2. THE NEWSPAPER INDUSTRY

A. GENERAL NATURE OF THE INDUSTRY

The UK continues to have a lively and diverse printed press industry, incorporating not only a range of national broadsheets and tabloids, but also some 1,100 regional and local newspapers. However, the industry is currently facing profound changes which are re-shaping it fundamentally. The past three decades may already have witnessed enormous changes (the advent of free newspapers; consolidation of ownership; structural changes in employment patterns; shifts in trade union power). All these changes have, however, been completely overshadowed in recent years by the impact of the internet and related new technologies, notably digital editions—including applications for mobile devices (“apps”) or e-editions, as well as some 1,700 regional news websites in the UK\(^{152}\)—the adoption of social media platforms, the rise of search engines and news aggregators, and the use of new technologies by state-funded news providers.

Impact of the internet. Search engines have developed from browser applications designed simply to locate material on the internet, to extraordinarily powerful systems capable of selecting, ranking and organising content to meet the searcher’s needs. Few, if any, newspaper publishers believe that they can dispense with an online presence. However, the future of the printed product, and the very role of a newspaper publisher in terms of editing, compiling and distributing content, has been called into question by search engines’ ability to serve content direct to users, often by-passing the publisher’s home page. Further, the internet in effect creates a single channel in which newspaper publishers compete with broadcasters and others (such as internet service providers) for online consumers of news content.

These changes are associated not only with new methods of creating, consuming and distributing content, including social networking, and the rapid spread of new mobile platforms, and especially “tablet” products and the development of their associated apps, but have also prompted a vigorous debate both within and outside the industry about its future. Declining print circulation and increased competition for advertising revenue have created unprecedented pressures in the industry, and are forcing publishers to experiment with different business models to support continued investment in content creation, and indeed ensure survival. Various solutions have been adopted: from the erection of so-called “pay walls” (allowing online access to content only in return for payment) to click-through e-editions sent to subscribers by email; from experimentation with lower-price digest formats to the abandonment of a cover price for printed copies altogether. At the time of writing, it remains unclear whether any of these models will emerge triumphant, or whether the industry will be able to continue offering diametrically opposed visions of how to survive in the electronic world.

A recent study suggested that while overall revenue would continue to fall (with advertising revenue falling faster than circulation revenue), the rate of decline was slowing as paywalls were beginning to make up lost ground. Whatever the outcome, the newspaper industry is rapidly evolving into one where print is simply one among a wide range of options for delivering news content.

National and regional press sectors. The growing impact of the internet has coincided with a shrinkage in the overall UK newspaper market. Revenues for 2015 were projected at around £4.8 billion in December 2014, having been shrinking at

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153 In a BBC Radio 4 debate held on May 18, 2010, Alan Rusbridger, then editor of The Guardian and John Witherow, then editor of The Sunday Times agreed that their currently installed presses would be their last.
154 For example, the decision by The Times and The Sunday Times to start charging for online content from June 2010.
155 For example, e-Metro (first launched in August 2008 by Associated Newspapers, now DMG Media) claims 814,000 direct email subscribers: [http://www.metroclassified.co.uk/media/images/MetroCRM0815...6284.pdf](http://www.metroclassified.co.uk/media/images/MetroCRM0815...6284.pdf) [Accessed December 5, 2015].
156 For example, the launch by Independent Print of The i (also by a dedicated app) on October 26, 2010.
157 For example, the print editions of the London Evening Standard from October 12, 2009.
158 An in-depth treatment of the global newspaper publishing market was published by the OECD on June 11, 2010 (The Evolution of News and the Internet: DSTI/ICCPIE(2009)14/FINAL).
around five per cent annually from 2010 onwards. This is compared to around £7 billion in 2009, itself reflecting a decline since 2004 of almost 31 per cent. While over half of newspaper revenue once came from advertising, the proportion is significantly affected by the strength of demand. The share of advertising going to print newspapers has been declining for over a decade, reflecting a migration of classified advertising to other media (specialised print classifieds or online sites), declining circulations, an increasing diversification of news outlets, and the rise of the internet. Whereas once newspapers relied primarily on print circulation and demographics for their value to advertisers, newspaper publishers now provide statistics for unique page views, email recipients and their “open” or “click-through” rates, and visitor time spent on pages or browsing apps. Also key are social media indicators such as Facebook “likes” and Twitter followers for the official page or account of the title.

The national sector now comprises 12 daily newspapers and 10 Sunday newspapers (not including Scottish titles). A significant landscape change occurred during 2011 with the closure of the News of the World and the creation of The Sun on Sunday amid the “phone-hacking” scandal which beset first the Murdoch newspapers and, from 2014, Trinity Mirror plc. However all national newspapers have been seeing year-on-year declines in print circulation for over a decade now. Total (average) daily circulation for these titles has dropped to around eight million copies for daily newspapers and around seven million for Sunday newspapers. Readership (as opposed to circulation) is relatively low compared to other OECD countries. The local and regional press sector comprised approximately 1,100 titles in the UK and 1,700 associated websites in August 2015, reaching 40 million readers. However, while print circulation is falling, the number of unique visitors to newspaper websites has grown very strongly in recent years. Online UK newspapers draw substantial domestic audiences, and the available statistics suggest that they attract even larger international audiences. Local media websites

162 For example, http://www.metroclassified.co.uk/productsandaudiences/metromultiplatform [Accessed December 5, 2015].
165 Audit Bureau of Circulation (ABC) 2014 and 2015.
166 As a percentage of all adults claiming to have read a newspaper recently or the day before: OECD (The Evolution of News and the Internet: June 11, 2010), based on data from the World Association of Newspapers (WAN).
169 Specifically, as of September 2014, both the Mail Online and the Guardian websites derived more than two thirds of their worldwide audience from outside of the UK, a trend which was increasing. Source: ABC (see http://www.themediabriefing.com/article/uk-and-rest-of-world-traffic-statistics [Accessed December 5, 2015]).
also attract 97 million unique users each month. It remains to be seen what impact charging for online content will have on this online audience growth, but the revenue shrinkage as a whole over recent years suggests the newspaper industry as a whole has yet to determine the best way to monetise reader migration to online and mobile news platforms.

26-48 General regulatory regime. There is no single definition of a newspaper, statutory or otherwise. Rather, newspapers are defined differently for different purposes, including libel, for tax purposes, for media ownership, and other purposes. Nor is there a specific regulatory regime governing the industry in the form of licensing or other permissions to publish a newspaper. In contrast with the broadcasting industries that are subject to a statutory licensing regime, the newspaper sector regards its freedom from government control licensing systems as an essential historical prerequisite to maintain the tradition of a free press: however, this position has come under considerable scrutiny since the findings of the Leveson Inquiry were published on November 29, 2012.

General legal and commercial constraints exist in the context of choosing a title (trade-mark law, passing off law), acquiring a newspaper company or group of companies, distribution networks (such as competition law considerations in respect of acceptance or refusal to supply particular outlets) and the need to ensure an imprint appears on the first or last page of each newspaper edition. There is a requirement that any person who prints “any paper for hire, reward, gain or profit” preserves at least one copy for a period of six months and marks on it in “fair and legible” letters the name and address of the person who employed him to print it. Failure to do so may incur a fine of up to £500 per copy (level 2). A myriad of statutory, case law and self-regulatory restrictions on content of published material exists.

In offering digital versions of publications to consumers directly, newspaper publishers have to comply with changing consumer law, including confirming the contract in writing and providing certain information upfront.

26-49 Legal deposit. The British Library is entitled to a copy of every newspaper and

171 Newspaper Libel and Registration Act 1881, although since repealed by the Defamation Act 1996 (in part) and the Deregulation Act 2015 (Sch.23 Pt 2). The Defamation Act 2013 codified a new defence for operators of websites.
172 See for example, the Value Added Tax Act 1994 Sch.8 Pt II.
173 The Enterprise Act 2002; the Communications Act 2003, repealing the Fair Trading Act 1973 s.57.
174 Statutory definitions may also be found in, for example, the Betting, Gaming and Lotteries Act 1963, Lotteries and Amusements Acts 1976, and the Accommodation Agencies Act 1953.
175 Communications Act 2003. See generally, as to broadcasting industry, paras 26-276 et seq., below.
176 As to relevant self-regulatory controls and an assessment of where the regime stands, see para.26-137, below.
177 Communications Act 2003, amending the Enterprise Act 2002 specifying new public interest considerations to be applied to mergers involving newspaper enterprises.
178 Newspapers, Printers and Reading Rooms Repeal Act 1869 Sch.2 of which re-enacted s.2, Printers and Publishers Act 1839, as amended by Criminal Law Act 1977 s.31(6).
179 Newspapers, Printers and Reading Rooms Repeal Act 1869, re-enacting the Unlawful Societies Act 1799 s.29.
180 Criminal Law Act 1977 s.31; Criminal Justice Act 1982 s.46.
181 The most important of which include contempt of court, defamation, and advertising regulation, both statutory and self-regulatory, in respect of advertisement content, and see paras 26-356, and 26-359, below.
182 The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI
other deposit libraries are entitled to a copy on request.\textsuperscript{183} This obligation does not apply to every edition of the same issue of a newspaper, provided that the later edition is “a work which is substantially the same as one already published in the same medium in the United Kingdom”.\textsuperscript{184}

The legislative framework for deposit of non-print publications came into force in 2013.\textsuperscript{185} Where a newspaper edition is published in print and digitally (and the print and non-print versions are substantially the same work), the newspaper publisher is only obliged to deposit a printed copy, unless otherwise agreed with the deposit library.\textsuperscript{186}

The British Library harvests web editions of newspapers on the basis that these are not the same “work” as the printed edition, but it has been in discussions with newspaper publishers about potential joint initiatives that could involve depositing and archiving digitally published news and copies of the “pre-print PDF” files used to print newspapers.\textsuperscript{187} Similarly, social networking content and blogs, where these are hosted by newspaper publishers but have a presence separate from the main newspaper website, may also be harvested.\textsuperscript{188}

Acknowledging the concern expressed by publishers in response to the Government’s consultations on non-print legal deposit about the security of works deposited, the deposit libraries signed a joint undertaking to the Joint Committee on Legal Deposit. This contains a range of commitments covering the security of deposited non-print publications and appropriate assurance mechanisms.\textsuperscript{189} These assurances are, perhaps, of greater relevance to publishers of limited circulation material (for example, industry-specific news made available on a subscription basis, which may have continuing commercial value following publication) than to publishers of material that is widely circulated.

Newspaper editions deposited or harvested under the legal deposit regime are not to be confused with those being digitised by the British Library for the British Newspaper Archive.\textsuperscript{190} Originally limited to copyright-expired material, this now embraces more recent material, under agreements entered into with newspaper publishers.

Continuing relevance of copyright. While print remains, for the time being, a key means of bringing editorial and advertising content to both domestic and business customers, it is now only one among a number of delivery platforms. Recent years have witnessed rapid expansion in both the formats in which information may be presented and the media by which it can be delivered. A striking recent phenomenon has been the explosion in new digital delivery

\textsuperscript{183} Legal Deposit Libraries Act 2003 s.1(1).
\textsuperscript{184} Legal Deposit Libraries Act 2003 s.2(1).
\textsuperscript{185} The Legal Deposit Libraries (Non-Print Works) Regulations 2013 (SI 2013/777).
\textsuperscript{186} The Legal Deposit Libraries (Non-Print Works) Regulations 2013 para.14(1).
\textsuperscript{188} http://www.bl.uk/aboutus/legaldeposit/websites/security/joint/DELsecurity/DELundertaking.pdf [Accessed December 5, 2015].
\textsuperscript{189} http://www.britishnewspaperarchive.co.uk [Accessed December 5, 2015].
platforms, driven by the increased sophistication of mobile technologies, battery power and screen quality. Publishers must now ensure that content is capable of being accessed not only in the form of web pages and electronic facsimiles of the print edition, but also for optimum delivery on devices such as smartphones and the growing tablet and netbook device market (with competing entries from Apple, Google, Microsoft, Samsung, Amazon and others). Key characteristics of these devices are that publishers have to adapt electronic content files for each platform (i.e. there is no universal standard); and, since (unlike print and web pages) the publishers do not control the platforms, content has to be licensed for delivery on each platform. This developing choice of delivery systems underlines the importance of copyright, as the transactions between publishers, intermediaries and readers are all constructed on the basis of copyright licences.

At the same time, content is now almost exclusively “born digital” and then adapted for different formats. Journalists create or capture most content in digital form. Often, material is captured in audiovisual form. Rights-clearance in relation to journalists and other traditional contributors (and in particular, ensuring that the publisher has secured the rights needed to publish in all formats and media) has, in general, declined as an issue, as commissioning terms were overhauled during the first wave of “new media” publishing. However, the use of moving images, sound and music requires more sophisticated rights management, and engagement with collecting societies, for example to deal with performers’ rights and recording rights.

26-51 Role of industry bodies. The industry is an active participant in debates on the domestic, European and international level in relation to adapting copyright to meet the demands of new technology. The industry sees itself as one of the key players in the new media environment, both as provider of content and as investor in new media products and infrastructure.

Much, though not all, of the industry’s representation takes place through its trade association links. Until 2014, the UK’s national press was represented by the Newspaper Publishers’ Association (NPA) and its regional and local publishers by the Newspaper Society. In November 2014 the two merged to form the News Media Association (NMA) which represents all UK national newspapers except the Express Group and the Financial Times. The NMA is a member of the European

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191 There are intermediaries that enable material to be read across multiple devices.


193 As to these rights, see Ch.12, above. As to the role of collecting Societies, see Ch.27, below. See also Experience Hendrix LLC and another v Times Newspapers Ltd [2010] EWHC 1986 (Ch), July 30, 2010.


195 Newspaper Organisation Limited (trading as News Media Association), 2nd Floor, 292 Vauxhall Bridge Road, London, SW1V 1AE, registered number: 08963259, tel: +44 (0)20 7963 7480 (http://www.newsmediauk.org/about [Accessed December 8, 2015]).

196 The Express Group having never been an NPA member and the Financial Times having withdrawn in 2014. Source: http://www.pressdistributionforum.com/PDRP%20Minutes%202014%2029%20%201%2015.pdf [2086]

The Newspaper Society was previously instrumental in an all-industry challenge in 1993 before the Copyright Tribunal to the royalty levels set by the BBC, ITV companies and Channel 4 in respect of their television listings following the ending of the duopoly in seven-day television listings. However, latterly there have been notable divergences of approach by newspaper groups in responding to the challenges posed by new technology. The decision by News Corporation to charge for online content, starting in June 2010, provoked opposition and criticism from within the industry. Technical and commercial models have, for the time being, taken precedence over amendments to legislation as the industry seeks ways to engage with the power of search engines and central aggregated news sources. Notably, in September 2015 (in a submission to the Government’s green paper on the BBC charter review), the NMA launched a staunch defence of private-sector news organisations against the digital outreach of the Corporation as local and national news brands attempt the difficult transition to sustainable digital models.

B. Sources of Copyright

General. The familiar axiom that there is no copyright in ideas, only in the form in which they are expressed, manifests itself in the newspaper context by the principle that there is no copyright in “news”. There is nevertheless copyright in the form in which it is expressed in particular articles and reports. Copyright may also subsist in the whole newspaper by way of the compilation of these items and, in addition, will subsist in the typographical arrangement of the published newspaper. This latter right protects a publisher’s intellectual creation in setting the layout of each edition, and may form the basis of an infringement action in circumstances where elements of the layout constituting the creative choices of the typesetter are copied for use in another publication (although the layout may in any event include third-party copyright in editorial or advertising material). The photocopying of individual articles has been held not to infringe the copyright in the layout, where the layout of any page was not sufficiently reproduced to amount to a substantial part (as the test was then applied) of its typographical arrangement. The composition of a digitally created or enhanced photographic image, as often seen in newspapers, may be sufficiently original for copyright to

[Accessed December 5, 2015].

197 ENPA, Square du Bastion 1A, Bte 3, 1050, Brussels, Belgium, tel: 00 32 25 51 0190, fax: 00 32 25 51 0199 (http://www.enpa.be [Accessed December 8, 2015]).

198 WAN-IFRA is based in Darmstadt (Washingtonplatz 1, 64287 Darmstadt, Germany, tel 00 49 61 51 7336, fax: 00 49 61 51 733800) and Paris (96 bis, Rue Beaubourg, 75003, Paris, France, tel: 00 33 1 474 28500, fax: 00 33 1 427 89233, http://www.wan-ifra.org [Accessed December 8, 2015]).


201 See Ch.7, above, as to the protection generally afforded to literary and artistic works.

202 As to copyright in compilations, see paras 3-21 et seq., above.

203 As to such copyright, see paras 3-104 et seq., above.

subsist but the level of intellectual creation of the author will need to be considered.205

Where digital platforms and newspaper websites are concerned, “user experience” is important. However, the Courts have held that copyright will not subsist in the ideas behind such a platform or the functionality of a computer program used to create it.206

26-53 Multiplicity of sources. The content incorporated into the published edition of a newspaper always originated from a wide variety of sources: salaried employees (including journalists, photographers and illustrators); freelance journalists; news agencies, archives207 and photo libraries; occasional contributors (the most common examples being readers’ letters to the editor and classified advertising); advertising agencies; and third-party contributors of databases of information such as weather and sport information, arts and entertainment and the like. Digital technology has only increased the range of external sources. Newspaper websites can include, for example, reader-generated content, comments on blog posts, contributions to discussion boards and information (including sound and images) uploaded via online data-sharing facilities: generally ownership of such content will vest in the author but wide usage rights will be granted to the newspaper under the conditions of use of the website, or in the terms of the entry form or log-in. Where newspapers have introduced ancillary electronic services such as recorded audiotext material, there may be other third-party right-holders in recorded music or sports, weather messages, or other recorded information. There has been a significant recent development in establishing a framework permitting collecting societies to license so-called “orphan works”, namely works where the author cannot be traced following a diligent search.208 The power to grant licences of true “orphan works” is appointed to the Comptroller General of Patents, Designs and Trade Marks.209 New regulations have also been introduced to standardise Codes of Practice for copyright collecting societies.210

26-54 Employee’s works. The rule whereby an employer is normally the first owner of

206 There are many examples of mass-digitisation projects currently underway such as the Google Book Project (https://books.google.com [Accessed December 8, 2015]) and the British Library’s newspaper scanning (http://www.bl.uk/aboutus/stratpolprog/dgi/digitisation/index.html [Accessed December 8, 2015]).
207 The Copyright and Rights in Performances (Certain Permitted Uses of Orphan Works) Regulations 2014 (SI 2014/2861) insert a new Sch.ZA1 into the CDPA which permits non-commercial bodies (defined as: public libraries; educational establishments; museums; archives; and public service broadcasting) to make copies of “orphan works” for certain non-commercial uses, or to make then available to the public.
208 The Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014 (SI 2014/2863). In addition, the Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014 (SI 2014/2588) provides for the Secretary of State to authorise a relevant licensing body to operate an Extended Collective Licensing Scheme (under which a relevant licensing body can grant licences over relevant works where copyright is owned by rights holders who are not represented by particular collecting societies) for a renewable period of up to five years.
209 The Copyright (Regulation of Relevant Licensing Bodies) Regulations 2014 (SI 2014/898). Ad-
works created by employees during the course of their employment\textsuperscript{211} is now regarded by newspaper proprietors as axiomatic.\textsuperscript{212} It gives a newspaper publisher wide scope to deal with employed journalists’ works, both in-house and commercially, without the financial and administrative burden of entering into a substantial number of licence agreements or negotiating royalty fees over and above paid salaries. Its practical effect is to permit, in the absence of an agreement to the contrary,\textsuperscript{213} use of employed journalists’ material in electronic media, magazines and spin-off publications, and to enable newspaper proprietors to publish such material in book form, to sell articles or photographs to radio or television companies or foreign websites, to pass them to other media owned by the same group and to store and retrieve them in databases for internal or external use, all without the need to obtain licences from employees.

**Employee or independent contractor?** Given that the ownership of copyright in the works of journalists depends upon the employment status of the journalist, the question of whether a journalist is working under a contract for service or contract for services is of crucial importance in the industry. Although as a general rule the status is clear, the gradual extension over recent years of “employee-style” benefits to freelancers, new ways of working and varying methods of payment has in some cases blurred the original, relatively distinct freelance status, and may create a risk to freelancers that (for copyright purposes) they might be deemed to be employees. There is much general case law on the subject of the criteria and consequences of the differing status of employees and independent contractors.\textsuperscript{214} However, the status of the copyright in the works, and the extent of the newspaper’s rights to syndicate, reproduce or re-use without further payment, will in most cases be established by written agreement with the contributor.

**Commissioned and unsolicited works.** The exception to the general rule in the 1988 Act that the author of a work is the first owner of the copyright applies only to employees’ works. Copyright ownership of material submitted by anyone other than an employee of the newspaper (whether journalist, graphic artist, illustrator or set designer and whether commissioned or unsolicited material)\textsuperscript{215} is therefore dependent upon such contractual arrangements as may exist between the parties.\textsuperscript{216} Similar considerations apply for ownership of copyright in materials produced by

\textsuperscript{211} CDPA 1988 s.11(2). See paras 5-08 et seq., above.

\textsuperscript{212} Compare with the position under the 1911 and 1956 Acts where, in some circumstances, the copyright was split between the journalist and his publisher-employer: see paras 5-29 and 5-30, above. The point is still important in the case of works made under the 1956 and 1911 Acts.

\textsuperscript{213} Agreements to the contrary are very rare in the newspaper industry.

\textsuperscript{214} See paras 5-11 et seq., above.

\textsuperscript{215} For example, the arrangement of backdrop to a photographic shoot: see \textit{Creation Records Ltd and Others v News Group Newspapers Ltd} [1997] EMLR 444.

\textsuperscript{216} See (1) \textit{Celebrity Pictures Ltd} (2) \textit{Tyson Sadlo v B Hannah Ltd} [2012] EWPCC 32 for an example of problems which can occur if proper contractual arrangements are not agreed or notified to the contributor. This copyright infringement claim was brought by a photographer and a company which had been granted syndication rights in certain photographs. There was no evidence that the
an employee otherwise than during the course of his employment, or where employees were involved in the creation of a work but not sufficiently to bring about joint authorship on the part of the employer absent a contractual agreement. It should be noted, however, that a newspaper publisher may be entitled to be taken to be the “author” of (and hence potentially first owner of copyright in) sound recordings and films made by non-employed journalists, to the extent that the publisher is the “producer”.217 Copy from advertising agencies and private advertisers (whether domestic or business) will generally be subject to a newspaper’s standard terms and conditions of acceptance of advertising, subject to contractual principles relating to incorporation of such terms.

Copyright in unsolicited materials intended for publication, such as letters to the editor, will normally remain with the author218 although some national newspapers have sought to obtain assignments of the copyright in such letters and to accept them only on the basis that they have not been submitted for publication elsewhere. On the other hand, the submission of material online, for example on bulletin boards, blogs or “tips” pages, is generally governed by terms of use which seek to make explicit the publisher’s right to use, retain and delete such material (although even to the extent that it could be valid219 the publisher will rarely seek to assert an assignment or exclusive licence of the copyright).

Agreements with news agencies and external photolibraries will govern permitted use of material received by virtue of a subscription service. Such agreements generally reserve to the agency copyright and all other intellectual property rights in material supplied by them, granting subscribers to their services non-exclusive, non-transferable licences for a set time period, normally between three to five years. Newspapers are generally able under the terms of the licence to extract from the stream of material received via the service as much or as little as is relevant to them, to edit the material, and publish it for the duration of the licence. Downloading of agency material onto a newspaper’s database is normally prohibited.

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26-57 **Journalists’ interviews.** Spoken words qualify for copyright protection once recorded in any manner, in writing or otherwise, provided they constitute a “literary” work and are “original”.220 Thus, copyright may well subsist in the words of an interviewee, once recorded by a reporter.221 Because the “author” of and thus owner of the copyright in the interviewee’s words is the interviewee himself and not the person recording the spoken words,222 an infringement action might lie223 with the speaker following publication of the words were it not for the exception

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217 CDPA 1988 s.9(2). “Producer” is defined as “the person by whom the arrangements necessary for the making of the sound recording or film are undertaken”: CDPA 1988 s.178. See Stephen Slater v Per Wimmer [2012] EWPCC 7 which confirms that copyright in the film footage of a skydive over Mount Everest was owned jointly by the cameraman who had shot the footage and the person who had financed the relevant project, held to be the “producer”.

218 The submission of a letter or article for publication will however usually imply a licence to publish. See paras 5-224 et seq., above.

219 CDPA 1988 s.90(3) and 92(1). For a more detailed consideration, see para.26-127, below.

220 CDPA 1988 s.3(2). As to “originality”, see paras 3-125 et seq., above.

221 “Record” is not defined but would include a record in any form including writing, a sound recording or a film. “Writing” includes any form of notation or code: CDPA 1988 s.178.

222 See para.4-16, above. As to the separate copyright belonging to the interviewer, see further in the text and para.4-17, above.

223 Often, of course, publication of the interview will have been impliedly licensed by the interviewee.
in s.58 of the 1988 Act. The effect of this section is that, provided no relevant prohibitions were imposed by the interviewee before the reporter made the recording, no express agreement need be obtained for subsequent use of the recording for the purpose of reporting current events or communicating the words to the public. It appears that any prohibition must be expressly made and it is suggested that the stipulation by an interviewee that his comments were “off the record” would usually constitute a valid prohibition, given the well accepted understanding that such words are meant to prohibit use in the form of news reports or otherwise.

It is a further condition that, for the underlying literary work in the spoken words not to be infringed, the person who is lawfully in possession of the “record” in which the literary work is fixed must consent to the use of it. This would appear to indicate that publication of the interview requires the consent of the reporter in order to ensure that the proprietor or other officer of the newspaper company does not infringe the interviewee’s copyright. It is likely, however, that the reporter’s consent would be inferred from the fact that the particular story had been submitted by him for publication. Presumably, also, where this tape is in “possession” of an employed reporter, his “possession” is that of his employer; and, where the interview has been commissioned by the newspaper from a freelancer, the provision of the recording would likely be an implied (if not express) term of the agreement.

There is a quite separate copyright which may subsist in the journalists’ work, consisting of his record of the interview. The standard of independent skill and labour required of a reporter in the taking down of notes to a speech or interview for the separate work to qualify for copyright protection is historically low, although this ought now to be considered in terms of intellectual creation, especially in reference to a record made in writing. The mere taking of a verbatim shorthand note of an oral speech not previously written down has been held sufficient for the written record to qualify for copyright protection, although it must be questioned if that would meet the test of intellectual creation. Given that most interviews are now recorded using digital sound recorders or video cameras, where the parties to the recording are not directly contracted to or employed by the newspaper publisher it may (as noted above) be entitled to claim ownership of the copyright, or a joint share of the copyright, in any sound recordings and films made by non-employed journalists, to the extent that the publisher is the “producer”.

For a journalist or publisher wishing to extract and re-publish elements of an interview obtained by a third party rights holder, such as a rival publisher, the new fair dealing exception of quotation will only assist where the words quoted have already been made available to the public, which adds an additional layer of protec-

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224 For a detailed discussion of this section, see paras 9-174 et seq., above, and see CDPA 1988 s.58(2)(b), (c).
225 Where an interviewee is unaware that a recording is being made, the laws of confidence, privacy and data protection may apply (subject to any public interest defences or exemptions for journalism). When a covert recording is made by telephone, the Regulation of Investigatory Powers Act 2000 must also be considered.
226 CDPA 1988 s.58(2)(d).
230 CDPA s.30(1ZA), as inserted by the Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 (SI 2014/2356).
Exploitation of Rights in Particular Industries

The use of quotations in journalism is subject to certain conditions to prevent unauthorized leaks emerging from high-profile interviews. It is also subject to a limitation on the extent of the quotation (namely, no more than is required by the specific purpose for which it is used). Both these conditions are consistent with an interpretation of “fair dealing” as not competing with the commercial interests of the original rights holder. In addition, the quotation defence requires a sufficient acknowledgement although putting aside industry convention whether this would apply to the need to acknowledge the journalistic source, as well as the interviewee, would depend on the extent to which the intellectual creation of the newspaper (or interviewer) had been taken in the quotation.

News stories obtained from other sources. It is a relatively commonplace practice for media to make note of other media sources for news stories to be then either followed up independently or rewritten by their own staff for publication. The rewriting of news stories may be permissible provided that this does not involve the wholesale reproduction of an article from another newspaper or radio, television or cable broadcast, or any part thereof constituting the intellectual creation of a third party, which would in either case infringe the copyright in that item. Even this, however, can sometimes be justified on the basis of “fairdealing”: either for the purposes of reporting current events or in quoting a previously published work (where the extent of the quotation is no more than is required for the specific purpose for which it is used), provided in each case that a sufficient acknowledgement is included. Where such defence does not apply, and what has been taken are extracts consisting of an interviewee’s own words, it is sometimes argued that a custom exists in the industry whereby it is accepted that this will happen. The question was previously framed in terms of what constituted a substantial part of a newspaper article, but this must now be considered in light of the ECJ’s decision in Infopaq International A/S v Danske Dagblades Forening, that the storing and printing out by a media monitoring business of 11 word extracts from newspaper articles amounted to a reproduction in part within art.2 of the Information Society Directive if the elements reproduced were the expression of the author’s own intellectual creation. This has been tested in the UK where the Meltwater litigation established that where media monitoring services provided headlines and extracts taken from articles on newspaper websites to their clients, those clients would require an end-user licence. The UK Court of Appeal has also given specific

231 In addition to those conditions at CDPA 1988 s.58(2) limiting the defence in respect of either reporting current events or communicating to the public the whole or part of the work.
232 CDPA 1988 s.30(2).
233 CDPA s30(IZA), as inserted by the Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 (SI 2014/2356).
234 See, e.g. Express Newspapers Plc v News (UK) Ltd [1990] 1 W.L.R. 1320. This is because it would be contrary to public interest if further dissemination of news items was prohibited absolutely as a copyright infringement. But the argument has never succeeded, for good reason it is suggested: the fair dealing defence of quotation may be of more assistance here. See Walter v Steinkopff [1892] 3 Ch. 489; Banier v News Group Newspapers Ltd [1997] F.S.R. 812.
236 Directive 2001/29/EC.
237 The ECJ left it to the national court to decide whether, on the facts, the extracts in issue did amount to the author’s own intellectual creation.
consideration to these Infopaq concepts of intellectual creation and reproduction “in whole or in part”, notably in SAS Institute Inc. v World Programming Ltd.

Other material obtained from other sources. Newspapers publish a huge range of other material obtained from a wide variety of sources. In doing so, reliance is often placed on the “fair dealing” defences. While the defence of “fair dealing” for the purposes of reporting current events is to be construed liberally, there are limits to its scope. Where extracts quoted from a private journal form a substantial part of the whole or represent (even in part) the intellectual creation of the author, the copy of the journal has been obtained via a breach of confidence, and the articles are not confined to current events, their purpose being to report on the revelation of the contents of the journal as itself as an event of interest, the defence is unlikely to apply. In order to rely on the newer “fair dealing” defence of quotation, a newspaper publisher would have to show that the work had previously been made available to the public, that the extent of the quotation was no more than required for the specific purposes of its use, and included a sufficient acknowledgement of the rights holder. Newspaper content is itself as much prone to “fair dealing” uses by third parties as it is likely to benefit from such uses. It is not however fair dealing for the purposes of criticism and review to reproduce the entire front page of a title published by a competitor in a comparative advertisement where a simple identification of the original title would have sufficed.

Advertisements, compilations and databases. Insofar as newspaper employees expend sufficient skill and labour in the creation of text, design and illustration for an advertisement which is their own intellectual creation, whether classified or display, the newspaper proprietor will prima facie own the copyright subsisting in the work. Where advertisements are created in part by newspaper staff and in part by a private advertiser or agency, copyright in the advertisement will be split accordingly. The same is true for newspaper promotions or other marketing tools in the form of games or competitions, many of which may sufficiently express the author’s intellectual creation to qualify for copyright protection as a compilation. Newspaper-compiled business directories and other lists of, say, restaurants, entertainments, educational courses or facilities may also qualify for protection provided that sufficient work goes into the selecting and arranging of the data; and

Sources of Copyright

240 [2013] EWCA Civ 1482. Recognising the increasing importance of European jurisprudence in copyright law these concepts must now be given primary consideration over and above the language of substantial part from the CDPA.
242 CDPA s30(1ZA), as inserted by the Copyright and Rights in Performances (Quotation and Parody) Regulations 2014 (SI 2014/2356).
246 CDPA 1988 s.1(1)(c) and see, for example, Express Newspapers v Liverpool Daily Post and Echo [1985] I W.L.R. 1089 where copyright was held to subsist in a game consisting of reader cards comprising a five-letter sequence and daily varying grid-letter sequences (which case expressed the test in terms of containing sufficient skill and labour).
that sufficient skill and judgment is applied during the process to make the work the “intellectual creation” of the journalist. Alternatively, they may qualify for protection under a sui generis database right; however, the Court of Appeal judgment in SAS Institute Inc. v World Programming Ltd suggests that the impact of the Information Society Directive (and related ECJ jurisprudence) has been to raise the bar in terms of qualifying for this protection. Mere mechanical effort in data collection and entry has been supplanted by the requirement for intellectual creation.

However, where journalists consult databases to gather source material for their articles, including website content that falls within the definition of a database then there is still a risk of infringement of database right. Transferring may occur even if no physical copying takes place. What is required is that a part of the database is found in a new medium. This may, for example, occur where the transferor consults the original database in order to assess each piece of data on whether to incorporate it into the new medium and in doing so displays it on a screen.

C. RIGHTS REQUIRED FOR EXPLOITATION

Employees. Notwithstanding the employee provisions of s.11(2) of the 1988 Act, it is common practice to include an express assignment of copyright in any work created by an employee at any time while in the newspaper’s employment. There are a number of reasons for this. First, an express assignment avoids arguments about whether a particular piece of work was produced “in the course of employment”. Express and clear provision in an employment contract can render less likely subsequent disputes about whether a verbal agreement was made as to copyright ownership, or whether a course of conduct was such that in respect of a particular article, photograph or illustration, there was a contrary agreement as to ownership. Lastly, an express assignment is useful in cases where other jurisdictions are involved, particularly in the event that the newspaper wishes to secure foreign rights in the material.
Freelances: express terms. The need to secure rights for re-use of material in a range of different digital formats and editions (including syndication in the UK and overseas), and litigation over whether such rights have been secured,\(^{255}\) have driven the industry to adopt a more systematic approach to commissioning of freelances. Most, if not all, newspaper publishers have adopted written commissioning terms that include the right to use contributions in all formats and editions (including print, electronic and audiovisual) of the newspaper, and to store and display commissioned material on internal and external databases. Other rights include those required to be passed on to the Newspaper Licensing Agency,\(^ {256}\) and the right to syndicate. Although there are no industry wide standard commissioning terms, there has been a convergence in approach by publishers. There are, of course, other advantages in securing an express grant of rights on a formal basis. An assignment or exclusive licence of copyright will not be effective unless in writing and signed.\(^ {257}\) For a newspaper proprietor to have locus standi to institute infringement proceedings relating to the work, a written, signed agreement would be required from the freelancer either making the proprietor an exclusive licensee or amounting to an assignment of copyright.\(^ {258}\)

Freelances: implied terms. Nevertheless, given the news industry’s abiding need for urgency, contributions are not infrequently commissioned without a written agreement between the newspaper and freelance. While repeated commissions may bring the publisher’s standard terms to the freelance’s attention, this may not happen in the case of “one-off” commissions. In the absence of a written agreement, a publisher will have an implied permission “to use the work in the manner and for the purpose in which and for which it was contemplated between the parties that it would be used at the time of the engagement.”\(^ {259}\) This implied permission will generally be regarded by custom and practice as including a non-exclusive licence to publish the work in printed form. In addition, it is likely that the non-exclusive right to permit photocopying of the article, post it up as part of the online or digital versions of the newspaper, promote and link to the article on social media and store it on archival databases may also be implied into the arrangement, since these are now likely to be understood as the normal consequences of publication in a newspaper. However, there is always a risk that the terms of the implied contract with the contributor may remain unclear, including the scope, permitted media of publication, territorial limitations, syndication rights, commercial terms and duration of the licence. An implied licence may also not extend to re-publication of archived articles, or syndication of the newspaper’s commercial databases to third parties, including news agencies or other media companies. As custom develops,

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256 See para.26-136, below.

257 CDPA 1988 ss.90(3) and 92(1).

258 CDPA 1988 ss.101(1) and 96(1), respectively. The new s.101A (see paras 21-30 et seq., above) is unlikely to be of much application to the newspaper industry because, while non-exclusive licences are not unusual in freelance commissioning terms, they are often not signed by the contributors.

259 *Robin Ray v Classic FM Plc* [1998] F.S.R. 622, at 643. See *Dr Susan Mary Wilkinson v London Strategic Health Authority* [2012] EWPCC 48 for an example of how the courts will imply a licence to use commissioned materials produced by a contractor which were based on earlier materials in which the contractor held the copyright.
Electronic commissioning of material. Publishers are increasingly looking to streamline the commissioning process, both to ensure that the commissioning terms are binding on freelance journalists, and to make the process easier to administer for commissioning editors. Commissioning freelances by electronic means is the inevitable result of combining these objectives with new technology. The question arises of whether electronic commissioning terms are capable of meeting the statutory requirements for a valid assignment of copyright or grant of an exclusive licence, even where a formal electronic signature is used. Section 8 of the Electronic Communications Act 2000 allows ministers to amend statutes to authorise or to facilitate the use of electronic communications or storage. As yet, no statutory instrument has been made to resolve the ambiguity in the law at present relating to whether signatures in an electronic form will suffice as a signature for the purposes of s.90 (3). However, it could be argued that an effect of EU legislation and international model laws is that the status of a “signature” must not be prejudiced solely by virtue of its electronic form. In the absence of definitive guidance, where there is doubt cast on whether the assignment or exclusive grant was properly executed electronically, a publisher commissioning material using electronic terms can argue that any agreement to assign or grant an exclusive licence is contractually enforceable by the publisher against the contributor.

Right to exploit advertising material. As with freelance commissioning terms, terms governing the booking of advertising space have evolved to reflect the opportunities for digital display, and now routinely include the right to publish the advertisement irrespective of the medium or platform in or on which it is published. Newspapers may insert in their standard terms and conditions for advertising a provision that the copyright for all purposes in all artwork, copy, and other material which the newspaper company or its employees have originated, contributed to or reworked belongs to the company. Such terms and conditions also authorise the company to record, reproduce, publish, distribute and broadcast (or permit such acts) in respect of all advertisements accepted for publication (including, but not limited to text, artwork and photographs) and to include and make them available in any information service, electronic or otherwise. A warranty to the effect that advertising copy submitted does not infringe any third-party intellectual property rights is another common provision, as is an indemnity from advertisers and advertising agencies in respect of all costs, damages and other charges falling upon the newspaper company in respect of legal actions or threatened legal actions arising from the publication of advertisements accepted for publication.

Photographs. In-house photographic libraries, the content of which comprise photographs taken solely by staff photographers after August 1, 1989, will generally be free from ownership restrictions on use. However, rights-clearance issues become more complicated where libraries comprise photographs taken by

260 CDPA s.90(3) and s.92(1).
262 UNCITRAL Model Law on Electronic Signatures 2001 art.6.
freelances (where use will be governed by contractual terms or implied licences), or in respect of older photographs where the law in force at the time the photograph was taken will apply. Newspaper publishers may not, of course, assume that contemporary industry custom takes precedence over prior agreements, so as to permit the online marketing of photographs, contrary to licence terms agreed in a consent order. Nor should they seek to rely on it to imply terms into an (unwritten) agreement that pre-dated the use by many years, before a time when such online marketing could be said to have been in the contemplation of the parties.

External photo libraries are becoming increasingly concerned that once their photographs have been digitised, there is almost unlimited scope for them to be copied, digitised and altered. Photographers and agencies have therefore become more reluctant to grant licences for online newspaper publications without strict limitations on the right to adapt or alter the works, often also requiring technical measures to restrict the facility of high-resolution downloads of photographs by end users. Where ancillary services are offered by newspaper companies, such as audiotext facilities linking newspaper text to telephone facilities, there may be a need for clearing rights via collecting societies such as the Performing Rights Society (PRS) or the Mechanical Copyright Protection Society (MCPS). Such commercial projects are increasingly becoming integrated in newspaper operations.

The defence of “fair dealing” for the purposes of reporting current events does not apply to photographs. Nor is it acceptable, in circumstances in which publication is time-critical, to reproduce photographs and pay licence fees for publication after the event. In such circumstances the court may reach a finding of flagrancy and award additional damages.

**Right to privacy of certain photographs and films.** Section 85 of the 1988 Act provides for a moral right restricting publication of photographs and films commissioned for private and domestic purposes. In certain circumstances waiver of this right will be required if such a photograph is to be included in a newspaper or posted up on a newspaper website. However, the section amounts to a very limited exception to the general common law position that there is no right to prevent a photographer from taking a photograph of a person and subsequently using the photograph commercially for publication and distribution. The section is narrow in scope and was intended to cover, for example, commissioned wedding photographs and family portraits in a non-commercial context. Nevertheless, developments in the law of privacy and data protection may in due course require that greater care...

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265 For a decision on infringement of a digitally created photograph see *Temple Island Collections Ltd v New English Teas and Anor* [2012] EWPC 1; [2012] F.S.R. 9; [2012] E.C.D.R. 11. See also *Emma Delves-Broughton v House of Harlot Ltd* [2012] EWPC 29 where a company was found liable for copyright infringement and derogatory treatment of a photographer’s work (CDPA 1988 s.80) after using a modified version of a photograph on its website. Despite not knowing that the photographer held the copyright (which was not disputed), the company was strictly liable for copyright infringement.

266 As to such societies see paras 27-65 and 27-63, below.

267 CDPA 1988 s.30(2).


269 In May 1993, the Photographs and Films (Unauthorised Use) Bill sought to extend the moral rights
will need to be taken in the use of photographs of a private nature, even if s.85 does not apply.270

26-68 Exceptions to paternity and integrity right. In specific circumstances the 1988 Act gives the author of a literary, dramatic, musical or artistic work the right to be identified as author of that work271 (the “paternity right”) and to object to the work being subjected to “derogatory treatment” (the “integrity right”).272 A number of exceptions to the paternity and integrity rights are relevant to publication of a copyright work in a newspaper apply, namely:

(i) where a work is made for the purpose of reporting current events273;
(ii) in relation to the publication in a newspaper, magazine or similar periodic al of any literary, dramatic musical or artistic work (including photographs, illustration, editorials or news stories) made for the purposes of such publication, or made available with the consent of the author for the purposes of such publication274;
(iii) where the employer of the author is the first owner of the copyright pursuant to s.11(2) and where what is done has the authority of the copyright owner.275

26-69 Implications of exceptions of paternity right. One practical effect of the Act’s exceptions to the paternity right is that no action will lie where a freelance or employed journalist is not identified in a published article by way of a by-line. In the case of freelancers, the exception applies whether the published work was specifically commissioned by the newspaper or whether it was an unsolicited work submitted to the newspaper. The rationale behind the exception lies partly in the practical difficulties which can ensue in ascertaining which of the persons who

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271 CDPA 1988 ss.77, 78.

272 CDPA 1988 s.80. The treatment would have to be held to amount to a “distortion or mutilation” of the work or be otherwise prejudicial to the honour or reputation of the journalist or photographer.

273 CDPA 1988 ss.81(3) and 79(6).

274 CDPA 1988 s.81(4)(a) and 79(6)(a).

275 CDPA 1988 ss.79(3), 82(1)(a). In the case of derogatory treatment, a disclaimer may have to be published if the author has been named. See s.82(2). Note that where a newspaper publishes only with a licence of the copyright owner, the licence may not extend to publication in altered form. See para.5-228, above.
contributed to a final published version of an article (researchers, journalists, contributions, sub-editors) should be accorded a by-line. It has also been argued that the clarity of representation of newspapers and the flexibility of editors and publishers to determine an attractive format and appearance might be hindered if a paternity right imposed an obligation to provide by-lines to journalists. In some cases publishers and editors identify authors voluntarily or in satisfaction of a contractual obligation. However, since it is arguable that the exception to the paternity right does not extend to electronic publications, express waivers are frequently included in contractual agreements. Terms for online submission or posting of content (for example on bulletin boards) may contain waivers, or may remain silent, relying on the fact that (under UK law) the paternity right cannot be infringed unless asserted.276

Implications of exceptions to integrity right. The Act’s exceptions to the integrity right277 mean that staff journalists, freelancers and readers who have submitted letters for publication and agencies who have submitted illustrations or text in advertising copy cannot (subject to contractual agreements) object to the editing of their contributions. The exception also applies to subsequent exploitation of the work elsewhere, for example online, without modification to the published version.278 Photographers cannot sue in respect of alterations to the size, colour or proportions of their published photographs. The electronic or manual alteration of a photograph, including cropping, has been justified in terms of the requirement to conform to space constraints or to align with the content of a particular news story. Some journalists’ employment contracts may contain waivers of the integrity right (conditional or unconditional, and sometimes expressed to be subject to revocation). These are unlikely to be necessary, given that the moral right of integrity does not apply to a work prepared for publication in a newspaper, magazine or similar periodical. However, since it is unclear whether the exception applies to newspaper websites, terms for online submission or posting of content often entitle the publisher to make additions or deletions to the text or graphics prior to publication.279

False attribution. Contracts with freelancers and employees (whether in respect of text, photographs, graphic illustrations or design) frequently contain a waiver of the moral right not to have work falsely attributed to the author.279 In a newspaper context, such a right could be infringed by normal distribution to the public of a newspaper containing an article, photograph or advertising material where a false attribution had been made. The attribution may be express or implied. In contrast with the paternity and integrity rights, there is no exception applicable in a news-reporting context.280

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276 CDPA 1988 s.78.
277 CDPA 1988 ss.81(4), 82(1)(a). Note that the third exception identified above does not apply to the integrity right where the author, journalist or photographer is identified at the time of the relevant act (i.e. publication) or has previously been identified in or on published copies of the work, unless there is a sufficient disclaimer. A “sufficient disclaimer” is defined as a clear and reasonably prominent indication given at the time of publication (which, if the author is then identified, must appear along with the identification) that the work has been subjected to treatment to which the author has not consented: CDPA 1988 s.178. See generally as to these rights, Ch.11, above.
278 CDPA 1988 s.81(4).
279 CDPA 1988 s.84.
280 See, for example Clark v Associated Newspapers Ltd [1998] 1 All E.R. 959.
D. Representative Collecting Societies and Licensing Agencies Responsible for Administering the Rights

In marked contrast with the industrial relations position in a number of member states, there is little involvement in the print industry in the UK with systems of pooled copyright management, house agreements, collective agreements and the like. Rights are generally agreed and exploited on the basis of bilateral agreements between creators of commissioned works and publishers. That is, individual management is the norm.

The Newspaper Licensing Agency. In January 1996, a number of national newspapers launched the Newspaper Licensing Agency (NLA). The NLA was designed to complement the service offered by the Copyright Licensing Agency (CLA) which licenses the copying of magazines, books and periodicals. The NLA is a limited company, owned by the UK’s eight national newspaper groups. It licenses the copying of newspaper content on behalf of the copyright owners, and represents over 1,400 titles in total. Over 150,000 organisations rely on the NLA’s 9,500 direct annual licences and in 2014 it generated revenues of almost £34 million in royalties for its represented rightsholders, representing year-on-year growth despite the shrinking market as a whole. The NLA offers a selection of licences dependent upon the type of organisation and its requirements. These licences permit the copying of UK national and regional newspapers, in both print and online editions, as well as foreign and specialist titles. The licensed activities include photocopying, faxing and printing, digital reproduction (scanning, emailing and hosting on an intranet site) and the receipt and distribution of content supplied by a third party such as a public relations or media monitoring agency. Since 2006 the NLA has maintained a pay-per-use electronic database of clips and since January 2010 newspaper website content has been included, offering a complete feed of newspapers’ online content direct to cuttings aggregators and press cuttings agencies. From 2013 the NLA began licensing magazine content.

Following the litigation in the case of The Newspaper Society Ltd v Marks & Spencer Plc the NLA amended the terms of its mandate and licences to cover the grant of licences of the copyright in individual articles, where that copyright had not been assigned to the applicable publisher. Its Distribution Scheme aims to identify contributors who have not assigned copying rights to the publisher (“Special Contributors”), who are entitled to a share of the sums paid by the NLA to newspaper publishers.

More recently, in a long-running case of considerable interest to the industry at large, the NLA successfully brought proceedings against a media monitoring service, Meltwater Holding BV, which provided headlines and short extracts from

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283 Representing a 17 per cent increase on 2013, although this was in part attributable to the inclusion of magazines in the portfolio for the first time. Actual newspaper revenue growth stood at 5 per cent for regionals and 2 per cent for nationals: http://www.nlamediaaccess.com/uploads/public/Home/2015nla-annualreport-web.pdf [Accessed December 5, 2015].
284 For further details, see the NLA website and para.26-143, below.

[2100]
articles published on NLA member websites and one of its customers. The NLA claimed that the activities of the customer infringed its members’ copyright. In a decision which cited Infopaq v Danske Dagblades, the English Court of Appeal confirmed that Meltwater’s users were infringing the NLA members’ copyright, which subsisted in those headlines and short extracts, and therefore required a web end-user licence from the NLA. The Copyright Tribunal subsequently delivered an interim decision on the structure and level of licence fee to be paid to the NLA.

Thereafter, in Public Relations Consultants Association Ltd v The Newspaper Licensing Agency Ltd and others, the Supreme Court considered whether users of the Meltwater Service who merely browsed content online on the Meltwater website (as opposed to receiving email content or downloading or printing it), which creates temporary copies of that content at various stages during the processing and display on-screen, would infringe copyright in the material being viewed or whether they would fall under the relevant exception. Although the Supreme Court concluded that online browsing would not infringe as it fell within the exception, it decided to refer this important question, which goes to the heart of the operation of the internet, to the ECJ. The ECJ ruled that internet users who browse media content online are not infringing copyright by making on-screen and cached copies of the content, as this is transient usage falling under the relevant exception in the Information Society Directive. The protection the ECJ granted in this decision does not extend to internet users who print, download or store such content on email, and such activities are still likely to be in breach of copyright.

E. Other Industry Controls

Self-regulatory controls. In both the editorial and advertising spheres, there remain self-regulatory controls in respect of content. However, this has come under considerable scrutiny since the recommendations of the Leveson Inquiry and the Privy Council approval of the Royal Charter on self-regulation of the press on October 30, 2013. Editorial content was until September 8, 2014 overseen by the Press Complaints Commission (PCC), which was then replaced by the preferred body of the majority of national editors, the Independent Press Standards Organisation (IPSO). IPSO enforces an Editor’s Code of Practice with provisions relating to accuracy, payment for articles, harassment, opportunity to reply, interviewing or photographing children, intrusion into grief or shock and other matters. However, it remains unclear whether IPSO will provide a long-term solution to...
regulation of editorial content given a divided industry and public, and uncertainty as to the future role of any independent regulator to be appointed by the Press Recognition Panel (created on November 3, 2014 under the Royal Charter) which is unlikely to be supported by the majority of newspaper editors. 295

Self-regulation in the advertising and marketing area is administered by the Advertising Standards Authority (ASA)296 on the basis the CAP Code.297 This topic is dealt with in more detail elsewhere.298

F. CURRENT INDUSTRY CONCERNS

26-75 The major current issues of concern to the newspaper sector relate to the impact of new technology. This, more than anything else, dictates the industry stance to ongoing reforms in copyright law, wherever these emanate from.

26-76 Online re-use and infringement. The exponential growth of search engines and online data aggregation has, from the perspective of newspaper publishers, been a blessing and a curse. It has provided access to content for millions of users, and opened up new markets. At the same time, it has facilitated re-use of content, much of it unauthorised, on a grand scale. The activities of linking, “spidering” and caching routinely undertaken by search engines and other intermediaries are designed to make material available to wider audiences. However, whilst the intermediaries argue that they are providing a beneficial service to the owner, by presenting their content to huge numbers of web users, the publishers argue that these activities do not always drive traffic to their sites, with the result that they are missing out on substantial advertising revenue and losing their basic right to control their own content.299 This has driven much of the litigation by industry bodies such as the NLA.

26-77 Search engines. Search engine algorithms typically gather and rank many thousands of news stories every day. The search page ranks the results, displaying the headline and a very short extract from the article. The headline is hyperlinked to the original newspaper publisher’s website. The European decisions in Copiepresse v Google300 and Infopaq301 and the Meltwater decisions in the UK confirm that reproducing headlines in hyperlinks can infringe newspaper publishers’ copyright in those headlines in certain circumstances. In the Court of Ap-
peal’s ruling on Meltwater,\textsuperscript{302} it was held that newspaper headlines could attract copyright as literary works, so search engines that reproduce newspaper headlines in their own URLs and hyperlinks could be infringing the original publisher’s right to reproduction. It was also held that end users could not rely on the “temporary copies” exception in the Information Society Directive\textsuperscript{303} and would likewise need a licence. However, the UK Supreme Court\textsuperscript{304} decided that the exception ought to apply to on-screen and “cached” copies of any copyright works which were generated by the user in the ordinary course of their browsing. On referral, the ECJ upheld this view\textsuperscript{305} on the basis that on-screen copies were transient in nature while cached copies were created as an incidental effect of the search process, and in both cases these were integral and necessary parts of the technical process of browsing. Although disappointing for newspaper rights holders, whose legitimate interests were considered by the ECJ (ultimately deciding that they already exercised sufficient control over the use of their copyright material in terms of whether and how they originally placed their own material online), the decision was welcomed within the technology sector as well as by ordinary users of the internet. The decision does not legitimise other secondary acts following the browsing process, such as unauthorised downloads, printing and screen-grabbing of content.

Elsewhere in Europe, rights holders have sought different ways to bring the fight to search engines (and Google in particular). In 2014, Spain sought to impose a so-called “Google tax”, namely a mandatory copyright fee to be paid by online news aggregators to publishers, via a collecting society, for linking their content within their aggregation services. This approach continues to be debated across Europe, despite a July 2015 report suggesting that the results had not after all been favourable to publishers.\textsuperscript{306} Meanwhile in Germany, a collecting society representing around 200 press publishers, VG Media, brought a claim in 2015\textsuperscript{307} arguing that Google’s use of “snippets” of its rights-holders’ content represented an actionable breach of their copyright. This case is likely to continue, with reports of a fresh claim brought in January 2016.\textsuperscript{308}

\textbf{Linking and deep linking.} Many search engines and content aggregators include links in their presentation of search results, including “deep links”.\textsuperscript{309} An unauthorised communication to the public of a copyright work is an infringement. A communication to the public includes:

\begin{itemize}
  \item \textsuperscript{302} {Newspaper Licensing Agency Ltd and Others v Meltwater Holding BV and others} [2011] All E.R. (D) 248 (Jul)
  \item \textsuperscript{303} art.5(1).
  \item \textsuperscript{304} {Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd and others} [2013] UKSC 18; [2013] 2 All E.R. 852.
  \item \textsuperscript{305} {Newspaper Licensing Agency Ltd and others v Meltwater Holding BV and others} [2014] A.C. 1438.
  \item \textsuperscript{306} NERA report available with an English executive summary (at page ix) here: \url{http://www.aeepp.com/pdfInformeNera.pdf}.
  \item \textsuperscript{307} For consideration of this non-binding judgment of the German Patent and Trade Mark Office Chamber of Copyright Arbitration of September 24, 2015, see W.I.P.R. 2015, 29(11), 11–12. The report notes the recommendation that search engines should be allowed to use up to seven words free of charge, and thereafter a fair minimum charge should be the subject of negotiation between the parties.
  \item \textsuperscript{308} See \url{http://mobile.reuters.com/article/idUSKBN0Ul1KF20160105} [Accessed January 5, 2016].
  \item \textsuperscript{309} That is, a hyperlink that points to a specific page or image on another website, rather than the main or home page of that website.
\end{itemize}
The news media industry argued strongly that such linking involves the “making available” of a copyright work to the public, which would require the copyright owner’s consent. In Svensson v Retriever Sverige AB the ECJ ruled that clickable links could constitute an “act of communication to the public” but only if the links made the content available to a “new public”. Following this ruling, clickable links are only likely to infringe copyright where they link to content that has previously been protected or hidden from the public at large, for example behind a paywall. To the frustration of many newspaper publishers, the ECJ found that linking to content online does not infringe copyright where the linked content has already been made freely available to the public, such as on an open-access news website.

The ECJ applied this rationale again when considering embedded or framed content in BestWater International GmbH v Michael Mebes and Stefan Potsch. In this case the ECJ found that sales representatives who embedded video content from a third party onto their own website were not infringing copyright, because the video had already been made freely available to the public on YouTube. Rights holders who do not rely on paywalls or other security systems may be tempted to argue in the alternative that clickable links that replicate a news headline infringe their copyright in the headline itself, which is sufficient to establish infringement under Infopaq.

26-79 **Spidering and screen-scraping.** Spidering involves computer programs that seek out and collect information from publicly available websites, and then republishing this information on the “spider” website. There is very little case law in the UK or elsewhere on the extent to which “spidering” involves an infringement of copyright, or indeed of database right, perhaps because of the difficulties of proving infringement where small quantities of factual data are harvested. However, in Innoweb B.V. v Wegener ICT Media B.V., Wegener Mediaventions B.V. the ECJ considered meta search engines that trawl databases and ruled that their activity could infringe database right in some circumstances. The facts of this case were fairly narrow and may not apply to all types of “spidering”, but in principle it seems likely that aspects of “spidering” can infringe. The gathering of data and retrieval of web pages results in copies of the data or pages being made; if the data or pages

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310 CDPA s.20(2)(b).
311 Nils Svensson and Others v Retriever Sverige AB (Case C-466/12). The High Court in the UK considered The Football Association Premier League Ltd v British Sky Broadcasting Ltd & Ors [2013] EWHC 2058 but distinguished Svensson on the facts of the case, indicating that the ruling in Svensson may have a narrow application.
312 Questions have been referred to the CJEU as to whether linking to unlawfully available content infringes:

313 BestWater International GmbH v Michael Mebes and Stefan Potsch (Case C-348/13).
314 In Infopaq International A/S v Danske Dagblades Forening (C-5/08), the ECJ held that even short sentences of 11 words could be sufficiently original to attract copyright if the words express the intellectual creation of the author. As such, a link that reproduces a news headline from another website could be argued to infringe copyright.
315 C-202/12. In this case a search engine which trawled a database and presented that database’s results to users in its own branding did infringe database right by reusing the contents of the database.
are a copyright work, there would be an infringement. These activities would also be an “extraction” for database right purposes.316

Case law is equally scarce relating to the closely related activity of screen-scraping, that is to say, the extraction of data from screen outputs of other websites. This issue was examined in RyanAir v Vtours by a German court.317 In that case, RyanAir succeeded in obtaining relief against the operator of a website which posted large quantities of data scraped from Ryanair’s site. It argued that Vtours’ activities breached RyanAir’s terms and conditions and infringed its copyright. Other causes of action should be considered too. In the United States, the courts have held that “spidering” constitutes a trespass to property.318 If an unauthorised change is made to the rights holder’s computer an offence may be committed under the Computer Misuse Act 1990. Finally, depending on the website’s terms and conditions, there may be contractual issues.

Media monitoring. Media-monitoring services (which include the descendants of press clipping agencies and public relations agencies) gather articles and extracts from newspaper websites, aggregating such material with content drawn from other sources for provision to their clients (often in the form of “monitoring reports”). It was a media monitoring agency, Meltwater, which provoked the landmark litigation with the Newspaper Licensing Agency.319 However, although the NLA ultimately lost its appeal in respect of users who merely view a monitoring report online, it was not disputed at the outset that media monitoring agencies such as Meltwater need (and continue to need) a licence from news agencies, such as the NLA’s member publishers, in order to provide their services of aggregating news stories and making them available to their clients in various forms.320 The commercial nature of the service meant that it would have been unlikely to argue a defence of “fair dealing” for the purposes of reporting current events, and the Infopaq decision meant that there could be no argument that a headline contained in a link was incapable of attracting copyright.321 It was also common ground from an early stage in the proceedings that, because at that time Meltwater sent users of its service a monitoring report by electronic mail (namely, in a form which was not temporary or transient), its own users also needed a licence. However, the Supreme Court (and, on referral, the ECJ) ultimately held that users who merely browse aggregators’ websites, and in the process make temporary copies by caching or viewing links on-screen, do not infringe the copyright of the publishers, meaning that such monitoring reports can be made available to users online without a licence from the publishers. Nevertheless, activities such as downloading or printing the material would create permanent copies and infringe unless both user and service were operating under licence.

316 See Ch.18.
318 Ticketmaster Corp. v Tickets.com, Inc. (District Court of Central California, March 6, 2003) 2003 U.S. Dist. Lexis 6483.
320 See for example the Copyright Licensing Agency website, which offers media monitoring licences: http://www.cla.co.uk/services/licences....available/media....monitoring [Accessed September 10, 2015].
321 Infopaq International A/S v Danske Dagblades Forening (C-5/08); see para.26-141, above.
Also of great significance to media monitoring agencies was the Svensson case\textsuperscript{322} which determined that, although clickable links could constitute an “act of communication to the public” within the meaning of the Information Society Directive,\textsuperscript{323} this would only be the case if the links made the content available to a “new public” who were not able to view the content elsewhere. Therefore a media monitoring service aggregating links and communicating them to their clients would only infringe if, for example, they provided links to premium content normally kept behind a paywall.

\textbf{26-81 Non-legal solutions.} Prior to judicial clarification of whether the access to newspaper content provided by search engines was a copyright infringement, several solutions of a technical or commercial nature were proposed or piloted. One technical solution proposed in 2007 was the Automated Content Access Protocol,\textsuperscript{324} launched in 2007, offering a new universal permissions protocol on the internet, which could be automatically recognised and interpreted by web crawlers in such a way that compliant material could be accessed and used without the need for human interpretation of usage policies and other legal terms. Although this failed to achieve recognition in the search engine industry, in 2011 its management was taken over by the International Press Telecommunications Council (IPTC).\textsuperscript{325} Other technical solutions are emerging that are designed to enable publishers to regain control of their content online, for example by “watermarking” content or scanning the internet for unauthorised copies.\textsuperscript{326} Commercial solutions are likely to involve agreements between publishers, other rights holders and search companies, perhaps involving a limit on the amount of content that can be accessed via search engines. None has yet succeeded in bridging the conflicting industry positions.

\textbf{26-82 “Videograbbing”.} This is the practice of using video technology to capture images from broadcast material (either live or film footage) for subsequent use in other publications. This should be understood in the context of the increasing use of video technology by newspaper journalists as a routine means of gathering information. The capture and publication of such images without authorisation is prima facie an infringement of copyright.\textsuperscript{327} In the absence of licence agreements, therefore, publishers are limited to reliance on the defence of fair dealing for the purpose of reporting current events, relying on the fact that a frame from a broadcast film is not a photograph.\textsuperscript{328} Clearly, such reliance brings with it numerous limitations on the commercial use of such images by newspapers. Given that the defence applies only to the reporting of current events, care must be taken as to the nature of newspaper articles accompanied by a videograbbed image. General features or documentary material on historical events, for example, unless relevant to a current topical issue, fall outside the fair dealing provisions.\textsuperscript{329} The specific exclusion in s.30(2) of photographs means that publication of video-grabbed images which

\textsuperscript{322} Nils Svensson and Others v Retriever Sverige AB (Case C-466/12).
\textsuperscript{323} art.3(2).
\textsuperscript{324} See: http://www.the-acap.org [Accessed December 5, 2015].
\textsuperscript{326} For example, “Digimarc Guardian”: see https://www.digimarc.com/products/guardian [Accessed December 8, 2015].
\textsuperscript{327} CDPA 1988 s.17(4).
\textsuperscript{328} In any event, a sufficient acknowledgement would be required on the reproduced image to fall within
reproduce broadcast photographs would not be subject to the fair dealing defence, although it may be possible in certain circumstances to rely on the defence of incidental inclusion of the image. In an effort to remove the uncertainty and limitation on use of such material occasioned by reliance solely on the fair dealing defence, some newspaper publishers have given serious consideration to entering into licences for publication of such images and other material, such licences being increasingly offered by broadcasters as part of a general subscription service.

**Public interest defence.** The availability of a public interest defence to a claim for infringement of copyright has been the subject of consideration on at least two occasions and is of particular interest to newspaper publishers and editors. It is now clear that the question must be considered in the context of an analysis of the defences available and whether these conflict with the right to freedom of expression, and that in these rare cases it is necessary to have close regard to the facts of the individual case. The court is required to apply the 1988 Act in a way that accommodates the right to freedom of expression. However, the right to freedom of expression does not normally include a right to make free use of another person’s work. Where a newspaper considers it necessary to use exact extracts, it is appropriate for it to indemnify the author of such extracts or provide him with any profits that stems from the use of them. But it has been observed that since there is a clear public interest in giving effect to the right of freedom of expression, where such right overrides the rights conferred under the 1988 Act s.171(3) of that Act does permit the defence of public interest to be raised.

**Data mining.** Following the recommendations of the Finch Review on Open Access to publicly funded research and subsequently the Hargreaves Review, a new exception to copyright infringement ("data analysis for non commercial research") came into force on June 1, 2014. This permitted data mining, the computer analysis of large sets of data to extract patterns and trends, for the sole purpose of research for a non-commercial purpose. This was adopted in the face of vigorous opposition from publishers who claimed that data mining requests could generally be

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330 CDPA 1988 s.31, and see paras 9-61 et seq., above.
332 In British Broadcasting Corporation v Kimberley Mary Hainey [2012] HCJDV 10; [2012] S.L.T. 476; [2012] S.C.L. 362, the High Court of Justiciary held that the BBC would not infringe copyright in a mother’s photographs of her child whom she had subsequently murdered if it published the photographs for the purposes of reporting the murder case. The Court relied primarily on s.45(2) of the 1988 Act (reporting judicial proceedings) but went on to say (obiter) that the public interest in the proper and full reporting of the case would be sufficient to “trump” the rights of the copyright owner under s.171(3).
333 Ashdown v Telegraph Group Ltd [2002] Ch. 149. The BBC announced in August 2011 that it makes every attempt to contact and request permission from photographers on social networking sites such as Twitter before using such content in news reports. However, “in exceptional circumstances, where there is a strong public interest and often time constraints, such as a major news story”, the BBC may use a photograph before it has cleared it: (http://www.bbc.co.uk/blogs/theeditors/2011/08/use_of_photographs_from_social.html [Accessed on August 12, 2012]).
335 The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014 inserting a new s.29A to the CDPA.
provided for under the terms of a licence. However, the new exception now renders unenforceable any contract term which seeks to prevent or restrict an act of data mining otherwise permissible under the exception.\footnote{CDPA s.29A(5) as amended.}

The exception is not intended to create a “right to mine” works to which a researcher does not already have a right of access. Transferring a copy of a work made under this exception to any other person constitutes an infringement unless the copyright owner has authorised it, and copies made under this exception will become infringing copies if subsequently dealt with.\footnote{CDPA s.29A(2) and (3) as amended.}