

Appraising potential legal responses to threats to news in the digital era, draft second report

Evaluating the proposal that copyright should be used to assist the commercial news industry.

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Dr Richard Danbury

Richard@richarddanbury.com

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Introduction

The first part of my research undertook a comparative description and evaluation of some specific copyright-related interventions¹ that were intended to assist the commercial news industry in various countries. These were selected, as they constitute one potential legal response to threats to the production of news in a digital environment by one type of actor. I described in detail interventions in three countries, namely Germany, Denmark and Belgium, because what happened in each these three countries contrasts usefully with what happened in the other two countries. I evaluated the extent to which three national interventions have been successful, judged from a narrow perspective of whether they seem to have brought – in the short term at least – increased revenue to commercial news publishers. I concluded that, on balance, for various reasons they were not successful by these lights, and that negotiation in each of the three contrasting countries has appeared to be a preferable course of action.

Clearly, concentrating on the extent to which interventions facilitated an increase in short term revenue is but one way of evaluating success, and a narrow one at that. This second section of my research evaluates copyright related interventions from a broader perspective. The intention is to address some of the key concerns of the second part of the project:

We will consider the methods of assessing these changes not just on the economy but on the society. What is the impact of these shifts on the “quality” of journalism and the level of access enjoyed by different sections of the public to news, analysis and debate? This analysis goes to the very heart of the core research question with which the CREATE is engaging: how can we judge whether levels of production of cultural and informational goods are optimal in terms of both the quantity of production and also its diversity and quality?²

This is a large area to study, but considering it through the lens of the disputes about copyright and commercially generated news provides a narrow, manageable focus. However, copyright and news is itself a broad area, and my consideration of even this narrower subject will also of necessity be constrained, so I will investigate and analyse aspects of the arguments around copyright interventions that throw light on the general issue of journalism’s place in a democratic society.

¹ By ‘intervention’ I don’t mean to restrict the analysis to a novel use of copyright. I mean to include both news-related copyright litigation, as well as legislation that alters or transforms copyright.

² CIPIL, 'Appraising Potential Legal Responses to Threats to the Production of News in the Digital Environment' (CIPIL 2014)
<http://www.cipil.law.cam.ac.uk/research/appraising_potential_legal_responses_to_threats_to_the_production_of_news_in_the_digital_environment.php> accessed 17 June 2015

To do this I will attempt to sketch and analyse a prominent and plausible account of how copyright interventions might be justified. The argument is not one that is expressed in quite these terms in the literature, though it is close to Levine's argument,³ but rather is one that encapsulates a particularly strong and prominent case for copyright interventions. The idea is to try and develop a model argument, and subject it to a critique that throws light on the relationship of the changing news business models to the functioning of a democracy.

Hence, in part one I will develop the case that there is a need for copyright related intervention because there is a financial crisis in the commercial news industry, due in part to the disruption of the advertising on which the industries' revenue model is largely built. Commercial news publishers have sought to develop replacement commercial models, some of which attempt to derive revenue from consumers of news by using paywalls and the like, and copyright is very helpful in making these structures work effectively. Additionally, copyright may help secure advertising revenue. Hence copyright interventions can be justified based on a need to incentivise the production of commercial news.

The case is challenged in parts two, three and four. Part two critiques the argument from the point of view of whether intervention is necessary, and considers arguments drawn from literature that discusses the business of commercial journalism. Part three asks whether intervention is appropriate, and draws on discussions about the place of commercial journalism in a democracy. Part four considers the place of copyright interventions from the point of view of legal doctrine, both in terms of copyright and freedom of speech law.

Part two will demonstrate that the case is the incentive case is *prima facie* viable, as it can be expected that copyright interventions should assist incentivising the production of commercial news, but acknowledges that intervention risks over-rewarding commercial journalism in a number of ways. Whether these risks are worth bearing depends in part on one's view of the importance of commercial journalism to democracy, and there are a number of contemporary arguments that challenge the view that it is important. Part three will consider some of the most prominent of these, and point out a deficiency in such arguments that serves to highlight how commercial journalism does indeed remain sufficiently important in the UK to merit – in principle at least – incentivising by means of copyright intervention. This is because it is a participant in, and focal point for, political debate.

However, copyright intervention risks damaging democracy as well as assisting commercial journalism, and part four will consider this from the perspective of whether such intervention is appropriate from the point of view of the laws and principles of freedom of speech. It will conclude that copyright interventions to assist news are

³ R Levine, *Free Ride: How the Internet is Destroying the Culture Business and How it can Fight Back* (Vintage, London 2012) ch 4.

inappropriate, as they create an unacceptable impediment to the free flowing of ideas necessary in a democratic state.

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Part I Building an incentive case for copyright interventions

The starting point for this argument for legal or policy intervention⁴ is aimed at benefitting the commercial news industry,⁵ as this (it is argued) is facing a crisis. To some extent this is nothing new, as commercial journalism – like many other activities – regularly claims to be beset by crisis.⁶ But there is now more substance to the claim than there has been, perhaps, in the past. This is because significant sectors of the news industry in many countries in Europe and the USA have seen a dramatic decline in revenue and profitability. This decline, it is argued, is likely to remove a key incentive that motivates the production of news by parts of the commercial news industry. Without such an incentive, industry will not to produce the valuable social good that is news,⁷ and copyright intervention is required to ensure there is such an incentive.

⁴ A useful overview of various types of proposed interventions beyond copyright can be found in J Kaye and S Quinn, *Funding journalism in the digital age : business models, strategies, issues and trends* (Peter Lang, New York ; Oxford 2010).

⁵ By ‘commercial’ I mean that sector of journalism that is primarily or largely profit-orientated, the future viability of which is most of current concern. ‘News’ and ‘journalism’ are terms the boundaries of which are notoriously difficult to describe with precision, a fact that has dogged the law since attempts in the eighteenth century to define ‘newspapers’ for the purposes of the Stamp Acts: see, for example, s 101 Act for Laying Several Duties upon all Soap and Paper (1711, 10 Anne c19); Act for Preventing the Mischiefs Arising from the Printing and Publishing Newspapers (1798, 38 Geo 3, c 78); s 1 Newspaper and Stamp Duties Act (1819, 60 Geo III & 1 Geo IV c 9); s 4 Stamp Duties on Newspapers Act (1836, 6&7 Will IV c 76). For a fuller discussion, see L Bently, ‘The Electric Telegraph, and the Struggle over Copyright in News in Australia, Great Britain and India’ in B Sherman and L Wiseman (eds), *Copyright and the Challenge of the New* (Wolters Kluwer, Alphen aan den Rijn, The Netherlands 2012) 55-69. Similar contemporary problems arise in relation to defining news and newspapers for the purposes of copyright interventions: see p000, and debate about the term is also extensive in other areas of the law. For example, the meaning of the term in the Freedom of Information Act 2000 was the subject of analysis by the Supreme Court in *BBC v Sugar* [2012] UKSC 4, [2012] WLR 439 (Lord Wilson) [38] [39]. For the purposes of the present discussion, I mean ‘the news industry’ and ‘journalism’ to refer to the portion of the media primarily oriented toward current affairs and public policy and related expression historically identified with newspapers, following CE Baker, ‘The Independent Significance of the Press Clause under Existing Law’ (2007) 35 Hofstra Law Review 955 1022. Support for such a definition can also be garnered from F Schauer, *Free Speech: a Philosophical Enquiry* (Cambridge University Press, Cambridge 1982) 106, and LC Bollinger, *Uninhibited, Robust, and Wide Open : a Free Press for a New Century* (Oxford University Press, Oxford ; New York 2010) 109- 110. However, I also would include other entertainment material, when bundled together with this core material. (See text to n 203 below for a discussion about the importance of bundling.)

⁶ D Ryfe, *Can journalism survive? : an inside look at American newsrooms* (Polity, Cambridge 2012), for example, cites an article in the *Los Angeles Times* article that argued that ‘newspapers [were] challenged as never before’, and asked ‘are you holding an endangered species in your hands?’. It was published as long ago as 1976. M Welch, ‘When Losers Write History’ in R McChesney and V Pickard (eds), *Will the Last Reporter Please Turn out the Lights* (The New Press, New York, London 2011) notes predictions of journalism’s imminent demise from 1999. In the UK, there have been three royal Commissions on the Press since the war, in 1947, 1961 and 1974, and two lawyer-led inquiries, one headed by Sir David Calcutt QC in 1990, and one by Sir Brian Leveson in 2011, prompted by fundamental and deep-rooted concerns about aspects of journalism.

⁷ Some aspects of this are discussed in part 3.

Other arguments can be advanced for copyright intervention to benefit commercial news that don't necessarily rely on the existence of a crisis, many of which do not even employ consequentialist reasoning. For example, natural rights arguments have been advanced that emphasise the effort involved in the news process, and claim that as published news is the result of the expenditure of such labour and wealth it is akin to a possession which a publisher should have the right to dispose of it as they wish. These rights of disposal should be, the argument goes, protected by copyright, and breaches of such a right are akin to theft.⁸ Similarly, a reward, or 'sweat of the brow' argument, can be advanced recognising the effort involved in gathering and telling news as effort that should be rewarded with copyright.⁹ Arguments such as these may well be *prima facie* convincing, but also raise difficulties. I will not investigate them to any great extent in what follows, concentrating rather on the incentive-based argument described above, as this appears to me particularly prominent and pervasive.

This might be seen as a flaw, for as Bently and Sherman suggest, the incentive, natural rights and reward arguments are likely to be simultaneously deployed by those seeking to explain, defend, expand or extend news-related copyright interventions.¹⁰ Considering incentive arguments separately from other accounts is hence a somewhat artificial exercise. However, parsing out the different arguments and considering them separately is merited, as the success criteria for each are distinct. It becomes more difficult to evaluate the force of particular arguments for copyright related interventions when they are all rolled up together.

Decline in revenue and profitability

The central aspect of the crisis, then, relates to the revenue and profitability of commercial news, and in particular the legacy print news in Europe and America.¹¹ Until

⁸ 'Producing journalism is expensive. We invest tremendous resources in our project from technology to our salaries. To aggregate stories is not fair use. To be impolite, it is theft.' Rupert Murdoch, Chairman and Chief Executive of News Corporation December 1, 2009, David Sarno, *Murdoch accuses Google of news 'theft'*, Los Angeles Times, Dec. 2, 2009, < <http://articles.latimes.com/2009/dec/02/business/la-fi-news-google2-2009dec02>>

⁹ *Walter v Steinkopff* [1892] 3 Ch 489 North J, 495; *Walter v Lane* [1900] AC 539 Lord Halsbury 545; *Associated Press v Meltwater* 931 F.Supp.2d 537, S.D.N.Y. Mar. 21, 2013 (US District Court for Southern District of New York) District Judge Cote.

¹⁰ L Bently and B Sherman, *Intellectual Property Law* (OUP, Oxford 2014), 40

¹¹ Works recognizing the existence of a contemporary crisis in commercial journalism, on which I have drawn for this analysis include: I Hargreaves, *Journalism: A Very Short Introduction* (Oxford University Press, 2014); G Brock, *Out of Print* (Kogan Page, London 2014); G Ellis, *Trust ownership and the future of news : media moguls and white knights* (Palgrave Macmillan, Basingstoke 2014); A Jones, *Losing the News: The Future of News that Feeds Democracy* (Oxford University Press, Oxford 2009); RW McChesney and J Nichols, *The death and life of American journalism : the media revolution that will begin the world again* (1st Nation Books edn Nation Books, Philadelphia, Pa. 2010); R McChesney, *Digital Disconnect* (The New Press, New York, London 2013) – McChesney also co-edited a useful collection of essays on the subject R McChesney and V Pickard, *Will the Last Reporter Turn Out the Lights: The Collapse of Journalism and What Can be Done to Fix it* (New Press, New York 2011). A helpful overview of the 'crisis' literature, including a critique of the term itself is undertaken in I Siles and PJ Boczkowski,

relatively recently the commercial print news industry in the US and many European countries was very profitable. Some estimates put the median profit margin for US publicly traded newspaper firms in 1997 at 11.4%, compared with 3.3% for the food industry, 6.1% for chemicals, and 3.3% for the food industry,¹² and some newspapers enjoyed profit margins as high as of 20% or more.¹³ Other assessments confirm that in 2005, the average profit margin of American media companies was just under 20%.¹⁴ Warren Buffet summed up how the industry was seen by investors when he said that: “no paper in a one-paper city, however bad the product or however inept the management, could avoid gushing profits”.¹⁵ The same sentiment could be applied to the industry more generally, although it’s important to recognise that there were significant differences between the commercial news industries in different countries.

But the changes in the fortunes of the commercial news industry have been dramatic. In 2010, the average operating margin for publicly reporting US news companies had fallen from the 20% described in the last paragraph, to 5.6%.¹⁶ And a similar picture emerged in many parts of the commercial journalism industries in Europe, and in the UK in particular. So a recent survey in the UK found that in 2011, newspaper groups had lost about £2 billion of revenue over five years, down to £6 billion.¹⁷ *The Guardian*, for example, has made losses every year since 2004,¹⁸ and the proportion of operating profit the Daily Mail and General Trust makes from newspapers fell from 86% in 1996 to 27% in 2009.¹⁹ This decline in profitability has led to or is associated with a number of consequences, many of which are pose cause for concern for those who consider the industry to be important: falling sales and circulation,²⁰ declining numbers of journalists employed by commercial news organisations,²¹ a net loss of titles,²² and, ultimately, the

'Making Sense of the Newspaper Crisis: A Critical Assessment of Existing Research and an Agenda for Future Work' (2012) 14 *New Media Society* 1375.

¹² Kaye and Quinn, 20

¹³ *Ibid.* 39.

¹⁴ Ellis 16

¹⁵ Jones 157

¹⁶ Ellis 16.

¹⁷ Mediatique, 'A Report for Ofcom (Annex 6 to Ofcom's advice to the Secretary of State for Culture, Olympics, Media and Sport)' (Mediatique, London 2012). Globally, newspaper advertising revenues fell by 22% between 2008 and 2012: Ellis 17

¹⁸ Ellis 184

¹⁹ The underlying figure - £75 million – was the same in both years, which as Ellis observes, shows the diversified nature of DMGT. *Ibid.* see p000.

²⁰ Hargreaves 112, 121. For a more detailed discussion, see text to n 97.

²¹ *Ibid.* 111; Levine 111; Ellis 29, 120

²² The Press Gazette reports that between 2005 and 2011, 242 local newspapers in the UK closed, and only 708 new titles launched: Hargreaves 112; and in the UK in 2003 there were 1165 regional and local titles, but only 1054 in 2013: Ellis 30. McChesney and Nichols 32 describes a similar picture in America.

insolvency and bankruptcy of many companies.²³ Regional commercial journalists on newspapers and radio in the UK have been hit particularly hard.²⁴

In general terms, the extent and speed of this decline raises serious doubts about the future viability of significant parts of the commercial news industry, particularly in Europe and the US. That said, there do remain significant questions about the detail, nature and extent of the crisis – many commercial news organisations operating online are thriving. I will discuss the impact these differences have on the case for intervention later.²⁵

The advertising model

Many reasons have been identified as contributing to this decline in revenue and profitability, some of which are not directly pertinent to arguments about copyright.²⁶ This is not unexpected, as historically copyright has not been a significant mechanism relied on by news institutions to make money. Other factors have been more important, notably the need to be first to market with the news, given that news is a product with an extremely short shelf life. ‘Today’s news’, as the aphorism goes ‘wraps tomorrow’s fish.’²⁷ Such factors unrelated to copyright that contributed the decline in the fortunes of the news industry include the global economic turmoil that followed the banking crisis in 2007. This was important for a number of reasons, not least because the recession constrained the advertising spending from which commercial journalistic institutions benefit, but also because the credit crunch made it difficult to service debt which had been taken on in earlier era of expansion and corporate acquisitions.²⁸

But other factors are more relevant to arguments about copyright. One of the most prominent relates to the systemic, rather than cyclical, decline in the revenue that can be derived from advertising.²⁹ While other sources of income have been important to the industry such as subscription and direct sales, advertising has been a mainstay of the commercial model of print news businesses for many years. It is particularly important as people have seldom been prepared to pay sufficient to cover the costs of the news process,³⁰ and so advertising cross-subsidises the costs incurred to produce news. In

²³ Ellis 16, 31 – 32.

²⁴ Ibid. 161, 162, 230

²⁵ Text to n 89.

²⁶ Some are set out in the text to n 88 ff.

²⁷ McChesney 83; Y Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (Yale University Press, New Haven 2006) 40 – 45; ‘The peculiar value of news is in the spreading of it while it is fresh...’ Pitney J in *International News Service v Associated Press* 248 US 215 (1918) . See p000.

²⁸ Ellis 28, Brock see p000.

²⁹ Hargreaves 110; Brock 66, 111; Levine see p000; Ellis 17 – global newspaper advertising revenues fell by 22% between 2008 and 2012.

³⁰ Ellis 6, for example. This is discussed in greater length below, text to n 131 - 136.

America, Clay Shirky observed that it was Wall-Mart that paid for the Baghdad bureaux, and the situation was similar elsewhere.³¹

Advertising has had a remarkably long run: it has been a significant means of funding commercial regular periodical general interest news since about the turn of the eighteenth century.³² (It is worth describing the development of advertising in a little detail, for reasons that will become evident later.)³³ Walker tells us that the first advertisement appeared in an English newsbook in 1624, but it wasn't until 1648 that adverts appeared regularly.³⁴ Before this, it is likely that revenue was primarily derived from sales and subscription, the traditional means of funding manuscript and oral news networks.³⁵ Over time, though, it became appreciated that the attention of those who read the news could be sold on to advertisers, and this could help generate wealth that could help sustain large parts of the news operation, and return a profit to those who owned the business.³⁶

A key, though, was to get the balance right between news and adverts. Raven and others suggest that some early experiments were not particularly successful when the balance wasn't struck correctly, and publications comprising solely of advertising did not thrive.³⁷ The key to success was the merging of advertising with news: the attention of a large amount of readers – assessed in the amount of papers circulated – was attracted by printing news, and access to this attention was sold to advertisers.³⁸ When learnt, the lesson was quickly disseminated. Between 1695 and 1700, three London papers, the *London Gazette*, *Post Boy*, and *Flying Post*, regularly advertised books, medical services, lotteries, real estate, goods for sale, auctions, bankruptcy and lost or stolen notices – which included mentions of eloping daughters and absconding apprentices.³⁹ By 1702 the *Daily Courant* gave over at least half of its back page to advertisements,⁴⁰ and at the end of the first decade of the eighteenth century, Pettegree tells us that *The Tatler* had as many as 14 to 18 advertisements in an issue and up to 150 a month, promoting wigs,

³¹C Shirky, 'Newspapers and Thinking the Unthinkable' in R McChesney and V Pickard (eds), *Will the Last Reporter Please Turn out the Lights* (The New Press, New York, London 2011); Levine; Brock 99; Hargreaves 110.

³² RB Walker, 'Advertising in London Newspapers, 1650 - 1750' (1973) 15:2 Business History 112

³³ Text to n118

³⁴ Walker, 113; Raven 119; Pettegree 302

³⁵ A Pettegree, *The invention of news : how the world came to know about itself* (Yale University Press, New Haven ; London, England 2014)chapter 2 and chapter 6: see p000

³⁶ This is to speak in general terms. Different papers relied to different extents on advertising revenue, then as now: Walker, 130.

³⁷ Raven 120. By 1731, a pure advertising paper was an unviable prospect, and the *Daily Advertiser* soon failed Pettegree 303; Jones 13.

³⁸ Raven 131. Pettegree 315.

³⁹ Walker, 117

⁴⁰ Raven. 122.

wheelchairs, birdcages, lotteries, cosmetics and medicines.⁴¹ By 1720, Raven describes how advertising brought additional revenue to a dozen or more London newspapers.⁴² By 1730 a third of all the columns in a newspaper might be adverts,⁴³ and by 1750, in some papers this had risen to three-quarters.⁴⁴ Nonetheless, the balance still needed to be calibrated carefully, and as early as 1728 a reader wrote to a paper threatening to cancel his subscription on the grounds that his newspaper contained insufficient news.⁴⁵

When mastered, though, the technique was very remunerative. Indeed, it was a spat over the proceeds of advertising that led to a famous 1728 pamphlet exchange between ‘Coffee Men’ - those who ran coffee houses - and the upstart newspaper men over the revenue derived from advertisements. The anonymous coffee house author, lamenting the loss of advertising business, looked on the new interloper with jealous eyes, complained that:

Newspapers [...] are made tools and properties of in the business of advertising: they stipulate for news; not advertisements: yet the papers are ordinarily more than half full of them. The *Daily Post*, for example; is often equipped with thirty; which yield three pounds fifteen shillings that day to the proprietors for the least, and sometimes that paper has more. Well may they divide twelve hundred pounds a year and upwards: they are paid on both hands; paid by the advertisers for taking in Advertisements; and paid by the coffee men for delivering them out: which (to make use of a homely comparison) is to have a good dinner every day, and be paid for eating it ‘Here’s luck, my lads!’ Never was there so fortunate a business.⁴⁶

Quite how lucrative, though was a disputed point. A respondent writing on behalf of the newspaper industry argued that sales:

afford [...] no more than a poor half-penny, exclusive of advertisements, [...] for defraying the charges of paper and print; for every paper sells but for three half-pence, and one half-penny goes to the Crown for stamps, and

⁴¹ Pettegree 276

⁴² Raven 121.

⁴³ J Raven, *Publishing business in eighteenth-century England* (People, markets, goods: economies and societies in history,, The Boydell Press, Woodbridge 2014) 128

⁴⁴ Walker,

⁴⁵ A reader wrote to *The British Sun*, in 1728: ‘I desire you to erase my name from among the number of your subscribers unless in your next you give me a just reason for the barrenness of your intelligence’. Cited in Pettegree 313.

⁴⁶ A Coffee-Man, *The Case of the Coffee-Men of London and Westminster*. (G Smith (1728), Gale ECCO Print Editions (2010), London 1728) [16]. The writer goes on to ask: “[a]nd, if the coffee houses were to be shut up, I would ask what would become of advertisements? Whether they would not be driven to their old habitations, the city gates, the corners of streets, tavern doors and pissing-posts? And what they would be worth in such situations? The Coffee Men, therefore, are the only persons who deserve to reap the profits of ‘em.” [18]

another is the profit of the mercury and hawker; and as for the number of advertisements [...] at the common price [...] by the duty⁴⁷ are a charge and no benefit at all to the paper.⁴⁸

The technique of raising funds from advertising quickly spread across the Atlantic,⁴⁹ as in 1704, there appeared what seems to be the first advert in American journalism, in an edition of the *Boston News-Letter*, relating to the Oyster Bay estate on Long Island. There, too, it proved a robust way of generating wealth. It was well established by 1833, when Benjamin Day founded the *Sun* in New York indicating that '[t]he object of this paper is to lay before the public... all the news of the day, and at the same time offer an advantageous medium for advertisements.'⁵⁰

By the 1880s, US papers derived about half their income from advertising and half from circulation,⁵¹ and this trend continued throughout the twentieth century. Between 1950 and 2000 American print advertising revenue increased from US\$2bn to US\$48.7bn. The figures for the UK are similar, as between 1960 and 1970, the average annual growth in advertising revenue was 7%, and from 1969 to 1999 it increased 18 fold to £4.4bn.⁵² This amounted to a substantial proportion of the income in general received by commercial news industry – in 1956 in the US, for example, advertisements contributed 71% of news industry income, and by 2000 it had risen to 82%.⁵³

The longevity of this revenue model has now been undermined by, amongst other things, the development of digital technologies associated with the Internet. Three prominent effects have been identified, which together make the decline seem likely to be irreversible. They are all manifestations of the fact that the news industry no longer has the monopoly or near monopoly of control of access to the attention of those interested in news.

First, the Internet has caused a decline in the amount that could be charged for display advertising because of the practically limitless supply of display advertising that is available online. Second, it has also caused a collapse in much of the market for classified advertisements, as online sites offer for free a service that was once available in

⁴⁷ The Stamp Act of 1721 s 42 – 44 imposed a 1s duty on advertisements contained in newspapers.

⁴⁸ Anonymous, *The Case between the Proprietors of Newspapers and the Subscribing Coffee-Men Fairly Stated* (E Smith and others (1729) Gale ECCO Print Editions (2010), London 1729).

⁴⁹ *Advertising Age* magazine, cited in Kaye and Quinn see p000.

⁵⁰ Brock 32

⁵¹ RG Picard, 'Shifts in Newspaper Advertising Expenditures and their Implications for the Future of Newspapers' (2008) 9 (5) *Journalism Studies* 704 Check. See p000

⁵² Ellis, 19

⁵³ Kaye and Quinn citing Picard *Evolution of revenue streams and the business model of newspaper: The US industry between 1950 – 2000* see p000: 1956 adverts 71% of income; 2000 82% of income. 1950 retail 57%, national 25% and classified 18%; 2000 retail 44%, classified 40% and national 16%.

print for a premium, and reach a greater and more specialised audience.⁵⁴ Moreover, the revenue that comes from the online advertising that the news publishers can provide on their own sites and that remains in print has, in general terms, yet to rise sufficiently compensate for this loss.⁵⁵ The commercial news industry has been left significantly out of pocket.

The third reason why the advert model for funding the news industry is under threat is because other industries have adopted the central aspects of the model, and deliver them more efficiently than can the commercial news industry.⁵⁶ These central aspects are the attraction of an audience to read the information that is published, and the selling of access to this attention to advertisers. The other industries that perform these tasks better than the commercial news industry include, most notably, Google, which in many ways delivers a more attractive service to both audiences and advertisers. Audiences are better served, insofar as Google provides them with more attractive, general, apposite and up-to-date information than that traditionally provided by the news industry,⁵⁷ and it does so without charge so attracts great numbers. The company also serves advertisers well, as it delivers to them more detail about the nature of the audience's attention than was provided by the news industry, for which advertisers will frequently pay a premium.⁵⁸ Moreover, unlike commercial journalism, Google's data costs are comparatively low as it generates only a small proportion of the information it organises and presents to its audience.⁵⁹

Hence, it is not accurate to say that the advertising model is dead. It is more accurate to say the model that was developed by the commercial news industry in the middle of the seventeenth century, and which they have used consistently ever since, is alive and well. But now it undergirds Google and other similar companies in the business of supplying information to the public, who have out-competed the news industry that pioneered it, and relied on it for so long.

Experiments to replace the model

Given this decline in the traditional advertising model of revenue generation that was for so long integral to the financing of the production of news, commercial news publishers have sought to develop alternative ways of generating revenue. These are numerous and varied. Many are of less importance to the incentive argument for copyright (though copyright can still be relevant), such as the proposal for increased trust ownership of

⁵⁴ Jones; Levine; see p000 pinpoint

⁵⁵ Jones 165

⁵⁶ M Cooper, 'The future of journalism: addressing persuasive market failure with public policy' in R McChesney and V Pickard (eds), *Will the Last Reporter Please Turn off the Lights* (The New Press, New York, London 2011); R Nielsen, 'The Uneven Digital Revolution' in DAL Levy and R Nielsen (eds), *Reuters Institute Digital News Report 2013* (RISJ, Oxford 2013)

⁵⁷ W Patry, *How to Fix Copyright* (OUP, Oxford 2011) 154

⁵⁸ McChesney 149- 156.

⁵⁹ This is a source of irritation to news producers, as is discussed in the text to n 81.

commercial news organisations,⁶⁰ or the development of news apps that work on the mobile web.⁶¹ But there are some prominent models being tried of more direct relevance to copyright, of which I will describe three that are of interest because of the amount of revenue they could possibly raise: archive sales, paywalls, and licencing current online news. And, indeed supplementary to these are the continuing efforts to use the advertising model, by adapting it to raise revenue in the context of the Internet, which I will also describe. I will then explain how copyright fits into the picture.

Archives

The first, and perhaps a less significant approach given the small amount of revenue involved, is the attempt to make money from selling old material, such as is contained in news archives.⁶² The revenue derived from sales of archives is unlikely ever to be sufficiently large to create an incentive for the commercial production of news by itself, so this is of marginal importance, but worth considering when combined with other similar revenue models.

Paywalls, etc

The second and more important model is that of the paywall, where audiences have to pay or provide some other benefit to news producers to get access to material on news publishers' websites.⁶³ There are many such experiments currently underway in the news industry, and much hope is lavished on their prospects of creating a new, lasting revenue model to replace the advertisement model.⁶⁴ Revenue can derive from a paywall in at least two basic ways: people can be charged for access to the news, and access to that customer's attention can be sold to advertisers.⁶⁵ I will discuss the latter in a moment, but as to the former, there is considerable dispute as to how reasonable it is to suppose that people will pay for news in sufficient quantities to make this model effective. There is a large amount of empirical work being undertaken to assess this question, and there appear to be different trends in different countries, which are evolving over time.⁶⁶ But in a recently study covering 2014-15, only between 6% and 14% of people paid for online news in the countries surveyed by the Reuters Institute.⁶⁷ However, it remains at least a

⁶⁰ Ellis.

⁶¹ N Newman and DAL Levy (eds), *Reuters Institute Digital News Report* (RISJ, Oxford 2014), 61; , *Reuters Institute Digital News Report* (Reuters Institute for the Study of Journalism, 2015) 7.

⁶² Brock, 128, 150; Jones 170

⁶³ There are a variety of types of paywalls, permeable and impermeable, and allied systems of freemium and metered access to content. These are studied, for example in OECD, 'Measuring the Digital Economy, a new perspective' (OECD, 2014).

⁶⁴ There is considerable study about the viability of these structures, and whether people will pay for news online. Newman and Levy (eds), (; Kaye and Quinn; Mediatique, 'The Provision and Consumption of Online News - Current and Future' (Mediatique, 2014).

⁶⁵ There are other ways of deriving revenue too, such as ecommerce.

⁶⁶ The Reuters Institute Digital News Report has been tracking payment trends since 2013 in US, Germany, France, Denmark, Finland, Spain, Italy, Urban Brazil and the UK.

sufficiently plausible source of significant funds for the news industry to be worth considering.

Licensing current news

The third development is the attempt to make money from licensing reuse of current news material. This is potentially more lucrative to news publishers than archive sales, as linking, cutting and pasting and re-disseminating news of contemporary interest happens extensively online. Industry research has found that ‘[i]n a typical week, over 13,000 articles from 5 major newspapers are cut and copied into other sites. These are often professionally run sites supported by advertising and ecommerce services. One site alone took 488 articles in one week.’⁶⁸ This, clearly, represents a loss of sales, attention and therefore revenue to news publishers. A broad-brush indication of how much, at least in terms of sales, can be found in the *Meltwater* litigation in the UK, where it was indicated that the licensing of newspaper articles by the members of the newspapers’ collecting society, NLA Media Access, raised about £20 million per year.⁶⁹ In 2015, the NLA raised a greater amount, £32 million.⁷⁰

Are these figures sufficient to potentially amount to an incentive to produce commercial news? It may seem not, as they remain somewhat small beer given the scale of revenues involved in commercial news production.⁷¹ But there is evidence that there is more at stake than these numbers suggest. For one thing, the amount of money the NLA and similar collecting agencies raises is likely to be a fraction of what it could collect if it were able to police the re-use of news material more efficiently. For example, revenue is raised by other commercial organisations who re-disseminate news published online, such as media monitoring organisations like Meltwater. These companies raise revenue from selling access to news, for which people will pay because these companies analyse and arrange it in ways appealing to their clients. If the NLA and similar agencies were able more efficiently to control - a contentious suggestion - the linking and cutting and

⁶⁷ The 2015 survey found the following percentage of people had paid for online news in the past year: UK 6%, Ireland 7%, Germany 7%, France 10%, Japan 10%, USA 11%, Spain 11%, Australia 11%, Italy 12%, Denmark 13% and Finland 14%, *Reuters Institute Digital News Report* 18-19. Picard summarises the state of play: ‘[o]verall consumption of news on digital platforms is growing, reflecting the rising penetration of smartphones and tablets and the access they provide customers to digital news throughout the day. Growth in the number of paying digital news consumers, however, has slowed and it appears that the number of paying users in many countries is stalling at a lower level than many news organisations hoped.’ RG Picard, ‘The Business Outlook: Constraints on Growth, but Some Hopeful Signs in Digital News Provision’ in N Newman (ed) *Reuters Institute Digital News Report 2015* (Reuters Institute for the Study of Journalism, Oxford 2015).

⁶⁸ G Shepherd, A Hughes and NLA Media Access, ‘Copyright Infringement and Newspapers, Online Article Tracking System (OATs)’ (NLA Media Access, 2014) [2]

⁶⁹ *Meltwater v Newspaper Licensing Agency Ltd* CT114/09, 14 February 2012 (Copyright Tribunal (Interim Decision)) [6].

⁷⁰ ‘Annual Report’ (NLA Media Access, London 2015)

⁷¹ Ellis, 184 has a table showing the Guardian’s turnover and losses from 2004-2013. In 2013, as an example, the £32 million raised by newspaper licensing would have just above covered the losses incurred by the newspaper division.

pasting of news on the Internet by companies like these, the revenue from licensing news could be increased. Additionally, and perhaps more importantly, there is the potential that controlling such actions could lead to increased revenue derived from advertising, to which I'll come in a moment.

Hence this is a potentially sufficiently remunerative area, in principle at least, to merit attention. But, while the proposal that news publishers and their agents should be able to exert control over the news they published online attracts some, it horrifies many.⁷² This is central to the whole debate about copyright, news and society that this research is examining, and invokes doctrinal questions about whether such actions are consistent with copyright law in different jurisdictions, and normative questions about whether they are appropriate. I will discuss some of these later, but for the moment it's necessary to consider another point, namely the concern about whether such control is feasible given the amount of material involved. For if it is not feasible, then this area need not detain us after all, as any control that is exercised will never be sufficiently remunerative to amount to an incentive to produce news.

The question, as ever, is difficult to answer without a long analysis of the capabilities of the digital technology associated with the Internet. However, it is sensible to assume for the purposes of argument that any problems that exist are not insurmountable. Indeed, this is the assumption behind work underway at places like the Copyright Hub⁷³ to create a system of machine-readable copyright licensing and payment protocols. This would facilitate the work of agencies like the NLA, and create a revenue streams based on a system of micropayments for various internet uses of news that can be licensed.⁷⁴ True, these may or may not be successful: those who are optimistic about the prospects of such work echo Charles Clarke's famous suggestion that 'the answer to the machine is in the machine',⁷⁵ and those who are less sanguine follow Clay Shirky in considering them a

⁷² Those in favour include, in different jurisdictions, Levine; N Marimon, 'Shutting Down the Turbine: How the News Industry and News Aggregators can Coexist in a Post-Barclays v Thelifyonthewall.com World' (2013) 23 *Fordham Intellectual Property, Media and Entertainment Law Journal* 1441; A Jensen, 'When News Doesn't Want to be Free: Rethinking "Hot News" to Help Counter Free Riding on Newspaper Content Online' (2011) 60 *Emory Law Journal* 537; N Gamse, 'Legal Remedies for Saving Public Interest Journalism in America' (2011) 105 *Northwestern University Law Review* 329; J Hegemann, 'Schutzlos ausgeliefert' *Frankfurt Allgemeine Zeitung* (Frankfurt 9 April 2009). They have been challenged by, amongst many others, Patry; T Kreuzer, 'German Copyright Policy 2011: Introduction of a New Neighbouring Right for Press Publishers?' (2011) 27 *Computer Law & Security Review* 214; R Xalabarder, 'The Remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish Government; Its compliance with International and EU law' (infojustice.org 2014) <<http://infojustice.org/archives/33346>> accessed 10 October 2014.

⁷³ , 'The Copyright Hub' (2015) <<http://www.copyrighthub.co.uk>. > accessed 17 June 2015

⁷⁴ Kaye and Quinn 70 -73. A current analysis of micropayments showing them to be viable in some markets is made by R Stern, 'From 10 Cents Per Article: Micropayments for Journalism' (European Journalism Observatory 2015) <<http://en.ejo.ch/media-economics/business-models/from-10-cents-per-article-micropayments-for-journalism>> accessed 17 June 2015

⁷⁵ C Clarke, 'The answer to the machine is in the machine' (Stationers' Company 1995) <<http://copyright-debate.co.uk/?p=641>> accessed 8 June 2015. There is a general attack on Clark's thesis in chapter 11 of

distraction.⁷⁶ But it is appropriate to assume that they might work, so that one can take the incentive argument for news-related copyright at its highest.

Adapting advertising

Additional to these models are contemporary attempts to derive money from advertising, as there remains value in selling access to the attention of those who read news. Moreover, such attention can now be exploited more fully in commercial terms, because more precise details about consumers' preferences can be deduced from their interaction with news published online. This is information for which, as I have indicated, advertisers will pay more.⁷⁷

Advertising, therefore, remains a potentially lucrative area. Indeed, aggregators⁷⁸ like Google News frequently do not derive revenue from selling access to the news, nor, often, from selling access to the attention of their audience reading the news. Rather, they can benefit by selling access to this sort of attention in other contexts, including by gathering valuable information about the preferences of their audiences.⁷⁹ Moreover social media platforms, which are fast becoming as important as search engines as the main routes by which people find news that has been published online, also make money from news in similar ways.⁸⁰

Many commercial news producers see this revenue stream as free riding on the back of their effort, a point of view with which some commentators agree,⁸¹ and others dispute.⁸²

Patry, but based more on theoretical concerns than the practical difficulties of application being discussed here.

⁷⁶ Cited in Kaye and Quinn, 39. Some argue that micropayments are less attractive than single large licence fees – see, for example, Lord Sumption *Public Relations Consultants Association v Newspaper Licensing Agency (Meltwater)* [2013] UKSC 18 [36].

⁷⁷ Newspapers are not always well equipped to undertake these data analytics tasks, Hargreaves 122: JT Hamilton, 'What's the Incentive to Save Journalism' in R McChesney and V Pickard (eds), *Will the Last Reporter Please Turn out the Lights* (The New Press, New York, London 2011). Data analytics raise significant issues to do with personal privacy, which I will not have space to explore in more detail here.

⁷⁸ A taxonomy of news aggregation services is suggested by K Isbell, 'The Rise of the News Aggregator: Legal Implications and Best Practices' (Citizen Media Law Project, Berkham Centre for Internet and Society, Harvard University, 2010).

⁷⁹ Levine 127, 128; *Google Inc v Vidal-Hall* [2015] EWCA Civ 311 is a case that arises because of actions by Google to collect information about users activities.

⁸⁰ 'Facebook and Google continue to build some of the world's most profitable companies based on targeted advertising wrapped around relevant and interesting content.' , *Reuters Institute Digital News Report 19*. E Bell, 'The Rise of Mobile and Social News and What it Means for Journalism' in N Newman (ed) *Reuters Institute Digital News Report 2015* (Reuters Institute for the Study of Journalism, Oxford 2015).

⁸¹ 'Free riding' is the notion at the semi-moribund 'hot news' tort: *International News Service v Associated Press* . Levine 209; McChesney and Pickard 23.

⁸² The allegation is rebutted by those who assert that many aggregators provide sufficient recompense in the form of increased attention from audiences clicking through to read the source in more detail: see, for example, *Newspaper Licensing Authority v Meltwater Holding BV* [2010] EWHC 3099 (Ch) [93] – [94] .

But without getting drawn too much into those aspects of the debate, this is clearly an important and lucrative area. As Picard observes, the problem news producers face is how to gain access to the money that advertising brings to others:

News providers would like to derive a revenue stream from consumption of news shared on social media, but few are gaining much revenue today. Significant issues are how advertising revenue should be split and the sharing of users' data. Companies such as Facebook and other social media operators are powerful intermediaries and that will make it even tougher for news providers to make money as more content moves off their sites and apps to social media.⁸³

Indeed, negotiations are on-going between the search and social media industries and news producers in an attempt to resolve this, and have led to Google recently launching the Digital News Initiative,⁸⁴ and Facebook the Instant Articles program.⁸⁵

The case for copyright

Experiments in new business models such as these raise the prospect of copyright intervention, because of the ease with which the Internet facilitates the immediate and perfect replication or redistribution of material with negligible cost. Such linking and cutting and pasting make the alternatives described less efficacious. Copyright, to the extent that it inhibits this facility, or ensures that there is a charge if it is done, enhances their effectiveness. This is a change in the importance of copyright to the profitability of news institutions, because up until now (as mentioned above) copyright wasn't a substantial means by which the commercial news industry made money.⁸⁶

In relation to the archive revenue model, the case for copyright interventions is that they are likely to inhibit or prevent the easy redistribution to archive material present online, and so enhance the ability of news publishers to derive revenue from their old material. In relation to paywalls, copyright can help plug potential gaps in the barriers erected to regulate access to news content, by inhibiting and providing a remedy against those who would seek to evade the restrictions created by the paywall. In relation to licensing of published news, copyright interventions are intended to ensure that linking and cutting

Further, others argue that the services provided by media monitoring organisations are novel and add sufficient value to not be considered free riding, though this argument did not succeed in *Associated Press v Meltwater* .

⁸³ Picard; , *Reuters Institute Digital News Report* 18.

⁸⁴ Google, 'Digital News Initiative' (2015) <<http://www.digitalnewsinitiative.com/index.html>> accessed 15 June 2015

⁸⁵ Facebook, 'Introducing Instant Articles' (2015) <<http://media.fb.com/2015/05/12/instantarticles/>> accessed 15 June 2015. There is concern about whether granting such access is a wise move for news producers, as there they are handing significant amounts of power to third party distributors. F Filloux, 'The Redistribution Game for News' (2015) <<http://www.mondaynote.com/2015/06/14/the-redistribution-game-for-news/>> accessed 15 June 2015, Bell.

⁸⁶ See text to and n 27 above.

and pasting of contemporary news cannot happen without consequence, whether by individuals or organisations, and so help publishers derive revenue from current news they publish.⁸⁷

Additionally, the revenue that can be delivered from advertising is of great importance. Copyright is indirectly relevant here, because it helps news producers control the use of the news they publish. This provides them with a means to gain access to some of the revenue that flows to others from the selling to advertisers of access to the attention of an audience, an audience that has been attracted by the news published by commercial news organisations. Publishers have, as it were, a card that can be used in negotiating with the search and social media companies and the like, who benefit from displaying news. Experience shows that this may not always be an effective card to play, as demonstrated by the experience in Germany and Spain, but it is important to describe how it fits into the incentive argument.

Conclusion

The case is, therefore, that copyright may well assist in increasing revenue both through direct sales and subscription revenue, and also indirect revenue from advertising. To put the matter succinctly, the demise of the advertising model of revenue generation is a significant feature in the decline in revenue news publishers have experienced, and this decline is likely to remove a significant incentive that leads to the production of news. News publishers are developing new methods to derive revenue from the online sale of news and from online advertising. The efficacy of these methods is detrimentally affected by the ease with which information can be linked to, cut and pasted on the Internet.

Copyright is one method by which a barrier can be created (or enforced, or applied) to constrain the easy and cheap replication of the news published by the commercial news industry that subverts these new models. It is also a way of encouraging those who benefit from selling advertising linked to news produced by commercial news organisations to share some of their revenue. Hence news publishers have a reason to seek to enforce, clarify or develop copyright laws to ensure that they regulate the reproduction, linking and so on of news online. Their rationale is to ensure that these revenue models work more effectively, and this, it is anticipated, would create sufficient incentive to ensure that commercial news publishers continue to be motivated to create the news that democracy values.

But, as I have noted, this account is controversial. Such copyright intervention is clearly not without cost and consequences, many of which are borne by those who do not make a living from the commercial publishing of news. Moreover is it not clear that the sort of applications of copyright law or interventions that news publishers seek is doctrinally sound or acceptable as a matter of principle. It is not surprising, therefore, that many arguments have been advanced in many jurisdictions against this application of copyright. I will now consider some of these.

⁸⁷ Whether copyright constrains such activity is the source of much litigation and legislation: Spanish and German laws; Svensson; etc.

Part 2: Evaluating the case i) Would copyright assist incentivising the production of commercial news?

A number of different arguments can be made against copyright interventions to assist commercial news producers, of which two will be considered here that challenge the proposal that copyright would assist incentivising the production of commercial news. In the first place, it can be argued that sufficient incentives still exist to motivate the production of commercial news, and, even if such incentives no longer exist, others argue that we can expect other comparable incentives to arise. In either case, intervention is unnecessary.

While there is much to be said for these arguments, they are not cogent enough to overturn the *prima facie* case for intervention. It is true that some parts of the commercial news industry in many countries make money and so do not need incentives of the sort provided by copyright interventions, but there are reasons to expect that the sectors of commercial news industry in decline are the most important elements of the industry, and their decline is longer-term and more serious, and so merits intervention. Moreover, the idea that we can expect the business model of the commercial news industry to be creatively destroyed and replaced by a novel means of making money seems optimistic at best, and indeed there are cogent reasons to be sceptical of such a proposal.

But, while not disposing of the *prima facie* case for copyright intervention, this analysis does recognise that copyright interventions bear with them a number of risks. These include the risks of over-protecting commercial journalism in sectors that are not suffering a crisis, and of benefitting commercial journalism now, when the dangers it is currently suffering may soon be over. They risk inhibiting the development of novel business models, but providing a crutch to a redundant way of raising revenue, and rewarding bad choices and protecting managers and investors from the consequences of their actions. Whether such risks are appropriate risks to take depends, amongst other things, on one's views of the centrality of commercial journalism to a democracy, a matter I will consider in part three.

Sufficient incentives still remain, so intervention unnecessary

The first argument suggests that sufficient incentives remain to make copyright intervention unnecessary because, by one account at least, the crisis in the industry isn't as acute as has been suggested, or is no longer so acute, or is not as acute in all sectors of the industry, and moreover there are significant differences in how it has been experienced in different parts of the world. If this is so, why should we intervene if the news industry is, once again, relatively profitable? And why should we intervene when parts of the news industry have always been in rude health?

The evidence is compelling that any crisis that exists is confined to certain sectors of the commercial news industry and to certain countries. Indeed, much of the literature on the crisis in journalism concentrates on the dire position of the American metro newspapers,

and it really isn't clear that these should be taken as representative of any wider picture. Comparative longitudinal research by Oxford University's Reuters Institute makes clear that any crisis does not follow a universal pattern in different sectors of the news industry, nor in different countries.⁸⁸ India, for example is not experiencing a crisis, but rather is going through somewhat of a boom period.⁸⁹ Moreover, the economics of the television, radio and online industries are different to that of print, so generalising from the experiences of some in the print industry to make a case about the whole of commercial journalism is inappropriate. Some online news organisations, such as *Buzzfeed*, *Vice News* and *Huffington Post*, are far from being in crisis, but rather are attracting increased funding.⁹⁰ Furthermore, there are salient and important differences in the way money is made in different parts of the news value chain, and merely because news publishing is suffering, that doesn't necessarily mean news gathering, selection, writing or producing is in difficulty.⁹¹ The continuing vitality of companies that make their money from providing news selecting services may be taken as evidence of this.

Other parts of the argument are also founded on reasonably convincing evidence. The suggestion that the worst might be over at least in some sectors of the industry and for some titles in some countries, for example, is increasingly credible. To look at News Corp and the UK for instance, while the company itself recorded an operating loss of £35m in 2014, its titles the *Times* and *Sunday Times* and *Sun* had returned to profit. According to the *Press Gazette*, the *Times* and *Sunday Times* reported their first operating profit since 2001 of £1.7m, and while the *Sun*'s revenues were down 5.5% to £489m, this resulted in an operating profit of £35.6m – though this was down year on year from £62.1m.⁹² And the trend may be replicated in other areas, such as local news. In 2013, Johnston Press, following a debt restructuring in 2009, reported an increase in operating profit for the first time in seven years.⁹³ Similar evidence can be found in other countries.⁹⁴ It may be, therefore, that the worst years have passed: on what grounds, then, is there a call for copyright intervention? Moreover, it may be that the news industry is merely returning to less extreme levels of profitability than it showed in the past, and if it

⁸⁸ DAL Levy, R Nielsen and Reuters Institute for the Study of Journalism., *The changing business of journalism and its implications for democracy* (Reuters Institute for the Study of Journalism, Oxford 2010); DAL Levy and R Nielsen (eds), *Reuters Institute Digital News Report* (RISJ, Oxford 2013); Newman and Levy (eds), (; M Schudson, *The Sociology of News* (2nd Edition edn W W Norton & Company, 2011) 207.

⁸⁹ J Painter, *India's Media Boom* (Reuters Institute for the Study of Journalism, Oxford 2013);

⁹⁰ *Buzzfeed* for example, has attracted \$70 million of venture capitalist funding: Bell

⁹¹ A very useful analysis of the different activities can be found in Mediatique, 'The Provision and Consumption of Online News - Current and Future' (

⁹² <<http://www.pressgazette.co.uk/news-corp-records-operating-loss-£35m-down-£51m-profit-company-spends-£100m-legal-costs-and-msc>> accessed 17 December 2014

⁹³ Ellis - 32

⁹⁴ Germany's Axel Springer, for example, saw revenues rise by 12.7% in the first quarter of 2015: , 'Axel Springer profits from digital growth in the first quarter' (Axel Springer 2015) <https://www.axelspringer.de/en/presse/Axel-Springer-profits-from-digital-growth-in-the-first-quarter_23325474.html> accessed 16 June 2015

is, what remains of the case for intervention? As John Morton argued in the *American Journalism Review*, perhaps one ought to ‘stop the ax-wielding and accept that the era of exceptional profitability is over’?⁹⁵

Together, this evidence shows that it is presumptuous to assert that a crisis is universal, and it might be premature to assume that the crisis is permanent. Rather, any crisis that exists may well be limited in its geographical scope and time, and different in the effect it has had on different sectors of the news industry. Hence, any case for intervention built on the difficulties that do exist for some in the news industry in Europe and America risks over-reach. It risks, that is, benefitting parts of the industry that are not suffering to ameliorate the situation for those parts of the industry that are in difficulties.⁹⁶ That said, however, such evidence is not sufficient to undermine the case for intervention for at least two reasons.

The first reason is that it remains rather too early to say that whatever crisis exists in parts of the industry has been successfully weathered. This is because it is not yet clear how much of the difficulty that the news industry has been in is the result of a cyclical downturn in the economy, from which recovery can be now expected. This argument is a little weak, as it leaves ambiguous the question of how and when we could be clear about whether any downturn in the fortunes of the news industry are cyclical, and in any event seems to run in the teeth of the most recent figures that show there’s been an upturn. Nevertheless, it does have force, because there are reasons to expect that the longer-term trends will be downwards, due to the substantial long-term systemic problems that exist in the commercial news industry.

These fundamental difficulties have been widely noted in the literature. Indeed, one example has been discussed above, namely the decline of the traditional advertisement revenue model, which was for so long a stalwart of the news industry’s finances. Another long-term problem is the protracted and extended decline in circulation figures that show little sign of being reversed. People in Europe and the USA are, in general, consuming less and less news, and printed news in particular,⁹⁷ and while this is particularly true of the young, social and demographic changes have also been identified as reasons why

⁹⁵ Kaye and Quinn 85

⁹⁶ There is some evidence that the news industries in countries less effected by the crisis have benefitted from copyright interventions, for example, in China: Staff Reporter, 'Beijing Tightens Copyright Legislation for News Media' (WantChinaTimes.com 2015) <<http://www.wantchinatimes.com/news-subclass-cnt.aspx?id=20150426000003&cid=1104>> accessed 27 April 2015, National Copyright Administration General Office (China) and Rogier Creemers (tr), 'Notice Concerning the Standardization of the Online Reprinting Copyright Order' (Creemers, Rogier 2015) <<https://chinacopyrightandmedia.wordpress.com/2015/04/17/notice-concerning-the-standardization-of-the-online-reprinting-copyright-order/>> accessed 27 April 2015.

⁹⁷ Ryfe 1, 34; Hargreaves 112, 121; Schudson 225; S Wunsch-Vincent, 'Online News: Recent Developments, New Business Models and Future Prospects' in DAL Levy and R Nielsen (eds), *The Changing Business of Journalism and its Implication for Democracy* (2010); , *Reuters Institute Digital News Report* 64-66.

older people are also losing the habit of purchasing news.⁹⁸ Falling circulation figures have knock-on effects that create a vicious circle for the commercial news industry, as advertising revenues are linked to circulation figures, given that less can be charged to advertisers for placing advertisements against a product that fewer people consume.⁹⁹ Moreover, declining revenues makes it more difficult to spend sufficiently to create good quality journalism.¹⁰⁰

There are reasonable grounds, therefore, to believe that whatever any short-term improvement in the finances of the news industry, the long-term trajectory is downward. Moreover, given the longer-term trends, it is likely that the downward trend is not merely to more normal levels of profitability, less extreme than the sector enjoyed in the past, but to levels insufficient to support a large-scale news industry.

The second reason why the argument set about above is insufficient to dispose of the case for intervention relates to the suggestion of over-reach: that there should be no general intervention which will benefit the legacy print news industry because it will benefit other sectors – such as broadcast and online – are not suffering to the same extent. To begin with, it's not clear that this is true, and if it is whether it is likely to be true for long: there is evidence of significant closures of local radio stations that might have transmitted news,¹⁰¹ and there are concerns that the Internet will undermine television's advertising model, as it did that of print.¹⁰² But perhaps more importantly, there remain other cogent reasons to pay particular attention to the legacy print industry, as legacy print journalists are the engine room of the news industry.

In some studies in the US, for example, it has been found that newspaper journalists generate the vast majority of news reporting, with one estimate putting the content generated by print journalists as high as 85% of the total material produced in a particular area at a particular time. Another frequently cited Pew Centre survey of news in Baltimore in 2010 reported that 95% of stories with new information arose from traditional media, of which newspapers produced the lion's share.¹⁰³ This is perhaps unsurprising, as US newspapers used to employ three times as many journalists as were employed by other media.¹⁰⁴ But even in the UK which is dominated by the journalistic

⁹⁸ ; P Starr, 'Goodbye to the Age of Newspapers' in R McChesney and V Pickard (eds), *Will the Last Reporter Please Turn out the Lights* (The New Press, New York, London 2011)

⁹⁹ Ellis 33, notes other irreversible problems.

¹⁰⁰ Kaye and Quinn 5

¹⁰¹ GMG Radio, the UK's third largest radio broadcaster in 2010 suffered losses of £68.6m, which were greater than losses of Guardian and Observer together. It was sold in 2011 Ellis 162

¹⁰² McChesney 128

¹⁰³ Levine 132; McChesney 179 see p000 get original source

¹⁰⁴ N Gamse, 'Legal Remedies for Saving Public Interest Journalism in America' (2011) 105 Northwestern University Law Review 329

behemoth of the BBC, a similar position about the important contribution made by legacy print journalists is validated by research.¹⁰⁵

This shouldn't be taken as an argument for the preservation of the dissemination of news by ink on paper. Rather, as Ellis observes '[t]he concern should not be with the predicted demise of the ink-on-paper edition but with the possible death of the type of serious journalism for which the printed page has become an idealised metaphor.'¹⁰⁶ Perhaps even more so, the argument should be to attempt to preserve those who are skilled and trained to undertake 'difficult journalism in the public interest – either requiring large resources or resilience against attack', who for historical reasons exist in large, predominantly print-based companies, that can cross-subsidize news operations and afford expensive staff lawyers.¹⁰⁷ The significant reservoir of this sort of individual is in legacy print operations.

Evidently, therefore, while there remains a case for intervention even taking into account some of the nuances of the crisis, it is important to appreciate its limits. It may be true to say that insufficient incentives remain and so intervention is in principle appropriate, but the differences in the extent of any crisis in different areas of commercial journalism mean that any intervention will run the risk over-protecting other elements of commercial journalism.

Even if sufficient incentives no longer remain, others will be created, so intervention unnecessary

These observations lead neatly to an argument from the second class, namely that of creative destruction. This argument is based on the proposal advanced by Schumpeter that the destruction of old ways of doing business can lay the seeds that grow into new ways.¹⁰⁸ It suggests that even if it is correct to assert there is loss of a substantial incentive to produce news, this should not be of concern as one can expect novel incentives to evolve to replace the ones that die. There may be a crisis, and this may be down in substantial part to the loss of the advertising revenue model, but this destruction can be expected to lead to the creation of another revenue model that will incentivise the production of news by the commercial industry.¹⁰⁹ Because of this, intervention is

¹⁰⁵ Levy, Nielsen and Reuters Institute for the Study of Journalism. 4. A recent survey found that that the majority (65%) of the spending on news in the UK is accounted for by the print sector, with the national press spending about £875million and the regional press £470 million. Mediatique, 'A Report for Ofcom (Annex 6 to Ofcom's advice to the Secretary of State for Culture, Olympics, Media and Sport)' (.

¹⁰⁶ 17 Ellis.

¹⁰⁷ Brock 122. The point is contentious, as some argue that the Internet makes such institutional journalism unnecessary, a view discussed in the text to n 183 ff.

¹⁰⁸ J Schumpeter, *Capitalism, Socialism and Democracy* (3rd edn Unwin University Books, London 1950)

¹⁰⁹ The argument is discussed judicially in *Barclays Capital Inc v Theflyonthewall.com Inc* 650 F.3d 876, 2011 Copr.L.Dec. P 20,117, 99 U.S.P.Q.2d 1247, 39 Media L. Rep. 2009, 77 A.L.R.6th 793. It is also advanced, in various forms, in Ryfe 86; Shirky; Brock chapter 6; P Schlesinger and G Doyle, 'From organizational crisis to multi-platform salvation? Creative destruction and the recomposition of news

inappropriate. Those who advance this sort of case sometimes use the analogy of the buggy whip business, which was creatively destroyed by the invention of the car, to assert the various aspects of the old ways of commercial journalism are as redundant as a buggy whip.¹¹⁰

The case can be bolstered by an argument about moral hazard. That argument holds that revising the incentives available to news producers risks insulating those who manage such concerns from the consequences of their previous bad decisions. For example, some of the difficulties that parts of the industry currently suffer can be laid at the door of those who in the past loaded news companies with excessive debt. This proved to be a bad mistake as it couldn't be paid off nor could it be re-structured after the credit crunch of 2007.¹¹¹ Moreover, any crisis that exists is associated with the ending of the possibility of further mergers and acquisitions of news companies, actions that in the past had caused great increase in book value of media companies without corresponding improvement in the quality of the news produced.¹¹² Indeed, there is strong evidence that during this period, expenditure on the news effort was cut to flatter companies' profitability.¹¹³ Why, the argument goes, should there be intervention to assist the news industry, including intervention that involves copyright, when part of the cause of the problem is the errors and mistakes of those running the news industry? Why should we rescue those who have destroyed wealth and value?

The creative destruction argument is attractive but flawed. Why this is so can be realised from breaking it down into some of its constituent parts, because this reveals some of the weakness in the ways it has persuasive force. It can be seen to have a normative element and a historical element. The normative argument holds that we ought not to create new incentives (or recognise those that already exist) because doing so may inhibit the development of new forms of business, which can only evolve replace older models if those are permitted to die. We can expect new forms to evolve for various reasons, including the likelihood that the possibility of making a profit from commercial news is seldom likely to go un-regarded and unexploited for long. The historical element bolsters this belief, because it suggests that this is what happened in the past. It is worth further distinguishing two related but distinct historical claims that could be confused here – first, that creative destruction of the way that news is generated and disseminated has occurred; and second that history shows there to have been creative destruction in the way that way money is made from news.

media' (2014) *Journalism: Theory, Practice and Criticism*. Hargreaves describes how many American journalists support the view: Hargreaves 115

¹¹⁰ Ryfe, citing a 1976 *Los Angeles Times* article; Patry 3.

¹¹¹ Jones 161; Ellis 28; Brock 103.

¹¹² Ellis 26 – 34.

¹¹³ Cooper. The point is discussed further below, in the text to n 149 ff.

The relevance of history

It is the historical element that causes the most significant flaws in the argument. This is because it is not clear that the historical record does in fact support the normative claim. For one thing, one ought to be wary in general of making claims about the lessons that can be learned from history, as history very seldom repeats itself in sufficient detail to make such conclusions valid. As Bently observes: 'history rarely, if ever, reveals immutable laws about human behaviour, or about the necessary relationships between practices and ideas, or between technology and the law'.¹¹⁴ In this instance, that means one ought to be wary of making claims that history leads us to expect technological developments to creatively destroy the ways that news is generated and disseminated, and the ways that money is made from such an activity. Such diffidence can only be enhanced when one recognises the force of Naughton's observation that we are in the early days of the Internet, and we really are not in a position to say for sure how things are going to pan out.¹¹⁵

However, even if it is appropriate to look to the past as a model for the future, the conclusions that can be drawn from history are not at all clear. On reflection, for example, it can be seen that novel technological forms of communication, while revolutionary, frequently supplemented older means of communicating and did not always destroy them. Printed periodical news did not stop people hearing news from pedlars, ballads, or even from sending and receiving manuscript news letters for many years,¹¹⁶ the telegraph did not kill newspapers, television news did not kill radio news, and video did not kill broadcast television news. A more nuanced view of history, therefore, is that technological developments have tended to alter, rather than inevitably destroy the previously existing ways of gathering and communicating news. So it seems plausible to conclude that the Internet has undoubtedly disrupted, but may not destroy other existing forms of news communication. It may supplement them.¹¹⁷ This removes a little of the persuasive force of the creative destruction case against intervention.

But, more to the point, a reasonable reading of history also challenges the idea that technology has inevitably creatively destroyed the way money is made from news. This

¹¹⁴ L Bently, 'Copyright and the Victorian Internet: Telegraphic Property Laws in Colonial Australia' (2004) 38 *Loyola of Los Angeles Law Review* 71 171

¹¹⁵ J Naughton, *What You Really Need to Know About the Internet: From Gutenberg to Zuckerberg* (Quercus, London 2012), 4, 235. It should be noted that Naughton would probably not agree with arguments being advanced in support of copyright. He considers that the doctrines about copyright that were developed in a pre-Internet age should not apply post-Internet, 204.

¹¹⁶ Manuscript newsletters lasted until the 18th century according to Pettegree 265: '[t]hose who subscribed to the avvisi and their print successor valued the total separation of news from the more discursive, analytical and frankly polemical style of news pamphlets. The fear that the serial news publications might be polluted by this parallel strand of news reporting was widespread and increasing in the early eighteenth century.'

¹¹⁷ 'The reality is that most people over 45 are using digital news as an additional layer of choice and convenience without abandoning their core habits around television, radio, and print. Younger audiences who have grown up with digital are exhibiting very different behaviours and increasingly expect the news to come to them through online channels and in new formats.', *Reuters Institute Digital News Report* 19.

reading suggests that it was not merely the development of printing in Europe in the late fifteenth century that revolutionised the news business, nor even the application of printing technology to the communication of news in the first decades of the seventeenth century. It was also, and significantly, the discovery that the attention of an audience was an asset that could be sold on to interested parties. This is evidenced by the fact that there appears to have been a number of decades between the emergence of the first printed periodical general interest news publications – the *Corantos* of the 1620s¹¹⁸ – and the rise of advertising. The lesson of history for contemporary arguments may be, then, that there is reason to doubt that we can expect the Internet to herald a new revenue model to replace advertising by itself, or if it does anytime soon. And even if it should arise, in the meantime, the prospects for the commercial news industry may be dire.

Indeed, one should be wary of technological determinism, of narratives that place undue emphasis on the importance of technology as either a creative or a destructive news force, divorced from other stimulæ. One can look again at the early days of the commercial news industry for evidence of this. Boys's analysis, for example, questions the idea that printing technology was by itself a driving force in the development of printed periodical general interest news in the seventeenth century. She avers that as important a driver for the creation of the news industry was a demand for information, caused by an event of great public interest. This demand occurred in the first half of the seventeenth century during the thirty years' war, when Charles I's continental intrigues reflected back on the unfinished religious turmoil that the nation was experiencing.¹¹⁹ Without this demand, the technology would likely have delivered a surplus of printed news. Additionally, Raven identifies another element necessary for the development of commercial news, but one related to supply. This was the desire of those who owned expensive presses to make the fullest use of their expensive equipment that would otherwise lie idle between book runs. News printing afforded one such use.¹²⁰ If these accounts are correct, it shows that the importance of social and economic drivers of supply and demand in the development of commercial news. If history is a model, then, contemporary accounts of changes in the business of news, whether destructive or creative, should pay due regard to forces such as these, and be careful not to place too much emphasis on technology as a necessary driver of change

Moreover, a reading of history seems to suggest that news publishers have always sought to develop complimentary revenue models, none of which have ever completely replaced each other. One can trace three contemporary strands of revenue generation – sales, subscription and subsidy – back into the business models of commercial news in the days before print. Pettegree describes how these were derived from the different natures of the different consumers served by the pre-print news telling structures in Europe. The first

¹¹⁸ JEE Boys, *London's News Press and the Thirty Year War* (Studies in Early Modern Cultural, Political and Social History, Boydell Press, Woodbridge 2011) 45.

¹¹⁹ Ibid.. Other factors include alterations in the licensing regulations..

¹²⁰ Raven

structure delivered news necessary for commerce and aimed at merchants,¹²¹ the second delivered news necessary for political administration and was aimed at the rulers of a country,¹²² and the third provided information of a more general character, and was aimed at people more widely.¹²³ Merchants' news networks were organised and funded by those involved in commerce, political news networks were organised by political administrators and funded by the state. And as for the extensive organised but informal oral or semi-printed news networks that existed, centred around markets, taverns and streets, aimed at ordinary people, these were funded on an ad hoc basis, when people bought the odd broadsheet ballad, paid pedlars and news singers, or subsidised news broadsheets indirectly by frequenting the taverns on whose walls they were posted.¹²⁴

These three streams of revenue generation are very much in evidence today. It's plausible to claim that, rather than providing compelling evidence of the creative destruction of revenue models, history seems to provide evidence of the remarkable longevity of revenue models. Indeed, if there is a lesson from history, it may well be that as in earlier days, those who have the most to gain financially from regular, accurate and relatively complete information relevant to their business are more ready to pay a subscription to receive news, in comparison with those who have the least economic need for news, who will be less likely to commit to pay regularly in advance to receive it.¹²⁵ States and those who run them, clearly, will always need news and will always pay for it, but they have little incentive to run an open network and share their information with others.

The normative case

So much for the historical case, but the normative case for creative destruction remains persuasive even when separated somewhat from its historical support. We should, after all, be wary of intervening where this may impede beneficial change. However, the normative case is now more limited.

This is because, when stripped of the historical support, the normative argument becomes more uncertain: how can we be sure there will be beneficial change? It might be the case that disruption is good, as it will shake out the old and dead, but equally it might be the case that disruption is bad, as it will destroy the good. Even a scholar such as Benkler, one of the leading thinkers in this area who argues that we should permit and expect new structures to arise,¹²⁶ and who believes that we can expect these to be in many ways superior to those that are being undermined, concedes that it is not clear yet the extent to

¹²¹ Pettegree ch 2

¹²² Ibid. ch 4

¹²³ Pettegree ch 6

¹²⁴ Other networks also thrived, such as that serving and funded by churches and various other ecclesiastical institutions.

¹²⁵ 'The central factor in willingness to pay is the perception that the value of paid content is higher than that of free content.' Picard; Kaye and Quinn 53.

¹²⁶ Benkler; Hargreaves 135. Benkler's work is discussed at greater length below, n 183 ff.

which this is happening.¹²⁷ Furthermore, there are many who argue that the old structures appear to provide qualities that are not replicated by the new. Sunstein, for example, argues that the demise of what are in effect news editors (he uses term general interest intermediaries)¹²⁸ may lead the creation of personal echo-chambers, and distort people's views of the world and place within it.¹²⁹ Hence, there is an element of risk in assuming that the new will be as good or better than the old,¹³⁰ and this provides a reason to be wary of the argument for creative destruction. (I will discuss these issues in more detail in part three.)

Moreover, there are three cogent reasons to be wary of the expectation that the market will evolve business models suitable to incentivise the production of commercial news, at least of content that we feel to be useful. They rely on some of the curiosities of the news market, frequently noted in the literature.

The first is that news, like many products of the cultural industries, is 'nonrivalrous and nonexclusionary'. If I read or view a story, my attention does not consume the story, which is still there for another person to read or view. A financial return cannot therefore be generated from publishing the news in the same way that it can be generated from selling apples. This is because when I eat an apple, I consume it. If I want another to feed my child, I have to buy another, and the producer and retailer gets paid for two apples. But if I read a newspaper or view a news story, and I wish to pass it on to my neighbour, I can do so without buying another newspaper, and the producer and retailer only gets paid for one publication. Moreover, my reading of the news story does not inhibit my neighbour's reading of it. These issues are not a problem by themselves, but they do present a problem for those who expect incentives naturally to arise sufficient to produce commercial news. Publishers cannot necessarily expect that an increase in revenue can be derived from publishing to one person than from publishing to a hundred thousand people.¹³¹

The second problem arises because news can be a public good. This means that it can create positive consequences for society, consequences that we value but which do not

¹²⁷ Y Benkler, 'Giving the Networked Public Sphere Time to Develop' in R McChesney and V Pickard (eds), *Will the Last Reporter Please Turn out the Lights* (The New Press, New York London 2011)

¹²⁸ CR Sunstein, *Republic.com 2.0* (Princeton University Press, Princeton ; Oxford 2007) ch 2: discussed below, text to n 202ff.

¹²⁹ *Ibid.* ch 4

¹³⁰ Arguably, Schelsinger's research confirms the view that some of the changes are not altogether to the good. He notes that the ability of journalists and editors in the *Telegraph* appears to be altering the editorial approach of the paper, tipping the delicate balance of news judgment away from a bias to what a journalist considers should be reported, and more towards matter in which an audience appears interested: Schlesinger and Doyle, . The difference between the business and ideal of journalism is compared by Hargreaves to 'the classic separation of 'church' and 'state'. Hargreaves 68: the idea is discussed below text to and nn 152, 158.

¹³¹ Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* 36

generate an equivalent financial return for those who produce the news. An investigation into MPs expenses, for example, is likely to benefit society in a number of ways, but the full amount of such benefit is not easily captured by the organisation that investigates and publishes the story. This is because, while some people may buy the paper that reports such a story, it's questionable whether they'll do so in sufficient numbers to produce a financial return equivalent to the social value created by the story, let alone to recoup the costs of the investigation. It is also because many people will not buy the paper at all, and yet will feel the benefits that can accrue from living in a society where such reporting has happened, and moreover where such reporting is possible.¹³² In other words, news can generate great positive externalities for society that are difficult for a news organisation to capture. Because of this, it's unlikely that the market of itself will incentivise the sufficient production of such news. The result is that seems reasonable to assume that the market alone will provide an insufficient incentive to produce the quantity and quality of news that we'd like to see.¹³³ As Baker put the point:

We all benefit from the wiser voting of those informed by journalism. To the extent that benefits go to non-readers, newspaper companies cannot adequately turn these benefits into revenue.¹³⁴

Considering this from another angle reveals the third problem. This is the strong possibility that there is no necessarily correlation between the type of news that people frequently wish to consume, and the type of news that is likely to be beneficial to society. Many people like to consume tittle-tattle, gossip and other low value speech, and sometimes cannot tell truth from falsity.¹³⁵ That view leads some to suggest that news is a merit good, namely one 'where the collective consequences of individual consumer choices do not necessarily lead to the production and distribution of the goods and services most useful to consumers.'¹³⁶ If this is true, it makes it seem optimistic to expect that the market will provide an incentive to produce the news we consider valuable.

Together these points emphasise that one needs to be careful about expecting that the market will, without outside intervention, create sufficient incentives to encourage the production of commercial news. It may happen, the advertising model may be replaced organically after it has been created, but there are cogent reasons to think it may not.

¹³² J Raz, *The morality of freedom* (Clarendon Press, Oxford 1986) 247.

¹³³ Gamse, 345; Brock 159; Kaye and Quinn 136;

¹³⁴ CE Baker, 'Testimony to the 2009 House Sub-Committee on Courts CHECK' in R McChesney and V Pickard (eds), *Will the Last Reporter Turn Out the Lights* (The New Press, New York London 2009)

¹³⁵ This is not to assert that such speech has no value. It may have value as a force for binding people into a community, or for enticing them to consume news, which provides them with an opportunity to be exposed to other more useful material. Nevertheless, this suggestion remains contentious, and is discussed in more detail below, text to n 198.

¹³⁶ P Keller, *European and international media law : liberal democracy, trade, and the new media* (Oxford University Press, Oxford 2011) 24

Moral hazard

What of the moral hazard argument? This is also ultimately unconvincing. It might be challenged on its essential claim that there were errors of judgment by those managing the news industry, or it could also be challenged on questions of the extent to which these errors were foreseeable or caused loss, but even leaving these questions aside, it is not a strong case. The problem with the argument is similar to the problem with the normative case for creative destruction, namely that we don't know for sure that the consequences of rewarding failure are worse than the consequences of not rewarding failure. We are taking a risk, in other words. The moral hazard argument pushes us to believe that it is better to ensure that bad judgment is punished (and interventions withheld), than it is to try to ensure that the commercial news industry remains profitable. But it is not clear why we should think it better. Indeed, it is coherent to suggest that the benefit that accrues from the existence of a viable commercial news industry outweighs the detriment that accrues from being seen to reward failure. Clearly, this is a counterfactual argument, as one does not know which of the two will be the worse outcomes, but the point is that it begins to seem a bit of a gamble to anticipate that we'll get something as valuable as a replacement if we do not intervene and assist the commercial news industry. It is irksome in the extreme to insulate those who made bad choices from the consequences of their actions, but at the very least, more is required to influence our actions than is presented by the moral hazard argument on its own.

Conclusion

The argument for copyright intervention based on the suggestion that it would help provide an incentive for the commercial news industry remains, despite the counter arguments reviewed here, persuasive. The incentive element of the case for copyright intervention is not undermined by the fact that some sectors of commercial journalism are doing well, because generally speaking the long-term trends are poor in other, important sectors. Moreover, there are insufficient reasons to be confident that the revenue model of the commercial media will undergo creative destruction, as opposed to mere destruction.

However, that said, the case for copyright is not without risk. A significant risk lies in the fact that copyright intervention may over-benefit institutional commercial journalism, and this may impede a useful evolution in the way commercial journalism is funded. The question of whether the risks of over-protection of the commercial news industry inherent in the incentive argument are merited is not so much an economic or a legal question, but one that involves social and a political concerns, and turns on issues such as what one's opinion is on the extent to which one views the commercial news industry as necessary and valuable in a democratic state. It is to these arguments I will turn now.

Part 3: Evaluating the case ii) Is commercial news sufficiently important to democracy to merit incentivising by copyright intervention?

Introduction

Should these risks be taken on board – should, in other words, we use copyright interventions to assist commercial journalism despite the detrimental consequences that might result from doing so? Are we happy that, as Welch provocatively put it in the context of America : ‘[d]ollars from every single taxpaying American may be redistributed to an industry that until very recently was among the most profitable in US history’?¹³⁷ The answer depends on a range of factors, including an evaluation of the nature of the threat posed to commercial journalism, discussed in the last section, and a comparison of the risks and benefits of proposed solutions some of which will be discussed in the next section. But one factor is the importance we place on commercial journalism, as the more significant we consider it to be, the more likely we are to consider it deserves assistance, despite any collateral damage that such intervention may cause. That is the focus of this section.

Some of the more important reasons why we might consider commercial journalism sufficiently important to accept the risks incurred in copyright intervention are because of commercial journalism’s relationship to democracy: we may wish to intervene to assist the news industry because, for example, of the view that commercially generated news provides the information that is the lifeblood of a democratic state. But how convincing are these arguments? It is an easier question to ask than to answer, because of the extensive literature that studies the complex relationship between news and democracy. One notable area of complexity arises because there are tricky definitional problems, in particular as to what one means by ‘democracy’. This is of importance, as the extent to which commercial journalism is seen as integral to democracy depends on the type of democracy at issue.¹³⁸ That can lead to an even thornier underlying question as to what sort of democracy ought to be at issue, and that leads to the question of why one considers democracy to be valuable in the first place. The type of democracy preferred will in turn depend to a large extent on which political values – such as autonomy, equality, liberty and human flourishing – are seen as foundational. Hence the relevance of journalism to democracy will ultimately depend on deeper questions as to which

¹³⁷ Welch

¹³⁸ FS Siebert, T Peterson and W Schramm, *Four Theories of the Press* (University of Illinois Press, Urbana, Illinois 1956); DC Hallin and P Mancini, *Comparing Media Systems: Three Models of Media and Politics* (Cambridge University Press, Cambridge 2004); DC Hallin and P Mancini (eds), *Comparing Media Systems Beyond the Western World* (Cambridge University Press, Cambridge 2012)

political values one considers to be foundational, why, and how they are maximally expressed in political structures.¹³⁹

It seems most useful, therefore, rather than attempt a comprehensive analysis of questions such as these, to consider some significant criticisms that can be advanced about the proposal that commercial journalism does make contribution to democracy in the UK. I will do this by starting from the explicit assumption that commercial journalism is indeed integral to democracy, and then consider some significant arguments that suggest this is incorrect, or no longer true. The idea is that this will highlight some important limitations that should be borne in mind when evaluating proposed copyright interventions in this country. The assumption seems reasonable, because the view that journalism is in principle integral to democracy is widely held, even if the profession has frequently not lived up to expectations. As Lord Leveson puts the point:

[t]here is no doubt that the press is considered a voice of authority in society. In many quarters, it has rightly earned a reputation for accurate and vigorous reporting, independence and holding power to account. It is because of the authoritative quality of the press, combined with its access to mass audiences, that communication by the press, as an institution of considerable power, has a significant impact on society. It can set the news agenda, shape culture and change.¹⁴⁰

But there are limitations of this approach; one being that all the counter arguments to the thesis that commercial journalism contributes to democracy won't be canvassed, another that the theoretical nature of UK democracy is insufficiently investigated, and a third that the dice are loaded in favour of copyright intervention by virtue of the starting assumption that commercial journalism does contribute to democracy. This will undermine, somewhat, any conclusion as to the appropriateness of copyright interventions. But this seems unavoidable, unless an extensive survey is undertaken of the place of journalism in democracy, starting from political theory, and space precludes such an undertaking in an evaluation of copyright interventions.

The significant criticisms of the idea that commercial journalism is central to UK democracy can, in a rough and ready way, be classified into two general groups. (The arguments are not necessarily advanced in the literature with particular reference to the UK, but do, in many respects, apply here.) The first relates to the commercial quality of journalism, and the second to its institutional nature. The first hold that commercial journalism is not central to democracy, because other ways of constituting the activity of journalism are preferable to that designed around profit. These arguments recognise the importance played in a democracy by journalism undertaken by institutions, but maintain that these can be undertaken by non-commercial concerns, and assert that commercial

¹³⁹ CG Christians and others, *Normative Theories of the Media: Journalism in Democratic Societies* (University of Illinois Press, Urbana, Illinois, USA 2010) chapters 2 – 5.

¹⁴⁰ Leveson LJ, 'An Inquiry Into the Culture, Practices and Ethics of The Press' (The Stationery Office, 2012) vol 1 pt B ch 4 2.6 77-8.

journalism creates too great a risk to the public sphere. The second set of arguments take a different tack, and focus their fire on the institutional nature of commercial journalism, emphasising that journalism undertaken by institutions in general (and commercial journalism in particular) is no longer of central importance in a democracy. This is because the journalistic functions once performed by institutions can now, it is argued, be undertaken largely or significantly by individuals, or networks of individuals.

Despite these criticisms, commercial journalism remains central to the UK democracy. Criticisms of the first sort, that commercial journalism may damage the public sphere, are weakened by their failure to pay sufficient regard to the contribution that the activity makes to the public sphere. But, even if that were not the case, public sphere critiques of commercial journalism overlook the importance of the activity to democracy as a participator in public debate. This is important, and should be taken into account. Second, it is not clear that the predictions are correct that journalistic institutions are redundant. Such predictions frequently assert that individuals will be able to undertake the activities formerly predominantly undertaken by institutions, and this does not seem to have happened to a sufficient extent to support the conclusion that there is no longer a need for institutions. Moreover, merely concentrating on the information produced by individuals, and comparing it against that produced by institutions, misses other ways in which commercial journalism is valuable to the UK's democracy. These include the fact that commercial journalism provides a focal point for debate, and is a feature against which people can define themselves. That, again, is of great benefit to democracy.

Hence, this aspect of the case for copyright interventions remains, and there are reasons to consider interventions to be worth the risk they bear of causing collateral damage. But that is not sufficient reason, of course, to justify assisting commercial journalism by means of copyright interventions. What also must be taken into consideration is whether copyright is the best means to protect democracy, and to evaluate this one needs to pay regard to some of the damage that copyright can do to democracy. One aspect of this is the damage that copyright designed to assist the news industry can do to the values protected by freedom of speech law, and I will consider that in the next section.

How to deal with self serving arguments

Before I embark on this evaluation, though, it's important to note one feature of the arguments to be discussed. This area is complicated by questions of motive: there is frequently room to suspect that arguments about the relationship between news and democracy are not advanced on their own terms. They are not propounded solely, significantly or mainly because it is believed that they are true, but are also advanced for other reasons.

Such motivations include, in the case of arguments advanced or adopted by the commercial news industry, the desire to turn a profit, because news producers, in common with many other industries, are at risk of confusing their own interest with the public interest. This is not a novel observation, having been recognised at least since the nineteenth century, and in 1835 a pamphleteer made a charge of hypocrisy by news publishers that sounds very familiar to contemporary ears:

How can society respect men who show so little respect for themselves and each other; who, when their gains are threatened, can talk, it is true, in a lofty tone about the high character of the Press of their country for talent and integrity, but who, in general, are occupied in bandying with each other the lowest slang of the pothouses, or imputations of gross dishonesty and dense ignorance?¹⁴¹

Indeed, Pettegree puts the point more pithily, when discussing the response of journalism to a eighteenth century Stamp Act: ‘the press is never more eloquent, self-righteous and clamorous in the defence of liberty than when its own economic interests are concerned’.¹⁴² But it should also be recognised, conversely, that arguments by critics of the commercial news industry can also be advanced not merely because they are believed to be true, but because of other ideological, political or economic concerns. Commercial news is frequently the chosen battleground of wider social and political campaigns, for example. And Google and other Internet based information companies can advance arguments that may be true, but which also bolster their own economic interests. In the words of Levine, ‘Google has as much interest in free online media as General Motors does in cheap gasoline’.¹⁴³

Nevertheless, even though arguments may be motivated by ulterior motives, they may be valid. Even if arguments in favour of the commercial news industry are motivated by thoughts of the bottom line, it may be true that (in this respect at least, and to some extent), the interests of the commercial press are aligned with the interests of democracy. And, on the other side of the coin, arguments against the commercial news industry may be used as weapons by those embarked on a broader political war, but the points they raise may still be salient. In fairness, then, the question of motive ought to be resolved by attempting to take the arguments proposed at their highest. These arguments – whether beneficial to commercial journalism, or antagonistic to it – should be considered at face value and evaluated on their own terms, even if there is a suspicion of bad faith in those by whom they are advanced.

Commercial journalism and democracy

The first set of criticisms of the case that commercial journalism is central to democracy concentrates on the commercial nature of the activity. A number of reasons can be put forward why this might be so. One that will be discussed here is the observation that a danger arises from profit-driven entities undertaking the valuable task of providing information and opinion in a democracy. A key feature of these critiques is the notion of

¹⁴¹ Pettegree 315/6 citing J A Robuck in his pamphlet *The London Review and the Periodical Press*(London, 1835), quoting Aspinall, ‘Social Status of Journalists at the Beginning of the Nineteenth Century’ *Review of English Studies*, 21 (1945) , 222-3

¹⁴² Pettegree 334. The Stamp Act in question was the 1765 replacement for the 1712 act, and Pettegree argues it was aimed at replenishing the treasury rather than curtailing the Press. See p000 check.

¹⁴³ Levine 9.

the ‘public sphere’, and critics of commercial journalism say that the commercial motive risks polluting the public sphere with undue influence and bias. Defenders of commercial journalism counter this criticism by pointing out the ways in which commercial journalism can promote the public sphere.

My view is that the case that commercial journalism is damaging to the public sphere is not made out. Commercial journalism can damage the public sphere, but it can also contribute in significant ways to it. Moreover, and even if it is the case that it does on balance damage the public sphere, this should not be the end of the matter. This is because there are important and under-recognised ways in which commercial journalism contributes to the public sphere, by participating in democratic argument – as, in other words, an active agent, rather than a passive conduit.

Damaging the public sphere

Habermas famously developed the notion of the ‘public sphere’ to denote the abstract environment where individuals can discuss and argue, and thereby develop public opinion and formulate political actions, unmediated by outside control or interference. He argues that it emerged in the eighteenth century when public discussion became relatively free of state control, before the development of the commercial journalism that exists today. Nowadays, as Hitchens observes, it is ‘difficult to envisage today the public sphere operating without the media participating’,¹⁴⁴ but modern commercial journalism can also pose a danger to the public sphere.¹⁴⁵ An important reason why this is said to be so is because commercial motives may warp the sort of information that should be reported. Before modern large scale commercial news developed, the argument goes, information contributed to the public sphere was published because of a desire to facilitate debate and inform. This changed after the development of commercial news, as publication became frequently and substantially motivated by the desire to turn a profit and influence people. Commercial pressures were thus brought to bear on the public sphere, and it became structurally transformed for the worse.

The historical and descriptive elements of Habermas’ analysis have been disputed,¹⁴⁶ but as a normative critique it remains very influential.¹⁴⁷ This is true both of the concept of a public sphere, and his account of the damaging effect on it of the commercial press. McChesney’s critique of commercial journalism echoes many of Habermas’ concerns, and so it’s useful to consider the case he advances as a representative of similar contemporary arguments.¹⁴⁸ By way of background, McChesney is sceptical the benefits

¹⁴⁴ L Hitchens, *Broadcasting pluralism and diversity : a comparative study of policy and regulation* (Hart Publishing, Oxford 2006) 58.

¹⁴⁵ J Habermas, *The Structural Transformation of the Public Sphere: an Inquiry into a Category of Bourgeois Society* (Polity, Cambridge 1989)

¹⁴⁶ A short survey is undertaken by Hitchens 49 – 60.

¹⁴⁷ Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* 11

¹⁴⁸ McChesney 66. Other prominent arguments include Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* .

of capitalism in general, and in particular about the benefits that accrue from commercial content production industries. He sees commercial content production as beset by a tendency to monopoly, and argues (amongst other things) that the advertising model frequently warps content, making commercial content companies risk averse, and encouraging them to generate material that will please the largest group of people and offend the fewest. Moreover, such content will be aimed only at that particular group of people in whom the advertisers are interested, and others of less interest to advertisers will be poorly served.

McChesney argues that these flaws of commercial content provision are also likely to affect commercial journalism, but additionally identifies other problems particular to the commercial news industry. Such problems are structural, in that they arise from the pressures inherent in commercial journalism to deliver increasing returns on investment.¹⁴⁹ Commercial news organisations, he argues, are thereby put under pressure to cut expensive activities such as investigations, and the un-remunerative reporting of socially valuable but un-compelling content, such as the proceedings of local authorities.¹⁵⁰ Indeed, there is empirical evidence that validates such claims, drawn from studies of US metropolitan newspapers.¹⁵¹ Commercial pressures are also likely to be brought to bear on news judgments, and this risks making news increasingly soft: stories become increasingly legitimate because of their commercial attraction and because they are what people want to read, and not because of editorial judgment that has been exercised (at least partially and in theory) with the public interest in mind.¹⁵² The net effect of these pressures is that the public sphere is warped, or is at severe risk of being warped.

McChesney's preferred remedy is to emphasise the benefits of direct or indirect state subsidy. This, while not a particularly striking suggestion in the UK, seems to be deeply controversial in the USA.¹⁵³ It is certainly reasonable to suggest that news production should be subsidised in the country that is home to the BBC, but I don't wish to get diverted into a comparative analysis of the merits of subsidised as opposed to commercial journalism here, so much as to observe some of the weaknesses of the public sphere critique of commercial journalism. This is because it is important to draw to the fore some of the benefits of commercial journalism that are overlooked by a public sphere analysis. The point is that subsidised journalism may have a place, but that there are

¹⁴⁹ McChesney and Nichols

¹⁵⁰ Jones

¹⁵¹ Cooper; Ryfe. The difficulties of local and regional newspapers in the UK were described above, n 24.

¹⁵² McChesney; Jones 167, 184, and at 42, citing Henry Luce, co-founder of *Time*, who expressed similar concerns, who Jones says: 'denounced what he saw as a dangerous trend for news organisations to merely give people what they wanted. The result, as he saw it, was rampant vulgarity and sensationalism, and the creation of 'an enormous financial incentive to publish twaddle.... Square miles of journalistic tripe''. Contemporary research shows this may be happening, given the ease with which editors can track audience preferences: Schlesinger and Doyle, and see discussion at text to n 130.

¹⁵³ This is discussed, for example, in Schudson ch 11.

cogent reasons to think commercial journalism also plays an important function in our democracy.

Contributing to the public sphere

Unsurprisingly, perhaps, critiques of commercial journalism of this type have been disputed. Some counter-arguments challenge the notion that commercial journalism presents an undue threat to the public sphere. Of these, some observe that there are ways commercial journalism can be structured to avoid the sort of warping effects described by McChesney.¹⁵⁴ But others go closer to the heart of McChesney's concerns, and point out that they under-recognise the contribution that commercial journalism makes to the public sphere, as there are in fact ways in which the public sphere is actually promoted by commercial news.

One way in which this can happen derives from the fact that the possession of an independent source of income helps to insulate journalism from state and private patronage. This, it is argued, is evident from history and manifest now.¹⁵⁵ Historically, it was the possession of a secure commercial revenue stream, derived from a source not closely aligned to politics, which enabled journalism to be critical of politicians in something approaching a non-partisan way. It has been said that in England in 1792 the government had bought up 'half the press',¹⁵⁶ and Dr Johnson went to far as to define the word 'Gazetteer' in his dictionary as:

- (1) A writer of news
- (2) lately of the utmost infamy, being usually applied to the wretches who were hired to vindicate the court'.¹⁵⁷

It was commerce, the argument goes, that led to the press enjoying a sustainable income that broke this dependency.

Moreover, the commercial funding of news continues to facilitate this sort of independence, and helps counter the dangers of patronage that remain evident. He who pays the piper still frequently seeks to call the tune, and the absence of viable commercial journalism makes 'paid for' news more likely: Schudson describes such semi-official systems in China and Mexico,¹⁵⁸ and Hargreaves in Russia.¹⁵⁹ This does not mean that commerce is sufficient to remove all risk of patronage and 'paid for' news, as this continues to be a problem in, for example, India, despite the comparative success of the

¹⁵⁴ For example, Jones asserts the benefits of family owned businesses; and Ellis the benefits of trust-ownership.

¹⁵⁵ See the text to, and n 105.

¹⁵⁶ Pettegree 368

¹⁵⁷ S Johnson, *A Dictionary of the English Language* (J and P Knapton and others, 1755) Cited in Pettegree 315.

¹⁵⁸ Schudson 173

¹⁵⁹ Hargreaves 23

country's journalism industry.¹⁶⁰ Nevertheless, while it may not be sufficient to prevent patronage, commercial funding remains a useful tool for journalistic institutions that want to resist being captured by the interests of those that fund them.

Evidently, those who seek to defend commercial journalism still have to deal with concerns this argument brings to mind about the power of those who own the commercial media. The risk is that that ownership of a commercial media outlet creates a danger of undue influence and advocacy by press barons and tycoons, complementary to the dangers of undue influence by the state and patrons. These dangers were manifest in the 'yellow journalism' of early 20th century America,¹⁶¹ and are a prime source of contemporary debates about media power in other countries.¹⁶² They are summed up by the journalist A J Leibling's famous epithet 'freedom of the press is guaranteed only to those who own one,'¹⁶³ and Stanley Baldwin's jibe that press proprietors were aiming at 'power without responsibility – the prerogative of the harlot throughout the ages'.¹⁶⁴

These concerns can, to an extent at least, be reduced by a combination of a culture of professionalism, regulation and organisational structures such as shareholder ownership. Professionalism is said to be effective because it entails separating the commercial interests of the paper or the opinions of the owner from editorial decision-making. It is strongly advocated and has a long history in America, influenced largely by the writings of Walter Lippmann,¹⁶⁵ but arguably is less evident in other countries, perhaps in parts of the British press.¹⁶⁶ Regulation, frequently a controversial suggestion, can also alleviate some of the concerns about undue influence by media owners, and can take the form of the laws that control media mergers, cross-media ownership,¹⁶⁷ and, ultimately even content.¹⁶⁸ Shareholder ownership, if effective, can remove an individual media owner from positions of power altogether, or dilute the effect of his control.¹⁶⁹

¹⁶⁰ P Roy, 'More News is Good News: Democracy and Media in India' in J Painter (ed) *India's Media Boom: The Good News and the Bad* (Reuters Institute for the Study of Journalism, Oxford 2013).

¹⁶¹ Schudson,

¹⁶² J Curran and J Seaton, *Power Without Responsibility : Press, Broadcasting, and the Internet in Britain* (7th edn Routledge, London ; New York, NY 2009)

¹⁶³ AJ Liebling, 'Do You Belong in Journalism' *New Yorker* (New York
<<http://www.newyorker.com/magazine/1960/05/14/do-you-belong-in-journalism>> accessed 24 June 2015

¹⁶⁴ The line was suggested by Kipling: Curran and Seaton 42 (see p000)

¹⁶⁵ W Lippmann, *Harcourt, Brace and Company* (New York, 1922)

¹⁶⁶ This has been noted for a while. A criticism, and a recommendation that independence from owners should be embodied in law, is set out in T Gibbons, 'Freedom of the Press: Ownership and Editorial Values' [1992] Public Law 279. A fuller analysis of the effect of owners on journalism is undertaken in chapter 5 of Hargreaves.

¹⁶⁷ Communications Act 2003; Hitchens.

¹⁶⁸ Leveson LJ(

¹⁶⁹ Hargreaves 68

Defenders of commercial journalism should also deal with the risk of subservience to advertisers. But this risk, it can be argued, can be reduced or evaded in a number of ways. One arises from the realisation that an audience is unlikely to consume news that genuflects to its sponsor for long. This will mean that sensible advertisers will not exert too much pressure on a news outlet, because while exerting such pressure may be in their short-term interests, in the long term it puts at risk the very quality they are seeking to purchase. In the long term, the argument goes, advertisers can actually gain from not interfering. All in all, the case is as Schudson explains, ‘commercial forces have historically encouraged good journalism – that is, popular and critical journalism – even if they have not intended to do so’.¹⁷⁰ Or, to put the point in the view of Katharine Graham, the erstwhile publisher of the *Washington Post*: ‘the best guarantee of first-class journalism is a strong bottom line’.¹⁷¹

A limitation of the ‘public sphere’ idea

There are evidently problems with both the case as advanced by the critics, and that advanced by defenders of commercial journalism. They are quite well known, and rather than attempt to resolve how convincing they are here, it is more useful to concentrate on an aspect of this debate that brings to the fore an important aspect of commercial journalism’s contribution to democracy, which can be overlooked and is relevant to copyright arguments. This arises from the fact that the arguments described are based on the notion of the public sphere. The use of this concept is not a problem in itself, but a problem arises from having one’s thoughts constrained by the metaphor, and from thereby being pushed in the direction of seeing journalism primarily as a neutral conduit. This is because journalism isn’t only a facilitator of the public sphere, but it also takes part in public debate: it is not only a passive conduit, but it is also an active agent. It is this active participation that, when undertaken by commercial journalism, is a useful element in the UK’s democracy.

The problem arises because inherent in the notion of a public sphere, as mentioned earlier, is the idea that it should be, as far as is possible, a space relatively uninfluenced by outside agendas. This is because mediation of information is likely to bring with it undue influence and bias, and that leads to the risk that ideas and opinions formulated in the public sphere are not as authentic as they could be. The notion of the public sphere, therefore, leads to a view of the importance of journalism as a neutral and passive conduit, a means by which ideas and information flow to and from people. Such a view is implicit to the arguments of both the critics and defenders of commercial journalism that I described above, as the critics censure commercial journalism on the grounds that it is not sufficiently neutral and so warps the public sphere, and the defenders observe that there are mechanisms to ensure that it is sufficiently neutral, and does not.

However, this is not the only notion of the function of journalism to be found in the literature. An alternative account regards journalism as a participant in debate, and indeed as a counterpoint to the power of the government: this is the traditional notion of

¹⁷⁰ Schudson 125

¹⁷¹ Jones 199; Hargreaves 68 - 71

journalism as a Fourth Estate, of campaigning journalism, and the idea of journalists acting as tribunes. It is exemplified, perhaps, in material such as Emile Zola's famous front page challenge '*J'Accuse....!*' published in the French newspaper, *L'Aurore*, to defend Lieutenant Colonel Dreyfus, and addressed to the President of the French Republic.

This can be called 'participatory journalism', and it's useful to distinguish it from the view of journalism primarily as a conduit for information that contributes to the public sphere. There is some overlap between participatory journalism and public sphere conduit journalism, as participatory journalism can create information that is valuable in the public sphere. However, it is important to keep the ideas separate. This is because conduit conceptions of journalism place great importance on the notion that journalism should not influence the debate that occurs in the public sphere, and see the function of journalism as predominantly passive. In contrast, participatory journalism emphasises there is a value in journalism that is active, arguing, disagreeing, influencing and campaigning. Conduit journalism, in other words, suggests that journalism is flawed when it enters the political arena, but participatory journalism sees engaging in political advocacy as in principle at least, a useful and important element in democratic political debate.

This is, admittedly, a brave argument. Describing journalism as a quasi-constitutional activity in contemporary Britain, and proposing that it is important and even integral to democracy, will seem to some presumptuous or even ludicrous. This is not least because of the legacy of phone hacking by tabloid papers that led to the Leveson Inquiry, and the generally low esteem in which journalists and journalism are held. However, it is not a new idea, and has a respectable intellectual pedigree. Indeed, a version of it can be found in the writings of David Hume:

These principles account for the great liberty of the press in these kingdoms, beyond what is indulged in any other government. It is apprehended, that arbitrary power would steal in upon us, were we not careful to prevent its progress, and were there not an easy method of conveying the alarm from one end of the kingdom to the other. The spirit of the people must frequently be roused, in order to curb the ambition of the court; and the dread of rousing this spirit must be employed to prevent that ambition.¹⁷²

Hume's argument was based on the tension he perceived between the monarchical and republican aspects of Britain's constitutional monarchy, which he saw as counterbalanced by the existence of a powerful and influential press. But this, in essence, classic 'Fourth Estate' conception of participatory journalism still remains convincing today, and is an important element of the way journalism is valuable in a democracy.

¹⁷² D Hume, 'Of the Liberty of the Press (1741)' in K Haakonssen (ed) *Hume, Political Essays* (Cambridge University Press, Cambridge 2006) 3. Hume's enthusiasm for Press freedom waned, and he edited a later edition of this essay to be less supportive of the idea: *ibid.* 261-63.

The argument seems more accepted in American literature, an example of which is the influential exposition of the importance of participatory journalism made by the American lawyer Blasi. Blasi argues that only journalism performed by well-funded and professional institutions independent of government is sufficient to provide a counterweight to the power of the state. Moreover, providing a counterweight to the power of the state is necessary given the risk that a history shows a state can easily overstep its bounds and exploit its power, and the checking function of an independent institutional Press is vital to inhibit this occurring, and swiftly to remedy it should it occur.¹⁷³

Nevertheless, the idea of participatory journalism is particularly important in the UK, given the relative absence of legal checks and balances found in UK constitutional doctrine, as theories of participatory journalism may be more potent in a country governed under a political constitution than they are in one that operates under a legal constitution. For example, many of the rules that restrict the operation of power in Britain are not directly legally enforceable, taking the form of constitutional conventions. The importance of this observation is that institutional journalistic expression is a significant way in which breaches of these conventions are enforced and policed, as Jennings noted: ‘conventions are observed because of the political difficulties which arise if they are not.’ While there are no doubt other mechanisms too, commercial journalistic expression is a significant way in which these political difficulties arise, are communicated and exert pressure. One example will suffice to illustrate the point, described by Bradley and Ewing. ‘The force of public opinion may compel [someone who breaches constitutional conventions] to think again: thus the Scottish judge who in 1968 joined a committee established by the Conservative Party resigned rather than prejudice the work of the committee.’¹⁷⁴

Further, the provisions of the Human Rights Act 1988 enhance this important way that participatory journalism contributes to a political constitution. It is well known that the Act provides the courts with no power to strike down legislation, but rather, if they conclude that legislation is inconsistent with the Convention, and it is not possible for the courts to read the legislation in a way that gives effect to the legislation in a Convention-compatible manner,¹⁷⁵ the Act provides that the High Court and above can issue a declaration of incompatibility.¹⁷⁶ This creates no legal obligation on the legislature to repeal or amend the offending legislation, but, as Nicol et al note: ‘in practice, the government would be under considerable political pressure to bring UK law into

¹⁷³ Blasi

¹⁷⁴ A Bradley and K Ewing, *Constitutional and Administrative Law* (14th edn Longman, Harlow 2007), 27. A similar point is made in C Turpin and A Tomkins, *British Government and the Constitution* (6th edn Law in context, Cambridge University Press, Cambridge 2007) 581 on the media’s involvement in the convention about ministerial resignations for errors or maladministration.

¹⁷⁵ Human Rights Act 1998, s 3(1).

¹⁷⁶ *Ibid.* s 4

conformity with what our courts have said the Convention requires.’¹⁷⁷ If that pressure fails to bring about change, there is no formal obstacle to a government choosing to be obdurate. It can be seen that journalistic expression is a significant way in which pressure is brought to bear on a government to act on a declaration of incompatibility. Should this fail, participatory journalism is also an important bulwark against, and possible remedy for, an obdurate Executive.

Implications of participatory journalism for the copyright argument

Clearly there are weaknesses with the concept of participatory journalism, not least the observation that participation and polemic can damage as well as contribute to political debate. There are concerns, in particular, about the risks of manipulation and distortion, and it is remarkable quite how often journalism falls below the standard that might be expected of it in engaging in debate. But it is not necessary to consider these criticisms in depth, as the point is to establish that, in theory at least, this is an important function that journalism plays in a democracy.

Nor is it useful to compare here conduit and participatory journalism, and determine which is more important in a democracy. This is because both are valuable, and both should co-exist: there is a use for journalism that argues and seeks to persuade, just as there is a value in journalism that informs. Both may be deficient in some respects, but both should be allowed and encouraged to flourish, not least because the weaknesses of one type of journalism can be complemented by the strengths inherent in the other. The relative importance of each depends on the time, the place, and the society.

However, what is useful is to emphasise how a public sphere-based critique that finds commercial journalism deficient because it does not operate as a conduit, is missing quite a large part of the overall picture, and thus is missing a way that commercial journalism contributes to democracy. This is not to suggest that commercial journalism is equivalent to participatory journalism, as patently it is not, but it is true that participatory journalism is a large part of what commercial journalism does. In particular, when commercial journalism engages in advocacy and seeks to influence the political debate, this is not necessarily a flaw: quite the reverse, as it can be seen to be a valuable activity in a democracy.¹⁷⁸

This has two consequences for the argument about copyright. The first is that those criticisms of commercial journalism that are, like the ones advanced by McChesney, based on the ways in which commercial journalism detracts from the public sphere overlook a significant way in which journalism in general – and commercial journalism

¹⁷⁷ Ibid. s 4(6); A Nicol, G Millar and A Sharland, *Media Law and Human Rights* (2nd edn Oxford University Press, Oxford 2009) 3.22 – 3.25.

¹⁷⁸ Whether, in particular circumstances, it does play such a part in a way that is in the short term beneficial to democracy may well be a matter of fact and degree, relating to the balance of power, and of the nature of public discourse in a particular society. But what becomes evident is that commercial journalism is not structurally an anomaly in a democracy, but can be seen as an integral part of it, at least in this respect.

in particular – can contribute to democracy. The undue emphasis that such accounts place on the notion of the public sphere makes them not entirely convincing when they propose that journalism motivated by commerce is less important, or no longer important, to democracy. This leads to a conclusion that public sphere arguments are insufficient to show that commercial journalism is no longer of significance in a democracy, which in turn means copyright interventions to assist the activity may remain viable. The second point is that the observation that there is a battle for ideas in any democracy, and that a significant part of this battle is played by participatory commercial journalism, demonstrates that commercially funded news remains of great importance to democracy. By this token at least, then, copyright interventions that seek to assist commercial journalism can be seen to be not only viable, but also sensible.

However, it is important to recognise two caveats to this argument, which have been implicit in the discussion so far. The first is that the structural importance of commercial journalism to democracy does depend strongly on the political facts on the ground. In some situations, at some times, and in some societies, participatory journalism will be less important, and even not crucial to democracy. Similarly, in some situations commercial journalism will also lose its importance. That means that, while appropriate for the time being, copyright interventions may become less so, as it is conceivable that commercial journalism may in time cease to be crucial to democracy. For the moment at least, it seems that participatory and commercial journalism remain significantly important to UK democracy. The second caveat is that these accounts of themselves are not strong enough to amount to a mandate for copyright interventions, as they are insufficiently compelling by themselves to justify such an action. More is required, if copyright intervention is to be shown to be defensible.

Institutional journalism and democracy

To turn, now, to the second class of criticisms of the proposal that commercial journalism is central to democracy, these are accounts that challenge the idea that journalism needs to be performed by institutions. This is because, it is suggested, individuals can undertake the activities that are currently undertaken by large-scale organisations, of which the institutions of commercial journalism form a substantial part. A significant reason why this is so, it is argued, is because of the technologies associated with the Internet. If these arguments are correct, and if individuals communicating on the Internet have made commercial journalism functionally redundant, then taking steps such as intervening with copyright related laws to assist commercial journalism seems unjustified.

These arguments are largely a contemporary version of a more traditional argument against treating institutional journalism as different from individuals as a matter of principle. Such a case was frequently countered by observing that as a matter of practice, institutional journalism does perform different functions in a democracy. But while raising intriguing proposals, contemporary arguments have yet to show this is no longer true – they echo traditional arguments of principle, but haven't defeated the counter-arguments of practice. Moreover, there are reasons to think institutional journalism remains of value, derived from the dangers of audiences filtering the news they consume.

Moreover, there are convincing accounts of news institutions providing a focal point for debates in a democracy, not easily replicated by individuals.

The importance of individuals and networks

The argument that individuals can undertake tasks equivalent to institutional journalists has taken on heightened importance since the development of the Internet, but it derives many of its roots in a long-standing assumption of traditional media law. A comparable idea was central to the thinking of the profoundly influential nineteenth century constitutional theorist Dicey, and behind his famous notion that: ‘hardly an exaggeration to say ... that liberty of the Press is not recognised in England’.¹⁷⁹ Dicey was not necessarily expressing hostility to institutional journalism by this remark, but was emphasising that institutional journalists should be treated in English law just the same as anybody else who chose to write publicly. The law, in other words, considered that there should be no difference between journalism as undertaken by individuals, and journalism undertaken by institutions.

This view remained persuasive throughout much of the twentieth century, both at home and in other common law countries.¹⁸⁰ For example, it can also be seen behind some important judgments in American law. The assertion that individuals such as ‘lonely pamphleteers’ could perform the same tasks of importance to democracy as journalistic institutions was recognised judicially in (for example) the 1972 US Supreme Court case of *Branzburg v Hayes*. In this case the court found that there was no reason in US law to afford special treatment to a large metropolitan publisher but withhold it from an individual ‘lonely pamphleteer’.¹⁸¹

But this idea of equivalence between of individuals doing journalism and institutions has become more compelling in recent times. This is because in the past, the case for recognising individuals as potentially equivalent to institutional journalists could be met by the practical observation that however much one wanted to treat lonely pamphleteers as equivalent to institutional journalists, individuals could never publish in sufficient quantity or quality or have sufficient influence to make equivalence much more than an ideal. However, since the development and adoption of technologies associated with the Internet, many find such a counter-argument less convincing: individuals can now publish at a scale previously unimagined, material of admirable quality, and can potentially exert an enormous influence. Today, the notional adversary of the institutions of journalism is not the ‘lonely pamphleteer’, but the networked blogger.

¹⁷⁹ A Dicey, *Introduction to the Study of the Law of the Constitution* (10 edn Macmillan & Co Ltd, London 1961) 247.

¹⁸⁰ For example, a prominent contemporary media law textbook endorses the Dicean view: G Robertson and AGL Nicol, *Media Law* (5th edn Thomson / Sweet & Maxwell, London 2007) xvii.

¹⁸¹ *Branzburg v Hayes* 408 US 665 (1972) (White J) 703. The question of whether institutional journalists should be granted special privileges under the first amendment was famously debated by P Stewart, 'Or of the Press' (1975) 26 *Hastings LJ* 631; M Nimmer, 'Is Freedom of the Press a Redundancy?' *Ibid.* 639; D Lange, 'The Speech and Press Clauses' (1975) 23 *UCLA Law Review* 42

Benkler advances one of the most prominent arguments to this end. In, amongst other places, *The Wealth of Networks*, he develops the idea of a ‘networked public sphere’. Benkler’s account is a wide-ranging explanation of why both commercial and institutional journalism no longer remains as central to democracy as it once appeared to be, but as I have discussed arguments about the commercial nature of journalism earlier, I’ll examine here some aspects of Benkler’s case that touch on the question of whether journalistic institutions remain important.¹⁸²

Central to Benkler’s contention is the proposal that Internet-related technology facilitates ‘large-scale cooperative efforts – peer production of information, knowledge and culture’,¹⁸³ which people can undertake at scale and in depth without necessarily acting for material gain.¹⁸⁴ This leads to a number of important consequences, one of which is the possibility of ‘decentralized approaches to fulfilling the watchdog function and to engaging in political debate and organisation’.¹⁸⁵ These functions were heretofore largely performed by journalistic institutions, and largely undertaken by commercial journalism, for various reasons to do with the size, scope, reputation and resources available to institutions in general and journalistic institutions in particular. Benkler’s case is that networks of individuals, facilitated by the communication technologies of the Internet, can now perform many, if not all of these tasks that were once undertaken by institutions.¹⁸⁶

Moreover, Benkler argues that other tasks traditionally undertaken by institutional journalists can also now be undertaken in other ways. One such task is the assessing what information is worth reading or watching – the filtering of the noise from the signal, and accrediting material as valuable and relevant. This was once a service the news editors and news institutions undertook, when people looked to institutional journalism for an indication of whether material was worth reading. If it was worthy of attention, the implicit understanding was that it would be contained in the output of institutional journalism. However, Benkler suggests that this filtering of information can now be undertaken by technology, as the links by which the World Wide Web works provide a decent proxy for relevance and accreditation – the more links there are, the more useful and credible a site is likely to be.¹⁸⁷ Indeed, this idea is part of what makes Google successful.¹⁸⁸

¹⁸² The criticisms I set out earlier about the limitations of the notion of the public sphere also apply to Benkler’s argument, but I will leave this point aside.

¹⁸³ Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* 5

¹⁸⁴ *Ibid.* 6

¹⁸⁵ Moreover, given that sites seem to link to like-minded sites, links can be a proxy for relevance. *Ibid.* 11

¹⁸⁶ In places, he argues that such production of content will be part of the mix rather than supplant institutional journalism at *ibid.* 56, but in other places (see text to n 189) below, suggests that the old institutions of news ought to be permitted to wither away.

¹⁸⁷ *Ibid.* 12

¹⁸⁸ L Page, 'The PageRank Citation Ranking: Bringing Order to the Web' (Stanford University InfoLab, Stanford, California 1998)

All in all, this means, Benkler argues:

It is less clear that in order to preserve and extend those critical functions, or to sustain robust public debate and engagement over matters of public concern and governance, we need to replicate and preserve the industrial, commercial model of twentieth century mass media. Indeed, the emerging models appear to be producing a more diverse set of news-gathering and reporting models [...] Particular business models that were prominent in the industry are in a crisis. The sociocultural practice we actually value is not¹⁸⁹

Others also draw a similar conclusion. Bill Dutton, for example, posits that the Internet will foster the development of a 'Fifth Estate' of networked individuals, who together will comprise a 'new source of accountability in government, politics and many other sectors' which 'could challenge the influence of other more established bases of institutional authority.'¹⁹⁰

One important element of the potential effect of networks that makes such developments plausible is explained by, amongst others, Ryfe. These networks, Ryfe argues, disrupt the traditional model of 'one-to-many' commercial news dissemination. This is because networks of communication, particularly online, result in a clustering of attention around particular passionate expert individuals. These people, who Ryfe calls hubs, become focal points for anyone seeking to communicate widely to the public, as it is to these people that others pay regard. This is a change from the non-networked world, in which attention was more equally distributed. That means, Ryfe argues, that journalism's position as a general interest communicator of objective information to everyone is at risk, largely because in a world characterised by networks of attention focused on individuals who comprise hubs, fewer and fewer people pay attention to journalism that broadcasts to the world at large.¹⁹¹

For these reasons, then, the traditional argument that individuals doing journalism should be seen as equivalent to institutions has become stronger. If true, these arguments lead to the conclusion that individuals may well be able to accomplish many if not all the tasks in a democracy formerly undertaken by institutions. If that is so, then the claim that commercial journalism is central to democracy has waned, and thus the argument for copyright intervention has weakened.

¹⁸⁹ Benkler, 'Giving the Networked Public Sphere Time to Develop' 226

¹⁹⁰ B Dutton, 'The Fifth Estate' (Oxford Internet Institute 2014)
<<http://www.oii.ox.ac.uk/research/projects/?id=57>> accessed 26 June 2015. Similar cases are advanced by, amongst others, C Shirky, 'Newspapers and Thinking the Unthinkable' (2009)
<<http://www.shirky.com/weblog/2009/03/newspapers-and-thinking-the-unthinkable/>> accessed 14 August 2014; Welch. J Keane, *Democracy and Media Decadence* (Cambridge University Press, Cambridge 2013) develops a similar idea that he terms 'monitory democracy' in ch 1 and 2.

¹⁹¹ Ryfe

The continuing importance of institutions

What can be said against the case that networks of individuals will take the place of institutions of journalism? Some contemporary arguments re-state older concerns that equality is in practice unlikely because individuals, even networks of them, are unlikely to be able to perform the functions currently undertaken by institutional journalism to the extent necessary in a democracy. Others draw on characteristics of the audience, to argue that the news as bundled together by institutional journalism is of value in a democracy, and there would be a loss if individuals doing journalism supplanted rather than supplemented journalistic institutions.

The capabilities of institutions

The first arguments assert that institutions can still do things that individuals cannot, and changes in communication associated with the development of the Internet and its associated digital technologies have not altered this fact. The reasons proposed why this is so include the possession by journalistic institutions of legal and financial resources, a reservoir of experience and skill, and the capacity to stand up to the significant legal and political pressure that can be exerted by many who wish to suppress a story. Before the emergence of the Internet, Blasi put the point thus, particularly in relation to the value in having institutions to stand up to the state:

[t]he inevitable size and complexity of modern government is related to another premise that underlies my understanding of the contemporary significance of the checking value. This is the need for well organized, well-financed, professional critics to serve as a counterforce to government- critics capable of acquiring enough information to pass judgment on the actions of government, and also capable of disseminating their information and judgments to the general public.¹⁹²

Contemporary defenders of journalistic institutions go further, seeing a value in institutions to stand up to non-state actors too. Moreover, they are not convinced that the potential evolution a networked public sphere, and of networks of individuals performing collective tasks, have changed things much. Hence, Brock argues:

To an important extent, difficult journalism in the public interest – either requiring large resources or resilience against attack – depends on strong institutions. Only large companies that can cross-subsidize news operations have been able to afford not only reporting staff but also lawyers.¹⁹³

McChesney and Nichols make a similar point:

¹⁹² V Blasi, 'The Checking Value of the First Amendment' (1977) American Bar Foundation Research Journal 521-541.

¹⁹³ Brock 122

Great journalism [...] requires great institutions. Like any complex undertaking, it requires a division of labour: copy editors, fact-checkers, and proof-readers in addition to the handful of well-known investigative superstars. It requires institutional muscle to stand up to governments and corporate power. It requires competition, so if one newsroom misses a story, it will be exposed by someone else. None of that is happening online.¹⁹⁴

As does Bollinger:

[i]t is a serious mistake to assume that a multitude of individual or small-scale Web sites would serve the same purpose as the traditional press, just as it would be a mistake to assume that Universities could be replaced by many individual Web sites, each offering specialized knowledge in an atomised manner. The way in which knowledge is organised, developed and conveyed in the context of a large [...] institution devoted to journalistic [...] values is radically different from the way knowledge would be transmitted and understood in a highly dispersed system. Myriad Web sites can enhance public debate, but they cannot replace the role of the institutional press¹⁹⁵

Clearly whether these views are true or not is disputed by the likes of Benkler, but there are some conclusions that can be drawn from this debate for the purposes of evaluating copyright. I will discuss these in a moment.

The characteristics of the audience

The second reason to consider that networks of individuals have not superseded the institutions of journalism emerges when one considers some aspects of how audiences respond to information published on the Internet. There are a number of aspects to this, but Sunstein has proposed one of the more convincing. There is a danger, he avers, that when people choose information unmediated by professional editors, that they limit their exposure to other useful and beneficial information. They only consume the information that they set out to consume. This may be attractive from the point of view of recognising their autonomy, but can lead to unsatisfactory consequences for democracy. This is because, as even Benkler acknowledges: '[g]iving the audience what it wants, as Ed Baker and others have observed, very often fails to give citizens what they need'.¹⁹⁶ Indeed, this is a point that has been asserted for some time, and was of central importance in (for example) the debates in the UK about whether to have commercial broadcasting in

¹⁹⁴ R McChesney and J Nichols, 'Down the News Hole' in R McChesney and V Pickard (eds), *Will the Last Reporter Turn Out the Lights: The Collapse of Journalism and What Can be Done to Fix it*. (The News Press, New York

London 2011)

¹⁹⁵ Bollinger 110:.

¹⁹⁶ Benkler, 'Giving the Networked Public Sphere Time to Develop'.

the first place.¹⁹⁷ Lord Reid used a very similar form of words to deal with the suggestion that the BBC was paternalist:

It is occasionally indicated to us that we are apparently setting out to give the public what we think they need and not what they want. [B]ut few know what they want, and very few what they need.¹⁹⁸

Clearly, this is a contentious point. Many celebrate this aspect of the Internet as permitting the wisdom of the crowd to emerge,¹⁹⁹ and others find the paternalism inherent to this argument deeply unattractive. Paternalism frequently isn't a very attractive political position to adopt. But it seems at least very plausible that allowing an audience to select the information they want from networks of individuals and hubs can lead to the validation of certain curious or bizarre views about the world. The wide variety of information available on the internet means that it is likely that one may find people of a like frame of mind. This can be all to the good,²⁰⁰ but it can also lead to 'echo chambers', in which people have their idiosyncratic views validated by finding them expressed by others of a similar frame of mind, as echo chambers can repeat and amplify subjective biases. The result is that people can be encompassed in a 'filter bubble', and shut off from being exposed to a diversity of viewpoints, when being exposed to such ideas is useful and healthy in a democracy.²⁰¹ People become difficult to reach, difficult to influence, difficult to persuade, because they become blinkered. And this loss of awareness and respect for the views of others can put at risk the tolerance that derives from it that is of central importance to a democracy.

Sunstein therefore highlights a value in institutional journalism because professional editors, who he calls 'public interest intermediaries', assist in exposing the public to a wide variety of information.²⁰² In the past, such exposure to unsought stories happened because news institutions bundled material together. People bought a newspaper for the sport coverage, or the crossword, or the comics – or watched television for the soap operas – but were thereby exposed to other information.²⁰³ However, the ability that the Internet provides to an audience to disaggregate information, while defensible in terms of their ability to choose, can be detrimental to their ability to know. The danger is, as Starr puts it:

¹⁹⁷ Curran and Seaton

¹⁹⁸ Curran and Seaton 143. This is also relevant to the also the argument that news is a merit good.

¹⁹⁹ J Surowiecki, *The Wisdom of Crowds" Why the Many Are Smarter Than the Few* (3rd edn Abacus, London 2005)

²⁰⁰ One of Raz's arguments defending freedom of speech is based on the ability of speech to validate, and therefore inculcate a sense of belonging and self-worth, in individuals: J Raz, 'Free Expression and Personal Identification' (1991) 11 *Oxford Journal of Legal Studies* 303.

²⁰¹ The terms in quotation marks are Sunstein's.

²⁰² Sunstein

²⁰³ Kaye and Quinn 134; Brock 122

On the one hand, there is likely to be less incidental learning among those with low political interest [...] sit through news to get to sports [...] exposure to the front page to get to crossword [...] online, less likely to see front page news²⁰⁴

This is because, in the words of Brock:

[the internet] works against the logic of bundling a varied collection of content for delivery to the reader. The internet [...] allows [readers] to go straight to the material they want without passing through the rest of the package²⁰⁵

But, if networked individuals performing journalistic tasks communicating on the Internet unbundles information can lead to unwelcome results to democracy, how can these be alleviated by the continued viability of journalistic institutions publishing online? One way this used to be achieved, by presenting the news bundled in paper form, is unlikely to be viable for long. An answer is because such institutions can continue to provide bundled information, even on the Internet. Such bundling of information on institutional journalist websites can occur in a number of ways: from the layout of a webpage, in the provisions of sidebars and links, and in the provision of range of material suggested by news algorithms that propose stories based on the audience's reading choices.

To some extent, though, these functions can be provided by news aggregators. So another, perhaps more controversial, way news institutions can lessen the risks of echo chambers and filter bubbles is because of the practice of journalistic disciplines of objectivity and impartiality, as these (where followed) can help audiences be exposed to information and views they may not have sought, but which can be beneficial to a healthy democracy for them to know. These are reinforced because institutional journalists operate under certain obligations, imposed by a combination of contract, corporate ethical and compliance regimes, and regulatory oversight. This is a point of which Leveson has taken note.

Implications for the copyright argument

Again, this is not the end of the matter, and much can be said for and against the argument that individuals doing journalism replace journalistic institutions. I will not be able to resolve the matter conclusively here, but three points of useful guidance on the debate about copyright interventions can emerge from this discussion.

The first point to draw out is that it becomes clearer that one aspect of the argument about the relative importance of individuals and institutions is to some extent irresolvable, at least at the present, at least without the benefit of more knowledge about how the Internet will change communication and politics over time. At the moment, there

²⁰⁴ Starr

²⁰⁵ Brock 151. See also Keane 7 -8.

a conflict between those of an optimistic frame of mind, and the pessimists: the Internet optimists believe that technology facilitates a new form of communication by individuals that can perform the same tasks as journalistic institutions; and pessimists who believe it has not, or should not.²⁰⁶ The argument is irresolvable because considering the evidence that has emerged doesn't necessarily determine the dispute between these two camps, for while pessimists observe that what the optimists predict hasn't happened, the optimists aver that it may yet. And, argue the optimists, even if hasn't, one should be wary of intervening in such a way as to protect the old institutions of journalism, as to do so will be to inhibit its chances of developing. If we nurture the old, we risk smothering the new, for Benkler suggests:

[w]e still stand at a point where information production could be regulated so that, for most users, it will be forced back into the industrial model, squelching the emerging model of individual, radically decentralised, and nonmarket production and its attendant improvements in freedom and justice.²⁰⁷

What happens if there's a draw between the arguments? There is one, slightly unsatisfactory way out. It will be remembered that I started with the assumption that commercial journalism was of importance to democracy, and so I placed the burden of showing that commercial journalism is no longer central to democracy on the optimists. On this analysis, those who argue that individuals *could* replace institutional journalism have not discharged the burden, as all they have shown is that it might be the case that in future networked individual journalism displaces institutional journalism. They have not shown that it has, or that it will. On this ground, the presumption remains undisturbed that commercial journalism remains of significant value in UK democracy, and hence there is a case for copyright intervention. Change may come, but the hope that it will is not sufficient to refrain from intervening, and the fear that this action may have detrimental consequences on the arrival of such change is not a strong argument.

Nevertheless, this is somewhat unsatisfactory because, as I said earlier, I have loaded the dice in favour of copyright. But it isn't an arbitrary position, and moreover it does seem supported by some evidence, as many of facts do seem to be going the pessimists' way.²⁰⁸ The study mentioned earlier, frequently referred to by the pessimists,²⁰⁹ undertaken by the Pew Centre, that found that over a week in Baltimore, 'of the stories that did contain new information nearly all, 95%, came from traditional media—most of them newspapers. These stories then tended to set the narrative agenda for most other media outlets.'²¹⁰ This does bolster the pessimist's case because it appears from this and

²⁰⁶ McChesney 5 – 10; Keane

²⁰⁷ Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* 26.

²⁰⁸ Benkler disputes this: Benkler, 'Giving the Networked Public Sphere Time to Develop'

²⁰⁹ Jones 4; McChesney and Nichols 111; Levine 132.

²¹⁰ Project for Excellence in Journalism, 'How News Happens: A Study of the News Ecosystem of One American City' (Pew Centre for the Study of Journalism, 2010).

other studies that provide complementary results countries including the UK,²¹¹ that what seems to be emerging on the internet is not a networked public sphere generating new information relevant in a democracy, but a network that re-disseminates material published by old journalistic institutions. Institutions, it seems, remain important.

Second, the discussion so far has omitted to consider one factor that is significant. This relates to the type of content that individuals and institutions can be expected to produce. Journalism generates and distributes a wide variety of content, from polemic, domestic and foreign information, entertainment and the like – from material discovered after long investigations, to eye-witness reporting. It seems more likely that networked individuals will produce polemic and eye-witness reporting, than they will undertake investigations, or report on what may be seen as dull but worthy news.

There are limits to this. For example, there are websites that exist to encourage independent investigations, such as Bellingcat,²¹² and indeed a central part of the argument of the optimists is that passionate and informed individuals may undertake reporting of subjects and areas, irrespective of the fact that others may consider such material dull. Indeed, the nature of the Internet means that niche subjects may well attract sufficient attention to make recondite reporting worthwhile: the Internet has a long tail.²¹³ Nonetheless, it does seem plausible to expect there is a difference between the types of content that the networked public sphere will readily produce, and at the less likely end of the spectrum are long-form, expensive, legally risky and potentially ultimately unfruitful investigations. This, and other material necessary for democracy to work is what Jones calls, perhaps a little pompously, the ‘iron core’ of journalism.²¹⁴ There are reasons to be sceptical that it will all be provided to a sufficient standard by networks of individuals.

Moreover, even if individuals do produce journalism of a high standard in decent quantities of all sorts, it remains highly plausible that institutions will remain significant, because of their legacy of reputation, credibility, and influence. Indeed, some evidence in support of this idea of a mixed economy of journalism, that institutions and individuals are likely to complement rather than compete with each other, can be found by considering an event from recent journalistic history. This was the leak of US cables to the Wikileaks organisation, which was publicised by the *New York Times*, *the Guardian*, *Le Monde*, *El Pais* and *Der Spiegel*.²¹⁵ While this material was leaked to Wikileaks, an institution of the Internet age, it did not have influence and impact because of being analysed and disseminated by networks of individuals. Rather, it gained traction because

²¹¹ Discussed text to and n 105, and n 155.

²¹² Various, 'Bellingcat' (Crowd Sourced Citizen Investigations Blog., 2014) accessed 13 August 2014;

²¹³ C Anderson, *The Long Tail: Why the Future of Business is Selling Less of More* (July 2008 edn Hachette Books, 2008)

²¹⁴ Jones

²¹⁵ <http://www.theguardian.com/world/2010/nov/29/wikileaks-embassy-cables-key-points>

of the interaction between such individuals and the established institutions of journalism.²¹⁶

This overcomes some of the unsatisfactory qualities of the last point. Even if the pessimists are deprived of the benefit of not having to prove their case; and even if we assume that the optimists are correct and the evolution of the networked public sphere is plausibly happening; it also seems plausible that it won't replace but will complement institutional journalism, and the future will see a mixed ecology of journalism. The networked public sphere may well emerge, and generate material of use to society that was once predominantly produced by journalistic institutions, but that is unlikely to be sufficient to amount to support for the assertion that institutional journalism's time has come. There are likely to still be tasks, and still to be characteristics of institutional journalism, that are not – or not sufficiently – undertaken by individuals. This means there is a reason to consider that institutional – and so commercial – journalism continues to be central to the UK's democracy, and ultimately, at least by this argument, a reason for copyright interventions.

Third, and even if this is not the case, there are other reasons to consider that institutional media remains of distinct value in a democracy, such as those Sunstein's describes about the dangers of losing professional curators of information – editors - from the public sphere. This may encourage, even more than is already present, the fragmentation of society into small groups of people not talking to each other, nor knowing what's going on in the world outside their interests. This leads to a further observation that I will develop in a moment.

Conclusion

Is there a crisis in the commercial news industry? If so, why? Will it mean a weakening of the incentive to produce commercially generated news? Even if it does, should we care? Why? Is copyright any part of the answer? These debates have become acute over the past five or so years. It's useful to compare the contrasting answers given by Levine, Paley and McChesney. All three of these authors agree with the crisis thesis, and that the Internet poses difficulties for institutional journalism. However, they differ on the consequences that flow from this. Levine holds that institutional journalism provides a useful and necessary function in a democracy, that without intervention in the market this will decline, and that enhanced copyright intervention is what is required to prevent this decline.²¹⁷ Paley holds that institutional journalism is in general terms supplanted by non-institutional journalism, and hence copyright interventions are not necessary.²¹⁸ McChesney, in contrast, denies that the valuable material produced by institutional journalism is replicated by the Internet, but equally denies that the market will save such institutions, and hence argues that copyright intervention is ineffective. He argues, rather, that the Press should be saved by direct subsidy from the state, in part of the basis that in

²¹⁶ Keane

²¹⁷ Levine

²¹⁸ Patry

former times the press enjoyed such benefits, in the form of – for example - postal subsidies.²¹⁹

I mentioned in the introduction that it was difficult to resolve these disputes, without engaging in a more far-reaching analysis of some of the arguments put forward in this section. But one point seems to emerge from the discussion, both about the challenge to commercial journalism as a threat to the public sphere, and because of the activities of individuals publishing journalism online. This is that there is a value to commercial news institutions in a democracy not merely because they can act as a conduit, and not merely by virtue of their being a unit of production of information, but also because of their active character.

To some extent, this builds on Sunstein's argument about the need for public interest intermediaries, but it develops his point. Commercial news institutions, even bearing in mind their undoubted flaws, can be a useful element in the UK's democracy for reasons to do with their being a participator in debate, and as a selector of information. But also, they are of value by providing a focal point around which people can define themselves: not the only focal point, clearly, but an important one, and not in the way that people have to agree with what is said by a news institution, but one by virtue of which, people can be involved in a national conversation.

This is not a new observation, as the point was well stated by de Tocqueville a hundred and fifty years ago in respect of American newspapers, even while conceding the fact that newspapers can be a force for ill as well as good. It applies equally in the UK, and in respect of the commercial news industry in general:

nothing but a newspaper can drop the same thought into a thousand minds at the same moment. [...] Newspapers therefore become more necessary in proportion as men become more equal and individualism more to be feared. [...] I shall not deny that in democratic countries newspapers frequently lead the citizens to launch together into very ill-digested schemes; but if there were no newspapers there would be no common activity. The evil which they produce is therefore much less than that which they cure. The effect of a newspaper is not only to suggest the same purpose to a great number of persons, but to furnish means for executing in common the designs which they may have singly conceived. [...] A newspaper then takes up the notion or the feeling that had occurred simultaneously, but singly, to each of them. All are then immediately guided towards this beacon; and these wandering minds, which had long sought each other in darkness, at length meet and unite. The newspaper brought them together, and the newspaper is still necessary to keep them united.²²⁰

²¹⁹ McChesney

²²⁰ A de Tocqueville, *Democracy in America* (George Dearborn & Co, New York 1835) Chapter 6; cited in Brock 87. The point is noted elsewhere, and Ryfe 181; Schudson 61 and famously B Anderson, *Imagined*

A point to emphasise though, is that the beacons lit by the commercial news industry are not only places to rally round, but also places by which people can and do orientate themselves. One doesn't have to agree with a campaign by the *Daily Mail*, or the *Guardian*, and rally behind it for this value to accrue to democracy, as a service to democracy is derived from such campaigns being a common reference point against which people respond. The value to democracy is not only provided by the content published, but is also provided by the fact of publication by a commercial news institution.

Moreover, the point remains valid in an Internet world – indeed, is even more important in such an environment, because of the risks of fragmentation of attention highlighted by authors such as Ryfe. It is undoubtedly true that on occasions the institutions of commercial journalism may damage aspects of our democracy, but in the longer term they are of central importance to its structure, and it would damage the UK's political health to see them wither away. Therefore, that there remains an argument – to this extent at least – that copyright intervention remains a reasonable step, and it is reasonable to take the risk that it will damage other activities.

That does not mean, as has been emphasised already, that copyright interventions are indeed appropriate. One reason this is so is because there are other significant aspects to the democratic arguments in respect of copyright intervention, and the democracy argument is clearly Janus-faced. As well as providing a ground for assisting commercial journalism with copyright intervention, considerations about democracy also provide a ground for resisting such an intervention. This is because copyright intervention risks curtailing the ability of people freely to share and be informed about information, where that information, or the free expression of it, is protected by copyright. Given that free sharing of information is central to a democracy, and that copyright may place undue restrictions on such an activity, an argument arises that copyright interventions are an impediment to democracy. These are the arguments I will consider next.

Communities: Reflections on the Origin and Spread of Nationalism (Verso, London 2006) who cites Hegel who compared reading a newspaper to offering a morning prayer.

Part 4: Evaluating the case iii) Is intervention legal? Problems with the incentive case for intervention by means of copyright

[a]t the heart of this conflict lie important considerations of freedom of expression on the part of internet consumers, which risk being overlooked by undue focus on the commercial character of MMO's activities.²²¹

Summary

Many copyright interventions are likely to fall foul of free speech law. Widely drawn interventions that place extensive restrictions on the re-use of political information necessary in a democracy are most likely to be deficient in terms of free speech law. This is most evidently the case in relation to the ECHR, but is also plausible in relation to the CJEU and domestic courts.

1) Judges in many jurisdictions have shied away from considering copyright to be in tension with freedom of speech, or given speech rights only a cursory evaluation in copyright cases.²²²

2) Yet this is curious, and incoherently marks copyright out as distinct from other fields of law that curtail freedom of speech, where other systems of rules are balanced against speech interests. As Barendt says:

After all, it is what courts do when they balance freedom of speech or expression against privacy or reputation rights ... English judges should, however, soon develop principles on the basis of which it would be relatively easy to determine when freedom of speech arguments would be seriously considered and when, on the other hand, copyright would be regarded as necessary and proportionate restriction...²²³

3) In English law, there are now a number of routes by which freedom of speech interests can be weighed in copyright actions. These include Article 10 of the ECHR, by virtue of the Human Rights Act; Article 11 of the Charter; and s 171(3) of the CDPA.

‘Today, if a UK court were to encounter a situation in which the rules of the CDPA conflicted with the right to freedom of expression protected by Art 11 of the Charter... it would be able to rely directly on Art 11 to curtail the operation of

²²¹ W Cornish, D Llewelyn and TF Aplin, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (8th edn Sweet & Maxwell, London 2013)

²²² Eg US *Eldred v Ashcroft*, *Golan v Holder*, UK *Ashdown*. Belgium

²²³ E Barendt, *Freedom of speech* (2nd edn Oxford University Press, 2007) 261

copyright law and would not therefore have to employ the public interest defence as a mediating concept. This is a more direct obligation to protect fundamental rights than that which arises under the HRA. Today, if a UK court were to encounter a situation in which the rules of the CDPA conflicted with the right to freedom of expression protected by Art 11 of the Charter (...) it would be able to rely directly on Art 11 to curtail the operation of copyright law and would not therefore have to employ the public interest defence as a mediating concept.’ [FN: “Copyright law falls clearly within the scope of EU law’.]²²⁴

4) In European law, the relationship between Article 11 and Article 10 is more complex than it seems. Article 52 of the Charter provides that Article 11 should be interpreted by the CJEU to mirror the right under the ECHR. However, opinion 2/2013 focused on the autonomy of the EU, and the ability of EU and the CJUE to reach decisions different from the ECtHR. Moreover, there’s lack of clarity as to what the Charter refers, and what ‘the scope of EU law’ actually means.

5). The legal tests and process involved in a domestic challenge, a challenge before the CJEU, and a challenge before the ECtHR are subtly different.

6) While copyright interventions should be evaluated to see that they comply with free speech law, they should also be evaluated to see how they comply with free speech in a more theoretical sense. But considering the law provides a more structured framework against which to analyze them.

7) The approach of the ECtHR is worth considering as it provides the most developed free speech jurisprudence of the three. Particular copyright interventions will obviously lead to different results in terms of their potential compliance with Article 10, and part 1 showed how wide the variety of copyright interventions are. It cannot be said, conclusively, therefore, that copyright interventions are likely to breach Article 10. However, it remains worth setting out how the ECtHR would approach the interventions, and this provides an account of what sort of interventions are likely to be restrictive.

8) This doesn’t seem to have been done before. Article 10 has been recognized as important, though, by Cornish (see above), and others. Xalabarder, for example, analyses Article 10 interests in her critique of the Spanish law, but by virtue of Art 7 TRIPS proportionality, and Art 10 (1) Berne Convention balancing between rights and fundamental freedoms. Xalarbarder has also considered some of the decisions of the CJEU that balance Art 17.1 EU Charter with Art 11.²²⁵

²²⁴ J Griffiths, 'Pre-empting conflict - a re-evaluation of the public interest defence in UK copyright law' (2014) 34 *Legal Studies* 76

²²⁵ *Promusicae*, CJEU, 29 January 2008 (C-275/06). Other more recent cases that have applied the principle of proportionality: CJEU, 16 Feb.2012, *SABAM v. Netlog* (C-360/10). CJEU, 24 Nov.2011, *Scarlet extended v. SABAM* (C-70/10), *Sky Österreich*

9) The approach of the ECtHR is to recognize that this is a clash of rights case. Art 10 comes into conflict with Art 1 Protocol 1.

11) However, it is reasonable to assert that Article 10 should be seen as the starting point, from which the interests protected by Art 1 Protocol 1 are considered a derogation.

In fact, according to the ECtHR, freedom of expression has to be considered as the point of departure, the principle from which copyright law deviates: in this sense, the rule becomes the exception and the exception becomes the rule, challenging the prevailing traditional position in copyright law.²²⁶

12) This is for doctrinal and theoretical²²⁷ reasons. The doctrinal reasons include the emphasis repeatedly placed by the court on the importance of freedom of expression in a democracy.²²⁸ (However, that said, there is a tension between contemporary decisions and older decisions of the Commission, which tend to undermine this suggestion.)²²⁹ The theoretical reasons include arguments about the nature of copyright as protecting a private right in property, and the nature of speech as protecting a more fundamental right associated with liberty, self-expression and the optimal functioning of a democratic state.

13) The court will consider whether the copyright intervention is an interference with speech by a public authority. It's likely that it will be considered thus, as this hurdle at Strasbourg is low. This is despite some traditions that copyright does not conflict with speech.²³⁰

²²⁶ C Geiger and E Izyumenko, 'Copyright on the human rights' trial: redefining the boundaries of exclusivity through freedom of expression' (2014) 45(3) International Review of Intellectual Property and Competition law 316

²²⁷ "freedom of expression of Article 10 ECHR, sometimes called the "European First Amendment", benefits from a privileged position in the European constitutional order, and any limitation is carefully controlled by the Strasbourg judges. It is hardly imaginable that in a case with strong freedom of expression interests (which was not the case in *Ashby Donald* and in "*TPB*"), the proprietary interests of the copyright holder would prevail" *ibid*.

²²⁸ *Ashby Donald v France* (36769/08) Unreported January 10, 2013 (ECHR); *Neij v Sweden* (Admissibility) (40397/12) [2013] E.C.D.R. 7 (ECHR)

²²⁹ *De Geilustererde Pers NV v The Netherlands* No 5178/71 (1976) 8 DR 5, *France 2 v France* reference? (F&P 600 refers to Hugenholtz's book 359-60

²³⁰ *Harper & Row Publishers* 471 US 539 558 (1985) O'Connor J 'it should not be forgotten that the Framers intended copyright itself to be the engine of free expression'. 'The judgment of the Constitution is that free expression is enriched by protecting the creations of authors from exploitation by others, and the Copyright Act is the congressional implementation of that judgment'. *Dallas Cowboys Cheerleaders, Inc v Scorebord Posters, Inc* 600 F 2d 1184 (5th Cir, 1979)

14) The analysis will focus on whether a copyright intervention is prescribed by law, pursues a legitimate aim, and is proportionate. Finally, the margin of appreciation will be considered.

15) However, the proportionality test and the margin of appreciation is an opaque concept at Strasbourg. But Fenwick and Phillipson (and others) argue that it masks a substantive analysis of the content of expression. Core political expression receives at Strasbourg – as it does at the US Supreme Court – a stricter scrutiny. Hence copyright interventions that seek to restrict the re-use of political speech are more likely to be considered to breach article 10.

16) The key idea in defamation revolves around whether the speech is in the ‘public interest’ (Von Hannover No 1) or the ‘general interest’ (Von Hannover No 2 and 3). At the moment, the test is quite wide, and includes variables such as the nature of the subject of the speech, and whether they are a public figure. Transferring a similar approach to copyright, one may not deploy concepts such as the ‘public figure’ concept, to see that the closer to core political speech that copyright intervention covers, the less likely it is to be appropriate.

17) Those seeking to defend a copyright intervention at this point will no doubt pray in aid the existence of exceptions and defences, to show that the impugned intervention is not too broad. However, in many cases these are insufficient of themselves to sufficiently protect speech. The notion of fair dealing, for example, in English law seems inappropriately rigid, seeing as many acts of investigative journalism that ought to be protected by Article 10 are unlikely to be considered by the court as ‘fair’.

18) Moreover, the extent of interests protected by copyright will be considered, as part of the proportionality test. The more extensive the copyright protection, the less proportionate it will appear to be. Concepts such as the term of copyright are relevant here. The more an intervention is unwaivable and inalienable, the less likely it is to be proportionate.

19) Another important variable in the proportionality test is likely to be any commercial nature of the use by a purported infringer. Here the arguments play both ways. Those seeking to defend an intervention pay show that it is being used commercially by a competitor, and so restricting such use is not a disproportionate restriction on speech. This is a view that coincides with the US free speech doctrine that places a lower protection on commercial speech. However, those seeking to impugn a copyright intervention will emphasise the social benefit that can arise from commercial journalism, and indeed, consider the fact that in defamation, the commercial nature of the speech by those who claim their article 10 rights have been infringed is not determinative. (It is relevant, however, as the recent case of *Delfi* confirmed.)

20) An interesting side question here is whether the three step test, and its concentration on non-competition with the normal exploitation of a work, is in conflict with Article 10. There is an argument that it is, at least if applied widely and construed strictly.

21) Finally, another variable to consider is the heightened status of the press at Strasbourg. Those seeking to defend a challenged copyright intervention, will note that it is to protect the press that it is proposed. However, the press is seen unequivocally at Strasbourg as an instrumental good, beneficial to democracy because of it undertakes the task of a watchdog and a bloodhound. If a copyright intervention benefits the press, but at the same time challenges the core Article 10 right which is more central to democracy, then the preferred position of the press at Strasbourg no longer is of benefit to it. This is because a copyright intervention may more directly harm the ultimate political value – a properly functioning democratic state – that is the source of the press’ value, even if it also benefits the press.

22) Hence a copyright intervention that is extensive, of long duration, covers core political speech, and has a minimum of exceptions and is not waivable, the less likely it is to be compliant with Article 10 of the ECHR. And, to the extent that Article 11 of the Charter will follow ECHR jurisprudence, non-compliant with Article 11 too.

23) Finally, there is a developing tradition of constitutional common law, and in particular freedom of expression, in the cases that follow *ex p Simms*. It may also be that domestic copyright law is vulnerable to an assault on the grounds that it unduly fetters freedom of speech.

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