



**IN THE COPYRIGHT TRIBUNAL**

**CT114/09**

**IN THE MATTER OF A REFERENCE TO THE COPYRIGHT TRIBUNAL UNDER  
SECTION 119 OF THE COPYRIGHT DESIGNS AND PATENTS ACT 1988**

**Before His Honour Judge Birss QC, Dr Lucy Connors and Mr Philip Eve**

**Tuesday 14<sup>th</sup> February 2012**

**B E T W E E N:**

**MELTWATER HOLDING BV**

**Applicant**

**and**

**THE NEWSPAPER LICENSING AGENCY LIMITED**

**Respondent**

**and**

**(1) PUBLIC RELATIONS CONSULTANTS ASSOCIATION LIMITED**

**(2) UK MEDIA MONITORING ASSOCIATION LIMITED**

**Interveners**

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## **INTERIM DECISION**

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**Henry Carr QC and Ben Allgrove (instructed by Baker & McKenzie LLP) for the  
Applicant and the First Intervener**

**Robert Howe QC and Edmund Cullen (instructed by Berwin Leighton Paisner LLP) for the  
Respondent**

**Tom Weisselberg (instructed by Bird & Bird LLP) for the Second Intervener**

Hearing dates: 12th to 15th, 19th September 2011

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<i>Contents</i>		Para
1. Introduction		1
1.1 How this reference arose		10
2. The Arguments in Outline		18
3. The Legal Framework		22
3.1 The task of the tribunal		28
4. The Witnesses		34
5. The Relevant Market:		37
5.1 The business of newspaper publishing, media monitoring and the impact of the internet		37
5.2 The nature of the basic services		62
5.3 Other services		68
5.4 Identity of customers		69
5.5. Charging, finances and scale		70
5.5.1 Actual numbers		72
5.6 The relevant market - conclusions		91
6. The various grounds		99
7. Royalty Structure		102
8. Fee levels for monitoring reports / alerts		105
8.1 Comparables		108
8.1.1 The existing PCA licences / WDL/WEUL		110
8.1.2 Google		126
8.1.3 Other comparables		135
8.2 What should the basic tariff rates be under the WDL/WEUL?		148
8.2.1 Impact of WDL/WEUL fees on Meltwater		151
8.2.2 Decision on tariff for monitoring reports / alerts		161
8.3 Rates over time		184
9. Ad hoc searching		190
9.1 Comparables		194
9.2 What should the rate for ad hoc searching be?		199
10. Client copying fee/ surcharge		205
11. Headline only service		212
12. Other, non financial issues		224
12.1 Requirement to delete the index and limit search access		226
12.2 Suspension rights		231

12.3 Audit rights		236
12.4 Additional publisher requirements (robot.txt)		238
12.5 The scope of territorial restrictions		245
13. Conclusions		260
Annexes		
1. Contracts between Meltwater and some other web publishers. <b>CONFIDENTIAL</b> (This annex is confidential to the parties to the proceedings and is not attached to the Decision as published.)		
2. Fixed rate tariffs		

## **The Tribunal:**

### *1. Introduction*

1. The Applicant, Meltwater Holding BV, is a Dutch company and is the parent of a multinational group of companies. The group includes an English subsidiary Meltwater News UK Limited and it has a substantial business presence in the UK. At least at one stage in these proceedings 5 of its 26 offices and 100 of its 750 employees were in the UK. This reference to the Copyright Tribunal was commenced by the holding company because it is that company which intends to take a licence from the Respondent. The holding company will then sub-license its subsidiaries. We will refer to the group as a whole as “Meltwater” unless it is necessary to distinguish between the individual companies.
2. Meltwater’s business is based on the internet. Meltwater operates computers which scan particular sites on the internet which publish news. These range from sites like the BBC’s news sites to small blog sites. Amongst the news sites scanned are the websites of British newspapers. Meltwater’s computers create an index of every word in every news article they find. This index therefore allows Meltwater to identify a news article by the words it contains. Customers of Meltwater pay for a monitoring service which Meltwater provides using the index. So a business may want to know what if anything is being said about it in the news on the internet. The business can subscribe to Meltwater’s service and choose its name as the word (or “agent” in Meltwater’s parlance) which will be used to identify news articles using the index. Meltwater will send a daily “Monitoring Report” by email to the business which will identify all the news articles in the last 24 hours which included that name. The news articles are identified by means of the headline of the article and an extract from the text of the article which consists of the first few words of the article together with a part of a “hit sentence” (i.e. the sentence containing the agent word). A link to the article on the web is also provided so that if they wish to the receiver can click on the link and view the original article on the news website itself. Subscribers can also perform ad hoc searches of Meltwater’s database. These searches produce results in the same format. There are also other services available such as statistical analyses and a newsletter service.
3. It will be seen right away that the basic Meltwater system bears a number of similarities to general internet search engines such as the very well known Google system. General search engines create indexes of the words found on websites available on the internet. When a user undertakes a search, what the user receives is a series of extracts of a very similar general form to the information provided by Meltwater. The user receives a kind of headline from the web page identified, an extract from the web page and a link which can be selected to take the user to the web page in question if they wish to go there. Indeed the similarity to Google does not end there because although the general Google search is not limited to news websites, in fact Google operates a free to the user search facility specifically aimed at returning news only, called Google News. Some simple statistics are also available through the Google News site. More significantly Google operates a news reporting system as well called Google Alerts in which the user provides Google with a word they are interested in and their email address. Google will send a daily report to the user’s email address. The report will include a headline, text extracts and a link to click on

just as the Meltwater system does. However unlike Meltwater, the Google Alerts facility is free to the end user.

4. Although the description above refers to Google in particular, there are other free to user internet search systems available. However the evidence and argument in this reference always simply referred to Google and we shall do the same. It is manifest (for what it is worth) that Google is the dominant system of this kind.
5. The Respondent is The Newspaper Licensing Agency Limited (“the NLA”). It was formed in 1995 by the eight national newspaper publishers who are its joint owners. It now represents over 1,300 newspapers comprising not only the national newspapers but also most regional newspapers. It also has reciprocal agreements with equivalent licensing bodies overseas. Traditionally, newspaper publishers’ revenue has been principally derived from sales of, and advertising in, the printed editions of the newspapers. The NLA was formed for the purpose of facilitating secondary exploitation of its members’ content, in particular by licensing the copying of such content by organizations which used to be known as press clippings agencies or “PCAs” and their customers. Today PCAs are often referred to as Media Monitoring Organisations (“MMOs”) although one needs to take care with the terminology.
6. The licensing regime applicable to PCAs has been in existence in the UK for some years. The regime is based around a licence called the NLA PCA Licence. It has aspects dealing with paper copies of articles being provided to clients (sometimes called the Paper Licence) and the provision of access to pdf copies (PCA Electronic Licence and Database Licence). There is also a side letter to the PCA Licence which deals with media monitoring in which the articles are delivered in the same way but the newspapers are read online by the PCA. This existing regime as a whole generates about £20 million per year to UK newspapers.
7. This case arises from a new pair of licences promoted by the NLA called the Web Database Licence (“WDL”) and Web End Users Licence (“WEUL”). The WDL / WEUL relate to a particular type of media monitoring activity. It is the activity carried on by Meltwater. They came into effect on 1<sup>st</sup> January 2010.
8. The First Intervener is Public Relations Consultants Association Ltd (“PRCA”). The PRCA is a professional trade association which represents UK public relations service providers and in-house communication teams. The PRCA represents the interests of its members before Government and other organizations like the Financial Services Authority and the NLA and lobbies on their behalf. The PRCA’s Communications Director Richard Ellis gave evidence. At the date of his first witness statement (27<sup>th</sup> September 2010) the PRCA had 260 members of which 50 were private or public sector in-house communication teams and the remainder were external PR agencies. In these proceedings Meltwater and the PRCA presented an essentially united front.
9. The Second Intervener is UK Media Monitoring Association Ltd (“UKMMA”). The UKMMA is an industry body that represents media monitoring agencies. The UKMMA’s Chairman, Stephen White, gave evidence on its behalf. At the date of his first witness statement (3<sup>rd</sup> December 2010) the UKMMA represented six media monitoring companies: Durrants Ltd, Kantar Media Intelligence Ltd, NIMMS Ltd, Press Data Ltd, Precise Media Monitoring Ltd and Press Index Ltd. Later NIMMS Ltd resigned from the UKMMA. In these proceedings the position presented by the

UKMMA was one which on various points aligned with either the NLA or with Meltwater/PRCA or with neither.

*1.1 How this reference arose*

10. The NLA contended that the nature of Meltwater's business meant that it and its customers needed to take out WDL and WEUL agreements. Meltwater's position was that it was prepared to enter into the WDL and undertook to do so. However Meltwater did not agree that its customers needed to enter into the WEUL at all. Their position was that Meltwater's customers, by receiving the Meltwater service, did not commit any "restricted acts" and therefore did not need a licence. The expression "restricted act" in this context refers to an act which would be an infringement of copyright if it was committed without the appropriate permission of the copyright owner (or other relevant person). In a nutshell Meltwater's point was that the material sent to customers was too insubstantial to be a copyright work or to be a substantial part of the original news article. Copying the material would not infringe (if there was no licence) and so copying the material was not a restricted act.
11. Meltwater's main concern was financial. As promulgated by the NLA, the WDL itself requires only a relatively modest one off annual payment from Meltwater of £10,000. However the WEUL would require end users to pay sums which, it contends, would be far too large and would make their business uneconomic. By 2014 the NLA fees in total would (says Meltwater) be about double Meltwater's current UK turnover. It is right to note at this stage that Meltwater has other points about the WDL/WEUL as well, some of which are by no means trivial, but inevitably the financial terms are of paramount importance.
12. Meltwater commenced this proceeding as a reference of the WDL and WEUL to the Tribunal under s119 of the Copyright Designs and Patents Act 1988. A technical point arising is whether these two licences constitute a single Scheme within the meaning of the 1988 Act or two Schemes. As far as we are aware the point does not matter since both are before the Tribunal anyway but, for what it is worth, it seems to us that these two licences are so interrelated that they constitute a single Scheme.
13. The NLA challenged the jurisdiction of the Tribunal to hear the reference at all. Essentially the point was that since Meltwater maintained that neither it nor its users needed a licence, the Tribunal's jurisdiction was not engaged. That application was rejected in the decision of the Tribunal dated 18th March 2010 with the same constitution as now (albeit the then Deputy Chairman is now the Chairman). At that stage it was clear that an issue which was likely to arise was the matter of whether end users needed a licence. In the past this Tribunal's predecessor the Performing Right Tribunal could refer such a question to the High Court but the 1988 Copyright, Designs and Patents Act did not confer that power on the Copyright Tribunal. However in the end the problem was solved because the NLA issued proceedings in the High Court for declarations that Meltwater and its customers, in the form of the PRCA, needed a licence.
14. The High Court stayed the first question (whether Meltwater needs a licence) since Meltwater had undertaken that they would enter the WDL anyway but addressed the second issue on an expedited basis. Proudman J decided that end users needed a licence in her judgment given on 26th November 2010 *The Newspaper Licensing*

*Agency v Meltwater* [2010] EWHC 3099 (Ch). Meltwater and the PRCA appealed to the Court of Appeal and parties agreed to adjourn the hearing of this reference pending the appeal. The Court of Appeal (The Chancellor Sir Andrew Morritt, Jackson and Elias LJJ) gave judgment dismissing the appeal on 27th July 2011 ([2011] EWCA Civ 890). This led to a late flurry of documents in the reference and some adjustments to the position adopted by Meltwater. Obviously Meltwater dropped the argument that their end users did not need a licence. The Court of Appeal had decided that they did.

15. A significant procedural development following the judgment of the Court of Appeal was that Meltwater raised a new proposal, that it would offer a so called “headline only” service. For any article identified as relevant it would send the user only the headline and a link to the underlying web page. They argued that although some headlines might attract copyright, most will not (or will not infringe copyright in the underlying article) and so users of a headline only service would only rarely be committing restricted acts on any view. They contended that a headline only service therefore was one for which it would not be necessary for users to enter the WEUL. Any licensing could be catered for by giving Meltwater the ability in the WDL to sub-license users of that service.
16. The hearing of the reference began on 12<sup>th</sup> September 2011. Henry Carr QC leading Ben Allgrove instructed by Baker & McKenzie LLP appeared for Meltwater and the PRCA. Robert Howe QC leading Edmund Cullen instructed by Berwin Leighton Paisner LLP appeared for the NLA. Tom Weisselberg instructed by Bird & Bird LLP appeared for the UKMMA.
17. The parties had agreed that the Tribunal should hear the reference and rule on it despite the fact that there was an outstanding application to appeal the Court of Appeal’s decision to the UK Supreme Court. We did so. At the end of the hearing on Monday 19<sup>th</sup> September we reserved our judgment. Some weeks after that the UK Supreme Court gave permission to appeal.

## *2. The Arguments in outline*

18. Meltwater’s case is that their business should be compared to Google News and Google Alerts. If one starts here then Meltwater contends that the WDL/WEUL are plainly unreasonable. The Google service is free to its end users. Meltwater points out that the terms on which Google operate vis a vis the owners of the relevant copyrights in this case are opaque. The NLA does not license Google. The premise on which this reference is being conducted is that the newspapers and thus the NLA have something to license. It must follow therefore that licences of some kind must exist between individual newspapers and Google; otherwise Google would be infringing. Google do not pay the NLA because they are not licensed by the NLA. There is no evidence that Google pay the newspapers anything for the licences which must exist. One can thus infer that whatever is paid (if anything) it must be small. So, reasons Meltwater, neither it nor its users ought to pay the NLA anything substantive.
19. The NLA’s case is entirely the other way around. The NLA contends that Google is irrelevant. It is not a competitor of Meltwater and not comparable. Meltwater are simply another form of Media Monitoring Organisation just like the PCAs. The

WDL/WEUL are based closely on the existing PCA licensing regime and their reasonableness can be judged by reference to that system. It is a system in which substantial fees are paid. When looked at that way, the WDL/WEUL as promulgated is reasonable and should be upheld by the Tribunal.

20. The PRCA's position on the main issue is the same as Meltwater's. There are some particular points of detail which reflect concerns of the PRCA rather than Meltwater's.
21. The UKMMA's position is that Meltwater's case should be rejected. As it sees it, Meltwater are seeking to use Google News as a means to undermine the current market for paid for media monitoring services. The UKMMA is concerned about the impact of Google News in the media monitoring market but regard that as a problem which is developing and has not yet reached the stage where action is required. The UKMMA submits that resetting the market to reflect Meltwater's primary case would result in unreasonable discrimination between Meltwater's service and the services provided under the existing NLA schemes applicable to PCAs (both PCAs who are members of the UKMMA and other smaller PCAs who are not UKMMA members). The UKMMA submits that there should be "media neutrality", in other words the WDL/WEUL scheme should not be priced in a way which distorts the market so as to favour the sort of media monitoring conducted under that scheme over the media monitoring conducted already under the existing PCA licensing schemes.

### *3. The legal framework*

22. The Copyright Tribunal is constituted by the Copyright, Designs and Patents Act 1988. It replaced the Performing Rights Tribunal which had been set up under the 1956 Copyright Act. The point of the Copyright Tribunal is to ensure that copyright licensing schemes are reasonable by allowing interested parties to refer schemes to the Tribunal for consideration.
23. Section 116 of the 1988 Act defines licensing schemes. There is no need to set it out. The sections of the 1988 Act with particular relevance to this case are ss119, 129 and 135. Section 119 is as follows:

*119.— Reference of licensing scheme to tribunal.*

- (1) If while a licensing scheme is in operation a dispute arises between the operator of the scheme and—
  - (a) a person claiming that he requires a licence in a case of a description to which the scheme applies, or
  - (b) an organisation claiming to be representative of such persons,that person or organisation may refer the scheme to the Copyright Tribunal in so far as it relates to cases of that description.
- (2) A scheme which has been referred to the Tribunal under this section shall remain in operation until proceedings on the reference are concluded.

(3) The Tribunal shall consider the matter in dispute and make such order, either confirming or varying the scheme so far as it relates to cases of the description to which the reference relates, as the Tribunal may determine to be reasonable in the circumstances.

(4) The order may be made so as to be in force indefinitely or for such period as the Tribunal may determine.

24. Section 129 of the 1988 Act is as follows:

129. General considerations: unreasonable discrimination.

In determining what is reasonable on a reference or application under this Chapter relating to a licensing scheme or licence, the Copyright Tribunal shall have regard to—

(a) the availability of other schemes, or the granting of other licences, to other persons in similar circumstances, and

(b) the terms of those schemes or licences,

and shall exercise its powers so as to secure that there is no unreasonable discrimination between licensees, or prospective licensees, under the scheme or licence to which the reference or application relates and licensees under other schemes operated by, or other licences granted by, the same person.

25. Sections 130-134 are not relevant. Section 135 is as follows:

135. Mention of specific matters not to exclude other relevant considerations.

The mention in sections 129 to 134 of specific matters to which the Copyright Tribunal is to have regard in certain classes of case does not affect the Tribunal's general obligation in any case to have regard to all relevant considerations.

26. There was some argument about the precise scope and effect of s129 on facts of this case. The point was as follows. Section 129 contains the word “shall”. The passage after sub-paragraph (b) states that the Tribunal shall exercise its powers so as to secure no unreasonable discrimination in certain circumstances. Such language is generally regarded as mandatory. The question is whether this mandatory language applies to the situation as between Meltwater and Google. Google must have licences from newspaper publishers to permit them to offer the Google News and Google Alerts service. However these licences are not part of the scheme and are not ones to which this reference relates. Google are not licensed under the WDL/WEUL. Indeed Google are not licensed by the NLA at all. The licences (assumed to exist) are directly from publishers. Meltwater’s case is that unless nominal fees are required under the WDL/WEUL, unreasonable discrimination would exist between Meltwater under the WDL/WEUL and Google under the terms of the licences between Google and the publishers (which for this purpose we can assume are royalty free). The same discrimination would go for their respective end users. The question is whether, assuming all those facts, this arises under the latter part of s129 – in which case the Tribunal *shall* exercise its powers to secure no such unreasonable discrimination – or

whether this does not fit under the latter part of s129 and falls to be considered more generally. The reason it might fall outside this part of s129 is due to the reference to “the same person” granting the licence. So it is said the NLA is not the same person as the publishers. All parties before us were agreed that the underlying point needs to be considered on its merits anyway and they argued that the point had little practical importance. However they made submissions on it anyway.

27. We believe this point is of no practical significance at all since the approach of any Copyright Tribunal faced with what it regarded as unreasonable discrimination in such circumstances would be the same whether it was considered under s129 specifically or s135 as another relevant consideration. However for what it is worth we will state our view that we think that the reference to the “same person” in s129 is not intended to allow for a distinction to be drawn in a case like this one, between a copyright owner who grants licences and a collecting society who has been mandated by that copyright holder to grant licences in respect of the very same copyright works. We believe that this approach is consistent with the judgment of Aldous LJ in *PPL v Candy Rock* [2000] EMLR 618, see in particular paragraphs 30 and 31. We do not see any need to consider the issue in any greater detail.

### 3.1 *The task of the Tribunal*

28. The Tribunal’s essential task was summarised by Arnold J in his judgment dated 12<sup>th</sup> February 2010 in *PPL v BHA* [2009] EWHC 209 (Ch) at paragraph 60. It is to determine what is reasonable in the circumstances and the Tribunal’s discretion is in the widest and most general terms (Arnold J referring to Harman J in *Association of Independent Radio Companies v PPL* (unreported 16 January 1986)). The statute requires the Tribunal to take certain specific matters into account in certain cases (these are addressed above) but s135 makes clear that the Tribunal is under a general obligation to have regard to all relevant circumstances. There is no presumption in favour of a referred scheme and there is no presumption that the referred scheme should be varied (*BPI v MCPS* [1993] EMLR 86 at 99).
29. It is convenient to set out paragraph 61 - 63 of Arnold J’s judgment in which he referred to, summarised and approved various earlier judgments dealing with the approach of the Tribunal. He said this:

“61. Two closely-related matters that are habitually taken into account are previous agreements and comparable licences. The Tribunal summarised the relevant principles in *British Phonographic Industry v Mechanical-Copyright Protection Society Ltd* [2008] EMLR 5 as follows (omitting footnotes):

"49. *The willing buyer/willing seller test.* This is a classic test in this jurisdiction whose present applicability has been expressly endorsed by all concerned. In assessing a reasonable tariff, the Tribunal has frequently addressed the matter on the basis that the proper rate is that which would be negotiated between a willing licensor and a willing licensee of the copyright repertoire. Before examination of the relevant circumstances to be taken into account in this notional exercise, it is however common practice to identify an existing tariff as a starting point. If such a licence exists (and particularly, if it is recent) and addresses comparable subject matter—and even better, if it was freely negotiated (rather than being as it were, 'imposed' by the Tribunal), that may be

particularly relevant and helpful in determining the right tariff (and other terms) of a licence. Such an agreement it has been said, is the best record of the market value of the relevant rights at the time (see below 'Comparators'). The Alliance submitted that this approach, though certainly not wrong, is simplistic since it often does not take into account the benefits to the licensee of collective bargaining. Nonetheless, our assessment of the centrality of this consideration and its relevance to this case, is undiminished.

50. *Comparators*. As noted above, s.129 of the Act *requires* the Tribunal to take into account schemes and licences 'to other persons in similar circumstances'. Mr Richard Boulton, the Applicants' principal expert, put the position with admirable clarity in his first Report, thus:

'The comparable royalties approach is often regarded as the best approach to use in circumstances where the parties do not agree on the level of royalty. Negotiations between a willing licensor and a willing licensee, in the circumstances, will provide, in theory, the best available information about the level of a reasonable royalty.'

51. In *AIRC v PPL*, the Tribunal stressed the importance of comparators:

'It is for the Tribunal in assessing the transactions cited as comparable to decide to what extent the rights licensed are of the same *or a similar kind*, whether the transactions were concluded at arm's length with neither side affected by stress, and whether they were affected by legal factors which do not apply in this case. It is then for the Tribunal to adapt any relevant comparators to the case under review.' [Emphasis added]

Thus, starting with a cited comparator, it is open to the Tribunal to take notice of it (or of parts of it) and to use it (or reject it entirely) as the case may require. The authorities show that whilst the utility of comparators has frequently occupied the Tribunal's time, in practice they appear to have been more of a legitimate quarry (or template) for particular terms and figures rather than as full precedents for a particular licence. In a few cases, comparators, particularly comparators from overseas, have proved to possess very little probative value whatever.

...

53. When one is dealing with the licensing of 'similar' rights, some comparators may be more relevant than others. For example, in cases where the exploitation of music requires licences both from the owners of the rights in the composition (i.e. the Alliance representing composers and publishers of music) and that of the owners of the rights in the sound recordings (i.e. the record companies or the PPL), the Tribunal has held that: (a) these two types of rights are legitimate comparators; and (b) there is no reason to treat one as being qualitatively superior to the other. ...

54. Where there are sufficiently comparable licences, the Tribunal should adopt a similar rate '*absent any special circumstances*': *AEI v PPL* at 256.

55. What one usually finds in the authorities is evidence of a *degree* of comparability, ranging from the superficial to the more realistic. iTunes submitted that even where the comparability was rather inexact, one could nevertheless take the comparables into account, '*but scale them down because of the differences*'.

56. Finally, this must be said of comparables: though the Tribunal may impose different rates upon different parties in respect of essentially the same rights, it must not thereby discriminate between licensees ... unless there is 'a logical reason for it.'

62 In a footnote to paragraph [53] the Tribunal cited three authorities in support of the propositions stated, including the conclusion of the Tribunal in *Association of Independent Radio Companies Ltd v Phonographic Performance Ltd* [1993] EMLR 181 at 239 that "the royalty yield of both tariffs should be in the same general range".

63 The Tribunal has often stated that what matters most is what is paid rather than how it is calculated: see e.g. *British Sky Broadcasting Ltd v Performing Right Society Ltd* [1998] EMLR 193 at [6.3]."

30. We propose to take the approach referred to in this passage. One can assess what reasonable terms would be in a licensing scheme by considering what terms a willing licensee and willing licensor would arrive at. Comparable licences provide a guide to that. The degree to which a given licence is comparable to the case before us is always a factor to consider and weigh up.
31. A final case to which we were referred was the judgment of Hoffmann J (as he then was) in *PRS v BEDA* [1993] EMLR 325. In the case Hoffmann J observed at p329 that: "It was true that one could not very well operate a disco without music, but then one could not operate it without electricity and many other things either. It could not be suggested that it would be fair for the suppliers of such utilities to have a percentage of the gross receipts." Mr Carr relied on this to show that one must take care with the argument from the NLA that their content is the *sine qua non* for Meltwater's business.
32. There was a suggestion that we could not decide this case without the assistance of economics experts. Neither party called such an expert. It seems to us that no such expert was necessary and that as a matter of principle there is no reason why parties should necessarily need such evidence. No doubt in an appropriate case such evidence might be useful and necessary but in this case we heard from witnesses operating directly in the industry concerned. As a Tribunal we felt by the conclusion of the proceedings, bearing in mind all the material filed (including some filed after the hearing) that we could see the picture tolerably clearly and at least sufficiently clearly to resolve the matters before us.
33. The way in which we propose to address the issues before us is first to set out our findings as to the relevant market to which this reference relates. We will consider how the business operates today, its characteristics and who competes with whom, and how it has developed over time. Those findings will inform the various decisions

we have to make. Then we will consider the various grounds for objection to the Scheme.

#### 4. *The witnesses*

34. We heard evidence from the following witnesses:

- i) Jens-Petter Glittenberg, founder and director of Meltwater;
- ii) Richard Ellis, Communications Director of the PRCA;
- iii) Andrew Hughes, Commercial Director of the NLA;
- iv) Felicity Irlam, Business Affairs Director of the NLA; and
- v) Stephen White, Chairman of the UKMMA.

35. We were not impressed with Mr Glittenberg as a witness. His general attitude seemed to us to be unnecessarily combative. The issue which caused us most concern was the question of the numbers of links being sent out by Meltwater. This was a manifestly important issue. When pressed in cross-examination Mr Glittenberg expressed views on these numbers and gave an estimate. It turned out that this estimate was far too low and Meltwater produced evidence at the conclusion of the proceedings to show that the numbers were much higher. Either Mr Glittenberg genuinely had no idea about these numbers and was simply guessing wildly, which we find hard to believe, or he genuinely believed his estimates and therefore does not have much of an idea about his own business, which we also find hard to believe or he was simply deliberately seeking to withhold information to further his cause. We cannot resolve which it was and will not do so. However it does mean that we will treat Mr Glittenberg's evidence with caution.

36. The other witnesses all gave their evidence fairly in our judgment. Mr Howe levelled some criticism that Mr Ellis's evidence was unsupported. We reject any criticism of Mr Ellis as a witness. All sides at different points in the argument have submitted that various figures are unsupported and we have taken that into account.

#### 5. *The Relevant Market:*

##### 5.1 *The business of newspaper publishing, media monitoring and the impact of the internet*

37. Every legal tribunal knows that the newspapers play a vital role in our society. They publicise events and hold them up to public scrutiny. That has particular importance for the courts. The point was explained by Jeremy Bentham and referred to by Lord Diplock in *Home Office v Harman* [1983] AC 280 at p303C (referring back to Lord Shaw of Dunfermline in *Scott v Scott* [1913] AC 417) as follows:

“Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial.”

(Benthamiana, or Select Extracts from the Works of Jeremy Bentham (1843), p. 115.)

38. As businesses, newspapers have both a publishing function and a news gathering function. A news gathering organisation has to be funded somehow. Traditionally newspapers have been funded by selling copies of their newspapers and selling advertising space in their pages. Journalists write articles and these are literary works protected by copyright law. So newspapers can sell their paper copies safe in the knowledge that copyright allows the newspapers to “monetise” their “content” by requiring someone who wants a copy of the article to pay for it.
39. The media monitoring business has built up over time. It started with simple press clippings agencies. In these companies individuals read the newspapers. They identified and clipped out articles, pasted them onto sheets of paper and sent them to their clients. This is how the PCAs started. No copying of the articles was involved. But in order to be able to paste a clipped out article on a sheet to give to a client, the PCA must have bought at least one copy of the newspaper.
40. The use of photocopiers obviously relieved the PCAs of the need to buy as many copies of the newspapers. Using a photocopier a single reader does not need to buy more than one copy of a newspaper. However now the PCAs are making copies of articles in which copyright plainly subsists and they would be depriving the copyright owner (the newspaper) of revenue. Without permission this would be infringement. The NLA was born to deal with this industry and the NLA’s “Paper Licence” was the starting point.
41. It is clear that today there is a close relationship between the NLA and the PCAs. As Mr Hughes explained in his evidence, when a business is licensed the interests of the licensor and licensee tend to align as compared to others in the field who are not licensed. The PCAs’ position is that they wish to carry on their business lawfully. They know that a licence is required since they are copying the newspaper’s literary works. As long as the tariff is an economically viable one from their point of view they will be content with it as long as a third party does not come along and compete with them without having to pay the tariff. This thinking explains the position of the UKMMA here. It also shows that it can properly be said that the various existing PCA licensing schemes applicable to PCAs and run by the NLA are examples of schemes entered into and negotiated by a willing licensor and willing licensees.
42. The relevant technology has moved on beyond the photocopier. Articles are no longer photocopied; they are scanned into a computer file. Now scanned articles can be accessed electronically; there is no longer a need to send paper copies to clients. However if the client was sent a scanned electronic copy of a newspaper article, say in the form of a PDF file (“PDF” standing for Portable Document Format), that PDF could be read and copied many times without the knowledge of the NLA and without the NLA (and thus the newspaper) being in a position to ensure that revenue was received from the activity. So that is not permitted by the NLA licences.
43. Scanning also affects the way in which newspapers are read. The PCAs can scan hard copies of newspapers and the PCAs’ reading process may itself be automatic, using electronic search tools to identify articles. However although the PCAs now use modern computer technology to identify press articles of interest, the service offered by the UKMMA members still involves the human touch. Mr White explained that the business operated by his members involves a person at the PCA physically reading every article before a reference to that article is sent to a client. An issue

arose as to the extent to which this human checking process was representative of all PCAs. It is clear before us that the UKMMA represents the major PCA organisations in the UK. Mr White was not able to speak directly for the smaller PCA businesses which clearly do exist but are not members of the UKMMA. He did express the view that some of these PCAs did not incorporate a human checking process and we do not doubt that some smaller PCA businesses do not do so but there is no evidence on which we are prepared to place any weight that such businesses are substantial in number or of any significance in this reference.

44. The scanning of hard copies of newspapers has led to the creation of databases of scanned articles. There are two kinds. The PCAs have created their own databases of scanned newspapers and the NLA itself has also created its own electronic database of scanned newspaper articles called eClips.
45. So for example one service offered by some PCAs is to scan hard copy newspapers, read the scanned pages electronically to identify relevant articles, check them and then provide paper copies of the relevant articles to end users. Sometimes the PCA will send its clients an email with an electronic link to allow the client to access the PCA's own electronic database of scanned articles. The PCA can instead send the user a link to the eClips database, in which the user will find the relevant article. One purpose of this latter arrangement is that it allows the NLA to monitor usage by the PCA's customers directly.
46. A further development arises from the decision by newspapers to put themselves on the internet. Thus anyone with internet browser software can go to the newspaper's website and read the articles available there. Many newspapers do not charge users for this but they do at least try to make money directly from their websites by selling advertising space. Moreover some newspapers, The Financial Times and The Times being the well known examples, do not make their content freely available to all. The Times is behind a "pay wall". In other words to access The Times newspaper online a user must have agreed to pay and therefore can only get to the content by logging in and allowing their credentials to be checked. Although The Financial Times and the publisher of The Times and the Sun, News International, are members of the NLA, none of the repertoire of The Financial Times nor of News International is licensed under the WDL/WEUL.
47. Naturally the PCAs use the newspapers' online content too. The existence of newspapers' online content has also led to a development of the eClips database called eClipsWeb. This is an NLA database of the newspapers' articles which appear on the newspapers' websites. The PCA can source articles directly from eClipsWeb and can send clients a link to allow them to access the articles on the eClipsWeb database. Again this allows usage to be monitored.
48. There are now a number of relevant licences promulgated by the NLA which cover this area of activity. They are called the Paper Licence, the Database Licence (also called the eClips Licence), the Electronic Licence and the eClipsWeb Licence. The relevant licence in any given case depends on how the PCAs read the newspaper articles and how they communicate with their clients. Essentially the position is as follows. A PCA which provides paper copies of the relevant articles to end users is covered by the Paper Licence. A PCA which sends its clients an email to allow access to the PCA's own database of scanned articles is covered by the

Electronic Licence, whereas if the link is to the eClips database, the Database Licence is applicable. Using eClips Web is covered by the NLA's eClipsWeb licence and the WEUL.

49. This summary represents the position essentially just prior to the introduction of the WDL and WEUL (although in fact eClipsWeb was launched after the WDL/WEUL but nothing turns on that). The precise network of arrangements between the PCAs and the NLA is somewhat involved, but the details do not matter. Overall it can be seen that copyright in the literary works produced by the journalists and its licensing through the NLA gives the newspapers a tool to generate revenue and be paid a proper share of the income generated from the business of PCAs. The tariff rates are the same across the various licences. The basic fee for copying an article is 9.6p as at July 2010. The fee was increased to 9.9p on 1<sup>st</sup> April 2011.
50. Whereas historically there were practical differences between a newspaper and other news services such as television and radio, today on the internet these distinctions are breaking down. BBC News, the Guardian newspaper and the Financial Times all have news websites and news gathering organisations which need to be funded somehow. The BBC is paid essentially by the licence fee, the Guardian's website is free for users to access although the hard copy papers have to be bought, the Financial Times sells hard copy newspapers and also charges for access to its website. There are also free newspapers which are not bought by "end users" but are funded largely by advertising.
51. From the point of view of the business of monitoring newspapers, although the business has changed and developed over the years, today it is still the case that some newspaper articles appear on paper only, many (probably most) appear on the web and on paper and some are on the web only. To offer a full media monitoring service to clients a PCA will have to cover both paper and web based content.
52. However now that news is available on the internet on a major scale it is possible for a service to be offered which only monitors online media and does not bother about hard copy newspapers. That is what Google's News and Alerts services do and it is what Meltwater's business is.
53. Meltwater was founded in Norway in 2001 as Magenta News and changed its name to Meltwater in 2007. Its headquarters are now in California. Meltwater provides an online media monitoring service called Meltwater News. The way its business works has been described above. The service began in 2001 in Norway and was first offered to UK end users in 2003. When the reference was launched Meltwater had 2230 UK end users. The number was 2315 by September 2010 when Mr Glittenberg signed his first witness statement. As at September 2010 Meltwater had 17,137 customers in 103 countries worldwide. From submissions at the end of the hearing we are advised that the number of Meltwater's UK customers has declined by some 14% between March and August 2011 from 2306 to 1984. There is no evidence why this is so.
54. Meltwater's business is based around the index it creates from the internet. Once that index has been created Meltwater can then sell services based on that index. The Meltwater News service works by using the index to identify articles appearing on websites which match the "agents" or search terms provided by the clients. These search terms can be a single word but they can also be much more sophisticated.

Meltwater provides a consultancy service to its clients whereby they create a search algorithm to refine the search terms in order to aim to filter out only the articles the client is actually interested in. To take a trivial example, if the client was British Gas, simply using “British” or “Gas” alone is likely to lead to far too many irrelevant articles being identified. So one might set the search to ensure that only articles in which the compound term “British Gas” appeared.

55. End users can receive Monitoring Reports from Meltwater and they can conduct their own ad hoc searches of Meltwater’s index. In either case the result is the same in that the client receives a description of all the articles identified along with a link to each article as it appears on the internet. The description consists of the headline plus the text extract. Mr Carr referred to the text extract as a “snippet”. The term was being used to minimise its significance but for present purposes we are not concerned with that. Before us there is no question that a copyright licence is required for this activity. For the proposed headline only service, just the headline is sent with no text snippet.
56. The Meltwater service is entirely automatic. Apart from the involvement of Meltwater staff to assist clients in formulating the search algorithm, which may well be a significant piece of work in some cases, there is no other human involvement. Unlike the traditional PCA service in which a human being reads the newspaper, Meltwater’s computers read the articles automatically. Unlike the PCA service in general (whether traditional or modern) no human being checks the articles identified before they are sent to the client. Of course unlike the Paper Licence a paper copy of the article is not provided by Meltwater. However Meltwater’s service is not like the existing PCA services offered under the Electronic Licence or the Database (eClips) Licence. That is because the link provided to the customer by Meltwater is a link to the newspaper’s own website. This is possible because self evidently the report is being sent to the client in the first place because an article has appeared on the internet.
57. Thus (as Meltwater was at pains to emphasise) if an end user clicks on the link and is taken to the newspaper’s website to see the article, if the newspaper has a pay wall, the end user will only be able to view the article by paying to do so. If the newspaper presents advertisements to users as a revenue raising exercise then this user will be exposed to the advertisements too. There was an argument about “deep linking”, that a user might go directly to the article and bypass the advertising on the website’s front page. We did not regard this as a significant factor. There was evidence that publishers can prevent it if they wish and the Google service works the same way.
58. Meltwater’s service can be called a paid for online media monitoring or a paid for OMM service. However since this expression also covers the services offered by PCAs which are licensed by the WDL/WEUL the terminology needs to be treated carefully. It is clear that Meltwater is not unique. There are other organisations which provide the same kinds of services. A term which sometimes appears to refer to the Meltwater type service is “paid for web aggregator”. No-one calls the PCAs paid for web aggregators and so we will use the term PWA to refer to Meltwater type businesses as distinct from the PCAs. Thus although this decision is in effect concerned with the reasonableness of a licensing scheme from the point of view of a single licensee, there are more PWAs than simply Meltwater. However Meltwater is the only one before us.

59. The Google News and Google Alerts services are very similar to the Meltwater News service save of course that it is not paid for by the end user. The articles are identified automatically without human intervention. Unlike Meltwater, Google do not provide a personal service assisting with the search algorithms. Like Meltwater, the link provided by Google is a link to the newspaper's website and behaves in the same way (subject to caching (below)). Both Meltwater and Google provide other related services as well and there was some unsatisfactory evidence about a further Google service called Google Reader. This arose as part of an argument about just how similar Meltwater's overall offering may or may not be to Google. It seemed to us to be of peripheral relevance and we will ignore Google Reader.
60. The point of this reference is that the NLA have promulgated the WDL and WEUL as a licensing scheme applicable to the paid for OMM service business. There is no doubt before us that the Meltwater News service (leaving aside for now the headline only service) requires licences to be taken by the provider, Meltwater, and its customers. At least some UKMMA members offer a form of paid for OMM service to their clients as well as Meltwater. They send links to the newspapers websites to their clients. These PCAs have signed up to the WDL/WEUL.
61. A key question which we need to address is the relationship between the PCAs, Meltwater and Google in this market. It is a critical factor in the identification of comparable licences against which to judge the WDL and WEUL. Meltwater emphasise their similarity to Google and the NLA/UKMMA emphasise Meltwater's similarity to the PCAs. The issues are:
- i) The nature of the basic services provided;
  - ii) Other services;
  - iii) Identity of customers;
  - iv) Charging, finances and scale.

### *5.2 The nature of the basic services provided*

62. We have addressed the basic services provided above. All three categories of service provider systematically monitor the media for clients and provide links to the newspapers' articles. That is the core business and it is the same for all three of Google, Meltwater and the PCAs. Meltwater sought to distinguish themselves from both Google and the PCAs in that Meltwater only send links to articles whereas both Google and the PCAs can send whole articles to their users. This alleged distinction is more apparent than real. The argument about whole articles from Google related to internet caching by Google. It is a similar arrangement to a PCA's internal database of scanned articles. The cached articles are only seen after a user has been sent a link and clicks on it to view the article. It is true that a PCA can send a whole paper copy of an article but by and large today what is sent by a PCA is a link – to one of the databases or to the newspaper's website itself.
63. We find that all three services are based essentially on the same thing – identifying relevant articles and sending links to those articles to clients.

64. At least some UKMMA members have entered the WDL/WEUL scheme. A simple argument by the NLA was that this showed the reasonableness of the WDL/WEUL and in particular the reasonableness of its pricing structure to a paid for OMM business. This submission is a powerful one. At an early stage in these proceedings we had difficulty reconciling this point with Meltwater's equally striking submission that the pricing of the WDL/WEUL would make their business totally uneconomic, certainly once the full levels of fees sought are charged in 2014. It was not obvious why one kind of paid for OMM business seemed to be able to afford the NLA's fees while the other seemed not to be able to. Although the NLA did not accept that we had a full picture of the economics of Meltwater's business it seemed to us that we had a reasonably clear picture. There are important disputes of detail but the overall position of Meltwater and the PCAs was clear enough for the puzzle to remain. Was it really likely that Meltwater were missing a trick and undercharging, relative to the PCAs, for the same service?
65. In our judgment the matter of human checking provides an important at least partial answer to this conundrum. When the PCAs provide the reporting service licensed by the WDL/WEUL they still incorporate the human element. The WDL/WEUL scheme is applicable essentially because of the manner in which a paid for OMM service identifies articles to clients: by sending out links to the newspapers' own websites (with headlines and text snippets if required). When a PCA provides this service the article has been checked for relevance by a person at the PCA whereas Meltwater does not do this. Thus, link for link, an individual link sent out by a PCA has a higher cost invested in it than an individual link sent out by Meltwater because a PCA's link comes with an endorsement from the PCA that one of their professionals has checked it. Someone has checked that the article is the sort of thing the client wanted. Apart from this human check, there is no significant difference between the basic alerting service offered by Meltwater and that offered by the PCAs.
66. We find that the human checking aspect is a key distinction between the two kinds of paid for OMM service available. The Meltwater type PWA service has no human relevance check whereas the paid for OMM service offered by PCAs does. This distinction is economically important. A PCA's links cost more to produce than a PWA's links and, link for link, the service providers are likely to need to charge more for the PCA's links. Looking at it the other way round, considering the matter link for link, an individual link from a PCA is likely to be worth more to a customer than an individual link from a PWA. The investment in the PCA's link means that the underlying article to which the link relates is itself more likely to be worth reading and relevant.
67. Equally the absence of a human relevance check makes the PWA service similar to the Google's free to end user OMM services. A further feature which Meltwater has in common with Google and which distinguishes them both from PCAs is the availability of ad hoc searches.

### *5.3 Other Services*

68. All three providers offer extra services. All three provide an opportunity for statistical analysis although the sophistication of what is on offer is very different. Meltwater's service is clearly much more sophisticated than the free service offered by Google. We infer the PCAs' statistical services are more sophisticated than the free Google

services. All three providers allow the emails sent to be forwarded on to other people. The significance of this is that each further copy of a headline plus text snippet will require a licence. There are also newsfeed services and archiving services offered by all three but the details differ. We are not convinced anything major turns on the newsfeed or archiving services. Unlike Google both Meltwater and the PCAs offer consultancy services and these have been mentioned already. Also unlike Google, both Meltwater and the PCAs offer newsletter services but we are not convinced they are relevant.

#### *5.4 Identity of customers*

69. The Google service is used extensively by consumers (since it is free to the end user) but the PCAs' and Meltwater's services are not. The latter two are, as the NLA put it, "business to business" services. However we accept Meltwater's submission that Google's services are used by businesses as well as consumers. That is plainly the case.

#### *5.5 Charging, finances and scale*

70. There are important differences in the ways in which the various services are funded. Google does not charge end users but it is not a charity. One way its service is funded is by advertising provided alongside the Google services in question. The PCAs charge their clients per article or link sent. Thus the larger the number of links, the higher the charges. That is reflected in the current PCA licensing schemes which are based on a charge per link. This was referred to as a variable rate for the obvious reason that it varies depending on the volume of links. There is also a fixed tariff available from the NLA, calculated on the basis of very high numbers of links. As far as we have been able to tell, the majority of PCAs' clients opt for the variable rate.
71. Meltwater charge their clients an annual subscription. It is negotiable. The precise fee depends on two main factors, the number of individual users with the end user company and the level of service required. The basic fee allows for one "admin" user and nine general users to receive Monitoring Reports and search using Meltwater's website. The fee may increase or decrease depending on the number of admin users, or general users required and whether other services are wanted. The other services are a newsfeed service, a statistical service and translation of non-UK sources. Notably Meltwater do not charge per link sent.

##### *5.5.1 Actual numbers*

72. Since the major dispute in this case concerns financial matters it is necessary to consider actual numbers representing the media monitoring market. Before doing so we should draw attention to the fact that many of the numbers used and discussed in these proceedings are very imprecise. They are often based on very rough estimates or guesswork. In doing so we have tried to avoid an unreal level of precision. The analysis often involves comparing figures from one period with figures from another. Ideally one should only do so if the businesses stayed the same all the time, which they clearly do not. However in our judgment the numbers are reasonably representative, recognising the limitations of the data.

73. The position of the PCAs is fairly clear. Mr White's evidence was that a PCA will typically charge a client something like £1.00 to £1.50 per article or link sent with a discount for multiple recipients of the same link at the same client. The basic tariff charged by the NLA per copy is 9.6p (the figure for July 2010). Thus when a PCA sends a client an email with one link to an NLA newspaper, for one user at the client, the royalty charged is 9.6p. When the WDL/WEUL was introduced and adopted by the PCAs, a lower royalty was negotiated between the NLA and UKMMA to start with. It was 5p per copy/link. That lower initial fee was set to reflect concern that too high a charge would kill user demand for the service. The actual royalty to be paid is calculated by reference to usage over a sampling period. As an illustration consider a two week sample period. The royalty due for the year would be the product of the number of links in that period x 26 x the rate per link x the number of users.
74. The NLA also introduced a fixed rate tariff for the WDL/WEUL. The fixed rate is not set by reference to the number of links sent but depends on the size of the client's business and the number of users within the company who are going to receive the service. Simply as an example, for a median member of the PRCA (6-8 users, 19 employees) the initial fixed rate under the WEUL would be £138 per year (for existing NLA licensee) or £207 (for new licensees), while for an average PRCA member (10 users, 33 employees) the fixed rate would be £328 per year (existing) or £492 (new).
75. To put these fees into perspective it is useful to have a feel for the volumes of links being sent out by the PCAs to their customers. Mr Hughes was able to provide figures for the volume of links sent out by the existing PCA licensees under the WDL. His evidence was that the NLA's data from PCA returns shows that the average number of links and text extracts sent to each client per month under the WDL in July 2010 was 43.25 (2,540 clients receiving a total of 109,863 links).
76. Meltwater's position is as follows. The precise fee structure of Meltwater's business was the subject of confidential evidence. It did not prove necessary to get into the details. Some simple numbers can be derived from public information as follows. Meltwater had 2320 UK clients in 2009. Meltwater says that its turnover attributable to the relevant UK business in 2009 was £7.2 million. Thus these figures represent revenue of approx £3,200 per client (i.e. 7,200,000/2,230). The figure is obviously sensitive to the correctness of both the nominator and the denominator and there was a dispute about both. One could use a figure of 2500 for the number of clients and the NLA contended that the turnover should have been £9 million. Keeping everything at two significant figures that gives a range of from £4,000 (9 million/2230) to £2,900 (7.2 million/2500). These differences are not trivial but they are relatively small as compared to how far apart the parties are on this reference.
77. A figure which was more controversial was Mr Glittenberg's estimate that only 4% of Meltwater's UK revenue was generated by NLA content. We will come back to that once we have analysed the information on the scale of Meltwater's UK business below.
78. The volume of links sent out by Meltwater was extremely unclear during most of the proceedings but clarity emerged in the end. Intuitively one would expect Meltwater's automatic system to be sending out many more snippets/links than the PCAs. Indeed it is clear that one of the NLA's concerns about Meltwater's business is exactly that.

However Meltwater was highly reticent about the exact numbers concerned. We detected in that reticence a desire to avoid giving out information which would expose just how large the number of text snippets is. In other words it was to avoid exposing, as Mr Howe put it, the scale of usage Meltwater are making of the publisher's copyright content. Mr Glittenberg had said in the High Court proceedings that he did not know what the volume of links sent out was. Before us he said the same thing but then Mr Howe pressed him with figures roughly calculated and put to Mr Ellis in the High Court. These calculations were that Meltwater were sending out between 8.3 and 125 million extracts from articles per year to its 2,300 UK clients. Mr Glittenberg did not agree. He estimated that the correct figure was somewhere between 1 and 5 million links per year to UK clients. Now even making all allowances for such a number, the problem with it is that it is totally inconsistent with Meltwater's general stance that they are quite different from the PCAs. Sending a total of 5 million links per year to a client base of 2,300 produces 2,200 links per year per client. Taking the revenue per client figure as £3,200 that would mean that Meltwater are charging their clients much the same sort of rate per link as the PCAs ( $\pounds 3,200/2200 = \pounds 1.45$  per link). That would imply that Meltwater's entirely automatic system was as efficient at identifying relevant links and weeding out irrelevant ones as the PCAs hand checked process and would also fundamentally undermine the argument that Meltwater's business could not withstand a NLA tariff of the same kind as the one applicable to the PCAs. It is also inconsistent with the stance of the NLA which was clearly based on the fear that Meltwater send out a higher volume of links than the PCAs do.

79. When this was put to Mr Carr in closing, it prompted Meltwater to produce new information at the conclusion of these proceedings. Given the manner in which the figures came out the NLA and UKMMA were rightly concerned and written submissions were filed afterwards.
80. The material produced at the end of the hearing was as follows. Since Meltwater have undertaken to enter the WDL at the conclusion of this reference Meltwater have been collecting the data they would be required to report to the NLA under the WDL but rather than give it to the NLA, the data has been held at Baker & McKenzie in escrow. Part of that data includes the numbers of links sent to UK customers. For August the total is 1.764 million NLA links. That would be 21 million per year (12 x 1.76 million). Since Meltwater estimate that only 30% of the links they send out are NLA links (and we accept that estimate as broadly correct), it would suggest a total of all kinds of links, NLA and non-NLA, of 5.88 million per month (1.76 million / 30%) which is 70.6 million per year.
81. After the hearing was over the parties exchanged further written evidence and submissions. One of the points was that the figure of 1.76 million in August included customer trials. The figure for paying customers was about 1.5 million links. That would represent 60 million links per year of which 18 million are NLA links. The later written submissions from the NLA sought to cast doubt on the above figures in various ways. One point was that the numbers included links which did not find their way into Monitoring Reports but Mr Glittenberg explained that to be a relatively small number and we accept his evidence (Glittenberg 5 para 5). Another point was that the new information showed that the number of Meltwater customers had dropped and that we should infer that it suggested Meltwater's revenue per customer was higher than we thought because no up to date revenue figures were given. Mr

Glittenberg did not accept this criticism and also pointed out he was using a figure for revenue per client of £3,500 in these calculations. That is still well within the range of figures we have considered above (£2,900 to £4,000). Mr Glittenberg provided a new figure for the average number of users per client (5.6). The NLA pointed out that this had an impact on various other calculations put forward by Meltwater. We agree and we will take it into account. The NLA also submitted that the figures emphasised by Meltwater were not representative of the whole period and that Meltwater had been wrongly selective. Mr Glittenberg did not agree and we accept his evidence on that (Glittenberg 5 paragraph 8). The UKMMA's post hearing submission picked up the charge per link issue and emphasised that PCAs will offer discounts for clients with multiple recipients. With 20 permitted users the average charge per link will be much lower. We will address that.

82. Overall in our judgment the basic figures now presented by Meltwater make sense and we accept them as broadly representative of the true scale of Meltwater's activity. On the one hand the new figures bear out the NLA's original concern about the scale of Meltwater's usage of copyright material. On the other hand they also show that in terms of the volumes of links, Meltwater are sending out far more links than the PCAs. These figures also explain why some clients will take both the service of a PCA and the Meltwater News service. The two are clearly not the same. Meltwater are sending out many more NLA links than the PCAs. Mr Hughes' figure for PCAs was 43.25 NLA links per client sent by the PCAs in July 2010 (2,540 clients receiving a total of 109,863 links). The Meltwater number of 1.5 million NLA links in August 2011 represents about 652 NLA links per client (assuming 2,300 clients).
83. One can also now compare charging rates per link. The PCAs charge about £1 – £1.50 per link. We are aware that the UKMMA wished to emphasise the discount applied by PCAs when a client has a large number of recipients of the link. The number of recipients referred to in Mr White's evidence was 20. We do not have evidence that this is happening on a large scale. Trying to compare like with like we note that the average number of recipients per Meltwater client is 5.6, a much lower number of recipients than the level at which PCA discounting becomes significant. It seems to us on the evidence as a whole that an average charge about £1 – £1.50 per link is broadly representative.
84. Meltwater's annual revenue per client is about £3,200. Ignoring other services like ad hoc searches, this is derived from something like 60 million links (both NLA and non-NLA) to its 2,300 UK customers. That works out at a rate per link of about 12.3p. That is based on 26,000 links per customer per year (60 million/2,300) charged at £3,200 per customer ( $12.3p = £3,200/26,000$ ). Of course this assumes that one link is worth as much as another and one can argue, as the NLA do, that from a media monitoring point of view NLA links to national and regional newspapers are more valuable than some other links, such as to obscure blog sites. However in our judgment the picture presented by the 12.3p per link figure is broadly correct. It may be out by a factor of 2 or a bit more but even then, taking the extremes of the ranges and comparing them to the PCAs per link charges gives a minimum of say 25 p per link / £1.00 = a 4 fold difference between a PCA and Meltwater as against a maximum of 12.3p per link / £1.50 = a 12 fold difference. Accordingly per link the revenue generated by Meltwater is about an order of magnitude less than the revenue

per link generated by PCAs. This difference accords with our impression of the evidence overall and we accept it.

85. One of the figures which Meltwater had produced was the “click through” rate. This number represents the number of times a recipient of a Meltwater text snippet selects the link provided and clicks through to the newspaper’s website to read the article. The significance of the number was to address an argument about substitution. Is reading a Meltwater text snippet a substitute for reading the underlying article? That might matter because the newspaper would say that a higher royalty should be paid if Meltwater’s service is relieving users of the need to read the newspaper at all. If users regularly click through to the website then they can be exposed to advertising and help the newspaper earn revenue that way.
86. Mr Glittenberg said that these figures were impossible to analyse in a useful way because some clients use broad agents like “UK” or “London” which will return a lot of background noise (i.e. irrelevant links) while other users are much more precise. However he then explained that his staff found that in 2009 there were 1.7 million “click throughs” worldwide. Of these 384,565 were to UK sources and of those 94,911 were to NLA publishers. Mr Glittenberg sought to make the point that this 90,000 odd figure for traffic Meltwater send to NLA members’ websites was not insignificant. When Mr Howe cross-examined Mr Glittenberg about numbers of links overall, one of the points being made was that one needed to have a feel for the actual volume of links sent out by Meltwater in order to put Mr Glittenberg’s opinion about the significance of 90,000 “click throughs” into context. With the data now available if one takes the figure of 18 million NLA links per year being sent out by Meltwater, the 90,000 “click throughs” can be seen to represent a small fraction of that number, about 0.5% or 1 in 200.
87. Again although this figure is created by taking together numbers from different years and based on very rough estimating, it seems to us to be broadly right. It indicates that users of Meltwater’s service do not generally use it in order to actually go on and read many of the underlying articles referred to in a Monitoring Report. No doubt users with more carefully targeted agents click through a much higher proportion of links than users with broad search terms but the overall picture is tolerably clear.
88. Finally one can also now consider Mr Glittenberg’s estimate that only 4% of Meltwater’s UK revenue was attributable to NLA content. First from a numerical point of view, in extrapolating up the figures for the volume of links a figure of 30% was used (30% of UK links sent are NLA links). We have accepted that figure as broadly correct. To get to Mr Glittenberg’s 4% figure involves taking into account Meltwater’s internal view that the source data for their services only accounts for 20% of the value of their services, whereas, for example, 50% of the value relates to the Meltwater consultants to whom the customers have access. While Meltwater no doubt uses these figures from an internal point of view, it seems to us that the more important consideration is the relative numbers of NLA links as compared to UK links as a whole.
89. Second, it is clear that not all sites are of equal importance. The websites of major UK newspapers which are members of the NLA are likely to be ones which Meltwater’s customers wish to make sure they are monitoring. Overall we believe a

30% figure is a much closer approximation to a fair estimate of the relative significance of the NLA's content than a figure of 4%.

90. Finally in terms of figures, we should mention the position of Google. The parties do not know what sort of revenue is generated by Google News / Google Alerts. The data are not available. Nor do we have data for the scale of the business. The newspapers clearly believe (we are sure correctly) that a common way in which consumers access their websites is via a general Google search. However this is not the same as the Google News / Alerts service and we are not aware of any reliable information showing how much those services send traffic to the newspapers websites. One piece of evidence that was available was that for the same search more hits were returned by Google News than by Meltwater. This emerged from tests which had been carried out by the parties and were explained in evidence by Ms Harding of Baker & McKenzie. The difference reflects the sophistication of Meltwater's methods as compared to Google's and no doubt is part of the way in which Meltwater can persuade customers to pay for their service despite Google.

#### *5.6 The relevant market – conclusions*

91. Having reviewed the business to which this reference relates as a whole, we are in a position to draw some conclusions. We find that the media monitoring industry and in particular the online part is a single business within which a range of service providers are offering overlapping services. By overlapping we mean that there are substantial numbers of users of media monitoring services who employ either just one of the three services, or two together or all three side by side. The Google Alerts service is free but it is not only used by consumers. It is used by commercial organisations too. We also find that at least in some cases clients will use Meltwater's service along side the service of a PCA. To some users the services on offer are not necessarily direct substitutes for one another. There was evidence of clients who appeared to be customers of both PCAs and Meltwater. Indeed Mr Hughes explained that he uses the services of Google News, a PCA and Meltwater News all at the same time.
92. That is not to say that the services do not compete with each other. We do not doubt that some potential customers will take either a service from a PCA or Meltwater's service but not both. The PCA service is inherently comprehensive and the relevance of the articles identified is checked by hand. The Meltwater service is less comprehensive but does not involve the cost of human checking.
93. Just as Meltwater competes with the PCAs so also does Google have an impact on both Meltwater and the PCAs. We do not doubt the evidence that when Meltwater staff are selling their service to customers, many ask why they should pay for Meltwater's service when they can get the same thing from Google for nothing. The answer of course is that Meltwater aim to make their service better than that available for nothing from Google and the fact that Meltwater exist at all is testament to their success in that argument. However the fact that Meltwater can build a business despite Google does not make Google irrelevant. It is plain to us that if Google's service was not available, Meltwater's business would be substantially different in terms of its pricing (higher) and/or the number of customers (higher).

94. Mr Glittenberg said that for 90% of his customers Google was the competitor whereas his business was only competing with the PCAs 10% of the time. We do not accept that these numbers fairly reflect the position because we believe that the position is more complicated than that. We do accept however that it is likely most of Meltwater's customers use Google News / Google Alerts as well.
95. The UKMMA argued that Google were not (yet) relevant to their market in which they operate. There was no evidence that the PCAs' revenues had fallen as a result of Google but there was no useful evidence either way. We do not doubt that today Google are much less important to the PCAs' premium quality service than to Meltwater's service but it is going too far to say that Google are irrelevant to the PCAs. For one thing Google offer an identical service to one of the portfolio of services offered by the PCAs – the paid for OMM service licensed by the WDL/WEUL which sends links to the newspapers' websites. Some customers of PCAs are likely to take the view that they will take the PCAs' traditional service but why pay for a WDL/WEUL type service as well when they can get the same sort of thing free from Google. The presence of Google Alerts, available to all end users for nothing, is likely to have an impact on the number of end users a given customer will wish to pay for as part of the subscription services of Meltwater or a PCA. We also believe that most relevant organisations in fact use Google even if that is in addition to other paid for services. Apart from anything else they will wish to know what the consumer will see when they use Google searches.
96. Before the High Court the NLA had stated that it had no mandate to license users of Google News. However it emerged before us that the NLA has been mandated to license systematic use of Google News / Google Alerts by commercial end users. Although it has not yet done so, the NLA intends to seek to require licences from commercial end users of Google Alerts who forward on the emails received within their businesses. Meltwater pointed out that this act of forwarding is additional to the core act of receiving the Google Alert service (or performing an ad hoc search). On any view this illustrates the significance of the Google News / Google Alerts service.
97. In summary we reject the submission that Google are irrelevant. Google offers an OMM service taken by commercial users whose existence has a bearing on the market for the services offered by Meltwater and by the PCAs. However the fact that Google is relevant does not mean we have accepted Meltwater's argument that we should take Google as a starting point and that the existing PCA licensing schemes are of no relevance. Ultimately Meltwater provides a media monitoring service which end users pay for, just like the PCAs do.
98. The positions of Google and the PCAs are both comparable to the position of Meltwater albeit in different ways. It is not realistic to identify Meltwater solely with one of them in preference to the other. However in terms of a starting point for structuring the licensing scheme and as something on which to base it, the fact that both Meltwater and the PCAs operate as business to business services in which the users pay charges to the providers for the services in question seems to us to indicate that the starting point should be the existing PCA schemes.

#### *6. The various Grounds*

99. The grounds of objection put forward by Meltwater/PRCA were as follows:

Ground 1 – Requirement for WEUL for headline only service

Ground 1A – The licence fee

Ground 1B – The surcharge

Ground 2 – Forced notification of end users (headline only service)

Ground 3 – Uncertain scope of content covered by the Scheme

Ground 4 – Uncertainty as to medium and long term pricing

Ground 5 – Unreasonable suspension rights

Ground 6 – Unreasonable audit rights

Ground 7 – Disclosure of confidential information (headline only service)

Ground 8 – Requirement to delete index

Ground 9 – Extension of obligations to third parties

Ground 10 – Acknowledgement of rights

Ground 11 – Requirement to limit search access after 100 days

Ground 12 – Additional publisher requirements

100. By the conclusion of the proceedings grounds 3, 9 and 10 had fallen to one side and did not require a decision of the Tribunal.
101. It is convenient to deal with the royalty structure of the Scheme first. That is grounds 1A, 1B and 4. Then we will deal with the headline only service. That raises grounds 1, 2 and 7 and also consideration of the licence fee. Finally we will deal with the other non-financial issues (grounds 5, 6, 8, 11, 12 and the territorial scope question).

### *7. Royalty Structure*

102. The fees due under the WDL/WEUL can be broken down into three aspects:
- i) Fees for providing monitoring reports;
  - ii) A fee for ad hoc searching; and
  - iii) A client copying fee /surcharge
103. Meltwater offer the ability to carry out ad hoc searches as part of their basic service along with the receipt of monitoring reports. Thus Meltwater generally put these fees together when they estimate the impact of the NLA's proposals. In order to make the decision manageable we will address ad hoc searching separately.
104. The client copying fee / surcharge is an issue which the PRCA are particularly concerned about. It is a distinct issue on any view and we will treat it as such.

*8. Fee levels for monitoring reports / alerts*

105. The parties are very far apart on the question of fees in two different respects. They do not agree what the fees ought to be but more significantly at least from the Tribunal's point of view, the parties do not agree on the consequences of the various fee structures being proposed. Part of the problem is undoubtedly caused by the fact that Meltwater themselves have not been forthcoming about the nature of their client base such that it is difficult to model what a given fee structure would produce if it was implemented.
106. However, without diminishing the significant difficulties caused by Meltwater's reticence, that is not the only problem. The NLA themselves have proposed calculations which are intended to provide a representative indication of how the fees they propose would affect parties to the WDL/WEUL system. Meltwater argue that these examples themselves do not present the whole picture. One of the major variables was the number of links being forwarded and that was eventually resolved to a significant extent. There was also a debate about whether one should best represent the impact of the proposed charges by considering median users or using average figures. Meltwater often referred to averages while the NLA pointed to figures based on a median user. Of course the correct answer is that both kinds of data can be regarded as meaningful in different ways, provided one is clear about what they mean and what they represent. The key point made by Meltwater is that the fees proposed by the NLA, particularly by 2014, would produce charges due to the NLA which are at a level more than double the level of Meltwater's current total income from the relevant services. Meltwater submits this is unrealistic. To make this good Meltwater produce calculations performed using averages. In reply the NLA point to figures for a median user of the service and contend that the fees due from such a company would not be unmanageable (assuming they shifted from the fixed to variable rate tariff after two years). However the NLA's response does not meet the point. First the NLA's calculations (Hughes 2 para 19) assume a number of links sent to the user based on levels sent by PCAs when in fact one of the NLA's concerns is that Meltwater send many more links than PCAs. Second, focusing on a median user does not grapple with the issue. As Mr Hughes rightly suggests, focusing on the median user does allow one to gauge the effect on a "normal" user whereas focusing on an average user can be misleading because the range of users includes a small number of large users. But the point is not concerned only with the effect on a "normal" user. The point is to look at the overall total fees generated by this tariff from a Paid for OMM service as a whole. One cannot perform that calculation from a figure taken using a median.
107. Our distinct impression from the position adopted by the NLA is that they regard as unimportant the prospect that their proposed fee structure will make Meltwater's current approach to business unviable. When confronted by this point in cross-examination Mr Hughes' response was that behaviour would have to change [Day 4 pp11-12]. We felt as a Tribunal that this illustrated an important underlying point. The NLA does not seem to like Meltwater's service and would appear to prefer that it did not exist. We do not doubt that the rather aggressively antagonistic attitude of Meltwater does not help. We have the distinct impression that the WDL/WEUL as proposed by the NLA is sought to be used as a tool to change fundamentally the economics of the business of organizations like Meltwater. While we entirely accept

that behaviour will almost inevitably change whenever a tariff is introduced into a market in which, rightly or wrongly, no tariff existed before, nevertheless it seems to us that an important question is whether we think the tariff to be introduced should be one which would make Meltwater's existing business unviable.

8.1 Comparables (as regards the basic alerts fee)

108. There are three possible comparables available which have a bearing on the basic fee rates. The most focus in the proceedings was on the first two: (1) the existing PCA arrangements (i.e. really the WDL/WEUL) and (2) Google. The third category is a group of other comparable licences.
109. For each putative comparable scheme or arrangement we need to consider two things. i) What are the rates and structure of the arrangement? And (ii) how comparable is the arrangement to the case before us?

*Comparable 1 - the existing WEUL/WDL*

110. The relevant fee for Meltwater under the WDL is £10,000. That is not in dispute. The important fees are the fees due under the WEUL. They are the ones which need careful consideration.
111. In order to move forward we need to analyse the fees proposed by the NLA for the WEUL. The WEUL has two rates – variable and fixed.

*Variable rates*

112. The variable rate in the WEUL when it was introduced was 5p per link. This was set at a discount to the prevailing rate for the receipt of electronic copies of articles sourced from printed newspapers by an end user who is an existing licensee of the NLA. The prevailing variable rate as at July 2010 was 9.6p per link and so the 5p per link was an approx 50% discount. The NLA intend to phase out the discount to some extent over time as follows:

	2010	2011	2012	2013	2014
New licensee	78%	78%	85%	93%	100%
Existing Licensee	52%	52%	57%	63%	67%

113. Thus the intention is to move to the same price per link by 2014 for new users of all NLA licences (now 9.9p per link from mid 2011) and to two thirds of that per link by 2014 for existing users.

*Fixed rates*

114. As mentioned above, when the WEUL was introduced, fixed rates were also proposed. For a median member of the PRCA (6-8 users, 19 employees) the fixed rate was £138 per year (existing NLA users) or £207 for new licensees, while for an average PRCA member (10 users, 33 employees) the fixed rates were £328 and £492 respectively. There was an argument that the average PRCA member was actually a company with 25 users, 25 employees (Glittenberg I para 60) but the fixed rates hardly differ, at £329 and £494 respectively. The prevailing fixed rate is not a single

figure because it varies depending on the size of the licensee (measured by total number of staff) and the number of permitted users of the service.

115. The range of fixed rate fees is as follows. The lowest fixed rate was for a licensee with a headcount of 1 to 5 (in this case the number of users does not matter). In 2010 the WEUL fixed rate for such a licensee would be £59 (existing) or £88 (new). The highest fixed rate would be for a licensee with 200,001 or more staff and 2,501 to 10,000 permitted users. In 2010 the WEUL fixed rate for such a licensee would be £20,084 (for existing licensees) or £30,126 (new licensees).
116. In fact, like the variable rate, the fixed rate in the WEUL is set at a discount to the prevailing fixed rate for the receipt of electronic copies of articles sourced from printed newspapers by an end user under the Paper Licence. The discounts proposed for the years until 2014 are:

	2010	2011	2012	2013	2014
New licensee	15%	15%	44%	72%	100%
Existing Licensee	10%	10%	29%	48%	67%

117. What emerges from these figures is that the initial discounts for the fixed rate are very substantial. For existing licensees in the first two years the prevailing figure is discounted by a factor of ten. Thus the lowest prevailing fixed rate, for a headcount of 1 to 5 at 1 July 2010 was in fact £587 and that is how the £59 figure for the WEUL arises. Equally the prevailing figures for companies and users at median and average PRCA members are £1378 and £3283 respectively.
118. Another way of looking at these figures is that the fixed rate sought in 2010 and 2011 will be increased nearly sevenfold by 2014 whereas the variable rate will only increase by about twofold.
119. What sort of volume of usage would make the fixed rate sensible under the existing PCA schemes (i.e. not with the WEUL discounts)? Taking the smallest figure, for a company with a total staff of 1 to 5 to accrue a charge at the prevailing variable rate (9.6p) equivalent to the prevailing fixed rate (£587) they would have to make over 6000 copies of articles or receive over 6000 links to different articles from a PCA. That figure (or 500 per month) is vastly more than the average usage by the PCAs (43 links sent to a client per month based on Mr Hughes' evidence) and indicates that the prevailing PCA fixed rates are only economically sensible if the licensee is an extremely heavy user of the service.
120. How comparable are the WEUL/WDL rates based on the existing PCA arrangements, to the case we are considering? The initial WDL/WEUL fees were arrived at following negotiations between the PCAs and the NLA. They are therefore the product of compromise and agreement between a willing licensor and willing licensees. Moreover they are based on the pre-existing PCA licence arrangements which are themselves the reflection of agreement between a willing licensor and willing licensees.

121. Mr Hughes described user reaction to the introduction of the WEUL in his first witness statement (paragraphs 129-133). These users included the reaction of 80 Meltwater customers. The average end user fee was £555. Mr Hughes stated that with almost no exception the reaction of NLA customers generally (we take it this was not limited to the 80) was to accept the principle of a licence, the price and the process. We accept this as relevant evidence reflecting a willingness of the part of licensees vis a vis the WEUL as it was introduced. However we do not accept that we can treat the NLA's proposals for the fee increases on up to 2014 (particular as regards the fixed fees) as the product of a negotiation with willing licensees.
122. The variable rate proposed in the WEUL/WDL is based on the 9.6 p per copy rate in the PCA scheme generally (with discounts). Does the same fee give the licensee the same thing? Under the Paper Licence this fee gives the licensee the right to their own paper copy of the whole article whereas looked at one way all one receives for the same fee under the WEUL/WDL is a headline plus text snippet and the licence limits the size of the headline plus text snippet which can be provided. However things are not that simple. The NLA's position is that a business customer of a paid for OMM service who clicks on the link provided needs to have the newspaper's permission to access the article on the website and absent the WEUL/WDL does not have it. We have addressed that issue in more detail below. Without diminishing the legal significance of this issue, it seems to us that from a licensing point of view, when the issue is the rate to be charged taking the need for the licence as a given, the more important consideration is the value of what is being provided.
123. We take it that under the PCA arrangements, users are prepared to pay £1 to £1.50 per article to a PCA because they are likely actually to wish to read the underlying article. An individual link to an article the user actually wants to read will have a similar value whichever licensing scheme it is provided under. It seems to us that the existing PCA variable rate arrangements provide a good guide to what a fair variable rate would be generally. When individual articles have a value, a variable rate is fair because the more you read, the more you will pay.
124. However we are less convinced that the existing fixed rate regime in the PCA licences is comparable to a fixed rate regime applicable to PWAs like Meltwater. They are dealing with different situations. The existing fixed rate scheme in the PCA licences relates to users who make very high numbers of copies of articles when the articles individually have a tangible value. It is not the same sort of fixed rate as the fixed rate users of a PWA service pay for the service itself. As mentioned already we note that the fixed rate regime in the WEUL/WDL as introduced was at a very substantial discount to the fixed rates in the existing PCA regime.
125. Finally we should mention the evidence about the reaction of other PWAs to the WDL/WEUL. Mr Hughes dealt with this in his evidence (e.g. Hughes I paragraphs 94-107). It appears to have been discussion with PWAs which led the NLA to introduce a fixed rate tariff in the first place. We are not surprised. It is fairly clear that some PWAs (such as a company called Moreover) did not regard the fixed rates in the WEUL as problematic. We take this to refer to the initial rates. There is no evidence that the PWAs Mr Hughes communicated with have had their attention drawn to the numbers behind the proposals running up to 2014.

### *8.1.2 - Comparable 2 - Google*

126. There was a suggestion that Google is purely a consumer service. We reject that. No doubt it is true that numerically a very high proportion of Google searches are carried out by consumers and are not carried out for commercial purposes, but it is perfectly obvious that Google News and Google Alerts are used by business people and for commercial purposes. There was no evidence of figures for the scale of this activity but that does not mean that it is insignificant from the point of view of the market with which this reference is concerned. We have accepted that it is likely the majority of Mr Glittenberg's customers also use Google News and we believe it is likely a high proportion of PCA customers do as well. We believe that one of the reasons Google is a competitor of Meltwater's is precisely because of business use of Google News/Alerts.
127. When a user receives a Google Alert they are presented with text snippets. If they choose to select a link and follow it to read the underlying article then (subject to caching which we regard as immaterial to this reference) the user is taken to the newspaper's own website. The Google News/ Alerts facility is just like Meltwater News. Moreover just like Meltwater, the facility for sending monitoring reports (Google Alerts) is provided alongside an ad hoc search facility. And yet neither Google facility is the subject of a licence from the NLA at all. Insofar as they are licensed directly by the newspapers it must be on very modest financial terms if any (since we infer we would have been told otherwise). Moreover we learned in the proceedings that the NLA do have a mandate to seek to license the forwarding of links derived from the Google service when that is done for commercial purposes, but not the basic alerts or ad hoc search services themselves.
128. At this stage it is convenient to deal with the NLA's position about business use and consumer use of newspaper websites because it has an impact on the Google issue. The NLA's position is that although consumer use of their members' websites is licensed by their members' terms and conditions, business use is not permitted. Nor is use of the websites by paid for OMM services or their customers. Thus, the NLA argues, while a member of the public is obviously entitled to visit a newspaper's website and read what is there and in the course of doing that make copies of what is on the site, commercial use of the newspapers' websites is not permitted. Thus when Meltwater and its customers copy content from a member's website, that copying is not licensed, absent the WDL/WEUL. The same reasoning must apply to Google although of course Google News/Alerts is a free to user OMM service not a paid for OMM service. As we understand it the NLA's position is that commercial use of Google News and Google Alerts is not licensed. That is why the NLA have a mandate to license aspects of the Google News and Google Alerts service (i.e. link forwarding). However it does not explain why the NLA has no mandate to license normal business use of Google News and Google Alerts. It is hard to see how the logic of the NLA's position can avoid a conclusion that such use is not presently permitted either albeit that it takes place.
129. One could have taken the view that Google was a purely consumer service and therefore somehow no question of business use arose but, as we have found, it is plain that there is business use of Google News and Google Alerts. (Hence the NLA's mandate.) Moreover we do not regard the argument that this licensing would not be practical as realistic. There would be all kinds of ways of addressing that if there was a will to do it. The Alerts service would be very straightforward to deal with since it

only works once a user has given Google an email address to which Google should send the alerts.

130. It was suggested on behalf of the NLA that the position of Google was not comparable because the Google system sends users to newspapers' websites in large numbers and that therefore allows the newspapers to earn revenue from advertising given the number of site visitors they have. We do not accept that as a sufficient distinction. Consider the click through rate, the likelihood that a user, having performed a search and been exposed to a text snippet derived from a newspaper, then clicks on the link and goes to the newspaper's site. There is no evidence that this click through rate is any different as between Google News and Meltwater. That is particularly so when one considers that a given search is likely to produce a number of hits. We can see there might be sensible arguments that the click through rate for Meltwater is actually higher than for Google News because Meltwater users are paying for the service. The fact they are paying is a reflection of their tangible interest in monitoring the online news media with some care.
131. We believe Meltwater and Google News are competitors to a significant extent and that Meltwater's current pricing level (which includes the search facility) is influenced to a substantial extent by Google News. If Google News did not exist as a free to user service, we are quite sure that Meltwater could charge much more for its service and maintain a similar market share. Thus if we impose a tariff on one kind of organisation (Meltwater) which makes their current pricing level economically unviable in this market, we are discriminating between Google and Meltwater. The argument that Google drives a lot of traffic to the newspapers' sites is not a justification. All it does is to seek to justify penalising a smaller participant in the market for their smaller size.
132. It seems to us that the reality of the situation is about economic power. As Mr Howe put it on behalf of the NLA, the reality is that Google is an enormous organisation clearly with immense resources at its disposal. It has many markets it could move into if it decided to. Google has all sorts of services for which, on the face of it, it is hard to see how the services make money. We believe a significant reason why Google is not being made subject to a licensing scheme like the one before us is simply because the newspapers do not wish to take it on, despite the fact that it is using copyright material in exactly the same way as Meltwater. That is not a good reason for ignoring Google as a comparator altogether.
133. That does not mean that Meltwater should not pay anything at all for their usage of copyright material. Far from it. The various services offered by Google are mass market oriented services albeit used by business people and are less sophisticated than Meltwater's services. No doubt that is one reason why Google does not charge for these services. In other words the fact that Google's service is offered free to the user is an important distinction and explains why Google is not a perfect comparable to the Meltwater service. Just as Google is a competitor of Meltwater, so the existence of Meltwater at all shows that there is scope to run a profitable business to business search and reporting service.
134. We believe it would be unreasonably discriminatory as between Meltwater and Google, for the WDL/WEUL licensing scheme to be priced in such a way that Meltwater are driven to cut down drastically the number of links they send to their

customers, for example by introducing a human cross-check of the kind offered by PCAs, without imposing the same thing on Google.

### *8.1.3 Comparable 3 - others*

135. The other comparables are:

- i) The Irish newspaper licence
- ii) Norwegian and Swedish licences
- iii) Text aggregators
- iv) CityWebWatch
- v) The PRS and CLA licences
- vi) Meltwater contracts with other web publishers

136. The first five on the list above are mentioned in the submissions. Item (vi) arises from the evidence of Mr Glittenberg. He gave evidence of certain contracts Meltwater itself has entered into with other web publishers to allow Meltwater to access the sites and include them in the Meltwater News service. We regard these as a further possible comparable.

#### *(i) The Irish newspaper licences*

137. Newspaper Licensing Ireland Ltd (“NLI”) is a similar body to the NLA in the Republic of Ireland. NLI promulgates a similar scheme to the NLA’s PCA licences and end user licences and the NLA submitted these served to confirm the reasonableness of the PCA Licence and end user licences. We do not doubt that. If there was an issue that the pre-existing PCA licensing schemes were unreasonable then these might have a bearing on the point but no-one has suggested that. We do not regard the NLI’s arrangements as having a bearing on the issues we have to decide.

#### *(ii) Norwegian and Swedish licences*

138. The NLA relied on evidence about examples of web content licensing for Norway and Sweden. We are aware that there has been litigation between Meltwater and publishers about the Meltwater News service.

139. The NLA submitted [closing paragraph 147] that their licence fee proposals were comparable to the equivalent charges under the Norwegian and Swedish licences. This is a slightly surprising submission since there are no end user fees at all in Sweden or Norway. However we understand the point being made is about the overall revenue being received by the NLA, not the identity of the person paying. Overall the NLA’s figures [Annexed to the NLA’s statement of case] showed that for a given mix of customers of varying sizes and numbers of users the NLA would receive £35,540 in the UK, the Swedish equivalent would be £28,140 and the Norwegian equivalent would be £43,356.52. Although it is not said so explicitly, as we

understand it, the calculation for the NLA is based on the fixed rate fees approximately as proposed in 2010.

140. Although we do not have details of the markets in Sweden and Norway, neither side put forward any evidence that the markets there were materially different from the market here. It seems to us that the NLA are right in that these charge levels do act as a relevant comparable for the levels of fees in the WDL/WEUL. It may be noted that the comparison applies to the 2010 fixed rates.
141. We also note that Mr Glittenberg referred to a licence Meltwater had negotiated with the same Swedish licensor as referred to by Mr Hughes (the news agency Tidningarnas Telegrambyrå or TT). That provides a fixed fee for 2010 of SEK 830,000 (about £70,000).

*(iii) Text aggregators*

142. Text aggregators are businesses which offer online research facilities comprising extensive databases of newspaper and other published content from many different sources. Two leading text aggregators are Lexis Nexis and Factiva. Publishers licence the use of their content in return for a share of revenue. We do not regard text aggregators as relevant comparables as regards the alerts fee. Insofar as they play a role it relates to ad hoc searching and we will address them there.

*(iv) CityWebWatch*

143. CityWebWatch is an MMO service covering 8 major newspapers and licensed directly by the publishers. In his evidence Mr Hughes contended that the fee payable under the WEUL is 15% of the fee payable by CityWebWatch for a far smaller number of titles. Moreover the Financial Times, the Times and the Wall Street Journal, all outside the scheme before us, are licensed to CityWebWatch. This was on the basis of his understanding that in one instance CityWebWatch pay a major UK title £4 per user per month and Mr Hughes was grossing that up and comparing it with the £58 pa fixed rate charge for a single user (and the smallest company) under the WEUL.
144. We are not satisfied that we have sufficient evidence of CityWebWatch on which to draw a conclusion about their rates but we do note that the NLA's argument here is based on the fixed rates proposed for 2010 and not the elevated fixed rates proposed for the future.

*(v) The PRS and CLA licences*

145. Meltwater sought to rely on the PRS and CLA licensing schemes as a sense check. We did not find the comparison with either the PRS or CLA schemes to be compelling and we will not rely on them.

*(vi) Contracts between Meltwater and web publishers*

146. Of more significance we believe was the evidence of contracts freely entered into by Meltwater with publishers of other news websites (not NLA members) to allow access to them for Meltwater's purposes. These contracts arise because some sites have a

paywall which allows the publisher to restrict access to the site and thus in order to be able to deal with such sites, Meltwater has to enter into a contract with the publisher. The evidence included contracts of that kind between Meltwater and the Financial Times as well as a few other licences. There is information about four licences although the evidence for one of them is not clear, leaving three. The figures are set out in Confidential Annex 1 to this decision. Meltwater regards the figures as confidential and accordingly we have not included Annex 1 in the published version of this Decision. Annex 1 is only available to the parties.

147. Although the data is very sparse, it does support the following considerations. First the sums being charged are fixed sums regardless of the volume of “content” included in Meltwater’s services. Second the three reliable figures are quite widely spread, rounded they are about £12,000 pa, £5,000 pa and £300 pa. However, even with that degree of spread they permit some comparisons to be made. If the WDL/WEUL tariff was to generate returns to the NLA of £2 million pa, that would be the equivalent of the NLA representing over 160 publishers of the first type (£2 million /£12,000), 400 publishers of the second type or over 6,000 of the third type. This can be compared with the newspapers the NLA represents. It was founded by 8 national newspapers and now represents 1,300 newspapers, although numerically most of these are regional titles. Moreover the News International content is not licensed under the WDL/WEUL. In our judgment the comparison provides a rough and ready but independent confirmation that revenues of the order of £2 million pa from Meltwater to the NLA would be unduly high and discriminatory.

#### *8.2 What should the basic tariff rates be under the WDL and WEUL?*

148. An outstanding question which may have a bearing on the decision about the tariff rates is whether it matters much what the impact of the tariff rates on Meltwater’s existing business would be. Do we need to consider the impact of the WEUL/WDL rates on Meltwater?
149. If the only relevant comparable was the pre-existing PCA schemes (and the corresponding fees as promulgated in the WDL/WEUL) then it could be said that worrying about the impact of the WEUL rates on a business like Meltwater’s existing business would be a minor matter. If a licence comparable to the existing PCA scheme made Meltwater’s existing business uneconomic, that would not be important because Meltwater have been operating without a licence and they and their customers have been getting something for nothing hitherto. However, as we have said above, it seems to us that Google is a relevant comparable. Google is a significant competitor in the relevant market. As we see it, the correct way to take account of the comparable nature of Google here is not to set a nominal tariff rate (Google is not that comparable) but to set a tariff rate which does not unduly unbalance the existing economics of Meltwater’s business.
150. That means it is relevant to assess the impact of the proposed WEUL rates on Meltwater.

##### *8.2.1 What would be the impact of the WEUL/WDL rates on Meltwater?*

151. Meltwater’s position is that their clients are likely to adopt the fixed rate rather than the variable rate. That may be correct although the variable rate tariff is not as

variable as its name would suggest. As mentioned above, the way in which the fees are actually calculated under the tariff is to estimate the yearly number of links sent out by taking a sample over a typical two week period. This is then multiplied by the number of users and the cost per link. This then sets the fee charged for the year and so the fee based on the variable rate does not vary over that year. It is a single sum calculated based on the reporting period. Nevertheless we do not doubt that many of Meltwater's customers will adopt a fixed rate tariff given that Meltwater's charging is on a fixed rate basis.

152. We will start with the impact of the fixed fees. Both sides produced figures by taking a figure for one kind of end user (median or average) and multiplying that by a number taken to be the number of Meltwater users (2320) to create an annual sum due to the NLA. Then the effect of the discounts was shown. For example starting with an average PRCA member (10 users, 33 employees), the starting fixed rate figure is £328 per year (existing licensees) or £492 (new licensees). Taking these as representative of the average Meltwater user and multiplying by 2320 users, that would represent between about £760,000 and £1,140,000 in total for the first year in 2010 depending on the mix of new and existing licensees (328 x 2320 to 492 x 2320) rising to between about £5,104,000 and £7,620,000 in 2014. (The latter two figures are £2,200 x 2320 and £3,283 x 2320. We have ignored the WDL's £10,000.) A representative figure for Meltwater's annual UK turnover is either £7 million (says Meltwater) or £9 million (say the NLA). In either case an NLA tariff of some £5 million in 2014 would be colossal. We will deal with a fee for ad hoc searches below but at this stage it can also be pointed out that in 2014 it would double the sum due, making some £10 million due in NLA fees.
153. However are these figures representative of the level of fees which would actually be due? The NLA pointed out that for a median member of the PRCA (6-8 users, 19 employees) the initial fixed rate was £138 per year and so the effect of grossing up is less. This also assumes all licensees are existing NLA licensees. We are not convinced it is legitimate to take a figure for a median customer and multiply it by the number of customers to gauge an overall figure (which is what Mr Hughes sought to do). Mr Hughes' figures approached this way produced a total for all Meltwater customers in 2010 of £319,470 and for 2014 a total of £2,140,449 (using a figure of 2315 for the number of Meltwater customers). These figures are calculated using a number for Meltwater's customers of 2315 and assumes that all WEUL customers will be existing NLA licensees. In reality the figures calculated this way will range between £319,470 and £479,205 for 2010 and between £2,140,449 and £3,190,070 in 2014.
154. Again, in 2014 the ad hoc search fee doubles the figure. In our judgment a level of fees of something over £2 million on an annual turnover of even £9 million is still very high. Mr Hughes recognised this because he pointed out that the user would benefit significantly by shifting away from the fixed rate after 2012.
155. In passing it can be said that it is obvious why these figures are so large. It is because they derive from a prevailing fixed rate in the PCA Paper Licence.
156. The point Mr Hughes was making about a shift from fixed to variable rates was based on his estimate of the effect of the variable tariff in Meltwater's case. This indicated that for the same median PRCA member, the tariff on the variable rate in 2010 would

be £180.60. That sum multiplies up to a total of £418,089 from all 2315 Meltwater customers in 2010 and with the variable fee increases to 2014 a total of £535,135. Thus although in 2010 the fixed rate for such a user (£138 per year) was less than the sum due based on the variable rate (£180), by 2014 the variable rate produced a much lower sum.

157. However these calculations are not soundly based because in order to produce a variable rate fee, Mr Hughes had to estimate how many links Meltwater were sending out. At the time he did this calculation Meltwater had not divulged the volume of links they send and Mr Hughes had used the 43.25 links per month figure based on existing WDL/WEUL returns from PCAs. We do not criticise Mr Hughes for doing this since Meltwater had not produced any further information but even the NLA must have appreciated that these numbers were not really representative since the NLA's stance is based on the premise that Meltwater send many more links out than PCAs.
158. Using the link numbers finally produced by Meltwater presents a different picture. Based on 18 million NLA links per year and 2010 rates, the total due on the variable rate in 2010 would be about £6.3 million (18 million x 5p x 7 users) for existing licensees or £9.5 million for new licensees (18 million x 7.5p x 7 users). The total in 2014 would be £12 million for new licensees (18 million x 9.6p x 7 users) or £8.1 million (18 million x 6.43p x 7 users) for existing licensees. Depending on the mix of new and existing NLA licensees, per client, these figures work out at between £4073 and £2715 in 2010 (9.5 million / 2320 and 6.3 million / 2320) and scale accordingly in later years.
159. Finally we should mention another figure which emerged after the hearing along with the link numbers. At paragraph 18 of his 4<sup>th</sup> Witness Statement Mr Glittenberg explained that the average number of permitted users per account was 5.6 for UK Meltwater customers in August 2011. This figure for the average number of users suggests that in fact the average PRCA member (with 10 users or with 25 users as proposed by Mr Glittenberg) is not representative of the average Meltwater customer. It has too many users and this matters because the number of users makes a significant difference to the NLA fees due. Somewhat ironically, Mr Glittenberg's figure would suggest that the median PRCA user the subject of Mr Hughes' calculations is a better representative of the Meltwater average than the average PRCA member.
160. The conclusion which we draw from considering how the WEUL/WDL rates would apply to Meltwater's business is that the future fixed rates are not realistic. We believe this is a reflection of the fact that although comparable to some extent, the PCAs and PWAs are not the same. As we have said above, we reject the idea that the WDL/WEUL tariff structure should be used to force a business like Meltwater to turn into a PCA.

#### *8.2.2 Our decision on the tariff rate for monitoring reports / alerts*

161. In the end two factors have weighed most heavily on us in deciding what a fair tariff would be in this case.
162. First, in paragraph 98 of their Re-Amended Statement of Case the NLA put their case as follows:

“[...] as stated above, it is estimated that in fact around 35% of results on the Applicant’s service come from NLA Publisher content. Therefore if the Applicant has UK revenues of around £9 million, around £3.1 million relates to NLA Publisher content. A royalty should be a fair proportion of that figure payable to the content provider.”

163. We agree with the sentiment expressed in that paragraph. The NLA should get a fair proportion of Meltwater’s revenues which relate to NLA Publisher content. A fair proportion of those figures is not £2 million in fees.
164. Second, we are concerned about fairness to the PCAs and what has been called media neutrality. The WDL/WEUL is applicable to the PCAs operating under it as much as to Meltwater. The existing variable rate in the WDL/WEUL has been arrived at by reference to the existing variable rates in the other PCA licences. If we set a different variable rate per link in the WDL/WEUL there is a severe risk that we will unbalance the existing PCA regime without a sufficient justification.
165. We are not convinced that the debate about substitution of text snippets for whole articles really helps. In some cases users will “click through” from the text snippet to the underlying article. In that situation given that the article is presented on the newspaper’s own site, we can see an argument for saying that the fee should be lower for those cases because in effect the PWA has sent traffic to the newspaper site. That is the same as the NLA’s point in justifying why the newspapers do not charge Google large sums. However given that the click through rate for Meltwater customers is low, we do not think that would be a reason to reduce the fee.
166. In some cases no doubt a text snippet is a substitute for the original article. A user would otherwise have read the article but does not do so because they get all they want from the text snippet. But to use that to justify a higher fee as a result seems to us to be rather inconsistent with the argument that business users of paid for OMM services have no licence to click through in the first place. We believe this is a similar tension to the one as was identified by Proudman J in her judgment in the *Meltwater* case at paragraph 100.
167. Furthermore we reject the idea that each text snippet is either clicked through or not such that when that does not happen the text snippet has acted as a substitute for the underlying article. We believe that the large majority of links sent by Meltwater are neither clicked through nor substitutes. They may be obviously irrelevant (obvious to the human user reading the snippet just not to Meltwater’s computers) or they may be simply links for which the user would never have looked at the underlying article in the first place. They are not using the Meltwater service to find articles they were ever actually going to take the trouble to read. They may have a PCA’s service for that purpose or they may simply be reviewing what is happening online at a more general level.
168. Leaving aside the legal argument about implied terms and the website terms and conditions, it seems to us that from the point of view of assigning a value to the copyright material, it is relevant that the newspapers with which this reference is concerned have chosen to put their copyright material on the internet in a way such that any computer on the net can access it. Not all newspapers have done this. The

newspapers to which the licence relates clearly regard it as an advantage from their point of view to have their material accessible in this way. We agree that this does not mean the content should be available for nothing but it seems to us nevertheless to be a material consideration in assessing a reasonable fee.

169. Other factors which we have taken into account are these:

- i) One of the challenges in this reference is that we have found that the licensing scheme in question covers two different kinds of service, i.e. the PCA service and the PWA service. One cannot distinguish between these two services from the point of view of their need for a copyright licence but it seems to us that it would be wrong to take that one stage further and say that it means the rates should be determined by one of them (PCAs) and not the other (PWAs). We believe that a scheme set by reference to either without consideration of the other would be unreasonable.
- ii) In justifying the high fixed fee levels, the NLA referred to an LECG consultation report and recommendations written in July 2007 which was part of what led to those fees. This included a recommendation of a fixed fee system based on organisational size for “very high volume copiers” [E3.1/p2383]. The fact that snippets are (absent a licence) infringing copies does not mean large numbers of links sent by Meltwater are of an equivalent value or worth to high numbers of copies which we understand the LECG report to be talking about.

170. There was a heated debate about whether Mr Hughes had told a journalist the NLA wanted or intended to generate fees at a level of about 10% of the turnover in the PWA market. In fact, as Mr Hughes, explained, that was not what he said. We accept that. However we also note that once they had set the tariffs the NLA calculated that the likely revenues would be about 10% to 15% of “MMO turnover” [Hughes I para 158]. Mr Hughes emphasised that it was not that the NLA accepted that a revenue sharing approach was the right way to set the tariff but that it provided a useful cross-check. We agree with both sentiments. Mr Howe submitted that it was a fallacy to set the tariff level by reference to Meltwater’s current turnover given that this turnover has been generated without paying for something (the copyright) which should have been paid for. If Mr Howe’s submission means that we should not even perform a cross-check against Meltwater’s turnover then we reject it. As we have already found, in terms of orders of magnitude, we believe a key determinant of the level of Meltwater’s turnover is competition with Google.

171. An important factor is that the licensed content is not even the repertoire of all UK newspapers, let alone all UK news websites. This seems to us to be a factor tending to reduce the appropriate tariff.

172. Taking a step back and looking at the position overall it seems to us that the real problem with the rates proposed by the NLA arises from what is proposed to happen to the fixed rates in future. The reason this is important is that we can see the force in Meltwater’s point that many of its clients (although not perhaps as many as Meltwater say) will wish to adopt a fixed rate tariff. After all Meltwater charges a flat rate to its customers regardless of the numbers of snippets sent out. The problem is that the NLA’s fixed rate proposal for the WDL/WEUL is based on a fixed rate tariff which

itself assumes extremely high volumes of what we can call high quality “PCA style” links. In other words links which have all been hand checked for relevance and are being charged to the client by the PCA at a rate of £1.00 to £1.50. A client prepared to pay a fixed rate of £3,283 to the NLA (the prevailing Paper Licence fixed rate figure for a company with 33 staff and 10 users) must be paying their PCA a multiple of that sum for the PCA service or else making large numbers of copies of whole articles identified by the PCA service. This bears no relation to the service being offered by Meltwater.

173. Accordingly what we have decided to do is to maintain the variable rate entirely as proposed by the NLA but set a fixed rate tariff tailored to the WDL/WEUL and not intended to end up at anything like the same levels as the existing fixed rate tariff under the Paper Licence.
174. We will maintain the variable rate as it preserves a degree of media neutrality. The price of an individual snippet provided by a media monitoring organisation, when considered on its own, is the same regardless of how it is delivered. The overriding reason to take this course is to seek to achieve a fair result for the PCAs and to preserve the NLA’s entirely proper income stream from the PCA business. We perceive that that existing business is largely conducted on the basis of the variable rate, i.e. a price per link and there is every reason not to interfere with it.
175. We believe the WDL/WEUL scheme should have a fixed rate tariff available within it but it should be one which recognises the reality of the paid for OMM market. Some licensees under the WDL/WEUL (PWAs such as Meltwater) charge their clients a flat fee regardless of the number of snippets provided. The service provided is not like the hand picked service of a PCA, it is a service in which not every link will be selected and clicked through to the newspaper’s website. Many links sent will be irrelevant and so the newspaper is not really losing a customer in such cases. The customer never wanted to read the article from which the snippet was extracted. We also bear in mind that we have evidence that some newspaper websites are indeed prepared to allow Meltwater to access their sites and employ their material in Meltwater News on a fixed rate basis which is at a level which does not make Meltwater’s business uneconomic.
176. We regard both the Norwegian and Swedish licences (relied on by the NLA) and the contracts between Meltwater and web publishers as significant comparables justifying a fixed rate regime in the WEUL/WDL but one which is much lower than the PCA licences’ fixed rate. We do not believe we can use those comparables to actually set the rate for the UK, but they do support the conclusion that there should be a fixed rate available and it should be within the orders of magnitude of levels introduced by the NLA in the WEUL/WDL.
177. We have considered the relative structure of the fixed rate tariff employed by the NLA. The NLA’s basic Paper Licence fixed rates are in Annex 2 Table 1a. The corresponding 2010 Existing Licensees’ and New Licensees’ Tariffs that are derived from this are shown in Tables 1b and 1c. The % scale factors which show how the various entries in the table relate to each other are in Annex 2 Tables 2a and 2b. Starting from the figure for a company with a headcount of 1 - 5 and a single user, all the other figures are generated by applying percentage uplifts downwards as the headcount increases (Table 2b) and then horizontally as the number of users increases

(Table 2a). We believe that using the current NLA fixed rate model, the increases in fee as employee numbers rise is too severe. It produces fees which are much too high for employee numbers over 25. We have therefore changed the way the increase in fee is calculated as employee numbers rise by simply increasing the fee by 5% as you move from the next category. These scale factors are shown in Annex 2 Tables 3a and 3b.

178. We also believe the actual fixed rates in the WDL/WEUL when the scheme was introduced in 2010 were reasonable as introductory rates. On Meltwater's own figures they represent about 9-14 % of their revenue. We will also apply these in 2011. At these levels the fixed rate for an existing licensee median PRCA member was £138 (19 employees and 6-8 users) and for an average PRCA member it was £328 (10 users, 33 employees). The equivalent figures for new licensees are £207 and £492 respectively.
179. We will maintain the same relationship as the NLA have proposed as between new and existing licensees. So the fixed rate table for existing licensees will be 67% (about two thirds) of the new licensees table. We will set the lowest fixed rate for new licensees in 2012 at £150 and for existing licensee at £100 (headcount 1 – 5 and a single user).
180. The figures this produces are in Annex 2 Tables 4a and 4b. For example it means that the fixed rate for the median and average PRCA members would be £353/£235 (new/existing licensees) and £738/£492 respectively. Bearing in mind Mr Glittenberg's point that his average customer in August 2011 has 5.6 users and using a figure of 25 employees for the size of the customer the fixed rate figure of between £353 and £235 will represent the average across all Meltwater's customers. It is the rate for 6 to 25 employees and 6 to 8 end users. With the same number of users and 33 employees the fixed rates will range between £528 and £352.
181. On this basis a fair representation of what the annual return for the NLA would be from Meltwater's customers at these levels is between about £820,000 and £550,000 (= 2320 x £353 or 2320 x £235). That is a reasonable share of Meltwater's revenue. It is between about 7.9%-11.7% of £7 million and 6.1% - 9.1% of £9 million. It is comparable to the share obtained from the PCAs under the pre-existing arrangements which are about 6% to 9% based on 9.6p per link for links charged at £1.00 to £1.50.
182. Using the figures for the same number of users but 33 employees produces a range between about £1,200,000 to £820,000 (= 2320 x £528 or 2320 x £352). These are clearly somewhat higher but they reduce significantly if the average number of users drops from 5.6 (rounded to 6) to 4.6 (rounded to 5). The figures for a customer with 33 employees and 5 users are £377 and £251 (new/existing) which gross up to £875,000 to £580,000 (= 2320 x £377 or 2320 x £251). We do not regard a change in user behaviour of this kind, dropping on average one user each, as significant.
183. We recognise that the effect of this combination of fixed rate and variable rate means that as a practical matter the fixed tariff acts as a cap on the fees due from a given organisation. We regard that as a virtue not a vice.

### *8.3 Rates over time*

184. Our decision represents a jump in the fixed fee rates between 2010/2011 and 2012. So a new median PRCA member's rate was £207 (19 employees, 6 to 8 users) in 2010/2011 and this has jumped to £353 in 2012. Although it is a substantial relative increase we regard it as reasonable. It is of the same order as the NLA proposed in any event.
185. As regards the variable rate the base figure in 2010 from which the others are derived was 9.6p per link. In July 2011 the NLA introduced a new basic variable rate of 9.9p per link.
186. Where we part company significantly from the NLA is in the future rates. We do not agree that the NLA's future fixed rate proposals are reasonable. The fixed rate we have arrived at for 2012 is a fair and reasonable level for this Scheme. The NLA's proposals for 2013 and 2014 are not.
187. Mr Carr invited us to fix the rates for three years. Rather than fix the rate for three years it seems to us that inflation ought to be taken into account. It would be reasonable for there to be an increase for inflation in 2013 and 2014 but those would be the only increases we will permit in the tariffs in 2013 and 2014 relative to 2012. We give the parties the opportunity to agree suitable terms embodying such an increase for the future. Many existing licensing schemes have suitable terms in them which the parties' legal representatives are aware of.
188. The inflation increase will be allowable both for the fixed and variable rates. Although the NLA changed the PCA variable rate to 9.9p in April 2011, we think the fixed and variable rates in the WDL/WEUL should not change in different periods. We will fix the basic reference point against which the NLA's tapered discount is to be applied for 2010/2011 as 9.6 p per link and set it at 9.9p per link from 2012. We will hear the parties as to the precise date on which rates should change. After 2012 the variable rate reference point of 9.9p can only increase each year annually with inflation in 2013 and 2014.
189. We will not say anything about the rates after 2014. It seems to us that fixing the regime for three years from now on gives sufficient commercial certainty to all concerned. On the other hand we recognise this is a developing and potentially fast moving market and conditions may be very different after that.

#### *9. The ad hoc search fee*

190. As part of its basic service Meltwater offers its customers the ability to perform ad hoc searches of its index. These produce the same kinds of results as the ones produced in Meltwater's Monitoring Reports. This sort of search facility does not exist under the PCA system. The NLA contend that media monitoring services (i.e. the PCAs) operate perfectly happily without it. The PCAs have not asked the NLA for such a facility and so from the NLA's point of view it is a distinct new facility and not a necessary part of a media monitoring service. The fee proposed by the NLA is based on the fixed fee. We agree with the NLA that realistically any such fee has to be fixed in form. Once ad hoc searches are performed the potential use is unlimited.

191. Like the fixed rate for the monitoring reports, the proposed fixed rate search fee is calculated as a discount from the prevailing fixed rates in the PCA Paper Licence, with the level of fee rising over time to 2014. The NLA's proposed percentages are:

	2010	2011	2012	2013	2014
New licensee	25%	25%	90%	150%	200%
Existing Licensee	20%	20%	60%	100%	140%

192. Broadly, and becoming definitely so in the later years, these figures are double the rates proposed for the fixed fee for monitoring reports. The reason for that is that as proposed the licence fee for search access would include the rights both to perform searches and to receive alerts. Thus the NLA's essential reasoning is that the fee for search access alone is another single fixed rate fee, not two. Approaching the matter this way worked from the NLA's point of view because when this table was put forward, they intended to tie the fixed search fee to the fixed rate for monitoring reports. A licensee could only obtain a licence to perform searches if they chose the fixed rate and not the variable rate for monitoring reports. However in the course of the hearing the NLA shifted their position. Thus although the search fee proposed is a fixed rate, the NLA will be content if the user wants to pay the variable rate for monitoring reports. At first sight that seemed to be a sensible position for the NLA to adopt. Superficially there was no necessary connection between paying a fixed rate for searching and paying a fixed rate rather than a variable rate for monitoring reports. We will return to this point below.
193. Thus looking at the search in isolation, the NLA's essential reasoning is that the fee for search access alone is a single entire fixed rate fee. We have already considered the effect of the fixed fee rates, particularly in later years. They would produce very high fee levels indeed.

#### *9.1 Ad hoc search - comparables*

194. What are the relevant comparators in relation to ad hoc searching? The NLA relied on the text aggregators. Text aggregators provide online searchable databases of material including newspaper material. Although ad hoc searching was not a service the PCAs require, from the NLA's point of view ad hoc searching has the potential to eat into the text aggregator's market. That is the NLA's justification for the search fee.
195. The text aggregators are not licensed by the NLA. Mr Hughes produced in evidence a letter to him from Richard Ulyett of Factiva (one of the text aggregators) dated 16<sup>th</sup> March 2010. The letter was written in response to a request from Mr Hughes. We presume the point of the request was in order to present information to this Tribunal. Factiva's position is that their policy is to take licences from all content "partners" including UK newspapers. All the content they host is licensed. Customers pay for access and royalties are paid by Factiva to its licensors based on usage and the total revenue. User fees vary. Individual "pay as you go" customers are charged \$2.95 per article. Factiva also has large accounts worth several million dollars per year. Factiva regards Meltwater as a competitor and believes it would be a competitive advantage for Meltwater if it did not have to pay for the content available through its services.

That is so both in terms of the royalties paid for content and the overhead required to have a licensing team. Mr Hughes expressed the view that content owners receive a share of the text aggregator's revenue "often 25 and 40% of the value attributed by the aggregator to the use of that content".

196. It seems to us that the evidence about text aggregators, both in terms of the detail of what they do and how they work, and in relation to financial matters and fees, is not sufficiently cogent for us to place any weight on them as a relevant comparable. In any event we are not convinced they are directly comparable in that although the searching works in a similar way, the circumstances are different. We believe a user of a text aggregator service is much more likely to be actively seeking the underlying article, in order to actually read the article concerned, than a user of a search service provided as part of a media monitoring service. On that basis a user of Meltwater's service, who was trying to use it as if it was a text aggregator's service, is very likely to "click through" to the newspaper's site. We know from the click through rates that that is not how most users use Meltwater.
197. It seems to us that the crucial comparator in relation to the search fee is Google. Google obviously provide a general ad hoc search facility and Google News provides one specific to news websites. In summary:
- i) When a user performs such an ad hoc search on Google News they are presented with snippets. Subject to caching the Google News ad hoc search is just like the Meltwater ad hoc search.
  - ii) Just like Meltwater, the ad hoc search facility is provided alongside a facility for sending monitoring reports (Google Alerts).
  - iii) Numerous ad hoc searches using Google News are being carried out by business people and for commercial purposes.
  - iv) We believe that one of the reasons Google is a competitor of Meltwater's is precisely because of business use of the ad hoc search facility in Google News.
198. A further set of comparators which we believe are relevant to ad hoc searching – although the evidence is thin – are the contracts entered into by Meltwater and other newspapers to access their sites. These are mentioned above. As far as we can tell the fixed fee charged includes the right to provide monitoring reports and also ad hoc searching. No distinction is drawn.

#### *9.2 What should the rate for ad hoc searching be?*

199. Bearing all this in mind we have decided that there should be a fee for ad hoc searching. It should not be compulsory. In other words an end user who does not want an ad hoc search service should not have to pay the fee.
200. In the fixed rate regime it should be 15% of the fixed rate fee for an existing user of the same kind as the user in question. The rate should be fixed because as a practical matter that is the only fair thing to do. It should scale with the number of end users to some extent just as the fixed fee does and, for similar reasons, scale with the size of the user company. However given that an *ad hoc* search facility is available free to

business users from Google News and is at least tacitly licensed by the newspapers, we believe it would be unreasonable discrimination between those business users and the customers of Meltwater to charge a substantially higher rate.

201. We do not regard the ad hoc search service offered by Meltwater as something which can be regarded as separable from the alerts service in the way the NLA contend. The fact that it is not provided by PCAs is a reflection of the differences which exist between the PCA and PWA services.
202. An important corollary of the link between the alerts service and the search fee is that we regard the 15% fee for ad hoc searching as ancillary to a full monitoring report service. A potential problem we have in mind is a sham arrangement in which a user wants the ad hoc search only and so adopts the variable rate, receives essentially no monitoring reports and so obtains the ad hoc search facility for too little.
203. The NLA has indicated that they are prepared to make the fixed ad hoc search fee available to users on the variable rate. In saying that the NLA no doubt had in mind the fixed rate with its very high future rates. In our judgment the right rate for ad hoc searching for a user on the variable tariff is still a fixed rate but it is not 15% of the fixed rate tariff. It should be 80% of the existing users' fixed rate tariff we have set.
204. Thus the customer will have a choice, take the fixed rate tariff for the report service and, if they wish, pay a modest uplift for ad hoc searching or take the variable rate for the report service and, if they wish, pay a substantial fixed rate tariff for the ad hoc search facility. This will make no difference to PCAs since they do not offer ad hoc searches. For Meltwater's customers it may mean more will opt for the fixed rate but Meltwater regarded that as likely anyway. This rate also ensures that the WDL/WEUL scheme is structured so that the focus is on media monitoring report services with ad hoc searching as an ancillary service.

#### *10. Client copying fee / surcharge*

205. The WEUL contains special terms which apply only if the licensee is a public relations consultancy or a trade or professional association. The terms are clauses 7.1 to 7.3. Clause 7.2 provides that the licensee may, on terms, provide media monitoring material to its clients or members as the case may be (clients of a PR agency and members of a trade association). For the purposes of this decision we will refer only to PR agencies although the clause is more general. It does not distinguish between them and trade or professional associations.
206. These clauses are concerned with a situation such as the following. A PWA like Meltwater has entered the WDL and the end user is a PR agency such as a member of the PRCA. The end user enters the WEUL and receives a media monitoring service from Meltwater. However that end user PR agency then wants to supply media monitoring material (i.e. alerts) on to its own clients. The terms required by section 7 require the PR agency to pay applicable fees and provide reports to the NLA. The issue is about fees. The fees applicable to a PR agency as an end user are the same as any other end user signing the WEUL save that there is a further fee applicable. The NLA call it a client copying fee. The PRCA and Meltwater call it a surcharge. The fee is charged per email address to whom the PR Agency sends the materials. There are two scales – one for print and web content and one for web content alone. Based

on the NLA's January 2010 price list, for web content only the fee per email address is £145 as a basic fee for national newspapers and rises in stages by (very) roughly £2.00 per regional title included up to £1,248 for all regional titles. For web and print content together the corresponding fees run from a £159.50 basic fee to £1,373 for all regional titles.

207. Meltwater says these fees are unreasonably high. Mr Glittenberg contended in his witness statement (paragraph 65) that if each of Meltwater's end users wanted to forward the media monitoring materials to one email address it would add £323,350 to the sum due to the NLA. However that sum (£145 fee x 2230 users) assumes all of Meltwater's end users are PR agencies or trade associations. They are plainly not. Elsewhere Meltwater made the point that only a tiny proportion of its customers are PRCA members.
208. The NLA say that the fee has its origin in the existing NLA licences. There is an NLA PRC Licence which has the very same fees in it. It is widely taken up. Of 1,058 licensees, 830 forward material to their clients and of these 595 pay additionally for some regional content. We take it this means that the remainder (830-595 = 235) pay the appropriate basic forwarding fee for national newspapers. The NLA argues that PR agencies occupy an intermediary role. They will be receiving monitoring reports in relation to their clients and may want to forward them directly to their clients with the further acts of copying that that would entail.
209. Mr Ellis for the PRCA explained that he was concerned about the impact on smaller PR agencies that do not already have a PCA licence (about 15% of his members). The point being made was that for the 85% of his members who do have an existing PCA licence, the extra fee associated with web content over and above what they are already paying is only £10 per email address. (That £10 was based on the basic fee for print being £138.50 and the basic fee for print and web content being £148.50. We understand these are the fees for 2011.)
210. We reject the case of Meltwater/PRCA on the surcharge/client copying fee. It seems to us to be reasonable. It seems to us that PR agencies are a special case in the context of media monitoring services as a whole and we regard the existence of the same client copying fee in the NLA's PRC licence as a relevant comparable. It is widely taken up. We are also struck by the fact that 85% of the members of the PRCA already have an NLA licence and for them the impact of this will be very small. It seems to us that this reflects the basic reasonableness of the client copying fee.
211. We are concerned about the potential impact on the smaller PR agencies but that impact can only arise because such an agency wishes to start forwarding content received from a media monitoring service on to its customers when it did not do so before. We do not regard it as a sufficient reason to change the surcharge/client copying fee.

#### *11. The headline only service*

212. After losing in the Court of Appeal, Meltwater proposed a headline only service which they contended made minimal use of the NLA's members' copyright material and should be licensed very differently. Meltwater argued that it was unreasonable to

require end users who received a headline only service to enter into individual licences with the NLA which imposed all of the obligations of the WEUL (Ground 1). From Meltwater's point of view that would be wholly disproportionate given that such an end user may only occasionally if ever receive a headline for which a licence is required. They contended that the WDL itself should include a term that allowed Meltwater to grant a bare licence to its customers to receive the service. End users would not have to enter into the WEUL and Meltwater would not have to tell them that they had to ("forced notification" Ground 2) nor disclose their customers' identities and usage to the NLA (Ground 7) since that information is confidential. As a fall back they suggested that given the minimal use of the copyright material in a headlines only service the tariff rates should be very low.

213. Grounds 2 and 7 only arise in relation to the headline only service because if a customer has to enter into the WEUL then it makes sense that that Meltwater must notify them of that fact (ground 2) and that they should be identified along with their usage (ground 7).
214. The NLA took a number of objections to this headline only argument. First, they point out it is hypothetical since Meltwater do not in fact offer a headline only service in the UK (there was an argument about Canada). Second, in contending that no end user licence was required because headlines only exceptionally infringed, the NLA submitted that Meltwater are really trying to reargue a point they lost in the court proceedings. Third, if Meltwater were seeking to make a quantitative point about the proportion of headlines for which copying of them alone without a text extract needed a licence, there was no material before the Tribunal on which we could decide such a question. Fourth they argued that there was no logical reason to distinguish between a headline only service and the headline plus text extract service the reference was primarily concerned with. The UKMMA made similar points and also contended that it was too late for Meltwater to raise the headline only service at all.
215. We will not reject the headline only service point as too late. Although it was raised at the last minute it seems to us that it can and should be dealt with on its merits. We are also not concerned with the fact that it is hypothetical. A putative licensee is entitled to come to the Tribunal in advance of actually implementing the activity for which they wish a licence. Clearly such a licensee needs to explain properly what it is they wish to do. Meltwater's proposed headline only service is tolerably clear.
216. The NLA contend that the point of the Court proceedings was to decide whether end users, who receive headlines and text extracts from Meltwater, needed a licence from the NLA. The upshot of the judgments in the High Court and the Court of Appeal is that they do. In reaching this conclusion both courts considered both the text extracts and headlines and decided copyright could subsist in them and/or they could be substantial parts of literary works. Proudman J dealt with headlines and text extracts. As regards headlines she held that that some headlines were indeed copyright works (paragraph 71). She decided that the end users needed a licence. The Court of Appeal essentially upheld the judgment of Proudman J that end user licences were needed. The Chancellor (Sir Andrew Morritt) gave the leading judgment in the Court of Appeal with which Jackson and Elias LJJ agreed. Paragraph 18 of the judgment records the submission of Meltwater/PRCA that in all but the most exceptional cases headlines are not capable of being literary works and that on the evidence before Proudman J none of the actual examples of headlines provided fell into that

exceptional category. That is one of the bases for Meltwater/PRCA's argument that there was no justification for the declaration that end users needed licences. The Court of Appeal clearly rejected that submission (see judgment paragraph 22) and paragraph 48 sums the matter up. The Chancellor there explained that it was not the case that every recipient of Meltwater News will inevitably infringe because there may be some cases in which neither the headline nor the "scrapings" (i.e. the text extract) constitute a copyright work or a substantial part of a copyright work. However, he said, there will not be many of those cases and therefore the correct form of the declaration to be made was that "most if not all" of the relevant class (actually members of the PRCA) require a licence or consent from the NLA or the publishers in order lawfully to receive and/or use Meltwater News. That decision took into account both headlines and text extracts. Meltwater has accepted that this reasoning means their customers must enter into the WEUL. It seems to us that the NLA are right that in arguing that their customers should not enter into the WEUL when they receive a headline only service Meltwater are indeed trying to reargue a point they have lost in the High Court and the Court of Appeal. The logic of the judgments applies to the headline only service as well.

217. A further aspect of the decisions of Proudman J and the Court of Appeal related to the question of what happens (in legal terms) when an end user clicks on a link sent to them by Meltwater in order to visit the newspaper publisher's website. Proudman J held at paragraph 103 that in principle copying by an end user without a licence through a direct link is more likely than not to infringe copyright. In doing so she was rejecting an argument based on an implied licence to copy articles on websites (see paragraph 103) and was also basing herself on her finding in paragraph 95 that the terms and conditions of some publishers' websites stipulate that paid for media monitoring services and their customers require a licence to use the content and that all websites have a term that they cannot be used for commercial purposes without the publishers' consent. The relevance of this to the headline only service is that it is a reason why the end user of Meltwater News needs a licence from the NLA irrespective of whether Meltwater are providing only headlines or headlines plus snippets. The end user needs a licence to use the links provided to them by Meltwater.
218. In the Court of Appeal the issue was dealt with in paragraph 100 of the judgment of The Chancellor. The Court did not consider it necessary to enter into the controversy about terms and conditions and did not do so. As regards Proudman J's rejection of the implied licence argument, neither Mr Howe nor Mr Carr were able to draw our attention to any passage in the Court of Appeal in which that finding was doubted.
219. Accordingly the terms and conditions / lack of implied licence point is a separate reason why users of a headline only service need a licence from the NLA and provides separate support for the NLA's second point.
220. The NLA's third point relates to a lack of quantitative evidence. Meltwater has not sought to produce any quantitative evidence that the proportion of headlines which attract copyright (as independent works or substantial parts) is at any particular level and we are not prepared to make any such finding on the (non-existent) material before us. In the light of the declaration, even in the modified form as made by the Court of Appeal, end users of a headline only service from Meltwater should enter into the WEUL.

221. We agree with the NLA that there is no logical distinction between the headline only service and the headline plus text extract service, on the arguments and evidence before us. End users of a headline only service should enter into the WEUL just like end users of the normal Meltwater News service of headlines plus extracts and should be subject to the same tariff rates. The reason for this is that a point which we have decided in Meltwater's favour on the issue of the appropriate rate for the normal Meltwater News service (inc. search fee), operates against setting a different rate for a headlines only service.
222. In the relevant market the economics of what Meltwater can charge for its services, bearing in mind the presence of other online media monitoring services like Google News, is a key factor when deciding what the tariff should be. A concern with the quantity of copyright content being used is a less important factor. That is because in a PWA type service (as with Google) not all snippets are equally significant or have equal value. This is very different from a PCA's service. We have included a fixed rate in the tariff for the alerts service (and ad hoc search) and such a rate is necessarily independent of the numbers of links being sent (save that more users will mean more copies of links). The level of the fixed fee which we have arrived at above is not equivalent to a fee calculated by reference to the actual number of links an alert and ad hoc link service may actually produce. What the NLA might call very heavy usage of copyright content does not demand a higher fee in this market. This reasoning has served to reduce the level of the fixed fee for the alerts service relative to the sums sought by the NLA. When it is applied to a headlines only service, the logic works the other way round. The fact that less copyright material might be being copied in a headline only service as compared to a headlines plus extract service is not the key issue when it comes to setting the rate. The rate is a rate to give the copyright owners a fair share of the revenue generated by this service, which is indeed based on their copyright work but does not scale directly with the volume of copyright "usage".
223. Accordingly our decision in relation to Meltwater's headline only service is that we reject the argument that requiring end user licensing under the WEUL, and at the same rates as the WEUL, is unreasonable. If Meltwater want to offer a headline only service to their end users they are free to do so but the service must be licensed in the same way as the headline plus text extract service. Thus we reject Grounds 1, 2 and 7.

#### *12. Other, non-financial issues*

224. There are various non-financial issues which fall to be decided on this reference. A number which were live at one stage have been agreed. The issues we have to decide are:
- i) The requirement to delete the index and limit search access
  - ii) Suspension rights
  - iii) Audit rights
  - iv) Additional publisher requirements (robot.txt)
  - v) The scope of territorial restrictions

225. We will address them in turn.

*12.1 The requirement to delete the index and limit search access (Grounds 8 and 11)*

226. Clause 3.6.1 of the WDL requires the licensee (in this case Meltwater) to delete their index (insofar as it includes NLA publishers' content) after 10 years and Part A of Service Schedule 4 of the WDL requires licensees to limit search access to their index to 100 days. In other words content more than 100 days old is not to be included in a search.
227. The NLA submit these terms are reasonable and Meltwater do not agree. As regards deletion Ms Irlam pointed out that similar requirements to delete "publisher metadata" after 10 years are part of the PCA's Database Licence and eClips International licence. As regards search access beyond 100 days, the NLA's position was that it may be possible to agree further search access but a further fee would be required.
228. The UKMMA makes no submission at all about deletion and as to limiting search access but simply submits that PCAs' customers should be licensed on the same terms. (That will happen since the terms of the WDL/WEUL will not be different as between PCAs and Meltwater.)
229. Meltwater say these terms are unreasonable. They contend that their ad hoc searching which is offered to their clients should not be restricted in this way. Moreover these restrictions will interfere with the statistical services they offer their clients.
230. We recognise that these two points are important but they can still be dealt with fairly shortly. We do not find the reference to the PCAs' terms to be productive in this context because PCAs do not have the right to offer ad hoc searches to their clients at all. We are not aware that the PCAs offer services which would be hampered by these provisions. Meltwater does offer services which would be impaired by these restrictions and so does Google News. The correct comparable in this context is Google News. Google News is not subject to either restriction. We refuse to include these restrictions in the WDL.

*12.2 Suspension rights (Ground 5)*

231. Both licences have clauses which allow the NLA to suspend the licensee's rights if the NLA has reason to believe that the licensee is in breach. They are:

*Clause 4.1 of the WEUL:*

The NLA may terminate or suspend the Licensee's rights under these Terms if the NLA has reason to believe that the Licensee has materially breached these Terms or the terms of any other agreement with the NLA (or with a publisher of an NLA Publisher Website) or the Licensee, any Permitted User or any of the Licensee's employees or agents are using any Articles in material breach of this Agreement. The Licensee confirms that the NLA will not be liable to the Licensee or any third party as a result of such termination or suspension.

*Clause 4.4 of the WDL:*

If the NLA reasonably believes that the use by the Licensee of any Publisher Content constitutes a material breach of this agreement the NLA may suspend the rights granted under this agreement on giving 24 hours notice (which for the avoidance of doubt shall be during normal business hours) to the licensee detailing the material breach and, where relevant, block access by the Licensee to any such Publisher Content (this being without prejudice to any other legal rights which the NLA may have). As provided in clause 8.2 the Licensee shall have 28 days from receipt of the notice from the NLA in which to remedy the material breach otherwise the NLA shall be entitled to terminate this agreement.

232. Meltwater's objection is not to the idea of provisions for termination on breach (with appropriate safeguards). They are in clause 8 of the WDL and clause 5 of the WEUL. The objection is that clause 4.4 provides for the right to suspend the WDL on 24 hours' notice on the basis of a reasonable belief of a breach and clause 4.1 allows the NLA to terminate the WEUL altogether on the same basis. Indeed the condition which may trigger clause 4.1 of the WEUL is wider still in referring to other agreements.
233. Meltwater contends these clauses are oppressive, unnecessary and remove the necessity to establish that there has been a breach. It contends that clause 4.4 is analogous to a form of interim injunction pending resolution of a dispute but may be contrasted with the protection a licensee would have in court proceedings if an interim remedy was sought there. In such a case the court would require a cross-undertaking in damages before granting such an injunction.
234. The NLA maintains the clauses are reasonable and necessary to ensure that the NLA can protect its members' copyright content. There is a similar clause in the NLA's Database Licence. The UKMMA supports the NLA's position.
235. Were it not for the fact that a similar clause is in the freely negotiated NLA Database Licence and that the UKMMA supports these clauses, we would find it hard to believe that a willing licensee would ever accept clauses of this kind and we would require both clauses to be deleted. However despite the existence of similar freely negotiated clauses, we believe that as drafted both clauses are indeed unreasonable. We will require the following:
  - i) First, the idea that one could terminate the WEUL on suspicion is not reasonable. A suspicion of a material breach can only support a suspension of the licence. Termination should be removed from clause 4.1.
  - ii) Second, the final sentence of clause 4.1 (excluding liability) is not reasonable. There is no reason the Licensor should have a form of blank cheque in the exercise of any suspension rights.
  - iii) Third, the suspension must be subject to a notice period and that period must be sufficient to allow the licensee to take remedial action. The period must be

more than 24 hours. We note that the relevant clause in the Database Licence (15.1) provides that remedial action must be taken within 7 days although it then also provides that the NLA may require a shorter timescale in its discretion if it reasonably believes a shorter timescale is required. We will require a period of 7 days. That will give the licensee sufficient time to react. We do not see why a shorter period (even in the NLA's discretion) would be reasonable.

### *12.3 Audit rights (Ground 6)*

236. There are two issues arising here. First, clause 4.6 of the WDL, which gives the NLA a right to audit on 24 hours' notice where it has a reasonable suspicion the licensee is in breach. Meltwater say this period is unreasonably short. The NLA say it is reasonable and is an important part of effective policing of the scheme. The UKMMA supports the NLA. The fear seems to be that the licensee might destroy documents. We agree that the licensor should have the right to require an audit on short notice but it seems to us 24 hours is too short a notice period. We will require 3 working days.
237. The second issue is the cost of what are in effect (but not necessarily) annual audits. Clause 5.5 of the WDL requires the licensee to keep proper records and to permit the NLA's independent auditors to carry out an audit no more than once a year. The Licensee is responsible for the cost of the audit. Meltwater argue that to require a licensee to pay for an audit even when he has complied with the licence is not reasonable and we can see that one could craft a clause in which the liability for audit fees depends on whether the audit shows that the licensee returns are accurate or not. Such clauses are used in many licence agreements. The NLA have offered to cap the fee to be paid at £2,500, which is substantially less than the likely actual cost and the UKMMA supports the position of the NLA. There are similar terms in the PCA Licence. It seems to us that an audit fee of no more than £2,500 has the virtue of simplicity. We find that it is reasonable in the circumstances.

### *12.4 Additional publisher requirements (Ground 12) (robot.txt)*

238. Appendix 2 to the WDL consists of a schedule of "Technical Requirements and Protocols" which the licensee accepts under the agreement. The contentious element of these requirements from Meltwater's point of view is that they allow the NLA's members to impose additional limits on Meltwater's use of the material published on the websites. Appendix 2 refers to the so called robot exclusion standard or robot.txt convention and to ACAP. These are technical protocols that can be used to prevent search engines from indexing a website. In a similar vein, Appendix 1 to the WDL excludes from the licence "material which is marked as being rights restricted (through ACAP or other methods)". The appendices are referred to in various clauses in the WDL.
239. Meltwater submit that these appendices allow any publisher to impede access to the content licensed under the WDL/WEUL at its discretion provided it treats all licensees the same. The NLA explains that the intent behind this is that it should apply in very limited circumstances such as when the content is libellous. However Meltwater contend that as drafted the clauses permit the publishers to apply these limitations whenever they want. Mr Carr put this to Ms Irlam in cross-examination:

“Q. If the Daily Mail wanted to exclude its entire sports section from the scope of the WDL or indeed the WEUL, appendix one allows them to do so, correct?”

A. It could do so yes. Again, it is the publisher’s content and it is for the publisher to elect how it wants its content to be licensed.

Q. So, because they are the rights holders, they can do whatever they want?

A. It is their content to license as they wish.”

240. While it is undeniable, as Ms Irlam pointed out, that the content is the publishers’ content and, at a certain level, it is for the publisher to elect how it wants its content to be licensed, it seems to us that that is not a sufficient reason for a licence like this one to give the licensor the right to remove licensed content from the scope of the licence in its discretion. Libel is a different matter. However the licence scheme as a whole and the tariff rates are based on the proposition that the licence is a licence to carry out media monitoring services on the newspapers’ websites. The example given by Mr Carr in cross-examination is a good one. It would be absurd if the licensors had the right to simply turn off access to all the sports coverage on their websites.
241. Part of the background to this aspect of the dispute is that one publisher – Mail Online – has applied the robot.txt exclusion to its website in order to try to prevent Meltwater from accessing (or “scraping”) its content. At a technical level the robot.txt exclusion does not actually prevent access, it amounts to a request to robots (i.e. Meltwater’s search programs) not to access the site. Meltwater chose to ignore Mail Online’s robot.txt exclusion and continues to access the site. Meltwater complains that this shows how the publishers will use the power given to them by the Appendices. The NLA retorts that at the moment Meltwater has refused to sign the WDL albeit it has undertaken that it will do so at the end of this reference. It seems to us that this robot.txt episode is an example of a wider problem underlying this reference – namely the confrontational attitude of Meltwater and to a lesser extent at least some of the NLA publishers.
242. We do not accept that the robot.txt exclusion and related technical measures should be removed from the WDL as a whole. It seems to us that provided it can be drafted reasonably, there is a role for these exclusions in this licence. We also note that Mr Glittenberg’s evidence includes copies of licences Meltwater has entered into with other online newspaper publishers. One of them (at F/p3546) includes an agreement which requires Meltwater to warrant that it observes the Robots Exclusion Protocol and to agree not to index certain areas of the website which the publisher may from time to time direct.
243. In order to meet Meltwater’s concerns (as they saw it) the NLA proposed modifications to Appendix 2 to make it clear that any technical requirements must be consistent with the rights granted under the WDL. They contend that that should be the end of the matter as far as Appendix 2 is concerned. The wording proposed by the NLA is intended to qualify the publishers’ right to impose technical requirements. The wording provides that the requirements may be imposed “save to the extent that it

would be inconsistent with the rights and obligations of the Licensee under this agreement”. It seemed to us that the sentiment behind this proposal is the right one but we were at one stage concerned that the wording as proposed did not go far enough in that it did not refer to the obligations of the licensor. However on reflection we have decided that the reference to the rights of the licensees is a sufficient safeguard. One of the rights of the licensee under the agreement is to access the newspapers’ websites. The clause is intended to allow the publisher to prevent access for example to content which has turned out to be libellous. On the other hand we understand it to be common ground that the clause does not permit the publishers to arbitrarily reduce access to content available on their websites without such a reduction having a bearing on the overall question of the size of the repertoire licensed. The parties had a dispute in the past about clauses dealing with the size of the licensed repertoire but had agreed on clauses to deal with it. Appendix 1 and 2 must not and in our judgment do not give the publisher a right to avoid that issue.

244. In summary, we find that the WDL in the form proposed by the NLA, with the qualifications expressed by reference to the licensee’s rights and obligations, are reasonable.

#### *12.5 The scope of territorial restrictions*

245. The territorial scope of the scheme gives rise to a dispute between the parties. The NLA’s position is that the licence granted by the scheme is not limited by territory, it is worldwide licence. In other words licensees have the permission of the NLA (and therefore the relevant newspapers) to do the acts set out in the licence anywhere in the world. That means that the licence is not simply a UK copyright licence. Copyright is a territorial right and so, for example, someone making a copy in Canada of an English newspaper does not ordinarily infringe UK copyright. Whether they infringe the UK newspaper’s Canadian copyright will be a matter for Canadian law. Although copyright laws across the world are harmonised to a considerable extent worldwide there is no question that they are the same. They are clearly not the same.
246. The point of the NLA’s position is that the licence means that the licensee has the newspaper’s permission throughout the world. This is on the basis that it means that whatever local copyright laws are in a given country, armed with such a permission the licensee can be sure that it is not infringing whatever rights the UK newspapers have in that country.
247. The quid pro quo for this worldwide permission is that all the provisions of the WDL and WEUL apply as well. So that means the foreign customers of Meltwater will need to enter into the WEUL if they are to receive links to UK newspapers from Meltwater and that Meltwater will not be permitted to supply such links unless the customers have signed the WEUL. Accordingly the fees to be paid by foreign users of Meltwater’s service will be the same as provided for generally and the reporting requirements will apply as well.
248. Meltwater submits this is unreasonable. It contends that the NLA justify the need for users to enter into the WEUL based on UK copyright law. It by no means follows that foreign end users need the newspapers’ permission to receive links to UK newspapers at all. Meltwater points specifically to the USA and Hungary and contend that in those countries no permission would be needed for end users. It contends that

the effect of the NLA's position is to give the licence unwarranted extra-territorial scope. Meltwater argues that the Tribunal should only permit the imposition of such conditions on (say) US end users if it is satisfied that they are reasonable, and they could not be reasonable if they go beyond US law itself.

249. The NLA reply that foreign end users are making use of NLA content in just the same way as UK end users. No doubt they may often have a lower level of interest in it but if so they could ask Meltwater not to monitor UK content at all or else, if the volume of NLA content is small, the variable rate fee will be correspondingly low (although the ad hoc search question complicates the analysis). The NLA submit that if a distinction were drawn between UK and non-UK end users, it would be a recipe for avoidance. End users could contract with Meltwater through an overseas subsidiary and avoid fees. They submit that it is overwhelmingly likely that foreign end users will be committing acts which require a licence and that is sufficient for it to be reasonable for the WDL to impose a requirement under the WDL that foreign end users be licensed under the WEUL.
250. The NLA also point out that this dispute has emerged at the last minute. It arose first in relation to the headline only service but now applies generally. The NLA contends there is no proper evidential basis for the submission that foreign end users may or will not need the permission given.
251. We have found this territorial dispute to be a difficult one to resolve. Neither party suggested that it fell outside our jurisdiction. We can see that the fact that the jurisdiction of the Copyright Tribunal is a UK jurisdiction under the 1988 Act does not mean that this dispute falls outside our jurisdiction. The licensing scheme is properly before us and we are required to rule on it. Nationally negotiated licences often have clauses which are extra-territorial in effect in various ways and we need to consider them in this case. However the basis on which we are doing so is that they are part of a licence of UK copyright. The members of the Tribunal sit as persons either with experience in UK copyright law or with lay, UK based, experience. We do not purport to have relevant experience outside the UK.
252. On the material before us, we are not in a position to rule on US copyright law or any other foreign copyright law even if such a ruling was required. On the material available it seems to us that we can say this much. It is clear that it is not clear. We believe the correct position as things stand before us is that a willing licensee in the position of Meltwater and a willing licensor in the position of the NLA would look at the matter in the following way. Given that end users in the UK need a licence under UK copyright, there are likely to be some countries in which local end users will need the newspaper's permission under the newspaper's local copyright to receive and use Meltwater's service when it includes UK content. Equally however there may well be other countries in which local end users do not need the newspaper's permission under the newspaper's local copyright to receive and use Meltwater's service when it includes UK content.
253. It seems to us in the circumstances before us that a willing licensor would see the force in a willing licensee's desire not to have the WEUL imposed on its customers in a given country if they did not need it. Equally it seems to us that a willing licensee would see the force in a willing licensor's desire not to over-complicate the licensing provisions. These competing factors are a reason why some businessmen agree to

licences expressed simply as worldwide licences with a blanket royalty to be paid whereas in other cases licences are broken down by territory such that a royalty is only to be paid for acts in territories in which the licensor actually has relevant rights. We also believe a willing licensee would accept as legitimate a willing licensor's wish to counter avoidance.

254. We note that the other licences entered into between Meltwater and other newspapers sites are not territorially limited and have no equivalent to the WEUL. They do not contain a requirement for end users of the service to take out a separate licence.
255. It was not suggested that the existing PCA licences had a bearing on this issue and the UKMMA made no submissions on the point.
256. We have decided that it would not be reasonable to treat foreign users of the service licensed by the WDL in the same way as UK end users. Willing parties negotiating the WDL would know that it cannot be assumed that the position in the UK is the same elsewhere and they would also know that in a foreign country, UK newspaper content will not necessarily have the same value as it has from the point of view of UK end users.
257. We have decided that terms on the following basis would be reasonable:
  - i) The WEUL is and will remain a worldwide licence. The permission given to licensees under the WEUL is not limited by territory. A licensee who enters the WEUL pays the royalty set in the WEUL regardless of the territory in which the acts take place.
  - ii) The NLA's concern about avoidance is legitimate. The NLA are entitled to know the identities of any end user receiving NLA content from a service provider subject to the WDL, wherever that end user is situated. Thus if the service provider subject to the WDL (whether directly or via another group company) wishes to supply NLA content to a foreign end user, that foreign end user must be notified to the NLA and the notification must be kept up to date. The licensee's records (which it is obliged to keep anyway) should include records relating to the foreign end users of the service insofar as it includes NLA content.
  - iii) A service provider entering the WDL will have a choice either to take a worldwide permission and thereby require all its users receiving NLA content to enter the WEUL or to take UK permission only and thereby only require its UK users to enter the WEUL. It is a matter for the service provider entering the WDL to choose. That choice may be reviewed after a reasonable period. We will allow the parties to make submissions on the length of that period.
  - iv) As we have said, if the service provider chooses worldwide permission then all its end users must enter the WEUL wherever they are situated if they are to receive NLA licensed content. The scheme will operate globally because the licensor is willing to do so and the licensee is willing to do so.
  - v) If a service provider chooses the UK only option, then the permission given under the WDL is limited to acts restricted by UK copyright only and does not

extend abroad. The obligation to keep records referred to above will still apply to the licensee under the WDL. UK end users will be required to enter the WEUL. The WDL will not grant permission under foreign copyrights to the service provider but will not itself impose a restraint on the supply of services to non-UK end users. Non UK end users will not receive a licence under non-UK copyrights either.

- vi) Even if a service provider has taken the UK only option, foreign end users of services supplied by a signatory to the WDL will always be free to enter the WEUL if they wish. If they do so then they behave just in the same way as a UK end user. They will obtain the NLA licence on a worldwide basis. They will pay whatever the appropriate fees will be. Their receipt of NLA content from the service provider will be licensed.
258. Part of the point of these requirements is to avoid the automatic imposition of the WEUL on a party who may not need it and does not want it. The WEUL is not unreasonable in the UK context but it is not trivial. If the PWA wishes to operate on the basis that all its foreign customers have to sign the WEUL, they are able to do so. On that basis all its customers have permission worldwide. If the PWA wishes to operate on the footing that it only has permission under UK copyright then it can do so but that means its foreign end users have no automatic permission applicable in their home country in relation to the UK content either. If permission is in fact needed in that home country then steps can be taken to sort that out. A foreign end user of NLA content obtained from a service provider under the WDL would be free to enter the WEUL if they wished. For a given state the NLA may be able to persuade the end users to enter the WEUL. On the other hand it would not be reasonable to impose on a foreign end user a licence settled in the UK. It may or may not be reasonable from the local foreign point of view. If it is not, the state may have its own mechanisms for regulating the reasonableness of what would be a licence under local copyright.
259. The parties should liaise to see if they can agree terms which put these requirements into effect. If they cannot agree we will resolve the matter.

### 13. Conclusions

260. We have rejected the submission that the fees to be charged should be purely nominal in nature. We also find that the level of future fixed fees proposed by the NLA would be much too high. In summary:

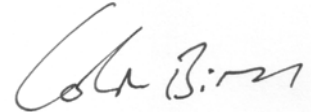
- i) The variable rate tariff will be essentially as proposed by the NLA for 2010, 2011 and 2012 although we will hear the parties on the precise date of the increase in the variable rate reference point from 9.6 to 9.9p to bring it into line with the fixed tariffs.
- ii) The fixed rate tariff for 2010 and 2011 will be as proposed by the NLA.
- iii) For 2012 the fixed rate tariff table for new licensees will start at £150 for a business with 1 user and 1-5 employees. The figure proposed by the NLA was £258. We propose the table will scale in a similar way to the NLA's proposed tariff table but will not rise as steeply as proposed by the NLA as the numbers of employees increase. We will permit parties to make submissions about the relative weighting in the table since this was not discussed at the hearing.
- iv) The fixed tariff for existing licensees will be two thirds (67%) of the tariff for new licensees.
- v) For 2013 and 2014 the only increases we will permit to the fixed rate and to the variable rate reference point against which the NLA's tapered discount is to be applied, are inflation based.
- vi) For ad hoc searching the fee for a licensee taking the fixed rate will be 15% of the appropriate fixed tariff table entry for existing licensees. For a licensee taking the variable rate the ad hoc search fee will be 80% of the appropriate fixed tariff table entry for existing licensees.
- vii) We accept the client copying fee for PR agencies proposed by the NLA.
- viii) We reject Meltwater's case that the headline only service should be treated any differently under the WDL/WEUL. The full provisions will apply.
- ix) We reject the NLA's case that the index should be deleted after a period of time or that there should be a time limit on search access.
- x) We have decided upon terms we regard as reasonable concerning suspension, audit and additional publisher requirements.
- xi) On territoriality, in essence we will give the service provider a choice whether to take a licence limited to UK copyright or a worldwide licence under the WDL. The WEUL will be a worldwide licence. Even if the service provider adopts a UK copyright only licence, the end user may choose to take the WEUL. In any event, whichever option the service provider takes under the WDL, the service provider will report the identities and usage of its users of NLA content to the NLA on a worldwide basis.

261. Our conclusions will require a further round of drafting of the WDL and WEUL and to that extent represent an interim decision. For this reason we will not annex the current drafts of the WDL and WEUL to this decision. If the parties can agree a form for the WDL and WEUL in the light of this decision we will endorse it in a final decision or else we will resolve any further disputes which arise. The final decision will annex the confirmed licences. We anticipate that a period of two months should be sufficient for the parties to either reach agreement or identify that they do not agree.
262. We wish to conclude by thanking counsel for the clear way in which they expressed their client's arguments and for the work done behind the scenes by the solicitors acting in this case to bring this matter to a trial in a well organised and smooth fashion.

The Copyright Tribunal  
The UK Intellectual Property Office  
Newport NP10 8QQ

Tribiwnlys Hawlfriant  
Swyddfa Eiddo Deallusol y DG  
Casnewydd NP10 8QQ

14<sup>th</sup> February 2012



For the Tribunal

## Annex 1 – Contracts between Meltwater and other web publishers

*This annex is confidential to the parties to the proceedings and is not attached to the Decision as published.*

Annex 2 - fixed rate tariffs

Table 1a – The NLA Basic Paper Licence Tariff

(from which Tables 1a and 1c tariffs below are derived at 10% and 15% respectively)

[from E3.2/75/p2522]

		Number of Permitted Users												
		1 user	2 to 3	4 to 5	6 to 8	9 to 15	16 to 20	21 to 30	31 to 50	51 to 100	101 to 250	251 to 1000	1001 to 2500	2501 to 10000
Number of Employees	1 to 5	587	587	587										
	6 to 25	587	615	984	1,378	1,928	2,611	3,292						
	26 to 50	698	1,048	1,676	2,345	3,283	4,445	5,606	8,422					
	51 to 100	943	1,414	2,264	3,169	4,437	6,006	7,574	11,378	14,297				
	101 to 500	1,191	1,785	2,857	4,000	5,599	7,579	9,557	14,360	18,042	24,930	33,672		
	501 to 1000	1,435	2,153	3,444	4,822	6,752	9,140	11,525	17,315	21,757	30,064	40,604		
	1001 to 5000	1,682	2,524	4,038	5,653	7,914	10,713	13,509	20,296	25,502	35,240	47,596	67,204	99,267
	5001 to 10000	1,927	2,892	4,626	6,476	9,066	12,272	15,476	23,253	29,217	40,372	54,527	76,992	113,726
	10001 to 25000	2,174	3,262	5,219	7,306	10,229	13,847	17,461	26,234	32,963	45,547	61,519	86,864	128,306
	25001 to 50000	2,419	3,630	5,807	8,130	11,381	15,405	19,428	29,190	36,677	50,681	68,450	96,652	142,765
	50001 to 75000	2,667	4,001	6,401	8,960	12,544	16,980	21,413	32,171	40,423	55,857	75,442	106,523	157,345
	75001 to 125000	2,912	4,368	6,989	9,783	13,696	18,540	23,381	35,127	44,137	60,989	82,373	116,312	171,804
	125001 to 200000	3,157	4,735	7,576	10,607	14,850	20,101	25,349	38,084	47,852	66,123	89,307	126,101	186,263
	200000+	3,404	5,106	8,169	11,437	16,012	21,674	27,333	41,065	51,597	71,298	96,297	135,971	200,843

Table 1b – 2010 Fixed Rate Tariff (Existing NLA Licenses)

from [E3.2/75/p2551]

		Number of Permitted Users												
		1 user	2 to 3	4 to 5	6 to 8	9 to 15	16 to 20	21 to 30	31 to 50	51 to 100	101 to 250	251 to 1000	1001 to 2500	2501 to 10000
Number of Employees	1 to 5	59	59	59										
	6 to 25	59	62	98	138	193	261	329						
	26 to 50	70	105	168	235	328	445	561	842					
	51 to 100	94	141	226	317	444	601	757	1,138	1,430				
	101 to 500	119	179	286	400	560	758	956	1,436	1,804	2,493	3,367		
	501 to 1000	144	215	344	482	675	914	1,153	1,732	2,176	3,006	4,060		
	1001 to 5000	168	252	404	565	791	1,071	1,351	2,030	2,550	3,524	4,760	6,720	9,927
	5001 to 10000	193	289	463	648	907	1,227	1,548	2,325	2,922	4,037	5,453	7,699	11,373
	10001 to 25000	217	326	522	731	1,023	1,385	1,746	2,623	3,296	4,555	6,152	8,686	12,831
	25001 to 50000	242	363	581	813	1,138	1,541	1,943	2,919	3,668	5,068	6,845	9,665	14,277
	50001 to 75000	267	400	640	896	1,254	1,698	2,141	3,217	4,042	5,586	7,544	10,652	15,735
	75001 to 125000	291	437	699	978	1,370	1,854	2,338	3,513	4,414	6,099	8,237	11,631	17,180
	125001 to 200000	316	474	758	1,061	1,485	2,010	2,535	3,808	4,785	6,612	8,931	12,610	18,626
	200000+	340	511	817	1,144	1,601	2,167	2,733	4,107	5,160	7,130	9,630	13,597	20,084

Table 1c – 2010 Fixed Rate Tariff (New Licensees)

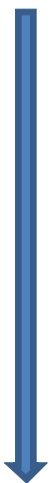
from [E3.2/75/p2552]

		Number of Permitted Users												
		1 user	2 to 3	4 to 5	6 to 8	9 to 15	16 to 20	21 to 30	31 to 50	51 to 100	101 to 250	251 to 1000	1001 to 2500	2501 to 10000
Number of Employees	1 to 5	88	88	88										
	6 to 25	88	92	148	207	289	392	494						
	26 to 50	105	157	251	352	492	667	841	1,263					
	51 to 100	141	212	340	475	666	901	1,136	1,707	2,145				
	101 to 500	179	268	429	600	840	1,137	1,434	2,154	2,706	3,740	5,051		
	501 to 1000	215	323	517	723	1,013	1,371	1,729	2,597	3,264	4,510	6,091		
	1001 to 5000	252	379	606	848	1,187	1,607	2,026	3,044	3,825	5,286	7,139	10,081	14,890
	5001 to 10000	289	434	694	971	1,360	1,841	2,321	3,488	4,383	6,056	8,179	11,549	17,059
	10001 to 25000	326	489	783	1,096	1,534	2,077	2,619	3,935	4,944	6,832	9,228	13,030	19,246
	25001 to 50000	363	545	871	1,220	1,707	2,311	2,914	4,379	5,502	7,602	10,268	14,498	21,415
	50001 to 75000	400	600	960	1,344	1,882	2,547	3,212	4,826	6,063	8,379	11,316	15,978	23,602
	75001 to 125000	437	655	1,048	1,467	2,054	2,781	3,507	5,269	6,621	9,148	12,356	17,447	25,771
	125001 to 200000	474	710	1,136	1,591	2,228	3,015	3,802	5,713	7,178	9,918	13,396	18,915	27,939
	200000+	511	766	1,225	1,716	2,402	3,251	4,100	6,160	7,740	10,695	14,445	20,396	30,126



Table 3a – Proposed Percentage Increase per Headcount Range

Number of Employees	1 user
	Start Price
1 to 5	
6 to 25	0%
26 to 50	5%
51 to 100	5%
101 to 500	5%
501 to 1000	5%
1001 to 5000	5%
5001 to 10000	5%
10001 to 25000	5%
25001 to 50000	5%
50001 to 75000	5%
75001 to 125000	5%
125001 to 200000	5%
200000+	5%



Increase starting price (1 user, 1-5 employees) by 5% as headcount range increases

Table 3b - Proposed Percentage Increase per Increase in End User Numbers

Number of Employees	Number of Permitted Users													
	1 user	2 to 3	4 to 5	6 to 8	9 to 15	16 to 20	21 to 30	31 to 50	51 to 100	101 to 250	251 to 1000	1001 to 2500	2501 to 10000	
1 to 5	Start Price	0%	0%											
6 to 25		5%	61%	40%	40%	36%	26%							
26 to 50		50%	60%	40%	40%	36%	26%	50%						
51 to 100		50%	60%	40%	40%	35%	26%	50%	26%					
101 to 500		50%	60%	40%	40%	35%	26%	50%	26%	38%	35%			
501 to 1000		50%	60%	40%	40%	35%	26%	50%	26%	38%	35%			
1001 to 5000		50%	60%	40%	40%	35%	26%	50%	26%	38%	35%	41%	48%	
5001 to 10000		50%	60%	40%	40%	35%	26%	50%	26%	38%	35%	41%	48%	
10001 to 25000		50%	60%	40%	40%	35%	26%	50%	26%	38%	35%	41%	48%	
25001 to 50000		50%	60%	40%	40%	35%	26%	50%	26%	38%	35%	41%	48%	
50001 to 75000		50%	60%	40%	40%	35%	26%	50%	26%	38%	35%	41%	48%	
75001 to 125000		50%	60%	40%	40%	35%	26%	50%	26%	38%	35%	41%	48%	
125001 to 200000		50%	60%	40%	40%	35%	26%	50%	26%	38%	35%	41%	48%	
200000+		50%	60%	40%	40%	35%	26%	50%	26%	38%	35%	41%	48%	



Increase starting price (1 user, 1-5 employees) by above percentages

Table 4a – Fixed Rate Tariff Table for 2012 (New NLA Licensees) (£)

		Number of Permitted Users												
		1 user	2 to 3	4 to 5	6 to 8	9 to 15	16 to 20	21 to 30	31 to 50	51 to 100	101 to 250	251 to 1000	1001 to 2500	2501 to 10000
Number of Employees	1 to 5	150	150	150										
	6 to 25	150	157	252	353	493	668	842						
	26 to 50	158	236	377	528	738	1,001	1,262	1,895					
	51 to 100	165	249	399	557	781	1,057	1,332	2,002	2,516				
	101 to 500	174	260	416	582	815	1,103	1,391	2,090	2,625	3,628	4,900		
	501 to 1000	182	274	438	613	859	1,163	1,466	2,202	2,768	3,825	5,165		
	1001 to 5000	191	288	460	644	902	1,221	1,539	2,313	2,906	4,016	5,423	7,658	11,312
	5001 to 10000	201	302	483	675	946	1,281	1,614	2,426	3,049	4,212	5,689	8,033	11,865
	10001 to 25000	211	317	507	710	993	1,345	1,696	2,548	3,201	4,423	5,975	8,436	12,461
	25001 to 50000	222	333	532	745	1,042	1,411	1,779	2,673	3,359	4,641	6,269	8,851	13,074
	50001 to 75000	233	349	558	782	1,095	1,482	1,869	2,808	3,527	4,874	6,583	9,295	13,730
	75001 to 125000	244	366	586	820	1,148	1,555	1,961	2,946	3,702	5,115	6,908	9,755	14,409
	125001 to 200000	257	384	615	861	1,206	1,632	2,058	3,092	3,885	5,368	7,251	10,238	15,122
	200000+	269	404	646	905	1,266	1,714	2,161	3,247	4,080	5,638	7,615	10,752	15,881

Fixed Rate Starting Price (1 user, 1-5 employees)

£150

Table 4b – Fixed Rate Tariff Table for 2012 (Existing NLA Licensees) (£)

		Number of Permitted Users												
		1 user	2 to 3	4 to 5	6 to 8	9 to 15	16 to 20	21 to 30	31 to 50	51 to 100	101 to 250	251 to 1000	1001 to 2500	2501 to 10000
Number of Employees	1 to 5	100	100	100										
	6 to 25	100	105	168	235	328	445	561						
	26 to 50	105	157	251	352	492	667	841	1,263					
	51 to 100	110	166	266	371	521	705	888	1,335	1,677				
	101 to 500	116	173	277	388	543	735	927	1,393	1,750	2,419	3,267		
	501 to 1000	122	183	292	409	573	775	977	1,468	1,845	2,550	3,444		
	1001 to 5000	128	192	307	429	601	814	1,026	1,542	1,937	2,677	3,616	5,106	7,541
	5001 to 10000	134	201	322	450	631	854	1,076	1,617	2,032	2,808	3,793	5,355	7,910
	10001 to 25000	141	211	338	473	662	896	1,130	1,698	2,134	2,949	3,983	5,624	8,307
	25001 to 50000	148	222	355	497	695	941	1,186	1,782	2,239	3,094	4,179	5,901	8,716
	50001 to 75000	155	233	372	521	730	988	1,246	1,872	2,351	3,250	4,389	6,197	9,154
	75001 to 125000	163	244	391	547	766	1,037	1,307	1,964	2,468	3,410	4,606	6,503	9,606
	125001 to 200000	171	256	410	574	804	1,088	1,372	2,061	2,590	3,579	4,834	6,825	10,081
	200000+	180	269	431	603	844	1,143	1,441	2,165	2,720	3,759	5,077	7,168	10,587

Fixed Rate Starting Price (1 user, 1-5 employees)

£100