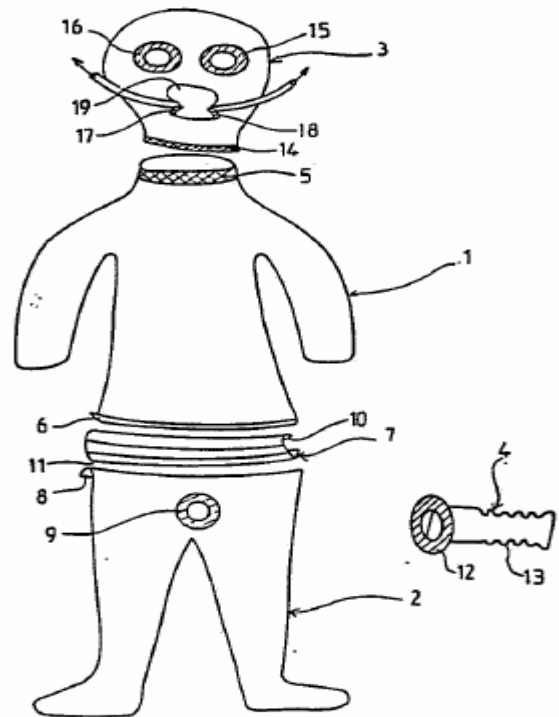
Run everyone, they're coming for you! Who you may ask? Killer Bees of course, making their way from South America and maybe coming to a location near you soon. How will we ever protect ourselves?

Ladies and Gentlemen allow me to introduce you to ... the Killer Bee Bunker! Your perfect way of escaping the swarm and probably everyone else as well. Complete with communications port (28) and it's own zip up nylon bag, you need never leave home without it!

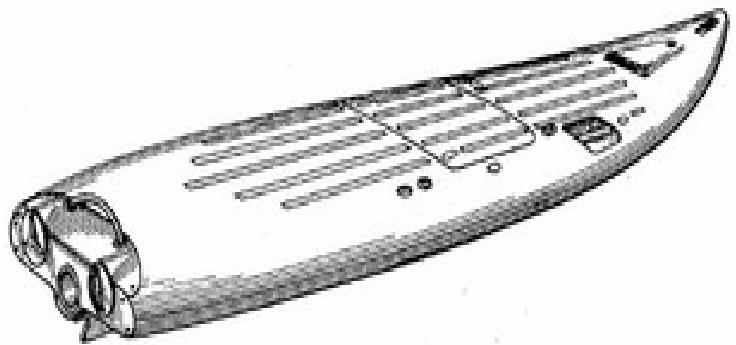
Our second instalment is also from the good old US of A. This is the Greenhouse Helmet! Enabling a human to breathe the wonderful fresh air produced by the cacti stored inside and keeping the individual safe from the effects of any surrounding pollution. Unfortunately the inventor doesn't seem to have considered two minor flaws in his plan. First I'm unconvinced that I would wish to wander round with two cacti precariously perched either side of my head (call me unadventurous if you wish). Second did they consider how much air two cacti actually produce? My biology is a little rusty, but I'm pretty sure that two little plants might struggle to photosynthesise quickly enough to allow a human to breathe!



Here's one more invention that must lead to serious questions about the inventor. Allow me to introduce you to the Full Body Condom. Affording you complete protection from all those nasty sexually transmitted diseases, while eliminating any sense of dignity to boot! Looking like a cross between Mister Blobby and The Scream one wonders quite what was going on in the poor French inventor's life at the time. Still if you don't get lucky it could always double for scuba gear!



Even more exciting than being dragged along behind a speed boat on your bare feet, this could be the latest and craziest entry into the X-Games. What is it you ask, well none other than the jet-powered surf board. Capable of flying across the water at previously unheard of speeds you need never worry about missing that perfect wave again, though worrying about health insurance could be recommended! Wonder if they'll lend it to us for the Summer Ball?



Leeds Students Given the Chance to “Own-It”

Students at BPP Leeds have been offered an exciting opportunity to liaise with BPP London to provide a pro bono service for members of the community. The Own It Project has been established at BPP London for a few months. It aims to supply free IP advice to creative people in London through drafting replies to IP related enquiries. The Own It project co-ordinators would direct enquiries to interested students in Leeds who would draft letters of advice and send these back to the co-ordinators for editing before they are sent on to the final recipient. No particular knowledge of IP is required to participate in this project; just enthusiasm and a willingness to learn new things!

Own It has a comprehensive website designed to supply information to assist creative people and businesses. This can be found at www.own-it.org. It states that its goal is to provide creative people with the necessary knowledge and support to protect and exploit their IP rights. This is important as the effective use of IP rights can ensure that businesses and artists generate the income, which is necessary to ensure continued artistic and economic development.

More information about the Own It project can be found at the above web site. If you are interested in the Leeds Own It Project or in any other IP related activities currently running at BPP Leeds please email ipgroup@bppls.co.uk.

Faking It?

The last time you bought a branded item from a market or ebay, did you know that it could have been fake? Sometimes it is obvious: badly made, stupidly cheap or maybe, it was the Del boy like character selling out the back of a Reliant Robin. However, new research has shown that up to half of the people who bought fake products actually believed that they were buying the genuine article, which amounts to more than 3 million people in the UK.

This has scared the luxury goods market, who originally believed that the people who bought fakes were unlikely to buy originals and made them realise that fake goods were doing far more damage to their industry than had been realised.

It would surprise few people that the most ripped off brand was the chav favourite Burberry, closely followed by Gucci, Louis Vuitton and Yves Saint Laurent especially if you go down to your local market.

This is not just a problem within the luxury market. European customs officers confiscated almost 100 million counterfeit items in 2003, a rise of 15 million from the previous year, including medicines, DVDs and toys.

On 26 April the European Justice Commissioner, Franco Frattini, proposed new sanctions that would see counterfeiters in Europe facing jail sentences of up to 4 years. This has reopened the old wounds between the EU and many countries over the power of Brussels to dictate law and has angered many EU countries, who feel that the penal code is a national issue and should not be interfered with by Brussels.

The criminal sanctions have been introduced to combat what Mr Frattini sees as a growing trend towards large-scale counterfeit goods trade throughout Europe. It is hoped that the new directive will standardise IP laws throughout Europe closing the loopholes available in some countries, which have more lenient IP infringement laws than others.

A precedent for the EU to impose minimum criminal sanctions on the member states was created in September 2005 in *Case C-176/03 Commission v Council* which stated that the EU could in limited circumstances (in this case environmental matters) impose minimum sentences and fines.

It is argued by the Commission that counterfeiting and piracy is so lucrative and carries such light penalties in many countries that it is receiving huge investment from criminal organisations, not to mention the exploitation of children within the industry.

Before you start to wipe all that ripped music from your computer, it should be pointed out that the 4-year sentence would apply to the worst offenders, such as those connected with organised crime. Nevertheless, under these proposals Mr Frattini could also have power to suggest or standardise fines across the EU for the most minor IP offence

These proposals are due to go before the European Parliament sometime later this year.

A Little Bit of History Part II

The first trademarks were governed in the Middle Ages by trade guilds. It was only in the 19th century that trademarks gained a more formal footing, being recognised as property in their own right. The 19th century also saw the first actions being brought against trademark infringement.

Meanwhile, Britain has the longest record of granting patents in the world, with the earliest known patent granted in 1449 by Henry VI to John of Utynam. It covered a method of making stained glass windows for Eton College and gave a 20 year monopoly.

Something You May Not Have Known!

Supplementary protection certificates (SPC) are a pseudo patent available for expired patents of drugs or plant protection products. The idea behind SPCs is that for this type of patent there is likely to be a long period needed to obtain regulatory approval. The concept was created by Council Regulation (EEC) No 1768/92 and Regulation (EC) No 1610/96, and Switzerland also has its own form of SPC. It has a maximum life span of 5 years and can only be applied for once the patent has expired.

On the 4 May the ECJ reached a decision in a case (Case C-431/04) brought by the Massachusetts Institute of Technology (MIT). It centred around a treatment for brain tumours that was made up of two separate elements, one of which was the active drug, the other for the delivery of that drug. The ECJ used a narrow interpretation of the regulation and held that an SPC could not be given where “only one of which has therapeutic effects of its own... [and the other] renders possible a pharmaceutical form of the medicinal product which is necessary for the therapeutic efficacy of the first substance”.

The narrow interpretation could have two effects. On the positive side it will reduce pharmaceutical companies' monopolies and will allow generic producers to enter the market earlier. On the negative side, the reduced period of monopoly available to the pharmaceutical companies could mean less R&D, as the likelihood of viable returns created by the commercial lifespan of the product will be dramatically reduced.

Code Breakers Caught Out

Dan Brown does it again, and Random House walks away with 85% of their legal fees paid, plus a huge increase in book sales for both the world best selling book the Da Vinci Code and The Holy Blood and the Holy Grail.

The copyright case involving Dan Brown, author of the Da Vinci Code, and Michael Baigent and Richard Leigh, recently reached judgment in the high court. The case has been hugely publicised as The Da Vinci Code has sold in excess of 30 million books worldwide. In case you've been living under a stone for the past few months the Da Vinci Code deals with the age old myth that Jesus and Mary Magdalene married and that their blood line continues to this day. Michael Baigent and Richard Leigh wrote a book called The Holy Blood and the Holy Grail exploring this theory in 1996. The action was brought by Leigh and Baigent under the premise that the Da Vinci Code breached their copyright from the The Holy Blood and the Holy Grail. They claimed that the Da Vinci code had stolen the central theme of their work.

Smith J's judgment held that Mr Brown did not copy the central theme of the novel, stating the central themes copied were too general or of too low a level of abstraction to be capable of protection by copyright law and accordingly there was no copyright infringement. He ordered the claimants to pay 85% of Random House's costs, around £1.3 million, as well as their own costs of £800,000. The court refused the claimants' request to appeal the decision and ordered them to make an interim payment of £350,000 by May 5.

Obviously the huge publicity wasn't enough for Smith J as it was discovered after the trial that he had inserted a code within his own judgment characterised by italicised letters.

Random House is one of the top dogs in the publishing world, representing thousands of authors, including both the claimants and the defendant. With the well-publicised case, sales in both books have increased around the world. Whether the action was a ploy to get the public hyped and ready for the coming feature film is questionable, I guess having Tom Hanks just isn't enough anymore! Obviously, they're keeping that in the Random family.

Written by Christopher Stowbridge, Michael Bennett, Katie Smith, Julia Armytage, Debbie Rees-Ingilis and Marva Lamey;

Editors Christopher Stowbridge and Michael Bennett