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SOUTH AFRICAN
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Articles

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James David

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SHIFTING DIGITAL MEDIA ECOLOGIES AND HOW COPYRIGHT LAW SHOULD ADJUST AND ADAPT TO JOURNALISM

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ABSTRACT

Digital Age misappropriation and plagiarism of published online news content by some South African media proprietors are negatively affecting professionalism and integrity in journalism. Such infringements invariably lead to great tension, harmful competition patterns and dwindling revenues. Frequently, digital news misappropriation creates factual distortions, impairing the democratic functions of journalism and healthy national discourse motivated by legitimate public interest considerations. A 2019 Reuters Institute Digital News Report revealed that, globally, South Africans spend the greatest number of hours browsing online, with 36% of the population enjoying sharing news content, while 40% enjoy commenting on news via social media or news websites. While the Digital Age has generated many forms of active players in journalism, this paper is limited to digital infringement conflicts and contestations between accountable and established media proprietors or competitors. This qualitative contribution proposes that media proprietors collectively seek an alternative dispute resolution approach to copyright infringements through a comprehensive 'Media Arbitration Copyright Infringements Code' with incorporated 'Hot News Misappropriation Doctrine' provisions to regulate the conduct of the media and to address proliferating digital infringements. The Media Code should also guide the proposed 'Media Copyright Tribunal' operating within a commercial arbitration framework in dispute adjudication and resolution. This paper argues that the Media Code with the Misappropriation Doctrine is a more viable approach for addressing media copyright disputes because it largely protects facts contained in published news content. Furthermore, a Media Code that is drafted addressing media copyright digital infractions using the ethical benchmarks set by the 'Press Code of Ethics and Conduct for South African Print and Online Media' editorial guidelines interpreted through a flexible informal commercial arbitration framework that expedites dispute resolution is desirable. This paper is largely concerned with the court's findings in *Moneyweb (Pty) Limited v Media 4 Limited and Another*, and the fact that it took about three years for the dispute to be resolved. Moreover, this paper argues that the current Copyright Act 98 of 1978 is less effective in dealing with the ethical quandary faced by journalism in the Digital Age.

KEYWORDS: journalism, copyright, safe dealing, Digital Age, infringements, misappropriation

1. Introduction and Background

The Digital Age has incontestably presented enormous copyright and professional ethical challenges to South Africa's media proprietors, spawning

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digital reproductions relating to news aggregations, misappropriation, scraping and online plagiarism of news content.[1] Almost eight years after *Moneyweb (Pty) Limited v Media 24 Limited* accentuated such unethical flaws, the general public is registering ancillary concerns about such unscrupulous conduct. A *Business Day* reader pointed out that unethical digital practice is thriving in the newsrooms, and that the state of journalism and endless corruption have become blurred in the public mind. Lowe wrote: 'The manner of […] blatant copying and dissemination by news organisations is yet another clear reflection of the parlous state of [South Africa] journalism and the laziness and lack of integrity of many who pretend to be holders of the title of journalist.'[2] Indisputably, traditional print journalism has profoundly changed from offline to online with new digital media platforms making news available through smartphones, tablets or computers.[3] Such transformative power of technology has provided new digital capabilities that can copy, paste, manipulate, distort and misappropriate news.

The Digital Age also presents information availability benefits, and increased access and pace of sharing news content. Research also demonstrates that unrestrained digital news infringement by some media proprietors or competitors is facilitating unethical business practices, sloppy journalism and an increase in unreliable news.[4] Concomitant to such digital infringements are the inexorable competitive tensions within South Africa's media industry causing dwindling revenue patterns. Moreover, the quality of news deteriorates, impairing the democratic functions of journalism and the accompanying healthy national discourse informed by legitimate public interest considerations. Adelabu and Mugawun highlight the present digital predicament of journalism:

> [The] lack of enforceable journalistic rules, ethical codes, gatekeepers, and the lack of legal standards, means that journalists' rights and obligations regarding the appropriation and attribution of news content are ill-defined. Journalists have consistently expended professional skills, resources, time, and effort to gather news products to disseminate to the public. The news product does not merely transpose itself from any journalist's handbook into the mind of any reader. Even though the Internet may make it seem so, the news is not simply floating around. Questions such as 'where did the news come from?' and 'who did the research and writing?' have new meanings in the context of online journalism. The answers to these questions have utmost importance in a democratic society, where we value a free marketplace of ideas to facilitate prudently informed decision-making.[5]

1 See *Moneyweb (Pty) Limited v Media 24 Limited and Another* 2016 (4) SA 591 (GJ) paras 129 and 139. The court observed at para 129: 'Fin24 5 was published online within seven hours, and on the same news day as Moneyweb 5. Almost all of Fin24 5 is a word-for-word copy of Moneyweb 5 [article]. In my view, Fin24 5 has taken more than a substantial part: it has taken the core of Moneyweb 5.'

2 Mark Lowe 'LETTER: Repeated plagiarism unchecked in SA journalism' *BusinessDay*, 6 April 2022, available at https://www.businesslive.co.za/bd/opinion/letters/2022-04-06-letter-repeated-plagiarism-unchecked-in-sa-journalism/ (accessed 1 August 2023).

3 C Roper, N Newman & A Schulz 'Reuters Institute Digital News Report 2019 South Africa Supplementary Report' Reuters Institute for the Study of Journalism (2019) 12–13.

4 Roper et al (n3) at 10–11.

5 Quoted in Roper et al (n3) at 49.

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Such highlighted shortcomings and indiscriminate infringements without any prior licensing agreements with media proprietors have incalculable economic ramifications for news production, which discourages future investment in news.[6] These developments are an insidious global phenomenon, and are not exclusive to South Africa.[7] In this jurisdiction, the Copyright Act grants the author exclusive rights for a limited duration in the manner and form of the exploitation of their works.[8] However, the extent to which the Copyright Act can adequately protect media proprietors' copyright in the digital era is debatable. To understand the economic implications of such digital infringements it is important to evaluate the extent of internet penetration and the extent to which media content is accessed and exploited on social media through digital devices.

1.2 The internet and digital access to news in South Africa

Statistics show that the Digital Age has facilitated the huge exploitation of works in South Africa, where 36% of the population enjoy sharing news using messenger apps, while 40% enjoy commenting on news via social media or via news websites.[9] A Reuters Institute of Journalism 2019 report noted:

> South Africans spent at least 9.5 hours a day online in 2022. This was the highest in the world, exceeding the global figure by around three hours, a study showed … The average time a person spent browsing the internet in 2022 was six hours and 37 minutes per day. By 2023, South Africa had 43.48 million internet users—its overall population is 60.14 million—showing a penetration of 72.3%. The country's government plans to ensure web access to all South African homes by 2024. In 2021, South Africa's digital quality of life was ranked 68th globally. Mobile and broadband internet affordability in the country, along with its mobile internet stability, was among the best in Africa.[10]

Further, the report stated that more than three-quarters of the population use smartphones to access news every week.[11] The general interest in news is phenomenal given the prodigious browsing appetites especially for content which entails politics and policy formulation.[12] This context is important in dissecting the social ramifications of news misappropriations, and desecration of the quality of online news which invariably harms public interest national discourse where 70% of the population has access to the web.[13]

6 M Novaria 'Piracy of online news: A "moral rights" approach to protecting a journalist's right of attribution and right of integrity' (2014) 24 *DePaul Journal of Art, Technology & Intellectual Property Law* 296.

7 A Omowale & HE Oyeleye 'Copyright violation and online news sourcing: Effect, challenges and panaceas' (2022) 4(1) *Global Journal of Education, Humanities and Management Sciences* 46.

8 The Copyright Act 98 of 1978 s 6 provides exclusive rights, while s 2(1) grants copyright to literary works.

9 Roper et al (n3) at 12–13.

10 Ibid.

11 Ibid.

12 Roper et al (n3) at 15.

13 Faustine Ngila 'South Africa is the world's most internet-addicted country' *Quarz.com*, 29 March 2023, available at https://qz.com/south-africa-the-worlds-most-internet-addicted-country-1850278160.

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1.3 The Media Infringements Code and Media Copyright Tribunal

It is indisputable that the current anachronistic Copyright Act 98 of 78 (the Act) is inadequate to address Digital Age challenges around the misappropriation or exploitation of online content without compensation. Nicholson stated that 'it is completely inadequate, outdated and irrelevant in a digital world.'[14] The proposed Copyright Amendment Bill, 2017 (the Bill)[15] seeks to address the legal lacuna created by the Digital Age, but arguably it is not equipped to effectively address digital news infringements. While copyright law remains relevant in addressing media copyright disputes, it is proposed that it would be more effective to implement Hot News Misappropriation Doctrine provisions that capture, highlight and expressly outlaw the misappropriation of news. Another issue of concern is that *Moneyweb (Pty) Limited v Media 24 Limited and Another* took almost three years to be decided, while an alternative dispute resolution arbitration route would have provided an expeditious resolution. Given the proliferation of such digital infringements, it is recommended that media proprietors also exploit alternative dispute resolution forums. In this regard, a 'Media Arbitration Copyright Code' (the MACC) to guide an independent 'Media Copyright Tribunal' (the MCT or Tribunal) operating under the auspices of a recognised commercial arbitration institute to adjudicate media proprietors' copyright infringement disputes is proposed. The MACC would be drafted and tailored around the existing 'Code of Ethics for South African Print and Online Media'[16] and the 'International Federation of Journalists (IFJ) Global Charter of Ethics for Journalists'[17] to provide a delineated comprehensive dispute resolution framework rulebook. The IFJ Global Charter is important because it is based on major texts of international law, such as the Universal Declaration of Human Rights, with articles that define journalists' ethics, duties and rights.[18]

If adopted, the MACC should be a binding media copyright dispute resolution rulebook, addressing the existing anxieties and aspirations of media stakeholders. The MACC rules and editorial guidelines should set parameters and benchmarks that capture the spirit and ethical standards in the existing journalism Code of Ethics and other relevant recognised professional journalists' editorial guidelines. The procedures for adjudicating

14 Denise Rosemary Nicholson 'Why South Africa's copyright bill is good for digital archives' *The Conversation*, 31 October 2019, available at https://theconversation.com/south-africas-copyright-bill-is-good-for-digital-archives-heres-why-125744 (accessed 1 August 2023).

15 See Copyright Amendment Bill, 2017, available at https://www.gov.za/sites/default/files/gcis_document/202207/220608b13d-copyright2017.pdf (accessed 2 August 2023).

16 Press Code of Ethics and Conduct for South African Print and Online Media (effective from 30 September 2022), available at https://presscouncil.org.za/ContentPage?code=PRESSCODEENGLISH (accessed 30 July 2023).

17 International Federation of Journalists Global Charter of Ethics for Journalists, available at https://www.ifj.org/who/rules-and-policy/global-charter-of-ethics-for-journalists (accessed 30 July 2023). It was adopted at the 30th IFJ World Congress in Tunisia, 12 June 2019. It completes the IFJ Declaration of Principles on the Conduct of Journalists, 1954, known as the 'Bordeaux Declaration'.

18 Ibid.

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disputes should be guided by recognised arbitration institutes' rules, such as the Association of Arbitrators (Southern Africa) NPC Rules for the Conduct of Arbitration or the Arbitration Foundation of Southern Africa (AFSA) Commercial Rules. The institutions are all private dispute resolution authorities managing a wide range of local and international disputes by way of mediation, arbitration and related processes. The proposed MCT should comprise a retired judge or senior advocates, with experienced journalists of good standing as arbitrators; its determinations should be final, binding and enforceable. The MACC will guide the determination of the dispute and help to establish liability for the infringement. The Arbitration Act will remain relevant to provide for the settlement of disputes by arbitration tribunals and for the enforcement of the awards.[19] This alternative dispute resolution framework and adjudication approach is an expeditious forum that will address the media's desire that its copyright disputes be removed from the demanding, rigid and often time-consuming court process that is frequently bogged down by endless technicalities.[20]

2. Misappropriation of News Doctrine and Plagiarism

This contribution is largely defined by the misappropriation of news doctrine, to help provide a copyright dispute resolution framework for media proprietors. While a thin line exists between the doctrine and plagiarism, an attempt shall be made to define both, because they are central to this contribution, as opposed to news aggregators and bloggers.

2.1 Misappropriation doctrine

In its theoretical form, the misappropriation doctrine provides that persons or companies should not appropriate the benefits of another's investment without a similar investment of their own.[21] This doctrine is also referred to as the 'hot news misappropriation theory' – which under common law recognises a property right in information that has been scrupulously and painstakingly gathered and distributed.[22] Hot news refers to its time-sensitive nature which must allow media proprietors to use this competitive edge. Shevory writes: '[H]ot news … means written material, often "facts", that have value for a short duration, and which will soon move into the "public

19 See Arbitration Act 42 of 1965.

20 K Kriel 'Latest copyright judgment discussed at Press Club' *De Rebus*, 1 July 2016, available at https://www.derebus.org.za/latest-copyright-judgment-discussed-press-club/ (accessed 29 July 2023).

21 See *International News Service v Associated Press (INS)* 248 US 215, 236 (1918) (a United States Supreme Court decision) which noted that news compilation is a labour-intensive endeavour, and therefore deserves 'quasi-property' protection. This judgment was delivered in 1918. See also DW Barnes 'Misappropriation of trademark' (2008) 9 *North Carolina Journal of Law & Technology* 171 at 174.

22 *Barclays Capital Inc. v Theflyonthewall.com, Inc. (Barclays II)* No. 10-1372-CV, 2011 WL 2437554 at 24–25 (a decision of the United States Court of Appeals for the Second Circuit, 2d Cir. June 20, 2011).

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realm" losing their value completely.'[23] The doctrine was first enunciated in a United States precedent, *International News Service v Associated Press*,[24] and after enduring for almost a century it was overturned in *Feist Publications, Inc v Rural Telephone Service Co*, which refused to recognise the 'sweat of the brow' doctrine in copyright law, holding that the Constitution recognised a minimum amount of originality for copyright protection.[25] However, 13 years ago, the misappropriation doctrine was revived in *Barclays Capital Inc v Theflyonthewall.com, Inc*, where the court adopted the doctrine's test requirements, also considered in *National Basketball Association v Motorola, Inc. (NBA)*, that:

> 1) the plaintiff 'gather[ed] information at cost'; 2) 'the information is time-sensitive'; 3) the defendant's actions are considered free-riding; 4) the defendant and plaintiff are in direct competition; and 5) without protection, the incentive to produce the information is so diminished that it would substantially jeopardize that part of the plaintiff's business.[26]

The misappropriation doctrine recognises the expenditure of labour, skill and money by the media proprietor into their work, and frowns upon its appropriation and selling for one's own benefit, thereby reaping where one has not sown. The court's reference to the labour, skill and money necessary to create news is an express recognition of the 'sweat of the brow' doctrine.[27] In the *Moneyweb* case, the court held that the 'sweat of the brow' doctrine was imprecise and capable of being misunderstood, despite noting that South African law still regarded the time and effort spent by the author as a material consideration in determining originality.[28] Where a work embodied existing subject matter, the court will decide whether the author has expended sufficient skill and labour to justify a claim that the work is original.[29] This will involve determining the work as a whole, and not select parts.[30] However it must be noted that traditional copyright law does not protect facts[31] or news of the day that are mere items of press information.[32] Apparently, s 12(8)*(a)* of the Act, referring to 'mere items of press information', was adopted from Art 2(8) of the Berne Convention, providing: 'The protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information.' It is submitted that the proposed Media

23 T Shivery 'Book review' (2005) 15 *Law & Politics Book Review* 1037 at 1037.
24 *International News Service v Associated Press* (n21).
25 *Feist Publications, Inc. v Rural Telephone Service Company* 499 US 340, 352–44 (1991) at 363–364 (a decision of the United States Supreme Court).
26 *National Basketball Association v Motorola, Inc.* 105 F.3d 841, 845 (2d Cir. 1997) (a decision of the United States Court of Appeals for the Second Circuit creating a hot news misappropriation test through which liability is incurred based on the time, money and labour that a plaintiff expends).
27 *International News Service v Associated Press* (n21) 238.
28 *Moneyweb* (n1) para 15.
29 Ibid.
30 *Moneyweb* (n1) para 16.
31 *Hoehling v Universal City Studios, Inc.* 618 F.2d 972, 980 (a decision of the United States Court of Appeals for the Second Circuit. 2d Cir. 1980) – noting that 'historical facts, themes, and research have been deliberately exempted from the scope of copyright protection'.
32 See Copyright Act 98 of 78 s 12(8)*(a).*

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Code should extend some protection to news, recognising the money and effort invested in the gathering and production of news, and the limited period allowed for news to return value. This is important considering the value of online news in the national public interest discourse, and the need to maintain the viability of the news business.

2.2 Plagiarism of news content

There is a distinction between plagiarism and misappropriation. While both forms of infringement overlap, they entail presenting other people's ideas, words, images or products as your own.[33] Mustajoki notes:

> It is … complicated to identify and avoid plagiarism of ideas which is called misappropriation. … On the other hand, using well formed ideas and the presenting them as your own … is clearly misappropriation and if one would end up using the words in which these ideas were presented directly, it would fall under plagiarism.[34]

In *International News Service v Associated Press*[35] it was held that the misappropriation of news gathered by the other party without exerting the effort or incurring the expense required by such gathering of news was unlawful.[36] While plagiarism is not a legal principle within the scope of copyright law,[37] the envisaged MACC rules and guidelines framework administered by the MCT can certainly identify and address such conduct. Already, the South African 'Press Code of Ethics and Conduct for South African Print and Online Media' categorically outlaws plagiarism.[38] Blignaut opines:

> Plagiarism can extend beyond copyright infringement in that it encompasses the misappropriation of another's ideas or words (spoken or written) without attributing those words or ideas to their true source and thus giving due credit or acknowledgement thereto. Copyright on the other end can only occur in relation to works which are in material form. Unlike copyright infringement, plagiarism can take place in respect of works which are out of copyright and are in the public domain.[39]

Plagiarism violates ethical journalism standards, and was advanced as a copyright infringement in *Moneyweb*.[40] There are numerous cases of online plagiarism where original news material is copied, pasted and presented carrying the identity of a new different author.[41] If plagiarism is not under

33 H Mustajoki 'Plagiarism and misappropriation' Research Ethics Online Course (2016) available at https://findocnet.fi/pluginfile.php/83335/mod_label/intro/D1-Trans.pdf (accessed 1 August 2023).
34 Ibid.
35 *International News Service v Associated Press* (n21).
36 Ibid.
37 H Blignaut 'Copyright' in O Dean & A Dyer (eds) *Introduction to Intellectual Property Law* (2014) 44.
38 Press Code of Ethics and Conduct for South African Print and Online Media (n16) s 1.13.
39 Blignaut (n37).
40 *Moneyweb* (n1) para 5.
41 S Cheikh 'Ethics in an unethical online environment – the rise of copy-paste journalism' (2020), available at https://ethicaljournalismnetwork.org/ethics-in-an-unethical-online-environment-the-rise-of-copy-paste-journalism (accessed 20 July 2020).

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the radar of copyright law principles, it strengthens the scope for an MACC editorial policy, ethics and rules framework that comprehensively addresses both offline and online plagiarism in the adjudication of copyright disputes. In some circumstances, gross plagiarism can be criminally punishable.[42] Such copyright infringements should be addressed within the confines of an arbitration system. Another distinction to be made is between infringement and plagiarism. Blignaut opines:

> Copyright infringement and plagiarism are different concepts … as copyright infringement breaches the exclusive rights of copyright owner when … work is reproduced without permission. On the other hand, the moral concept of plagiarism entails the unearned increment of the plagiarist reputation that is achieved through false claims of authorship.[43]

There are concerns about regulating journalism misconduct under criminal law[44] or addressing copyright disputes through civil litigation, with its extensive rules and limitations.[45] As earlier proposed, an MACC operating within an arbitration framework, with MACC rules and guidelines, will provide an expedient, uniform, delineated and coherent media self-regulatory and dispute resolution framework. This will help to remove the copyright law uncertainties around the media digital breaches and will help to locate and resolve such infringements within the Media Code. Besides, such digital infringements have devastating financial implications for media proprietors.

3. Financial Implications of Digital News Infringements

The financial implications of media digital copyright infractions justify a new regulatory framework to act as a deterrent and provide expedited dispute resolution mechanisms. The misappropriation doctrine advances a utilitarian theory that seeks to provide the media with exclusive rights to their content for a limited duration to facilitate their receiving sufficient economic incentives to spur innovation and facilitate the continued production of news.[46] The primary motivation for providing that copyright protection under an outcome-based utilitarian framework is to encourage the production and distribution of news, as a form of intellectual work, which ensures that authors produce sufficient works serving the public interest.[47] Scholars have argued that the future of news lies in the incorporation of such a doctrine within copyright

42 CB Snyman *Criminal Law* (2008) 531.
43 Blignaut (n37).
44 See S Hoctor 'The crime of defamation – still defensible in a modern constitutional democracy?' (2013) 34(1) *Obiter* 130–135, who noted that '[a] third argument against the existence of the crime of defamation is that the civil remedy for defamation is a vigorous and effective means of righting the wrong suffered by one whose reputation has been wrongfully assailed.' See also J Burchell *Principles of Criminal Law* (2016) 741.
45 Kriel (n20).
46 S Karjiker 'Justifications for copyright: The economic justification' (2014) 2 *IPLJ* 15.
47 Ibid.

law.[48] The efficacy of such a doctrine can begin with its implementation and interpretation within the Media Code. Moon writes:

> If the [doctrine] ceased to exist, the lack of protections for newspapers would lead to a lack of incentive for news organizations to expend the effort to gather, compile, and publish hot news–meaning hot news may not be accessible to us, the public. Thus, not only would hot news be extinguished or drastically diminished, but also, since no protection equates into an inability to recoup advertising revenue, newspapers, as we know them, would be a thing of the past. In other words, misappropriation of newspapers' work will lead to broke newspaper.[49]

The predicament of media proprietors in the digital era was also further demonstrated by Scott Baradell, a former journalist, who lamented that 'now we have thousands of Web sites all reporting the same news—with only a small handful actually paying for the reportage that supports this entire infrastructure of information. And that small handful—the newspapers—are running out of money, and out of time.'[50] In general, current digital misappropriation or plagiarism of news invariably renders the 'publication profitless or so little profitable as in effect to cut off the service by rendering the cost prohibitive in comparison with the return.'[51] The news misappropriation theoretical framework deliberately outlaws free-riding activities on original legitimate works as they retard the media proprietors' capacity to recoup their investments. The infringements also limit the industry's creative capacity. The initial court rulings in the United States reflected such a utilitarian posture that outlawed free riding activities.[52] This is the economic utilitarian context in which such infringements should be addressed. The proposed approach to news copyright dispute resolution must protect news content because there are more social benefits than costs in securing exclusive rights as they ensure reinvestment in news production to foster a healthy diet of accountable and informative news content. Research has already demonstrated the negative effect of digital infringement, in particular aggregators of news on online publications, the effect of which is a decrease in circulation and revenue.[53] Isbell argues that there is 'a lot of legal uncertainty about the activities of news aggregators'.[54] The intricate online news business was unravelled in *Moneyweb*: it entails the production of 'unique and original content' from

48 J Moon 'The "hot news" misappropriation doctrine, the crumbling newspaper industry, and fair use as friend and foe: What is necessary to preserve "hot news"?' (2010–2011) 28 *Cardozo Arts & Entertainment Law Journal* 631 at 644.

49 Moon (n48) at 639.

50 Ibid.

51 Ibid.

52 See *US Golf Association v St Andrews Sys, Data-Max, Inc* 749 F.2d 1028, 1035 (3d Cir. 1984) (a United States Court of Appeals, Third Circuit decision) where it was stated: '[T]he dilemma posed by the [misappropriation] doctrine can best be viewed as an attempt to provide the necessary incentives to the creators of intellectual property without unnecessarily restricting the public's free access to information.' In Barnes (n21) at 176.

53 WA Tan 'See you later, aggregator: How hot news misappropriation deters aggregators without overprotecting facts' Theses from the College of Journalism and Mass Communications, 2013.

54 K Isbell 'The rise of the news aggregator: Legal implications and best practices' The Berkman Center for Internet & Society Research Publication Series (2010) No. 2010-10 at 2.

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its journalists' own 'original skill, effort and expertise'.[55] Moneyweb also pays licence fees for its syndicated content from other services. A substantial source of income for Moneyweb are visitors to its website, 'who are attracted to its unique and original content', thereby determining the revenue inflows, mainly originating from advertisers.[56] The republishing of Moneyweb articles, through Media 24's aggregation with very minor changes and additions, is in some instances misappropriation if, as Moneyweb argued, 'the republished articles remained substantially the same in terms of form and structure.'[57] Again, there was evidence of plagiarism where Fin24 also copied the first three paragraphs of the Moneyweb 7 story highlighted in the court judgment, and accompanying extracts of published discussions.[58]

In the US, the legislature, commerce and the Copyright Office have intervened to amend the Copyright Act and adapt it to the challenges of the digital era.[59] The changes sought to protect online content from predatory misappropriations, plagiarism, aggregations or scraping of news content to ensure protection for content creators, guaranteeing fair compensation for their works.[60] While some of the aggregators' activities may be justified under fair use or safe dealing, other aggregators are reproducing news content verbatim without attribution. Such free riding activities are an obvious harmful business practice. The need for regulatory clarity of the aggregators' activities becomes imperative because already scholars note that there is a lot of legal uncertainty about the activities of news aggregators in relation to either fair dealing or fair use exceptions, where the courts have regrettably applied such exceptions inconsistently.[61]

Nonetheless, Australia has since passed a new law, 'The News Media and Digital Platforms Mandatory Bargaining Code', which requires digital platforms such as Facebook and Google to compensate media outlets and publishers when linking their content in news feeds or search results.[62] The Code is designed to guarantee remuneration for media proprietors arising from the content they generate to help sustain public interest journalism.[63] The Code ushered Australia into the digital era, as the first country where a government-appointed arbitrator can decide on the final price that either platform will have to pay Australian news publishers, provided a commercial

55 *Moneyweb* (n1) para 19.1.
56 Ibid.
57 Ibid.
58 *Moneyweb* (n1) para 98.
59 C Little 'Strong copyright laws protect journalism and the public [Commentary]' *The Baltimore Sun*, 21 May 2014, available at https://www.baltimoresun.com/opinion/op-ed/bs-ed-newspaper-copyright-20140521-story.html (accessed 3 August 2023).
60 Ibid.
61 P Andanda 'Copyright law and online journalism: A South African perspective on fair use and reasonable media practice' (2016) 6(4) *Queen Mary Journal of Intellectual Property* 413.
62 SR Choudhury 'Australia passes new media law that will require Google, Facebook to pay for news' *CNBC*, 24 February 2017, available at https://www.cnbc.com/2021/02/25/australia-passes-its-news-media-bargaining-code.html (accessed 29 July 2023).
63 Ibid.

deal cannot be reached independently.[64] This is similar to the proposed arbitration copyright digital infringement dispute resolution framework under the MACC adjudicated by the MCT. Big tech giants such as Microsoft have since supported the Code. There are indications that Australia's Code could set a precedent for how other countries should regulate big tech companies and their relations with media proprietors in their exploitation of media content.[65] This approach is worth considering in this jurisdiction, given the effects of news appropriation on digital platforms. This is important considering that an established global wire service, the Associated Press, noted the following with concern:

> The evidence is everywhere: original news content is being scraped, syndicated and monetized without fair compensation to those who produce, report and verify it. AP's legal division continues to document rampant unauthorized use of AP content on literally tens of thousands of websites.[66]

The challenges with the migration from analogue to online facing media proprietors, which have necessitated the need for a proposed bespoke Media Code framework to address such shortcomings under arbitration, emerged in *Moneyweb v Media 24 Limited*.

4. *Moneyweb (Pty) Limited v Media 24 Limited*

Moneyweb[67] highlighted emerging copyright contestations between online news media proprietors that also revealed copyright law shortcomings and the need for further legislative clarity. The Digital Age carries new terminologies and infringement patterns that have not yet been captured under copyright law. These include hyperlinks, news aggregators, bloggers, scraping and file sharing. While courts can be innovative and adapt existing copyright law exceptions under fair use or fair dealing to resolve disputes, it would help if comprehensive amendments that capture such digital technicalities are adopted. Moneyweb contended that Fin24 unlawfully copied, appropriated and/or plagiarised seven Moneyweb stories – presented as Moneyweb 1, 2, 3, 4, 5, 6 and 7. The main arguments that emerged in the litigation also related to the definition of news, the copyright originality test, and whether the stories that passed the originality test were substantially copied to establish liability.

4.1 Originality test

The Berne Convention under Art 2(8) provides minimum standards for the protection granted to works under copyright.[68] The Copyright Act s 12(8) underscores the Berne Convention's provision by providing: 'The protection

64 Ibid.
65 Ibid.
66 Z Seward 'Newspaper execs treading carefully on antitrust laws' Nieman Journalism Lab, 28 May 2009, available at http://www.niemanlab.org/2009/05/newspaper-execs-treadingcarefullyon-antitrust-laws/ (accessed 4 August 2023).
67 *Moneyweb* (n1).
68 OH Dean *Handbook of South African Copyright Law* (2015) at 1-98C, para 9.9.2.

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of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information.' Undoubtedly, providing journalists with information at a press conference signifies the communicator's intention to provide their views in the public domain, and in the public interest. Some of the contested Moneyweb articles fell within this scope.

However, the court found that stories gathered outside the framework of a press release or conferences are not considered 'mere news' or 'items of press information'.[69] For the news fashioned out of a press conference to pass the originality test, the court held that the answer depended on whether the article is an original work containing more than the provided press information.[70] If it is held to be original, s 12(8)*(a)* of the Copyright Act will apply, because it will have assumed originality by providing supplementary information. If nothing new or significant is added to the 'news of the day' or 'mere items of press information', the copyright provision would not apply. The court stated that the exemption includes

> all information communicated to the media in material form or subsequently reduced to material form. This would include, but not be limited to, 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 authorisation being required from anyone.[71]

In the case of Moneyweb 1: The journalist attended a press conference, took notes, asked questions and wrote a story. The court held that Moneyweb 1 failed to show originality as there was no further evidence such as notes of the interview, and how the journalist went about constructing the story.[72] Furthermore, the court held that public events, carrying press briefings, are considered protected items of press information, which are communicated in material form or subsequently reduced to material form with full knowledge that the information will be in the public domain.[73] Therefore, the existence of prior material, such as a press statement, limits the scope of originality, therefore demanding more exacting proof of its existence.[74] Despite the author's byline being present in the article, the court demanded more detailed evidence about the manner in which the story was created, to enable the court to discern the nature and extent of the journalist's contribution, assessing her independent effort and skill.[75] The same argument was advanced in Moneyweb 2 and 3: more evidence of the journalist's effort in constructing the news was needed.

In the case of Moneyweb 4, the court was given the benefit of a press statement from which the original story originated. The court noted that the journalist sourced additional material for the story, and it 'contain[ed] more

69 *Moneyweb* (n1) para 75.
70 *Moneyweb* (n1) para 76.
71 *Moneyweb* (n1) para 72.
72 *Moneyweb* (n1) paras 19–20.
73 *Moneyweb* (n1) paras 74–75.
74 *Jacana Education (Pty) Ltd v Frandsen Publishers (Pty) Ltd*, quoted in *Moneyweb* (n1) para 21.
75 *Moneyweb* (n1) para 24.

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information than the press release', but found that 'the article is largely a copy of the press release' and hence made a similar finding that the journalist had 'not contributed enough to produce an original work'.[76]

In the case of Moneyweb 5, the court noted that the journalist's extraction of salient quotes from an audio recording[77] suggested that he had applied his mind to the facts. The story also contained inputs from other different sources, and this met the originality test. There are, however, strikingly similar circumstances that could be gleaned from Moneyweb 1, 2, 3 and 4. Furthermore, despite the journalist in the case of Moneyweb 6 not producing his notes, a recording or a transcript, the court was satisfied that the structure of the article itself demonstrated that the journalist had applied his mind to what was happening around him and created an original work by describing an event using his own observations.[78] Moneyweb 7 was wholly based on an interview sought, granted, transcribed and published, and hence passed the originality test.[79]

The court's application of the originality test was inconsistent when it interpreted the facts. Andanda highlighted the court's contradictions in approach and standards in determining the originality of the contested Moneyweb articles. She observed:

> 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. 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.[80]

It is important to note that the court concluded that Moneyweb discharged its onus of proving Moneyweb 5, 6 and 7 to be original works, but failed to discharge its onus of proving originality in respect of Moneyweb 1, 2, 3 and 4.[81] The onus of proving a defence in terms of s 12(8)*(a)* rested on Fin24, and it had to prove that Moneyweb 1, 2, 3 and 4 contained nothing more than 'mere items of press information'. After determining that Moneyweb had discharged its onus on proving originality with respect to Moneyweb 5, 6 and 7, it now needed to prove whether Fin24 had reproduced any substantial part of the articles that had been proved to be original works.[82]

76 *Moneyweb* (n1) para 39.
77 *Moneyweb* (n1) para 43.
78 *Moneyweb* (n1) paras 49–50.
79 *Moneyweb* (n1) para 53.
80 Andanda (n61) at 418.
81 *Moneyweb* (n1) para 77.
82 *Moneyweb* (n1) para 78.

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4.2 Substantiality test

The substantiality test is used to determine whether any substantial part of the original article was reproduced.[83] The test for substantiality was established in *Galago Publishers (Pty) Ltd v Erasmus*, where the court held that

> it is not necessary for a plaintiff in infringement proceedings to prove the reproduction of the whole work: it is sufficient if a substantial part of the work has been reproduced. … [I]t must be shown (i) that there is sufficient objective similarity between the alleged infringing work and the original work, or a substantial part thereof, for the former to be properly described, not necessarily as identical with, but as a reproduction or copy of the latter; and (ii) that the original work was the source from which the alleged infringing work was derived.[84]

In determining whether a substantial part of the work has been reproduced, the court makes a value judgment based on the work as a whole, focusing more on the quality of what has been taken rather than on the quantity.[85] The substantiality of the copied work now depends more on the quality than on the quantity or physical amount of what he has taken, and the novelty or striking features of the reproduced work. This was submitted to mean that quality relevant for the purposes of substantiality in the case of a literary work refers to the originality of that which has been copied.[86] The court established that much of the Fin24 5 article reproduced news that was a word-for-word copy of the Moneyweb 5 article, including established core aspects of the news, thereby establishing that a substantial part of the article had been appropriated.[87] Despite noting some degree of misappropriation in the case of Moneyweb 6, the court held that it was of a 'very little quantity' – even though Fin24 reproduced the headline, but used the word 'boss' instead of 'mastermind', and even though the first three paragraphs, and two paragraphs towards the end, of the Fin24 6 article were also copied from Moneyweb 6.[88]

In journalism, the headline and introduction capture the heart of the story, but the court held that 'it does not follow, without more, that the headline and introductory paragraphs of Moneyweb 6 represent, qualitatively, a substantial part of the article.'[89] In the case of Moneyweb 7, despite Fin24 copying the first three paragraphs of Moneyweb 7, four extracts from the some discussion and part of the sub-headline, the court held that Fin24 did not substantially copy Moneyweb material.[90]

83 Ibid.
84 *Galago Publishers (Pty) Ltd v Erasmus* 1989 (1) SA 276 (A) at 277.
85 *Moneyweb* (n1) para 85.
86 Copinger & Skone *James on Copyright* 16 ed (2013) 7–30.
87 *Moneyweb* (n1) para 88.
88 *Moneyweb* (n1) para 90.
89 *Moneyweb* (n1) paras 90–91.
90 *Moneyweb* (n1) para 98.

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4.3 Relevance of the misappropriation doctrine to the Media Code

The application of copyright law is the best way to determine news infringement.[91] However, in a number of areas it fails to accurately capture the professional ethical customs prevailing in the media industry. This does not render it completely irrelevant in the adjudication of media infringement disputes. It is proposed that a more informal arbitration forum capturing the nuances and historically binding ethical considerations could be more effective in adjudicating digital copyright disputes than civil copyright litigation with its rich common-law jurisprudence. Moon – highlighting the impact of news misappropriation in the US – noted:

> A thorough analysis of the current self-help measures taken by the newspaper industry has made it clear that a legislative amendment to the Copyright Act is necessary to save the industry. By incorporating the misappropriation doctrine into the Copyright Act, we will eliminate the uncertainty of litigation because, if history is any indication of the future, it appears that most litigation between newspapers and bloggers will result in settlements.[92]

Moon illustrates the existing tensions in copyright law around determining the extent to which a news story – being a mixture of existing facts and additional compilations – could assume originality. Quoting from the *Feist* case, Moon writes: 'if the compilation author clothes facts with an original collocation of words, he or she may be able to claim a copyright in this written expression. Others may copy the underlying facts from the publication, but not the precise words used to present them.'[93] Such work had to be independently created by the author rather than being copied and it had to possess a minimal degree of creativity.[94] She argues that even factual compilations may possess the requisite originality, and that the journalist may choose

> which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers. These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws.[95]

While facts themselves are not copyrightable, a compilation of facts, if original in its selection and coordination, can be protected under copyright law.[96] This is however contestable, given the approach taken by the court with regard to news originating from a press conference in the *Moneyweb* case. However, the misappropriation doctrine raises the bar for digital infringement liability in instances where Fin24 was found to have plagiarised or copied word-for-word the Moneyweb news articles. Moon notes that there has been copyright tension between facts and compilations, as many compilations consist solely

91 *Express Newspapers Plc v News (UK) Ltd* [1990] 1 WLR 1320. See *Ashdown v Telegraph Group* [2001] EWCA Civ 1142; [2001] 4 All ER 666 (CA).
92 Moon (n48) at 636.
93 *Feist* (n25) at 348.
94 Moon (n48) at 638. See also *Feist* (n25) at 345.
95 Moon ibid, citing *Feist* (n25) at 348. See also RC Denicola 'Copyright in collections of facts' (1981) 81 *Columbia Law Review* 516 at 523.
96 Moon (n48) at 638.

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of data: '[I]f the compilation author clothes facts with an original collocation of words, he or she may be able to claim a copyright in this written expression. Others may copy the underlying facts from the publication, but not the precise words used to present them.'[97] It is submitted that factual compilations such as news should possess prescribed originality, because the production of news, even arising from a press conference or public event, is evolving. Importantly, the news item which is structured and provided with context and background information is not distributed to the few who attended the conference, but to millions of readers online who will benefit from understanding the event. Media proprietors use resources to deploy the salaried journalist to the press conference, and write the news. The journalist invariably

> chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers. These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws.[98]

In the *Feist* case, it was held that '[n]o one may claim originality as to facts.'[99] But it is explained that:

> This is because facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence. To borrow from Burrow-Giles, one who discovers a fact is not its 'maker' or 'originator'. 'The discoverer merely finds and records.' ... Factual compilations, on the other hand, may possess the requisite originality. ... Thus, even a directory that contains absolutely no protectable written expression, only facts, meets the constitutional minimum for copyright protection if it features an original selection or arrangement.[100]

Therefore news compilation should find copyright protection and liability established especially if there is evidence of uncredited copy-and-paste of original facts. However scrapers, bloggers and other news aggregators tend to argue that news cannot be copyrightable because it is comprised of facts.[101] This can be persuasively countered after considerations of the financial implications arising from the hard facts of the hot news dilemma, where allowing media proprietors to unremittingly copy the whole or part of competitors' work could harm a return in new investment. This is so because breaking news attracts online hits and raises profits to finance further news production.[102]

If the Copyright Act were amended to include the misappropriation doctrine, liability for Fin24's conduct would probably arise if Moneyweb's considerable time, money and effort were considered. While it is evident that Fin24 did in some instances publish Moneyweb articles word-for-word, the financial

97 Ibid.
98 Ibid.
99 *Feist* (n25) at 347–348.
100 Moon (n48) at 638.
101 *Feist* (n25).
102 Moon (n48) at 649.

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impact of such behaviour cannot be ignored. Fin24 definitely benefited from its copy-and-paste of Moneyweb content as visits to its website attracted advertising revenue. Under an alternative dispute resolution framework, the ethical principles in the proposed Media Code would certainly establish liability in the case of copy-and-paste situations. Moon noted:

> News is, by its very nature, time sensitive: its value and worth are derived from the fact that it is 'breaking news', based on an event that occurred a short time ago. … [W]hen one copies information and news that has been gathered at another's expense and efforts, that clearly falls under the definition of free-riding. … [T]hose who copy breaking news … are deriving profits from the advertising revenues one can collect from having more news-seeking readers visit their websites. Thus, the scrapers are effectively stealing profits that news gatherers … need to recoup in order to continue paying their … employees.[103]

Arguments that hot news cannot be copyrightable because it is comprised of facts ignore significant financial investment in news production.[104] The significance of every word, sentence and headline matters in journalism, and the way in which the media underscores such significance is captured in what Associated Press head, Jim Kennedy, said: 'the essence of an article can be encapsulated in very few words. As content creators, we firmly believe that everything we create, from video footage all the way down to a structured headline, is creative content that has value.'[105] In *Moneyweb*, the court observed that, in the case of Moneyweb 6,

> Fin24 took very little quantity from Moneyweb 6. It reproduced the headline, but used the word 'boss' instead of 'mastermind'. The first three paragraphs, and two paragraphs towards the end, of Fin24 6, are also copied from Moneyweb 6. The remainder of a fairly long and detailed article is not taken from Moneyweb 6.[106]

Fin 24 escaped liability despite the court finding that the headline and introductory paragraphs of an article, although important to retain the reader's interest, did not, without more, represent qualitatively a substantial part of the article.[107] In *Sheldon v Metro-Goldwyn Pictures Corp*, the court held that 'no plagiarist can excuse the wrong by showing how much of his work he did not pirate.'[108] In another case, *Meeropol v Nizer*, there was a finding of significant copying where the copied content amounted to less than one percent of the infringing work.[109] In some instances, appropriating as little as 39 words cannot be justified.[110] The quantity and quality of the appropriated work are factors for consideration in the copyright substantiality test. The

103 Moon (n48) at 642.
104 Moon (n48) at 643.
105 S Hansall 'The Associated Press to set guidelines for using its articles in blogs' *New York Times*, 16 June 2008, at C7, available at http://www.nytimes.com/2008/06/16/business/media/16ap.html (accessed 7 November 2023).
106 *Moneyweb* (n1) para 90.
107 *Moneyweb* (n1) para 91.
108 See *Sheldon v Metro-Goldwyn Pictures Corp.* 81 F.2d 49, 56 (2d Cir. 1936) (a decision of the United States Court of Appeals for the Second Circuit).
109 *Meeropol v Nizer* 560 F.2d 1061, 1071 (2d Cir. 1977) (a decision of the United States Second Circuit).
110 *Harper* 471 US 539, 566.

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Associated Press, frustrated by rampant digital copying of its work, defined standards as to how much of its articles and broadcasts competitors could take without infringing and hurting its business.[111] The approach involved restrictions on quotations from its articles ranging from 39 to 79 words. Such an unprecedented intervention by a wire service demonstrates the predicament in which media proprietors find themselves.[112]

4.4 Challenges with copyright law in defining news

The emerging challenge is defining mere items of news under the Act. While the court in *Moneyweb* attempted to define mere items of news, journalists believe that the definition is broad in scope and problematic.[113] Furthermore, the digital revolution has also complicated the traditional definitions of journalists, news and its production, which makes revisiting existing copyright law obligatory.[114] Ward noted:

> A media revolution is transforming, fundamentally and irrevocably, the nature of journalism and its ethics. The means to publish is now in the hands of citizens, while the internet encourages new forms of journalism that are interactive and immediate. Our media ecology is a chaotic landscape evolving at a furious pace. Professional journalists share the journalistic sphere with tweeters, bloggers, citizen journalists, and social media users. Amid every revolution, new possibilities emerge while old practices are threatened. Today is no exception. The economics of professional journalism struggles as audiences migrate online. Shrinkage of newsrooms creates concern for the future of journalism.[115]

There are underlying concerns from the media around the interpretation of 'mere items of press information' referred to in the Act.[116] It is accepted that once news material is published for public consumption it ought to be interrogated in social forums, generating invaluable national discourse. The news of the day provision was interrogated for the first time in *Moneyweb*, and there is a real likelihood that further interpretations will emerge as more copyright cases are adjudicated. Nonetheless, journalists feel that the court's definition of mere items of press information is too wide in its scope. At an event to deliberate on the *Moneyweb* judgment, the *Rapport* editor noted:

> Should the article be original, we accept that it is not items of mere press information; it may be items of press information, but not mere press information. So, if your article is original, it will be protected. … But I do think it is a very wide definition, which does not take into account of what we do on a daily basis.[117]

111 Hansall (n105).
112 Ibid.
113 Kriel (n20).
114 O Akinwale, I Seriki & P Gutura 'An era of journalism transition in South Africa: Traditional media versus online media' (2017) 51(1–3) *Journal of Social Science* 1–5.
115 SJA Ward 'Digital media ethics' Center for Journalism Ethics, School of Journalism and Mass Communication (2016), available at https://ethics.journalism.wisc.edu/resources/digital-media-ethics/ (accessed 30 July 2023).
116 Copyright Act s 12(8)*(a)*.
117 Kriel (n20).

The court further held that news exempted from liability should include a dragnet of 'all information communicated to media'.[118] This is broad in scope and creates distinguishing marks problems for which information should be eligible for protection from infringement. The wide interpretation of news creates some degree of apprehension within the media, as reportedly

> many commentators and editors felt that the sky was falling with this decision … nobody is going to invest in journalism; nobody is going to do the work because everybody can just copy from one another. … They feel it is going to clamp down on the creativity in the industry.[119]

Such envisaged 'sky falling' ramifications for the media industry might be overstated, although understandable in the context of how print newspapers were disrupted and then closed in the Information Age.[120] In this context the *Rapport* editor, while noting that a total demise of traditional dependable media might be too early to predict, further outlined the immediate implications of the disruptive nature of the Digital Age:

> I think the entire business model in the media is being disrupted and we disrupt it ourselves. We take Facebook pictures from victims, where there is also copyright, we take those pictures; we take some of the content from the internet from private individuals and incorporate that into our articles. The whole industry is being disrupted … but in ten years' time, this is not going to be an important conversation. … This is not a matter that the courts are going to clarify for us, but it is a matter of ethics. We should instil some honour in the process and keep it out of the courts.[121]

This article's approach is to take such matters out of the courts' hands, and to instil some honour through journalists' own interpretation of editorial ethical standards in the proposed MACC and MCT. The ethical considerations under the Code of Ethics automatically become relevant. If, as the *Rapport* editor hinted, it is not a matter that the courts are going to clarify for the media, journalists need to establish dispute interpretation frameworks that suit their ethical code. This is important because of the observation that the *Rapport* editor made:

> IP law is a blunt instrument that stuck with me [after reading the Moneyweb judgment]. It does not really appreciate journalistic practice as we think about it. … If we look at the ambit of items of press information and if we look at the examples that the court decided to view as articles not being original, … it was purely evidential thing. It was just that Moneyweb did not go through all the hoops to prove it.[122]

This quandary for journalism reveals that copyright law should adapt to changing circumstances that suit and address digital complexities around the

118 *Moneyweb* (n1) paras 63–66.
119 Ibid.
120 J Martinson 'The Independent: A newspaper killed by the internet' *The Guardian*, 11 February 2016, available at https://www.theguardian.com/media/media-blog/2016/feb/11/the-independent-a-newspaper-killed-by-the-internet (accessed 31 July 2023).
121 Ibid.
122 Kriel (n20).

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production of news.[123] The *Moneyweb* case reveals the underlying concerns of news proprietors about infringers, and justifies calls for the crafting of a MACC that regulates the conduct of journalists, proprietors and competitors to maintain ethical standards.[124]

4.6 Digital technical attribution features and links

Fair dealing exceptions provide fairly justifiable considerations in the exploitation of analogue liability. While it remains relevant, the Digital Age has complicated its application due to a vast expanse of complex technical features used in the reproduction of news. New digital technical forms such as news aggregations, hyperlinks, downloads and peer-to-peer sharing are competing with the current existing analogue copyright approach for legal attention. The technological attribution, news content reproduction and distribution links encompassing news aggregations and hyperlinks are novel digital concepts that have infiltrated journalism, demanding the adaptation of copyright law to define the scope of infringement liability. An aggregator is defined as a website that takes information from multiple sources and displays it in a single place.[125] Andanda noted that news aggregations increase the scope for copyright infringement, given that some content is uplifted verbatim without attributions, going beyond the scope of copyright exceptions.[126] She writes:

> There are competing interests … 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 … argue that the online media are taking a public good news and broadening its reach as well as adding context, commentary, and content.[127]

Axiomatically, the downside of news aggregations is a drop in newspaper revenue. Copyright law has not expressly defined such technical parameters. It is commendable that some media proprietors have responded to digital developments and produced internal editorial guidelines for appropriate standards in the aggregation of digital news.[128] At least there is a starting point. For example, in *Moneyweb*, the plaintiff adduced as evidence editorial policy guidelines designed for publishing content aggregated from various sources to rebut the defendant's originality argument.[129] The court case was favoured with standards set for News24's news content-aggregating guidelines which laudably provided:

123 K Viner 'The rise of the reader: Journalism in the age of the open web' *The Guardian*, 9 October 2013, available at https://www.theguardian.com/commentisfree/2013/oct/09/the-rise-of-the-reader-katharine-viner-an-smith-lecture (accessed 28 July 2023).

124 O Adelabu & OH Mugawun 'Copyright violation and online news sourcing: Effect, challenges and panaceas' (2022) 4(1) *Global Journal of Education, Humanities and Management Sciences* 48.

125 Isbell (n54) at 2.

126 Andanda (n61) at 412.

127 Ibid.

128 *Moneyweb* (n1) para 118.

129 Ibid.

1. Never use more than 30% of the original source.
2. Rewrite all content.
3. Where possible add in your own context and own information.
4. Always credit the original source.
5. Include a link to all original sources.[130]

If such editorial guidelines could morph into binding envisaged MACC editorial rules and guidelines this could be helpful in adjudicating infringement disputes, because there would be clear parameters for establishing liability arising from unanimously acknowledged and delineated editorial rules and standards.[131] The judiciary has progressively defined 'hyperlinks' and determined whether they are sufficient attribution whenever used by media competitors in the reproduction of content.[132] Such common-law development is commendable and in tandem with technological developments. There has some legal resistance to media organisations challenging the misappropriations, scraping or aggregations of their works by competitors and individuals such as bloggers, often hiding behind the cover of copyright law safe dealing[133] or fair use doctrines.[134] The extravagant expropriation of works by bloggers and news aggregators involving wholesale misappropriations or plagiarism would certainly not receive copyright protection.

5. The Press Code of Ethics and the IFJ Global Ethics

A Media Code will be helpful in clarifying the adjudication of disputes between media proprietors in an arbitration commercial forum. Lessons could be drawn from the *Moneyweb* case and other international precedents to help formulate a Media Code around the misappropriation doctrine. The Media Code should be tailored around ethical considerations in journalism, which set the highest standards in the collection, writing and dissemination of news.[135] The misappropriation doctrine has an ethical dimension that corresponds to the spirit of the South African Press Code and the IFJ Global Charter of Ethics for Journalists.

In general, a journalist's responsibility towards the public takes precedence over any other responsibility, in particular to their employers and the public authorities.[136] Additionally, in pursuit of this principled objective, the IFJ Global Charter of Ethics for Journalists notes a responsibility to the 'honest collection and publication of news'.[137] Similarly, the South African Press Code commits the media to the 'highest standards' and to 'take care to report news truthfully, accurately and fairly'.[138] Fairness, it is submitted, also denotes that

130 Ibid.
131 Ibid.
132 *Moneyweb* (n1) paras 124–126.
133 Ibid.
134 *AP v Meltwater* 2013 WL 1153979 (S.D.N.Y.).
135 See Press Code of Ethics (n16). See also IFJ Global Charter (n17).
136 IFJ Global Charter (n17) preamble.
137 Ibid.
138 Press Code of Ethics (n16).

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natural justice principles must apply in the collection of news, and media proprietors must also treat each other fairly when conducting business.

Journalism has often been referred to as 'The Fourth Estate' which metaphorical expression illuminates its significance as an independent institution that serves to 'check on government power and potential abuse by shining a light on its actions'.[139] The background to the expression looms large in European revolutions that sought to oust government tyranny, replacing it with accountable state institutions. In this regard, Carlyle, in the context of the French Revolution, placed the press at the very heart of democratic revolt: 'A Fourth Estate, of Able Editors, springs up; increases and multiplies, irrepressible, incalculable.'[140] If the quintessential role of the media is to protect the public from government tyranny, and in equal measure hold private and public institutions and individuals accountable, then its role and conduct in society in collecting and publishing news should be without blemish. While journalists have a corollary obligation to manage or control the use of their work online, the availability and use of digital circumvention technologies render this almost impossible.[141]

The common thread arising from the Press Code of Ethics and the IFJ Global Charter is the 'highest standards' in the collection and writing of news. Such drafting cannot be envisaged in the wording of the Copyright Act. Nonetheless, the teleological premise around the drafting of such wording in the Code of Ethics is discernible and understandable. The proposed MACC encapsulating ethical principles would have provided some appropriate ethical barometers in the *Moneyweb* case through arbitration to hold Media24 accountable for the unethical practice of misappropriating content.[142] The core media values condense an enduring professional ethos guided by a public service mission profoundly accommodating in its notions of objectivity, accuracy, fairness and high professional ethical considerations.[143] The same ethics occupied the gist of Moneyweb's application in which it argued that Fin24 unlawfully 'copied, appropriated and/or plagiarised' its articles.[144] This therefore justifies a forum for commercial arbitration using an MACC ethics code and rules before an impartial tribunal consisting of a retired judge or experienced counsel with seasoned journalists to adjudicate. The Media Code should provide scope for the misappropriation doctrine to guide professional relations between media proprietors.

The central role that journalists play in shaping the national discourse and advancing the constitutional public interest discourse is captured in

139 EC Carroll 'Platforms and the fall of the Fourth Estate: Looking beyond the First Amendment to protect watchdog journalism' Georgetown Law Faculty Publications and Other Works (2020) at 530.

140 T Carlyle 'The Fourth Estate' in *The French Revolution* vol 1 (1837) ch V.

141 M Jansen 'The protection of copyright works on the internet – an overview' (2005) 38(3) *The Comparative and International Law Journal of Southern Africa* 350–354.

142 *Moneyweb* (n1).

143 W Mari *An Enduring Ethos: Journalism Practice* (2015) 687–703.

144 *Moneyweb* (n1) paras 5 and 88.

both the Constitution[145] and the foreword to the Code of Ethics. Thus South African journalists are guided and regulated by the Code's editorial ethical guidelines.[146] Retief, commenting on the Code of Ethics, posited that '[t]here is hardly anything that anyone can do without influencing somebody else; there is nothing that a journalist can do in her or his line of duty without affecting somebody.'[147] Given the profound public interest role of the media, the Code of Ethics is regarded as an 'ethical compass without which the media are all at sea.'[148] The Code highlights cardinal principles that should be adhered to enhance professionalism and the quality of news. Journalists 'exist to serve society' and the connotation arising from the adjective 'serve' invariably implies accountability and responsibility.[149] Section 1.4 of the Code requires the media to 'obtain news legally, honestly and fairly, unless public interest dictates otherwise.' Further, section 1.13 prohibits plagiarism. Retief writes:

> A journalist's work has to do with duty, obligation, dedication, devotion. Commitment. Everybody can become a journalist, because everybody has the right to freedom of speech – but not everybody can become a good journalist. Only those reporters who are committed to their work would be good reporters. Moreover, the Preamble does not ask for just any kind of (watered-down) commitment – it requires the maximum; it speaks of the 'highest' standards of excellence. This is one of the differences between law and ethics.[150]

Section 1.4 of the Code of Ethics adds that the media shall 'obtain news legally, honestly and fairly, unless public interest dictates otherwise'. There must be some measure of fairness and honesty in the business interactions of media proprietors, and the dissemination of the content itself. Journalists are urged in the section to conduct themselves ethically not only when they write their stories, but also when they are gathering their news.[151] There are glaring shortcomings that emerged in the *Moneyweb* case, in so far as news content was misappropriated in the case of Moneyweb 7 and others.[152] Section 1.13 of the Code of Ethics simply states 'the media shall not plagiarise'. Retief, buttressing this call, reiterates:

> Plagiarism is one of the worst 'faces' of unethical journalism imaginable. Reporters work with words, and if they take over text from somebody else without acknowledging this fact, they are stealing and betraying the very trade that they (should) hold so dearly. It is not prohibited to take over text from somebody else, but then you should limit it to the minimum and clearly attribute it to the source. The most common errors in this regard are twofold: Sometimes journalists simply cut and paste from the internet and then put their names to

145 Section 16 of the Constitution of South Africa states: '1. everyone has the right to freedom of expression, which includes: a) Freedom of the press and other media; b) Freedom to receive and impart information or ideas; … 2. The right in subsection (1) does not extend to: a) Propaganda for war; b) Incitement of imminent violence; or c) Advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

146 Press Code of Ethics (n16).

147 J Retief 'Decoding the Code' (2019) at 2, available at https://presscouncil.org.za/News/View/decoding-the-code-76 (accessed 27 July 2023).

148 Ibid.

149 Ibid.

150 Retief (n147) at 12.

151 Retief (n147) at 21.

152 *Moneyweb* (n1) para 94.

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> it; or reporters merely publish media releases, again under their own names. To me, such journalists do not belong in the industry. They make their living by writing – and if they use somebody else's work under their own names, they are defying the very purpose for which they should be striving.[153]

The question that emerges is: to what extent can copyright law capture such enforceable journalism principles that should guide in establishing liability where the evidence is overwhelming if it is watered down by common-law definitions of originality and substantiality as provided for under copyright law? Media24 admitted the reproduction of part of the Moneyweb articles, but denied that the reproduction was substantial,[154] even though it was found liable in the production of one of the seven articles. It is indisputable that unethical conduct which flies in the face of the Code of Ethics was established, but regrettably copyright law has its own separate legal considerations that operate miles away from the framework of the Media Code in establishing liability for unethical misappropriation. The efficacy of copyright law as the main relevant statute for adjudicating copyright misappropriation disputes is wanting in some respects. Andanda equally noted: '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.'[155] Such comments are pertinent in dissecting the limitations of copyright law in regulating the conduct of the media and establishing the scope of digital infringement.

6. Recommendations

A comprehensive MACC implemented by the proposed MCT operating under the auspices of a commercial arbitration centre is needed. Furthermore, an equivalent of Australia's new law, 'The News Media and Digital Platforms Mandatory Bargaining Code', which requires digital platforms such as Facebook and Google to compensate media proprietors for their news content has been proposed to prevent the unauthorised exploitation of digital content without compensation. Additionally, media proprietors must also find innovative ways of adapting to the harsh disruptive realities. Digital avenues that are designed to recoup their news investments through digital subscriptions and encryptions help to maintain the value of honest content and ethical journalism.

The advantages of an MACC and an MCT operating under a commercial arbitration institute is that the disputes will be accorded maximum journalism ethical standards and considerations in determining liability, without complicated common-law considerations espoused by copyright law. By referring such matters to a proposed arbitration forum, with rules and guidelines, the matters are removed from a complicated, lengthy court

153 *Moneyweb* (n1) para 26.
154 *Moneyweb* (n1) para 5b.
155 Andanda (n61) at 418.

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process where the judiciary and court dates are imposed on aggrieved parties, involving a costly litigation process within the framework of complicated and rigid court rules and procedures that can easily lead to an unfair outcome based on cumbersome technicalities. Arbitration may be less expensive than litigation if the adjudication process is properly managed. Copyright disputes are resolved within the framework of the Arbitration Act, accompanied by an informal and expedited resolution of the dispute.[156] This does not render the Copyright Act and common-law considerations irrelevant. Certainly, there are fundamental copyright principles and interpretations that retain value in the adjudication of disputes. Where issues of law emerge, or gross misconduct or error of judgment in dispute adjudication, the court can be retained to exercise its authority, while remaining alive to the value and essence of amicable alternative dispute resolution frameworks.[157] In certain circumstances, the court can set aside the awards.[158]

Under the MCT, professional media practitioners can assist in adjudicating disputes, assisted by a retired judge or experienced counsel. Expertise is available because the arbitrators and journalists are selected for their experience and knowledge of ethical considerations and the technical nuances of the dispute. The dispute resolution framework is flexible and final.[159] In such a forum, justice is often provided to those who are disadvantaged by the costs, delays and uncertainty of court litigation.

The resolution remains entirely within the hands of the media industry, which has the capacity to set benchmarks through a binding comprehensive Code of Ethics, defining its own terms and conditions to establish liability for infringements under its professional customs. Despite such challenges, there is no need to fear digital technological transformation despite its disruptive forms. There is evidence that emerging technologies could provide newspapers with many returns, which include increased revenue and attracting new vast audiences through the interactivity of social media.[160] Social media can also interact positively with news production, with viewers' comments often resulting in updates and the enriching of copy.[161] Scholars

156 AR Gorley 'Advantages and disadvantages of the arbitration procedure' (May 1998) *De Rebus* 339, available at https://journals.co.za/doi/pdf/10.10520/AJA02500329_2322 (accessed 4 August 2023).

157 See Arbitration Act s 20(1). See also s 33(1) of the Act which permits a court to interfere with an award where an arbitration tribunal has misconducted itself, or committed a gross irregularity, or exceeded its powers, or the award has been improperly obtained. See also s 32(2) of the Act, which provides as follows: 'The court may, on the application of any party to the reference after due notice to the other party or parties made within six weeks after the publication of the award to the parties, on good cause shown, remit any matter which was referred to arbitration, to the arbitration tribunal for reconsideration and for the making of a further award or a fresh award or for such other purpose as the court may direct.' See also *Leadtrain Assessments (Pty) Ltd and Others v Leadtrain (Pty) Ltd and Others* 2013 (5) SA 84 (SCA).

158 Arbitration Act s 33.

159 Arbitration Act s 48.

160 CE Everett 'Transformation of newspapers in the technology era' (2011) 2(2) *The Elon Journal of Undergraduate Research in Communications* 103.

161 Ibid.

observe that social media has changed the traditional approach of news with innovative participatory audience involvement which usually makes them feel appreciated.[162] In this respect, newspapers audiences have in some respects grown, posting new profitability margins from advertising revenue arising from digital innovation.

7. Conclusion

A recalibrated digital copyright Media Code that establishes news editorial policy and a standards framework that defines journalism, journalists, infringement patterns and liability for infringements must be drafted. The ubiquity of the Internet and the accompanying copyright infringements render imperative such ethical editorial policy guidelines and an MCT and an MACC operating under the auspices of established commercial arbitration institutions. Such a Media Code will help to restore the reliability of some online news content, promoting ethical standards in the collection and distribution of news.

162 P Farhi 'The Twitter explosion' (2009) 31(3) *American Journalism Review* 26–31.

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