PUBLISHING LAW

FOURTH EDITION

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Publishing Law

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and
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Publishing Law

Publishing Law is a comprehensive guide to the law as it affects the publishing process. Written by the Copyright Counsel to the Publishers Association and a practising solicitor with many years' experience of the publishing trade, this work will serve as a comprehensive handbook for all those who need a practical understanding of where and how the law may apply, including publishers, authors and agents, and all those involved with published material.

Hugh Jones and Christopher Benson address a range of key legal issues in the publishing process, including:

- copyright, moral rights, commissioning and contracts, including online and e-book issues
- libel and other legal risks such as negligence, privacy and obscenity
- infringement and defences such as fair dealing; trade marks and passing off
- consumer law, data protection, advertising, distribution and export.

This fully updated fourth edition features:

- full coverage of electronic rights and e-commerce issues
- up-to-date coverage of changes in EU and UK legislation, including the Digital Economy Act 2010.

Legal points are explained with reference to important statutes, cases and relevant trade practices. A revised glossary, lists of useful addresses and further reading are also provided.

Hugh Jones is Copyright Counsel to the Publishers Association. A qualified solicitor, he worked in publishing for fifteen years, for law publishers Sweet and Maxwell and reference publishers Macmillan Press, before practising for eight years as a publishing and copyright lawyer at city law firm Taylor Joynson Garrett (now Taylor Wessing). He writes and lectures regularly, and is Treasurer of the British Copyright Council.

Christopher Benson is a solicitor at City law firm Taylor Wessing. He has been practising for over fifteen years as an intellectual property lawyer. He has considerable experience in the fields of publishing and copyright and also advises on all aspects of intellectual property law, both contentious and non-contentious, including copyright protection, trade mark protection and passing off, brand management, licensing, merchandising, sponsorship, franchising and advertising. He is a regular writer and lecturer on intellectual property matters.

For Osman

Preface to the fourth edition

In the four years since the last edition, publishing has continued to develop rapidly in line with new technologies, media platforms and business partners (such as aggregators), and the law has continued to do its best to keep up (note that it is usually this way round). Some areas – such as copyright – have been under almost constant review, in the UK and EU, and still are – the Gowers review process found that intellectual property law in the UK is still basically fit for purpose in the twenty-first century (albeit with 54 recommendations), but at the time of writing a new Prime Ministerial Review into IP laws was about to start again 'to make them fit for the internet age' (on the assumption, presumably, that they aren't). Despite such regular review, the world's first copyright act, the Statute of Anne, celebrated its 300th birthday this year, so although much has changed, and must of course continue to do so, presumably copyright is doing something right, although new sections on cybercrime and dealing with peer-to-peer networks under the Digital Economy Act 2010 suggest there is no room for complacency.

In addition, there is a proposed reform of libel laws to protect freedom of speech. A Defamation Bill is to be drafted and introduced into Parliament. There is also to be consultation on proposals of civil litigation funding and the question of costs of civil actions.

Taking account of all this remains a considerable challenge, so this book is increasingly a collaborative effort between specialist media lawyers, and the publishers, authors and others who have to put it all into practice. We owe particular thanks to the following long-suffering friends and colleagues: Olga Martin Sancho, much missed lawyer for the Federation of European Publishers, for commenting on EU material in Chapter 1, Paul Mitchell, of Taylor Wessing and the British Copyright Council, for detailed comments on Chapters 2 and 3, Jim Parker, the Registrar of Public Lending Right for once again providing statistics of the PLR scheme, Gilane Tawadros of the Design and Artists Collecting Society for helping us make (some) sense of Artist's Resale Right, Kate Pool of the Society of Authors and Kevin Stewart, Publishing Contracts Consultant, for their invaluable experience of authors' contracts in Chapter 4, Mark Majurey and William Bowes of Taylor and Francis and Informa respectively, and Sue Joshua and Cliff Morgan of Wiley, for enormous help with online and aggregator agreements in Chapter 5, James Shirras of Film Finances

Ltd, Mark Bide of EDItEUR and Brian Green of Book Industry Communications for continued help with subsidiary and electronic agreements in the same chapter. Mark Seeley of Elsevier once again contributed substantial new material on US copyright law.

Thanks are also due to the following from Taylor Wessing for their invaluable help: Lorna Caddy in relation to defamation, Mark Dennis and Tim Pinto on confidentiality and privacy, Nick Cody and Graham Hann on sale of goods, consumer protection and advertising, Sally Annereau on data protection and Robert Vidal and Louisa Penny on distribution and competition. Thanks also to Catherine Lloyd and Andrew Breeze for preparing the index and Marian Donne for researching the Appendices.

Any errors and inaccuracies are all our own work. As before, it would be helpful to hear of any errors or omissions, or sections which could be clearer, since the main aim of this book is still to make this corner of law understandable to the people it affects most. We have, once again, tried to foresee at least the major likely developments at the date given below, but this remains a fast-moving area of law, and if in doubt after that date it may always be wise to check with a publishing lawyer.

Hugh Jones
Christopher Benson
Brighton and London
16 January 2011

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The law, and original works

Publishing and the law 1

Anyone can be a publisher in the UK. You don't need professional qualifications, or letters after your name, or a practising certificate. All of us 'publish' opinions or other information every time we send an e-mail, or circulate anything that anyone other than the intended recipient may see (although there may be an argument about personal text messaging). Most of this is normal Internet and mobile phone traffic, the lifeblood of twenty-first century communication, and most of it – most of the time – keeps well away from the law. But what if an e-mail you send to a list of friends or colleagues defames someone's reputation? Or what if text or pictures you use on your website infringe someone else's copyright? The law can quickly become involved, even in such apparently domestic transactions, so anyone who is part of the full-scale business of publishing – either as an author, a publisher, or in any other capacity – needs to keep the law in mind all the time. That is what this book is about, and what it is for – a roadmap of publishing, for those who wish to stay within the law.

The rest of this book will broadly follow the chronological sequence of most publishing, so we will start at the beginning, with the author's first idea, and follow the process through copyright and contract, to the legal risks of publication to the outside world (such as libel), and on through sales and marketing to distribution and export (in hard copy or digital form). At every point, we will find that the law has a habit of getting involved. Those of us who are familiar with the law will not find this terribly surprising (although there is a school of thought that some of us should get out more). Those for whom law (especially English law) is an arcane mystery, may need a few more signposts along the way. So even before our author has his (or her) first idea, here is a brief introductory map of the legal system which governs most UK publishing – UK and EU law, linked to foreign laws in many cases via international treaties such as the Berne Convention.

UK AND INTERNATIONAL LAW

One of the most important things to understand about law is that most laws operate on a territorial basis – in other words, they are promulgated by nation-states for their own citizens and to regulate activities within their own territorial boundaries.

They do not generally apply anywhere else. This has strengths and weaknesses – if

in the UK you create or publish an original copyright work (like this book) you will have the full protection of UK copyright law, but if you find your copyright is being infringed in, say, Turkey or China, there is nothing UK law itself can do to help you and any legal remedies you may have will largely be dependent on local Turkish or Chinese law and on local courts. As you can imagine, some countries have better laws (and offer better protection) than others. In an Internet age, this worldwide patchwork of very different legal regimes is already proving a challenge. If material which infringes copyright, or libels someone, is created in New Jersey, uploaded to a server there, hosted on a UK website and downloaded in France and Saudi Arabia, whose law should govern the resulting dispute, and whose courts should have jurisdiction to try the case? This is no tiresome technicality – for publishing today, this can matter a great deal, since some laws are relatively liberal while others can be positively restrictive.

Increasingly, of course, the countries of the world have tried to regularise all this by means of **international treaties**, so there is an **International Court of Justice** at The Hague (mainly referred to for war crimes), and a **European Court of Human Rights** in Strasbourg. However, these only operate in certain areas, and (as in the case of the European Court of Human Rights) their judgments may be regional rather than global, and normally enforced against individual member states. There is no truly global International Court, applying global laws. Many think the Internet will eventually require something similar, but it seems we are still a long way away from persuading all governments in the world to agree on what the global laws would be, and who should enforce them. Copyright, however, is comparatively well off, thanks to one of the world's most successful and longest-running treaties, the **Berne Copyright Convention** of 1886, now acceded to by well over 160 countries, which obliges members to apply reciprocal 'national treatment' in their own courts to works of other member states. National treatment means that the UK, for example, is required to give copyright works of other convention countries – such as the USA – the same protection in UK courts as it gives to UK works – and vice versa. The World Trade Organisation's **TRIPS Treaty** also requires member states to enforce copyright effectively (for more on this, see Chapter 9).

EU LAW

The UK is of course a member of the **European Union**, comprising 27 countries at the time of writing (with three more countries currently applying for membership – Croatia, Turkey and Macedonia), and like every other member state the UK participates in its government, with nominated Commissioners holding portfolios at the **Commission** in Brussels, and elects MEPs to the **European Parliament** in Brussels and Strasbourg. Equally, apart from its own domestic laws, it is also subject to EU laws. European legislation derives from the EU Treaties (so-called EU primary legislation), which are agreed voluntarily on joining by all member states. The latest Treaty in force, since December 2009, is the Lisbon Treaty, which aims mainly to increase efficiencies in the decision-making process, give a greater role

to the European Parliament and national parliaments, and increase external effectiveness (e.g. with a single Presidency and foreign affairs role). The purpose of much EU law is to harmonise legal regimes across Europe, in pursuit of the famous 'level playing field'. These EU laws can be on a wide variety of topics – from fish farming to intellectual property – and (as so-called secondary legislation) commonly take the form of:

- **Regulations**, which have direct effect in the member states of the EU, or
- **Directives**, which as the name implies are directions to member states to amend their own laws in accordance with given rules.

Both these forms of law take precedence over domestic UK laws. The E-Commerce Directive of 2000 and the Copyright Directive of 2001 are examples of laws which particularly affect publishing in the EU. They are enforced by the **European Court of Justice**, which sits in Luxembourg, with 25 judges drawn from a variety of member states, and an Advocate General. A **General Court** (formerly known as the **Court of First Instance**) was also established in 1988 to help with the case-load problem. In addition, there are **Decisions**, binding on those to whom they are addressed, and **Recommendations** and **Opinions** which have no binding force but which result from references by national courts to the European Court of Justice for interpretation. Such 'soft law' instruments have become the most frequent tools used to develop EU policies in recent years, in particular relating to issues affecting publishing.

HUMAN RIGHTS LAW

The UK has been a signatory to the European Convention for the Protection of Human Rights and Fundamental Freedoms since 1950. However, in October 2000 the Human Rights Act 1998 came into force, thus bringing convention rights such as freedom of expression and privacy more centrally into UK law. When courts now interpret the law, they must do so in a way which is compatible with the Convention. In doing so, they must take account of the decisions of the European Court of Human Rights.

This, then, is the international and European context in which UK law now operates.

UK LAW

'COMMON LAW'

After the Romans departed (taking Roman law with them) the islands now making up the UK were a pretty lawless place. But over the centuries a body of Anglo-Saxon, and then Norman, law developed, based on cases decided by judges, and increasingly following set rules.