



**FINANCIAL
TIMES**



ADJUDICATION

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INTRODUCTION

1. This is an Adjudication of an editorial complaint received by the *Financial Times* (“FT”) from a reader called Paul Tierno. Mr Tierno sent an email to the Letters Editor’s public email address at 19:00 on Monday, 20 November 2017.
2. In summary, the complainant had noted significant similarities between the FT’s online obituary of Charles Manson, and the obituary of Manson by Margalit Fox which had been published in the *New York Times*¹ (“NYT”). While the NYT had referenced a leading biography of Manson by his prosecutor Vincent Bugliosi (with Curt Gentry), no such citation was included in the FT.
3. The FT obituary was written by John Murray Brown in around 90 minutes, between 0700 and 0830, on the Live Desk where he was stationed that day. It is not in dispute that the more-than-2,200-word NYT obituary had already been published (indeed, had been written well in advance of publication), and that – alongside obituaries by the BBC and *The Guardian* - it was one of three sources for the FT obituary. None of these three media outlets was credited.
4. Following the complaint, a decision was made by James Lamont (FT Managing Editor) to suspend Mr Murray Brown pending investigation. A disciplinary hearing chaired by John Thornhill (formerly the FT Deputy Editor, now the FT Innovation Editor) considered the investigation. Its report held that the article amounted to plagiarism.
5. Mr Murray Brown (supported by his union, the National Union of Journalists) appealed this decision, and an Appeal Hearing was necessarily convened before a member of the FT Board of Directors (James Lund, Chief Financial Officer), supported by HR. However, both the FT and Mr Murray Brown agreed that the appeal decision would hinge in-part on whether what occurred was in fact ‘plagiarism’. Mr Murray Brown, for his part, vociferously denies that it is so.

¹ “*Charles Manson Dies at 83; Wild-Eyed Leader of a Murderous Crew*” by Margalit Fox, *New York Times*, published online 20 November 2017: <https://www.nytimes.com/2017/11/20/obituaries/charles-manson-dead.html>

6. Although I have no role whatsoever in disciplinary matters, the proper construction of the FT Editorial Code of Practice is my domain, and adjudicating editorial complaints is my function. Therefore, the FT agreed that I would determine Mr Tierno's editorial complaint in the usual way – deciding if the publication by the FT had breached the Editorial Code – with Mr Lund's decision to follow. If I found no breach, Mr Lund indicated the appeal would be automatically allowed. If I found a breach, Mr Lund (without my input) would still have to take an independent decision on whether the disciplinary finding should be allowed to stand, and if so, on whether the sanction was appropriate.
7. The question – the **only** question – I am required to resolve is whether, in publishing the obituary of Charles Manson, the *Financial Times* breached Article 7(2) of the FT Editorial Code of Practice² which concerns 'plagiarism'. I emphasise that I am deciding this as a matter of an editorial complaint against the newspaper, not a disciplinary complaint against any particular journalist. By giving a clear construction of Article 7(2) itself, I hope and expect this Adjudication to assist the FT in avoiding even allegations of plagiarism.

THE ARTICLES

8. The complaint recognised similarities between the published versions of the FT and NYT obituaries. However, the article to which I must compare the NYT article alleged to have been plagiarised is the version submitted by Mr Murray Brown to the Live Desk ("the Filed Version"): any similarities introduced by subsequent editing cannot fall to be counted against him (nor can the removal of any similarities be held in his favour).
9. Mr Murray Brown has sent me an email of 08:38 on 20 November 2017 which records his draft as-filed (this accords with the version provided to the James Lamont investigation by Peter Spiegel). I have added paragraph numbers for ease of navigation:

² FT Editorial Code of Practice: <https://aboutus.ft.com/en-gb/ft-editorial-code/>

HEADER: *Cult leader and murderer Charles Manson dies at 83*

- [1] *The cult leader and convicted murderer Charles Manson, who headed a group behind a series of brutal killings in Los Angeles in the late 1960s, has died at a prison hospital at the age of 83.*
- [2] *Manson, a crazy eyed criminal and failed rock musician, led a group of drifters known as the Manson family, whose killing spree in August 1969 brought the the hippies' summer of love to a violent and bloody end.*
- [3] *Manson shot to prominence after he was arrested in connection with the shockingly brutal murder of 5 people at the Bel Air- house of Roman Polanski including the acclaimed film director's wife Sharon Tate.*
- [4] *Tate who was 8 and a half months pregnant died from stab wounds and her blood was used to write the word "pig on the outside of the house.*
- [5] *Members of the "family" also murdered grocer Leno LaBianca and his wife Rosemary La Bianca at their home a few days later. The phrases "Death to Pigs" and "Healter Skelter," misspelled, were scrawled in blood at the scene, apparently in an attempt to make it look like the work of black militants.*
- [6] *Manson was originally sentenced to death but this was modified to life in 1972 after California abolished the death penalty. He was denied parole 12 times between 1978 and 2012 and was not eligible for another parole hearing until 2027. He had been held at California State Prison-Cocoran since 1989.*
- [7] *Manson's cult status spawned pop songs, an opera, films, and half the stage name of the rock musician Marilyn Manson. The band Kasabian took its name from the gang member who escaped prosecution by giving evidence against her former associates.*
- [8] *Manson was born in Cincinnati Ohio on November 12 1934. He spent spells in reform schools, and by the age of 17 had a string of convictions, including for armed robbery.*
- [9] *During the 1950s he lived in Southern California, working as a parking lot attendant while engaged in check forgery and earning money as a pimp.*
- [10] *He was married twice during this period, to a teenage waitress Rosalie Jean Willis, and a few years later to a young prostitute called Leona. Both marriages ended in divorce.*
- [11] *By March 1967 he had moved to San Francisco Bay Area, which had become the centre of the peace and free love social revolution, fuelled by drugs particularly the hallucinogenic LSD.*

- [12] *Manson set himself up as a guru, espousing a mix of Scientology, pop lyrics, and writings of Hitler, his Christ like appearance attracting a clutch of devoted female followers.*
- [13] *It was during this period that the group moved into in a house owned by Beach Boys drummer Dennis Wilson, who introduced Manson to friends working in music and show business.*
- [14] *Manson became obsessed with the song Helter Skelter on the Beatles' White Album, released in November 1968, which he interpreted as a warning of an impending black on white race war.*
- [15] *One night in August 1969 Manson decided to take action himself, sending four of his followers Susan Atkins, Patricia Krenwinkel, Charles Watson and Linda Kasabian – to the Tate home in the Hollywood hills.*
- [16] *Manson knew the house as it had been owned by Terry Melcher, a record producer who had turned down Manson's request for a recording contract.*
- [17] *In a frenzied outbreak of shooting, stabbing, beating and hanging, they murdered Ms. Tate and four others in the house and on the grounds: Jay Sebring, a Hollywood hairdresser; Abigail Folger, an heiress to the Folger coffee fortune; Voytek Frykowski, Ms. Folger's boyfriend; and Steven Parent, an 18-year-old visitor.*
- [18] *Mr Polanski was in London at the time. During the court trial, Mr. Manson at one point lunging at the judge with a pencil. He also punched his lawyer in open court.*
- [19] *In another session, Manson appeared in the dock with an "X" inked into his forehead. He would later turn the "X" into a swastika. He always denied he ordered the Tate-LaBianca murders.*
- [20] *In a 1986 interview with television journalist Charlie Rose he was asked if he cared that he had killed Ms Tate and her unborn child. "Care?" Mr Manson replied. "What the hell does that mean, 'care'?"*

10. The Filed Version comes in at 694 words. The NYT piece weighs in at over 2,200 plus photo art. Clearly there is much in the NYT – including original analysis and comment – which has not made its way into the essentially factual account in the Filed Version. The allegation is a combination of outright plagiarism (direct copying) and plagiarism by the practice of “re-writing” (that is to say: copying, but masking that copying by changing some words).

11. There are about eleven relevant passages of the NYT obituary which are said to have been copied and/or re-written (paragraph letters added for convenience of cross-reference, where [A] is the third paragraph of the NYT obituary, and [L] is – importantly – the very last paragraph of that piece):

[A] *Mr. Manson was a semiliterate habitual criminal and failed musician before he came to irrevocable attention in the late 1960s as the wild-eyed leader of the Manson family, a murderous band of young drifters in California. Convicted of nine murders in all, he was known in particular for the seven brutal killings collectively called the Tate-LaBianca murders, committed by his followers on two consecutive August nights in 1969.*

...

[B] *Starting in the mid-1950s, Mr. Manson, living mostly in Southern California, was variously a busboy, parking-lot attendant, car thief, check forger and pimp. During this period, he was in and out of prison.*

[C] *He was married twice: in 1955 to Rosalie Jean Willis, a teenage waitress, and a few years later to a young prostitute named Leona. Both marriages ended in divorce.*

...

[D] *Since then, the Manson family has occupied a dark, persistent place in American culture — and American commerce. It has inspired, among other things, pop songs, an opera, films, a host of internet fan sites, T-shirts, children's wear and half the stage name of the rock musician Marilyn Manson.*

...

[E] *There, espousing a philosophy that was an idiosyncratic mix of Scientology, hippie anti-authoritarianism, Beatles lyrics, the Book of Revelation and the writings of Hitler, he began to draw into his orbit the rootless young adherents who would become known as the Manson family.*

...

[F] *At some point, Mr. Manson seems to have decided to help Helter Skelter along. Late at night on Aug. 8, 1969, he dispatched four family members — Susan Atkins, Patricia Krenwinkel, Charles Watson and Linda Kasabian — to the Tate home in the Hollywood hills. Mr. Manson knew the house: Terry Melcher, a well-known record producer with whom he had dealt fruitlessly, had once lived there.*

[G] *Shortly after midnight on Aug. 9, Ms. Atkins, Ms. Krenwinkel and Mr. Watson entered the house while Ms. Kasabian waited outside. Through a frenzied combination of shooting, stabbing, beating and hanging, they murdered Ms. Tate and four others in the house and on the grounds: Jay Sebring, a Hollywood hairdresser; Abigail Folger, an heiress to the Folger coffee fortune; Voytek (also spelled Wojciech) Frykowski, Ms. Folger's boyfriend; and Steven Parent, an 18-year-old visitor. Ms. Tate's husband, Mr. Polanski, was in London at the time.*

[H] *Before leaving, Ms. Atkins scrawled the word "pig" in blood on the front door of the house; in Mr. Manson's peculiar logic, the killings were supposed to look like the work of black militants.*

[J] *The next night, Aug. 10, Mr. Manson and a half-dozen followers drove to a Los Angeles house he appeared to have selected at random. Inside, Mr. Manson tied up the residents — a wealthy grocer named Leno LaBianca and his wife, Rosemary — before leaving. After he was gone, several family members stabbed the couple to death. The phrases “Death to Pigs” and “Healter Skelter,” misspelled, were scrawled in blood at the scene.*

...
[K] *During the trial, the bizarre became routine. On one occasion, Mr. Manson lunged at the judge with a pencil. On another, he punched his lawyer in open court. At one point, Mr. Manson appeared in court with an “X” carved into his forehead; his co-defendants quickly followed suit. (Mr. Manson later carved the X into a swastika, which remained flagrantly visible ever after.)*

...
[L] *To the end of his life, Mr. Manson denied having ordered the Tate-LaBianca murders. Nor, as he replied to a question he was often asked, did he feel remorse, in any case. He said as much in 1986 in a prison interview with the television journalist Charlie Rose. “So you didn’t care?” Mr. Rose asked, invoking Ms. Tate and her unborn child. “Care?” Mr. Manson replied. He added, “What the hell does that mean, ‘care’?”*

FRAMEWORK

12. It is necessary, or at least may be helpful, to explain the framework by which I must adjudicate editorial complaints under the FT Editorial Code of Practice.
13. Before the phone-hacking scandal at the *News of the World* led Prime Minister David Cameron to announce the Public Inquiry by Lord Justice Leveson³, most British newspapers were voluntary members of a self-regulator called the Press Complaints Commission (“PCC”). The PCC adjudicated editorial complaints based on the Editors’ Code of Practice, which – as its name suggests - was written by newspaper editors.
14. Following the Leveson Inquiry, the PCC was abolished. Two new regulators came into being, each of which operate their own editorial codes of practice:
 - a. IPSO, to which almost all the former PCC members now belong; and
 - b. IMPRESS, a press regulator approved by an independent Royal Charter body called the Press Recognition Panel, which has the support of those who consider self-regulation under the PCC and IPSO to be insufficient, but has no major traditional media organisations as members).

³ The Leveson Inquiry into the culture, practices and ethics of the press:
<http://webarchive.nationalarchives.gov.uk/20140122144906/http://www.levesoninquiry.org.uk/>

15. A small number of major newspapers – including the *Financial Times* (and the other 27 titles in the FT Group), *The Guardian* and *The Observer*, *The Independent* and *The London Evening Standard* – decided not to join either IPSO or IMPRESS, and instead to have an ombudsman directly employed but independent of the editorial process. Some papers appointed a column-writing Readers’ Editor (*The Guardian*, *The Observer*) following the tradition of the Public Editor as used to exist at the *New York Times* and *Washington Post*. The FT instead chose a more limited role, appointing a majority-external oversight committee to appoint and oversee the work of an Editorial Complaints Commissioner, who would adjudicate editorial complaints on appeal from the decision of the Editor, Lionel Barber.
16. Although the FT does not belong to IPSO, it incorporates the IPSO Editors’ Code (formerly the PCC Editors’ Code) as an Annex within the FT Editorial Code of Practice. This makes good sense: the PCC/IPSO Editors’ Code is a long-standing and well-recognised journalistic code which deals with most major issues about which editorial complaints are received. The IPSO Code is made up of ‘clauses’: Clause 1 concerns ‘accuracy’; Clause 2 concerns ‘privacy’ etc.
17. However, the FT Editorial Code of Practice (see link at footnote 2 above) is longer and more detailed. It contains specific provisions, including investment registers for staff, and rules around sourcing and attribution, and conflicts of interest. It has particular rules to ensure compliance with recommendations of financial instruments (required by the EU Market Abuse Regulation). It also has a general preamble which requires all contributors (staff or otherwise) to support the FT in attaining the highest journalistic standards.
18. The FT Editorial Code of Practice, made up of ‘articles’, includes at Article 1(2) an obligation on all staff and contributors “*to conduct her/himself according to practices which reinforce the FT’s reputation for accuracy, truthfulness, honesty and authority*”. This is a general obligation, which applies whether or not there is a specific Article or Clause governing the conduct in question.

19. It was not until February 2015 that a glaring omission was spotted. An academic called Dr Bia Labate complained to the FT that two paragraphs of an academic article she had co-written had been plagiarised by John-Paul Rathbone, the FT's Latin American editor, in a long-form piece he had written on ayahuasca tea ceremonies and the murdered cartoonist Glauco. After an exhaustive investigation, I produced a 48-page Adjudication ("the Labate Adjudication") on 18 June 2015⁴ which determined on the facts that there had been no breach.
20. One of the reasons for the length of the Labate Adjudication was the need to impose a framework by which the complaint could be adjudicated. This was necessary because, somewhat remarkably, there was no *express* prohibition on plagiarism in either the clauses of the IPSO Code or the articles of the FT Editorial Code of Practice. It was clear that plagiarism was not permitted, but the only relevant clause of the Code was Article 1(2) set out above. I therefore had to define what 'plagiarism' was, and what standards should apply (strict liability vs 'knowing' breach; the criminal or civil standard of proof).
21. One of my recommendations was that the FT Editorial Code should be updated to include an express prohibition against plagiarism. Given that I must construe the FT Editorial Code, it is important that I have no role in writing it – a judicial function should not legislate – and the IPSO Code is licensed from IPSO: it would be for the IPSO code committee to update it. The FT Code was updated, with Editor Lionel Barber drafting along with the committee who oversee my work (Baroness Wheatcroft, Professor Hargreaves & FT CEO John Ridding).
22. The new express prohibition was added to the existing Article 7. Previously, Article 7 had been limited to giving effect to the sourcing and attribution policy. The old Article 7 became Article 7(1), and a new Article 7(2) was inserted, which provided that:

⁴ Labate Adjudication, 18 June 2015
https://ft1105aboutft-live-14d4b9c72ce6450cb685-1b1cc38.aldryn-media.io/filer_public/75/99/75999bef-ec3c-480a-a314-8f7939bd356a/2015-02-27_jp-rathbone-adjudication-edited.pdf

“Editorial employees and contributors must not plagiarise others’ work.

That is, they must not knowingly pass-off others’ work as their own: if the essence or a substantial part of another’s work is knowingly included in material to be published by FT, sufficient acknowledgement of the original author and/or publisher should be provided.

(In assessing whether any plagiarism has occurred, regard may be had to all the circumstances, including a person’s state of mind; the extent of any apparent copying or derivation; and, the nature of any original, and subsequent, work.

It is recognised that the facts and subject matter of current or historical events may be public-domain details that are legitimately available to be reported by different authors and news organisations in their own right.

Principles of fairness and common sense should be applied.)”

23. This is the first Adjudication in which I have had to construe the new Article 7(2). Because Mr Murray Brown contends that his conduct did not amount to plagiarism under Article 7(2), it will be necessary to construe the new Article 7(2) to determine what it means and how it should be applied.

CONSTRUCTION

24. Some preliminary observations on Article 7(2). The first sentence is a straightforward prohibition. The second sentence defines what is meant by the verb ‘to plagiarise’ in the first sentence. The third, fourth and fifth sentences are directions to the decision-maker (first to editorial, then to me on appeal) as to how to decide whether the definition in the second sentence is made out.

25. The key is the second sentence, which I break down into five parts as follows:

“That is, they [employees and contributors] must not

*(a) **knowingly***

*(b) **pass-off** others’ work as their own:*

*(c) if the **essence** or a **substantial part** of another’s work is*

*(d) **knowingly included** in material to be published by FT*

*(e) **sufficient acknowledgment** of the original author and/or publisher should be provided”*

26. In the Labate Adjudication, I declined to define plagiarism in journalism as a strict liability offence (i.e. the mere fact of copying or derivation, irrespective of intent, being sufficient) as is sometimes the standard in academic plagiarism. I held that ‘plagiarism’ was an intentional wrong, akin to a crime or an intention tort, such that there needed to be both an *actus reus* (a ‘guilty act’) and *mens rea* (‘a guilty mind’) of actual intent or subjective recklessness. Negligence, unless perhaps so serious as to be gross negligence, would not be sufficient.
27. This approach is reflected in the new Article 7(2), although the authors decided not to permit even serious negligence. The inclusion of ‘knowingly’ twice in the second sentence of Article 7(2) makes that clear. Accordingly, in the second sentence, (b) (c) & (e) are the *actus reus*; (a) and (d) are the *mens rea*.

Standard of Proof

28. In the Labate Adjudication, I also considered whether I should apply the criminal standard (‘beyond reasonable doubt’ or ‘sure’) or the civil standard (‘balance of probabilities’ or ‘preponderance of the evidence’). I held that the civil standard was more appropriate for even serious professional misconduct proceedings, and is the standard I use for all Adjudications under the Code.

Substantial Part or Essence

29. Another way in which the new Article 7(2) differs from my decision in the Labate Adjudication is that I had held that even a single, short sentence-fragment deliberately copied could (in theory) constitute plagiarism: if the necessary intent was there (whether found or admitted), the scale of the copying did not seem to me to be a factor at all. Value may be a factor in sentence, but we don’t include value as an element of the crime of ‘theft’: peppercorns and diamonds can be stolen alike. Part (c) of the second sentence of Article 7(2) requires, however, that a ‘substantial part’ or the ‘essence’ of another’s work be plagiarised. Scale of copying is therefore an element of the *actus reus*.

30. I had thought that part of the new test - as to whether the amount copied was 'substantial' – should relate to the subsequent article in the FT. However, as the NUJ representative for Mr Murray Brown identified at the Appeal Hearing, the test in Article 7(2) is actually whether the amount alleged to have been copied was the 'essence or a substantial part' of the *donor* article (by *another* person).
31. I accept this submission as being correct as to the proper construction of Article 7(2). Accordingly, in looking at the passages said to have been plagiarised in this case (the *actus reus*), I am not looking at the amount of the *FT article* said to have been copied, but rather whether they constitute a substantial part of the *NYT article*. That said, in cases where the *mens rea* is in issue (i.e. was this deliberate or not), the proportion of the FT article said to be not-original may be evidence as to mental state.
32. I have mentioned in previous Adjudications the desirability for the Editorial Code to be consistent (albeit not in lockstep) with the general law. Thus I have previously borrowed from the law of defamation to determine 'meaning' in an inaccuracy complaint under Clause 15, and from the law of privacy in assessing a privacy complaint under Clause 3⁶.
33. I therefore consider that I should give the word 'substantial' the same meaning it would usually have in English law (i.e. "more than trivial", "more than minimal" or "not insubstantial") as opposed to its alternative meaning: "a major or significant part of". This accords, in particular, with the authorities on English copyright law (see in particular the construction of 'substantial part' in s.16(1) of the Copyright, Designs & Patents Act 1988 by the House of Lords in *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2000] 1 WLR 2416).

⁵ Wessendorff Adjudication, 31 October 2017 at [8], [14]-[15]
https://ft1105aboutft-live-14d4b9c72ce6450cb685-1b1cc38.aldryn-media.io/filer_public/c9/71/c971ea46-1c8d-47f4-940c-8132b412c7fe/wessendorff_adjudication.pdf

⁶ PA Adjudication, 7 April 2015 at [8]-[13]
https://ft1105aboutft-live-14d4b9c72ce6450cb685-1b1cc38.aldryn-media.io/filer_public/de/e2/dee28afo-d416-48d9-a9fa-624f8b2e5215/2015-02-17_pa-final-adjudication.pdf

34. I arrive at this conclusion not only because of the obvious relationship between plagiarism and copyright infringement (although, for the reasons I explain in the Labate Adjudication at [54]-[58] as set out below, the two issues are clearly distinct), but also because the fifth sentence of Article 7(2) requires me to apply principles of ‘common sense’. If a 750-word FT article had knowingly copied 300 words from the Encyclopaedia Britannica (approximately 44 million words), there could be no question that Article 7(2) had been breached: 300 words is not “a major or significant part of” a 44-million-word book, but it is “more than insubstantial, or trivial” (such as a sentence fragment might be).
35. ‘Essence’ is somewhat harder to define. Perhaps like Justice Potter Stewart’s test for obscenity, the only real test for a copied work’s ‘essence’ is that “*I know it when I see it*”. It arises instead-of or as-well-as direct copying of passages of unaltered text amounting to a substantial part of the copied work. It therefore has to refer to non-textual copying, such as structure, fact-pattern (allowing for the direction in the fourth sentence of Article 7(2) about public domain facts), original reporting or analysis, originality of concept, or matters which (by virtue of other journalistic rules) must be copied without changes, such as quotes in direct speech by third-parties (including interviewees).

Passing-Off

36. How then to construe to “*pass-off others’ work as their own*” in section (b) of the second sentence of Article 7(2)? It must be remembered that this is the *actus reus* element, so it does not in itself have a mental element. The word ‘knowingly’ has been added before ‘pass-off’, which confirms that ‘passing-off’ is something that can be done ‘knowingly’ or ‘unknowingly’. Indeed, in intellectual property cases, the common law tort (now largely superseded by the law of Trade Marks) is known as ‘passing-off’ and relates to a misrepresentation with an objective tendency to cause confusion in the minds of customers or other end users *irrespective of intent*: see Lord Oliver in *Reckitt & Colman Products Ltd v Borden Inc (No 3)* [1990] 1 WLR 491, 499.

37. I therefore consider that – subject to the later *mens rea* test – the *actus reus* of passing-off will be made out if the impression is created (or would likely be created) in the minds of the FT reader that what they are reading is original FT content when in fact it is not. This will be made out if a not-insubstantial part of another person’s content is included in the FT without ‘sufficient acknowledgment’. ‘Sufficient’ here is a variable standard, but does not arise in this case as there was no attribution to the NYT at all.

Knowingly

38. The most difficult question in the proper construction of Article 7(2) is the *mens rea*: the double use of the word ‘knowingly’. It is not in dispute that ‘knowingly’ confirms the need for a mental element or *mens rea*. ‘Plagiarism’ under the new express prohibition in Article 7(2) is not and cannot be a breach committed with no mental element, or committed by mere negligence. If a journalist did not know there was third-party content mixed into their text, even if negligently so, there is not a breach of Article 7(2).

39. However, it would be entirely wrong to assume to find a breach of Article 7(2), a person must be shown to have known that what they were doing was ‘plagiarism’ and/or have ‘intended to plagiarise’. Some genuine plagiarists will fall into this category, but it would be easy for them to say “I didn’t believe that what I was doing was wrong”, such that findings could not be made against them without proving that they had no such honest belief. There must be a mental element, but it cannot be used to make it impossible to police the Editorial Code, or to allow those who do not share the common standards of the newsroom in respect of plagiarism to have some unearned degree of immunity.

40. Again, I have the benefit of drawing principles from the general law. In the recent UK Supreme Court decision in *Ivey v Genting Casinos* [2017] UKSC 67, a former World Series of Poker champion, Phil Ivey, claimed £7.7 million from a casino that declined to pay him his Punto Banco winnings because they said that he had ‘cheated’. Mr Ivey and a colleague used a technique called ‘edge sorting’, whereby a croupier was persuaded to turn the deck which gave the players information as to the likely card. Mr Ivey did not consider ‘edge-sorting’ to be ‘cheating’, and there was no challenge to the honesty of that belief.

41. The Supreme Court (Lord Hughes giving the judgment of the Court) upheld the decisions of the High Court and Court of Appeal. They also considered the relationship between ‘cheating’ and ‘dishonesty’. In doing so, they considered the second limb of the two-stage criminal law ‘dishonesty’ test in *R v Ghosh* [1982] QB 1053. The test in *R v Ghosh* had been to ask the jury:
- a. First, whether the conduct complained of was objectively dishonest by the standards of ordinary, reasonable and honest people?; and
 - b. Second, whether the defendant must have realised that ordinary and honest people would have so regard his behaviour?
42. The unanimous decision of the Supreme Court was to abolish the second limb of the *R v Ghosh* test. It did not matter whether or not the person accused of an offence realised that their acts objectively amounted to an offence, or agreed that the offence was made out by those acts. The mental state necessary was that they consciously and deliberately committed those acts, which were objectively dishonest. The primary reason for the decision was that it would be perverse if those who did not share or recognise society’s common standards of honesty would enjoy effective immunity from dishonesty offences.
43. Applied to ‘plagiarism’, which like the term ‘cheating’ is perhaps similarly connected to (and yet distinct from) ‘dishonesty’, there is no need for a journalist to know that their copying and passing-off of another’s work without sufficient attribution is a breach of Article 7(2), or to believe that it constitutes ‘plagiarism’ as they do it. The test in Article 7(2) is ‘knowingly’, not ‘knowingly and dishonestly’. On a plain text reading of Article 7(2), it is only the ‘passing-off’ / ‘inclusion’ of another’s material which must be ‘known’.
44. In my judgment, all that is required to satisfy the *mens rea* is that the person accused **knowingly** ‘passed-off another’s work as their own’ (i.e. created the effect in the mind of the FT reader that the work was original) or in other words **‘knowingly included** [the essence or a substantial part of another’s work] in material to be published by the FT’ without ‘sufficient acknowledgment’.

45. So if the *actus reus* is made out, but the journalist genuinely thought that the attribution was included (but in fact it was cut, whether by the journalist or by sub-editors, by mistake) such that he believed no readers would think the work original, the *mens rea* will not be made out. Similarly, if the journalist genuinely does not know or realise that some of the material included is another's work (e.g. because of a mix-up of typed notes), the *mens rea* will not be made out.

46. But if a journalist:

- a. knows or intends to use a substantial part of another's work; and
- b. knows or intends that it should be included in material to be published by the FT; and
- c. knows or intends that there is no (sufficient) attribution, and that the impression thereby created in the mind of readers will be that the content is original;

then the *mens rea* is made out. Whether the journalist also knows or intends or believes that Article 7(2) is breached, or knows or believes that what has been done is plagiarism, is simply not part of the relevant *mens rea* test.

47. This distinction proved critical in the Labate Adjudication. Through a forensic analysis of the 14 pre-publication drafts of the story, including their meta-data, it was established beyond reasonable doubt that the paragraphs in question had been derived from the complainant's academic article, which there was evidence had been read by the journalist prior to writing. However, those 14 drafts were written and re-written over the course of many months, starting some considerable time after the academic article had been read by the journalist. The paragraphs had been substantially changed (by changes to the words, and by splitting them and moving them around the draft article, then re-worded, then the facts corrected) between first copying and final submission of the article. The paragraphs were primarily "boilerplate factual narrative" and so – when combined with other factors – it was established on the evidence that *at the time of submitting the article for publication* (and indeed until the second interview with me, bringing the evidence of derivation to his attention) the journalist had genuinely not realised that those paragraphs had begun life many months earlier as the work of another.

ANALYSIS

48. It is, of course, necessary to compare the NYT obituary to the Filed Version. I have considered, but not relied upon, both the matters raised in Mr Tierno's complaint and those by the FT Deputy News Editor, Tony Tassell, in his analysis. Mr Murray Brown also provided an MS Excel spreadsheet of identical wording. Beyond commonalities of structure and fact pattern, which are perhaps to be expected in an obituary (being – ordinarily– a broadly chronological highlights reel of a notable life) it is clear there are similarities between the specific language used in the Filed Version and the NYT obituary.
49. I have tried to highlight the common language (set out in *italics*) which the respective paragraphs share exactly. By contrast, the language in [square brackets] are edits or omissions, and where the bracketed text is split by a “/”, the two versions have differed in the choice of word. For a proper comparison, the numbered paragraphs in the Filed Version should be read alongside the corresponding lettered paragraphs of the NYT version (both set out below).

Filed Version	NYT obituary	Common Language
[1] & [2]	[A]	“[crazy / wild] <i>eyed</i> ”; “ <i>failed [rock] musician</i> ”; “ <i>drifters</i> ”; “ <i>brutal killings</i> ”
[9]	[B]	“ <i>1950s</i> ”; “ <i>Southern California</i> ”; “ <i>pimp</i> ”; “ <i>parking lot attendant</i> ”; “ <i>check forger[y]</i> ”
[10]	[C]	“ <i>married twice</i> ”; “ <i>Rosalie Jean Willis</i> ”; “ <i>a teenage waitress</i> ”; “ <i>and a few years later to a young prostitute [named/called] Leona. Both marriages ended in divorce</i> ”
[7]	[D]	“[spawned/inspired] <i>pop songs, an opera, films ... half the stage name of the rock musician Marilyn Manson</i> ”
[12]	[E]	“ <i>espousing a [philosophy that was an idiosyncratic] mix of Scientology [hippie anti-authoritarianism, Beatles / pop] lyrics, [the Book of Revelation] and the writings of Hitler</i> ”

[15] & [16]	[F]	“[Manson seems to have decided to help Helter Skelter along] ... <i>night</i> [on Aug. 8/ in August] 1969, [Manson decided to take action himself] [he dispatched / sending] <i>four</i> [of his followers / family members] – <i>Susan Atkins, Patricia Krenwinkel, Charles Watson and Linda Kasabian – to the Tate home in the Hollywood hills.</i> ”
[17] & [18]	[G]	“ <i>frenzied</i> [outbreak / combination] of <i>shooting, stabbing, beating and hanging, they murdered Ms Tate and four others in the house and on the grounds: Jay Sebring, a Hollywood hairdresser; Abigail Folger, an heiress to the Folger coffee fortune; Voytek [(also spelled Wojciech)] Frykowski, Ms. Folger’s boyfriend; and Steven Parent, an 18-year-old visitor. [Ms. Tate’s husband] Mr. Polanski, was in London at the time.</i> ”
[4] & [5]	[H] & [J]	“ <i>The phrases “Death to Pigs” and “Helter Skelter,” misspelled, were scrawled in blood at the scene.</i> ”; “ <i>grocer [named] Leno LaBianca and his wife Rosemary</i> ”; “ <i>look like the work of black militants</i> ”;
[18] & [19]	[K] & [L]	“ <i>Mr. Manson [at one point] lung[ing/ed] at the judge with a pencil. [On another / He also] punched his lawyer in open court.</i> ” “ <i>[Always] denied [he/having] ordered the Tate-LaBianca murders</i> ”
[19] & [20]	[L]	[Use of quotes from 1986 Charlie Rose i/v]

EVIDENCE

50. In general terms, the degree of reliance on other outlet’s reporting is admitted:

“Let me say straight up – this was not a piece of original reporting. I conducted no interviews for this story. I made no phone calls. It was 7 am in London and the middle of the night in the US. I relied on three existing obits – the NYT, the Guardian and the BBC.”

51. Some direct copying and pasting into a MS Word document is also admitted:

“The one paragraph [Paragraph [G] / [17]] where there was a big duplication I explained must have resulted from my copying and pasting the section – to make sure I got the spellings of the victims’ names right, but then overlooking to rewrite the surrounding text. I acknowledged this error as soon as I realised what had happened.”

52. Mr Murray Brown’s initial email to James Lamont’s investigation (22 November 2017 at 18:46) describes his method of writing obituaries from scratch under pressure (allowing that this piece was written first thing, under time pressure, on a subject about which he had no significant prior knowledge):

“I find sources (in this case I read NYT, Guardian and BBC sites). Having tried to work out what are key facts in common in each and which therefore we would also need. I would sometimes cut the key sections that I need to be absolutely right – facts about the murders, names and dates. I’m not exactly sure which bits I did cut but it seems clear I must have cut the paras detailing the Sharon Tate murder night from NYT. I probably also cut the second LaBianca murders too (this is to save time as much as anything else as type-transcribing names from one site to my word doc takes time).

I would then start writing perhaps in a fresh word doc, or more likely on same word doc, eliminating the bits I don’t need, building up the copy that way, with the relevant factoids already selected from the existing obits in front of me. Of course when I paste bits, I don’t put a note to myself saying this is from the NYT etc. Which also makes it difficult for me to which is [m]y copy and which is copied! Anyway it’s a bit of a dog’s dinner.”

53. In comments on the transcript of the James Lamont investigation meeting on 27 November 2017, Mr Murray Brown disputes the characterisation of the NYT obituary as the ‘base story’, saying:

“I did not use the NYT as a base story. That is not the way I described the process by which I worked. I have been very clear that I read 3 obituaries, took what were the salient dates and facts about Manson’s life. I put these into a notes word document. If there is any base document, it is this notes document and definitely not the NYT”.

54. At the Appeal Hearing I attended on 27 January 2018, Mr Murray Brown is recorded as having said:

“I’ve conceded I did some cutting and pasting and obviously there is drawing heavily on the New York Times ...

If the code said any copying unconscious or conscious is a piece of plagiarism then clearly I am guilty because I have copied one section, the other bits are just a crap rewrite. Greg, in answer to your question about rewrite, it is much easier to do from one document to another. I was trying to do a more difficult task. Trying to gain from 3 sources simultaneously.”

55. I have reviewed all of the documentation in relation to this episode – I have cited above the parts I found most pertinent. However, unlike the task of James Lund, my decision on the editorial complaint is a *de novo* review. I have to come to my decision based on the documentation, on the evidence I heard, on the analysis of the articles that I have conducted, and by applying the Code.

DISCUSSION

56. In applying the Analysis to the Framework – including the proper Construction of Article 7(2)), and having regard to the factors in the third, fourth and fifth sentences of Article 7(2) – the questions which I must answer are:

- (1) whether a ‘substantial part’ or the ‘essence’ of the NYT obituary has been included in material to be published by the FT?;
- (2) whether that inclusion constitutes ‘passing-off’ of the work of another?;
- (3) whether the *mens rea* element of ‘knowingly’ is made out?

‘Substantial Part’ or ‘Essence’ of Another’s Work

57. I do not accept the submission, based on Mr Murray Brown’s MS Excel analysis of the non-standard words-in-common, that only those words in the Filed Version *actually shared* with the NYT piece are relevant. If a 300-word portion of text from a 10,000-word article is used, and has 250 words changed, the subsequent article has ‘made use of’ 300 words of another’s work, not 50 words.

58. There are eleven paragraphs ([A] to [L] above), coming to around 600 words, of the NYT obituary that have, in my judgment, been heavily relied upon for the Filed Version of the FT obituary, albeit that they have been partially re-written. In my view, this clearly and unambiguously constitutes ‘a substantial part’, and would have done so even if I had preferred the definition of “a major or significant part” to the proper construction (as I have held it to be) of “a not-insubstantial part” or “more than a trivial or minimal amount”.

59. On an objective analysis of the Filed Version, it appears to me quite clear that the NYT obituary was used as a baseline – with 60% being cut, including much of its more original analysis – but that whether by way of copy-and-paste or some form of side-by-side read-and-type, the Filed Version was effectively a re-write of the NYT obituary, with a few details added from *The Guardian* (LSD, Cocoran, Manson’s rejection by Melcher) and the BBC.
60. Even beyond the ‘substantial part’, I consider the ‘essence’ of the NYT obituary to have been included in the FT’s obituary. I refer not only to the narrative structure (which, although *pro forma* chronological, still includes the creative choice and curation of particular facts to the exclusion of others), and the various turns of phrase I have held to be non-coincidentally similar, but in particular to the use of the Charlie Rose quote as a concluding kicker. While a quote to finish is a common practice, the deployment of this quote as the *coup de grace* of the entire article is recognisably a creative decision by Ms Fox. Its inclusion *in the same place* in the Filed Version, is undeniably borrowed
61. There is, I’m afraid, nothing in the submission that attribution has been given by the FT to Charlie Rose as the journalistic originator of the exchange with Manson. The ‘work of another’ at issue here is the creative decision of Ms Fox to conclude her NYT obituary with a sign-off quote of real pathos. She does not enjoy moral rights in the originality of the exchange, but she does in its deployment – this is of the ‘essence’ of the obituary published in the NYT. Indeed, I suspect this final element – more likely than similar turns of phrase – is what first caused Mr Tierno to recognise the similarities between the pieces.

‘Passing-off’

62. There is no dispute that the NYT obituary was ‘another’s work’, namely that of Ms Fox, and that her work was included in ‘material to be published by the FT’, namely the Filed Version. There was no acknowledgment of this whatsoever, or indeed any contribution of the BBC or *The Guardian* obituaries, so no difficult questions arise as to whether any attribution was ‘sufficient’.

63. Does this constitute ‘passing off’ under Article 7(2) of the FT Editorial Code? In my opinion, it clearly does. The published version of the FT obituary is under the FT masthead, and is by-lined “John Murray Brown”. The clear implication is that this is original journalism by an FT journalist, and by absence of attribution of the NYT, BBC or *The Guardian*, the ordinary and reasonable reader of the FT is objectively led to believe that this is wholly original work. Indeed, Mr Murray Brown’s contention is that the article **is** original work.

‘*Knowingly*’

64. In his Letter seeking an Appeal, Mr Murray Brown said:

“I believe that the disciplinary hearing's finding that there was unintentional copying of some sentences does not amount to plagiarism as defined in clause 7.2 as there is an acceptance in that finding that none of this was deliberate and thus lacks the element of ‘knowingly’.”

65. Mr Murray Brown and his NUJ representative submitted that he did not consider what he had done plagiarism, and that he had been perfectly candid with his editors about the derivation of facts from the obituaries in the NYT, BBC and *The Guardian*. He had copied and pasted facts (in the public domain) from other sources into a baseline document. He had not been ‘dishonest’ in any classic sense of the word, even if he had erred by omission to make sufficient changes so as to render his article original, and to justify the failure to give those media outlets (particularly the NYT) sufficient acknowledgment. Accordingly, it was submitted, while there may have been mistakes made, there was not the deliberate intent to plagiarise, and so it could not be said that the passing-off of another’s work as his own was done ‘knowingly’.

66. This case – to be decided on the new standard instituted by Article 7(2) – nonetheless hinges on the important distinction between synthesising multiple sources (by taking notes and writing entirely original copy from scratch) and re-writing copy lifted wholesale from elsewhere (which invariably involves the copy-and-paste function) and re-writing or over-writing it. The former is permitted and sometimes necessary (especially on a Live Desk, covering news broken by other outlets): the latter is plagiarism, whether recognised or not.

67. I discussed in the Labate Adjudication the perils of ‘re-writing’:

“54 Unfortunately, there is also a problem of originality more generally in journalism. While huge swathes of subjects are not covered, even trivial items of news (or content which doesn’t deserve the appellation) are covered by every mainstream media outlet. Much of this journalism is derivative and unoriginal. Many journalists and bloggers complain that certain outlets copy whole chunks of stories, and that the courtesy of ‘re-writing’ copy is a product, not of ethics, but of copyright law.

55 Is journalistic plagiarism even distinct from copyright infringement? As newsrooms have shrunk to historically small numbers of editorial employees, re-writing copy (that is to say, reading a piece and writing a differently-worded version) has become so commonplace as not to be seen by all as a clear ethical infraction. Failing to re-write would be seen as such, but the capacity to regurgitate facts in slightly different terms is (it has been suggested to me) more often lauded as a virtue by cash-strapped editors than condemned as a vice. Stealing a scoop might be unethical, it is said, but wilfully re-writing a synopsis of facts is not itself plagiarism: it’s efficient journalism.

56 I cannot agree. Plagiarism by outright copying is acknowledged by all, and where the expression is near-identical, this will also carry copyright implications. But although I accept that the citation burden is far lower in journalism than academia, I do not consider it is ethical for a journalist to directly copy text from another’s work, and re-write it so that it appears original. Writing boilerplate factual narrative will necessarily lead to similarities between the work of different journalists doing the same job independently of each other, and there is no legal or moral restriction on using the same facts. However, the value of a trained journalist is weaving facts into narrative: to take another’s work, and replicate it with modifications to imply original writing, is (to my mind at least) a form of dishonesty.”

68. I accept the submission that there are certain similarities of language that are, if not inevitable, then certainly unavoidable in practice: “brutal killings” is scarcely any more original a turn of phrase than ‘innocent bystanders’. Almost every obituary of Manson will have commented on his eyes (“crazy eyed” in the Filed Version; “wild-eyed” in the NYT), and most will have called his followers “drifters”, which is almost a term-of-art for the sorts of rootless youngsters of that era. Plagiarism is not committed by fishing in the same pool of vocabulary.

69. If the only paragraph to have been copied from the NYT was paragraph [G] (which became paragraph [17]) and the remaining similarities could be explained away as coincidence or necessarily arising from the format of obituaries, then perhaps the Filed Version might have qualified as synthesis. But the extent of the similarities – riddled through all stages of the Filed Version like marbling through meat – suggest much broader copying and rewriting that is not consistent with permitted synthesis: “*scrawled in blood*”, “*in open court*”, “*espousing*”, “*half the stage name of the rock musician Marilyn Manson*”, and “*to the Tate home in the Hollywood hills*”.
70. Perhaps none of these examples would amount to as much individually, but there are so many different (if minor) examples as to suggest a high degree of reliance. Around 14 of the 20 paragraphs in the Filed Version share some degree of common language with the corresponding NYT paragraphs, as set out above, as well as reflecting the facts, essence and narrative structure of the NYT piece.
71. Indeed, even of the six paragraphs in the Filed Version where there is no material common text-string (namely [3], [6], [8], [11], [13]-[14]), all concern facts within the compass of the NYT obituary – albeit with a few additional details (“*Bel-Air*”, “*Cocoran*”, “*LSD*”, “*White Album*”, Manson actually turned down by Melcher) – and included in a similar place in the narrative as they occupy in the NYT obituary. The extra details are garnish, not substance.
72. I have reviewed the obituaries in *The Guardian*⁷ and on the BBC website⁸. They too share some similarities with the NYT obituary, but are materially different in structure, and certainly don’t appear to share the same volume of commonalities of language or turn of phrase. Once it is recognised that two-thirds has been cut, it is the structural similarity to the NYT obituary that is so striking. Paragraphs [D], [H] and [J] from the NYT have been moved higher-up in the Filed Version, but its narrative is strongly redolent of the NYT article.

⁷ “*Charles Manson obituary*”, by Christopher Reed, *The Guardian*, 20 Nov. 2017: <https://www.theguardian.com/us-news/2017/nov/20/charles-manson-obituary>

⁸ “*Charles Manson dies aged 83 after four decades in prison*” BBC, 20 Nov. 2017: <http://www.bbc.co.uk/news/world-us-canada-42016704>

73. I have reached a clear view that the copying and pasting from the NYT went significantly beyond Paragraph [G], and went beyond facts into structure, essence, and turns of phrase. Mr Murray Brown cannot remember exactly, as is clear from his 22 November 2017 email to James Lamont. But his admissions do stretch to knowing that he was copying and pasting from the NYT, so as to re-write the text around the facts (and other matters, like the Charlie Rose quote) which that newspaper had reported, assembled, and arranged.
74. The discussion in the ‘Construction’ section above should make clear why I am satisfied that the *mens rea* of ‘knowingly’ is made out in this case. It is not, and I emphasize this, that I have found that Mr Murray Brown knew he was committing an act of plagiarism: that is not the test. The proper test is whether he knowingly committed the acts constituting the *actus reus*. I find that he did.
75. Unlike JP Rathbone, the FT journalist in the Labate Adjudication, there is no case here of failing to recognise, or even once knowing but then forgetting, that passages have been derived from the work of another. I was more than satisfied in the Labate Adjudication that at the point of submission of the 14th draft of his long-form article to his editor, JP Rathbone did not remember relying on the two paragraphs of academic prose (‘boilerplate’) at all. Even had he remembered including them, he would have struggled to recognise them, so substantially had they changed in the intervening months and drafts.
76. Here, the NYT obituary was read and passages copied-and-pasted to a MS Word document less than 90 minutes before submission of the Filed Version to the Live Desk. I find the reliance on the NYT obituary for facts, phrases and structure was knowable and actually known then, and at all times since.
77. The fact that Mr Murray Brown does not consider what he did to be plagiarism, or does not (because of the different meanings of ‘substantial’) recognise the significance of the borrowing that is apparent to me, is not a necessary element of the *mens rea*. It is – by analogy, I stress – akin to the second limb of the test in *R v Ghosh* jury direction which was disapproved by the UK Supreme Court in *Ivey v Genting Casinos*. An FT journalist who knows that they are breaching

Article 7(2) will obviously be guilty of plagiarism: but that specific knowledge, while sufficient, is not necessary. It is enough to show that the person knowingly did the acts which are objectively recognised as wrong: it is not necessary to further prove that they subjectively recognised their acts as being wrong.

78. I should not want it to be thought I do not have any sympathy with the circumstances in which Mr Murray Brown found himself on the morning of 20 November 2017, or indeed now. But the admissions as to specific conduct he has made are, in my view, enough to satisfy the test. Where there were only three sources, and the reliance on one of them was and is so obvious, and there was no original reporting, and the writing was over-writing in an MS Word document that had passages copied-and-pasted from that source, the requisite knowledge for Article 7(2) was – in my judgment – undeniably present.

CONCLUSION

79. It follows that I find that the *Financial Times* has breached Article 7(2) of the FT Editorial Code of Practice.

80. As to remedies for the breach, the published FT article is no longer available online, and so no update or correction can be applied to it. This Adjudication, like all my Adjudications, will be published on FT.com.

81. I can and do direct that a shortened URL be found for the link to this Adjudication, and that the following statement be published on the Letters Page of each of the print editions of the *Financial Times* for one day only:

“On 20 November 2017, an obituary of Charles Manson was published on FT.com. That obituary included material from the New York Times which was not credited. The FT Editorial Complaints Commissioner has found that this constituted a breach of Article 7(2) of the FT Editorial Code of Practice, which prohibits plagiarism. The full Adjudication by the Commissioner can be read online at [link].”

82. Finally, I should record my thanks to Mr Tierno. Without readers spotting similarities between publications, the vast majority of plagiarism – technical or egregious – would go unacknowledged. I have no doubt that any reader who raises suspected plagiarism with the FT, or other titles in the FT Group, will be taken seriously by editorial. If it is ever felt complaints are not taken seriously, I can be reached at complaints.commissioner@ft.com. However, I sincerely hope this sorry episode will be the last time that I have to consider Article 7(2) for the remainder of my tenure in this role.

GREG CALLUS
Editorial Complaints Commissioner
Financial Times
15 February 2018