

## **Meghan Markle wins privacy and copyright claims against Associated Newspapers**

In a significant victory for the Duchess of Sussex, the High Court has granted summary judgment, ruling that she had a reasonable expectation of privacy in the contents of a private letter that she wrote to her father, and it was fanciful to think otherwise.<sup>1</sup> The court then rejected the publisher's arguments that her right to privacy was outweighed by the interests of her father and the public. While the Duchess is a public figure and the existence of the letter (and an allegedly misleading summary of its contents) had been made public in a US magazine, the judge held that extent of publication by Associated Newspapers was largely irrelevant to any legitimate aim, and the number of extracts published was wholly disproportionate.

The High Court also ruled that the letter was an original copyright work of which Associated Newspapers had copied a substantial part. The court again rejected the publisher's reliance on the fair-dealing exception for the purpose of reporting current events, and/or that publication was justified in the public interest. An issue remaining for trial is whether the Duchess was the sole author or a co-author of the letter, although the judge considered that of minor significance in the wider context of the claim.

### **Background**

Three months after her wedding to Prince Harry, Meghan Markle sent her father a letter, to which he replied in September 2018. The existence of the letter became public in February 2019 when the US magazine "People" referred to it in an article. Three days later, Associated Newspapers – publisher of the Mail on Sunday and the MailOnline – published five articles in hard copy and online. The Mail articles quoted extensively from the letter on a total of 88 separate occasions.

### Claim

In her claim, the Duchess asserted that she had a reasonable expectation of privacy in the contents of the letter, on the basis that it concerned her private and family life and her intimate thoughts and feelings, which were not matters of legitimate public interest. She maintained that she had a reasonable expectation that the contents of the letter would remain private, and that the inclusion of extracts of the letter in the Mail articles was a misuse of her private information. The Duchess also submitted that the publication of the letter constituted an infringement of her copyright, as the letter was an original copyright work in which she owned the copyright.

### Defences

Associated Newspapers denied that the letter was private, or that the Duchess had a reasonable expectation of privacy in its contents. Further, or alternatively, the defendant asserted that any privacy interest that the Duchess enjoyed was "slight" and "outweighed by the rights of her father and the public". Associated Newspapers relied on a number of factors to limit the Duchess's privacy rights, including her public status, her knowledge of her father's propensity to speak to the media, and her conduct in causing (or her alleged intention to generate) publicity about the letter and her relationship with her father. It was also argued that the article published in People magazine gave a misleading account of their relationship and of the letter, and that Mr Markle's response in the Mail articles justified the disclosure of the letter in order to protect Mr Markle's rights and those of the public.

In relation to copyright infringement, Associated Newspapers challenged the Duchess's case on originality, subsistence of copyright, ownership and infringement. It also raised defences of fair dealing

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<sup>1</sup> *HRH The Duchess of Sussex v Associated Newspapers Limited* [2021] EWHC 273 (Ch).

and public interest and argued that the rights of others under the European Convention on Human Rights to impart and receive information outweighed any copyright claim.

### **Application for strike-out or summary judgment**

The Duchess applied: (a) to strike out the defences to the claim for misuse of private information, on the basis that the defence disclosed no reasonable grounds for defending the claim; and/or (b) for summary judgment, on the basis that Associated Newspapers had no real prospect of successfully defending the privacy and copyright claims, and that there was no other compelling reason why they should be disposed of at trial.

Associated Newspapers submitted that summary judgment is rare in these areas of law due to the “intense focus” on the specific details of the competing rights in play, suggesting that it is usually impossible to conduct such an assessment except at trial. Yet Lord Justice Warby, sitting as a judge of the High Court, disagreed and noted that there can be plain and obvious cases in privacy and copyright, as there are in other fields of law.

### **Privacy claim**

#### Stage 1: reasonable expectation of privacy

There were six main factors for the court to consider at this stage:

- 1 *The claimant’s status and role* – While Warby LJ acknowledged that Meghan Markle is a public figure who must accept a degree of intrusion, he explained that it does not mean that she has given up her right to a private life, or that every aspect of her private or family life is open to examination in the press.
- 2 *Whether the letter or its contents were private in nature* – The judge stated that it was obvious to the court that, to some extent at least, the letter was private in nature. Indeed, the Mail articles referred to it as “Meghan’s private letter”, which reveals the “true tragedy of Meghan’s rift with her father” as she “pours out her heart to her father”. The judge found that the letter did contain information relating to Mr Markle, but it did not relate to him alone and its purpose was to explain how his actions made his daughter feel. So it was impossible to separate out that information and to categorise it as “belonging” to Mr Markle, rather than the claimant. Similarly, it could not be said that Mr Markle’s right to tell his story outweighed the presumptive right of the Duchess to keep the contents of the letter private. The judge did not find that respecting that right would significantly impinge on Mr Markle’s right to tell his story: it only restricted his right to use the contents of the letter in doing so.
- 3 *Character and location of the recipient* – Warby LJ stated that, while it was known that Mr Markle had a propensity to speak to the press, that did not defeat the right to expect him to keep the contents of the letter private: the level of risk-taking might affect damages, but not whether the publication was an intrusion. The letter was sent to Mr Markle in the USA, and it was alleged that under US law publication of the contents of the letter was lawful. Even if that were correct, the judge found that it was irrelevant to the Duchess’s legitimate expectation that the letter would not be published in this jurisdiction, which the judge held is a matter of English law.
- 4 *Public domain* – Associated Newspapers relied on the People article and allegations that the Duchess must have authorised (or acquiesced in) the disclosure of the existence of the letter. The judge noted that this is not, however, the same as disclosure of the detailed contents of the letter.

- 5 *Other disclosures or alleged disclosures by the Duchess* – Associated Newspapers also relied on allegedly authorised disclosures of other aspects of the Duchess’s life and relationship with her father. Yet the court recognised that the respect for individual autonomy within Article 8 encompasses the right to exercise control over private information, including a person’s right to decide whether, what, when and to whom to disclose anything about their private life.
- 6 *The claimant’s intentions* – Associated Newspapers argued that the letter was written and sent with a view to being disclosed publicly, partly on the basis that the Duchess had discussed it with the Kensington Palace communications team. While the court could not determine the disputed facts, that was unnecessary, as the judge found that this defence had no sound basis in law: it is not an essential element of the tort that the claimant had no intention to disclose the information.

Overall, the judge held that the Duchess was bound to win at trial on this issue, and it would be fanciful to think otherwise.

### Stage 2: the balancing exercise

Once the judge had decided that the claimant had a reasonable expectation of privacy in relation to the letter, he had to go on to conduct the balancing exercise to determine whether the publication of the Mail articles was necessary and proportionate in pursuit of the legitimate aim of protecting the rights of others, namely the freedom of expression of the publisher.

Associated Newspapers again relied on the factors discussed above. The judge considered that, even taking its case on each of those factors at its highest, there was no real prospect that the balance would be struck in favour of Associated Newspapers against the claimant. The court was invited to infer that the Duchess is willing to publicise details of her private life, including correspondence, as long as it is favourable. While the court could not resolve the factual disputes, it considered that this would not assist Associated Newspapers’ case in any event. There was simply no basis to conclude that the Mail articles served any purpose other than satisfying public curiosity about the claimant.

The judge found that the People article did portray the letter in an inaccurate way, and that would justify some steps to make the true position known. Yet, as the judge commented, the relevant part of the People article only amounted to 25 words. Associated Newspapers published “the bulk” of the letter, which was largely irrelevant to any legitimate aim and – even allowing for the “fullest editorial judgment” was wholly disproportionate which, on the judge’s calculations, amounted to 585 words out of the 1,250-word letter.

### Conclusion

The judge found that the Duchess had a reasonable expectation that the contents of the letter would remain private, and that Associated Newspapers interfered with that reasonable expectation. Taking the disclosures as a whole, the publication was manifestly excessive and unlawful, and the judge found that there was no prospect that a different judgment would be reached after trial. Accordingly, summary judgment was granted.

### **Copyright claim**

#### Originality

Associated Newspapers asserted that neither the letter nor the electronic draft were original, because they purported to recite pre-existing facts, including the Duchess’s views of her father and his conduct, and they asserted that none of those matters were the claimant’s own intellectual creation. The court described this argument that as a “remarkable argument for a news publisher to want to advance”. The

judge saw no prospect of a conclusion that the electronic draft was merely a mechanical exercise in reciting bald historical facts. Instead, it would inevitably be held to be the product of intellectual creativity sufficient for copyright purposes.

### Infringement

Warby LJ held that it was undeniable that the Mail articles reproduced a substantial part of the content of the electronic draft and the letter. The prominent parts were chosen for publication, and that constituted the majority of the substance of the intellectual creation.

### Fair dealing

The judge found that only the reproduction of the single paragraph of the letter that addressed the inaccuracies in the People article could count as fair dealing for the purposes of reporting current events. Otherwise, the reproduction of the letter was essentially for the purpose of reporting the contents of the letter, which was not a current event. Moreover, the use was not fair, particularly in relation to one of the articles that set out a personality profile for the Duchess based on her handwriting in the letter.

### Public interest

The court noted that freedom of expression in the public interest will prevail over copyright in only rare cases. Copyright itself is a right under the European Convention on Human Rights, and its protection is a legitimate aim that is capable of justifying an interference with freedom of expression. A balance must be struck, and it would be rare for the public interest to justify copying the actual form of a copyright work. Further, the fair-dealing defence normally affords sufficient protection for the public interest, and this was not a case of fair dealing. So there was no basis to conclude that public interest required the copyright to be overridden.

### Ownership

Associated Newspapers argued that a member of the Kensington Palace communications team had been involved in writing the letter such that it was either a work of joint authorship or there were several separate works with different ownership. The court could not describe the case on joint authorship as fanciful. But this did not merit a trial on the full copyright claim. Accordingly, summary judgment was granted on subsistence and infringement, leaving the issue of whether the Duchess was the sole or co-author for trial.

### **Comment**

The judgment provides important guidance on both an individual's reasonable expectation of privacy in something that the claimant's leading Counsel submitted is "self-evidently private", but also on individuals' rights to control their own privacy. The judge noted that, in modern law, it is recognised that "the respect for individual autonomy that lies at the heart of Article 8" means that the "starting point is a person has the right to exercise close control over particular information about her private life: to decide whether to disclose anything about a given aspect of that life and, if so, what to disclose, when, to whom". An individual who actively seeks and invites publicity may have a reduced expectation of privacy, but "the analysis must be focused, not broad-brush".

A key part of the judge's reasoning was the extensiveness of publication of the letter, which the judge found was entirely disproportionate to any possible defence of public interest in terms of privacy law and, for copyright purposes, went far beyond both the relevant current event and any fair use. Publishers should consider carefully what the relevant public interest and/or current event is and ensure

that it has a connection to the information published, and that they only publish what is reasonably necessary to serve that purpose.

Finally, the court expressly rejected the contention that the focus on the competing rights involved means that these types of cases are not appropriate for summary judgment. While this is a highly fact-specific analysis and the impact on future cases is yet to be seen, similar applications for early determination may become more common, leading to a decline in the number of cases proceeding to trial, which is already relatively small in this area of law.

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