

2013-2

Open Journalism

LEAD ARTICLE

User-generated Content and Audiovisual News: The Ups and Downs of an Uncertain Relationship

- User-generated content
- Regulatory and policy context
- User-generated content and news

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The OSCE Representative on Freedom of the Media “2013 Social Media Guidelines”



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Open Journalism

Foreword

Publish and be damned?

The Duke of Wellington's famous phrase could be used to describe the challenges for regulators dealing with the complex legal issues surrounding open journalism. In the age of Internet and the smart phone, we are ALL potentially journalists capable of generating copy, sound and images. From the rise of blogs which allowed private individuals to publish content on their own platform, to the opening of comments sections at the end of newspaper articles, to the inclusion of user generated films in news reports, the "professional" media have come to absorb user generated content as a supplementary source of content. Nowadays the media actively recruit these "open journalists" in order to tap into an additional source of copy. Clearly, this practice brings with it a new array of societal and consequently legal questions. They are only partly covered by the existing legal frameworks, which were designed for media services with less important user input and less inventive media reach out.

The field of open journalism and "user generated news" is multi-faceted and its potential regulatory needs warrant first of all some stock taking. To disclose and locate such needs is the goal of the Lead Article of this IRIS *plus*. The article analyses the impact that resorting to user-generated content has on news-making processes and highlights possible legal consequences. Among others, the article distinguishes different kinds of user-generated content and possible definitions and it looks into how they are or rather might be handled – on a European level – in the jurisprudence on freedom of expression and information as well as in the context of general regulation. It also illustrates why user-generated-content becomes such a "special animal" when offered as part of the news in audiovisual media and how this form of open journalism is capable of generating even more issues concerning media freedom and news-making processes.

Open journalism is, however, not only an issue with regard to news reporting in audiovisual media. The issue also broadens out to cover the right to freedom of expression and information online as such. A potpourri of legal activity illustrating this fact is offered by the Related Reporting-section of this IRIS *plus*. This chapter reflects on a Council of Europe view on how to protect the freedom of expression in an online environment and how differently this might be translated into national legal approaches. Other articles of this section draw into the picture the convergence between media services and social networks and other issues of responsibility for content in an increasingly mashed up media-user-information-system.

Efforts to provide guidance to new forms of interactive bi-directional journalism continue and the ZOOM-section contains the latest contribution from the office of the OSCE Representative

on Freedom of the Media in the Form of the 2013 Social Media Guidelines. Under the headings social media and freedom of expression, social media and journalism, professional media and Web 2.0, user-generated content and online comments, as well as multi-stakeholder approach and corporate responsibility, the user of this IRIS *plus* will find further leads for coping with the manifold challenges of open journalism.

Strasbourg, April 2013

Susanne Nikoltchev

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European Audiovisual Observatory*

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User-generated Content and Audiovisual News: The Ups and Downs of an Uncertain Relationship

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Introduction¹

The three little pigs' world has been turned on its head. Traditionally, they only had to endure the huffing and puffing of the wicked wolf. As if that wasn't bad enough, now they have to contend not only with the lupine menace, but also with the full glare of instant international publicity as they do so. In *The Guardian's* award-winning video advertisement about open journalism,² the three little pigs' ordeal is utterly transformed at top-speed by interactive journalism. The pigs no longer control their own narrative; their story is rewritten by the masses. As the plot unfolds, the familiar tale is transformed by analysis and insights provided by journalists, public opinion, expert commentary and social mobilisation.

The pigs were regular homeowners with the right to protect their property. But did boiling the big bad wolf alive not exceed reasonable force on the part of the pigs? The wolf had asthma, according to one acquaintance, so he couldn't have blown the houses down. A medical expert simulated the huffing and puffing to prove it was not feasible. Was it an inside job; a conspiracy to commit insurance fraud and frame the wolf? The pigs' motive was financial – they were struggling with mortgage repayments. Solidarity with the pigs led to public demonstrations and riots, thereby forcing a political debate about mortgage reform. The intricate twists and turns in the evolving news story of the three little pigs would not have been possible in a unidirectional or linear news-making process. They can only be realised when news professionals reach out to others in order to enhance their product.

But open journalism or more broadly, public input into media content, is by no means the preserve of fables. A single tweet, when given exposure in mainstream media, can even have some influence on the outcome of a presidential election campaign. In Ireland, the use of an unverified tweet in a live televised debate featuring presidential candidates three days before the election, did just that.³ The tweet was directed at the candidate who was topping the polls at that stage in the campaign. It was purportedly (but in actual fact not) from the Twitter account of one of the rival candidates. The tweet, which was read out on air, reignited a sensitive discussion concerning the

1) Before reading this article, readers are advised to watch "The Guardian open journalism – Three Little Pigs advert", available at: www.guardian.co.uk/media/video/2012/feb/29/open-journalism-three-little-pigs-advert

2) Cannes Lion Award-winning "Three Little Pigs advert", YouTube, uploaded on 29 February 2012.

3) See IRIS 2012-5/27, also reproduced in the Related Reporting section accompanying this article.

political affiliation and connections of the candidate at whom it was directed, and the resultant turn in the studio discussion led to very unfavourable results for the candidate (consequently, he did not win the presidential election).

These two dramatic examples demonstrate the potential power of non-media sources of information and opinion to transform media content. More mundane examples include photos sent to television stations by viewers to enliven weather reporting bulletins, and comments left on news' media websites by members of the public. In all of these cases, a new dimension of media or news is created – by the “users” of the media or news. The growing reliance on “user-generated content” in news in the European audiovisual sector is the focus of this article.

First, the article will examine the different meanings attributed to the term, user-generated content, and situate the term among related or similar terms. It will try to distinguish between different types of user-generated content and tease out the legal implications of their differences.

The article will then describe the broader regulatory and policy context in which user-generated content in (audiovisual) news has to be assessed. It will focus on freedom of expression and information; the complementarity of traditional regulation, self- and co-regulation, and the regulatory and policy challenges ahead.

Thirdly, the article will explore the relationship between user-generated content and news: a developing relationship with transformative potential but (as yet) limited uptake in practice.

Next, the article will zone in on user-generated content and audiovisual news, setting out selected specific features of the audiovisual context and their regulatory implications. As it winds towards its conclusions, the article will flag some issues for the future.

I. User-generated content

1. Unpacking the notion

User-generated content (UGC) is a vogue term. One might sceptically question whether it is not just a fancy, dressed-up term for individual expression or information from individuals that finds its way into mainstream media content. Such scepticism can travel a certain distance. UGC is a means for facilitating individual engagement with the media, both in the production of content and in reaction to content, but it does not necessarily have to be individual. UGC is often produced in a collaborative way by varying numbers of individuals. Although it is suggestive of free individual endeavour, it can also be created within organisational structures, whether commercial or not-for-profit, or structured social entities (e.g. religious groups). Moreover, due to its explicit reference to content, the term denotes more than mere expression or information. Much UGC will be visual or audiovisual; digital or multimedia. In short, UGC is much more complex than the conventional forms of “user” involvement in media activities in the past, such as letters to the editor, a right of reply, phone-ins to chat shows, etc.

The Organisation for Economic Co-operation and Development (OECD), in a 2007 report, identified three central characteristics of UGC (or user-created content (UCC), as it was called in the report).⁴ The report has become a much-cited reference point for discussions on UGC and as such, the characteristics it identifies and explains are worth citing in full:

- **Publication requirement:** While theoretically UCC could be made by a user and never actually be published online or elsewhere, we focus here on the work that is *published* in some context,

4) “Participative web: user-created content”, OECD Directorate for Science, Technology and Industry, Committee for Information, Computer and Communications Policy, Working Party on the Information Economy, DSTI/ICCP/IE(2006)7/FINAL, 12 April 2007, available at: www.oecd.org/internet/interneteconomy/38393115.pdf

be it on a publicly accessible website or on a page on a social networking site only accessible to a select group of people (*i.e.* fellow university students). This is a useful way to exclude email, bilateral instant messages and the like.

- **Creative effort:** This implies that a *certain amount of creative effort was put into creating the work or adapting existing works to construct a new one*; *i.e.* users must add their own value to the work. The creative effort behind UCC often also has a collaborative element to it, as is the case with websites which users can edit collaboratively. For example, merely copying a portion of a television show and posting it to an online video website (an activity frequently seen on the UCC sites) would not be considered UCC. If a user uploads his/her photographs, however, expresses his/her thoughts in a blog, or creates a new music video this could be considered UCC. Yet the minimum amount of creative effort is hard to define and depends on the context.
- **Creation outside of professional routines and practises:** User-created content is generally created *outside of professional routines and practises*. It often does not have an institutional or a commercial market context. In the extreme, UCC may be produced by non-professionals without the expectation of profit or remuneration. Motivating factors include: connecting with peers, achieving a certain level of fame, notoriety, or prestige, and the desire to express oneself.

The purpose of identifying and explaining these characteristics was mainly to try to demarcate the term; to clarify what it covers and what it does not cover. As already mentioned, the *practice* of UGC is not a new phenomenon, as such: it has existed – in different forms – in offline media down through history. However, the *term*, UGC, was coined and has gained currency in an online setting. Therefore, as commonly understood, the term is instinctively associated with the Internet.⁵ That association is evident from the characteristics of UGC identified by the OECD. The architecture of Web 2.0, with its in-built bias for peer-exchange and participatory activities, has greatly facilitated the uptake of UGC. This can be seen, first and foremost, in quantitative terms: enhanced technological capabilities and know-how make it much easier than ever before to create text-based, photographic, audiovisual and other types of content and disseminate it widely. It can also be seen in qualitative terms: as relevant technologies become more accessible to a growing segment of society, the sophistication with which (at least) some persons use those technologies also improves accordingly. The promotion of media literacy – understood as “the ability to access, analyze, evaluate, and *create* messages in a variety of forms”⁶ – gives important thrust to the skilful uptake of those technologies.

Returning to the characteristics of UGC, as set out by the OECD, a few analytical remarks are perhaps in order. The first characteristic, the publication requirement, has a useful function inasmuch as it excludes e-mails and bilateral instant messaging. In doing so, it addresses both the fact of publication and the extent of the publication. The inclusion of publication to a select group of persons is significant, including from a legal perspective, as we will see below. The second characteristic, creative effort, is important for its insistence on the creation of a work or the addition of value to an existing work. These questions are of obvious importance from a copyright perspective. Finally, although “conceptually useful, the last characteristic [namely, production outside of professional routines and practises] is getting harder to maintain”, as the OECD was quick to acknowledge.⁷ It observed that while “in the beginning UCC was a grassroots movement, there is now a trend towards the monetisation of UCC from the user-side”.⁸ An example of this trend could be designated UGC platforms which try to generate revenue through advertising. Further in

5) This point is also made in, *inter alia*, Lorna Woods, “User Generated Content: Freedom of Expression and the Role of the Media in a Digital Age”, in Merris Amos, Jackie Harrison & Lorna Woods, Eds., *Freedom of Expression and the Media* (Leiden/Boston, Martinus Nijhoff Publishers, 2012), pp. 141-168, at 143.

6) (emphasis added) Sonia Livingstone, “Media Literacy and the Challenge of New Information and Communication Technologies”, 7 *The Communication Review* (No. 1, 2004), pp. 3-14, at p. 5. See further, Tarlach McGonagle, “Media Literacy: No Longer the Shrinking Violet of European Audiovisual Media Regulation?”, in Susanne Nikoltchev, Ed., *Media Literacy*, IRIS *plus* 2011-3 (Strasbourg, European Audiovisual Observatory, 2011), pp. 7-27. Available at: www.obs.coe.int/oea_publ/iris/iris_plus/iplus3LA_2011.pdf

7) *Ibid.*, p. 9.

8) *Ibid.*

this connection, as noted by Lorna Woods, “whilst much contributed is amateur, the boundaries of audience blur where some contributors use the medium to further professional careers, or where contributors comprise professionals in ‘off-duty’ moments”.⁹ And then there is also another category of users who generate content: members of civil society organisations. Such organisations, while they are not professional media entities, strictly speaking, increasingly engage in very effective communications strategies with high levels of professionalisation.

In short, then, the term UGC covers diverse types of content that are typically created and circulated in an online environment by a range of different actors.

2. Towards a typology

Having summarily unpacked the notion of UGC in the previous section, and armed with an approximate understanding of the term, we can now attempt to devise a typology of different forms of UGC.

Various typologies could be advanced, based for example on the format of the UGC, or the purposes for which it is produced. The preferred typology here, however, focuses on editorial and presentational criteria. Concepts such as editorial control and editorial responsibility have particular meanings and regulatory implications in the Audiovisual Media Services Directive, for instance. Thus, the typology chosen for the purposes of this article underlines how different forms of UGC have different legal significance.

It therefore separates UGC into the following categories:

- A. UGC that is prepared by users and then incorporated into otherwise professionally produced and editorially controlled content;
- B. UGC that has a stand-alone character, i.e., UGC that exists alongside professionally produced and editorially controlled content;
- C. UGC that is the product of co-creation by media professionals and users;
- D. UGC that is created via and maintained on purpose-built fora and networks and is not incorporated into professional media content.

An example of A could be the following scenario: an individual records a short video clip on a mobile phone and sends it to a television station for possible inclusion in a programme, but it is edited by the media professionals before it is actually included. An example of B could be reader/audience comments on the website of a newspaper or a broadcaster. For C, one could mention genuinely collaborative, more or less horizontal, production processes, like when a journalist would reach out to members of the public or experts in given fields and co-author a piece with them. This contrasts with the more vertical editorial relationship that applies in A. Finally, D is UGC that has not been incorporated into professionally produced and editorially controlled content: it is housed or circulated outside of professional media entities, e.g. on personal blogs or social networking sites. Its separate existence does not necessarily preclude D from becoming A, should the media professionals seek to incorporate it into their editorial content.

Lorna Woods has drawn similar distinctions in her very clear-sighted examination of the legal issues arising from the media’s use of UGC. Instead of referring to professional production and editorial control, she employs the neater term, “professional media”, which, of course, goes to the heart of the matter – the relationship between professionally produced and amateur content. Later in this article, however, as the focus narrows to the European audiovisual sector, further differentiation within “professional media” will prove useful, in order to set apart audiovisual media service providers from newspapers, which are subject to different regulatory regimes in many important respects.

9) Lorna Woods, “User Generated Content: Freedom of Expression and the Role of the Media in a Digital Age”, *op. cit.*, p. 143.

Yet another distinction, again building on Woods' analysis, concerns the manner in which UGC is obtained. Is it submitted unsolicited to professional media? Is it (pro-)actively solicited by professional media, through invitations to the public to contribute certain types of content or on certain themes? Or do the professional media themselves (pro-)actively search for and/or monitor UGC that is already available on the Internet? In the case of the latter, is UGC subsequently incorporated into professional media content with or without the prior consent of its creators?

3. Legal issues¹⁰

It is not very meaningful to discuss the legal issues arising from UGC in a generalised way, given the wide variety of forms of UGC. As the first section has shown, any definition of UGC would necessarily have to stretch in many different directions at once. Moreover, the typology developed in the previous section was largely guided by the anticipation of relevant legal issues per type.

Typical legal issues that arise from the use of UGC include editorial responsibility and liability for published content; levels of responsibility and liability may vary depending on whether UGC is classed as Type A, B, C or D, and/or depending on whether editorial responsibility and liability rest with a media entity that is governed by a specific regulatory regime. For example, the way in which UGC is used by an audiovisual media service provider – either fully integrated into a regular linear or non-linear audiovisual media service or as stand-alone content on the provider's website (subject or not to some level of editorial moderation) – can be determinative for whether the UGC is placed in the regulatory framework of the Audiovisual Media Services Directive or the E-Commerce Directive.

These issues are developed in detail, below. For now, it is sufficient to flag them and also indicate that questions of editorial responsibility and liability can come into play in respect of a range of issues: defamation; hate speech; privacy, data protection and image rights; copyright and neighbouring rights,¹¹ etc. Specifically in the context of news-making, an extended panoply of values and issues enters the fray: objectivity, impartiality, truthfulness, transparency, reliability, ethical standards, source protection, etc. The verification of the authenticity and copyright status of UGC can prove problematic in an online context, given the widespread use of anonymity and pseudonymity and of mixing and mashing and cutting, copying and pasting techniques. These are all issues that demand heightened scrutiny in respect of UGC, which has far-reaching practical consequences for news-making processes and similarly significant legal ramifications. Finally, the relationship between institutionalised media and creators of UGC can also give rise to important practical and legal questions: what are the terms of engagement, collaboration or even possible remuneration? How explicitly have they been formulated by the media entity? What implications do those terms have for individuals' general rights and expectations of access to institutionalised media and to what extent does editorial discretion trump those individual rights and expectations?

II. Regulatory and policy context

The regulatory framework governing UGC is multilayered (European and national) and multidimensional (regulation, self-regulation and policy) and as a result, complicated.

1. Freedom of expression and information

To date, the European Court of Human Rights ("the Court") has not returned judgment on a full-blown Type-A UGC case, teasing out and clarifying the complex relationship between professional

10) This section draws in places on the present author's contribution to: Jop Esmeijer *et al.* "Making User Created News Work", TNO Report 2012 R11277, December 2012 (publication forthcoming).

11) For more information on the copyright-related aspects of UGC see Francisco Javier Cabrera Blázquez, "User-Generated Content Services and Copyright", IRIS *plus* 2008-5 (Strasbourg, European Audiovisual Observatory, 2008). Available at: www.obs.coe.int/oea_publ/iris/iris_plus/iplus5_2008.pdf

editorial control over UGC comprising illegal elements and the resultant editorial liability for those illegal elements. However, (at least) one such case is pending before the Court: *Delfi AS v. Estonia*.¹² The facts have been summarised as follows:¹³

“[The case concerns] Delfi, one of the largest news portals on the internet in Estonia, and its responsibility for the comments posted by its readers. Following an article published on its site about a company planning to destroy ‘iceroads’ (roads linking mainland Estonia with some of its islands), offensive comments were posted on the portal about the company’s majority shareholder and, as a result, he brought a civil suit against the news portal. The courts found against the news portal and awarded the plaintiff damages.”

Pending the the Court’s judgment in the *Delfi* case, existing case law is already gradually paving the way for frontal judicial engagement with UGC. In the Court’s case law, there is a well-established tendency to afford journalists/the media an enhanced level of protection for their right to freedom of expression. Building on this tendency, three emergent trends in the case law of the Court are beginning to fashion a more detailed framework for the use of UGC in news: a growing emphasis on responsible journalism; a growing recognition that journalistic freedoms are applicable to non-journalistic actors (providing they contribute to public debate); a growing awareness of the specific interactive and collaborative features of the online environment. These existing and emergent trends will now be examined in turn.

(i) Enhanced protection for the media’s freedom of expression

The particular importance of the media for democratic society has been stressed repeatedly by the Court. The media can make important contributions to public debate by (widely) disseminating information and ideas and thereby contributing to opinion-forming processes within society. As the Court consistently acknowledges, this is particularly true of the audiovisual media because of their reach and impact. The Court has traditionally regarded the audiovisual media as more pervasive than the print media but it has yet to set out a clear policy line for online media, or consequently for UGC. The media can also make important contributions to public debate by serving as fora for discussion and debate. This is especially true of new media technologies which have considerable potential for high levels of individual and group participation in society. The third characteristic of UGC, as identified by the OECD (creation outside of professional routines and practices), mentions “connecting with peers” as one of the motivating factors for creating UGC in the first place. As such, UGC can be seen as an important means towards enhanced participation in public affairs, given the centrality of Internet-based interaction in the contemporary communications environment.

Furthermore, the role of “public watchdog” is very often ascribed to the media in a democratic society. In other words, the media should monitor the activities of governmental authorities vigilantly and publicise any wrongdoing on their part. In respect of information about governmental activities, but also more broadly in respect of matters of public interest generally, the Court has held time and again that: “Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them”.¹⁴

In light of the important democratic functions which the media and journalists can fulfil, the case law of the Court tends to acknowledge an enhanced level of freedom of expression for media and journalistic freedoms (as opposed to ordinary individuals). The same approach is taken in relevant standard-setting texts adopted by the Council of Europe’s Committee of Ministers and

12) *Delfi AS v. Estonia*, Appn. No. 64569/09, communicated on 11 February 2011.

13) European Court of Human Rights (Press Unit), *New technologies*, Factsheet, January 2013, p. 3.

14) *Sunday Times v. the United Kingdom*, Judgment of the European Court of Human Rights of 26 April 1979, para. 65.

Parliamentary Assembly as well.¹⁵ It is important to dwell on the enhanced level of freedom of expression for media and journalists because insofar as UGC fulfils the democratic functions ascribed to media and journalists, a plausible case can be made for creators of UGC to also benefit from – at least some functionally relevant aspects of – that enhanced freedom.

The enhanced freedom comprises legal recognition and protection of specific journalistic practices and realities: freedom to report and comment on matters of public interest; presentational and editorial freedom (including recourse to exaggeration); protection of sources; intellectual property rights. On another level, this enhanced freedom also includes protection against searches of professional workplaces and private domiciles and seizure of materials; protection against physical violence and intimidation; various rights in times of crisis and in war situations.

These can be seen as occupation-specific freedoms that are derived from a more generic right to freedom of expression. As the right to freedom of expression – like all rights guaranteed by the European Convention on Human Rights – must be “practical and effective” and not merely “theoretical or illusory”,¹⁶ it is essential that the right be interpreted in a way that is informed by contextual specificities. Put more simply, in order for journalists’ right to freedom of expression to be effective in practice, the European Court of Human Rights needs to interpret it in a way that is informed by the realities of the journalistic/media sector, such as the perishability of news and the pressure of deadlines, threats to and violence against journalists, designed to muzzle them, etc. Insofar as the creators of UGC fulfil similar functions to those of journalists or media professionals, it can be argued that they should also benefit, *mutatis mutandis*, from the freedoms enjoyed by their professional counterparts.

Together, these freedoms help to safeguard the operational autonomy necessary for the fulfillment of journalistic tasks in democratic society. The enjoyment of these freedoms is, however, coupled with the expectation of adherence to professional ethics and codes of conduct. Typically, such codes include provisions about accuracy, fairness, avoidance of stereotypes, etc. They will be discussed in greater detail, below (II. 1. (ii)). For now, it is enough to raise the thorny question of whether non-journalists or those outside of the professional media sector, in particular individual creators of UGC, can be expected to adhere to similar ethical standards and values as their professionally trained counterparts.

The right to freedom of expression also includes editorial and presentational autonomy for media professionals because Article 10 ECHR, protects “not only the substance of ideas and information, but also the form in which they are conveyed”.¹⁷ As the European Court of Human Rights famously held in its *Jersild* judgment, it is not for the courts “to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists”.¹⁸ The right to freedom of expression, as applied to the media, clearly includes protection of pre-publication procedures and processes for the gathering and selection of material, such as research and enquiry.¹⁹ Indeed, interferences with those processes can pose such a serious threat to the right to freedom of expression that they demand the highest levels of scrutiny by the Court.²⁰

In the context of UGC, the aforementioned pre-publication processes are obviously conditional on access to the Internet. Blocking a group of websites entails a risk of “collateral censorship” and as such a measure would amount to prior censorship, it would also require the highest levels of

15) See generally: Susanne Nikoltchev and Tarlach McGonagle, Eds., *Freedom of Expression and the Media: Standard-setting by the Council of Europe, (I) Committee of Ministers - IRIS Themes* (Strasbourg, European Audiovisual Observatory, 2011), available at: www.obs.coe.int/oea_publ/legal/ebook_committeeministers-coe.pdf.en; Susanne Nikoltchev and Tarlach McGonagle, Eds., *Freedom of Expression and the Media: Standard-setting by the Council of Europe, (II) Parliamentary Assembly - IRIS Themes* (Strasbourg, European Audiovisual Observatory, 2011), available at: www.obs.coe.int/oea_publ/legal/ebook_ParliamentaryAssembly.pdf.en

16) *Airey v. Ireland*, Judgment of the European Court of Human Rights of 9 October 1979, para. 24.

17) *Oberschlick v. Austria*, Judgment of the European Court of Human Rights of 23 May 1991, para. 57.

18) *Jersild v. Denmark*, Judgment of the European Court of Human Rights of 23 September 1994, para. 31.

19) *Dammann v. Switzerland*, Judgment of the European Court of Human Rights of 25 April 2006, para. 52.

20) *Ibid.*

scrutiny by the Court.²¹ The extension of these – and related principles – to the Internet environment is a logical step and one that was taken recently by the Court when it found that the blocking of Google Sites in Turkey amounted to a violation of the right to freedom of expression.²² The Court noted in passing that one of the features of Google Sites is that they “facilitate the creation and sharing of a website within a group and thereby constitute a means of exercising freedom of expression”.²³ These features are of clear importance for UGC. Furthermore, underscoring the link between freedom of expression and information and news in an online environment, the Court had also previously held that:

“In light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public’s access to news and facilitating the dissemination of information generally.”²⁴

(ii) *Growing emphasis on responsible journalism*

In recent years, the Court has been placing increasing emphasis on adherence to journalistic ethics and codes of practice.²⁵ It has explained its approach as follows:

“These considerations play a particularly important role nowadays, given the influence wielded by the media in contemporary society: not only do they inform, they can also suggest by the way in which they present the information how it is to be assessed. In a world in which the individual is confronted with vast quantities of information circulated via traditional and electronic media and involving an ever-growing number of players, monitoring compliance with journalistic ethics takes on added importance.”²⁶

However, the heavy emphasis on ethical practices has been roundly criticised for tipping an already precarious balance away from freedom of expression towards responsibility. This criticism has come from within the Court in the form of virulent dissenting opinions,²⁷ and also from leading academic commentators.²⁸ The essence of the criticism is that the conflation of legal and ethical issues is confusing and inappropriate, not least because it can result in journalistic practices assuming greater importance than the public’s right to receive information and the media’s right to impart it.

While responsibility is clearly a legitimate trade-off for the enhanced freedom enjoyed by journalists, undue emphasis on that responsibility can have a “chilling effect” on the right to freedom of expression.²⁹ If, for example, the same expectations of responsibility were to be extended to the growing range of actors performing news-like or journalist-like functions, it could serve as a disincentive to exercise their freedom of expression.

21) *Ahmet Yildirim v. Turkey*, Judgment of the European Court of Human Rights of 18 December 2012, paras. 47-55, esp. paras. 47 and 52.

22) *Ibid.*, esp. para. 50.

23) [Author’s translation] *Ibid.*, para. 49.

24) *Times Newspapers Ltd. (nos. 1 & 2) v. the United Kingdom*, Judgment of the European Court of Human Rights of 10 March 2009, para. 27.

25) Dirk Voorhoof, “Het Europese ‘First Amendment’ - De Straatsburgse jurisprudentie over artikel 10 EVRM: 2004-2009 (deel 2)”, 22 *Mediaforum* 2010-6, pp. 186-201, at pp. 194-195.

26) *Stoll v. Switzerland*, Judgment of the European Court of Human Rights (Grand Chamber) of 10 December 2007, para. 104.

27) *Stoll v. Switzerland*, *op. cit.*, *Guja v. Moldova*, Judgment of the European Court of Human Rights of 12 February 2008, *Flux (No. 6) v. Moldova*, Judgment of the European Court of Human Rights of 29 July 2008.

28) See generally (and in particular the papers by Dirk Voorhoof, Mario Oetheimer and Gavin Millar): *The European Protection of Freedom of Expression: Reflections on Some Recent Restrictive Trends*, Seminar at the European Court of Human Rights, Strasbourg, 10 October 2008; website: www-ircm.u-strasbg.fr/seminaire_oct2008/index.htm

29) *Barthold v. Germany*, Judgment of the European Court of Human Rights of 25 March 1985; *Goodwin v. the United Kingdom*, Judgment of the European Court of Human Rights of 27 March 1996.

(iii) *Growing recognition that journalistic freedoms are applicable to non-journalistic actors*

As explained above, journalistic freedom can be seen as a corollary of the right to freedom of expression because of the public watchdog role ascribed to the press. Increasingly, however, that freedom is predicated on the provision of a forum for public debate. The ability of the media to take on such a role is facilitated by the increasingly interactive design of online media. The primacy of robust public debate in democratic society has also led to another crucial development in the case law of the European Court of Human Rights, *viz.* the realisation that a broad range of actors can make viable contributions to public debate. In the past, because of their dominant position in the communications sector, the media were effectively the gate-keepers or moderators of public debate. Technological advances have reduced the erstwhile influence/control of the media and made it possible for a greater range and diversity of actors to participate meaningfully in public debate.³⁰

The changing patterns in societal communication practices have been acknowledged by the Court, for example in *Steel & Morris v. the United Kingdom*, when it held that:

“[I]n a democratic society even small and informal campaign groups [...] must be able to carry on their activities effectively and [...] there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest [...]”³¹

The Court has similarly recognised the value of contributions to public debate of NGOs, expanding the notion of public watchdog to social watchdog, in the process.³² The upshot of this trend is that there is increased and more nuanced legal recognition of the paramountcy of public debate; with renewed emphasis on the democratic societal context as opposed to the profession of the person. This widens the notion of public debate considerably and appropriately. The widening has also inevitable implications for UGC because the newly recognised participants in public debate can and often do rely on UGC as a means of participation.

In its Recommendation No. R (2000) 7 to member states on the right of journalists not to disclose their sources of information, the Committee of Ministers of the Council of Europe defined “journalist” as: “any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication”. This definition of journalist reflects a model of journalism that dominated in the past. It clearly grates with the Committee of Ministers’ current approaches to new media and evolving nature of journalism, as outlined in its Recommendation on a new notion of media.³³ The current approach recognises that a growing number and diversity of actors are contributing to journalism in different ways.

The Court of Justice of the European Union has also opted for an expansive definition, stating that activities may be classed as “journalistic”, “if their object is the disclosure to the public of information, opinions or ideas, irrespective of the medium which is used to transmit them”. Furthermore, “[t]hey are not limited to media undertakings and may be undertaken for profit-making purposes”.³⁴ Again, this opens up the traditionally narrow definition to include a broader and more diverse range of participants.³⁵

30) Karol Jakubowicz, *A new notion of media?: Media and media-like content and activities on new communications services* (Strasbourg, Council of Europe, April 2009).

31) *Steel & Morris v. the United Kingdom*, Judgment of the European Court of Human Rights of 15 February 2005, para. 89.

32) *Vides Aizsardzības Klubs v. Latvia*, Judgment of the European Court of Human Rights of 27 May 2004; *Társaság a Szabadságjogokért v. Hungary*, Judgment of the European Court of Human Rights of 14 April 2009; *Kenedi v. Hungary*, Judgment of the European Court of Human Rights of 26 May 2009.

33) *Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media*, 21 September 2011. See IRIS 2011-10/4.

34) Case C-73/07, *Tietosuoja-valtuutettu v. Satakunnan Markkinapörssi Oy en Satamedia Oy*, Judgment of 16 December 2008, para. 61.

35) For further analysis of relevant legal issues, see: Anne Flanagan, “Defining ‘journalism’ in the age of evolving social media: a questionable EU legal test”, *International Journal of Law and Information Technology*.

(iv) Growing awareness of specific features of online environment

To date, the European Court of Human Rights has engaged meaningfully with the Internet generally³⁶ and the specific features of the online communications environment in particular in a surprisingly limited number of cases.³⁷ It has focused on the duty of care of Internet service providers,³⁸ the added value of online newspaper archives for news purposes³⁹ and interestingly, the challenges of sifting through the informational abundance offered by the Internet.⁴⁰ How the Court dealt with the final point is of interest:

“It is true that the Internet is an information and communication tool particularly distinct from the printed media, in particular as regards the capacity to store and transmit information. The electronic network serving billions of users worldwide is not and potentially cannot be subject to the same regulations and control. The risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press. Therefore, the policies governing reproduction of material from the printed media and the Internet may differ. The latter undeniably have to be adjusted according to the technology’s specific features in order to secure the protection and promotion of the rights and freedoms concerned.

Nevertheless, having regard to the role the Internet plays in the context of professional media activities [...] and its importance for the exercise of the right to freedom of expression generally [...], the Court considers that the absence of a sufficient legal framework at the domestic level allowing journalists to use information obtained from the Internet without fear of incurring sanctions seriously hinders the exercise of the vital function of the press as a ‘public watchdog’ [...].”⁴¹

The Court made these observations in a case involving a newspaper that, owing to a lack of funds, “often reprinted articles and other material obtained from various public sources, including the Internet”.⁴² In short, the Court is calling for a rethink of familiar principles of media freedom and regulation in the expansive, global context of the Internet.

Again, these findings by the Court focus on journalists and professional media, but in light of the expanding understandings of the roles played by journalists and professional media, they are also of relevance for other actors. This reading is confirmed by the reference to the importance of the Internet “for the exercise of the right to freedom of expression generally”. From the cited passage, it is clear that the Court places the onus on states’ authorities to develop a legal framework clarifying issues such as responsibility and liability. It is unclear, however, to what extent an equivalent self-regulatory framework would suffice. The Court has held in other case law that self- and co-regulatory mechanisms can suffice, provided they include effective guarantees of rights and effective remedies for violations of rights.⁴³

These developments are tentative in case law, but more advanced in other standard-setting activities. While not legally binding, such standard-setting work, notably by the Council of Europe’s

36) T. Murphy and G. Ó Cuinn, “Works in Progress: New Technologies and the European Court of Human Rights”, 10(4) *Human Rights Law Review* (2010), pp. 601-638, at p. 636; European Court of Human Rights (Research Division), *Internet: case-law of the European Court of Human Rights* (Strasbourg, Council of Europe, 2011).

37) Dirk Voorhoof, “Het Europese ‘First Amendment’ - De Straatsburgse jurisprudentie over artikel 10 EVRM: 2004-2009 (deel 2)”, *Mediaforum* 2010-6, pp. 186-201, at pp. 195-196; Tarlach McGonagle & Kim de Beer, “A brave new media world revisited. Een nog kritischer blik op het nieuwe mediabeleid van de Raad van Europa”, 24 *Mediaforum* 2012-11/12, pp. 338-345.

38) *K.U. v. Finland*, Judgment of the European Court of Human Rights of 2 December 2008, para. 49.

39) *Times Newspapers Ltd. (nos. 1 & 2) v. the United Kingdom*, *op. cit.*, para. 45.

40) *Editorial Board of Pravoye Delo & Shtekel v. Ukraine*, Judgment of the European Court of Human Rights of 5 May 2011.

41) *Ibid.*, para. 63.

42) *Ibid.*, para. 5.

43) For details and analysis, see: Hans-Bredow-Institut for Media Research, University of Hamburg, *Study on Co-Regulation Measures in the Media Sector*, Final Report, Study for the European Commission, Directorate Information Society and Media, 2006, pp. 147-152.

Committee of Ministers⁴⁴ and Parliamentary Assembly,⁴⁵ is politically persuasive and offers a number of advantages over treaty-based approaches:⁴⁶

- More detailed engagement than in treaties
- Coverage of issues not dealt with in case law
- Dynamic/modern approach to relevant issues

Nevertheless, in respect of UGC, little guidance is forthcoming from the standard-setting work of the Council of Europe's Committee of Ministers to date. In its 2011 Recommendation on a new notion of media – its flagship policy statement on the future development of media freedom and regulation – references to UGC are scant and summary.⁴⁷ They do not offer significant explanatory insights.

However, in the latest significant development in this connection, in its *Ahmet Yildirim v. Turkey* judgment of 18 December 2012, the Court finally recognised in a very forthright way the importance of the Internet in the contemporary communications landscape:

“The Internet has become one of the principal means for individuals to exercise their right to freedom of expression today: it offers essential tools for participation in activities and debates relating to questions of politics or public interest.”⁴⁸

This recognition clearly places great store by the participatory dimension of free expression; a theme that is also at the core of UGC.

2. Complementary regulatory regimes

In the previous section, selected existing and evolving principles of freedom of expression and information that are relevant to the legal position of UGC were explored. But its legal position is not determined only at the level of principles; it is also governed by more concrete regulatory regimes.

Those regimes are the focus of this section.

It will be recalled that earlier in this article, four types of UGC were distinguished:

- A. UGC that is prepared by users and then incorporated into otherwise professionally produced and editorially controlled content;
- B. UGC that has a stand-alone character, i.e., UGC that exists alongside professionally produced and editorially controlled content;
- C. UGC that is the product of co-creation by media professionals and users;
- D. UGC that is created via and maintained on purpose-built fora and networks and is not incorporated into professional media content.

This typology will now be revisited, and placed in various regulatory frameworks that make up the European audiovisual sector. Type A is perhaps the most straightforward case: it falls squarely under the Audiovisual Media Services Directive because editorial control remains with the audiovisual media service provider and so do editorial responsibility and liability. Type C will often fall under the AVMSD as well, depending on the dynamics of the collaborative process and the specific terms of the

44) S. Nikoltchev & T. McGonagle (eds), *Freedom of Expression and the Media: Standard-setting by the Council of Europe, (I) Committee of Ministers - IRIS Themes* (Strasbourg, European Audiovisual Observatory, 2011).

45) S. Nikoltchev & T. McGonagle (eds), *Freedom of Expression and the Media: Standard-setting by the Council of Europe, (II) Parliamentary Assembly - IRIS Themes* (Strasbourg, European Audiovisual Observatory, 2011).

46) Tarlach McGonagle & Kim de Beer, “A brave new media world? Een kritische blik op het nieuwe mediabeleid van de Raad van Europa”, 22 *Mediaforum* 2010-5, pp. 146-156.

47) Recommendation CM/Rec(2011)7 on a new notion of media, 21 September 2011, *op. cit.*, : paras. 26, 32, 33, 68 and 89.

48) Judgment of the European Court of Human Rights of 18 December 2012, para. 54.

prior agreement (between the media professionals and creators of UGC) to collaborate. Type B would usually fall under the E-Commerce Directive; the extent of editorial control by the audiovisual media service provider (as evidenced by the nature of the editorial moderation of UGC on the website) will influence whether or not it can claim the hosting exemption under Article 14 of the Directive. Type D is a more open-ended category in which different regulatory regimes could apply, depending on the nature of the UGC, the nature of the fora or networks via which it is provided or circulated, and so on. For instance, if there is no economic aspect to the service at all, the E-Commerce Directive will not ordinarily apply. UGC created and circulated by individuals without any economic motive or effect, e.g. via social networking sites or on many types of blogs, would be subject to general civil and/or criminal law, as relevant, and usually dealt with at the national level. UGC posted on the websites of newspapers will, in many cases, be governed by self-regulatory mechanisms for the press sector, and certainly insofar as those mechanisms have provisions that explicitly or implicitly deal with newspapers' online presence and UGC.

The extent of liability can be influenced by the editorial procedures/controls that are in place and are followed. Systems of editorial moderation of user-generated comments posted on websites can take a number of forms. Distinctions can, for instance, be made between pre-moderated screening, post-moderated screening and reactively moderated screening.⁴⁹ Pre-moderated screening takes place prior to posting; post-moderated screening takes place after the automatic posting, and reactive moderated screening is carried out in response to complaints/requests for modification or removal of user-generated comments. Moreover, moderation can be carried out in-house, outsourced (e.g. to a professional company), by community managers (in the case of certain online communities/comments), or by combinations of the foregoing. Moderation is often partly automated and partly personal.

III. User-generated content and news

1. A developing relationship

The focus of this section shifts to the relationship between UGC and news; how UGC is used in the news-making process.⁵⁰ That relationship – itself a developing one – needs to be seen in the context of broader ongoing changes to news-making processes. The ongoing changes to how information for news is gathered, verified, processed, framed, published and disseminated are the result of technological advances, evolving and increasingly active and interactive communication practices, and revised understandings of what the right to freedom of expression entails in light of those developments.⁵¹

“News” itself is tremendously difficult to define. The determination of newsworthiness has always involved a measure of subjectivity, reflecting *inter alia* the editorial preferences of the media entity, which are in turn shaped to a greater or lesser extent by the target readers/audience and proprietary, political and commercial influences. The term is now becoming increasingly difficult to define, for a number of reasons: (i) the opening up of institutionalised news-making processes to a greater diversity of (non-professional) actors; (ii) the growing alternatives to institutionalised news-making processes, and (iii) the resultant diversification in types of news (with overt focuses on, for example, politics or entertainment).

49) Annabel Brody, “Pressing times ahead: the evolution of press councils in an age of media convergence”, 16 *Communications Law* (No. 3, 2011), pp. 106-113, at p. 110.

50) For a helpful introduction to this topic, see: Josef Trappel and Gunn Sara Enli, “Online Media: Changing Provision of News”, in J. Trappel *et al.*, Eds, *Media in Europe Today* (Bristol/Chicago, Intellect, 2011), pp. 97-113.

51) See generally: Karol Jakubowicz, *A new notion of media?: Media and media-like content and activities on new communications services* (Strasbourg, Council of Europe, April 2009).

(i) *A greater diversity of (non-professional) actors*

First, a dramatic “increase in the array of actors who shape the news in the online environment invites a shift in our understanding of the locus of news production”.⁵² Once the stronghold of professional journalists and institutionalised media, recent years have witnessed pronounced trends towards greater openness and participation in the processes of news production (as described in the next paragraphs). The practices behind these trends are sometimes referred to as “mutualized” or hybrid journalism,⁵³ i.e., forms of journalism that incorporate or otherwise employ user-generated content in different ways. They typically include the crowdsourcing of stories and various forms of collaboration with citizen journalists.

All of this means that news today is characterised by its “liquidity”⁵⁴ and the increased emphasis it places on comment and reaction. The dynamics of news production continue – much more so than in the past – beyond the presentation/publication of a news item by professional journalists or media. Subsequent engagement with the published item ensures that it continues to develop afterwards, as in the fictitious example of the Three Little Pigs. In this logic, user reaction and comment can be seen as an integral part of news. This ongoing development grounds news very firmly in one of the underlying instrumental goals of news: to inform the public with a view to facilitating participation in public debate in democratic society. This is a classic rationale for freedom of expression,⁵⁵ as has been consistently recognised and reiterated by the European Court of Human Rights.⁵⁶

Post-publication dynamics stemming from UGC demand greater engagement by news media professionals and institutions with their news stories than in the past. The need for pre-publication verification remains, but it is now coupled with the need for post-publication vetting, and insofar as reactions to stories are offered on their websites, post-publication moderation of those reactions. In practical terms, the additional engagement required is often legally necessary, e.g. to demonstrate an editorially responsible approach to moderation or in conjunction with hosting obligations, but it can be a considerable drain on scarce time and resources.

(ii) *Growing alternatives to institutionalised news-making processes*

Second, the news sector – especially online – is an increasingly crowded and noisy space. Next to traditional news media, which have partly migrated into the online world, a growing diversity of other “new” or “born-on-the-web”⁵⁷ news actors is emerging. Many of these actors are qualitatively different to traditional news media. Some of them are very powerful, having “a higher degree of agency in shaping the news than the typical case of print and broadcast media”.⁵⁸ They include news aggregator sites, which operate on the basis of search algorithms; so-called content farms, where content is produced by freelancers; niche news-sites, which are very targeted in the topics they cover, and other sites that are difficult to classify, such as WikiLeaks, the famous wiki-based initiative where whistle-blowers can render confidential information public from behind the shield of anonymity.

Robin Foster has usefully grouped these “digital intermediaries” into four broad categories: “news aggregators like Yahoo, search engines like Google, social media like Facebook, and digital stores/devices like Apple”, while pointing out that this categorisation is not watertight: some of them operate in more than one field.⁵⁹ All of these intermediaries move content from providers

52) Pablo J. Boczkowski, *Digitizing the News: Innovation in Online Newspapers* (Cambridge, Massachusetts, etc., The MIT Press, 2004), p. 184.

53) Alan Rusbridger, “The splintering of the fourth estate”, *The Guardian*, 19 November 2010.

54) See generally: Michael Karlsson, “Charting the liquidity of online news: Moving towards a method for content analysis of online news”, *74 International Communication Gazette* (No. 4, 2012), pp. 385-402.

55) Eric Barendt, *Freedom of Speech* (2nd Ed.) (New York, Oxford University Press, 2005), pp. 6-23.

56) See generally, Dirk Voorhoof’s IRIS reporting on the European Court of Human Rights’ case law on the right to freedom of expression.

57) Pablo J. Boczkowski, *Digitizing the News: Innovation in Online Newspapers*, *op. cit.*, p. 174.

58) *Ibid.*, p. 172.

59) Robin Foster, *News Plurality in a Digital World* (Reuters Institute for the Study of Journalism, University of Oxford, 2012), p. 6.

to users. Foster points to a recent study to underscore the importance of this growing trend: “30% of online news users use search engines as one of the main ways they access news, 22% use news aggregators, and 20% use social media”.⁶⁰

Alongside these influential digital intermediaries, other smaller – often individual – actors also assume increasingly relevant roles in news sourcing and production: citizen journalists⁶¹ and bloggers, for instance. Of course, not all blogs serve informational purposes that are relevant for news-making purposes and not all blogs have the ambition to produce or otherwise provide newsworthy content. Many blogs are personal in character and as such target personal networks and communities of interest. It is important, therefore, not to lump all blogs together without distinguishing between them. Even within the range of blogs that do contribute to news-making processes, more specific typologies can be useful to further specify the nature of their contribution to news-making, for example, the distinction between media blogs, journalist blogs, audience blogs and citizen blogs.⁶² The sub-category, “public watchblog”, has even been put forward to denote blogs that take on the public watchdog role traditionally played by journalists and institutionalised media.⁶³

These actors – whether citizen journalists, bloggers or others – often will not have the same professional training, ethical commitment or legal obligations as news professionals working for institutionalised media, especially in the audiovisual sector. This leads to asymmetries in news production processes, as well as fragmentation in the news media ecology. These developments make “any attempt to impose shared professional standards nearly impossible”, as Paolo Mancini has noted.⁶⁴ Moreover, the “professional identity of traditional journalists becomes blurred with a plurality of new figures that circulate news, comment on the Web, and mix mobilization with information,” he adds.⁶⁵

Predictions about the future of the Internet abound – from observations and speculations about Web 3.0/the semantic web and beyond to the view that the web will become obsolete, that the “space-based web we currently have will gradually be replaced by a time-based worldstream”, i.e., “a heterogeneous, content-searchable, real-time messaging stream” that has already “arrived in the form of blog posts and RSS feeds, Twitter and other chatstreams, and Facebook walls and timelines”.⁶⁶ Whatever the future reality, it is certain that news-making processes will have to continue to adapt accordingly.

(iii) Diversification in types of news

Third, the rise of infotainment, celebrity, showbiz and other forms of “soft” news and the elevated status that such types of “news” accord gossip and rumour, marks a departure from the democratic functions of “hard” news. As such, infotainment and “soft” news cannot expect to enjoy the same enhanced level of free speech as “hard” news that does perform a clear instrumental role in democratic society. This has been recognised by the European Court of Human Rights, *inter alia*, in *Mosley v. the United Kingdom*⁶⁷ and in *Caroline von Hannover v. Germany (Nos. 1 and 2)*.⁶⁸

60) *Ibid.*, citing Nic Newman, Ed., *Reuters Institute Digital News Report 2012* (Oxford, RISJ, 2012).

61) See further: Nadine Jurrat, “Citizen Journalism and the Internet”, Mapping Digital Media Reference Series No. 4, Open Society Media Program, April 2011.

62) David Domingo and Ari Heinonen, “Weblogs and Journalism: A Typology to Explore the Blurring Boundaries”, *29 Nordicom Review* 2008-1, pp. 3-15, at pp. 7 *et seq.*

63) Michiel Oosterveld and Manon Oostveen, “Van public watchdog naar public watchblog: het EHRM en journalistieke blogs”, unpublished research paper written under the present author’s supervision as a group assignment in the context of the *Informatierecht* research masters programme, Faculty of Law, University of Amsterdam, 2012 (paper on file with author).

64) Paolo Mancini, “What Scholars Can Learn from the Crisis of Journalism”, *International Journal of Communication* (No. 7, 2013), 127-136, at p. 134.

65) *Ibid.*

66) David Gelernter, “The End of the Web, Search, and Computer as We Know It”, *Wired*, 2 February 2013, available at: www.wired.com/opinion/2013/02/the-end-of-the-web-computers-and-search-as-we-know-it/

67) *Mosley v. the United Kingdom*, European Court of Human Rights (Fourth Section) Judgment of 10 May 2011.

68) *Von Hannover v. Germany (No. 1)*, European Court of Human Rights (Third Section) Judgment of 24 June 2004; *Von Hannover v. Germany (No. 2)*, European Court of Human Rights (Grand Chamber) Judgment of 7 February 2012.

As a result of these contextual changes, the role of institutionalised media has, in turn, changed from that of gatekeeper to that of “gate-watcher”,⁶⁹ which suggests a more lenient admission policy regarding externally produced content. It also suggests an outward-looking posture that is observational and aware of what is going on outside the gate. Thus, the availability of UGC elsewhere – including in semi-public social networking sites – is routinely and often systematically monitored and considered from the perspective of its suitability for incorporation into professionally produced content.⁷⁰

The role-change has also been described as moving from a gatekeeper to a conversationalist, which again suggests a more casual and personal practice than in the past. This suggests more widespread interaction with users, resulting in a rise in “nonlinear storytelling”⁷¹ and the de-formalisation of production processes. The nature of news production can indeed develop into an extended and continuous conversation between not only the journalist and audience, but also their sources (“three-way” journalism).⁷²

2. Transformative potential

News-making processes that have an open and participatory character stand to gain many benefits: a keener sense of their users’ interests, priorities and opinions; the structures and processes to tap into vast, grassroots’ information and expert knowledge. This thrust of bottom-up news reporting and commentary – with UGC as its centrepiece – can enhance the levels of diversity and multiplicity of voices in the news-making process.⁷³ The playwright Arthur Miller once quipped that a good newspaper is a nation talking to itself; an observation equally applicable to other media, especially those with a public service mandate. Increased interaction and collaboration between professionals and users improve the coherence of their relationship. A more user-centric approach to news reporting can also be persuasive when attracting advertising revenue insofar as advertisers seek tailored audiences.

When considering the potential added value of UGC for news-making purposes and processes, it is UGC’s added value for the processes that is usually emphasised. It is sometimes overlooked that there can also be significant added value for the creators of the UGC: the integration of UGC into institutionalised, well-established media gains wider exposure for the UGC and reduces the risk of it otherwise becoming lost in “a blizzard of content”.⁷⁴ In other words, the creators of UGC benefit from the mainstream stronghold of well-established, institutionalised media.

3. Limited practice

Notwithstanding the potential benefits that accrue for the news-making process through the incorporation of UGC, a degree of newsroom or journalistic scepticism of or resistance to UGC has been documented.⁷⁵ This fits in with a broader pattern of hostility towards public participation

69) Josef Trappel and Gunn Sara Enli, “Online Media: Changing Provision of News”, in J. Trappel *et al.*, Eds, *Media in Europe Today* (Bristol/Chicago, Intellect, 2011), pp. 97-113, at 105 (after Axel Bruns, *Gatewatching: Collaborative Online News Production* (New York, Peter Lang, 2005)).

70) See further: Paul Bradshaw, “Social Media and News”, Mapping Digital Media Reference Series No. 15, Open Society Media Program, November 2011.

71) Pablo J. Boczkowski, *Digitizing the News: Innovation in Online Newspapers* (Cambridge, Massachusetts, etc., The MIT Press, 2004), p. 5.

72) Joris Luyendijk, “Thinking Beyond the Box”, 6 *International Journal of Communication* (2012), pp. 2919-2922, at p. 2921.

73) See further: Robin Foster, *News Plurality in a Digital World*, *op. cit.*

74) Lorna Woods, “User Generated Content: Freedom of Expression and the Role of the Media in a Digital Age”, *op. cit.*, p. 141.

75) See, for example, Jackie Harrison, “Freedom of Expression: the BBC and User Generated Content”, *op. cit.*, and Pablo Boczkowski, *Digitizing the News: Innovation in Online Newspapers*, *op. cit.*

in journalistic or news-making processes.⁷⁶ Media professionals are well known for their staunch defence of their sectoral autonomy and its self-regulatory mechanisms. It is perhaps unsurprising, then, that new news players operating – often very successfully – outside the institutional and ethical parameters that have traditionally defined the media sector, would sometimes be viewed in adversarial terms by news media professionals.

Opinions on trends towards more open and participatory news-making vary from embracement of the wisdom of the crowds to the rejection of the ignorance of the masses and there have even been calls for “revenge of the experts”. There is a clear tension between contradictory perceptions of “dumbing down” and “democratisation” of news.⁷⁷

Another obvious explanation for the limited usage of UGC in practice is the cost-benefit calculation, which is partly influenced by journalistic scepticism of the added value of UGC for news purposes. Jackie Harrison has noted that “moderation as a form of gatekeeping UGC has proven to be one of the most time consuming and resource hungry elements of the user generated phenomenon”.⁷⁸ Although her observation was specifically prompted by a study she conducted on the BBC’s use of UGC, its relevance is by no means limited to the BBC’s experience. Harrison neatly summarises the extensive investment required to moderate UGC (again, in the BBC context, and notwithstanding some editorial particularities of the BBC, the relevance extends beyond the immediate case-study):

“From the extent of moderation alone it can be seen that UGC is not a cheap option for the BBC and never will be. The BBC’s impartiality rules do not allow for a partisan viewpoint to dominate and as such UGC is seen as requiring careful scrutiny (sometimes legal and always editorially and journalistically) an exercise that is both labour intensive and expensive. Adding to this expense is the fact that UGC is further supported by: the ‘Have Your Say’ website, creative commons licensing; the BBC open ‘creative archives;’ payments for received content; conferences and training; access to mainstream news site; support and solicitation for audience engagement.”⁷⁹

Some sections of the mainstream media are currently suffering from a wholesale backlash of negative public opinion and distrust in the light of the *News of the World* telephone-hacking scandal and the Leveson Inquiry⁸⁰ and Report,⁸¹ but UGC has not escaped critical scrutiny either. A lack of trust in the sourcing and production processes and ethics of UGC is another reason for its limited uptake in practice.

Credibility issues often loom around UGC due to widespread use of pseudonymity or anonymity and the lack of transparency in the news-making process that they can compound. The “Gay Girl in Damascus Blog” was a high-profile case in point. The well-followed blog, purportedly written by Amina Abdallah Araf al Omari, a feminist and lesbian in Damascus, documented her daily experiences – romantic and political – against the backdrop of spiralling unrest in Syria. The blog detailed her clandestine existence following an attempted arrest by Syrian security forces, and later announced her kidnapping (via a post purportedly from her cousin). The blog turned out to be a protracted hoax. The blog had in actual fact been created and maintained by one Tom MacMaster, an American “40-year-old Middle East activist studying for a masters at Edinburgh University”.⁸²

76) Henrik Örnebring, “Anything you can do, I can do better? Professional journalists on citizen journalism in six European countries”, 75 *International Communication Gazette* (No. 1, 2013), pp. 35-53.

77) Media, Entertainment and Arts Alliance, *Journalism at the Speed of Bytes – Australian Newspapers in the 21st Century* (Australia, 2012), pp. 27-28.

78) Jackie Harrison, “Freedom of Expression: the BBC and User Generated Content”, in Merris Amos, Jackie Harrison & Lorna Woods, Eds., *Freedom of Expression and the Media* (Leiden/Boston, Martinus Nijhoff Publishers, 2012), pp. 169-187, at p. 178.

79) *Ibid.*

80) See: www.levesoninquiry.org.uk/

81) “The Report into the Culture, Practices and Ethics of the Press”, The Leveson Inquiry, 29 November 2012, available at: www.levesoninquiry.org.uk/about/the-report/. For expert analysis and commentary, see *inter alia*, the LSE Media Policy Project’s Blog: <http://blogs.lse.ac.uk/mediapolicyproject/category/phone-hacking/> and *IRIS* 2013-2/29.

82) Esther Addley, “Syrian lesbian blogger is revealed conclusively to be a married man”, *The Guardian*, 13 June 2011, available at: www.guardian.co.uk/world/2011/jun/13/syrian-lesbian-blogger-tom-macmaster

The details of the story have been unravelled very clearly by *The Guardian*. The hoax was so convincing that journalists, bloggers and activists had contacted Amina and maintained e-mail correspondence with her; many of them also tried to schedule meetings with her (which ultimately never went ahead). One woman believed she was having a relationship with her. There was then great concern for Amina's welfare and commotion when it was announced that she had been kidnapped.

But there are even more twists in this tale relating to how UGC was a significant force in deconstructing the hoax and shaping the story. The hoax was exposed by a flurry of investigative and verification activities by "an army of bloggers, journalists and others" who traced the blog posts to different IP addresses registered to MacMaster and his wife; matched her photos in a photo-sharing site with those sent in private e-mails by Amina, etc. In other words, peer-vetting brought the blog down. The groundswell of evidence pointing at the false identity prompted MacMaster to admit that he was the blog's true author. Yet he appeared somewhat unrepentant, stating, "While the narrative voice may have been fictional, the facts on this blog are true and not misleading as to the situation on the ground," and claiming, amongst other things, that it proved how superficial coverage of the Middle East really is. Unsurprisingly, MacMaster's revelations triggered further UGC from many quarters.

At the bottom of *The Guardian's* article, a scrupulous editorial comment has been placed: "The photograph on this article was changed on Monday 13 June because a positively verified picture of Tom MacMaster was not available." The comment suggests that *The Guardian* may have found photos of Tom MacMaster online (perhaps on social networking sites), but given the rigour of its reporting guidelines, it could not establish for certain that the portrayed person was the Tom MacMaster in question. Certainly for a story like this, there was no way that *The Guardian* was going to take any editorial or ethical shortcuts.

This example provides an excellent demonstration of how UGC can equally break or make trust.

4. Forecast

While much of the potential of UGC for news purposes remains untapped, various interesting initiatives to stimulate its uptake are afoot, such as: (i) the European Broadcasting Union's (EBU) strategies for the promotion of media literacy; (ii) *The Guardian's* policy of open newlists, and (iii) *Al Jazeera's* open archive policy.

(i) EBU media literacy initiatives

As mentioned above, media literacy, as conventionally understood, includes an important focus on content creation by individuals. The EBU sees the promotion of media literacy as an objective that should typically be pursued by public service broadcasters/media. It has organised its Principles on Media Literacy along three main axes: "[b]ridging the digital divide", "inform[ing] and empower[ing] citizens to democracy", and "creating a trusted space".⁸³ The organisation's current efforts to promote media literacy include the showcasing of relevant best practices developed by its members. On the relevant section of the EBU website a number of these best practices have usefully been selected, itemised and grouped in categories, including: "Encouraging online engagement", "Platform for expression", and "Facilitating interaction and creativity".⁸⁴ Each of these categories represents important dimensions of the UGC phenomenon. At the EBU Media Literacy Forum in March 2012, it was announced that the EBU would explore the possibility of developing a Media Literacy Toolkit to help to promote media literacy through practical measures.

83) *Empowering Citizenship Through Media Literacy: the Role of Public Service Media*, European Broad. Union Viewpoint 1 (Feb. 3, 2012), http://www3.ebu.ch/files/live/sites/ebu/files/Knowledge/Initiatives%20-%20Policy/Topical%20Issues/Media%20Literacy/Viewpoint_2011_EN_Media_literacy.pdf

84) See: <http://www3.ebu.ch/cms/en/sites/ebu/contents/policies/eu---policy/public-affairs-and-legal-issues/media-literacy-1.html>

(ii) The Guardian's Open Newlist Policy

The practice of crowdsourcing the news has been taken to a new level by *The Guardian*. In 2011, it opened its newlists to the public "so you can help us make news".⁸⁵ It was prompted by the realisation that readers could help newsdesks to figure out which stories "were worth investing precious reporting resources in" and help to make and shape the news by filling in the gaps of the journalists' knowledge and expertise. It was a radical departure in a sector where scoops are hugely prized and details of breaking stories are jealously guarded from peers. Its radical nature is hardly affected by the admission that exclusive stories and embargoed content are not included. And in announcing the initiative, the paper did engage in some appropriate expectation-management: "What we won't do is give up our right to exercise our own judgment about which stories are important, or pay much attention to pestering from PR people, but we do think it is worth listening to our readers". This statement is indicative of a widely felt tension in newsrooms between an enthusiasm to embrace technology-enhanced, participatory reporting and investigation and a reluctance to relinquish editorial control over the news-making process.

Crowdsourcing is catching on in an increasing number of quarters: the financing of audiovisual production (especially films); music-making and news, as in the above example of *The Guardian*. It has been speculated that in the future, the public might increasingly demand that media companies adopt crowdsourcing models, e.g. radio stations deciding what music should be played and public service broadcasters deciding what types of programming should be financed.

(iii) Al Jazeera's Open Archive Policy

This collaborative process involving audiovisual media and the public can be furthered in a variety of ways. One high-profile initiative was developed by *Al Jazeera* in 2009.⁸⁶ It involves making available "material under a Creative Commons license to allow commercial and amateur users to share, edit, subtitle and cite video news". Some of the footage was exclusively prepared by *Al Jazeera* and covered news stories for which a scarcity of footage was available.

A similar, earlier initiative was taken by the BBC in the form of its Creative Archive Pilot Project (2005-2006) and according to the website, the Creative Archive Licence Group (which oversaw the project) "continues to explore how the scheme can be used".⁸⁷ The draft scheme's slogan was "Find it. Rip it. Mix it. Share it. Come and get it.": all instructions/goals that contribute centrally to the stimulation of UGC. The Creative Archive Licence involved five rules: no commercial use, share alike, give credit, no endorsement and UK only.

Conclusions

"The future is mutualized," Alan Rusbridger, *The Guardian's* Editor-in-chief tells us, "but we will need help – from government and others – to get there".⁸⁸ The Leveson Report will prove a watershed moment for the future of media freedom and regulation – not just in the United Kingdom, but with its ripple-on effects elsewhere. The future of media freedom and regulation is inextricably bound-up in the future of freedom and regulation for other actors participating in public debate, through UGC or indeed any form of media, institutionalised or not, professional or not. Any regulatory rallying to Rusbridger's call will need to be keenly aware of and reflective of the relevance of UGC and all forms of media and all forms of actors participating in public debate, as well as the similarities and differences between their respective legal positions.

85) Dan Roberts, "The Guardian is opening up its newlists so you can help us make news", *The Guardian*, 9 October 2011, available at: www.guardian.co.uk/media/2011/oct/09/the-guardian-newlists-opening-up. The Guardian Open Newlist can be consulted at: www.guardian.co.uk/news/series/open-newlist?INTCMP=SRCH

86) "Al Jazeera: About the Repository, available at: <http://cc.aljazeera.net/content/about-repository>

87) For an overview, see: www.bbc.co.uk/creativearchive/

88) Alan Rusbridger, "The Future is Mutualized", 48 *Columbia Journalism Review* (No. 4, November/December 2009), p. 52.

This article has tried to provide a summary, exploratory sense of the pace and nature of ongoing change in news-making processes in an online environment, paying particular attention to the role and impact of UGC in and on the dynamics of mutualisation. It has sought to briefly introduce some of the legal issues involved and how they play out in the regulatory frameworks that shape the European audiovisual sector. It started by unravelling the term, UGC, and aligning it alongside other features and jargon in the opening up of news-making to a broader range of actors. It continued with an exploration of the very significant evolution that is taking place in how the right to freedom of expression and information is being applied to the Internet and online news-making processes by the European Court of Human Rights. It then moved from the level of principles to a less abstract level: that of the European regulatory frameworks for communication, both the Audiovisual Media Services Directive and the E-Commerce Directive.

That was the limit of this article's ambition. Over the years, two of the great strengths of the *IRIS plus* series have been, first, to address emergent issues in European audiovisual law, and second, to revisit them in due course, in light of subsequent accumulated experience or changed perceptions. The present article hopes to have set up an opportunity for a future *IRIS plus* article to revisit its central theme from other perspectives, such as a more detailed analysis of the proposed UGC-typology in the European Union's regulatory framework, especially as informed by national legislative and jurisprudential developments pertaining to the role of UGC in news-making processes in the audiovisual sector.

Freedom of Expression Online

The freedom to express oneself is no longer a right mainly exercised through spoken or printed words or comparable traditional forms of expression via media but also a right whose use has “gone online” and become increasingly interactive.

Accordingly, standard setting bodies such as the Council of Europe’s Committee of Ministers instruct us on how to protect this right in its new online environment. To this very end, the first article on “standards” of this related reporting section summarises the Committee of Ministers’ related Declaration. In the same online context, a second article stresses a potential danger to undue limitations imposed on the freedom of expression, which could possibly materialise if the proposed regulation for Internet portals, websites and blogs were to be adopted in “the former Yugoslav Republic of Macedonia”. A specific issue concerning online and offline exercise of the freedom of expression is addressed by the Maltese Guidelines on the Obligation of Due Impartiality. They describe professional standards to be applied to news, current affairs programmes and programmes dealing with controversial issues.

The next two articles explore some specific angles of the relationship between social networks and audiovisual media services. They set initial benchmarks on how broadcasters may or may not use these networks to provide services. Whereas in Austria, a specific statute prohibits the ORF from cooperating with Facebook, the French regulator has just allowed the referencing of social networks by name under certain circumstances: a practice formerly banned as surreptitious advertising.

The last two articles concern the issue of responsibility for, on the one hand, the content of a television report contained in a website-embedded YouTube video and, on the other hand, an unverified tweet shown on television with major consequences on a Presidential election. These examples illustrate not only to what significant degree off- and online media engage meanwhile in sharing content but also how challenging it has become to balance various fundamental freedoms.

Standards

Committee of Ministers

Continued Attention for Online Freedom of Expression, Assembly and Association

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On 7 December 2011, the Council of Europe's Committee of Ministers (CM) adopted a Declaration on the protection of freedom of expression and freedom of assembly and association with regard to privately operated Internet platforms and online service providers. This follows the CM's adoption in September 2011 of a similarly-titled Declaration on the protection of freedom of expression and information and freedom of assembly and association with regard to Internet domain names and name strings (see IRIS 2011-10/6).

The Declaration opens with an affirmation of the importance of the right to freedom of expression (including "its corollary, freedom of the media") and of the right to freedom of assembly and association in democratic society (para. 1). These rights are guaranteed by Articles 10 and 11, respectively, of the European Convention on Human Rights (ECHR).

The Declaration stresses the importance of safeguarding these rights in an online environment due to the public's increased reliance on "social networks, blogging websites and other means of mass communication" for informational, communicative, associative and other purposes (para. 2). It notes that "these platforms are becoming an integral part of the new media ecosystem" and adds that although they are privately operated, "they are a significant part of the public sphere through facilitating debate on issues of public interest; in some cases, they can fulfil, similar to traditional media, the role of a social 'watchdog' and have demonstrated their usefulness in bringing positive real-life change" (para. 2).

The Declaration then draws attention to, and briefly explains, the threats to online freedom of expression posed by political influence or pressure on new media actors (para. 3) and by "[d]istributed denial-of-service attacks against websites of independent media, human rights defenders, dissidents, whistleblowers and other new media actors" (para. 4).

In light of the instrumental role of privately-owned Internet platforms and online service providers in safeguarding online freedom of expression, assembly and association, as well as the aforementioned threats to the role of those actors, the Declaration seeks to take a stand on their behalf. It does so by insisting on the importance of Articles 10 and 11 ECHR, as a shield against "politically motivated pressure exerted on privately operated Internet platforms and online service providers, and of other attacks against websites of independent media, human rights defenders, dissidents, whistleblowers and new media actors" (para. 7).

- Declaration by the Committee of Ministers on the protection of freedom of expression and freedom of assembly and association with regard to privately operated Internet platforms and online service providers, 7 December 2011
<http://merlin.obs.coe.int/redirect.php?id=15643>

IRIS 2012-2/3

“The former Yugoslav Republic of Macedonia”

Libel and Defamation to Be Decriminalised

Borce Manevski

Independent Consultant for Media and Public Relations

After years of debate between professional journalists, NGO's, legal experts and governmental representatives and supported by the Council of Europe, the draft text of the Act on Civil Responsibility for Libel and Defamation has entered the Parliamentary procedure.

The public discourse of the so-called “decriminalisation of libel and defamation” is multi-faceted: the national Government, which proposed the law, states that during the preparation of the draft text “the remarks of the Council of Europe expert Gavin Millar ... and the rich jurisprudence of the European Court for Human Rights” have been incorporated, including the Document 11305 (2007) of the Parliamentary Assembly of the Council of Europe, titled “Towards Decriminalisation of Defamation”. Also a comparative analysis of the respective law in other countries has been made.

In addition, it was decided that the 325 pending criminal charges for libel and defamation against journalists will be stopped and transferred to the civil courts.

The current Criminal Code, which regulates defamation, sets no limit to the possible financial sanctions that the Court can impose on the affected journalists. This led to the imposition of sanctions of even EUR 30,000 or more, which is a huge amount in a country with an average salary of about EUR 300. Now, the new law foresees to set the limit at a maximum of EUR 27,000, out of which the author of the text would pay EUR 2,000, the editor in chief EUR 10,000 and the owner of the media outlet EUR 15,000. Hence, the responsibility in future would be distributed among several persons. This may entail a risk of influence by company owners and chief editors on the reporters' work and jeopardize the environment of free journalistic investigation and reporting.

However, according to Article 8 of the bill, the author of a text will not be held responsible, if he proves that he was ordered to write the text by the company or in a case where the text was significantly altered by the editor.

The bill also regulates internet portals, websites and blogs. Information society experts have located shortcomings in Article 11 of the draft, which could endanger the freedom of expression. The non-governmental Metamorphosis Foundation comments “Given that every online service provider or website administrator has the technical capabilities to control all content (the form of control can ultimately be deletion or removal of the website from the internet), contrary to the principle of presumption of innocence, with this Article (Article 11) the owners are put in a situation to have to prove that they were innocent, instead of the plaintiff(s) having to offer evidence for their guilt or malicious intent.” Furthermore, according to Article 23 of the bill, courts are given the possibility to stop a journalist from publishing information, by means of so-called ‘temporary judicial measures’: “...this leaves a space for misuse during the implementation (of the law), in order to limit the freedom of expression”, claims a representative of the Journalists' Trade Union. In general, the Association of Journalists of Macedonia is satisfied with the proposed text and hopes that by the time the bill will be voted by the Parliament, all shortcomings and gaps will have been corrected based on the on-going public debates.

- Предлог закон за граѓанска одговорност за навреда и клевета (Bill on Civil Responsibility for Libel and Defamation)
<http://merlin.obs.coe.int/redirect.php?id=16134>

IRIS 2012-10/22

Malta

Guidelines on the Obligation of Due Impartiality

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In April 2012, the Maltese public service broadcaster – Public Broadcasting Services Limited – issued a set of Guidelines on the Obligation of Due Impartiality addressed at news, current affairs programmes and programmes dealing with controversial issues. According to these Guidelines, “due impartiality is the presentation of divergent views on any issue that is objectively presented by the producer and presenter”. Responsibility in law vests in the Head of News for decisions concerning the content of news bulletins and current affairs programmes transmitted by the public service broadcaster. These Guidelines apply to all PBS employees. These employees are debarred from associating themselves “with a political party or undermin[ing] the perception of the impartiality, integrity, independence and objectivity of PBS”.

The Guidelines further provide that topics selected for discussion should be selected without any pressure whatsoever and should be presented in an objective manner, with the presenter providing accurate information. Programme guests are enjoined to offer a wide range of opinions and views. In the case of programmes dealing with political or industrial controversy or public policy, guests should reflect a balanced and adequate representation of all interested parties. The Guidelines also mandate that audiovisual material used should reflect divergent views as well.

Interestingly enough, the Guidelines state that: “Journalists, presenters and producers are not expected to be neutral on every controversial issue,” but if they do air their views “care is to be taken that they do not favour one opinion as opposed to another in such a manner that gives advantage to that opinion or that invites the viewers or listeners to adhere to that opinion”. Where presenters have a strong opinion on a topic they have to consult the editor to guide them as to “whether the presenter should declare his position during that programme.”

A presenter’s conduct is not limited to the actual programme but extends to when s/he is engaged in activities off-air. A presenter’s behaviour off-air may tarnish the reputation as to the objectivity of the public service broadcaster. Hence, they should not express support for any political party or lobby group or campaign in favour of a policy that is of the nature of political or industrial controversy. Nor can they disclose their voting intentions either in elections or in referenda. Nor can they endorse political candidates. Furthermore, presenters of public broadcasting services programmes are prohibited from demanding a change in “high profile public policy”. All “news presenters, producers, journalists and presenters of news and current affairs programmes are not to undertake promotions or endorsements of political parties or individual candidates or political organisations as well as endorse commercial products”. All these persons are also requested not to write on or participate in public debate on a number of matters such as current affairs, politics, economics, business, finance, public policy and matters of political or industrial controversy. This participation can take place through letters to the editor, newspaper contributions, blogging online, posting remarks or opinions online, participating in public debates and fronting a campaign. Should any of the above take place, prior authorisation is required and the Registered Editor may, depending on the circumstances of each case, change, adapt or even stop the programme in question.

Social Networks

Austria

ORF Facebook Pages Unlawful

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In its decision of 25 January 2012 (KOA 11.260/11-018), the Austrian communications authority, KommAustria, concluded that various Facebook pages provided by the public service broadcaster ORF in connection with its television programmes constituted unlawful cooperation with Facebook as a social network. The *ORF-Gesetz* (ORF Act) prohibits ORF from offering online services in the form of social networks, including links to and other forms of cooperation with them.

The case concerned a total of 62 different ORF Facebook pages. Some content was provided by commissioned producers and some directly by ORF staff and editors. The pages contained not only the type of information found on a traditional website, but also opportunities to interact with registered Facebook users.

Article 4f of the *ORF-Gesetz* regulates the provision of online services by ORF, including a list of services that may not be offered by ORF. Under Article 4f(2)(25), these include social networks and links to social networks and other forms of cooperation with them. An exception applies to links related to ORF's own online news reports, i.e., links shown editorially, including as part of a report. This exception did not apply in the cases examined here.

ORF particularly argued that the pages were not social networks, but marketing activities or web content which it, like any other company, provided as part of its online activities and which were comparable to traditional websites. The regulator disagreed, especially since Facebook was more or less the prototype of a social network. It also noted that, in order to participate, Facebook's terms of use had to be accepted, which amounted to a form of cooperation.

In summary, KommAustria concluded that 38 Facebook pages produced by ORF staff members or employees of ORF-commissioned producers should be attributed to ORF and infringed the restrictions set out in Article 4f *ORF-Gesetz*.

- *Entscheidung KOA 11.260 / 11-018 der KommAustria, 25. Januar 2012* (KommAustria decision KOA 11.260 / 11-018, 25 January 2012)
<http://merlin.obs.coe.int/redirect.php?id=15674>

IRIS 2012-3/9

France

CSA Allows Social Networks to be Named on the Air

*Amélie Blocman
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On 3 January 2013, in plenary assembly at the end of a process of thorough consideration in conjunction with radio and television companies, journalists, and representatives of social networks,

the audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel – CSA) revised its decision to ban specific references to social networks in radio and television broadcasts. It has become a frequent occurrence for channels to refer viewers to the pages devoted to their programmes on social networks such as Facebook, or to invite them to respond with a Tweet. Until now, radio and television broadcasts have only been allowed to use the generic term “social networks”. In May 2011, the CSA indicated that it considered referring viewers or listeners to a social network without mentioning its name was informative, whereas giving the actual name of the social network constituted advertising, which contravened the provisions of Article 9 of the Decree of 27 March 1992 prohibiting surreptitious advertising (see IRIS 2011-7/22), a position that was criticised by the profession at the time.

The CSA, keen to take account of the evolution in habits while ensuring compliance with the regulations on advertising in the interests of consumers, now allows social networks to be named in reference to a source of information. Similarly, it is now allowed to refer the public to a social network, if the reference is occasional and discreet, does not constitute advertising, and is not a sustained encouragement to connect to the network. On the other hand, the CSA found that including the name of a social network in the title of a programme, and displaying the registered brand names of social networks or the distinctive signs habitually associated with them was contrary to the ban on surreptitious advertising. The court recalled that the social networks are brand names used by commercial companies and the ban may not, under the current version of the legislation, be waived.

- *Recommandations du CSA relatives à la mention des réseaux sociaux dans les programmes de télévision et de radio, Communiqué de presse du CSA du 4 janvier 2013* (Recommendations by the CSA on mentioning social networks during radio and television broadcasts, CSA press release of 4 January 2013) <http://merlin.obs.coe.int/redirect.php?id=16278>

IRIS 2013-2/22

Responsibility

Germany

Hamburg District Court Finds Blogger Liable for Embedded YouTube Video

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On 22 May 2012, the *Landgericht Hamburg* (Hamburg District Court – LG) ruled that a blogger was liable for a YouTube video that he had embedded on his website. The video showed a television report about the plaintiff, a doctor, broadcast on the ZDF magazine programme “WISO”. In the report, the doctor was accused of using dubious methods to treat cancer patients. However, the report also included false allegations, for example, it claimed that there was no expert evidence verifying the effectiveness of the plaintiff’s methods, which proved to be untrue. The doctor’s complaint at the time was therefore upheld and ZDF was forbidden by a court from distributing the film.

The blogger accused in the present case had reported on his website about the legal dispute between the plaintiff and ZDF and, despite the court injunction imposed on ZDF, had embedded the TV report in his blog as a YouTube video. The doctor also lodged a complaint about this.

The court concluded that the blogger had failed to meet his duty to check the report’s accuracy. For example, he had been aware of the legal dispute in which the doctor had sought an injunction

preventing ZDF from distributing the television report. He had therefore known that the video's accuracy could not be trusted, especially as he had been aware that the plaintiff had already taken court action repeatedly against reports that he thought had infringed his general personality rights. The defendant should therefore have checked the accuracy of the television report before embedding the YouTube video in his blog.

According to the LG Hamburg, the principles of the 2003 *Paperboy* ruling, in which the *Bundesgerichtshof* (Federal Supreme Court – BGH) had expressly authorised so-called “deep links”, i. e., links leading directly to a particular web page rather than to a website's home page (see IRIS 2003-8/32), were not relevant in the current case. The reason for this lay in the purpose of the respective complaints: whereas the *Paperboy* ruling dealt with copyright infringements, the current case concerned “the dissemination of expressions of opinion”. It was also detrimental to the blogger's case that he had regarded the link as a reference to additional information and referred to the video in his article.

The ruling, which to a large extent runs counter to previous “opinion-friendly” case law of the BGH and the *Bundesverfassungsgericht* (Federal Constitutional Court – BVerfG), has attracted a considerable amount of criticism. The defendant has already declared his intention to appeal.

- *Urteil des Landgerichts Hamburg, Az.: 324 O 596/11* (Ruling of the Hamburg District Court, case no. 324 O 596/11)
<http://merlin.obs.coe.int/redirect.php?id=15981>

IRIS 2012-7/13

Ireland

Broadcast of Unverified “Tweet” Unfair to Presidential Candidate

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On 7 March 2012 the Compliance Committee of the Broadcasting Authority of Ireland (BAI) upheld a complaint made by a former candidate for the office of President of Ireland. The complaint concerned the use of an unverified tweet during a live televised debate just three days prior to polling. The Committee also held that the broadcaster, RTÉ, (the national public service broadcaster), exacerbated the unfairness by including extracts of the debate in a related radio interview with the complainant broadcast the following morning. This related radio broadcast also failed to include any clarification regarding the provenance of the tweet.

During the debate the tweet was attributed, in error, to the official twitter account of another Presidential candidate. Its content called into question the relationship and prior involvement of the complainant, who was standing as an independent candidate, in fundraising activities for a political party, an involvement which the complainant had rebutted throughout the campaign and had also addressed earlier in the live debate. The tweet formed the basis for the presenter to reopen discussion on the nature and extent of the complainant's involvement with the political party.

During a period of robust exchanges on the topic, the candidate, to whom the tweet was accredited, was not asked to confirm its provenance; nor were there any apparent attempts by the broadcaster to verify the provenance of the tweet. This is despite information being available within minutes that clarified that the tweet was not from the official account of the other candidate.

The complaint was made in accordance with s.48 of the Broadcasting Act 2009, and contended that there had been a breach of s.39(1)(b) of the Broadcasting Act 2009. This section requires that every broadcaster should ensure that in its treatment of current affairs it is fair to all interests concerned and that broadcasts are presented in an objective and impartial manner. The complainant also sought an apology from the broadcaster and an investigation or public hearing into the matter. The broadcaster claimed that the broadcast of the tweet was legitimate for a number of reasons, including:

- the content of the tweet, if not its source, was accurate;
- the other candidate, to whom the tweet was accredited, did not deny its provenance;
- the complainant had the opportunity to respond to the tweet and to matters relating to his relationship with the political party and its fundraising activities.

The Committee in their decision confirmed that the focus of the debate on the character and policies of candidates for the office of President of Ireland was appropriate. Accordingly, questions on the complainant's prior relationship with the political party were considered to be legitimate and in the public interest. Therefore there was a context for inclusion of the tweet in addressing these legitimate interests and the Committee considered that it is reasonable, in principle, for a presenter to reopen topics once the programme as a whole does not breach the requirements of fair, objective and impartial treatment of all contributors to a programme.

It was the Committee's view that the broadcast, in a programme of this nature, of what amounted to unverified information at the time of broadcast, from a source wrongly accredited by the presenter, was unfair to the complainant. The Committee decided that the complaint was not of such a serious nature to warrant an investigation or public hearing. No provision exists to compel broadcasters to issue an apology in such circumstances but the broadcaster was required to carry an announcement detailing the Committee's decision.

The Committee also noted that the disclosure of material relating to the complaint, by persons unknown, during the period of consideration of the complaint by them, demonstrated a lack of respect for the integrity of the complaints process.

- BAI, Compliance Committee Meeting, February 2012
<http://merlin.obs.coe.int/redirect.php?id=15771>

IRIS 2012-5/27

2013 Social Media Guidelines

The OSCE Representative on Freedom of the Media's 2013 Social Media Guidelines represent another milestone in the Representative's continued endeavours to protect and promote freedom of expression and media freedom on the Internet.

The Guidelines, republished in the Zoom section of this IRIS *plus* with the kind permission of the OSCE Representative on Freedom of the Media, are built around a number of thematic focuses: social media and freedom of expression; social media and journalism; professional media and web 2.0; user-generated content and online comments, and a multi-stakeholder approach and corporate responsibility.

These focuses usefully complement those of the lead article (which was completed before the Guidelines were published) in various ways. First, the Guidelines comprise specific focuses on user-generated content and on different, ongoing transformations in the journalism and media sectors. Second, journalistic and media activities today are defined by their increasing interactivity; the increasing diversity of actors involved, and the increasing complexity in questions of responsibility for the production, dissemination and hosting of content online. These are all cross-cutting topics in both the Guidelines and the lead article.

The Guidelines are also very useful as an example of an institutionally-endorsed attempt to navigate vast and largely uncharted waters, an exercise which has to contend with strong legal currents and the changing winds of media practices.

The OSCE Representative on Freedom of the Media 2013 Social Media Guidelines, which can be found in the OSCE RFOM's 2013 Social Media Guidebook, at pp. 141-147, are available at: <http://www.osce.org/fom/99563>

The OSCE Representative on Freedom of the Media 2013 Social Media Guidelines

Introduction

A decade ago, the Office of the OSCE Representative on Freedom of the Media first convened a series of Internet Conferences to establish the potential and challenges of the Internet for freedom of expression and freedom of the media. The Amsterdam Recommendations of 2003 and the Media Freedom Internet Cookbook of 2004 approached the Internet as a new phenomenon and an unprecedented communication platform.

The general principles are still valid today, but the Internet has evolved from a rather technical infrastructure to an integral part of our everyday lives. As broadband access to the Internet is expanding, the Internet is constantly becoming a more affordable tool for citizens across the OSCE region.

At the same time, the technical development of the so-called Web 2.0 has made it even easier to share information and participate in public discourse. We live in the Digital Age, which makes it easier for us to create more democratic cultures with participation by all members of society. The Internet isn't free by nature, though, but by design and by enlightened decisions of legislators, the technical community and users.

The Internet also brings along a new notion of media: Social media make it possible for everyone to create, impart and receive news; or to comment on and discuss ideas and developments. Bloggers have expanded the scope of classical journalism and added the new form of "citizen reporting" to the media landscape. And traditional professional journalism is also increasingly making use of social media tools for researching and distributing their stories.

In the light of these developments, the OSCE Representative on Freedom of the Media compiled these guidelines from the contributions to the 2013 Social Media Guidebook to assist all stakeholders in OSCE participating States to foster freedom of the media on the Internet.

Just as 10 years ago with the Amsterdam Recommendations, these guidelines need to be adjusted as social media develop even further. The underlying principle, however, remains the same: the basic human rights to free media and free expression and their implementation in the digital age.

Social media and freedom of expression

- Social Media make it easier than ever for every connected citizen to disseminate information, share news, comment on reports and get involved into the creation of content. The right to free expression and free media as human rights is not reserved for media companies or editorial offices. These rights are equally applicable to all forms of journalism, not just traditional media. As basic human rights there cannot be different rights for different categories and there cannot be different subsets for traditional media and new media.

- The right to free media also includes the right to seek and receive information and ideas of all kinds, regardless of frontiers, orally or in print, in art or any other media of choice. Social media and social networks unquestionably are protected by these rights, because they are simply a different way transferring news, opinions and ideas.

- It is important to note that freedom of the media on the Internet must be defended offline, too, because "traditional" forms of censorship, such as harassment or imprisonment of online journalists or physical raids of editorial offices, apply for online media, too. Assaults on journalists, bloggers or social media activists are direct attacks on media freedom.

- Legislation and regulations constantly need to be adjusted to reflect technical innovations and new communication platforms. The underlying right to free expression, however, remains unaltered and valid for any new technological platform.

Social media and journalism

- The real-time flow of information from all over the world funneling through social networks cannot be ignored. For journalists, the balance of using social media for newsgathering, reporting, verifying – and ethical issues that go with it – remains a challenge that continues to be tested as new 2013 Social Media Guidelines standards evolve to meet the demands of new technologies. Social media's immediacy, ease of use, low barrier to entry and global footprint have made information, news, content, sentiment, travel farther and faster than ever before.
- Beyond the use for individual communication, social networks today serve as an indispensable tool for the work of journalists and bloggers. Research, publication, distribution, funding, collaboration, follow up or discussion – all this happens on social networks and through social media. At the same time also users rely on social media and social networks to receive news reporting. This multi-dimensional usage of social media and social networks also brings with it implications for the basic right of freedom of the media.
- The Internet and mobile technologies are at the center of how people's relationship to news is changing. The importance of social networks for news consumption is growing. People use social networks and social networking technology to filter, assess and react to news. The Internet with its social media and social networks, today forms an indispensable infrastructure for the right to seek and receive information –also across borders – a right that is enshrined in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.
- Blogging, vlogging, posting videos, aggregating news, sharing articles online or syndicating content are some of the forms of journalism that the innovative technology of the Web 2.0 allows for.
- With regard to the increasing importance of the Internet as a means of mass communication, a debate is needed on extending the protection of journalists' sources to others engaged in the dissemination of information.
- In a world in which individuals communicate on public or semi-public platforms, the line between professional journalism and other forms of content production is not easily drawn. Collaborative works, such as wikis, make it difficult to identify a single author. Rather than judging by the origin of content, the content itself should qualify as journalism and this definition should be broadly applied.

Professional media and Web 2.0

- The way that media outlets are developing their social media policies and practices is influenced by the extent to which the "people formerly known as the audience" are increasingly accessing and sharing news and information via social media platforms.
- What used to happen before "going to press" - information distribution – in the forms of verification and fact checking, now plays out simultaneously on social media. Process and transparency is as newsworthy as the newsgathering and reporting itself, and is becoming a part of how stories are told with these media. And the whole world is paying close attention.
- Social media as a news source means changing roles for journalists in how they approach and cover news. The changing role for news organizations on social media continues to be the tone and the approach they use in posting content; the process of vetting content and reaching their audience in the space. Instead of fearing to be left out, however, journalists should embrace new technologies and social media as yet another tool in their professional toolbox.
- It would be valuable to establish what constitutes standard practice with respect to user-generated content in newsrooms. Understanding the in-depth newsroom workflows and practices in relation to production and technical capabilities would allow researchers to better understand the challenges that newsrooms face in evaluating UGC and integrating it effectively into news

packages and programs. A set of best practices could emerge from further inquiry into these processes.

- However, the real-time news feed of social media content has not come without pitfalls. Posting updates on social media and verifying authenticity has become more important than ever before. Editorial and social media teams could follow social media reports closely and work to verify and distribute reports from originating sources.

- The Internet and social media are highly technical environments. Journalists have an opportunity to learn about false identities and identity tracking from activists, dissidents, hackers and security researchers. Social media journalists could also make themselves familiar with the technical functionalities such as IP addresses, TOR, email headers and similar features.

- The use of Web 2.0 tools for this form of research – or “crowdsourcing” – is still underdeveloped and journalists need to develop skills to check and verify sources to guarantee reliable and accurate information. Recent cases have demonstrated a considerable lack of fact checking of social media sources by journalists. Awareness should be raised and tools for journalist training in the use of social media and social networks should be developed.

User generated content and online comments

- The issue of free comments by citizens on the Internet, although partly going beyond the bounds of media law regulation, is worth looking at. For the first time in history, an opportunity to discuss events reported by media and propose topics and develop life stories has emerged. For now, it is not a question of replacing professional journalism with “citizen reporting,” but enhancing the work of media editors through social media and a new group of media actors.

- With the diverse range of cultures, values and online usage throughout the OSCE, it is not surprising that regulation of online comments is just as varied. As the process involves interpretation of guidelines, understanding of freedom of expression, business interests and privacy policies, almost every country has its own way of responding to the issue, and it is unlikely there will be a unified policy any time in the near future. The rapidly changing way of Internet regulation also means the existing policies will probably be fluid, both technologically and legally, with individual Web sites determining the policies that work for them and their users.

- Accountability is an issue, for example when it comes to anonymous wikis. Professional journalism ethics, as well as guidelines for user ethics, needs to be further developed in this field.

- No matter what policy is chosen, however, the policies each country uses should not violate freedom of expression as stated in Article 10 of the European Convention of Human Rights nor should they hold third parties liable for posts, particularly considering the rate and volume at which online comments are posted and circulated. Only continued discussion and transparent debate on this subject will ensure that these standards are met.

- Mandatory prior monitoring of user-generated content, including online comments, is practically impossible and legally too restrictive. Mandatory monitoring has a chilling effect and discourages users to express themselves freely. Editorial offices and Web site owners, of course, can establish their own procedures, but legally prescribed prior monitoring inhibits the users’ free expression.

- Holding intermediaries liable for the content disseminated or created by their users severely undermines the enjoyment of the right to freedom of opinion and expression, because it leads to self-protective and overly broad private censorship, nontransparent and potentially arbitrary decisions, often without respecting due process. Content regulation should never be delegated to a private entities alone.

- No one should be held liable for content on the Internet of which they are not the author, as long as they do not specifically intervene in that content or refuse to obey court orders to remove that content, where they have the capacity to do so (‘mere conduit principle’).

Multi-stakeholder approach and corporate responsibility

- It is crucial to also mention the importance of the right to privacy, data protection and the confidentiality of individual communications, although it might take place on the same platforms as public communication.
- Government actions requesting to remove content should be as transparent as possible and allow for independent appeals procedures.
- Companies and service providers have a positive obligation to exercise their corporate social responsibility in such a way that guarantees freedom of expression and freedom of the media online and safeguards the privacy and security of their users.
- Although it is foremost that the state has the obligation to guarantee the individuals' basic human rights, corporations and companies also have a responsibility to protect these rights and enable their users in exercising these rights. These partly voluntary commitments are manifested in covenants and industry standards such as the Silicon Valley Standard and other Corporate Social Responsibility (CSR) guidelines.
- When following removal requests that are valid, written demands, based on law and consistent with human rights principles, interventions should always be as narrow as possible and it should be made sure that any removals are done locally, not globally.
- Countering Internet censorship is not something that any particular industry could tackle on its own. Sustainable efforts to promote freedom of expression and to limit the impact of censorship will require significant action from both the public and private sectors.
- Coming up with globally valid and enforceable rules to apply to situations worldwide will be difficult to achieve. A multi-stakeholder approach, including governments, civil society, industry and academia, might be helpful to develop guidelines for how technology companies, including those operating in repressive regimes, could best operate to promote freedom of expression and protect privacy of users.



OBSERVATOIRE EUROPÉEN DE L'AUDIOVISUEL
EUROPEAN AUDIOVISUAL OBSERVATORY
EUROPÄISCHE AUDIOVISUELLE INFORMATIONSTELLE

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It is the task of the European Audiovisual Observatory to improve transparency in the audiovisual sector in Europe. It does this by collecting, processing and publishing up-to-date information about the various industries concerned.

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