

GD MEDIA LAW BULLETIN 23

GD Media Law Bulletin is a news review compiled quarterly by Goodman Derrick's Media Group. The aim of the Bulletin is to provide a brief summary of interesting developments in media law and regulation. The Bulletin is directed at journalists, producers and compliance officers. Detailed guidance on how those developments may impact upon programme makers and broadcasters is available from any member of the Media Group.

LEGAL

Unusually, the leading legal development to report in this edition of GD's MLB concerns not defamation, contempt or privacy, but copyright - specifically fair dealing in the broadcasting context.

Fraser Woodward -v- BBC

(What follows is merely a brief summary: the full decision is well worth reading).

Prominent celebrity photographer Jason Fraser has failed in his action against the BBC for breach of copyright in several of his photographs used in the programme "Tabloid Tales", produced for the BBC by Brighter Pictures. The programme critically examined Victoria Beckham's relationship with the tabloid press and featured 14 of the claimant's photos of Victoria and David Beckham and their children. The pictures were not shown in their original form but rather as part of cuttings from the various tabloid newspaper articles in which they were published. No single picture appeared on screen for more than 4 seconds. Mann J held in the High Court that the BBC could rely on the defence of fair dealing for the purposes of criticism and review under S30 CDPA '88 because the clear purpose of the programme was to review in a critical manner the press coverage of the Beckhams and the use of the photos was both consistent with this and fair.

Following earlier decisions, the Court held that the criticism or review did not have to relate to the photographs themselves but, in this case, to the general tabloid coverage of the Beckhams.

There was a dispute between the parties about whether the producers had contacted the claimant for prior permission to use the photos: he maintained that they had and that he had refused; the producers insisted that no such approach was made. The Court found in favour of the producers on this point but interestingly emphasised that even if the claimant had refused consent, this would not necessarily have rendered the subsequent use unfair, even though the claimant himself took part in the programme as an interviewee. Mr Fraser also claimed that the use was unfair because the showing of his photographs on television lowered their residual value and therefore competed with his commercial interests. This was rejected as he was unable to establish any actual or significant risk of damage. The fact that Mr Fraser occasionally licenses his photographs to broadcasters for a relatively small fee did not help his case. The Court also flatly rejected the contention that the photos were used by the producers for the ulterior motive of boosting ratings for the programme.

Finally, on the question as to whether the programme had accorded a sufficient acknowledgement to the claimant for the purposes of S30 CDPA, it was held that there is no requirement for the author of the work to be expressly identified on each occasion the work is shown if it is obvious

from earlier indications who the author is. Not all the images were accompanied by text attributing the photographs to Mr Fraser. However, the accompanying commentary, or the showing of a series of his photographs in succession following an initial attribution, made it sufficiently clear that they were all taken by the same person.

Copyright and Public Interest

The author was recently consulted by a broadcaster about a claim which raised an interesting and fairly novel point of law. Readers may recall the sad story of Chanel Rodgers who was murdered last July, only six weeks after her betrothal to Mr Lee Taylor. Immediately following the murder, her father, Terry Rodgers, disappeared and thereby became an obvious suspect. A manhunt duly ensued. Various news organisations obtained and broadcast extracts from Chanel and Lee's wedding video which clearly pictured Terry Rodgers and thereby alerted viewers to his identity. Mr Rodgers was subsequently apprehended and arrested. Following this Lee Taylor, who it appears did not consent to the release or broadcast of the wedding footage, instructed solicitors who wrote to the broadcasters complaining of breach of his privacy. Significantly, the privacy right in question arose under S85 CDPA '88, which is that part of the Copyright Act devoted to moral rights. S85 created a right to privacy in certain photographs and films as a species of moral rights. It provides that:

"A person who for private and domestic purposes commissions the taking of a photograph or the making of a film has, where copyright subsists in the resulting work, the right not to have copies of the work issued to the public; the work exhibited or shown in public; or the work communicated to the public".

The commissioning of the wedding video by Mr and Mrs Taylor would undoubtedly have been for private/domestic purposes and it was apparent that Mr Taylor, at least, did not consent to the broadcast. The fact that he may not have owned the copyright in the footage was immaterial for these purposes. Did he therefore have a winning claim? Well apparently, unless the broadcasters could establish public interest as a means of "trumping" Mr Taylor's right of privacy. After all, weren't the broadcasters performing an important public duty by extensively publishing the identifying footage of the suspect? Public interest is, of course, recognised as a justification for infringing the regulatory right of privacy under the Programme Code and also in relation to the common law of confidentiality but would it also apply to this statutory moral right? An interesting question, but one which remains unresolved as the matter was settled amicably.

Meanwhile, the existence of a public interest defence to a breach of copyright/moral rights remains a contentious one. The Courts have previously shown some readiness to recognise it, at least in the fair dealing context (*Hyde Park Residence -v- Yelland* 2001 and *Ashdown -v- Telegraph* 2002). However, some argue that the possible availability of a PI defence has now been removed by the Information Society Directive (2001/29) - implemented in the UK by the Copyright and Related Rights Regulations 2003 - since that Directive sets out an apparently exhaustive list of defences to copyright infringement and PI is not included among these. Against that it is argued that the denial of PI as a defence to copyright infringement could in certain circumstances contravene Act 10 ECHR (Freedom of Expression). A test case is clearly called for.

Reporting Sexual Offences:

News International is being prosecuted under the Sexual Offences Act 1992 following the disclosure by The Sun of the identity of a victim of sexual assault. Permission for the prosecution to proceed was given last month by the Attorney General. A preliminary hearing is scheduled at Huntingdon Magistrates Court at the end of April after which further details should be available.

Dow Jones v Yousef Jameel

The Court of Appeal has thrown out a libel action brought by Mr Jameel against Dow Jones, the Wall Street Journal's online publication, after it was shown that only 5 people (including the Claimant's solicitor and two of his business associates), had accessed the publication in England. It held that it would be an abuse of process to allow the claim to continue considering that, if Mr Jameel was successful, the cost of the trial would be completely disproportionate to the tiny amount of damages he would receive.

The claim was brought after Dow Jones published an article in March 2003 which contained a hyperlink to the "Golden Chain List", which purports to identify rich Saudis who may have provided funding for Osama bin Laden. Mr Jameel's name was on the list and he claimed that this implied that he was a supporter of bin Laden and Al Qaeda.

The Court of Appeal reiterated the cardinal principle that when defamatory material is published there is a presumption that the defamed person has suffered damage. However, it went on to hold that in cases in which there is minimal damage to the claimant's reputation, the application of such a principle would be disproportionate and an unnecessary interference with freedom of expression. In such cases it would be appropriate to have the action struck out as an abuse of process.

The decision is a very welcome one, especially in the USA where ISPs face the threat of being sued in the UK, with its much stricter libel laws, when the material in question has been accessed by a miniscule numbers of visitors to the site from the UK. It is also capable of being applied equally to foreign journals and other publications which have a tiny number of readers in the UK. It remains to be seen how liberally the Courts will apply this decision and where the threshold will be set for the number of visitors/readers to be considered sufficiently significant.

REGULATORY

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Proprietors of teleshopping channels will be treading even more carefully than usual following Ofcom's recent decision to revoke two broadcast licenses following a series of breaches of the Advertising Standards Code (now the BCAP Television Advertising Standards Code, following the assumption by the ASA of Ofcom's regulatory responsibilities for Broadcast Advertising).

Auctionworld Ltd held two licences for the "Auctionworld" and "Chase-It TV" shopping channels. The Auctionworld licence was revoked following the imposition of a staggering £450,000 fine for earlier breaches of the Standards Code. The Chase-It TV licence was revoked following a change in control when Auctionworld Ltd was put into administration. The fine was imposed after Auctionworld was found to have breached several sections of the Code following complaints of delays in the delivery of goods, poor customer service and misleading and inaccurate guide prices. Ofcom considered that revocation of the licence was appropriate due to the serious and repeated nature of the breaches, the volume of complaints, and Auctionworld's unsatisfactory compliance history. Hundreds of complaints were received and Ofcom repeatedly invited Auctionworld to provide an explanation, but was not satisfied with their responses. Several directions were given to Auctionworld allowing them an opportunity to avoid the ultimate sanction. It failed to comply with these directions and as a result the fine was imposed and its licence was revoked. This proved to be fatal to Auctionworld Ltd and the company was put into administration. This constituted "a change in the nature or characteristics of a licensee" for the purposes of S5 BA '90 (reflected in Chase-It TV's Ofcom licence) which entitled Ofcom to revoke Chase-It's licence as well.

Standards

Ofcom upheld viewer complaints about a short animation in the "Three Minute Wonder" series on Channel 4 entitled "His Passionate Bride". This was shown at 7.55 pm and featured images of genitalia and scenes involving sexual intercourse with accompanying sound effects. Perhaps not surprisingly these were found to breach the Family Viewing Policy, being well before the Watershed. However, the violence contained in the animation (which involved machine guns, rocket launchers and driving over a person before driving off a cliff) was not found to be in breach on the grounds that it was "highly stylised". This argument was not effective in relation to the sex and nudity issues. Ofcom also indicated that the preceding announcement warning viewers about the content was insufficiently clear, although this was somewhat academic in view of the inherent unsuitability of the content in a pre-Watershed slot.

Playboy TV was fined a hefty £25,000 for showing an R18 film in breach of the Code and for broadcasting promotional material on an unencrypted basis at 8.21 pm which was far more explicit than is acceptable under the Code. Readers will be aware that the prohibition on broadcasting R18 films is absolute and unqualified. The fact that this film started at 00.08 and was only available in encrypted form to subscribers was immaterial.

ITV West News was found to be in breach of the Family Viewing section of the Code after broadcasting a news item in its 6pm programme which showed addresses of pornographic websites. The item reported on the conviction of a Bristol Councillor for vote rigging and downloading child pornography. In order to demonstrate the ease of downloading such material from the Internet the shot included a page of web addresses, one of which was clearly visible, and in Ofcom's view, on screen for long enough to register with viewers. Even though pornographic material is easily accessible on the internet, Ofcom reminded ITV that broadcasters have a duty of care to viewers, especially children, which was breached on this occasion when large numbers of children could be expected to be watching. Although some flexibility can be expected in the application of the Watershed to news stories appearing in early evening bulletins, this unfortunately crossed that line.

Privacy and Fairness

A complaint by 82 year old Terence Gavaghan that he was treated unfairly in an edition of BBC2's "Correspondent" series entitled "Kenya - The White Terror" was upheld in part. It was not unfair for the BBC to use an interview with Mr Gavaghan when it had not given him all the details about the programme. However, because serious allegations were put to him during the interview which he was not told about beforehand, this rendered it unfair. Ofcom was also critical of the way in which the programme was edited which meant that his position was not fairly represented.

The BBC's treatment of Mr Gavaghan was heavily criticised by David Elstein in Broadcast magazine (4.3.2005). He believes that Ofcom ignored multiple breaches of its own and the BBC's Producer Guidelines in rejecting part of Mr Gavaghan's complaints. Mr Gavaghan had been an officer in pre independence Kenya and was awarded an MBE for his service. He claimed that he was led to believe that he was the first interviewee in what was then an open-ended programme about the Mau Mau period, when in fact the programme was almost complete by the time of his interview. He was not told of the documentary's thesis before the interview took place or of its rather pejorative title. When he discovered the thrust of the film, he asked to withdraw his interview but the BBC refused. Ofcom ruled that Mr Gavaghan could have withdrawn the unfairly edited sections of the interview but, as Elstein questions, how he could have known prior to transmission which parts were unfairly edited? Elstein speculates that the effect of this decision is that contributors giving pre-recorded interviews will insist on a cast-iron right to withdraw these interviews once they have seen the finished programme, assuming of course that they have been given the right to view the finished programme before broadcast. On the other hand, it would be

dangerous to read too much into a single Ofcom decision as these are often of limited value as precedents.

Miscellaneous

We omitted to mention in our last Bulletin that Channel 4 had been found to be in breach of the Code of Programme Sponsorship in respect of the sponsorship credits on Big Brother 5, which promoted the Talk Talk mobile phone service. The credits featured the statement "Free Talk on Talk Talk" in both text and voiceover. Under the Code, sponsorship credits must be distinct from advertising and should not include specific references to the benefits or prices of the sponsor's goods or services. In response to complaints from, amongst others, BT, Channel 4 pointed out that "Free Talk" was intended as a reference to the essence of Big Brother, namely the relationships between the housemates and their tendency to talk freely. However, irrespective of this, Ofcom felt that the statement did promote a benefit of the Talk Talk service, ie, free calls to other Talk Talk customers and was therefore in breach of the sponsorship code.

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This guide is for general information and interest only and should not be relied upon as providing specific legal advice. In relation to any particular matter, readers are advised to seek advice.

further information:

If you would like more information about any of Goodman Derrick's Media Law services please telephone and ask to speak to a member of the Media Group.

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