GLOBAL ACADEMIC RESEARCH INSTITUTE

COLOMBO, SRI LANKA

GARI International Journal of Multidisciplinary Research

ISSN 2659-2193

Volume: 01 | Issue: 01

On 10th November 2015

http://www.research.lk

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GARI Publisher | Law | Volume: 01 | Issue: 01

Article ID: IN/GARI/ICCPL/2015/150 | Pages: 01-17 (17)

ISSN 2659-2193 | Edit: GARI Editorial Team

Received: 01.09.2015 | Publish: 10.11.2015

COPYRIGHT LAW AND ONLINE JOURNALISM: A SOUTH AFRICAN PERSPECTIVE ON FAIR USE AND REASONABLE MEDIA PRACTICE

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ABSTRACT

The application of exceptions to copyright infringement in news articles that are published online has become contentious with the widespread practice of aggregation and curation in online journalism. The specific concern is whether reproducing or adapting original news articles that are published on competitors' websites without permission and attribution fall within the scope of the exceptions to copyright infringement in respect of news articles on economic and political topics or, alternatively, such conduct is protected by the doctrine of fair use. This paper provides a South African perspective on this concern by comparing the USA decision in Associated Press v. Meltwater U.S. Holdings, Inc. (2013) with the ongoing South African case of Moneyweb (Pty) Ltd v. Media24 (Pty) Ltd and Another, which is likely to set rules for online journalism in the digital era. It first analyses the complexities of the rapid rise of online news, which raise questions such as whether hyperlinking is sufficient attribution and the difference between "scraping" and aggregation, as well as the effects of these practices on competing media. It then considers whether the doctrine of fair use, which should arguably be flexible enough to adapt to the changing obligations in the context of new technologies (Katyal et al, 2007; Schonwald, 2014) is capable of providing clear guidance on reasonable media practice online, beyond South Africa, due to the global scope of online journalism. The central argument is that the doctrine of fair use should foster online innovation and sharing of public information while ensuring respect of copyright. Keywords: aggregation, copyright infringement, fair dealing, fair use, media.

INTRODUCTION

The nature of news in the digital media is accurately captured by Viner (2013) who argues that 'digital news is constantly updated, improved upon, changed, moved, developed, an ongoing conversation and collaboration. It is living, evolving, limitless [and] relentless.' The description illustrates the complex nature of rights in such news in terms of copyright law. If the creation of such news is indeed an ongoing conversation and collaboration, what kind of rights do online news companies have in the conversation or collaboration and what type of claims can they have against their competitors such as aggregators? These questions are compounded by the nature of digital content, which as Samuelson (1990:324-36) correctly predicted even before the digital media became a challenge, is easy to replicate and transmit. The above questions are marred by the prevalent practice of disputing parties reaching licensing agreements, which often leave the question of what constitutes acceptable aggregation unanswered. Current literature has focused on the apparent competition between online newspaper companies and aggregators who compile news items from the former's websites (Jensen, 2010-2011) thus leading to decrease in the circulations and revenue of online newspaper companies. The main concern by online newspaper companies is that such activities by the aggregators tend to go beyond the scope of the doctrine of fair use. There are competing interests, between these two parties, insofar as online news companies argue that aggregators unjustifiably enrich themselves by reaping where they have not sown while on the other hand, authors such as Jensen (2010-2011) argue that 'the online media are taking a public good-news-and broadening its reach as well as adding context, commentary, and content.' Besides, he adds, 'these sites can be a model for how to package and present the news' (p.578). For purposes of placing the issues in perspective, it is important to define the term 'aggregator' and distinguish among the existing categories of aggregators. Isbell (2010: 2) defines an aggregator as 'a website that takes information from multiple sources and displays it in a single place.' In the process of aggregating such information, issues such as the possibility of infringing copyright in the original source may arise depending on the type of aggregator. Isbell (2010: 2-5) has identified the following four types of aggregators:Feed Aggregators such as Yahoo! and Google News that draw material from news websites by providing headlines and a few lines of the news item but create a link to the original source; Specialty Aggregators that collect information from various sources on particular topics of location. They also provide headlines and a few lines of the news item but create a link to the original source;User-Curated Aggregators, which function in a similar way as the first two categories but feature user-submitted links and portions of text taken from a variety of websites.Blog Aggregators that use third-party content to create a blog about a given topic.The common attribute among the four types of aggregators is their use of third party content in diverse ways. The nature of such third parties' rights in the news that the aggregators collect from websites is analysed in the second part of this paper with a view to determining whether or not the activities are likely to infringe copyright in such news. Isbell (2010) also alludes to a fifth category of aggregators, which collects and reports news articles verbatim thus falling within the realm of copyright infringement. It is this category of aggregators that this paper focuses on in view of the relevant facts in the Meltwater and Moneyweb cases. This is not to imply

that the other categories may not raise concerns. A survey of Google's news visitors for instance established that 44% of such visitors scanned the headlines on google without using the link to the originators' sources (Wauters, 2010).Arguments in favour of aggregators only make sense in relation to blog aggregators, user curated aggregators as well as feed and specialty aggregators whose activities fall within the scope of exceptions to copyright infringement, if the requirements that are discussed further in this paper are met. This is the case insofar as blog aggregators collect topics for criticism and commentary; user curated aggregators encourage commentary and interaction among users while feed and specialty aggregators facilitate users' searches for information and news on the original sites (Larson, 2014: 108). Isbell (2010: 21) however correctly observes that there is a lot of legal uncertainty about the activities of news aggregators. The US Federal Trade Commission (2010: 8) has also acknowledged that the varied activities of aggregators are very unclear in relation to fair use and courts have applied the doctrine inconsistently. The complexities of these activities are discussed in the next section.

THE COMPLEXITIES OF ONLINE NEWS AGGREGATORS' ACTIVITIES FROM A SOUTH AFRICAN PERSPECTIVE

The complexities can be gleaned from the issues that have arisen in the ongoing South African Moneyweb case, which is briefly discussed in this part of the paper. It should be noted that although the case was heard in May 2015 and judgment was reserved, the pleadings and the respective parties' affidavits have been published by Moneyweb on its website and are accessible to the public. Rather than pre-empting the outstanding judgment of the court in the case, the discussions in this paper will focus on a critical analysis of the issues that have emerged in the case insofar as they relate to copyright law and online journalism.The South African perspective on fair dealing first needs to be explained by considering different views on whether or not such exceptions to copyright infringement are rights or privileges. This is a question that has been considered in jurisdictions such as the US as well and is subject to diverse views, which have animated 'the divergence between narrow and broad constructions of fair use' (Katyal et al., 2007: 1019). In South Africa, the exceptions are for specific purposes and subject to certain conditions, hence the specific wording of the fair dealing provision as explained later. There are however diverse views on the position of exceptions. Dean argues that these exceptions are based on the assumption that 'an act of infringement has been committed and this act is then excused by the exemption' (2012: 1-92). Pistorius finds Dean's approach incorrect and maintains that fair dealing is a right not a defence. Her view is that 'the general purpose of copyright exceptions and limitations is to balance the public's right to access copyright works and the economic rights of copyright owners' (2011: 211). Van der Walt and du Bois agree with Pistorius' view since it 'corresponds exactly with the general purpose of the public domain in the sense that intellectual property rights should be construed and developed in such a way that intellectual property works would still be readily accessible to the public and available for future creative use'(2013:47). The clarity on the South African perspective is further provided in the discussion of the issues that have emerged in the Moneyweb case.

ISSUES IN THE MONEYWEB CASE

The applicant in this case, Moneyweb, publishes business, financial and investment news, primarily on the Internet (by operating moneyweb.co.za) and other digital platforms, as well as in newspapers with whom it has a content supply arrangement (Moneyweb's founding affidavit, para 5.3). The respondent, Media24, is the largest publisher and printer of magazines and newspapers in South Africa with significant online components (Moneyweb's founding affidavit, para 6.2). It owns a number of websites including Fin24, which is at the centre of the application before the court and operates as Fin24.com. The second respondent is the editor of Fin24.The application before the court shows that Moneyweb's core business entails the production of 'unique and original content' from its journalists' own original skill, effort and expertise (Moneyweb's founding affidavit, para 19.1). In instances where it uses syndicated content from other services, it pays licence fees. It is worth noting that the main source of income for Moneyweb is the number of visitors to its website who are attracted to its unique and original content. The number of visitors proportionally determines its revenue from advertising as it does not charge visitors for reading its content.Moneyweb's business model is significantly different from Media24's wire-services approach, which entails publishing third party material or re-purposing it by aggregating contents from websites such as Moneyweb's (founding affidavit: para 24). Consequently, Moneyweb disputed the lawfulness of Media 24's aggregation approach, which entails republishing articles from Moneyweb's website with very minor changes and additions. The republished articles remained substantially the same in terms of form and structure. Media24 did not include any link to direct readers to Moneyweb's site as the original source of the republished articles (founding affidavit: para 68.6).Moneyweb's claim against Media24 is based on copyright infringement and unlawful competition in respect of eight articles that were copied by the latter. Moneyweb relies on these articles in support of the claim but the reproduction and misuse of its Defencex articles by Media24 triggered the dispute. The articles were written by Moneyweb's journalist who attended a rally by the promoter of the Defencex scheme, which was suspected of being a Ponzi scheme and generated a lot of public interest as its bank accounts had been frozen by the Cape Town High Court. One of Moneyweb's article's that was published on 9th March 2013 was the first original and exclusive article based on the promoter of the Ponzi scheme's address to the audience that the journalist attended. The story generated a lot of visits to Moneyweb's website. The article was allegedly copied by the second respondent and published on Fin24.com on 10th March 2013 without a hyperlink back to the Moneyweb article (founding affidavit: paras 68 and 69). After receiving complaints from Moneyweb, Fin24 added a hyperlink but maintained that it was entitled to copy the article as it had done since that constituted acceptable aggregation. It is worth noting that Media24's journalist was unable to attend the audience with the promoter of the Ponzi scheme where Moneyweb's journalist had gathered the original news.

The following issues have emerged from the case;

'Whether or not Moneyweb enjoys copyright in its news articles (Moneyweb's heads of argument, para 11.1).'

'whether or not Media24's conduct in reproducing or adapting news stories published by Moneyweb on its website falls within the scope of either of the statutorily-

recognised exceptions to copyright infringement which apply in respect of news articles and articles on economic, political or religious topics [in terms of] sections 12(1) and 12(7) of the Copyright Act' (Moneyweb's heads of argument, para 11.2).

With regard to the first issue, Media24 advanced the argument that there is no copyright in the news articles because Moneyweb sourced them from external third parties and Fin24 only sourced a part of its own articles from Moneyweb. It accordingly contested the originality of the articles and substantial copying by Fin24. Media24 also raised fair dealing as a defence. It is important to note that Media24 relied on the public interest in news dissemination and in the ability of a media institution to re-report the core elements of a news story first reported by its competitor as a reason for contesting the eligibility of news articles for copyright protection (answering Affidavit: para 5.2). The issues from the case have led to speculations that it is likely to determine the future of news in South Africa (Rose, 2015). The specific issues in the case are discussed in details below in the context of online journalism.

COPYRIGHT IN NEWS ARTICLES

The issue that most South African media experts find complex is the ownership of news once it is in the public domain and it is in the public's interest that it should be spread as much as possible (Harber, 2013). Section 12 (8) (a) of the copyright Act, which provides that 'no copyright shall subsist in… news of the day that are mere items of press information' seems to unravel the complexity but has not been judicially tested in South Africa. However, it clearly confirms that there can be no exclusive rights in events or factual information (Shay, 2014: 588). The provision is in line with international standards as provided for in the Berne Convention (Article 2(8)), which has similar wording. Article 9.2 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) explicitly states that copyright protection shall extend to expressions and not to ideas. Consequently, events and factual information belong to the intellectual commons under South African and international law.The publication of news in an original form is however protected under copyright law. Rahmatian (2011: 125) has graphically described this idea/expression dichotomy as follows: '…the building blocks of a work in question are to be freely available to the future authors while the particular application, order and arrangement of the particular blocks as they form the work and give it a distinctive appearance are to be reserved to the author of that work.' In our context, news of the day or information are building blocks while the news article that is original gives the distinctive appearance that is protected by copyright law. Section 21(1) (b) of the copyright Act, which provides for ownership of copyright in newspaper articles, implies that original news articles are protected under the Act. This is the case as long as they meet the requisite requirements that are provided for in section 2 namely; that they are works which are original. Besides, the definition of 'literary work' in section 1(1) includes stories and articles 'irrespective of literary quality and in whatever mode or form expressed'.The concept of originality in copyright law is well established in South African jurisprudence. In the case of Klep Valves (Pty) Ltd v Saunders Value Company Ltd (1987; paras 22H -23H) the Supreme Court of Appeal (citing Copeling, 1978;15) indicated that '"originality", for the purposes of copyright, refers not to originality of either thought or the expression of thought, but to original skill or labour in execution. All that is required is that the work should emanate from the author himself and not be copied.' In the instant case, sufficient evidence seems to have been adduced to show that Moneyweb's articles are original thus warranting copyright protection.News articles are also protected 'against misappropriation of information through an

action for unlawful competition' (Shay, 2014: 589). The particulars of this type of protection were explained in the United States (US) case of International News Service v The Associated Press (248 U.S. 215), which has been cited by South African courts (in Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd (1968); Schultz v Butt (1986)), and was relied on by Moneyweb to support its claim for copyright in its news articles. In the International News Service case, the US Supreme Court used a quasi-property approach to protect news material, between two competing media houses, (248 U.S. 236) thereby holding that a competitor's act of collecting and rewriting the information gathered by the other party without exerting the effort or incurring the expense required by such gathering amounted to unfair competition (248 U.S. 236-240). The court further emphasised that the principle only applied to fresh news and that the news of current events was regarded as common property. The statement below, by Justice Pitney, sheds light on what the court meant in the above judgment:'…the view we adopt does not result in giving to [the] complainant the right to monopolize either the gathering or the distribution of the news, or, without complying with the copyright act, to prevent the reproduction of its news articles; but only postpones participation by complainant's competitor in the processes of distribution and reproduction of news that it has not gathered, and only to the extent necessary to prevent that competitor from reaping the fruits of complainant's efforts and expenditure, to the partial exclusion of complainant' (248 U.S. 241).The whole approach, of postponing 'the participation of competitors', as used in the judgment seems rather problematic as it deviates from the idea/expression dichotomy, which is entrenched in copyright law. This dichotomy should be used as the basis of determining the existence of misappropriation of information rather than just focusing on the timing of the competitor's use of the news article.The validity of the above critique of the US judgment becomes evident if one considers the South African Moneyweb case where Fin24 republished the fresh news, a day after its publication by Moneyweb, without complying with the requirements for fair use as explained below. It is notable that the US court focused on 'the peculiar value of news… in the spreading of it while it is fresh' (248 U.S. 235). Consequently, Larson III correctly argues that the court intended to create a narrow remedy that is limited to 'situations where a direct competitor abuses the distribution process to gain an unfair advantage over the original publisher' (2014:104). He equally observes (p.104) that a quasi-property right on news has not been viewed favourably by scholars who argue that it is a complete departure from the traditional intellectual property principles (Calvert et al, 2009). The above departure is evident in the court's clarification that its judgment was an equitable remedy targeting news organizations' conduct with respect to one another without affecting the right of the public to use the news content (p.236). The clarification leaves a number of very important copyright law questions unanswered, namely; first, supposing a complainant's news article does not meet the requirements for copyright protection, can this equitable remedy be availed to such an applicant? Secondly, what would be the basis of granting such a remedy if there is no protectable intellectual property right in the first place? These questions can only be answered if the fact/expression dichotomy, as used in copyright law, is applied. This argument is developed further below.According news articles a quasi-property right is problematic since, as already explained above such articles, if original, are protected under the Copyright Act. Consequently, they are intellectual property rights. In this regard, the South African Supreme court of Appeal's pronouncement in Laugh It Off Promotions CC v SA Breweries International (Finance) BV t/a Sabmark International (2005: para 10) in the context of trademarks is equally instructive in relation to copyright. Harms JA stated as follows:'trademarks are property, albeit intangible or incorporeal. The fact that property is intangible does not make it of a lower order. Our law has always recognised incorporeals as a class of things in spite of theoretical objections

thereto…It thus follows that as long as news articles meet the requisite requirements of the copyright Act, they should be protected as intellectual property rather than applying the misappropriation approach in the manner that the US court did in the International News Service case. Vekstein (2012; 323) has argued that the approach, that the US court used, has detrimental consequences for online news sources and a suitable approach would be to make this extinct equitable remedy (see Erie R.R. Co. v. Tompkins, (1938), which overruled the previous precedents) a statutory rule against misappropriation of hot news in order to encourage the production of such news.Three other factors that the court considered in Pollstar v. Gigmania Ltd., (2000) are; that information was gathered at a cost, that the defendant is free riding on the plaintiff's efforts, and that the parties are in direct competition. Jensen (2010-2011: 572) argues that the third factor should not be considered because the internet has since changed the nature of competition such that there is 'uncertainty over which entities are competitors.' Practices such as simple linking should not be prohibited because this 'would severely hamper consumers' ability to get news on the internet' (Jensen, 2010-2011: 574). The element of free ridding has been described by Carter (2011: 190) as an extra element that goes beyond copyright law though it is aimed at ensuring a level of transformation that is required by copyright law. The above observation, by Carter, supports the argument in favour of using fact/expression dichotomy, in dealing with the misappropriation claims. This approach would be useful because in a claim for copyright infringement, apart from establishing the eligibility of news articles for copyright protection, it must be established that the alleged infringing news articles have objective similarities with the original article and that there is a causal connection between the two works. This test was laid down in the South African case of Galago Publishers (Pty) Ltd v Erasmus (1989: 284). Shay (2014: 591) has correctly argued that, since copyright law does not protect facts or information, 'journalists can prevent their expression being copied only if this expression goes beyond plainly stating factual information.' This essentially means that the form in which the news is reported must be original such that the objective similarities, between the infringing and original news articles, in expressing the facts or information would be evident. The protection of news articles through copyright law is rather controversial and Easton (2004: 522) has argued that such protection 'was always unnecessary and probably unwise, even when qualified by the so-called fact/expression dichotomy.' He accordingly suggests that such articles should rather be protected against misappropriation as well as authorial rights of attribution and integrity (p.523). This suggestion should be considered in light of the comments that are made in the preceding paragraph regarding the value of the fact/expression dichotomy in protecting news articles against misappropriation. It is worth reiterating here that the dichotomy serves a useful purpose of providing evidence of misappropriation by determining the extent of transformative input by the alleged infringer. In this regard, Carter (2011: 170) correctly argues that the dichotomy is particularly important in the context of copyright protection of news. This makes sense because the claimant should in the first place have a right that is capable of being misappropriated.

THE DOCTRINE OF FAIR USE/DEALING

This doctrine is provided for in the Berne Convention (Article 10(1), which states that it is '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.' This provision seems to be as wide as the US fair use provision (§107 of the Copyright Act), which contains no determinative statutory factors. Newby

(1999: 1636 & 1638) has accordingly argued that it is an equitable doctrine, which is fact specific since Congress intended it to 'remain flexible and fact sensitive so that courts could adapt it to new technology without repeated legislative action.' The factors to be considered under this doctrine are (17 U.S.C. § 107):

'(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.'

It is however important to note that the context in which the four factors have to be applied is contained in the first paragraph of the section, which provides that 'fair use… including such use by reproduction… for purposes such as criticism, comment, news reporting, teaching…scholarship, or research, is not an infringement of copyright.' The context and the four factors should therefore be read together.The US fair use doctrine is open ended, while the South African equivalent, known as fair dealing is restrictive as it prescribes a list of purposes that fall within the scope of the exemption (Shay 2014: 593). The fair dealing doctrine is provided for in section 12 of South Africa's Copyright Act (1978). Subsection 1 provides as follows:

'(1) Copyright shall not be infringed by any fair dealing with a literary or musical work-

(a) for the purposes of research or private study by, or the personal or private use of, the person using the work;

(b) for the purposes of criticism or review of that work or of another work; or

(c) for the purpose of reporting current events -

(i) in a newspaper, magazine or similar periodical; or

(ii) by means of broadcasting or in a cinematograph film:

Provided that, in the case of paragraphs (b) and (c) (i), the source shall be mentioned, as well as the name of the author if it appears on the work.'In the comparing the South African and US fair dealing/use doctrine it should be noted, as Newby (1999: 1639) clarifies, that the factors are intended to be guidelines for the courts in the US and not confining rules. It is in this regard that this paper draws from the rich American jurisprudence for purposes of providing an exposition on the South African perspective. It is equally useful to provide conceptual clarity on the scope of fair use and fair dealing doctrines. The latter has been described by Senftleben (2004: 47-50) as a list of statutory exceptions to copyright infringement that depend on particular contexts. Peltz (2009:277) observes that fair use is much broader such that jurisdictions that apply fair dealing, such as the United Kingdom (UK) have in the past done fair dealing analysis using factors from the US fair use doctrine but within the confines of statutory fair dealing exceptions such as news reporting. This observation is relevant for the South African context in view of the fact that its Patents, Designs, Trade marks and Copyright Act (9 of 1916) adopted the British Copyright Act of 1911 and the second Copyright Act (63 of 1965) was based on the British Copyright Act of 1956

(Pistorius, 2011:148). Consequently, the South African fair dealing doctrine is modelled on the UK legislation.In the same manner that the UK has used fair use factors in the analysis of fair dealing, South Africa could benefit from the same approach subject to contextualised adjustments. Shay (2014:595) for instance argues that the factors are useful for providing clarity in South Africa when it comes to determining what is 'fair' dealing. For example, in online journalism, the character of use can assist courts in determining the extent to which the use is transformative such that the 'unadulterated reproduction of a news article…would almost never be fair' (Shay 2014: 595). In terms of the nature of the copyright work, where there is stronger public interest in the subject matter this would be a factor that points to fair dealing (Shay 2014: 597). The substantiality factor is equally useful insofar as fair dealing is a qualitative assessment (Cornish, Llewelyn & Aplin, 2013: 491). The fourth factor has been interpreted in a rather restrictive manner in the US such that the presence of commercial use by the alleged infringer has been viewed to weigh against fairness (see the Meltwater case). Shay (2014: 599) is therefore of the view that such an approach would not be compatible with section 12(1)(a) of the South African copyright Act, which stipulates that use for the purposes of research or private study do not amount to infringement.The South African provision equally emphasises the importance of attribution. Carter (2011: 183) argues that attribution is useful for protecting news organisations from wholesale and unattributed copying of news content by competitors. In online journalism, providing a hyperlink to the original article would meet the requirement. Failure to include a hyperlink would definitely be evidence of lack of fairness. Indeed, linking is highly recommended since it is a way of encouraging diversity and connectivity (Viner, 2013).Since fair use serves the important function of protecting public interest in accessing information and news, it is worth discussing this point at some length. The amici curiae brief that was filed by Electronic Frontier Foundation (EFF) and Public Knowledge (PK), supporting Meltwater's Opposition to Motion for Summary Judgment by AP, in the Meltwater case raised interesting issues in this regard. These are discussed below.

THE PUBLIC INTEREST IN NEWS DISSEMINATION AND IN THE ABILITY OF A MEDIA INSTITUTION TO RE-REPORT

The fundamental point, as Baker (2004: 8) argues is that 'media products have significant "public good" aspects.' The two attributes of the public good aspect are non-rivalrous use and non-excludability. The public's interests have been protected so far by using the fact/expression distinction for purposes of ensuring that copyright law does not protect facts or information, which should be freely available to the public. For instance, in the International News Service case (248 U.S. 215, 234) the US Supreme Court held that current events cannot be the subject matter for exclusive rights even if a claimant is the first to report such events. The court also distinguished between those aspects of news (original expression) that are protectable from the aspects that cannot be protected (information and facts). The second protective mechanism is the doctrine of fair use, which has been discussed in the previous part. It is interesting to note that Moneyweb rebutted Media24's reliance on the public interest in news dissemination and in the ability of a media institution to re-report the core elements of a news story first reported by its competitor by relying on the US case of

Associated Press v. Meltwater U.S. Holdings, Inc. (2013). This warrants a brief discussion of this case where the court had to balance the public's interest in news dissemination through a news clipping service and interest in the enforcement of copyright laws. The case also dealt with the defence of fair use and other defences, which are not relevant for the issues under discussion. Authors such as Shay (2014:604) have equally emphasised the need for South Africa to consider foreign jurisprudence in the interpretation of Copyright law to the emerging technologically advanced space in which news articles are used. In the Meltwater case, the plaintiff (Associated Press), claimed that Meltwater infringed its copyright in news stories by republishing their excerpts as part of its online news aggregation service to its subscribers. Meltwater's principal defence was fair use (para 550) in the sense that it used the contents for a new purpose, namely; as an integral part of information location tool. The evidence before the court however showed that Meltwater used an automated computer programme to copy or 'scrape' articles from online news sources, indexed and delivered verbatim excerpts of the articles to customers in response to search queries 'without adding any commentary or insight in its News Reports' (para 552).Unlike the South African Moneyweb case, Meltwater did not contest the protection of Associated Press' (AP) news articles by copyright law. The court therefore considered the validity of the fair use defence by applying the four factors, which have been discussed in the preceding parts of this paper and came to the conclusion that it was not valid in the circumstances. The court took note of the fact that Meltwater's subscribers were never directed to the third party websites where the original news articles had been obtained and as such it substituted the original websites. Meltwater equally never transformed the original news by adding any commentary or insight.Three amici curiae briefs were accepted for filing (para 549) but we focus on the brief filed by EFF and PK raising the public interest issue in which they argued that fair use must be interpreted in light of its purpose, namely; bringing copyright in line with the public interest. The court considered the public's interest in the dissemination of news through search engines such as Meltwater's and the enforcement of copyright law and came to the conclusion that such public interest 'does not outweigh the strong public interest in the enforcement of the copyright laws or justify allowing Meltwater to free ride on the costly news gathering and coverage work performed by other organizations' (para 553). This made the court to decide the first factor in fair use (purpose and character of use) in favour of AP (para 557). With regard to the second factor, which the court considered neutral since Meltwater copied published work and AP's news stories were more vulnerable to the application of fair use doctrine as a defence, the court found in favour of AP (para 557). In applying the third factor (amount and substantiality), the court used both quantitative and qualitative assessments by considering the portion of copyrighted work that was copied in relation to the whole work and the expressive components that were copied respectively. The court considered the analysis of the third factor to be relevant to the fourth one, the effect of the use on the copyrighted work's potential market, as well. This is the case insofar as the substantiality of the use may determine whether or not the second work may substitute for the original work in the market. Since the evidence showed that Meltwater had copied the "lede" (heart of AP's news stories, para 541) and failed to prove that it took no more than necessary to

direct users to the original source, both factors weighed against it (para 558). Melwater's fair use defence was accordingly dismissed and it was found guilty of infringing copyright in AP's news stories.Although the ruling in the Meltwater case favoured AP, the parties reached an amicable settlement in terms of which they agreed to work together thus averting Meltwater's intended appeal (Mullin, 2013). Commentators such as Mullin (2013) argue that the licensing settlement has left a murky precedent in place since it is unclear what kind of internet searching is fair use. He speculates that the main reason why the court ruled against Meltwater could be that it was not a public search engine and was not successful at getting the users to click back to the original articles. This observation is indeed correct since these are the requirements of fair use, which are equally relevant to fair dealing in South Africa where the right to attribution is provided for in the copyright Act.Schonwald (2014: 803) has raised a very pertinent issue regarding the impact of the Meltwater ruling on the 'still-forming' market of online news. Her view is that 'we may be leaving important technology issues to an antiquated system plagued by doctrinal feedback, whereas thoughtful policy decisions would be a far better fit.' This view sets the tone for the discussion in next part, which addresses the question of the flexibility of the fair use/dealing doctrine to adapt to the context of online journalism. It is notable that the doctrine of fair use needs to be applied in a manner that takes cognisance of the global scope of online journalism. In this regard, the Meltwater court's observation, that access to online news and the protection of news organisations' interests should complement each other, is very instructive. The court's view was that '[t]he Internet would be far poorer if it were bereft of the reporting done by news organizations and both are enhanced by the accessibility the Internet provides to news gathered and delivered by news organizations' (para 553). This calls for thoughtful policy decisions that Schonwald has alluded to.

How the application of fair use/dealing to online news aggregators will shape media practice

At this stage, it is worth considering how the issues that are discussed above will shape media practice. Easton's (2004:523) suggestion is that copyright law should be fine-tuned with respect to news in order to restore a sense of public service obligation among journalists. It should however be pointed out that rather than fine tuning copyright law itself, a more nuanced interpretation of the fair use/dealing doctrine should be adopted. As noted already, the concern with the US courts' approach in applying the doctrine is arbitrariness. It would thus be useful to take Hansen's three suggestions on board by letting policy rather than doctrine control cases; sensitising users 'to resist copyright industries' culture of requiring licenses for every use including fair uses' and availing resources to users to enable them resist such a licensing culture (in Katyal et al., 2007:1048).Scholars such as Leval (1990) and Nimmer (2003) have argued that the interpretation of the four factors for fair use are arbitrary thus leading to lack of consistency in the treatment of the doctrine as Schonwald (2014: 824-8) correctly observes. Schonwald argues that the inconsistency arises from the fact that courts tend to 'use the factors as ex post facto justifications rather than as guidance decisions' (824). She points out that the Meltwater court expanded the legal remedies that are available to news services (833).From the foregoing discussions on the application of fair use doctrine, it appears that the flexible US approach, which is intended to embrace emerging

technology, has the disadvantage of leading to inconsistency in its application. A closed list approach (fair dealing) that provides a list of criteria that should guide the court on the other hand, according to Schonwetter (2006: 49), would lack flexibility. The next paragraphs explore the viability of the three approaches that have been suggested in current literature to deal with the issue of aggregators in the context of fair use. These are: the utilisation of fact/expression dichotomy alongside unlawful competition actions based on misappropriation; limiting fair use in respect of news reporting and managing aggregators' activities through licensing.

Using fact/expression dichotomy in unlawful competition actions

This would be the approach that digital media companies such as Google (2010) that rely on aggregation in advertising for their businesses are advocating for. Google (2010: 14) has argued that fair use doctrine in its current form allows courts to apply it in a flexible manner that is capable of catering for the needs of aggregators and search engines. In Google's view, it is unnecessary to amend copyright law to cater for such stakeholders. A panellist at the US Federal Trade Commission public comment session (2010: 11) had made a suggestion to limit the fair use doctrine through the construction of some statutory analytical framework for aggregators and search engines so that their copying of original content can amount to copyright infringement. If the suggestion is accepted, it will defeat the purpose of fair use.Google's concerns point to the possibility of the South African fair dealing doctrine being rather restrictive for online journalism. This is the case because courts will most likely lack flexibility in dealing with cases that involve news aggregators and they may apply the closed list of requirements that are provided for in the copyright Act. A better approach would be to consider convincing policy arguments as Hensen (in Katyal et al., 2007: 1049) has suggested instead of sticking to precedents from previous decisions. The approach can ensure that the doctrine remains flexible enough to adapt to the changing obligations in online journalism.There is space within the South African legal system for implementing the policy approach that Hensen has suggested by the using the fact/expression dichotomy in misappropriation actions for unlawful competition. The availability of unlawful competition as a cause of action was confirmed in the case of Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Gwhano (Pty) Ltd (1981:186D) where the court stated that: '…the law of South Africa recognises and grants a general action in the case of unlawful competition, based on the principles of the lex Aquilia.' The aquilian liability is well established in South African law and is available to every competitor who suffers patrimonial loss as a result of unlawful competition. The liability arises from 'conduct in the course of trade - mostly in the form of misrepresentation or misappropriation of a rival's product - that unlawfully causes economic loss, or the potential of such loss' (Loubser, 2000:173). There is no closed list of acts of unlawful competition that have to be brought under this cause of action insofar as uncommon acts can be judged using the general principles of the law of delict (Klopper, 2011:16). The flexibility of the principles of lex Aquilia is very useful for applying the doctrine of fair dealing in a manner that takes cognisance of the changing obligations in online journalism. The claimant has to prove, in terms of the law of delict that the competitor was at fault by acting wrongfully (either negligently or intentionally). Klopper (2011:17) however observes that 'negligent unlawful competition is the exception rather than the

rule' since, in his view, all acts of unlawful competition are generally premeditated. In the context of online news articles, lack of attribution and the existence of objective similarities between the original and infringing articles can be used to prove that unlawful competition is premeditated. The fact that the infringer's conduct is contrary to the prevailing standards in online journalism, which require attribution and fair dealing, can be used to prove unlawfulness. It should also be noted that lack of attribution infringes the original online news reporter's right to attract custom and Klopper has correctly argued that 'every act that infringes the right to attract custom qualifies as unlawful competition' (2011:24). The proposed approach would require some flexibility on the part of the courts since in the past some courts have shown the tendency to use unlawful competition in intellectual property related disputes with reference to established categories of unlawful competition. For example, the Appellate Division in Payen Components SA Ltd v Bovic CC (1994:453G) stated that 'unlawful competition should not be added as a ragbag and often forlorn final alternative to every trade mark, copyright, design or passing off action. In most cases it is one of the established categories or nothing.' Loubser (2000:173) correctly observes that the tendency has led courts 'to shy away from recognizing forms of unlawful competition outside the established categories.' The above tendency does not seem good for emerging categories of unlawful competition such as misappropriation of online news articles and courts should be encouraged to embrace a less restrictive approach. Indeed the court in the Atlas Organic Fertilizers case (1981:188) confirmed that the norm to be applied in the enquiry into unlawfulness of competitive trading 'is the objective one of public policy [which] is the general sense of justice in the community, the boni mores, manifested in public opinion.' It follows that such public opinion should not be restricted by fixed categories of unlawful competition.

Limiting fair use in respect of news reporting

Holte (2008: 33-34) has suggested revising fair use provision to limit use for purposes of news reporting to twenty four hours after the first reporter has published it with a view to encouraging research and profit in quality investigative journalism. The problem with this approach is that it essentially entails changing copyright law to protect information for a limited period only, which was the court's reasoning in the 1918 International News Service case. This would be problematic for the media as it would limit access to the intellectual commons that should be freely available even if the limitation is only in place for a limited period.

Managing aggregators' activities through licensing

Since licensing is a common practice in the management of intellectual property rights, it has been suggested that licensing agreements should be used to make news aggregators pay for the online content that they use (FTC 2010: 13). Unfortunately, this suggestion defeats the whole purpose of fair use as a means of protecting the intellectual commons as news aggregators will be forced to pay for contents that in some cases don't qualify for copyright protection and should not be subject to monopoly rights in the first place. One would question the rationale of having a licensing agreement that is based on non-protectable contents. If such a suggestion were to be implemented in any country, it would have adverse effects on online journalism by subjecting the intellectual commons to monopoly rights.

Additionally, Hansen's suggestion, which is mentioned above, should be taken on board by empowering users to resist such licensing practices by the copyright industry particularly through the ability to engage in litigation in order to make use of the doctrine instead of entering into inappropriate licensing agreements. The settlement in the Meltwater case illustrates this point since Meltwater opted not to proceed with the proposed appeal, which would have provided an opportunity of contesting the validity of the court's analysis of the doctrine.

CONCLUSIONS

The approach that seems most viable for promoting reasonable media practice in online journalism is the use of fact/expression dichotomy alongside unlawful competition actions based on misappropriation of original news articles. This is the approach that is unfolding in the South African Moneyweb case and it presents an opportunity of developing a flexible approach to the fair dealing doctrine. If the approach is properly developed in terms of the statutory requirements for fair dealing, it will go a long way in providing the much needed clarity and consistency in the application of the doctrine. The approach would also avert the expansion of legal remedies that are available to news services as happened in the Meltwater case.The proposed flexible approach would equally be useful for fostering online innovation by leaving the building blocks of news freely available to competitors thereby encouraging sharing of public information and respect for copyright law.

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