[GB] High Court determine publication of Notice by the Daily Mail recording summary judgment awarded to HRH Duchess of Sussex

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The Honourable Mr Justice Warby of the High Court of Justice gave summary judgment on 11 February 2021 (February judgment) for HRH The Duchess of Sussex (HRH) which declared that Associated Newspapers Limited (ANL) in a series of Daily Mail and MailonLine articles had breached HRH's copyright and privacy by publishing a private letter that she had sent to her estranged father a few months after marrying Prince Harry. On 5 March 2021 Mr Justice Warby determined the extent and nature of the public apology notice from ASL (March judgment).

In May 2021 the court received further evidence that undermined ANL's remaining defence due for trial in Autumn 2021 that HRH had co authored the letter with a member of the Royal Household staff and as a consequence the copyright belonged to the Crown. ANL had argued that that HRH did not solely own the copyright and could not thwart its publication.

Subsequent to the February judgment the offending articles continued to be published by ANL on their MailOnLine site despite the court having held them to be a misuse of private information and infringement of HRH's copyright.

ANL contended special reasons to continue publication although they had not identified any form of harm or detriment to them or to the public interest caused by not publishing. The court found no good reason for continuing publication and whilst the letter had become public domain information it did not prevent HRH seeking to protect its content.

Applying Directive 2004/48/EC (the Enforcement Directive) enacted in Part 63 Practice Direction (PD63) of the English Civil Procedure Rules. Article 15 of the Enforcement Directive provides: "Member States shall ensure that, in legal proceedings instituted for infringement of an intellectual property right, the judicial authority may order, at the request of the applicant and at the expense of the infringer, appropriate measures for the dissemination of the information concerning the decision and publishing it in full or in part. Member States may provide for other additional publicity measures which are appropriate to the particular circumstances, including prominent advertising."

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Paragraph 26.2 of PD63 states: "Where the court finds that an intellectual property right has been infringed, the court may, at the request of the applicant, order appropriate measures for the dissemination and publication of the judgement to be taken at the expense of the infringer."

The court had a discretion by applying various factors including the deterrence of the infringing defendant and acting as a deterrent to other infringers. Factors against granting the relief included the strength of policy grounds relating to the case's facts plus procedural or practical obstacles preventing an effective and proportionate order. HRH had to present a precise form of order, and a workable solution. identifying appropriate platforms or publications for the notice, including possibly a hyperlink to the main judgment so the public could see its reasoning and context. ANL had been criticised as to how it had reported the outcome of the February judgment.

Any notice was not to punish or humiliate the defendant whilst a disproportionate financial burden upon a publisher would be impermissible. Although a published notice interfered with freedom of expression it was a justified measure, necessary and proportionate to pursue a legitimate aim; HRH's rights required protection and vindication having been infringed by ANL's publication thus justifying interfering with their freedom of expression. Such interference was neither an objectionable or disproportionate interference with free speech by publishing a supplementary statement to correct a wrongful publication and referring to a court judgement.

Mr Justice Warby ordered a notice to be published once on the front page of the Mail on Sunday and to include: "*The court found that Associated Newspapers infringed her copyright by publishing extracts of her handwritten letter to her father in the Mail on Sunday and in Mail Online.*" The same notice would appear for a week in the MailOnLine with a hyperlink to the February judgment and summary.

Since the March judgment, evidence has been produced that Mr Jason Knauf of the Royal Household staff had not co-authored the letter so copyright did not belong to the Crown. HRH lawyers contend that summary judgment for all outstanding issues is granted in her favour obviating the need for the autumn trial; ANL do not oppose summary judgment.

HRH The Duchess of Sussex v Associated Newspapers Limited in the High Court of Justice, Chancery Division, Business and Property Courts-Intellectual Property List [2021]EWHC 510 (Ch), 5 March 2021

https://www.judiciary.uk/wp-content/uploads/2021/03/Duchess-of-Sussex-v-Associated-judgment-1.pdf

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