

# **ADJUDICATION OF A COMPLAINT**

## UNDER THE FINANCIAL TIMES EDITORIAL CODE

Adjudicator:	Christina Michalos QC,
	Editorial Complaints Commissioner, Financial Times Limited
Complainant:	Dany H. Assaf
<b>Relevant Code Provisions:</b>	Article 7(2)

- This is the adjudication of an appeal by Dany H. Assaf under the Financial Times ('FT') Editorial Code of Practice. The appeal is against the decision of the Senior Editor for Quality & Accuracy which was communicated to Mr Assaf by email on 21st January 2022. On 29th April 2022, Mr Assaf indicated by email to me that he wished to appeal that decision.
- 2. The procedural rules which govern the appeal that I (as the independent Complaints Commissioner to the Financial Times) must follow are set out in the Editorial Complaints: Guidance on Policy & Process (hereafter GPP) which is available online <u>here</u>. The following are particularly relevant to this appeal:
  - 2.1. There is no duty on complainants to articulate their complaints in terms of the breach of a particular Clause of the FT Editorial Code of Practice. If it could reasonably be inferred (by the objective editor, standing in the shoes of the person receiving the complaint) that the facts if proven might reasonably amount to a breach of the FT Editorial Code of Practice, then that will be a complaint: §9 GPP.
  - 2.2. In relation to complaints other than those under Clause 1, the Commissioner may dismiss complaints solely on the basis that more than 3 months has elapsed since the alleged breach, and will ordinarily dismiss complaints under Clause 1 if more than 12 months has elapsed since first publication: §10 GPP.

## The Complaint & Appeal

- 3. The complainant is a lawyer with a specialism in competition law. He is a former editor of Antitrust Magazine, a publication of the American Bar Association. He has both published a book and contributed Op-eds to various national newspapers in Canada including the Globe and Mail, the Toronto Star and the National Post.
- 4. His complaint to the editorial team concerned (1) his submission of a piece for publication on 11<sup>th</sup> December 2020 concerning 'trustbusting' (ie. government dissolution of corporate trusts and monopolies under the United States antitrust laws) in relation to Facebook; and (2) the handling of a second submission which was due to be published January 2021, then delayed and subsequently not published as a consequence of the publication schedule altering due to the attack by rioters on the US Capitol on 6 January 2021.
- 5. The appeal is solely concerned with the first of these complaints; the second one not falling with in the FT Code in any event and having been dealt with by an apology. In short, Mr Assaf complains that after he submitted his piece for publication to the Financial Times (FT) on 11<sup>th</sup> December 2020, he was surprised to see published by the FT on 18 December 2020 (just a few days later) an article by William Magnuson ("the Author") titled *The modern day trustbusters have Facebook in their sights*. This article is available online at: <a href="https://www.ft.com/content/166fe7e1-df7f-4aff-9297-08fd486ede70">https://www.ft.com/content/166fe7e1-df7f-4aff-9297-08fd486ede70</a>
- 6. On receipt of Mr Assaf's appeal and reviewing the correspondence between him and the FT, it appeared to me that this was a complaint purely against the FT. Mr Assaf's complaint seemed to be a concern that after his article was submitted, the FT then took his article and his idea and in effect copied the idea, commissioned someone else to write it or suggested the idea to another in sufficient detail. It did not on the face of it appear to be an allegation against the second author of plagiarism or copyright infringement.
- 7. In order to be sure that I was approaching this appeal on the correct basis, I emailed Mr Assaf on 14<sup>th</sup> May 2021 asking him to clarify the basis of his appeal and to confirm that my understanding was correct. He replied to me also on the 14<sup>th</sup> May 2021, confirming that it was. I wish to emphasis therefore that at no time has there ever been any allegations made against the Author by Mr Assaf. This is a complaint only against the FT and the Author is, for want of a better term, an innocent bystander. The chronology of this matter makes this absolutely clear but it is important to state it in terms as even a suspicion of copyright infringement is a serious matter for any writer. There is no such suspicion here at all in this case and there is no allegation of copyright infringement made by Mr Assaf against the author. The complaint is solely against the FT.

## **Relevant Code Provisions**

8. I have inferred this is a complaint falling within Article 7(2) of the FT Code which states as follows:

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

provided. (In assessing whether any plagiarism has occurred, regard may be had to all the circumstances, including a person's state of mind; the extent of any apparent copying or derivation; and, the nature of any original, and subsequent, work. It is recognised that the facts and subject matter of current or historical events may be public-domain details that are legitimately available to be reported by different authors and news organisations in their own right. Principles of fairness and common sense should be applied.)

# Time of Complaint

- 9. Under r.10 of the GPP complaints may be dismissed on the basis that more than 3 months have elapsed since the breach complained of. The article that generated the complaint was published on 18th December 2020. Mr Assaf first raised the formal complaint by email to the Complaints Commissioner on 6th January 2022. This was about a year and a couple of weeks after the initial article was published.
- 10. I raised by email with Mr Assaf whether there were any reasons for the time taken. His response was essentially that he felt he was being "*strung along*" and that "*in light of what were obvious unfair circumstances, another article would be published, etc and in good faith extended* [the FT] *the benefit of the doubt.*"
- 11. It would be open to me to dismiss this complaint under r.10 of the GPP simply on the basis that it was out of time. However, I will nevertheless proceed to adjudicate on the merits of this claim because I can see why it is Mr Assaf had concerns about the chronology of events; I accept that he was extending the benefit of the doubt to the FT to wait (not least given the first submission was in 2018) and because I consider that it is in the interests of both Mr Assaf and the FT to have this resolved finally. In circumstances where the complaint is on the face of it a serious one of plagiarism, my view is that it would be unfair to both parties to leave the matter undetermined notwithstanding the delay here.
- 12. This decision to adjudicate on the merits notwithstanding the delay is limited to the facts of this complaint. It should not be taken as a precedent for a general disapplication of r.10 GPP in cases where there has been a delay in bringing a complaint within 3 months (or as applicable within 12 months if the complaint is one relating to accuracy). Complainants should expect complaints not brought promptly as required by r10 GPP to be dismissed unless there are exceptional circumstances or they are able to provide good reasons for the delay.

## Chronology

13. On 1<sup>st</sup> April 2018, Mr Assaf had emailed the editors of the FT submitting for consideration for publication an Op-Ed drawing a parallel between Facebook and the break-up of Standard Oil in 1911 following a decision of the US Supreme Court. Brooke Masters, then Comment & Analysis Editor of the FT, responded to the effect that the piece was essentially descriptive and the FT would be looking for strong and convincing argument about what might happen today. There followed some further email correspondence which concluded with an email

from Brook Masters saying that things had moved on and if it regained momentum, it could be revisited. No article by Mr Assaf was published.

- 14. On December 11, 2020 Mr Assaf emailed Brooke Masters replying to her last email to him of 12<sup>th</sup> May 2018. This followed the US Federal Trade Commission's move calling for a break-up of Facebook. Mr Assaf's email thus revived an email conversation that had last been active approximately 2 <sup>1</sup>/<sub>2</sub> years previously. It did not, word for word, formally state it was re-pitching the piece but attached an updated version to that email.
- 15. Unfortunately, Ms Masters did not open or see Mr Assaf's email of 11 December 2020.
- 16. Entirely separately, on 15 December 2020, the Author sent by email an unsolicited proposed article on the same subject (ie. the similarity between the then present position of Facebook and the break-up of Standard Oil) to Brooke Masters. The Author's email to Brook Masters read as follows:

"I am reaching out because [your colleague]... suggested that I send you an article I have just finished on Facebook's new antitrust suit. I am a law professor at Texas A&M, where I teach and write on corporations and technology, and I am working on a new book charting how corporations have shaped our world. One of the chapters focuses on Standard Oil, and as I read the FTC's lawsuit against Facebook, I was struck by how similar it all sounded to everything that Rockefeller did with Standard Oil-buying up competitors, squashing rivals, spying on other companies. The article argues that we can learn much about what might happen to Facebook by looking at what happened to Standard Oil-both about how effective these strategies can be, and also about what might cause them to fail in the end."

The Author is, as indicated, an associate professor at Texas A&M Law School. His primary research interests are business associations, mergers and acquisitions, international business transactions and international law. He attached to that email a draft of an article that was 1050 words titled *What Rockefeller and the Gilded Age Can Teach Us About Facebook*.

- 17. Following consultation with colleagues, Brooke Masters replied to the Author accepting the article subject to editing and finding a publication slot. On 16 December 2020, she emailed to say a slot had opened up but a senior editor had requested some changes. After a telephone conversation between Brooke and the Author, he refiled the article on 17 December 2020. There was some further editing and the final version of the article was published by the FT under the headline *The modern day trustbusters have Facebook in their sights* online on 20 December 2020.
- 18. On 20 December 2020, Mr Assaf emailed Brooke Masters to say the article was '*awfully similar to that I shared with you. Is there something I don't know*?'. Ms Masters replied the same day apologising to Mr Assaf. She stated that she had just found his updated piece in my inbox which she had missed indicating she was receiving 200 emails a day in lockdown. She said she remembered that the FT had a pitch a long time ago on a similar subject but did not realise that he had come back to them. She concluded by saying "I can see why you are frustrated and I'm sorry. My apologies".

- 19. The same day, on 20 December 2020, Mr Assaf replied stating "*apology accepted*. . . *I will look forward to another opportunity*." It appeared the matter had been resolved. However, there then followed a further submission from Mr Assaf as outlined in paragraph 4 above.
- 20. On 6th January 2022, Mr Assaf first raised his complaint by email to the Complaints Commissioner email address. As there had been no first instance editorial decision, he was referred to Mr Hugh Carnegy, Senior Editor for Quality & Accuracy for a response from the editorial team.
- 21. Mr Carnegy responded to Mr Assaf's complaint on 21st January 2022 in which he apologised to Mr Assaf on behalf of the FT for the way his submissions were handled. Mr Carnegy set out the chronology of events in a shorter form than as set out here (in particular the detail of the email of submission was not disclosed to Mr Assaf). Further Mr Carnegy stated that the Author's submission was sent to Ms Master's "on the recommendation of an FT colleague who likewise had no knowledge that you had previously submitted a piece on the same subject". He acknowledged Mr Assaf's evident frustration but concluded that the FT did not accept there was any copying or mimicking of Mr Assaf's piece.
- 22. By email of 28<sup>th</sup> April 2022, Mr Assaf indicated that he wished to appeal that decision. He felt that it was improbable as a coincidence that an article so closely resembling his was submitted independently just days after to the same newspaper and editor. He was also obviously concerned by the reference to "*the recommendation of an FT colleague*" as the reason for the Author's submission.

#### Decision

- 23. I have some sympathy for Mr Assaf's scepticism and can quite see why from his perspective (without having the benefit of seeing the evidential chronology), the publication of a similar piece given the timing and his previous submission appeared to be improbable. However, on reviewing the correspondence, it was quite clear to me from the tone and content of the Author's first email submitting his piece, that prior to sending it that he had no prior contact with Brooke Masters. He is similarly a specialist in a relevant area of law and one who is writing a book covering this subject. With the benefit of hindsight, it is probably unsurprising that those with specialist knowledge of the history of Standard Oil would draw parallels between that company and the modern position of Facebook. It is not an analytical idea in which anyone familiar with US 'trustbusting' law could legitimately claim a monopoly.
- 24. On the face of it, the initial email of submission that I have just referred to would be enough to confirm that Mr Assaf's concerns were unjustified. My provisional view was that the submission of the Author's article was a coincidence that was triggered by the Federal Trade Commission's law suit asking a federal court to order Facebook to be broken up.
- 25. However, I have nevertheless investigated this further and have reviewed all the correspondence. In addition, I have spoken to the Author and I am grateful to him for assisting me with my inquiries. My provisional view is fortified by the fact that:

- 25.1. The Author had already written his article prior to (on 15<sup>th</sup> December 2020) emailing his FT contact who was based in San Francisco (and not working in the same country or the same office as Brook Masters);
- 25.2. On 15 December 2020, the draft of the article was sent to his FT contact who responded saying that Brooke Masters, the opinion editor, was the appropriate contact for opinion articles.
- 25.3. There had been no prior contact between Brook Masters and his FT contact in relation to this article before it was written.
- 25.4. There had been no prior contact between the Author and his FT contact in relation to this article before it was written.
- 25.5. This was a genuinely independently created article that was submitted to the FT by a third party without any prior commissioning or suggestion by the FT.
- 26. As a matter of fact therefore, the FT is not in breach of Article 7(2) because there was no prior contact between the FT and the author prior to the published article being created. There is no factual basis from which to find or infer any kind of plagiarism. I remind myself that Article 7(2) records "It is recognised that the facts and subject matter of current or historical events may be public-domain details that are legitimately available to be reported by different authors and news organisations in their own right. Principles of fairness and common sense should be applied".
- In addition, reviewing and comparing the content of the two articles shows that although 27. they are obviously similar in theme and in the ideas presented, the form and wording is substantially different. In any event, plagiarism is concerned with form and substance rather than ideas. Any such similarities that there are in wording arise from commonplace and unoriginal description. For example the published article states " in 1902, Rockefeller was undone by a "muckraking" investigative journalist named Ida Tarbell."; Mr Assaf's submission stated " It was only through the effort of a "muckraking" journalist, Ida Tarbell, who wrote a series of articles for McClure's Magazine". The role of Ida Tarbell in the history of the break-up of Standard Oil is well known and historical fact. The term muckraker is credited to President Theodore Roosevelt dating back to a speech he gave in 1906. It is commonly understood to refer to journalists in favour of social reform during the Progressive Era in the United States (1890s-1920s). Ida Tarbell was well known to fall within this group and much writing about her describes her as such. Similarly the seven regional telephone companies known as Baby Bells that were created out of the 1980s break-up of AT&T is an objective fact and historically relevant.
- 28. The only substantive change made in the editing process by the FT to the submitted article prior to publication was to the ending referring to the fact that some of the constituent parts of Standard Oil and AT&T became corporate giants in their own right. Again this is relevant and correct historical fact and the correspondence shows that at that point, Ms Masters had not considered Mr Assaf's work since 2018.

#### **Conclusion**

29. This appeal fell to be dismissed in any event under r.10 of the GPP as being out of time. Nevertheless for the reasons given above, on the facts of this case, I have in my discretion proceeded to adjudicate on the merits of the appeal. This should not be taken as a precedent and it is normally to be expected that complaints brought outside the time periods set in r.10 GPP would be dismissed unless there are exceptional circumstances or good reasons for the delay.

- 30. In this case, I find that there no factual evidence that the FT had copied or 'mimicked' Mr Assaf's work or taken his idea, and further, there is overwhelming positive evidence that the article published was totally independently created without any prior contact, prompting or suggestion from the FT. Ultimately, there is no monopoly in an idea; which in turn means that sometimes coincidences may occur, as happened here.
- 31. I do not criticise Mr Assaf for his concerns but it is very clear that they were unfounded. I therefore dismiss this appeal and find that there had been no breach by the FT of Article 7(2) of the Code.

Christina Michalos QC Editorial Complaints Commissioner Financial Times 27<sup>th</sup> June 2022