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A Legal Battle Royale: The Conflict of Privacy and Press in HRH The Duchess of Sussex v. Associated Newspapers Ltd., 56 UIC L. Rev. 343 (2023)

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A LEGAL BATTLE ROYALE: THE CONFLICT OF PRIVACY AND PRESS IN HRH THE DUCHESS OF SUSSEX V. ASSOCIATED NEWSPAPERS LTD.

KAYLEE HARTMAN*

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I. INTRODUCTION

Princess Diana captured the imagination of many in the United States, turning their attention to the British royal family and “the people’s princess”; but her story also shows that not all royal tales have happy endings.¹ On November 27, 2017, American

* Juris Doctorate Candidate 2023, UIC School of Law. This is for Grandma, who taught me words are our most inexhaustible source of magic, and Dad, who has been there while I try to find a place in this world. Long story short, I survived these past three years because of: Sheldon, Jason, Pierrie, Sarah, Katie, Elizabeth, Sam and how they know me all too well. I've had the time of my life fighting dragons with you. Endless gratitude to Oliver Kassenbrock, Zachary Sikora, Alan Schwartz, and Bonnie Perrino for the insight that strengthened this piece substantially.

1. Alicia Carroll, *America’s Obsessions with Royalty Started with Princess*

actress Meghan Markle (“Meghan”) and His Royal Highness Prince Henry of Wales (“Prince Harry”) announced their historic engagement, becoming the center of international attention.² As a biracial divorcee from America, Meghan is hardly considered the typical royal bride.³ With the announcement, she sought to join one of the most exclusive families in the world.⁴ This has hardly been a smooth transition, resulting in public strife⁵ and legal battles.⁶

This announcement brought Meghan into one of the most exclusive folds in the world – the British royal family and their centuries of strict marriage requirements⁷ and contentious media relationships.⁸ Soon after the engagement announcement, Meghan found herself in the midst of a media maelstrom.⁹

Diana, N.Y. TIMES (May 31, 2012), www.nytimes.com/roomfordebate/2012/05/31/why-do-americans-love-the-british-royal-family/americas-obsession-with-royalty-started-with-princess-diana [perma.cc/YD9W-ME25].

2. Press Release, The Royal Family, Prince Harry and Ms. Meghan Markle Are Engaged to Be Married (Nov. 27, 2017), www.royal.uk/prince-harry-and-ms-meghan-markle-are-engaged-be-married [perma.cc/PW2F-XXSA].

3. Historically, members of the British royal family marry English nobles or members of foreign royal families. *A History of Royal Weddings*, HISTORIC ROYAL PALACES, www.hrp.org.uk/kensington-palace/history-and-stories/a-history-of-royal-weddings/ [perma.cc/2W4W-NTPV] (last visited Oct. 30, 2021).

4. Immediate members of the British royal family were not allowed to marry without permission of the monarch under the Royal Marriages Act of 1772. Tim Ott, *Why Edward VIII Abdicated the Throne to Marry Wallis Simpson*, BIOGRAPHY (June 2, 2020), www.biography.com/news/edward-viii-abdicated-throne-wallis-simpson [perma.cc/PQA7-G5BC]. This Act was repealed by the Succession of the Crown Act of 2013. *Id.* In 1936, King Edward VIII abdicated from the throne so he could marry American divorcee Wallis Simpson. *Id.*

5. Press Release, The Royal Family, A Statement by the Communications Secretary to Prince Harry (Nov. 8, 2016), www.royal.uk/statement-communications-secretary-prince-harry [perma.cc/BS4K-BHU7] [hereinafter Press Release].

6. HRH The Duchess of Sussex v. Associated Newspapers Ltd. (*Markle Case*), [2021] EWHC 273 [¶ 1] (Ch) (2021).

7. See C. d’O Farran, *The Royal Marriages Act, 1772*, 14 MOD. L. REV. 53, 54 (1951) (summarizing the Royal Marriages Act which enacted “that no descendant of the body of his late Majesty King George the Second . . . shall be capable of contracting matrimony without the previous consent of his Majesty, his heirs or successors . . .”). As the Head of the Church of England, the monarch could not give permission for royals to marry divorced persons whose ex-spouse still lived. Neil Parpworth, *Crown Act 2013: Modernising the Monarchy*, 76 MOD. L. REV. 1070, 1088 (2013). The law was changed in the Succession to the Crown Act 2013 which reformed marriage laws, limiting mandatory consent to the first six heirs in line for the throne. *Id.*

8. Lauren Sharkey, *A History of Royals Suing the Press, Because Meghan & Harry Aren’t the First*, BUSTLE (Oct. 2, 2019), www.bustle.com/p/a-history-of-royals-suing-the-press-because-meghan-harry-arent-the-first-18841587 [perma.cc/FL7K-82CF]; see also *Prince Albert v. Strange* (1849) 1 Mac & G 25, 41 ER 1171, (1849) LJ Ch 120, [1849] EWHC Ch J20 (discussing the publication of a catalogue of private sketching of Queen Victoria made by Prince Albert that had been illegally obtained and published).

9. Press Release, *supra* note 5 (stating Meghan “has been subject to a wave of abuse and harassment” and decrying the “racial undertones of comment

As her impending nuptials approached, this media mayhem came from an unexpected source: her father.¹⁰ After the wedding, Meghan wrote a 5-page letter (“Letter”) to her father, a private correspondence reflecting her personal feelings.¹¹ On February 10, 2019, she read her own words in five articles¹² published online and in print in the *Mail on Sunday* and *MailOnline*.¹³

On September 29, 2019, Meghan filed a claim against the *Mail on Sunday* and *MailOnline*’s parent corporation, Associated Newspapers Limited (“Associated Newspapers”), for misuse of private information, breach of duty under data protection legislation, and copyright infringement.¹⁴ In a decision of some 29,000 words issued on February 11, 2021, Meghan was granted summary judgment on the misuse of private information claim.¹⁵ Justice Warby,¹⁶ the author of the judgment, recognized copyright infringement, but a question of sole or joint authorship would not be resolved until a later date.¹⁷ The data protection claim was not

pieces; and the outright sexism and racism of social media trolls and web article comments.”).

10. Amy Mackelden, *Meghan Markle’s Dad Allegedly Faked His Paparazzi Photos Ahead of the Royal Wedding*, HARPER’S BAZAAR (May 13, 2018), www.harpersbazaar.com/celebrity/latest/a20674064/meghan-markle-dad-staged-photos-thomas-markle-royal-wedding/ [perma.cc/2HDN-THK7].

11. *Markle Case* [2021] EWHC 273 at ¶ 1.

12. *Id.* at ¶ 56.

13. The *Mail on Sunday*, *MailOnline*, and *DailyMail* are owned by Associated Newspapers Ltd., a publishing and broadcasting corporation based in the United Kingdom. *Associated Newspapers Ltd*, BLOOMBERG, www.bloomberg.com/profile/company/2339887Z:LN [perma.cc/XT34-6MB9] (last visited Oct. 27, 2022). The *Mail on Sunday* is published weekly with both print and electronic versions. *The Mail on Sunday*, Brands & Products, DMG MEDIA, www.dmgmedia.co.uk/brands/the-mail-on-sunday/ [perma.cc/SZZ4-XX67K] (last visited October 27, 2022). The *MailOnline* is a purely electronic version of the *DailyMail* with a reported 24.9 million monthly users from around the globe. *MailOnline*, Brands & Products, DMG MEDIA, www.dmgmedia.co.uk/brands/mailonline/ [perma.cc/W34J-W2ED] (last visited October 27, 2022).

14. *Markle Case* [2021] EWHC 273 at ¶ 3.

15. *HRH The Duchess of Sussex v. Associated Newspapers Ltd (Markle Case II)*, [2021] EWHC 510 [¶ 6] (Ch) (2021). Summary Judgment in the UK is governed by Civil Procedure Rule 24.2 and “allows the court to give summary judgment against a defendant on the whole of a claim, or on a particular issue, if it considers (a)...that the defendant has no real prospect of successfully defending the claim or issue; and (b) there is no other compelling reason why the case or issue should be disposed of at trial.” 24 CPR 2 (2021).

16. Lord Justice Mark Warby specialized in media and sport law before taking silk in 2002 and currently serves as a Judge on the Court of Appeal. *Lord Justice Warby*, CTS. & TRIBUNALS JUDICIARY (Aug. 1, 2022), www.judiciary.uk/guidance-and-resources/lord-justice-warby/ [perma.cc/JN5V-YUAL].

17. *Markle Case* [2021] EWHC 273 at ¶ 170. *See also* *HRH The Duchess of Sussex v. Associated Newspapers Ltd.* [2021] EWHC 1245 (Ch) ¶ 8 – 13 (noting that the alleged co-author provided a letter stating he did not claim any copyright in the Letter and did not wish to join Defendant’s suit).

addressed at that time.¹⁸

In a follow-up article after summary judgment, *MailOnline* lamented the decision, stating that the “implications of today are that Meghan has silenced her critics and the journalists who would wish to leak these sorts of letters in the future, so effectively the media are being manacled.”¹⁹ The article asserts that future leaks would be directed to American media sources as such publication is lawful in that jurisdiction.²⁰

The United States is a country founded on the principles of freedom, specifically freedom of speech and the press.²¹ However, it is also a country that values the importance of privacy.²² So, when the two clash, as they do in this case, which prevails? This case note will examine this clash as seen in *HRH the Duchess of Sussex v. Associated Newspapers Ltd.* Part II will examine the background of the case, including the structure of the United Kingdom’s court system and relevant tenets of English law. Part III will detail the court’s decision and Part IV will apply American legal parallels to the facts.

II. BACKGROUND

Prior to discussing the facts of the case, relevant history and United Kingdom law will be provided. Parallel United States’ law will also be provided as a foundation for comparison.

A. *British Royalty and the Media*

This case is not the first time British Royalty have sought legal recourse against the British media.²³ In 1849, Prince Albert, consort to Queen Victoria, was granted an injunction against a British printer to stop making bootleg copies of etchings of Queen Victoria that he had privately drawn.²⁴ Prince Albert’s victory established

18. *Markle Case II* [2021] EWHC 510 at ¶ 18 – 20 (stating the claimant was willing to abandon the data protection claim but, upon objection from Associated Newspapers, Justice Warby stated this issue would be determined at a further hearing, date to be set).

19. Vivek Chaudhary & Ross Ibbetson, *Meghan Markle Wins Privacy Case Against Mail on Sunday and MailOnline Over Letter to Father WITHOUT a Trial*, DAILY MAIL (Feb. 11, 2021), www.dailymail.co.uk/news/article-9250667/Meghan-Markle-wins-privacy-copyright-case-against-Mail-Sunday-letter-father.html [perma.cc/DG76-Q6VT].

20. *Id.*

21. See U.S. CONST. amend I (stating “Congress shall make no law . . . abridging the freedom of speech, or of the press . . .”).

22. See generally Samuel Warren & Louis Brandeis, *Right to Privacy*, 4 HARV. L. REV. 193, 194 (1890) (advocating for a legal right to privacy and interpreting the Fourth Amendment to provide a constitutional right to privacy).

23. Sharkey, *supra* note 8.

24. See *Strange*, 41 Eng. Rep. at 1171. In this case, *Strange* had acquired

the “law of confidence”²⁵ that Princess Diana would rely on in 1993 against a gym owner for taking and selling photos of her in a leotard and leggings at the gym, which was deemed a breach of confidence.²⁶ Even the Queen herself went to court when *The Sun* leaked a copy of her 1992 Christmas broadcast speech, violating her copyright.²⁷

However, the general approach to media attention from the royal family is to “never complain, never explain.”²⁸ Over the years, a unique, somewhat symbiotic relationship between the royals and press developed “in which Royals trade exclusives with tabloids in exchange for some peace and privacy.”²⁹ This relationship is hardly smooth and is often tumultuous.³⁰ In 2011, employees of the *News of the World* tabloid and other British news outlets owned by Rupert Murdoch emerged at the center of an illegal news-gathering scandal.³¹ This scandal involved intercepting voicemails to illegally obtain information, including private information about an injury suffered by Prince William, Prince Harry’s brother.³²

What makes this case distinct is Meghan and Prince Harry’s method. Instead of issuing a formal statement via palace email with an official announcement, the couple broke the lawsuit via WhatsApp messenger to their communication team.³³ They also

copies of etchings Prince Albert had drawn of Queen Victoria and their family. *Id.* Strange published and sold a Catalogue of 63 etchings, without permission, and was restrained from further exhibition of the Catalogue in this case. *Id.*

25. *Id.* (explaining that the printer entrusted with taking impressions of the etchings and who made extra impressions for their personal benefit breached an implied warranty of trust and confidence and thus Prince Albert was entitled to an injunction).

26. Paul Gould, *Gym Photos Victory for Princess Diana*, UPI ARCHIVES (Feb. 8, 1995), www.upi.com/Archives/1995/02/08/Gym-photos-victory-for-Princess-Diana/4751792219600/ [perma.cc/A6M6-DH86].

27. Tim Kelsey, *The Queen Acts Over ‘Sun’ Leak*, INDEP. (Feb. 3, 1993), www.independent.co.uk/news/uk/the-queen-acts-over-sun-leak-1470537.html [perma.cc/FB8Y-EJZK].

28. OMID SCOBIE & CAROLYN DURAND, *FINDING FREEDOM: HARRY AND MEGHAN 177* (2020).

29. *Id.*

30. *Diana Death a ‘Tragic Accident’*, GUARDIAN (Dec. 14, 2006), www.theguardian.com/uk/2006/dec/14/monarchy [perma.cc/W2N7-75N5] (deeming Princess Diana’s death an accident although the “car was being pursued by paparazzi photographers” when the accident occurred and “pictures were taken of the princess as she lay fatally wounded . . .”); see also *Paparazzi Photos Shown to Diana Inquest Jury*, NBC NEWS (Oct. 11, 2007), www.nbcnews.com/id/wbna21249543 [perma.cc/UY82-UWRY] (discussing that paparazzi at the scene took photos of the fatally wounded victims both inside the car and as they were being carried out by emergency responders).

31. CNN Editorial Research, *UK Phone Hacking Scandal Fast Facts*, CNN (Apr. 27, 2021), www.cnn.com/2013/10/24/world/europe/uk-phone-hacking-scandal-fast-facts [perma.cc/25U3-B646].

32. *Id.* Other victims of the hacking scandal included actor Hugh Grant, musicians Paul McCartney and Elton John, and the family of Milly Dowler, a missing teen later found murdered. *Id.*

33. SCOBIE & DURAND, *supra* note 28, at 307.

opted for legal aid from Schillings, the UK's top firm in defamation and media-related cases, rather than the traditional royal lawyers, Harbottle & Lewis.³⁴ According to the 2020 biography about the couple, *Finding Freedom*, Prince Harry sought to “ring in a more honest and fair media” as the “mass-market tabloid press in the UK is a toxic part of British society that needs to be addressed.”³⁵

B. Relevant United Kingdom Law

This case presents an interesting intersection of the privacy of public figures versus the freedom of the press. It was considered in the England and Wales High Court of Justice, Chancery Division³⁶ by the Honorable Justice Warby.³⁷ The High Court consists of the Chancery, King's Bench, and Family Divisions.³⁸ These divisions are overseen by High Court and Deputy High Court Judges who hear appeals and “first instance” cases.³⁹ It is similarly structured to American courts with the next step being the Court of Appeals followed by the UK Supreme Court.⁴⁰

Justice Warby applied the principles of summary judgment stated in a landmark UK court case, *Easyair Ltd. v. Opal Telecom Ltd.*⁴¹ Notably, these principles include considering a “realistic” versus “fanciful” prospect of success, whether the defense has “some degree of conviction,” and whether reasonable grounds exist for “believing that a fuller investigation into the facts” would change the outcome.⁴² Meghan brought a motion for summary judgment on the claims of misuse of private information and copyright infringement.⁴³

34. *Id.* at 306.

35. *Id.* at 308-09.

36. The Chancery Division, formerly Court of Chancery, first developed in the 15th century as a court of equity, provides remedies not available in common law. *Chancery Division*, BRITANNICA, www.britannica.com/topic/Chancery-Division [perma.cc/MGK8-QP5E] (last visited Oct. 27, 2022). Now, it is one of three divisions in the High Court of Justice and primarily addresses business and property disputes, including intellectual property cases. *Id.*

37. Lord Justice Warby has been appointed to the Court of Appeal since his initial ruling on this case, effective March 2021. *Lord and Lady Justices of Appeal*, CTS. & TRIBUNALS JUDICIARY, www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/senior-judiciary-list/lord-and-lady-justices-of-appeal/ [perma.cc/83YB-JXLQ] (last visited Oct. 9, 2022).

38. *Structure of the Courts & Tribunals System*, CTS. & TRIBUNALS JUDICIARY, www.judiciary.uk/about-the-judiciary/our-justice-system/court-structure/ [perma.cc/C4DD-MPZX] (last visited Oct. 9, 2022). At the time this case was considered, the King's Bench would have been the “Queen's Bench.” *Id.* This changed upon the passing of Queen Elizabeth II. *Id.*

39. *Id.*

40. *Id.*

41. *Markle Case* [2021] EWHC 273 at ¶ 12.

42. *Easyair Ltd. v. Opal Telecom Ltd.* [2009] EWHC 339 (Ch).

43. *Markle Case* [2021] EWHC 273 at ¶ 9.

1. *Misuse of Private Information in the United Kingdom*

The UK recognizes a tort of misuse of private information, which must be proven through two principles.⁴⁴ The first principle asks, “whether the claimant enjoyed a reasonable expectation of privacy in respect of the information in question.”⁴⁵ Factors to consider include: 1) attributes of the claimant; 2) nature of the activity; 3) place; 4) nature and purpose of intrusion; 5) absence of consent; 6) effect on claimant; 7) circumstances leading to the information finding publisher.⁴⁶ These are known as the “Murray Factors.”⁴⁷

The second principle considers “whether in all the circumstances the privacy rights of the claimant must yield to the imperatives of the freedom of expression enjoyed by publishers and their audiences.”⁴⁸ This is determined by a proportionality test balancing the comparative importance of specific rights versus the justifications for interfering with each right.⁴⁹

The case behind these principles, *Murray v. Express Newspapers*, was brought by the parents of David Murray.⁵⁰ Murray, then nineteen months old, was unknowingly photographed while out on a walk with his family.⁵¹ The judge espoused the factors that should be applied when determining if a reasonable expectation of privacy existed based on the facts.⁵² The distinguishing factor here was that Murray was a child and was only a subject of interest due to his mother’s status.⁵³ The case was eventually settled out of court after the Court of Appeal determined there were triable facts concerning Murray’s privacy.⁵⁴

Although the “Murray Factors” are seminal in the United Kingdom when analyzing this tort, the underlying case drew

44. *ZXC v. Bloomberg LP* [2020] EWCA Civ 611 [2020], 3 WLR 838 at [¶ 40-48], [¶ 103-109].

45. *Markle Case* [2021] EWHC 273 at ¶ 30.

46. *Murray v. Express Newspapers plc*, [2008] EWCA (Civ) 446 [¶ 36] (discussing the reasonable expectation of privacy when respondent took a photo of the claimant out on a walk and published it without consent in a magazine).

47. *Markle Case* [2021] EWHC 273 at ¶ 30.

48. *Id.* at ¶ 31.

49. *Id.* Here, the rights being balanced would be the right to privacy versus a reasonable interference that allows freedom of expression. *See also id.* at ¶ 105 (explaining that unauthorized disclosures can be justified when they seek to set the record straight to prevent misleading the public).

50. *Murray* [2008] EWCA 446 at ¶ 1 (noting Murray’s parents are Dr. Neil Murray and Joanne Murray, who authored the *Harry Potter* book series under the name J.K. Rowling).

51. *Id.* at ¶ 5-6.

52. *Id.* at ¶ 36.

53. *Id.* at ¶ 61.

54. Clare Dyer, *JK Rowling Wins Ban on Photos of Her Son*, *GUARDIAN* (May 8, 2008), www.theguardian.com/media/2008/may/08/privacy.medialaw [perma.cc/KA47-HX7Q].

heavily from another United Kingdom case – *Campbell v. MGN*.⁵⁵ There, supermodel Naomi Campbell sued the publisher of *The Mirror* after they released photographs of her leaving a Narcotics Anonymous meeting.⁵⁶ *The Mirror* responded by publishing additional articles and calling Campbell “pathetic” for the suit.⁵⁷ Ultimately, the English court deemed there could be a privacy violation under the European Convention of Human Rights Article 8, which is concerned with “respect for private and family life.”⁵⁸ Notably, the *Campbell* court cited the United States’ Restatement (Second) of Torts § 652D when discussing possible formulations for determining if the disclosed information would be deemed private.⁵⁹ The publication itself was found to be justified to the extent it sought to correct the record after Campbell denied drug use, but the House of Lords deemed, as a whole, the photos and details were excessive and unwarranted.⁶⁰

2. Copyright Law in the United Kingdom

Copyright in the UK is a statutory property right codified by the Copyright, Designs, and Patents Act of 1988 (“CDPA”).⁶¹ It recognizes a right for the ownership of “original literary works” from the time the work is recorded in writing.⁶² The author is the first owner⁶³ and can retain or assign certain rights,⁶⁴ like the right to reproduce, copy, or issue the copyrighted work. Also, CDPA allows an owner to bring a claim against unlawful infringement.⁶⁵ A unique exception to first ownership in the UK is Crown copyright, which holds that “where a work is made by Her Majesty or by an officer or servant of the Crown in the course of his duties” then “Her

55. *Campbell v. MGN Ltd.* [2004] UKHL 22 [¶ 11], 2 WLR 1232, HL (E).

56. *Id.* at ¶ 8.

57. *Id.*

58. *Id.* at ¶ 16.

59. *Id.* at ¶ 22 (stating “[d]ifferent forms of words, usually to much the same effect, have been suggested from time to time. The second Restatement of Torts in the United States (1977), article 652D, p 394, uses the formulation of disclosure of matter which ‘would be highly offensive to a reasonable person’” although the court noted this formulation “could be a recipe for confusion.”).

60. *Murray* [2008] EWCA 446 at ¶ 22.

61. Copyright, Designs, and Patent Acts 1988, CDPA 1988/48 § 3, ¶ 1 (Eng.).

62. *Markle Case* [2021] EWHC 273 at ¶ 31.

63. *Id.* at ¶ 132.

64. Copyright, Designs, and Patent Acts 1988, CDPA 1988/48 § 16, ¶ 1 (Eng.) (detailing the exclusive rights of copyright owners, including the right to copy the work and to communicate the work to the public).

65. *Id.* at § 17-21. These sections discuss the various types of actionable infringement under the CDPA. Notably, § 20 states infringement can be found when one communicates the copyrighted work to the public by “making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them.” *Id.* at § 20, ¶ 2.

Majesty is the first owner of any copyright in the work.”⁶⁶

The CDPA also allows the alleged infringers to use the defense of fair dealing to allow for reporting current events and requires that the court “must not enforce copyright if that would involve an unjustifiable interference with the right to freedom of expression.”⁶⁷ Fair dealing occurs when the publication is done with the purpose of criticism or review but, when using quotations, there is a limit that “the extent of the quotation is no more than is required by the specific purpose for which it is used.”⁶⁸

One example of copyright infringement versus fair dealing is seen in the case of *Ashdown v. Telegraph Group Ltd.*⁶⁹ In this case, a political leader, Paddy Ashdown, considered publishing his personal diaries he had written throughout his career.⁷⁰ The diaries were unknowingly copied and given to an editor of the *Sunday Telegraph*, who promptly published verbatim excerpts.⁷¹ Telegraph Group argued the publication was fair dealing because it was done “for the purpose of criticism or review” as set forth in the CDPA.⁷² Fair dealing was analyzed under three factors: “(1) whether the alleged fair dealing is in commercial competition with the owner’s exploitation of the work, (2) whether the work has already been published or otherwise exposed to the public and (3) the amount and importance of the work which has been taken.”⁷³ The court stated “it is impossible to lay down any hard-and-fast definition of what is fair dealing, for that is a matter of fact, degree, and impression.”⁷⁴ Telegraph Group’s appeal was dismissed in favor of Ashdown because the extent of the reproduction suggested the diaries were “deliberately filleted in order to extract colourful passages” to further the commercial interests of the publishing company.⁷⁵

The history, case law, and statutory rights of author’s and potential infringers are all essential in the foundation for *HRH The Duchess of Sussex v. Associated Newspapers Ltd.* Each piece plays a role in Justice Warby’s analysis, as well as the justification from the Daily Mail in publishing the Letter and Meghan’s arguments for privacy.

66. Copyright, Designs, and Patent Acts 1988, CDPA 1988/48 § 163 ¶ 1 (Eng.). At the time of writing, the CDPA has not been updated to reflect the Queen’s passing. It is likely the UK will change Crown copyright from “Her Majesty” to “His Majesty” to reflect the change in monarch.

67. *Markle Case* [2021] EWHC 273 at ¶ 133.

68. Copyright, Designs, and Patent Acts 1988, CDPA 1988/48 § 30 ¶ 1 (Eng.) (further stating fair dealing requires the work to be available to the public and accompanied by a sufficient acknowledgement of the quotation source).

69. *Ashdown v. Telegraph Group Ltd.* [2001] EWCA (Civ) 1142 [¶ 1] (Eng.).

70. *Id.* at ¶ 6.

71. *Id.* at ¶ 7.

72. *Id.* at ¶ 20.

73. *Id.* (internal citations omitted).

74. *Id.* at ¶ 70.

75. *Id.* at ¶ 82.

C. *The Facts*

Meghan is a California-born American actress, best known for her seven seasons on the TV show *Suits*.⁷⁶ She studied theater and international relations at Northwestern University in Evanston, Illinois.⁷⁷ In 2016, she went on a blind date with Prince Harry, which led to their eventual engagement in late 2017 and marriage on May 19, 2018.⁷⁸ Throughout their romance, Meghan was subject to racist and sexist abuse and harassment, eventually leading to a public statement from Prince Harry pleading with the media to respect their privacy.⁷⁹

In addition to public scrutiny, Meghan felt strain in her family relationships.⁸⁰ Meghan's parents divorced when she was very young and she was primarily raised by her mother.⁸¹ Her father, Thomas Markle ("Mr. Markle"), was part of her life and as an adult Meghan would help cover his bills and other expenses.⁸² Overall, Mr. Markle encouraged Meghan in her dream of becoming an actress and helped pay for her to attend elite private schools in Los Angeles.⁸³ Days before her wedding, the British press published staged photos of her father being fitted for a suit and consulting books about Britain, contrary to the internal plea for guests to keep wedding details private.⁸⁴ Mr. Markle then decided not to attend the wedding, only for Prince Harry and Meghan to insist they still wanted him there.⁸⁵ He had heart issues and was unable to fly to England.⁸⁶ Mr. Markle then released various statements about his relationship with his daughter to news outlets like *TMZ*,⁸⁷ *Good*

76. SCOBIE & DURAND, *supra* note 28, at 15.

77. *Id.* at 18.

78. *Id.* at 36, 213.

79. Press Release, *supra* note 5.

80. Meghan has two half-siblings from her father's first marriage. Ellie Cambridge, *Thomas Markle Jr's Letter to Prince Harry*, SUN (May 19, 2018), www.thesun.co.uk/news/6298014/thomas-markle-jr-open-letter-prince-harry-royal-wedding/ [perma.cc/NB2P-BJUS]. Her half-brother published a "scathing" open letter to Prince Harry saying, "it's not to [sic] late." *Id.* Her half-sister also self-published a story about their childhood despite being estranged for years. Meredith Nardino, *Meghan Markle's Half-Sister Samantha Markle Details their Childhood, Last Conversation and More in 'The Diary of Princess Pushy's Sister Part 1'*, USMAG. (Feb. 17, 2021), www.usmagazine.com/celebrity-news/pictures/meghan-markles-half-sister-tells-all-in-new-book-8-revelations/ [perma.cc/9DN7-7SET].

81. SCOBIE & DURAND, *supra* note 28, at 15.

82. *Id.* at 176.

83. *Id.* at 15-16.

84. Mackelden, *supra* note 10.

85. SCOBIE & DURAND, *supra* note 28, at 194.

86. *Id.* at 199.

87. *Thomas Markle: Let's Talk, Royals Because I'm Not Going Away*, TMZ (July 17, 2018), www.t TMZ.com/2018/07/17/thomas-markle-interviews-not-going-away-royal-family-silent/ [perma.cc/3T4P-G5AG].

Morning Britain,⁸⁸ and *The Sun*.⁸⁹ While these unauthorized statements were stressful for Meghan, the true nail in the coffin would come with the release of the Letter.⁹⁰

After the back-and-forth over attending the wedding, staged photos, and international judgment on the father-daughter relationship, Meghan wrote the Letter in a draft on her phone (“Electronic Draft”) and transcribed it to a five-page written Letter.⁹¹ The Letter was a plea from daughter to father that included statements such as “your actions have broken my heart into a million pieces” and “if you love me, as you tell the press you do, please stop. Please allow us to live our lives in peace. Please stop lying, please stop creating so much pain, please stop exploiting my relationship with my husband.”⁹²

The Letter arrived directly to Mr. Markle via FedEx on August 27, 2018.⁹³ The next month Mr. Markle sent a four-page reply letter stating, among other things, “I wish we could get together and take a photo for the whole world to see”⁹⁴ The Letter was in Mr. Markle’s possession when an article from *People* magazine was published, and the private communication became the subject of an international discourse.⁹⁵

People published an online article⁹⁶ on February 6, 2019, purporting to tell “the truth” about Meghan from five anonymous interview sources (“Five Friends”).⁹⁷ One friend is quoted as saying: “After the wedding she wrote him a letter. She’s like, ‘Dad I’m so heartbroken, I love you. I have one father. Please stop victimizing me through the media so we can repair our relationship.’”⁹⁸

After reading the *People* article, Mr. Markle was shocked and felt it “misrepresented the tone and content of the Letter” and decided he needed to “defend himself publicly against these

88. Interview by Piers Morgan with Thomas Markle, *Thomas Markle Admits Staged Paparazzi Pictures Were a Mistake*, GOOD MORNING BRITAIN (June 18, 2018), available at www.youtube.com/watch?v=Vc4T5rxd4Ng [perma.cc/N4RT-QUZD].

89. James Beal, *Meg’s ‘Smile of Pain’ Meghan Markle’s Dad Thomas Fears She Is Being Put Under ‘Too Much Pressure’ By the Royal Family*, SUN (July 15, 2018), www.thesun.co.uk/news/6781106/thomas-markle-believes-meghan-markle-terrified-of-new-life/ [perma.cc/5JPU-CVLG].

90. *Markle Case* [2021] EWHC 273 at ¶ 44.

91. *Id.*

92. SCOBIE & DURAND, *supra* note 28, at 232-33.

93. *Markle Case* [2021] EWHC 273 at ¶ 44.

94. *Id.* at ¶ 46.

95. *Id.* at ¶ 52.

96. Michelle Tauber, *Meghan Markle’s Best Friends Break Their Silence: ‘We Want to Speak the Truth’*, PEOPLE (Feb. 6, 2019), www.people.com/royals/meghan-markles-best-friends-break-their-silence-we-want-to-speak-the-truth/ [perma.cc/PF3L-F66D].

97. In a separate action, the court granted anonymity to the Five Friends. *Markle Case* [2021] EWHC 273 at ¶ 7.

98. Tauber, *supra* note 96.

misrepresentations” by reaching out to Caroline Graham, a Los Angeles-based writer for Associated Newspapers.⁹⁹ He provided Graham a copy of the Letter and information on “the various ways in which [the People Article and the Letter] in his view contained false information.”¹⁰⁰

Edward Verity, the editor of the *Mail on Sunday*,¹⁰¹ later asserted before Justice Warby that there were good reasons to publish the story, including how Mr. Markle’s allegations “called into question the conduct and behaviour of the claimant as a ‘prominent member of the Royal family.’”¹⁰²

Five articles went live on February 10, 2019, in the print version of the *Mail on Sunday* and online through *MailOnline*.¹⁰³ One article offered a “WORLD EXCLUSIVE” with a 2-page spread on “Meghan’s shattering letter to her father” while a story-within-a-story in the print edition titled “How Meghan’s Media Fightback Led Her Dad to Reveal a Letter He Wanted to Keep Secret,” argued Meghan’s alleged authorization of the *People* article as the reason Mr. Markle came forward.¹⁰⁴ Two additional pages, dubbed “The Harry Articles” by Justice Warby, contain refutations from Mr. Markle about alleged attacks on Prince Harry.¹⁰⁵ The fifth article, dubbed the “Handwriting Article,” was published online and contains “opinions of two handwriting experts who had analysed the Letter” to provide insights on Markle’s personality.¹⁰⁶

Across the five articles, there were 88 separate quotations from the Letter, including textual transcriptions and photographs of the Letter.¹⁰⁷ In February 2019, the letter of claim for the case here was filed.¹⁰⁸ Prince Harry announced the lawsuit to the Sussex communications team via a WhatsApp group chat, stating “up to now, we have been unable to correct the continual misrepresentations – something that these select media outlets have been aware of and have therefore exploited on a daily and sometimes hourly basis.”¹⁰⁹

99. *Markle Case* [2021] EWHC 273 at ¶ 52-53.

100. *Id.* at ¶ 53.

101. Stephen Brook, *Verity Appointed Mail on Sunday Executive Editor*, THE GUARDIAN (Jan. 9, 2008), www.theguardian.com/media/2008/jan/09/mailonsunday.associatednewspapers [perma.cc/2L7R-57FQ].

102. *Markle Case* [2021] EWHC 273 at ¶ 54.

103. *Id.* at ¶ 56.

104. *Id.* at ¶ 57.

105. *Id.* at ¶ 58.

106. *Id.* at ¶ 60 (Justice Warby called the fifth article the ‘Handwriting Article’—which ran to over 30 paragraphs—and said the writer is “ultra-cautious” but a “showman and a narcissist.”).

107. *Markle Case* [2021] EWHC 273, at ¶ 56-57.

108. *Id.* at ¶ 61. A “letter of claim” is a letter sent from a claimant to the potential defendant(s) that sets out the details of the intended claim(s). 7 CPR 4 (2022).

109. SCOBIE & DURAND, *supra* note 28, at 306.

D. Procedural History of HRH The Duchess of Sussex v. Associated Newspapers Ltd.

Justice Warby considered all asserted defenses and arguments from claimant and defendant.¹¹⁰ The ultimate finding granted summary judgment to Meghan for misuse of private information and a claim for copyright infringement.¹¹¹ However, there was an issue of whether there was sole or joint copyright ownership, which was resolved at a later date.¹¹²

In response, the *DailyMail* posted an article claiming the British press would be manacled by this decision.¹¹³ In the article and during the case, the defendant asserted this publication would be lawful under United States law.¹¹⁴ A media law expert stated to the *DailyMail*, “[t]his is a letter that could have easily been published in the United States and you are in a situation where going forward people will leak these letters to media in America.”¹¹⁵ A New York attorney provided expert evidence stating, “there is no law in any state of the US or under any federal law that would render the publication of the Letter or any of its contents unlawful.”¹¹⁶ Justice Warby did not admit this point, nor did he contradict it.¹¹⁷

The case was recently heard in the Court of Appeal.¹¹⁸ New information came to light regarding Meghan’s expectations regarding the Letter and possible information provided to the authors writing a book about Meghan and Prince Harry.¹¹⁹ This

110. *Markle Case* [2021] EWHC 273 at ¶ 170.

111. *Markle Case II* [2021] EWHC 510 at ¶ 2.

112. *HRH The Duchess of Sussex* [2021] EWHC 1245 at ¶ 8 – 13 (discussing the alleged co-author provided a letter stating he did not claim any copyright in the Electronic Draft and did not wish to join the Defendant’s suit and thus there would be sole authorship in Meghan Markle).

113. Chaudhary & Ibbetson, *supra* note 19.

114. *Id.* See also *Markle Case* [2021] EWHC 273 at ¶ 79 (arguing the publication of the Letter would be lawful in the United States).

115. Chaudhary & Ibbetson, *supra* note 19 (quoting Mark Stephens CBE as a media law expert). Stephens is a partner at Howard Kennedy in the UK and has contributed to seven books relating to media law. *People: Mark Stephens*, HOWARD KENNEDY, www.howardkennedy.com/en/people/mark-stephens-cbe [perma.cc/2CZF-R9PH] (last visited Jan. 8, 2022).

116. *Markle Case* [2021] EWHC 273 at ¶ 79. A letter from David Korzenik was admitted into evidence. Korzenik is a New York-based attorney at Miller Korzenik Sommers Rayman LLP and has been an Adjunct Professor at the Benjamin N. Cardozo School of Law teaching Media Law, Entertainment Law, and Advanced Copyright. *Attorneys: David Korzenik*, MILLER KORZENIK SOMMERS RAYMAN LLP, mksr.law/attorneys/david-korzenik/ [perma.cc/S2BX-PP5W] (last visited Oct. 9, 2022).

117. *Markle Case* [2021] EWHC 273 at ¶ 79.

118. *HRH The Duchess of Sussex v. Associated Newspapers Ltd. (“Markle on Appeal”)*, [2021] EWCA Civ 1810 [¶ 1].

119. Bonnie Eslinger, *Markle’s Court Win Ignored Credibility Concerns, Tabloid Says*, LAW360 ILL. (Nov. 9, 2021), www.law360.com/articles/1439064/

development came from Meghan's press secretary, who provided evidence that when Meghan "wrote the Letter she realized it was 'likely' to be disclosed to the public."¹²⁰ Meghan also admitted she did provide information to the authors of *Finding Freedom*, which is "in direct contrast to her denials that she in any way cooperated with the authors."¹²¹ However, the appeals court reaffirmed the summary judgment decision, stating that "whilst it might have been proportionate to disclose and publish a very small part of the letter . . . it was not necessary to deploy half the contents" as Associated Newspapers did.¹²²

E. Legal Parallels in American Law

1. Right to Privacy

The idea of privacy being afforded a remedy at law in the United States was first espoused in an 1890 Harvard Law Review article written by Samuel Warren and Louis Brandeis.¹²³ The landmark article called for a recognition of the "right to be let alone" in light of the "heightening of sensations which came with the advance of civilizations."¹²⁴ Notably, the article recognized "gossip is no longer the resource of the idle and of the vicious, but has become a trade . . ." partly due to the rise of "instantaneous photographs and newspaper enterprise" invading private life.¹²⁵

A parallel to the UK misuse of private information tort is the US invasion of privacy tort summarized in the Restatement Second of Torts.¹²⁶ Of the four recognized causes of action for invasion of

markle-s-court-win-ignored-credibility-concerns-tabloid-says [perma.cc/PW3H-3XAU] [hereinafter *Eslinger November Article*].

120. *Id.*

121. *Id.*

122. Bonnie Eslinger, *Tabloid Loses Appeal in Markle's Letter Privacy Suit*, LAW360 CONSUMER PROT. (Dec. 2, 2021), www.law360.com/articles/1445023/tabloid-loses-appeal-in-markle-s-letter-privacy-suit [perma.cc/A9GH-5LDT] [hereinafter *Eslinger December Article*].

123. See Warren & Brandeis, *supra* note 22, at 195 (arguing for a "right to be let alone" and a legal recognition of the right to privacy). At the time, Warren and Brandeis were law partners in Boston. Leah Burrows, *To Be Let Alone: Brandeis Foresaw Privacy Problems*, BRANDEIS NOW, www.brandeis.edu/now/2013/july/privacy.html [perma.cc/6STE-U4C3] (last visited Jan. 8, 2022). Twenty-six years later, Brandeis would join the Supreme Court of the United States and later argue for a constitutional right to privacy in a dissenting opinion. *Id.*

124. Warren & Brandeis, *supra* note 22, at 195.

125. *Id.* at 195-196.

126. See RESTATEMENT (SECOND) OF TORTS § 652A (1977) (stating "one who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other. . . .The right of privacy is invaded by (a) unreasonable intrusion upon the seclusion of another, as stated in § 652B; or (b) appropriation of the other's name or likeness, as stated in § 652C; or (c) unreasonable publicity given to the other's private life, as stated in § 652D; or

privacy, the most applicable here is 652D, Publicity Given to Private Life.¹²⁷ Under this tort, “[o]ne who gives publicity¹²⁸ to a matter concerning the private life of another is subject to liability to the other for invasion of their privacy, if the matter publicized is of a kind that: (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.”¹²⁹

This tort employs the “reasonable person” standard¹³⁰ of a similarly situated person – in this case, a reasonable celebrity. In considering Publicity Given to Private Life, there is often pushback when it comes to celebrity privacy.¹³¹ Celebrities have the same general right to privacy, but the degree of protection is narrower for public figures.¹³² Celebrities face a unique challenge in a world hungry for news – their every move is considered “public concern” even if it is simply idle gossip.¹³³ This concern can sometimes extend to “information concerning the individual and facts about [them].”¹³⁴

(d) publicity that unreasonably places the other in a false light before the public, as stated in § 652E.”).

127. *Id.* at § 652D.

128. *Id.* at cmt. A (internal quotations omitted) (In this context, “[p]ublicity . . . means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.”).

129. *Id.*

130. *Id.* at cmt. on Clause (a) (stating that “the protection afforded to the plaintiff’s interest in his privacy must be relative to the customs of the time and place, to the occupation of the plaintiff and to the habits of his neighbors and fellow citizens. Complete privacy does not exist in this world except in a desert, and anyone who is not a hermit must expect and endure the ordinary incidents of the community life of which he is a part . . . it is only when the publicity given to him is such that a reasonable person would feel justified in feeling seriously aggrieved by it, that the cause of action arises.”).

131. *Id.* at cmt. E (stating that “[o]ne who voluntarily places himself in the public eye, by engaging in public activities, or by assuming a prominent role in institutions or activities having general economic, cultural, social or similar public interest, or by submitting himself or his work for public judgment, cannot complain when he is given publicity that he has sought, even though it may be unfavorable to him. So far as his public appearances and activities themselves are concerned, such an individual has, properly speaking, no right of privacy, since these are no longer his private affairs.”).

132. Jamie E. Nordhaus, *Celebrities’ Rights to Privacy: How Far Should the Paparazzi be Allowed to Go?*, 18 REV. LITIG. 285, 289 (1999).

133. See RESTATEMENT (SECOND) OF TORTS § 652D cmt. D. (1977) (stating that “when the matter to which publicity is given is true, it is not enough that the publicity would be highly offensive to a reasonable person. The common law has long recognized that the public has a proper interest in learning about many matters. When the subject-matter of the publicity is of legitimate public concern, there is no invasion of privacy.”).

134. See RESTATEMENT (SECOND) OF TORTS § 652D cmt. H. (1977) (finding that “permissible publicity to information concerning either voluntary or involuntary public figures is not limited to the particular events that arouse the interest of the public. That interest, once aroused by the event, may legitimately extend, to some reasonable degree, to further information concerning the individual and to facts about him, which are not public and which, in the case

Celebrities like Meghan are viewed as inherently “public” and are thus seen as waiving their rights to privacy.¹³⁵ This is a limited waiver, restricting the press to examining or exposing only information that has some bearing on the individual’s position in society.¹³⁶ However, in an age where one’s personal decisions are often subject to public scrutiny, the line between public and personal becomes blurred. The challenge becomes balancing the expectation of privacy with the First Amendment right of a free press.¹³⁷

In a landmark case for public figures and invasive newsgathering in the United States, former First Lady Jackie Kennedy Onassis, following the death of her husband, President John F. Kennedy, was granted an injunction requiring a photographer, Ronald Galella, to stay a certain distance from her family to prevent invasion of her privacy.¹³⁸ This was done after months of harassment by Galella, including throwing himself in front of Onassis’ son on a bike, stalking her, and a number of intrusive practices.¹³⁹ While Galella asserted First Amendment protections as a member of the press, the court said “crimes and torts committed in newsgathering are not protected.”¹⁴⁰ At the district level, the court stated the right to privacy includes:

. . . a general ‘right to be left alone,’ and to define one’s circle of intimacy; to shield intimate and personal characteristics and activities from public gaze; to have moments of freedom from the unremitted assault of the world and unfettered will of others in order to achieve some measure of tranquility for contemplation or other purposes, without which life loses its sweetness.¹⁴¹

However, the tension between celebrity privacy and the press continues. Celebrities have had sexual videos leaked by the press,¹⁴²

of one who had not become a public figure, would be regarded as an invasion of his purely private life.”)

135. Nordhaus, *supra* note 132, at 289.

136. See RESTATEMENT (SECOND) OF TORTS, § 652D cmt. H. (1977) (instructing that “in determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of the community mores. The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public with decent standards, would say that he had no concern.”).

137. See U.S. CONST. amend I. (“Congress shall make no law . . . abridging the freedom of speech, or of the press . . .”).

138. *Galella v. Onassis*, 353 F. Supp. 196, 231 (S.D.N.Y. 1972) *aff’d in part, rev’d in part*, 487 F.2d 986 (2d Cir. 1973). Galella initially sued Onassis for alleged false arrest and malicious prosecution to which Onassis counterclaimed for privacy violations based on Galella’s harassment of her and her children. *Id.*

139. *Id.*

140. *Galella v. Onassis*, 487 F.2d 986, 995 (2d Cir. 1973).

141. *Galella*, 353 F. Supp. at 232.

142. See *Bollea v. Gawker Media, LLC*, 913 F. Supp. 2d 1325, 1326 (M.D.

been sexually harassed in pursuit of a photo,¹⁴³ and have led to physical altercations with photographers.¹⁴⁴

2. Copyright Law in the United States

Copyright protections in America have a long history, dating back to the writing of the Constitution.¹⁴⁵ The Copyright Act protects “an original work of authorship that has been fixed in a tangible medium of expression,” including “literary works.”¹⁴⁶ It only requires “some minimal degree of creativity.”¹⁴⁷

The owner of copyright in America is granted a number of exclusive rights, including the right to exclude others from reproducing, copying, distributing, or adapting their works.¹⁴⁸ The U.S. Supreme Court has also recognized the right of first publication.¹⁴⁹ Justice O’Connor persuasively stated,

in our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression . . . [and] ‘the economic philosophy behind the clause . . . is the conviction that encouragement of individual effort . . . is the best way to advance public welfare’ . . .¹⁵⁰

To establish copyright infringement, the owner must prove “(1) ownership of a valid copyright, and (2) copying of constituent

Fla. 2012) (denying an injunction sought by entertainer Hulk Hogan after a media site published a private sex tape because it would be a prior restraint on First Amendment rights).

143. See, e.g., Caroline Leaper, *Emma Watson Talks About the Disgusting Way Paparazzi Have Treated Her, and Other Female Celebrities*, MARIE CLAIRE (Nov. 3, 2016), www.marieclaire.co.uk/news/celebrity-news/emma-watson-paparazzi-took-pictures-up-my-skirt-on-my-18th-birthday-14485 [perma.cc/975G-89XE] (detailing an attempt by the paparazzi to take a picture up Emma Watson’s skirt on the evening of her 18th birthday).

144. See, e.g., Katie Scott, *Justin Bieber’s Paparazzi Run-Ins: Is the Canadian Singer Changing His Tune?*, GLOB. NEWS (Aug. 22, 2017), www.globalnews.ca/news/3687756/justin-bieber-paparazzi/ [perma.cc/GD5L-UEZ8]. See also Sophia Caraballo Pineiro, *Britney Spears’ Shaved Head ‘Meltdown’ Revisited in New Documentary*, U.S. SUN (Feb. 6, 2021), www.the-sun.com/entertainment/2279177/britney-spears-documentary-framing-shaved-head-meltdown/ [perma.cc/N9CB-8GX4].

145. See U.S. CONST. art. I, § 8, cl. 8. (“Congress shall have Power to . . . promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . .”).

146. 17 U.S.C. § 102(a) (2022).

147. Cf. *Feist Publications, Inc. v. Rural Tel. Servs. Co.*, 499 U.S. 340, 345 (1991) (holding that the compilation of ‘white pages’ in a telephone directory lacked requisite originality and did not constitute a defensible copyright).

148. 17 U.S.C. § 106 (2022).

149. See *Harper & Row, Publrs. v. Nation Enterp.*, 471 U.S. 539, 600 (1985) (holding that *The Nation’s* pre-publication of unpublished verbatim excerpts of President Ford’s memoir was not fair use and infringed on a marketable interest of first publication rights).

150. *Id.* at 606 (quoting *Mazer v. Stein*, 347 U.S. 201, 219 (1954)).

elements of the work that are original.”¹⁵¹ Fair use is a recognized defense of copyright infringement.¹⁵² The statute defining fair use lists four factors to consider, including the purpose and character of use, nature of the work, amount of the work used, and effect of the use on the potential value of the work.¹⁵³ The analysis of the first factor asks 1) if the use is commercial in nature and 2) if the use is transformative.¹⁵⁴

The issue of copyright infringement based on private letters is not new to American courts. In the 1840s, a politician was blackmailed into handing over private letters to defendants who intended to publish the letters.¹⁵⁵ The plaintiff, a New York customs officer who had written some of the letters extorted from the politician, asserted that the letters were of private concern, written in friendship, and that he did not consent to their publication.¹⁵⁶ The court turned to a slew of cases from English Chancery to determine if “the court has ever interfered to restrain the publication of private letters” because the “court has jurisdiction similar to and coextensive with that of England.”¹⁵⁷ Relying on the decisions of the English Chancery, the court determined that “every private letter upon any subject to any person is not to be clothed with that character and to be protected upon the principle of copyright . . .”¹⁵⁸ *Wetmore* was distinguished from the English Chancery cases because the latter involved claims of copyright or literary composition, whereas the former merely claimed the letters related “exclusively to matters of private concern” and that there was “no other law than that which may be found in a just sense of propriety and honor to forbid the publication of private letters or papers.”¹⁵⁹ The injunction was ultimately dissolved.¹⁶⁰

Over a century later, a biographer and publishing company

151. *Feist Publications, Inc.*, 499 U.S. at 361.

152. 17 U.S.C. § 107 (2022).

153. *Id.*

154. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585-586 (1994) (reversing the lower court’s determination that the commercial nature of a parody song rendered it presumptively unfair without having considered the nature of the copyrighted material).

155. *Wetmore v. Scovell*, 3 Edw. Ch. 515, 521-22 (N.Y. Ch. 1842).

156. *Id.* at 520.

157. *Id.* at 522; *see, e.g.*, *Pope v. Curl* (1741) 2 Atk. 341 (Lord Hardwicke) (finding the publication of Pope’s private letters to be unlawful); *Thompson v. Stanhope* (1774) Ambl., 737 (Earl Bathurst) (granting an injunction to prevent a third party from publishing private letters); *Percival v. Phipps* (1813) 2 Ves. & B 19 (Sir Thomas Plumer) (holding that even when the author of a private letter parts from the physical property, they do not part with copyright ownership in the letter).

158. *Wetmore*, 3 Edw. Ch. at 524.

159. *Id.* at 531.

160. *Id.* at 530, 533. (stating “that if one party has that right, the other party must not invade it; if he has not that right, the court cannot give it to him the consequences that belong to it . . .”).

collaborated to publish a biography of the famous author, J.D. Salinger.¹⁶¹ Salinger was still alive during the proposed publication and was a notorious recluse.¹⁶² The proposed biography included reproducing, quoting, and paraphrasing unpublished letters that had been donated to library collections.¹⁶³ Salinger registered the letters with copyright and then filed for a preliminary injunction that the district court denied, saying that the use of the letters constituted fair use.¹⁶⁴ The Second Circuit reversed, finding it was not fair use because the letters were unpublished at the time and Salinger had a protectable copyright that had been infringed.¹⁶⁵

However, 17 U.S.C § 107 was amended in 1992 to state “the fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon all the above factors.”¹⁶⁶ This amendment overturned the court’s determination in *Salinger v. Random House, Inc.* that unpublished works “normally enjoy insulation from fair use copying.”¹⁶⁷ While copyright can be found in a private letter, a publisher can still use the defense of fair use if they publish it.¹⁶⁸ Indeed, in a post-amendment decision, the outcome was distinct from *Salinger*. In a 1994 California case, the plaintiff alleged copyright infringement when a biographer copied excerpts of copyrighted letters and published them in a biography.¹⁶⁹ Despite the unpublished nature of the letters, the court found a biographer is expected to quote outside sources and the use was deemed fair.¹⁷⁰

III. ANALYSIS

In considering Meghan’s Motion for Summary Judgment, Justice Warby looked to any reasonable grounds for defending the claim.¹⁷¹ The analysis begins with the misuse of private information claim by weighing the two-part test and Murray Factors.¹⁷² Next, the copyright infringement claim, including the question of

161. *Salinger v. Random House, Inc.*, 811 F.2d 90, 94 (2d Cir. 1987).

162. *Id.*

163. *Id.* at 93.

164. *Salinger v. Random House, Inc.*, 650 F. Supp. 428 (S.D.N.Y. 1986).

165. *Salinger*, 811 F.2d at 100.

166. 17 U.S.C. § 107 (2022).

167. *See* *Authors Guild v. Google, Inc.*, 804 F.3d 202, n.13 (2d Cir. 2015) (finding Google’s Library Project and Google Books project constitutes fair use and is transformative under the fair use doctrine).

168. *See Salinger*, 811 F.2d at 100 (recognizing copyright in personal letters) and *Authors Guild*, 804 F.3d at n.13 (allowing fair use protection to be used against unpublished works).

169. *Norse v. Henry Holt & Co.*, 847 F. Supp. 142, 143 (N.D. Cal. 1994).

170. *Id.* at 145 (noting a biography is a scholarly work and scholarship is eligible for fair use defense, and further discussing fair use can be found in unpublished works so long as all fair use factors are considered).

171. *Markle Case* [2021] EWHC 273 at ¶ 10.

172. *Id.* at ¶ 28.

originality, infringement, fair dealing, and joint authorship will be discussed.¹⁷³ When relevant, the recent decision from the Court of Appeal will be incorporated to supplement Justice Warby's reasoning.¹⁷⁴

A. *Misuse of Private Information Claim*

The first issue considered is the misuse of private information claim, which, Meghan's attorney phrased as: "does the writer of a letter that is self-evidently private and sensitive have the right to decide whether, when, how, and to what extent to publish its contents? Or does a newspaper have the right to publish those contents, without the prior consent or even knowledge of the writer?"¹⁷⁵

To answer these questions, Justice Warby utilized a two-part test.¹⁷⁶ The test determines 1) if the claimant had a reasonable expectation of privacy with the information in question and 2) if the privacy rights present, if any, must yield to freedom of expression due to the press.¹⁷⁷

1. *Reasonable Expectation of Privacy*

Meghan asserted that the Letter was private in nature with no relation to her public profile and of no public interest.¹⁷⁸ Further, she alleged that a reasonable expectation of privacy was thwarted when the defendant published substantial portions of the Letter to a readership of millions.¹⁷⁹

Associated Newspapers responded that there was no reasonable expectation of privacy and, if one did exist, it was outweighed by the public interest and rights of Mr. Markle.¹⁸⁰ They argued privacy rights were limited because of legitimate public

173. *Id.* at ¶ 28, 130.

174. *See generally Markle on Appeal* [2021] EWCA 1810 (discussing whether Justice Warby was correct in granting Summary Judgment to Meghan Markle and ultimately reaffirming Justice Warby's decision).

175. *Markle Case* [2021] EWHC 273 at ¶ 35.

176. *See ZXC v. Bloomberg LP* [2020] EWCA Civ [103-109] (stating there are circumstances where the owner of private information must yield to the right of freedom of expression and that this is determined by a balancing test weighing the reasonable expectation of privacy and the need to contribute to a debate of general interest).

177. *Markle Case* [2021] EWHC 273 at ¶ 30-31.

178. *Id.* at ¶ 4-5.

179. *Id.* at ¶ 66.

180. Eslinger November Article, *supra* note 119; *see also Markle on Appeal*, [2021] EWCA 1810 at ¶ 24 (quoting Edward Verity who stated that there were "good reasons to publish the story" because Mr. Markle was misrepresented and that it raised "serious questions around the appropriateness" of Meghan's "media fightback . . .").

interest in the claimant and her connection to the royal family.¹⁸¹ Further, those rights were destroyed or compromised because Meghan had knowledge, or at least a belief, that her father had a propensity to speak to the media.¹⁸² The Defendant relied heavily on the *People* article that alleged the Letter's existence as a justification for the later publications as a way to correct a misleading account of Mr. Markle's reputation.¹⁸³ Justice Warby viewed this as a binary issue with the only option being "yes" or "no" in regard to the reasonable expectation of the Letter's contents remaining private.¹⁸⁴

In applying the Murray Factors, Justice Warby considered Meghan's attributes, which included her status as a member of the royal family and thus a public figure.¹⁸⁵ The first factor weighed against Meghan.¹⁸⁶ However, the nature of the "activity" did not relate to this role because it focused exclusively on the relationship with her father and was privately and directly delivered to Mr. Markle by a courier service. Thus, the second factor favored Meghan.¹⁸⁷ Associated Newspapers argued that matters related to the wedding, specifically why her father did not attend, were matters of "public interest" and Meghan's status with the royal family made her, and by extension her familial relationships, subject to public scrutiny.¹⁸⁸ Her role as a public figure subjects her to some degree of intrusion because of society's interest in her conduct, character, and relationships and how they reflect on the royal family.¹⁸⁹ However, "it has long been established that a public figure does not, by joining that select group, give up her right to a private life, or open up every aspect of her private and family life or correspondence to examination in the press."¹⁹⁰

The Letter itself was viewed as a correspondence relating to family life,¹⁹¹ but this alone was "not conclusive on the question of whether the claimant enjoyed a reasonable expectation of privacy."¹⁹²

181. *Markle Case* [2021] EWHC 273 at ¶ 6.

182. Eslinger November Article, *supra* note 119 (stating that "Associated Newspapers claimed in its defense that even if Markle had privacy rights . . . the former actress had forfeited them by leaking details of the letter to People magazine and other media through her friends.").

183. *Markle on Appeal* [2021] EWCA 1810 at ¶ 7.

184. *Id.* at ¶ 37.

185. *Markle Case* [2021] EWHC 273 at ¶ 71-72.

186. *Id.* at ¶ 69.

187. *Markle on Appeal* [2021] EWCA 1810 at ¶ 1, 39.

188. *Markle Case* [2021] EWHC 273 at ¶ 71.

189. *Id.*

190. *Id.*

191. *Id.* at ¶ 73.

192. *See Hutchesson v. News Group Newspapers Ltd* [2011] EWCA (Civ) 808 [2012] EMLR [¶ 38] (denying an interim injunction to prevent publication of a story about a celebrity's alleged second family because the fact that a reasonable expectation of privacy *may* be implicated was not conclusive enough to defeat a

Associated Newspapers argued that, absent a mutual understanding between parties, “the recipient of a letter is not obliged to keep its existence or contents private.”¹⁹³ This was at odds with previous cases in the United Kingdom that recognized “as a general rule correspondence between A and B on private matters such as their feelings for one another would be a prime candidate for protection.”¹⁹⁴ However, there was also the recognition that “where two people have shared experience, the rights of each must be taken into account, and each has a right to speak about their own life story.”¹⁹⁵

Ultimately, the words used in the Articles assisted the court in determining the private nature of the Letter.¹⁹⁶ The Letter was a communication between two family members, delivered directly to the recipient, and related to the claimant’s behavior, feelings, and her view of their rift.¹⁹⁷ Associated Newspapers, through the Articles, recognized the nature of the Letter when they described it as “deeply personal” and noted Mr. Markle initially “never intended to talk publicly about the Letter.”¹⁹⁸

Mr. Markle’s right to tell his own story is not doubted, but it is not without limits and cannot be said that it “defeats or overrides the [Meghans]’s presumptive right to keep the contents of her Letter private.”¹⁹⁹ Overall, Justice Warby found that this Murray Factor fell in favor of Meghan.²⁰⁰

The Defendant asserted Meghan’s expectation of privacy was diminished, if not completely destroyed, by a reasonable belief that her father was likely to disclose to the media, especially because the existence of the Letter had already been brought to the public’s attention by another source.²⁰¹ Further, the Defendant argued the publication was lawful in the United States, where Mr. Markle initially shared the Letter with the California-based Associated Newspaper reporter.²⁰² Mr. Markle’s propensity to speak to the

public interest argument before trial).

193. *Markle Case* [2021] EWHC 273 at ¶ 74.

194. *Maccaba v. Liechtenstein* [2004] EWHC 1579 (QB), [2005] EMLR 6 [¶ 4]; see also CHARLES PHIPPS ET AL., *TOULSON AND PHIPPS ON CONFIDENTIALITY* (4th Ed., 2020) (serving as a comprehensive and authoritative source of confidentiality law in the UK) and CLEMENT GATLEY, *GATLEY ON LIBEL AND SLANDER* (12th Ed., 2008) (discussing the law of defamation in the UK).

195. *Markle Case* [2021] EWHC 273 at ¶ 75 (citing *Theakston v. MGN* [2002] EWHC 137 (QB) [2002] EMLR 22 [¶ 64] (Ousley J); *Lorde Browne of Madingley v. Associated Newspapers Ltd* [2007] EWCA Civ 295, [2008] QB 10332; *Hutcheson v. News Group Newspapers Ltd* [2011] EWCA Civ 808 [2012] EMLR [¶ 38], *OPO v. Rhodes* [2015] UKSC 32 [2016] AC 219 [¶ 75]).

196. *Markle Case* [2021] EWHC 273 at ¶ 76(1).

197. *Markle on Appeal* [2021] EWCA 1810 at ¶ 42.

198. *Id.* at ¶ 23.

199. *Markle Case* [2021] EWHC 273 at ¶ 76(3).

200. *Id.* at ¶ 73.

201. *Id.* at ¶ 77.

202. *Id.*

media was demonstrated by the issue that led to the Letter in the first place: staged paparazzi photos.²⁰³ However, one person's rights are not simply defeated by the likelihood that the rights might be ignored when they conflict with the rights of another.²⁰⁴

The nature of Mr. Markle's location and the legality of publication in the United States was not answered or addressed by Justice Warby.²⁰⁵ The idea of rights enjoyed in a foreign jurisdiction as a basis for defense in English courts has been rejected as irrelevant.²⁰⁶

The intrusion factor from *Murray* considers the type and extent of the intrusion.²⁰⁷ It was not disputed that the detailed contents entered the public domain directly because of Associated Newspapers' publication of the Articles.²⁰⁸ The Defendant argued it was a justifiable intrusion based on an alleged authorization of the *People* article by Meghan.²⁰⁹ Associated Newspapers also pointed to the 2020 publication of the book *Finding Freedom*, as proof that Meghan always intended for the Letter to enter the public domain, and therefore it was never a private letter.²¹⁰ Meghan initially denied knowledge or authorization of any part of the Letter in *Finding Freedom*, but on appeal Meghan admitted "she authorized some information to be provided to the authors but only 'to prevent further misinformation coming into the public domain to the effect that [she] had abandoned her father.'" ²¹¹

Justice Warby said the disclosure of the *existence* of the Letter is fundamentally different from disclosing detailed *contents*.²¹² The Articles described the Letter as "sensational revelations" purporting to reveal information for the first time.²¹³ This was done without consent and with the reasonable likelihood that such

203. Mackelden, *supra* note 10.

204. *Mosley v. News Group Newspapers* [2008] EWHC 1777 (QB) [2008] EMLR 20 [¶ 225-226] (Eady J) (finding that the President of the Fédération Internationale de l'Automobile's self-destructive behavior is not enough to excuse intrusion into a person's privacy when *News of the World* published an 'exclusive' about his sexual life).

205. *Markle Case* [2021] EWHC 273 at ¶ 79.

206. *See Douglas v. Hello Ltd (No 2)* [2003] EWCA Civ 139, [2003] EMLR [¶ 41] (Rix LJ); *Douglas v. Hello! Ltd (No 6)* [2003] EWHC 786 (Ch) [2003] 3 All ER 996 [¶ 211], [¶ 277] (Lindsay J) *aff'd Douglas v. Hello Ltd (No 3)* [2005] EWCA Civ 595 [2006] QB 125 [¶ 100-101] (concerning unauthorized photos taken of a celebrity wedding where photographs were taken in New York but published in England and Wales and ultimately decided under English law).

207. *Murray* [2008] EWCA 446 at ¶ 36.

208. *Markle Case* [2021] EWHC 273 at ¶ 68.

209. Eslinger November Article, *supra* note 119.

210. *Id.*

211. *Id.*

212. *Markle Case* [2021] EWHC 273 at ¶ 68.

213. *Id.* at ¶ 68. *See also Markle on Appeal* [2021] EWCA 1810 at ¶ 42 (quoting the Articles where Associated Newspapers described the Letter as "Meghan's private letter revealing the true tragedy of her rift with her father . . .").

unwanted disclosure would cause Meghan distress, especially with the knowledge that her father gave the Letter to the media.²¹⁴ The publication of the book was not considered proof of Meghan's intent to release the Letter to the public.²¹⁵ It was not published until 2020 and then, only with quotations already in the Articles.²¹⁶ The author, Scobie, also testified that the quotes in the books were drawn directly from the Articles.²¹⁷ Associated Newspapers tried to assert that Scobie received a copy of the Letter, but this was dismissed as hearsay.²¹⁸

Overall, the first principle, Meghan's reasonable expectation of privacy, weighed in her favor.²¹⁹ Justice Warby stated that Meghan "would be bound to win at trial" and "it is fanciful to think otherwise."²²⁰

2. *Balancing Meghan's Privacy Expectation with the Freedom of Expression*

The second prong for intrusion of privacy centers on whether the interference was reasonable in comparison to the rights of others and whether allowing the intrusion is necessary to permit freedom of expression.²²¹

Associated Newspapers sought to assert the common law idea that "those who seek favourable publicity somehow waive their rights, and must accept adverse publicity."²²² By pointing to the *People* article and *Finding Freedom*, the Defendant argued Meghan is open to publicity, but only if she can manipulate her public image for favorable coverage, contrary to the common law principle.²²³ While a public figure "may have a correspondingly reduced expectation of privacy,"²²⁴ it is not completely demolished.²²⁵

214. Eslinger December Article, *supra* note 122.

215. *Markle Case* [2021] EWHC 273 at ¶ 83.

216. SCOBIE & DURAND, *supra* note 28, at 232-33.

217. *Markle Case* [2021] EWHC 273 at ¶ 84.

218. *Id.*

219. *Id.* at ¶ 95. In the United Kingdom, hearsay "means a statement made, otherwise than by a person while giving oral evidence in proceedings, which is tendered as evidence of the matters stated; and (b) references to hearsay include hearsay of whatever degree." Misc. Rules About Evidence 33/1 (2017).

220. *Markle Case* [2021] EWHC 273 at ¶ 95.

221. *Id.* at ¶ 96 (stating the publication should be "rational and proportionate in pursuit of protecting the rights of others . . .").

222. *Id.* at ¶ 101; *see also* Woodward v. Hutchins, [1977] 1 WLR 760 [763-4] (Lord Denning MR) (denying an injunction to prevent publication of unfavorable facts about a pop-group and stating that if an image fostered is not a true one, it is in the public interest to correct it).

223. *Markle on Appeal* [2021] EWCA 1810 at ¶ 54.

224. *Markle Case* [2021] EWHC 273 at ¶ 101.

225. *Id.* at ¶ 98 (citing *Campbell* [2004] UKHL 22 at ¶ 57) (stating that "a person may attract or even seek publicity about some aspects of his or her life without creating any public interest in the publication of personal information about other matters.").

The Defendant also argued there was a need to publish the Letter to “prevent the public from being misled” by the *People* article.²²⁶ Allegedly, Mr. Markle had a “self-defense” right to correct the record as the *People* article was damaging to his reputation.²²⁷ Associated Newspapers pointed to the long-established right to utilize confidential material to vindicate one’s reputation from false imputations.²²⁸ They argued the *People* article incorrectly summarized the nature, tone, and contents of the Letter.²²⁹ Associated Newspapers asserted the *People* article harmed Mr. Markle by misrepresenting his intentions in the response to the Letter.²³⁰

However, in balancing Mr. Markle’s right with Meghan’s privacy, the court held that the alleged “self-defense” right is a limited one.²³¹ Even if the *People* article gave an inaccurate and one-sided account, it would only provide *some* justification for a “rational or arguably proportionate reason for disclosure of any part of the Letter.”²³² This is akin to the *Campbell* case where the court deemed *some* disclosure of the claimant’s private life would be justified to the extent that it sought to correct the record.²³³ In that situation, the question shifts to asking what harm was caused and how much of the disclosure was necessary to correct that harm.²³⁴ However, Mr. Markle and Associated Newspapers failed to show actual harm, leading the court to conclude “there is no authority to support the view that the mere fact a person ‘believes’ his portrayal is untrue is enough.”²³⁵ To do this here would mean legitimizing disproportionate responses in the future.²³⁶

Although the *People* article could be deemed inaccurate in some regards, justifying *some* sort of response, “it cannot be said that twenty-five words²³⁷ warrant the extensive takings by Associated Newspapers, without notice [to] or consent” from the author.²³⁸ Further, there was “no foundation for a conclusion that the publication . . . served any purpose other than satisfying public

226. *Markle Case* [2021] EWHC 273 at ¶ 104.

227. *Id.* at ¶ 109.

228. *See* Lord and Lady Perceval v. Phipps 35 Eng. Rep. 225 (1813) 2 v & B 19 (allowing the defendant to publish private letter written by the claimant in order to correct false information and protect his reputation).

229. *Markle Case* [2021] EWHC 273 at ¶ 111.

230. *Id.* at 114.

231. *Markle on Appeal* [2021] EWCA 1810 at ¶ 54.

232. *Markle Case* [2021] EWHC 273 at ¶ 113.

233. *Murray* [2008] EWCA 446 at ¶ 21 (distinguishing *Murray* by noting *Campbell* involved correcting the record after claimant lied in interviews to deny drug use).

234. *Markle Case* [2021] EWHC 273 at ¶ 104.

235. *Id.* at ¶ 112.

236. *Id.*

237. *Id.* at ¶ 120. *See also Markle on Appeal* [2021] EWCA 1810 at ¶ 20 (providing the exact quotes from the *People* Article).

238. *Markle Case* [2021] EWHC 273 at ¶ 120.

curiosity about the claimant, or that it otherwise made . . . any contribution to a debate of public or general interest.”²³⁹

On the balancing principle, Justice Warby found the Articles to be a “wholly disproportionate” means to pursue the Defendant’s objective “by publishing long and sensational articles” in an unauthorized manner as they did.²⁴⁰ On appeal, the Court of Appeal agreed with Justice Warby that the disclosure was disproportionate.²⁴¹

Because both principles found in Meghan’s favor for the intrusion of privacy claim, Justice Warby granted summary judgment in Meghan’s favor, separate from any copyright infringement findings.²⁴² Granting summary judgment in the UK serves to end litigation and permits the court to give further directions, including awarding remedies to one or both parties.²⁴³ The question of damages and remedies was decided at a later date.²⁴⁴

B. Copyright Infringement Claim

The second claim considered statutory property rights in original literary works that are granted to the author of such work and whether Associated Newspapers infringed on any copyright.²⁴⁵

Meghan claimed to be the sole author of the Electronic Draft, later transcribed into the Letter, and that she satisfied originality elements necessary for copyright in a literary work.²⁴⁶ By

239. *Id.* at ¶ 103.

240. *Id.* at ¶ 125(2).

241. *Markle on Appeal* [2021] EWCA 1810 at ¶ 106 (finding that “essentially, whilst it might have been proportionate to disclose part of the Letter to rebut inaccuracies in the People Article, it was not necessary to deploy half the contents . . . the true purpose of the publication was . . . to reveal for the first time . . . ‘the full content of a sensational letter’ written by” Meghan).

242. *Markle on Appeal* [2021] EWCA 1810 at ¶ 1.

243. *See* 24 CPR 6 (2021) (stating that when the court determines summary judgment it may “give further directions about the management of the case”); *see also* 3 CPR 1(3) (2021) (providing the court can attach conditions when it makes an order); 24 CPR 4.2 (2021) (describing conditional orders as orders that require a party to pay a sum of money or take a specified step); 6 CPR 24 (2021) (stating “if a remedy sought by a claimant...includes...taking an account or making an inquiry...an application can be made” directing these).

244. HRH The Duchess of Sussex v. Associated Newspapers Ltd. [2021] EWHC 669 (Ch) [¶ 5] (discussing the details of the Publication Order by Justice Warby that required a Notice of the judgment); *see also* Allison Grande, *Prince Harry, UK Celebs Hit Daily Mail with Privacy Suits*, LAW360 (Oct. 6, 2022), www.law360.com/articles/1537924/prince-harry-uk-celebs-hit-daily-mail-with-privacy-suits [perma.cc/U5TK-XZ8B] (stating Meghan was “awarded £1 nominal damages and an undisclosed amount in damages for copyright infringement in May 2021. The publisher was also ordered to issue a front-page apology and pay her legal costs.”).

245. *Markle Case* [2021] EWHC 273 at ¶ 130-32.

246. *Id.* at ¶ 135.

publishing excerpts of the Letter without consent, the Associated Newspapers' Article publications would be an infringement of Meghan's copyright.²⁴⁷

In response, Associated Newspapers recognized Meghan would be entitled to copyright protection *if* she were, in fact, the sole author.²⁴⁸ The Defendant alleged the involvement of the Kensington Palace Communications Team led to the possibility of a separate copyright belonging to the Crown.²⁴⁹ A defense of fair dealing was also raised.²⁵⁰

1. Originality

Turning first to the question of whether the Letter is a literary work, statutory requirements must be considered.²⁵¹ To qualify as a literary work, there must be some level of originality.²⁵² Similar to the United States, copyright in the UK protects the form of the work rather than ideas.²⁵³ It does not need to be novel or ingenious,²⁵⁴ but does require "sufficient relevant artistic effort."²⁵⁵

Associated Newspapers argued there was no originality because the Letter was "primarily an admonishment" that only recited past and present facts as well as Meghan's view of those facts.²⁵⁶ The underlying argument was that "the author of text that is a recitation of pre-existing facts cannot claim a copyright . . ." but this is not supported by any authority.²⁵⁷

This argument was rejected entirely because the Letter was "more than a short and banal insult" and was a "long-form telling-off, selecting a variety of literary forms, interwoven with . . .

247. *Id.* at ¶ 136. *See also* Copyright, Designs, and Patent Acts 1988, CDPA 1988/16 § 16-21 (Eng.) (detailing the acts restricted by copyright, including issuing copies to the public and reproducing the work).

248. *Markle Case* [2021] EWHC 273 at ¶ 136.

249. *Id.* at ¶ 137-38. The Kensington Palace Communications Team consists of Jason Knauf of Royal Communications, Sara Latham, Samantha Cohen, and Christian Jones, sometimes referred to as the "Palace Four". *Id.* When a Crown copyright exists, the Crown becomes the first owner of the copyright. Copyright, Designs, and Patent Acts 1988, CDPA 1988/48 § 163 ¶ 1 (Eng.).

250. *Markle on Appeal* [2021] EWCA 1810 at ¶ 59.

251. Copyright, Designs, and Patent Acts 1988, CDPA 1988/48 § 3 ¶ 1 (Eng.).

252. *Markle Case* [2021] EWHC 273 at ¶ 139.

253. *See IPC Media v. Highbury* [2004] EWHC 2985 (Ch) [¶ 13] (Laddie J) (citing *Nichols v. Universal Pictures Co.*, 45 F2d 119, 121 (2d Cir. 1930)).

254. *Markle Case* [2021] EWHC 273 at ¶ 141.

255. *IPC Media* [2004] EWHC 2985 at ¶ 9 (discussing that the work must be original but can utilize well-known themes and ingredients so long as the author put sufficient effort into the production) "Monet was, no doubt, not the first artist to paint water lilies, but his paintings of them were protected by copyright." *Id.*

256. *Markle Case* [2021] EWHC 273 at ¶ 144.

257. *Id.* at ¶ 145.

narrative” that “reflects an exercise in expressive choice.”²⁵⁸ Ultimately, “the Electronic Draft is and would inevitably be held to be the product of intellectual creativity sufficient to render it original . . . and to confer copyright.”²⁵⁹

2. *Infringement*

With copyright protection decided, Justice Warby considered “whether the Articles comprised a copy of ‘substantial part’ of the Electronic Draft or the Letter.”²⁶⁰ Copyright infringement under the CDPA occurs when “a person, who without the licence of the copyright owner does, or authorises another to do, any of the acts restricted by the copyright”²⁶¹ which includes copying or issuing copies of the work, either as a whole or substantially.²⁶²

This analysis considered the breadth of the taking – how much of the Letter did the Articles use? The Letter amounted to 1,250 words of which the Articles used approximately 585, directly copying the expression protected by copyright.²⁶³ The chosen extracts were prominent portions of the Letter that reflected its main themes and a majority of what the claimant had to say.²⁶⁴ This is further supported by determining substantiality by the quality of the work taken, not the quantity.²⁶⁵ Under the CDPA, the breadth of the taking would be unlawful by copying the work “as a whole or substantially” and issuing copies of the work.²⁶⁶

3. *Fair Dealing*

The main defense to copyright infringement is fair dealing,²⁶⁷

258. *Id.* at ¶ 148 (noting “there must be 50 ways to scold your father, and 100 more in which to explain why you have told him off.”).

259. *Id.* at ¶ 149.

260. *Id.* at ¶ 150.

261. Copyright, Designs, and Patent Acts 1988, CDPA 1988/1616 ¶ 2 (Eng.) (defining the acts restricted by copyright in a work, which includes copying the work, issuing copies of the work, renting, or lending the work to the public, communicating the work to the public, or adapting the work).

262. *Id.*

263. *Markle Case* [2021] EWHC 273 at ¶ 150.

264. *Markle on Appeal* [2021] EWCA 1810 at ¶ 42.

265. *HRH Prince of Wales v. Associated Newspapers* [2006] EWHC 522 (Ch) [¶ 160].

266. Copyright, Designs, and Patent Acts 1988, CDPA 1988/16 §16 ¶ 3 (Eng.).

267. Copyright, Designs, and Patent Acts 1988, CDPA 1988/30 § 30 ¶ 1 (Eng.) (stating that fair dealing “with a work for the purpose of criticism or review, of that or another work or of a performance of a work, does not infringe any copyright” provided it has a sufficient acknowledgement and that the work has been made available to the public, and further stating that no acknowledgement is required when the fair dealing is in connection to reporting current events); see *Ashdown* [2001] EWCA 1142 at ¶ 69 (determining “the fair dealing defence . . . should lie where the public interest in learning of the very

Fair dealing is a matter of fact, degree, and impression.²⁶⁸ Summary judgment can be used to dismiss fair dealing as a defense when it is plain the use is not fair dealing.²⁶⁹ In *Ashdown v. Telegraph Group, Ltd.*, the court considered “whether the alleged fair dealing is in fact commercially competing with the proprietor’s exploitation of the copyright work.”²⁷⁰ If the taking is moderate and there are no special adverse factors, “especially if the defendant’s additional purpose is to right a wrong, to ventilate an honest grievance, to engage in political controversy, and so on,” then the defense is likely to succeed.²⁷¹ Fair dealing also asks if the work has been previously published or exposed to the public, although it recognizes it is sometimes “necessary for the purposes of legitimate public controversy to make use of ‘leaked’ information.”²⁷²

Here, it is undisputed that the Defendant knew it was an unpublished work.²⁷³ The work was not intended for commercial exploitation,²⁷⁴ so there was no commercial competition between Meghan’s ownership and the infringing use.²⁷⁵ Without a competing market, the fair dealing argument looks to the taking itself and any adverse factors.²⁷⁶ The infringement constituted an important portion of the Letter.²⁷⁷ Although the Defendant argued the purpose was “to right a wrong,” the taking was a disproportionate amount in pursuit of that goal and the use was “irrelevant to any legitimate reporting purpose and disproportionate to any such purpose.”²⁷⁸ The fair dealing defense failed based on *Ashdown* and the lack of public

words written by the owner of the copyright is such that publication should not be inhibited by the chilling factor of having to pay damages or account for profits . . .”).

268. *Markle Case* [2021] EWHC 273 at ¶ 154.

269. See *Hyde Park Residence Ltd v. Yelland* [2001] (Ch) [¶143] (finding that illegally obtained photos of Princess Diana taken shortly before her deadly car crash did not achieve a fair dealing defense even if it reported on matters of public interest); *Ashdown* [2001] EWCA 1142 at ¶ 70 (stating fair dealing applies when the infringement seeks to report news, review, or criticize work and that it is a matter of degree and impression); *HRH Prince of Wales v. Associated Newspapers* [2006] EWHC 522 (Ch) [¶ 160] (finding the publication of private diary entries did not qualify as reporting current events under the fair dealing defense).

270. *Ashdown* [2001] EWCA 1142 at ¶ 70.

271. *Id.*

272. *Id.*

273. *Markle Case* [2021] EWHC 273 at ¶ 155.

274. *Id.*

275. See *Ashdown* [2001] EWCA 1142 at ¶ 70 (stating commercial competition “is by far the most important factor” if the fair dealing is actually in competition with the owner’s potential use of the copyrighted work).

276. *Id.* (noting fair dealing can be found where the defendant’s purpose is to “right a wrong, to ventilate an honest grievance, to engage in political controversy, and so on.”).

277. *Markle Case* [2021] EWHC 273 at ¶ 155.

278. *Id.*

interest to justify overriding the copyright.²⁷⁹

Upon appeal, Associated Newspapers argued Justice Warby failed to adequately weigh Mr. Markle’s right to ventilate an honest grievance and the limited scope of copyright in the face of reporting current events.²⁸⁰ It is true that “criticism or review” and “reporting current events,” as stated in the CDPA, are wide in scope and are typically interpreted liberally.²⁸¹ However, the Court of Appeal agreed with Justice Warby.²⁸² The Articles were not considered current events at the time of their publication.²⁸³ Further, the Defendant’s alleged right to ventilate a grievance failed because “the way that the Articles deployed the Letter was anyway not by way of defence for Mr Markle. Instead, the Letter was splashed as a new public revelation.”²⁸⁴ Essentially, despite the alleged “need to correct the record” or “news reporting” by the Defendant, the actual contents and language of the Articles demonstrated a contrary intent that did not constitute fair dealing.

4. Joint Ownership

To round out the copyright conversation, Justice Warby addressed the Defendant’s argument that there was “joint ownership”²⁸⁵ between Meghan and the Crown.²⁸⁶ This was based on the unknown and uncertain extent of the involvement of the Kensington Palace team, namely Communications Secretary Jason Knauf.²⁸⁷ It is not known nor possible to determine exactly how much the Kensington Palace team contributed, although Associated Newspapers argued “there [wa]s reason to believe that Mr Knauf ‘was involved in wording.’”²⁸⁸ If there was joint ownership, it would

279. *Id.* at ¶ 158.

280. *Markle on Appeal* [2021] EWCA 1810 at ¶ 7, 64.

281. *See* *Pro Sieben Media v. Carlton UK Television* [1999] 1 WLR 605, 615 (stating that the test for “criticism or review” is objective and can extend to the social or moral implications of the work and that fair dealing was satisfied in a TV interview concerning a woman pregnant with octuplets).

282. *Markle on Appeal* [2021] EWCA 1810 at ¶ 101.

283. *Id.* at ¶ 99.

284. *Id.* at ¶ 95.

285. *Markle Case* [2021] EWHC 273 at ¶ 159. A work is defined as “joint ownership” when “a work produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors.” Copyright, Designs, and Patent Acts 1988, CDPA 1988/48 § 10 ¶ 1 (Eng.).

286. *Markle Case* [2021] EWHC 273 at ¶ 159. A Crown copyright is found “where a work is made by Her Majesty or by an officer or servant of the Crown in the course of his duties— (a) the work qualifies for copyright protection notwithstanding section 153(1) (ordinary requirement as to qualification for copyright protection), and (b) Her Majesty is the first owner of any copyright in the work.” Copyright, Designs, and Patent Acts 1988, CDPA 1988/48 § 163 ¶ 1 (Eng.).

287. *Markle Case* [2021] EWHC 273 at ¶ 160.

288. *Id.*

factor into the determination of Meghan’s damages.²⁸⁹ If there remained any question of fact on joint authorship, that issue would not be resolved at the summary judgment stage.²⁹⁰

In May 2021, Justice Warby directed parties to prepare for a hearing on the matter of joint ownership, damages for infringement, damages for invasion of privacy, and the agreed dismissal of the data privacy claim.²⁹¹ Later, counsel for Knauf submitted documentation that he did not lay claim to any ownership in copyright of the Letter.²⁹² The Crown also made no claim to copyright and this ended the conversation on joint ownership.²⁹³ The Court of Appeal heard Associated Newspapers’ appeal of the summary judgment findings on November 9, 2021 and affirmed all of Justice Warby’s findings.²⁹⁴ After the positive ruling in the Court of Appeal, Meghan was quoted saying:

this is a victory not just for me, but for anyone who has ever felt scared to stand up for what’s right . . . what matters most is that we are now collectively brave enough to reshape a tabloid industry that conditions people to be cruel, and profits from the lies and pain that they create.²⁹⁵

However, Associated Newspapers has expressed an interest in appealing once more, taking the case to the United Kingdom Supreme Court.²⁹⁶

IV. PERSONAL ANALYSIS

This analysis section will consider what changes, if any, would have occurred if the argument of American law protection had been considered.²⁹⁷ Rather than applying the law of a specific state, this

289. *Markle Case II* [2021] EWHC 510 at ¶ 7.

290. *Id.* at ¶ 20.

291. *Id.* at ¶ 10.

292. HRH Duchess of Sussex [2021] EWHC 1245 at ¶ 9.

293. *Id.* at ¶ 10, 13 (directing an “unqualified summary judgment on liability for copyright infringement be entered for the claimant.”).

294. *Markle on Appeal* [2021] EWCA 1810 at ¶ 106.

295. Phil Boucher, *Meghan Markle Speaks Out After Winning Court Appeal in Privacy Battle Over Letter to Her Dad*, PEOPLE (Dec. 2, 2021), www.people.com/royals/meghan-markle-wins-final-round-of-right-versus-wrong-privacy-case-against-uk-tabloid/ [perma.cc/DA9A-FMN7].

296. Eslinger December Article, *supra* note 122. In the UK, a case can be heard by the Supreme Court in one of three ways: through a reference from one with relevant statutory powers, like the Attorney General, through an appeal from certain higher courts, or through reference from certain appellate courts. *The Supreme Court and the United Kingdom’s Legal System*, SUPREME CT., www.supremecourt.uk/docs/supreme-court-and-the-uks-legal-system.pdf [perma.cc/NLE2-NXFX] (last accessed Oct. 27, 2022).

297. *See Markle Case* [2021] EWHC 273 at ¶ 79 (recognizing the alleged protection of American law, but neither contradicting nor considering the allegation).

analysis will rely on federal law and general principles.²⁹⁸ The analysis will culminate with a consideration of the clash between privacy and press and possible remedies.

A. *Meghan's Privacy Rights Under American Law*

First, would Meghan have succeeded on her intrusion of privacy claim in an American court? It is well-known America values the freedom of the press,²⁹⁹ so what happens when that freedom collides with someone's privacy? Does this consideration change if that someone is a celebrity who is often the focus of the press and public scrutiny?

Early analysis of privacy as a tort comes from the 1890 Harvard Law Review article by Warren and Brandeis.³⁰⁰ This piece called for the recognition of the "right to be let alone,"³⁰¹ which has been relied on in many subsequent studies and cases.³⁰²

Meghan would likely have a strong case under the idea of "Publicity Given to Private Life" from the Restatement (Second) of Torts.³⁰³ It would require showing that the matter publicized is one that (a) would be highly offensive to a reasonable person and (b) is not of legitimate concern to the public.³⁰⁴ Generally, this tort arises if there is a publication of non-public information that is not of legitimate public concern.³⁰⁵ It usually involves the publication of true information where the harm occurs after publication.³⁰⁶

298. 17 U.S.C. 107 (2022).

299. *See* *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 570 (1976) (holding that an injunction restraining publication has very high barriers and is presumptively invalid); *see also* *Bartnicki v. Vopper*, 532 U.S. 514, 517 (2001) (finding the publication of illegally intercepted communications is protected by the First Amendment).

300. Warren & Brandeis, *supra* note 22, at 195.

301. *Id.*

302. *See* *Griswold v. Connecticut*, 381 U.S. 479, 494 (1965) (Goldberg J., concur) (stating that the right of privacy, fostered by Warren and Brandeis, is fundamental and guaranteed by the Fourth and Fifth Amendments); *see also* Alberto Bernabe, *Giving Credit Where Credit is Due: A Comment on the Theoretical Foundation and Historical Origin of the Tort Remedy for Invasion of Privacy*, 29 J. MARSHALL J. COMPUT. & INFO. L. 493, 493 (2012) (discussing the influential nature of Brandeis and Warren's *Right to Privacy* article); *see also* Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1489 (2012) (stating that, based on the methodology used, the Warren and Brandeis *Right to Privacy* article was the second-most cited law review article as of 2012); *see also* Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 GEO. L.J. 124, 125 (2007) (arguing that *The Right to Privacy* article pushed American common law towards a general protection against invasions by strangers).

303. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

304. *Id.*

305. *Id.*

306. *See* *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 490-91 (1975)

Looking at Justice Warby's characterization of the Letter, it would be relatively easy to show that the matter disclosed is highly offensive to a reasonable person. Justice Warby described the Letter as "an anguished private letter pouring out [Meghan's] heart."³⁰⁷ Many would cringe at having their inner-most thoughts splashed across the front page of a public newspaper.

However, in the United States, such invasions of celebrity privacy happen often.³⁰⁸ This is because the constant intrusion into privacy causes the general public to feel like they "know" the celebrity on a personal level and are thus entitled to facts about their private life, a belief the press is too happy to bolster.³⁰⁹ The right to privacy is often narrower for public figures in a society that has deemed every move of a celebrity as one of "public concern."³¹⁰ From leaked voicemails³¹¹ to information on dating lives,³¹² otherwise private information has been exposed and protected by the idea of exposing information that has some bearing on the individual's position in society.³¹³

Generally, the Supreme Court has held that the reporting of lawfully obtained, truthful information is protected by the First Amendment and the freedom of the press.³¹⁴ Later cases have imposed liability only when "there is a state interest of the highest

(finding that "the interest in private reputation is overborne by the larger public interest, secured by the Constitution in the dissemination of truth . . .").

307. *Markle Case* [2021] EWHC 273 at ¶ 72.

308. *See, e.g.,* Oliver Darcy, *Police Scold TMZ After Outlet Was the First to Report Death of Kobe Bryant*, CNN BUS. (Jan. 26 2020), www.cnn.com/2020/01/26/media/tmz-death-report-kobe-bryant/index.html [perma.cc/2CRP-QBBX] (detailing that the news site reported the death of Kobe Bryant to its readership before police were able to notify the families of the helicopter crash victims); Starr Bowenback, *Jennifer Lopez Says Video of Her Performing for Ben Affleck at Their Wedding Video 'Was Stolen,'* BILLBOARD (Aug. 29 2022), www.billboard.com/music/music-news/jennifer-lopez-reacts-ben-affleck-wedding-video-leak-1235132546/ [perma.cc/NBB2P-X8VL] (stating a leaked video from the singer's wedding was "stolen without our consent and sold for money.").

309. Nordhaus, *supra* note 132, at 290.

310. *Id.* at 286.

311. Andrea Peterson, *Was That Recording of Kanye West and Taylor Swift Illegal?*, WASH. POST (July 18, 2016), www.washingtonpost.com/news/the-switch/wp/2016/07/18/was-that-recording-of-kanye-west-and-taylor-swift-illegal/ [perma.cc/SS3F-ZLL7].

312. *See* *Eastwood v. Superior Court of L.A. Cty.*, 149 Cal. App. 3d 409, 410 (Cal. Ct. App. 1983) (holding truthful reporting of Clint Eastwood's romantic affairs was a matter of public concern).

313. Nordhaus, *supra* note 132, at 288.

314. *See Cox Broadcasting*, 420 U.S. at 495 (1975) (holding that the First Amendment prevents liability for public disclosure of private facts if the information was lawfully obtained from public records and is truthfully reported); *see also* *Florida Star v. B.J.F.*, 491 U.S. 524, 534 (1989) (holding that there cannot be liability for invasion of privacy when lawfully obtained and truthful information is published, unless there is a state interest of the highest order justifying liability).

order justifying liability.”³¹⁵ Even this liability based on state interest has been overturned when the Court began to find truthful information may never be punished.³¹⁶

Unlike these previous cases, Mr. Markle is a non-government source providing Associated Newspapers with the information.³¹⁷ Mr. Markle, as the Letter’s intended recipient, was legally in possession of the Letter when he gave it to the reporter.³¹⁸ In *Florida Star v. B.J.F.*, the Court found the press had no liability when it published information that an unaffiliated source illegally intercepted and then passed to the media.³¹⁹ Justice Stevens wrote “privacy concerns give way when balanced against the interest in publishing matters of public importance . . . one of the costs associated with participation in public affairs is an attendant loss of privacy . . .”³²⁰

Under this analysis, Meghan’s privacy interest would be outweighed by the freedom of the press. The (disregarded) claim that publication of the Letter would have been lawful in American jurisdiction³²¹ would indeed ring true. This result is in direct contradiction to Justice Warby’s finding that Meghan’s privacy was intruded upon by Associated Newspapers.³²²

B. Protection Under American Copyright Law

Perhaps the best protection for Meghan under United States jurisprudence would be the federal Copyright Act.³²³ It closely mirrors the UK’s CDPA requirements of an original work with some degree of originality.³²⁴ It only requires “some minimal degree of creativity.”³²⁵

With proven copyright comes certain protections – namely the right of first publication.³²⁶ In *Harper & Row, Publishers v. Nation Enterprises*, a magazine was anonymously provided with the unpublished autobiography of President Ford.³²⁷ The magazine proceeded to publish excerpts of the manuscript prior to publication, which caused the publisher to violate a licensing agreement with

315. *Florida Star*, 491 U.S. at 534.

316. *Bartnicki*, 532 U.S. at 534 (finding that an illegally obtained recording was published permissibly even though the press involved knew it was illegally intercepted).

317. *Markle Case* [2021] EWHC 273 at ¶ 53.

318. *Id.*

319. *Florida Star*, 491 U.S. at 535.

320. *Id.* at 534.

321. *Markle Case* [2021] EWHC 273 at ¶ 79.

322. *Markle Case II* [2021] EWHC 510 at ¶ 6.

323. 17 U.S.C. § 102(a) (2022).

324. *Id.*

325. *Feist Publications, Inc.*, 499 U.S. at 345.

326. *Harper & Row, Publs.*, 471 U.S. at 600.

327. *Id.* at 542.

Time magazine.³²⁸ The Supreme Court ultimately held the verbatim use of quotations was not fair use and the author has a right to control the first publication.³²⁹ It is likely that Meghan could argue based on *Harper & Row* that the verbatim publication of previously unpublished works constituted a violation of her copyright.³³⁰

Just like in *Harper & Row*, Associated Newspapers' actions supplanted the copyright holder's commercially valuable right of first publication.³³¹ Meghan asserted the Letter was not written for publication, which would insinuate she did not intend to employ that right of first publication. However, as the copyright owner, Meghan would have the right to *not* publish.

Associated Newspapers would likely respond with a fair use defense.³³² The fair use analysis asks (1) if the use is commercial in nature and (2) if the use is transformative.³³³ The Supreme Court has identified commercial speech as an expression that proposes a commercial transaction.³³⁴ The expression here is the Letter reproduced into the Articles. A newspaper, like the ones owned by Associated Newspapers, is designed to disseminate news and events to its readership. It also derives revenue from "clicks" on the website, papers sold, and piqued interest. In commencing the lawsuit, Meghan seeks an accounting of profits for copyright infringement.³³⁵ This lends itself towards showing the Associated Newspaper's unauthorized use was commercial in nature. Undoubtedly, Associated Newspapers derived some commercial benefit from the Articles.

This leaves the transformative use question. Transformative use is one that copies the work while also adding to it.³³⁶ The Articles used approximately 585 out of 1,250 words from the Letter.³³⁷ Associated Newspapers did reproduce and directly quote large portions of the Letter, but they also added quotes from Mr. Markle, interjected speculations and conclusions based on the Letter, and selectively chose what to utilize. The *Salinger* case involved similar facts to Meghan's plight. The publisher sought to reproduce, quote, or paraphrase Salinger's unpublished, private letters, which was neither fair use nor transformative use.³³⁸

328. *Id.*

329. *Id.* at 569.

330. *Id.*

331. *Id.* at 596.

332. 17 U.S.C. § 107 (2022).

333. *Campbell*, 510 U.S. at 585-586.

334. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976) (holding that commercial speech is protected by the First Amendment when a pharmacist sought to advertise prescription drugs).

335. *Markle Case II* [2021] EWHC 510 at ¶ 10.

336. *Authors Guild*, 804 F.3d at 1203.

337. *Markle Case* [2021] EWHC 273 at ¶ 150.

338. *Id.*

Similarly, Associated Newspapers used large block quotes from the Letter without truly transforming it, even with their interjections.³³⁹ The Defendant can argue the use was transformative in at least one of the five Articles. The Handwriting Article analyzed Meghan's handwriting and provided expert feedback on what her writing style said about her personality.³⁴⁰ This could be fair use under the idea that is presented "new" information even while using a reproduction of the Letter.³⁴¹

Ultimately, the copyright question would likely swing in Meghan's favor, although it would be a close call. This still leaves a wide gap in celebrity privacy rights. In the event copyright protection did not apply to the intrusion in question, the issue of legal protection becomes murkier. If there was no copyright, what protection would there have been? Likely none.

C. A New Question

If this case entered American courts, Meghan might turn to a protection not available in the United Kingdom: the right of publicity.³⁴² This right protects a person's ability to control the commercial value of their name, likeness, or performance.³⁴³ The Supreme Court has imposed liability for invasion of this right.³⁴⁴ The facts of the case show that the Letter was published without consent and related to the commercial value of Meghan's public character.³⁴⁵ The Defendant used her likeness, her words, and her name to promote the Articles and draw readers in, generating

339. See *Markle Case* [2021] EWHC 273 at ¶ 58-60 (discussing the Articles, including the extent of the quotations and the 88 separate quotations used in the Articles).

340. See *Markle Case* [2021] EWHC 273 at ¶ 59-60 (discussing the Handwriting Article, which was over 30 paragraphs and analyzed Meghan's handwriting with feedback from handwriting experts).

341. *Harper & Row, Publs.*, 471 U.S. at 553.

342. See Hayley Stallard, *The Right of Publicity in the United Kingdom*, 18 LOY. L.A. ENT. L. REV. 565, 565 (1998) (stating that "unlike in the United States the law of the United Kingdom...does not recognize a right of publicity or even a distinct right to protect a person's image or likeness from unauthorized use . . ."); see also Paul Jordan & Sean Ibbetson, *The Essentials of Publicity Rights in the United Kingdom*, LEXOLOGY (Nov. 19, 2019), www.lexology.com/library/detail.aspx?g=ff52596b-50c5-4706-9206-5667e87f9cb4 [perma.cc/59CA-RDCJ] (stating "there is no specific right of publicity under English law.").

343. See *Publicity, Right of Publicity: An Overview*, LEGAL INFO. INST., www.law.cornell.edu/wex/publicity [perma.cc/KTP5-9HG6] (detailing that "the right of publicity is largely protected by state common or statutory law" and that about half the states have recognized a right of publicity) (last visited Jan. 8, 2021).

344. See *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 578 (1977) (holding that a state can impose liability for invasion of the right of publicity when a television station broadcasted a performer's entire performance without authorization).

345. *Markle Case* [2021] EWHC 273 at ¶ 41, 72.

revenue for a commercial enterprise.³⁴⁶ Thus, Associated Newspapers interfered with her ability to control her publicity.³⁴⁷

D. Looking Forward

The reality is that the protection for a celebrity's privacy is limited and often outweighed by the freedom of the press in the U.S.³⁴⁸ In a world where information is easily accessed and constantly available, the press faces an insurmountable obstacle of producing non-stop newsworthy content. Celebrities must carefully maintain their public persona while striving for some sense of normal life. The protection of Publicity Given to Private Life³⁴⁹ is limited, although it has been adopted by many states.³⁵⁰ When the press documents relationships,³⁵¹ drug relapses,³⁵² and even the daily coffee run,³⁵³ everything seemingly becomes "public interest."

New developments in the case accuse Meghan of writing the Letter knowing it would likely be published.³⁵⁴ According to Associated Newspapers, this frame of mind should destroy any reasonable expectation of privacy.³⁵⁵ Associated Newspapers also argues that Meghan's alleged contributions to *Finding Freedom* limit any reasonable expectation of privacy.³⁵⁶ However, media conglomerates like Associated Newspapers have built their status from documenting every move of celebrities – and the royal family.

346. *Markle Case II* [2021] EWHC 510 at ¶ 14.

347. *Id.* at ¶ 7.

348. Nordhaus, *supra* note 132, at 314.

349. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

350. *Restatement*, BLACK'S LAW DICTIONARY (11th ed. 2019) (stating that Restatements are "not binding on a court unless it has been officially adopted as the law by that jurisdiction's highest court. . ."); *see also* Abby DeMare, *The Disclosure Tort in Indiana*, 54 IND. L. REV. 661, 670 n. 95 (2021) (providing a list of states that recognize Public Disclosure of Private Facts). Indiana is the most recent state to adopt § 652D. *Community Health Network, Inc. v. McKenzie*, 185 N.E.3d 368, 381 (Ind. 2022). *But see* *Howell v. New York Post Co., Inc.*, 81 N.Y.2d 115, 123-124 (NY App. 1993) (opining that New York does not recognize a common law of privacy); *Hall v. Post*, 372 S.E.2d 711, 712 (N.C. 1988) (declining to recognize public disclosure of private facts as cognizable at law in the state); *Evans v. Sturgill*, 430 F. Supp. 1209, 1213 (W.D. Va. 1977) (finding "no general right of privacy exists in the law of Virginia. . .").

351. *Fergie and Josh Duhamel Reach Divorce Settlement, Peaceful Custody Deal*, TMZ (Nov. 25, 2019), www.t TMZ.com/2019/11/25/fergie-josh-duhamel-divorce-settlement-filed/ [perma.cc/P9YK-U4TJ].

352. Francesca Bacardi, *Demi Lovato Quietly Completes Another Rehab Stint 3 Years After Overdose*, PAGE SIX (Jan. 8, 2022), www.pagesix.com/2022/01/08/demi-lovato-completes-another-rehab-stint-3-years-after-overdose/ [perma.cc/XRH2-V3LN].

353. Sam Cohen, *Coffee Shops Where You're Most Likely to Spot a Celebrity*, LIST (Dec. 16, 2021), www.thelist.com/710150/coffee-shops-where-youre-most-likely-to-spot-a-celebrity/ [perma.cc/4VML-DPRM].

354. Eslinger November Article, *supra* note 119.

355. Eslinger December Article, *supra* note 122.

356. *Markle on Appeal* [2021] EWCA 1810 at ¶ 27.

Contributing to a biographical account of your life is not unheard of, even if it is considered taboo for the royals.³⁵⁷

Without protection, celebrities and public figures would live in the constant fear that someone might invade their privacy and publish private communications without consequence. Even if there is only a remote chance they may use such information in a biography or autobiography, there should still be a reasonable expectation of privacy that imposes protections against egregious violations.

This imbalance places a lot of power in the press. While the free and unfettered exchange of ideas is a compelling governmental interest, there should be a line somewhere. Ideally, clarifying the boundaries of the press when it comes to a celebrity's privacy would be the solution. There should be a distinction between public *interest* and public *sensation*, which is interest garnered only because the press drove it into the limelight and made it of interest. Meghan's Letter to her father reflects her character, thoughts, and feelings.³⁵⁸ It cannot be said to advance a political, social, economic, or even artistic interest. It did not impact her ability to perform her duties or her role in the royal family. Associated Newspapers argued that the royal family, including Meghan as a member, receive public funds and should be subject to such public scrutiny as the Letter introduced.³⁵⁹ However, it furthered a sensational story that began when the press approached Mr. Markle relentlessly and pressured him into the paid photographic opportunity before the wedding.³⁶⁰ The public became interested because the media made it sensational and created a high level of access that the public has come to expect. The public expects to know the ins and outs of a celebrity's life, and this has stripped celebrities of sufficient privacy protections. This lack of privacy and sufficient protection can lead to safety concerns and have an impact on the celebrity's health and well-being.³⁶¹

Unlike the United Kingdom and United States, other countries

357. See SCOBIE & DURAND, *supra* note 28, at 4 (discussing that "as a rule, no member of the British royal family is officially allowed to authorize a biography.").

358. *Markle Case* [2021] EWHC 273 at ¶ 73.

359. *Id.* at ¶ 71.

360. Mackelden, *supra* note 10.

361. See, e.g., David K. Li, *Taylor Swift Stalker Arrested – Again – For Breaking into Her NYC Home*, NBC NEWS (Mar. 7, 2019), www.nbcnews.com/news/us-news/taylor-swift-stalker-arrested-again-%20breaking-her-nyc-home-n980511 [perma.cc/4SL9-FAWW]. Swift stated the press has "taken it upon themselves to post every home address I've ever had online." *Id.*; and Katie O'Malley, *Bella Hadid Slams Paparazzi for Taking Photos of Her Inside NYC Apartment*, ELLE (June 14, 2017), www.elle.com/uk/life-and-culture/culture/news/a36443/bella-hadid-slams-paparazzi-privacy-apartment/ [perma.cc/2CE6-72W2] (detailing how a photographer used a long-lens camera to take photos of Hadid while she was in the privacy of her home).

have paid attention to celebrity privacy rights.³⁶² In France, all individuals are afforded privacy protection and have a right to seek damages and injunctive relief for any violations.³⁶³ Notably, French courts define “private life” to include “love life, family circumstances, leisure activities, political opinions, trade union or religious affiliation and state of health”.³⁶⁴ The right to privacy entitles anyone – without regard to status – to take action against those who intrude upon their privacy.³⁶⁵ Indeed, U.S. celebrities have already found favorable outcomes in French courts. In 2015, actor Leonardo DiCaprio relied on French privacy laws to sue a magazine for publishing photos of him without consent.³⁶⁶ The judge noted that while privacy may yield to freedom of information, it is “subject to respect for the dignity of the human person.”³⁶⁷

France could be a place to look when U.S. courts consider where the line is between public interest and public sensation. In the former, there is a legitimate need for the public to be apprised of the information. In the latter, news reporters seek to gain their own notoriety by invading the privacy of others.

V. CONCLUSION

Meghan’s case was recently affirmed on appeal and Associated Newspapers has expressed an intent to attempt to take it to the UK Supreme Court.³⁶⁸ However, the questions remain the same. Meghan Markle wrote a private letter, sent it to her father, and then she read her words in five Articles on a public platform.³⁶⁹ Justice Warby granted summary judgment in her favor on an intrusion of privacy claim and a copyright infringement claim.³⁷⁰ Meghan framed this as a victory for anyone scared to challenge the behemoth tabloid industry that prioritizes profit over person.³⁷¹

Both UK and U.S. law provide little in the way of privacy protections for celebrities. Copyright law lends some cover if the

362. Chassen Palmer, *Celebrity Privacy: How France Solves Privacy Problems Celebrities Face in the United States*, 50 CAL. W. INT. L. J. 245, 263 (2020).

363. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 9 (Fr.).

364. Embassy of France, *French Legislation on Privacy*, Ministère De L’Europe Et Des Affaires Étrangères (Dec. 2, 2007), www.franceintheus.org/spip.php?article640 [perma.cc/CY8A-AJM4].

365. *Id.* (noting an example where a monarch was able to sue over a photograph depicting him outside the scope of his public duties).

366. Global Freedom of Expression, *Leonardo DiCaprio v. Oops!*, COLUMBIA UNIV., globalfreedomofexpression.columbia.edu/cases/leonardo-dicaprio-v-oops/ [perma.cc/9SB5-BUJ] (last visited Nov. 1, 2022).

367. *Id.* DiCaprio was awarded 8000 euros “for moral damage resulting from a violation to his private life and his image rights.” *Id.*

368. Eslinger December Article, *supra* note 122.

369. *Markle Case* [2021] EWHC 273 at ¶ 1.

370. *Id.* at ¶ 170.

371. Eslinger December Article, *supra* note 122.

information qualifies for copyright protection, but only after the damage is done. Both countries would benefit from a distinct line between public interest and merely sensational writing designed to sell papers, perhaps by taking a cue from French courts. The freedom of the press was designed to further the exchange of ideas and free-flow of thoughts.³⁷² The growing obsession with public figures has placed celebrities and figures like Meghan under a scorching magnifying glass with a nearly extinguished right to privacy.³⁷³ The reality of today echoes Brandeis and Warren's argument for a recognized right to privacy – for everyone.³⁷⁴

372. See generally *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) (discussing the importance of free speech for the welfare of the country).

373. Nordhaus, *supra* note 132, at 286.

374. Warren & Brandeis, *supra* note 22, at 193. “Shall the courts thus close the front entrance to constituted authority and open wide the back door to idle or prurient curiosity?” *Id.* at 220.