

THE CASE FOR MEGHAN MARKLE: COPYRIGHT INFRINGEMENT AND THE RIGHT TO PRIVACY

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Meghan Markle and Prince Harry, also known as the Duke and Duchess of Sussex, shocked the British media when they announced in October that Meghan was suing one of Britain's most established tabloids, the *Mail on Sunday*. The suit is the couple's attempt to rein in a media organization whose conduct Harry sees as so egregious that he warned of history repeating itself, drawing a comparison to his mother, Princess Diana, who died in a car accident after being chased by paparazzi.¹ Meghan and Harry are without a doubt very public figures who are used to tabloid coverage. Nevertheless, the suit will present interesting legal arguments on where the boundaries are for media outlets in the business of reporting the most private aspects of royal life.

While the royal family has for generations been the subject of unpleasant tabloid coverage, some view Meghan's treatment as a much more vicious attack.² In 2016, when Harry and Meghan's relationship was still relatively new in the press, Harry issued a statement characterizing the media's treatment of Meghan as a "wave of abuse and harassment."³ The lawsuit seems to be the culmination of both Meghan and Harry's frustration with the British media over what they perceive to be negative coverage with racially charged undertones.⁴ As a biracial and divorced American actress, Meghan is not a traditional addition to the British royal family. However, Meghan's lawsuit focuses on only one incident. Meghan has accused the *Mail on Sunday* of copyright infringement and misuse of private information after the outlet published excerpts from a private letter she wrote to her father in February. The arguments raised by Meghan's legal team are risky, innovative, and complex.

Meghan's lawsuit rests on well-established British copyright law, which protects original literary works—including letters. The law states that the contents of a private letter belong to the author, not the letter's recipient.⁵ As the letter's author, and therefore owner of its copyright, Meghan controls the reproduction of the letter, and any publishing of the letter requires her consent.⁶ However, there are exceptions to copyright protections where the permission of the author is not necessary. These exceptions include where the use of the copyrighted material is for the purpose of criticism, quotation, or review.⁷ Each exception has requirements which must be met in order to avoid copyright infringement. The *Mail on Sunday* is likely to argue is that the letter was a fair

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¹ Isabel Togoh, *Harry and Meghan Are Suing a British Newspaper. Here's What Their Case Hinges On*, FORBES (Oct. 2, 2019, 7:04 AM), <https://www.forbes.com/sites/isabeltogoh/2019/10/02/harry-and-meghan-are-suing-a-british-newspaper-heres-what-their-case-hinges-on/#7e48b87954dc>.

² Michelle Ruiz, *The Meghan Markle Tabloid "Pile-On" — And How to Fix It*, VANITY FAIR (Apr. 5, 2019), <https://www.vanityfair.com/style/2019/04/meghan-markle-tabloids-racism-sexism>.

³ Press Release, Harry Windsor, "A Statement by the Communications Secretary to Prince Harry" (Nov. 8, 2016), <https://www.royal.uk/statement-communications-secretary-prince-harry>.

⁴ Ruiz, *supra* note 2.

⁵ Copyright, Designs and Patents Act 1988, c. 48, § 9 (Eng.).

⁶ *Id.* § 18.

⁷ *Id.* §§ 28A-31.

use exception.⁸ When courts determine fair use, they take into consideration whether the letter was already public or had been kept confidential.⁹ Courts are unlikely to be swayed in favor of fair use for a letter that was confidential unless a legitimate and continuing public interest can be demonstrated.¹⁰ And just because something is of *interest* to the public, does not mean the public has a need to know.¹¹ Proving that the letter was a fair use will be an uphill battle for the *Mail on Sunday* during the ensuing legal battle.

Additionally, Meghan is arguing that the *Mail on Sunday*'s publication of the letter infringed on her privacy. In the United Kingdom, privacy laws fall under the Data Protection Act of 2018, which implements protections for personal information.¹² Under the law, personal information cannot be published without permission.¹³ The *Mail on Sunday* could argue that a breach of the Data Protection Act is permissible when it is necessary for the public interest.¹⁴ However, the public interest exception requires a higher level of justification in order to support the breach of Meghan's individual rights.¹⁵

The case appears to be one for the history books. Royals have sued the press before, but this suit will likely be a "legal landmark for the line it seeks to draw in the sand between the modern monarchy and the media."¹⁶ Most legal and media experts predict this action is an attempt to rein in the "unrestrained practices of the rowdiest" outlets.¹⁷ However, using the lawsuit as a "statement" may not lead to the desired result as there is always the chance that the tabloids will retaliate with more undesirable news coverage.

Furthermore, it leaves open the compelling question of what the role and responsibility of media outlets should be. Should the press have a responsibility to be fair, kind, sympathetic, sensitive to racial stereotyping and sexism? Does the public expect and want this from the media? After all, behind the veneer of being the Duchess of Sussex, there is a real person who desires—and quite frankly deserves—a level of privacy closer to what ordinary citizens enjoy. In comparing Meghan to his mother, Harry stated, "I've seen what happens when someone I love is commoditized to the point that they are no longer treated or seen as a real person. I lost my mother and now I watch my wife falling victim to the same powerful forces."¹⁸ Meghan deserves compassion, but the media's continued stance seems to separate what members of the royal family *deserve* and what the media believes the royals are *entitled* to. However unjust, the media is a for-profit industry and, at the end of the day, all that matters is the bottom line. If people

⁸ Hayleigh Boshier, *Meghan Markle Letter: What the Law Says About the Press, Privacy and the Public's Right to Know*, CONVERSATION (Oct. 2, 2019; 11:38 AM), <https://theconversation.com/meghan-markle-letter-what-the-law-says-about-the-press-privacy-and-the-publics-right-to-know-124619>.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Data Protection Act 2018, c.12, § 2 (Eng.).

¹³ *Id.*

¹⁴ *Id.* § 8.

¹⁵ Boshier, *supra* note 7.

¹⁶ Maria Puente, *Prince Harry & Duchess Meghan's Legal Battle Against Tabloids: They Will Likely Win and Lose*, USA TODAY (Oct. 25, 2019, 12:27 PM), <https://www.usatoday.com/story/entertainment/celebrities/2019/10/25/prince-harry-duchess-meghan-likely-win-battle-tabloids/3977939002/>.

¹⁷ *Id.*

¹⁸ Togoh, *supra* note 1.

continue to buy papers and visit webpages to view the stories, media organizations will continue producing them. In this respect, even if Meghan is successful in her lawsuit, it is unlikely the media will change its behavior. The industry has lost legal battles with the royals before and it has not deterred their behavior.¹⁹ Whatever the outcome, hopefully Meghan and Harry will get some media outlets and the public to crossover to their side. Only time will tell.

¹⁹ *Id.*