

injunctions tend to be inconsistent with the freedom of expression principle contained in art.10 of the ECHR.

However, if the claimant is able to show that the defendant is intending to publish matter which is clearly untrue and that there is no arguable defence, an injunction may exceptionally be granted. Such an injunction was unusually awarded in 2003 to restrain the *Mail on Sunday* from publishing untrue allegations about the sexual conduct of the Prince of Wales. In exercising its inherent discretion as to whether to grant an interlocutory injunction the court will, as a result of relevant case law, take into account the following four principles:

- (1) where the defendant states that they intend to rely on a defence, an injunction will not be granted unless it can be shown that the defendant is acting in bad faith or that the defence is certain to fail;
- (2) the claimant should be able to show that the defendant intends to publish or further publish the defamatory or similar words;
- (3) an injunction will not be granted unless the claimant is able to show that the words to be published are clearly defamatory of him (this principle is repeated in the Human Rights Act 1998, s.12(3)); and
- (4) the claimant may be obliged to make an undertaking to meet the defendant's costs of complying with the injunction where it is found at trial that the injunction should not have been granted. A failure by the claimant to provide such an undertaking or a doubt about his ability to meet such costs may be detrimental to his application.

The unwillingness of the court to grant interim injunctions in defamation cases has led claimants to make their application for an injunction on the grounds of breach of confidence or breach of contract where an interim injunction may be granted even though the defendant has a defence which may succeed at trial.

Statement in open court

Where libel proceedings are brought and the defendant subsequently settles the action, it is common for a claimant to seek a statement in open court as part of the settlement agreement. This is where the defendant will formally admit in court that the allegations it made were untrue and apologise for them. For example, in March 2003 the *Daily Mail* carried an article which suggested that the actress Nicole Kidman had had an adulterous affair with the actor Jude Law, while he was married. The *Daily Mail* subsequently made a statement in open court apologising for the distress and embarrassment caused by its untrue allegations (*Kidman v Associated Newspapers* Unreported 2003). The purpose of the statement in open court is to give a formal record of the fact that the allegations are untrue, and to provide an opportunity for other media organisations to publicise such a statement so that the claimant obtains widespread coverage of the correction and apology.

MALICIOUS FALSEHOOD

A false statement will be actionable in defamation only where it leads to a lowering of the claimant in the estimation of right-thinking members of society. Statements may be made about the claimant which, whilst untrue, are not defamatory. In such cases it may be possible for the claimant to bring an action in malicious (or injurious) falsehood.

An example is provided by the case of *Grapelli v Derek Block (Holdings) Ltd* [1981] 2 All E.R. 272. The claimant, Stephane Grapelli, employed the defendants as his managing agents. The defendants arranged, without the claimant's authority, for the claimant to give concerts at various venues in England. When the concerts had to be cancelled, the defendants stated that the reason for the cancellation was that Mr Grapelli was seriously ill and that it would be doubtful if he would ever tour again. Such a statement was clearly damaging to Mr Grapelli's career but not defamatory as it is not damaging to reputation to say that someone is ill. The claimant's action in slander was accordingly dismissed but his alternative plea of malicious falsehood was successful.

A further reason for bringing an action in malicious falsehood, as opposed to defamation, is that legal aid has traditionally been available where the claimant is able to show that they have a good case on the merits. This has been less significant since the advent of "no win, no fee" agreements for claimants in defamation actions.

An action in malicious falsehood survives the death of either party, whereas the cause of action in defamation ceases with the claimant's (or the defendant's) death.

Definition

In order to succeed in an action in malicious falsehood the claimant must generally prove that the defendant has:

- (a) published about the claimant words which are false;
- (b) published those words maliciously; and
- (c) save in the special circumstances described below, thereby caused special damage which followed as the direct and natural result of the publication.

Malicious falsehood is therefore concerned with protecting the claimant's economic interests rather than his reputation.

Untrue statement about the claimant

In *Kaye v Robertson* [1991] F.S.R. 62, the claimant was a well-known actor and star of a television series called *'Allo 'Allo*. He had undergone very extensive surgery on his head after part of an advertisement hoarding had fallen through his car windscreen in a storm. The first defendant was the editor of the *Sunday Sport*, a tabloid renowned for far-fetched "scoops", and was responsible for journalists who interviewed and photographed the claimant in his hospital bed. The claimant sought an interlocutory

injunction to prevent publication, alleging inter alia malicious falsehood. It claimed that he had not consented to the interview and had anyway (to the defendants' knowledge) not been in a fit state to consent; shortly after the interview he had no recollection of the incident. As to the requirement that the words complained of be false, Glidewell L.J. said:

"I have no doubt that any jury which did not find that the clear implication from the words contained in the defendants' draft article was false would be making a totally unreasonable finding. Thus the test is satisfied in relation to this cause of action."

In *Vodafone Group Plc v Orange Personal Communications Services Ltd* [1997] E.M.L.R. 84, the defendant had run an advertising campaign stating, inter alia, that: "On average, Orange users save £20 per month". The comparison was being made with the telephone services of Vodafone and Cellnet. In determining that the words used meant that if Orange users had been on Vodafone or Cellnet they would have had to pay £20 more per month, Jacob J. in the Chancery Division stated that, for the purposes of malicious falsehood, the court had to decide the single natural and ordinary meaning of the words. In doing so the court can be guided by libel principles but should not consider innuendo. The courts have been reluctant to prevent fair competition by way of comparative advertising and did not allow Vodafone to succeed in its malicious falsehood claim.

As regards the extent to which the words complained of have to "about" the claimant, the case of *Marathon Murual Ltd v Waters* [2001] EWHC 1931 (QB) confirmed that there only has to be some reference, direct or indirect, in the words complained of to the claimant or to its business or other economic interest—there is no need for it to be proved that the claimant had been identified in the minds of recipients of the words.

Malice

Malice in the context of malicious falsehood means to act without just cause or excuse and with some indirect, dishonest or improper motive. It is for the claimant to prove malice.

The requirement of malice in the *Kaye* case was made out because there was no doubt from the evidence that it was apparent to the reporter from the *Sunday Sport* that Mr Kaye was in no condition to give any informed consent to an interview. Even if there had been any doubt as to this, the defendant could not have been in any such doubt after he read the affidavit sworn by Mr Kaye in the proceedings. Any subsequent publication would therefore inevitably have been malicious.

The definition of malice in this context was arguably broadened by *Joyce v Sengupta* [1993] 1 All E.R. 897. The *Today* newspaper published an article on its front page headed "ROYAL MAID STOLE LETTERS". The article was based on police suspicions and went on to describe how Linda Joyce had stolen the Princess Royal's intimate letters and handed them to a national newspaper. Instead of suing in defamation for which legal aid is unavailable (Legal Aid Act 1988, Sch.2, Pt II, para.1), the claimant brought a claim against the defendants claiming damages for malicious falsehood and obtained legal aid to pursue her claim. On appeal from a decision of the

High Court striking out her claim, the Court of Appeal reversed the decision and held that the publication was capable of being malicious in that:

"The defendants went ahead and published the police suspicions as though they were fact and did so without taking any steps to check or verify them. This showed a calculated, reckless indifference to the truth or falsity of the allegations. Malice is to be inferred from the grossness and falsity of the assertions and the cavalier way they were published." (per Sir Donald Nicholls V.C.)

Special damage

In most cases, the claimant must prove that they have suffered special or actual damage in order to succeed in an action in malicious falsehood. The *Vodafone* case (above) confirmed that in the context of malicious falsehood, special damage means actual pecuniary loss. Such special damage must have been incurred by the claimant as a direct result of the publication. Proof of special damage will not be required where:

- the words used are calculated to cause financial loss and are published in writing or other permanent form (e.g. broadcasts); or
- the words used are calculated to cause financial damage to the claimant in respect of any office, profession, calling, trade or business held or carried on by him at the time of the publication.

In *Stewart-Brady v Express Newspapers Plc* [1997] E.M.L.R. 192, the claimant unsuccessfully argued that he had suffered pecuniary loss as a result of an article in the *Sunday Express*. The article stated that the claimant, one of the Moors murderers who was a patient at Ashworth hospital, had assaulted a female visitor by grabbing her face and sticking his tongue down her throat. The claimant argued that the words would cause financial loss in two ways: (1) he received privileges such as visits and gifts, making and receiving telephone calls, sending and receiving letters or making purchases in the hospital shop which were likely to be withdrawn; and (2) he received a discretionary weekly allowance from the hospital which was likely to be withdrawn or reduced. The judge held that the first claim of financial loss could not "by any stretch of the imagination" amount to pecuniary loss for the purposes of malicious falsehood and the second claim was unfounded as there was no reason to believe that the allowance would be withdrawn.

Defamation and malicious falsehood compared

Where a company's products are criticised, it can be difficult to analyse whether the allegations are tantamount to a libel on those running the company. The issue is likely to arise when a defendant to a libel claim (brought to avoid the need to prove malice as part of the grounds of action) applies for a ruling disallowing the meaning pleaded by the claimant. This is what happened for instance in *ICN Photonics v Patterson* [2003] EWCA Civ 343. The claimant had brought libel proceedings over a letter written by the defendant criticising its Nlite laser product. The defendant made an interim

application to the judge, arguing that the letter was incapable of bearing any meaning defamatory of the claimant, and that, if anything, the claim was one of malicious falsehood. The judge disagreed, and the defendant appealed to the Court of Appeal.

The defendant was successful. The court ruled that, where the words complained of relate to a product, the issue on an application for a ruling as to their meaning was whether those words were capable of reflecting adversely on the manufacturer or his conduct of his business as opposed to being disparaging merely of the product. In the current action, the statement that the product was unsafe unless used with medical supervision was not capable of being defamatory of the manufacturer.

Despite the fact that the torts of defamation and malicious falsehood both enable the claimant to bring an action as a result of statements made about him, there are hence significant differences between the two causes of action. The table below highlights those differences.

Differences between Libel and Malicious Falsehood

	Libel	Malicious falsehood
Proof of damage required	✗	✓
Right to jury	✓	✗
Proof of loss of reputation required	✓	✗
Presumption of falsity of statement	✓	✗
Proof of malice required	✗	✓
Legal aid available	✗	✓
PCC action after death	✗	✓

PRESS COMPLAINTS COMMISSION (PCC)

Although providing no cause of action in law, the PCC receives complaints from members of the public about, amongst other matters, infringement of personal privacy. The Commission has published a Code of Practice (see Appendix E) which provides appropriate professional standards in respect of reporting in the printed media. The code covers all newspapers, whether daily or weekly and whether national or local. It also covers most magazines, but not those which are available only on subscription.

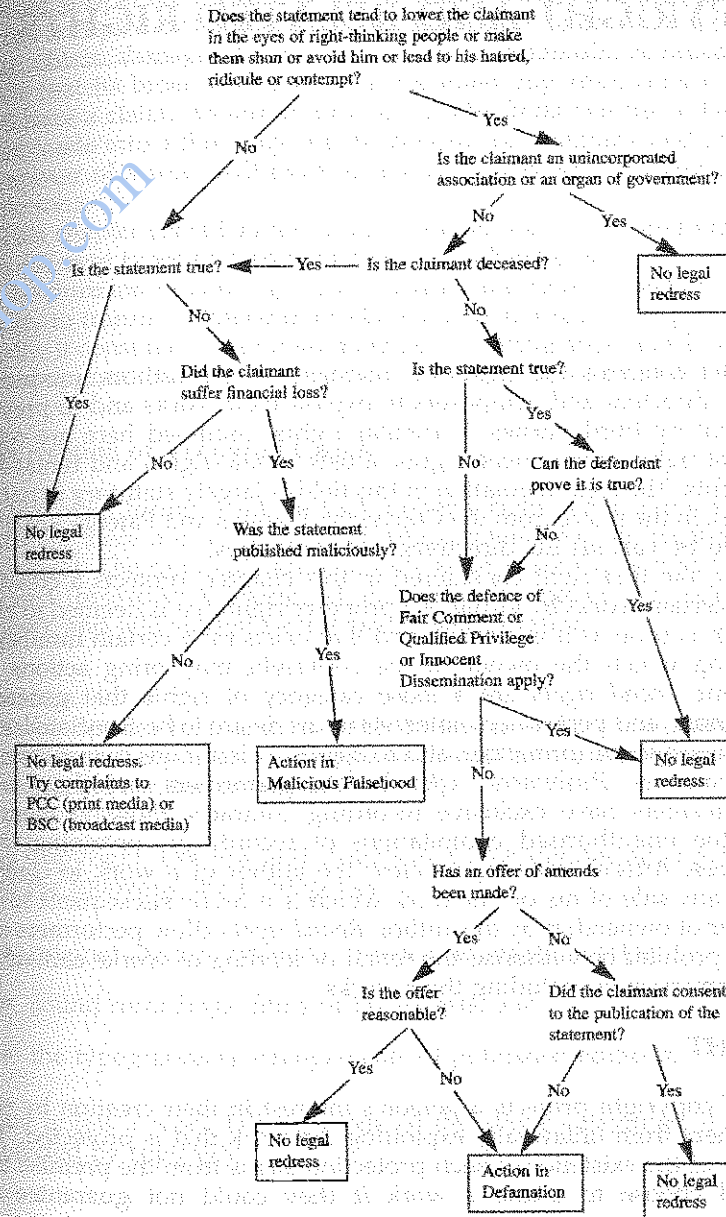
Complaints should be made in writing to the Commission (address listed in Appendix H) and should include:

- a cutting of the complete article;
- a summary of the complaint and how it has breached the code; and
- copies of any relevant correspondence.

The Commission will make an initial determination as to whether the complaint shows a breach of the code. If it does not show such a breach the Commission will write to the complainant informing him of that decision and will send a copy of the complainant's letter to the editor of the

newspaper concerned. If the complaint does reveal a potential breach, the Commission will send a copy of the complainant's letter to the relevant editor and investigate the matter further. The PCC will usually attempt to broker a resolution acceptable to both sides. If that proves impossible, the complaint will be adjudicated on by a panel from the Commission. If the complaint is upheld the newspaper concerned will be asked to publish the adjudication of the Commission with "due prominence".

Reputation



3. COPYRIGHT AND RELATED RIGHTS

This chapter concerns the rights of, amongst others, authors, producers, publishers, directors and composers to exploit their works and to prevent infringement by third parties. Particular rights discussed here are copyright, moral rights, performers' rights, artists' resale rights and rental and lending rights. The legal regulation in this field is largely statutory in nature and derives, in the main, from the Copyright, Designs and Patents Act 1988, as amended by various EU directives in recent years.

Copyright, the first right considered in this chapter, protects a creator's interest in certain works by virtue of a property right that is deemed to exist in the work as soon as it is created, and that exists for a certain number of years during which the owner of the copyright may bring actions for infringement. *Moral rights* are a loose category of rights that generally protect authors' and performers' interests in the desire to be associated with their creations and performances, and to object to alterations to those works and performances. *Performers' rights* benefit performers and those with whom performers have exclusive recording contracts allowing them to object to the unauthorised exploitations of recordings containing their performances. *Artists' resale rights* allow the author of a work to claim a royalty on any sale of his or her work which is a resale subsequent to the first transfer of ownership by the author. *Rental rights* allow performers and authors to prohibit or authorise the rental or lending of works containing their performances or including their works.

COPYRIGHT

The law of copyright protects a person's interest in their creation by preventing others from unlawfully exploiting the work that is protected. The desirability of the existence of such protection stems from the premise that few would choose to create a work if they could not guarantee for

themselves a monopoly in the commercial realisation of profits from their creation. The universal recognition of this need for protection has led most developed countries to create laws that protect this most important of intellectual property rights. Harmonisation of such laws throughout the EU has produced a substantially similar legal regime throughout Member States: some very similar; others, particularly France, less so.

It is generally true to say that the law of copyright prohibits any person from reproducing the copyright work of another without the owner's consent. Copyright is a property right and will be owned by a person in a similar way to the ownership of a house or a car. Thus a journalist whose article is copied by another journalist has a right of action in the courts and may obtain damages for the infringement. Similarly, a broadcaster that finds that its broadcast material is recorded and re-broadcast by another will have a claim. An author of a novel who finds that his or her work has been made into a film may sue the production company and others; and a composer of a song will have an action against an illicit cover version of their song.

This chapter considers the creation and existence of copyright as well as the different types of copyright that may subsist in various works. It looks at the duration of copyright and analyses the rules of ownership and the ability to transfer ownership or allow others to exploit the protected work. Lastly, it considers when a seeming act of infringement (such as copying a newspaper article) may not, in fact, be an infringement of copyright.

The creation of a copyright work

Unlike other forms of intellectual property right (such as trade marks and patents), there are no registration requirements for the legal existence of copyright. The right will automatically arise as soon as a copyright work is created (provided it is original and meets the qualifying conditions—see below), and will subsist for the prescribed duration.

EXAMPLE

Sasha decides to give up a career in law to write a novel about lawyers and their daily lives. Copyright will exist in the work the moment the words are written or typed.

The Copyright, Designs and Patents Act 1988 divides all copyright works into the following three categories:

- original literary, dramatic, musical or artistic works;
- sound recordings, films or broadcasts; and
- the typographical arrangements of published editions.

Thus unless a work falls into one of the above categories, it will not be protected by copyright.

Literary, dramatic, musical and artistic works

The fundamental requirement for the existence of copyright in literary, dramatic, musical and artistic works is that the work in question must be original. The requirement of originality does not import a concept of inventiveness. There are two aspects to originality. First, the work must not be copied from another work. Secondly, more than a minimal amount of skill, labour and judgement must have been expended in creating the work. Thus a mere list of information compiled from other information will be entitled to copyright protection (see *Independent Television Publications Ltd v Time Out Ltd* [1984] F.S.R. 64 where it was held that the *TV Times* programme listings were an original literary work) where some effort has been expended in arranging the material by the author. In practice, the threshold is rather low. The mere fact that one work is similar to another does not mean that the second is not protected by copyright, so long as there has been no copying—two composers may create a strikingly similar piece of music without ever hearing each other's work and copyright will exist in each. Literary, dramatic and musical works are defined in s.3(1).

A literary work is defined as:

"any work, other than a dramatic or musical work, which is written, spoken or sung, and accordingly includes—

- (a) a table or compilation other than a database,
- (b) a computer program,
- (c) preparatory design material for a computer program, and
- (d) a database."

"A database" is defined in s.3A as:

"a collection of independent works, data or other materials which—

- (a) are arranged in a systematic or methodical way, and
- (b) are individually accessible by electronic or other means."

The definition of originality is different for databases. A literary work consisting of a database is original if "by reason of the selection or arrangement of the contents of the database the database constitutes the author's own intellectual creation".

Common examples of literary works include books, articles and newspapers as well as interviews, speeches and song lyrics. Despite the word "literary", this type of copyright does not require the work to have any literary merit (and thus it applies to a table of numbers just as much as it does to a great work of English literature). The work must be more than minimal though and, therefore, names or slogans alone will probably not attract copyright protection.

A dramatic work "includes a work of dance or mime". Examples of dramatic works include plays written for the theatre, works of choreography, pantomimes, operas and screenplays. The expression "dramatic work" has to be given its natural and ordinary meaning (see *Norowzian v Arks Ltd (No.2)* [2000] F.S.R. 363 where it was held that the expression meant

a work of action, with or without words or music, which was capable of performance).

A musical work means "a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music", i.e. the musical composition itself, excluding any lyrics, which will attract literary copyright. Copyright in a musical work should not be confused with that in a sound recording (see below), and thus the music played in the sound recording, and the sound recording itself, are separate copyright works.

Copyright does not subsist in a literary, dramatic or musical work until the work is recorded in a material, or tangible, form (s.3(2)). Thus the law of copyright does not protect a mere idea but the form of expression of an idea (for the protection of ideas by the law of confidentiality see Ch.4). It is thus essential to record an idea for copyright protection in the expression of that idea to be gained. For example, a novel or speech will be recorded for the purposes of s.3(2) as soon as it is written down. An interview will be recorded where it is taped or videoed. In certain cases (particularly where ownership of copyright is disputed) it may be crucial to ascertain the date upon which the copyright in a work came into existence. Authors of novels and other works could send by post or email a sealed (in the case of a hard copy) and date stamped copy of their work to themselves or a solicitor or trusted friend as soon as it is completed, but this is not automatically deemed conclusive proof of the date of creation and, contrary to popular belief, this is not a necessary prerequisite to the existence of copyright.

EXAMPLE

In the example above, Sasha writes the novel and it is so successful that she is invited to receive an award. She rehearses what she is going to say in her acceptance speech in front of the mirror. She repeats the speech at the awards ceremony, which is televised. Copyright exists in her speech only at the ceremony because the speech was not recorded when rehearsed in front of the mirror.

An artistic work is defined in s.4(1) as:

- (a) a graphic work, photograph, sculpture or collage, irrespective of artistic quality,
- (b) a work of architecture being a building or a model for a building, or
- (c) a work of artistic craftsmanship."

As mentioned above, an artistic work must be original, but the statute does not specifically impose a requirement that it be recorded. Of course, it will be relatively rare for a work that falls within the above definition not to exist in a material form. It is possible for a work to gain protection as both a literary and artistic work (see, e.g. *Anacon Corp Ltd v Environmental Research Technology Ltd* [1994] F.S.R. 659, a case relating to circuit diagrams).

Sound recordings, films and broadcasts

Such works are often called *derivative works* because they consist of (or derive from) other copyright works. The works upon which derivative