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**Article:**

Horton, G. (2020) Celebrity privacy and celebrity journalism: has anything changed since the Leveson inquiry? *Communications Law: Journal of Computer, Media and Telecommunications Law*, 25 (1). pp. 10-22. ISSN 1746-7616

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Celebrity Privacy and Celebrity Journalism: Has anything changed since the  
Leveson Inquiry?

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## **Introduction**

The conclusion of the Leveson Inquiry has been well documented in academic literature and news stories. Revelations that illegal and unethical practices had been taking place at the *News of the World*, in particular phone hacking, led to its closure. Behaviour from the Rupert Murdoch owned publication was deplored by Lord Justice Leveson and members of the public. There was further criticism surrounding how people's privacy had been invaded, with private individuals and celebrities alike coming forward to complain about certain invasions. Hugh Grant, the Dowlers and Kate and Gerry McCann all featured as case studies within the Leveson Inquiry Report.<sup>1</sup> Furthermore, other celebrities such as actress Sienna Miller, author J.K. Rowling and actor Steve Coogan also came forward to testify at the Inquiry, retelling stories of press invasion.<sup>2</sup> There were also criticisms surrounding the links between the government and the press, in particular the relationship between Prime Minister at the time David Cameron and Rebekah Brooks, the chief executive of News International.<sup>3</sup> Such a relationship was 'seen as indicative of a culture of press-politician mutual interest in which media executives and party leaders work[ed] together to "push the same agenda"'.<sup>4</sup>

While such a relationship brings into question the independence of the press from government, this is a question that falls outside the remit of this paper. The focus of this paper is to examine whether or not the treatment of celebrities at the hands of the press has changed following the conclusion of the Leveson Inquiry or whether celebrities are still finding that their privacy is being invaded. There are numerous debates about the definition of celebrity from various academics.<sup>5</sup> For example, it has been questioned if politicians can be considered a type of celebrity today as their private lives are seen to be of much more interest than they have been in the past. The perfect example that displays this concerns the intense scrutiny that surrounded Prime Minister Boris Johnson after it was reported in *The Guardian* that the police had been called to his house following a phone call from neighbours who had heard Johnson and his girlfriend Carrie Symonds rowing.<sup>6</sup> Nonetheless, this paper will only consider celebrities that Rojek has described as ascribed and achieved.<sup>7</sup> Ascribed celebrities are those who are born into fame, for example, members of the royal family.<sup>8</sup> Achieved celebrities are those who are famous because of their talents, such as, but not limited to, sporting stars, actors/actresses, and musicians.<sup>9</sup> Rojek does offer another category of celebrity: the attributed celebrity. Attributed celebrities are those who the press suddenly have an interest in because they have found themselves the centre of attention.<sup>10</sup> Rojek cites the example of Mandy Allwood,

a woman whose name might not carry notoriety today, but she was famous in the news in the late 1990s after she gave birth to and tragically lost octuplets.<sup>11</sup> She was only famous due to press speculation. These celebrities will not be considered within this paper as, more often than not, their fame is fleeting. Instead, the press have shown a considerable interest in maintaining coverage of the royal family and other achieved celebrities. The three examples that will be used predominately within this paper involve celebrities who fall into these categories: one being a rugby player, one a cricketer, and the other royalty. The interest in these figures has been existent for many years, but only in recent decades has it heightened considerably.

Competition within the journalism industry is nothing new. It has been around for decades, showing prominence in the 1970s and 1980s and then continuing to the early 2000s.<sup>12</sup> Newspapers have to compete in order to sell copies and to do this there have been instances in which they have focused on stories that will evoke emotions from the public and encourage them to pick up a copy of their publication.<sup>13</sup> Whether it be anger or fear, the stories have to be engaging in order to beat competition.<sup>14</sup>

This competition has only continued to grow in recent years with the rise in more news outlets coupled alongside 24-hour TV news and the increase of online and mobile news platforms. This has led to news being published at quicker rates than ever before.<sup>15</sup> As Fenton has noted, this has led to the newspaper industry facing numerous challenges in an attempt to stay afloat and compete with numerous other news sources that exist.<sup>16</sup> One way in which they have done this is through diversification. As Gibbons acknowledged, many newspapers have online presences that are more successful than their print counterpart.<sup>17</sup> Because these stories can be published instantly, the pressure on journalists to produce original content becomes even more intense, both online and in print.<sup>18</sup>

In order to remain successful, the journalism industry has turned to sensationalistic news as this type of news produces stories that can attract readers.<sup>19</sup> With news being so instant and easy to publish, there can be competition between outlets to get the big scoop – to pick up the story that will sell the most copies and bring in the most readers. In order to do this, there can be issues as journalists are put under pressure to avoid recycling old material. They may have to push boundaries to do this, putting a strain on ethical reporting to gain an original story and attract readers.<sup>20</sup> It is this fact that can lead to publications wanting to know more intimate details about a celebrity in order to gain a big scoop and draw attention to themselves, urging people to pick up their publication instead of rivals. While the theory behind this idea seems to be logical, recent examples of this happening have shown a push back from certain members of the public who have deplored the behaviour of the press. Furthermore, such behaviour also seems to indicate that the celebrity-focused press have not changed since the Leveson Inquiry. Reasons why this is the case shall be explored, alongside discussion on whether or not such stories reflect case law involving invasion of privacy.

## Recent Examples

While there have been celebrities, such as Coleen Rooney, Tamzin Outhwaite and Jemima Goldsmith, who have come forward and used *Twitter* to argue that the press have invaded their privacy, there are certain celebrities whose response to the press reporting on them has garnered much more attention. Three complaints that happened in quick succession of each other concerned the rugby player Gareth Thomas, cricketer Ben Stokes, and the Duke and Duchess of Sussex. These three cases, alongside other complaints, seem to indicate that the press are still invading celebrities' privacy.

Firstly, the case involving Gareth Thomas concerned the rugby player being forced to disclose that he had been given a positive HIV diagnosis after a tabloid newspaper threatened to go public with the information. Thomas later declared that he would never have come forward if the tabloid had not threatened to publish the story.<sup>21</sup> He also revealed that a journalist spoke to his parents about his diagnosis before he had the chance to tell them himself.<sup>22</sup> Thomas has stated that he has no intention of taking legal action as he believes that the tabloid would simply 'create their own law' to justify the way they acted.<sup>23</sup>

The second example revolves around the cricketer Ben Stokes. Stokes condemned a front-page story that had been published in the *Sun* surrounding tragic family circumstances that had taken place 31 years ago, prior to his birth. The story concerned intimate details surrounding his mother's private life, but was clearly published due to the familial link between herself and Stokes, despite the story having taken place before his birth. While the *Sun* might have imagined that such a story would be considered 'a big scoop', the response from some members of the public was open hostility. The hashtag *DontBuyTheSun* began trending on *Twitter* and Paul Connew, the former deputy editor of the *News of the World* even commented that the story had not worked in the *Sun's* favour: 'The Sun have taken a risk here. Look at social media, there's a backlash, there are calls to boycott the Sun...it may turn out to be a one-day circulation booster that actually loses more circulation in the days and weeks to come'.<sup>24</sup> Stokes himself hit out at the *Sun* on *Twitter*, issuing a statement claiming that the article was 'the lowest form of journalism, focussed only on chasing sales with absolutely no regard for the devastation caused to lives as a consequence'.<sup>25</sup> Stokes has since confirmed he intends to take legal action, citing misuse of private information for the publication of the story.<sup>26</sup> The *Sun* refused to comment on the case.<sup>27</sup>

The final example involves the Duke and Duchess of Sussex. The Duchess of Sussex found herself the centre of attention when the *Mail on Sunday* published letters that she had written and sent to her father. In a statement on their website, Prince Harry the Duke of Sussex wrote an impassioned response, claiming that the press had 'vilified' his wife and that the legal action against the *Mail on Sunday* 'hinges on one incident in a long and disturbing pattern of behaviour by British tabloid media'.<sup>28</sup> There were also claims that the letter had been altered.<sup>29</sup> The Duchess of Sussex intends to take legal action, claiming that the *Mail on Sunday's* article is a misuse of private information, infringement of

copyright and breach of the Data Protection Act 2018.<sup>30</sup> The *Mail on Sunday* has stated that they defend publication of the letter and deny altering it in any way.<sup>31</sup> While there was sympathy from other celebrities and members of the public for the royal couple,<sup>32</sup> journalists, such as Piers Morgan, have taken the opposing view, seeing their actions as an ‘attempt to bully the press into fawning sycophancy’.<sup>33</sup>

These three instances highlight the tension between celebrities and the press. While the celebrities in question clearly believe that their right to privacy has been invaded, the press would be more inclined to argue that they had a right to freedom of expression to publish the information. The right to freedom of speech is protected through ethical codes of conduct and law, just as the right to privacy is. Therefore, it is necessary to consider how both these rights are balanced before questioning if the individuals in the aforementioned instances had their privacy invaded.

### **Freedom of Expression and the Right to Privacy**

Protection of an individual’s privacy can be found not only through law, but also through ethical codes of conduct that journalists must abide by. In the UK, there are two key bodies of importance when discussing self-regulation of the printed press: IMPRESS and the Independent Press Standards Organisation (IPSO). Prior to the Leveson Inquiry, the Press Complaints Commission (PCC) was the press regulator. However, Lord Justice Leveson stated that it had failed in its work and had not acted as an effective regulator. It was subsequently closed down and in its place IPSO was established. However, IPSO has not been recognised as an approved press regulator by the Press Recognition Panel (PRP). The PRP, established by Royal Charter, has the main job of ensuring that any organisation that regulates the press and wants official recognition as a press regulator is properly funded, able to protect the public, and is independent.<sup>34</sup> There is a list of 29 criteria that each regulator must meet. IPSO does not meet all 29.<sup>35</sup> In response to information for the PRP’s 2019 report on recognition, IPSO stated the following: ‘we have not sought, nor are we seeking, any recognition or assessment by the Press Recognition Panel of our work’.<sup>36</sup> IMPRESS meets the criteria in question, yet many of the largely circulated newspapers and magazines are not signed up to IMPRESS. For example, the *Sun*, *Daily Mail*, *Daily Mirror* and *Daily Express* are all signed up to IPSO. While there is no legal requirement to be recognised as an official regulator by the PRP, Lord Justice Leveson had argued that there should be some incentives towards joining, such as protection from legal costs in cases involving defamation, privacy and harassment claims.<sup>37</sup> Under proposals for section 40 of the Crime and Courts Act 2013, publishers who did not belong to a recognised regulator might have found themselves forced to pay the other side’s costs, even if they won the case. However, section 40 never materialised. In March 2018, the government announced that they intended to scrap Leveson 2, which included section 40. Leveson 2 would also have examined relationships between the media and the police, but the then culture secretary Matt Hancock stated that there had been change and that Leveson 2 was no longer required. In particular, Hancock stated: ‘It’s clear that we’ve seen significant progress, from publications, from the police

and from the new regulator. The world has changed since the Leveson inquiry was established in 2011. Since then we have seen seismic changes to the media landscape [reference to declining newspaper circulation]'.<sup>38</sup>

Without section 40, it is doubted that some publications would feel a compelling need to join IMPRESS. Even when section 40 was on the table, the *Sun* editor Tony Gallagher declared that it was simply an attempt to 'blackmail' the press to join IMPRESS.<sup>39</sup> The reluctance to join IMPRESS stems from the fact that it has links, regardless of how tenuous, to government. There is a firm belief that the press should be free and independent, staying away from politicians.<sup>40</sup> Particularly since the Leveson Inquiry when the relationship between Brooks and Cameron was called into question, it can perhaps be acknowledged why the press feel the need to be seen as more independent from government than ever before.

While the differences between IPSO and IMPRESS are clear, there are some similarities. For example, both have codes of conduct that state that the right to privacy has to be considered. IPSO's Editors' Code of Practice protects privacy under clause 2 and clause 7 protects it under IMPRESS' Standards Code. Both codes accept that this right can be over-ridden if publication of the private information is in the public interest. Furthermore, IPSO asks the question of whether or not there was a reasonable expectation of privacy, alongside asking if the information in question was, or is about to be, in the public domain. For the purpose of this paper, IPSO shall be taken into consideration as the newspapers in the recent examples are under their regulation. Alongside the right to privacy, IPSO acknowledges that there is also a right to freedom of expression, stating: 'It [the code] should be interpreted neither so narrowly as to compromise its commitment to respect the rights of the individual, nor so broadly that it infringes the fundamental right to freedom of expression – such as to inform, to be partisan, to challenge, shock, be satirical and to entertain – or prevents publication in the public interest'.<sup>41</sup> When judging instances that come before them, IPSO does this on a case-by-case basis, but it is apparent that both of these rights need to be balanced.

Furthermore, there are also legal implications if it is discovered that a publication has breached someone's right to privacy. While there is no explicit tort of privacy,<sup>42</sup> other areas of law have been developed to allow for consideration of Article 8 of the European Convention on Human Rights (ECHR). Article 8(1) guarantees a right to privacy, but such a right can be limited in certain scenarios, as explained by Article 8(2). Just as the right to privacy is protected under the ECHR, so is the right to freedom of expression. This falls under Article 10(1) ECHR and it can also be limited as per Article 10(2). Both Article 8 ECHR and Article 10 ECHR have to be balanced with each other. Usually what the press wish to publish, a celebrity wishes to keep private. When this happens, both rights are given equal weighting. Lord Steyn made this clear in the case of *Re S* when he stated: 'First, neither article has *as such* precedence over the other'.<sup>43</sup> To balance these two rights, there are two questions that have to be taken into consideration. The first question asks whether or not there was a reasonable expectation of privacy. If so, was it in the public interest for this

information to be disseminated? However, the ways in which the courts, and IPSO, consider these two items are different.

With regards to the reasonable expectation of privacy test, the courts have long advocated that circumstances can dictate when one has a reasonable expectation of privacy. Lord Hoffmann noted in the case of *Campbell v MGN Ltd* that 'the famous and even the not so famous who go out in public must accept that they may be photographed without their consent, just as they may be observed by others without their consent'.<sup>44</sup> Numerous factors are taken into account when deciding whether or not one has a reasonable expectation of privacy. These 'include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publishers'.<sup>45</sup> For example, certain types of information might come with a reasonable expectation of privacy, such as revelations of extra-marital affairs.<sup>46</sup> While we might accept that certain 'aspects of our personal life [are] gossiped about among acquaintances...but publication in the media would breach the expectation of privacy'.<sup>47</sup>

However, when it comes to being photographed simply walking down a street and not engaging in activities that could be considered private,<sup>48</sup> the judiciary are loathe to offer protection.<sup>49</sup> Furthermore, they also have to take into consideration section 12(4) of the Human Rights Act 1998, which states that they have to consider whether the material is in the public domain already, or is about to become available to the public. However, it should be recognised that this is not a decisive factor. In the case of *PJS v News Group Newspapers Ltd*<sup>50</sup> it was held that, even though information concerning a 'threesome' involving a celebrity was published in Scotland and other jurisdictions, the information should be kept private in England to protect the people involved and to prevent a media frenzy. Ultimately, each case is taken on its own merits, but these are simply some guidelines over what the courts will usually protect and what they might not protect.

Alongside the reasonable expectation of privacy test being considered in case law, IPSO also has to take this into consideration. Clause 2ii of the Editors' Code of Practice states that editors have to justify intrusion into individuals' private lives without consent. They also have to take into consideration the extent to which the information is already, or is about to be, in the public domain. Furthermore, clause 2iii goes on to state that: 'it is unacceptable to photograph individuals, without their consent, in public or private places where there is a reasonable expectation of privacy'.<sup>51</sup> Like the courts, IPSO also takes these issues into consideration on a case-by-case basis. They ask a number of questions as laid down in the Editors' Codebook when it comes to taking photographs of someone.<sup>52</sup> For example, did the picture show anything that was private? Where was the picture taken: a private place or in public? Was the picture in the public interest to be published?<sup>53</sup> Again, IPSO judges on a case-by-case basis and they have recognised how difficult this can be: 'Perhaps the most difficult decision is

whether a person in a public place has a reasonable expectation of privacy. This is a particular problem when the pictures involve celebrities, who develop their careers through exposure in the media'.<sup>54</sup>

Once the reasonable expectation of privacy test has been considered, the public interest test is then discussed. Both the courts and IPSO state that the right to privacy can be limited if there is a public interest in the information being published. This can become problematic as there is no one-size-fits all model of what will be in the public interest. Decisions of what is in the public interest are taken on a case-by-case basis.<sup>55</sup> Previously, the courts have held that there is a public interest in correcting false information<sup>56</sup> alongside there being a public interest if someone has acted in a certain manner that is contradictory to the way in which they are presented.<sup>57</sup> In certain circumstances, there has been a public interest in revealing private information about someone if they are considered a role model, but this reason has been highly debated and contested by the courts.<sup>58</sup> Ultimately, however, when it comes to the public interest it is necessary to recognise that it is different to information that interests the public.<sup>59</sup>

IPSO has also recognised that a public interest can exist in numerous circumstances. They too agree that there should be a public interest in setting the record straight if someone has acted hypocritically to the image they have projected.<sup>60</sup> However, where the issue becomes slightly hazy is the blurring between what is considered in the public interest to IPSO and what is considered in the public interest by the courts. This is due to two contrasting decisions from the respected bodies. In an adjudication from IPSO called *A man v Daily Star Sunday*,<sup>61</sup> it was held that there was a public interest in revealing news that a woman had been cheated on by the claimant, who was well known to the public. While the courts have often held that kiss-and-tell stories are rarely in the public interest,<sup>62</sup> this adjudication goes against that grain.

IPSO considered the vague phrase 'there is a public interest in freedom of expression itself' which features in the Editors' Code of Practice. Based on this statement, it was held that the woman was able to tell her story. It was her right to freedom of expression. Publication of text messages between the two were said to be an invasion of privacy and an apology of the same size as the strapline was required to be published on the front page. However, the information that an affair had taken place was not a breach of privacy. As noted in the adjudication:

In the second article, the newspaper repeated the woman's claim that she had had a relationship with the complainant and that he had been unfaithful to his partner. While this complainant had, in advance, notified the newspaper that he did not consent to publication, this article had not included any details about the nature of the alleged relationship and had not reproduced the complainant's text messages. In all the circumstances, the reference to the woman's claim did not intrude into the private life of the complainant in breach of Clause 2.<sup>63</sup>



The fact that the woman had been permitted to tell her story was her freedom of expression and clearly there was a public interest, according to IPSO, in her being able to tell it. Whether or not this decision is in the public interest to everyone is subjective, but the courts might not agree with it following the case of *PJS v News Group Newspapers Ltd*.<sup>64</sup> As has been mentioned, this case involved a famous celebrity who had gone to the court and had been granted an injunction to prevent news from being published concerning a sexual encounter that had taken place in 2011 involving himself, AB and CD. In this case, Lord Mance stated that: 'It may be that the mere reporting of sexual encounters of someone like the appellant, however well known to the public, with a view to criticising them does not even fall within the concept of freedom of expression under article 10 at all'.<sup>65</sup> It was held that there was no public interest in the publication of these details.

Clearly, these two decisions are contradictory. With the courts taking a more conservative view towards protecting privacy, IPSO have gone the opposite way, more willing to state that such kiss-and-tell stories are in the public interest and reveal people's identities. Such an approach has attracted criticism, particularly when contrasted with IMPRESS's clause relating to the public interest. IMPRESS's Standards Code states the following: 'A public interest means that the public has a legitimate stake in a story because of the contribution it makes to a matter of importance to society'.<sup>66</sup> As can be noted by Carney, this is a much stronger requirement compared to IPSO's definition:

Given that the public interest clause in the Editors' Code recognises that freedom of expression is a public interest itself, the provisions can be read collectively to conclude that entertainment can be used to trump 'individual rights.' It might be claimed that this is an overly pessimistic or cynical interpretation of these provisions, but it does seem to provide weaker protection for 'individual rights' than that demanded by the Standards code...<sup>67</sup>

There is no surprise that tabloids would much rather publish such stories involving extra-marital affairs and other scandals. Many newspapers rely on being able to publish such stories to be able to sell; something that the courts have recognised. The courts have stated that celebrity stories can be vital towards keeping publications afloat as these stories can often be what draw readers in.<sup>68</sup> To an extent, newspapers in particular often see themselves as being there to report on moral issues. The courts have also noted that people will have different views on various matters that might include controversy. Nicol J stated in the case of *Ferdinand v MGN Ltd* that '...in a plural society there will be a range of views as to what matters or is of significance in particular in terms of a person's suitability for a high profile position'.<sup>69</sup> Yet, according to Wragg, the idea that there can be a public interest based on someone acting immoral or hypocritical suggests that there is a freedom of expression in criticising people.<sup>70</sup> However, Wragg states that there are issues with the doctrine of a public interest in criticising individuals, namely that it 'is premised on the idea that standards of morality are a public issue and therefore individuals who act immorally are accountable to the general public. Unfortunately, this encompasses much human

behaviour. Thus it sets a low threshold for what counts as a public issue matter'.<sup>71</sup>

Furthering this point, there is also the issue that morals are subjective. For example, take into consideration extra-marital affairs. A YouGov survey in 2015 stated that one in five adults have admitted to having an affair.<sup>72</sup> While having an extra-marital affair might be considered immoral and wrong to many people, clearly it is not uncommon. For celebrities who hold no position of power, there is a lack of public interest in exposing them simply to criticise them. Take footballers into account. Extra-marital affairs involving footballers are not uncommon, but *The Secret Footballer* – an anonymous professional footballer – noted the following after revelations that a footballer had gained an injunction to prevent news of an affair coming to light:

So, here we are, another week and another player falls foul of a kiss-and-tell story. “Thank goodness for the super injunction,” says Player X. But do we even care? Do you get to the end of a tabloid story along those lines and think: “I really enjoyed reading that”? Probably not, I’d guess.<sup>73</sup>

Certainly, judging those who hold no real position of power can be seen controversial. Furthermore, there is also the argument to be made of whether or not anyone truly cares about holding people to a certain moral standard. Journalists clearly see it as being important and the conflict between themselves and the judiciary is clear to see when it comes to reporting on celebrities’ private lives. This was certainly the case following the conclusion of the *PJS* case.<sup>74</sup>

In particular, the *Sun* was vocal about the court’s decision to grant privacy to the celebrity couple involved. There were a range of issues surrounding this case for journalists, namely that the information could be published elsewhere in other jurisdictions and it was common knowledge on social media. Furthermore, there was also the fact that the *Sun* felt as though there was a public interest to reveal the information to correct the image of a committed couple that *PJS* was involved in presenting. In an exert written by Mike Hamilton, the following is quoted from one of the individuals involved in the sexual encounter:

It seems the whole Western world is allowed to know – apart from England and Wales. We helped to give the world modern democracy. But now we are a laughing stock as we have the least freedom of speech...This is utter madness.<sup>75</sup>

Hamilton also goes on to state: ‘Yet the bizzare ruling means that despite the extra-marital affair, the judges decide they were a “committed” married couple’.<sup>76</sup> Tension between the judiciary and journalists is evident in this case. It would have been interesting to see, if the story had been published, how IPSO would have adjudicated on it based on their contradictory decisions to the courts. The balancing of the right to privacy and freedom of expression has been laid out within this section, henceforth it is only appropriate now to consider it in relation to the recent examples and consider if there has been an invasion of privacy.

## Examining Recent Examples

The incident involving rugby player Gareth Thomas is one that is quite straightforward when taken into consideration. With regards as to whether or not he had a reasonable expectation of privacy, the answer has to be a definite yes. As per the case of *Campbell v MGN Ltd*<sup>77</sup> a reasonable expectation of privacy can exist should the information be inherently private.<sup>78</sup> This is particularly so when medical records are concerned.<sup>79</sup> Antoniou has noted that there is something that sets this case apart as being particularly cruel, and this is the fact that Thomas's right to tell his parents had been taken away from him.<sup>80</sup> Clearly, Thomas had a reasonable expectation of privacy that the information should have been kept private. The IPSO Editors' Codebook even states that 'private health details of individuals, including public figures, are generally protected under the Code unless there is some public interest in revealing them'.<sup>81</sup> It would be hard to argue that there had been a public interest in revealing this information. Thomas might be a public figure, but this should not diminish his privacy in this situation. He had not lied to the press, nor had he acted in a manner that might cause a public interest in his behaviour.

The situation concerning Ben Stokes becomes slightly more intriguing when the response from the *Sun* is taken into consideration. As has been established, the story surrounding Stokes' mother took place a little over 30 years ago. It was not something new, nor had Stokes himself personally been involved. The story had been front-page news in New Zealand when it occurred. It had already been in the public domain and, as discussed, this is a factor that has to be taken into consideration. However, simply because something is in the public domain does not mean that it becomes 'fair game' in the eye of the law.<sup>82</sup> This was established in the case of *PJS*.<sup>83</sup> However, clause 2ii of IPSO's Editors' Code of Practice states the following: 'In considering an individual's reasonable expectation of privacy, account will be taken of the complainant's own public disclosures of information and the extent to which the material complained about is already in the public domain or will become so'.<sup>84</sup> The Editors' Codebook offers some further guidance about this clause:

In 2018 Clause 2 was revised and 2(ii) now requires the regulator to consider the extent to which the material complained about is already in the public domain or will become so. The revised clause is based on the existing wording of Clause 3 of the Public Interest section of the Code and is intended in part to address the challenge of effectively regulating global digital publications which are owned and domiciled in the UK but also have editorial operations in other jurisdictions producing content which can be viewed in the UK.

The amendment is intended to help the public by making clear that a complaint under Clause 2 may not succeed if the committee believes that information has been (or inevitably will be) so widely disseminated that it can no longer be considered private.<sup>85</sup>

As the *Sun* has argued, the information in question was in the public domain. A spokesperson for the *Sun* stated: 'The Sun has the utmost sympathy for Ben Stokes and his mother but it is only right to point out the story was told with the co-operation of a family member who supplied details, provided photographs and posed for pictures. The tragedy is also a matter of public record and was the subject of extensive front-page publicity in New Zealand at the time'.<sup>86</sup> Ben Stokes has stated that he intends to pursue legal action over what happened against the *Sun*.<sup>87</sup> IPSO received complaints following the publication of the story and issued a statement in relation to both the stories surrounding Stokes and Thomas, but the statement was vague, stating that they cannot comment on individual cases, but that individuals involved should take the course of action that is suitable for them.<sup>88</sup> Hacked Off, a group campaigning for a free and accountable press, condemned the *Sun's* coverage, stating that it 'is an appalling invasion of privacy with no public interest justification. We have been told repeatedly by newspaper editors that "everything has changed" since the Leveson report 7 years ago. It is abundantly clear that nothing has changed'.<sup>89</sup> While it might be in contention as to whether or not IPSO would uphold a complaint under clause 2 due to the information being in the public domain, there might be another clause to consider.

Stokes also might have a claim under clause 1 of the Editors' Code of Practice in relation to accuracy. In his *Twitter* statement, Stokes stated: 'The article also concerns serious inaccuracies which has compounded the damage caused'.<sup>90</sup> Clause 1 of the Editors' Code of Practice concerns accuracy, stating that the press must take care not to publish inaccuracies and if a significant inaccuracy is published then an apology must be published.<sup>91</sup> What is even more interesting in relation to this clause is that there is no public interest defence. If there were serious inaccuracies throughout the article, then the *Sun* would not be able to claim that there had been a public interest in publishing the information. They would have no defence. However, it seems as though Stokes has decided to go down the legal route instead of using the press regulator. With this being the case, it will be interesting to see what progresses and the remedy offered to Stokes and whether or not it will be enough to deter such reporting in the future. It is unlikely that Stokes will be granted an injunction. As Coe has noted '....this is all a bit late in the day, as the article has already been published in print and widely distributed online'.<sup>92</sup> It is more than likely Stokes would be offered damages if successful but, arguably, the damage has already been done. The story has been published and, in certain circumstances, no amount of money is going to make up for the damage that has been done.<sup>93</sup>

The final example revolves around the Duke and Duchess of Sussex who have also launched legal action for claims of invasion of privacy. The *Mail on Sunday* published letters that had been written by the Duchess and had been sent to her father. In his statement on his website, Prince Harry stated:

The contents of a private letter were published unlawfully in an intentionally destructive manner to manipulate you, the reader, and further the divisive agenda of the media group in question. In addition to their unlawful publication of this private document, they purposely

misled you by strategically omitting select paragraphs, specific sentences, and even singular words to mask the lies they had perpetuated for over a year.<sup>94</sup>

The *Mail on Sunday* denied these claims, stating that the letter had not been altered in any way.<sup>95</sup> While there is a privacy element to this case, there is also a copyright issue. Under the Copyright, Designs and Patents Act 1988, someone who creates a piece of work usually has ownership over it and therefore those who wish to use it require permission. However, certain exemptions do exist, for example, it can be used if the purposes are to review it, criticise it, quote from it, or report about it.<sup>96</sup> With regard to the exemptions surrounding criticisms, reviews, or quotes, the material has to be available to the public. When publishing material for the purpose of current events, it has to be considered if the work was already in the public domain and if the work was also confidential. If the information is confidential, then the courts consider if there is a public interest element in publishing it.<sup>97</sup>

One has to question whether there was a public interest in this letter being revealed. While the contents of the letter might have been interesting to read about, there can be no denying that they were confidential according to the Duke and Duchess. They were meant for the Duchess's father to see and only for him. However, things become murkier following comments that were made by Thomas Markle, the Duchess's father. He claimed that he had no intention of making the letter public, but he only released it when its contents had been misrepresented following an interview with one of the Duchess's friends in *People* magazine.<sup>98</sup> In an interview with the *MailOnline*, Thomas Markle said he wanted to release parts of the letter to defend himself.<sup>99</sup> Furthermore, the *MailOnline* also invited speculation surrounding a plot to release the letter:

At the time it was widely speculated that Meghan had, perhaps, authorised her friends to brief the magazine – something neither she nor the Palace have denied. What is certain is that Mr Markle viewed the letter very differently, saying it made no attempt to heal their rift and felt more like 'a final farewell'.<sup>100</sup>

Clearly, if this happened then it adds another dimension to the issue. Should someone who colluded with the press be protected when their privacy is intruded upon? This is something that Monti and Wacks have considered, asking: '...when we voluntarily disclose personal information, do we really lose our privacy? We are exercising rather than relinquishing control'.<sup>101</sup> Schoeman and Witzleb et al have also considered this point of view, arguing that privacy revolves around being able to protect information and stay in control of it.<sup>102</sup> It is the ability for individuals to disclose what they want disclosing. In this circumstance, if someone has colluded with the press to release particular titbits of information, then they should still be entitled to privacy. They should not give everything up simply for releasing certain pieces of information. They had the control to do this. If information is released that they did not choose to release, then this violates their privacy. It takes away their choice to be able to do this. However, the fact is that the press use those in the public eye to sell copies, just

as those in the public eye use the press to stay in the limelight.<sup>103</sup> The courts have noted this in the case of *Fraser Woodward Ltd v BBC*.<sup>104</sup> This case concerned copyright use of images that had been taken of David and Victoria Beckham and this beneficial relationship was discussed:

The programme...then contains a sort of survey of press coverage of the Beckhams, and in particular Victoria Beckham, starting with her career as a member of the Spice Girls pop group and showing, or claiming to show, a developing relationship with the press.<sup>105</sup>

However, even if such a relationship exists, this does not mean that someone in the public eye loses his or her right to privacy. This was noted in the case of *Douglas v Hello! (No.5)* where it was held that: 'To hold that those who have sought any publicity lose all protection would be to repeal Article 8's application to very many of those who are likely to need it'.<sup>106</sup> In the situation involving the Duchess of Sussex, it would be difficult to argue that there is a public interest in the letters being published, particularly if one takes into consideration the case of *HRH Prince of Wales v Associated Newspapers Ltd*.<sup>107</sup> This case concerned extracts that had been published from the Prince of Wales's diary. While a diary is different to a letter, 'it is likely that they would be treated the same in the circumstances of being published without permission'.<sup>108</sup> It was held in this case that the information had not been published for the purpose of current news affairs and therefore there was no public interest justification.<sup>109</sup> It seems likely that the same could be said in this instance concerning the Duchess of Sussex.

With regards to IPSO, once again it needs to be taken into consideration whether the information was in the public domain and whether or not there was a public interest in the information being published. While its contents had been briefly discussed in *People* magazine, it had not fully been published in the magazine. Furthermore, the contents of it were not divulged in depth:

One friend is quoted in the *People* article as saying: "After the wedding she wrote him [her father] a letter. She's like, 'Dad, I'm so heartbroken. I love you. I have one father. Please stop victimising me through the media so we can repair our relationship'".<sup>110</sup>

Clearly, not a great amount of detail was given based on this extract compared to the full letter being published. Arguably, because of this, a reasonable expectation of privacy should still exist. Knowing that something exists is different to seeing that it exists. There is still an element of privacy as it has not been seen in its entirety.

These three cases suggest that nothing has particularly changed as certain factions of the press are still invading celebrities' privacy. In the cases discussed, there have been arguments showing that a reasonable expectation of privacy does exist alongside a lack of public interest. While this is the case, there is a more pressing matter to discuss: a lack of consideration from the press towards those who are involved. While journalists strive for ethical journalism and IPSO's Editors' Code of Practice aims to achieve this, it seems clear that this is not

happening. Therefore, the question has to be asked: can anything be done to cause a change?

### **Can anything change?**

Journalists' ethics have come under scrutiny before. Questioning the way in which the press operate is nothing new. Prior to the Leveson Inquiry, in 1990, the Calcutt Report also looked into press intrusion. Some of their recommendations included replacing the PCC and forming a new Code of Practice.<sup>111</sup> Three years following the conclusion of the Committee, Calcutt stated that more should be done as the PCC was not making enough progress. Calcutt declared that statutory regulation would be necessary following on from the lack of progress that the PCC was making.<sup>112</sup> In 1993, the National Heritage Select Committee also stated that not enough was being done to protect people's privacy, but they did not offer the same recommendations that Calcutt offered. Instead of statutory regulation, they recommended a new statutory press ombudsman, fearing that statutory regulation would imprison the press and restrict them too much.<sup>113</sup>

The fact of the matter remains that the behaviour that has been exhibited by the press is nothing new. In the past, they have been chastised for their approach towards invading celebrities' privacy and, while this chastisement has taken place, clearly nothing has changed. It has to be questioned what can be done to offer further protection. Case law dictates that celebrities have a right to privacy and, judging on precedent, in the three recent examples discussed it seems that those involved will also have such a right. Bringing a case to court can be costly and time consuming, particularly if it starts to reach the appeals stage. The costs that newspapers can face can be damaging. In recent cases involving invasions of privacy they have totalled north of £100,000. For example, Sir Cliff Richard in his case against the BBC was awarded £190,000 in damages.<sup>114</sup> In relation to phone hacking, eight individuals who took their case to court were awarded between £72,5000 and £260,250 respectively.<sup>115</sup> The courts are clearly willing to offer significant amounts of money for those who have had their privacy invaded, which makes it all the more interesting that the newspapers in the examples published the stories that they did. While it might be that the cost of the story pales in comparison to the publication of the story (i.e. increased circulation), it seems unlikely that this is the case.

Print circulation has halved since 2001 in the newspaper industry.<sup>116</sup> Sales are down, but many publications have strengthened their online platforms. For example, *MailOnline* in 2017 had 11.7 million average unique browsers every day.<sup>117</sup> However, it is doubted that any publication truly wants to be sued in court, but they are still willing to take the risk by publishing stories that could be classed as an invasion of privacy. Increased damages and tougher regulation would be met with hostility from the press and, in certain circumstances, there is a risk that it could produce a chilling effect on journalism, with journalists perhaps becoming fearful of what they publish. If laws can do no more to act as a deterrent from invading celebrities' privacy, then ethical regulation should be considered.

IPSO has come under fire from the campaign group Hacked Off who have argued that it has not done enough to protect people from press invasion. The shortcomings of IPSO have been documented in the Media Standards Trust Report.<sup>118</sup> The main issue concerns the fact that IPSO failed 25 of the 38 recommendations made by the Leveson Inquiry.<sup>119</sup> Furthermore, the independence of IPSO has also been questioned in the report, in particular due to the existence of the Regulatory Funding Company (RFC). The RFC, on their website, states that they are 'charged with raising a levy on the news media and magazine industries to finance the Independent Press Standards Organisations'.<sup>120</sup> The RFC have powers over the funding of IPSO alongside the Editors' Code of Practice and who is appointed to IPSO.<sup>121</sup> Board members of the RFC include members from Condé Nast, JPI Media and Times Newspapers. One has to question the independence of the RFC when it comes to making appointments if their board is made up of those with links to publishing houses. The Media Standards Trust also stated:

The Regulatory Funding Company continues to exert an unnecessary degree of control over the IPSO system. As the Leveson Report noted, there is no need for such a body to exist at all, other than perhaps to collect and pass on members' fees. The powers of the funding body over the previous Press Complaints Commission system were determined by Leveson to represent a serious structural deficiency to the previous regulatory system; the fact that this structural issue continues to affect the IPSO system remains a concern.<sup>122</sup>

Alongside these concerns, there are also concerns that IPSO is not using the powers that it has. For example, IPSO has the power to fine publications £1 million following an investigation into their behaviour and they also have the power to order corrections and apologies to be published.<sup>123</sup> However, in relation to celebrity privacy cases, these powers have been restricted. In many instances, it has been stated that there has not been a breach of privacy. From 26 cases involving celebrities that were considered up until August 2019, only 9 were found to be in breach of the code, 16 were considered not to be in breach and 1 was resolved. While celebrities are still complaining about invasion from the press, evidently many do not go to IPSO with their complaint. Is it because they do not see a point in doing this because they fear they will achieve nothing? An interesting take could be that they are simply using social media to air their concerns instead. They might feel that they can attract more attention to themselves by doing this and berating the press publicly. In many circumstances, if IPSO asks for an apology then this can be tucked away in page 2 of a publication and might not be noticed as it is too small.

This is certainly what BBC presenter Dan Walker has argued in reference to a post on *Twitter* from former footballer and current football pundit Gary Lineker. Posting a picture of an apology from the *Daily Mail*, the original story was found to be fabricated and had accused Lineker and his ex-wife of behaving inappropriately on a British Airways flight.<sup>124</sup> In a comment on Lineker's post, Walker stated the following: 'Always feel there should be some sort of regulation



which says the apology should be the same size and have the same prominence as the original story'.<sup>125</sup> Perhaps this is one key issue with IPSO's remedial actions, namely the fact that apologies can appear hidden. If one were not to flip to page 2 or see the small box containing the apology, would anyone know that the story had been fabricated? There might still be those who think that the story had been accurate. By using social media to state that this was not the case, Lineker has used his own platform and, potentially, attracted more attention.

For example, Lineker has 7.4 million followers on *Twitter* at the time of writing. The *Daily Mail* had a circulation of 1,164,025 per issue in 2019 in figures obtained from ABC.<sup>126</sup> Social media has the potential to reach more people and, in turn, this can also affect the news they read or the publications they trust. It is useful to think back to Ben Stokes and his statement on *Twitter*. When the hashtag *DontBuyTheSun* began trending, this showed the contempt that certain people had for the story by stating on social media that they had no intention of picking up a copy of the publication. Celebrities might be more willing to take matters into their own hands because they know that they can have a further reach. They can talk to their fans directly and chastise press behaviour in the public arena of social media.<sup>127</sup> In turn, this can lead other publishers to pick up on the story, drawing more attention to it and the anger a celebrity feels towards it.

This should not act as an escape route for the journalism industry. It should not be an excuse for IPSO to bury its head and let celebrities take matters into their own hands through social media. If the press can continue to act in such a manner then it might be that a vicious cycle continues. The press invade a celebrity's privacy; the celebrity shames them on social media; the members of the public turn against them. But then the cycle will repeat itself, as we have seen countless times before. These three instances discussed simply feel like a build up towards discussion of the press' behaviour, but how long will it be until another crescendo is hit and another Inquiry is called? Certainly, if behaviour such as this continues and campaign groups like Hacked Off continue to call for reform, then it is a discussion that will become much more discussed in the future.

The answers are not clear-cut. So long as section 40 of the Crime and Courts Act 2013 remains off the table, there is no incentive for IPSO to seek official recognition from the PRP. There is nothing encouraging them to do this, which could be considered the problem. If they had sought recognition then they would have to engage with the criteria set out by the Leveson Inquiry. By striving to reach these criteria, it might be that they are taken more seriously and publications under their remit might think twice about publishing stories like the ones that have been discussed. However, so long as Leveson 2 remains unimplemented and IPSO unwilling to seek recognition, it seems very little will force a change.

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