Editorial

In Brief

Articles

- Social networking: a conceptual analysis of a data controller
  Rebecca Wong

- Three cheers for subjectivity: or the crumbling of the seven pillars of traditional journalistic wisdom
  Ivor Gaber

Case Notes and Comments

Recent Developments

Book Reviews
No easy passage for Digital Economy Bill

Criticism has already been voiced from some powerful quarters over a number of measures contained in the Digital Economy Bill, which received its second reading in the House of Lords on December 2 (see In Brief for a summary of the Bill’s key measures). Google, Yahoo, eBay and Facebook have written to the Business Secretary and sponsor of the Bill, Lord Mandelson, declaring their opposition to clause 17, which gives future Secretaries of State sweeping powers to amend the Copyright, Designs and Patents Act 1988 for the purpose of preventing or reducing copyright infringement through the internet if it appears appropriate to do so in the light of technological developments that have occurred or are likely to occur. This order-making power to change the law – which can also require a person to pay fees – is portrayed by the government as being a useful and flexible way of combating future damaging online copyright activities which bypass the need to enact further primary legislation to address new types of infringement as they occur. Google and the rest see it rather differently, expressing fears in their letter that ‘this power could be used, for example, to introduce additional technical measures or increase monitoring of user data even where no illegal practice has taken place.’

Concerns over the intrusive nature of other government powers contained in the Bill have also been raised by Liberty, which prepared a briefing for the second reading. Liberty feels that the approach to online infringement of copyright adopted by the Bill raises significant human rights issues. The argument advanced by Liberty is that two models for identifying and bringing to justice those who commit future copyright infringements in the fields of music, film and games are contained within clauses 4-16 (which seek to insert cls 124A-124M in the Communications Act 2003). Clauses 4-9 cover the first model, under which a copyright owner who believes that an internet subscriber has breached, or allowed someone else to breach, the owner’s copyright can make a copyright infringement report (CIR) to an internet service provider (ISP). Several obligations to be governed by a regulatory code are placed on ISPs, including the requirement to notify the relevant subscriber that a CIR has been made, and to keep a record of the number of CIRs linked to each subscriber. A copyright owner will have the right to apply to the court for access to the personal information required for civil proceedings to be taken against repeat offenders.

The second model contained in clauses 11-14 gives the Secretary of State wide order-making powers under clause 11 to impose a ‘technical obligation’ on ISPs to limit internet access to certain subscribers (by reducing bandwidth or possibly through temporary suspension of internet connection, although the details have yet to be finalised). The Liberty briefing states that ‘while the Bill’s clauses seem to imply that the second model will only be adopted if the first model does not succeed in reducing illegal file sharing, nothing in the Bill requires the first model to be tried and tested before the second model is adopted.’ Liberty criticises the executive’s ‘shockingly broad’ power to limit internet access, which taken in conjunction with the other provisions of clauses 11-14 could mean that the second model breaches article 10 (free expression) of the Human Rights Act 1998. The Internet Service Providers Association (IPSAs) has already echoed a number of these concerns. ☞
Digital Economy Bill begins its legislative passage

The Digital Economy Bill, which implements many of the recommendations made in the government’s Digital Britain white paper, was published jointly by the Department for Business and the Department for Culture, Media and Sport on November 20.

The Bill aims to support growth in the creative and digital sectors and includes measures aimed at tackling widespread online infringement of creative copyright, such as peer-to-peer file-sharing. Other key proposals look to strengthen the UK’s communications infrastructure, such as superfast broadband, via the introduction of new Ofcom duties to encourage investment.

Measures are also put in place to protect the creation of a range of engaging public service content from multiple providers on multiple platforms. The Bill addresses the need for action to secure provision of news in the nations, locally and in the regions.

Introduced in the House of Lords, the Bill was given its second reading on December 2 and will undergo detailed scrutiny at committee stage on January 6. Key measures include:

Online infringement of copyright: Clauses 4-17 contain the infringement provisions, and insert new sections 124A-124M in the Communications Act 2003. Individual internet service providers (ISPs) will be required to take action against unlawful peer to peer (P2P) file sharing by notifying subscribers of copyright infringement reports (CIRs) received about them from copyright owners (cl 4). ISPs will have to keep a record of the number of CIRs linked to each subscriber and a record of which copyright owner sent the report (cl 5). Clause 6 sets out the requirements for the approval by Ofcom of a code regulating matters in connection with these obligations. Ofcom will be required by clause 9 to prepare full reports every 12 months and interim reports every three months on copyright infringements by internet subscribers.

A power is conferred on the Secretary of State by clause 10 to direct Ofcom to assess whether ISPs should be obliged to take technical measures against frequent infringers. Clause 11 gives the Secretary of State wide order-making powers to order ISPs to impose such measures in order to limit internet access for frequent infringers.

A new section 302A is to be inserted in the Copyright, Designs and Patents Act 1988 through clause 17 which enables the Secretary of State to amend Part 1 or Part 7 of the Act for the purpose of reducing on-line copyright infringement. The provisions can be updated without the need for further primary legislation, so that if in future new communications technologies allow creative content to be unlawfully copied in new ways, remedies can be developed and implemented more quickly and flexibly than might otherwise be possible.

Extended collective licensing: Clause 42 introduces new sections 116A-116D into the Copyright, Designs and Patent Act 1988 which give the Secretary of State the power to extend licensing and regulate licensing bodies. Modernising the copyright licensing system will make it simpler and quicker for licensing societies to make content available online to consumers and support innovative commercial services that rely on copyright material.

Orphan works: New section 116A of the Copyright, Designs and Patent Act 1988 will enable the Secretary of State to make regulations providing for the authorisation of a licensing body to use or license the use of orphan works. This will open up previously unusable works for commercial and public use where the rights holder cannot be identified or found.

Independent and high quality news: Support is given to the plurality of regional and local news, with clauses 23-29 updating the statutory framework for Channel 3 and Channel 5 licences and introducing amendments to the Broadcasting Act 1990 and the Communications Act 2003. Ofcom is given power (in cl 28) to appoint persons to provide regional and local news for Channel 3 areas. The Secretary of State is given the power (in cl 37, amending s 263(4) of the Communications Act 2003) to alter the conditions of public service that Ofcom must include in Channel 3 and 5 licences.

Public lending rights: Clause 44 amends the Public Lending Right Act 1979 and the Copyright, Designs and Patents Act 1988 to extend public lending rights so that digital material such as audio and e-books are included. This will mean that producers and artists who have created this content will be rewarded when material is lent out from public libraries.

Digital infrastructure and content: Ofcom is given new duties in clauses 1-3 to promote investment in the communications networks, to make a formal assessment of the UK's communications infrastructure every two years in a report to the Secretary of State, and to report on media content. Clause 1 amends section 3 of the Communications Act 2003 by inserting a new subsection 1A; clause 2 inserts three new sections (134A - 134D), and clause 3 extends the scope of Ofcom’s reviewing and reporting obligations beyond television in a new section 264A.

Internet domain names: The Secretary of State is given new powers to take corrective action in relation to internet domain registries by clauses 18-20, which insert new sections 124N to 124Q in the Communications Act 2003. These powers come into operation where there has been a serious failure of a registry because it has engaged in unfair practices, misused internet domain names, or failed to deal with complaints properly.

Unfair practices could for example include cyber squatting (registering domain names of economic value to others and charging high prices for them to buy or use them). Misuse of an internet domain name could include registering intentionally misleading
domain names for ‘phishing’ purposes. A failure will be serious if it adversely affects, or is likely to so affect, the reputation or availability of electronic communications networks or services provided in the UK, or the interests of consumers or the public.

**Digital radio:** Changes to the regulatory framework to prepare for moves to digital switchover for radio by 2015 are introduced by clauses 30 to 36.

**Channel 4:** The Bill introduces provisions that extend the content of Channel 4 television channel (C4C) by requiring it to commission a high quality content which will appeal to a broad range of tastes in a culturally diverse society, and to broadcast or distribute this material through a range of media platforms including on-line. The content will include news and current affairs, and C4C will also participate in film-making. These requirements, and provisions for monitoring the delivery of C4C’s new functions, are contained in clauses 21 and 22 and introduced via a new section 198A of the Communications Act 2003.

**Mobile and wireless broadband:** Clauses 38 and 39 seek to enable development of next generation mobile broadband services by allowing for the charging of periodic payments such as administered incentive pricing on auctioned spectrum licences, and allowing Ofcom to levy monetary penalties for failure to meet certain licence conditions.

**Video games:** Changes to video games classification recommended by the Byron review, *Safer children in a digital world*, are introduced by clauses 40 and 41, and Schedule 1. The statutory classification requirement is extended to video games only suitable for viewing by persons aged 12 years and above. Amendments are made to the Video Recordings Act 1984, including the insertion of new sections 2A, and 4ZA-4ZC.

**Internet Service Providers Association criticises P2P measures in Digital Economy Bill**

Elements of the proposed legislation to reduce illicit peer to peer (P2P) file sharing published in the Digital Economy Bill (see above) are being strongly opposed by the Internet Service Providers Association (ISPA).

ISPA members are extremely concerned that the Bill, far from strengthening the nation’s communications infrastructure, will penalise the success of the Internet industry and undermine the backbone of the digital economy. ISPA Secretary General Nicholas Lansman said: ‘The Association is extremely disappointed by aspects of the proposals to address illicit file sharing. This legislation is being fast-tracked by the government and will do little to address the underlying problem.’

The ISPA is concerned that the proposals grant far too much control to the Secretary of State, who will have the power to make specific recommendations on costs and impose an obligation on ISPs to use technical sanctions. The Association believes that an independent body would be a fairer way to assess these factors and calls for the clauses granting these additional powers to the Secretary of State to be dropped from the Bill.

Mr Lansman added: ‘Rather than focusing blindly on enforcement, the government should be asking rightsholders to reform the licensing framework so that legal content can be distributed online to consumers in a way that they are clearly demanding.’

While the ISPA supports the notification system, members believe that an obligation must be placed on rightsholders to pursue targeted legal action against persistent infringers. The ISPA supports the view of consumer groups that strong deterrents already exist, such as the threat of litigation in the courts, and thinks that this should be recognised in the legislation.

Consistent with the principle of beneficiary pays, ISPA rejects an apportioning of costs and believes that rightsholders should shoulder this burden, including reimbursement of ISPs’ reasonable costs. The Association feels that ISPs provide timely and accurate assistance to law enforcement with serious criminal investigations, under a system of cost recovery, and therefore should not incur costs for pursuing alleged civil infringements.

Mr Lansman said: ‘For nearly 10 years ISPs and law enforcement agencies have been cooperating based on a system of cost recovery in the UK. I find it very surprising that the Government’s own legislation – the Regulation of Investigatory Powers Act (2000) – considers it appropriate for ISPs to be reimbursed for costs incurred when assisting in serious criminal investigations, such as terrorism or kidnap, but not for costs incurred pursuing an alleged civil infringement on behalf of a commercial interest.’

The ISPA is also disappointed at the threat of technical measures and calls for the reserve powers, which include the imposition of technical sanctions on users, to be dropped from the Bill. ISPA members believe measures such as filtering would be ineffective, expensive, difficult to implement and could have unintended consequences such as restricting access to legitimate services.

Mr Lansman commented: ‘The ISPA is concerned by the growing evidence that such measures will encourage the encryption of traffic and allow repeat infringers to avoid detection which may cause difficulties for law enforcement agencies pursuing criminal investigations. The Association continues to believe strongly that a reduction in unlawful file sharing can only be achieved if the focus turns to the education of consumers and the reform of content licensing to enable legal alternatives at a fair price.’

Suspension of users’ accounts as a potential sanction can only be achieved if the focus turns to the education of consumers and the reform of content licensing to enable legal alternatives at a fair price.

Authors, publishers and Google reach landmark settlement

The Authors Guild, the Association of American Publishers (AAP), and Google announced an amended settlement agreement on October 28 that would expand online access to millions of in-copyright books and other written materials in the US.

Reached after two years of negotiations, the agreement would resolve a class action lawsuit brought by book authors and the Authors Guild, as well as a separate lawsuit filed by five large publishers as representatives of the AAP’s membership. The class action, which was put on hold to allow the parties to return to the negotiating table, is subject to approval by the US District Court.
for the Southern District of New York. A hearing is expected in February, and even if the settlement is approved, the judge’s decision could be subject to appeal.

The agreement promises to benefit readers and researchers, and enhance the ability of authors and publishers to distribute their content in digital form, by significantly expanding online access to works through Google Book Search which aims to make millions of books searchable via the web. A statement from Google said that the agreement acknowledges the rights and interests of copyright owners, provides an efficient means for them to control how their intellectual property is accessed online, and enables them to receive compensation for online access to their works.

The UK Publishers Association has welcomed the amended agreement, the revisions to which are widely considered to benefit UK rights holders, and has produced a summary of changes (available on www.publishers.org.uk). Maureen Duffy, the author’s rights campaigner and honorary president of the Authors’ Licensing and Collecting Society (ALCS) expressed her pleasure at the action taken by the Authors’ Guild and the Association of American Publishers ‘to protect the fundamental principles upon which copyright is based’ in an ‘increasingly lawless digital world.’

If approved by the court, the agreement would provide:

- more access to out-of-print books;
- additional ways to purchase copyrighted books;
- institutional subscriptions to millions of books online by offering a means for US colleges, universities and other organisations to obtain subscriptions for online access to collections from some of the world’s most renowned libraries;
- free access from US libraries, providing free, full-text, online viewing of millions of out-of-print books at designated computers in US public and university libraries; and
- compensation to authors and publishers and control over access to their works by distributing payments earned from online access provided by Google and, prospectively, from similar programs that may be established by other providers, through a newly created independent, not-for-profit Book Rights Registry that will also locate rights holders, collect and maintain accurate right holder information, and provide a way for rights holders to request inclusion in or exclusion from the project.

Under the agreement, Google will make payments totaling $125 million. The money will be used to establish the Book Rights Registry to resolve existing claims by authors and publishers, and to cover legal fees. The settlement agreement resolves Authors Guild v Google, a class-action suit filed on September 20, 2005, and a suit filed on October 19, 2005 by five major publisher-members of the Association of American Publishers. These lawsuits challenged Google’s plan to digitize, search and show snippets of in-copyright books and to share digital copies with libraries without the explicit permission of the copyright owner.

The Authors Guild announced on November 13 that it has filed the amended settlement in Authors Guild v Google. One of the key revisions concerns the scope of the settlement, which has been amended to cover books that have been registered in the US or published in Australia, Canada and the UK. Each of these countries will have an author and a publisher seat on the Book Rights Registry board.

Other changes include:

- An independent fiduciary approved by the court will be solely responsible for decisions regarding unclaimed works.
- The Book Rights Registry will now hold unclaimed funds for 10 years, instead of five. (After five years, one-quarter of the unclaimed funds can be earmarked for finding rights holders.) There will be no distribution of any of the unclaimed funds to claiming rights holders, with unclaimed funds going instead to charities in the US, Canada, the UK, and Australia as determined by court order after 10 years.
- Future business models have been pared down to three: institutional subscriptions, print-on-demand, and digital downloads. None of these business models can be implemented by Google without approval of the Registry’s board, and none can be implemented without notice to all claiming rights holders, who will have the absolute right not to participate.
- The ‘most favoured nation clause’, which prevented third parties from negotiating terms preferable to Google’s, has been dropped.
- More time has been allowed for claims to be made for the book digitization payments ($60 to $300 per book, depending on the number of claims) with the deadline extended to March 31, 2011. Those wishing to remove their works from Google’s database have been given until March 9, 2012 to decide (removal is irreversible).

Google has copied some 10 million books, of which some seven million were out of print. It has been estimated by the Publishers Association and the ALCS that over 20,000 British writers could benefit financially from Google’s initiative. Concerns still exist among publishers and authors that rights are being ceded to Google by default, but there is also optimism that the revised settlement will bring tangible benefits to everyone involved.

Maximum penalties of £500,000 for serious breaches of data protection principles proposed

The government launched a consultation on November 9 seeking views on implementing a maximum penalty of half a million pounds for serious breaches of the data protection principles.

Civil Monetary Penalties: setting the maximum penalty, (CP48/09), published by the Ministry of Justice, asks whether new fines of up to £500,000 will provide the Information Commissioner’s Office (ICO) with a proportionate sanction to impose on those seriously contravening the data protection principles. The ICO’s power to impose civil monetary penalties was inserted into the Data Protection Act 1998 through section 144 of the Criminal Justice and Immigration Act 2008. Sections 55A-55E of the Data Protection Act contain the provisions on civil monetary penalties.

Following discussions, the government has decided that a fixed maximum penalty will give the ICO the flexibility and discretion to deal effectively with a large number and range of data controllers. Increasing the sanctions faced by data controllers should contribute to tighter compliance with the data protection principles and greater confidence for data subjects that their information is being handled correctly, but any financial sanction imposed by the ICO must be proportionate.

Many regulators have the power to impose a penalty of up to 10 per cent of an organisation’s turnover, but the greater administrative burden involved in operating a turnover-based system has led to this approach being rejected in the current consultation. However, the government considers that the maximum amount of
the penalty imposed should not be higher than the equivalent of 10 per cent of the highest annual turnover of a small company.

The consultation closed on December 21, 2009. Detailed guidance will be published by the ICO showing the criteria it will use and the circumstances it will consider when issuing civil monetary penalties.

New EU telecoms rules agreed by European Parliament

The European Parliament has approved a major overhaul of EU telecoms rules designed to strengthen the rights of phone users and internet surfers and boost competition among telecoms firms.

The new rules will enhance consumer rights, safeguard internet freedom, protect data, boost competition and modernise radio spectrum use. The revised EU telecoms framework Directive was adopted on November 24 at the third and final reading by 510 votes to 40, with 24 abstentions, and the new rules will be implemented within 18 months.

Under the rules, a user’s internet access may only be cut off if ‘appropriate, proportionate and necessary within a democratic society’ and only after ‘a prior, fair and impartial procedure’ which gives users the opportunity to state their case and respects the principles of presumption of innocence and the right to privacy. MEPs thus succeeded in affording internet access an equivalent legal protection to that of a fundamental right by adding the world’s first ‘internet freedom provision’ to the EU framework law for electronic communications networks and services.

Member States will have to adapt their national legislation to comply with these safeguards by 24 May 2011. The telecoms Directive also includes rules to:

- harmonise radio spectrum management across the EU, especially with a view to the switchover from analogue to digital TV by 2012;
- improve co-operation among Member States’ telecoms regulators; and
- allow ‘functional separation’, ie rules requiring dominant operators to separate their network infrastructure from business units offering services that use this infrastructure.

Parliament and Council had already agreed on the other two parts of the telecoms package (telecoms regulators and citizens’ rights), which were approved by MEPs on May 6, 2009 and by the Council on October 26. The Directive on citizens’ rights aims to:

- improve consumer rights, eg by allowing customers to have their mobile telephone number transferred within one working day when changing operators;
- strengthen personal data and privacy protection, eg by requiring the user’s consent to the use of cookies (small amounts of text entered into the memory of your browser).

MEPs also agreed with the EU’s telecommunications ministers to set up a European body bringing together all 27 national regulators – the Body of European Regulators for Electronic Communications (BEREC).

The various deadlines for implementation of the new regime are as follows:

- Entry into force of the whole telecoms reform package with publication in the Official Journal: December 2009
- Establishment of the European Body of Telecoms Regulators (BEREC): spring 2010
- Transposition of the citizens’ rights Directive into national legislation in the 27 EU Member States: by 26 April 2011
- Transposition of the framework Directive into national legislation in the 27 EU Member States: by 24 May 2011

Murdoch conflict with Google rumbles on

Rupert Murdoch wants to prevent Google from listing news content belonging to his companies and titles, which include the Sun, The Times and the Wall Street Journal.

Mr Murdoch said in an interview with Sky News Australia in November that he plans to bar access to his stories via Google once News Corporation has their ‘pay solution’ in place. Plans to make News Corporation stories accessible via subscription only were due to come into effect by June 2010, but although this deadline will not now be met work continues to put the measure in place.

In Mr Murdoch’s opinion fair usage is exploited when search engines like Google use headlines and paragraphs of copyrighted news content in their index listings, a practice which he claims exceeds the ‘fair use’ doctrine. Google responded to his comments by saying that if a publisher wanted content to be removed then they will comply fully as the process requires ‘simple technical standards.’

Since then Google has gone further and sought to placate newspaper publishers by restricting access to paid-for content through its web site. Until now web users have been able to see on-line news stories hidden behind a ‘paywall’ by searching for them on Google and accessing the link. Josh Cohen, Google’s senior business product manager, told Times online that a technical adjustment has been made so that publishers can limit users who have not registered or subscribed to a maximum of five pages per day.

Google said it had adopted the new policy because newspapers are giving increased consideration to charging for access to their online content. In the UK Johnston Press, a publisher of several hundred local and regional newspapers, has introduced a trial system of on-line charges under which subscribers pay £5 for access to the web sites of six titles over a three month period.

Consultation over rules governing product placement on UK television launched

The Department for Culture, Media and Sport is seeking further views on whether to allow product placement in programmes made for UK television, and published a consultation on November 9 which also asks what safeguards should be in place should the product placement rules be revised.

Under the Audiovisual Media Services (AVMS) Directive, Member States must prohibit product placement, but can grant exceptions for certain types of programmes. A consultation in 2008 on the AVMS Directive produced finely balanced views both for and against allowing product placement, with the government concluding then that the balance of argument was against lifting the ban. The consultation will close on January 8, 2010.
Social networking: a conceptual analysis of a data controller

Rebecca Wong

Introduction

“You want to be social with your friends, but now you’re giving 20 guys you’ve never met vast amounts of information from your profile. He said “that should be troubling to people.””

The article is intended to revisit the definition of a ‘data controller’ as laid down under the Data Protection Directive 95/46/EC. The main thesis of the author is that within a social networking environment, it is becoming easier for individuals to be brought within the scope of a ‘data controller.’ The discussion will take into account the recent Article 29 Data Protection Working Party opinion on social networking, which has recently clarified the extent to which social network providers and users are considered ‘data controllers.’ If one examines the traditional legal definition of a data controller within the Data Protection Directive 95/46/EC:

‘A natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data; where the purposes and means of processing are determined by national or Community laws or regulations, the controller or the specific criteria for his nomination may be designated by national or Community law.’

The problem that arises is that the Data Protection Directive 95/46/EC was drafted at a time when the internet was still at its infancy. However, with the second generation of the internet, often loosely termed as web 2.0, it is becoming possible that anybody can be brought within the scope of the broad definition of a ‘data controller’, leading to the question over how the data protection framework is going to be enforced (should litigation between one or several individuals arise). The article will take the following structure. I will consider the first issue – who constitutes a ‘data controller’ – within the data protection framework in the light of the recent Article 29 Data Protection Working Party opinion on social networking. This will be followed by a discussion of the legal definition of a ‘data controller’ and the implications arising out of this definition; the dilemmas raised under the data protection framework as applied to SNS. I will then consider the views of the data protection authorities, followed by a discussion into the consequences of web 2.0 technologies within a SNS before drawing my conclusions on this analysis.

Dilemmas

As the breadth of the definition of a ‘data controller’ is wide enough to include any individuals who post information about others on the internet, the question is why does this matter and what, if any, are the implications? The Directive was originally intended to regulate activities of organisations in processing personal data, and social networking presents a different dimension to the problem in the sense that one is dealing with users (who have multiple roles both as ‘data subjects’ and as ‘data controllers’) and post information about others (be they friends, colleagues and associates). The main questions to address in a social networking environment are:

- Who are our users/data subjects?
- What are the obligations for data controllers laid down under the data protection laws?
- How easily would information about others be circulated and would there be the opportunity to remedy the damage?

According to a recent study by the International Working Party on Telecommunications, the likely threat that may arise by posting a user’s profile in a social networking environment is the rise of identity theft. In a recent press release titled ‘New front in the battle against identity theft’:

‘Millions of young people have made themselves vulnerable to identity theft as well as putting their future academic and professional prospects at risk by recklessly posting personal information on the internet, Britain’s privacy watchdog warns in a report published today.

‘The report’s findings will add to increasing fears about the unchecked growth of personal information held in Britain and the way it is protected after a security blunder at HM Revenue & Customs in which highly sensitive details belonging to 25 million people were lost in the post. Now, in a far-reaching study of the internet behaviour of young people, the Information Commissioner’s Office (ICO) says that 4.5 million web users aged between 14 and 21 could be vulnerable to identity fraud because of the carefree way they give up information on the internet, especially when visiting social networking sites.’
Similarly, ‘Watchdog’, the BBC consumer programme, recently created a Facebook page with a cartoon picture of a woman in her 20s and invited 100 random people to join as her friends. The programme was able to show how the identities of the friends were stolen and details used to open an online bank.6

Whether the application to users of SNS would be strictly enfor-
ced by data protection authorities or individuals when something goes wrong is not yet certain. The Article 29 Data Protection Working Party’s opinion has taken the view that most instances individuals who use a networking site for private purposes would fall outside the scope of the Data Protection Directive.7 There are limited circumstances when individuals could still fall within the category of ‘data controller’ even if they do not use the social networking site for private purposes.

At the time of writing, one notable case that reached the UK courts concerned a user who brought legal action against his former friend for posting a false profile on Facebook. The case is significant for clarifying the extent to which users can bring a legal action. In Applause Store Productions Ltd and Anor v Raphael8 the court found for the claimant on the grounds of ‘misuse of private information’:

‘As far as the tort of misuse of private information is concerned, I accept Mr Firsht’s evidence that it caused him, a very private person, great shock and upset. The information which has been conceded to be private, or which I have held in the private annex to this judgment to be private, related to his supposed sexual preferences, his relationship status (single or otherwise), his political and religious beliefs, and his date of birth. It seems to me that the most important information is that which relates to his supposed sexual preferences.’9

There was no question that some of the statements made in the Facebook profile were defamatory, but it is the tort of misuse of personal information that is of interest for the purposes of this article. If one is permitted to extend this further to a data protection framework, the posting of a profile is also construed to be ‘processing’ of personal information within section 1 of the Data Protection Act 1998 and may even constitute the processing of ‘sensitive’ personal information within section 2 of the Data Protection Act 1998. With social networking websites, it is becoming easier for users to post comments that portray individuals in a different light and could potentially be defamatory. This is a separate legal ground from data protection and will not be discussed further in this paper.

Whilst Facebook has adopted sophisticated technological measure-
s to the user to protect their privacy settings, it does not deal with user etiquette nor with personal information or individual’s profiles that get out of control. It is possible for Facebook to simply remove the profile of the user or enable the user to delete this. Whether they would be operating as a censor is another question. Simple steps to inform user etiquette and peer pressure to ensure that this forum is not misused would go a long way.

Who is a ‘data controller’?

Whilst the paper does not call for a radical overhaul in the tradi-
tional definition of a ‘data controller’,11 it does call for a rethink in the approach by legislators and even the judiciary about the like-
lihood of lawsuits that may be brought by individuals on the basis that other individuals were processing personal information based on the legal definition of a ‘data controller’.12 This has already happened with one case which was successfully brought by one individual in the UK for posting a false profile of the user. The issue of a ‘data controller’ is likely to be a question of fact as laid down under the DPA 1998 (Common Services Agency v Scottish Information Commissioner [2008] UKHL 47).

‘The issue is whether the broad interpretation of a “data control-
er” is likely to lead to a flood of cases involving the misuse of personal information on social networking websites. How do we quantify and identify who are the data controllers?’

At the time of writing, the Article 29 Data Protection Working Party had issued a recent opinion that users would generally be covered under the article 3.2 private purposes exception, but could, in limited circumstances have data protection responsi-
bilities, if they fall outside the scope of the private purposes exception. An example given would be where the SNS was used as a collaboration platform for a company13. The distinction between private use of a social networking site and other uses can be very difficult to draw and therefore, a rigid application of the Directive is not what is called for, but sensible application by the data protection authorities.

Some of the implications that arise for Data Protection Authorities are that if individuals are viewed as ‘data controllers’14 then:

(1) Data protection principles would need to be followed – this includes processing personal data fairly and lawfully and ensuring that it does not exceed what is required. Requiring all individuals to abide by the data protection principles on a social networking would be difficult to police and enforce. It also demonstrates a specific problem about the data prote-
tion framework in fitting this to new uses. Therefore, strict compliance would need to take account of practical realities.

(2) Regulators/data protection authorities – the likelihood of opening the floodgates principle. The courts should not be inundated with claims that individuals’ images/com-
ments about other individuals have not been inappropriately misused on social networking websites. Other than users complaining before their social network providers, there should also be an alternative dispute resolution process, such as an independent arbitrator that will determine the use of social networking disputes whereby parties agree that deci-
sions by the arbitrator would be binding and the law to be applied.

(3) Use of the exemptions – understand that the exemptions should be clearly, narrowly interpreted and applied. In particu-
lar, article 9 of the Data Protection Directive 95/46/EC to social network-
ing websites is likely to be of interest – is the profile used for ‘journalistic purpose or not?’ There have been relatively few cases determining the application of article 9 of the Data Protection Directive. However, in the recent significant case of Tietosuojavaltuutettu v Satakunnan Markkinan rssi Oy, Satamedia Oy,15 the European Court of Justice (‘ECJ’) took the view that data taken from documents that were in the public domain would fall within the exemption of personal data carried out ‘solely for journalistic purposes.’ The ECJ also took the view that this would be a matter for the national courts to decide and would involve a balancing act. Section 32 of the UK Data Protection Act 1998 provides a narrow test on the use of the journalistic purpose exemption. It takes a three pronged approach to determine whether processing was intended for journalistic purpose, namely:

(a) …with a view to the publication by any person of any journalistic, literary or artistic material;
their permission.

However, there is a difference available on SNS. Secondly, users have consented from the private purposes exemption for posting personal information about others in the online environment if it can be used for purely private purposes. In Lindqvist, L had created a web page containing personal details (including the interests and hobbies) of some of the members of the parish church, and also mentioned that one of the members had injured her foot. The

It is unclear whether the Directive (or national data protection laws) would be enforced in the strict sense as personal information is readily available on SNS. Secondly, users have consented to have this information given to users. However, there is a difference between data given for original purposes and data used for secondary purposes. It is unlikely to satisfy the consent requirements where third parties use the profile of individuals without their permission.

Whilst the Article 29 Data Protection Working Party has indicated recently how article 3.2 of the Data Protection Directive should be applied to a social networking environment, the Lindqvist decision by the ECJ is unlikely to avail for individuals who wish to benefit from the private purposes exemption for posting personal information about others in the online environment if it can be shown that the profile is easily accessible to anybody and was not used for purely private purposes. In Lindqvist, L had created a web page containing personal details (including the interests and hobbies) of some of the members of the parish church, and also mentioned that one of the members had injured her foot. The Swedish court took the view that she had contravened the PDA 1998 and subsequently fined her. The questions brought before the ECJ under an article 234 preliminary ruling were whether the information about the individuals placed on the web constituted personal data, and secondly whether this constituted the transfer of personal data contrary to article 25 of the Data Protection Directive, which prohibits such transfer without the assurance that the recipient country had adequate safeguards on data protection in place. The ECJ interpreted the scope of article 8 of the Data Protection Directive 95/46/EC widely, and had held that article 3.2 would be unable to avail on the basis that information was available/accessible to anyone on the internet (no discussion was made by the ECJ of restricting access using intranets).

Article 4 of the Data Protection Directive applies to user-generated content based within the EU. Article 4(1)(a) of the Data Protection Directive provides that this Directive (or corresponding national data protection laws implementing the Data Protection Directive) apply to activities of an establishment of the controller on the territory of the Member State and/or article 4(1)(c) uses equipment to process. For example, in the example of MySpace, there are potentially two data controllers. Firstly, there is MySpace that holds the personal information of their users, and secondly there are the users themselves. It is established that MySpace has an office in the UK. They would be likely to be construed as data controllers within section 5(1)(a) of the DPA 1998. A data controller is established in the UK and the data is processed in the context of that establishment. The alternative would be if MySpace uses equipment to process personal data within section 5(1)(b). If section 5(1)(b) applies, then the data controller (MySpace) would be required to nominate a representative within the UK. However, reading through their privacy policy, they draw a dividing line when they are data controllers or not:

MySpace determines the purposes of collection, use and disclosure of the Registration Data you provide and, as such, is considered the data controller of this information. Because the Member, not MySpace, determines the purposes for which Profile Information is collected, used and disclosed, MySpace is not the data controller of Profile Information that Members provide on their profile (emphasis added). Users of their profiles are considered as ‘data controllers’, but as MySpace also has a UK MySpace webpage which collects the profiles of individuals in the UK they would still governed by the UK Data Protection Act 1998.

Article 13 of the Data Protection Directive 95/46/EC restricts the scope of the obligations and rights provided for in articles 6(1), 10, 11(1), 12 and 21 of the DPD when such a restriction constitutes a necessary measure to safeguard (a) national security (b) defence (c) public security (d) prevention, investigation, detection and prosecution of criminal offences, or of breaches of ethics for regulated professions (e) an important economic (g) protection of the data subject or of the rights and freedoms of others (my emphasis). It is this final category which is likely to apply, but to date there have been no cases to clarify the breadth of this. The general thrust of the argument is that if the data protection framework is to be applied effectively, then it will need to recognise that the difficulties provided under the framework cannot be solved instantaneously. Any changes to the European data protection framework would need to begin at a European level. In the meantime, the application is likely to lead to major questions about the relevance of the framework to social networking environment.

**Data Protection Directive 95/46/EC and its application to SNS**

The section below will consider, in brief, the application of the Data Protection Directive to SNS. As the Data Protection Directive is applicable to social networking users as ‘data controllers’, the main provisions of the Directive will therefore apply (not exhaustive):

1. Data protection rights and obligations as laid down under articles 7 and 8
2. Rights of the data subjects under article 10

It is unclear whether the Directive (or national data protection laws) would be enforced in the strict sense as personal information is readily available on SNS. Secondly, users have consented to have this information given to users. However, there is a difference between data given for original purposes and data used for secondary purposes. It is unlikely to satisfy the consent requirements where third parties use the profile of individuals without their permission.

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Work of the Data Protection Commissioners

How have the Data Protection Commissioners responded to the growing rise of the use of SNS, and what, if any guidelines have been published? Several Data Protection Commissioners have already issued guidelines on the use of SNS, but these take a limited and cautious approach about users posting information rather than recommending a remedial effect when SNS goes wrong. Even if SNS is not discouraged and has been seen to have a beneficial effect for widening communication channels, Data Protection Commissioners continue to address the problem of users’ readiness to give away their personal information so readily. Here is a description of the main countries that have responded to SNS (this is not exhaustive). The countries were chosen to illustrate how they have approached social networking issues in a data protection context.

Australia

In Australia, the Privacy Commissioner posted a press release titled ‘Protect your privacy on social networking sites, says Privacy Commissioner.’ The advice from the Australian Privacy Commissioner to users of social networking websites is simply to be aware of the risks and taking a common sense approach to looking after your personal information, including reading your privacy policy and asking individuals to be careful about what information they give. To date, there have been no legal cases brought in Australia relating to social networking and privacy.

Canada

The Canadian Privacy Commissioner has been proactive in warning of the dangers of using social networking websites and individuals giving away personal information. The Privacy Commissioner has produced a video highlighting the perils of SNS entitled ‘What does a friend of a friend of a friend need to know about you?’ The latest news was that four students have lodged a complaint before the Privacy Commissioner in Canada claiming that Facebook had given their personal information to marketers without their consent. The Privacy Commissioner has recently decided that Facebook breaches the Canadian PIPEDA Act and has recommended changes. The decision is of significance because the changes will not only apply to Facebook, but impact upon other social network providers in Canada.

Germany

Before one discusses the current developments in Germany, a brief description of the German Data Protection Framework is necessary. The German Federal Data Protection Act 2001 applies to federal public bodies and private organisations. The State (‘Land’) data protection laws applies to state public bodies. As for online activities, this is covered under the German Telemedia Act, which replaces the German Teleservices Data Protection Act 1997 and German Teleservices Act 1997.

On the question of the application of the German Telemedia Act to social networking sites, unless the profile is private, then it would fall within the scope of the Act. What is unclear is whether the Federal Data Protection Act 2001 would cover individuals who post information about other individuals that may have an adverse effect and whether this would be exempted for the purposes of “literary or journalistic purposes”. Following queries with the Berlin Data Protection Commissioner, the main response is as follows:

‘…third party personal data contained e.g. in a social network subscribers’ profile. Whether a subscriber would be held as a controller of such data, will depend on the degree to which these data are accessible to others. E.g. a photo album held on the server of a social network provider only accessible to the subscriber himself would fall under the exemption for “purely personal or household activities” in Art 3 para 2 of Directive 95/46 resp Para 1 section 2 No 3 of the Federal German Data Protection Act. If such data are made available to others, the subscriber may well be held as a controller of such data depending on the degree of public availability. This would need to be determined according to the circumstances in every single case’ (emphasis added).

The Berlin Data Protection Commissioner has since, published guidelines on social networking and data protection issues. Through translation of the guidelines, online providers should ensure that that they are fully compliant with the processing of personal data and their choice and design options. The use of personal data online for advertising purposes must also accord with the Telemic Act (Telemediengesetz), which came into force on March 2007.

According to one legal expert on data protection issues in Germany, someone who uploads the material to a social networking site would be regarded as the controller of the data until it is uploaded.

‘The social networking website would become the data controller. Even if these social networking websites were to use the exemptions on grounds of press privileges, this would not exclude the application of the Federal Data Protection Act or the Teleservices (sic: Telemedia) Act. Content is generally dealt within the Teleservices (sic: Telemedia Act). The Act also complies with the E-Commerce Directive and would be interpreted in the light of the Directive.’

Some examples involving social networking included the German Student Community Studi VZ (ca 10 Mio user), which changed their terms and conditions in January to enable them to monitor traffic in order to generate information for advertisement and to pass information to Law enforcement (without legal obligation to do so, using an implicit ‘consent’). While there was enormous protest, very few people left StudiVZ.

To date, there have been no actual legal cases determining the extent of the application of data protection laws to social networking in Germany. It is likely that the Federal Data Protection Commissioner’s guidelines will align their view to the recent Article 29 Data Protection Working Party’s opinion on social networking.

Sweden

The Personal Data Act 1998 regulates the processing of personal data in Sweden and implements the Data Protection Directive 95/46/EC.

There have been guidelines issued by the Swedish Data Inspection Board (‘DIB’) on social networking. On a specific point relating to the scope of ‘data controller’ within the definition of the Data Protection Directive 95/46/EC, this question is still to be determined by the DIB. The DIB has not yet had any specific cases regarding websites nor issued any formal opinions on this subject. According to the DIB, the Personal Data Act 1998 is applicable to personal data that is published by people or organisations who are
established in Sweden. The only difficulty that may arise is tracing the source of the information (the ‘infringer’ for posting personal information online).

The DIB has however has issued some results into a study carried out at the beginning of 2008 on young people’s views on Facebook. According to the report, half of the young people had been subjected to someone lying or writing unfair things about them on the internet:

‘One out of five has experienced someone else using their identity, and 29 per cent of the queried girls say they have been subjected to sexual harassment on the Internet. Eighty-six per cent have published photographs of themselves. However, there is a great deal of resistance to others publishing photographs without asking permission, but 30 per cent have been subjected to this.’

According to the DIB, notwithstanding these offences, young people still expose themselves on the internet that is unthinkable in real life. The DIB has indicated that more needs to be done and this is expressed by Göran Gräsund, Director-General of the DIB:

‘Behaviour that involves risk does not seem to be attributable to lack of knowledge; rather, the problem seems to be a basic attitude to personal integrity. If we are to change attitudes, everyone must help: decision-makers, teachers and especially parents.’

United Kingdom

The UK Information Commissioner (ICO) has also been quite active in publishing guidelines on social networking and privacy recommending that youngsters should not put too much personal information on such social networking websites. According to a survey taken by Viadeo, 62 per cent of British employers do check SNS with the result that a quarter of potential candidates are rejected.

According to the latest Ofcom study into the use of social networking sites, the average social networker has profiles on 1.6 sites with the average user checking their profile each day. Some 39 per cent of adults have profiles of two or more sites. The study highlights the distinct groups in which these users fall under:

- **Alpha socialisers (a minority)** – people who used sites in intense short bursts to flirt, meet new people, and be entertained.
- **Attention seekers** – (some) people who craved attention and comments from others, often by posting photos and customising their profiles.
- **Followers** – (many) people who joined sites to keep up with what their peers were doing.
- **Faithfuls** – (many) people who typically used social networking sites to rekindle old friendships, often from school or university.
- **Functionals** – (a minority) people who tended to be single-minded in using sites for a particular purpose.

In recent correspondence with the UK Information Commissioner it was revealed that since 2005 two complaints have been received about Bebo, one in 2007 and one in 2008. Five complaints were lodged against Facebook, and no complaints were received about MySpace. According to the ICO:

‘One of the enquiries we have received about Bebo was from an individual who stated that an account had been opened in his son’s name. Bebo had subsequently cancelled the account, but the enquirer was concerned that personal data relating to the account may have been retained by Bebo. He was advised his son could consider issuing a notice under section 10 of the Data Protection Act 1998 against Bebo...The complaint about Facebook also concerned an account which had been opened in the complainant’s name. The complainant had notified Facebook of this, and Facebook had closed the account. However, Facebook subsequently refused to tell the complainant when the account was created, how many users had accessed it, or to contact users to tell them that the account had been closed down because it had been created without the complainant’s knowledge or consent.

‘We notified the complainant that no action could be taken because Facebook is not a UK based company. Also, that even if this was not the case, the complainant had not right of access to any information concerning the account because it was opened by someone else, and so the information was not the complainant’s personal data. The complainant was advised that if he suspected fraud or harassment he should contact the local police.’

Whilst the correspondence was fairly recent, it does not take account of the cases alluded to earlier. The significant case of Applause is likely to bring into sharp focus the extent to which users can bring legal action against others under the Data Protection Act even if this is on privacy grounds.

International Working Group on Data Protection in Telecommunications

The International Working Group on Data Protection in Telecommunications (hereinafter the ‘working group’) published guidelines into the use of SNS and privacy in March 2008, which require some perceptive analysis before concluding this section.

It took the view that legislators, data protection authorities and social network providers were faced with a situation that had no visible past. The working group recognised that once personal information was published on the internet, it may stay there forever even when the data subject has deleted it from the original site. The working group also identified that there was a misleading notion of ‘community’ in a SNS which would lead individuals to readily share personal information and that platforms (such as MySpace) created the illusion of intimacy on the web. Traffic data was frequently collected by social network providers. There was potential misuse of profile data by third parties, which also depended on the privacy settings that were available. The working group also found that one third of human resources managers admitted to using data from social networking services. The working group was particularly concerned about the rise in identity theft through the proliferation of user profiles.

The main recommendations worth noting are that the working party took the view that service providers should be honest and clear about what information was required so that users could make informed choices whether to take up the service. It also recommended the introduction of data breach notifications by service providers, so that users could be informed and make choices. One of the most significant recommendations is that the current regulatory framework be reviewed with respect to controllership of personal data published on social networking sites with a view to possibly attributing more responsibility for personal data content on social
networking sites to social networking providers. It concluded by indicating that the working party will closely monitor future developments and revise and update the guidance where necessary.

**Article 29 Data Protection Working Party’s opinion on social networking**

The recent Article 29 Data Protection Working Party’s opinion on social networking is likely to be of significance since it has clarified the extent to which users may or may not be considered as ‘data controllers.’ It took the view that in general users would be subject to the article 3.2 category, processing for private purposes (‘household exemption’). However, users may still be regarded as ‘data controllers’ if their activities go beyond the private purposes category, such as acting on behalf of a company or association, or using the social networking site to promote charitable or political aims. Whilst the opinion concentrated mainly on the application of private purposes, it would also have been useful to clarify the extent to which other exemptions such as article 9 (‘artistic, literary and journalistic’) may apply. A hypothetical practical example where this may occur is where X is a journalist, but has a blog, Facebook profile, and an organisation profile. Under those circumstances, it is very unlikely that X’s profile would fall within the article 3.2 category unless he was not acting in his capacity as a journalist. The journalistic provisions may be applicable, but even then it would be difficult to ascertain whether X was using the social network as a ‘journalist’ or rather in his private capacity. This would be further extended towards other professions such as accountants, lawyers and teachers. Again, it would be more advantageous for article 3.2 to be applied, which would require a clear disassociation from their professions.

The Article 29 Data Protection Working Party also took the view that social network providers and, in some circumstances, application providers, would be considered as ‘data controllers’ within the Data Protection Directive, which raises issues of required consent by the data subject, contractual obligation and so forth. Again, compliance with these principles may be difficult in the context of social networking. However, if one considers the Facebook environment, there is a mechanism for members to alert Facebook if other Facebook users are not operating under article 7 of the Data Protection Directive, which raises issues of required consent by the data subject, contractual obligation and so forth. Again, compliance with these principles may be difficult in the context of social networking. However, if one considers the Facebook environment, there is a mechanism for members to alert Facebook if other Facebook users are not operating under article 7 of the Data Protection Directive. Information about third parties (such as adding a name to a picture etc) would have to operate under article 7 of the Data Protection Directive, which raises issues of required consent by the data subject, contractual obligation and so forth. Again, compliance with these principles may be difficult in the context of social networking. However, if one considers the Facebook environment, there is a mechanism for members to alert Facebook if other Facebook users are not operating under article 7 of the Data Protection Directive. Information about third parties (such as adding a name to a picture etc) would have to operate under article 7 of the Data Protection Directive. Information about third parties (such as adding a name to a picture etc) would have to operate under article 7 of the Data Protection Directive.

In short, the Article 29 Data Protection Working Party’s opinion is to be welcomed for clarification on the extent of Data Protection Directive 95/46/EC to social network providers and users.

**Consequences of Web 2.0 Technologies within SNS**

The next question deals with the negative connotations of using SNS and the consequences of the loss of privacy of personal information within a social networking context. To give a hypothetical example, if I create a profile, am I responsible for what someone else puts on my profile page? The Article 29 Data Protection Working Party’s opinion has indicated that in some instances individuals may assume ‘data controller’ responsibilities. The difficulty lies with the attribution of responsibility on individuals, in that the less observant individual is unlikely to regularly check their SNS profiles. Yet third parties such as prospective employers, journalists and even educational establishments (as shown in the case of the Oxford student scenario) are more likely to use SNS and thus, form their impression (positive or negative) of the individuals. Other than the loss of productivity in workers for using SNS such as Facebook, a potential consequence is liability for a defamatory post (under defamation laws) and possibly misuse of personal information (applause), lending itself to further queries by some commentators whether SNS is likely to lead to a rise in caselaw. If SNS is misused, then the law may intervene to rectify a false profile or defamatory statement posted online, precisely because SNS had simply ‘got out of line.’

These potential negativities arising from the misuse of SNS and can be summarised as follows (not exhaustive):

- potential liability arising under a defamatory claim from third parties;
- loss of potential job/existing job based on individual’s SNS profile – inferences drawn by prospective/existing employers on the prospective/existing employee’s SNS profile;
- loss of reputation based on SNS profile;
- loss of identity through ‘identity theft’;
- merger of boundaries between an individual’s personal and professional life through the use of SNS;
- individual profile created on SNS can still be searchable on search engines;
- virtual identity created online would be difficult to delete even with sophisticated technologies;
- possibility of linkage between SNS profile to other websites and users’ clickstream data, thus creating a virtual profile;
- criminal offences that may occur through the misuse of individual’s personal information, such as cyber-stalking and harassment.

The above examples illustrate some of the problems arising under a SNS, but it should not be forgotten that one is dealing with negativities rather than the positive effects of SNS. The key is that if individuals are likely to be attributed responsibility for the information they post on their profile, are they likely to be more careful with what they put on this profile? Other than using existing controls to limit the amount of personal information, are they likely to be proactive in the way they give their personal information including their hobbies, habits, pastimes and so forth? Sounding alarm bells on the potential negativities may be one possibility, but emphasising the relative ease in which individual’s profile can be easily accessible to identity thieves and unwanted third parties is also another way to alert individuals to being more cautious.

You can’t be too careful with your personal information: privacy conscious or privacy smart?

With enough publicity by newspapers of security breaches of personal information and numerous guidelines on SNS produced, is it not possible to underestimate the ways in which individuals protect their personal information? To put it another way, is it possible that some individuals can become privacy conscious or privacy smart? With enough technological controls in limiting the amount of personal information, surely, this should be possible. According to one report in Canada, more than half of Canadians would be concerned about giving their personal information to their retailers. The question is, why not apply this to a social networking setting? In other words, educate users to become more ‘privacy savvy’ so that more people do not give their personal information away so easily.

Indeed, one retired lawyer remarked on the rise of blogs and social networking sites, ‘why would you want to write anything
about your personal life on these blogs" and "who reads these things?" Whilst he comes from a generation where computers did not become mainstream, yet his view highlights a clear division in opinion over the value of blogs.

According to the latest OFCOM study, it was found that social networking sites were most popular with teenagers and young adults and that two-thirds of parents claim to set rules on their child’s use of social networking sites, although only 53 per cent of children said that their parents set such rules.

Conclusions
To conclude, social networking websites are perceived to be a harmless activity, particularly amongst friends and colleagues including causes that they may share, yet the article highlights a difficulty with the current legal data protection framework as an attempt in applying the old law to new uses. The Article 29 Data Protection Working Party’s opinion seeks to clarify the extent to which users are regarded as ‘data controllers’ within an SNS, particularly in the context of third party applications (presumably the ultimate decision is for the ECI as article 29 reports are opinions and not binding). Some SNSs have already started to indicate that users are ‘data controllers’ of the profiles they put on their website. It is acknowledged that social networking can be accessible by third parties, yet the data protection principles clearly state that the user’s right to give information out for one purpose is not to be used for another purpose. On a practical level, it would be fairly difficult to see how this principle can be achieved. Although the prospect of bringing lawsuits within a social networking website is unlikely to be attractive to many, for the few who do decide to take this up the question is whether this is the appropriate method in protecting one’s identity or reputation.

The data protection authorities have started to look into this subject, but other than educating the younger adults about the wider availability of their personal information beyond their inner circle of friends, there is also the issue of understanding the limitations in the enforcement of the data protection framework. Again, the impetus would be upon individuals to take proactive action to protect their identity. Revising the private exemption in article 3.2 to exclude private users for non-commercial purposes from the definition of data controllers is one objective which would have to be achieved at European level. Facebook should also consider introducing take-down procedures for third parties who wish to remove material from a profile because there has been a misuse of their personal information. A final concluding remark is that the national data protection authorities should ensure that the rigours of the national Data Protection Acts are applied sensibly to social networking sites and that only those who are culpably blameworthy for the use and misuse of an individuals’ profile are held accountable. As one learned piece of advice goes: ‘Common sense is the best I know of’ (per Lord Chesterfield).

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Notes
2 The author is not concerned with the technological measures that are available on Facebook, MySpace which can restrict access of users’ profile to certain categories of individuals. This issue has addressed in a recent article, Gray, T T Zeggane, & W Maxwell, ‘US and EU authorities review privacy threats on social networking sites’ (2008) Entertainment Law Review 69.
3 In this article, reference is made to user-generated content with users uploading their personal profiles on Flickr, Facebook, MySpace and Bebo.
4 Cf. Consider also the Canadian view on their legal framework to protecting individuals available at (http://www.pitblado.com/lawyer_images/Lawyers_Weekly технологии_drives_need_for_new_privacy_legislation.pdf), which raises the discussion over third generation privacy laws. Looking at the current statistics from the Facebook website, there were more than 130 million active users with the average user having 100 friends on the site (available at http://www.facebook.com/press/info.php?statistics).
6 Boys, R, ‘And this is me on Facebook…helping with brainysurgery’ The Times, August 18, 2008.
7 On a broader question on the application of art 3.2 Data Protection Directive to the internet, see also Wong, R, and Savimuthu, J. All or nothing, this is the question: the application of art 3.2 Data Protection Directive 95/46/EC to the internet’, John Marshall Journal of Computer and Information Law, 2008, 25, 241.
8 [2008] EWHC 1781.
10 Appliance Store Productions Ltd and Anor v Raphael, op cit n 8, at para 80.
11 At the time of writing this article, the 39th International Data Protection Commissioners’ Conference was held in Strasbourg, with a symposium to consider the issues arising from social networking sites. This is available at http://www.datenschutz-berlin.de/content/berlin/Beauftragte/Veranstaltungen/Symposium+2008
15 C-73/07, OJC44 of February 21, 2009 at p 6. The case concerned the collation and publication of publicly available details of Finnish taxpayers which were initially published in regional newspapers and were then forwarded to a sister company of the newspaper publisher on CD-Roms with a view to the information being made accessible via a text messaging service – paras 52-62 relate to the journalistic exception. The exception applies to all journalistic activity (para 58) and can be to make a profit, in this particular case from people paying to
receive text messages, and can be within the exception ‘if their object is the disclosure to the public of information, opinions or ideas, irrespective of the medium which is used to transmit them. They are not limited to media undertakings and may be undertaken for profit-making purposes’ (at para 61) – possibly amateur ‘journalists’ on Facebook?


20 The UK Data Protection Act 1998, however includes ‘recreation’ within s 36 of the DPA 1998 and it is arguable that profiles created would fall within this notwithstanding the difference from the European Data Protection Directive 95/46/EC.

21 To date, Argentina, Hungary, Switzerland, Canada (whereby its Personal Information Protection and Electronic Documents Act applies), Guernsey and the Isle of Man are considered to be adequate under art 25 Data Protection Directive by the European Commission. The US has an agreement with the European Union known as the safe harbour principles in which companies self-certify to a set of principles akin to those of the DPD.


25 One example would be if individual A had mentioned individual X (whether by name or indirectly) on a social networking profile in order to highlight certain offences committed by individual X, and from this information it was readily identified that this referred to X. If there is some validity in the claim, then art 13(1)(g) may be used by individual A to content that the Data Protection Directive would not apply as X’s actions were to protect others.


34 For more on this, see Internet 2008 - Alles möglich, nichts privat? available at https://ntuanywhere.ntu.ac.uk/summerakademie2008,(Danainlo = swxyChflh/Msm6BCgly-CN92.SS.

35 For a detailed commentary into Swedish developments on data protection, see Blume, P (ed), Nordic Data Protection Law, (Copenhagen: DIOR 2001) as a starting point.

36 The study is available in Swedish only and can be found at http://www.datatemsken.se/Documents/rappport-ungdom2008.pdf

37 The Data Inspection Board. Every other young person has been offended on the internet available at http://www.datatemsken.se/en-in/english/every-other-young-person-has-been-offended-on-the-internet.

38 Id.

39 Bergstrom I, Facebook can ruin your life. And so can MySpace, Bebo…., The Independent available at http://www.independent.co.uk/lifestyle/gadgets-and-tech/news/facebook-can-ruin-your-life-and-so-can-myspace-bebo-780521.html

40 Ofcom. Engaging with social networking sites available at http://www.ofcom.org.uk/advice/media_literacy/medlitpubs/socialnetworking/summary/

41 Written correspondence from the ICO dated September 30, 2008.


43 This can be likened to the right to silence where this issue is not the defendant’s right not to speak, but also adverse inferences should not be drawn by the prosecution for the defendant’s right not to speak. Indeed, it was shown that 62 per cent of British employers now check Facebook, MySpace and Bebo (see also Bergstrom, I, ‘Facebook can ruin your life. And so can MySpace, Bebo…” The Independent, February 10, 2008 available at http://www.independent.co.uk/lifestyle/gadgets-and-tech/news/facebook-can-ruin-your-life-and-so-can-myspace-bebo-780521.html


45 Mann, B L, op cit n 14 – Mann takes the view that scare tactics maybe one option to consider to illustrate the privacy concerns in a social networking website. ‘Scare tactics that work for habitual drunk drivers may be needed for habitual SNW users acting actus reus, such as television commercials showing users in jail and others who have lost their job as a result of the UGC they generated in a SNW.’

46 Canadians concerned about giving retailers their personal information available at http://www.privcom.gc.ca/media/cr/2008/nr-e_080703_e.asp

47 Ofcom, op cit n 30.

48 See the 30th International Data Protection Commissioners Conference, Protecting privacy in a borderless world, Strasbourg available at http://www.privacyconference2008.org/index.php?page_id=1. Panel sessions were convened to address several issues of privacy including social networking sites.
Three cheers for subjectivity: or the crumbling of the seven pillars of traditional journalistic wisdom

Ivor Gaber

Introduction

At a time when non-statutory regulation of the industry by the Press Complaints Commission is under heavy criticism, influential voices are now arguing for the introduction of a statutory element such as an independent Press Ombudsman (perhaps modelled on the new statutory regime introduced by the Irish Defamation Act 2009), and the whole issue of the ethics of modern journalism is under scrutiny, perhaps as never before. This raises a number of important questions – not least who, in the age of the citizen journalist/blogger, would be bound by this new ethical framework and how would it be enforced? Despite this problem of enforcement, ethical considerations ought to play a key part in deciding whether journalistic conduct can be characterised as ‘responsible’. This is a particularly important consideration in the application of the Reynolds public interest qualified privilege defence in defamation cases involving the media. It is appropriate then to ask whether the traditional ethical canons of journalism are still fit for purpose in this online century, and whether they should be applied beyond the traditional boundaries of mainstream journalism.

It is a truism to state that new technology has changed journalism profoundly. But many traditional journalists maintain that despite all the technological developments – and in particular the rise of the blogosphere – the practice of journalism remains essentially unchanged. And, perhaps more importantly, they argue that there is a fundamental ethical divide between ‘journalists’ and ‘bloggers’. This paper challenges this view and argues, using the UK’s political blogosphere as an example, that the line between bloggers, blogging journalists, campaigning journalists, commentators and ‘journalists’ (pure and simple) has become ever more blurred. And this blurring does not just relate to the expression of opinion and the transmission of rumour and gossip, but also reaches into the dissemination of news – indeed in some cases bloggers now do news better than journalists. This blurring also throws into doubt traditional journalistic conventions of objectivity, truth etc. and, the author suggests requires, the creation of a new ethical creed to guide journalists and bloggers alike.

The beginnings

One of the fundamental underpinnings of the Anglo-American model of journalism is the notion of ‘objectivity’ – described by Michael Schudson as ‘a kind of industrial discipline [for journalists]’1. This article argues that ‘objectivity’ is based on one of the great myths of journalism – the ‘inverted pyramid’ which can be found at the core of much journalism teaching. This is the notion that a news story must be structured with the most important aspects of the story coming first – classically the ‘Who, What, How, Where When and Why’, followed by the next most important, with the least important at the bottom – awaiting the sub-editor’s ready knife.2

The classic example of his format is: ‘Lady Godiva (who) rode (what) naked (how) through the streets of Coventry (where) yesterday (when) in a bid to cut taxes (why).’ This format superseded the idea that journalists told their ‘stories’ in more conventional narrative chronologies, and its origins lay either in the US or Britain, depending on which media historian’s interpretation is preferred.

In the US it coincided with the growth of the telegraph as means of transmitting news which, because of its expense, required reporters to compress their dispatches into the fewest number of words. For fear of transmission failures, they sought to get the gist of the story across first so that if the line went down the newspaper would at least have something to print3. The British version of the ‘inverted pyramid’ traces its origins back to the days when sub-editors and printers worked with back-to-front metal type which enabled the letters to be printed the right way around. Thus, when late cuts had to be made the ‘stone sub’ could make them from the bottom up, safe in the knowledge that although the type itself could not be read, the story would have been written with the most important elements first.4

But the problem with the inverted pyramid is that it conceals the fact that for many news stories, deciding the gist – and hence what should come first – involves essentially subjective, judgments. Thus, ‘Who, What, How, Where, When and Why’ far from being simple observable facts, become hugely problematic.
Three cheers for subjectivity: or the crumbling of the seven pillars of traditional journalistic wisdom

Who is the most important character in the narrative? What (and according to whom) happened? How did it happen (depends on who is asked)? Where is the most important location for the events described? When was the significant moment and... why, oh why, oh why???

But the argument about the relevance, or otherwise, of the inverted pyramid and the traditional notion of objectivity which it underpins, are compounded by equally passionate contemporary discussion as to ‘what is journalism’ and ‘who is a journalist?’ In the pre-digital era these issues were less troublesome – if somebody was paid to write, broadcast, or photograph and they had access to a mass audience via print, radio or television, then they were a journalist and what they did was journalism. But the dramatic changes wrought in the media ecology by the digital revolution have challenged these assumptions.

Traditional journalism and new technology

This new ecology of journalism is characterised by four principal developments. First, the traditional media is converging so that a great deal of text (online) is produced by the broadcasters and much audio and video material is to be found on the websites of national and local papers.

Second, that most (if not all) the traditional media have had to embrace the notion of audience ‘interactivity’. This supersedes the notion that journalists ‘discover’ the news, which they then disseminate. Today journalists receive as much as they give – whether in the form of email responses to stories, participation in blogs, message boards, social networking sites, citizen journalism etc. The material is coming in all directions; the audience is no longer ‘them’ and journalists are no longer ‘us’.

Third, today the audience is no longer dependent on journalists working on the traditional mass media to tell them what is happening. News, unfiltered by journalists, is found all over the place and not just on news web sites but for example on sports entertainment and other sites, on message boards, chat rooms, social networking sites.

Fourth, and perhaps most significantly, there is the growth of blogosphere. According to Technocrati, an internet tracking agency, there is one new blog being created somewhere in the world every 1.4 seconds of every hour of every day.

The rise of the political blogosphere – a case study

The election of Barack Obama has highlighted the power of the internet as a means of communication, fundraising, mobilisation and so on. In the UK the key online activity – in terms of political activity is the political blogosphere. To indicate its size one can note that Total Politics magazine publishes an annual list of the ‘top’ 1,500 political blogs in the UK. These include the ‘Top 100 Right of Centre Blogs’, the ‘Top 100 Left of Centre Blogs’, the ‘Top 50 LibDem Blogs’, the ‘Top 20 MP Blogs’, the ‘Top 40 Welsh Blogs’, the ‘Top 40 Scottish Blogs’, the ‘Top 10 Northern Irish Blogs’, the ‘Top 20 Non Aligned Blogs’, the ‘Top 20 Libertarian Blogs’, the ‘Top 20 Green Blogs’ and the ‘Top 30 Media Blogs’.

So much for quantity, what about quality? The question thus arises, to what extent are the blogs ‘journalism’, and are bloggers ‘journalists’? Clearly they are part of the commentariat (albeit, some would argue, the ‘rough end’). But they are also breaking news as well. The 2008 British cabinet reshuffle, for example, could be followed on the right-wing lain Dale’s Diary blogspot as follows:

Cabinet Reshuffle Open Thread

00.100 Mandelson replaces Hutton at Business, Enterprise & Regulatory Reform - an eye catching, not to say astonishing move. Has there ever been a politician who has come back to the Cabinet after two resignations?

00.105 Jon Cruddas tipped to replace Caroline Flint at Housing - the job he turned down last year.

00.109 Ben Brogan reports that Damian McBride will leave his job as Brown’s spokesman. Is he copsing it for the Ruth Kelly debacle?

00.115 Geoff Hoon to Transport. Doubt whether he will be very pleased by that.

00.116 Boulton speculating that Margaret Beckett will replace Mandelson as Britain’s European Commissioner. This would mean a by election.

00.117 Looks like my friend Mr McNulty is going to miss out.

00.119 Des Browne to leave government of his own volition.

00.21 Ooops, forgot to say Nick Brown is tipped to be the new Chief Whip.

00.27 Caroline Flint may go to the Cabinet Office.

00.57 How on earth is Gordon Brown conducting a reshuffle, when he is live on Sky News with the dreadful Michael Winner in Luton?!

10.07 The Labour spin on this reshuffle is that the Tories will be ‘nervous’ about this reshuffle and will be terrified by Mandelson. You’ve got to laugh, haven’t you? Draper was on Sky earlier saying that this spelled the end of the Tory Party and is a masterstroke by the PM. I wonder if the electorate will be as welcoming.

10.18 A correspondent suggests that it might be Lord Mandelson of Notting Hill!

10.22 Ed Milliband to head up a new department of Energy & Climate Change. Benn to remain at Defra.

11.07 The Labour spin on this reshuffle is that the Tories will be ‘nervous’ about this reshuffle and will be terrified by Mandelson. You’ve got to laugh, haven’t you? Draper was on Sky earlier saying that this spelled the end of the Tory Party and is a masterstroke by the PM. I wonder if the electorate will be as welcoming.

11.41 John McDonnell on Sky saying ‘I’m not into criticising personalities, but Mandelson’s a ****’ or words to that effect.

11.49 Margaret Beckett to the Cabinet Office (someone says in the comments!)

13.02 David Yelland to be new Director of Communications. Justin Forsyth (who, he) to replace Damian McBride.

13.06 Baroness Cathy Ashton (currently Leader of the Lords) tipped to replace Mandelson in Brussels.

13.24 Adam Boulton withdraws David Yelland story.

This extract highlights some key characteristics of political bloggers. First, during the reshuffle – when the story was moving with great speed – this blog was one of the places in the media where up-to-the-minute reporting of the re-shuffle could be found – even though not all the reports turned out to be accurate. Second, it contained material openly pulled in from other sources – mainstream media, other bloggers and posters (people responding to blogs) - and these are all freely acknowledged. Third, there is the ready admission to, not only admit mistakes, but to display where text has been corrected (in this case the striking through of the David Yelland story). And finally, there is the injection of comment – some of it useful, some of it gratuitous – mixed in with the reporting."
Comparing this coverage to both the mainstream media, and perhaps more relevantly the blogs posted by the mainstream political correspondents, there is a fine line, if any, between what the two groups are doing. One graphic example of this came when there was a minor political splutter in the UK as junior health minister was forced to apologise for apparently sending emails of a sexual nature to one of his civil servants. Bloggers rushed to suggest that there was more to this than met the eye. Here are three such examples, all making the same point; two are from right wing bloggers and one from a political correspondent working for the mainstream media, which is which?

Exhibit A

‘Ivan Lewis has been a little too outspoken about Gordon’s failings, accusing Brown of being out of touch, it was remarkable that he escaped censure at the time. If there is one thing the Brownies excel out, it is malevolence. That the girl isn’t quoted means it is not kiss and tell for cash. A few other ministers will be worried that their office darlings could be exposed by veneful Brownies. This is a warning to other ministers and a score settled...’

Exhibit B

‘A quick thought on Ivan Lewis, the junior Health Minister exposed in the Mail on Sunday for ‘bombarding a young female aide with suggestive phone messages.’ Yes, that’s right: the same Ivan Lewis who this summer branded the Prime Minister ‘timid’ and urged him to show stronger leadership. If the political operation inside No 10 wasn’t so cack-handed these days, I’d suspect that Mr Lewis was the victim of a Downing Street dirty tricks department. Conspiracy theory?’

Exhibit C

‘When I saw the front page headline in today’s Mail on Sunday, I thought to myself: “I bet that’s Ivan Lewis.” The headline was MINISTER: I’M SORRY FOR TEXTS TO GIRL, 24. Now don’t get me wrong, I had no prior knowledge of Mr Lewis’s text habits, but what I do know is that the junior health minister has angered Number 10 by several off message outbursts about how the government needs to get its act together. Since then, anonymous briefings have suggested he should behave or suffer the consequences. He has just suffered the consequences.’

In order, the comments are from blogger Guido Fawke’s ‘Order Order’; Murdoch’s Sky News; and finally blogger ‘Iain Dale’s Diary’.

In the United States there have been numerous examples of major political stories being broken by the bloggers and then picked up by the conventional media. These included the start of Bill Clinton’s problems with Monica Lewinsky and the revelations that led to the downfall of CBS News’s Dan Rather. The ‘Draft Sarah Palin for Vice President’ blogspot claimed credit (if that’s the right word) for securing the nomination of an unknown Alaskan Governor to the Republican Presidential ticket. In the UK Guido Fawkes’ revelations led directly to the forced resignation of Downing Street senior press officer Damien McBride, and the blog by Robert Peston, the BBC’s Business Editor, played a key role in last year’s financial crisis.

Political bloggers are often accused of being scurrilous and irresponsible. But non-professional bloggers have no monopoly of scurrility as this extract from Sky News’s Political Blog demonstrates:

‘Osborne: “Bloody Fool”’

(October 13, 2008 4:05 PM written by Alistair Bunkall)

‘UPDATE: A spokesman for Lord Turner has been touch. The head of the FSA insists that our story is “completely untrue” and “unhelpful at this time.” Boulton & Co’s City source stands by what he heard.

‘Oh dear, it seems the Chairman of the FSA has little time for the Shadow Chancellor. A contact of mine in the city just messaged to say that he witnessed a meeting between Lord Turner and George Osborne this afternoon. I’ve told that when the latter was safely out of earshot, Adair Turner muttered ‘Bloody Fool’ under his breath. Apparently poor George carried on oblivious! But perhaps it’s just lag that’s making Lord Turner a little grumpy. He told me he had just got off a plane from Washington when I spoke to him an hour or so ago.”

Seven pillars of traditional journalistic wisdom

Yet despite this sort of commentary that can be found on mainstream media sites, many traditional journalists still seek to distinguish what they do from the bloggers by asserting that their ethical standards are very different (and implicitly higher) from those of the blogosphere. Obviously such protestations ignore journalists who blog (as above) and the fact that many bloggers describe themselves as “journalists.”

In the tradition of a Socratic dialogue here is an articulation of ‘seven pillars of journalistic wisdom’ that traditional journalists might use to clarify the difference between themselves and bloggers:

(1) Journalists seek to be objective, bloggers do not.
(2) Journalists are interested in ‘the truth’, for bloggers this is negotiable.
(3) Journalists are impartial, bloggers are not.
(4) Journalists seek balance, bloggers do not.
(5) Journalists are unbiased, bloggers are proudly biased.
(6) Journalists are independent, bloggers are not.
(7) Journalists strive to ‘get it right, bloggers do not.’

All of these are today, and probably always have been, misconceived.

Objectivity

Objectivity, whether realised or aspired to, is a seductive concept; but like much that it is seductive it flatters to deceive. It must surely be self evident that objectivity is, and has always been, a meaningless concept. That is because all journalists have a gender, an ethnicity, a family, a social background, a personal history, a set of prejudices and other attributes that afflict their ‘way of seeing’. They also have an ingrained sense of ‘professional’ values and expectations which colour the way they go about their work. Every attempt by journalists to argue that they are able to put aside their own beliefs, feelings etc and become, or aspire to become, genuinely ‘objective’, strengthens a dangerous canard. For it is when journalists believe they have attained Olympian objectivity that they are in greatest danger of failing to see how their own conscious and unconscious
motivations are affecting what and how they report.

Take a simple example of a reporter covering a political conference. To begin with he or she will probably be part of team, and hence might well be assigned to cover a particular debate, fringe meeting or whatever. So at the very outset his or her ability to decide what is the most important event at the conference, and to report what he or she regards as the most important events of the day, is severely limited. Second, there is the editorial line of the paper (and the case of the broadcaster, the necessity of attracting and holding an audience) that has to be taken into account in deciding what stories are going to be of interest. Third, there is the prevailing mood of ‘today’s story’ – ‘Labour in disarray’, or whatever – that colours news judgments. All this is before any consideration of how the journalist reports a debate, or meeting, that might have taken place over two hours, involved perhaps 20 participants, speaking the equivalent of 10,000 words (easily done in two hours) into 250 crisp and accurate words.

Of course, the way s/he does it, is by making brutal selections of what quotes to use, and by summarising the broad thrust of the debate in a couple of dozen words. And how is this selection made? ‘News judgment’ is the usual response. But what is ‘news judgment’ if it is not a mix of providing the newspaper or broadcaster with what is expected, based on past performance, professional rituals, prevailing moods and a soupcon of personal viewpoint. It is not wrong, there is probably no other way to do it, but ‘objective’ it is not. To all of which bloggers might respond that since they make no pretence of ‘objectivity’, none of these difficulties apply to them.

**Truth**

The notion of the ‘truth’ is highly problematic – in most situations, there many truths not one. Deliberate falsity is rare, but arguments as to what are the most important elements of a particular event are not. To return to the example of the political gathering, the journalist reporting the fringe meeting at which 19 speakers said that Labour should stick with Gordon Brown as leader and one that said he should go, would see the ‘truth’ of the meeting being an overwhelming show of support for Brown. But if the one speaker against was a former cabinet minister, then undoubtedly that will lead the reporter’s story – whose ‘truth’ is right? Bloggers represent the ‘truth’ by simply reporting everything they hear and then correcting items when they discover them to be untrue.

**Impartiality**

Impartiality is equally problematic, even if the UK’s broadcasting legislation, which requires broadcasters to be impartial in matters of public controversy, implies that it is not.9 Should a journalist be ‘impartial’ between the racist and the non-racist, the climate scientist and the climate-change sceptic, the eminent historian and the Holocaust denier? If the answer is no – as it surely must be – how does the journalist decide which stories require impartiality and which do not? Clearly political stories ought to demonstrate impartiality, but what happens when the journalist works for a newspaper with a political line that requires not just reportage but ‘informed comment’ as well. And what of the category of ‘campaigning journalist’ – a badge that many now wear with pride? Is the journalist campaigning against pollution from a local factory required to be impartial in the controversy? And what happens if his or her newspaper, or TV station, decides that it is going to formally back the campaign? Whither impartiality then? The blogger does not seek to be impartial and so has no agonising to do.

**Balance**

The problem with balance is that it implies that all stories have two, more or less valid, sides. As the discussion about impartiality suggests, giving equality of treatment between two sides in a number of areas can be highly problematic. But there is another issue. Many, if not most, controversies that catch the attention of the media have more than two sides to them – situations, once investigated in depth, are generally more nuanced than they might first appear and hence do not lend themselves to simple ‘on the one hand, on the other hand’, treatments.

**Bias**

For all the reasons outlined in the discussion about objectivity, journalists are rarely genuinely unbiased. Perhaps in reporting a football match between two teams about which the reporter has no strong feelings, a journalist might begin with an unbiased approach. But during the 90 minutes biases can, and do, develop – this team is playing unfairly, that team is showing more determination, the referee is biased and so on. All (or most) journalists start determined to be unbiased but by the time it has come to start putting the story together, unseen and unheard bias will have reared its ugly head. Online, on the other hand, the biases scream out to be seen and heard.

**Independence**

Are journalists independent, whilst bloggers are not? ‘Up to a point Lord Copper’, as journalists down the ages have mumbled10. Independence implies writing or broadcasting without let or hindrance. But journalists need to reach audiences in order to be journalists. But if the TV channel won’t commission the programme, the programme does not exist (unless it is streamed on the internet – as millions of video bloggers are now doing on sites such as YouTube). The columnist might demand that not a word of his or her copy is altered, but if what the writer is writing ceases to please the editor or proprietor, then he or she will lose their column – a thought that is undoubtedly in the back (if not further forward) of the minds of every working columnist. As for the mere mortal hacks labouring away in the foothills of the news, they too have editors and owners and thus no real independence. Conversely, it can be argued that the blogger, with no concerns about being sacked, is far more independent than the journalist. He or she is freer to pursue stories or to vent spleen - freer to write whatever catches his or her fancy, than their more traditional journalistic cousins.

**Accuracy**

Finally, do journalists strive for accuracy whilst bloggers do not? On this charge I would argue that both journalists and bloggers try and get it right all the time, even if they also try to put their own spin on the events and select the facts that suit their own particular purposes. The earlier example of the reporter at a political gathering covering a two-hour fringe meeting in 250 words is one example – his or her report might have accurately reported the words he or she chose to select but for anyone who attended the meeting they would, in all probability find that the newspaper’s report of the meeting bore little relationship to the meeting that they experienced.

So having destroyed existing journalistic ethics, and even
suggested that in the ethics stakes bloggers can claim to be ‘ethical’ by their own lights, where do we go from here?

**Seven Pillars of New Journalistic Wisdom**

Here I offer my own ‘Seven Pillars of New Journalistic Wisdom’ – applicable to journalists and bloggers alike.

1. Thou shalt recognize one’s own subjectivity.
2. Thou shalt strive to be fair.
3. Thou shalt strive to be accurate.
4. Thou shalt strive to be thorough.
5. Thou shalt seek verification.
6. Thou shalt strive to be transparent.
7. Thou shalt be accountable.

**Subjectivity**

Given the previous arguments about the dangers of objectivity, it seems incumbent on journalists and bloggers to recognize ‘where they are coming from’. This does not mean writing or broadcasting from a particular perspective per se, but it does imply recognizing that, consciously or otherwise, they do have a perspective. In so doing both the journalist and blogger are so much better equipped to counteract it within their own work and ensure that the audience is made aware of the partiality of the journalist or publication. The failure to recognize this can be problematic for journalists and bloggers alike.

Some years ago, the author, whilst working for the BBC at Westminster, would observe how some journalists, despite working in a political arena, would declare ‘I have no politics.’ Putting aside the issue that everyone in a democratic society has a responsibility to have a view about politics, these journalists were potentially dangerous. They failed to recognize their own prejudices and were thus ill-equipped to monitor their own output to ensure its fairness – equally colleagues who openly declared their own personal politics were better able to monitor themselves to help ensure that their output was less affected (and their colleagues were well-placed to call ‘foul’ if they thought their self-declared prejudices were showing).

**Fairness**

And that brings us to perhaps the most important of the pillars – ‘fairness’ and its close relationship to subjectivity. For fairness, unlike impartiality, neutrality and so on, is not something that can be established, or experienced, objectively. By its very nature it is felt. Journalists, even those working under extreme time pressure, always have a sense of ultimately how ‘fair’, or otherwise, they have been. Sometimes that awareness only comes to the fore retrospectively. The overwhelming majority of journalists do set out to be fair, but in the rough and tumble of a news story subjective judgments have to be made about ‘good guys’ and ‘bad guys.’ Being aware of such judgments is the key to transcending them.

Investigative journalism can complicate matters. Most investigations begin with the journalist having some notion of who is the ‘guilty’ man, woman or organisation. The journalist then seeks to uncover the evidence that will sustain that charge. If, in the course of the investigation, he or she finds material that suggests that the original assumption about guilt was mistaken then, as a critical part of the fairness pillar, he or she either ceases the investigation, or produces a story vindicating the subject. If, on the other hand, the journalist does find sufficient evidence of ‘guilt’ (sufficient to satisfy him or her plus the editors and lawyers) then the story can be proceeded with. And whilst it is important that the subject is provided with some space to state his or her defence, that does not mean equal time and prominence. Of course, should the journalist make the wrong call, then the consequences have to be faced.

**Accuracy**

The next two precepts – injunctions to be accurate and thorough – are at the heart of ethical journalism and should require little elucidation. Nonetheless, they can conceal as much as they reveal. Accuracy is often assumed to be simply ensuring that the ‘facts’ are correct – names, numbers etc. However, it is worth noting that of complaints to the UK Press Complaints Commission in 2008, ‘accuracy’ was by far and way the largest category, comprising 70 per cent of complaints (in second place, far behind with 9% of complaints, was privacy). A cursory glance at some of the complaints about accuracy shows that they involved issues such as whether the complainant had said the words attributed to them, or denying having given permission for certain information to be used. Thus the term ‘accuracy’ can conceal as much as it reveals.

However, a simple nostrum in terms of this journalistic pillar should be that when reporting matters of fact, journalists should take every reasonable care to ensure the accuracy of the information they are reporting – and if in doubt the source of the information should be identified. In an age when much of the information that journalists are using has been obtained online, both checking the information and revealing the sources of information to the audience, is significantly easier.

**Thoroughness**

Thoroughness is more problematic. At what point should the journalist draw the line? This author, on leaving full-time journalism for academe, was asked what the difference was between journalistic and academic research. He answered by saying that it is unlikely that an academic researcher, on ending a conversation with an informant who suggested another potential interviewee, would be unlikely to respond, as would a journalist, with: ‘No thanks, I’ve got enough for the piece.’ In a journalistic context absolute thoroughness can never be achieved – time and space limitations are always an issue. But a proximity to absolute thoroughness is necessary if the journalist is running an investigation in which allegations of wrong-doing are involved; not only is it editorially necessary but without it, there is little legal cover.

**Verification**

Verification is partly another aspect of thoroughness but it is also an injunction to journalists to only use material from sources they regard as ‘reliable’ – although this raises important issues about the use to be made of material obtained from the internet (Wikipedia extracts being only the most obvious example of the problems of verification and provenance online).

In terms of verification, establishing the provenance of the case study used here – UK political blogs – is usually straightforward. For example, Iain Dale’s Diary defines itself as ‘Daily political commentary of the Conservative Party activist Iain Dale’ whilst Guido Fawkes describes his blogspot as ‘Discussion on Parliamentary plots, rumours and conspiracy’ which, whilst it might not fully indicate his blogs libertarian bent, does at least suggest that it is a long way from ‘Here is the News’. On the other
hand the world’s most popular political blogspot, the ‘Drudge Report’,24 gives absolutely no indication of its right-wing stance, neither does its opposite number on the blogging left ‘The Huffington Post’.25

So if the blogs are dangerous territory for journalists in pursuit of ‘verification’, maybe ‘old-fashioned’ websites are safer terrain? Alas no, for there has always been an issue of provenance online. For example, the UK website ‘Spiked Online’ describes itself as standing for: ‘…. liberty, enlightenment, experimentation and excellence.’26 What it doesn’t tell you is that the website grew out of the collapse of the magazine Living Marxism, which itself had developed out of a Trotskyist sect – the Revolutionary Communist Party. That’s fine, but is any of this revealed on its website? Alas no, one has to turn to campaigners such as George Monbiot, writing in the Guardian, to find this out.27 So verification is important for both the journalist and his or her audiences, particularly online.

Transparency

From ‘verification’ to ‘transparency’ is not a great distance. Transparency has two meanings. One relates to the previous discussion about provenance, the other to the journalists working methods. It seems important, and relatively easy (particularly online) to maintain a position of revelation – not so much in terms of content but in terms of method. This involves enabling the audience to make judgments about how information was obtained and where more can be found. Journalists thinking about their working methods need only have one simple criterion in mind when deciding if a particular course of action would be ‘ethical’ – and that is: ‘would I be comfortable if my working methods were made public, could I justify them in terms of the “public interest”?’

Accountability

Accountability – also linked to transparency – can be problematic. To what extent is the journalist (off or online) ‘accountable’ and to whom? Certainly he or she is accountable to whoever is paying him or her to be a journalist. But there is also, arguably, the more important issue of accountability to the audience. This can be complex. Journalists working for publicly funded or subsidised media – the BBC and the commercial public service broadcasting channels for example – have a direct line of accountability to their communities. This is accountability to the public both as their paymasters and more widely, in terms of the extent to which it enhances or detracts from the public sphere (mainly through its provision of news and current affairs).

But do journalists, working outside the public media, have accountability to society at large? This author would argue that in a pluralist liberal democracy, probably not. Certainly they are accountable to the courts for libel, breaches of privacy etc, but it is difficult to sustain the argument that they are any more accountable to the public than, say, are accountants, solicitors or doctors. Certainly all such groups are accountable to their ‘clients’ (not something that directly impacts on journalists as such) and also to the regulators and professional associations that police their own professions. In this sense an argument can be made that there is accountability, once removed. But most journalists – on or offline – would probably see their accountability being simply one of maintaining their audience, both in terms of numbers and of trust. Although, according to Adrian Monck, trust is now an outdated concern: ‘For me transparency and information supersed our need for trust,’ he argues.28

Conclusion

This debate about trust underpins this whole discussion around the ethics of traditional and new journalism. We are in a time when journalism is undergoing more changes – both in terms of formats and content – than at any time in the past. Of course, change has been a constant factor throughout the history of the media, ever since William Caxton hit upon the idea of moveable type. However, the changes we are now witnessing – and this paper has only focused on those affecting the reporting of politics – are having a profound impact on our entire understanding of journalism. Is it meaningful, any more, to try and distinguish a particular set of dissemination categories and describe them – and the people who author them – as journalists? If and not, then is there any point in trying to establish what is, and what is not, ethical?29

The answer must surely be yes. That some bloggers, citizen journalists or social networks do not acknowledge, or follow, ethical precepts does not invalidate the fact that they should exist. For whilst traditional journalists’ own codes of conduct were more often honoured in the breach than the observance, they did, at least, provide a template for what was to be regarded as acceptable behaviour. Bloggers, and other online contributors, can at times appear to be following an ultra libertarian philosophy of ‘publish and be damned’ which creates the real danger of an anarchic tsunami of information leading the audience, actually or metaphorically, to simply switch off. Surely a far better banner, for bloggers and journalists alike, to be fighting under would be: ‘Let’s have some ethical standards, for if we don’t have any, how do we know when we are breaking them?’

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References


Franklin, B. (2005), Key Concepts in Journalism Studies, London, SAGE.


Three cheers for subjectivity: or the crumbling of the seven pillars of traditional journalistic wisdom


Monck, A., (with Hanley, M.), (2008), Can We Trust the Media?, Cambridge, Icon Books.


Notes

1 Schudson, p 82.
2 A typical example can be found in Niblock, (1996), Inside Journalism, p 14.
3 Friend & Singer, p 6.
4 Author’s personal experience working on the Guardian.
5 The entire Total Politics Guide to political blogging in the UK 2008-09 is available for download on http://www.totalpolitics.com/politicalblogs/graphics/Blogging_T_Low_Res.pdf
6 And the list keeps growing. The Iain Dale site added on October 12, 2008: ‘I’ve got about 70 new blogs to add to the Online Total Politics Blog Directory. Most of them are brand new, and a few have been around for some time. I’ll be posting them here in batches of ten over the next few days.’
1. Red Mist
2. Voyage of Discovery – Libertarian blog
3. Edinburgh Sucks
4. New Progressive
5. Jamie Satterler – LibDem (on politics and sport)
6. I Intend to Escape… And Come Back
7. Open Eye – Police blog
8. Alan Williams – Plaid councillor
9. Barnett Council Watch
10. From the Barrel of a Gun – Libertarian

7 See Holubow and Lloyd (2008), The Power of the Commentariat. The phrase ‘the Commentariat’ denotes the near army of journalist commentators who now command significant column inches in the national press.
9 Ibid, viewed November 4/5, 2008. Iain Dale’s Diary extended this practice further on the night of November 4/5, as the US presidential election came through. He asked his readers to volunteer to cover a particular TV or radio channel and then to blog, through the night, both news from the channel and comments on its coverage. This resulted in his website running the most comprehensive live coverage of the results state-by-state as they were being reported by 10 UK and US news outlets.
10 http://www.order-order.com/2008_09_01_archive.html

12 http://palinfvpn.blogspot.com/.
14 On the website ‘Liberal Conspiracy’ http://www.liberalconspiracy.org of the 33 named contributors, 10 identify themselves as ‘journalists’.
15 For an interesting discussion about the nature of objectivity in journalism from a constructivist perspective, see Poerksen, The Ideal and the Myth of Objectivity: Provocations of Constructivist Journalism.
16 See John Berger’s classic text, Ways of Seeing.
17 Herman and Chomsky (1994) summarise the pressures thus: ‘Most biased choices in the media arise from the preselection of right-thinking people, internalized preconceptions and the adaptation of personnel to the constraints of ownership, organization, market, and political power’ (p xii).
18 The BBC editorial guidelines state that ‘Impartiality lies at the heart of the BBC’s commitment to its audiences.’
19 Lord Copper was the know-nothing proprietor immortalised in Scoop, Evelyn Waugh’s classic novel about journalism.
21 See McNae’s Essential Law for Journalists, (2007), pp 275-79 for exposition of the significance of the ‘Reynolds defence’ which has made investigative journalism less likely to fall foul of the UK’s stringent libel laws.
22 http://iaindale.blogspot.com/.
26 http://www.spiked-online.com/.
27 See reference to Monbiot below.
28 Monck, p 4.
29 See Beckett, pp 4 & 167, in which he argues that new journalism – what he describes as ‘networked journalism’ – in its coverage offers the opportunity of enabling traditional journalism to enhance its own social role by being the spur to creating new ethical standards for all.
Investigating corruption – the article and the archive, and the Reynolds defence in action: Flood v Times Newspapers Ltd [2009] EWHC 2375 (Ch), October 16, 2009

Introduction

The currently received wisdom is that the Reynolds qualified public interest defence1 in the law of defamation got off to a very shaky start in the lower courts but has received a fresh impetus as a result of the House of Lords decision in Jameel v Wall Street Europe2. In Bonnick Lord Nicholls of Birkenhead, giving the judgment of the Privy Council, put it thus:

"Stated shortly, the Reynolds privilege is concerned to provide a proper degree of protection for responsible journalism when reporting matters of public concern. Responsible journalism is the point at which a fair balance is held between freedom of expression on matters of public concern and the reputations of individuals. Maintenance of this standard is in the public interest and in the interest of those whose reputations are involved. It can be regarded as the price journalists pay in return for the privilege" (at para 23).

Not all are so convinced that it effectively protects serious investigative journalism. In the recent report Free speech is not for sale (2009), published jointly by the free speech campaigning groups English Pen and the Index on Censorship, there was a statement that there was ‘no robust public interest defence in libel law’ (p 2).3 In a report that contains some sensible recommendations on libel tourism, the single publication rule, and capping reputational damages the discussion of Reynolds is disappointingly superficial. The House of Lords in Jameel deprecated Lord Nicholls’s criteria for assessing whether the defence was complied with as a check list test, with each element having to be satisfied before the defence could be relied on. Furthermore, the defence is already available beyond journalists, as the authors of the report argue for.4

Clearly only time will tell whether the judges in the lower courts accept the strictures about not applying the defence too restrictively.

The offending newspaper article

Flood gives a chance to see the Reynolds defence at work in one area, the investigation of alleged police corruption. Its basic facts are reasonably straightforward. The Times published an article on June 2, 2006 which suggested that the claimant, a detective sergeant with the Metropolitan Police Service (MPS) Extradition Unit, had been accused of taking bribes from Russian exiles, and police were investigating the alleged sale to a security company of intelligence on the Russian Government’s attempts to extradite opponents of President Putin such as Boris Berezovsky. The investigation was said to be being carried out by the Directorate of Professional Standards (DPS) of the MPS. The claimant, who had an outstanding police service record, strenuously denied these allegations and ultimately the DPS issued a report of their investigation stating that they were unable to find any evidence to show the claimant had divulged confidential information for monies or otherwise. No recommendations were made as to criminal or disciplinary proceedings in relation to the matter.

Significantly, the content of the newspaper article was placed on The Times website at the same time and entered their web archive. It remained on the site during the currency of the litigation. Lying behind the allegations was also a concern that the MPS and the DPS had not been carrying out their duties properly in investigating the issue in the first place.5 An important point which really never seems to have been satisfactorily resolved is whether the DPS was already investigating the matter before being contacted by journalists, or whether it was the journalists’ approach which initiated a serious investigation. The allegations concerned whether a London-based security company, ISC Global (UK), had paid the claimant sums under the code name ‘Noah’ for sensitive information – though again what valuable information could have actually been provided in this context never really became apparent in the case.

The claim was issued just a few days before the expiry of the one year limitation period in respect of both the newspaper article and the website reproduction of it alleging that the article meant that there were strong grounds to believe, or alternatively reasonable grounds to suspect, that the detective sergeant had abused his position as a police officer in the MPS and corruptly accepted £20,000 in bribes from Russia’s most wanted suspects in return for selling them highly confidential Home Office and police intelligence. This constituted an appalling breach of duty and betrayal of trust, and also meant that the officer had committed a serious criminal offence.6 The availability of the defence was a matter of law and for the judge to decide, so the jury – at least in this area – did not have an opportunity to express their view via a verdict on whether the actions of the journalists were responsible or not. Matters were complicated because the information setting off the investigation had come via unnamed sources; there had been fallings out between the founders of the relevant security company and the speculation was that it had
come via one or more of the disgruntled former associates and friends.

The judge’s tracking through the complex fact situation and his detailed analysis of what the journalists did or did not do – with of course the benefit of hindsight – gives a good insight into what may be required of journalists and how a judge views what is done from a legal perspective.7 When the investigation started was a key issue because the claimant argued that the defendants’ case was circular – they made the allegation and then reported it and sought to rely on Reynolds to report a ‘public concern’ for which there was no prior evidence but which they had initiated (at para 16). The identities of four relevant sources were withheld, which complicated the judge’s job in assessing veracity and related issues.

Application of the Reynolds defence

In considering the application of the law the judge sought to balance the reputational interest of the claimant under article 8 of the European Convention on Human Rights against the defendant’s right of freedom of expression under article 10. The protection of reputation from a qualifying derogation in article 10(2) the protection of the reputation of others, to be strictly construed as an exception to the general freedom of expression in art 10(1) to a free-standing aspect of the privacy right in article 8 is in itself potentially worrying for the media because it is leading to the treatment of reputation as a free standing right to be ‘balanced’ with freedom of expression in article 10. This provides the potential for perhaps undue strengthening of reputation at the price of expression.8

The judge, following Jameel, ruled that the public interest issue had to be dealt with by looking at the article as a whole (at para 126) and that it was appropriate to name the claimant rather than merely saying ‘a member of the MPS extradition unit is being investigated.’9 Clearly matters of alleged police corruption were of genuine interest to the public (at para 131).10 The judge very importantly stressed that verification activities did not relate to why the police were carrying out the investigation more verification that they were (at para 135). Tugendhat J also emphasised that ‘the failure of a journalist to satisfy one of Lord Nicholls’s ten tests cannot of itself be fatal to his defence’ (at para 142). Lord Nicholls had commented in Reynolds that the proposition ‘any lingering doubts should be resolved in favour of publication’ was no longer good law (at para 146). The argument essentially was that the explicit approach of naming the claimant was disproportionate to the information at their disposal, the motives and standing of the sources, and their relative knowledge of the full picture.

Carefully and in a balanced fashion, the judge went through the pros and cons in relation to each of the 10 criteria mentioned by Lord Nicholls in Reynolds. An interesting aspect of the case was the feeling that it was inappropriate for the press to be carrying out a parallel investigation, particularly as the claimant might not be able to fully defend himself because of the article 6 ECHR implications, and it was unfair that: ‘TNL insists that the accuser must be assured of anonymity, even if malicious, but then argues that the accused must be exposed in the national media, with every detail of the accusation and evidence that the press can discover, under the protection of privilege’ (at para 180). The judge recognised that this was an anomaly, but mainly one factor to be borne in mind in the ultimate balancing test. Tugendhat J rejected as far too wide a general proscription on parallel investigations, though in exceptional cases where such an investigation might interfere with the police investigation the Reynolds test might not be satisfied, but felt the facts of the present case were far removed from being exceptional. Indeed given the possibly valid doubts about how rigorously the police were in fact pursuing the matter, a parallel journalistic investigation was, it is suggested, entirely justified.

Importantly, the judge concluded they were entitled to report the fact of the police investigation which had included the execution of a search warrant even if they had precipitated it. They were not reporting their allegations, but the factual actions taken as a result of them (para 191). The judge also refused to be drawn into speculating what further information might have been obtained, rather looking at what precisely was known at time of publication and whether it was reasonable to publish it.11 He also stressed that the journalists did not have to wait for the outcome of the police investigation and that appropriate weight had to be given to the professional judgment of the editor and journalists in regard to what had not been a decision which was ‘casual, cavalier, slipshod or careless’ (at para 202).12 In the end the judge accepted that the judgment to publish given the issue involved was within the permissible range of editorial judgments and was an exercise in responsible journalism (at paras 216-17). In many ways the judge’s approach and the steps the journalists took were, it is suggested, the way the Reynolds defence should progress. In the author’s opinion the judge adopted a rigorous forensic approach but sufficiently anchored in the realities of the situation, and it is suggested that the journalists’ actions were responsible and appropriate on the facts of the case.

The archive issue

English law notoriously does not adopt the single publication rule, and each downloading from the internet is capable of constituting a separate publication. The European Court of Human Rights has held that provided any second or subsequent action is brought reasonably proximately to the original publication the rule does not breach article 10.13 It is clear that serious consideration must be given to the amendment of the multiple publication rule in the internet age, particularly with the growing significance of newspaper archives – still largely freely available. Section 11 of the Irish Defamation Act 2009 states:

1. ‘Subject to subsection (2), a person has one cause of action only in respect of multiple publication.
2. A court may grant leave to a person to bring more than one defamation action in respect of multiple publication where it is considered that the interests of justice so required.
3. In this section “multiple publication” means publication by a person of the same defamatory statement to 2 or more persons (other than the person in respect of the statement is made) whether contemporaneously or not.’

Perhaps this might be the way forward, and would take account of situations where there is no qualification or serious consideration of take down by the publisher.14 The UK Ministry of Justice is currently consulting on whether the rule should be retained or amended, with consequent adjustments to the limitation period as it is felt the current one year limit would be too favourable to defendants if the single publication rule was adopted. In any event, a 10 year long-stop period is being considered after which no actions could be taken.15
In the instant case, as the multiple publication rule applied each accessing of the article therefore constituted a separate publication and potentially could trigger a fresh action. The defendants had taken steps, though warnings seem to have changed through the period, initially being: ‘Warning this article is subject to a legal dispute. It should not be relied on or repeated.’ Quite why the warnings changed was not explained to the court. During the trial a second copy of the article was downloaded and the warning read: ‘this article is subject to a legal complaint.’

It is now accepted that the rather dismissive reference to the social utility of web archives in the Court of Appeal decision in Loatchansky was – even if right then, which was highly doubtful – certainly not warranted in 2009.16 Tugendhat J adopted a more realistic approach, aptly saying:

‘what is found on the internet may become like a tattoo…. Some actual and prospective employers, and teachers, make checks on people by carrying out internet searches. An old defamatory publication may permanently blight a person’s prospects. This may be so, even in those cases where the allegation has been authoritatively refuted, but the refutation is either not on the internet, or, where it is on the internet, its authority is not apparent, or is not credited, on the footing that there is no smoke without fire’ (at para 233).

There must therefore be an effective and proportionate correction system. It might actually make some readers more sceptical about the authority of some news gatherers if there were a lot of such corrections on their sites, and newspapers should not be allowed in an almost Stalinist way to airbrush out of history their errors on their own sites. Also, as Tugendhat J pointed, out now that two convention rights were being balanced instead of a convention right against a non-convention right, the case for effective correction was stronger (at para 235). The matter was complicated here by a dispute over what corrective report the defendants might publish; they broadly stated that insufficient evidence to proceed had been found, with the claimant arguing this added insult to injury and wanting it firm to the point of no evidence to足 been found to proceed. The vagaries of any right of reply do not assist here, with the issue dealt with as it is outside legal proceedings by industry self-regulation. The final police report had referred to the lack of finding of ‘any evidence’ though one of the investigating officers had used the phrase ‘insufficient evidence’ in a letter to the defendants.

The judge emphasised however that the defendant ‘cannot offer the claimant a form of words which the claimant refuses to accept, and then rely on that refusal to relieve him of the obligation of acting responsibly and fairly, at least where the claimant’s refusal was reasonable, as it was here.’ Moral – avoid weasel words and phrases as here. Ultimately, if there is no agreement with the claimant the defendant has to act unilaterally. It is suggested that a full and frank admission of error should be a factor in the equation. In the judge’s view the balance of the Reynolds factors had changed since the original publication in the newspaper – the failure either to withdraw the article completely or provide an adequate qualification could not be described as responsible journalism – but only from the date when the circumstances effectively changed. The precise content of the any caveat was not fully fleshed out in the judgment.

This issue does raise concerns for the press as there will need to be constant review and monitoring of sites – it has wider implications for the rather more carefree attitudes in the blogosphere – perhaps by analogy to correction of mistaken credit reference files if the parties cannot agree a qualification statement the claimant be permitted to insert say 200 words of his own choosing and provided it in itself is not defamatory or in breach of any privacy right etc should be published. The Press Complaints Commission might need to address this more formally in their code of practice.

Conclusion

It is suggested that this case therefore effectively balances the respective interests and shows how the Reynolds defence should work in practice. It also suggested that given the current state of journalistic ethics, particularly at the tabloid end of the market, a widening of the defence to grant a qualified privilege defence merely on the grounds of a honest belief about a matter of public interest is going too far. In this I would disagree with the Libel reform Campaign’s ‘Free speech is not for sale’ report. The UK is not ready for the New York Times v Sullivan test, even if the US ever was. The other recommendations about costs, libel tourism, reform of the multiple publication rule, damage capping and effective summary procedure recommended by the report, yes, replacement of Reynolds not yet, at least until impact of Jameel has time to work through.

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Notes

2 [2007] 1 AC 359 – in the judgment of Lord Hoffmann.
3 In recommendation 6 the report states: ‘Although Reynolds privilege and the subsequent ruling in Jameel have gone some way to providing journalists with a public interest defence, it has not been applied widely enough beyond investigative journalism…The court should also take into account the capacity of the defendant to follow all the steps required for a Reynolds defence. Defendants writing about a totalitarian regime, for instance, may not be able to corroborate their reports safely. Journalists and others should be allowed to publish statements which they believe to be true and in the public interest.’
4 Seaga v Harper [2009] 1 AC 1, where the Privy Council recognised that the defence could be available to the author of a book.
5 It was canvassed whether the article was designed to prompt the police to act on ‘intelligence’ received and might have in fact been a critique of their perceived failures to act rather than a direct article about the content of the complaint. As one might expect in a sensitive area there was a degree of ambiguity in the e-mails and discussions between the journalists and the police – such as the disconnection between receiving ‘a complaint’ and merely receiving ‘intelligence’ (see paras 82 and 83). It was asserted by the defendants that the police would never have started a formal investigation on the unsupported allegation of a newspaper (see para 94). The judge concluded that the police had probably not acted on any intelligence they had received prior to the inquiries of the journalists (at para 96) – one of the unsatisfactory aspects of the case was the lack of any direct witness evidence from the MPS about what went on.
6 Times Newspapers claimed justification and qualified privilege, arguing that the article only meant that the claimant was the subject of an internal police investigation and that there were grounds which objectively justified a police investigation as to whether the claimant had received payments in return for passing confidential information about Russia’s possible plans to extradite Russian oligarchs. Eady J had ordered that the qualified privilege defence issue be tried separately as a preliminary issue. Tugendhat J did not decide what meaning was to be preferred as it was not required in relation to his decision on qualified privilege.
7 Michael Gillard, the lead journalist, is very experienced in matters of police corruption and had researched and co-authored a book ‘Untouchables’ on corruption in the MPS – so there was no doubt a certain ‘history’ which may have tainted matters.
8 See Cumpara and Mazea v Romania Apelion (33348/96) (2005) 41 ECHR 14, and Pfeifer v Austria (12554/03) (2009) 48 ECHR 8 – also opening up the possibility of a second front that even if the media ward off a defamation claim on basis that the facts are justified, they may nevertheless face privacy action on the basis that the facts should not have been published in the first place and unjustly impact on reputational privacy – H v Tomlinson (2008) ELR 14. Here there was
publication of information about an alleged arrest of a child with Asperger's Syndrome – at first instance the justification claim was upheld, but the court refused to strike out the privacy claim in relation to alleged arrest of the child for violent conduct outside his father's house. The Court of Appeal ruled this was a public act and struck out the privacy claim – but with a clear implication that the private act might have been regarded as misuse of private information claim. The balancing approach was that adopted by Lord Steyn in Re S (a Child) (Identification: Restriction on Publication) [2005] 1 AC 593 at para 17. First, neither article has as such precedence over the other. Second, where the values under the two articles conflict, an intense focus on the competitive importance of the specific rights being claimed in the individual case is necessary. Third, the Justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each.  


10 The judge rejected the argument that this was a 'reportage' case (see Roberts v Gable [2008] QB 502 CA) and that reportage was not available as the accuser was unnamed (paras 133-35).  

11 An approach advocated by May LJ in GKR Karate (UK) Ltd v Yorkshire Post [2001] 1 WLR 2751 at 2758-2759A.  

12 One point which in my view does reflect rather badly on current journalistic ethics was the failure of the newspaper voluntarily and at an early stage to publish any statement or comment on the fact the claimant was exonerated by the police investigation. Newspapers argue for ready access to the Reynolds defence and the inevitable power to harm that it brings, surely they should be more ready to address subsequent vindication of the claimant? As a matter of law of course events subsequent to the time of publication are not relevant to whether the privilege is available (see para 212). It is true during the proceedings there were rather sterile discussions about the nature of a correction that could go on the website, but this has very legalistic overtones and involved the solicitors of each parties – rather reminiscent of the drafting of apologies in the offer of amends procedure in ss 2-4 Defamation Act 1996.  

13 Times Newspapers Ltd v United Kingdom (3002/03) [2009] EMLR 14 – the European Court of Human Rights left the matter rather hanging in the air given that the second action in Loutchansky was reasonably proximate and the Court of Appeal did not require the article to be taken down, simply suitably qualified. The court stated: ‘In these circumstances, the problems linked to ceaseless liability for libel do not arise. The court would, however, emphasise that while an aggrieved applicant must be afforded a real opportunity to vindicate his reputation, libel proceedings brought against a newspaper after a significant lapse of time may well, in the absence of exceptional circumstances, give rise to a disproportionate interference with press freedom under art 10′ (at paras 47-48).  

14 See also s 38 Defamation Act 2009. Cause of action will accrue on publication and any action must normally be brought within one year with power to allow extension to two years. Publication on the internet will date from time it is first accessible – so quite a tight timeline for claimants.  


16 Lord Phillips of Worth Matravers MR said: ‘the maintenance of archives is a comparatively insignificant aspect of freedom of expression. Archive material is stale news and its publication cannot rank in importance with the dissemination of contemporary material’ (at para 74).
Recent Developments

Offer of amends and statements in court

In Winslet v Associated Newspapers Ltd [2009] EWHC 2735 (QB), November 3, 2009, the claimant issued an application notice for permission to read a unilateral statement in open court in accordance with the provisions of CPR 53PD 6.1. The claimant had earlier accepted an offer of amends made in accordance with the regime governed by sections 2-4 of the Defamation Act 1996. The defendant opposed her application on the basis that the claimant was simply not entitled to a statement upon acceptance of an offer of amends. It was argued that she was entitled only to such remedies as she might obtain in accordance with those statutory provisions.

In terms of the acceptance of the offer of amends the claimant had reserved the right to make an application for a statement to be read in open court, if the terms of an apology could not be agreed.

The claimant sued over an article appearing in the Daily Mail on the basis that she had lied publicly about her exercise regime. Following the acceptance of the money offered, the newspaper published an apology which the claimant and her advisers thought was inadequate. It appeared on page 27 in a rather obscure corner, which bore no relation to the size or prominence of the words complained of.

The defendant argued that the claimant had no entitlement to make an application, despite the broad wording of paragraph 6.1 of the Practice Direction, because the offer of amends regime did not expressly contemplate it. The effect of this would be to read into paragraph 6.1 an exception, by way of implication, so that it should be understood to mean that an application for a statement may be made where a party wishes to accept an offer of settlement in relation to a claim for libel ‘unless it was an offer of settlement made under sections 2-4 of the Defamation Act 1996.’

Reliance was placed on section 3(4) of the Act, it being submitted that only the offeror may make a statement. There were no circumstances in which the offeree should be permitted to do so. A closely related point was made on the basis that she had lied publicly about her exercise regime. It was said that in applying to make a statement in open court a claimant would be ‘continuing defamation proceedings’ in breach of section 3(2). It was submitted that where any apology made by a defendant was thought to be inadequate, the only means of reflecting that was by a corresponding increase in the level of compensation assessed by the judge. In this case, that could not happen as the sum had been agreed. It was argued that it was not a question of discretion. The court simply had no jurisdiction to entertain the application.

A central question for the court was whether an application to read a statement in open court, following the claimant’s acceptance of the other terms, could be said to represent a ‘continuation’ of the proceedings and thus fall foul of section 3 (2). Mr Justice Eady stated that to take such a step would not be a continuation of the proceedings in any real sense. It might be thought that what Parliament intended to prohibit was the continued prosecution of the action in a substantive way. The question remained, however, whether the application before the court, made immediately after the acceptance, could be said to represent ‘continuation’ in a technical sense.

It seemed to Eady J that the current exercise was part of bringing the proceedings to a conclusion rather than continuing them. The use of a statement in open court had long been seen as part of the settlement process or as an ‘incident’ of it. It would be quite artificial to regard it as a continuation of the proceedings, in those circumstances, since continuation was the antithesis of settlement.

The judge held that the jurisdiction did exist and that there was no good reason to make an exception to the broad wording of paragraph 6.1 of the Practice Direction. Indeed, the Practice Direction came into effect on the same day as the offer of amends regime. It was thus clear that the two sets of provisions were intended to operate in harness. It was important to recognise that what the claimant was seeking to do was not to enforce the offer under the statutory provisions but rather to take a separate and independent step which had long been recognised as incident to the settlement of libel proceedings generally – not linked specifically to the new statutory regime. In the circumstances, Eady J came to the conclusion that the court had the power to order a statement in open court in the context of a settlement under the offer of amends regime.

Article 10 and burden of proof

In Europapress Holding d.o.o. v Croatia (application no 25333/06), the European Court of Human Rights held that the obligation to establish the truth of defamatory allegations of fact was not incompatible with article 10 of the European Convention on Human Rights.

The applicant company, Europapress Holding d.o.o., is the biggest newspaper and magazine publishing company in Croatia. In February 1996 its most prominent weekly publication, the news magazine Globus, published an article reporting on an incident in a government building a week earlier during which the then Minister of Finance and deputy Prime Minister, BS, displeased with an article by the journalist EV, had allegedly told her that she should be killed. The article also suggested that BS had later taken a handgun from a security officer and pointed its barrel at EV, saying that he would kill her, after which he had laughed at his own joke. An account of the alleged incident was subsequently published by two daily newspapers. A criminal complaint and an action for damages lodged by EV against BS were dismissed on the grounds that she was unable to prove that there had been a serious threat to her life.
In May 1996 BŠ brought a civil action for defamation against the applicant company before Zagreb Municipal Court. During the proceedings the court heard several eyewitnesses and in February 1998 partially granted BŠ’s claim. It held that the published information had been untrue and that the author of the article, who had not been present during the incident, had not properly verified its accuracy. In particular, the court found that BŠ had not held the handgun. It ordered the applicant company to pay BŠ 100,000 Croatian kunas (HRK) as compensation for non-pecuniary damage. The judgment was subsequently upheld by the Zagreb County Court, which reduced the amount of damages to be paid to HRK 60,000 (the equivalent of 8,000), and by the Supreme Court. In November 2005 the Constitutional Court dismissed a constitutional complaint lodged by the applicant company, finding no violation of its right to freedom of expression.

The applicant company complained that the domestic courts’ decisions had violated its right to freedom of expression as guaranteed by article 10 of the Convention. In particular it considered that the courts had imposed a standard of proof that was impossible to meet and therefore jeopardised the role of the press in a democratic society.

The court noted that it was not incompatible with article 10 to place on a respondent in defamation proceedings the burden of proving that the defamatory statements were substantially true. The article in Globus had made specific allegations of fact concerning the politician BŠ, which the author of the article had adopted as his own, without reference to a source. The applicant company, which had published them and did not claim that they amounted to value judgments, was therefore liable for their truthfulness.

As to the assessment of evidence, the eyewitnesses’ testimony, the court did not find any reason to depart from the findings of the domestic courts that the information published in the article had been incorrect. Given the seriousness of the allegations, the applicant company had moreover been under a special obligation to verify them. However, the company had not at any point in the proceedings produced evidence that the Globus journalist had, as they claimed, tried to contact BŠ’s office or any of the eyewitnesses. The court therefore agreed with the domestic courts that the applicant company had not properly verified the published information. The reasons for ordering the applicant company to pay damages had hence been relevant and sufficient. The court held unanimously that there had been no violation of article 10.

**Capable of bearing a defamatory meaning**

Ecclestone v Telegraph Media Group Ltd [2009] EWHC 2779 (QB), November 6, 2009, concerned an application by the defendant for a ruling pursuant to CPR part 53, Practice Direction paragraph 4.1(2) that the words complained of were not capable of being defamatory of the claimant. The claimant sued in respect of an item published in the ‘Mandrake’ column of the Daily Telegraph. It said, *inter alia*, as follows:

‘Sir Paul McCartney’s call for “meat-free Mondays” hasn’t impressed Petra Ecclestone, left, the daughter of Bernie Ecclestone, the Formula One racing boss. “I am not a vegetarian and I don’t have much time for people like the McCartneys and Annie Lennox”, she told Mandrake at the 10th Anniversary party of Asia de Cuba, the West End restaurant.’

Mrs Justice Sharp was content to adopt the threshold test suggested by the claimant, namely, whether the words were capable of lowering the claimant’s standing in the eyes of the public. It was accepted that the threshold for the exclusion of meaning was a high one and it was obviously important that a judge should not usurp the proper function of the jury; but on the other hand, if he or she was of the view that the words were simply not capable of being defamatory of the claimant and the claimant therefore did not have a viable cause of action in defamation, then it was his or her duty to say so.

In the real world, Mrs Justice Sharp did not think most readers would have done any more than read the item quickly (it was not an academic article, or even a serious and considered article in the same newspaper). But even if read with care she simply did not think it was capable of lowering the claimant in the estimation of right thinking members of society generally. It might be that a sector of the public (ie those who disapproved of the use of leather or eating animal products) could think the less of the claimant for taking the opposite stance, and might even do so because of what she was reported to have said about the McCartneys and Annie Lennox. But the test was not whether a sector of the public could think less of the claimant for what she was alleged to have said, but whether ordinary reasonable people in our society as a whole – or ‘the public’ generally – could do so. People held different (and sometimes strong) views on any number of issues including the use of animal products. In a democratic society where freedom of expression was a protected right, people were entitled to hold strong views, and to express them within the limits laid down by the law.

The focus of the complaint in this case was the sentence: ‘I am not a vegetarian and I don’t have much time for people like the McCartneys and Annie Lennox.’ It was the use of those words which gave rise to the complaint and to the characterisation of the claimant’s views as ‘disrespectful’ and ‘dismissive’ in the pleaded meaning. In Mrs Justice Sharp’s view the ordinary reasonable reader would see this sentence in the context in which it was used as nothing more than the expression of a permissible view about an issue and matters on which some people held strong opinions. All that was being said was the claimant was not a vegetarian, and did not have much time for people who were. She was entirely unpersuaded that the ordinary reasonable reader would (or could for this purpose) think that anything other than unremarkable, let alone think the less of the claimant as a result.

Her view was no different, even if the phrase ‘I don’t have much time for...’ connoted an element of dismissiveness or a lack of respect for people who took the opposite view to that said to be held by the claimant, including Sir Paul McCartney and Annie Lennox. It could not seriously be suggested that it was defamatory of someone to say, without more, that they were dismissive or showed a lack of respect to these individuals, however well-respected they may be. There was no obligation on a young person in today’s society to be respectful to people such as Sir Paul McCartney; nor were people likely to think the less of the claimant merely because she expressed herself as not having much time for him because they held different opinions on vegetarianism.

Circumstances could be envisaged where a person might be exposed to ridicule because of what they were reported to have said; or where a complaint might arise because someone’s reported views did not coincide with what they had said or done earlier (giving rise to an innuendo of hypocrisy). But this case did not fall into either such category.

There might also be circumstances where the views attributed to...
a person were such that a claim for defamation might be viable (if a person was said to have expressed support for the conduct of a notorious child abuser, and child killer, to take an extreme example). Equally, a claim for defamation might arise where a claimant was alleged to have expressed views about people with whom he or she disagreed in such violent, excessive or abusive language that ordinary reasonable members of society might think the less of him or her for having done so. There might even be cases where a perceived lack of respect for a particular person in certain circumstances might be actionable in defamation. It seemed, however, that if the opinion expressed was an acceptable one there must be significant latitude given as to the manner in which it was expressed before right-thinking members of society would think the less of the person for expressing either their views, or their opinion of someone with whom they disagreed.

No injunction when no threat to publish

In Martin v Channel Four Television Corporation & Ors [2009] EWHC 2788 (QB), November 6, 2009, the applicant sought an injunction to restrain the respondents from broadcasting or using in any way a film called ‘The finishing line’, which was compiled after extensive filming at his home.

One of the unusual features of this case was that no proceedings had been issued. This was despite the fact that the matter had been before the court, undertakings accepted and the matter referred to a jury list judge. The proceedings and an application should have been issued. A judge would not ordinarily adjourn an ex parte application for two to three months without requiring the respondents to be properly served.

The respondents resisted the application on a number of additional grounds. In particular, they had no plans currently to broadcast the film, as had been made clear to the applicant’s advisers. Accordingly, there was no threat or reasonable apprehension that any unlawful conduct was about to take place and thus no ground for granting an interim injunction, whether as a matter of urgency or at all. They had agreed that, if the situation changed for any reason, the applicant would be given reasonable notice and thus an opportunity to obtain an injunction at that stage should it prove necessary to do so.

Furthermore, the respondents had offered to edit the passages in the film to which the applicant took objection and to show the final results to him and/or his advisers for their comments. The third respondent, Mr Wagner, had spent several weeks filming the applicant carrying on his day to day life. The reason for his interest was that the applicant had in 1996 been the victim of a racist attack in Germany, as a result of which he was rendered tetraplegic. Subsequently, he had become well known in certain circles in the context of promoting his charity, the primary object of which was to discourage racism among young people in Germany. The filming took place with the applicant’s full consent. It was now denied that consent was given either expressly or by implication. It was alleged on the applicant’s behalf that there was an oral contract between him and the respondents. A primary contention of the applicant was that he was to be given effectively editorial control over the content of the film. He certainly contended that he would be entitled to veto any of the content to which he took objection.

The third respondent denied that editorial control was ever ceded to the applicant. In Mr Justice Eady’s experience, any such concession would be so fundamentally contrary to the practices of journalists and documentary makers that it would seem to be quite implausible. On the other hand, there were two witnesses who had provided statements to the effect that such an agreement was entered into. That was an issue, therefore, which could not at this stage be resolved.

There was no dispute that the applicant did not sign one of the standard written forms of consent that were regularly used for contributors to documentary programmes. Nor had any film been produced to evidence the applicant’s giving consent orally (as sometimes happened in accordance with published guidelines). The respondents’ case was put on the footing that the applicant’s consent was signified by his conduct and willing participation, over a considerable period of time, in the filming process. Whether or not that consent was conditional upon certain requirements as to control or editing of the final version was a matter that could not be determined on the basis of written evidence alone.

It had been made clear to the applicant’s advisers that the film was being taken out of the schedule and that reasonable notice would be given of any change of plan.

Eady J held that if the applicant were able to present a case based on breach of contract and/or infringement of privacy, then there might well be a case for an interim injunction to ‘hold the ring’ while the factual dispute was resolved. He would not be able to form a view as to the applicant’s ‘likelihood’ of success for the purposes of section 12 of the Human Rights Act. Nevertheless, this would fall within one of the exceptions to that test identified by Lord Nicholls in Cream Holdings Ltd v Banerjee [2005] 1 AC 253 (at [22]). That was to say, a temporary injunction could be granted while the court took time to establish the facts.

None of that arose, however, because (a) there was no justification for granting an injunction since there was no threat or current intention to publish and (b) there would certainly be no reason to grant such an injunction without the commencement of proceedings.

Scottish legal aid for defamation not insurmountable standard

In DW v The Scottish Ministers [2009] CSOH 151, the petitioner sought a judicial review of a decision of the Scottish Ministers to issue two Directions relative to legal aid for defamation proceedings. Lord Whealey considered inter alia whether the test for grant of legal aid in defamation proceedings was so draconian as to be ultra vires.

In 2001 the petitioner approached his local National Health Service trust to obtain a form of fertility treatment. Following their normal practice, the trust made inquiries of Edinburgh City Council’s Social Work Department (in whose area the petitioner had formerly lived) about his background. The council responded to the trust, and also replied to the petitioner on September 30, 2004, to the effect that in the social work file kept by the council there was noted an allegation that the petitioner had been in prison for murder. The immediate consequence of this was that the trust told the petitioner that treatment would not be offered to him and his partner. Subsequently, the council indicated to the trust that despite a most extensive investigation, it had not
been possible to confirm what had been said about the petitioner noted in their files, and concluded that the allegations should be regarded as unfounded. The offer of fertility treatment was not renewed.

The petitioner received emergency legal aid from the Scottish Legal Aid Board (SLB) for the limited purpose of raising his action against Edinburgh City Council. This was in accordance with the board’s normal practice and allowed the petitioner to draft and lodge a summons in court. The action for damages raised by the petitioner was based on negligence, and also on an alleged violation of his rights under articles 6(1), 7(1) and 8(1), (3) and (4) of the European Convention on Human Rights, as a result of the council’s infringement of those rights by giving false information to the trust. The damages claimed were first for solatium (wounded feelings) and secondly for the cost of the private fertility treatment for which the petitioner and his partner had paid. When the petitioner applied for full legal aid, which he required to prosecute his claim, this was refused by the SLB.

The reason for the SLB’s refusal of legal aid was that his claim for damages, while in part based on negligence and violations of human rights, was essentially one of defamation. Formerly, actions for defamation had been excluded from the categories of action for which the board could offer financial assistance. However, legal aid became available for defamation and verbal injury actions in certain circumstances by virtue of section 71(3)(a) of the Legal Profession and Legal Aid (Scotland) Act 2007. This section introduced the possibility that legal aid might be offered in defamation and verbal injury actions in a somewhat circuitous way.

Section 14 of the Legal Aid (Scotland) Act 1986 provided that subject to section 15, civil legal aid shall be available to a person if, on an application to the board:

(a) the Board is satisfied he has a probabilis causa litigandi; and

(b) it appears to the Board that it is reasonable in the particular circumstances of the case that he should receive legal aid.

In making civil legal aid available to a person in proceedings which are wholly or partly concerned with defamation or verbal injury, the SLB must be satisfied, in addition to the requirements of section 14(1) and 15 of the Act being met, that

(a) (i) there is significant wider public interest in the resolution of the case and funded representation will contribute to it; or

(ii) the case is of overwhelming importance to the person; and

(b) there is something exceptional about the person or the case such that without public funding for representation it would be practically impossible for the person to bring or defend the proceedings and the lack of public funding would lead to obvious unfairness in the proceedings.

(2) In determining whether for the purposes of paragraph 3(1)
(b) there is something exceptional about the person or the case the Board must be satisfied that a degree of exceptionality is the same as, or is approximately the same as, the facts found in the case of Steel and Morris v United Kingdom.

This Direction was revoked and replaced by the Civil Legal Aid for Defamation or Verbal Injury Proceedings (Scotland) Direction 2008, which was in essence in exactly the same terms as the 2007 Direction, but made provision for cross border disputes.

The SLB refused legal aid to the petitioner in terms of their decision letter dated February 27, 2008 because they considered that it was unreasonable to grant legal aid in the circumstances, and that in the petitioner’s case the conditions of the Directions had not been met. In addition the Board added that it was ‘not reasonable to make civil legal aid available in view of the absence of support for losses allegedly sustained by the applicant (the petitioner), in particular the absence of any medical report.’

The petitioner argued, inter alia, that he was not seeking a remedy in damages or interdict, but an order against the Scottish Ministers on the ground that these Directions, with which the SLB had to comply, effectively withdrew the right to legal aid from those persons who wished to raise an action of defamation, a right which had been given in the statute.

The terms of the Directions were such that there could be no limited class of person who could realistically be envisaged as qualifying for legal aid. By imposing such draconian limits on who might thus qualify, all applicants for assistance in defamation or verbal injury cases were affected. As the Sheriff Principal of Lothian and Borders said in the appeal against the refusal of legal aid, the requirements imposed upon persons such as the petitioner left them with an insurmountable obstacle.

This defamation action could not be regarded as simple. Issues involving the provision of false information, data protection, and freedom of information were all complex, and litigants could not be expected to cope without assistance.

In terms of the Direction of 2007, section 3(1)(a) and the interpretation of section 2 of the 2007 Direction required a wider public interest to be demonstrated before legal aid could be granted, but an action of defamation could not in normal circumstances realistically involve such a wider public interest and accordingly the Directions had to be seen as irrational.

Similarly, in terms of section 3(ii), the question of there being an issue of overwhelming importance to a person was hardly likely to arise in an action of defamation or verbal injury. All these considerations pointed to the irrationality of the Directions and thus suggested that they were ultra vires.

In addition, regard had to be had to section 3(b), which described the degree of exceptionality which would be required; in terms of section 3(2) this was to be the kind that was found in Steel and Morris v UK. The reference to this case was not to be regarded as an issue of principle, but as an indicator of the degree of exceptionality to be examined against the facts of the case in question. In these circumstances the respondents had produced Directions which effectively excluded legal aid from defamation and verbal injury litigants. The question here was whether any litigant could ever satisfy the SLB in terms of the Directions that he or she could fall within the guidelines provided.

Lord Wheatley held that in order to have the Directions of 2007 and 2008 set aside on the grounds that they were ultra vires, the petitioner would have to show that the Directions were so irrational, and involved such a fundamental violation of his human rights, that they should be reduced. In this he had not succeeded. The respondent’s position required the petitioner to argue that the terms of the Directions were such that there could be no class of
litigant who could realistically be envisaged as qualifying for legal aid; that in effect the Directions effectively withdrew the right to legal aid granted by section 71 as amended. Lord Wheatley was not persuaded that the petitioner had demonstrated that the Directions were so phrased that it was impossible for anyone or any class of litigant to obtain legal aid. It was true the Directions specifically referred to the case of Steel and Morris as a guideline case and that the case was exceptional in its circumstances. All that meant however was that the Scottish Ministers intended by these various legislative acts to make legal aid for defamation actions available only in truly exceptional cases. It also meant, presumably, that the Scottish Ministers intended, as a matter of policy, that litigants in defamation actions were expected to proceed without the assistance of legal aid. That was a decision which Ministers were entitled to take. The standard that had to be reached in this respect, if legal aid was to be granted, might be almost insurmountable, but both from the content of the various legislative provisions and the manner in which they were introduced it was clear that was nonetheless what the legislature intended. But that was not quite the same thing as saying that the granting of legal aid for such claims had become impossible.

Lord Wheatley could not therefore hold that the Directions were irrational and for that reason ultra vires. Nor was this a truly exceptional case, involving an important and discrete question of public law. There were not a number of other cases depending on the outcome. The argument here was about a set of Directions which intended to make the granting of legal aid difficult, but not impossible; it was entirely possible to imagine another case which would involve the same kind of complex issues found in Steel and Morris v UK, although such a case may not be likely to happen with any great frequency. This was not therefore a point of statutory construction, or a matter of universal concern arising out of an issue of public law. Accordingly, there was not a live issue in this case, or exceptional circumstances justifying the court’s intervention. Nor were the Directions so irrational that they should be regarded as ultra vires.

Press Complaints Adjudications

Intrusion

Mrs Hazel Cattermole complained to the PCC that the Bristol Evening Post had intruded into her family’s grief in the way it obtained and published information about the death of her son Mark. The complaint, under clause 5 (Intrusion into grief or shock) related to the behaviour of a photographer and to an article headlined ‘Farewell to our darling son’, published on February 26, 2009.

The complainant’s son had taken his own life. On the day of the funeral, a photographer seen hiding in bushes outside the crematorium was asked to leave by the undertaker, on the instructions of the family. The published article was accompanied by photographs of the mourners, taken by the photographer, outside the crematorium. It also included details taken from the order of service and from messages left on flowers outside the crematorium, which the complainant found distressing.

The newspaper said that cremations were public events, and that the photographer had behaved in a sensitive manner. Out of respect, he had decided to remain between the main gate and the chapel, and was shielded from mourners by a hedge. He was not ‘hiding’ in the bushes. Once the undertaker signalled that he should stop taking pictures, the photographer had immediately left. The journalist had not attended the funeral itself, but had picked up an order of service at its conclusion to take down details. She had waited until mourners had left to note the messages on flowers.

The newspaper was not aware of the family’s wish that no pictures should be published. Following the complaint, it was willing to publish an apology to the family for causing them distress.

In upholding the complaint, the Commission stated that newspapers had an important role to play in the reporting of tragic events, which the Commission did not wish unduly to restrict. For instance, some funerals were public celebrations of a person’s life, at which the presence of reporters was welcome. However, given the age of the complainant’s son – and the manner in which he died – the need for restraint and sensitivity on the part of the press was great, as this would inevitably have been a time of intense grief and shock for the boy’s family.

In this context, it was incumbent on the newspaper to demonstrate that it had paid appropriate regard to the feelings of the family. It was not able to do so. In the Commission’s view, the newspaper should have taken steps to establish the parents’ wishes before sending a photographer and a journalist to the funeral. Once the photographer had been warned away from the funeral, it should have considered the likelihood that the family would object to the publication of his photographs.

The newspaper’s behaviour was not appropriate in the context of this untimely and tragic death. Parents grieving for the loss of their child should not have to be concerned about the behaviour of journalists, or the likelihood that details of the funeral would be covered without their consent.

Privacy

Patricia Hewitt MP complained to the PCC that an article published in The Sun on September 21, 2009 headlined ‘Hewitt son in coke bust’ intruded into her son’s privacy in breach of clause 3 (Privacy) and unnecessarily referred to her and her husband in breach of clause 9 (Reporting of crime).

The article reported that the complainant’s son, Nicholas Birtles, had been charged with possession of cocaine.

Ms Hewitt said that while her son had committed a criminal offence and behaved very foolishly, publishing the story on the front page was disproportionate and had only happened because of the identity of his parents. This was unfair on Nicholas, who was a private individual entitled to the same treatment – from the media as well as from the criminal justice system – as any other young man. She and her husband had never talked publicly about their children, specifically to avoid unwanted attention on them.

The newspaper argued that criminal charges were not private: any local newspaper was entitled to report on them, and this principle extended to the national press as well. In this case, that Ms Hewitt was a former Health Secretary and her husband a judge who had spoken about the problem of drugs in his neighbourhood, naturally made them both relevant to the story. The newspaper happily accepted that their positions in public life also accounted for the prominent publication of the story. But, given that the information was not private – and that the complainant and her husband were genuinely relevant to the story – the location of the story in the paper was a matter for the editor to decide rather than something that fell under the Code of Practice.
Ms Hewitt said that she had not given particular prominence to the issue of drugs when she was Health Secretary, and said that her husband’s comments related to drug dealing (about which he had written, confidentially, to his local NHS trust), for which her son was not convicted. In any case, she suspected that even if she and her husband had never publicly discussed drugs the story would have been published on the front page. Furthermore, given that government had a policy on almost any issue, the newspaper’s argument meant that any criminal act involving the child of a current or former minister was fair game. She argued that there was growing concern among people in public life about press intrusion, because while people like her and her husband inevitably had to accept public scrutiny, it was grossly unfair that their children should suffer the humiliation of national press coverage.

In not upholding the complaint, the Commission held that there were three particular features of this case that made it difficult to conclude that the Code had been breached.

First, Nicholas Birtles was an adult, not a child (in the sense of the Code) who would be entitled to greater protection for their privacy.

Second, he had committed a criminal offence, which was not something that was regarded as a private matter. Indeed, it was in the interests of society as a whole that the administration of criminal justice was as transparent as possible. The press was entitled to report such proceedings, and naming him in connection with the charge was not itself an intrusion into privacy.

Third, the Commission was satisfied that Ms Hewitt and her husband were genuinely relevant to the story given their current and previous roles and comments. The arrest happened in the neighbourhood where they lived together with Nicholas (whose address given to the police would be that of his parents). Ms Hewitt’s husband, who was a member of the judiciary, had contacted his NHS Trust about drug problems in the area. Ms Hewitt herself, as a former Health Secretary, had played a public role in drugs policy. These facts made them genuinely relevant to the story.

The Commission noted Ms Hewitt’s contention that the story was published with disproportionate prominence. But given that the story itself did not breach the Code, the question of where to publish it in the paper was a matter for the editor to decide. The Code contains no rules that allow the PCC to pronounce on such matters.
Employment Covenants and Confidential Information Law, Practice and Technique

- Kate Brearley and Selwyn Bloch QC
- Tottel Publishing, 2009
- Third edition
- ISBN 978 1 845 92041 8
- £134.63 (hb)

The aim of the third edition of the definitive text on employment covenants and confidential information is to examine the conflicts of interest between the employer and his employees when an employee seeks to compete with the employer. There have been many changes in the 10 years since the publication of the second edition and the authors offer a comprehensive and timely review of all aspects of the law, practice and technique on restrictive covenants and confidential information.

Amendments and revision have been made to many of the topics included in the previous edition. Developments are highlighted in areas such as garden leave in relation to the ‘right to work,’ and in springboard injunctions. New chapters on fiduciary duties, database rights, international elements and team moves are introduced, reflecting the reality of an increasingly competitive and technology driven global marketplace.

Brearley and Bloch open by setting the scene outlining their aims and a synopsis of areas covered. They move on to explore subjects such as the implied duty of fidelity which is approached by an exploration of authorities on preparation to compete, especially in relation to team moves. Moving on to fiduciary duties, the two-stage Fishel test for fiduciary obligations is explored in detail and followed by a useful analysis of both pre and post-Fishel authorities.

The thorny question of the effect of an employer’s repuditory breach on discharging an employee’s duty of confidence is addressed in the section on termination of employment. Legitimate protection for the ex-employer is examined in the context of implied duties and the reasonableness of express covenants. Of particular interest is the discussion of current trends towards the enforcement of restrictive covenants; the authors’ view is that we are in an era which gives precedence to freedom of contract over freedom of competition – possibly judicial rejection of the traditional view of disparity of bargaining power between the parties. The authors provide evidence for this in the analysis of authorities, for example the use of severance of excessive parts of covenants leaving a protective ‘rump’ for the employer.

In the current economic downturn the section on the introduction and/or variation of restrictive covenants is particularly pertinent, and the effect of a TUPE transfer on these matters is considered alongside the implications of dismissing an employee who refuses to agree to a TUPE-related introduction or variation. The appendix to this section is invaluable for focusing the mind of an employer or legal advisor in making the decision to introduce new covenants or vary existing ones.

When the previous edition was published, the Woolf reforms were very recent. The sections on general and specific interim remedies and on final remedies give up to date coverage of the position under the Civil Procedure Rules. There is consideration of whether the judicial approach regarding discretion in relation to interim injunctions under American Cyanide v Ethicon has been altered by the overiding objective. The section on preliminary considerations regarding remedies includes the new general Practice Direction on Pre-action Conduct and its impact on this area.

This edition contains a useful new section on database rights: as the authors point out, infringement of these rights may be an additional or alternative claim to that of breach of confidence. This is a complex area, particularly since the decision in William Hill 2005 but the availability of flagrancy damages may be attractive.

The new section on international elements reflects the issues arising from an increasingly global perspective to this area of law and practice. Jurisdictional issues, for example those in Duarte v Black & Decker present particular tactical and procedural issues for litigants and the experience and expertise of the authors is particularly apparent in this section.

Many of the chapters have a practical basis, not just useful to legal advisors but also to employers and human resources personnel. Checklists, tables, sample clauses and appendices are employed to assist the non-lawyer and those lawyers new to this area. There are exemplary precedents throughout with considered explanations of the reasons for choosing that precedent rather than others commonly used. The authors deliver sound, commercial advice on practical steps to protect the employer’s interests, discussing ways to ensure employees are motivated and rewarded and how an employer can maximise the detection of competitive activities. Issues are addressed in an employer-friendly manner and it is good to see an evaluation of mediation in relation to discovery of competitive activity and the matters arising from this method of dispute resolution. The repeal of the statutory disciplinary procedures is discussed in relation to discovery of such activity but the authors are labouring under the perennial problem inherent in such a fast-moving area of law in that the new ACAS Code of Practice has not yet been tested through the courts.

The new section on team moves is to be welcomed. There are additional legal and commercial considerations associated with team moves, as compared with individual moves, and this section addresses those considerations. Early detection strategies, team strategies and possible responses by an ex-employer are discussed. Team moves are examined from all perspectives, including that of the original employer, the team, the ‘poaching’ employer and a financial backer. The possible use of the latest TUPE Regulations add an interesting dimension to team moves, particularly in the context of service provision change.

Possibly the target market for this work is somewhat ambitious. It is stated that the book is aimed at HR professionals and company directors, as well as employment
Global Intellectual Property Law

Graham Dutfield & Uma Suthersanen
Edward Elgar, Cheltenham, 2008
ISBN 978 1 84376 942 2
389pp
£85 (hb), £35 (pb)

It is now trite to observe that with the advent of the internet and the ease of digital copying the current global intellectual property regime faces a crisis – but not for the first time. It is worth remembering that many of the observations and comments being made now were being made with the advent of the Xerox machine and easy photocopying, and again with the introduction of the video machine.

Whatever the state of the IP regime – whether it is allegedly too strict, too expansive, too narrow, or too ineffectively enforced – publishing in the area is flourishing, with a positive torrent of books about the state of IP rights and the global system flowing from the presses. Accordingly it was with rather a heavy heart that your reviewer opened Global Intellectual Property Law, but a pleasant experience awaited – this is an excellent work. This should have come as no surprise, as Graham Dutfield, Professor of International Governance at Leeds University School of Law, and Uma Suthersanen, Reader in Intellectual Property Law and Policy at the School of Law, Queen Mary, University of London, are two of the most perceptive writers on intellectual property in the UK today. The book is based on the results of teaching in and research for the University of London’s LLM programme on the global policy and economics of intellectual property law. It is targeted primarily at postgraduate students, but in my view could usefully be read by undergraduates and indeed anyone with an interest in IP who is trying to cut through the cut and thrust of propaganda emanating from the various pressure groups.

The work is divided into three parts: Part I, ‘The Status Quo And Its Origins’; Part II, ‘Principles Of Intellectual Property Law’; and Part III, ‘Themes and Threads.’ It is very well-referenced, with end of chapter footnotes. The work seeks to examine the process of the globalization of intellectual property law, distinguishing between what the authors describe as ‘localised globalism’ and ‘globalised localism’. The former occurs when a local phenomenon is successfully globalised – eg the English language, Coca Cola, American copyright law etc – and the latter when local conditions change and adapt to international and transnational influences – eg the domestic implementation of the WTO GATT/TRIP’s agreement.

The authors adopt a questioning and sceptical attitude to the status quo, observing that ‘reality defies lazy platitudes’ (at p 6). The work avoids becoming sucked into detailed analysis of any specific law or case law; its approach is of sufficient generality to prevent the reader from failing to see the wood for the trees, but the work is not simplistic – far from it. The authors point out that there is little empirical evidence to support some of the more sweeping demands for ever wider and tighter intellectual property laws: ‘As to the notion that achieving national prosperity and international competitiveness requires countries to make available high US or European style standards of intellectual property protection and enforcement, there is very little evidence that this is the case’ (at p 8). It is also observed by the authors that there is much more creativity in the developing world than we imagine, but the institutions to help convert that knowledge and creativity into wealth are seriously lacking in the sector.

The book reiterates the often forgotten fact that many developed countries were ‘knowledge pirates’ before being converted to the cause of high level protection (eg the USA and Japan). Equally, the issue is raised that ‘a case can be made for arguing that we in the developed world are not becoming knowledge-based economies as quickly as we are becoming knowledge-protected economies, or even – and this is a bit more worrying – knowledge-over-protected economies, in which dominant industries maintain their market power by tying up their knowledge in complex bundles of legal rights and instruments’ (at pp 8-9).

From a question-raising first part the reader is guided through the main intellectual property rights such as copyright, patents and trade secrets, trade marks and miscellaneous, looking at various aspects such as qualification for them, ownership, etc. A key point here is that the discussion is kept at a broad framework level so the reader does not get bogged down in the particulars of this or that national, regional, or international provision. The reader is then lead into a discussion of the some of the most contentious current issues such as the relationship between international human rights and intellectual property, IP and education, biology, life and health, traditional knowledge, and information technologies and the internet.

The writing is very clear and lucid and avoids some of the almost evangelical rhetoric that informs some overview works of this type. The book is balanced, and the pros and cons of various rights are explored. It is a thought-provoking work, and the clarity of argument rises above the swirl of often intemperate special pleading by one group or another. In short, this is a book that repays reading before a student plunges into the detail of a specific regime and – as can be the case with some IP teaching – it is taken for granted that IP is a good thing. It is a work to provoke a questioning approach – perhaps Lord Mandelson ought to read it before he decides on any new legislation to implement the ‘Digital Britain Agenda’.

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