

**EIP**

# Duchess of Sussex held to be entitled to reasonable expectation of privacy and copyright in letter to father

On 11 February 2021, the High Court ruled in favour of the Duchess of Sussex, Meghan Markle, in her dispute against Associated Newspapers over the publication of a number of articles in 'The Mail on Sunday' and the 'MailOnline' (the "**Mail Articles**") which reproduced large amounts of a handwritten letter, sent to her estranged father, Thomas Markle, on 27 August 2018, three months after her wedding to Prince Harry. Having contended that Associated Newspapers' defence had no reasonable prospect of success, summary judgment was granted in the Duchess's favour on the grounds that the reproduction of the letter constituted (a) a misuse of her private information; and (b) an infringement of her copyright.

The decision was appealed. The Court of Appeal affirmed the High Court's decision, ruling that it was right to grant summary judgment and dismissing Associated Newspapers' grounds of appeal, on the basis that it could be determined at this stage that there was no triable issue. The court also agreed with the Duchess' argument that a trial would be a "further intrusive process".

## **The claim of copyright infringement and the defence of Fair Dealing**

At both first instance and appeal the judges had to consider the balance between the competing rights of freedom of expression under Article 10 of the European Convention of Human Rights ("ECHR"), asserted by Associated Newspapers, and copyright, asserted by the Duchess.

In relation to copyright, Associated Newspapers contended that the judge at first instance had erred on two grounds in failing to properly evaluate; (i) the interference with Article 10; and (ii) the fair dealing defence.

## **(i)Interference with Article 10**

Associated Newspapers raised a number of arguments based on Article 10, including that the judge had failed to evaluate the extent and weight of copyright in the letter, arguing only a low level of copyright protection was available due to the limited intellectual creativity of its contents. They also argued that publishing more of the letter allowed for a fairer evaluation. It was noted that the letter referred to facts which were not themselves protected by copyright.

Ultimately the Court of Appeal held there was no triable issue that would lead to a different result after a trial and refused this ground. The appellate court appreciated that the circumstances in which public interest may override copyright are not precisely defined, but are a rare occurrence. In particular the court referred to *Ashdown v. Telegraph Group Ltd* [2001] EWCA Civ 1142, in which it was noted that "in most circumstances, the principle of freedom of expression will be sufficiently protected if there is a right to publish information and ideas set out in another's literary work, without copying the very words which that person has employed to convey the information or express the ideas" and that in such circumstances "the author of the work should have his property in his own creation protected".

## **(ii)Fair dealing defence**

Associated Newspapers ran similar arguments to those above, and also argued for a liberal interpretation of the fair dealing defence, arguing that the judge took "too narrow a view of the public interest in the current events surrounding the estrangement of the claimant and Mr Markle".

Again both courts considered the *Ashdown* commentary that a fair dealing defence would likely succeed if, for example, the defendant's additional purpose is to "right a wrong, to ventilate an honest grievance, to engage in political controversy, and so on

". Associated Newspapers, for example, argued that the publication of the letter was to correct inaccuracies about the letter that was reported in a People Magazine article in February 2019.

Key factors included whether the work had "already been published or otherwise exposed to the public", and "the amount and importance of the work that had been taken", where taking an excessive amount could negate any fair dealing defence. Ashdown explained that it was rare for the right of freedom of speech to prevail over copyright because, among other things, copyright is itself a right protected by Article 1 of the First Protocol of the European Convention of Human Rights ('Protection of Property') and "the protection of copyright was a legitimate aim capable of justifying an interference with freedom of expression", where the court "had to strike a fair balance".

The judge at first instance found that the main reason for rejecting the defendant's fair dealing defence was the excessive reproduction of the letter, which was ruled to be essentially for the purpose of reporting its contents, as opposed to any 'current event' of public interest. The use, therefore, was not "fair". The judge accepted that the existence of the letter and a description of its contents had been put into the public domain by the People Magazine article. However, that court ruled that Associated Newspapers:

"knew they were dealing with an unpublished work, it copied a large and important proportion of the work's original literary content, most of which infringed the claimant's privacy rights and was disproportionate to any legitimate reporting purpose. The fairness of the reproduction was, therefore, very limited. Most importantly, perhaps, the use made of the Letter was unfair, because it was not about reporting current events, but reporting the actual contents of the Letter to make the splash of publication already referred to".

Having found against a fair dealing defence, the judge further ruled that this was not a rare exception where the court could conclude that, notwithstanding a fair dealing defence failing, the public interest required the copyright in a work to be overridden in any event.

The Court of Appeal agreed and accordingly rejected this ground, holding again that there was no triable issue.

## Commentary

A key reason for the decision in this case was the extent of the letter disclosed. The Court of Appeal commented that publishing a small part of the letter may have been justifiable to rebut any inaccuracies in the People Magazine article, but the amount disclosed in the

Mail Articles was held to be “manifestly excessive” and therefore unlawful. This also indicated that the real purpose was not to right any wrongs, but to create a sensationalised exclusive “to reveal for the first time [to the world]”, as stated in the Mail Articles “[t]he full content of a sensational letter written by [the Duchess] to her estranged father shortly after her wedding”. This tipped the balance in favour of the Duchess’s Article 8 right to privacy, over Mr Markle and Associated Newspapers’ Article 10 right to freedom of speech, further compounded by the letter’s contents, which concerned “personal matters that were not matters of legitimate public interest”.

[2021] EWCA Civ 1810

Written by Lydia Birch