

Chapter 12

Introduction to Entertainment Law

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After reading this chapter you should:

- Appreciate the main legal issues affecting the entertainment industries;
- Be able to trace the history of copyright law;
- Understand the latest rulings on piracy and illegal file sharing;
- Appreciate how and why television formats are protected;
- Gain a detailed insight into defamation and privacy laws and understand how they are applied in practice;

Introduction

This chapter will deal with selected legal issues which relate to the entertainment industries, including parody, television formats, piracy and illegal file-sharing. As these issues all hinge on the laws of copyright, the chapter will begin with a brief introduction to copyright law. The second part of the chapter will consider legal issues arising from the media sector of the entertainment industries, such as the laws of defamation and privacy. The chapter does not intend to provide a detailed insight into all aspects of entertainment law; the aim is to provide an overview of selected legal issues that impinge upon the entertainment industries. Although the focus lies predominantly on UK and English Law, the chapter does incorporate international case studies and provide comparative examples from other jurisdictions.

An introduction to copyright law

Copyright law comes under the umbrella of Intellectual Property rights, which exist to protect the intellectual efforts of human endeavour. Other Intellectual Property rights include trademarks, patents and design, and the common law rights of passing off and breach of confidence (MacQueen *et al.*, 2010). In the UK, copyright law dates back to 1710 with the introduction of the Statute of Anne. Since then, the advent of technology has meant that copyright law has had to play a 'catch-up' game. The inventions of the gramophone, television, cinema, photocopier, computer and most recently the Internet have led to the introduction of a number of copyright laws including the Copyright Acts 1911, 1956 and 1988. The Copyright Designs and Patents Act 1988 (hereinafter CDPA 1988) was amended most recently by the Copyright and Related Rights Regulations 2003 to take into account issues thrown up by the Internet. The tensions which exist between copyright law and technology have been an on-going issue, so in the following pages, the challenges faced by copyright law in the digital era and within the entertainment industries will be highlighted.

According to sections 1-8 of the CDPA 1988, copyright law protects ‘original’ literary, dramatic, musical and artistic works, together with films, sound recordings, broadcasts and typographical arrangement of published works. Copyright and Related Rights Regulations 2003 provided for the protection of rights in relation to ‘wireless broadcasting’, which now appears under section 6A(1)(a)-(c) of the CDPA 1988.

Furthermore, unlike other intellectual property rights, copyright arises automatically, subject to the work being ‘fixed’. In accordance with CDPA 1988, section 3(2), ‘copyright does not subsist in a literary, dramatic or musical work unless and until it is recorded, *in writing or otherwise*’. Whilst the most obvious forms of ‘fixation’ come in the form of writing and recording, the section is interpreted to also include, for example, fixation in the form of short-hand, electronic mail, and content recorded and stored on flash drives, for example (MacQueen *et al.*, 2010).

‘Originality’ in copyright law is determined by the *expression of ideas*, not by the ideas themselves. As illustrated in University of London Press v. University Tutorial Press: ‘The word “original” does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought. The originality which is required relates to the expression of the thought.’ But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work – it should originate from the author.

The case of Designer Guild v. Russell Williams clarified the position further, when it established that when deciding whether copyright has been infringed in a work, it is important to consider whether the infringer has incorporated a ‘substantial part’ of the *independent skill, labour and effort* contributed by the original author in creating that copyright work (Laddie, Prescott and Vitoria, 2011). What exactly constitutes ‘substantial part’ is considered on a case-by-case basis, but it is generally accepted to be a test of quality as opposed to quantity (MacQueen *et al.*, 2010).

Exceptions to copyright, parody and the Hargreaves Review

There are certain acts permitted under copyright legislation. These include fair dealing with a literary, dramatic, musical or artistic work for the purposes of research for a non-commercial purpose (CDPA 1988, section 29(1)) and for the purpose of private study. CDPA 1988, section 29(1C) states that fair dealing with a literary, dramatic, musical or artistic work does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement, unless this would be impossible for reasons of practicality or otherwise (CDPA 1988, section 29(1B)). The fair dealing provision also extends to criticism, review and news reporting (CDPA 1988, section 30). The 2003 Regulations also recognized that ‘copyright in a literary work, other than a computer programme or a database or in a dramatic, musical or artistic work [...] is not infringed by the making of a temporary copy which is transient or incidental which is an integral and essential part of a technological process and the sole purpose of which is to enable (a) a transmission of the work in a network between third parties by an intermediary; or (b) a lawful use of the work; and which has no independent economic significance’ (CDPA 1988, section 28A). As such, recent changes to copyright law have attempted to keep up with technological developments.

However, the UK’s fair dealing exception as outlined above is narrow and does not include exceptions for private copying, format-shifting, time-shifting or parody. This makes the law unclear, as it does not stipulate precisely what an individual can or cannot do. For example, it is

unclear whether copying music for private, individual use or format-shifting from a computer to a mp3 player infringes copyright law. Furthermore, the UK does not benefit from a parody exception. According to the Oxford English Dictionary, parody is the ‘imitation of the style of a particular writer, artist, or genre with deliberate exaggeration for comic effect’. The UK’s narrow fair dealing exception has meant that such works are not covered by copyright law. Recognising this gap, the Hargreaves Review recommended some changes to the UK’s copyright law, including the introduction of a parody exception and private copying exception amongst others (Hargreaves Review, 2011). In particular, the Review noted that ‘video parody is today becoming part and parcel of the interactions of private citizens, often via social networking sites, and encourages literacy in multimedia expression in ways that are increasingly essential to the skills base of the economy’. This view was further compounded by a study carried out by the Centre for Intellectual Property Policy and Management (CIPPM) at Bournemouth University. The study included a detailed analysis of the parody exceptions in Canada, France, USA, Australia, Germany and The Netherlands and concluded that the UK has much to gain from a parody exception (Mendis and Kretschmer, 2013). Presenting new empirical data drawn from music videos on the YouTube platform, the research further concluded that there is little evidence of economic damage to rights holders through substitution; the presence of parody content is correlated with, and predicts larger audiences for original music videos (Erickson, Kretschmer and Mendis, 2013).

The existence of such an exception will provide clarity for users and those in the entertainment industries who wish to ‘conjure up’ the original works for the purpose of creating a work of parody, pastiche or satire. In France, the existence of a parody exception (L 122-5 of the French Intellectual Property Code 1992) led to recognition of the defendant’s parody of *Tintin*, whilst in The Netherlands, Nadia Plesner’s artistic work was also considered to be a work of parody under Article 18b of the Dutch Copyright Act 1912 (as amended). A parodic version of Roy Orbison’s *Oh Pretty Woman* was further held not to infringe copyright under the USA’s ‘fair use’ doctrine (section 107, Copyright Act 1976). During a review of the Intellectual Property Laws in the UK (Gowers Review, 2006), it was suggested by Arts Council England that an exception along the lines of ‘parody, comedy and pastiche’ should be introduced on the basis that these were ‘particularly strong creative areas in the UK’ (Arts Council England’s submission to Gowers Review, 2006; see also Deazley, 2010).

Piracy and illegal file-sharing

It has been estimated that by 2015, digital piracy will cost the entertainment industries €32 billion, and will have caused job losses of 611,300 (International Chamber of Commerce, 2010). Companies such as Napster, Grokster and Pirate Bay which have offered file-sharing services brought the issue of piracy to the forefront, highlighting the urgent need for copyright law reform. The advancement of technology has led to widespread piracy, with the web community becoming well-versed in the art of ‘uploading and downloading’ in the Web 2.0 era – often in breach of copyright (Larsson, 2009).

<<Figure 12.1 here>>

Figure 12.1: A street vendor sells pirated DVDs in Greece
Image by Stuart Moss

Whilst rights holders have lamented, and in the cases noted above brought proceedings against both individuals and companies involved in illegal file-sharing activities, this has had very little impact on acts of piracy and illegal file-sharing (James, 2010). Copyright owners and organizations representing them remain unhappy with the current situation, as emphasized in

the International Federation of the Phonographic Industry (IFPI) Digital Music Reports of 2004-2011. The IFPI Digital Music Report 2010 underlined the fact that despite the wealth of online offerings and the global embrace of digital services, overall music revenues had fallen by around 30 per cent since 2004, with a sales downturn of 12 per cent in the first half of 2009 (IFPI Digital Music Reports 2010-2011). Since 2004, copyright owners, particularly those in the music industry, have lobbied hard for stricter copyright laws to be implemented in an attempt to curb online piracy (IFPI Digital Music Reports 2004-2011).

Case study 1: The Digital Economy Act 2010

In the UK, the Digital Economy Act 2010 (hereinafter DEA 2010) was introduced to deal with piracy and illegal file-sharing. This controversial Act was rushed through Parliament in early 2010 and is commonly referred to as ‘three-strikes-and-you’re-out’. It is a controversial piece of legislation which still requires secondary legislation, and in June 2012, two years after the DEA 2010 received Royal Assent, the much-awaited Initial Obligations Code was published. The DEA 2010 has also gone through a judicial review hearing (2011) and an appeal hearing (2012), which has delayed its implementation further. The DEA 2010 reflects the trend followed in countries such as France, New Zealand, South Korea, and more recently Australia and the USA.

<<Figure 12.2 here>>
Figure 12.2: Digital Economy Act

The essence of the DEA 2010 (and similar three-strikes laws) is as follows: an alleged infringer, who will be identified by their Internet Protocol (IP) address, will be warned three times before technical obligations (yet to be drawn up as secondary legislation) are imposed. The technical obligations can lead to alleged offenders being disconnected from the Internet altogether; having their Internet speed limited; being prevented from using the service to gain access to particular material, or having such use limited; or seeing the services provided to them limited in another way (section 9, DEA 2010). Some of the concerns surrounding this piece of legislation have related to the difficulties in identifying an alleged infringer using their IP address. The issue becomes particularly relevant where the IP address is shared by a number of people in a flat, café, university, library, etc. In such a situation it may be possible to identify the person whose name is on the broadband bill, but it is almost impossible to identify the individual who may have infringed the copyright laws.

The inconsistencies and inaccuracies which arise from identifying alleged infringers through their IP addresses were emphasized by Judge Birss QC in the case of *Media C.A.T. v. Adams*. In this case ACS:Law representing Media C.A.T. sent hundreds of letters to alleged infringers of copyright by tracking their IP addresses. However, in the court case Judge Birss QC ruled that Media C.A.T.’s monitoring system failed to identify any individual wrongdoing, finding that all an IP address identifies is an Internet connection, which can only identify the person who has the contract with their ISP (para 31).

Section 17 of the DEA 2010 made it possible for right holders to gain ‘takedown’ injunctions against ISPs, forcing them to block access to websites which host a ‘substantial proportion’ of copyright, was deemed unworkable in May 2011 by the Office of Communications (OFCOM). OFCOM concluded that it is not possible to deliver a framework under the DEA (OFCOM, 2011). In July 2011, the *Newzbin II* case questioned the validity of Section 17 in view of an

existing provision – Section 91A CDPA 1988 – which achieves the same result without the need for ‘actual knowledge’ of the infringement to be proved. In August 2011, the Government stated that it would not ‘bring forward regulations on site blocking under DEA, at this time’ (DCMS, 2011).

The heavy-handed approach taken by the DEA 2010 has not gone unnoticed by the United Nations Human Rights Council (UNHRC), which voiced concern about the ‘three-strikes’ approach in a recent report (UNHRC, 2011). The Special Rapporteur Frank La Rue stated in his report that he was ‘alarmed by proposals to disconnect users from Internet access if they violate intellectual property rights’ and singled out the DEA and the French three-strikes law, in particular, as pieces of legislation which violate human rights (La Rue, 2011).

As mentioned above, the Act has been plagued by a judicial review hearing and an appeal hearing brought by BT and Talk Talk in March 2011 and January 2012 respectively. Whilst the DEA 2010 survived both judicial review and appeal hearings, the challenges for this Act persist and questions remain regarding its future. Producers in the entertainment industries certainly need to be rewarded and incentivized to create original content, and indeed this forms the basis of the cyclical pattern of Intellectual Property Law. However, it remains to be seen whether laws such as the ‘three-strikes’ law are the answer to the challenges by copyright (Farrand, 2011; Mendis 2013).

The Protection of TV formats

TV formats such as *Who Wants to be a Millionaire*, *X Factor* and *Dragon’s Den* have proved to be a lucrative business and since the 1980s, the TV formats industry has boomed. The global expenditure on TV formats has been valued in excess of €9 billion and in 2007, the TV formats industry was estimated at US\$250 Billion (Format Recognition and Protection Association, 2011). Therefore it is not surprising that the creators of successful TV formats wish to protect them from piracy. However, as Coad (2011) points out, nowhere in the world is the existence of a TV format recognized expressly by statute. There is therefore no statutory definition of a TV format, although case law and commentaries in this area have provided for a number of different definitions. Whilst in the American case *Murray v NBC*, Circuit Judge Altimari defined a TV format as a ‘proposal’, Tony Stern of Fremantle Media defined it as ‘a recipe of a show that can be remade in various territories’ (Stern, 2009). Either way, the collective components of a TV format such as catch-phrases, music, themes, staging, camera angles and lighting arrangements, which are meticulously scripted into a ‘format bible’, makes each TV format unique, thereby requiring some form of protection. This has come about in the form of intellectual property rights, in particular copyright law. However, the challenge for creators of TV formats lies in reaching the threshold of originality in copyright law by demonstrating that the TV format is not a ‘mere idea’ but the *expression* of an idea.

TV formats and copyright law

One of the most significant cases relating to TV formats in the UK dates back to 1982 to the case of *Green v. Broadcasting Corporation of New Zealand*. The case concerned the well-known show *Opportunity Knocks* created by Hughie Green. In this case, the claimant, Green, brought an action against a TV broadcaster in New Zealand claiming copyright infringement in the *Opportunity Knocks* format, which was also aired under the same name in New Zealand. The court established that the *Opportunity Knocks* script written by Green did ‘no more than

express a general idea or concept for a talent contest'; and as copyright does not protect ideas, the court held that the New Zealand TV format did *not* infringe the claimant's copyright.

However, in contrast, the Australian court in *Nine Films v. Ninox Television* accepted that copyright law can exist in TV formats as did the Dutch court in *Castaway v. Endemol*. In this latter case, after a long drawn out battle lasting well over three years, the Dutch Supreme Court ruled that the format of *Survivor* was a copyright work and therefore protected by copyright law. However, the court held that on the facts of the present case, the TV format of *Big Brother* (produced by Endemol) did not infringe the format of *Survivor*.

Protecting TV formats through unfair competition or passing off

The protection of TV formats through copyright has led to uncertainty, with Logan stating that the 'business is generally run as a series of gentlemen's agreements' (Logan, 2009, p. 37). It has therefore been suggested that the laws of unfair competition and 'passing off' provide better protection. Unfair competition is 'any act of competition contrary to honest practices in industrial or commercial matters' (Paris Convention 1979, Article 10bis(2)). Whilst countries such as France and the USA provide for a specific unfair competition clause, the UK recognizes it under the common law tort of 'passing off' in order to satisfy the provisions of the Paris Convention.

In 2008, the UK Consumer Protection from Unfair Trading (CPUT) Regulations were brought into force, replacing the Trade Descriptions Act 1968 to give effect to the EU Consumer Commercial Practices Directive. Section 3(3)(b) of CPUT prohibits commercial practice if it 'materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product'. Whilst the introduction of this provision is encouraging for creators of TV formats, it is important to note that the provision is only applicable between businesses and consumer relationships, and as such does not assist in preventing the copying of TV formats. Therefore, it has fallen upon the law of passing off – a common law tort – to afford protection for TV formats. The law of passing off requires a claimant to satisfy three criteria (known as the 'Classic Trinity') to be successful in a passing off claim. The three ingredients developed by Lord Oliver in the *Jif Lemon* case require a successful claimant to demonstrate the requirement of goodwill or reputation, misrepresentation and damage.

Establishing the existence of goodwill or reputation where the infringing TV format is broadcast in the same territory as the original is relatively straightforward, as illustrated in the Australian case of *Willard* and the French case of *TFI v. Antenne 2*. However, the case of *Green* (above) declined the existence of goodwill or reputation where two territories were involved and the audiences were unlikely to have seen the UK version of the shows. Considering the advancement of technology and the availability of sites such as YouTube, which allows for worldwide viewing of TV formats, it is possible that *Green* may have been decided differently today.

In establishing misrepresentation, it is necessary to prove that the goods or services in which the defendant trades are those of the claimant, or in some way have a business connection with the claimant, or share particular qualities with the claimant's goods or services (MacQueen *et al.*, 2010). However, it is important to point out that even when the defendant has copied the claimant's badge of identity, passing off will not provide a remedy unless the latter's goodwill has been damaged. When establishing damage, it is necessary to evidence loss of custom (actual and potential); attraction of custom by the defendant using the claimant's goodwill;

damage to the claimant's reputation, and hence goodwill, through false association; and damage to the claimant's trading relations.

TV formats can also be protected through the common law right of breach of confidence. However, this claim can only succeed where a confidential concept for a show has been communicated in a confidential situation and subsequently used without permission. Although breach of confidence has its own challenges in attempting to protect TV formats, in the Australian case of *Talbot v. General Television Corp Pty Ltd.*, the Supreme Court of Victoria found that Channel Nine had breached the duty of confidence that it owed to Mr Talbot, who had met with and submitted to Channel Nine a written programme submission and pilot for a show about the development and effect of a millionaire's riches. The court held that the format was to be 'rightly regarded as the property' of Talbot.

It is clearly a challenge to protect TV formats through copyright law, unfair competition/passing off or breach of confidence. The difficulties associated with protecting these formats under the current law are summarized by Lisa Logan (2009) as follows: 'Like the emperor who couldn't see the cloth, TV producers cannot ensure that their TV format rights exist in each jurisdiction but pretend all the same that the rights exist. For a global format market worth Euro 6.4 billion in 2002/4, the economic justifications for providing greater protection are paramount. However, any change to either the Paris Convention [...] will require substantial lobbying from industries likely to benefit from harmonized laws of unfair competition including the TV industry' (p.92).

The entertainment industries and the media: Defamation and privacy laws

Defamation and privacy laws exist to protect the reputation and private lives of individuals and corporations. Drawing a line through the case law relating to privacy, and in particular to defamation laws, it becomes clear that almost all claimants are those in the media, and generally affluent. This is unsurprising due to the lack of legal aid in the UK for defamation cases and the high costs associated in bringing these claims (Quinn, 2011). This aspect was well documented following the *McLibel* case (*McDonald's Corp v. Steel and Morris*), which concerned two 'ordinary' people of the Greenpeace Group who refused to say 'sorry' to McDonald's for circulating allegedly defamatory statements made against the large corporation (Scolnicov, 2005; Stephens, 2005; Nash and Crown, 2005; Starmer and Hudson, 2005). Lack of legal aid made it very difficult for the two defendants to continue their fight against McDonald's. Having lost their case against McDonald's at the Royal Courts of Justice in London, the 'McLibel Two' took their case against the UK to the European Court of Justice – and won. However, the lack of legal aid for defamation cases continues, thereby making it a claim available only to the wealthy.

Defamation law

The tort of defamation is regulated by the Defamation Acts 1952 and 1996. On 26 May 2010, the Liberal Democrat Peer Lord Lester introduced a Private Members' Bill into the House of Lords which proposed updating the current defamation laws (Krishnan, 2012). Lord Lester's Defamation Bill was received well, and on 15 March 2011, the Government introduced the Defamation Bill to bring the libel law 'up to date, striking a balance between protecting people's right to free speech [...] while enabling people who have genuinely been defamed to protect their reputations' (Shaw and Chamberlain, 2011, p. 50). The bill was passed by Parliament and received Royal Assent on 25 April 2013 and will come into force later in 2013 through

secondary legislation. A number of changes in relation to the online environment is reflected in the Act and it swings the balance in favour of freedom of expression. Taking into account these latest changes to the defamation law, the discussion below will make reference to the Defamation Acts 1952, 1996 and 2013 as relevant.

Defamation law exists to protect the reputation of an individual corporation, i.e. companies, schools, universities and associations which are legally incorporated, such as football clubs. It is also worth noting that trade unions, local authorities and central government and political parties are unable to bring an action in defamation, although the right to bring an action is available for individuals within these groups. As such, where a written or spoken statement, act or gesture injures the *reputation* of an individual, corporation or association by exposing them to ‘hatred, contempt or ridicule’, a claimant can bring an action under defamation law. The point to note, however, is that defamation law will not permit someone to recover damages in respect of an injury to a character which he *does not or ought not to possess*.

Defamation can be divided into two categories: libel and slander. Libel is defamation in permanent form (e.g. publication in a newspaper, magazine, on the Internet, etc.), whereas slander is defamation in transitory form (such as the spoken word). The following discussion will focus on libel. A further and unusual aspect of defamation or libel law, which comes under the umbrella of civil law, is that until the Defamation Act 2013 was passed these cases were heard by ‘libel juries’. Trial by jury has led to unrealistically high awards, far greater than those awarded in cases of personal injury. Recent defamation cases have seen claimants being awarded £500,000 plus £700,000 in damages (e.g. Jeffrey Archer). The Defamation Act 2013 removes the presumption in favour of trial by jury and proposes that libel trials be carried out without a jury unless a court orders otherwise (section 11, 2013 Act).

Bringing a successful claim

In order for a claimant to bring a successful defamation claim, they must show:

1. that the statement is defamatory;
2. that it referred to the claimant;
3. that it was published to a third party.

The onus then shifts to the defendant to prove one of the defences.

A *defamatory statement*, which can also include innuendos, is one which tends to do any of the following:

- a) expose an individual or corporation to hatred, ridicule or contempt;
- b) cause them to be shunned or avoided;
- c) disparage them in their business, trade, office or profession;
- d) lower them in the estimation of right-thinking members of society generally.

For example, in the case of *Berkoff v. Birchill*, Neill LJ stated that calling someone ‘hideously ugly’ could be defamatory.

Secondly, the statement must *refer to the claimant*. In other words, the claimant must show that an ordinary, reasonable reader or listener would take the statement as referring to him or her. Whilst it is relatively straightforward for an individual who has been defamed to bring an action, it is less so for a corporation or an association. The requirement is that the claimant(s) must be an identifiable group. In this context, an identifiable group, such as a football team, can bring an action in defamation, whilst it will not be possible for ‘all lawyers in England’ to bring an action against an individual who has defamed them. From a practical point of view, it is necessary to

consider the amount of damages which will be available for each individual in such circumstances. Where a statement about a claimant's trade defames the claimant, it is 'not sufficient that the statement should simply affect the person adversely in his business; it must point to the discreditable conduct in his business, or else tend to show that he is ill-suited or ill-qualified to carry on' (*Hulton v. Jones*).

Thirdly, a claimant must show that the *statement has been published* – i.e. communicated to a person other than the claimant or their spouse. The meaning of 'publication' has led to some difficulties in recent times due to the advent of the Internet and due to an archaic rule from 1849, which states that every fresh publication of a defamatory statement gives rise to a new course of action (*Duke of Brunswick v. Harmer*; see also, *Jordan, 2010*). The 2013 Act proposes a 'single-publication' rule, which suggests a period of one year from the date of the original publication for a claimant to bring a claim and which does not restart each time the material is viewed, sold or otherwise republished, provided the publication is 'substantially the same' (section 8, 2013 Act). The proposed measure strengthens freedom of speech by providing far greater protection to publishers.

Case study 2: The Defamation Act 2013: Operators of Websites

Under the Defamation Acts 1952 and 1996, failing to pre-moderate users' comments or failing to take down comments soon after a complaint has been received made the website publisher liable (*Godfrey v. Demon Internet*; Section 1 1996 Act). The 2013 Act provides a new provision in this regard, taking into account that comments can arise from individuals who wish to remain anonymous or those who have a pseudonymous identity. Where a complaint arises from a comment made by an identified author, the website should promptly publish a notice of the complaint alongside the comment. The complainant can apply for a 'takedown' order. If it is granted, the comment should be removed to avoid a defamation claim. In the case of comments left by individuals who appear as 'anonymous' or under a pseudonymous identity, websites should immediately remove them on receipt of a complaint (as it is not possible to identify the author), unless the author agrees to identify themselves (section 5, 2013 Act).

The section will primarily apply to operators of forums and blog-sites but will eventually be relevant to all user-generated sites. Ultimately the effectiveness of this section will depend on the regulations which is yet to be published and which will set out the procedure to be followed on receipt of notice of defamatory content (*Agate, 2013*).

Under section 10, the 2013 Act further provides that a court "does not have jurisdiction to hear and determine an action for defamation brought against a person who was not the author, editor or publisher of the statement complained of".

With 'publishing' becoming increasingly immediate and convenient in the digital era and with the increased use of social networking sites such as Twitter, it was important for libel reform to take into account these developments. The complexities which can be thrown up by online services was illustrated in the first ever Twitter libel case in the UK. In March 2012, former New Zealand cricket captain Chris Cairns won his libel case against Lalit Modi, former Chairman of the Indian Premier League (IPL) (*Chris Cairns v. Lalit Modi*). Modi's tweet of 5 January 2010 alleged that Cairns had been involved in match-fixing. On 26 March 2012, Mr Justice Bean held that Cairns' otherwise clean reputation had been damaged by Modi's tweet and awarded Cairns £90,000 in damages with an order for the defendant to pay the claimant's legal costs of £400,000. The

phrase ‘be careful what you tweet’ is becoming clichéd; however this case is reflective of the dangers which lurk behind online tools, which allow for the quick-and-easy publishing of potentially defamatory comments.

Bringing a successful defence

In a defamation case, the defendant has the challenging task of proving (on the balance of probabilities) that the published statement was true (Section 5, 1952 Act); that it was a fair comment (Section 6, 1952 Act); or that it was made on a privileged occasion (Section 14, 1952 Act). From a legal point of view, it is therefore relatively easy for a claimant to bring an action in defamation. For defendants, however, it is more challenging, as they must prove:

- a) the truth or substantial truth of each defamatory statement;
- b) the truth of any reasonable interpretation which may be understood of the words complained of; and
- c) the truth of any innuendos lying behind the words.

The difficulties here are that defendants may be unable to bring enough admissible evidence and where the defendant is unable to prove that the statement is substantially true. Furthermore pursuing with the justification defence, leads to the award of damages being increased (e.g. Cairns v. Modi).

The Defamation Act 2013 reflects a number of changes to the above position. Firstly, under section 1 of the Defamation Act 2013, a statement will not be treated as defamatory unless its publication has caused or is likely to cause ‘serious harm’ to the reputation of the claimant. The existing definition of defamation remains unchanged, but, the bar has been raised to capture the most serious defamatory claims. As Hooper, Murphy and Waite state, “the requirement of serious harm permeates all aspects of the new law of defamation and is likely to lead to an increasing number of claims being struck out or simply not brought. Whenever the court will be exercising its discretion as to whether to allow a case to proceed, it will be asking itself whether the publication has caused or is likely to cause serious harm” (Hooper, Murphy and Waite, 2013, p. 199).

The existing law on justification or truth under section 5 of the 1952 Act remains largely unchanged although it is codified by section 2 of the 2013 Act. To prove the substantial truth of part of a statement deemed defamatory, the test will involve establishing whether that part would or is likely to cause serious harm (section 2(3), 2013 Act).

The defence of fair comment (section 6, 1952 Act) has been re-named ‘honest opinion’ under the new law (section 3, 2013 Act). Except for the name change, once again the existing law remains largely unchanged, although some of its complexities have been removed (see Hooper, Murphy and Waite, 2013).

Other defamation defences include: the defence of privilege (sections 14, 15 and Schedule 1, 1996 Act); the offer of amends for unintentional defamation (Sections 2-4, 1996 Act); where a claimant has agreed to the publication; where the claimant has died; and if the proceedings were not started within the limitation period of one year (Section 5, 1996 Act).

The 2013 Act provides a public interest defence (section 4) which applies irrespective of whether the statement is a matter of fact or opinion. The Act does not, however, define public interest leaving it to the courts to decide on a case-by-case basis.

Finally, the Act introduces a new area of qualified privilege – peer reviewed statements in scientific or academic journals. The section is a product of the Simon Singh v. British Chiropractic Association case. Although the section is restricted to peer-reviewed academic or scientific material rather than all scientific debate – which can be defended through honest opinion or lack of serious harm – its inclusion is seen as a welcome addition by the scientific and academic communities.

The journey of the defamation laws in the UK illustrates that there have been attempts made to strike the correct balance between protecting an individual's reputation whilst upholding the defendant's freedom of expression. Section 1 of the new Defamation Act is particularly relevant to this point requiring serious harm to the reputation of the claimant in bringing a claim. The inclusion of this section in the Defamation Act 2013 is reflective of the law moving in the right direction. Up until now, it has been relatively easy for a claimant to bring an action in defamation, which in turn has encouraged claimants from other jurisdictions to pursue libel cases in England and Wales – known as 'libel tourism'. With the new Defamation laws in place a claimant will have to think twice before pursuing a libel claim in the English courts, thereby providing for a fairer and balanced legislative framework for claimants and defendants.

Privacy and Breach of Confidentiality

A right to privacy was recognized under the Human Rights Act 1998, which came into force in 2000. Prior to that, an individual wishing to safeguard their privacy relied on the common law right of breach of confidentiality. One of the early cases to have used this right dates back to 1849 and concerned Prince Albert. In Prince Albert v. Strange, the right to breach of confidentiality was upheld in favour of Prince Albert when his private drawings, in the form of etchings between himself and the Queen, were published in a catalogue. However it was not until 1969, in the case of Coco v. A.N. Clark (Engineers) Ltd., that the court established a three-step test, which provided clear guidance in determining the right. The court held that in order to bring a successful breach of confidence claim, it is necessary to show that the information:

- a) has the necessary quality of confidence;
- b) has been imparted in circumstances importing an obligation of confidence; and
- c) has been used without authorization to the detriment of the party communicating it.

A case in 1991, Kaye v. Robertson, brought the issue of the lack of a privacy right in the UK to the forefront. In this case, the plaintiff, a well-known actor, was recovering in hospital from a serious injury when two journalists gained access to his private room, took photographs and conducted an interview. In this case Glidewell LJ stated: 'In English law there is no right to privacy, and accordingly there is no right of action for breach of a person's privacy. The facts of the present case are a graphic illustration of the desirability of Parliament considering whether [...] statutory provision can be made to protect the privacy of individuals.'

Seven years later, transposing Article 8 of the European Convention on Human Rights 1950 (ECHR 1950), the right to privacy was recognized under Section 12 of the Human Rights Act 1998 (HRA 1998), which came into force in 2000. Article 8 states that 'everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of the right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country for the prevention of disorder or crime; for the protection of health or morals; or for the protection of rights and freedom of others'.

In addition to the law, the Press Complaints Commission Code of Practice provides further guidance under Clause 3, which states that 'everyone is entitled to respect for his or her private and family life, home, health and correspondence. A publication will be expected to justify intrusion into any individual's private life without consent. The use of long-lens photography to take pictures of people in private places without their consent is unacceptable.'

The Human Rights Act and beyond

Case study 3: Michael Douglas v. *Hello!* magazine

The case of Douglas v. *Hello!* was one of the first cases which attempted to apply the new right of privacy. The case concerned the wedding of Michael Douglas and Catherine Zeta-Jones at the Plaza Hotel in New York. Photography at the wedding was prohibited and the guests were given strict instructions not to use cameras. The couple had an agreement with *OK!* magazine who were given the exclusive rights to publish their wedding photographs. However, a photographer managed to surreptitiously enter the wedding venue and sold six of his unauthorized photographs to *Hello!* magazine within 24 hours of the wedding. The Douglasses and *OK!* applied for an injunction to prevent *Hello!* from publishing the pictures, which was rejected by the Court of Appeal. This led to both magazines publishing the photographs the next day. Whilst *OK!* sought compensation for the loss of its exclusive right to publish the wedding photographs, the couple sought damages from *Hello!* for breach of privacy. Interestingly, this long-drawn-out case, which began in 2000 and ended in 2007, was decided in favour of Michael Douglas and Catherine Zeta-Jones based on breach of confidentiality as opposed to relying on the newly established right to privacy (Lavender and Kill, 2007).

In Campbell v. MGN Ltd., photographs of the super-model Naomi Campbell coming out of Narcotics Anonymous (NA) were published by *The Mirror* newspaper. The headline accompanying the photograph read: 'Naomi, I am a drug addict' and the article contained information about the number of NA meetings she had attended. In this case, the court carried out a balancing act of protecting the claimant's privacy against the defendant's right to freedom of expression. Campbell accepted that the public had a 'right to know' that she was a drug addict, but argued her case on the premise of breach of confidentiality. This case also went all the way to the House of Lords, and was once again decided on breach of confidentiality. The Law Lords reversed the Court of Appeal decision by a 3-2 majority and held in favour of Campbell, stating that in the present circumstances there had been a breach of confidentiality and the claimant's right to privacy outweighed the defendant's right to freedom of expression (Moreham, 2005).

Case study 4: Max Mosley v. Newsgroup Newspapers

A turning point in the law came about with the case of Mosley v. Newsgroup Newspapers. In this case, Max Mosley, the former President of the Fédération Internationale de l'Automobile, the governing body of motor sport worldwide, was filmed engaging in sado-masochistic activities with five prostitutes in a private flat. An edited version of the footage was then made available on News Group Newspapers' (NGN) website in connection with a *News of the World* article. The article which accompanied the footage further alluded to the fact that Mosley had been involved in a Nazi re-enactment. Whilst Mosley accepted the events shown, he denied the Nazi

element and claimed for invasion of his privacy (as opposed to breach of confidence, which had been used in previous cases). In this instance, the court held that Mosley's privacy had been invaded and awarded him £60,000 in damages. Having won his privacy case in the UK, Mosley took his case to the European Court of Human Rights (ECHR) in Strasbourg, challenging UK laws which allow publication without giving individuals advanced warning. He suggested that reform of privacy law should include a 'prior notification' clause to protect the privacy of individuals. However in May 2011, Mosley lost his privacy case in Strasbourg.

At the time of writing, privacy law is in a state of flux. The law was brought into question in 2011 following a few individuals who used the social networking site Twitter to publish the names of celebrities alleged to have obtained super-injunctions to protect their privacy. A super-injunction or a legal 'gagging order' is an interim injunction which restrains a person from (a) publishing information which concerns the applicant and is said to be confidential or private; and (b) publicizing or informing others of the existence of the order and the proceedings (TSE v. NGN Ltd). The significance of super-injunctions is that they not only block the media from reporting the details of a story, but also prevent journalists from even mentioning the existence of the injunction (Smartt, 2011). The fact that they were published on Twitter under a pseudonym account revealed the challenges to privacy in the Internet era on the one hand, whilst questioning the restrictions which these orders place on freedom of expression on the other. Such challenges have led to the question of whether the law of privacy should be re-written (Mindell, 2012).

Whilst such questions were being asked, in 2011 Prime Minister David Cameron called for an inquiry investigating the role of the press and police in relation to the 'phone hacking' scandal in the UK. The ensuing Leveson Inquiry aimed to make recommendations for the future regarding press regulation, governance and other areas of oversight. In November 2012 the Leveson Report was published (Leveson Report, 2012). The report made a number of recommendations, including amongst others, the setting up of an independent regulatory body backed by legislation. In particular, the report recommended that the independent regulatory body should take an active role in 'promoting high standards' and hold the power to investigate serious breaches and sanction newspapers. Only time will tell whether the recommendations made in the Leveson Report will make a difference to media standards and ethics.

Conclusion

The laws considered in this chapter reveal some of the key legal challenges facing the entertainment industries. Whilst each area of the law faces its respective challenges, a common thread which runs through the topics considered in this chapter relates to the tension which exists between law and technology. Whether it is copyright, file-sharing, TV formats, defamation or privacy laws, it is clear that with advancements in technology, in particular the Internet, the law is finding it increasingly difficult to keep up with the challenges technology throws up. In more recent times, social networking tools such as Facebook and Twitter have accounted for an rising number of privacy and defamation cases; illegal file-sharing sites have been the cause of controversy for some time, leading to an equally controversial piece of legislation; and the issue of TV formats has certainly become more complicated with the advent of YouTube and other online tools which provide for dissemination of TV programmes across borders cheaply and swiftly.

Facing up to these challenges in the entertainment industries has led to a call for the reform of certain laws. For example the Digital Economy Act 2010 aims to combat illegal file-sharing and online piracy; the Defamation Act 2013 brings the libel laws ‘up to date’; and a consideration of the privacy laws under the Leveson Inquiry has called for regulation to support the integrity and freedom of the press whilst encouraging the highest ethical standards. Whether the suggested recommendations and future reform will be successful is a separate question. For the moment, it is encouraging to see these reforms being proposed in order to bring the law in line with modern developments.

As discussed in this chapter, there are other areas of the entertainment industries, such as TV formats, where the law is riddled with uncertainty. Whilst advancements in technologies also play a role here, the main issue is that the protection of TV formats continues to be unclear. Attempts at protecting TV formats through copyright law, passing off, unfair competition and breach of confidentiality bring their own challenges. Protecting a global format market worth billions can be economically justified. But whether it can also justify the harmonisation of European Union laws remains to be seen.

The entertainment industries and the regulations pertaining to it are clearly experiencing a time of major change and uncertainty. But change should not be perceived as being unusual: as technology, society and the entertainment industries develop, reforming the law to reflect these changes will be increasingly important. However, as changes are effected through reform of the law, it is equally important that those changes prove to be effective in serving all stakeholders in the entertainment industries. As we have seen in this chapter, this will ultimately involve a balancing act between these stakeholders. Therefore, in looking to the future, it is hoped that the changes and reforms which are being proposed at present will be translated into a fair and balanced system in order to meet today’s challenges in a changing entertainment market.

Seminar Activities

1. Identify the issues surrounding the protection of copyright content and the problems thrown up by illegal file-sharing.
2. Critically analyse the issues surrounding the protection of parody and TV formats.
3. Identify and explain the grounds for bringing a claim for defamation.
4. Identify and explain the defences to a defamation action.
5. Critically discuss the assertion that the Defamation Act 2013 is a step in the right direction.
6. Identify the key developments in the law of privacy and breach of confidence.
7. Discuss the future of privacy law in the UK.
8. Discuss the claim that the UK’s Digital Economy Act 2010 will be outdated before it can be implemented.
9. With reference to relevant case law, discuss the development of the common law right of breach of confidentiality and a right to privacy as recognised in the Human Rights Act 1998.
10. Discuss the future of the press and privacy laws with reference to the recommendations made in the Leveson Report.

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