

IN THE HIGH COURT OF JUSTICE  
CHANCERY DIVISION

Royal Courts of Justice  
Strand, London WC2A 2LL  
Friday, 2<sup>nd</sup> July 2010 at 10.00 PM

EX-PARTE APPLICATION

Before:  
MR. JUSTICE SMITH

Associated Newspapers Limited

Applicant

-and-

All persons responsible for the publication and/or  
distribution of the so-called "spoof" *METRO* on 2 July

Respondent

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MR. JAMES ABRAHAMS (instructed by Bird & Bird LLP) appeared for the  
Applicant

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P R O C E E D I N G S  
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PS Mr Abrahams, what have you got for me?

JA Handed up:  
"Spoof" Metr0  
Edition *Metro* 9 April 2010  
Note of chronology prepared by Bird & Bird LLP  
Press release from IndyMedia (<http://london.indymedia.org.uk/articles/5099>)  
Copy of "spoof" in PDF downloaded from metr0.co.uk  
Copy of "spoof" website metr0.co.uk  
Draft Order

[Mr Justice Smith retired to consider papers]

PS Mr Abrahams, can you tell me what the urgency is tonight?

JA Can I draw your attention to the press release from IndyMedia "days of action: Metro targeted by anti-racist "spoof" which highlights that this is part of two days of action. If I can draw your attention to pages 4 and 5 of the press release which states that the spoofing operation was part of "two days of action against racist press"

Can I also hand up a press release “two days of action against racist press, sick of being lied to?” from Press Action (<http://pressaction.wordpress.com/2010/06/06/two-days-of-action>). If I could draw your attention to the fact that the press which is being targeted in particular.

PS What is the urgency? You’ve had today’s spoof in London. It hasn’t been distributed anywhere else. What is the damage if it is distributed tomorrow?

JA If I could draw your attention to the fact that some of Associated Newspapers Limited’s newspapers are political. *Metro* avowedly doesn’t take a political stance. The damage to the brand and goodwill is unquantifiable. The people behind the spoof are avowedly political. They are piggybacking on the goodwill built up in the brand since 1999 to espouse their own political causes.

PS This was done today. What damage has Associated suffered? I see you’ve done an online “take down” notice. What is this?

JA As I understand it there is a US firm with the servers who store the website’s information. When an internet user accesses the page they access the information from the US servers.

PS Presumably they are beyond my jurisdiction.

JA The client has written and asked for them to take down the website. I’m informed that they have just refused to take the website down.

PS Apart from the US ISP providers, apart from them who have you got to sue?

JA Well the organisation who it has its address at has the account with the ISP for the website – London Action Resource Centre. If I could refer you to paragraph 19 of the note LARC is a “collectively run building providing space and resources for people and groups working on self-organised, non-hierarchical projects for radical social change.”

PS They sound like they could just be an internet café where anyone can use the resources.

JA They are clearly involved with the two days of action. It is overwhelmingly likely that either tonight or tomorrow morning that the people responsible for the action will be there. Associated’s solicitors are ready to serve any Order on them tonight and then again in the morning. It is very likely that they will be able to serve this on the people directly responsible for the action as it is clearly their headquarters.

PS I thought that there was no ability to serve on persons unknown after Woods [ ].

JA The case where an Order was made against persons unknown was brought by Bloomsbury and JK Rowling.

PS Do you have a copy of the case?

JA I regret that I do not have a copy of the case.

[PS referred to the White Book but could not find case reference]

JA In the Bloomsbury case, a copy of the Harry Potter manuscript had been found and it was feared that other copies may be in circulation so the Order was made against persons unknown. As you can see the draft Order has been drafted in a way that is narrower than this. In the recent super injunction cases the Court did not criticise the fact that the Orders were directed at persons unknown.

PS I was surprised by that decision – it went against what we had known in respect of 25 years of the cases against squatters. The Order 24 was made against persons unknown because it was thought that you couldn’t get such injunctions in Wilkes and Wood.

Here you’re planning on serving on anyone who is involved and they will be

bound.

JA In the draft people who are served are not bound if they do not fall within the operative provisions of the Order. Only the respondents are bound, not others.

PS This is a general warrant on anyone who is served.

JA It is drafted to only be bound on people responsible. I regret that I do not have the details of the Bloomsbury case. It was also an intellectual property case.

PS Does your client seriously think that if it is granted an injunction that it will actually be able to do something.

JA My client would not be here if it didn't think that it could do something effective before distribution of any spoof tomorrow. We understand that if we go to LARC the people responsible will be there. It is clear that those who are responsible for the spoof have a choice – they can either comply with the Order or choose not to. If they are not responsible for the spoof then it doesn't bite because they are not the respondent. It would be the same if they were named or not named; but the person in the street would not be bound.

PS Why are damages not an adequate remedy? Are you seriously suggesting that your clients will suffer damage?

JA It is impossible to quantify the damage to the client.

PS It's a one-off, it has had so little impact, and it's not even been distributed in the other 32 cities.

JA With respect My Lord that's not right. We do not have that information.

PS Where are the respondents attacking Associated Newspapers?

JA If I could draw My Lord's attention to the back page of the spoof and the section on Advertising.

PS The advertisers are not going to stop putting ads in *Metro* on the basis of this.

JA If I could just draw your attention to the fact that this is an anti-racist spoof, they are effectively stating that *Metro* is a racist newspaper.

PS First of all, no one is going to seriously think that this is the *Metro* newspaper.

JA My Lord it is easy to analyse this in the Chancery Division at 20 to 11 on Friday evening...

PS There's a picture of Gordon Brown being arrested.

JA The get up of the *Metro* is so similar to my client's masthead.

PS There's no doubt that they are infringing your client's trade mark rights.

JA This is a professional operation, they have gone to the trouble of mocking up vans and printing t-shirts with the METRO logo on them.

PS I understand all of that. However you have no evidence that they are going to do anything tomorrow. Why are we here at 10.40 PM on Friday night versus Monday morning when your client has had more time to investigate the matter more thoroughly. What is the permanent irreparable harm suffered, this hasn't gone around the world. This is clearly a spoof. Would your client object to a "spoof" in a satirical publication such as *Private Eye*?

JA This is a different situation *Private Eye* is clearly a satirical magazine – even if they were saying something completely unfair. This is entirely different. They are using my client's entire brand identity to produce and distribute a false *Metro*. The *Metro* does not take political positions and this attack is an insidious one.

PS There is no doubt that in the long term your client could seek an injunction. They would be in a far better position on Monday. This note is full of "ifs and buts".

JA This is a two day thing. There is likely to be a publication tomorrow that my client wishes to stop. There is no question that this is unlawful use of my client's rights – this is a newspaper under METRO.

PS What are the remedies you could seek at 10.45 PM on Friday night? Your client is not going to suffer any loss. I'm concerned that this is a case of make haste and repent at leisure.

JA This Order is not addressed to persons unknown, the respondents are defined on the face of the Order and my client has a realistic prospect of reaching and binding the respondents. On my submission this is likely to be effective. The damage is intangible damage to my client's brand and goodwill.

PS *Metro's* revenue is presumably through advertising and no advertiser is going to pull out between now and Monday. What's the problem with making an application on Monday.

JA It is an intangible damage to my client whose goodwill, that is, it effects what people will think about its product.

PS Advertisers are not going to withdraw advertising and consumers are not going to stop picking up a free newspaper.

What information do you have about how many copies were distributed?

JA On the basis of the press release they distributed 10,000 copies of the "spoof" at London Bridge, Victoria, Walthamstow, Brixton, Clacton, Hackney, Seven Sisters and Liverpool Street stations.

PS That's if you take their own press release at face value.

JA With respect My Lord, this is a very professional job, it's not just one guy with a computer mocking this up. They've done a professional job in producing the get up of *Metro* and distributing it.

PS This is on the basis of a photograph of one man handing out the spoof at a station. It is only on their evidence that you have distribution.

JA The evidence is that this is professionally organised, they've gone to the trouble of having a t-shirt printed up and vans mocked up.

PS How did you obtain copies of the spoof?

JA I'm informed that one of *Metro's* drivers picked up the copies. The drivers reported distribution at London Bridge, Walthamstow, Brixton, Victoria and Clacton.

PS Who is that gentleman providing you with this information?

JA Mr Davis is in-house legal counsel at Associated Newspapers.

We have a picture of a mocked up "METRO" van which one of the drivers has taken. It's unfortunately not a good picture and is highly pixelated. I would venture that this has been taken on a camera phone. [same handed up]

PS And are IndyMedia also a US based outfit?

JA The metr0.co.uk website is hosted in the US. IndyMedia appears to be a blog site.

PS Nevertheless they are aiding and abetting infringement of your client's copyright in the masthead.

JA It is possible that they would argue that they are reporting current events and so may have an arguable defence of fair dealing for reporting current events and affairs.

PS When did you first become aware of this happening?

JA That is set out in the note at paragraph 18.

PS You were slow to get here.

JA I regret that we were not here earlier but as is set out people were off site with their phones turned off.

PS Perhaps they were not concerned then.

JA I wouldn't say that My Lord. As I said it would have been preferable that we were here earlier and it is regrettable.

PS Is that is?

JA I would just ask that My Lord considers the draft Order in paragraphs 1.1, 1.2 and 2 individually if you are minded to go against me on any particular point.

PS It's a terrible procedure to serve an Order and people would be threatened contempt without recourse.

JA My Lord, I have the reference for the Bloomsbury case it is [2003] 1 W.L.R. 1633. [Mr Justice Smith retired to obtain and consider case]

JA I just have two more points to I need to bring to your attention. Firstly, the respondents arguably have a defence of free speech and therefore you must be satisfied that there is greater than 50% chance of success. Here my client's chances are 100% in respect of trade mark infringement. Secondly, I should draw your attention to the fact that the METRO trade mark registration is under attack for non-use but that the opponent has acknowledged use in relation to newspapers.

PS Yes, I read that. They certainly infringe your client's copyright; I assume that your client has copyright in the masthead.

JA That is overwhelmingly likely. Certainly there is an s.10.1 trade mark infringement action.

PS [Indicated what Order he was prepared to make (see final Order)]