

Freedom of Expression and Music Contracts: Is There a Place for Blasphemy Anymore?

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This article discusses the use of the traditional warranty given by recording artists and music composers, when signing contracts with record and music publishing companies, that the material they submit shall not be blasphemous. The historical context and evolving legal nature of blasphemy in England is analysed in the light of article 10 of the European Convention on Human Rights, namely freedom of expression, which has been introduced into English law by the Human Rights Act 1998. The article argues that record and music publishing companies have – albeit by accident rather than design – realigned their respective contracts so that they are more in tune with the spirit of the Convention in terms of freedom of expression by removing the warranty in respect of blasphemy. However, blasphemy is still a crime in England, so music law practitioners representing parties to the record and music publishing contracts need to be aware that this remains the case and advise their clients accordingly.

It is testament to the pervasiveness of Christianity that blasphemy still influences modern English legal practice. Its meaning has evolved over time and it remains part of common law at the dawn of the third millennium. The present state of the law of blasphemy has been discussed by a number of commentators, along with the directions it could head in to ensure that freedom of expression is not unduly inhibited. Music recording artists and composers have traditionally had their freedom of expression affected *inter alia* by a warranty they have given in their record and music publishing contracts that the material they submit shall not to be obscene, defamatory or blasphemous. Is such an application of the law of blasphemy viable in a world now both multi-faith and non-faith? Or should other means of safeguarding religion be employed? To answer this question, it is necessary to determine why, and in what ways, this offence is still relevant in a modern legal context.

The law of blasphemy derives from the third of the Ten Commandments: ‘Thou shalt not take the name of the Lord thy God in vain: for the Lord will

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not hold him guiltless that taketh his name in vain'.¹ Under Mosaic law it was punishable by death. Perhaps the most well-known transgressor was Jesus. When he was brought before Pilate, the Jewish Temple authorities said that 'by our law he ought to die, because he made himself the Son of God'.² During the sixth century the (Christian) Byzantine emperor Justinian I introduced the death penalty for blasphemy.³ The Muslim faith, established in the seventh century, also recognised the concept.⁴ Extreme cases could lead to the declaration of a *fatwa*, whereby those responsible for blasphemy against Islam were condemned to death. Historically, blasphemy was a serious matter.

The etymology of blasphemy can be traced to the Greek words 'blaptein', meaning to injure, and 'pheme', meaning reputation;⁵ and 'blasphemeo' meaning blame.⁶ This suggests a sense of being responsible for irreverence towards anyone or anything worthy of esteem. One dictionary definition of blasphemy is 'impious or profane talk'.⁷ The present legal definition given by *Halsbury's Laws of England* is that blasphemy consists of the 'publication of contemptuous, reviling, scurrilous, or ludicrous matter relating to God, Jesus Christ, the Bible or the formularies of the Church of England'.⁸

In England, *blasphemy* is the spoken version of the offence, and *blasphemous libel* is the written form: here they will be collectively referred to as 'blasphemy'. It is an element of both constitutional and criminal law. Blasphemy is triable only on indictment, and so involves a jury trial. It is currently punishable by fine, imprisonment or both.

The Early Cases

Judicial evolution of the offence in England began in the seventeenth century. At this time the relationship between the law and religion was tight-knit: it was unlawful 'to express or to teach religious opinions contrary to those of the established church'.⁹ King Henry VIII had broken with the Church of Rome less than a century earlier; protection of the fledgling Church of England was important for this new independence from Catholic influence to continue. Against this background the first recorded example of blasphemy as a crime came in 1618, when in *Traske's Case* [1618] Hob 236 sentence was passed on a man who maintained that pork should not be consumed and the Jewish Sabbath ought to be observed. Application of the pro-Christian law was rigid at this time. Speaking blasphemous words was held in *Taylor's Case* [1676] I Vent 293 to be a criminal offence against both religion and the state. As Hale C.J. put it, 'Christianity is parcel of the laws of England; and therefore to reproach the Christian religion is to speak in subversion of the law'.

The offence reached statutory form in the Blasphemy Act 1698,¹⁰ which created civil disabilities and possible prison sentences for those educated in Christianity and found guilty of denying Christian doctrines. Less than 30 years later an important concession was made in *R v. Woolston* [1729] SC Fitzgibbon 64 by Raymond L.J.C., when he stated: 'We do not meddle with any differences of opinion; we interpose only when the very root of Christianity is struck at'. But what matters would this cover? Who should make this distinction – the court or the church? Any attack on the established religion however was considered unlawful, regardless of the matters involved or the manner in which they were expressed. It was still thought church and state would stand – or fall – together.

Further prosecutions involved *The Age of Reason* by Thomas Paine the following century. He suggested in his book that the word of God was not the Bible (itself a blasphemy against God), but the universe. In *R v. Carlile (Richard)* [1819] 3 B & Al 161 it was said that Paine was 'the first Englishman that struck an honest and well-aimed blow at the idolatry of the Christian Church'.¹¹ The case in favour of the 'free thinkers' was making itself felt. By 1830 an 'honest denial' of the tenets of Christianity was not considered blasphemy: '[It] cannot be doubted that any man has a right ... to publish his opinions for the benefit of others ... The law visits not the honest errors, but the malice, of mankind'.¹² In a Parliamentary speech in 1833 Lord Macaulay said, 'Every man ought to be at liberty to discuss the evidences of religion ... But no man ought to be at liberty to force, upon unwilling ears and eyes, sounds and sights which might cause irritation'.¹³ However, five years later in *R v. Gathercole* [1838] 2 Lewin 237, where the defendant was acquitted of blasphemous libel after attacking the Roman Catholic church, Alderson B. confirmed that blasphemy only applied to attacks on the Church of England. He stated that one could 'without being liable for prosecution for it, attack Judaism, or Mahomedanism [*sic*], or even any sect of the Christian Religion [except the established church]'.¹⁴

This inflexible application of the law of blasphemy was becoming embarrassing to the government. The Home Secretary in 1883 said of *R v. Ramsay & Foote* [1883] 15 Cox CC 231 that 'more harm than advantage is produced to public morals by Government prosecutions of this kind'.¹⁵ The relationship between religion, law and the state needed to evolve; blasphemy changed from being an offence against the state to one of incivility. Coleridge L.C.J. stated in *Ramsay & Foote*, 'If the decencies of controversy are observed, even the fundamentals of religion may be attacked, without the writer being guilty of blasphemy'.¹⁶ It was the *manner* of the attack which was now seen as more important than the content involved. In the late 1880s there were two failed attempts to introduce a Religious Prosecutions Abolition Bill to get rid of the statute and common law against blasphemy.

The Twentieth Century and Freedom of Expression

It was held in *Bowman v. The Secular Society, Ltd.* [1917] AC 406 that views such as ‘human conduct should be based upon natural knowledge, and not upon supernatural belief’¹⁷ were not unlawful. *R v. Gott* [1922] Cr App R 87 settled that ‘offensiveness’ in blasphemy cases was determined by the sensitivities of the community in general – an *objective* test. There was no further prosecution for over 50 years. During this period the Criminal Law Act 1967 abolished the long outmoded offences of the Blasphemy Act 1698,¹⁸ and blasphemy became a purely common law matter. Lord Denning said ‘we all thought it was obsolescent’.¹⁹ But it was resurrected in 1976 when Mary Whitehouse, practising Christian and general secretary of the National Viewers and Listeners Association, started a private prosecution of a poem which had appeared in a periodical newspaper aimed at the gay community. This was the first of a trinity of cases in the last quarter of the twentieth century involving creative publications which, together with a review by the Law Commission, constitute the modern era of the law of blasphemy in England. It is worth noting that a theme common to all three publications was the combination of elements of sexuality with religious narratives.

Gay News

In 1976 the periodical *Gay News* published a poem by James Kirkup entitled ‘The Love That Dares To Speak Its Name’,²⁰ which was about the supposed sex life and homosexual activity of Jesus. In *R v. Lemon & Gay News Ltd.* [1979] 1 AER 898, the offence alleged was that the editor Denis Lemon and his fortnightly paper had ‘unlawfully and wickedly published ... a blasphemous libel concerning the Christian religion, namely an obscene poem ... vilifying Christ in His life and His crucifixion’. King-Hamilton J. confirmed the use of the objective test given in *Gott*, and the jury found the defendants guilty by a 10–2 majority.²¹ On appeal, the conviction was upheld. The House of Lords also approved, but only by a 3–2 majority. Although the minority was of the opinion that the prosecution had to show that there was a *subjective* intention to shock and arouse resentment among Christians, the majority held that it was sufficient the published material was *likely* to shock and arouse resentment. The published item would speak for itself in blasphemy prosecutions, and literary evidence was ruled inadmissible.²² But given the small target audience of this specialist publication, it seems doubtful that the offended Christians were protecting themselves from religious persecution. Lord Scarman described the offence as ‘shackled by the chains of history’.²³

The case then went before the European Commission of Human Rights (‘the European Commission’), where it was asserted in *Gay News Ltd. &*

Lemon v. United Kingdom [1982] 5 EHRR 123 that lack of clarity in the law of blasphemy meant the restrictions placed on the applicants' freedom of expression under the European Convention on Human Rights ('the ECHR') article 10 were not justifiable.²⁴ The European Commission rejected this argument, stating that the offence of blasphemy was sufficiently precise, its main purpose being the protection of citizens' right not to be offended in their religious feelings – a legitimate aim recognised by the ECHR. The restrictions in this instance were deemed 'necessary in a democratic society',²⁵ as well as proportionate: the attack in the poem was considered severe, the paper was on sale to the public, and persuasively the national courts had also held the work to be blasphemous. But the decision has been described as 'a setback in our progress to a rational and fair system of criminal liability'.²⁶

In contrast to *Gay News*, when the film *Monty Python's Life of Brian* (which lampooned religious attitudes and Christianity in particular) was released in 1979, outraging sectors of the religious public, it was given a general distribution – and no prosecutions were subsequently brought (although 11 local authorities banned it and 28 gave it an 'XX' certificate).²⁷ Those who wanted to see it paid for a ticket and did so; those who did not, did not. In a postscript to the *Gay News* trial, in 1996 – the age of the world wide web – there was an attempt to bring a case of blasphemy against the Lesbian and Gay Christian Movement over a hypertext link on their internet site to the Kirkup poem. The Crown Prosecution Service eventually announced that no charges would be brought, as no evidence was found that the Movement had published the poem on its website.²⁸ The offending poem is now readily available to anyone who wishes to see it, has access to the internet and can use a search engine.²⁹ A charge of blasphemous libel was more recently referred to the Director of Public Prosecutions for consideration after Joan Bakewell recited part of the poem in an episode of her television series *Taboo*, broadcast on BBC2 on 12 December 2001.³⁰ Also, on the 25th anniversary of the conviction of *Gay News* and its editor, the *Guardian* newspaper published three passages from Kirkup's poem.³¹ It remains to be seen what action, if any, will be taken as a result of these publications.

The Law Commission

In 1981 the Law Commission released its Working Paper.³² It suggested that the 'range of topics which are capable of causing offence to the feelings of any one of the numerous religious groups in this country is so wide that it would constitute an unprecedented curb on freedom of speech'.³³ Three basic defects in the law of blasphemy were highlighted. First, it was not certain enough to establish in advance whether a given publication would amount to an offence, but was a matter for a jury to decide based on their

interpretation of adjectives such as 'scurrilous', 'abusive' or 'offensive'. Second, the imposition of strict liability – whereby evidence from the author or publisher about the purpose of the offending work was inadmissible – was unduly hard on the defendant. Third, in a society that was both multi-religious and secular, protection was given only to Christianity and the established church. The possibility of an offence involving the publication of matter likely to outrage or wound the feelings of religious groups was looked at, but it was thought that such an offence could become a weapon in the hands of more litigious groups. Further intolerance, interference and divisiveness could be encouraged as a result.

The Law Commission delivered its final report in 1985.³⁴ The majority decision was that the case in favour of creation of a new offence (insulting or outraging the feelings of adherents of any religion) to replace the current law was not justified. It was also suggested that 'where members of society have a multiplicity of faiths or none at all, it is invidious to single out that [Christian] religion ... for protection'.³⁵ The task of defining 'religion' so that it would encompass in a meaningful way disparate groups such as Anglicans, Rastafarians, Catholics, Scientologists, Jews and Moonies for such an offence was, in practical terms, not possible. As for the offence itself, there was 'no one agreed definition of blasphemy'.³⁶ The Law Commission recommended that blasphemy be abolished without replacement.

The Satanic Verses

In 1989 an application for summonses against author Salman Rushdie and his publisher in respect of blasphemy offences relating to the book *The Satanic Verses* was refused.³⁷ It was claimed the book contained a scurrilous attack on God, the supreme deity common to all major religions of the world,³⁸ including Islam and Christianity. One aspect of the alleged blasphemy was that the wives of Mohammed were described as whores in the book.³⁹ On appeal in *R v. Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury* [1991] 1 AER 306, the initial judgment was upheld – the law as it stood was clearly limited to Christianity only. Where the law was clear, the Court stated that it could not amend it due to a perceived anomaly or injustice, as it was for Parliament to change the law. In terms of the ECHR, the rights under articles 9 and 14 – freedom of religion⁴⁰ and prohibition of discrimination⁴¹ respectively – did not necessitate a law for the protection of Islam, and it was held that such a development would violate the author's right of freedom of expression under article 10.⁴² This admission to freedom of expression was not made in the other two cases.

However, it was also pointed out that the right of all non-Christians to freedom from offensive attacks on their faith was being denied on the basis of religion, and so articles 9 and 14 *were* being violated. Also, article 10 did

not guarantee absolute freedom of expression: restrictions were available.⁴³ Watkins L.J. stated in *ex parte Choudhury* that ‘Muslims have demonstrated against the book in the UK and ... have been arrested and convicted of offences against public disorder’.⁴⁴ It is arguable that this was *prima facie* a case for a restriction. The *fatwa* on Rushdie announced by Ayatollah Khomeini, spiritual and political leader of Iran at the time, was considered in England to be an unacceptable interference with freedom of expression – yet Rushdie’s book had caused much offence to Muslims in England.⁴⁵ Not only was Rushdie seen not to have been held accountable by the law, but it also gave him 24-hour protection. To the Muslim community this legal position appeared to be discriminatory.

The decision taken in *ex parte Choudhury* shows problems with both the nature and application of the offence. Judges had created the law of blasphemy and then attempted to shape and adapt the law to different conditions as time passed. Difficulties were likely to arise as the process continued. But legislating a suitable means of preventing insult or outrage to religious feelings which does not also place an unjustifiable limitation on the right of freedom of expression is not straightforward. There are some ‘religions’ that the passenger on the Clapham omnibus may deem it right and necessary in the public interest to condemn in no uncertain terms, regardless of how participants in those faiths might respond. Should a new law provide protection for such groups, no matter how potentially harmful they may be? Beliefs that thieves should have their hands cut off or adulterers executed should arguably be open to attack using the strongest language available. But it is not easy to balance unacceptable criticism of religion with freedom of expression in a way that is acceptable to all parties concerned.

Visions of Ecstasy

The most recent case involving blasphemy was *Wingrove v. United Kingdom* [1996] 24 EHRR 1, and involved an 18-minute video called *Visions of Ecstasy* by Nigel Wingrove, about the mystical visions of Saint Teresa of Avila.⁴⁶ The video depicted erotic fantasies involving the crucified Christ. It was refused classification by the British Board of Film Classification (‘the BBFC’) due to its potential for offending religious feelings – a move which effectively banned it. Wingrove complained to the European Commission on the grounds that this violated his right of freedom of expression under article 10 of the ECHR. They agreed with him, ruling that this restriction was not necessary in a democratic society, and referred the case to the European Court of Human Rights (‘the European Court’). They however disagreed with the European Commission and Wingrove, holding that the application of English law to prohibit distribution of the video *was* in this instance compatible with article 10. Because there was no

pan-European consensus as to the significance of religion in society (or consistent treatment of blasphemy in the European civil law codes), individual member-states were in a better position than the European Court to decide the need for freedom of expression restrictions when it came to public morals, and in particular religion. A 'margin of appreciation' was left to national authorities in making such decisions.

This outcome mirrored that of the first European Union case of blasphemy a year earlier, *Otto-Preminger Institute v. Austria* [1995] 19 EHRR 34. A change in the English law was thus not required, and the offence was retained. When it came to religious feelings, restrictions on freedom of expression were acceptable to the European Court – even though the law applied only to Christianity. The law of blasphemy would not necessarily breach article 10 of the ECHR. But given that no objection had been made to the video at the time of the BBFC's refusal, the measures taken do appear disproportionate. Stopping a video being viewed privately because it might affront the religious beliefs of others is hard to reconcile with the concept of freedom of expression. If it is allowed to extend only to those matters which do not cause offence, then this restricted freedom is of little practical worth. It has since been suggested that 'the United Kingdom's attitude to blasphemy is institutionalised hypocrisy'.⁴⁷

The Options

In the seventeenth century the justification for the law of blasphemy in England was twofold: there was a moral responsibility to punish an insult to God, and it was in the public interest to uphold Christianity and overcome any bid to subvert it. Four hundred years later, however, the destruction of society is no longer envisaged because of an abusive attack on the established church. As Lord Lester has pointed out, 'The Church [itself] has not needed to invoke blasphemy law in modern times'.⁴⁸ That the law developed via judicial decision over time to give protection against abusive insults which did not include serious, well-reasoned critiques – which could be said to be far more damaging to a religion – indicates that, as the state has grown in strength and confidence over the centuries, it has become more relaxed in its application of a unified church-state authority. But should the privileged position of the established church continue? There are a number of options:

1. Maintain the status quo – leave the law as it currently stands.
2. Extend blasphemy to include all religions.
3. Abolish the law without replacement.
4. Monitor the effect of incorporating the ECHR into English law via the Human Rights Act 1998.⁴⁹
5. Introduce a new offence of incitement to religious hatred.

Each option has problems. Maintaining the current legal position is inequitable; extending the current law to encompass all faiths would not be straightforward in practice; abolition without replacement may be contrary to articles 9 and 14 of the ECHR; and a wait-and-see approach in respect of the Human Rights Act will involve expensive and time-consuming litigation. The introduction of a new offence prohibiting incitement to religious hatred along lines similar to those already in place in Northern Ireland,⁵⁰ and similar in form to current racial hatred provisions in the Public Order Act 1986, would not be without difficulty either (in respect of defining 'religion'), but it would bring the government more clearly into line with United Nations obligations which provide: 'Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'.⁵¹

There was an unsuccessful attempt by Lord Willis to abolish the offence with his Blasphemy Bill in 1978, during which he pointed out there was 'a whole series of twentieth century statutes and cases involving offences which would previously have been prosecuted as blasphemy but which can now be prosecuted as obscenity, indecency, incitement to racial hatred, or conduct likely to cause a breach of the peace'.⁵² More recent attempts to get rid of the law of blasphemy have also proved fruitless: Tony Benn's attempted Private Member's Bill in 1989 was lost, and the Bill for the abolition of the offence tabled by Lord Avebury failed in 1995, when the government made it clear they did not intend to change the law. They subsequently suggested that 'the Christian faith ... no longer relies on [the law of blasphemy], preferring to recognise that the strength of their own belief is the best armour against mockers and blasphemers'.⁵³ Then in 1997, then-Home Secretary Jack Straw indicated to the Home Affairs Select Committee that the extension of the law of blasphemy to other religions would be appropriate – but that it may not be the most effective direction in which to head.⁵⁴

Paul Kearns, who has recently written a number of articles on the law of blasphemy in relation to art,⁵⁵ characterises the ongoing debate as a clash between thought and belief: '[The] protection of both art and a minority religion in England should be founded on a more comprehensive ... analysis than is currently revealed in legal practice'.⁵⁶ He also suggests that, although there is a defence in the Obscene Publications Act 1959 which provides that a person shall not be convicted where it is proved that publication of the article was justified as being for the 'public good',⁵⁷ there is no such protection offered by the law in respect of blasphemy. In his opinion, there should be an artistic merit defence available whenever creative works are involved.

Post-11 September

The likelihood of change in the law of blasphemy now seems to have increased in the wake of the events of 11 September 2001. In November 2001, Home Secretary David Blunkett told the Commons Human Rights Committee, 'there will come a time when it will be appropriate for the blasphemy law to find its place in history'.⁵⁸ Its repeal had been considered by the Home Office in the Prevention of Terrorism Bill (itself a direct response to the US hijackings), but it was decided that legislation on religious matters was not within its scope. Lord Avebury, however, has once again introduced a Private Member's Bill with this object in mind. The Religious Offences Bill received its second reading on 30 January 2002.⁵⁹ During debate in the House of Lords, Lord Ahmed said, 'It is imperative that we amend our laws so that they are relevant to the multi-religious Britain of today'.⁶⁰ The Bishop of Birmingham has also commented in the House of Lords: 'The present state of the law, which is to offer protection to one religion, is plainly indefensible ... The view of the bishops of the Church of England is that if there is satisfactory and plainly effective legislation against religious hatred, then the law against blasphemy can go'.⁶¹ The House of Lords has since announced the appointment of a select committee to consider the amendment or abolition of certain religious laws, in particular blasphemy.⁶²

There are those who suggest that it might not be a good thing to change the current position: 'To some, the blasphemy laws represent an anachronism, but their repeal ... would erode the unseen foundations upon which our society is built'.⁶³ But this position seems hard to support given its limitation to the Church of England in what is now a multi-faith environment. The majority of commentators are of the opinion that the law of blasphemy has become obsolete, and it should not be widened so that other faiths may be included: 'Rather than trying to improve on an antiquated law, it is better to abolish it and look at new ways of safeguarding the rights of religious minorities'.⁶⁴ In terms of freedom of expression, 'Parliament should not make the courts of law arbiters of what is right, wrong or acceptable in the area of religious or philosophical controversy. These debates should take place in newspapers, tv and radio programmes, pulpits and public platforms. Criminal law should protect the citizens, not ideas'.⁶⁵ The Law Society's Criminal Law Committee has also commented in favour of abolishing blasphemy:

You would have to extend it to all types of speech and behaviour touching on religious issues. Offences governing incitement to racial hatred, and public disorder, provide adequate protection. As a profession, we should be saying that this is the way forward rather than harking back to ancient, less flexible laws.⁶⁶

There are significant numbers of people in England who are aligned with non-Anglican and non-Christian faiths, or who are non-religious. The Church of England's average attendance on a Sunday is presently seven *per cent* of the English population.⁶⁷ Although the law of blasphemy has been held not to contravene the ECHR, it seems contrary to the spirit of equal protection under the law. Either a law of blasphemy for all religions or no such law at all may be defensible positions, but anything in-between is arguably discriminatory, and so has no place in a modern pluralist society. Given the history of the offence and current related legislation, there are other means available for protecting religious beliefs which are more suitable, and more effective, in today's England. The time has come for the law of blasphemy to be abolished.

Blasphemy and Music

The first case of note occurred in 1978, when Small Wonder Records released the EP *The Feeding of the 5,000* by Crass. The opening track, 'Reality Asylum', was replaced by a three-minute silence, due to objections from employees of the pressing plant in Ireland which was making the product. This track dealt with the band's view that religion was being used as a means of sexual oppression. The following year Crass re-released it as a single on their own label, at which point they were interviewed by the police and subsequently advised that a charge of criminal blasphemy was to be referred to the Director of Public Prosecutions.⁶⁸ The case was later dropped, although at the time record shops were advised that they risked prosecution if they stocked Crass product.⁶⁹ In March 2001 Mute Records released the compilation album, *25 Years of Rough Trade Shops*, which included the Crass track: no blasphemy enquiries appear to have been made by the authorities this time.

There have been occasional further releases reported due to their blasphemous nature. Advertisements for the 1988 Christian Death album *Sex, Drugs and Jesus Christ* were censored in the English music press, the band had their tour curtailed and the album release was extensively banned.⁷⁰ They were considered blasphemous, although the band saw themselves as pro-Christian; their point was that the organised Christian churches had betrayed the message of Christ.⁷¹ Newspapers refused to run advertisements for the Depeche Mode single 'Personal Jesus' in 1989, because they did not want to cause offence.⁷² British clergy attempted to have a Creaming Jesus concert cancelled in 1990; the Sussex Board of Social Responsibility called the band 'blasphemous' and 'disgusting'.⁷³ The band James claimed in 1992 that Channel 4 prevented them performing the song 'Live a Life of Love' on the *Jonathan Ross Show* because it was

blasphemous.⁷⁴ In 1994 the MP for Selby instigated blasphemy proceedings in respect of the song 'So My Soul Can Sing' by Jackie Leven.⁷⁵ A concert-goer was arrested leaving a Cradle of Filth concert in 1998, for wearing the band's 'Jesus is a cunt' t-shirt; the case was dismissed prior to going to court, as it was not considered to be in the public interest by the Crown Prosecution Service. That same year the band's former drummer was arrested in Dover for wearing the shirt.⁷⁶

It has been suggested that Christians have now re-thought their position in terms of legal proceedings in such instances: they feel that prosecution merely publicises the material, and thus harms their position more than it helps.⁷⁷ Even so, these cases of censorship involving music mixed with religious elements illustrate the continuing effect of the threat of blasphemy proceedings when artist and company alike consider releasing product to the public. But as Marc Marot, Managing Director of Island Records said in 1991, 'the potential to be offended is one of the prices we pay for a free society'.⁷⁸

Blasphemy in Music Contracts

Blasphemy appears to have originally appeared in music contracts as an additional means of protection for the companies: liability for material submitted by artists which was released and subsequently found to be of a blasphemous nature would thus rest with the artists themselves. In terms of non-release of material due to a company invoking its blasphemy warranty, no such case has been identified by the author. Martin Cloonan has suggested that a form of 'prior restraint' at the point of production may be frequent, but goes unreported.⁷⁹ It is essentially an 'in-house' battle within a company, between artistic expression and commercial expediency, and the company will release product according to what they believe will be acceptable to the public. As discussed above however, there are reported examples of artists being censored due to alleged blasphemy, notably Crass in 1978.

Cloonan also notes that a warranty in respect of blasphemy would enable a company either not to market the artist's material, or to rely on this warranty if problems arise after release, should the material submitted by the artists be considered blasphemous.⁸⁰ Legal action often works its way back from the retailer selling the material to the company releasing it, and those involved at each stage would want to protect their own positions – which such a warranty enables. In other words, the responsibility would ultimately rest with the artist. But if the artist is established, the fact that their loyal following ensures profit means that the company may be more inclined to take a chance with a release. Being a business, it is perhaps not

surprising to note that the music industry is inspired more by market forces than artistic expression.

Internationally there are currently five 'major' music companies: BMG, EMI, Sony, Universal and Warner. All operate in England. As with other forms of commerce, globalisation has led to a situation where the major companies now have similar contracts to each other.⁸¹ Current media law texts state that it is standard practice to include in recording and music publishing contracts a warranty by the composer or artist that their work will not be obscene, blasphemous or defamatory of anyone.⁸² *The Encyclopaedia of Forms and Precedents* also suggests that in such agreements the services of the composer or artist 'shall not be obscene, blasphemous or defamatory of any person'.⁸³

The Legal and Business Affairs departments for the record and publishing divisions of each of the five 'major' music companies all confirm however that they no longer mention blasphemy in the standard form contracts. The following wording is representative of what is actually presently used by companies in their standard contracts, in respect of this warranty:⁸⁴

Recording Contracts:

None of the titles embodied in any of the material hereunder nor any arrangement or adaptation thereof shall infringe or give rise to any claim or infringement of the copyright or any other rights of any third party nor be criminally obscene nor defamatory of any person, firm or company.

Publishing Contracts:

The writer hereby warrants and represents that the compositions are and will be neither criminally obscene nor defamatory and do not and will not infringe the copyright or other rights of any third party.

Although none of the 'major' companies utilise the blasphemy warranty in their music contracts anymore, there appears to be no definitive point when it fell out of favour. The *Gay News* trial would have brought with it the realisation that blasphemy was still a criminal offence, and accordingly its inclusion at that time as a 'boiler plate' clause to protect the position of companies is not surprising. Then with *The Satanic Verses* it became clear that its application was both archaic and discriminatory, as well as contrary to artistic freedom of expression. This could be when its usage started to decline.

The initial shift may have been brought about by an artist's legal representative questioning the relevance of it, leading to negotiation on the point, and it being dropped from the contract. Standard warranties are not often dealt with in this manner, however. It is perhaps more likely that one

or more of the 'major' companies decided it was outmoded and removed it themselves to circumvent future argument. From here it is a short step to blasphemy being dropped from the company's standard form contract. Then, as contracts have a way of 'doing the rounds', with alterations being picked up and incorporated by other companies, it became standard industry practice over time. That its removal was an overtly conscious effort seems doubtful, as the music business has traditionally been more likely to focus its operational decision-making on commercial practicalities, before artistic considerations such as freedom of expression were taken into account.

The introduction into English law of the ECHR has had no effect on standard form music contracts of the 'major' companies. So far, little practical notice at all appears to have been taken of the legislation by the music business. Some companies contacted made the point that contractual alterations usually happened for commercial reasons, but there could be a 'trickle down' effect as human rights case law develops in England. They also stressed the ongoing nature of their relationship with an artist or composer, and how artistic expression was at the root of their business, so it was in everyone's interest to support their freedom in this regard.

Blasphemy seems to have slipped out of usage as a warranty over the past two decades due to a perceived lack of relevance both to contemporary contractual relationships and to modern life. The net effect is that the industry position has now become more closely aligned with the spirit of the ECHR than it was previously, due to this example of artistic inhibition of expression and discrimination being eliminated from music contracts. But this development seems to have been somewhat coincidental, and what has been given with one hand (removal of the blasphemy warranty, leading to increased freedom of expression and non-discrimination) may have already been taken by the other (the new and more wide-ranging warranty in respect of 'rights of any third party'). Certainly the record and music publishing companies appear happy with this current 'catch all' version of the warranty. This small phrase is broadly drafted and casts its net wide – and its scope appears virtually limitless. In terms of rights guaranteed by the ECHR, the Human Rights Act and the proposed Religious Offences Bill, any legal difficulties of a religious nature arising with material released would now be covered by the updated and all-encompassing 'rights of any third party', and the contractual position of the companies would remain secure while the artist would still be held liable.

Conclusion

Originally created in seventeenth-century England to help keep the peace within the kingdom, protection from blasphemy is no longer required by

either the state or the general population. But from the historical struggle for freedom of thought, through to modern artistic freedom of expression, reaction from religious quarters has never been far away. At each turn, the definition of blasphemy has shed old, or taken on new, shades of meaning, which over time have made it difficult to deal with. The present legal situation in England has been described as ‘an inherent contradiction (protecting a faith in a secular land) within another inherent contradiction (protecting the Christian faith in a multi-faith land)’.⁸⁵

The law of blasphemy was brought out of retirement in 1976 by a small lobby with strong religious convictions, at a point when there had been no prosecution for the offence brought in over half a century. It resulted in the successful prosecution of a periodical and its editor for a poem they published. Over 25 years later, excerpts from the offending poem have been broadcast by a national television station and published in a national newspaper (both within the last year).⁸⁶ The law has not been amended in the intervening years and these publications have yet to be prosecuted. The attempt to prosecute Salman Rushdie and his publisher for blasphemy ultimately failed in 1991, because Islam was deemed not to be covered by the legal definition as it had been judicially developed: it was held to apply to the Church of England only. Along with the 1996 banning of a video depicting the visions of Saint Teresa, these three cases all involve the linking of elements of religious narrative and sexuality, and it is this which appears to have contributed in large measure to the ensuing proceedings in each case.

The case law generated by these publications suggests the European Court is willing to uphold restrictions on freedom of expression when it comes to blasphemy in England. Such limitation would be considered unconstitutional under the First Amendment in the US.⁸⁷ It is perhaps worth asking whose religious feelings have been offended, and how representative they are of society in general. In the light of Muslim reaction to *The Satanic Verses*, the archaic character and inequitable application of the law as it stands is very clear. Even Christian supporters of the law cannot find it easy to defend its limitation to the Church of England. English law upholds freedom of expression, and English society is now multi-faith, multiracial and multicultural – a place where other people’s opinions need to be tolerated more than they may have been in the past. In this environment a workable relationship between the state, law and religion requires increased tolerance from, and towards, all sections of the community. There is no room for an anachronistic law that both discriminates against members of that community and unduly inhibits their freedom of expression. The law of blasphemy should therefore be abolished without replacement. Parliament alone has the power to effect this abolition. Since the events of 11

September 2001 there has been renewed impetus to address the state of blasphemy law in England. This impetus presently takes the form of the Religious Offences Bill. The Church of England has given conditional approval to its repeal, and the current Home Secretary has voiced his support as well. It is hopefully only a question of time before this arcane offence is consigned to its rightful place in the annals of English law.

It should however be remembered that blasphemy remains a criminal offence in England today. It may seem unlikely, given the post-11 September climate of greater cultural and religious awareness and the current mood for legislative change, that any charge of blasphemy would be brought against an artist, but legal representatives of music companies and artists alike must be aware that it is still a crime (as well as a 'sin'), and advise their respective clients appropriately. They should familiarise themselves not only with the relevant areas of the ECHR and Human Rights Act, but also with any further new legislation which may be brought into effect in place of blasphemy, such as religious hatred offences. Although it remains a crime, the 'major' record and music publishing companies no longer make use of the archaic and discriminatory blasphemy warranty in their contracts. They have in this respect managed to position themselves in a way that demonstrates their support of artistic expression and non-discrimination. This benefits both companies and artists in the sense that it helps keep the ongoing relationship between them running smoothly. It benefits the companies in particular because they can show how supportive they are of their artists' material without having lost contractual ground. The actual motives of the music business may in fact be primarily profit-orientated, but when it comes to freedom of expression and modern music contracts they have got one thing right: there is no place for blasphemy anymore.

NOTES

1. *The Bible* (Authorised King James Version), Exodus 21:7.
2. *Ibid.*, John 19:7.
3. *Encyclopaedia Britannica*, www.britannica.com/eb/article?eu=15818, last accessed 17 September 2002.
4. *Ibid.*
5. *Catholic Encyclopaedia*, www.newadvent.org/cathen/02595a.htm, last accessed 17 September 2002.
6. *The Concise Oxford Dictionary*.
7. *Ibid.*
8. Lord Hailsham of St Marylebone (ed.), *Criminal Law, Evidence and Procedure*, Vol.11(1), fourth edn. (London: Butterworths, 1990), para.348.
9. W.S. Holdsworth, *A History of English Law*, Vol.VIII, second edn. (London: Methuen, 1937), 406.
10. 9 & 10 Will III, c.132. No prosecution was ever brought under this Act.
11. Carlile, quoted in N. Walter, *Blasphemy in Britain* (London: Rationalist Press Association, 1977), 3. Carlile was a bookseller, publisher and early defender of freedom of the press.

12. T. Starkie, *A Treatise on the Law of Slander and Libel and of Malicious Prosecutions*, second edn. (sine loco: Clarke, 1830), 559 at 600; cited by Holdsworth (note 9), 415.
13. Cited in C. Kenny, 'The Evolution of the Law of Blasphemy', *Cambridge Law Journal* 1/2 (1922), 127 at 135.
14. *R v. Gathercole* [1838] 2 Lewin 237, 254.
15. William Harcourt, quoted in Walter (note 11), 5. A private action had to be instigated in this case.
16. *R v. Ramsay & Foote* [1883] 15 Cox CC 231, 238.
17. *Bowman v. The Secular Society, Ltd.* [1917] AC 406, 407.
18. Criminal Law Act 1967, s.13 and sch.4.
19. Lord Denning, *Landmarks in the Law* (London: Butterworths, 1984), 301.
20. *Gay News* 96, 3–16 June 1976.
21. Lemon received a nine-month suspended sentence in addition to a fine of £500 (or six months' imprisonment); *Gay News* was fined £1,000; prosecution costs were awarded against them as well.
22. Kirkup himself released a statement about the reasons he wrote the poem: 'As for blasphemy ... [it] never entered my head for one moment that the poem might be misconstrued in that way. My motives were pure ... and all I wanted to do was create a work of art. Audacity yes, blasphemy no', quoted in Walter (note 11), 10.
23. *R v. Lemon* [1979] AC 617, 658.
24. 'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.' The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), article 10(1), Rome, 4 November 1950.
25. 'The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation and rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.' ECHR, article 10(2).
26. J.C. Smith, 'Blasphemy', *Criminal Law Review* (May 1979), 311 at 313.
27. 'Top of the Stops', *Observer*, 10 April 1994.
28. www.churchnet.org.uk/news/files2/news0.
29. When the name of the poem and poet concerned are entered, a list of websites featuring details of both is generated; www.annoy.com/history/doc.html?DocumentID=100045 is one website that displays the full text of 'The Love That Dares To Speak Its Name', last accessed 17 September 2002.
30. 'TV Joan Faces Jail for Gay Poem: Moralists Accuse Bakewell of Blasphemy', *Observer*, 3 March 2002. The referral was made by Mediawatch, the updated National Viewers and Listeners Association.
31. 'Rude Awakening', *Guardian*, 11 July 2002.
32. *Offences Against Religion and Public Worship*, Law Commission working paper no.79 (London: HMSO, 1981).
33. *Ibid.*, para.8.7.
34. *Criminal Law: Offences Against Religion and Public Worship*, Law Commission report no.145 (London: HMSO, 1985).
35. *Ibid.*, para.2.54.
36. *Ibid.*, para.2.55.
37. As with *Gay News*, a private action was instigated in the absence of a public prosecution.
38. Islam also recognises Jesus as a holy prophet.
39. For the complete list of headings of blasphemy laid before the magistrates, see *R v. Chief Metropolitan Stipendiary Magistrate, ex parte Choudhury* [1991] 1 AER 306, 309.
40. 'Everyone has the right to freedom of thought, conscience and religion; this right includes

- freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.' ECHR, article 9(1).
41. 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.' ECHR, article 14.
 42. This is comparable to the position in the First Amendment to the United States Constitution: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.'
 43. EHCR, article 10(2), see note 25 for text.
 44. *Ex parte Choudhury* (note 39).
 45. In February 2002, an Iranian religious foundation increased the reward for the death of Rushdie, 'Rushdie Fatwa Renewed as Tensions Grow', *The Financial Times*, 15 February 2002.
 46. A sixteenth-century Spanish Carmelite nun.
 47. J. Rubenstein, 'Art and Taste', *New Law Journal* 146/6767 (1996), 1610 at 1611.
 48. Parliamentary Debates (Vol.555) 1993-94 (Hansard) HMSO, col.1891, per Lord Lester of Herne Hill, 16 June 1994.
 49. The Human Rights Act 1998 came into effect in England and Wales on 2 October 2000.
 50. Prevention of Incitement to Hatred Act (Northern Ireland) 1970; Public Order (Northern Ireland) Order 1987.
 51. Article 20(2) of the International Covenant on Civil and Political Rights – the United Nations equivalent of the ECHR. The government however has reserved the right not to introduce new legislation, as the freedoms of assembly and expression must also be taken into account. See C. Unsworth, 'Blasphemy, Cultural Divergence and Legal Relativism', *Modern Law Review* 58/5 (1995), 658.
 52. Parliamentary Debates (Vol.389) 1978 (Hansard) HMSO, col.286, per Lord Willis, 23 February 1978.
 53. Minister of State John Patten from his letter to British Muslims, 4 July 1996, cited in *Wingrove v. United Kingdom* [1996] 24 EHRR 1, para.29.
 54. S. Palmer, 'Blasphemy and the Margin of Appreciation', *Cambridge Law Journal* 56/3 (1997), 469 at 471.
 55. P. Kearns, 'Art, Freedom and the Christian Law of England', *Maastricht Journal of European and Comparative Law* 1 (1994), 307; idem, 'The Uncultured God: Blasphemy Law's Reprieve and the Art Matrix', *European Human Rights Law Review* 5 (2000), 512; idem, 'Sensational Art and Legal Restraint', *New Law Journal* 150/6962 (2000), 1776.
 56. P. Kearns, 'Obscene and Blasphemous Libel: Misunderstanding Art', *Criminal Law Review* (August 2000), 652 at 657.
 57. '... a person shall not be convicted of an offence ... if it is proved that publication of the article in question is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern', Obscene Publications Act 1959, s.4(1).
 58. 'Blasphemy Law to be Scrapped Soon', *Guardian*, 15 November 2001.
 59. This Bill includes *inter alia* a provision for abolition of the offences of blasphemy and blasphemous libel (section 1(1)).
 60. Hansard, Lords, 30 January 2002, at col.318; www.parliament.the-stationery-office.co.uk/pa/ld199900/ldhansard/pdvn/lds02/text/20130-08.htm#20130-08_head0, last accessed 17 September 2002.
 61. The Right Reverend Mark Santer, quoted in www.birmingham.anglican.org/article/3/, last accessed 17 September 2002.
 62. www.parliament.uk/parliamentary_committees/lords_religious_offences.cfm, last accessed 17 September 2002.
 63. Paul Conrathe, quoted in M. Gerrard, 'Faith in the Law', *Gazette* 99/26 (2002), 22 at 23.
 64. Sadiq Khan, quoted in *ibid*.

65. E. Garnier, 'Beware Those Who Want to Curtail Our Free Speech', *The Times*, Law Supplement, 30 October 2001.
66. Malcolm Fowler, quoted in N. Laver, 'Blast from the Past', *Gazette* 98/15 (2001), 18 at 19.
67. 'Church Attendance Tops One Million Mark After Recount', *Guardian*, 5 February 2002.
68. This particular instance occurred within two years of the *Gay News* trial, and its temporal proximity may have been a contributing factor to proceedings.
69. J. Encoule, 'Crass – Penny Rimbaud', www.trakmarx.com/2001_01/crass.htm, last accessed 17 September 2002.
70. 'Holy Wars - Rock n' Religion', www.sortedmagazine.com/archive/magazine/features/rock.htm, last accessed 17 September 2002.
71. More recently US artist Marilyn Manson has released the album *Antichrist Superstar*, which is an attack on the oppressive nature of organised religion, *ibid.*
72. *NME*, 26 August 1989, cited in M. Cloonan, *Banned! Censorship of Popular Music in Britain: 1967–1992* (Aldershot: Arena, 1996), 240.
73. Cloonan (note 72), 240.
74. *Vox*, September 1992, cited in *ibid.*, 153.
75. *Yorkshire Evening Press*, 29 March 1994; cited in *ibid.*, 291. The track was from the Cooking Vinyl album *Songs from the Argyll Circle*, the attempt was unsuccessful.
76. He spent the night in jail, and was made to take it off, www.nme.com/news.12882.htm, last accessed 17 September 2002.
77. 'The Church of Deafening Silence', BBC News Online, 2 November 1999, <http://news.bbc.co.uk/1/hi/uk/501296.stm>, last accessed 17 September 2002.
78. 'Censorship Rant', *Vox*, November 1991, 65, cited in Cloonan (note 72), 88. The Fourth and Broadway album release *Efil4zaggin* by US rap group Niggers With Attitude was held in 1991 not to be obscene under the Obscene Publications Act 1959.
79. Cloonan (note 72).
80. *Ibid.*
81. A. Boon, S. Greenfield and G. Osborn, 'Complete Control? Judicial and Practical Approaches to the Negotiation of Commercial Music Contracts', *International Journal of the Sociology of Law* 24 (1994), 89.
82. N. Lipton, *Music: The Law and Music Contracts* (Hertfordshire: CLT Professional Publishing, 2000); P. Carey and R. Verow, *Media and Entertainment Law* (Bristol: Jordan Publishing, 2001).
83. Sir Peter Millet (ed.), *The Encyclopaedia of Forms and Precedents – Entertainment and Media*, Vol.15(1), fifth edn. (London: Butterworths, 1998), paras.608, 911. The updated June 2002 electronic database version of this publication also uses this wording.
84. These clauses are taken from the standard form contracts of one of the 'major' record and music publishing companies respectively.
85. S. Hannabuss and M. Allard, 'Issues of Religious Censorship', *Library Review* 43/8 (1994), 14 at 27.
86. See notes 30, 31.
87. See note 42.