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Copyright in the News

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Introduction and Background

It is common to refer to the present age as the information society. Whilst not wishing to dispute the accuracy of that view as such, it is perhaps more accurate to describe it as *an* information society. For, in reality, the same term could be applied to many preceding ages and societies. In a different context to the one which forms the subject matter of this paper, it has been said that the 'collection of personal data is as old as society itself, it may not be the oldest profession but it is one of the oldest habits'[1]. This statement is probably no less accurate when applied to other types of information, particularly that relating to news and current affairs whether at parochial, national or international level. Whereas globalisation has the effect that more people are interested in affairs at international and global level than might have been the case in a previous age, the same motivation to be acquainted with the details of events is apparent. So in 1918, Brandeis J noted that there were 2,500 newspapers published in the US[2] suggesting a healthy appetite for and consumption of news which continues to increase - more recent figures suggest that there are now more than 1,400 daily newspapers and 8,000 non-daily newspapers in the US alone[3].

A number of cases which have been at the centre of the legal debate concerning copyright and linking have involved newspapers and the dissemination of news[4] often via sites which either did not themselves investigate or write news stories but provided comprehensive news services by providing an index and/or search facilities to traditional newspapers which had an on-line presence. Yet there has been little discussion about why this should be. Is it that the newspaper industry is essentially more litigious? Is there something about the news itself which attracts this sort of activity? Is the newspaper business more threatened by these activities than other sectors which might be subject to the activities of powerful search engines and their ability to present and correlate vast amounts of data in a minimum time?

The nature of the medium

News has always had an alluring quality and journalists and newspaper editors have made their names if, by inspirational investigation, good management, or just plain luck, they have been able to scoop a story in advance of the competition or publish an exclusive. However, news neither retains its freshness nor can reporting of a particular event be considered the sole prerogative of one particular journal and it has always been common practice in the trade to take stories from other newspapers for the purposes of independent investigation and verification so that they can be republished in the second newspaper for the benefit of its readers. Historically, one reason for this may be that by and large most people do not buy newspapers because it is covering a particular item of news, although this may happen when a significant story is breaking. They buy it because it is their practice to buy a particular paper, because they are familiar with its layout, because they align themselves with its political stance, because they and their forefathers before them have always

bought that particular paper and so on. As with most sectors of the market there is evidence of significant brand loyalty.

Whereas newspaper will have to be selective about which items of 'minor' news are included in that day's edition - a decision which will not only depend on the major news items which are significant that day but on the perceived interests of the readership at which the paper is aimed, there is an expectation from readers that items of major national or even global significance will be reported in some form by all news papers and that the coverage accorded will be reasonably proportional to the importance of the story for the readership. So when the World Trade Centre was attacked on September 11th, it would have been a strange newspaper which did not send reporters to the scene, devote many pages to reports and articles about the incident itself, the political background, human interest stories and so on.

So far so obvious - it is rather trite, at this stage in their development, to point out how the Internet and World Wide Web have had a major impact on the quantity of information which can be easily made available to all those who can receive it in this form (an increasing number in all parts of the globe) both quickly and cheaply. But as we all know, it is not merely the communication of information which has been simplified but the manner in which that information can be presented to the recipient. In traditional print media, if customers buy a newspaper as a consequence of being attracted by the headline story, they will obviously also obtain a number of other stories, feature articles, editorial, advertisements, readers' letters etc. which they may or may not have an interest in.

In contrast, the volume of news generated and the propensity given for immediate and widespread dissemination of news (especially news of global significance) by means of computer networks has led to a whole new approach to news distribution and news retrieval. The mere act of putting the topic into either a general search engine or one on a dedicated news site on the WWW will give a plethora of reports on the same news item. Whether or not an increasing thirst for news fuelled the development of new products and services or whether these arose as a consequence of the particular properties of the medium is not clear, but it is beyond doubt that these features have allowed the development of novel services which cannot be easily replicated by newspapers publishing in traditional format. The fact that web based news services can offer a different type of news service can be very attractive to users and may itself increase the demand for access to information about news and current events.

The end result has been a major change in the way in which news is presented. It is now possible to track news as it is happening via the Web. Dedicated news sites may provide links to a multitude of other news sites, provide e-mail updates, 'e-mail an article to a friend' services, and personalised services for topics of interest. Powerful search engines on these and other sites allow lists of news stories to be presented to the user with minimum effort and minus the other articles which would be an aspect of obtaining the same story in a traditional newspaper. Many, if not most, traditional newspapers also have an online presence which provide many of these services. However there are also an increasing number of sites which exist purely to provide a service to users by providing access to news stories from one URL[5] by giving a list of links to the on-line version of traditional newspapers, by providing links to stories of interest, dedicated search facilities and providing personalised updates for registered users. Other sites may operate similarly to a bulletin board allowing subscribers to post newsworthy articles of interest from other sources with or without criticism and comment. It is these new services which have more often been the target of litigation by established newspapers.

The nature of the threat

Newspapers are concerned that the services just described pose a threat to their legitimate business and some of the relevant issues were aired in *Los Angeles Times and Washington Post v Free Republic & ors*[6]. The Los Angeles Times and Washington Post are newspapers which publish in

traditional paper form and also have an on-line presence (www.latimes.com and www.washingtonpost.com). Free Republic is a bulletin board website whose members post articles of interest, often full text, with or without additional commentary. The websites of both the Los Angeles Times and Washington Post allow access to the current edition free of charge but there is a fee to read archived articles. In addition, further revenue is obtained from advertising and licensing. For its part Free Republic contended that its service was of benefit to the newspapers as it encouraged visitors to their home websites as a result of reading articles on the Free Republic site. The newspapers, however, asserted that they lost readers who read a particular article on the Free Republic site rather than reading the original on their site and that Free Republic were breaching the copyright in the original articles.

The court assessed the application of the fair use doctrine to this situation (discussed in more detail below) and, in so doing, explored the above contentions. The alleged purpose of posting to the Free Republic site was to 'to facilitate discussion, criticism and comment by registered visitors' a purpose which the newspapers pointed out could be easily facilitated by a link to the original story. The Free Republic suggested that this could cause problems for 'unsophisticated users' (an argument which the court found to be 'unpersuasive') but that in any case links often expired as a result of archiving, as was the case here. There was evidence that a link had been provided to the *Jewish World Review* at its request and verbatim extracts were no longer posted from that publication, but this would not have been possible for the two newspapers in the case as maintaining a link after archiving would have meant that the bulletin board users would have had to pay a fee. On the issue of whether or not such a service encouraged demand for the original article or suppressed the market for the work, the Court did not accept, given the evidence of the number of hits on the Free Republic site and the fact that there was no need to pay for archive material from the Los Angeles Times and the Washington Post, that the activities of Free Republic did not have an effect on the market. There was also a direct loss of revenue arising from the reduced number of hits and consequent loss of advertising and licensing fees. But could this, on the other hand, be balanced by an actual benefit to the newspapers in encouraging visits to their websites? This was difficult to answer definitively as, although there was evidence that a significant number of hits to both the Los Angeles Times and Washington Post sites occurred after an access to the Free Republic site, it was not possible to quantify the reverse trend i.e. how many hits were diverted from both newspaper sites to use the Free Republic site instead.

Two other cases, those of *Washington Post Inc & o'rs v Totalnews Inc* [7] and *Algemeen Dagblad BV & o'rs v Eureka Internetdiensten* (the 'kranten.com case') [8], involved news sites which provided comprehensive links to a number of newspapers. This allows the person looking for coverage of a particular story to view reports from a number of different newspapers but with the convenience of only having to visit one site in the first instance. For the purposes of this paper one of the major factual distinctions between these two cases was that in the Totalnews case, the reports from other sites were presented to the user within a frame containing the Totalnews logo and advertising sold by Totalnews, whereas the kranten.com case users were provided with the required story via 'deep' links [9], bypassing the home page of the publication in question. In addition, Eureka, the operator of the kranten.com site also provided a daily e-mail as a reader service with the latest news stories in the form of a list of these deep links.

One of the main issues with the use of frames is that they can deceive the reader as to the true origin of the material. The Totalnews case settled and the agreement appeared to accept that linking via frames to these stories was unacceptable and violated the newspapers' rights to exploit their own copyright material. A visit to the Totalnews site today shows that framing technology is still used in connection with some reports and stories but that, where this is so, every effort is made to alert the user to both the fact that the story is being retrieved from a remote site and the URL of that site. In the kranten.com case, on the other hand, the view of the court was that the existence of a site such as this was just as likely to have a promotional effect in attracting users to the newspapers' own web sites. Even though the deep links used by the allegedly offending site bypassed the home page (with

consequent loss of revenue) this did not make that home page inaccessible.

So the apparent seriousness of the threat to the newspapers' business may depend on the nature of the site, whether it reposts articles, whether it presents the results in frames or via deep links. Are there other factors which might affect the number of hits on a newspaper's own site? Is it relevant at all that users might decide not to bother anyway if they had to pay for archived material for instance, whereas they might be happy to browse for free? This will probably depend on the purpose of the access, whether idle curiosity, necessary research, general interest etc. On the other hand, if a bulletin board along the lines of the Free Republic was dedicated to a specific theme, crime reports, financial matters, international affairs etc, this might have the propensity to make it the first port of call for the enthusiast providing the opportunity to access reports on the same story from a variety of news publications in different jurisdictions from the one site.

The nature of the work

The 1918 case of *International News Service v Associated Press*[10] concerned the use of news gathered by an agency by other publications. Although a case decided in a different era on equitable principles relating to unfair competition rather than copyright, the case concerns much discussion about the nature of news and the purported property interest in the news which still remains relevant. Pitney J pointed out that it was important to consider the dual character of news, whilst news articles might possess a literary quality, it was important that the substance of the information was distinguished from 'the particular form or collocation of words in which it is communicated' but on the other hand 'the news element - the information respecting current events contained in the literary production - is not the creation of the writer ... it is the history of the day.' [11] It was stressed that there was clearly no value in keeping news secret and that the greater the availability of news the greater the demand and that publication would be profitless (in all senses) if the 'news is abandoned to the public for all purposes when published in the first newspaper' [12]. The nature of the investment of primary reporters and publishers of news stories was emphasised by the comment of Holmes J that 'fresh news is got only by enterprise and expense' [13]. However Brandeis J, dissenting, felt that there was no basis for an implication that news could not be used gainfully in competition with the gatherer and that such activities had been made possible by 'improvements in the means of transmitting intelligence.'

These comments underline the central issues which remain at the heart of the most recent cases in a different situation relating to improved transmission of intelligence. To what extent is news reporting capable of legal protection? Copyright law in the US was not well developed at the time of the above case but that is, of course, the legal device by which newspapers would now seek to assert its right to control dissemination of its reports and articles. Does copyright apply to newspapers in exactly the same way as to other literary works? The straightforward answer is clearly 'yes'. Although news reports are based on facts which by themselves cannot be copyrighted, there will be copyright in the way those facts are expressed by a particular journalist and additional copyrights in the total compilation of the newspaper and the typographical lay-out. This simple answer masks a number of subtleties. First whether news reports being based on factual circumstances are less deserving of copyright protection than creative literary works, second whether there is an overriding public interest in disseminating the news and third the extent to which exceptions such as fair use and fair dealing apply to reproduction of news reports.

Many copyright regimes contain certain exemptions and limitations on the protection offered to news reports, so the first issue is a definitional one - what is news? Is it purely the 'history of the day'? In *Feist Publications Inc v Rural Telephone Service Co* [14], the US Supreme Court suggested that 'all facts - scientific, historical, biographical and news of the day ... are part of the public domain available to every person'. In other words the 'news of the day' is not protected by copyright as such. But the Newspaper Association of America reacted angrily to the suggestion [15] that this meant that newspapers were not worthy of full protection under US copyright law because of the nature of the

information at issue and went on to underline its belief that newspapers were currently having their copyright infringed, particularly on the Internet, by the activities of the sites referred to above. [16]

It is common for fair use and fair dealing exceptions to copyright to include the purposes of reporting news or current events as a use which falls prima facie within these exceptions. In *Pro Sieben Media AG v Carlton UK Television* [17], Walker LJ commented that 'reporting current events' was an expression of 'wide and indefinite scope' and that little assistance was available from comparisons with other expressions such as 'current affairs' or 'news'. It was further suggested in *Newspaper Licensing Agency Ltd v M&S plc* [18] that the term 'current events' was narrower than the term 'news' and did not extend to matters of current interest which are not current events. It connoted a 'public reporting of a recent newsworthy event' so while there may be no public interest in copying news reports purely for commercial purposes, a public interest could 'be discerned in the public reporting of newsworthy current events.'

An additional factor is that newspapers do not merely report on the 'news of the day' however defined. They may include feature articles which are closer to creative literary works as well as additional criticism and review. When the contents of newspapers are made available by other sites on the web, access is not restricted solely to those parts of the publication concerned with the news of the day. [19]

It also needs to be remembered that there are some additional factors which may also impinge on the dissemination of both the news and other contents of newspapers via independent websites. These include the widespread presumption, probably engendered by the use of newsgroups and similar sites that news provision is automatically available and shared. This is underlined by the fact that many of the major search engines provide their own news services. However this is not of course, to say that denial of copyright has become the custom and practice on the web. Far from it - the fact is that the wording of copyright statutes allows it to apply to this method of dissemination whether or not the new form of dissemination could have been in the original contemplation of the legislature..

Fair use, fair dealing and other applications of copyright law

The US Copyright Act, in 17 USC § 107, includes the purposes of criticisms, comment and news reporting as potential fair uses subject to a consideration of the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used and the effect on the potential market. These issues were considered therefore by the court in *Los Angeles Times and Washington Post v Free Republic* [20] in deciding whether Free Republic could rely on the fair use defence. The court held that three out of these four factors favoured the newspapers. The purpose and character of the use was not transformative [21] because the entirety or large portions of the work were copied, a factor which also meant that the third head weighed against fair use. Free Republic argued that the purpose of the site was to encourage comments on the manner in which news was presented i.e. to engage in criticism and comment. This might have justified long extracts but the evidence was that the comments were actually on the subject matter of the news itself and this could be accomplished without verbatim reproduction. It was not clear that Free Republic was itself operating the bulletin board for profit but the manner of operation nevertheless did allow users to avoid paying fees for certain items. In relation to the effect on the market, it was not necessary to show with certainty that future harm would result and weighing up the factors already discussed, the court would not accept that the effect on the capacity of the newspapers to exploit their market was only minimal. Notwithstanding the discussion above about the nature of news reports, the court in this case found that the content at issue was 'predominantly factual' giving a stronger claim to fair use than if the works had been creative and fictional but this was the only factor which could support fair use in any way.

This judgment contains no real issues of novelty for copyright law - it does not seem in any way influenced by the medium of dissemination of the news but is a result of applying standard copyright

principles to the specific situation. In comparison, the terms of the settlement agreement in *Washington Post Inc & o'rs v Totalnews Inc*[22] suggest that Totalnews accepted that its activities interfered with the right of the newspapers concerned to exploit their own copyright works. The use of framing technology in this case would not be argued as an issue so much of fair use as a creation of a new or derivative work which infringed the copyright in the original since the perception to the user created by the placing of the story within the frame of the Totalnews site is to suggest that it originates there and not with the original newspaper. However this could again be regarded as an application of basic copyright principles with no acknowledgement that the medium gives rise to any different issues[23].

A rather different view seems to pervade the judgment in the *Kranten.com* case.[24] As discussed already, the District Court of Rotterdam was not so easily convinced either that there was any breach of copyright or that the services provided on the *kranten.com* site interfered to any significant extent with the newspapers' commercial activities. In this case a search on the site would give a list of titles of news reports as deep hyperlinks to the newspapers' sites. The court tacitly supported the suggestion from Eureka, the operator of the *kranten.com* site, that hyperlinks were fundamental to the operation of the world wide web and agreed that they did not infringe copyright as the titles, of themselves, did not have sufficient original character. It further suggested that by placing them on the web, the newspaper gave implicit permission to use the titles as a hyperlink, a point which will be discussed further below. So the court did not find in favour of the newspapers in this case. It was noted also that deep links were in common use by search engines and the approach of the court in this case is compatible with the fact that creating lists via third party search engines does not seem to be a factor either way in compromising the newspapers rights of exploitation.

As this was a case which was heard in the European Union, the newspapers also alleged a violation of the database right provided by the Database Directive[25] for the compilation of the lists of titles of the reports.[26] However, neither was the court sympathetic to this argument. Like the court had been in *International News Service v Associated Press*, it was happy to accept that primary investigation and reporting were activities which required substantial investment, but that did not extend to drafting the list of titles which, in comparison, required neither a substantial qualitative nor quantitative investment.

Conclusion

What does all this mean for the dissemination of news via the Web? In terms of the courts' general attitude it might appear that to date, the European attitude might seem more sympathetic to new news services on the Web than their US counterparts. Whether or not, as stated in the *Kranten.com* case it is necessary to rely on an implied licence to link is a moot point since, as stated both in that case and in others in other jurisdictions, links are fundamental to the operation of the Web and also what makes it unique. There would be little point in having a site which had neither links to it nor from it since it could never be visited. If one analogy to a web site is with a poster on a wall then a licence to view seems an unnecessary device, especially with all that might potentially entail in determining the limits and terms of that licence. If there is a claim that the rights in a web site are more akin to a tangible property right (as borne out by the use of the word `visit' rather than `view') then perhaps the existence of such a licence is a more tenable idea.

Few newspapers would argue that other news gathering and reporting services could not pick up a story from a rival. The implied consent to do this has been accepted press custom and practice for many years as discussed in *Express Newspapers plc v News (UK) Ltd*[27] by reference to *Walter v Steinkopf*[28]. The fundamental issue seems to be much more an issue of ethics - is it fair that websites can provide a comprehensive news service as a free rider on the back of established newspapers? Whereas copyright law may be successfully applied to prevent certain types of activity such as the verbatim reproduction of articles, it may not provide the required remedy where the web site provides a clear indication of the links it is making and the fact that these are hosted elsewhere.

Newspapers would appear to have two possible solutions available. The first is to attempt to provide novel services themselves which will attract users. Many already do this and 'e-mail an article to a friend' services are particularly common although there appears to be no prohibition on further widespread distribution. Neither is the recipient of the article necessarily alerted to any terms and conditions of use which might pertain to the article which they have received. The second is to make use of technological devices to stop the creation of such rival websites. This was a further factor in the *Kranten.com* judgment since it was observed that it would have been open to the newspapers to prevent the deep linking they were complaining of by technical means but that they had not done so. The use of technological devices to safeguard copyright works has been sanctioned in the US by the Digital Millennium Copyright Act[29] and in Europe by the Copyright Directive[30], strict enforcement of which could potentially militate against the rights of those who traditionally could rely on fair use and fair dealing defences.

The world wide web provides the means and the mechanism for providing a more comprehensive, complete and contemporary news service than has ever been possible before. Established newspapers need to ensure that they do not miss out on this opportunity by crying 'foul' whenever they perceive that their traditional market is threatened by new products and services. On the other hand the increased use of copy protection devices, supported by legal provisions such as the DMCA and the Copyright Directive may have the effect of stifling this new market.

[1] Earl Ferrers Hansard col 37, 11 October 1993.

[2] *International News Service v Associated Press* 248 US 215, 248.

[3] Newspaper Association of America March 2000.

[4] The first of these was *Shetland Times v Wills* [1997] SLT 669, [1997] FSR 604. See discussion in K.J. Campbell 'Copyright on the Internet: The view from Shetland' [1997] EIPR 255, J.P. Connolly and S. Cameron 'Fair Dealing in Webbed Links of Shetland Yarn' [1998] JILT elj.warwick.ac.uk/jilt/copyright/98_2conn.html, H.L. MacQueen 'Copyright in Cyberspace: *Shetland Times v Wills*' [1998] JBL 297. For its significance generally in relation to the development of the law on linking see D. Rowland and A. Campbell 'Content and Access Agreements - an analysis of some of the legal issues arising from linking and framing' forthcoming ((2002) 17 International Review of Law Computers and Technology)

[5] See e.g. www.totalnews.com

[6] CV 98-7840 MMM CD Cal. (2000)

[7] 97 Civ. 1190 (PKL) SDNY (1997) The case settled but details of the complaint, which alleges 8 other grounds of unlawful conduct in addition to copyright infringement, can be accessed at www.jmls.edu/cyber/cases/total1.html.

[8] Case 139609/K GZA 00-846 22 August 2000, www.ivir.nl/rechtspraak/kranten.com-english.html

[9] Such deep links were the issue at the heart of *Shetland Times v Wills* supra n. 3.

[10] 248 US 215, supra n. 1.

[11] *ibid* 234.

[12] *ibid* 238.

[13] *Ibid.* 247.

[14] 499 US 340 (1991)

[15] In relation to whether or not newspapers could avail themselves of copy protection devices as provided for by the Digital Millennium Copyright Act.

[16] Correspondence between the Newspaper Association and the US Copyright Office, 31 March 2000.

[17] [1999] FSR 610.

[18] [2001] RPC 76 citing *Pro Sieben Media AG v Carlton UK Television* *supra* n. 16.

[19] In this context see e.g. *Berlin Online* Landgericht Berlin 8 October 1998 ([1999] Computer und Recht 388) - brief details on [in which the online database Berlin Online was constituted from classified ads from the newspaper Berliner Zeitung which were searched by a meta search engine and the search results automatically e-mailed to users.

[20] *Supra* n. 5

[21] Following *Luther Campbell v Acuff-Rose Music Inc* 127 L Ed 2d 500 (1994).

[22] *Supra* n. 6.

[23] In the UK, there was no discussion as to whether or not the fair dealing exception might apply in *Shetland Times v Wills* although it was suggested by Connolly and Cameron that it would (*supra* n. 3).

[24] *Supra* n. 7.

[25] Directive 96/9/EC on the legal protection of databases.

[26] A similar action would not be impossible in the US following the case of *Feist* (*supra* n. 13) and the fact that the US has been implacably imposed to enacting similar legislative protection for databases to that in the directive.

[27] [1990] 3 All ER 376.

[28] [1892] 3 Ch 489.

[29] 17 US § 1201 - for text see e.g. eon.law.harvard.edu/openlaw/DVD/1201.html

[30] Directive 2001/29/EC on copyright and related rights in the information society.