

Private lives for public consumption: legal rights in revelations

THE TRADING OF INFORMATION IS A KEY ELEMENT of the modern media and entertainment industry. But when the information at the heart of the transaction is personal or private, such as revelations of an intimate nature, this gives rise to considerations that do not apply to other transactions. This article explores the interaction between the developing law of privacy and the law of contract, and the issues that arise in practice, both for those participating in the making of productions and for media organisations who rely upon agreements with contributors.

When celebrity Kerry Katona, former member of band Atomic Kitten, appeared on ITV's *This Morning* programme (22 October 2008), it initiated a debate about broadcasters' responsibilities towards interviewees. The interview was a candid discussion including aspects of her private life, such as weight loss and surgery. When Ms Katona, who appeared to slur her words during the interview, was asked about her health, drinking and addiction, she explained that her speech was affected by prescription medication. The programme's host, Phillip Schofield, said that Ms Katona had not been ambushed, but explained that no one from the show had the opportunity to meet with her before the interview, and, had they done so, it might not have gone ahead.

Ms Katona was on the show to promote a new MTV programme called *Kerry Katona: Whole Again*, which chronicled her body transformation through breast reduction and other cosmetic surgery. The fly-on-the-wall style show featured Ms Katona's examinations with her plastic surgeon, her nudity and intimate discussions about conventionally private medical and personal subjects. It undoubtedly contained information that is, on any view, private and capable of protection. Equally without doubt was that Ms Katona wanted to contribute to the MTV show and was happy to divulge these private events.

THE RIGHT TO PROTECT OR TO TELL YOUR STORY

Since the enactment into English law of the Human Rights Act (HRA) 1998, the English courts are obliged to give effect to the European Convention

on Human Rights (ECHR). This has given rise to a new cause of action, known as the misuse of private information – the content of which is essentially Article 8 ECHR – and which provides a two-stage test to determine whether there has been a breach of the right to privacy:

- 1) did the claimant have a reasonable expectation of privacy in all the circumstances; and
- 2) if so, is there a competing justification for the disclosure that outweighs the claimant's right to privacy?

This has most commonly been deployed where individuals have sought to prevent revelations about their private life, such as Naomi Campbell's claim regarding an article and photographs showing her leaving Narcotics Anonymous (*Campbell v MGN Ltd* [2005]). However, rights under Article 8 are not limited to a right to prevent the unlawful disclosure of private information, but equally recognise an individual's right to tell the story of their own private life. As Buxton LJ observed in *McKennitt v Ash* [2007]: 'If information is my private property, it is for me to decide how much of it should be published.'

It is clear that it is Ms Katona's right to determine how much private information about her life is put into the public domain, and, in the absence of an overriding competing right, such as the public interest in disclosing hypocrisy or other wrongdoing, it is for her to draw the boundaries.

ACQUIRING THE RIGHT TO COMMERCIALLY EXPLOIT PRIVATE INFORMATION

So how does a media organisation acquire the right to make programmes or otherwise disclose a celebrity's highly sensitive private information? It depends upon the celebrity's consent to participate, which will constitute a defence to an action for the misuse of private information, or will operate to negate an expectation of privacy in the circumstances of the programme. Consent may be implied from the mere fact of participation, but is more usually obtained by means of a contractual agreement, either in a standard contributor consent form (which typically provides for nominal consideration of £1, or sometimes the consideration is merely the right to participate in the production), or a longer form agreement under which the individual may be paid a substantial sum for their participation. In the event of a dispute, and particularly on an application for an injunction, a court is likely to be slow to infer consent where there is no written evidence.

The scope of any such consent is key, and, in particular, how any private information will be used,

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the manner and extent to which it will be disclosed and whether the individual retains a right to exercise any control over it. These factors should be set out in unambiguous terms. The importance of this was demonstrated in a recent US case – *Anderson v Mayo Clinic* [2008] – brought by a patient whose interview with her doctor had been filmed. She had signed a one-page consent form, which stated that the clinic could provide the footage to the media for the health education of the general public. The video was subsequently broadcast on the local news. The patient said she thought it was for the clinic's internal use only. The Minnesota Court of Appeal upheld the clinic's right to disseminate the material based solely on the signed consent form, which it said was in very clear terms understandable to a lay person and expressly permitted the kind of use that had been made of the material. This appears to be an extraordinary decision, as there can be no doubt that a meeting between patient and doctor – just like Ms Katona's discussions with her surgeon – is private. Although the decision in *Anderson* is not binding, it demonstrates that the enforceability of the terms of a consent agreement is critical to both the individual and the media.

ENFORCEABILITY OF AGREEMENTS TO EXPLOIT PRIVATE INFORMATION

The obvious problem that arises with reliance upon an individual's consent for a third party to act in a way that would otherwise be unlawful, is the position if that individual changes their mind about that consent. In the case of Ms Katona, what would the position have been if the *This Morning* interview had not been live but pre-recorded, and, following the interview, she withdrew her consent for the material to be shown? Of even greater potential significance, what would be the position if Ms Katona had done the same with the MTV show prior to broadcast?

In *Anderson*, the Minnesota Court recognised that if the patient had changed her mind and revoked her consent prior to the broadcast, the clinic would no longer have been entitled to use the material. The Court said that the right to revoke gratuitous consent arises by operation of law and the consent is revocable at any time. There is no English authority on the point in relation to private information, but it is analogous with the position in copyright, where a bare licence can be withdrawn at will unless the party relying upon the licence can show that there is a reason why the licensor should be estopped from doing so.

If Ms Katona's *This Morning* appearance had, for example, been on the basis of consent implied from the mere fact of her participation or written

consent for no value, it could be withdrawn prior to broadcast (on the hypothetical example of a recorded interview). In respect of the private information disclosed in the interview, and in particular the discussion of her medical treatment and its effects upon her, a broadcaster may be without a defence to a claim for misuse of private information if the material was used.

Media organisations do not usually rely upon a gratuitous licence but instead incorporate the consent into a contractual agreement. Whether such an agreement will be enforceable may depend on whether a court finds that there is sufficient consideration to achieve a binding agreement. There is a risk that an agreement for nominal consideration may be set aside as an unconscionable bargain, especially if the participant is vulnerable. This will depend on the facts of the case, but the relevant factors include:

- whether in the circumstances of signing the release, the subject was aware of their rights that would be affected by its terms;
- whether its effect was properly explained;
- whether the subject has had previous dealings with the media;
- whether the subject had an opportunity to consider the terms or obtain independent advice; and
- whether the consent form was manifestly to the contributor's disadvantage.

If the contract is unenforceable, the media is left only with a bare licence which may be revoked.

Of course, many agreements between celebrities and the media are extremely valuable and the company pays handsomely for, amongst other things, the right to disclose otherwise private information. One would expect there to be such an agreement between Ms Katona and MTV for her fly-on-the-wall documentary. On normal contractual principles, such a contract is enforceable and a last-minute change of heart by the participant would constitute a breach of its terms. Most agreements of this kind would also include a term that the contributor agrees not to seek injunctive relief and that damages will be an adequate remedy, so that the broadcast of the programme cannot be restrained. Some agreements go further and provide for the contributor's agreement to the company's right to require specific performance of its terms.

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For a project of this kind, the broadcaster therefore appears to have certainty that it has the necessary rights and will be able to enforce these if a participant attempts to withdraw. However, the impact of HRA 1998 means that a contributor could advance an argument that the court is obliged to disregard the contract terms where the interference with the right to privacy is so serious as to necessitate the court's intervention. In *London Regional Transport & anor v Mayor of London & anor* [2003] the Court of Appeal upheld a decision not to grant an injunction in respect of the disclosure of information that was the subject of an express contractual duty of confidence, on the grounds that the public's Article 10 ECHR (freedom of expression) right to know the content of the information was such as to warrant its disclosure, notwithstanding the contract terms. Although in that case the contractual terms yielded to render disclosure permissible, it is easy to envisage a case where the court might intervene to set aside a contractual right to disclose information in favour of the preservation of an individual's right to privacy.

Anderson v Mayo Clinic [2008] AO7-2071,
Court of Appeal of Minnesota

Campbell v MGN Ltd [2005] UKHL61

*London Regional Transport & anor v
Mayor of London & anor* [2003] EMLR 88

McKennitt v Ash [2007] 3 WLR 194

In circumstances where either a bare consent has been withdrawn, or if there is a risk that a contractual consent may be unenforceable, a media organisation may advance a defence of estoppel. Once again, there has been no case law considering the application of this kind of defence to privacy claims.

However, if a celebrity has co-operated in an enterprise – such as Ms Katona's MTV project – in the full knowledge that the producer has invested substantial resources in its preparation, a court may be inclined to agree that it would be inequitable for the subject to withdraw their consent at the eleventh hour. In order to resist an application for an injunction restraining its broadcast, such a defence would require clear evidence of a willing participant who fully understood the nature of the project, and private information of a relatively insignificant nature, or of a kind that the participant has previously put into the public domain. Such a defence may not succeed where very sensitive material is concerned, or if the basis on which the participation occurred is less clear.

Given the absence of any legal authority and the scope for factual dispute in this area, it is perhaps surprising that it has not yet produced a reported case. Disputes do occur, but are usually resolved privately. However, the continuing rise of a celebrity-driven media and interest in 'warts-and-all' reality television means that the acquisition, exploitation and protection of rights of privacy are of increasing value and importance, both commercially and personally. It is an area that is likely to generate more cases in the future.

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