

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/11/2010

Before :

MRS JUSTICE PROUDMAN

Between :

(1) THE NEWSPAPER LICENSING AGENCY LIMITED **Claimants**
(2) MGN LIMITED
(3) ASSOCIATED NEWSPAPERS LIMITED
(4) EXPRESS NEWSPAPERS LIMITED
(5) GUARDIAN NEWS AND MEDIA LIMITED
(6) TELEGRAPH MEDIA GROUP LIMITED
(7) INDEPENDENT PRINT LIMITED

- and -

(1) MELTWATER HOLDING BV **Defendants**
(2) MELTWATER NEWS UK LIMITED
(3) PUBLIC RELATIONS CONSULTANTS ASSOCIATION LIMITED

Robert Howe QC and Edmund Cullen (instructed by **Berwin Leighton Paisner LLP**) for the **Claimants**

Michael Silverleaf QC and Andrew Lykiardopoulos (instructed by **Baker & McKenzie LLP**) for the **Third Defendant**

Hearing dates: 9, 10, and 12 November 2010

Judgment

Mrs Justice Proudman:

Background

1. The first claimant, the Newspaper Licensing Agency Limited (“NLA”) is a company formed to manage the intellectual property rights of its members by licensing, and collecting the licensing fees for, making copies of newspaper content. The other claimants (“the Publishers”) are publishers of national newspapers and are shareholder members of NLA. NLA was formed in 1995, primarily with a view to licensing press cuttings agencies to make copies of newspaper articles to send to their clients and to license the clients to make their own copies. The NLA is a licensing body within the meaning of s 116(2) of the Copyright Designs and Patents Act 1988 (“CDPA”).

2. The NLA has promulgated various licensing schemes. It is for the Copyright Tribunal (“the Tribunal”) to determine the reasonableness of the terms of any such schemes on the reference of a recipient.
3. The first defendant is the Dutch parent company of a multi-national group and the second defendant is its UK subsidiary. I shall collectively refer to them as “Meltwater”. They provide a commercial media monitoring service called “Meltwater News” to business customers. That service is provided on-line only. The action has been stayed against Meltwater in the circumstances I shall mention.
4. The third defendant Public Relations Consultants Association Limited (“PRCA”) is an incorporated professional association which represents the interests of its members who are UK public relations providers using the Meltwater News service.
5. Because of the proliferation of on-line media monitoring services the NLA has recently promulgated two new licensing schemes for commercial users of such services. One, taking effect from 1 September 2009, is to license media monitoring organisations, and the other, taking effect from 1 January 2010, is to license those who receive and use their services.
6. The issue I have to determine is whether PRCA and its members (“the End Users”) require a licence from the claimants in order lawfully to receive and use Meltwater News. Such a licence is known as a Web End-User Licence (“WEUL”). Although I have defined PRCA and its members as the End Users they are not necessarily the ultimate users of the service in the sense that members (at any rate those members who are not in-house consultants) obtain the information from Meltwater News for external clients.
7. There was some evidence tending to show that emails received from Meltwater containing Meltwater News are sometimes forwarded to clients. At the time Mr Glittenberg (a founder and director of Meltwater) made his statement there were two forward functions enabling the text extracts to be forwarded to third parties via the Meltwater website. However the ‘share’ function now provided has been modified so that only the headline can be forwarded, thus limiting the scope of the shared information. Mr Glittenberg said that forwarding the whole text extract is contrary to Meltwater’s terms and conditions, although it is technologically impossible to prevent the forwarding of an email. Mr Silverleaf QC submitted on behalf of PRCA that I had to make findings on the basis of simple receipt by PRCA’s members.
8. Mr Silverleaf pointed out that para 67.2 of NLA’s pleading seeks a declaration that,

“the PRCA and/or its members require a licence or consent from the NLA and/or the Publishers in order lawfully to receive and/or use the Meltwater News Service”,

He asserts that the focus and scope of the claim is whether receipt of the service, rather than communicating the results to others, is a potential breach of copyright. It seems to me that the word ‘use’ goes further than that, and it seems to be accepted that some at least of PRCA’s members share the contents of Meltwater News with external clients although there was little or no hard evidence on this subject.

9. Despite questions from the Court it has not been made clear whether it is still alleged that PRCA itself requires a licence. PRCA says it is not a customer of Meltwater and does not receive Meltwater News. Mr Howe QC says it does not matter very much and I ought to concentrate on the position of PRCA's members.
10. Meltwater does not currently have a licence and was offered a Web Database Licence ("WDL") by NLA under which Meltwater would be licensed to carry out its monitoring activities.
11. Under CDPA the Tribunal exercises control over licensing bodies in accordance with its jurisdiction set out in s. 149 CDPA. Under s. 118 and 119, the terms of any new or existing licensing scheme can be referred to the Tribunal by a potential licensee (or under s. 121 by a person who has been refused a licence) for adjudication on whether those terms are reasonable in the circumstances of the case. A licensor cannot make such a reference.
12. On 16 December 2009 Meltwater commenced a reference under s. 119, challenging a number of aspects of the WDL as unreasonable. PRCA intervened in the reference on behalf of its members, adopting some of Meltwater's objections in relation to the WEUL. Meltwater and PRCA make common cause and are represented by the same lawyers. In the Tribunal PRCA has formally appointed Meltwater to act as its agent.
13. Importantly, Meltwater asserts that it does not require a licence at all as its activities do not infringe the Publishers' copyright. However Meltwater took the position that notwithstanding this contention it would enter into the WDL on such terms that the Tribunal determined were reasonable. Both Meltwater and PRCA deny that PRCA's members require WEULs.
14. Pausing there I make two observations about the effect of CDPA. First, it is common ground that under s. 129 the Tribunal must exercise its powers to ensure that there is no unreasonable discrimination between licensees or prospective licensees under any proposed scheme, ensuring a level playing field and avoiding the abuse potentially inherent in the dominant position held by a collective licensing body.
15. Secondly, there is a dispute between the parties as to the effect of an award once it is made. PRCA asserts that under s. 123 CDPA the person obtaining the licence is deemed to be in the same position as regards infringement as if he had at all material times after the making of the reference, not the Order, been the holder of the licence. In other words, it is asserted that the licence is backdated to the start of the reference so that the licensee cannot be sued for infringement in respect of any subsequent period. NLA says that is not the case save in the restricted circumstances provided for by s. 123 (3). That is where the Tribunal has exercised its statutory power to backdate the effect of its order only where it has ordered a variation in the charges payable under the scheme. I do not find it necessary to adjudicate on that question of statutory construction.
16. The terms of any licence are a matter for the Tribunal. The Tribunal refused to order (as sought by NLA) that it should not entertain Meltwater's reference to the extent that it related to the existence and infringement of copyright. However the Tribunal observed that the question of whether the End Users required a licence was one which required "careful thought". There was a suggestion in the judgment that the Tribunal

might refer those issues to this court for determination, but I am told that it is dubious whether any jurisdiction exists to make such a reference.

17. NLA accordingly brought these proceedings. As Meltwater had agreed to enter into a licence irrespective of whether it needed to do so, Newey J on 5 July 2010 stayed the claim in this action against Meltwater. He also directed an expedited trial of the claim against PRCA.
18. There is a further wrinkle. Under the terms of the existing WDL as offered, Meltwater is only licensed to supply its services to other licence holders, that is to say, to End Users holding WEULs. The licence fee of £10,000 under the WDL has been set by NLA in that context. In the event that this court decides that the End Users do not have to obtain WEULs, NLA has lodged an alternative claim with the Tribunal seeking to obtain from Meltwater a higher fee (calculated on a different basis) than the £10,000 currently proposed under the WDL. I am told that Meltwater contests NLA's ability to change its case in this way. Doubtless in such circumstances both parties would seek to alter their positions.
19. It became obvious during the course of the evidence that the Publishers feel a strong grievance against Meltwater's perceived commercial exploitation of their websites. The Publishers have devoted very substantial resources in developing those websites and to the selection, arrangement and presentation of the material on them. Meltwater is making millions of pounds from its own activities which include 'scraping' the Publishers' websites for information for its own commercial gain. The tenor of Mr Howe's cross-examination of Mr Glittenberg was that the £10,000 fee under the currently proposed WDL is a trifling sum in the context of Meltwater's profits.
20. The Publishers have arrangements or understandings with certain free media monitoring services such as Google News and Google Alerts whereby those services are currently licensed or otherwise permitted. It would apparently be open to the End Users to use such free services, or indeed a general search engine, instead of a paid media monitoring service without (currently at any rate) encountering opposition from the Publishers. That is so even though the End Users may be using such services for their own commercial purposes. The WEUL only applies to customers of a commercial media monitoring service.
21. The NLA scheme at present is not to pursue service providers such as Meltwater alone for a licence but, by analogy with press cuttings services, to pursue the End Users as well. One of the grounds on which Meltwater alleges in the Tribunal that the WDL is unreasonable is that it is required to supply services only to End Users who themselves have a licence notwithstanding that the End Users are not required to be licensed to obtain similar free services.
22. I have to decide not whether Meltwater requires a licence in the form of a WDL, but whether the End Users infringe the Publishers' copyright so as to require their own licences in the form of WEULs. That is the only issue I have to decide.
23. I make the preliminary observation that the dispute is a very bitter one in which all parties evidently feel a strong and genuine sense of grievance. To use Mr Howe's expression, there is a battle royal. Each side accuses the other of spin and mud-slinging tactics.

Meltwater News: Meltwater's Media Monitoring Service

24. The Meltwater News service is described in Statements of Facts which have been substantially agreed between the parties. The following summary is uncontentious.
25. Meltwater monitors a wide range of websites, including those of the Publishers and other members of the NLA, using so-called "spider" programs to "scrape" or "read" the content. Its programs then create an index which records the position of every word in every article on every such website. Meltwater's customer will select particular search terms (the term of art is "agents") and Meltwater will then provide Meltwater News, a Monitoring Report with details of every article containing the agent published within a defined period, for instance the preceding day or 7 days. Meltwater News is then either emailed to the customer or the customer is given the facility to access it at Meltwater's website.
26. Meltwater News will (subject to the constraints of length to which I later refer) include the following three items:
 - A hyperlink to each relevant article ("the Link"). The Link is a citation of the headline ("the headline") from the article. A click on the Link takes the customer through to the article as it appears on the Publisher's website.
 - The opening words of the article after the headline ("the opening text").
 - An extract from the article ("the hit extract") showing the context in which the agent appears. This will reproduce the agent and some words immediately preceding and following it.
27. Thus, subject to length constraints, the total text extracted from the article on the Publisher's website ("the text extract") comprises the headline, the opening text and the hit extract. Under the terms of the WDL, any text extracted from an article generated using scraping techniques must not exceed 256 characters, which it is common ground means 256 characters excluding spaces.

The law as to the acts restricted by copyright

28. By s. 1 (1) CDPA, copyright subsists in "original literary, dramatic, musical or artistic works." By s.3 (1), "literary work" means any work, other than a dramatic or musical work, which is written, spoken or sung, and accordingly includes (among other things) a database.
29. It is settled law that originality in this context does not involve any assessment of the literary quality of the work: see e.g. **Sawkins v. Hyperion Records** [2005] 1 WLR 3281 at [31]. As Peterson J said in **University of London Press Limited v. University Tutorial Press Limited** [1916] 2 Ch 601 at 608-9, approved by the House of Lords in **Ladbroke (Football) Limited v. William Hill (Football) Limited** [1964] 1 WLR 273 at 277-8, 285 and 291,

“The word ‘original’ does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and, in the case of ‘literary work’, with the expression of thought in print or writing. The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in original or novel form, but that the work must not be copied from another work- that it should originate from the author.”

30. Originality involves the application of skill or labour in the creation of the work: see **Interlego AG v. Tyco Industries** [1989] 1 AC 217 at 259-263. The skill or labour need not be directed to the creation of particular modes of expression; it can be deployed in the selection or choice of what should be included in the work. Thus copyright protection is available to verbatim reports of interviews and public speeches: see **Walter v. Lane** [1900] AC 539, **Express Newspapers plc v. News (UK) Limited** [1990] 1 WLR 1320.
31. S. 3 CDPA provides that a database may be a literary work. S. 3A (introduced to give effect to the Database directive 96/9/EC) defines database for this purpose as “a collection of independent works, data or other materials which (a) are arranged in a systematic or methodical way, and are (b) individually accessible by electronic or other means”. S. 3A (2) sets out a special definition of originality in relation to databases, namely “if, and only if, by reason of the selection or arrangement of the contents of the database the database constitutes the author’s own intellectual creation.”
32. By s. 16 (1) CDPA the owner of copyright in a work has the exclusive right to copy it and issue copies of the work to the public. By s. 16 (2) copyright is infringed by a person who, without the licence of the copyright owner does, or authorises another to do, any of the acts restricted by the copyright.
33. S. 16 (3) CDPA explains that references to doing an act restricted by the copyright refer to acts done directly or indirectly and in relation to the work as a whole or any substantial part of it, and that it is immaterial whether any intervening acts themselves infringe copyright.
34. By s. 17(1) and (2) CDPA copying a work is an act restricted by copyright and for this purpose “copying in relation to a literary, dramatic, musical or artistic work means reproducing the work in any material form [including] storing the work in any medium by electronic means.”
35. By s. 18 CDPA the issue of copies to the public of a copyright work is also an infringement.
36. S.23 CDPA provides that copyright in a work is infringed by a person who without the consent of the copyright owner possesses an infringing copy of the work (as defined in s. 27) in the course of business.

37. Chapter III CDPA provides for certain permitted acts in relation to copyright works, that is to say acts which do not infringe the owner's copyright. Of particular relevance in the present case are s. 28A, making of "temporary copies" and s. 30, "criticism, review and news reporting", both of which PRCA contends are applicable to the present case.
38. Thus s. 28A CDPA provides that copyright in a literary work is not infringed by the making of a temporary copy which is transient or incidental, which is an integral and essential part of a technological process and the sole purpose of which is to enable (a) a transmission of the work in a network between third parties by an intermediary; or (b) a lawful use of the work; and which has no independent economic significance.
39. S. 30 CDPA exempts fair dealing with a work (which has been made available to the public) for the purpose of criticism or review, or for the purpose of reporting current events, provided that in each case it is accompanied by sufficient acknowledgement. "Sufficient acknowledgement" is defined by s. 178 CDPA to mean an acknowledgement identifying the work in question by its title or other description, and identifying the author unless, in the case of a published work, it is published anonymously.
40. Domestic legislation must be construed in conformity with, and so as to achieve the result intended by, EU Directives: **Marleasing SA v. La Comercial Internacional de Alimentacion SA (C-106/89)** (ECJ) [1990] ECR I-4135, **Revenue and Customs Commissioners v. IDT Card Services Ireland Limited** [2006] EWCA Civ 29 at [73]-[92].
41. In this context I have been referred in particular to recitals (29), (33), (34) and (44) to, and Articles 2 and 5 of, the Information Society Directive (Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, ("the InfoSoc Directive")).
42. Article 2 is headed "Reproduction right" and provides that Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part, of relevant works. There is no express reference to a "substantial" part (cf s. 16 (3) CDPA), but the meaning of "in whole or in part" has been considered in **Case C-5/08 Infopaq International v. Danske Dagblades Forening** [2010] FSR 495.
43. Article 5 provides at 5.1 for an exemption which has been reflected in s. 28A CDPA. The European Court of Justice in **Infopaq** states in terms that the conditions specified in the Article (and thus in the section) are cumulative in the sense that they all have to be complied with strictly before the exemption is applicable.
44. Article 5.3 provides for further exceptions or limitations, including those enacted (in different words) in s. 30 CDPA,
 - "(c) reproduction by the press, communications to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the

author's name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible;

(d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose”.

NLA's case as to the need for a licence

45. NLA contends that in the absence of consent the End Users of Meltwater's service will have infringed copyright in the Publishers' headlines, and/or the Publishers' articles and/or the Publishers' databases in three ways:
- By receiving and reading Meltwater News, whether by email or by accessing it via Meltwater's website, the End User will be making a copy of it, and the copyright material contained in it, within the meaning of s. 17 CDPA. The End User will also be in possession of an infringing copy in the course of business within the meaning of s. 23 CDPA.
 - By clicking on a Link to an article, the End User will make a copy of the article within the meaning of s. 17 and will be in possession of an infringing copy in the course of business within the meaning of s. 23.
 - By forwarding Meltwater News or its contents to clients an End User will issue to the public copies of the work within the meaning of s.18 CDPA.

Whether the activities of the End Users are comprised in the grant of a licence to Meltwater

46. PRCA asserts that it has an overarching argument which defeats NLA's claim. It compares the service under consideration with the old press cuttings service in this way. A cuttings service requires the provider to take a licence for making copies of the articles for distribution to its customers. The recipients do not need a licence simply to receive the cuttings. Their licence is required to enable them to make further copies for internal or external purposes. Mr Silverleaf submitted that, on a proper analysis of the electronic process, the PRCA members merely receive Meltwater's services; there is only one copy inherent in the process, which is the copy sent by Meltwater to the End User. It is common ground that when one speaks of going to a website it is in fact the website which comes to the user. The submission is that whether access to the Meltwater Newsletter is by email or on Meltwater's website, there is in each case a single copy sent by Meltwater and accessed by the End User.

47. As a further plank in the argument, Mr Silverleaf submits that once Meltwater is licensed, it is a derogation from grant to require an End User to take a licence as well. Mr Howe counters by saying that this ignores the fact that the WDL's terms are limited to providing services to customers who themselves have a licence. He relies on s. 119 (3) of CDPA which provides that a scheme which has been referred to the Tribunal under s.119 shall remain in operation until proceedings on the reference are concluded. In other words, the provision limiting the licence to services provided to those who also are licensed is binding unless and until the Tribunal determines otherwise.
48. Mr Silverleaf ripostes with the argument that the terms of the licence are a matter of contract only. The issue is one of copyright law. Once Meltwater is licensed, it must be licensed to provide services; that necessarily imports the requirement that its customers must be entitled to receive them. To quote paragraph 12 (c) of PRCA's defence, the WDL
- “must carry with it an implied licence that the end user is able electronically to receive the email, view the email, view the site and use the contents of the licensed service...”
49. I agree with Mr Silverleaf to this extent only. If the End Users do not need a licence for what they do, then no contractual term can alter that position. It is a matter for the Tribunal about which I can and do make no binding finding. However I see the common sense of the argument that if the End Users do not need a licence it would deprive the WDL of all or most of its force if Meltwater could only supply services to licensed End Users.
50. However the issue is not to my mind one of derogation from grant or exhaustion. The outcome hinges on the answer to the very question which I am asked, namely whether the End Users need a separate licence for their activities in relation to Meltwater's services. It cannot be the answer to that question that a mere grant of a licence to Meltwater would obviate the need for a WEUL.
51. If the PRCA members are making copies of copyright material there can be no exhaustion. A licence to provide a service may import an implied licence to receive it, but it cannot import an implied licence to make further copies of licensed material. If the PRCA members are not making any copies, then there is no scope for a WEUL. In either case it becomes a matter for the Tribunal to decide whether it is unreasonable to grant a WDL only on terms that Meltwater supplies to customers with WEULs, although I think it is accepted by NLA that if the End Users do not require a licence NLA would have to fall back on its alternative claim for a larger fee from Meltwater calculated on a different basis.
52. In my judgment Mr Silverleaf's argument that there is only one copy faces the considerable difficulty that the defendants themselves admit (see paragraph 5.1 of the Defendants' response to the Claimants' Statement of Facts) that End Users make a copy of Meltwater News on their computers. I quote,

“When the End User receives the email containing the Monitoring report a copy is made on the computer and remains there until deleted by the End user. When the End user views the Monitoring Report on their computer screen, or views the results of a search undertaken on the Meltwater website, a copy of the Monitoring Report or the equivalent search results is made on their computer.”

53. Again, it is expressly admitted in paragraph 10 of PRCA’s amended defence that when an End User receives the Meltwater Newsletter by email or accesses it via the Meltwater website “a copy is made in the memory of the end user’s machine.” In paragraph 11 it is expressly admitted that “a copy of the Meltwater Newsletter is also made by the end user’s machine when the [Meltwater Newsletter] materialise[s] on the end user’s screen in order to be viewed.”
54. Thus irrespective of whether or not End Users copy text extracts to their clients PRCA admits that receipt of Meltwater News involves copying by the End Users on their computers of material which has already been reproduced by Meltwater.
55. In these circumstances the derogation and exhaustion arguments fail.

Are the text extracts or any part of them copyright works?

56. It is not disputed that copyright subsists in the full articles (as literary works) published in the Publishers’ publications. One issue is whether a headline is, or is capable of being, a free-standing original literary work. Secondly, there is the question whether a text extract constitutes a ‘substantial part’ of the article as a literary work. I deal with these issues in turn.

Headlines

57. NLA asserts that headlines to the Publishers’ articles do in some instances at least (which is enough for its purposes) have the necessary quality of originality to qualify as literary works. PRCA asserts to the contrary that in the context of a newspaper article a headline is part of the article to which it relates and forms a single work with the article. While it is accepted that a photograph which accompanies an article is a separate work, PRCA relies on the fact that a photograph is different in kind from the article which it illustrates.
58. In seeking to demonstrate the requisite degree of skill and labour involved in crafting a headline NLA relies (a) on the evidence of James Bromley, the Chief Operating Officer of the third claimant, which publishes the Daily Mail, as to how the Publishers’ headlines are created and (b) some illustrative examples from the Daily Mail. It is said that this evidence shows the following:

- The headlines are often striking and substantial, both in terms of content and in terms of length.
 - They are not usually written by the journalists who write the underlying articles but by editorial staff whose specific functions include the composition of headlines.
 - The ability to compose a headline is a valuable and discrete skill and courses exist to teach it.
 - Headlines require skill in order to fulfil the objective of capturing the reader's attention and inducing them to read the article. Thus a headline frequently has some emotional or sentimental 'hook', it may contain a pun, it may summarise the content of the article to which it relates.
 - The process of final selection of a headline is separate from the selection of the article. Often a number of options will be proposed and the decision will be taken by a senior editor. Occasionally the article will be tailored to fit the headline.
59. Mr Howe relied on various cases showing that a title can invoke separate copyright; **Lamb v. Evans** [1893] 1 Ch 218, **Shetland Times Limited v. Wills** [1197] FSR 604.
60. Mr Silverleaf submitted that the article and the headline are a single composite work. He pointed to the "short, banal" factual content of many of the headlines reflecting the article's content and the fact that the article is always displayed with the headline. The only circumstances in which the headline appears separately is on a home or similar page as an introduction to the reader to identify, and an inducement to him to read, the article. He submitted that there is a long history in domestic legislation of cases in which it has been held that a title or heading did not qualify as an independent literary work, contrasting what was said in **Dick v. Yates** (1881) 18 Ch D 76 at 89, about a "whole page of title". In short, there has to be something which makes a headline different in kind so as to take it out of the ordinary.
61. Mr Silverleaf relied on the detailed analysis of English and Australian authorities (including **Lamb v. Evans**, **Francis Day & Hunter Limited v. Twentieth Century Fox Corp Limited** [1940] AC 112, **Ladbroke v. William Hill, Exxon Corporation v. Exxon Insurance Consultants International Limited** [1982] Ch 119, **Shetland Times** and **IceTV Pty Limited v. Nine Network Australia Pty Limited** (2009) 239 CLR 458 and passages in *Copinger and Skone James* (15th 2005 ed at 3-16) and *The Modern Law of Copyright and Designs* (3rd Ed 2000) (at [28]-[50])) by Bennett J in the Federal Court of Australia in **Fairfax Media Publications Pty Limited v. Reed International Books Australia Pty Limited** [2010] FCA 984.
62. **Fairfax** is the only authority directly to address the status in copyright law of a headline in a newspaper. Bennett J said at [40]- [50],
- "In my view, the headline of each article functions as the title of the article...It may be a clever title. That is not sufficient. Headlines are, like titles, simply too insubstantial and too short to qualify for copyright protection as literary works. The function of the headline is as a title to the article as well as a brief statement of its subject, in a compressed form comparable

in length to a book title or the like. It is, generally, too trivial to be a literary work, much as a logo was held to be too trivial to be an artistic work...

It may be that evidence directed to a particular headline, or a title of so extensive and of such a significant character, could be sufficient to warrant a finding of copyright protection...but that is not the case here...Fairfax claims copyright in the headlines as a class of work, based on the evidence of a general practice that headlines are determined by staff and settled at meetings of staff to provide a title to a story which also fits into the format of the page...That is insufficient to overcome the reasoning for the established practice of denying copyright protection to titles which is the apt characterisation for headlines as a class.”

Pausing there, NLA does not claim copyright for all the Publishers’ headlines, saying that if some only are literary works that is sufficient. NLA does not therefore consider that it needs to identify which are which. However I note Mr Silverleaf’s submission that NLA has not promulgated any test for a distinction in principle between headlines which do, and those which do not, constitute literary works in their own right. To continue the citation from Bennett J’s judgment,

“The need to identify a work by its name is a reason for the exclusion of titles from copyright protection in the public interest. A proper citation of a newspaper article requires not only reference to the name of the newspaper but also reproduction of the headline...If titles were subject to copyright protection, conventional bibliographic references to an article would infringe. Such considerations may well be a reason for the fact that headlines and “short phrases” are excluded from copyright in the United States...

In my view, to afford published headlines, as a class, copyright protection as literary works would tip the balance too far against the interest of the public in the freedom to refer or be referred to articles by their headlines.”

63. In some of the cases analysed, copyright protection was apparently denied to titles on the ground of lack of originality. For example, ‘Splendid Misery’ for a book title in **Dick v. Yates** (that expression obviously being one in universal use at the time although as far as I know it has now completely fallen out of use) or ‘the Lawyer’s Diary’ in **Rose v. Information Services Limited** [1978] FSR 254. In other cases, it seems that there was sufficient originality in a heading but the status of literary work was still denied, such as ‘Opportunity Knocks’, ‘Dr Martens’, ‘Exxon’ and, notably, ‘the Man Who Broke the Bank at Monte Carlo’. Cases in which headings were, to the contrary, given the status of literary work are distinguishable. In **Shetland v. Mills** the case proceeded on the basis of a concession and in **Lamb v. Evans** the

whole purpose of the trade directory under consideration was to arrange and compile the entries under headings.

64. It is evident that public policy was an important ingredient in Bennett J's decision in rationalising the authorities. That is a factor which is relevant also in the present case where a bibliography is prepared in a commercial context so that the exceptions for private use in CDPA do not apply.
65. The Judge also found at [48] that a headline and by-line constitute information about the work, but are "not part of the work, the work being the article". As the headlines were held to be too insubstantial to be works in themselves the effect of her finding appears to be that they had no status at all, even as part of the article. It is however a main plank of Mr Silverleaf's argument that the headline is part and parcel of the article. I flag this as he later argues that in considering the question of substantiality the headline must be ignored, which seems to me to be a contradiction within his position.
66. The issues I have to decide about the headlines in this case are (a) can they have the necessary quality of originality to qualify as a literary work? In any case, (b) are they part of the articles to which they relate?
67. Bennett J did not purport to take any account of European copyright protection law. I on the other hand must do so. Even though Bennett J's analysis is persuasive as a historical analysis of the law any historical perspective has for the purposes of this Court been overtaken by the decision of the ECJ in **Infopaq**.
68. **Infopaq** was not directly concerned with headlines but with the status of text extracts from newspaper articles. At [42] the ECJ determined that Article 2 of the InfoSoc Directive had to be given a broad interpretation. At [47], the Court said,

"...given the requirement of a broad interpretation of the scope of the protection conferred by Article 2 of Directive 2001/29, the possibility may not be ruled out that certain isolated sentences, or even certain parts of sentences in the text in question, may be suitable for conveying to the reader the originality of a publication such as a newspaper article, by communicating to that reader an element which is, in itself, the expression of the intellectual creation of the author of that article. Such sentences or parts of sentences are, therefore, liable to come within the scope of the protection provided for in Article 2 (a) of that directive."

That observation was made in the context of the question of part reproduction of a single larger work, as can be seen from the following paragraph [48],

"In the light of those considerations, the reproduction of an extract of a protected work which, like those at issue in the main proceedings, comprises 11 consecutive words thereof, is such as to constitute reproduction in part within the meaning of Article 2 of Directive 2001/29, if that extract contains an element of the work which, as such, expresses the author's own

intellectual creation; it is for the national court to make this determination.”

The passage at [38-9] is particularly important,

“As regards the parts of a work, it should be borne in mind that there is nothing in Directive 2001/2009 or any other relevant Directive indicating that those parts are to be treated any differently from the work as a whole. It follows that they are protected by copyright since, as such, they share the originality of the whole work.

...the various parts of a work thus enjoy protection under art 2 (a) of Directive 2001/29, provided that they contain elements which are the expression of the intellectual creation of the author of the work.”

69. It therefore seems that the ECJ is saying that no distinction is to be made between the part and the whole, provided that the part contains “elements which are the expression of the intellectual creation of the author”. There is no reference to “substantial part” in Article 2; the ECJ makes it clear that originality rather than substantiality is the test to be applied to the part extracted. As a matter of principle this is now the only real test.
70. The evidence in the present case (incidentally much fuller than that before Bennett J in **Fairfax** -see her observations at [28]) is that headlines involve considerable skill in devising and they are specifically designed to entice by informing the reader of the content of the article in an entertaining manner.
71. In my opinion headlines are capable of being literary works, whether independently or as part of the articles to which they relate. Some of the headlines in the Daily Mail with which I have been provided are certainly independent literary works within the **Infopaq** test. However, I am unable to rule in the abstract, particularly as I do not know the precise process that went into creating any of them. I accept Mr Howe’s submission that it is not the completed work as published but the process of creation and the identification of the skill and labour that has gone into it which falls to be assessed.
72. To the extent that the headlines are, as alleged by Mr Silverleaf, joint enterprises with the articles and part and parcel of those articles, the distinction is one without a difference since **Infopaq**. The only circumstances in which the distinction would make a difference are where the headline is totally distinct from the article through being independently and separately produced by a different person. Only then might the headline fall into a third category in which it neither formed part of the article nor (if it were insufficiently original) would it constitute an independent literary work. However, as I have said, that is not Mr Silverleaf’s case. I find that some of the headlines are independent literary works; those that are not form part of the articles to which they relate.

Text extracts

73. The next question is whether the text extracts constitute a substantial part of the articles so that s. 16(3) CDPA applies, as construed in conformity with the InfoSoc Directive.
74. Several judicial decisions address the question of what is a substantial part: see *Copinger* and cases therein cited. In short, substance is a question of the quality of the extracted part rather than the quantity. Again however it is not literary quality which is in issue but the quality of originality which earned the work copyright protection: see the observations of Lord Hoffmann in **Newspaper Licensing Agency Limited v. Marks & Spencer plc** [2001] UKHL 38, [2003] 1 AC 551 at [19],

“The House of Lords decided in *Ladbroke*...that the question of substantiality is a matter of quality rather than quantity. The relevant passages are too well known to require citation: see Lord Reid, at p. 276, Lord Evershed, at p.283, Lord Hodson, at p.288 and Lord Pearce, at p.293. But what quality is one looking for? That question, as it seems to me, must be answered by reference to why the work is given copyright protection. In literary copyright, for example, copyright is conferred (irrespective of literary merit) upon an original literary work. It follows that the quality relevant for the purposes of substantiality is the literary originality of that which has been copied.”

It follows that the relevant inquiry is as to the level of the author’s skill and labour appropriated by the copier.

75. Those principles must now be considered in the light of **Infopaq**. The ECJ concluded that copying of an extract of 11 consecutive words from an article constitutes reproduction in part for the purposes of Article 2 of the InfoSoc Directive, provided that those words had the necessary quality of originality. In that case the monitoring report contained only the search term and the five preceding and five subsequent words, the equivalent of the hit extract in the present case with no headline and no opening text. The only thing which made the text extract potentially more substantial was that in some instances there were multiple search terms which would have (unlike the present case) returned further hit extracts from the same article.
76. On the basis of **Infopaq**, the text extract and indeed the text extract excluding the headline (save perhaps in cases where the headline so long that no significant text extract is possible within the constraints of 256 characters) are capable of being substantial enough for the purposes of s. 16 (3).
77. Although quality rather than quantity is relevant, it has always been held that a single word (even an invented one such as Exxon) is too short a term to convey sufficient quality of originality. The same would presumably be true of a single word text extract. However, it appears that a mere 11 word extract may now be sufficient in quantity provided it includes an expression of the intellectual creation of the author.

78. The question for the Court is thus whether some or all of the text extracts in the present case do express the author's intellectual creation. The question arises whether the test of originality has been changed by **Infopaq**. Mr Silverleaf submitted that in order to fulfil the **Infopaq** test, the extract must convey the attitude, position or meaning taken by the writer of the article. If it does not convey anything of what the article is about it cannot fulfil the **Infopaq** test. He appeared to be saying that **Infopaq** has overruled or at any rate overtaken **Ladbroke** in that it introduces the concept of creativity which is not merely a different means of expressing skill, judgment and labour but requires a higher threshold of originality.
79. Mr Howe took the polar opposite position. He submitted that if the article as a whole is sufficiently original any extract of 11 words will also be original unless the extract is itself copied from some other source: "it follows that they [the parts] are protected by copyright since, as such, they share the originality of the whole work". (**Infopaq** at [38]).
80. It seems to me wrong in principle to suggest that the court must conduct some sort of assessment of whether the extract is itself novel or artistically worthwhile. That would be tantamount to determining whether the extract is itself a literary work, contrary to **Infopaq** and doing what Mummery LJ said was illegitimate in **Baignet v. Random House** [2007] EWCA Civ 247 [132],

"...on the issue of infringement, it is wrong to take the parts of the original copyright work that have been copied in the alleged infringing work, to isolate them from the whole original copyright work and then to conclude that a 'substantial part' of the original copyright work has not been copied because there was no copyright in the copied parts on their own."

81. In my judgment the test of quality has been re-stated but for present purposes not significantly altered by **Infopaq**. I say that in the knowledge that the decision may sit awkwardly with some provisions of English law, that many questions remain unanswered by the ECJ and that the full implications of the decision have not yet been worked out. However in **SAS Institute Inc v. World Programming Limited** [2010] EWHC 1829 Arnold J said at [243] in considering Lord Hoffmann's observation in **NLA v. Marks & Spencer** (quoted above),

"This passage was strictly obiter, but it plainly represents the considered view of the House of Lords. In any event, the Court of Justice has now adopted the same approach in **Infopaq** in holding at [48] that an extract of 11 words from a literary work constituted a substantial part of the work if the extract contained an element of the work which expressed the author's own intellectual creation. It follows from this that, when considering whether a substantial part has been reproduced, it is necessary to focus upon what has been reproduced and to consider whether it expresses the author's own intellectual creation. To that extent, some dissection is not merely permissible, but required. On the other hand, the Court of

Justice also held in *Infopaq* at [49] that it is necessary to consider the cumulative effect of what has been reproduced.”

82. That said, Mr Howe’s submission goes too far in contending that any 11 word extract (provided only that the words extracted from the article were not copied from another source) is always sufficiently original because it *necessarily* reflects the originality of the article from which it is taken.
83. The effect of **Infopaq** is that even a very small part of the original may be protected by copyright if it demonstrates the stamp of individuality reflective of the creation of the author or authors of the article. Whether it does so remains a question of fact and degree in each case. It is often a matter of impression whether use has been made of those features of the article which, by reason of the skill and labour employed in its production, constitute it an original copyright work. Is there merely a commonplace arrangement of unoriginal words (see **Ladbroke** at 276) as Mr Silverleaf submitted? Or has substantial use been made of the skill and labour which went into the creation of the original work? I bear in mind Lord Hodson’s reference at 288 in **Ladbroke** to Peterson J’s remark in the **University of London** case (at 610) that “there remains the rough practical test that what is worth copying is prima facie worth protecting.” Of course that is not a test in itself or all copying, however insubstantial, would be an infringement. Lord Hodson quoted this sentence in the context of his own observation that,
- “The defendants are not, in my opinion, able to escape by saying that all that they have done is to give banal commonplace descriptions to matter which is common to all engaged in the business and that, even if they have copied, they have copied nothing of any significance.”
84. I was taken by both counsel to very many examples of text extracts with (in some cases) the article from which they were taken. In those cases where the headline is an independent literary work, communication of the headline is itself an infringement of the Publisher’s copyright. In those cases where it is not, I see no basis for excluding the headline from the text extract. As I have said, Mr Silverleaf’s case was put on the basis that the headline is part and parcel of the article and conceived as a joint enterprise with it. He sought to show that in many cases it was derived from or reflective of the underlying article. Accordingly the opening text and the headline together comprise significant and striking features of the article.
85. I cannot decide on all or even any of the individual examples given. However I have no doubt that in many (though not all) cases the text extracts, even leaving aside the headline, do contain elements which are the expression of the intellectual creation of the author of the article as a whole. That is so whether one is applying the test of whether there has been an unfair appropriation of the author’s labour and skill which went into the creation of the original article or whether parts of sentences have been appropriated “which may be suitable for conveying to the reader the originality of a publication such as a newspaper article, by communicating to that reader an element

which is, in itself, the expression of the intellectual creation of the author.” (**Infopaq** [47]). In most cases the text extracts (and in particular the headline and the opening text) are not merely isolated words or clauses which in themselves convey no meaning. They provide the tone of the article and generally have the special function of drawing the reader in to the work as a whole.

86. As the text extract comprises not only the hit extract but also the headline and opening text, it provides the End User with as clear an idea as possible of the subject-matter and content of the article, within the constraints affecting the permissible number of characters.

The Publishers’ websites as databases

87. If s. 3 CDPA applies to protect the Publishers’ websites as databases, the protection afforded is not subject to the exception afforded by s.28A CDPA to temporary, transient copies. NLA asserts that the End Users require licences to protect them against infringement of the Publishers’ websites as databases.
88. It is common ground that each of the websites constitutes a collection of independent works, data and other materials including, in particular, articles. It is also self-evident that the materials are individually accessible by electronic or other means: the Agreed Statement of Facts accepts that the works can be accessed by End Users visiting the websites. NLA has shown in its evidence that the Publishers devote significant resources to the selection, arrangement and presentation of the material on the website so that they are “arranged in a systematic or methodical way” for the purposes of the definition in s. 3A CDPA.
89. Strictly for present purposes only PRCA concedes that a website is capable of being a database within the definition contained in s.3A, although it is denied that there is anything original in the structure of the Publishers’ databases such as to qualify them for the protection of CDPA.
90. S.3A (2) modifies the originality requirement for databases by relating the question of originality to the selection and arrangement of the contents of the database. Protection is restricted to the structure and arrangement of the database. Article 3.2 of the Database Directive provides in terms that,
- “The copyright protection of databases provided for by this Directive shall not extend to their contents and shall be without prejudice to any rights subsisting in those contents themselves.”
91. As far as I can see all the acts of infringement relied on against PRCA’s members relate to the contents of the articles. There is nothing suggesting infringement of the arrangement or structure of the website as a database. It is untenable on the case as presented by NLA to suggest that a text extract is a copy of a substantial part of the effort that went into the structure and arrangement of the articles within the website.

92. I therefore do not find that the End Users need a licence to avoid infringement of the Publishers' websites as databases. I say nothing which affects the position one way or the other in the case against Meltwater.

Infringement by accessing the Publishers' website through Meltwater News

93. The Publishers assert that Meltwater News prevents End Users from using the Publishers' websites because it avoids the need to click through, whereas PRCA says that the Meltwater News service brings more people to the sites through affording them a hyperlink to a site which they would not necessarily otherwise access. There was much discussion of what was termed 'the click-through rate', NLA complaining that it is low and PRCA contending that it is likely to be high. The evidence does not really go beyond assertion and a few statistics and an article of little or no probative worth.
94. There is a logical difficulty with NLA's argument in that on the one hand NLA says that Meltwater News diverts End Users away from reading their articles and, on the other, that it is an infringement of the Publishers' copyright to access the article through the Link for commercial purposes.
95. The terms and conditions of some of the Publishers' websites stipulate that paid for media monitoring services and their customers require a licence to use the content. Further, and importantly, it is a term of all the websites that they cannot be used for commercial purposes without the relevant Publisher's express consent.
96. I was taken in oral argument only to one set of terms and conditions, those of the Mail online, although all of the claimant Publishers' terms and conditions were examined in Mr Howe's closing written submissions. They are all accessed by a very small link at the bottom of the relevant newspaper's home page.
97. Mr Silverleaf pointed out that it was very unlikely that any user of the Publishers' sites would in practice read the terms. Further an End User would have to access the site first in order to read the terms and conditions which debar commercial users so there is an element of circularity in saying that by accessing the site one is agreeing to abide by the terms and conditions. NLA asserts that it is in any event generally known that the Publishers object to the use of the site without permission by the customers of commercial media monitoring companies and by commercial users generally.
98. Mr Ellis, the Communications Director of PRCA says in a witness statement,
- "To my knowledge there is no understanding amongst End users [as to the requirement of a licence]. Almost nobody reads publishers' terms and conditions, which are accessed via a tiny link at the bottom of the home page. In any event, our members do not access publisher websites to make money out of their content. I would not understand this to constitute using a website for commercial purposes, a phrase which suggests to me that one is exploiting the content of a website for gain,

either by reproducing something from it or by cannibalising information it contains for further publication.”

99. I note that articles on the websites typically have a printer icon next to them, inviting the reader to print and make a hard copy of the article.
100. I was taken to no authority as to the effect of incorporation of terms and conditions through small type, as to implied licences, as to what is commercial user for the purposes of the terms and conditions or as to how such factors impact on whether direct access to the Publishers’ websites creates infringing copies. As I understand it, I am being asked to take a broad brush approach to the deployment of the websites by the Publishers and the use by End Users. There is undoubtedly however a tension between (i) complaining that Meltwater’s services result in a small click-through rate (ii) complaining that a direct click to the article skips the home page which contains the link to the terms and conditions and (iii) asserting that the End Users are commercial users who are not permitted to use the websites anyway.

Prima facie infringement

101. When an End User receives an email containing Meltwater News, a copy is made on the End User’s computer and remains there until deleted. Further, when the End User views Meltwater News via Meltwater’s website on screen, a copy is made on that computer.
102. Therefore the End User makes copies of the headline and the text extract in those two situations and there is prima facie infringement.
103. When an End User clicks on a Link a copy of the article on the Publisher’s website which appears on the website accessible via that Link is made on the End User’s computer. It was (I believe) said by PRCA that owing to the factors considered under the previous heading there was an implied licence to copy articles directly from the Publishers’ website. The argument on this head was, as I have said, a broad brush argument, and not presented as clearly as I would have liked. However it seems to me that in principle copying by an End User without a licence through a direct Link is more likely than not to infringe copyright.
104. An End User who uses the share function to forward a headline Link (and, *a fortiori*, an End User who simply forwards an email) to a client will make further copies and thus further infringe. Such forwarding will also be issuing a copy to the public under s. 18 CDPA.
105. As there is prima facie infringement I must therefore go on to consider the exceptions provided for in CDPA.

Temporary copying

106. First there is the exception contained in s. 28A CDPA. In **Infopaq** at [54] the ECJ set out the five requirements that must be fulfilled before the exception can apply. They are: (i) the act must be temporary, (ii) it must be transient or incidental, (iii) it must be an integral and essential part of the technological process, (iv) the sole purpose of the process must be to enable a transmission network between third parties by an intermediary or the lawful use of the work or protected subject matter; and (v) the act must have no independent economic significance. In addition, the ECJ also said at [61]-[64] that (vi) the act of making the temporary and transient copy must not exceed what is necessary for the proper completion of the technological process and (vii) the storage and deletion must not be dependent on human intervention; it must be automated.
107. PRCA allege that any acts incidental to browsing are comprised within the exception and it relies on recital (33) of the InfoSoc Directive which allows “acts which enable browsing as well as acts of caching to take place”. However, the exception only applies (according to the express provisions of recital (33)) to the extent that the acts enabling browsing and caching meet the conditions previously set out in the recital. Those are the conditions referred to by the ECJ in **Infopaq**.
108. In **Football Association Premier League Ltd v QC Leisure** [2008] EWHC 1411(Ch) Kitchin J said at para 241-2,

“Further, the opinion of the Economic & Social Committee (of September 9, 1998) on an early draft of the Directive explained the purpose of the exception as follows:

‘3.7.1. Article 5.1

3.7.1.1. The first exception is ‘temporary acts of reproduction’. This is designed to ensure that the incidental storage of copies of the work on, for example, intermediate computer servers between a web-server and the computer running a web-browser used by an end-user is exempted. The test is whether the temporary reproduction has no ‘independent economic significance’: it should perhaps be made clear that the independent economic significance in question is independent economic significance to the use of the work in question, not to its transmission.

3.7.1.2. This clause needs expanding and clarifying. Any reproduction that in effect is consumption of the work, such as the temporary copying of programmes or data into memory in order to use or access such works, for example the act of accessing on-line databases, should only be permitted with the rightholder's authorisation.’

It emerges from these materials that the exception is concerned with transient copies which have no value in themselves and which do not prejudice the rights holder by interfering with the normal exploitation of the work. Typical of such uses will be those mentioned in Recital (33), such as acts which enable browsing and caching, and those which enable transmission systems to work effectively.”

109. Thus the temporary copies exception is solely concerned with incidental and intermediate copying so that any copy which is ‘consumption of the work’, whether

temporary or not, requires the permission of the copyright holder. A person making a copy of a webpage on his computer screen will not have a defence under s. 28A CDPA simply because he has been browsing. He must first show that it was lawful for him to have made the copy. The copy is not part of the technological process; it is generated by his own volition. The whole point of the receipt and copying of Meltwater News is to enable the End User to receive and read it. Making the copy is not an essential and integral part of a technological process but the end which the process is designed to achieve. Storage of the copy and the duration of that storage are matters within the End User's control. It begs the question for decision whether making the copy is to enable a lawful use of the work. Moreover, making the copy does have an independent economic significance as the copy is the very product for which the End Users are paying Meltwater.

110. The exception cannot have been intended to legitimise all copies made in the course of browsing or users would be permitted to watch pirated films and listen to pirated music. The kind of circumstance where the defence may be available is where the purpose of the copying is to enable efficient transmission in a network between third parties by an intermediary, typically an internet service provider.
111. The exception cannot be used to render lawful activities which would otherwise be unlawful. On the contrary, the purpose of Articles 2 and 3 is to ensure that copyright is protected against all forms of electronic copying unless falling within the narrow scope of the exceptions in Article 5.
112. I therefore find that s. 28A CDPA (construed in accordance with Article 5 and recital (33) to the InfoSoc Directive) is inapplicable to permit the End Users to make copies with impunity.

Fair Dealing under s. 30 CDPA

113. The fair dealing defence only applies if the other requirements of s. 30 CDPA are fulfilled. S. 30(1) applies to fair dealing with a work "for the purpose of criticism or review". S 30(2) applies to fair dealing with a work for the purpose of "reporting current events". In both cases the dealing must be "accompanied by a sufficient acknowledgement".
114. S.30 reflects Article 5.3 (c) and (d) of the InfoSoc Directive, which provide,
 - "(c) reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible;
 - (d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter

which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is on accordance with fair practice, and to the extent required by the specific purpose”.

115. These exceptions are intended to effect a balance of the rights of the copyright holder with the interests of the wider public. In **Pro Sieben Media AG v. Carlton Television Limited** [1999] 1 WLR 605 at 614, Robert Walker LJ said,

“‘Criticism or review’ and ‘reporting current events’ are expressions of wide and indefinite scope. Any attempt to plot their precise boundaries is doomed to failure. They are expressions which should be interpreted liberally, but I derive little assistance from comparisons with other expressions such as ‘current affairs’ or ‘news’...However it can be said that the nearer that any particular derivative use of copyright material comes to the boundaries, unplotted though they are, the less likely it is to make good the fair dealing defence.”

116. This has to be read in the light of the comment of the ECJ in **Infopaq** (at [56],

“...it should be borne in mind that, according to settled case-law, the provisions of a Directive which derogate from a general principle established by that Directive must be interpreted strictly...”

The Berne Copyright Convention; Paris Act 1971 (“Berne”)

117. Mr Silverleaf relied on Article 10 of Berne in support of his construction of s. 30 CDPA. He submitted that Article 10 provides the context in which s.30 and its predecessor provisions in English law fall to be construed, as well as the context of the InfoSoc Directive. Article 10 provides,

“(1) It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.”

I observe in passing that, importantly, where such use is made as provided for in Article 10, “mention shall be made...of the name of the author if it appears” in the works: Article 10 (3).

118. Mr Silverleaf asserted that as Article 10(1) is expressed in general terms, the use of quotations from any published work, specifically including newspaper articles and periodicals in the form of press summaries, was made permissible so long as compatible with fair practice. All encroachments upon this principle must therefore, he submitted, be construed very strictly indeed.
119. I do not accept this argument for a number of reasons. First and most importantly, the InfoSoc Directive was promulgated to incorporate the EU's obligations under Article 10 of Berne. The InfoSoc Directive contradicts the broad interpretation proffered by Mr Silverleaf. This court is bound, under the **Marleasing** principle, to give effect to the InfoSoc Directive and to give the exceptions the narrow construction placed on them by the ECJ in **Infopaq**. Berne cannot displace the express provisions of the InfoSoc Directive or override what was said by the ECJ.
120. Secondly, Article 10 of Berne has no direct effect in English law and cannot displace the express provisions of s. 30 CDPA. Lord Diplock explained the applicable principle in **The Jade** [1976] 1 WLR 430 at 436,

“The ordinary rule of statutory construction is that domestic legislation which has been enacted to give effect to the UK's obligations under an international convention or treaty if the words of the statute are reasonably capable of bearing that meaning”.

This rule imposes a weaker duty of interpretation on the court than the **Marleasing** principle: see per Arnold J in **SAS** at [164].

121. The UK has chosen to implement the relevant exceptions in s. 30 CDPA. The terms of the section have been considered by the Court of Appeal in a number of cases and those decisions are binding on this Court. If Mr Silverleaf's argument were correct, it would follow, remarkably, that three recent decision of the Court of Appeal, namely **Pro Sieben, NLA v. Marks & Spencer** and **Ashdown v. Telegraph Group Limited** [2002] Ch 149 were all decided *per incuriam*. The same would also have to be said of the decision of Arnold J in **SAS**, who plainly had Berne well in mind as he cited several of its provisions.
122. The InfoSoc Directive is itself in terms permissive in enabling Member States to enact the relevant exceptions. They are not mandatory. If CDPA is narrower in scope than may be permitted by Article 5 (3) that does not provide a basis for construing the English statute more broadly.
123. I therefore turn to the relevant exceptions.

For the purpose of criticism or review

124. In ordinary language, criticism in relation to a literary work is I suppose the assessment or analysis of its merits or deficiencies, while review is the delivery of that assessment. I was taken to dictionary definitions of these terms in the Shorter Oxford Dictionary (Mr Howe) and in Collins Dictionary (Mr Silverleaf). Mr Silverleaf's

Dictionary highlighted the use of the word review in its sense of viewing something again, but I did not think that Collins took PRCA's case any further. Dictionaries are a starting point but in the event I did not find the definitions conclusive or even particularly helpful in this context.

125. I turn to the observations of Sir Andrew Morritt V-C at first instance, quoted and endorsed by the Court of Appeal, in **Ashdown** at [61],

“I accept, of course, that the expression ‘criticism and review’ is of wide import. Cf Robert Walker LJ in *Pro Sieben Media AG v. Carlton UK Television Ltd* [1999] 1 WLR 605, 614G. Likewise I accept that it is necessary to have regard to the true purpose of the work. Is it ‘a genuine piece of criticism or review, or is it something else, such as the attempt to dress up the infringement of another’s copyright in the guise of criticism, and so profit unfairly from another’s work’? Cf Henry LJ in *Time Warner Entertainments Co LP v. Channel Four Television Corp plc* [1994] EMLR 1, 14. But what is required is that the copying shall take place as part of and for the purpose of criticising and reviewing the work. The work is the minute. But the articles are not criticising or reviewing the minute: they are criticising or reviewing the actions of the Prime Minister and the claimant in October 1997. It was not necessary for that purpose to copy the minute at all. In my judgment the articles do not come within section 30(1) because the purpose of copying the work was not its criticism or review.”

126. I accept that the terms used in s.30 CDPA may have a wide interpretation beyond their strict dictionary definitions. However, Mr Silverleaf's proffered interpretation was that their meaning simply comprised viewing for the purpose of determining whether the article was likely to be of relevance or interest to the End User and his client. Viewing an item is plainly insufficient by itself, or copyright would afford no protection at all. The question is whether the added purpose of seeing whether the text extract is likely to be of interest brings the activities of the End User within the exception.
127. The End User does not apply his critical faculties at all to the work, whether the article or the text extracts. The purpose of Meltwater News is merely to enable the End User to decide whether he wants to see the content of the articles. However widely I interpret the expression “criticism or review”, I do not see that the End User's activities are comprised within it.

For the purpose of reporting current events

128. It is not clear to me who is said to be reporting what to whom on PRCA's case. Is it Meltwater to PRCA's members? Or is it PRCA's members to their clients? If the

latter, the evidence does not show to what extent or in what way the contents of Meltwater News are forwarded to clients.

129. Be that as it may, it seems tortuous to say that copying for the purpose of seeing mentions of the End Users' clients in the news and the stories with which they have been concerned is "reporting current events". As Lord Phillips of Worth Matravers MR said (in handing down the judgment of the Court of Appeal) in **Ashdown** at [65],

"The defence provided by section 30(2) is clearly intended to protect the role of the media in informing the public about matters of current concern to the public."

Meltwater News is not intended for public consumption; it is tailored, and addressed exclusively, to particular End Users for their clients' purposes.

Fair dealing

130. Even if the End Users were to establish that their use of the Publishers' copyright fell within criticism, review or reporting current events PRCA would have also to show that it constituted fair dealing. Article 5(5) of the InfoSoc directive provides that the exceptions:

"...shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder."

Similar provisions are contained in Article 9(2) of Berne, Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and Article 10(2) of the World Intellectual Property Organisation Copyright Treaty and explanatory Statement (WIPO).

131. It seems to me that the only purpose in copying the text extracts is to enable the End User to choose whether or not to read the underlying articles. Without those extracts, he would have no option but to go to the articles themselves. But for the existence of Meltwater and similar businesses, End Users that wanted to monitor press coverage would have to do so by going directly to the Publishers' websites or by using a free alert service or search engine.
132. In **NLA v. Marks & Spencer**, Peter Gibson LJ, in deciding that there was no defence under s. 30(2) because there was no public reporting of a recent newsworthy event, said (at 271),

"I can see no public interest reason why the legislature should want to provide a defence to an infringement of copyright for the copying within a commercial organisation for commercial reasons of material subject to copyright, whereas a public interest can be discerned in the public reporting of newsworthy current events."

However, he went on to decide that if he was wrong about that (that is to say, if the dealing had been for the purpose of reporting current events) he would incline to the view that the dealing was fair dealing. In that connection he cited Aldous LJ **Hyde Park Residence Limited v. Yelland** [2001] Ch 143 and **Pro Sieben**.

133. Chadwick LJ decided, to the contrary, that copying of articles within Marks & Spencer which had been supplied to it by a licensed cuttings agency was copying “done for the purposes of reporting a “current event” to those within the defendant’s organisation who have a commercial need to be informed of it.” However he went on to decide that the reporting of such current events for the defendant’s internal purposes was not fair dealing. He said (at 280),

“...a dealing by a person with copyright work for his own commercial advantage- and to the actual or potential commercial disadvantage of the copyright owner- is not to be regarded as a fair dealing unless there is some overriding element of public advantage which justifies the subordination of the rights of the copyright owner. In my view, it was the recognition that the property right conferred on the copyright owner by the 1988 Act and its statutory predecessors -and which, subject to the provisions of the Act, the copyright owner is entitled to protect and exploit- should yield, in appropriate circumstances, to an overriding public interest in the promotion of research or private study, in the publication of comment or criticism, or in the reporting of current events which led Parliament to include the fair dealing provisions in the legislation. I can see no reason why Parliament should have intended, in the absence of some overriding element of public advantage, to permit one person to deal with copyright work, to his own commercial advantage and to the actual or potential commercial disadvantage of the copyright owner; and no reason why what would otherwise be an infringement of the rights of the owner of copyright in typographical arrangement should be permitted. Simply because the particular commercial advantage to be obtained was a more convenient (or less costly) means of disseminating reports of current events within a commercial organisation by the circulation of facsimile copies of press cuttings.

There is no suggestion, in the present case, that there is any element of public advantage in the use which the defendant makes of the press cuttings copied and circulated by its internal press offices. I would hold that the provisions of section 30 (2) of the 1988 Act have no application in the present case.”

134. Mance LJ also held that the defendants would be in difficulty in relying upon the subsection because they were copying a significant part of an otherwise protected arrangement for essentially private commercial reasons. He said (at 290),

“I would agree with Peter Gibson LJ that some of the copying, which they undertook was of material which it is on any view difficult to bring within the concept of ‘current events’...

The problem remains that the exception of fair dealing for the purpose of reporting current events, represents a public interest exception to copyright, which is difficult to extend to the reporting of current events in private commercial purposes. One may contemplate circumstances where the exception would apply to private reporting, which was itself in the public interest, for example, reporting to the Cabinet or other official bodies. Much to extend the exception to all reporting for any purpose seems to me debatable.”

135. Mr Silverleaf urged me to ignore these observations on the basis that the members of the Court based their decisions on different findings about s. 30 CDPA and that those findings were inherently contradictory. However, all the members of the Court of Appeal held the view in common that s. 30 (2) did not apply to commercial, non-public, user. To use Mr Howe’s expression, although they did not all speak with one voice as to the reasoning, they were unanimous as to the result. When that decision is combined with the passages I have quoted from **Ashdown**, the Court of Appeal’s decision about the scope and effect of s. 30 is, to put it at its lowest, very persuasive indeed, and I propose to adopt it.
136. However Mr Silverleaf further submitted that dealing was fair in this case in that there is no actual or potential commercial disadvantage to the Publishers in the End Users’ receipt and use of Meltwater News. He contended throughout that the service provided by Meltwater provides a different service to that provided by the Publishers. The End Users pay for Meltwater’s search and analytical services and not for access to the original content, which is obtained only by visiting the Publishers’ websites themselves. Further, a directed search such as the End Users obtain from Meltwater will inevitably lead them to the Publishers’ websites in circumstances where they would not otherwise access them. Meltwater’s services thus complement the Publishers’ websites, they do not compete with them.
137. Again, I find NLA’s argument has an element of artificiality in that it says that as commercial users the End Users are not permitted to use the Publishers’ websites anyway. However it seems to me that I should deal with the matter on an alternative basis.
138. If NLA is correct and there is no implied licence to access the website directly, then the End Users are being permitted, indeed encouraged, to do something via the Meltwater service that they ought not to do. It is hard to see how that is fair dealing.
139. If on the other hand the End Users are permitted to access the website directly, Mr Silverleaf’s argument takes insufficient account of the fact that the text extracts contain direct quotations from the words of the articles (including the whole of the headline) for the express purpose of enabling the End Users to decide whether or not the articles themselves are worth reading.

140. I also have regard to the scale of the use which is being made of the work. Mr Glittenberg provided no direct statistical evidence about Meltwater's operation in terms of the number of text extracts supplied to its clients. However, extrapolating from the rough figures provided by Mr Ellis of PRCA, it would seem that a single End User could well receive (and copy) text extracts from some 50,000 articles per annum.
141. It therefore seems to me that, even if I am wrong about the inapplicability of the basic provisions of s. 30 CDPA, there is no fair dealing in copying Meltwater News.

The use must be accompanied by sufficient acknowledgment

142. However, even if I am wrong about all the foregoing in relation to s. 30 CDPA, PRCA is faced with the requirement for sufficient acknowledgment as defined in s. 178 CDPA. The requirement to identify the author is an absolute one (see also Article 5 of the InfoSoc directive) unless the work is published anonymously.
143. It is common ground that unless the Publishers 'tag' the names of the authors of their articles the authors are not named in the Meltwater News text extracts.
144. It is asserted in the defence that the author is identified "to the extent that is technically possible" (see paragraph 26(d)) but what is meant is that Meltwater's software does not enable the author to be identified automatically. That is not the same thing at all. Mr Silverleaf went so far as to say that the Publishers can hardly complain about Meltwater's failure to identify the author if his name is not tagged in such a way as to enable Meltwater's systems to identify it automatically. However, inconvenience is not impossibility and the criticism of the Publishers in this regard is misplaced.
145. I think Mr Silverleaf realised the difficulty of his argument in the face of the uncompromising wording of s.178 CDPA. He therefore went on to contend that the Link provides a sufficient acknowledgment in the same way as a footnote in a critical review. He pointed out that s.30 (2) merely requires as a condition of fair dealing that the use be "accompanied by" a sufficient acknowledgment. Article 5 paragraphs 3(c) and (d) require an acknowledgment "including" the author's name, and s.178 defines sufficient acknowledgment as "identifying" the author.
146. I do not accept that argument either. The Link directs the End User to the original article. It is no better an acknowledgment than a citation of the title of a book coupled with an indication of where the book may be found, because unless the End User decides to go to the book, he will not be able to identify the author. This interpretation of identification of the author for the purposes of the definition of "sufficient acknowledgment" renders the requirement to identify the author virtually otiose.
147. This is, I accept, a technical reason for holding that the exception in s.30 CDPA does not apply but, technical or no, it seems to me that there is no answer to it.

Conclusion

148. In all the circumstances I find that without a licence from the Publishers there is infringement of the Publishers' copyright by the End Users in receiving and using Meltwater News.