



NLA evidence to Cairncross Review

September 2018

Introduction

NLA Media Access is delighted to have the opportunity to submit written evidence to the Cairncross review.

'Supporting journalism' – our strapline - is at the heart of NLA Media Access's business. Nearly all of our revenues go back to publishers to re-invest in journalism, and our corporate responsibility activity supports new entrants to journalism from diverse backgrounds.

However, as a licensing body, our remit is relatively narrow. We have therefore not offered a response to all the questions posed by the review. Instead we have focused on the role that licensing currently plays in increasing publisher revenues; examined the impact which the introduction of the proposed publisher's neighbouring right might have on licensing; and critically considered whether the NLA model might be adapted to increase the scope and scale of licensing and hence provide more money to invest in journalism.

Our response is therefore most relevant to the review's question 5:

Many consumers access news through digital search engines, social media platforms and other digital content aggregation platforms. What changes might be made to the operation of the online platforms and/or the relationship between the platforms and news publishers, which would help to sustain high-quality journalism?

- (a) Do the news publishers receive a fair proportion of their revenues for their content when it is accessed through digital platforms? If not, what would a fair proportion or solution and how could it best be achieved?
- (b) When their content is reached through digital platforms, do the news publishers receive fair and proportionate relevant data from the platforms? If not, what changes should be made and how could they best be achieved?

We hope that the review finds our evidence helpful, and we would be happy to supply additional information if it were thought useful.

I About NLA Media Access

1. Principles

NLA Media Access (“NLA”), formerly the Newspaper Licensing Agency, has traded for more than 20 years. The company initially operated purely as a collective licensing organisation; more recently it has added database and publisher services businesses. Collecting societies have the authority to license copyrighted works and collect royalties on behalf of their members. They collect royalty payments and distribute the royalties to the copyright owners.

Originally cuttings agencies bought multiple copies of newspapers and distributed cuttings (in those days articles physically cut out from newspapers) to their clients which required no licence. When copying became feasible, NLA was created to ensure that organisations that wanted to distribute copies of newspaper cuttings did so with the permission of the copyright holder, and under terms that reflected the value of the content. Before the establishment of NLA, individual publishers had to negotiate copyright charges directly with users, which was time-consuming and expensive, if done at all.

There are three principles underpinning the work of NLA which the review might wish to bear in mind:

- News media and magazine content has **economic value**, both to organisations which ‘wholesale’ it to end-users (typically, companies) and those end-users themselves
- NLA works within a **legally regulated system** which ensures that the terms of its licences and their cost are ultimately subject to third-party approval from the Copyright Tribunal, a statutory body, if a reference is made
- The revenues generated by NLA are returned for **investment in journalism** by the news media and magazines which produce the content in the first place

The success of NLA in representing news media publishers, and in more recent times extending that to magazine publishers, reflects its record of continual innovation and ability to offer services that are better handled by a single body acting on behalf of the industry as a whole:

- Selling non-exclusive licences
- Collecting licensing (royalty) payments
- Distributing collected royalties at a low cost
- Managing reciprocal arrangements with other collecting societies in the UK and overseas
- Rights enforcement
- Additional services such as databases

2. Ownership

NLA is owned in equal shares by seven national news media publishing groups (Associated, Financial Times, Guardian News & Media, Independent Digital, Reach, News UK and Telegraph Media Group).

The NLA Board includes representatives from each of the shareholders; a representative for regional publishers; a representative for magazine publishers; and a representative for freelance contributors.

3. Services and licences

At present, NLA takes in both print and online content from all major UK publishers and delivers it on to the media monitoring organisations (MMOs), such as Cision/Gorkana and Kantar, which it also licenses to operate.

Our remit encompasses over 6000 national, regional and foreign newspapers, over 2700 magazines and more than 2600 news media websites, including digital only publishers such as Huffington Post and BuzzFeed.

Text aggregators, such as Factiva and Lexis Nexis, and other third parties such as MSN, Yahoo etc., (with whom publishers hold direct agreements) also are fed this content by NLA; but no licensing agreement exists between NLA and these secondary recipients. NLA does though offer a service to publishers in managing relations with text aggregators, helping to bring fairness and transparency to this sector.

This role might have parallels with the relationship between publishers and platforms, as discussed below.

Within the MMO sector, NLA runs a licensing scheme to earn revenue for publishers under the legal authority provided by the Copyright Designs and Patents Act 1988. Every publisher has the right to license its content directly: however, all aside from the FT have chosen to use NLA – on a non-exclusive licence basis - as a more efficient vehicle for both themselves and end users.

MMOs are commercial organisations which provide monitoring services to their clients (other corporate entities/charities and campaigning groups/PR companies etc.). This involves them seeking out articles published in newspapers and magazines both in print and online, corresponding to the instructions/keywords given to them by their clients.

NLA licenses MMOs to provide copies of these articles. It is important to note, however, that MMO licences do not include any rights for the use by their clients of these articles. These rights are obtained under a separate end-user licence purchased directly from NLA by the clients of the MMOs.

While the choice of content provided by an MMO to its clients is entirely at the MMO's discretion, each MMO is required to report to NLA the number of articles copied per client, and from which publications, to ensure the correct fee is charged for the use of publisher content.

MMOs may purchase a variety of licences and content bundles from NLA. The cost of their licence is determined both by how an MMO wishes to use publisher content, and (more importantly) how many clients are receiving the content.

The NLA also offers a Universal Licence, which allows large organisations to pay a fixed fee (usually over £100k) for unlimited copying of content: this covers a handful of clients whose scale of use makes it economic to have a licence for unlimited copying.

4. Web content licensing

The NLA Web Database Licence specifically gives MMOs the right to scrape, copy and supply (in the form of links) selected newspaper web content to clients. Clients of such an MMO service then purchase the NLA Web End User Licence, in order to receive this content for commercial purposes.

If they also receive print content, or put content from select publishers on their website, they need to buy separate licences from NLA for this and these fees are dictated by reported volumes and usage.

Fee levels for licensing are supervised by the Copyright Tribunal (see next section). Those for web are very low in comparison to print licensing: this discounting is due to current British and EU law attaching no copyright to hyperlinks.

As with the print licensing, this system gives NLA a picture of the overall use and distribution of news media web content.

5. Legal and regulatory structure

The NLA's licensing system is subject to the ultimate authority of the Copyright Tribunal, an independent tribunal established under the Copyright, Designs and Patents Act (CDPA) 1988.

The Tribunal consists of a chairman and two deputy chairmen who are appointed by the Lord Chancellor, sitting with eight ordinary lay members who are appointed by the Secretary of State for Business, Innovation and Skills. The Tribunal's secretary is a member of staff of the Intellectual Property Office based in London. The tribunal's jurisdiction covers the whole of the UK.

The Tribunal is responsible for resolving disputes between collecting societies - like NLA - and users of copyright material. The disputes the Tribunal resolves usually relate to the terms and conditions of licences (including in some circumstances their cost), or the refusal by a collecting society to provide a licence. Under normal circumstances, however, the Tribunal does not set tariffs.

The NLA tariffs reflect the value of the IP rights being licensed; and economic modelling (carried out by independent economic consultants), is used to derive the appropriate levels for each activity. The most common methods for valuing IP rights are on an Economic Benefits or Comparable Royalties basis. All tariffs are agreed with publishers and reviewed annually. In addition, and when relevant, the NLA consults industry bodies representing the MMOs or the PR industry.

In exceptional cases, where NLA is unable to agree terms with a licensee, the licence or tariff may then be set by the Copyright Tribunal. Unless a term has been ordered by the Copyright Tribunal, in which case it may only be varied by that body, NLA is able to review and make changes to its licensing terms and conditions, including licensing fees, under its own authority.

In addition to the formal oversight of the Copyright Tribunal, NLA has a code of practice which sets out what licensees can expect from NLA. The Code offers an independent ombudsman service to resolve disputes¹.

In summary, NLA is part of a clear, transparent and heavily-regulated system with a high degree of independent oversight. It is also the case that participation in NLA licensing is both voluntary and non-exclusive, giving a welcome degree of flexibility to publishers.

6. Benefits to journalism

NLA is a success story of the industry working collectively, and has delivered uninterrupted growth in licensing revenue for publishers over the last 10 years. Eighty per cent of NLA revenues are returned to the publishers to be invested back into the industry. Annual NLA revenues are the equivalent of over 1000 jobs in journalism.

¹ http://www.nlamediaaccess.com/uploads/public/About_Us/2015NLA_Final_COP_End_Users_270313.pdf

Total revenue for these activities (plus some service fees) was more than £40m in 2017, bringing the total returned by NLA for investment in news and journalism to over £380m over the course of the last twenty years.

II The Publisher's Right

1. Definition

The current draft of the European Union's revised Copyright Directive (currently being considered by the European Parliament), proposes a new right - at Article 11 - for European publishers: a related right which neighbours those of the creators of a work.

This apparently technical change would have important effects in some EU member states, as it would clarify the right of publishers, give them legal standing, and enable them to receive revenues for the use, extraction, or distribution of the content concerned.

At present, the ability of authors, journalists and illustrators to assert their ownership of content has placed constraints on the ability of media companies in some EU countries to adapt their products to digital channels. This is not the case in the UK, where NLA operates a Special Contributors' Scheme for those publishers that cannot confirm that they have cleared all necessary rights beyond the rights for initial publication.

NLA operates a survey to calculate what portion of their NLA licensing revenue is due to freelance contributors or agencies and this enables publishers to make the appropriate payment to those contributors.

The proposed publisher's right is not without precedent. A similar right is enjoyed in the audio-visual and music industries.

Nor would the right be absolute. It is proposed that existing exceptions to copyright continue to apply in certain special cases (reviews and parodies being representative examples) where these do not conflict with the normal exploitation of the work, and do not unreasonably prejudice the legitimate interests of the author.

2. The impact on the UK position

The interaction of the proposed publisher's right and the UK position requires some elucidation.

In the UK, section 11(2) of the Copyright, Designs, and Patents Act 1988 gives news media publishers ownership of the copyright of their employees' work: "Where a literary, dramatic, musical or artistic work or a film, is made by an employee in the course of his employment, his employer is the first owner of any copyright in the work subject to any agreement to the contrary."

This is not the case in all EU member states and hence the publisher's right would in those countries create a new right enabling publishers to exploit the content they have commissioned.

In addition, recent UK case law has clarified that publishers' copyright extends to headlines and small extracts ('snippets'). This clarification came about as the result of a series of court decisions in litigation between NLA and an MMO, Meltwater.

One advantage of the publisher's right if established in UK law would be to codify some of the elements of the NLA/Meltwater litigation, in particular the right of news media companies to license

the sharing of headlines and snippets. It would go further to make all snippets, even those which might fail the copyright test of originality and/or substantiality, subject to copyright.

This might seem a minor question. It is not. Nearly half of all internet users only browse through news snippets. Thus, for nearly half of the internet users, snippets, which they access via third party services, seem to suffice to satisfy their primary information demand. They do not access publishers' websites and therefore do not contribute to advertising revenues and publishers' potential to sell subscriptions or privileged access is diminished.

Search results with snippets can convey the essential meaning of the linked news text. The benefit for the consumer does not depend on a minimum length of the work. On the contrary, the typical consumer would like a quick overview of what is new. The services provided by online platforms on a commercial basis provide for exactly this demand.

The introduction of the publisher's right would clarify two other aspects of intellectual property: it would define more clearly the circumstances in which a licence was needed; and it would enable publishers to market their products without having to ascertain or be put to proof about the scope of freelance or other third-party rights first. This can be time-consuming. Instead, publishers would enjoy an independent and exclusive right.

As NLA understands the current position, the licensing of news media and magazine content is not legally inhibited in the UK (except in respect of the third-party rights noted above, and then not substantially). Indeed, the present legal position is clear: publishers own their copyrights and, subject to certain exceptions, the copying, use or dissemination of that content beyond a mere hyperlink requires a licence.

Rather than the catastrophic end to the open internet that has been suggested by some campaigners against the passage of Article 11², the incorporation of a publisher's right in UK law (at least in the current form it has reached at EU level) would simply clarify the existing complex legal and regulatory regime that applies to published content.

3. Recent experiences in Germany and Spain

Germany introduced a law intended to create a publishers' right (ancillary copyright, or 'Leistungsschutzrecht') in 2013.

As the German news media publishers argued, ancillary copyright merely filled a gap in German copyright law created by the internet, with very similar justifications to those in the UK: 'search engines and news aggregators compile and categorize publishers' content and use it to enhance their own offers. While they profit from value added to their own offerings by using press products and, thus, increase their ad revenue by doing so, publishers are not involved in this process. Yet it is them who shoulder the enormous investments necessary to create media content and innovations. It is the publishers who hire countless journalists, editors and freelancers'³.

The ancillary copyright grants press publishers the exclusive right to decide on the use of their products, or extracts thereof, by commercial providers such as search engine operators or news aggregators. The law is intended to enable publishers to request reasonable compensation for each use.

² <https://savethelink.org/>

³ <http://www.lsr-aktuell.de/ancillary-copyright/debate-ancillary-copyright-press-publishers-germany>

However, digital platforms have hitherto refused to accept the validity of both the licence and the proposed tariff for copying and as a consequence there is litigation between VG Media and Google which includes a technical issue (on whether the German Federal Government should have notified the European Commission of its proposed law before it came into force) which will be ruled on by the ECJ. The Berlin District Court, which referred this matter to the ECJ held that the ancillary right was justified at least in part.

VG Media is the collecting society for private media companies, working on the same model as NLA. It represents the copyright and ancillary copyright of nearly all German - and some international - private TV and radio broadcasters, as well as over 200 digital publications, including the websites of local and national news media companies.

In Spain, a January 2015 amendment to the fundamental Spanish IP legislation ('Real Decreto Legislativo 1/1996, de 12 de abril, por el que se aprueba el texto refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la materia') gave newspaper publishers an inalienable and irrevocable right to license text aggregators (such as Google News) which were using and distributing their content.

In response, before the law came into effect, Google closed its Google News service which has not subsequently been available in Spain. The law did not affect search engines.

The operation of the law requires aggregators to pay a levy fixed at Euros 0.05 per active user per month, although in practice it is intended that agreements would be negotiated by the Spanish collecting society (and NLA equivalent), CEDRO (Centro Español de Derechos Reprográficos).

Since the introduction of the law, one licensing agreement has been agreed between CEDRO and Upday (a joint venture news service between Samsung and Axel Springer). Upday is preinstalled on Samsung mobile phones and available as an app.

There are two important aspects of the Spanish experience to note:

- Initial fears that the impact of the law, and the removal of Google News, would lead to a drastic reduction in traffic to Spanish newspaper websites have been found to be erroneous. An insignificant initial decline has subsequently been reversed
- The legislation was deliberately framed to make the publisher's right irrevocable and inalienable (on the model of authors' rights) as it was otherwise feared that the market imbalance between digital platforms and publishers would make the law a dead letter.

III The future licensing of news media content

1. The Cairncross Review

The issue that the Cairncross Review has to resolve is simple to articulate, if complex to solve. The initial enthusiasm for sharing content on digital platforms was driven by a belief or hope that online advertising revenue would offset the loss of copy sales revenue in the offline world. This has proven not to be the case, and the two largest digital platform businesses, - Alphabet and Facebook, have captured almost all of the digital advertising market, estimated at £11.5bn in 2017 between them, on the basis of providing free services to their end-users. At the same time, the advertising market has migrated to digital, away from other media sources, particularly print, falling by over 20% in 2017 across both news media and magazines.

This trend of market migration and consolidation is unlikely to reverse. The result is a reduction in resources available to the publishing industry, leading to the closure of titles, loss of jobs, and a reduction in reporting. *Supporting journalism*

Securing a sustainable future for high-quality journalism could be realised, at least in part, by ensuring that the value of news media and magazine content to the products and services of digital platforms is recognised beyond the provision of internet traffic. The reality is that through the collection, aggregation and exploitation of vast amounts of personal data of EU citizens, Google and Facebook now have the market power to define and dominate the digital advertising market across large parts of the world.

Over the past twenty years NLA has developed great expertise in a variety of roles which are relevant to the practical questions emanating from the Cairncross Review, and in particular the collection and distribution of new revenues from digital platforms.

Given its 20-year history of generating revenues on behalf of the news media industry, the NLA understands the monetary value that the licensing of high quality journalism can provide for reinvestment in journalism at a local and national level. While the business and policy questions are ultimately for individual publishers to resolve, the NLA understands that there is no legal impediment to a licensing scheme being developed for the use of news media content in search and social environments. Rather, publishers have thus far been unwilling to take legal action against global platforms with substantial market power, due to concerns about the ability of those platforms to respond negatively through their near total dominance in search or social media. Such a response can be seen by Google's decision to close Google News in Spain⁴, and to force publishers to waive their legal right to payment in Germany⁵.

A combination of factors, prevent the emergence of an approach to the search and social licensing of news in the UK, including:

- Publishers receive traffic to their websites thanks to their content appearing in search results or on digital platforms (like Facebook) and do not wish to reduce that flow, even though there is no ability to negotiate terms
- Similarly, publishers receive advertising revenue (shared with platforms) from visitors to their sites, although the terms are not transparent
- Publishers secure data about visitors to their websites which it was thought would be monetisable (although in practice this has not been lucrative, as the platforms themselves collect the most valuable data across their sites)
- There are many publishers but very few platforms, creating a competitive imbalance between the two. Unlike publishing, digital platforms operate in a winner takes all environment, as can be seen in the respective market shares in their fields for (for instance) Facebook, Google, YouTube, and Instagram. The publishers' right is an attempt to remedy this imbalance
- In the UK there is a supply of 'free' news from the BBC (at least free at the point of delivery) which is very well-funded and has no incentive to restrict access to its content (indeed the reverse is true)
- There can be no first-mover advantage in taking the licensing route as there are a range of substitutable sources of news on which platforms and citizens could draw. No one publisher

could risk this approach, given the risk of consequent exclusion from platforms to the benefit of rival suppliers

⁴ <https://www.theguardian.com/technology/2014/dec/11/google-news-spain-to-close-in-response-to-tax-on-story-links>

⁵ <https://www.zdnet.com/article/google-stops-displaying-news-snippets-from-german-publishers-that-sued-it/>

The advantage of licensing is not limited to financial reward. The principle of licensing is that permission is granted subject to conditions – among which may be (or may not) be - an agreement to pay fees. Allowing third parties to scrape news media content, and their algorithms to present individual articles in a list of search results, without any conditions being agreed, leads inevitably to the commoditisation of news media brands within environments over which they have little to no control.

Therefore, licensing systems could be based on the conditions of the usage of news media content, as well as negotiations around payment. The internet has the potential to automate some licences, making it possible for them to be cost-effective even if licensing fees are very low, proportional to use, or even sometimes zero. This offers the potential for significant innovation.

In terms of the commercial challenges facing news media businesses at a local and national level, the debate about Article 11 and the wider use of licensing have focused on the potential to raise revenues for reinvestment in high quality journalism. This is clearly the most substantive aspect of the current debate about licensing, especially when the use of news media content by the search and social platforms is significant in terms of scale and commercial value for the licensee.

2. The role of NLA

Over the 20 years it has been in existence, NLA has developed immense expertise in a number of areas relevant to this discussion:

- Collective licensing – its core and original business
- Compliance mechanisms
- Payment collection and distribution
- Database management

Naturally therefore when looking at the possibility of licensing the use of news media content by search and social platforms, the potential role of NLA in managing this system has been mentioned.

In addition, NLA already licenses web-based news media content. Thanks to the outcome of litigation between NLA and Meltwater (referred to above) NLA has an unambiguous legal right to license web-based news media content. Licences apply both to media monitoring organisations (MMOs) and to their clients, the end-users.

In principle that opens a possible route for licensing digital platforms as if they were another media monitoring service, wholesaling news media content to end-users.

There is of course one significant difference between licensing MMOs and commercial end-users. MMOs charge their clients for access to news media web content. Platforms do not: their business model is based on optimising scraped content to secure increased traffic driving higher advertising revenues.

Although this difference is clearly material in terms of business models, in practical terms, there is little difference in terms of the licencing of news media content. The fact that a business model is underpinned by advertising, rather than a direct user payment is **no impediment** to the development of a licensing regime. Many publisher members of the NLA already license to a wide variety of platforms, each of whom have different business that can deliver revenue on a revenue share model, based on minimum guarantees. Both MMOs and platforms make money from news media content,

whether directly or indirectly – in the case of platforms from advertising revenue. When negotiating such a licence the discussions would focus, just as they do in all other similar negotiations, on the scope of the rights being granted and the extent and terms under which fees or other considerations are provided in return.

The analogy does break down, however, when considering the end-users. Buyers of MMO services are themselves commercial organisations (whether companies or PR agencies) which can be licensed in their turn. This would not be the case with the consumer customer bases of the platforms. So while the existing model could be substantially re-used, it would inevitably need to be varied to reflect the different nature of the services.

Again, that need not be a barrier to a licensing system. Part of the consideration for a licence would need to be the provisions of the data were available to identify the volumes of links being shared with end-users, estimating the associated revenues accruing to the platform, and then the use of those numbers as a basis for some form of licence and hence royalty payment.

3. The treatment of scale

While the principle of treating digital platforms as if they were MMOs seems plausible, there is a difference in scale. MMOs serve thousands of businesses, but digital platforms provide their services to millions of end-users.

Scale is however already inherent in the current NLA Web Database Licence. An MMO which provides a service to between 101 and 150 clients pays a smaller licence fee (£12,504) than one with between 4251 and 4750 clients (£44,352). But the cost per client in the latter case is much lower at about £10 per head compared to £123 in the former.

Licensing digital platforms could work in the same way, with increasing discounts offered per client (readers in this case), while the cost of the licence could reflect the relationship between searches and ad revenue.

Ultimately, there would be no need for end users to ever be aware of the ostensibly free products or service they are using, to have ever purchased a licence to publish news media content. This would be a cost of business that would take place in the background between the search or social platform and the licensing agency, in much the same way as platforms such as Google licence their IP to other digital businesses.⁶

4. How a licensing system could work in practice

For this licensing system to work there would have to be agreement between publisher and platforms; transparency; and a system of independent regulation. Achieving any one of these three will be difficult: achieving all three would likely only be made possible through the intervention of government.

- Digital platforms would have to agree to supply NLA (or another licensing body created specifically for this sector) with a report on the publisher content which they do not own but have indexed and distributed to end-users who have accessed that content.
- NLA could help this process, if mandated by publishers, by making feeds of publisher content available to digital platforms as it currently does for text aggregators.
- NLA would collate the information by publisher and distribute the appropriate licence fees to publishers in proportion to use.

- Some form of independent legal regulation would be required to ensure that the system worked fairly. For example, platforms might decide to reduce their licensing fees by deliberately demoting qualifying content in search results.

⁶ <https://cloud.google.com/maps-platform/pricing/>

- This role could be carried out by the Copyright Tribunal, or by a new body with specific responsibility for resolving disputes in a swift and low-cost manner, to avoid expensive litigation in which the platforms would have a built-in advantage.

5. Licensing choices

There would be no compulsion for news media and magazines to licence their content via NLA. Indeed, the Financial Times (one of NLA's owners) has chosen not to do so. The same would apply to any licensing of platforms. News media and magazine businesses could choose to participate in an NLA licence or to negotiate their own licences.

In the latter case, there might still be a role for NLA in managing, monitoring, and ensuring the smooth running of a licence, as these are areas in which the organisation has great technical expertise and can act on a consultancy basis if so desired.

Conclusion

NLA believes that, with sufficient investment, a licensing system for publisher content which is indexed and shared by digital platforms is possible. Such a system would be assisted by clarifying the law via the introduction of a publisher's right; but that is not an absolute requirement.

NLA suggests that in this connection the Cairncross Review should propose that:

1. The publisher's right should be incorporated into English law to clarify any ambiguity over the legal rights of publishers over their content
2. The appropriate regulatory machinery should be put in place to ensure that a system in which publishers licensed digital platforms was fair, transparent, and not capable of being manipulated to the advantage of either side

NLA hopes that this analysis is helpful to Cairncross Review, and looks forward to the findings of the review in due course.
