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zoo-m-in is written by the Abbas Media Law team. We are a niche law firm advising on all aspects of UK law and regulation affecting the television, film, advertising and publishing industries.

Founded by Nigel Abbas, we work closely with broadcasters, independent production companies of all sizes, and other content producers.

Abbas Media Law is experienced in advising both before publication or broadcast, working with creatives to minimise their legal and regulatory risk, as well as following publication or broadcast, defending content when it – and its producers – come under attack.

With particular expertise in television and film, we have advised on thousands of hours of television over the past two decades, across all genres.

zoo-m-in editor Nigel Abbas is also the primary author of Channel 4’s Producers Handbook.

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OLYMPIC ATHLETE COLIN JACKSON IS AMONG A HOST OF CELEBS TO SETTLE PHONE-HACKING CASES AGAINST TABLOID NEWSPAPERS. SEE P4
Phone hacking trial settles at last minute

A further round of phone-hacking litigation against the publisher of the Sun and the News of the World settled in January, just as a six-week trial was about to begin at the High Court.

The claimants – comedian Vic Reeves (whose claim was under his real name, Jim Moir), TV presenter Kate Thornton, Coronation Street actor Jimmi Harkishin and talent agent Chris Herbert – received compensation from News Group Newspapers on confidential terms, but believed to be in six figures. Each claimant was also estimated to have racked up £450,000–£500,000 in legal costs.

Further settlements of claims against the publisher by a separate batch of claimants, including actor David Tennant and Olympic athlete Colin Jackson, were also announced following the calling-off of the trial.

The proceedings were to focus on allegations of phone hacking at both the News of the World, which closed in 2011, and The Sun. News Group has never admitted that hacking took place at The Sun, and it continued to deny it here.

The trial would have brought the alleged involvement of senior journalists and executives at both newspapers back into focus, more than ten years after the events in question. The claimants’ counsel, 5RB’s David Sherborne, had told the court that the claimants would ‘allege criminality at the most senior level: James Murdoch and Rebekah Brooks’.

The trial would also have determined generic claims relating to hacking at The Sun, and an alleged conspiracy by senior executives to destroy documents, computer records and emails. These would have provided a template for the approach to further claims that are in the pipeline.

The Judge criticised the parties, noting that while settlement was a good thing, it ‘raises different issues for test cases’. He said the last-minute deal ‘enhanced the view that I already had that I have not so much been managing cases to trial as managing them to settlement’.

The trial was to have been heard at a challenging time for News Group, and the Murdoch family who control it.

Along with other newspaper publishers, News Group still cannot rule out the possibility of the second part of the Leveson Inquiry, due to look at unlawful conduct at the News of the World and other newspapers, taking place. Former Labour leader Ed Miliband said: ‘This last-minute deal is yet another case of the Murdochs going to extraordinary lengths to prevent detailed scrutiny of what really happened at their newspapers. It shows why we need the Leveson 2 inquiry to get to the truth.’

Other publishers also continue to be affected by the fall-out. Mirror Group Newspapers recently settled a claim by actor Hugh Grant over hacking by The Mirror, admitting that senior employees and executives acknowledged or turned a blind eye to the culture of unlawful information-gathering at the paper.

(US) Prince’s estate claims victory over unreleased material

The estate of pop star Prince says a dispute with a producer who sought to put out unreleased material by the artist has been resolved in its favour.

The release of an EP called Deliverance was announced by iTunes in April 2017. However, shortly after the announcement, previews of the tracks were taken down from the internet when a court in Minnesota granted Prince’s estate and Paisley Park Enterprises an interim injunction to prevent the publication or dissemination of unreleased recordings.

The defendant to the claim was sound engineer Ian Boxill, who had worked on the EP. It was alleged that he had breached a confidentiality agreement made with Prince, and was not authorised to make the songs available for sale because the Prince sessions remained the artist’s property.

When announcing the EP, Boxill said ‘we decided to go independent because that’s what Prince would have wanted’.

Prince’s estate is relying on Boxill’s failure to respond to the claim by the deadline of 23 January

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Prince’s estate is relying on Boxill’s failure to respond to the claim by the deadline of 23 January 2018 as meaning that its claim has succeeded. As a result, it is seeking a permanent injunction prohibiting Boxill from releasing the music.

In spite of the legal wrangle over
THE ESTATE OF POP SINGER PRINCE SAYS IT HAS WON A LEGAL BATTLE OVER UNRELEASED WORK BY THE ARTIST. SEE OPPOSITE
the material recorded with Boxill, the estate’s adviser, Troy Carter, has promised fans that there will be unreleased material available imminently. He told Variety: ‘We’ve got great projects in the works that I’m excited to talk about. So the answer is yes, there will be unreleased Prince music coming soon.’

(US) Frowning feline wins big

The owners of Grumpy Cat, a feline with a comically miserable expression that has become famous on the internet, have been awarded $710,000 (£500,000) in damages by a jury in California.

The award is the outcome of a claim for copyright infringement and breach of contract brought against coffee company Grenade Beverage, which was found to have broken the terms of an agreement to use the cat’s image in its marketing materials.

The cat, originally named Tardar Sauce by its owner Tabatha Bundsen, shot to fame online in 2012 when pictures of her scowling features were posted on Reddit by Ms Bundsen’s brother. The moggy’s merchandise empire extends to clothes, calendars and soft toys, and it has made TV and film appearances.

In 2013, Grenade sought to cash in on the enormous popularity of the cat and the internet memes it has spawned, and agreed with her owner that it could sell iced coffee drinks branded with the cat’s likeness, called ‘Grumppucinos’, in return for a payment of $150,000.

However, Grumpy Cat’s owner claimed in court documents that the company had ‘blatantly infringed’ her copyright and trademarks, and breached their agreement, when it began selling coffee beans and Grumppucino T-shirts featuring the cat’s face.

The complaint explained that Grenade had done ‘has actually given Grumpy Cat and her owners something to be grumpy about’.

Grenade brought a counterclaim saying that Grumpy Cat had not promoted the drinks sufficiently. The company also complained that a promised film appearance alongside Will Ferrell and Jack Black had not materialised.

A Federal jury in California found for the cat and her owner, ordering the $710,000 payment by way of damages for copyright and trademark infringement, as well as a $1 nominal damages payment for breach of contract.

Reports of the hearing said that Grumpy Cat herself was in Court during the January trial, but was not present for the jury’s verdict.

The case highlights the potential for very large awards of damages in copyright disputes in courts in the US, where such cases are usually heard by juries rather than, as in England, by a judge sitting alone – even where they involve difficult points of fact and law.

Mail Online in payout over Katie Hopkins column

A teacher has received an apology and substantial damages from Mail Online after professional controversialist Katie Hopkins falsely claimed she had taken her class to a protest against Donald Trump. The payout and apology came as Hopkins left her Mail Online writing contract by ‘mutual consent’.

The apology to teacher Jackie Teale, which appeared on the website, read:

‘An article published in Katie Hopkins’ column on 5 February 2017 reported that Jackie Teale, a teacher, had taken her class to a protest against Donald Trump outside Westminster.

‘We are happy to make clear that statement was wrong. It was in fact a banner made by some of her twelve-year-old pupils which she took to the protest. We apologise to Ms Teale for this error and have agreed to pay Ms Teale substantial damages and legal costs.’

Hopkins’ departure from Mail Online came in the wake of a series of legal and other controversies. Mail Online itself had to pay out £150,000 to the Mahmoods, a British Muslim family whom Hopkins falsely accused of extremism and of having links to al-Qaeda in two articles published in December 2015.

Earlier in 2017, the food writer Jack Monroe won £24,000 in damages and more than £100,000 in legal fees when she brought a libel action over two tweets by Hopkins that wrongly accused her of support for the vandalising of a war memorial, after Hopkins mistook Monroe for political journalist Laurie Penny.

In May 2017, Hopkins’ weekly show on the radio station LBC was stopped after she tweeted, following the Manchester Arena attack, that there should be a ‘final solution’ for Muslims in Britain. This provoked widespread criticism because of the expression’s links to the Holocaust. Hopkins later said the tweet was a ‘typo’, and then replaced ‘final’ with ‘true’.

Hopkins was also criticised for a tweet inaccurately claiming that an
accident outside the Natural History Museum was a terrorist attack, saying afterwards: ‘I stand by the idea that it’s a terror attack. I don’t shy away from that. It’s my personal opinion.’

Hopkins’ work has in the past garnered support from Donald Trump, who in 2015 tweeted: ‘Thank you to respected columnist Katie Hopkins of Daily Mail.com for her powerful writing on the U.K.’s Muslim problems.’ However, Hopkins is increasingly dogged by controversy and her departure from Mail Online leaves her without a mainstream media platform on either side of the Atlantic.

Can’t Pay must pay after breaching privacy

Channel 5 will pay £20,000 in damages in connection with an episode of Can’t Pay? We’ll Take it Away! after the High Court found it misused private information.

Mr Ali and his wife Mrs Aslam were evicted from the home they shared with their two children in Barking in April 2015. The High Court Enforcement Agents (commonly referred to as bailiffs) who carried out the eviction were accompanied by a film crew from an independent production company, filming for the Channel 5 series. The story was shown in an episode of the show that first aired in August 2015 and was subsequently repeated 35 times, as well as being available on Channel 5’s on demand service. In total it was viewed over 9.65 million times.

Mr Ali was filmed emerging drowsily from the room he was using as his bedroom in his nightclothes. The couple were shown in distress, packing their belongings and being berated by their landlord’s son. The inside of their home, including bedrooms and bathroom, was shown. The couple had expected to be given further time to vacate the property – indeed, it emerged they were told by the council’s housing department that if they left the property before they were evicted they would be regarded as ‘intentionally homeless’ and would not be rehoused. The couple’s children, although not shown in the programme, had also suffered as a result of the broadcast: in particular, the couple’s daughter was bullied at school.

The Judge found the couple had a reasonable expectation of privacy in their home, even though they were being evicted from it. Channel 5 had argued that the couple were trespassers, as the landlord had already obtained a court order for possession – but the legal position is that they were tenants until the writ of possession was executed (ie until they were evicted). In any event, a property can be a person’s ‘home’ in privacy terms, regardless of the position in property law. The Judge found the house was continuously on page 31.
ASA: Poundland ads banned for being ‘irresponsible’ and ‘likely to cause offence’

A series of posts on Poundland’s Twitter and Facebook pages, promoting the #ElfBehavingBad campaign in the run up to Christmas, have been found to be ‘irresponsible’ by the ASA and banned in their current form.

The ads featured a ‘naughty’ elf toy in various sexualised positions, including an image of the toy elf sitting on a toy donkey’s back with the caption, ‘Don’t tell Rudolph I’ve found a new piece of ass #ElfBehavingbad’, and another showing the toy elf in a sink filled with bubbles sitting with two female dolls, taking a selfie. The caption stated: ‘Rub-a-dub-dub, three in a tub. A night of “Selfies and chill”’.

The 85 complainants challenged whether ‘the ads were offensive for their depiction of toy characters… displayed in a sexualised manner’; and whether ‘the ads were unsuitable to be displayed in an untargeted medium where children could see them’.

Poundland’s response stated that its campaign was based on humour and double entendres and explained that the nature of double entendres was that they would not be understood by children. It also stated that Twitter and Facebook had policies preventing under-13s from creating accounts, and Poundland had never sought to encourage anyone other than adults to follow it on these social networks. The retailer said it had not intended to offend anyone.

The risqué advertising campaign seemed to have paid off for Poundland, which said its elf ads had helped the business achieve its most successful December since it began trading in 1990, with sales in the week before Christmas 20% higher than a year earlier.

In response to the complaints, the ASA noted that Poundland’s Facebook and Twitter pages were not age-gated and could therefore be seen by anyone.

The ASA also noted that the ads had been shared widely on social media and therefore would have been seen by a large number of people, including some children, who did not actively follow Poundland.

The ASA considered that the depiction of a child’s toy in relation to sexual references and acts, contained within a medium that could also be accessed by children, was irresponsible and likely to cause serious or widespread offence. It also noted that one of the ads, which featured a group of unclothed dolls playing what appeared to be strip poker and which was captioned with the phrase ‘I really want to poker’, was a sexual reference aimed towards the female dolls in a manner that could be seen as demeaning to women.

The ASA concluded that the ads, which appeared in an untargeted medium where they could be seen by children, were therefore in breach of the CAP Code (Edition 12) rules 1.3 (Social responsibility) and 4.1 (Harm and offence) and must not appear again in their current form.

Poundland has taken this ruling in its stride and has since tweeted an image of ‘Elfie’ behind bars at ‘Wormwood Scrubbers’, along with a statement on behalf of the ‘naughty elf’ which said: ‘Britain’s the home of saucy postcards, Carry On films and panto, so I’m sad the ASA found my double entendres hard to swallow … I’m doing everything I can to get out on good behaviour later this year.’

OFCOM: Flight fight complaint partly upheld

OFCOM has upheld, in part, a complaint made by a woman about a
report of her involvement in an altercation on a flight from Manchester to Lahore. ‘Mrs D’ stated that she had been the victim of a physical assault on the flight, but was unfairly portrayed by Channel 44 as violent and the aggressor. The reports had described the incident by saying that two women were involved in a fight, that they pulled each other’s hair and slapped each other, and that both were taken into custody in Lahore. It was also said that the ‘violent ladies’ were released after giving written apologies.

Mrs D also complained that her privacy had been unwarrantably infringed because her passport had been shown on screen, with none of the details (such as date of birth) obscured.

There was plainly a factual dispute about what had happened on the aircraft and during the aftermath at the airport in Lahore. Channel 44 sought to justify the description of the incident as broadcast by reference to contemporaneous documents from the Lahore Airport Security Force. Mrs D relied upon other documents, including a police report she had filed.

Ofcom found that there was no evidence for some of the details in the report – in particular that both ladies slapped each other and pulled each other’s hair. This was a failure to follow Practice 7.9. However, a failure to follow a Practice only constitutes a breach of the Rule (and therefore the Code) if it results in unfairness. Ofcom did not consider that the inclusion of these extra claims would have made a material difference to viewers’ perceptions of Mrs D and the incident in such a way as to cause unfairness to her.
Channel 44 said the unobscured image of Mrs D’s passport had been broadcast in error. It did not seek to defend it on public interest grounds. Accordingly, Ofcom upheld the infringement of privacy complaint.

This is a useful reminder that personal data on documents like passports should normally be obscured unless the person has consented to the disclosure of such information (or disclosure is in the public interest); and also that while the Code’s Practice should be followed, non-compliance with them is not always a breach of the Code – it is the Rules themselves that must not be breached.

**OFCOM: Channel 5’s OMG: Painted, Pierced and Proud in breach**

Ofcom has found that a Channel 5 documentary on extreme body modifications was in breach of the regulator’s rules against glamorising violent or dangerous behaviour, and the inclusion of unjustified methods of self-harm.

*OMG: Painted, Pierced and Proud* was broadcast on Channel 5 on 2 July 2017. One of its contributors was a woman called Torz, who had deliberately cut off part of one of her fingers. The broadcaster included a warning preparing viewers for extremely graphic scenes of surgery.

Torz, who said that she had ‘always kind of identified as a bit of a freak’, described how she amputated part of her little finger. She referred to the ‘horrible crunch’ and reconstructed how she had cut off her finger by placing it between the blades of a bolt cutter. The narrator of the programme explained how she had ‘controlled the blood loss and didn’t contract a serious infection’.

The programme also included statements made by Torz and her father, Rich, about her decision to cut off her finger. Torz was happy with her decision, saying that the amputation was ‘just cute as fuck!’. Rich was described as having accepted the amputation and referred to the fact that he would ‘hate for you to be a bit vanilla and boring and normal if you like. Chip off the old block really.’

The programme then showed Torz and her father watching home-video footage of the amputation on a mobile phone. This depicted Torz kneeling with her finger between the jaws of a pair of bolt cutters. Torz’s finger was blurred out and the precise moment that she cut off her finger was not shown. However, the immediate aftermath was shown, with Torz holding her severed finger and with small amounts of blood on a sheet.

Ofcom considered that the material raised potential issues under Rule 2.4, which prohibits the inclusion of material which ‘condones or glamorises violent, dangerous or seriously antisozial behaviour and is likely to encourage others to copy such behaviour’; and Rule 2.5, which prohibits the inclusion of methods of suicide and self-harm ‘except where they are editorially justified and are also justified by the context’.

Ofcom acknowledged that the programme’s narration made clear that the behaviour included within it was ‘extreme’. However, it did not consider that the programme’s narration provided sufficient counter to Torz and her father’s view that Torz’s actions were a positive act of self-identity. It also took account of the broader context of the programme.

Ofcom considered that insufficient context was provided to counter the degree to which this example of dangerous behaviour was condoned. Considering the instructional nature of the content and that the amputation was presented as having no negative consequences for Torz, Ofcom concluded that the programme was likely to encourage others to copy Torz’s behaviour and was in breach of Rule 2.4.

Ofcom’s concern in relation to Rule 2.5, which Channel 5 had argued did not apply, is whether the methods by which suicide or self-harm is depicted in a programme are editorially justified and also justified by the context. It considered that it did apply in this case and went on to consider whether this material was editorially justified and justified by the context.

While Ofcom acknowledged that this was a programme about people who undertake extreme body modifications and therefore it may include some examples of what could be considered to be self-harm, it was concerned by the level of detail provided in the programme as well as its instructional nature. It took account of other contextual factors such as the time of broadcast (10.05pm) and the inclusion of a warning for ‘extremely graphic scenes of surgery’, but did not consider that these provided sufficient protection to vulnerable viewers to provide justification for the broadcast of this method of self-harm. The programme was also in breach of Rule 2.5.
OFCOM: £120,000 penalty for Al Arabiya News

OFCOM has imposed a £120,000 fine on an Arabic language TV channel over a programme about an attempt to overthrow the government of Bahrain.

Footage of one of the people involved in the 2011 protests in the Gulf state showed him apparently making a confession in prison, in circumstances where other, similar, confessions had been obtained by torture.

The broadcast of the footage was found in 2017 to be in breach of the OFCOM Code’s rules against unjust or unfair treatment of individuals or organisations, and an infringement of privacy. Because of the seriousness of the breaches, OFCOM has now imposed the fine as a statutory sanction.

Al Arabiya News is an Arabic language news and current affairs channel originating from Dubai, United Arab Emirates, and broadcast by satellite in the UK.

On 27 February 2016, it broadcast a programme about efforts in February and March 2011, by a number of people, including the complainant, Hassan Mashaima, to effect regime change in Bahrain by turning the country into a Republic. The programme included footage of Mr Mashaima as he explained the circumstances which had led to his arrest and conviction for his participation in these activities.

A complaint was made to OFCOM on behalf of Mr Mashaima about unfair treatment and unwarranted infringement of privacy in connection with the programme.

In OFCOM’s Adjudication (the Adjudication) published on 24 April 2017, OFCOM’s Executive found that the programme had breached Rules 7.1 and 8.1 of the Code.

In summary, OFCOM found that, amongst other things, the programme included footage of an interview with Mr Mashaima which had the potential to materially and adversely affect viewers’ perception of him, and that the broadcaster had not provided him with an appropriate and timely opportunity to respond to the allegations of wrongdoing being made about him in the programme.

It also found that the broadcaster had unwarrantedly infringed Mr Mashaima’s privacy.

OFCOM has procedures for the consideration of statutory sanctions in breaches of broadcast licences, and accordingly, following the Adjudication, went on to consider whether the Code breaches were serious, deliberate, repeated or reckless so as to warrant the imposition of a sanction. It decided that they were.

Among the relevant circumstances were the fact that the footage of Mr Mashaima was of him making highly sensitive confessions and that it was filmed in a private room in prison, where he was being detained. Only approximately three months prior to the date on which Al Arabiya News says the footage was filmed, similar such confessions had been obtained from individuals, including Mr Mashaima, under torture.

The allegations made against Mr Mashaima were, at the time of the filming, still subject to subsequent re-trial and appeal hearings, where Mr Mashaima was to maintain that his conviction should be overturned on the grounds that his confession had been obtained under torture.

In spite of the highly sensitive circumstances, the broadcaster did not obtain Mr Mashaima’s informed consent or verify the accuracy of the footage, either with him directly or with his representatives.

OFCOM relied on the question of the sanction on a previous decision made in relation to the Iranian channel Press TV, which ultimately in 2012 lost its licence to broadcast. In 2011, it imposed a penalty of £100,000 on Press TV for showing an interview of an Iranian journalist which had taken place while he was being detained in prison and where it should have been clear to Press TV that he was giving an interview under duress and to which he did not consent.

In this case, it decided that the appropriate sanction should be a financial penalty of £120,000 and that the licensee should be directed to broadcast a statement of OFCOM’s findings, and to refrain from broadcasting the material again.

Both the sanction imposed on Al Arabiya and the earlier decision in relation to Press TV underline the need for producers and broadcasters to consider carefully whether or not interviews are suitable for inclusion where they have been filmed by third parties, and if it is possible that they have been filmed under duress. The use of footage from repressive or authoritarian regimes which indicates state involvement in or approval of the filming will always be particularly sensitive.

Because of the seriousness of the breaches, OFCOM has now imposed the fine as a statutory sanction.
Sarah Ferguson seeks £45m payout over Fake Sheikh story

Sarah Ferguson, the Duchess of York, is suing Rupert Murdoch’s News Group for £45m, which she claims is the value of the business opportunities she lost after she was the subject of a sting by ‘Fake Sheikh’ Mazher Mahmood.

In 2010, Mahmood posed as a wealthy Indian businessman and secretly filmed the Duchess in a Mayfair apartment agreeing to organise a meeting between the then News of the World reporter and her ex-husband Prince Andrew.

The footage is said to have shown her accepting an advance of £27,600 on a fee of £500,000, saying to Mahmood: ‘I can open any door you want.’

The Duchess initially brought a claim against News Group Newspapers, the former publisher of the News of the World, for £26m in 2016, but court documents indicate that this sum has now increased to £40m.

The losses are said to relate to a number of different sources of earnings, and projects that the Duchess claims she was working on at the time.

These include fees from lucrative public speaking and TV appearances, plans for television shows, books and health products, sizeable commission the Duchess says she would have earned from working on a merger of the Jaeger and Aquascutum fashion labels, and film projects.

The legal documents claim, in relation to the films: ‘The Duchess was working to assist... Graham King on raising funds for new projects of $125m (£89m). The commission that would have been payable on funds raised was... £4,373,250.’ King was an executive producer on Ben Affleck’s film Argo and Martin Scorsese’s The Departed. The Duchess says the ‘introductor agreement’ fell through following the story.

She alleges that Mahmood – who was imprisoned in 2016 for tampering with evidence in the collapsed drugs trial of singer Tulisa Contostavlos – invaded her privacy and ‘used deceit to induce her to make ‘unguarded statements to her detriment’.

The claim that Ferguson suffered loss due to deceit is an unusual one in the context of media law litigation. It is a type of claim – a tort or civil wrong – that involves claiming losses that arise because the claimant has acted in reliance on an untrue statement that the defendant knew to be untrue.

She says that when the News of the World ran the story, it took her comments out of context, causing her ‘serious embarrassment, humiliation, distress and reputational damage’ and huge financial losses.

News Group has responded by saying the story was both true and in the public interest. Its defence says the Duchess was prepared to ‘enter into a corrupt arrangement’ to secure access to Prince Andrew. It says she suggested to Mahmood that ‘commercial favours could be bought from a member of the Royal Family’ and that her ex-husband’s trade envoy role could be exploited ‘provided the price was right and the money went to her’.

The claim is the first to come to light in what are thought to be a series of legal cases arising from Mahmood’s activities over many years. The litigation comes at a difficult time for the newspaper group, as it is still mired in claims relating to phone hacking at the News of the World and, it is alleged, The Sun. (See p4.)

Comedian sued by estranged husband

Comedian Louise Beamont is being sued by her estranged husband over material contained in her Edinburgh Fringe stand-up show. Ms Beamont, who performs under the name Louise Reay, is being sued by Thomas Reay in defamation, privacy and under the Data Protection Act. He is seeking damages and an injunction to prevent her publishing further statements about him.

Lawyers for Mr Reay have said the allegations made, which included an allegation that the relationship between the couple was an abusive one, are serious and false. It is also claimed that the show breached Mr
SARAH FERGUSON, DUCHESS OF YORK, IS SUING NEWS GROUP FOR £45M IN LOST EARNINGS. SEE OPPOSITE
Ms Beamont has said she only referred to her husband ‘a couple of times – perhaps 2 minutes’ worth of reference in a 50-minute show.’ She removed the material from the show, entitled Hard Mode, after receiving her husband’s complaint. The show was billed as being an immersive comedy about life in an ‘authoritarian regime’ but one critic described it as ‘at its core... about a very recent raw heartbreak’. Ms Beamont has set up a crowd-funding page to fund her defence, on which she says the issue is one of free speech, and that she is facing censorship.

Mr Reay’s legal team deny that the case raises free speech issues or that it constitutes any form of censorship. They say Mr Reay was never asked for his consent in relation to the use of the material and that the references to him have caused him enormous distress.

Comedians often make provocative statements, and use their own lives as source material, referring to partners, ex-partners and friends in their jokes and material. As the laws of defamation, privacy and data protection apply to comedians as they do to everyone else, often legal risk is managed by not providing identifying information about living individuals, by changing names, or by seeking the explicit consent of the person being referred to. The latter course is often what needs to happen where partners or ex-partners are referred to, whether the stories are true or not, because even if they are not named or false names are used, they are likely to be identifiable to at least some people. Where consent is sought, it should be recorded in writing.

The last comedian before the libel courts was Frankie Boyle, but in that case he was the claimant, winning damages in 2012 of over £50,000 from the Daily Mirror after it published an article describing him as ‘a racist comedian’. That case was one of the last defamation cases to go before a jury, before the practice was effectively abolished in 2014. This case will be heard by a judge. zoom-in will report further as it progresses.

Taxi driver’s slander claim over drug allegation fails

A slander claim by a taxi driver against a competitor has failed because he was unable to show that he had suffered actual financial loss, with the Judge at the trial issuing a warning against starting a publication claim without an awareness of a basic point of law.

Mandeep Singh Pannu, of Strood Cabs in Medway, sued Tracy Carter, joint owner of Chatham-based ABC Taxis. Both firms sometimes supplied drivers to Medway Council for transporting children with special educational needs to and from school.

Mr Pannu claimed he was slandered by Ms Carter when she passed on information, about Mr Pannu’s alleged arrest in connection with the supply of drugs, to a contact at the Council with whom she had regular dealings. Ms Carter asked that the information be treated in confidence and that she herself should remain anonymous. The Council, however, ignored her request and passed on the information directly to Mr Pannu.

At trial, the Council admitted breaching Ms Carter’s confidence, and explained that it had agreed to pay damages to her.

Although there was uncertainty about exactly what was said by Ms Carter to her contact, the Judge decided that the words she had spoken were to be regarded as meaning that there were reasonable grounds to suspect that Mr Pannu had committed a drugs offence.

Defamation can take two forms: libel and slander. Libel is the publication of defamatory matter in a permanent form, such as in a newspaper, or a radio or television programme, while slander is the publication of defamatory matter in speech or some other transitory form.

This distinction can be important because there are subtle differences in the law: for example, slander claims are not actionable without proof of ‘special damage’, meaning material (generally financial) loss, and the claimant here had not attempted to prove any. There are established exceptions to this rule, but the claim did not come within any of those, and it failed for that reason.

The Judge went on to assess whether the words would, in any event, have been protected by ‘qualified privilege’ because there was a social or moral duty for Ms Carter to pass on a serious allegation of this kind, and for the Council to consider it and take such steps as seemed appropriate, where it had a relationship of trust with Mr Pannu.
He decided that they would have been protected, and that there was no evidence of any malice on the part of Ms Carter that could have defeated that defence. The claim would have failed for this reason also.

The Judge concluded by issuing a stark warning of the potential dangers in bringing this type of claim, saying that there are ‘clearly risks in launching too readily into this type of claim, where there are often more issues to be considered than at first meet the eye, and the uncertainty and complexity of which can sometimes be underestimated… the hurdles confronting claimants in the law of slander, qualified privilege and malice may... prove hazardous and unexpectedly tricky to negotiate’.

He said that a ‘fundamental problem’ relating to a ‘basic point of law’ should have been relatively easy to identify, and that the anxiety and costs of the claim could then have been avoided.

The decision and the Judge’s remarks offer an object lesson in the perils of embarking on media litigation without taking specialist legal advice.

Where defamation claims are made in connection with television programmes and other content, the claim will normally be a libel claim, as the publication will be in permanent form. That is not to say that production companies and broadcasters can never be the subject of a slander claim. It is possible that liability could attach in connection with defamatory words spoken at a live recording or event arranged by the production company or broadcaster. Wherever content may stray into territory that could give rise to defamatory statements, producers should seek expert advice.

Court decides meaning of allegations on BBC local news

A High Court judge has decided that a local news bulletin on BBC Look North, and an accompanying online article, meant there were reasonable grounds to suspect a GP of carrying out a fraud on the NHS while running a surgery.

Dr Rina Miah is a GP who had, until August 2015, run the Harbottle Surgery in Northumberland. The early evening edition of BBC Look North on 6 October 2015, broadcast after the national 6pm news, told viewers that Dr Miah was being investigated over allegations of fraud, and that NHS England had confirmed an investigation was underway into Dr Miah by NHS Protect, which investigates fraudulent activity.

The item went on to say that Dr Miah strongly denied allegations of fraudulent activity. The online article, headlined ‘Former Harbottle Surgery doctor investigated for fraud’, contained broadly the same allegations.

Dr Miah argued that the publications meant there were reasonable grounds to suspect her of defrauding the NHS of public money while running Harbottle Surgery. The BBC argued that it meant that she was the subject of a fraud investigation by the NHS, and/or that there were grounds to investigate whether she had committed fraud.

The different levels of meaning argued for by the two sides, of ‘reasonable grounds to suspect’ and ‘grounds to investigate’, reflect the well-known principles applied by the courts in determining the meaning of defamatory publications.

The Judge ultimately sided with Dr Miah, deciding that the broadcasts and article meant there were reasonable grounds to suspect her of fraudulent activity. The reported denial did not prevent the broadcasts having this meaning, because the investigation had been reported notwithstanding the denial, and the solicitor’s statements that there was not an investigation appeared to be contradicted by the statement from NHS England.

The decision on meaning may well be significant for the progress of the claim, since a defendant who is attempting to prove the truth of a ‘reasonable grounds to suspect’ allegation is only able to do so by reference to a claimant’s conduct. It also highlights the risks of reporting on investigations where little is known about the underlying facts, since usually the fact that an investigation merits a report will be understood by readers or viewers as implying that there are in fact grounds to suspect the person being investigated of some wrongdoing.

Slander claims are not actionable without proof of ‘special damage’, meaning material (generally financial) loss

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Access agreements

Invariably access agreements are necessary where programme-makers want to film with companies and organisations, for example when making observational documentaries. Whether it’s filming within a hospital, an educational establishment, alongside the emergency services, with a local council or with organisations like the CPS, Trading Standards, or HMRC; or filming within a commercial organisation like a department store, airport, or supermarket chain, it is vital to nail down the terms of the access agreement right at the start, and certainly before filming begins.

Any organisation granting access will be looking to control carefully the terms of access being granted, and will be seeking certain contractual assurances. At the same time, production companies need to ensure that the access being granted is sufficient to enable them to produce and deliver the programme or series they are being commissioned to make. A good access agreement should anticipate the likely issues that will arise over the course of filming and put in place procedures for dealing with them.

There are various issues to consider when negotiating access arrangements, and production companies should always seek expert advice before starting to negotiate access arrangements. Some important issues include:

Rights Access agreements should be explicit about who owns rights in the footage. Invariably it will be the production company but this should be made clear. Underlying rights may also be an issue. Where it is anticipated that the programme will include copyright works belonging to the body granting the access – eg archive, images, logos – it is sensible for the access agreement to include a licence for exploitation of such works, rather than having to do that separately after filming has taken place. While relations with the organisation granting access will hopefully continue to be good up to and after transmission, that cannot be guaranteed.

Individual consents In most cases, companies cannot agree to the filming of staff and other individuals on their behalf, as filming an individual engages personal privacy rights. Accordingly, organisations
are normally concerned before any filming begins that programme-makers have in place suitable procedures to obtain informed consent from individuals who are filmed, and to ensure that those who do not wish to be filmed are excluded. Normally those granting access are reassured when they are informed of Ofcom’s rules in this regard, and that programme-makers will follow those rules. Such procedures are normally agreed before filming begins and are made a contractual term of the access agreement.

Pre-transmission viewing rights
These are often very important. Understandably, organisations are often wary about how they will be portrayed, and offering viewing rights at the start can be a useful way of addressing concerns. However, it is important that programme-makers do not cede editorial control, which must remain with the broadcaster. In other words, those being filmed cannot be granted editorial approval, as to do so would be a serious breach of Ofcom’s rules. Assuming the

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**ABBAS MEDIA LAW** are experts in business affairs and rights issues. Nigel Abbas and Jenny Spearing advise clients, both companies and individuals, on all aspects of business and commercial affairs, and chain of title and rights issues, in connection with the television, film, advertising and publishing industries. We can advise you on structuring a deal, draft and negotiate all types of agreements, and answer all your day to day queries. We regularly advise clients on agreements concerning commissioning and production, financing, distribution, co-production and all manner of underlying rights.

We provide a first-class professional service offering clear practical advice and solutions. Please get in touch for more information.
Copyright permeates all aspects of television production, providing copyright owners with certain exclusive rights to do specific acts in connection with the copyright works that they own. Copyright protects people’s and companies’ creative endeavours so that they can benefit and profit from their work. A television company making a programme for broadcast will own copyright in the film it is producing. Copyright enables the owners to earn money by licensing rights in the programme to others who wish to exploit it. At the same time, producers need to ensure that rights in copyright works included within programmes – so-called ‘underlying rights’, in music, archive, photographs etc – are properly licensed from whoever owns them, unless they can rely on one of the statutory defences to copyright infringement, such as fair dealing. Infringing others’ copyright is likely to result in you being sued for damages and may mean that your programme can’t be shown. An understanding of copyright is therefore essential for those working in television production.

(US) Sofia Richie sued after posting a picture of herself on Instagram

Sofia Richie is facing a copyright infringement claim from a celebrity photo agency. It claims she posted seven pictures of herself, which it owned, on her Instagram account, in a case that highlights the dangers of reproducing photos without knowing the identity of the copyright holder.

The 19-year-old model and daughter of singer Lionel Richie posted the images of herself to her 3.2 million followers in July 2017. The pictures show her in public, both alone and walking with a friend.

The agency, Backgrid, claims it is the copyright holder of the photos. It claims to have sent a cease and desist letter to the star in October, but that the communication was ignored.

Following subsequent contact with Richie’s representatives by the agency, it has been reported that four of the pictures were taken down, but that a further three remained online.

Backgrid has now issued legal proceedings, through which it seeks to recover over $1m (£710,000) in damages and lost profits.

Richie is the most recent target of the photo agency. Backgrid reportedly brought copyright claims against Khloe Kardashian, Blac Chyna, Gigi Hadid and Kendall Jenner in 2017.

In November 2017, singer Bruno Mars was sued by the photographer who took a picture of him as a toddler, after the singer posted it on his Instagram feed. Catherine McGann alleged that the photo received more than 1.2 million likes on Instagram, and brought a claim against Mars and his record label, Warner Music, for damages.

This is a cautionary reminder to programme-makers and other content producers. While some social media services have terms of service that grant them a worldwide licence to use any content posted, and to allow the media to do the same as long as their broadcast media guidelines are followed, this does not override existing intellectual property rights. In other words, if the user who has uploaded the content does not own the copyright, any other media reproducing that content will be liable for copyright infringement and will not be able to rely on the terms of service of the social media site.

Some media organisations have tended to work on the basis that the risk of reproducing content that has been posted is low. However, the Richie claim shows that the presence of an image on a social media service does not mean that the account that posted it is necessarily that of the copyright owner, or that it is safe to assume that the ultimate owner will not take legal action to protect their rights. Content producers should seek legal advice. It may be that the use falls within one of the statutory exceptions eg fair dealing.

(US) Warner-approved Harry Potter fan film is a YouTube hit

An Italian-made unofficial prequel to the Harry Potter films, which follows the back story of arch-villain Lord Voldemort, has amassed millions of views on YouTube after it was released with the consent of studio Warner Bros.

Italian film company Tryangle launched a Kickstarter campaign to crowd-fund the film during 2016, saying that it wanted to ‘prove how, with commitment and passion, even without large Hollywood funds, it is possible to realise competitive and valuable movies’.

But the crowd-funding effort came to an abrupt end in July 2016 when Warner Bros wrote to the company saying that it was ‘the exclusive owner and/or licensee of copyright, trademark,
SOFIA RICHIE FACES LEGAL ACTION AFTER INSTAGRAMMING A PHOTO OF HERSELF; SEE OPPOSITE
and other intellectual property rights in and to the Harry Potter series of books and motion pictures.’

Confidential discussions between the studio and the film company followed.

‘The only thing we can say is that they let us proceed with the film, in a non-profit way, obviously,’ said director Gianmaria Pezzato of the outcome.

Now the 52-minute film, shot in Italy with a budget of about £16,000, has been released on the internet in full. Entitled Voldemort: Origins Of The Heir and originally filmed in Italian, it has been dubbed into English.

It uses the story of an original character, Grisha McLaggen, the heir of one of the four Hogwarts founders, Godric Gryffindor, to trace Tom Riddle’s journey from Hogwarts schoolboy to ‘He Who Must Not Be Named’, the villainous Lord Voldemort.

‘The movie follows the part of his life that has mostly been left out in the official movies of the saga,’ Tryangle Films said.

It is unusual for a media company to become involved in so-called ‘fan-fic’ relating to one of its products. It is possible that, given her close involvement in the film and other spin-offs from her books, JK Rowling herself might have given the release of the film her seal of approval.

Had the legal dispute continued, while it is possible that a copyright claim could have been brought, depending on the nature and amount of the material taken from the official Harry Potter franchise, the most likely type of claim in England would have been one in ‘passing off’. This is a legal claim where, through some misrepresentation to the public, the defendant unfairly trades on the goodwill of the claimant, thereby causing the claimant loss. Fortunately for the fan-fic producers, in this case there was a happy ending.

The judgment provides a very useful analysis of how the law of joint authorship applies to the creation of film scripts.

Opera singer loses legal fight over Florence Foster Jenkins script

A High Court judge has declared that screenwriter Nicholas Martin is the sole author of the Hollywood comedy drama Florence Foster Jenkins, which was directed by Stephen Frears and starred Meryl Streep and Hugh Grant. The Judge rejected claims by Martin’s ex-girlfriend Julia Kogan that she was its joint author and entitled to a share of the profits.

Mr Martin is a professional scriptwriter. Ms Kogan, an opera singer, lived with him during the period in which the idea of a film based on Florence Foster Jenkins arose, and when treatments and early drafts of the screenplay were written. The couple frequently discussed the project.

Mr Martin was the claimant in the litigation, seeking a declaration that he was the sole author, while Ms Kogan filed a counterclaim for a declaration that she was joint author of the screenplay and that Mr Martin had infringed the copyright in it. Ms Kogan also joined the production and

Fair dealing advice

Over the last decade, fair dealing rules have been used with increasing frequency by programme-makers, both in news programmes when reporting on current events, and when reviewing or critiquing copyright works that it’s difficult or impossible to license. In addition, in 2014, fair dealing rules were extended: there is now a specific defence when fair dealing with quotations as well as a defence of ‘fair dealing for the purposes of caricature, parody or pastiche’. Abbas Media Law’s Nigel Abbas is one of the country’s most experienced lawyers advising in this area. He has advised on many hundreds of hours of programming featuring fair dealing over many years.

Nigel is the primary author of Channel 4’s Producers Handbook and one of the primary authors of Channel 4’s fair dealing guidelines. Nigel updated the guidelines for Channel 4 in 2015 to incorporate advice and practical guidance on fair dealing with quotations and for caricature, parody and pastiche. See Channel 4’s guidelines at www.channel4.com/producers-handbook/c4-guidelines/fair-dealing-guidelines. Nigel advises many of the leading content producers working in this area.

If you need any advice on fair dealing, please contact Abbas Media Law at info@abbasmedialaw.com or visit our website, abbasmedialaw.com.
financing companies for the film as defendants, suing them for infringement of copyright.

The Judge had to decide the nature and extent of Ms Kogan’s contribution to the writing of the screenplay, whether that made the screenplay a ‘work of joint authorship’ under the Copyright, Designs and Patents Act 1988, and whether anything Ms Kogan said or did gave the production and financing companies a defence to her claim.

He found that Ms Kogan’s contributions to the text of the screenplay were limited to suggestions of technical musical language, with which she was undoubtedly more familiar than Mr Martin. These were incorporated into early drafts and some of them found their way into the final screenplay.

In an analysis that is relevant to how writing collaborations often work in practice, the Judge dealt with the question of who was the ‘ultimate arbiter’ of the content of the script, ie who had the final word as to what would go in and what would not. He decided that the fact that one contributor was the ultimate arbiter did not mean that there could not be joint authorship and that, although this was a relevant factor, it was not decisive. He found that Mr Martin was the ultimate arbiter of what went into the screenplay drafts.

The Judge concluded that ‘the textual and non-textual contributions made by Ms Kogan never rose above the level of providing useful jargon, along with helpful criticism and some minor plot suggestions’. Taken together they were insufficient to qualify Ms Kogan as a joint author of the screenplay, regardless of whether those contributions had been made in the course of a collaboration to create the screenplay. Mr Martin was the sole author.

In a subsequent judgment, the Judge decided that, although the costs claimed against Ms Kogan as the unsuccessful party ran to almost £300,000, she was only liable for a little over £75,000 of the costs because of the cost caps that apply in the Intellectual Property Enterprise Court, where the case was heard.

The judgment provides a very useful analysis of how the law of joint authorship applies to the creation of film scripts, which are often collaborative projects that go through many different versions with input from numerous writers. It records that Mr Martin agreed during the process of finalising the script to give 15% of his writing income to a Hollywood-based couple who reviewed the project with him.

Given the size of the part of the costs bill that Mr Martin was unable to recover from Ms Kogan, the case underlines the value of making clear and enforceable agreements with collaborators early in the production process.

(US) Kendrick Lamar and SZA sued over Black Panther song video

Rapper Kendrick Lamar and R’n’B singer SZA are being sued in the US courts over their video for the song All the Stars, which features on the soundtrack to the Marvel blockbuster Black Panther.

The claim has been brought by Lina Iris Viktor, a British-Liberian conceptual and performance artist who accuses the pair of attempting to recreate the ‘unique look and feel’ of her Constellations series in the video, without her permission.

She claims to have previously approached Lamar’s label through her lawyers, on the basis that she was willing to resolve the complaint in return for a public apology and a licence fee.

Her legal claim says: ‘The Infringing Video and the Movie promote(s) and profit(s) from) themes of black and female empowerment and the end of racist and gender exploitation, themes particularly topical in the current environment. Yet, in a bitter irony, the Defendants have ignored the wishes of the Artist, herself a Black African woman, whose life’s work is founded on an examination of the political and historical preconceptions of “blackness”, liberation and womanhood.’

It goes on to make a personal attack on the stance adopted by Kendrick Lamar: ‘In contrast to his message in the song’s lyrics that “I hate people that feel entitled,” and that “I want my credit if I am winning or I am losing,” Defendant Lamar, who is the public face of the Infringing Video and is quick to take credit for it in public statements, has sought to distance himself from any responsibility for the video as an infringement of Plaintiff’s rights.’

In a claim for what in English law would be the flagrancy of the infringement, she says her work was used following a refusal by her either to lend or create a piece for the video, saying that this use was ‘both an egregious violation of federal law and an affront to the artist, her livelihood, her legacy and to artists everywhere’.

Viktor commented on her Facebook page, thanking those who had supported her and saying that she was seeking ‘justice’.

Kendrick Lamar and SZA were yet to respond at press time.
The art of documentary

CLOCKWISE FROM TOP: THE TRUTH ABOUT ANOREXIA; LORD LUCAN: MY HUSBAND, THE TRUTH; TRUMP’S FIRST 100 DAYS
Greg Sanderson is MD of Brook Lapping, the company that produced Inside Obama’s White House, The Truth about Anorexia and Lord Lucan: My Husband, The Truth. His film credits include The English Surgeon and Out of the Ashes. He steps out of the edit suite to speak exclusively to zoom-in

What gets you out of bed in the morning?
When the Today programme annoys me sufficiently to force me to the gym.

Favourite restaurant?
Morito, Hackney Road. It’s a smaller version of Moro and closer to my flat.

What are you reading at the moment?
Fire and Fury by Michael Wolff. If even half of it is true, we’re in trouble.

Favourite TV shows?
How to Get Away with Murder and Have I Got News For You.

Guilty TV pleasure?
Designated Survivor. It’s so laughably bad it’s good.

Favourite place to have fun?
The Glory, Kingsland Road. It’s a bar with the most amazing mix of people. Drag queens, TV execs and just about everything in between.

First record ever bought?
Goodbye Yellow Brick Road by Elton John.

Most used expression?
‘I can see the editorial value in that but we can’t afford it.’ I must have said it three times today already.

Dream dinner party guests?
Oscar Wilde, Quentin Crisp, Graham Norton and Zac Efron.

What was your very first job?
I was a chorister at Portsmouth Cathedral.

Who gave you your first career break?
Malcolm Brinkworth at Touch Productions. I met him at a drunken house party.

What do you love most about your job?
I’m learning something new every five minutes.

What’s the difference between a good documentary and a great one?
A great documentary gets you a bit closer to understanding the human condition.

Which programme are you most proud of?
The English Surgeon. It was about the life of the neurosurgeon Henry Marsh. It was just incredibly moving to work on.

How did you get Lady Lucan to agree to be interviewed?
I read in a gossip magazine that she was writing a book, and we made the initial approach through her literary agent. We then met her in the Goring Hotel for tea and Baileys. Once she committed to the project, she turned out to be one of the easiest contributors I’ve ever worked with. The stuff about the S&M sex came out of nowhere.

What’s the biggest TV-related legal pickle you’ve got into, and how did you get out?
I did a Storyville for the BBC about jihadism. The counter-terrorism squad tried to impound our rushes. The BBC fought it in court. And won.

Most diva-ish moment you’ve witnessed working in TV?
When I worked in live TV we had a technical failure for the last three minutes of broadcast at Last Night of the Proms. You can imagine.

The trouble with TV today is...
There are too many people pitching for too little work.

What advice would you give to your 16-year-old self?
Don’t wear that oversized jacket.

Greatest achievement in life?
That’s easy. I once sang a duet of New York, New York with Joan Rivers at the Piccadilly Arts Club.

Last time you cried?
At New Year’s Eve when they showed Mo Farah winning the Olympics.

Describe yourself in five words.
Almost so handsome it hurts.

Any wise words?
Never send an angry email until the day after. Paul Hunwick
One can only guess at what goes on in the ‘secret bedroom’

Strategic planning, celebrity patronage, design magic, planetary alignment: it’s impossible to define the perfect recipe that makes a club the hottest place in town. Whatever it is, Laylow (always Laylow, never the Laylow) has it.

Nestled near Ernő Goldfinger’s Trellick Tower on Golborne Road and seconds away from Kate Moss’s favourite vintage shop, Rellik, it is the place everyone’s talking about. It opened with a soft launch last November. Rita Ora enjoyed it so much, she threw her MTV Awards after-party there the following week.

It is a soundproofed members club with a bar, a basement cinema that holds around 45, a restaurant open to the public (members are given priority bookings) and a private apartment. Its shareholders include Tom Hollander (actor), Charlotte Tilbury (make-up artist and entrepreneur), Eric Fellner (film producer) and Danny Huston (film director), each of whom put up between £10k and £400k. The driving force behind it is local charmer Taz Fustok. Some-
time artist, band manager and man about town, this handsome thirty-something has the rakish figure, mop of curls and rock’n’roll good looks posh girls find hard to resist. When setting the club up, he invited Bella Freud to design the uniforms, romance quickly blossomed, and Freud’s brief expanded. Smart move. The passion of young love and her sheer talent is clear throughout the design.

Most notable is Freud’s skilled and seductive use of colour: playful at times, downright rude at others. One can’t help wonder if, when ordering the velvet to cover the booths in the restaurant, she didn’t ask for vulva pink.

There’s a thick black-and-yellow-striped carpet for the first floor bar, which Freud describes as being simultaneously ‘lairy and calm’. The second-floor apartment has a black faux gorilla fur-covered sofa with a mirror set into the top, which tells its own story. One can only guess at what goes on in the ‘secret bedroom’.

Jonathan Krauss, of Sketch and Chiltern Firehouse fame, is a co-founder, so it’s no surprise the food is good. It is well presented and served by waiting staff who know that sweet spot between being friendly and giving great service. They’re wearing Bella Freud sweaters that retail for around £300, so there’s reason for them to be happy. Great news for vegetarians: they have their own menu. Roasted cauliflower, green harissa and almonds with a side of Jerusalem artichoke, anyone? They know their audience well. Weekend brunch is served until a civilised 4pm.

Laylow, much like new love, is exciting right now and everyone is talking about it. The trouble with that is it’s easy to fall out of style when the next big thing comes along. If Laylow can maintain the attention to detail it has started with and keep the magic alive with events, there’s every reason to think this west London watering hole is in for the long haul.
Since the Human Rights Act 1998 came into force, English law has developed a legal right to privacy. The courts can and will intervene to protect privacy rights where they are infringed without justification. This is commonly referred to as ‘misuse of private information’. Personal information is also protected by the Data Protection Act, so journalists and programme-makers need to be aware of, and comply with, its rules as it applies to them. In this section, we report on some recent privacy and data protection decisions of note.

‘Right to be forgotten’ reaches English court

Two unnamed men are suing Google in the first ‘right to be forgotten’ case to reach the English courts. They are seeking the removal of search results that refer to criminal offences of which they were convicted more than a decade ago. One was convicted of conspiracy to account falsely, the other of conspiracy to intercept communications.

Their sentences are now ‘spent’ under the Rehabilitation of Offenders Act, meaning they generally do not have to disclose the convictions, for example on job applications. They argue it is a breach of their rights for these results to be so easily accessible now their convictions are spent. The cases are expected to go to trial in late February and early March.

At a recent hearing the Judge was asked to impose reporting restrictions, the argument being that if details that allowed the two men to be identified were reported, the object of their ‘right to be forgotten’ claim would be defeated.

The Judge considered the nature of the claims, and identified them as another example of the right to privacy coming into conflict with the right to freedom of expression.

In all such cases, a balance must be struck between these competing rights. The Judge pointed out that the Rehabilitation of Offenders Act was passed in 1974, so a right to be forgotten had long been recognised in English law. The question now was how this should be dealt with in the internet age.

In considering whether reporting restrictions were appropriate, the Judge noted the real difficulties of ensuring open justice while protecting the rights that are the purpose of the men’s claims. The media had not been notified of the application for a reporting restriction, so the Judge adjourned the application for this to happen, while imposing a temporary restriction to ‘hold the ring’ until the matter was fully argued.

The ‘right to be forgotten’ came to prominence after the Google Spain case in 2014. In that case, the Court of Justice of the European Union ruled that Google must remove links to data that is inadequate, irrelevant or no longer relevant where the data protection rights of the person concerned are infringed. There have been concerns this could lead to censorship and removal of information that the public should legitimately have access to and is part of the public record – such as news reports of criminal convictions. Under the forthcoming General Data Protection Regulation (GDPR), which comes into force in May, it will become known as ‘the right to erasure’.

However, the right to be forgotten is far from absolute. An organisation may refuse a request on various grounds, including because it is exercising its right to freedom of expression. It is for this reason that people generally bring right to be forgotten claims against search engines, rather than publishers of content, as the content publisher is highly likely to be able to refuse the request on freedom of expression grounds.

As such, where individuals are successful, links to webpages are removed from search engine results for searches against their name, but the webpage itself is not removed. It would also still appear in search results for other terms – just not in a search for the person’s name. So, while it is important for broadcasters and producers to keep up to date on developments in relation to the right to be forgotten, and aware that links to their content could be removed from search engines as a result, this particular area of data protection law is of more direct concern to those operating search engines.

First blood to Appleby in Paradise Papers claim

A High Court judge has ruled that a claim by the law firm that was hacked to give access to the so-called ‘Paradise Papers’ will proceed in the court where it started, rejecting arguments by the defendants, The Guardian and the BBC, that it should be transferred to the specialist Media and Commu-
The decision means the public interest arguments relied on by the defendants to justify the disclosures will be considered in the ostensibly less media-friendly forum of the Business and Property Court.

Appleby is the parent company of an international group of law firms based in offshore territories including Bermuda, the Isle of Man, the Channel Islands and the British Virgin Islands. The group provides legal and other services to corporate and private clients.

It has sued the BBC and The Guardian for damages and a permanent injunction for breach of confidence. It alleges that the two publishers infringed the company’s legal rights when they used and published information contained in documents taken from a global computer network and electronic data storage system referred to as ‘the Appleby Server’. The firm also wants the publishers to hand over any documents that originated with it.

Appleby alleges that many of the documents on the Appleby Server contained information confidential to companies within the Appleby group and their clients, including information protected by legal privilege. The documents also contained information relating to the private affairs of the group’s clients and employees.

Following an intrusion onto the server, a hacker provided several million documents, covering the period from the 1950s to 2016, to a German newspaper, Süddeutsche Zeitung. The newspaper made the documents available to an American body called the International Consortium of Investigative Journalists, which created a database onto which it placed the documents, and this was made available to a large number of media organisations across the world, including the BBC and The Guardian.

Appleby’s claim is based on the fact that, when the defendants used and reproduced the contents of the documents, they did so without any grounds for suspecting that the database provided evidence of unlawful activity on the part of Appleby or its clients, and that in fact no evidence of unlawful activity has been uncovered.

While there has been an apparent media consensus that there was a public interest in covering the contents of the Paradise Papers in considerable detail, the nature of Appleby’s claim highlights the potential legal difficulties faced where journalism is based on leaked information. One traditional defence to a claim for breach of confidence is ‘iniquity’: legal wrongdoing, which justifies the revelation of information that would otherwise remain secret.

Appleby, however, claims there was no wrongdoing uncovered by the Paradise Papers, at least in strict legal terms. The debate that ultimately arose around the story was largely to do with the morality of what those who used Appleby’s services were doing when they avoided tax within the law.

The arguments about whether the case should be transferred to the Media and Communications List reflected the centrality of this issue. The BBC argued that the Court would have to consider issues potentially of wider importance for media law cases and journalism generally, including whether there needed to be grounds to suspect illegality for the publishers’ initial accessing of the documents to be lawful journalism, and whether unethical conduct or other wrongdoing short of illegality is sufficient to justify a journalist’s investigation and publication of confidential information.

While the Judge accepted that the court hearing the dispute would need to understand journalistic practices and consider whether what the defendants did in this case can be described as ‘responsible journalism’, she said the issue would need to be the subject of evidence which will be placed before the Court by the parties, and this did not justify the claim being moved to a specialist list.
In spite of the massive interest in, and discussion of, the material they published, the defendants look set to face some difficult questions regarding their decision to publish it. The laws of confidence and misuse of private information can provide a relatively easy route for claimants to get injunctions to stop the media publishing material. Where confidential or private material is published without consent, those whose confidence or privacy has been infringed can, after the event, seek damages and a permanent injunction among other things, as in this case. Whenever producers are in possession of confidential or private information without the consent of those who information it is, expert legal advice should be sought.

Cliff wins disclosure fight

The most recent decision in the ongoing litigation between Sir Cliff Richard and the BBC has seen a judge refuse an application by the broadcaster for further documents from the singer relating to his financial affairs. The disclosure in dispute consisted of information relating to money spent by Sir Cliff on solicitors and PR agents to deal with the consequences of the publicity given by the BBC to the raid on his home in 2014.

The star has a claim against the BBC for special damages, and has already disclosed some documents relating to some work undertaken by the solicitors and PR agents. The BBC argued that it needed more complete disclosure so that sample transactions could be selected that would enable the special damages issues to be properly tried. It said the material it wanted should be readily available in the solicitors’ files without disproportionate inconvenience or expense.

But the Judge decided that the disclosure sought by the BBC, of all the documents relating to all the transactions, with the exception of internal emails, was not practical or sensible.

There was enough information in the disclosure already given to allow the court to rule on questions of principle relating to the claims.

The trial of the singer’s claim is due to take place later in 2018.

Let it Shine contestant’s injunction claim rejected

Deaglan Arthurs, a contestant on the BBC talent show Let it Shine, has seen his claim for an injunction against The Sun to prevent reporting of his father’s terrorism and fraud convictions rejected by an appeal court in Northern Ireland.

Arthurs auditioned for Let it Shine in Belfast and was then selected to sing in front of the producers of the show at Media City London. He performed three songs and was asked by one of the producers whether there was anything in relation to his family that would result in publicity. He told the show that his uncle, Declan, had been murdered but did not mention his father’s convictions.

He was then picked for the televised audition, and the show recording his performance was broadcast on BBC1 on 7 January 2017. He got through to the next round of the competition after getting a good reaction from the audience and judges.

A week after the broadcast of the televised audition, The Sun published an ‘exclusive’ story under the headline: ‘BAD DAD – Dad of a wannabe star on Gary Barlow’s new talent show Let it Shine was an IRA terrorist who was jailed for 25 years.’

The article went on to say that Arthurs’ dad Brian, 51, was an ex-IRA brigade commander jailed for possessing explosives and that, although he was released in 2000 after five years under the terms of the Good Friday Agreement, in 2012 he was convicted of a £250,000 mortgage fraud and given a suspended jail term. It noted that in 2014 he was named as the chief perpetrator of a gang funding letter bombs by selling counterfeit cigarettes, and was then said to have ‘strong’ links to the New IRA.

Arthurs applied to a High Court judge for an interim injunction
against The Sun for misuse of private information and for an interim order pursuant to section 10 of the Data Protection Act 1998. His application was dismissed.

Arthurs appealed the dismissal to the Court of Appeal of Northern Ireland. The Court referred to the facts that informed the decision of the Judge below, including that: Arthurs was not a child in legal terms; he wished to be a performer and put himself in the public eye; he chose to refer to his uncle’s death without disclosing his father’s convictions, which were at least as relevant; his link to his father would have been well-known in the neighbourhood in which he lived; and the link to the father was disclosed in the Irish News newspaper circulating in Northern Ireland prior to publication by The Sun, albeit without setting out his convictions.

In light of those facts, the Court decided that the judge at first instance was fully entitled to conclude that Arthurs had no legitimate or reasonable expectation of privacy restraining a newspaper from linking him, after he appeared on television, with his father’s personal history. The father’s convictions were in the public domain, as was his relationship to Arthurs, who voluntarily entered the public domain. There was no need to consider any balancing exercise.

The convictions of Arthurs’ father were not (and never will be) ‘spent’ under the Rehabilitation of Offenders Act, ie there is no way in which, unlike more minor offences, they can effectively be ignored after a specified length of time. Where convictions are not spent, a court is very unlikely to decide that a claimant has a reasonable expectation of privacy in information about them.

The decision demonstrates the limits on the extent to which those who enter the public eye can control media interest in them and their families.

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broadcaster agrees – and producers should always check with their commissioning editor – what is normally agreed is that the programme-makers will arrange for a viewing of a fine cut of the programme(s), at a time when changes can still be made, and will agree to correct any factual inaccuracies. Occasionally, but exceptionally, producers can agree to remove other types of material e.g. if filming with the police authorities, material they reasonably deem would compromise undercover operations, or perhaps interfere with active legal proceedings. If in doubt, seek advice.

Occasionally organisations, eg the police or other authorities, may try to seek more extensive access to rushes and other material filmed by the production company. This should be resisted and indeed it is likely that broadcasters will insist upon it. There are established ways that organisations like the police and prosecutors can access footage by the media eg by using legislation such as PACE, or other laws which enable prosecutors to issue witness summonses to produce evidence. Where this is an issue, producers should seek legal advice.

Filming with particular types of organisations, such as the police or hospitals, often requires specific terms to be included in the access agreement. For example, for hospitals, key concerns are normally patient consents, privacy and safety matters.

When filming with police forces, key concerns tend to be about safety, fairness and accuracy – both in relation to the conduct of officers and suspects – and, as noted above, anything in the filming which could compromise ongoing investigations or interfere with active legal proceedings. Again, such concerns can normally be addressed in the access agreement.

In recent years data protection issues have tended to arise when negotiating access. Organisations granting access are often worried that they may be breaching data protection laws by allowing the media access to information which they have gathered and possess, one such example being CCTV footage. In most cases, such concerns can be allayed by explaining to them carefully why what is proposed is legitimate, but this requires a thorough understanding of the relevant laws and producers should seek expert advice in this regard.

Where it is important that the film crew’s conduct does not interfere with the work of those they are following – this is often the case when filming within hospitals and with the emergency services – it is useful to have a written protocol in place setting out clearly how the crew will work and interact with those they are accompanying. This can be approved in advance and incorporated into the access agreement.

The broadcaster may also require an exclusivity provision to ensure that the company or organisation to be featured won’t take part in a similar programme prior to transmission and for a reasonable period afterwards. For commercial organisations in particular, this can be seen as overly restrictive, but by negotiating certain carve-outs from the exclusivity requirement, for example for marketing or promotional activities, it is possible to achieve a contractual obligation everyone is happy with.

These are just a few of the issues that programme-makers need to consider when agreeing access to film with companies and other organisations. Abbas Media Law has many years’ experience in drafting and advising on such agreements in a very wide range of contexts. For further information or advice contact info@abbasmediaw.com. In addition, AML will be conducting a series of talks this year focusing on access in factual programmes. See back page.
A judge at Maidstone Magistrates’ Court has lifted an order preventing the identification of Freddie Lomas, a one-month-old child who died in 2016. The order was made in a case in which two defendants are accused of causing unnecessary suffering or injury to Freddie, which they deny.

Section 45 of the Youth Justice and Criminal Evidence Act 1999, the law under which the order was made, cannot be used to protect those who have died. The Judge realised his error when the order was challenged by Kent Messenger reporter Guy Bell.

Kent Messenger editor Denise Eaton said: ‘The Judge was very good-natured about it, even apologising to the reporter for the mistake.’

It is important for those reporting on court proceedings to be aware of the limits of the powers of the court, to avoid improper orders being made, and to ensure the media are allowed to report the case fully.

In 2015, section 45 orders replaced orders made under the Children and Young Persons Act 1933 section 39 for criminal cases involving children. Orders may be made granting lifelong anonymity to child victims and witnesses in criminal cases. Section 45, like section 39 in older cases, also allows defendants who are under 18 but tried in adult courts to be granted anonymity, but the restriction ends automatically when the defendant reaches the age of 18.

Where a child defendant is found guilty of a serious offence, the media will often apply to discharge the order. In such cases, the court will weigh up the interests in play. Some child offenders are named, for example in June last year the perpetrators of the ‘Spalding murders’ were named as Kim Edwards and her boyfriend Lucas Markham. They had murdered Kim’s mother and sister at their home in 2016. In that case, an important factor was that it was impossible to fully understand the case without understanding the relationship between the murderers and their victims. Generally child offenders are not named, in particular where there is a risk to the child and/or their rehabilitation.

**YouTube videos in breach of order are in contempt**

A man has been found guilty of contempt of court and given a six-month suspended sentence for anonymously putting videos on YouTube that a High Court judge had prohibited him from publishing.

The first claimant, Al-Ko Kober Ltd, was a UK company and part of the business Al-Ko VT, which is a leading brand in the towing and trailer industry; the second claimant was its marketing manager, Paul Jones.

The defendant, Balvinder Sambhi, claimed to have developed a product called the ‘Torquebar’, which would be a competitor product to stabiliser products manufactured by the first claimant.

Mr Sambhi made various videos that attacked the claimants and their products, and published them on his Torquebar YouTube channel.

The claimants responded by obtaining an interim injunction against Mr Sambhi in October 2017 to stop him from publishing (or continuing to publish) the videos on the grounds that their continued publication was a malicious falsehood and/or a breach of Mr Jones’ rights under the Data Protection Act 1998.

Within 24 hours of the injunction being made, Mr Sambhi began setting up anonymous YouTube accounts and publishing videos from his Torquebar YouTube channel in breach of the order.

He also handed out a leaflet at the Motorhome and Caravan Show 2017 containing statements the claimants said were prohibited by the order.

The claimants obtained information about the activities behind the anonymous YouTube accounts and publishing videos from his Torquebar YouTube channel in breach of the order. He also handed out a leaflet at the Motorhome and Caravan Show 2017 containing statements the claimants said were prohibited by the order.

The claimants obtained information about the activities behind the anonymous YouTube accounts and publishing videos from his Torquebar YouTube channel in breach of the order.
The Judge dealt first with the leaflet handed out at the exhibition. Although Mr Sambhi admitted being behind it, the Judge could not be sure that it contained statements that were to substantially similar effect as those prohibited by the order.

The case against Mr Sambhi for the publication of the YouTube videos was an entirely circumstantial one, since the accounts were anonymous and he had not admitted responsibility for them. Nevertheless, the Judge assessed the timing of the creation of the accounts, the details of their operation, and the nature of the videos uploaded to the accounts, which had all previously been available on Mr Sambhi’s Torquebar YouTube channel, and decided that the same individual was responsible for the uploading of the videos to the accounts and that he could be sure that that person was Mr Sambhi.

Ultimately, the weight of evidence for Mr Sambhi’s responsibility for the videos was so overwhelming that the Judge found he could be sure that Mr Sambhi had set up the accounts in question, and had published the videos on them in breach of the order. At a later hearing, he handed down a six-month sentence of imprisonment, which was suspended for 18 months.

There are two notable aspects to the Court’s decision. First, it demonstrates that the anonymity provided by the internet only goes so far, and that the legal process can be used to unmask those who try to disseminate material online anonymously, with serious consequences for them. Second, it is unusual, particularly in media law where litigants are often relatively sophisticated, for a person who has been made the subject of an injunction to breach the court’s order immediately. This decision shows that the courts will take these kind of breaches seriously, not only because they affect those who have obtained the order in the first place, but also because they threaten the rule of law and the wider function of the courts in society.

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their home for these purposes until they left it.

Channel 5 also made an analogy between showing the bailiffs executing the writ of possession and court reporting, relying on the ‘open justice’ principle. However, the Judge rejected this. While the channel could legitimately have broadcast the fact of the writ of possession or the fact of the eviction, this did not mean it was justified in broadcasting the inside of the couple’s home, or them in distress during the eviction as they were being taunted by their landlord.

Channel 5 had argued that the couple consented to being filmed and to that material being broadcast, and that the broadcast was in the public interest.

The Judge found the couple had not consented to being filmed, and were not in fact told what the filming was for, despite the show’s production ‘bible’ requiring them to do so. At one point a member of the film crew started to explain, but was stopped by the bailiff. As could be seen from the rushes, at various points both Mr Ali and Mrs Aslam objected to being filmed. When Mr Ali finally agreed to briefly answer some questions from the film crew, this was ‘the lesser of two evils’ in that otherwise the programme was likely not to include anything of his side of the story, in particular as the landlord had made serious allegations about them. Further, he had later telephoned the production company and made clear he objected to being on television.

As to the public interest, it was accepted that there was a public interest in the general subject matter of the programme: debt, rent arrears, and what happens when bailiffs execute writs of possession. Channel 5 argued that it was entitled to illustrate these matters with stories of real people in real situations, as this is the best way to engage viewers and stimulate debate. However, the Judge found that the use of the claimants’ private information went beyond what was justified for the purposes of the public interest. The focus of the programme was not on matters of public interest, but on the drama of the conflict between the couple and their landlord. The Judge noted that while the programme-makers had said the programme was intended to be impartial, it was clear from the rushes that there were points where one of the bailiffs encouraged conflict in order to ‘make good television’: for example at one point he encouraged the landlord to ‘give it some welly’.

The Judge awarded Mr Ali and Mrs Aslam £10,000 each in damages.

The ruling has implications not only for Can’t Pay? We’ll Take It Away!, but for all programmes using a similar method of filming officials (whether public or private) going about their business and the people they interact with. Those making programmes of this type may wish to review their procedures.

This is the second time in recent months that Can’t Pay? We’ll Take It Away! has come under scrutiny from a privacy perspective. As we reported in the Winter 2017 issue of zoom-in, Ofcom found that the programme had amounted to an unwarranted intrusion into privacy in its ‘Miss F’ ruling. Some of the same issues were discussed in this case – for example the fact that the bodycams worn by the bailiffs were provided by the production company, which also owned the copyright in all the footage.
ABOUT ABBAS MEDIA LAW

We are specialists on all aspects of UK law and regulation affecting the television, film, advertising and publishing industries. We advise before publication and broadcast, working with creatives to minimise legal and regulatory risk, and following publication and broadcast, defending content when it and its producers come under attack. We work with many of the country’s leading content producers.

Content Advice
Abbas Media Law boasts some of the most experienced content advisers in the country. We work on the most exciting and challenging factual programmes; news; films and dramas; and all kinds of entertainment and comedy programmes. Nigel Abbas is the primary author of Channel 4’s Producers’ Handbook, a comprehensive guide to best practice, regulation and the law as they apply to the making and broadcasting of programmes.

Business Affairs & Rights
We advise clients on all aspects of business affairs, chain of title and rights issues, in connection with the television, film, advertising and publishing industries. We advise on deal-making, draft and negotiate all types of agreements, and can answer all your day-to-day queries. See page 16.

Legal and Regulatory Threats, and Litigation
We regularly represent clients when legal and regulatory threats are made against programmes and other content, both before and after publication. We represent clients in most areas of litigation affecting the media, advising on strategy, tactics, drafting of pleadings and advocacy.

Training for producers
AML conducts training for those working in television production. We prepare and deliver bespoke training programmes for clients, or producers can avail themselves of AML’s regular training programme.

This year we are conducting a series of talks for producers on legal and compliance issues, the first of which will cover the many issues that can arise in access-based programmes.

For further information about the training AML offers, and to find out more about scheduled talks and masterclasses near you, email info@abbasmedialaw.com

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