The regulation of the press

1. **History**

From 1476 all print press was state licensed and from 1538 all printed books had to be approved by the Privy Council and registered with the Stationers' Company. The licensing regime ended with the abolition of the Star Chamber in 1640 but was reintroduced in 1643 by Cromwell and only ended in 1695 when the House of Commons refused to renew the statute. Ever since then, there has been a general right to publish newspapers, books or magazines without state authorization and only subject to other constraints in the law such as criminal and seditious libel and blasphemy etc. In 1712, the Stamp Act introduced taxes on the press, to curb the radical press, and although unpopular, these were only abolished in 1861. During World War II censorship returned in the Realm Regulations with power to ban any publication calculated to foment opposition to the war. Today a system remains in relation to defence material.

The position has always been different for radio and television which were, and remain, licensed. Originally due to spectrum scarcity, then power and reach/political impact; the print press and television are treated very differently indeed –even in relation to news. The Ofcom Code, for example, has rules on harm and offence and due impartiality in news and current affairs which could have no place in relation to the print press as our newspapers are often overtly partisan.

2. **Overview**

The print press has long had a self-regulatory code of conduct, the Editors' Code, the focus of which is accuracy, some acknowledgement of privacy and a right of reply. As noted, print has never been required to be impartial or even handed, even in relation to hard news and the Code is focused on default rules for protecting those in the media storm from undue intrusion to their privacy. Today there is a debate about which approach (print versus television) is most appropriate for the internet. The EU has already provided a *light touch* broadcast style regime for programme-like material on the internet, in the Audio-Visual Media Services Regulation AVMSD). Advertising is also regulated slightly differently online and offline and there are two Committee on Advertising Practice Codes, the CAP Code, governing print and online and the BCAP Code for Broadcast Advertising.

3. **Editorial independence**

A crucial distinction was drawn traditionally between 'editorial' and 'advertising' and there was, and remains, a need to clearly distinguish between the two. The regulation of editorial is covered by the Editors' Code while advertisements fall under by the two advertising code(s) below. What must be avoided is advertising in disguise, also known as "*infotorial*" or "*advertorial*."These standards have been somewhat relaxed and the focus for the regulators is transparency. The public today is more media savvy and provided they are warned of the lack of editorial independence--that will usually suffice. Content is often these days labelled as 'sponsored' to indicate that it is advertising. Similarly, under the Editors' Code honest disclosure is required where the writer or publication has a financial interest in a stock or company or issue.

4. The Code

The focus of the Editors' Code is in art.1 which requires that the press must take care not to publish inaccurate, misleading or distorted information and must promptly correct errors. Other provisions deal with privacy (particularly of children), harassment and intrusion in cases where sensitivity is required.

The Editors' Code is currently the standards code adopted by the Independent Press Standards Organization (IPSO) set up as a self appointed and self recognized, self regulatory body, on 8 September 2014. IPSO refused to apply to the government's specially chartered panel for authorization as a recognized standards body and acknowledged that it did not meet all the statutory criteria. However some 90% of national press joined IPSO. Privacy campaigners backed by Max Mosley have set up their own alternative, Impress, which has been approved by the government panel. The Royal Charter stipulates that the panel must inform Parliament after a year if the system of regulation does not cover "all significant news publishers." Leveson recommended the imposition of a backstop regulator in this instance, here Ofcom, however the government appears to lack the will.

The same self regulatory code for editorial content, the Editor's Code, was previously known as the PCC Code and earlier versions have existed since the 1950s. Publishers joining a standards body and signing up to its code may find this provides some protection if they meet its standards for complaint and adjudication procedures. While the Code is not the law, it captures the gist of the law on privacy and libel and compliance with it will go a long way towards compliance with the law.

5. Pictures

This note does not include advice on data protection and privacy per se but you should be aware that taking and publishing photographs of individuals may engage the protection of the law of privacy even if taken in public, if a reasonable person would expect them to be private (and this applies particularly in relation to photos of children even if out with their parents[1]) and advice should be taken before publishing photographs of persons engaging in acts which most reasonable people would consider private –even if done in public. Great care must also be taken in relation to school photographs etc. Unless there is a strong public interest in the story, the privacy interest of children under 18 will generally trump other interests, which is why the media tend to publish photographs of children with faces pixellated unless there is express consent from parents. Even this will not necessarily be determinative and publishers under the IPSO Code must consider the best interests of the child, particularly where payment is involved.

6. Advertising

Within the EU, advertising is within the regulated field for the E-commerce Directive which applies a Country of Origin principle –so that service providers

[1] See *Weller & Ors v Associated Newspapers Ltd* [2014] EWHC 1163 (affirmed on appeal).

must mainly comply with the law in their place of establishment (although this does not relieve them entirely of the need to comply with the law of the place to which their services are directed).

Within the EU, the law on advertising has been harmonised by the Unfair Commercial Practices Directive (2005/29/EC).[2] Misleading, deceptive and false and unfair advertising are prohibited by this Directive as are other objectionable practices. The Directive has a black list of practices which are considered unfair in all circumstances. Note the following: §11 "*Using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial).*"

In the UK, the primary regulations now governing commercial communications are the Business Protection from Misleading Marketing Regulations 2008 (BMR) and also the Consumer Protection from Unfair Trading Regulations 2008 (CPR) —both derived from the Directive. The BMR deals with business to business issues and the CPR with business to consumer issues.

The Consumer Rights Directive (2011/83/EC) and the Consumer Rights Act 2015 will also apply where there is an individual who is the consumer.

§18 of the CPR provides a defence for those whose business is the publishing of advertisements and who received the advertisement in the ordinary course of business and did not know that publication would be an offence. The same defence is at §12 of the BMR. This will be the primary defence that a publisher will rely on should an issue arise from its dissemination of commercial content from members and third parties.

7. The CAP Code and BCAP Code

The Committee on Advertising Practice (CAP) has created an industry regulating code of conduct for advertising; the British Code of Advertising, Sales Promotion and Direct Marketing (The CAP Code). The Code is at http://copyadvice.org.uk/CAP-Code.aspx. This traditionally applied only to advertising in paid space but now also applies to viral and email advertisements and from March 2010 the Code extends to unpaid space –including on social media and home sites. Editorial, public relations e.g. press releases and investor relations materials remain outside the remit of the Code. So the extended remit as from 1 March 2011 includes: *"Advertisements and other marketing communications by or from companies, organisations or sole traders on their own websites, or in other non-paid-for space online*[3] *under their control, that are directly connected with the supply or transfer of goods, services, opportunities and gifts, or which consist of direct solicitations of donations as part of their own fund-raising activities.*" This means the Code will apply to advertisements by and/or under the publisher's control.

[2] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:149:0022:0039:EN:PDF.

[3] See 3.4 Extending the Digital Remit of the CAP Code, Publication. 'non-paid-for space online under [the advertiser's] control': this phrase covers, although not exclusively, advertisements and other marketing communications on advertiser-controlled pages on social networking websites.

The Code requires that advertisements are legal, decent, honest and truthful.[4] The Code is not the law but compliance with the Code will often result in compliance with the legislation and better.

The Advertising Standards Authority (ASA) determines Code violations. The ASA is regarded as a great regulatory success but this is largely as it has always had real sanctions.

If a marketing communication is in breach of the Advertising Codes, the marketer responsible is told by the ASA (or the CAP Compliance team) to amend or withdraw it and if they do not, sanctions include adverse publicity and an ASA adjudication and possibly being banned from online promotion and search and the withdrawal of other trading privileges, and referrals to the Office of Fair Trading/Competition Commission for action under the CMR or BMR.

There is a good system for pre-publication vetting by the CAP Copy Advice team. See http://copyadvice.org.uk/ which provides free and immediate telephone advice on whether a proposed advertisement is Code compliant.

8. Broadcast

The BCAP Code, also regulated by the ASA governs advertising on television. An excellent pre-clearance system is also provided.

If you include moving audiovisual material online—you may need to comply with the Audiovisual Media Services Directive (AVMSD). This can be a length issue and if audiovisual materials are short, it may not apply—as the AVMSD is aimed at 'programme –like materials. See the Table below for a summary.

9. Code and algorithms

It is also important to remember that there are other general laws that apply online. Under art. 5(1) of the E-Commerce Directive (2000/31/EC) a provider of online services must provide its customers with its name, geographic address and details, including its email address and preferably a telephone number and all commercial communications must include a statement to the effect that the communication is a commercial communication and full details of the maker. Software or 'code' which collects and analyses site visitors' actions may have legal implications. The Internet Advertising Bureaux has a self regulatory Code of Practice relevant to these issues and provides guidance. Data protection laws and privacy law also applies generally. Data protection laws need careful compliance. Proper notices must be given at the point of collection and informed consent must be obtained. Use of third party analytics will involve similar requirements to those adopted by the third party. There are many currently unresolved legal issues surrounding so called 'behavioural advertising' and the laws of privacy and data protection are only slowly developing.

[4] See the prohibition on Astro-turffing in Rule 22.3 on ""Recognizing Marketing Communications and identifying marketers –provides marketers should not falsely claim or imply they are acting as consumers or for purposes that do not relate to their business."

10. User-generated content

Previously, press publishers would take legal responsibility for readers' letters to the editor –which were edited and then published. This approach informs the treatment of this content for secondary responsibility in section 1 of the Defamation Act 1986 and under the new Website Operators' defence in the Defamation Act 2013.[5] We do not here provide detailed advice on intermediary liability –but if not intending to rely on the libel defences above, a media publisher can still rely on general intermediary defences for readers' comments or user generated content. See *Imran Karim v Newsquest Media Group Limited* [2009]EWHC 3205(QB), *Kaschke v Hilton* [2010] EWHC 690 and *Mulvaney v Betfair* [2009] EIHC page 133. To rely on the intermediary defense available to host, the publisher must not control or moderate this content in anyway, nor engage with it other than by algorithm or automated filter, and remove it immediately on receipt of a Takedown notice. See Case C-236/08 *Google France, Google Inc. v Louis Vuitton Malletier.*

Two recent cases also treat press publishers as having a greater responsibility for third party comments where they have control and derive revenue but the use of a Notice and Takedown remedy in relation to such content can itself satisfy the need to balance the competing art 10 and art 8. rights. See *Delfi v Estonia* (Application no. 64569/09) and *MTE & Index.hu zrt v Hungary* (Application no. 22947/13).

11. Hyperlinks

Following the rulings in Case C466/12 Svensson and Case C348/13 Bestwater, the general rule is that it is not copyright infringement to link or embed a work already online, as there is no new public to that contemplated by the copyright owner. However, while this remains the case even where the original upload linked to, is itself infringing, as liability requires knowledge of the infringement, which most linkers will lack. However, where the linking is done for profit/commercial purposes, knowledge will be presumed (on the basis that businesses should check rights) and the business user must rebut knowledge. See Case C150/16 *GS Media*.

12. Sources and whistleblowers

European Court of Human Rights:

"Protection of journalistic sources is one of the basic conditions of press freedom ... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined," Goodwin v UK (1996) 22 EHRR 123 [39]. This is reflected in §10 Contempt of Court Act 1981:

> *"No court may require a person to disclose, nor is any person guilty*

[5] If there is a defamation issue, then the Website Operator's defence in section 5 of the Defamation Act 2013 may apply. This can provide the host with a defence if he forwards the complaint to the author/poster and follows the procedure in that section and the regulations.

> *of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime. "*

See also the Editors' Code at [14]. Recent scandals saw media sources revealed by evidence gathering from ISPs and telecoms firms of journalists' phone records in order to identify their sources, in the Mitchell and Huhne cases (where PACE was used to avoid RIPA protections). The Investigatory Powers Act 2016 now contains protections for journalists. Note also that the Public Interest Disclosures Act 1998 now protects whistleblowers but only if they attempt to raise the issue internally and then with the government/the regulator before going to the media. This is unsatisfactory but based on a UN model. Public interest and good faith are required. Whistleblowers are usually breaching contractual and other obligations –including an employee's obligation of good faith and law of confidence and the Act protects whistleblower from detriment –but in practice the individual is at risk. This is particularly problematic in relation to monopoly employers. If a public authority has whistleblower---he gets special protection under Art. 10 –*Guja, Heinisch* etc