Copyright law and online journalism: a South African perspective on fair use and reasonable media practice

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The application of exceptions to copyright infringement in online news articles has become contentious with the widespread practice of aggregation. The specific concern is whether reproducing or adapting news articles that are published on competitors' websites without permission falls within the scope of the exceptions to copyright infringement in respect of news articles or, alternatively, such conduct is protected by fair use.

This paper provides a South African perspective on the above concern by comparing the USA case of Meltwater¹ with the South African case of Moneyweb,² which has attempted to provide clarity on copyright in the context of online journalism. The paper first analyses the complexities of the rapid rise of online news, which raise questions such as whether hyperlinking is sufficient attribution and the difference between 'scraping' and aggregation, as well as the effects of these practices on competing media. It then considers whether the doctrine of fair use, which should arguably be flexible enough to adapt to the changing obligations in the context of new technologies,³ is capable of providing clear guidance on reasonable online media practice beyond South Africa. The central argument is that the doctrine of fair use should foster online innovation and the sharing of public information while ensuring respect of copyright.

Keywords: aggregation, copyright infringement, fair dealing, fair use, journalism, media, South Africa, USA

1 INTRODUCTION

The nature of news in the digital media is accurately captured by Viner who argues that 'digital news is constantly updated, improved upon, changed, moved, developed, an ongoing conversation and collaboration. It is living, evolving, limitless [and] relentless'.⁴ The description illustrates the complex nature of rights in such news in terms of copyright

1. *Associated Press v Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537, 543 (S.D.N.Y 2013).

2. *Moneyweb (Pty) Ltd v Media24 (Pty) Ltd and Fadia Sallie*, 2016 (4) SA 591.

3. S Katyal, P Aiken, L Quilter, DO Carson, JG Palfrey and HC Hansen, 'Fair Use: Its Application, Limitations and Future' (2007) 17(4) *Fordham Intellectual Property, Media and Entertainment Law Journal* 1017–82; RJ Schonwald, '*Associated Press v Meltwater US Holdings, Inc.*: Fair Use, a Changing News Industry, and the Influence of Judicial Discretion and Custom' (2014) 29(4) *Berkeley Technology Law Journal* 799–834.

4. K Viner, 'The Rise of the Reader: Journalism in the Age of the Open Web', the AN Smith lecture in Melbourne (2013) <<http://www.theguardian.com/commentisfree/2013/oct/09/the-rise-of-the-reader-katharine-viner-an-smith-lecture>> accessed 23 August 2015.

law. If the creation of such news is indeed an ongoing conversation and collaboration, what kind of rights do online newspaper companies have in the conversation or collaboration and what type of claims can they have against their competitors such as aggregators? These questions are compounded by the nature of digital content, which, as Samuelson correctly predicted even before the digital media became a challenge, is easy to replicate and transmit.⁵

Current literature has focused on the apparent competition between online newspaper companies and aggregators who compile news items from the former's websites, thus leading to a decrease in the circulations and revenue of online newspaper companies.⁶ The main concern by online newspaper companies is that such activities by the aggregators tend to go beyond the scope of the doctrine of fair use. There are competing interests between these two parties in so far as online news companies argue that aggregators unjustifiably enrich themselves by reaping where they have not sown, while on the other hand, authors such as Jensen argue that 'the online media are taking a public good – news – and broadening its reach as well as adding context, commentary, and content'.⁷ Besides, he adds, 'these sites can be a model for how to package and present the news'.⁸

For the purposes of placing the issues in perspective, it is important to define the term 'aggregator' and explain distinctions among the existing categories of aggregators. Isbell defines an aggregator as 'a website that takes information from multiple sources and displays it in a single place'.⁹ In the process of aggregating such information, issues such as the possibility of infringing copyright in the original source may arise depending on the type of aggregator. Isbell has identified the following four types of aggregators:¹⁰

- *feed aggregators* such as Yahoo! and Google News that draw material from news websites by providing headlines and a few lines of the news item but create a link to the original source;
- *specialty aggregators* that collect information from various sources on particular topics. They also provide headlines and a few lines of the news item but create a link to the original source;
- *user-curated aggregators*, which function in a similar way as the first two categories but feature user-submitted links and portions of text taken from a variety of websites;
- *blog aggregators* that use third-party content to create a blog about a given topic.

The common attribute of the four types of aggregators is their use of third-party content in diverse ways. This calls for an analysis of the nature of such third parties' rights in the news that the aggregators collect from websites and whether or not such activities are likely to infringe copyright in such news.

Isbell also alludes to a fifth category of aggregators, which collects and reports news articles verbatim, thus falling within the realm of copyright infringement.¹¹ It is this category of aggregators that this paper focuses on in view of the relevant

5. P Samuelson, 'Digital Media and the Changing Face of Intellectual Property Law' (1990) 16 Rutgers Computer and Technology Law Journal 323–40.

6. EA Jensen, 'When News Doesn't Want to be Free: Rethinking "Hot News" to Help Counter Free Riding on Newspaper Content Online' (2010–2011) 60 Emory Law Journal 537–84.

7. Ibid.

8. Jensen (n 6) at 578.

9. K Isbell, 'The Rise of the News Aggregator: Legal Implications and Best Practices' (2010) The Berkman Center for Internet & Society Research Publication Series, No. 2010-10, p. 2.

10. Ibid at 2–5.

11. Isbell (n 9).

facts in the South African *Moneyweb* case. This is not to imply that the other categories may not raise concerns. A survey of Google's news visitors for instance established that 44 per cent of such visitors scanned the headlines on Google without using the links to the originators' sources.¹²

Arguments in favour of aggregators only make sense in relation to blog aggregators and user-curated aggregators, as well as feed and specialty aggregators whose activities fall within the scope of exceptions to copyright infringement, if the requirements that are discussed further in this paper are met. This is the case in so far as blog aggregators collect topics for criticism and commentary; user-curated aggregators encourage commentary and interaction among users, while feed and specialty aggregators facilitate users' searches for information and news on the original sites.¹³ Isbell however correctly observes that there is a lot of legal uncertainty about the activities of news aggregators.¹⁴ The US Federal Trade Commission has also acknowledged that the varied activities of aggregators are very unclear in relation to fair use and courts have applied the doctrine inconsistently.¹⁵ The complexities of these activities are discussed in the next section.

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

The complexities can be gleaned from the issues that the court had to determine in the South African *Moneyweb* case, which commentators predicted would bring much needed clarity to copyright law in the country.¹⁶ This paper critically discusses the issues that have emerged in the case in so far as they relate to copyright law and online journalism.

The South African perspective on fair dealing first needs to be explained by considering different views on whether or not exceptions to copyright infringement are rights or privileges. This is a question that has been considered in jurisdictions such as the USA and is subject to diverse views, which have animated 'the divergence between narrow and broad constructions of fair use'.¹⁷ In South Africa, the exceptions are for specific purposes and subject to certain conditions, hence the specific wording of the fair dealing provision, as explained later. There are however diverse views on the position of the exceptions. Dean argues that these exceptions are based on the assumption that 'an act of infringement has been committed and this act is then excused by the exemption'.¹⁸ Pistorius finds Dean's approach incorrect and maintains that fair dealing

12. R Wauters, 'Report: 44% of Google News Visitors Scan Headlines, Don't Click Through', TECHCRUNCH (19 January 2010) <<http://techcrunch.com/2010/01/19/outsell-google-news/>> accessed 28 September 2015.

13. RG Larson III, 'Online News Aggregators, Copyright and the Hot News Doctrine' (2014) 4 (1/2 Summer/Fall) University of Baltimore Journal of Media Law & Ethics 92–116.

14. Isbell (n 9) at 9.

15. Federal Trade Commission, Staff Discussion Draft: Potential Policy Recommendations to Support the Reinvention of Journalism (2010) <https://www.ftc.gov/sites/default/files/documents/public_events/how-will-journalism-survive-internet-age/new-staff-discussion.pdf> accessed 24 September 2015.

16. H Muhlberg, 'Copyright – Oft Ignored or Misunderstood' (2015) September, Without Prejudice 41–2.

17. Katyal et al. (n 3) at 1019.

18. O Dean, *Handbook of South African Copyright Law* (Juta and company, Cape Town, 2014, service 14), 1–92.

is a right not a defence. Her view is that 'the general purpose of copyright exceptions and limitations is to balance the public's right to access copyright works and the economic rights of copyright owners'.¹⁹

Van der Walt and du Bois agree with Pistorius' view since it 'corresponds exactly with the general purpose of the public domain in the sense that intellectual property rights should be construed and developed in such a way that intellectual property works would still be readily accessible to the public and available for future creative use'.²⁰ The clarity on the South African perspective is further provided in the discussion of the issues that the court dealt with in the *Moneyweb* case.

2.1 Issues in the *Moneyweb* case

The applicant in this case, *Moneyweb*, publishes business, financial and investment news, primarily on the Internet by operating moneyweb.co.za and other digital platforms, as well as in newspapers with whom it has a content supply arrangement.²¹ The respondent, Media24, publishes online magazines and newspapers in South Africa. It is consequently a direct competitor of Moneyweb.²² It owns a number of websites including Fin24, which was at the centre of the application before the court and operates as Fin24.com. The second respondent is the editor of Fin24.

Moneyweb's core business entails the production of 'unique and original content' from its journalists' own original skill, effort and expertise.²³ In instances where it uses syndicated content from other services, it pays licence fees. It is worth noting that the main source of income for Moneyweb is the number of visitors to its website who are attracted to its unique and original content. The number of visitors proportionally determines its revenue from advertising as it does not charge visitors for reading its content.²⁴

Moneyweb's business model is significantly different from Media24's wire-services approach, which entails publishing third-party material or re-purposing it by aggregating contents from websites such as Moneyweb's.²⁵ Consequently, Moneyweb disputed the lawfulness of Media 24's aggregation approach, which entails republishing articles from Moneyweb's website with very minor changes and additions. Moneyweb argued that the republished articles remained substantially the same in terms of form and structure. Media24 did not include any link to direct readers to Moneyweb's site as the original source of the republished articles.²⁶

Moneyweb's claim against Media24 was based on copyright infringement and unlawful competition in respect of seven articles that were copied by the latter. For ease of reference, the article numbers as used by the court in its judgment are retained

19. T Pistorius, 'Copyright Law', in H Klopper, T Pistorius, B Rutherford, LA Tong and P van der Spuy (eds), *Law of Intellectual Property in South Africa* (Lexis-Nexis, Cape Town, 2011), 211.

20. AJ Van der Walt and M du Bois, 'The Importance of the Commons in the Context of Intellectual Property' (2013) 1 Stellenbosch Law Review 47.

21. Moneyweb's founding affidavit, para 5.3.

22. *Moneyweb (Pty) Ltd* (n 2) para 2.

23. Moneyweb's founding affidavit, para 19.1.

24. *Ibid* at para 34.

25. Moneyweb's founding affidavit, para 24.

26. Founding affidavit, para 68.6.

in this discussion, namely Moneyweb's articles one to seven (MW1 to MW7). Article MW1 covered the topic of the annual packages for members of parliament and it was published on 20 July 2012. It was based on a press conference in parliament and notes taken by a freelance contributor who was contracted by Moneyweb. The contributor simply stated in the evidence before the court that the article entailed 'an original work and required [her] independent effort, skill and expertise to write'.²⁷ Article MW2 on an engineering company's (Group five) financial performance was published on 13 August 2012. The contents were drawn from a conference call where the company's chief executive officer addressed journalists after the publication of the company's annual results. It was equally written by a freelance contributor who was contracted by Moneyweb and the adduced evidence was similar to article MW1.²⁸

Article MW3, which was published on 26 August 2012, was based on a media visit at McDonald's Woodmead restaurant where journalists from other media groups were present. It reported on McDonald's plans to launch McKitchen and was written by Moneyweb's employee, who equally stated that the original works required her 'independent effort, skill and expertise to write' without any further elaboration.²⁹ Article MW4 reported on the sale of Hout Bay Castle and was based on a press release and interviews, which a property journalist who was contracted by Moneyweb conducted. The article was published on 14 September 2012. Since the author of this article was deceased by the time the case was filed, Moneyweb submitted more evidence in comparison with articles MW1 to MW3 in a bid to prove originality. Accordingly, the press release as well as the article were submitted in evidence.³⁰

In great contrast with the first four articles, the author of MW5, based the article on transcribed recorded interviews and adduced detailed evidence on how he constructed the article, particularly by extracting the most salient quotes from the transcripts.³¹ The article, which was published on 16 January 2013 reported on Angloplat Company's response to the department of mineral resources' reaction to its proposed restructuring plans.

Moneyweb relied on the above five articles in support of its claim but the reproduction and misuse of its Defencex articles (MW6 and MW7) by Media24 triggered the dispute. The articles were written by Moneyweb's journalist who attended a rally by the promoter of the Defencex scheme, which was suspected of being a Ponzi scheme and generated a lot of public interest as its bank accounts had been frozen by the Cape Town High Court. MW6, which was published on 9 March 2013 was the first original and exclusive article based on the promoter of the Ponzi scheme's address to the audience that the journalist attended. The story generated a lot of visits to Moneyweb's website. The article was allegedly copied by the second respondent and published on Fin24.com on 10 March 2013 without a hyperlink back to the Moneyweb article.³² After receiving complaints from Moneyweb, Fin24 added a hyperlink but maintained that it was entitled to copy the article as it had done, since that constituted acceptable aggregation. It is worth noting that Media24's journalist was unable to attend the audience with the promoter of the Ponzi scheme where Moneyweb's journalist had gathered the original news.

27. *Moneyweb (Pty) Ltd* (n 2) para 18.

28. *Ibid* at para 27.

29. *Moneyweb (Pty) Ltd* (n 2) paras 31 and 32.

30. *Ibid* at paras 36–8.

31. *Moneyweb (Pty) Ltd* (n 2) paras 41–3.

32. Founding affidavit, paras 68 and 69.

MW7 was published on 1 July 2013 and was based on an interview with the promoter of the scheme, which Moneyweb's journalist conducted by posing as a prospective investor.³³

The court had to deal with the following issues:³⁴

- Whether Moneyweb's news articles were original.
- Whether, if Moneyweb was able to prove originality in any of its articles, 'Media24 had reproduced a substantial part of the relevant articles'.
- Whether Media24 was absolved from the alleged liability by virtue of the statutory defences in sections 12(1)(c) and 12(8)(a) of the Copyright Act. Section 12(1)(c) provides that 'copyright shall not be infringed by any fair dealing with a literary or musical work ... for the purpose of reporting current events (i) in a newspaper, magazine or similar periodical; or (ii) by means of broadcasting or in a cinematograph film'. Section 12(8)(a), on the other hand provides that 'no copyright shall subsist in ... news of the day that are mere items of press information'.

With regard to the first issue, Media24 advanced the argument that there is no copyright in the news articles because Moneyweb sourced them from external third parties and Fin24 only sourced a part of its own articles from Moneyweb. It accordingly contested the originality of the articles and substantial copying by Fin24. Media24 also raised fair dealing as a defence. It is important to note that Media24 relied on the public interest in news dissemination and in the ability of a media institution to re-report the core elements of a news story first reported by its competitor as a reason for contesting the eligibility of news articles for copyright protection.³⁵ The issues from the case led to speculations that it is likely to determine the future of news in South Africa.³⁶ The specific issues in the case are discussed below in the context of online journalism.

2.1.1 Copyright in news articles

The issue that most South African media experts find complex is the ownership of news once it is in the public domain and it is in the public's interest that it should be spread as much as possible.³⁷ The complexity arises in view of the wording of section 12(8)(a) of the Copyright Act, which, as mentioned above, exempts 'news of the day that are mere items of press information' from copyright protection. The section was critically analysed in the *Moneyweb* case for the first time in South Africa.³⁸ The court interpreted 'news of the day' to mean 'current news'³⁹ and concluded that not all current news are exempt from copyright protection since the section only applies to 'mere items of press

33. *Moneyweb (Pty) Ltd* (n 2) para 52.

34. *Ibid* at para 6.

35. Media24's answering Affidavit, para 5.2.

36. R Rose, 'Moneyweb vs Media24 Case will Determine the Future of News' (2015) *Rand Mail Daily*, <<http://www.rdm.co.za/business/2015/03/30/moneyweb-vs-media24-case-will-determine-the-future-of-news>> accessed 28 September 2015.

37. A Harber, 'The Elephants are Fighting. The Ants are Nervous' (2013) *The Harbinger* <<http://www.theharbinger.co.za/wordpress/2013/09/19/the-elephants-are-fighting-the-ants-are-nervous/>> accessed 24 September 2015.

38. *Moneyweb (Pty) Ltd* (n 2) paras 57 and 76.

39. *Ibid* at para 63.

information'.⁴⁰ The court clarified that these items include 'all information communicated to the media in material form or subsequently reduced to material form' such as 'press statements and press interviews concerning "news of the day", which journalists, and anyone else, would be free to use, in whole or in part, without restriction and without authorization being required from anyone'.⁴¹ This clarification is useful for appreciating the manner in which the court treated the evidence, which was adduced by Moneyweb in a bid to establish originality in their news articles MW1 to MW7.

The clarity from the *Moneyweb* case confirms views that had previously been expressed by authors such as Shay that, in terms of section 12(8)(a), there can be no exclusive rights in events or factual information.⁴² The provision is in line with international standards as provided for in Article 2(8) of the Berne Convention, which has a similar wording.⁴³ The article is understood, in terms of current literature, as concerning a subject matter that is 'pivotal to press uses because the subject matter it disqualifies is the standard grist of the press mill [such that] to bring news of the day or items of press information within copyright control could seriously hamper press operations and injure the public interest in being informed of newsworthy events'.⁴⁴ Similarly, Article 9.2 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) explicitly states that copyright protection shall extend to expressions and not to ideas.⁴⁵ Consequently, events and factual information belong to the intellectual commons under South African and international law. As the court succinctly put it in the *Moneyweb* case:

[A]nyone who communicates information to the media intends that information to be put in the public domain ... it is certainly in the public interest that the general public be easily aware of the information communicated to the media that is either in the public domain or soon will be.⁴⁶

The publication of news in an original form is however protected under copyright law. The original form, as the court ruled in the *Moneyweb* case, requires the article to 'contain more than "mere items of press information" because the author's contribution will have constituted more than mere copying' such that section 12(8)(a) would not apply.⁴⁷ Rahmatian has graphically described this idea/expression dichotomy as follows: '... the building blocks of a work in question are to be freely available to the future authors while the particular application, order and arrangement of the particular blocks as they form the work and give it a distinctive appearance are to be reserved to the author of that work'.⁴⁸ In *Moneyweb*'s context, news of the day or information are building blocks while any news article that is original has the

40. *Moneyweb (Pty) Ltd* (n 2) para 64.

41. *Ibid* at para 72.

42. RM Shay, 'Exclusive Rights in News and the Application of Fair Dealing' (2014) 26 South African Mercantile Law Journal 588.

43. The Berne Convention for the protection of Literary and Artistic Works (1886).

44. P Goldstein and PB Hugenholtz, *International Copyright: Principles, Law, and Practice* (3rd edn, Oxford University Press, New York 2012), 395.

45. The World Trade Organization, Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) 1994.

46. *Moneyweb (Pty) Ltd* (n 2) para 73.

47. *Ibid* at para 76.

48. A Rahmatian, *Copyright and Creativity: The Making of Property Rights in Creative Works* (Edward Elgar Publishing, Cheltenham, UK and Northampton, MA, USA 2011), 125.

distinctive appearance that is protected by copyright law. Section 21(1)(b) of the Copyright Act, which provides for ownership of copyright in newspaper articles, implies that news articles are protected under the Act. This is the case as long as they meet the requisite requirements that are provided for in section 2 namely that they are works which are original. Besides, the definition of 'literary work' in section 1(1) includes stories and articles 'irrespective of literary quality and in whatever mode or form expressed'.

Although the concept of originality in copyright is well established in the South African jurisprudence, establishing originality in the context of news articles, which may contain items of press information, is not an easy task, as transpired in the *Moneyweb* case. In the case of *Klep Valves (Pty) Ltd v Saunders Value Company Ltd*⁴⁹ the Supreme Court of Appeal, citing Copeling,⁵⁰ indicated that "originality", for the purposes of copyright, refers not to originality of either thought or the expression of thought, but to original skill or labour in execution. All that is required is that the work should emanate from the author himself and not be copied'.

In considering whether Moneyweb's seven articles were original, the court held that 'a court can only be able to determine originality after it has weighed up all relevant considerations and made a value judgment'.⁵¹ Using this approach, the court found that the evidence which Moneyweb adduced to establish originality in four of the seven articles, MW1 to MW4, was insufficient because the nature and extent of the authors' contributions remained unclear since the court had no basis from which to assess the independent effort, skill and expertise of the authors.⁵² Three articles, MW5 to MW7 were found to be original in view of the detailed evidence from which the court was able to discern the nature and extent of the authors' contributions.⁵³

The court's basis of finding article MW6 original however seems contentious because the nature of the evidence that was adduced in this regard was very similar to that in relation to articles MW1 to MW4, in respect of which the court was unable to establish originality. It is interesting to note how the court acknowledged that it was unclear whether or not the journalist who wrote article MW6 took notes or recorded and transcribed the proceedings of the interview, yet it concluded that the article was original based on the structure of the article itself.⁵⁴ The court seems to have taken judicial notice of the originality of this article irrespective of aspects of the evidence, which it acknowledged to be unclear. One then wonders why the court did not consider the structure and other attributes of articles MW1 to MW4 in order to take judicial notice of their originality, thus making the same value judgment, regarding originality, as it did in the case of article MW6.

It is worth noting that the court relied on the established principle for determining originality of derivative works that may contain prior material such as 'mere items of press information' in this case. The principle was stated in *Jacana Education (Pty) Ltd v Frandsen Publishers (Pty) Ltd*,⁵⁵ where the supreme court of appeal held that 'the existence of prior material tends also to limit the scope for originality and to require more exacting proof of its existence than with truly original works'. It thus follows

49. 1987 (2) SA 1 (A).

50. AJC Copeling, *Copyright and the Act of 1978* (Butterworths, Durban 1978) 15.

51. *Moneyweb Ltd* (n 2) para 15.

52. *Ibid* at paras 25, 29, 35 and 39 respectively.

53. *Moneyweb (Pty) Ltd* (n 2), paras, 45, 49–50 and 53 respectively.

54. *Ibid* at para 50.

55. 1998 (2) SA 965 (SCA) at 969E.

that establishing originality in news articles should indeed require more exacting proof, which the judge demanded in the *Moneyweb* case. The concern however relates to the inconsistent manner in which he applied the principle in relation to the different news articles as noted above. The approach used by the judge in this regard could be argued to be a deviation from the established international standard in terms of Article 2(8) of the Berne Convention, which scholars such as Blomqvist have correctly argued underscores the low threshold of originality or individuality for protection.⁵⁶ Consequently, concluding that the court was unable to establish the originality of articles MW1 to MW4 due to the insufficient evidence, while at the same time using similar evidence to establish the originality of article MW6, is contentious. If the low threshold could be applied to article MW6, then it could as well be applied to articles MW1 to MW4.

2.1.2 Protection of original news articles against substantial copying

As noted already, the second issue that the court had to determine in the *Moneyweb* case was whether Media24 had reproduced a substantial part of the relevant articles which were original. Notably, news articles are also protected ‘against misappropriation of information through an action for unlawful competition’,⁵⁷ and it is therefore not surprising that, apart from its claim for copyright infringement, Moneyweb based its claim for unlawful competition at common law as well.⁵⁸ In this regard Moneyweb contended that Fin24 acted unlawfully ‘by making impermissible use of the time, effort, money and skill expended by Moneyweb to produce the articles concerned’.⁵⁹ As discussed further below, the court determined the claim for unlawful competition by focusing on what copyright law permits.⁶⁰ Accordingly, it is logical to consider the protection of news articles under both regimes, with a view to highlighting the fresh perspective which the court provided in determining the issue of substantial copying, alongside originality, and how it relates to claims under the common law of unlawful competition.

The particulars of the common law protection were explained in the United States’ (US) case of *International News Service v The Associated Press*,⁶¹ which has been cited by South African courts in *Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau*⁶² and *Schultz v Butt*⁶³ and was relied on by Moneyweb to support its claim for copyright in its news articles. In the *International News Service* case, the US Supreme Court used a quasi-property approach to protect news material, between two competing media houses,⁶⁴ thereby holding that a competitor’s act of collecting and rewriting the information gathered by the other party without exerting the effort or incurring the expense required by such gathering amounted to unfair competition.⁶⁵

56. Jørgen Blomqvist, *Primer on International Copyright and Related Rights* (Edward Elgar Publishing, Cheltenham, UK and Northampton, MA, USA 2014) 87.

57. Shay (n 42) at 589.

58. *Moneyweb (Pty) Ltd* (n 2), para 132.

59. *Ibid* at para 132.

60. *Moneyweb (Pty) Ltd* (n 2), para 133.

61. *International News Service v The Associated Press* (248 U.S. (1918); 215).

62. *Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 (1) SA 209 (C) 219–20.

63. *Schultz v Butt* 1986 (3) SA 667 (A) 681–3.

64. *International News Service* (n 61) at 236.

65. *Ibid* at 236–40.

The court further emphasized that the principle only applied to fresh news and that the news of current events was regarded as common property.

The statement below, by Justice Pitney, sheds light on what the court meant in the above judgment:

... the view we adopt does not result in giving to [the] complainant the right to monopolize either the gathering or the distribution of the news, or, without complying with the copyright act, to prevent the reproduction of its news articles; but only postpones participation by complainant's competitor in the processes of distribution and reproduction of news that it has not gathered, and only to the extent necessary to prevent that competitor from reaping the fruits of complainant's efforts and expenditure, to the partial exclusion of complainant.⁶⁶

The whole approach, of postponing 'the participation of competitors', as used in the judgment seems rather problematic as it deviates from the idea/expression dichotomy, which is entrenched in copyright law. This dichotomy should be used as the basis of determining the existence of misappropriation of information rather than just focusing on the timing of the competitor's use of the news article.

The validity of the above critique of the US judgment becomes evident if one considers the South African *Moneyweb* case where Fin24 republished the fresh news, only a day after its publication by Moneyweb in article MW6, without complying with the requirements for fair dealing as explained below. It is notable that the US court focused on 'the peculiar value of news ... in the spreading of it while it is fresh'.⁶⁷ Consequently, Larson correctly argues that the court intended to create a narrow remedy that is limited to 'situations where a direct competitor abuses the distribution process to gain an unfair advantage over the original publisher'.⁶⁸ He equally observes⁶⁹ that a quasi-property right on news has not been viewed favourably by scholars who argue that it is a complete departure from the traditional intellectual property principles.⁷⁰

The above departure is evident in the court's clarification that its judgment was an equitable remedy targeting news organisations' conduct with respect to one another without affecting the right of the public to use the news content.⁷¹ The clarification leaves a number of very important copyright law questions unanswered, namely; first, supposing a complainant's news article does not meet the requirements for copyright protection, can this equitable remedy be availed to such an applicant? Secondly, what would be the basis of granting such a remedy if there is no protectable intellectual property right in the first place? These questions can only be answered if the fact/expression dichotomy, as used in copyright law, is applied, as the court correctly did in the *Moneyweb* case by holding that the copyright law requirement of originality is fundamental in determining whether or not there is unlawful competition.⁷² This argument is developed further below.

According news articles a quasi-property right is problematic since, as already explained above, such articles, if they are original, are protected under the Copyright Act. Consequently, they are intellectual property rights. In this regard, the South African Supreme Court of Appeal's pronouncement in *Laugh It Off Promotions*

66. *International News Service* (n 61) at 241.

67. *Ibid* at 235.

68. Larson (n 13) at 104.

69. *Ibid* at 104.

70. C Calvert, K Gutierrez and C Locke, 'All the News That's Fit to Own: Hot News on the Internet & the Commodification of News in Digital Culture' (2009) 10(1) Wake Forest Intellectual Property Law Journal 15–18.

71. *International News Service* (n 61) at 236.

72. *Moneyweb (Pty) Ltd* (n 2), paras 133 and 135.

CC v SA Breweries International (Finance) BV t/a Sabmark International in the context of trademarks is equally instructive in relation to copyright. In this case Harms JA stated that ‘trademarks are property, albeit intangible or incorporeal. The fact that property is intangible does not make it of a lower order. Our law has always recognised incorporeals as a class of things in spite of theoretical objections thereto ...’.⁷³ It thus follows that as long as news articles meet the requisite requirements of the copyright Act, they should be protected as intellectual property rather than applying the misappropriation approach in the manner that the US court did in the *International News Service* case. Vekstein has argued that the approach that the US court used has detrimental consequences for online news sources, and a suitable approach would be to make this extinct equitable remedy a statutory rule against misappropriation of hot news in order to encourage the production of such news.⁷⁴ It is notable that the court’s approach in the *Moneyweb* case provides a fresh perspective, which entails a consideration of what is permissible in copyright law for the purposes of determining if original news articles have been misappropriated at all.⁷⁵

Three other factors that the court considered in *Pollstar v Gigmania Ltd* are; that information was gathered at a cost, that the defendant is free riding on the plaintiff’s efforts, and that the parties are in direct competition.⁷⁶ Jensen argues that the third factor should not be considered because the Internet has since changed the nature of competition such that there is ‘uncertainty over which entities are competitors’.⁷⁷ Practices such as simple linking should not be prohibited because this ‘would severely hamper consumers’ ability to get news on the internet’.⁷⁸ The element of free riding has been described by Carter as an extra element that goes beyond copyright law though it is aimed at ensuring a level of transformation that is required by copyright law.⁷⁹

The above observation by Carter supports the argument in favour of using the fact/expression dichotomy, together with the misappropriation approach. This combined approach would be useful because in a claim for copyright infringement, apart from establishing the eligibility of news articles for copyright protection, it must be established that the alleged infringing news articles have objective similarities with the original article and that there is a causal connection between the two works. This test was laid down in the South African case of *Galago Publishers (Pty) Ltd v Erasmus*.⁸⁰ Shay has correctly argued that, since copyright law does not protect facts or information, ‘journalists can prevent their expression being copied only if this expression goes beyond plainly stating factual information’.⁸¹ This essentially means that the form in which the news is reported must be original such that the objective similarities, between

73. *Laugh It Off Promotions CC v SA Breweries International (Finance) BV t/a Sabmark International* 2005 (2) SA 46 (SCA) para 10.

74. EJ Vekstein, ‘A Hot Mess: How Hot-News Misappropriation Bypassed Copyright Law in *Barclays v TheFlyontheWall.com* and Gave Originators a Propriety Right in Facts’ (2012) 61(1) *Catholic University Law Review* 297–323; see also *Erie R.R. Co. v Tompkins* (1938) 304 U.S. 64, which overruled the previous precedents.

75. *Moneyweb (Pty) Ltd* (n 2) paras 133 and 135.

76. *Pollstar v Gigmania Ltd*, 170 F. Supp. 2d 974, 979–80 (E.D. Cal. 2000).

77. Jensen (n 6) at 572.

78. *Ibid* at 574.

79. LE Carter, ‘Copyright Ownership of Online News: Cultivating a Transformation Ethos in America’s Emerging Statutory Attribution Right’ (2011) 16(2) *Communication Law and Policy* 190.

80. *Galago Publishers (Pty) Ltd v Erasmus* 1989 (1) SA 276 (A).

81. Shay (n 42) at 591.

the infringing and original news articles, in expressing the facts or information would be evident.

The protection of news articles through copyright law is rather controversial and Easton has argued that such protection 'was always unnecessary and probably unwise, even when qualified by the so-called fact/expression dichotomy'.⁸² He accordingly suggests that such articles should rather be protected against misappropriation as well as authorial rights of attribution and integrity.⁸³ This suggestion should be considered in light of the comments that are made in the preceding paragraph regarding the value of the fact/expression dichotomy in protecting news articles against misappropriation. It is worth reiterating here that the dichotomy serves a useful purpose of providing evidence of misappropriation by determining the extent of transformative input by the alleged infringer. In this regard, Carter correctly argues that the dichotomy is particularly important in the context of copyright protection of news.⁸⁴ This is the case because in copyright law, 'all works are both reliant on previous works and serve as the raw material for the next ones'.⁸⁵

The value of the fact/expression dichotomy can be appreciated by looking at the manner in which the court dealt with the issue of substantial copying in the *Moneyweb* case.⁸⁶ In considering whether Fin24 had reproduced substantial parts of articles MW5 to MW7, the court applied the test that was laid down in the *Galago Publishers* case⁸⁷ and made a value judgment based on the whole articles despite the respondents' counsel's attempts to convince the court to revisit the issue of the originality of the reproduced parts of the articles.⁸⁸ Using an objective comparison between the articles that had been published by Moneyweb and Fin24 on the same topics, the court found that article MW5 had been copied word for word by Fin24, which also copied the main issues, thereby constituting a substantial reproduction of the original article.⁸⁹

Interestingly, the court found that Fin24 had not reproduced a substantial part of article MW6, which was an undercover report that captured the atmosphere of the meeting with the Ponzi scheme's promoter. The court's decision was influenced by the fact that the alleged infringing article contained very little detail of the meeting that was covered by article MW6.⁹⁰ It is worth noting how this decision was not only determined by the court's earlier finding that article MW6 was original. The additional requirement of substantial reproduction in terms of copyright law had to be proved. A similar decision was made by the court in relation to article MW7, in respect of which Fin24's article only focused on one issue that was copied word for word. Consequently, in the court's view, the reproduction was not substantial.⁹¹ These decisions show how inappropriate it is to apply the misappropriation approach in the manner that the US court did in the *International News Service* case without reckoning with the established principles in copyright law.

82. EB Easton, 'Who Owns the "First Rough Draft of History"? Reconsidering Copyright in News' (2004) 27(4) *Columbia Journal of Law & the Arts* 522.

83. *Ibid* at 523.

84. Carter (n 79) at 170.

85. M Birnhack, 'Judicial Snapshots and Fair Use Theory' (2015) 5(3) *Queen Mary Journal of Intellectual Property* 271.

86. *Moneyweb (Pty) Ltd* (n 2) paras 86–99.

87. *Galago Publishers (Pty)* (n 80).

88. *Moneyweb (Pty) Ltd* (n 2) para 85.

89. *Ibid* at para 88.

90. *Moneyweb (Pty) Ltd* (n 2) para 92.

91. *Ibid* at paras 98 and 99.

2.1.3 The doctrine of fair use/dealing

Having disposed of the first two issues relating to originality and substantial reproduction of Moneyweb's articles that were proved to be original, the final issue that the court determined was whether Fin24 could prove that its substantial reproduction of article MW5 could constitute fair dealing.⁹² It is worth noting that the issue of fair dealing had not been dealt with by South African courts prior to the *Moneyweb* case.⁹³

The doctrine is provided for in Article 10(1) of the Berne Convention, which states that:

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

This provision seems to be as wide as the US fair use provision, which contains no determinative statutory factors.⁹⁴

Newby has accordingly argued that it is an equitable doctrine, which is fact specific since Congress intended it to 'remain flexible and fact sensitive so that courts could adapt it to new technology without repeated legislative action'.⁹⁵ The factors to be considered under this doctrine are:⁹⁶

1. the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

It is however important to note that the context in which the four factors have to be applied is contained in the first paragraph of the section, which provides that 'fair use ... including such use by reproduction ... for purposes such as criticism, comment, news reporting, teaching ... scholarship, or research, is not an infringement of copyright'. The context and the four factors should therefore be read together.

The US fair use doctrine is open ended, while the South African equivalent, known as fair dealing is restrictive as it prescribes a list of purposes that fall within the scope of the exemption.⁹⁷ The fair dealing doctrine is provided for in section 12 of South Africa's Copyright Act.⁹⁸ Subsection 1 provides as follows:

1. Copyright shall not be infringed by any fair dealing with a literary or musical work —
 - (a) for the purposes of research or private study by, or the personal or private use of, the person using the work;
 - (b) for the purposes of criticism or review of that work or of another work; or

92. *Moneyweb (Pty) Ltd* (n 2) para 100.

93. *Ibid* at para 103.

94. §107 of the American Copyright Act.

95. GT Newby, 'What's Fair Here Is Not Fair Everywhere: Does the American Fair Use Doctrine Violate International Copyright Law?' (1999) 51(6) *Stanford Law Review* 1636, 1638.

96. 17 U.S.C. § 107.

97. *Shay* (n 42) at 593.

98. Copyright Act No. 78 of 1978 (South Africa).

- (c) for the purpose of reporting current events —
 - (i) in a newspaper, magazine or similar periodical; or
 - (ii) by means of broadcasting or in a cinematograph film:

Provided that, in the case of paragraphs (b) and (c) (i), the source shall be mentioned, as well as the name of the author if it appears on the work.

It is worth noting that South Africa's department of trade and industry published an amendment Bill to the Copyright Act in July 2015 for public comments.⁹⁹ Through the proposed amendment, a new section 12A is to be inserted into the current Act to provide for general exceptions from protection of copyright for fair use. The proposed conceptual change from fair dealing to fair use should be noted and this amounts to very poor drafting since there is no proposed amendment to the current section 12(1), which still refers to the fair dealing. Subsection (5)(a)–(c) and (e) of the new section replicates the four factors in the American Copyright Act as factors that should be considered in determining whether the use of copyright work in any particular case is fair use.

Section 12A(2) equally replicates the American context in which the four factors should be applied. The only significant difference between the proposed amendment and the American provision is that section 12A(5)(d) stipulates further considerations for determining whether the use of the work is fair and proportionate. The additional factors that are mentioned in the proposed amendment essentially exclude use of small portions of the work for cartoon, parody or pastiche from infringement since such uses qualify as fair use. The Bill is still under discussion but it is worth mentioning here since the criticism of the US position in this paper equally applies to the proposed South African amendments, which are essentially attempting to deviate from the current position by ushering in a new regime that embraces the US approach.

In comparing the South African and US fair dealing/use doctrine it should be noted, as Newby clarifies, that the factors are intended to be guidelines for the courts in the US and not confining rules.¹⁰⁰ It is in this regard that this paper draws from the rich American jurisprudence for the purpose of providing an exposition on the South African perspective. In so doing, we are not oblivious of Birnhack's useful caveat that a foreign concept should not 'be detached from its origin and transplanted within a different legal setting, without sufficient attention as to how it should be absorbed within the recipient legal body'.¹⁰¹ It is equally useful to provide conceptual clarity on the scope of fair use and fair dealing doctrines in view of Birnhack's argument that a theoretical framework is useful for providing the context for adjusting foreign concepts to local settings.¹⁰² Fair dealing has been described by Senftleben as a list of statutory exceptions to copyright infringement that depend on particular contexts.¹⁰³ Peltz observes that fair use is much broader, such that jurisdictions that apply fair dealing, such as the United Kingdom (UK), have in the past done fair dealing analysis using factors from the US fair use doctrine but within the confines of statutory fair dealing

99. Department of Trade and Industry, Copyright Amendment Bill 2015. Government Gazette No. 39028, 27 July 2015.

100. Newby (n 95) at 1639.

101. Birnhack (n 85) at 265.

102. Ibid at 265.

103. M Senftleben, *Copyright, Limitations, and the Three-step Test: An Analysis of the Three-step Test in International and EC Copyright Law* (Kluwer Law International, The Hague, New York 2004) 45–50.

exceptions such as news reporting.¹⁰⁴ This observation is relevant for the South African context in view of the fact that its Patents, Designs, Trade marks and Copyright Act¹⁰⁵ adopted the British Copyright Act of 1911 and the second Copyright Act¹⁰⁶ was based on the British Copyright Act of 1956.¹⁰⁷ Consequently, the South African fair dealing doctrine is modelled on the UK legislation and the proposed amendments to the South African Act should be thought through carefully.

In the same manner that the UK has used fair use factors in the analysis of fair dealing, South Africa could benefit from the same approach. Shay argues that the factors are useful for providing clarity in South Africa when it comes to determining what is 'fair' dealing.¹⁰⁸ For example, in online journalism, the character of use can assist courts in determining the extent to which the use is transformative such that the 'unadulterated reproduction of a news article ... would almost never be fair'.¹⁰⁹ In terms of the nature of the copyright work, where there is stronger public interest in the subject matter, this would be a factor that points to fair dealing.¹¹⁰ The substantiality factor is equally useful in so far as fair dealing is a qualitative assessment.¹¹¹ The fourth factor has been interpreted in a rather restrictive manner in the US such that the presence of commercial use by the alleged infringer has been viewed to weigh against fairness.¹¹² Shay is therefore of the view that such an approach would not be compatible with section 12(1)(a) of the South African Copyright Act, which stipulates that use for the purposes of research or private study does not amount to infringement.¹¹³

Since the *Moneyweb* case considered the issue of fair dealing for the first time, both parties relied on decisions and writings from foreign jurisdictions. The court cautiously focused on English authorities for guidance due to historical reasons.¹¹⁴ Accordingly, although the court relied on the test for fair dealing that Lord Phillips approved in *Ashdown v Telegraph Group Ltd*,¹¹⁵ it chose to interpret section 12(1)(a) in a manner that is consistent with the South African Constitution since it was of the view that the English test should not be simply imported into the South African law.¹¹⁶ The court accordingly held that section 12(1) only applies after substantial copying of the original article has been established¹¹⁷ and that the test for fair dealing is an objective one, which should be limited to the facts at the time of the dealing.¹¹⁸ Evidently, the approach that the court used is more flexible and is likely to promote consistency in other cases in

104. RJ Peltz, 'Global Warming Trend? The Creeping Indulgence of Fair Use in International Copyright Law' (2009) 27 Texas Intellectual Property Law Journal 277.

105. No. 9 of 1916.

106. No. 63 of 1965.

107. Pistorius (n 19) at 148.

108. Shay (n 42) at 595.

109. Ibid.

110. Ibid at 597.

111. W Cornish, D Llewelyn and T Aplin, *Intellectual Property* (Sweet and Maxwell, London 2013) 491.

112. *Associated Press* (n 1).

113. Shay (n 42) at 599.

114. *Moneyweb (Pty) Ltd* (n 2), para 103.

115. [2001] 4 All ER 666 (CA) at 683g to 684c, para 70. The three key factors in the English test are whether there is commercial competition between the two parties, whether the infringed work has already been published and the amount and importance of the work that has been taken.

116. *Moneyweb (Pty) Ltd* (n 2), para 106.

117. Ibid at para 111.

118. Ibid at para 112.

comparison with the proposed amendments through the 2015 Bill, which might open doors for the prevailing inconsistency in the US to enter into South Africa.

The importance of the substantiality factor is evident in the above decision, particularly when one considers the following factors, which the court outlined for purposes of establishing fair dealing in terms of section 12(1)(c)(i):

the nature of the medium in which the works have been published; whether the original work has already been published; the time lapse between the publication of the two works; the amount (quality and quantity) of the work that has been taken; and the extent of the acknowledgement given to the original work.¹¹⁹

The court indicated that the list is not exhaustive and that the importance that is accorded to the factors may be more or less important depending on the context in which publication occurs.¹²⁰ The court considered these factors in deciding that Fin24 had failed to prove fair dealing in relation to article MW5.¹²¹

The South African provision equally emphasizes the importance of attribution. Carter argues that attribution is useful for protecting news organizations from wholesale and unattributed copying of news content by competitors.¹²² In online journalism, providing a hyperlink to the original article would meet the requirement. Failure to include a hyperlink would definitely be evidence of lack of fairness. Indeed, linking is highly recommended since it is viewed as a way of encouraging diversity and connectivity.¹²³

In the *Moneyweb* case, the court held that 'a hyperlink substantially complies with the requirements' of attribution in terms of the proviso to section 12(1), which requires the source and name of the author to be mentioned.¹²⁴ The court however cautioned that 'the provision of a hyperlink does not by itself discharge the burden of "fair dealing"'.¹²⁵ It accordingly held that since Fin24's article essentially substituted for the original MW6 article through substantial copying, fair dealing had not been proved in such infringing circumstances.¹²⁶

Since fair use serves the important function of protecting public interest in accessing information and news, it is worth discussing this point at some length. The amici curiae brief that was filed by Electronic Frontier Foundation (EFF) and Public Knowledge (PK), supporting Meltwater's Opposition to Motion for Summary Judgment by Associated Press, in the *Meltwater* case raised interesting issues in this regard. These are discussed below.

2.1.4 Public interest in news dissemination and in the ability of a media institution to re-report

The fundamental point, as Baker argues is that 'media products have significant "public good" aspects'.¹²⁷ The two attributes of the public good aspect are non-rivalrous

119. Ibid at para 113.

120. Ibid at para 113.

121. Ibid at para 131.

122. Carter (n 79) at 183.

123. Viner (n 4).

124. *Moneyweb (Pty) Ltd* (n 2) para 112.

125. Ibid at para 130.

126. Ibid at para 131.

127. CE Baker, *Media, Markets, and Democracy* (Cambridge University Press, Cambridge 2004) 8.

use and non-excludability. The public's interests have been protected so far by using the fact/expression distinction for purposes of ensuring that copyright law does not protect facts or information, which should be freely available to the public. For instance, in the *International News Service* case the US Supreme Court held that current events cannot be the subject matter for exclusive rights even if a claimant is the first to report such events.¹²⁸ The court also distinguished between those aspects of news (original expression) that are protectable from the aspects that cannot be protected (information and facts). The second protective mechanism is the doctrine of fair use, which has been discussed in the previous part.

It is interesting to note that Moneyweb rebutted Media24's reliance on the public interest in news dissemination and in the ability of a media institution to re-report the core elements of a news story first reported by its competitor by relying on the US case of *Associated Press v Meltwater U.S. Holdings, Inc.*¹²⁹ This warrants a brief discussion of this case because the court had to balance the public's interest in news dissemination through a news clipping service and interest in the enforcement of copyright laws. The case also dealt with the defence of fair use and other defences, which this paper will not delve into as they are not relevant for the issues under discussion. Authors such as Shay have equally emphasized the need for South Africa to consider foreign jurisprudence in the interpretation of copyright law in regard to the emerging technologically advanced space in which news articles are used.¹³⁰

In the *Meltwater* case, the plaintiff (*Associated Press*) claimed that Meltwater infringed its copyright in news stories by republishing their excerpts as part of its online news aggregation service to its subscribers. Meltwater's principal defence was fair use in the sense that it used the contents for a new purpose, namely; as an integral part of an information location tool.¹³¹ The evidence before the court however showed that Meltwater used an automated computer program to copy or 'scrape' articles from online news sources, and indexed and delivered verbatim excerpts of the articles to customers in response to search queries 'without adding any commentary or insight in its News Reports'.¹³²

Unlike the South African *Moneyweb* case, Meltwater did not contest the protection of Associated Press' (AP) news articles by copyright law. The court therefore considered the validity of the fair use defence by applying the four factors which have been discussed in the preceding parts of this paper, and came to the conclusion that it was not valid in the circumstances. The court took note of the fact that Meltwater's subscribers were never directed to the third party's websites where the original news articles had been obtained and as such it substituted the original websites. Meltwater equally never transformed the original news by adding any commentary or insight.

Three amici curiae briefs were accepted for filing¹³³ but we focus on the brief filed by EFF and PK raising the public interest issue in which they argued that fair use must be interpreted in light of its purpose, namely bringing copyright in line with the public interest. The court considered the public's interest in the dissemination of news through search engines such as Meltwater's and the enforcement of copyright law and came to the conclusion that such public interest 'does not outweigh the strong

128. *International News Service* (n 61) at 215 and 234.

129. *Associated Press* (n 1).

130. Shay (n 42) at 604.

131. *Associated Press* (n 1) para 550.

132. *Ibid* at para 552.

133. *Associated Press* (n 1), para 549.

public interest in the enforcement of the copyright laws or justify allowing Meltwater to free ride on the costly news gathering and coverage work performed by other organizations'.¹³⁴ This made the court decide the first factor in fair use (purpose and character of use) in favour of AP.¹³⁵

With regard to the second factor, which the court considered neutral since Meltwater copied published work and AP's news stories were more vulnerable to the application of fair use doctrine as a defence, the court found in favour of AP.¹³⁶

In applying the third factor (amount and substantiality), the court used both quantitative and qualitative assessments by considering the portion of copyrighted work that was copied in relation to the whole work and the expressive components that were copied respectively. The court considered the analysis of the third factor to be relevant to the fourth one, the effect of the use on the copyrighted work's potential market as well. This is the case in so far as the substantiality of the use may determine whether or not the second work may substitute for the original work in the market. Since the evidence showed that Meltwater had copied the 'lede' (heart of AP's news stories),¹³⁷ and failed to prove that it took no more than necessary to direct users to the original source, both factors weighed against it.¹³⁸ Meltwater's fair use defence was accordingly dismissed and it was found guilty of infringing copyright in AP's news stories.

It is not surprising that the court in the *Moneyweb* case did not consider the *Meltwater* case as a relevant authority for guidance in reaching its decision. This can be attributed to three factors. First, the court took cognizance of the historical circumstances and the influence of domestic statutory precepts, which made it more logical to focus on English authorities.¹³⁹ Secondly, the issue of originality featured prominently in the *Moneyweb* case while it was not an issue at all in the *Meltwater* case, though in view of the nature of news articles as derivative works, which contain elements of information that belong to the commons, it would have been appropriate for the court to consider the originality of AP's news articles. Thirdly, in the South African context fair dealing only applies after substantial copying of an original news article has been established and this makes the context in the *Meltwater* case different from *Moneyweb*. It is however worth considering the possible effects of the *Meltwater* case on online news for purposes of appreciating the clarity that the South African perspective can contribute, particularly on issues that have been mostly obscure in online journalism.

2.2 The effect of the *Meltwater* case on online news

Although the ruling in the *Meltwater* case favoured AP, the parties reached an amicable settlement in terms of which they agreed to work together, thus averting Meltwater's intended appeal.¹⁴⁰ Commentators such as Mullin argue that the licensing settlement has left a murky precedent in place since it is unclear what kind of Internet searching is

134. Ibid at para 553.

135. Ibid at para 557.

136. Ibid.

137. *Associated Press* (n 1) para 541.

138. Ibid at para 558.

139. *Moneyweb (Pty) Ltd* (n 2) para 103.

140. J Mullin, 'AP Settles Copyright Suit with PR Firm after Winning Fair Use Ruling' (2015) <<http://arstechnica.com/tech-policy/2013/07/ap-settles-lawsuit-with-pr-company-after-winning-key-fair-use-ruling/>> accessed 24 September 2015.

fair use.¹⁴¹ He speculates that the main reason why the court ruled against *Meltwater* could be that it was not a public search engine and was not successful at getting the users to click back to the original articles. This observation is indeed correct since these are the requirements of fair use, which are equally relevant to fair dealing in South Africa where the right of attribution is provided for in the Copyright Act.¹⁴² The other factor that made the court rule against *Meltwater* is that the originality of AP's news articles was never considered by the court and this approach makes the decision in the *Meltwater* case questionable because the nature and extent of AP's original contribution was not determined.

Schonwald has raised a very pertinent issue regarding the impact of the *Meltwater* ruling on the 'still-forming' market of online news. Her view is that 'we may be leaving important technology issues to an antiquated system plagued by doctrinal feedback, whereas thoughtful policy decisions would be a far better fit'.¹⁴³ This view sets the tone for the discussion in the next part, which addresses the question of the flexibility of the fair use/dealing doctrine to adapt to the context of online journalism. It is notable that the doctrine of fair use needs to be applied in a manner that takes cognizance of the global scope of online journalism. In this regard, the *Meltwater* court's observation, that access to online news and the protection of news organizations' interests should complement each other, is very instructive. The court's view was that '[t]he Internet would be far poorer if it were bereft of the reporting done by news organizations and both are enhanced by the accessibility the Internet provides to news gathered and delivered by news organizations'.¹⁴⁴ This calls for thoughtful policy decisions that Schonwald has alluded to.

3 HOW THE APPLICATION OF FAIR USE/DEALING TO ONLINE NEWS AGGREGATORS WILL SHAPE MEDIA PRACTICE

Easton's suggestion is worth bearing in mind while considering how the issues that are discussed above will shape media practice. He suggests that copyright law should be fine-tuned with respect to news in order to restore a sense of public service obligation among journalists.¹⁴⁵ It should however be pointed out that rather than fine tuning copyright law itself, a more nuanced interpretation of the fair use/dealing doctrine should be adopted. As noted already, the concern with the US courts' approach in applying the doctrine is arbitrariness. It would thus be useful to take Hansen's three suggestions on board by letting policy rather than doctrine control cases; sensitizing users 'to resist copyright industries' culture of requiring licenses for every use including fair uses'; and availing resources to users to enable them to resist such a licensing culture.¹⁴⁶

Scholars such as Leval¹⁴⁷ and Nimmer¹⁴⁸ have argued that the interpretation of the four factors for fair use are arbitrary, thus leading to lack of consistency in the treatment of the

141. Ibid.

142. The proviso to s 12(1).

143. Schonwald (n 3) at 803.

144. *Associated Press* (n 1) para 553.

145. Easton (n 82) at 523.

146. Katyal et al. (n 3) at 1048.

147. NP Leval, 'Toward a Fair Use Standard' (1990) 103 *Harvard Law Review* 1105–25.

148. D Nimmer, "'Fairness of Them All" and Other Fairy Tales of Fair Use' (2003) *Law & Contemporary Problems*, Winter/Spring 263–80.

doctrine as Schonwald¹⁴⁹ correctly observes. Schonwald argues that the inconsistency arises from the fact that courts tend to 'use the factors as ex post facto justifications rather than as guidance decisions'.¹⁵⁰ She points out that the *Meltwater* court expanded the legal remedies that are available to news services.¹⁵¹

From the foregoing discussions on the application of fair use doctrine, it appears that the flexible US approach, which is intended to embrace emerging technology, has the disadvantage of leading to inconsistency in its application. Prior to the decision in the *Moneyweb* case, authors such as Schonwetter argued that a closed list approach (fair dealing), which provides a list of criteria that should guide the court, would lack flexibility.¹⁵² Considering the manner in which the court dealt with the issue of fair dealing in the *Moneyweb* case, by linking it to proof of originality and substantiality, it cannot be argued that the court lacked flexibility in applying section 12(1). On the contrary, the court explicitly acknowledged that 'fairness is an elastic concept' and its determination 'involves a value judgment and will depend on the particular facts or circumstances at the time of dealing'.¹⁵³ The court's approach was evidently flexible enough to guide decision-making in similar cases in the future irrespective of the concerns that have already been highlighted in the previous parts of this paper regarding the court's inconsistent treatment of the adduced evidence.

The flexible approach that the court used in the *Moneyweb* case is more suitable for dealing with the issue of aggregators. The next paragraphs explore the viability of the three approaches that have been suggested in current literature to deal with the issue of aggregators in the context of fair use. These are: the utilisation of the fact/expression dichotomy alongside unlawful competition actions based on misappropriation; limiting fair use in respect of news reporting; and managing aggregators' activities through licensing.

3.1 Using fact/expression dichotomy and unlawful competition actions

This would be the approach that digital media companies such as Google that rely on aggregation in advertising for their businesses are advocating for.¹⁵⁴ Google has argued that fair use doctrine in its current form allows courts to apply it in a flexible manner that is capable of catering for the needs of aggregators and search engines.¹⁵⁵ In Google's view, it is unnecessary to amend copyright law to cater for such stakeholders. A panellist at the US Federal Trade Commission public comment session¹⁵⁶ had made a suggestion to limit the fair use doctrine through the construction of some statutory analytical framework for aggregators and search engines so that their copying of original content can amount to copyright infringement. If the suggestion is accepted, it will defeat the purpose of fair use.

149. Schonwald (n 3) at 824–8.

150. Ibid at 824.

151. Schonwald (n 3) at 833.

152. T Schonwetter, 'The "Fair Use" Doctrine and the Implications of Digitising for the Doctrine from a South African Perspective' (2006) 7 African Journal of Information and Communication 32.

153. *Moneyweb (Pty) Ltd* (n 2) para 114.

154. Google, Comments on Federal Trade Commission's News Media Workshop and Staff Discussion Draft on 'Potential Policy Recommendations to Support the Reinvention of Journalism' (2010) <http://www.ftc.gov/sites/default/files/documents/public_comments/2010/07/544505-05218-55014.pdf> accessed 24 September 2015.

155. Ibid at 14.

156. Federal Trade Commission (n 15) at 11.

A better approach would be to consider convincing policy arguments, as Hansen has suggested, instead of sticking to precedents from previous decisions.¹⁵⁷ The approach can ensure that the doctrine remains flexible enough to adapt to the changing obligations in online journalism. The decision in the *Moneyweb* case has proved that there is space within the South African legal system for implementing the policy approach that Hansen has suggested by the using the fact/expression dichotomy alongside misappropriation actions for unlawful competition. The availability of unlawful competition as a cause of action was explained in the case of *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Gwhano (Pty) Ltd* as follows: ‘... the law of South Africa recognises and grants a general action in the case of unlawful competition, based on the principles of the *lex Aquilia*’.¹⁵⁸ This confirms that the aquilian liability is well established in South African law and is available to every competitor who suffers patrimonial loss as a result of unlawful competition. The liability arises from ‘conduct in the course of trade – mostly in the form of misrepresentation or misappropriation of a rival’s product – that unlawfully causes economic loss, or the potential of such loss’.¹⁵⁹ There is no closed list of acts of unlawful competition that have to be brought under this cause of action in so far as uncommon acts can be judged using the general principles of the law of delict.¹⁶⁰

The flexibility of the principles of *lex Aquilia* is very useful for applying the doctrine of fair dealing in a manner that takes cognizance of the changing obligations in online journalism. The claimant has to prove, in terms of the law of delict, that the competitor was at fault by acting wrongfully (either negligently or intentionally). Klopper however clarifies that ‘negligent unlawful competition is the exception rather than the rule’ since, in his view, all acts of unlawful competition are generally premeditated.¹⁶¹ In the context of online news articles, lack of attribution and the existence of objective similarities between the original and infringing articles can be used to prove that unlawful competition is premeditated. The fact that the infringer’s conduct is contrary to the prevailing standards in online journalism, which require attribution and fair dealing, can be used to prove unlawfulness. It should also be noted that lack of attribution infringes the original online news reporter’s right to attract custom, and Klopper has correctly argued that ‘every act that infringes the right to attract custom qualifies as unlawful competition’.¹⁶²

The proposed approach would require some flexibility on the part of the courts since in the past some courts have shown a tendency to use unlawful competition in intellectual-property-related disputes with reference to established categories of unlawful competition. For example, the Appellate Division in *Payen Components SA Ltd v Bovic CC* stated that ‘unlawful competition should not be added as a ragbag and often forlorn final alternative to every trade mark, copyright, design or passing off action. In most cases it is one of the established categories or nothing’.¹⁶³ Loubser correctly observes that the tendency has led courts ‘to shy away from recognizing forms of unlawful competition outside the established categories’.¹⁶⁴

157. Katyal et al. (n 3) at 1049.

158. *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Gwhano (Pty) Ltd* 1981 (2) SA 173 (T) 186.

159. MM Loubser, ‘Principles and Policy in Unlawful Competition: An Aquilian Mask’ (2000) 168 *Acta Juridica* 173.

160. HB Klopper, ‘The Right to Attract Custom and Unlawful Competition’, in H Klopper, T Pistorius, B Rutherford, LA Tong and P van der Spuy (eds) *Law of Intellectual Property in South Africa* (Lexis-Nexis, Cape Town 2011), 16.

161. *Ibid* at 17.

162. Klopper (n 160) at 24.

163. *Payen Components SA Ltd v Bovic CC* 1994 (2) SA 464 (W).

164. Loubser (n 159) at 173.

The above tendency does not seem good for emerging categories of unlawful competition, such as misappropriation of online news articles, and courts should be encouraged to embrace a less restrictive approach. Indeed the court in the *Atlas Organic Fertilizers* case confirmed that the norm to be applied in the enquiry into unlawfulness of competitive trading 'is the objective one of public policy [which] is the general sense of justice in the community, the *boni mores*, manifested in public opinion'.¹⁶⁵ Consequently, such public opinion should not be restricted by fixed categories of unlawful competition.

In the *Moneyweb* case, the court took cognizance of the warning in the *Payen Components* case¹⁶⁶ and expressed the view that Moneyweb's claim under unlawful competition sought 'to blur the lines between copyright and other forms of unlawful competition'. In the court's view, 'what is permissible use will depend on what copyright law permits'.¹⁶⁷ Consequently, it is evident that the court's decision was not determined by fixed categories. Its decision in dismissing Moneyweb's claim under unlawful competition was based on a clear application of the fact/expression dichotomy under the Copyright Act. The court found that Moneyweb had failed to prove copyright infringement and as such it could not succeed in a claim for unlawful competition.¹⁶⁸ Although this reasoning is correct in relation to articles MW1 to MW4, in respect of which the court was unable to determine originality due to the scant evidence that Moneyweb adduced, one would question the rationale of applying the same reasoning to articles MW5 to MW7, which Moneyweb proved to be original. It is unclear why the court did not find in favour of Moneyweb in respect of these original articles, particularly MW6, in respect of which Moneyweb proved substantial reproduction. Hopefully there will be an opportunity on appeal so that clarity can be provided in matters where the court treated the evidence in a very inconsistent manner.

3.2 Limiting fair use in respect of news reporting

Holte has suggested revising the fair use provision to limit use for the purposes of news reporting to 24 hours after the first reporter has published it with a view to encouraging research and profit in quality investigative journalism.¹⁶⁹

The problem with this approach is that it essentially entails changing copyright law to protect information for a limited period only, which was the court's reasoning in the 1918 *International News Service* case.¹⁷⁰ This would be problematic for the media as it would limit access to the intellectual commons that should be freely available even if the limitation is only in place for a limited period. It is even more problematic that a subject matter such as information, which does not qualify for copyright protection, would be protected for a limited period if the proposed approach is accepted. This would contradict the essence of copyright law.

The approach in the *Moneyweb* case is very instructive in this regard since the court endeavoured to establish the originality of the articles on which Moneyweb based its

165. *Atlas Organic* (n 158) at 188.

166. *Payen Components SA* (n 163).

167. *Moneyweb (Pty) Ltd* (n 2) para 133.

168. *Ibid* at para 135.

169. RT Holte, 'Restricting Fair Use to Save the News: A Proposed Change in Copyright Law to Bring More Profit to News Reporting' (2008) 13(1) *Journal of Technology Law & Policy* 33–4.

170. *International News Service* (n 61).

claim for infringement. Although, as already discussed, the court's decision on the originality of articles MW1 to MW4 can be contested due to the inconsistent manner in which it treated the adduced evidence, the approach of trying to determine the nature and extent of the authors' contribution shows the importance of focusing on what copyright law permits rather than the timing of publication itself. The time lapse between the publications of the two works is just one of the factors that should be considered in terms of the objective test for fair dealing that the court outlined in the *Moneyweb* case.¹⁷¹ Additionally, the court emphasized the need to consider the context in which publication occurs.¹⁷² This approach is more valuable than Holte's proposal to limit fair use by placing a time limit on news reporting to 24 hours after the first reporter has published it.

3.3 Managing aggregators' activities through licensing

Since licensing is a common practice in the management of intellectual property rights, it has been suggested that licensing agreements should be used to make news aggregators pay for the online content that they use.¹⁷³ Unfortunately, this suggestion defeats the whole purpose of fair use as a means of protecting the intellectual commons, as news aggregators will be forced to pay for contents that in some cases don't qualify for copyright protection and should not be subject to monopoly rights in the first place. One would question the rationale of having a licensing agreement that is based on non-protectable contents. If such a suggestion were to be implemented in any country, it would have adverse effects on online journalism by subjecting the intellectual commons to monopoly rights.

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

4 CONCLUSIONS

This paper has analysed the issues that the court dealt with in the South African *Moneyweb* case alongside the decision in the US *Meltwater* case with a view to providing a South African perspective on the doctrine of fair dealing. The analysis shows that the doctrine of fair dealing as contained in the South African Copyright Act may appear rather restrictive but it can be applied in a flexible manner, as the approach that was used in the *Moneyweb* case confirms. The more flexible US fair use has however led to inconsistency in the application of the doctrine. In a bid to find a more suitable approach in the context of online journalism, three options have been explained, namely: the utilization of the fact/expression dichotomy alongside unlawful

171. *Moneyweb (Pty) Ltd* (n 2) para 113.

172. *Ibid.*

173. Federal Trade Commission (n 15) at 13.

competition actions based on misappropriation; limiting fair use in respect of news reporting; and managing aggregators' activities through licensing.

The approach that seems most viable for promoting reasonable media practice in online journalism is the use of the fact/expression dichotomy alongside unlawful competition actions based on misappropriation of original news articles. This is the approach that was used in the South African *Moneyweb* case, which presented an opportunity for developing a flexible approach to the fair dealing doctrine. The court provided much needed clarity on the application of the statutory requirements for fair dealing, which will go a long way in ensuring consistency in the application of the doctrine to copyright in news articles as well as online journalism. The approach can also avert the expansion of legal remedies that are available to news services as happened in the *Meltwater* case. It is accordingly advisable, as the proposed amendments to the South African Copyright Act are still being discussed, that the clarity that the court provided in the *Moneyweb* case inform the conversation leading to an appropriate decision on whether such amendments are necessary.

The flexible approach in the *Moneyweb* case would equally be useful for fostering online innovation by leaving the building blocks of news freely available to competitors and thereby encouraging the sharing of public information and respect for copyright law.