

New Media – Fundamental Rights

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Introduction

The Internet today is not a virtual space or the digital world as opposed to the 'real' world anymore, but it is an integral part of our everyday life and touches upon all dimensions of our life: private, public, business, education etc. It is important to note that the Internet is not free by nature – but by design, law and enlightened decisions of governments and companies.

Digital media and social networks change the way news are generated and accessed. They influence journalistic media in three dimensions: as a tool for journalists to create content, as a tool to distribute and impart information and as a tool to seek, receive and access information. The exercise of these fundamental rights by journalists and citizens also relies on the unhindered access to the Internet.

Freedom of the media as a human right is not reserved for media companies or editorial offices. This right cannot be interpreted only in the context of traditional media, but applies to any form of journalistic work that is meant for public distribution. As it is a basic human right, there cannot be different subsets for traditional media and new media.

Besides the positive and beneficial potential the Internet offers for the free flow of information, education, development and economy, also terrorists, like other criminals, can use the Internet for malicious purposes. These include the dissemination of materials designed to encourage terrorist acts or establishing communications to plan and coordinate terrorist acts.

On the other hand, freedom of expression and freedom of the media, also on the Internet, are fundamental cornerstones of democratic societies and in itself a safeguard against extremism and terrorism.

Social Media

Social media and social networks form ever new ways to communicate and share ideas, many of which we could not have imagined just a few years ago and many to come that we cannot envision today. They make use of innovative technologies and combine them with already existing features to new forms of Internet services which can be used by journalists and citizens alike.

Facebook, Twitter & Co. make it easier than ever before to share information, impart and receive news, or comment on and discuss ideas and developments. Bloggers already widened the scope of classical journalism and added the new form of 'blogging' or 'citizen journalism' to the media landscape. Now, social media and social networks add even another dimension.

The term social media refers to the use of web-based and mobile technologies to turn communication into an interactive dialogue. They can be defined as a group of Internet-based applications that build on the ideological and technological foundations of the so-called Web 2.0, and that allow the creation and exchange of user-generated content.

Enabled by ubiquitously accessible and scalable communication techniques, social media substantially change the way of communication between organizations, communities, as well as individuals and can take on many different forms, including magazines, Internet forums, weblogs, microblogging, wikis, podcasts, photographs or pictures, video, rating, social bookmarking or social networking.

Whereas this definition sees social networking as a part of social media, the distinction between social media and social networks in reality is blurred. Microblogging services such as Twitter serve both as personal networking tools and at the same time as a platform to disseminate news – or even for journalistic research. Social networks such as Facebook or Google+ are used for individual communication, but more and more also for institutional communication, news distribution, research through crowdsourcing and many more purposes, plus many still to be developed.

Open Journalism

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.

'There is some controversy over the term citizen journalism, because many professional journalists believe that only a trained journalist can understand the rigors and ethics involved in reporting the news. And conversely, there are many trained journalists who practice what might be considered citizen journalism by writing their own blogs or commentary online outside of the traditional journalism hierarchy.

Or in short: 'citizen journalism is that the people formerly known as the audience employ the press tools they have in their possession to inform one another.'

According to the Council of Europe, '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' qualifies as a journalist. This would include bloggers who publish new articles regularly.

At the same time, the Council of Europe suggests that with regard to the increasing importance of the Internet as a means of mass communication, there should be a debate on whether the protection of journalists' sources should be enlarged to other persons 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. Also, 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 'journalistic', and this definition should be broadly applied.

Freedom of the Media not Reserved for Editorial Offices

Freedom of the media and freedom of expression are universal rights that apply to all forms of media, no matter whether online or offline, no matter whether professional or citizen journalism, no matter whether print media or social media.

The right to freedom of the media also includes the right to seek and receive information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of choice. In consequence this means that social media and social networks themselves fall under the protection of the right to freedom of the

media, as today they serve manifold purposes in the production and consumption of journalistic content.

The protection of Internet services by the right to freedom of expression is also in line with the above mentioned human right to access to the Internet as well as existing OSCE commitments relating to freedom of opinion and expression and freedom of the media that apply to all forms of their exercise, including digital media on new platforms.

Criminal law only to be applied where expression intentionally causes harm, not where it merely offends

Already in 1976, the European Court of Human Rights in Strasbourg ruled that:

“Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued.”

(Ruling of the European Court of Human Rights, Case of Handyside vs. The United Kingdom, Application no. 5493/72, 7 December 1976)

Articles 10 ECHR requires that any interference or restriction must be “necessary in a democratic society”, which implies that there must be no lesser means available, that the legitimate aim that is pursued by the interference cannot be achieved by less restrictive measures. In practice, the European Court of Human Rights examines whether there was a “pressing social need” for the interference and, if so, whether the interference was reasonably proportionate to the fulfilment of that need. Finally, the words “in a democratic society” allow the Court to examine the interference in a particular country in the light of what such a society requires.

An interference will be considered “necessary in a democratic society” for a legitimate aim if it answers a “pressing social need” and, in particular, if it is proportionate to the legitimate

aim pursued and if the reasons adduced by the national authorities to justify it are "relevant and sufficient".

'Mere conduit'

As outlined in the EU Electronic Commerce Directive (2000/31/EC) of 2000, 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, were they have the capacity to do so ('mere conduit principle').

art. 12 of the Directive states:

"Mere conduit"

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:
 - (a) does not initiate the transmission;
 - (b) does not select the receiver of the transmission; and
 - (c) does not select or modify the information contained in the transmission.

EU Electronic Commerce Directive (2000/31/EC)

Holding intermediaries, e.g. ISP, social networking sites, or hosting providers, 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, untransparent and potentially arbitrary decisions, often without respecting due process. Content regulation should never be delegated to a private entity alone.

Illegal Use of the Internet

Criminal and illegal use of the Internet and digital media cannot be ignored. However, the Internet also offers a valuable tool to counter these activities and digital media can be used – and are being used, in fact – for public good, education and information.

Although the Internet can be a tool for evil, it also provides an enormous wealth of useful information and virtually limitless opportunities for social networking. The positive aspects of keeping the Internet free from regulations outweigh the risks posed.

Some of the key principles developed (*inter alia* by the OSCE Representative on Freedom of the Media) that should be considered when combating the use of the Internet for terrorist or criminal purposes include:

- Governments have obligations under international laws and conventions, including OSCE commitments to protect freedom of expression, to consider when regulating Internet issues.
- Attempts to regulate the flow of information should be carefully considered.
- Measures undertaken by authorities should be directed only against illegal content.
- If a website has to be closed down, any such action has to be based on law, be necessary in a democratic society, should fall under the responsibility of courts of law and should not lie in the hands of private companies.
- The applied procedures for shutting down a website should be transparent and any affected party should have the right to appeal.
- Any measure should follow the principles of the "upload-rule", meaning that the content of a website has to be in compliance with the laws of the country of its origin and not with those of the country where the content is downloaded.
- Filtering and blocking websites is generally not in accordance with freedom of expression standards. In fact, people should decide for themselves which sites they wish to access.
- 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.
- It should be remembered that the Internet also offers opportunities for promoting tolerance and fostering mutual understanding. These positive features should be explored as well when fighting illegal content. Awareness raising, education, development of media literacy or the dissemination of reliable information should be considered against more intrusive and restrictive approaches.

Multi-stakeholder dialogue

National governments do play an important role when it comes to Internet regulation. With their executive power, and as legislators, they shape the conditions for the use of the Internet and can rule out content such as child pornography or incitement to hatred by law.

This has become more difficult with the advent of the Web 2.0 and the increasing number of users globally that create content on the Internet. Such technological developments do not necessarily change the role of national legislators but new forms of international collaboration, self-regulation, corporate responsibility in the field of human rights and media literacy and ethics of the individual user should be fostered.

The UN Internet Governance Forum (IGF) is an inclusive dialogue on the future governance of the Internet. From a perspective of freedom of expression, this multi-stakeholder approach under the auspices of the UN, including governments, civil society, the private sector and academia, has proven to be the best way to address policy issues for the Internet. There is no political or technical reason to introduce a new form of oversight of the Internet on the cost of multi-stakeholder participation.

Internet governance, as defined at the World Summit, is 'the development and application by governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, decision-making procedures, and programmes that shape the evolution and use of the Internet'. As an inclusive multi-stakeholder forum, the IGF is open to all participants.

Discussions about media freedom online, cybersecurity, data protection, hate speech, privacy or the underlying technical infrastructure of the Internet need international co-operation in policy making and the inclusion of corporations and civil society along with governments in order to keep the Internet a global open forum to exchange ideas and share information, also across borders.

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