

# Kluwer Copyright Blog

## The Duchess and the tabloid: copyright, fair dealing and freedom of expression in personal letters

Jeremy Blum, Sean Ibbetson (Bristows LLP) · Thursday, February 3rd, 2022

There has been widespread press coverage of Meghan Markle's (the Duchess of Sussex) recent success in a claim which she brought against the publishers of the Daily Mail, Mail on Sunday and the Mail Online website ("the Mail"). In February 2021, the High Court granted Ms Markle summary judgment on her claim for misuse of private information, and also on the central issues of her copyright claim. The summary judgment procedure allows a judge to reach a decision without the case proceeding all the way to a full trial. The effect of the summary judgment was therefore to dispose of the claim in Ms Markle's favour. Just before Christmas, the Court of Appeal handed down [its decision](#).



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For those unfamiliar with the background, Ms Markle's claim relates to the publication by the Mail of articles which contained large portions of a letter which she had sent to her father in August 2018, shortly after her wedding to Prince Harry.

The strained relationship between Ms Markle and her father was one of many aspects of the couple's lives which were covered by the press in excruciating detail in the lead up to the wedding. To give a sense of the articles which were published by the Mail which included the letter to her father - one was headlined: *"Revealed: the letter showing true tragedy of Meghan's rift with a father she says has 'broken her heart into a million pieces'"*.

Ms Markle alleged that her letter was both private and also protected by copyright, and that the publication of the letter by the Mail therefore involved a misuse of her private information, a breach of data protection legislation, and an infringement of her copyright.

## **The appeal**

The Mail appealed the decision to grant Ms Markle summary judgment, and that appeal was recently decided by the Court of Appeal. The Mail's appeal was unsuccessful. Whilst much of the press coverage of the case has focused on the privacy aspects of the claim (and whether or not Ms Markle may have misled the court), we consider in this article the very interesting copyright aspects of the case.

### **Ms Markle's copyright claim**

On appeal, the Mail did not challenge the judge's finding that it had reproduced a substantial part of Ms Markle's letter. The extracts were both extensive quantitatively (about 500 of the 1250 words) and, more importantly, the extracts were the most important parts of the letter - those which represented what Ms Markle thought of her relationship with her father, his conduct around the time of the wedding and her feelings.

The Mail's appeal on the copyright aspect of the case was therefore focused on the two defences which it sought to rely on:

1. that the Mail should benefit from the fair dealing defence available in the [CDPA](#) for the purposes of reporting current events; and
2. that Ms Markle's copyright was outweighed by the Mail's right to freedom of expression under Article 10 of the ECHR. That right must be taken into account in a copyright claim, because the CDPA provides that rights under copyright law are without prejudice to any public interest defence which might be available by any other law.

### **Fair dealing for the purposes of reporting current events**

The CDPA provides a defence which is available when the copyright work is used for the purposes of reporting current events. The defence is one of a number in the UK statute which is subject to meeting a 'fair dealing' requirement.

On appeal, the Mail pointed to a number of 'events' which it said it was reporting on and which the publication of the letter therefore justified. However, the Court of Appeal - like the High Court - was unpersuaded.

The fundamental problem with the Mail's argument was that the articles it published were not primarily reporting current events but were instead reporting the actual contents of Ms Markle's letter. As the opening paragraph of one of the Mail articles said, the purpose of the article was to "reveal for the first time" the "full content of a sensational letter written by [Ms Markle]." Reporting on the contents of the letter was not, in itself, a current event.

The Mail also failed the 'fair dealing' element of this defence - this was primarily because it was knowingly dealing with an unpublished work, it copied a large and important proportion of the work's original literary content, the publication infringed her privacy rights, and the extent of the publication was completely disproportionate to any legitimate reporting purpose. The defence therefore failed.

## Public interest and Article 10 ECHR

Similar arguments were made by the Mail in relation to its Article 10 right to freedom of expression.

The English courts have previously held that it will be rare for Article 10 to trump copyright, given that:

(1) copyright, as a property right, is itself protected by the ECHR; (2) it is rare that it is in the public interest to permit copying of copyright works; and (3) the fair dealing defences which are provided by the CDPA will normally enable the court to reflect the public interest in freedom of expression.

Central to the Mail's argument was that the judge had failed to evaluate the extent of the copyright which the letter should be afforded, in the sense that much of it had a pretty low degree of intellectual creativity. Had he done so, the Mail argued, then the balancing act between its Article 10 rights and Ms Markle's copyright would have weighed in favour of Article 10.

The Court of Appeal rejected those arguments, instead finding that the High Court judge had properly understood that the nature of the copyright work can affect the assessment of freedom of expression. Critically, as this was an appeal against a decision to grant summary judgment, the Court of Appeal could identify no triable issue which would look different after hearing evidence at trial. The Court of Appeal therefore upheld the decision of the High Court to reject this defence.

### **Comment**

The decision is interesting for two main reasons.

The first is that (subject to any appeal to the Supreme Court) - Ms Markle has successfully utilised the summary judgment procedure to secure a victory without the need for a full trial. In this case, the benefit of doing so is unlikely to be to save costs (the Court of Appeal noted that "It would not be an exaggeration to say that no expense has been spared"). In other cases, however, being able to avoid the time and costs of a full trial, with its potentially extensive disclosure and evidence requirements, would be hugely beneficial to parties.

The case is also interesting as an illustration of the limits of the defences provided by the CDPA - in particular those which are permitted only to the extent that there has been 'fair dealing'. As is often the case - the reproduction of large swathes of a copyright work for commercial purposes is quite difficult to defend by reference to any of the fair dealing defences.

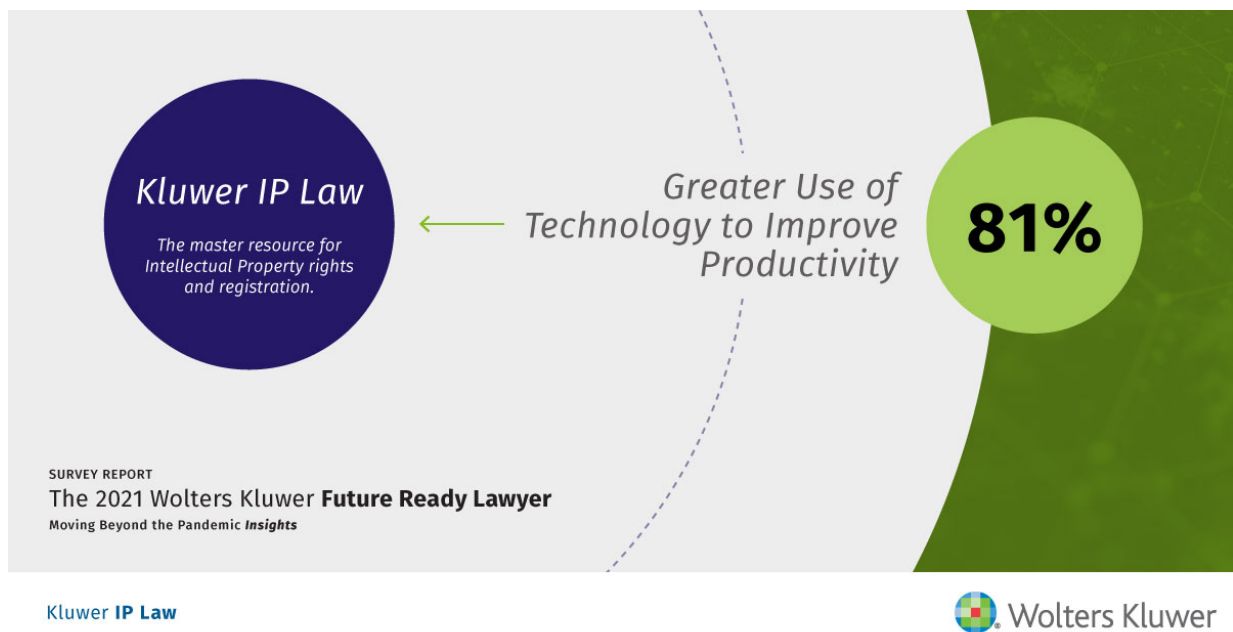
If the Mail does appeal to the Supreme Court, as it has indicated it wishes to, then it will certainly be one of the most high-profile cases of 2022.

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