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PRIVATE REGULATION, FREEDOM OF EXPRESSION
AND JOURNALISM:
TOWARDS A EUROPEAN APPROACH?

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*Private Regulation, Freedom of Expression and Journalism:
Towards a European Approach?*

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Abstract

The increasing role of electronic media in news and, more generally, in content production is changing the scope and boundaries of the journalism profession and the instruments deployed to regulate the activity. Historically, journalism has primarily been self-regulated. The limits of public legislation, mainly driven by the constitutional constraints posed by the freedom of expression, have created different models of national private regulatory regimes across Europe.

Media regulation is a multilevel architecture and national legal systems still play a primary role in designing rules concerning news production. Self-regulation reflects national approaches and varies according to legal and social regulatory cultures. Within the private sphere, different forms of regulation have been implemented reflecting the changing balance between the profession, the industries and the new players which have emerged after the Web revolution. The development of new media poses the following important challenges to that regulatory framework: the criteria to be used to define journalism; the distinction and the boundaries between professional and non-professional journalism; the distinction between commercial and social/not for profit content production.

This essay will examine these challenges looking at practice and litigation in European countries, identifying the different conflicting interests generating this litigation and the (private) regulatory responses. It will explore the differences between professional and industry regulation both within and across media: looking at the national and European or transnational regulatory scope of these regimes.

Keywords

Private regulation, professional journalism, jurisprudence, freedom of expression.

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PRIVATE REGULATION, FREEDOM OF EXPRESSION AND JOURNALISM: TOWARDS A EUROPEAN APPROACH?

*Fabrizio Cafaggi & Federica Casarosa**

1. Introduction

The increasing role of electronic media in news and, more generally, in content production is changing the scope and boundaries of the journalism profession and the instruments deployed to regulate the activity. Historically, journalism has primarily been self-regulated.¹ The limits of public legislation, mainly driven by the constitutional constraints posed by the freedom of expression, have created different models of national private regulatory regimes across Europe.² More recently, legislation and public regulation have increasingly played a role in defining what constitutes journalism. In particular, the audiovisual media service directive (AVMS)³ and the guidelines recently issued by national authorities⁴ are influencing the degree and mode of media integration by providing a definition of media services. The two concepts are not overlapping but clearly the metric to define media services will influence the boundaries between professional and citizen journalism and between commercial and associative media. The boundaries of what constitutes journalism are therefore the outcome of a plurality of sources regulating activities and their impact on different, often conflicting, fundamental rights. The focus of this essay is on the interplay between the private regulation of journalism and the courts, but clearly the role of public regulators implementing European legislation is in the background of the discussion.

Media regulation is a multilevel architecture and national legal systems still play a primary role in designing rules concerning news production. Self-regulation reflects national approaches and varies according to legal and social regulatory cultures. Within the private sphere, different forms of

* This paper has been written within MEDIADEM – European Media Policy Revisited: Valuing & Reclaiming Free and Independent Media in Contemporary Democratic System, a European 7th Framework Project. An earlier version was presented in Edinburgh at the 4th Mediadem Conference, 8-10 December 2011. We thank Elda Brogi for her valuable contributions to the research, and her elaboration and discussion of some parts of the paper. We are grateful to Tony Prosser and Ben Farrand for valuable comments on earlier drafts.

¹ The first codes of conduct were drafted in the USA in the first part of the 20th century, followed by European countries, where the first body was the Swedish Press Council formed in 1916 at a joint meeting of the Board of Swedish Publicists Club, the Swedish Newspaper Publishers Association and the Swedish Journalists Association. C. Frost, *Journalism ethics and regulation*, 2nd ed., Pearson Education Limited, 2007, p. 250.

² See F. Cafaggi, *Private regulation and European legal integration*, in Hartkamp et al. (eds) *Towards a European civil code*, 4th ed., Kluwer, 2011, p. 91, and before Id (ed.) *Self-regulation in European private law*, Kluwer, 2006. See also H. Thorgeirdottir, *Report on Self-regulation within the Media in the handling of complaints*, Venice Commission, CDL(2008)039, available at <http://www.venice.coe.int/docs/2008/CDL%282008%29039-e.asp>, par. 14.

³ See Directive 2010/13 of the European Parliament and of the Council, 10 March 2010, on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ EU, 15.03.2010, L 95/1.

⁴ The guidelines available are those issued by the English ATVOD (available at http://atvod.co.uk/uploads/files/Guidance_on_who_needs_to_notify_Ed3.1_Mar_2011.pdf), the Italian AGCOM (available at <http://www.agcom.it/default.aspx?message=contenuto&DCId=495>), the Dutch Media Authority (available at <http://www.cvdm.nl/dsresource?objectid=11318&type=org>) and the Belgian Conseil Supérieur de l'audiovisuel (available: http://www.csa.be/system/documents_files/1713/original/CAC_20120329_recommandation_competence_materielle.pdf?1333030000).

regulation have been implemented reflecting the changing balance between the profession, the industries and the new players which have emerged after the Web revolution.

The development of new media poses the following important challenges to that regulatory framework:

1. Regarding the criteria used to define journalism;
2. Regarding the distinction and the boundaries between professional and non-professional journalism;
3. Regarding the distinction between commercial and social/not for profit content production.

This essay will examine these challenges looking at practice and litigation in European countries, identifying the different conflicting interests generating this litigation and the (private) regulatory responses. It will explore the differences between professional and industry regulation both within and across media: in particular, looking at the national and European or transnational regulatory scope of these regimes. We suggest that private regulation has so far been unable to provide adequate answers to the challenges for two main reasons:

- a) It has failed to take into account the most recent evolution of business models concerning content production in the media field;
- b) It has adopted a reactive rather than proactive attitude towards new actors in news aggregation and production.

We conclude with some policy recommendations, which can improve regulatory dialogue between European courts and private regulators and make private regulation more accountable to the different interests enjoying constitutional protection at the national and European levels, complementing public regulation to implement freedom of expression principle.

2. Freedom of Expression, Regulation and Journalism

In this essay we want to examine the drivers of regulatory changes regarding journalism, in particular the expansion of professional regulation to new actors both in the economic and social spheres. We want to investigate more specifically the interaction between courts (national and European) and private regulators to determine whether private regulation has reacted to judicially-led changes, or vice versa. As already mentioned, the role of private regulation is influenced by the increasing impact of legislation and the interpretative function of public regulators in defining what media services are. After the enactment of the AVMS directive, communication authorities at the national level have also addressed the definition of audiovisual media services, adapting the criteria indicated in the directive⁵ to the national context: the relevant factors may be editorial responsibility and that they broadcast 'TV-like programmes', but additional elements may be added by the national authorities in order to define in more detail the scope of regulation.⁶

Thus, the perimeter of media service is narrower than journalism in its different expressions; here, the analysis focuses on the broad definition of journalism that includes both professional journalism and so-called citizen journalism.⁷

⁵ See that in some cases the implementing acts used not only the content of the articles of the directive but also its recitals (e.g. Italy, France and Estonia). M. D. Cole, *The European Legal framework for On-demand services: what directive for which services?*, in European Audiovisual Observatory, *The Regulation of on-demand audiovisual services: chaos or coherence?*, Iris special, 2011, 36.

⁶ For example, catch-up TV is likely to be covered as a non-linear service in the UK but not in Italy.

⁷ See below par. 7.

Private regulation, both in the form of self- and co-regulation, defines across countries, implicitly or explicitly, (1) what constitutes journalism, (2) the boundaries of professional activity, (3) the scope and the procedural features in the interest of the profession and (4) the final beneficiaries (i.e. citizens).⁸ Activity regulation concerns both conduct and content but the models differ quite significantly between those focusing predominantly on the activity (conduct) and those that encompass content as well.⁹

By activity regulation, we mean the regulation of conduct, and more specifically how the news is produced by the individual journalist and along the supply chain (for instance, who has editorial control and what the relationships are between the sources and the publishing media).

By content regulation we refer to rules that define what can be published and what cannot be published, for instance, hate speech content prohibition rules. Clearly there is a link between what can be published and how it is published so that the boundaries between conduct and content regulation are not always clear-cut; they represent a continuum rather than two separate domains. That said, it is analytically useful to distinguish between the two.

We shall distinguish different regulatory models along four axes:

1. Who regulates: what is the legal form and composition of the regulatory body;
2. What is the scope of regulation: integrated model encompassing conventional and new media, fragmented modes distinguished according to the type of medium or distinguished according to the type of content published;
3. What is regulated: activity and content;
4. What is the relationship with public regulators and courts: which oversight powers are conferred to the public entity, and whether the private regulator's activity is subject to judicial review.

Historically, journalism has been primarily self-regulated by the profession, as it fell into the press regulation category.¹⁰ This is mainly due to constitutional principles of freedom of expression, which limit the role of legislation and public regulation. With the appearance of broadcasting, things have changed. Legislative intervention has become more intrusive on the assumption that the impact of broadcasters is much stronger and therefore likely to influence public opinion on a larger scale. The definition of audiovisual media service and the notion of editorial responsibility have gained growing relevance in driving private regulatory regimes. Regulatory models across Member States (MS) in Europe differ. In some instances, activity regulation has primarily remained a task of the profession (Italy and Greece), in other instances it stays within the private remit, but it is the result of the activity of multi-stakeholder bodies, where also the industry is highly involved (Germany). In a further set of instances the public is involved and the regulatory body includes multiple actors, both public and private (Belgium, Denmark, Netherlands, UK and Sweden).¹¹

⁸ See below par. 5 for an analysis of these issues.

⁹ See for instance the Sweden case where the distinction between content and conduct rules affects also the type of enforcement system applicable to the rules, namely press council decision or internal professional association decision. See below, par. 5.3.

¹⁰ See D. Tambini, C. Leonardi, and C. Marsden, *Codifying Cyberspace – Communication self-regulation in the age of Internet convergence*, Routledge, 2008, p.64; on a wider comparative effort see D. Kevin, T. Ader, O. Carsten Fueg, E. Pertzidou, M. Schoenthal, *Final report of the study on “the information of the citizen in the EU: obligations for the media and the Institutions concerning the citizen’s right to be fully and objectively informed”*, Report prepared on behalf of the European Parliament by the European Institute for the Media, 2004, p. 212.

¹¹ See below par. 3.

Freedom of expression is defined as freedom to seek, impart, and receive information.¹² We contend that freedom of expression has both an institutional and a substantive dimension. From the institutional perspective it contributes to allocating regulatory power to the different institutional actors, addressing the choice among different regulatory instruments, e.g. competition and regulation; from the substantive perspective, it allocates entitlements to the producers and users of information, when that distinction still holds.¹³ In exercising their freedom of expression, journalists must comply with principles of editorial responsibility concerning respect for sources, accuracy in collecting information, and respect for the fundamental rights of individuals and legal entities. The principles of editorial responsibility have been used by private regulatory instruments taking the form of either self- or co-regulation, depending on the medium and the individual legal system's approach.¹⁴ Even more importantly, the allocation of editorial control is often dependent upon distribution of ownership and contractual arrangements along the supply chain.¹⁵ We adopt a broad definition of private regulation encompassing contractual relationships among the different content providers and between them and news aggregators.¹⁶

Within 'traditional' media, the role of professional private regulation varies rather significantly. While in the press the role of professional self-regulation has been predominant, in broadcasting co-regulatory models have emerged¹⁷ due to the higher level of content regulation and the presence of

¹² See Art. 10 European Convention of Human Rights. The concept of freedom of expression entails the freedom to think and speak freely without censorship and prior restraints. The meaning includes, as mentioned for instance in Article 19 of the Universal Declaration of Human Rights (and recognised in international human rights law in the International Covenant on Civil and Political Rights (ICCPR)), the freedom to seek, receive and impart 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. As well as the 1948 UN Declaration, Article 10 of the European Convention of human rights states that freedom of expression is the freedom to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless of frontiers. This means that freedom of expression covers all seeking, receiving, imparting activities. Recently, Article 11 of the Charter of Fundamental Rights of the European Union has stated that everyone has the right to freedom of expression and that this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless of frontiers.

¹³ For a deep and innovative analysis see Y. Benkler, *The wealth of networks*, Yale University Press, 2006.

¹⁴ The link between editorial responsibility and respect for fundamental rights is clearly articulated in the recommendations by the Council of Europe on "A new notion of media" Recommendation CM/Rec (2011)7 particularly points 85/90. See for example p. 86 "The above requirements should be graduated having regard to the editorial policies and processes adopted by the media concerned and their potential outreach and impact and also public expectation in their respect. Media content creators, editors and distributors should adhere to relevant professional standards including those designed to combat discrimination and stereotypes and to promote gender equality. They should exercise special care to ensure ethical coverage of minority and women issues also by associating minorities and women to creation, editorial and distribution process."

¹⁵ See that the contractual allocation of editorial control is used by regulatory authorities to define who is the audiovisual media service provider in charge of complying with AVMS rules. On this point see the decision of the UK regulatory authority OFCOM in the case Nickelodeon UK lim., Paramount UK partn. And MTV networks Europe, January 2012, available at <http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/nickelodeon.pdf>.

¹⁶ F. Cafaggi, 'Rethinking private regulation in the European Regulatory Space', in *Reframing self-regulation in European Private law*, ed. Id. (Kluwer, 2006), 15; A. Ogus, 'Rethinking Self-Regulation', *Oxford Journal of Legal Studies* 15 (1995): 97; C. Parker & J. Braithwaite, 'Regulation', in *The Oxford Handbook on Legal Studies*, eds P. Cane e M. Tushnet (Oxford: OUP, 2003), 126; T. Prosser, *Self-regulation, Co-regulation and the Audio-Visual Media Services Directive*, *Journal of Consumer Policy*, 2008, 31, p. 99.

¹⁷ In the UK this has occurred primarily in relation to the regulation of broadcast advertising, which has been delegated by Ofcom, the statutory media regulator, to the Advertising Standards Authority set up by the industry itself. However, substantial safeguards have been retained by Ofcom, including the right to require changes in the Authority's codes and to veto amendments to them. See also the failed co-regulation experiment in Greece, where the establishment of ethics committees in national broadcasting media (both public and private) was required, but never happened in practice. In order to receive the licence for broadcasting by the national Broadcasting authority, any radio or TV channel should enter into multi-party self-regulatory agreements, aimed at defining and adopting codes of conduct and ethics regarding media

public service broadcasting which have also influenced commercial media. There is now a consensus over the fact that the audiovisual media service directive (AVMS) has promoted the introduction of co-regulatory models at the Member State level.¹⁸

Even within this general trend, defined by European legislation, differences across Member States remain remarkable. In some cases, integrated models across media regulate journalistic activity. Even in relation to the press, co-regulatory models emerge due to legislative intervention or, more recently due to legislative developments (Belgium, Denmark) which have expanded the scope of activity regulation to electronic media. In other cases, regulation is fragmented and the press remains separated from broadcast and electronic media, with the exception of online newspapers regulated within the press (UK).

3. Supply Chains and Regulatory Models

The on-line versus off-line distinction has not been adopted as intermediate choice between full integration of activity regulation across media, or full separation based on each type of medium. The current state of regulation, however, is not fully responsive to changes occurring in the production systems of the media. There is no synchronicity between socio-economic and regulatory evolution.

With the development of the internet and new media, the production of news has been radically transformed.¹⁹ Traditionally, the news industry was organised around two main actors: news agencies, owning the input channels through which information was gathered; and publishers and networks, owning the distribution channels and with the ability to filter relevant information from continuous data flows provided by news agencies.²⁰ In the last 20 years, the picture has changed. On the one hand, user-generated content has become an important source of information; on the other hand, new models of news aggregation have redefined the supply chain with increasing outsourcing.

1. The possibility for users to collect and to disseminate information over the Internet enables a shift in the news production process away from industrial publishing companies to the users, readers, and consumers empowered by shared digital information spaces. These forms of news production have initially developed as alternative modes but have later become complementary to industrial methods. Today, many news producers across media, from newspapers to on-line news producers, are involving non-professional journalists in the production chain by opening collaborative relationships which can then be transformed into stable forms of cooperation. The media offers opportunities to contribute that are evaluated by professional teams which select whom they consider to be the best contributors, to whom they offer collaborative remunerated contracts. This is further complicated by the limitations of the

(Contd.)

content. Not only were these committees mostly inactive where created, but also in several cases they have were not even created in the first place. See more in the Greece case study, Mediadem project, 2011.

¹⁸ Once more, the UK provides a useful example. The legislation implementing the Directive gives Ofcom the function of regulating On Demand Programme Services, with the power to delegate these to an appropriate authority. The delegation was made to the Association for Television on Demand (ATVOD), a self-regulatory body created by the industry. To secure independence from the industry, ATVOD was restructured to include a majority of members independent of the industry and an independent chair.

¹⁹ B. Grueskin, A. Seave, L. Graves, *The Story So Far - What We Know About the Business of Digital Journalism*, Columbia Journalism School - Tow Center for Digital Journalism, 2010, available at http://www.cjr.org/the_business_of_digital_journalism/the_story_so_far_what_we_know.php [hereinafter *The story so far*]; R. Picard, *Digitization and media business models*, Mapping digital media - Open Society Foundation, 2011, available at http://www.soros.org/initiatives/media/articles_publications/publications/mapping-digital-media-digitization-media-business-models-20110721.

²⁰ S. Bowman and C. Willis, *We Media - How audiences are shaping the future of news and information*, The media center at the American Press Institute, Thinking Paper, 2003, p. 10; S. Wunsch-Vincent and G. Vickery, *The evolution of news and the Internet*, OECD, 2010, available at http://www.oecd.org/document/48/0,3343,en_2649_33703_45449136_1_1_1_1,00.html.

liability of Internet Service Providers for content . Consequently, two patterns have emerged: (1) Internet users gather and publish news items over the Internet, and (2) users can search and aggregate their own news from the freely available content on the Internet. In the first case, news production occurs outside the traditional value chain, as bloggers, and social and associative networks produce information, and also monitor the accuracy of information production by professional journalists and media outlets in general.²¹ In the second case, new intermediaries in the distribution phase gain a strategic role, namely news online providers which aggregate the content already available online, or which organise content provided by journalistic sources, together with providers which supply differentiated content.²² User-generated content has therefore influenced the production process of information, giving rise to more network-based organisational models²³. The current dilemma posed by the new developments is twofold: positively, whether the commercial world incorporates social production; normatively, there is the question of whether legal intervention should protect social production and prevent full incorporation by commercial actors of social networks. The implications go well beyond the scope of this essay, limited to the role of professional regulation. The preservation of the social dimension of new media could be based on a notion of democracy, which recasts the defence of pluralism from public ownership, and public service into preserving free and inexpensive accessibility to the web.²⁴

2. Changes have occurred within the industry as well, with news agencies losing power and influence in relation to other forms of news aggregation and production. The boundaries of aggregation and production have become professionally and legally blurred. New technologies are pushing towards a deeper differentiation between facts and opinions.

The appearance of new actors has brought about changes in the business models of conventional media and has promoted the creation of new business models, which influence the identity of standard setters and the operation of private regulation²⁵. A major factor of these transformations has been revenues shifting from conventional to new media, and from content to service providers. The distribution of revenues along the chain is both the cause and the consequence of the new private regulatory landscape. Conflicts are increasing between news aggregators and content producers over distribution of revenues.²⁶

²¹ See Jakubson, *A new notion of media*, 2009, where different types of blogging activity is listed, namely Citizen Blogs: (*Journalistic weblogs written by the public outside the media*); Audience Blogs: (*Journalistic weblogs written by the public within the media*); Journalist Blogs: (*Journalistic weblogs written by journalists outside media institutions*); Media Blogs: (*Journalistic weblogs written by journalists within media institutions*). Obviously, the first two hypothesis are those that could challenge the notion of professional journalism. For an analysis of the media accountability systems adopted in the online environment, among which blogging and citizen journalism are also included, see H. Heikkilä, D. Domingo, J. Pies, M. Glowacki, M. Kus & O. Baisnée, *Media Accountability Goes Online - A transnational study on emerging practices and innovations*, MediaAct working paper, 2012, available at http://www.mediaact.eu/fileadmin/user_upload/WP4_Outcomes/WP4_Report.pdf.

²² See below the case regarding the Internet Service Provider Yahoo! in par. 7.

²³ See Y. Benkler, *The wealth of nations*, 2006.

²⁴ See the debate raised by the proposal of defining Internet access as a fundamental right, F. La Rue, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, available at <http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/OpinionIndex.aspx>; V. Redding, Speech at the Debate on Electronic communications networks, personal data and the protection of privacy, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20090505+ITEM-003+DOC+XML+V0//EN>.

²⁵ On the link between private regulation and industrial organisations with specific reference to the supply chain see F. Cafaggi, "Transnational regulatory contracts and supply chains", unpublished paper on file with the author. Other examples of different forms of revenue sharing are available in B. Grueskin, et al., *The story so far*, cit., p. 108.

²⁶ See Casarosa, *Copyright Infringing Content Available Online - National Jurisprudential Trends*, on file with the Author.

One of the most dramatic consequences of these changes is the emergence of news ‘proptertisation’²⁷ as a means to protect freedom of expression.²⁸ Information directed to the public, unlike that used for economic purposes, has always been considered a public good, inapt to become the content of a property right.²⁹ Protection for information content has been offered to content producers primarily via liability rules. Content producers, partly as a response of shifting revenues distribution along the supply chain in favour of service and access providers, have tried to protect content production via property rights.³⁰ This is occurring in different ways both in Europe and US, given the different approaches to copyright and the applicability of copyright laws to news.³¹

These transformations are changing the definition of journalism and require editorial standards to be applied to media content creators, editors and distributors.³² The role of newspapers and news broadcasters with professional journalists will generate the added value. Competition will differ among those (industry) players whose main objective is to generate fast news, and those engaged in producing comments and analysis in which professional journalism will make the difference. Private regulation should come to grips with these transformations in order to continue ensuring pluralism and freedom of expression.

²⁷ E. B. Easton, Who owns ‘The first rough draft of History?’: Reconsidering copyright in news, *Columbia Journal of Law and the Arts*, 2004, p. 521.

²⁸ Content producers affirm that the lack of sufficient revenues reporting the news could have two possible consequences: either they would reduce investments in news gathering and dissemination, or they would limit access to news through “paywalls” - in both cases the consequence is a shrinking of the amount of information crucial to everyday life and the democratic process made available to the public. Thus, copyright protection has been viewed, mostly by newspaper industry members, as a lifebuoy to retain control over news content, as for instance it would be able to stop news aggregators from providing stories without the permission of the newspapers that produced it. For a deeper analysis, see Cafaggi, Prosser and Casarosa, *The regulatory quest for free and independent media* - Comparative report for the Mediadem project, forthcoming.

²⁹ It was only the last revision of the Berne Convention for the protection of literary and artistic works, in 2004, that provided a specific clause applicable to newspaper articles, as it expressly stated that, though the convention is not applicable to “news of the day or to miscellaneous facts having the character of mere items of press information” (Art. 2(8)), news articles can be subject to the convention as long as they constitute literary or artistic works. In other words, the Convention acknowledges that news articles can constitute original creations as they do not only entail facts reporting.

³⁰ See the several competition claims raised by content producers, such as broadcasters, or collective societies against Internet service providers, both in Europe and in single MS. See the antitrust investigations addressing Google activity at EU level [European Commission press release, Antitrust: Commission probes allegations of antitrust violations by Google, 2010, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1624&format=HTML&aged=0&language=EN&guiLanguage=en>], and at national level in France [Autorité de la concurrence, *Sector inquiry/Online advertising*, 2012, available at http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=368&id_article=1514] and in Italy [A. Catricalà, *Google in Italy...*, *Journal of European Competition Law & Practice*, 2 (4), 2011, p. 293].

³¹ See in the US the so-called ‘hot news’ doctrine defined in the landmark case *International News Service v. Associated Press*, 248 U.S. 215 (1918). Here the court affirmed that while the information found in AP news was not copyrightable, AP has a quasi-property interest during the production of “hot news”. See R. Epstein, *International News Service v. Associated Press: Custom and Law as Sources of Property Rights in News*, *Virginia Law Review*, 1992, 78 (1), p. 85; V. S. Ekstrand, *News Piracy and the Hot News Doctrine: Origins in Law and Implications for the Digital Age*, New York: LFB Scholarly Publishing, 2005.

³² See the European Parliament Culture Committee Report “on concentration and pluralism in the media in the European Union” (2007/2253(INI)), adopted 8th June 2008, where the following suggestion is included: “Proposes the introduction of fees commensurate with the commercial value of the user-generated content as well as ethical codes and terms of usage for user-generated content in commercial publications” (p. 7).

4. Reconstructing the Private Sphere in the Media Regulation

The consolidation of new media has brought into the private regulatory framework two actors: industry and social media. In particular, the industry has become a major actor in regulating activity of news production and dissemination. The role of media owners was relevant even in the past, but in many legal systems professionals, rather than industry, played the dominant regulatory function. Broadcasters, also pushed by competition from electronic media and telecommunications, have taken a much more active role in regulating modes of production and, to a limited extent, content. We thus observe new private regulators, primarily content and service providers, and to a limited extent access providers.

The perspectives of the profession and that of the industry are not necessarily aligned. In fact most of the time they reflect conflicting views over the process of content production and the allocation of editorial responsibility. To an extent this divide is also dependent upon some constitutional interpretations of freedom of expression recognising the self-regulatory power of the profession and not, or at least not to the same extent, of the industry. These conflicts have contributed to a reactive rather than proactive attitude of the profession towards new models of news production that could incorporate user-generated content and non-professional sources including social networks.

A second distinction is between professional and non-professional, which only partly overlaps with commercial and non-commercial. Non-professional or citizen journalism has existed since the birth of journalism. What makes the difference in the current framework is the growing importance linked to the revolution of informal technologies. New technologies have increased both the width and the relevance of non-professional journalism, not only as an alternative to but also as a complement of professional journalism.

5. Professional Self- and Co-Regulation

We now move to an analysis of professional regulation to examine where and how the boundaries of journalistic activities are drawn and the role attributed to new media. Professional self-regulation constitutes the eldest regulatory body of rules, as an alternative or a complement to legislative intervention in the media sector.³³ In some countries, journalistic activity requires a professional status recognised by law, with specific privileges and obligations, which is sometimes related to professional registers, such as in the case of Italy. In other European countries, there is no legal recognition of professional bodies, as in the UK; it is indirectly provided by collective agreements where a definition of the journalism profession or activity is instrumental to defining working obligations.

Two models emerge: the status-based and the activity-based. The status-based definition is generally associated with a strong professional association based on membership, which defines who is a journalist and the applicable rules for journalistic conduct. Activity-based self-regulatory regimes are developed where no mandatory membership to professional associations exist; the scope of the rules is therefore defined on the basis of the definition of journalism itself rather than who is a journalist. The following analysis will illustrate the two models emerging in different European countries.³⁴

³³ See L. Fielden, *Regulating the Press – A Comparative study of International Press Councils*, Reuters Institute for the Study of Journalism, 2012, p. 19; T. Laitila, 'Journalistics Codes of Ethics in Europe' in D. McQuail, P. Golding, E. De Bens, *Communication Theory and research*, Sage, 2005, p. 191, where the Author counted over twenty codes of conduct adopted by unions or associations of journalists among the thirty-one available in Europe (29 countries analysed).

³⁴ The analysis will include 9 Member States, namely Belgium, Denmark, France, Germany, Greece, Italy, Netherlands, Sweden, and UK.

5.1. Regulatory Body

It should be emphasised that journalists' associations are present in each country, or where they are lacking, trade unions specifically protecting the interests of journalists exist, and each of these organisations drafts codes of conduct or ethical codes that define the values endorsed by the association and set the rules to which the members commit. Where a choice has been given between state and private regulation, professional association have preferred the latter in order to preclude the imposition of external supervision and limitations on freedom of expression.³⁵

As shown by Table 1, the available alternatives in Europe are the professional associations and press councils.

Table 1. Regulatory Body

	Professional association	Press council
<i>Belgium</i>	X	X (since 2009)
<i>Denmark</i>		X
<i>France</i>	X	
<i>Germany</i>		X
<i>Greece</i>	X	
<i>Italy</i>	X	
<i>Netherlands</i>		X
<i>Sweden</i>	X	X
<i>UK</i>		X

The two regulatory models have different features, but even within each of them there is no complete uniformity, due to the historical background of each country.

The first model relies on the regulatory role and enforcement activity of professional associations, which is adopted in Belgium, Italy, Greece, Sweden and France. It should first be clarified that in Greece, Sweden and France the regulatory body is the trade union, whereas in Belgium and Italy the associations were created in addition to the existing trade unions. In all of these cases,³⁶ professional

³⁵ See the case of UK Press Council which was replaced by the Press Complaint Commission under the threat of legislative intervention in the sector. For more on this, see T. Prosser, *Self-Regulation, Politics and Law: the Example of the Media*, in F. Cafaggi, *Reframing Self-Regulation in European Private Law*, Kluwer, 2006, p. 247 ff.

³⁶ The only exception is the French case, where a clear and wide definition of journalistic activity can be found in the French *Charte d'éthique professionnelle de journalistes* drafted by the *Syndicat national de journalistes*: "Le journalisme consiste à chercher, vérifier, situer dans son contexte, hiérarchiser, mettre en forme, commenter et publier une information de qualité; il ne peut se confondre avec la communication. Son exercice demande du temps et des moyens, quel que soit le support. Il ne peut y avoir de respect des règles déontologique sans mise en œuvre des conditions d'exercice qu'elles nécessitent. La notion d'urgence dans la diffusion d'une information ou d'exclusivité ne doit pas l'emporter sur le sérieux de l'enquête et la vérification des sources." However, the corresponding definition provided by law in the French *Code du Travail* instead falls into the general model, including a specific clause regarding the definition of journalist. "Est journaliste professionnel toute personne qui a pour activité principale, régulière et rétribuée, l'exercice de sa profession dans une ou plusieurs entreprises de presse, publications quotidiennes et périodiques ou agences de presse, et qui en tire le principal de ses ressources." (L. 7111-3 Code du travail).

activity is the element that characterises the definition of journalists, as the criteria that qualify a journalist as such are the exercise of the profession as a primary activity, the existence of a working relationship with a media outlet and the continuity of the activity.³⁷ Moreover, in Belgium and Italy, the qualification of journalists' activity as a regulated profession also was matched with a criminal offence in the case of deceitful claims to be a journalist.³⁸

Of the four cases, the most unusual is the Italian case. The *Ordine dei Giornalisti* (OdG) is the association in charge of drafting, monitoring and enforcing the code of conduct of professional journalists, on the basis of a delegation of regulatory power provided by Law 69/1967.³⁹ The association, as mentioned above, is composed of professional and semi-professional journalists, but membership is not voluntary; it is compulsory for anyone claiming to be a (professional) journalist.⁴⁰ However, it should be acknowledged that when journalistic activity conflicts with other fundamental rights, namely privacy, the definition provided by the specific code of conduct has also been extended so as to include also those who “occasionally exercise journalistic activity”,⁴¹ without being members of the Italian Journalists Association.⁴² This example shows that there might be functional definitions which may be broader or narrower depending on their scope.

³⁷ For instance, in the Italian case, the regulation provided by the Journalists Association is based on the legislative act delegating the regulatory power, but neither private regulation nor legislation provided a clear definition of who is a journalist. Law n. 69/1963 only defines that professional and semi-professional journalists are those who are members of the Journalist association (Art. 1). As in the French case, the definition of professional journalist is based on the type of working conditions, as professional journalists are those who exercise the profession on a continuous and exclusive basis; these should be distinguished from semi-professional journalists (*pubblicisti*) that exercise this activity on a non-occasional basis, though they can at the same time have a different working position. In Belgium, there is the law that defined professional journalists, namely Law 30 December 1963 “relative à la reconnaissance et à la protection du titre de journaliste professionnel”. For a journalist to be recognised as professional, she should comply with the following requirements: work as journalist as a primary professional activity and with(?) remuneration; contribute to the redaction of the daily or periodic press, of radio or television news bulletins, film journals or press agencies; exercise this activity for a minimum of two years .

³⁸ See in Belgium, the Law 30 December 1963 (already cited) provided «*Quiconque s'attribue publiquement sans y être admis le titre de journaliste professionnel sera puni d'une amende de 200 à 1.000 francs. L'article 85, alinéa 1er, du Code pénal est applicable à cette infraction.*». In Italy, a general provision applies, namely art. *** Criminal code. See in the Italian jurisprudence, the decision of the Highest Court, Criminal Sect., providing that “*Il compimento, da parte di un non iscritto in un albo, di prestazioni caratteristiche di una professione regolamentata, purché non esclusive o riservate, è lecito solo se occasionale e gratuito, mentre costituisce il reato dell'articolo 348 C.p. se ha carattere di onerosità e di continuità, integrante un esercizio professionale*” (Cassazione, Sezione VI penale, 8 gennaio 2003; see also Cassazione civile, decision n. 1806/1973). More recently see the case of an online platform, whose CEO is currently charged of “abusive exercise of the profession of journalist” before the Criminal Court of Pordenone, see more at <http://www.medialaws.eu/online-blogging-and-online-journalism-in-italy-out-of-date-rules-or-out-of-date-rulers/>.

³⁹ See App. Milano, 05-05-2004; Il Sole 24 Ore s.p.a. c. Ordine dei Giornalisti. “*L'Ordine, in particolare, ha il precipuo compito di salvaguardare, erga omnes e nell'interesse della collettività, la dignità professionale e la libertà di informazione e di critica dei propri iscritti. L'Ordine dei giornalisti - come di norma anche ogni altro ordine professionale - ha natura di ente pubblico associativo esponenziale di una categoria di professionisti, al quale la legge affida la rappresentanza della categoria e conferisce numerose attribuzioni.*” (Giornale Dir. Amm., 2004, 12, 1322, comment by Orlando).

⁴⁰ It should be mentioned that the role of the OdG has also been questioned before the Constitutional Court, which did not define it as an institution that limits the freedom of the press because it regulates only the ways in which professional activity should be carried out, and it does not impose any limit on the freedom of expression of those who do not wish to become journalists. See Constitutional Court, decision n. 11/1968.

⁴¹ See art. 13, Code of practice Concerning the Processing of Personal Data in the Exercise of Journalistic Activities, pursuant to Section 25 of Law 675/1996, OJ N. 179 of 03.08.98. Available at <http://www.garanteprivacy.it/garante/document?ID=1219452>.

⁴² This approach was provide by legal basis for the code of conduct, namely art. 136 Privacy code (d.lgs. 196/2003) that include in its scope of application those data treatments “*carried out in the exercise of the journalistic profession and for the sole purposes related thereto; [...] by persons included either in the list of free-lance journalists or in the roll of trainee journalists as per Sections 26 and 33 of Act no. 69 of 03.02.63; [...] on a temporary basis exclusively for the*

The second model is present in Denmark, Germany, Netherlands, Sweden and the UK. There are two special cases, Sweden and Belgium. In Belgium a new Press Council has been created recently for the French-German community, adding to the pre-existing Flemish Press Council.⁴³ Here, a first element that characterises the model is the coordination between the journalist associations or trade unions, which are always members of the press councils, and the industry associations, which can also include those from broadcasting.⁴⁴ The Swedish case, instead, shows a duplication of the regulatory body based on the same self-regulatory act. On the one hand, the Press council is in charge of adopting, revising and enforcing the Code of Ethics for the Press, Radio and Television. On the other hand, the journalist trade union (which is also a member of the press council) comprises a professional ethics council which only addresses the rules on professional conduct included in the Code of Ethics.⁴⁵ This also reflects the jurisdiction of the two regulatory bodies, as will be clarified below.

In all cases the creation of the press council was triggered by the (threat of) state intervention in the field, and in a few cases the justification was found in the inability of professional regulation to achieve the expected results of monitoring and enforcement of ethical rules among journalists.⁴⁶ The involvement of industry associations, namely publishers (and in few cases broadcasters associations) in private regulation was mostly appreciated by public actors and journalists associations as it would be the way in which ethical codes and codes of conduct could be implemented in signatory media outlets.

In Press Council regulation, the definition of journalist is also based on professional activity,⁴⁷ but the most relevant aspect of the definition is the existence of a working relationship with a media outlet which is in charge of implementing the code of conduct among their employees.⁴⁸ For instance, in

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purposes of publication or occasional circulation of articles, essays and other intellectual works also in terms of artistic expression.”

⁴³ French community Decree 30 April 2009 “*réglant les conditions de reconnaissance et de subventionnement d’une instance d’autorégulation de la déontologie journalistique*”.

⁴⁴ Note that in the UK the journalist’ union is not a member of the Press Complaints Commission, nor are journalists represented directly in it.

⁴⁵ See D.C. Koene, *Press councils in Western Europe*, 2009, available at <http://www.rvdj.nl/rvdj-archive/docs/Research%20report.pdf?PHPSESSID=a7529bd07dd005cc0f1bb69fd0f416a4> p. 43.

⁴⁶ For instance, in the Netherlands, from 1948 to 1960 a Disciplinary Council (‘Raad van Tucht’) set up by the Federation of Netherlands Journalists had jurisdiction over journalists’ conduct, but only those who were also members of the Federation. The event that triggered a change was an incident about a violated embargo involving a Dutch journalist. The lack of monitoring of the Disciplinary Council over journalists’ conduct threatened state intervention, which consequently prompted the Federation of Netherlands Journalists to convert the Disciplinary Council into the ‘Raad voor de Journalistiek’ (Press Council). The shift towards the form of Press council extended the power of this body, as it may deal with complaints against journalists not affiliated to any organisation, though it does not have the power to impose sanctions in the process. See Koene, *cit.*, p. 27.

⁴⁷ See the definition provided by the Decree 30 April 2009 “*réglant les conditions de reconnaissance et de subventionnement d’une instance d’autorégulation de la déontologie journalistique*”, in providing the legal basis acknowledges as the definition of journalist the following: “*toute personne physique qui, dans le cadre d’un travail indépendant ou salarié, contribue régulièrement et directement à la collecte, la rédaction, la production ou la diffusion d’informations, par le biais d’un média, au profit du public*” (Art. 1(1)).

Also the Dutch Press Council provides a similar definition: “*a journalist is anyone who makes it their prime occupation, either as employee or on free-lance basis, to work on the editorial supervision or editorial composition of mass media*” (art. 4(2) Articles of the Association constituting the Press Council). However, the Guidelines for the Netherlands Press Council widened the field of application, affirming that ethical rules are applicable to any journalistic behaviour which is interpreted as “*an act or omission by a journalist in the course of his profession. [...] journalistic behaviour is also taken to mean an act or omission within the framework of journalistic activities of someone who, not being a journalist, regularly and against payment contributes to the editorial content of the mass media*”. In this case, the term of reference for the inclusion in the category of journalist is the provision of editorial activity.

⁴⁸ The UK Press Complaints Commission code provides “*It is the responsibility of editors and publishers to apply the Code to editorial material in both printed and online versions of publications. They should take care to ensure it is observed*

Germany, § 10 of the articles of association constituting the Press Council provides that the association will request that publishers give a written undertaking to abide by the Code and the principles of editorial data protection, as well as to comply with any sanctions issued by the press council.⁴⁹ A new approach is likely to be taken by the new body currently proposed to replace the Press Complaints Committee in the UK after the total failure of the Committee to deal with serious problems of phone hacking by a number of newspapers. The precise model will not be clear until the report of the Leveson Inquiry into the press is published in summer 2012, but it seems likely that it will be based on commercial contracts between the new body and newspaper publishers providing contractual rather than statutory sanctions against defaulting newspapers.⁵⁰ It should be noted that, as with the present system, the regulation will be of newspaper publishers rather than directly of journalists, although the Press Complaints Commission does organise training sessions for journalists and the Editors' code which it administers is applies to 'all members of the press'.

One significant element is the composition of the Press Councils, as it is then reflected in the scope of private regulation. Given that Press Councils are usually multi-stakeholder bodies, in some cases the participation of non-press associations has been accepted. As Table 2 shows, the participation of broadcasting companies is not always included, nor that of new media companies. The wider membership available in Belgium (both the French-German and Flemish Press Councils),⁵¹ and Denmark should also be linked to the legislative acts that provided for the legal basis for the two Press Councils. In the Danish case, for instance, it is the Media Liability Act enacted in 1991 that created the legal basis for the current Press Council, and since statutory act included electronic media in its scope of application, the Press council also regulates electronic media as a result.⁵²

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rigorously by all editorial staff and external contributors, including non-journalists". See Editors' Code, Introduction, available at <http://www.pcc.org.uk/cop/practice.html>.

⁴⁹ See Koene, cit., p. 89.

⁵⁰ In March 2012, the PCC announced that it will transfer its assets, liabilities and staff to the new regulatory body that will be defined after the results of the Leveson inquiry. In particular, the proposal of new governance of the self-regulatory body includes the conclusion of commercial contract between each member and the self-regulatory body:

"The new system will be legally underpinned through a system of enforceable commercial contracts. Each publisher would sign a contract with the regulator, which would be enforceable through the civil law. This would bind publications into the system, equipping the new regulator with powers of enforcement, effectively compelling cooperation with the regulator, by enabling it to sue for any contractual breaches. This is another power that may – indeed should – never have to be used. The contracts might include the following commitments:

- *To fund the regulator according to an agreed formula*
- *Undertaking to abide by the Code and relevant laws*
- *Responding positively to individual complaints that have been handled by the complaints arm*
- *Support for clearly defined compliance and standards mechanisms which could be audited by the regulator*

Accepting proportionate financial sanctions via the funding formula should serious standards breaches be found."

PCC, "Towards a new system of self-regulation", available at http://www.pcc.org.uk/assets/0/Draft_proposal.pdf, p. 2.

⁵¹ See Besien, B. Van (2011), Does media policy promote media freedom and independence? The case of Belgium, available at <http://www.mediadem.eliamep.gr/wpcontent/uploads/2012/01/Belgium.pdf>; and Koene, cit., p. 105.

⁵² See Sect. 1, n. 3) which provides that *"Texts, images and sound programmes that are periodically imparted to the public, provided that they have the form of news presentation which can be equated with the kind of presentation to which nos. 1) [domestic periodical publications] and 2) [sound and image programmes] of this section extends"*.

Table 2. Members of Press Councils from Industry

	Press	Broadcasting	New media
<i>Belgium</i>	Yes	Yes	Yes
<i>Denmark</i>	Yes	Yes	Yes (registered)
<i>Germany</i>	Yes	No	No
<i>Netherlands</i>	Yes	Yes	Yes
<i>Sweden</i>	Yes	No	No
<i>UK</i>	Yes	No	No

5.2. Scope of Private Regulation

Another interesting feature that may distinguish different models of private regulation in the journalism profession is related to the scope of codes of conduct, namely whether they encompass one type or multiple types of media.

As shown by Table 3, only Greece has a single media definition (at least among the countries analysed), whereas multimedia can be internally distinguished as among sector distinction (press and broadcasting versus new media), content distinction (written versus audiovisual and other), and all media.

Table 3. Scope of Private Regulation

	Single media	Multi-media		
		No distinction	Sector distinction	Content distinction
<i>Belgium</i>		Code applicable to all media		
<i>Denmark</i>		Code applicable to all media		
<i>France</i>		Code applicable to all media ⁵³		
<i>Germany</i>				Only press and electronic version of press.
<i>Greece</i>	Applicable only to press			
<i>Italy</i>			Applicable to press, and broadcasting	
<i>Netherlands</i>		Code applicable to all media.		
<i>Sweden</i>			(professional activity) Applicable to press and broadcasting	(press council) Only press and electronic version of press.
<i>UK</i>				Only press and electronic version for PCC.

1. **Sector distinction:** In this case, professional regulation was historically focused on press, and then extended through legislation to broadcast media. Although the current analysis only refers to Italy and Sweden (for professional conduct only), it is true also for other European countries not covered by the present analysis.⁵⁴ However, this approach clearly fails to account for the integration of new media.

⁵³ Note that the code has not been revised so as to include new media, as the SNJF claimed that the general principles enshrined in the Charte de devoir are applicable to any medium.

⁵⁴ See the cases of Poland, Austria, and Ireland, whose codes of conduct are available at <http://ethics.iit.edu/>.

2. **Content distinction:** This category includes Germany and the UK. Here, the distinction depends on the type of content distributed on any type of medium, namely written content (including photographs and the like) versus audiovisual content. For instance, the rules of the UK PCC's Editors Code apply only to the online version of newspapers and magazines,⁵⁵ but where the online versions include material such as audio visual material, and user-generated blogs and chat rooms, the applicability of the PCC code only applies to the material that meets two key requirements: "(1) that the editor of the newspaper or magazine is responsible for it and could reasonably have been expected both to exercise editorial control over it and apply the terms of the Code. (2) That it was not pre-edited to conform to the on-line or off-line standards of another media regulatory body."⁵⁶ There are two consequences of this rule; on the one hand, the journalist within a broadcasting company should not comply with the PCC code but with the Ofcom Broadcasting Code, which applies to any video-based news whether aired on television or published online.⁵⁷ On the other hand, the scope of application of the PCC code only includes the electronic version of traditional media, and in particular the 'editorial materials' published online, excluding a large part of the materials that fall within the wide category of user-generated content.

3. **Codes applicable to all media:** In these cases the codes of conduct apply to any content available on any media; however, the inclusion of bloggers, social networks and user-generated content platforms is not always guaranteed. For instance, in the Danish case, the jurisdiction is based on membership of the Press council, thus digital media is also covered by the code insofar as they register; however, private websites are not allowed to register, as only "*texts, images and sound programmes that are periodically imparted to the public, provided that they have the form of news presentation which can be equated with the kind of presentation to [press and broadcasting]*"⁵⁸ can be registered with the Press Council. The Belgian Press councils, being the youngest ones,⁵⁹ have addressed the new media related issues more, though without achieving a forward-looking perspective. In 2009, the Flemish Press council published a recommendation on how traditional media should handle user-generated content: media should always clearly distinguish user-generated content from its own content and limit the publication of anonymous contributions to exceptional circumstances.⁶⁰ Thus, in this case a clear distinction between professional (editorial) and non-professional (user-generated) content is available, with the code of conduct applying only to the former. Similar results can be found in the recent intervention of the Belgian French-German Press Council, which published an opinion on rules of journalist ethics applying to social media such as Twitter and Facebook.⁶¹ Again the distinction is not based on the media

⁵⁵ For instance Ofcom has recently upheld an appeal against a decision of the Authority for Television On Demand (ATVOD) concerning the treatment of a newspaper website as an "on-demand programme service", Ofcom decision, 21 December 2011, available at http://www.atvod.co.uk/uploads/files/Ofcom_Decision_-_SUN_VIDEO_211211.pdf.

⁵⁶ See the Press Standards Board of Finance, Guidance note, 2007, available at <http://www.pcc.org.uk/news/index.html?article=NDMyMg==>.

⁵⁷ This code is applicable to any video that is available on online versions of newspapers and magazines.

⁵⁸ Art. 1 (3) Media Liability Act. See that the law requires the registered undertakings to be subject to the provisions regarding radio and television, namely the obligation to provide a responsible editor, which is in charge of ensuring that a copy of all programmes is kept for three months in a proper manner.

⁵⁹ The Flemish Press Council was set up in 2002, where the French-German one was only set up in 2009.

⁶⁰ Richtlijn over de omgang van de pers met gebruikersinhoud, available at www.rvdj.be/node/52.

⁶¹ Avis du Conseil de déontologie journalistique du 13 octobre 2010 sur l'application de la déontologie journalistique aux réseaux sociaux, available at <http://www.deontologiejournalistique.be/telechargements/10%2010%2013%20Avis%20sur%20la%20deontologie%20et%20les%20reseaux%20sociaux.pdf>

as such, but on the fact that social media is used by journalists to express their opinions and disseminate news content to the public. This implies that it is the fact that professional journalists use social networks that make them subject to journalist ethics, whereas the same rules are not applicable where an individual produces the same news content on social networks.⁶²

The previous analysis of the three models shows that technological developments have not brought about the inclusion of new media in professional journalists' associations' rules (as in the Italian and Greek case). Press councils have been keener to adapt, but still in some cases the approach has been limited by the strong distinction between press and broadcasting regulation, the latter being subject to public regulation. Only in the most recently set up Press councils⁶³ has new media been taken into account, yet again the approach is corporative: new media is interpreted as an additional instrument for professional journalists' communication to the public, without addressing the issue of the new models of news production available.

5.3. Content versus Conduct Regulation

Although the comparison of the content of ethical codes is necessarily limited by the different forms in which the codes are drafted, namely principle-based or rule-based,⁶⁴ and by the different legal and social background to which they refer, a brief analysis of the way in which conduct and content are regulated within each of the countries analysed is still feasible.⁶⁵

Except for the Swedish case, where content and conduct rules are distinguished within the code of ethics, imposing a different jurisdiction reach for the professional ethics council and the press council,⁶⁶ all the other cases analysed do not demonstrate the existence of a distinction between the two types of rules.

Content rules can address specific issues such as child protection,⁶⁷ privacy,⁶⁸ advertising activity,⁶⁹ and in few cases also how sources should be reported.⁷⁰ In these cases, the codes expressly set a

⁶² See also the Dutch case where discussion websites, in which there is no question of one-way communication and which contain unedited postings, are not subject to Press council jurisdiction. Readers' comments posted on websites can instead only be adjudicated by the press council if they undergo editorial screening. Koene, p. ***

⁶³ As mentioned above, the Belgian Flemish and French-German Press Councils date back respectively to 2002 and 2009, and their Danish counterpart was set up (in its new incarnation) in 2004, whereas the Dutch reform of the ethical code dates back to 2008.

⁶⁴ On this distinction see J. Black, *Forms and Paradoxes of Principles Based Regulation*, LSE Legal Studies Working Paper No. 13/2008, available at <http://ssrn.com/abstract=1267722>.

⁶⁵ Laitila, cit., p. 191.

⁶⁶ See Koene, cit., p. 44.

⁶⁷ See UK PCC code, "*Children in sex cases: 1. The press must not, even if legally free to do so, identify children under 16 who are victims or witnesses in cases involving sex offences. 2. In any press report of a case involving a sexual offence against a child - i) The child must not be identified. ii) The adult may be identified. iii) The word "incest" must not be used where a child victim might be identified. iv) Care must be taken that nothing in the report implies the relationship between the accused and the child.*" A similar provision can be found in the Italian code, "*A journalist respects all principles confirmed in the UN Convention dated 1989 on the right of children and their rules undersigned by the "Treviso Ethical Code" (Carta di Treviso) to protect children, their character and their personality, both as an active protagonist and as a victim of a common-law offence and particularly: a) a journalist must not publish the name or any other element that can lead to the identification of people involved in daily episodes or events*".

⁶⁸ See the Dutch code of ethics "*2.4.3. A journalist does not publish pictures and broadcast images of persons in non-generally accessible areas without their permission, nor will he use letters and personal notes without the permission of those involved.*"

⁶⁹ See the Belgian Code, "*12. Advertisement. Advertisements must be presented in such a way that they cannot be confused with factual information*".

boundary of what can and cannot be included in the content of news, providing a preliminary balance between the public interest and the conflicting interests at stake. However, the presence of this type of rules is very limited and does not allow for any generalisation in the different cases. Instead, ethical codes share the general principles regarding the way in which journalists should behave, providing more or less detailed rules on accuracy and truthfulness, the right of reply, protection of sources, equality, fairness in information gathering, and independence.⁷¹

6. Industry Private Regulation

We now turn the attention to industry regulation by looking at how the media industry designs rules to be applied to journalistic activity. In this case, we look at the cases in which a single media outlet regulates the behaviour of its own employees (e.g. through editorial codes). Although industry private regulation is often combined with professional regulation, in particular when industry associations are part of press councils, some differences can be ascertained in terms of if and how journalistic activity is regulated.

When looking at the private regulation of industry with regards to new media, a preliminary distinction between traditional media providing content online (1) and online-only content providers (2) is necessary. The former category contains newspapers and broadcasters that make their content available both offline and online; while the latter category includes all new forms of news provision, with no corresponding paper or audiovisual version available off-line.

1. Within the first category, editorial codes adopted by media outlets providing content offline and online usually apply to both means of distribution.⁷² In some cases, industry regulation has developed a wider and more comprehensive standard in comparison to those provided by professional private regulation, such as in the case of the two major public broadcasters in Denmark.⁷³

When addressing the boundary between professional versus non-professional, industry self-regulation does not apply the same standard to professional journalists employed in media outlets and the blogger (or user) providing news content. This is clear when media outlets include user-generated content in their online version. Usually, editorial presentation through which user generated content is included in the website shows that the objective is to insulate the work of professional journalists from that of citizens.⁷⁴ For instance when blogs are included in the content of a newspaper, the bloggers have to comply with very general rules.⁷⁵

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⁷⁰ See the German ethical code “*Unconfirmed reports, rumours or assumptions must be quoted as such.*”

⁷¹ Laitila, cit.; M. Kunzik, *Ethics in journalism : a reader on their perception in the Third World*, Division for International Development Cooperation of Friedrich-Ebert-Stiftung, Bonn, 1999, p. 19.

⁷² See the code of conduct of the Italian economic newspaper *Il sole 24ore*, which includes a specific clause regarding real time information: “*I giornalisti e i collaboratori del Sole 24 Ore, nei casi in cui lavorino per media di informazione tempestiva (per esempio: radio, tv, on line) del gruppo, si impegnano alla più attenta verifica delle notizie e delle fonti compatibile con i tempi di pubblicazione o diffusione richiesti. I giornalisti e i collaboratori si impegnano anche a pubblicare le notizie appena conclusa positivamente la verifica delle stesse e delle fonti.*” Available at <http://www.odg.mi.it/node/178>

⁷³ The choice of the two public service broadcasters was to have a internal mechanism of control over journalists' conduct, that might reduce complaints and improve professionalism at the same time. See more in Helles, R and H. Søndergaard, I. Toft (2011), Does media policy promote media freedom and independence? The case of Denmark, available at <http://www.mediadem.eliamep.gr/wp-content/uploads/2012/01/Denmark.pdf>.

⁷⁴ S. Smith, Media-hosted eParticipation and the journalistic field: case studies from Europe, Paper presented at the Conference Médias09 - Aix-en-Provence, 16-17 décembre 2009, available at <http://www.medias09.univ-cezanne.fr/fileadmin/templates/medias09/DOC/Smith.pdf>.

⁷⁵ See the *Charte de blogs et le règles de conduite* of Le Monde blogs. The document provides for several rules regarding the type of content available online : «*Les comportements suivants sont proscrits sur les blogs du Monde.fr:*

Only when journalists include user generated content in their edited materials, should this content comply with professional rules. Thus, any photograph, video or piece of information should be verified in its reliability and accuracy, taking into accounts the timeliness of the information.⁷⁶ This is a clear policy in several media companies.⁷⁷

2. Within the second category, industry-driven private regulation has mainly addressed questions concerning the responsibility for content between content and service providers. The instruments to enforce the rules are not codes of conduct or ethical codes, but instead rules are included as clauses in contractual instruments, like licence agreements - policy guidelines like those concerning privacy and intellectual property rights - and more recently in private agreements between Internet platforms and content providers⁷⁸. Here, the regulation of conduct and content is provided through contract: any user, in order to have the possibility to publish her content online, has to agree to the terms and conditions of the platforms (e.g. video-sharing platform such as Youtube). In particular, the user accepts that he is the only one responsible for the content uploaded, waiving any liability of the platform for the content hosted.⁷⁹ It should be emphasised that, in distinction to the case of professional self-regulation, the rules applied to users only address content. They require the user uploading material to verify if the content complies with the relevant regulations concerning copyright materials, defamation, hate speech, and otherwise objectionable materials.⁸⁰ In some cases the distinction

(Contd.)

- *Les activités illégales sous toutes leurs formes, notamment la copie ou la distribution non autorisée de logiciels, de photos et d'images, le harcèlement, la fraude, les trafics prohibés, la diffamation, la discrimination raciale, l'incitation à la violence ou à la haine ;*
- *La publication de contenus contrevenant aux droits d'autrui ou à caractère diffamatoire, les propos injurieux, obscènes ou offensants ;*
- *La violence ou l'incitation à la violence, politique, raciste ou xénophobe, la pornographie, la pédophilie, le révisionnisme et le négationnisme ;*
- *La divulgation d'informations permettant l'identification nominative et précise de membres de la communauté des abonnés au Monde.fr, telles que le nom de famille, l'adresse postale, l'adresse électronique, le numéro de téléphone ;*
- *Le détournement du service de blogs pour faire de la propagande ou du prosélytisme, à des fins professionnelles ou commerciales (prospéction, racolage ou prostitution) et à des fins politiques, religieuses ou sectaires ;*
- *La contrefaçon de marques déposées ;*
- *La reprise partielle ou totale de contenus propres au site www.lemonde.fr (image, article, objet multimédia, dossier, repère...) » Available at http://www.lemonde.fr/services-aux-internautes/article/2004/12/03/la-charte-des-blogs-et-les-regles-de-conduite-sur-lemonde-fr_389436_3388.html.*

⁷⁶ See the editorial guidance of the BBC on Pictures from Social Media Sites, available at <http://www.bbc.co.uk/guidelines/editorialguidelines/page/guidance-social-media-pictures>. The Guidance includes the following checklist for journalists: Authenticate, User or Publisher Intentions, Consent, Impact of Re-use, Is the Re-use Misleading?, Badge of Honour, Legal Issues.

⁷⁷ Smith, cit., p. 7 ff.

⁷⁸ See the examples of stakeholder dialogue pushed by the European Commission on the sensitive issues of the sale of counterfeit items via Internet platforms and on Internet piracy. It should be noted that in the former case a Memorandum of Understanding has been agreed upon and signed by most of the Internet service providers and trademark holders, whereas in the latter there has only been the mutual acknowledgement of stakeholders' positions, namely the entertainment industries, Internet service providers and telecommunication companies. For a more detailed description of the experiences see at http://ec.europa.eu/internal_market/iprenforcement/stakeholders_dialogues_en.htm#Illegal.

⁷⁹ E.g. Youtube *Terms and Conditions*: "7.3 L'utente riconosce ed accetta di essere l'unico responsabile dei propri Contenuti e delle conseguenze del loro caricamento online o pubblicazione. YouTube non avalla Contenuti o opinioni, raccomandazioni o consigli in essi contenuti, e declina espressamente ogni e qualsiasi responsabilità in relazione ai Contenuti di essere l'unico responsabile dei propri Contenuti e delle conseguenze del loro caricamento online o pubblicazione. YouTube non avalla Contenuti o opinioni, raccomandazioni o consigli in essi contenuti, e declina espressamente ogni e qualsiasi responsabilità in relazione ai Contenuti. [...] 7.7 I Contenuti presentati nel Servizio non possono contenere alcun materiale coperto da copyright di terzi o soggetto ad altri diritti proprietari di terzi (compresi diritti di privacy o diritti di pubblicazione), a meno che l'utente non abbia una licenza formale od un permesso da parte del titolare legittimo, ovvero sia in altro modo legalmente autorizzato, a pubblicare il materiale in questione ed a concedere a YouTube la licenza di cui al successivo articolo 8.1."

⁸⁰ See the analysis of terms and conditions content in OII, Regulation by Content, 2011.

between regular users generating content and ‘professional’ contributors is acknowledged,⁸¹ though such a distinction does not affect the rules applicable to the users; , rather it shifts the position of the platform from a mere hosting provider to an editor, as the provider is in charge of pre-selecting and organising the content submitted by the user before online publication.⁸²

A different instance is provided by news aggregators, where the service provider does not produce any content, and instead collects and presents the content available from news content websites. Here, the selection of the news content providers is made by the service provider, and the criteria do not limit access to the service either for press and broadcasting online news only,⁸³ nor for professional content. In fact, news aggregators do not include only newspapers and news agencies websites as sources in their service they also accept blogs and individual websites.⁸⁴ However, some general guidelines are provided in order to identify the criteria for selection, namely the focus on news content, the originality of the content, the expertise in the specific sector, and the availability of contact information.⁸⁵ More detailed guidelines are available where the service provider decides to engage in content production in a more structured way.⁸⁶ Here, the platform is not directly involved in content production but profits from the submissions of contributing users that apply to have their own blogs on the platform. The submission guidelines in this case are more formal and provide for a specific section for news content. Again the originality of the piece of information is one of the elements that is required, but it is connected with source's proper citation, a well-founded commentary on the news, and the “avoid[ance of] ranting or overly editorialized” style.⁸⁷

The description above shows that when traditional media moves to the online environment the boundary between professional and non-professional still holds, manifesting in conduct rules only for content under the editorial responsibility of professional journalists. When looking at online-only news providers, the distinction between professional and non-professional is no longer crucial as the same rules on content are applicable to both. Here, a shift towards more reliable information is also noticeable as different strategies have been implemented in particular by news aggregators, though the criteria to identify news content providers as reliable and accountable are still limited.

⁸¹ Such as in the Dailymotion video-sharing platform where users can participate to the so-called “Motion Maker” programme that is available to any user who is willing to have a dedicated channel within the platform.

⁸² The shift affects the liability regime that is applicable to the platform, which is no longer exempted from liability pursuant to art. 14 E-commerce directive.

⁸³ See the Google news service policy, affirming that any website offering “*timely reporting on matters that are important or interesting to our audience*” can submit their website and be included in the platform.

⁸⁴ See that blogs have an additional tag to the reference that acknowledges it, as for instance in Google news the tag is “(blog)”.

⁸⁵ The Google news aggregator provides for quality guidelines to be complied with in order for a source to be included in the set of content providers available to the final user. See <http://support.google.com/news/publisher/bin/answer.py?hl=en&answer=40787&topic=2484652&ctx=topic>.

⁸⁶ In 2010, Yahoo! acquired the independent publishing platform and online content destination Associated Content in order to expand its focus on content provision using the existing network of freelancers working for the company. The new service, called “Contributor Network”, allows any user (and former freelancer) to provide their own content, which is reviewed by a trained editor, and then paid for on the basis of each submission or on the basis of the number of people which view the article.

⁸⁷ <http://contributor.yahoo.com/help/guidelines/>

7. Self-Regulation of Social Networks and Bloggers

Professional journalism has also specifically addressed the challenges of new media through the creation of websites for the provision of content. Although non professional journalism has always existed,⁸⁸ the current technological evolution has made it more powerful and widespread. In particular, this is true for the speed, low cost and global reach with which topics can be brought to the national and international news agendas, including issues that those in power would prefer to be ignored.⁸⁹ Though the definition of citizen journalism as a specific form of journalism is recent, a development can be traced in this area showing a trend towards an increased level of professionalisation and transparency in citizen journalism news websites, in particular through the drafting of editorial guidelines that ensure a greater level of accuracy and credibility.⁹⁰

In order to describe the new multifaceted framework, a distinction among different models should be made. The hypotheses available differ on the basis of the involvement of professional journalists in the creation, editing, and distribution of content. Depending on the type of involvement, the availability and scope of rules on content and conduct vary.

In a first category, professional journalists associate to create a new platform where different content, additional to that available on mainstream media, is published.⁹¹ In this case the reference to specific rules of conduct is limited, and where available the points of reference are the existing standards that are applicable to professional journalists in the country of origin.

In a second category falls the so-called pro-am (professional-amateur) journalist websites, where the collaboration of non-professional journalists is encouraged and emphasised. This category can be divided further into subcategories, depending on what the professional journalists do with the user-generated content submitted: it can range from a pre-moderation with editorial control over any content published to post-moderation.⁹² Where the involvement of non-professionals is only as a form of participation in forums or comments areas, the level of control is limited to examine the type of language used, in particular if it is aggressive, libellous or interpreted as hate speech or sexual harassment.⁹³ Where collaboration with users is envisaged, rules are more structured and the website's internal editorial staff is in charge of monitoring compliance.⁹⁴

⁸⁸ Some scholars trace the European and U.S. origins of citizen journalism back to 17th and 18th century pamphleteering. See D. Gillmor, *We the media*, 2006, pp. 1–4; S. Allan and E. Thorson, (eds.), *Citizen Journalism: global perspectives*, New York: Peter Lang Publishing, 2009.

⁸⁹ N. Jurrat, *Citizen journalism and the media*, OSF 2011.

⁹⁰ N. Jurrat, *cit.*, p. 17.

⁹¹ See the cases presented in N. Bruno and R.K. Nielsen, *Survival is success – Journalistic online start-ups in Western Europe*, Reuters Institute for the Study of Journalism, 2012, available at http://reutersinstitute.politics.ox.ac.uk/fileadmin/documents/Publications/Challenges/Survival_is_Success.pdf.

⁹² See F. Le Borgne-Bachschmidt, et al., *User-Created-Content: Supporting a participative Information Society*, Final Report, SMART 2007/2008, 2008, available at http://ec.europa.eu/information_society/eeurope/i2010/docs/studies/ucc-final_report.pdf.

⁹³ See MinnPost terms and conditions: “MinnPost welcomes user comments on our stories and posts. MinnPost’s mission is to engage the public in news analysis of issues in their community and to encourage interaction with our editors, writers and other posters. We intend for this area to be used by our readers as a place for civil, thought-provoking and high-quality public discussion. In order to achieve this, MinnPost requires that all commenters register and post comments with their actual names and place of residence. MinnPost reserves the right to remove postings that include the use of foul language, personal attacks or the use of language that may be libelous or interpreted as inciting hate or sexual harassment; however we are under no obligation to do so. User comments may be reviewed by moderators and may be included or excluded at our discretion.” Available at <http://www.minnpost.com/terms-of-use>

⁹⁴ See the Owni charte editorial “3. Exigence de qualité éditoriale - Tous les articles publiés traitent de faits vérifiés par la rédaction sur le fond ; ils sont corrigés et enrichis, si nécessaire, sur la forme.”

In a third category falls citizen journalism sites,⁹⁵ where the participation of non-professionals in the news process collection and creation is asserted and praised. In this case, the adoption of self-regulatory tools is at the choice of the website owners, striking a balance between the ambition of ensuring quality and trustworthiness of the content they host, and the willingness to abide with liability rules provided for Internet service providers.⁹⁶ For instance, the well-known OhMyNews website is a citizen journalism website, based on submissions by registered members. In this case, there is a general control over the news submitted by approved citizen reporters before they are published online, thus in a form of peer review. The OhMyNews editors read each submitted story, fact-check them, and edit them for style, making them more polished and attractive for the readers. In practice, all citizen reporters are required to abide by the website's Code of Ethics and Citizen's Reporter Agreement that provide a brief but comprehensive list of rules addressing both conduct and content issues.⁹⁷

One special case is that of an Italian platform for citizen journalism named *timu*⁹⁸ which clearly provides four principles that should steer the activity of users submitting content to the platform. The principles are accuracy, impartiality, independence, and legality, and they are explained through a set

⁹⁵ See the self-definition provided by the US National Citizen Journalist Association, "Citizen Journalist and Citizen Journalism: A citizen journalist is any citizen who gathers, researches, administers, analyzes, reports and publishes news and information within their community and beyond presenting an independent, reliable and accurate account of news and information essential to a full functioning democracy. Citizen journalists use a wide variety of resources and means of expression, many made possible by the World Wide Web, as well as other more traditional sources and vehicles usually without editorial oversight.

⁹⁶ See that the exemption from liability in the case of illegal content published on the website is valid only for pure hosting websites. This approach is shared both by the European E-commerce directive (see artt. 14-15) and by the US Digital Millennium Copyright Act and the Communication and Decency Act (respectively addressing materials that breach copyright and defamation offences). See F. Casarosa, *Traditional v new media – National jurisprudential trends*, on file by the Author.

⁹⁷ "OhmyNews Reporter's Code of Ethics

1. *The citizen reporter must work in the spirit that "all citizens are reporters," and plainly identify himself as a citizen reporter while covering stories.*
2. *The citizen reporter does not spread false information. He does not write articles based on groundless assumptions or predictions.*
3. *The citizen reporter does not use abusive, vulgar, or otherwise offensive language constituting a personal attack.*
4. *The citizen reporter does not damage the reputation of others by composing articles that infringe on personal privacy.*
5. *The citizen reporter uses legitimate methods to gather information, and clearly informs his sources of the intention to cover a story.*
6. *The citizen reporter does not use his position for unjust gain, or otherwise seek personal profit.*
7. *The citizen reporter does not exaggerate or distort facts on behalf of himself or any organization to which he belongs.*
8. *The citizen reporter apologizes fully and promptly for coverage that is wrong or otherwise inappropriate.*

OhmyNews Citizen Reporter's Agreement

1. *I recognize the editorial authority of OhmyNews' in-house editing staff.*
2. *I will share all information about each of my articles with the OhmyNews editing staff.*
3. *I will not produce name cards stating that I am a citizen reporter of OhmyNews.*
4. *When an article I submit has or will be simultaneously submitted in another medium, I will clearly state this fact to the editorial staff.*
5. *I will accurately reveal the sources of all quotations of text.*
6. *Citizen reporters who work in the field of public relations or marketing will disclose this fact to their readers.*
7. *Legal responsibility for acts of plagiarism or unauthorized use of material lies entirely with the citizen reporter.*
8. *Legal responsibility for defamation in articles lie entirely with the citizen reporter."*

⁹⁸ See at <https://www.timu.it/it/about/cos-e-timu/>

of good practices for quality information, including rules on the protection of sources, privacy, copyrighted materials, etc.⁹⁹ The interesting aspect is the fact that the platform links their own methodology for the quality of information to the national quality standards for professional journalists, as defined by Italian Supreme Court.¹⁰⁰ The platform does not provide any form of monitoring over the content submitted, as it claims that as registered users adhere to the four principles there is no need for additional controls.¹⁰¹

8. The Role of European and National Courts in ‘Regulating’ Journalism

After describing different forms of private regulation and explaining how they draw the boundaries between different types of journalistic activities we now move on to an examination of the role of the courts in drawing these boundaries. Litigation, as we shall see, is often between third parties, rights holders, and news producers. The purpose of the analysis is to determine whether litigation is contributing to the redesigning of these boundaries by applying the rules of codes of conduct and rules defined by the courts themselves to the new content producers primarily operating on the web.

Courts play a complementary role to private bodies in professional regulation. They adjudicate cases where fundamental rights to privacy, data protection, and dignity are violated in the course of journalistic activity, and are often called on to clarify the meaning of journalist for the purpose of applying privileges and defences. They are also asked to define boundaries between professional and non-professional journalism including the scope and remit of social networks involved in the production and aggregation of news.

In this context, litigation arising between social networks, bloggers, other content producers, and parties claiming violation of their privacy or their reputation has contributed to redesigning the boundaries and scope of journalistic activity.

The constitutional principles of freedom of expression have become a reference point for deciding who can enjoy these privileges and defences. Courts, both European and national, have contributed to the expansion and redefinition of the notion of journalism and the boundaries of the profession by extending the privileges and protection granted to professional journalists to other content producers.

⁹⁹ See at <https://www.timu.it/it/g/hub/i-quattro-principi/>

¹⁰⁰ “Also, in the past years Italy’s High Court outlined a series of binding guidelines for news reporting. In short, journalists should make sure to report only facts with public interest; to avoid the use of insinuations, scandals or a “tabloid” tone; to avoid shock or outrage just for the sake of it. Also, reporters must always follow their professional standards, in accordance with the handbooks of major news organizations and the very four core standards adopted by timu: Accuracy, Impartiality, Independence, Legality”.

¹⁰¹ See the FAQ explicitly dedicated to content monitoring and control: “Qualcuno controlla i miei contenuti? No. Non c’è nessuna attività di filtro o controllo da parte di <ahref. Se hai scelto di condividere il metodo che ti proponiamo non ce n’è la necessità. <ahref interviene solo nel caso in cui siano segnalate da terzi sui tuoi contenuti violazioni di legge e lo fa principalmente a tua tutela. Ma anche in questo caso la prima valutazione che verrà fatta da parte nostra per decidere come agire sarà quella di verificare se hai applicato correttamente i termini del patto per la informazione di qualità che ti sei impegnato a condividere e a migliorare insieme a noi.”

8.1. European Courts Assessing Journalism Ethics

The case-law of the European Court of human rights has addressed two important sets of questions in this respect:

1. The extent to which non-professional journalists could benefit from the privileges and immunities of journalists
2. The extent to which organisations, which are not primarily content producers, can benefit from journalistic guarantees when exercising equivalent functions i.e operating as social watchdogs.

The ECtHR has extended the protection of Art. 10 to activities which are not considered journalism according to the self-defined boundaries of the profession at the national level.¹⁰² As we shall see, this trend is consistent with the national case law where Courts have extended the protection of freedom of expression to categories which professional self-regulation had not included in their 'jurisdictions'.

Similarly, the ECJ has extended derogations, concerning data protection under Art. 9 dir. 95/46/EEC, to companies disseminating journalistic content. In striking the balance between freedom of expression and the right to privacy, the ECJ has interpreted what constitutes journalism for deciding whether or not the derogations and limitations provided for in Art. 9 were applicable to a data processing entity using already published documents to be disseminated via text messages in mobile phones.¹⁰³ The Court concluded that those derogations and limitations were applicable.¹⁰⁴ A second and perhaps even more important conclusion is that journalistic activity can be defined uniformly across media¹⁰⁵.

The interpretation of the freedom of expression principle, as defined by Art. 10 ECHR, requires a more detailed analysis as the number of judgements is higher and the picture provided by them is multi-faceted.

8.1.1. The link between freedom of expression and journalistic activity.

If a shared definition of journalism and journalist probably does not exist among the European states, at the legislative or self-regulatory level, it is a matter of fact that being a journalist is strictly linked with the exercise of freedom of speech and expression, a right enshrined by all the post war constitutions and many international instruments.

¹⁰² However Art. 10 ECHR does not distinguish between legal or natural persons (for instance journalists, bloggers, publishers, editors or media companies) or the aim pursued by them. Yet the press has always been more or less privileged by the European Court of Human Rights. Only recently the Strasbourg court clearly affirmed that the protection accorded to non-media should be the same as that of journalists. See E. Lievens, E. Werkers, P. Valcke, *Exploring the boundaries of online journalism*, paper presented at CIRC conference, Barcelona, 25-26 May 2007, available at [https://www.law.kuleuven.be/icri/publications/918CICR_ICRI_31012007.pdf?where=.](https://www.law.kuleuven.be/icri/publications/918CICR_ICRI_31012007.pdf?where=)

¹⁰³ See point 28 case C-73/07 *Satakunnan Markkinapörssi and Satamedia*. In that case "a company transferred personal data published in a newspaper in the form of a CD-Rom disc to another company, owned by the same shareholders with a view to those data being disseminated by a text-messaging system."

¹⁰⁴ See point 61 case C-73/07 "Article 9 of the directive is to be interpreted as meaning that the activities referred at points (a) to (d) of the first question relating from data from documents which are in the public domain under national legislation, must be considered as activities involving the processing of personal data carried out "solely for journalistic purposes" within the meaning of that provision".

¹⁰⁵ In particular, at point 60, Case C-73/07 "the medium which is used to transmit the processed data, whether it be classic in nature, such as paper or radio waves, or electronic, such as the internet, is not determinative as to whether an activity is undertaken solely for journalistic purposes".

In particular, the connection between freedom of expression and journalistic activity has framed the latter as being an ‘instrumental good’ that permits the achievement of the values that are at the core of freedom of expression.¹⁰⁶ In this sense, journalists can claim special privileges and/or immunities, which “*should only be recognised insofar as they promote the values of freedom of speech, in particular the public interest in pluralism of its source of information*”.¹⁰⁷ The jurisprudence of the ECtHR underlines this connection between freedom of expression and journalistic activity,¹⁰⁸ allocating the press the task to “*impart information and ideas on political issues just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them*”.¹⁰⁹ In a more recent judgement, the Strasbourg Court is even clearer in this regard, imposing a negative obligation on states so as to allow the press to pursue its “public watchdog” role: “[t]he national authorities’ margin of appreciation is thus circumscribed by the interest of democratic society in enabling the press to play its vital role of ‘public watchdog’”.¹¹⁰

However, the Court of Human Rights does not treat the exercise of freedom of expression by journalists as an absolute right, without any limit or obligation. Instead, every time the Court affirms the application of the freedom of expression principle, it always links it with duties and responsibilities that flow from that privileged position, and among them the court lists the ethics of journalism.¹¹¹

8.1.2. The distinction among different media

The wording of Art. 10 of the European Convention of Human Rights does not explicitly mention the press, nor does it provide for any differentiation among different media, as regards the way in which individuals can exercise their freedom of expression. The reference to broadcasting, television and cinema enterprise, in the last indent of par. 1, refers only to the possibility for the State to impose restrictions on the freedom of expression through a licensing system. However, with regards to journalists, the equivalence between media is clearly stated by the Court.¹¹² Where the Court evaluated the proportionality of the national measures, the potential impact of the medium used to express opinions and views is a criterion taken into account. In this sense, the Court acknowledges that “*in considering the “duties and responsibilities” of a journalist, the potential impact of the medium*

¹⁰⁶ See Lichtenberg, *Foundations and limits of freedom of the press*, in Lichtenberg (ed.), *Democracy and the Mass Media*, CUP, 1990, 104. The author affirms that “*freedom of the press should be contingent on the degree to which it promotes certain values at the core of our interest in freedom of expression generally. Freedom of the press, in other words, is an instrumental good: it is good if it does certain things and not especially good (or not good enough to justify special protection, anyway) otherwise*”.

¹⁰⁷ Barendt, *Freedom of Speech*, 422.

¹⁰⁸ The court affirms that freedom of expression constitutes “*one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment. [...]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. [...] These principles are of particular importance as far as the press is concerned*”.

¹⁰⁹ ECtHR, *Lingens v Austria*, 1986, par. 41.

¹¹⁰ ECtHR, *Radio France and others v. France*, 2004, par. 33. See also *Bladet Tromsø and Stensaas v. Norway*, 1993.

¹¹¹ In particular, the court clarifies that “*It should be pointed out in this connection that the exercise of freedom of expression carries with it duties and responsibilities, and the safeguard afforded by Article 10 to journalists is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism*”, ECtHR, *Campana and Mazare v Romania*, 2004, par. 104. Nonetheless, the Court has held on many occasions that even the press “*must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information*”, *Bladet Tromsø and Stensaas v. Norway* 1999, par. 59. See also *Radio France and Others v. France*, cit., par. 37; *McVicar v. the United Kingdom*, 2002, pars. 83-86.

¹¹² “*Although formulated in the first instance for the written press, these principles are applicable to the audiovisual media*”, ECtHR, *Jersild v. Denmark*, 1994, par. 31

concerned is an important factor, and it is commonly acknowledged that the audiovisual media have often a much more immediate and powerful effect than the print media”.¹¹³

In a recent judgement, the Court has also extended the general principles regarding journalistic activity to cases concerning on-line publication: “*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. The maintenance of Internet archives is a critical aspect of this role and the Court therefore considers that such archives fall within the ambit of the protection afforded by Article 10*”.¹¹⁴ Thence, in assessing the proportionality of state measures restricting the freedom of expression, the same test on the potential impact of the media should be applied to the Internet.¹¹⁵

8.1.3. A wider definition of journalistic activity

Although the Strasbourg Court has never provided a clearcut definition of journalist as such, on several occasions it has applied the same reasoning used for journalists to extend the journalistic privileges and defences to non-journalists. In this sense the criteria used by the Court were the exercise of a public watchdog role of organisations, or the expression of individuals regarding matters of public interest.

Regarding the first line of reasoning, the Strasbourg Court explicitly stated that “*En tant qu’organisation non gouvernementale spécialisée en la matière, la requérante a donc exercé son rôle de « chien de garde » conféré par la loi sur la protection de l’environnement. Une telle participation d’une association étant essentielle pour une société démocratique, la Cour estime qu’elle est similaire au rôle de la presse tel que défini par sa jurisprudence constante [...]. Par conséquent, pour mener sa tâche à bien, une association doit pouvoir divulguer des faits de nature à intéresser le public, à leur donner une appréciation et contribuer ainsi à la transparence des activités des autorités publiques*”¹¹⁶ (emphasis added). The same result was achieved in a case regarding a non-governmental organisation, which was held to enjoy the same level of protection afforded to the press,¹¹⁷ as it exercised, like the press, as a social “watchdog” role.

Regarding the second line of reasoning, the court affirmed that “*the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they act in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism and the same principle must apply to others who engage in public debate*” (emphasis added)¹¹⁸ This would also allow that individuals who engage in public debate also have the

¹¹³ ECtHR, *Radio France and others v. France*, cit., par. 39.

¹¹⁴ ECtHR, *Times Newspapers Ltd v. the United Kingdom* (nos. 1 and 2), 2009, par. 27.

¹¹⁵ In particular, the court has expressed the opinion that the impact of information available on a poster displaying a reference to a website address is multiplied, as information can be accessed on the Internet by anyone, including minors. In this case, states can have a legitimate interest in taking measures that may restrict the right to impart information through this medium, and the restriction will be more justified when it does not prevent the expression of beliefs by other means of communication. See ECtHR, *Mouvement Raëlien Suisse v. Switzerland*, 2011, par. 54.

¹¹⁶ ECtHR, *Vides Aizsardzības Klubs v. Latvia*, 2004, par. 42.

¹¹⁷ The court clarifies that “[t]he function of the press includes the creation of forums for public debate. However, the realisation of this function is not limited to the media or professional journalists. In the present case, the preparation of the forum of public debate was conducted by a non-governmental organisation. The purpose of the applicant’s activities can therefore be said to have been an essential element of informed public debate”. ECtHR, *Társaság A Szabadságjogokért a Hungary*, 2009, par. 27

¹¹⁸ ECtHR, *Steel and Morris v. UK*, 2005, par. 90.

possibility of “*recourse to a degree of exaggeration, or even provocation*”.¹¹⁹ This was extended in practice to individuals publishing their views in a newspaper.¹²⁰

As the Internet has become a widespread tool of communication, and the World Wide Web has been developed, everyone, with a relatively small set of equipment can both inform and be informed through the net. As we have seen, new forms of journalism are arising: from citizen journalism to data journalism.¹²¹ These activities are not strictly linked to an editorial enterprise, nor to a professional activity, but since they are means of imparting information in substance, they can be compared to traditional journalistic activities. The Strasbourg Court acknowledged this major change, also as regards the journalism profession: “*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*”.¹²² The duty of the press to observe the principles of responsible journalism by verifying the accuracy of the published information (good faith, ethical behaviour, reliable information) is even more strict as regards information concerning past events in respect of which there is no urgency – Internet archives constituting a major source for education and historical research – than news about current affairs, which is by definition perishable.¹²³

In another case, the Court, having regard to the important role the Internet played for media activities generally, and for the exercise of freedom of expression, found that the absence of legal regulation allowing journalists to use information obtained from the Internet without fear of being sanctioned was an obstacle to the press exercising the vital function of a “public watchdog”.¹²⁴ Thus, the Court, for the first time, acknowledged that Article 10 of the Convention had to be interpreted as imposing on States a positive obligation to create an appropriate regulatory framework to ensure the effective protection of journalists’ freedom of expression on the Internet.¹²⁵

8.1.4. Role of private regulation in assessing journalistic activity

The exercise of freedom of expression by journalists is not conceived by the Court as an absolute right. One of the relevant criteria that is used by the Court in order to strike a balance between freedom of the press and conflicting rights or interests invoked by defendant states is the fact that the journalist has acted according to her professional ethics. In many cases, the Court referred to the fact the journalist had acted in conformity with the professional ethics, this being an argument to support press

¹¹⁹ ECtHR, *Prager and Oberschlick v. Austria*, 1996, par. 38.

¹²⁰ ECtHR, *Riolo v. Italy*, 2008, par. 63. The Court affirms that “*La Cour note d’emblée que le requérant n’exerce pas régulièrement la profession de journaliste, mais est un chercheur en sciences politiques à l’université de Palerme. Cependant, puisque l’intéressé a écrit un article destiné à être publié dans le journal Narcomafie, et qui, de plus, a été repris par le quotidien national Il Manifesto (paragraphe 13 ci-dessus), ses propos, à l’instar de ceux de toute autre personne se trouvant dans une situation comparable, doivent être assimilés à ceux d’un journaliste et jouir de la même protection sous l’angle de l’article 10 de la Convention*”.

¹²¹ See the definition of data journalism or data-driven journalism at http://en.wikipedia.org/wiki/Data-driven_journalism.

¹²² ECtHR, *Stoll v. Switzerland*, 2001, p. 104.

¹²³ ECtHR, *Times Newspapers Ltd v. the United Kingdom*, cit.

¹²⁴ ECtHR, *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, 2011.

¹²⁵ In that case the applicants had been ordered to pay damages for republishing an anonymous text, which was objectively defamatory, that they had downloaded from the Internet (accompanying it with an editorial indicating the source and distancing themselves from the text). They had also been ordered to publish a retraction and an apology – even though the latter was not provided for by law. Examining the case under Article 10 of the Convention, the Court found that the interference complained of had not been “prescribed by law”, as required by the second paragraph of that Article, because at the time, in Ukrainian law, there was no statutory protection for journalists republishing content from the Internet. In addition, the domestic courts had refused to transfer the provisions protecting the print media to that situation.

freedom and to qualify an interference by the authorities as a violation of Article 10 of the Convention.¹²⁶ Thus, the Court affirmed the following reasoning “*in essence, Article 10 leaves it for journalists to decide whether or not it is necessary to reproduce (...) documents to ensure credibility. It protects journalists’ rights to divulge information on issues of general interest provided that they are acting in good faith and on an accurate factual basis and provide “reliable and precise” information in accordance with the ethics of journalism*”.¹²⁷ Then, the same test can allow the Court to affirm that the disregard of journalism ethics is an argument to justify the legitimate character of the sanction or the interference in journalistic activity.¹²⁸

Attention should be paid to the decision on *Stoll v Switzerland*,¹²⁹ where particular importance was given to the decision of the Swiss Press Council on the conduct of the claimant journalist. Although the Court initially affirmed the need for an objective analysis of the claim without interfering with the conduct rules to be assessed by press councils or equivalent bodies;¹³⁰ nonetheless, the court addressed two aspects that can be both regarded as concerning the 'techniques of reporting', distinguishing between the manner in which the journalist obtained the information used to write an article, and the form of the published article.¹³¹ Only in the latter case did the Court make reference to journalism

¹²⁶ The Court emphasised that journalists “*cannot be accused of having failed in their professional obligations by publishing what they had learned about the case*” ECtHR, *De Haes and Gijssels v. Belgium*, 1997, par. 39.

¹²⁷ ECtHR, *Fressoz and Roire v. France*, 1999, par. 54. See also ECtHR, *Bladet Tromsø and Stensaas v. Norway*, 1999, par. 65.

¹²⁸ In particular, a journalist cannot invoke the “*his good faith or compliance with the ethics of journalism. The research that he had undertaken does not appear adequate to substantiate such serious allegations. In this connection it suffices to note that, on his own admission, the applicant had not attended a single criminal trial before Judge J. Furthermore he had not given the judge any opportunity to comment on the accusations levelled against him*”, ECtHR, *Prager and Oberschlick v. Austria*, 1995, par. 37. However, the decision was not unanimous on this point, as the dissenting opinion of Judge Martens emphasised that “*The article as a whole makes it sufficiently clear that it is based on personal observations over a considerable period as well as on the questioning of such witnesses as could reasonably be regarded as having professional experience of this particular court and its members, such as criminal lawyers, court reporters and probation officers. The Eisenstadt judge suggests that such questioning only yields hearsay evidence which is suspect, but in my opinion the methods used by Mr Prager cannot per se be held to fall short of the standard of proper journalistic care*”, ECtHR, *Prager and Oberschlick v. Austria*, cit., dissenting Opinion Judge Martens, joined by Judges Pekkanen and Makarczyk, par. 33.

¹²⁹ ECtHR, *Stoll v. Switzerland*, 2001.

¹³⁰ “*It is not for this Court, nor for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists*”, Par. 146 (see also ***)

¹³¹ The court reasoning was the following:

“The manner in which the applicant obtained the report

141. The Court considers that the manner in which a person obtains information considered to be confidential or secret may be of some relevance for the balancing of interests to be carried out in the context of Article 10 § 2. In that regard, the applicant submitted that the Swiss authorities had prosecuted and convicted the wrong person, since he had never been accused of having obtained the document in question by means of trickery or threats (see, *mutatis mutandis*, *Dammann*, cited above, § 55 in fine) and the officials responsible for the leak were never identified or punished. [...]

144. Nevertheless, the fact that the applicant did not act illegally in that respect is not necessarily a determining factor in assessing whether or not he complied with his duties and responsibilities. In any event, as a journalist, he could not claim in good faith to be unaware that disclosure of the document in question was punishable under Article 293 of the Criminal Code (see, *mutatis mutandis*, *Fressoz and Roire*, cited above, § 52).

- The form of the articles

145. In the present case, the question of whether the form of the articles published by the applicant was in accordance with journalistic ethics carries greater weight. In this regard the opinion of the Press Council, a specialised and independent body, is of particular importance.

146. The Court reiterates at the outset that Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed. Consequently, it is not for this Court, nor for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by

ethics by analysing the vocabulary used, the accompanying photographs and title, the writing style, and underlying intention of the article. These aspects were analysed in the light of the reasoning given by the Swiss press Council in its earlier decision, and were used as a basis for the conclusion of the Strasbourg Court that Art. 10 had not been violated. As a result the Court extended the restrictions to media freedom not only to subject-matter,¹³² but also to the way in which the article is written or researched. In other words it encompassed both content and conduct regulation.

This trend that is currently being developed by the Strasbourg Court regarding journalism ethics will possibly affect the future directions of national self- and co-regulatory bodies of journalism ethics or professional journalism on both conduct and content rules. A parallel effect may be experienced also at the level of domestic courts, since they may start to integrate the assessment of journalism ethics provided by regulatory bodies in their judgements.¹³³

8.2. National Courts Assessing Journalists' Ethics

Although national courts have not addressed this subject with the same depth and continuity shown by ECtHR, the role of new modes of news production and its effects on regulatory boundaries has been examined by domestic tribunals. In fact, the following analysis will describe the most relevant

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journalists (see, for example, *Jersild*, cited above, p. 23, § 31, and *De Haes and Gijssels v. Belgium*, judgement of 24 February 1997, Reports 1997-I, p. 236, § 48).

147. Nevertheless, like the Press Council, the Court observes a number of shortcomings in the form of the published articles. Firstly, the content of the articles was clearly reductive and truncated. [...] The Court is not persuaded by the arguments advanced by the editors of the *Sonntags-Zeitung* that, on 25 January 1997, it would have been virtually impossible to add another page to the newspaper and that plans to publish the full text on the Internet were abandoned owing to technical problems.

148. Secondly, the vocabulary used by the applicant tends to suggest that the ambassador's remarks were anti-Semitic. Admittedly, freedom of the press covers possible recourse to a degree of exaggeration, or even provocation (see, for example, *Prager and Oberschlick v. Austria*, judgement of 26 April 1995, Series A no. 313, p. 19, § 38). The fact remains that the applicant, in capricious fashion, started a rumour which related directly to one of the very phenomena at the root of the issue of unclaimed assets, namely the atrocities committed against the Jewish community during the Second World War. The Court reiterates the need to deal firmly with allegations and/or insinuations of that nature (see, *mutatis mutandis*, *Lehideux and Isorni v. France*, judgement of 23 September 1998, Reports 1998-VII, p. 2886, § 53, and *Garaudy v. France*, (dec.), no. 65831/01, ECHR 2003-IX). Moreover, the rumour in question most likely contributed to the ambassador's resignation.

149. Thirdly, the way in which the articles were edited seems hardly fitting for a subject as important and serious as that of the unclaimed funds. The sensationalist style of the headings and sub-headings is particularly striking [...]. In the Court's view, it is of little relevance whether the headings were chosen by the applicant or the newspaper's editors. [...]

150. Fourthly, the articles written by the applicant were also inaccurate and likely to mislead the reader by virtue of the fact that they did not make the timing of the events sufficiently clear. [...]

151. In view of the above considerations, and having regard also to the fact that one of the articles was placed on the front page of a Swiss Sunday newspaper with a large circulation, the Court shares the opinion of the Government and the Press Council that the applicant's chief intention was not to inform the public on a topic of general interest but to make Ambassador Jagmetti's report the subject of needless scandal. It is therefore easy to understand why the Press Council, in its conclusions, criticised the newspaper clearly and firmly for the form of the articles as being in clear breach of the "Declaration on the rights and responsibilities of journalists" (see paragraph 7 of the Press Council opinion and point 5 of its findings, paragraph 24 above).

152. Accordingly, the Court considers that the truncated and reductive form of the articles in question, which was liable to mislead the reader as to the ambassador's personality and abilities, considerably detracted from the importance of their contribution to the public debate protected by Article 10 of the Convention."

¹³² ECtHR, *Von Hannover v Germany*, 2004.

¹³³ D. Voorhoof, *Freedom of expression, journalists' rights and duties and the impact of ethics and self-regulation in the light of Article 10 ECHR*, Presentation at the Conference La protection européenne de la liberté d'expression : réflexions sur des évolutions restrictives récentes, Strasbourg, 10 October 2008, available at http://www-ircm.u-strasbg.fr/seminaire_oct2008/docs/Report_by_Dirk_Voorhoof_Session_II.pdf.

examples in the jurisprudence of MS. On the one hand it shows the role Courts have been playing in defining regulatory boundaries; on the other hand it describes the different approaches taken to the question of the regulatory integration of journalistic activity across media.

8.2.1. The link between freedom of expression and journalistic activity.

Several studies show that freedom of expression is one of the fundamental principles enshrined in the national constitutions of all European countries.¹³⁴ Though differently expressed in wording,¹³⁵ national constitutions acknowledge the close and immediate connection between freedom of expression and freedom of the press.¹³⁶ This is also reflected in the case-law of domestic courts. In particular, European courts share a common interpretation concerning the link between the need for information and the need for respectful debate based on accurate information and contributing to public debate. Like the European Court of Human rights, national supreme courts consider cases involving the press or controversial expressions of opinion in terms of their contribution to public debate.¹³⁷

In practice, national courts often refer to the Strasbourg Court's jurisprudence to support their reasoning.¹³⁸ In some cases, domestic courts and Constitutional Courts have also referred to ECHR case law as an interpretive tool for national rules, in particular for defining the limits of freedom of expression and balancing freedom of expression with other liberties. In general, the effects of ECtHR jurisprudence on national courts is affected, on the one hand, by the way in which the ECHR is applied in national legal systems,¹³⁹ and on the other hand, by the way in which judges have considered ECtHR case law as guidance.¹⁴⁰ Otherwise, courts implicitly refer to the jurisprudence of the ECtHR as part of their reasoning by deploying the same terminology of the Strasbourg Court.¹⁴¹

¹³⁴ See D. Kevin, et al., *The information of the citizen in the EU*, cit.

¹³⁵ See, M. Verpeaux, *Freedom of expression: in constitutional and international case law*, Strasbourg : Council of Europe Publishing, 2010. “*The different wordings have led to uncertainty about the nature of freedom of expression, which can be classed among the freedoms commonly referred to as “freedom of thought”, although the means of expressing that thought is an external process more akin to the freedom to inform. Interpreted thus, freedom of expression covers several notions such as freedom of assembly, research, opinion, the press communication and so on.*” p. 12.

¹³⁶ For instance, the German constitution (Basic Law) in art. 5 (1) affirms that “*everyone is entitled to express and distribute freely his opinion in word, writing and image and to obtain unhampered information from sources accessible to all. Freedom of the press and freedom to inform by radio, television and cinema are guaranteed. There is no censorship.*”

¹³⁷ The Danish Supreme Court decided a case regarding a sub-editor accused of defamation as a result of articles in his newspaper relating to a case of sexual violence inflicted on children. The Danish supreme court found it questionable to hold that the defendant was guilty of defamation as the national rules were interpreted in the light of Art. 10 of the Convention (Decision 15 April 2004, Ugeskrift for Retsvaesen, 2004, 1773).

¹³⁸ In Italy, the Constitutional Court has acknowledged that “*that freedom of expression is the foundation of democracy and that the press, seen as an essential tool of such freedom, must be safeguarded against any threat or coercion, whether direct and indirect*” (Constitutional Court, decision n. 172/1972). See also the recent case before the Supreme Court, where the court not only affirmed the coordination between Article 21 Const. and Article 10 ECHR so as to protect the freedom to seek, impart, and receive information without interference from public authorities, but it also acknowledged, in relation to the press and media in general, the role of privileged fora to disseminate information about public interest issues (such as fairness and impartiality of judiciary, in the specific case). The Court stated that “*the fundamental role played by press in the democratic debate does not allow to exclude that it could criticise the judiciary, being newspapers “watchdogs” of democracy and institutions, including judiciary, as already affirmed by ECtHR*’.

¹³⁹ In UK, the passing of the Human Rights Act (HRA) 1998 gave domestic effect to almost all the rights contained in the European Convention on Human Rights. The HRA requires courts to ‘take into account’ ECtHR case law, without imposing on them the obligation to follow the decisions. However, if a conflict between a Supreme court decision and a ECtHR decision arises, English courts must follow the decision of the Supreme Court; *Pinnock v Manchester City Council* [2010] UKSC 45.

¹⁴⁰ In Italy, before 2007, the effects of the judgements of the Strasbourg Court did not have an express influence on national jurisprudence, since references to the ECHR were indirect and implicit. In fact, the influence of the ECtHR case law has

8.2.2. A wide definition of journalistic activity

National courts are also keener to extend the notion of journalistic activity beyond the boundaries set by different forms of self-regulation. In some countries, they have provided for a functional definition of the journalistic activity itself, identifying the specific criteria or interpreting in practice those defined by law. Respectively, these are the cases of the Italian and French jurisprudence.

In the Italian case, the self-regulatory authority has a status-based definition of journalist, thus only the members of the association qualify as journalists. As outlined above, the law delegating the regulatory power to the self-regulatory body has not provided for criteria to identify the journalism profession, and instead it only characterised the journalism profession with the exercise of the “right to inform and to criticise” (Art. 2, Law 69/1963). Italian courts have built on this assertion and have identified a set of criteria that could qualify journalistic activity, namely the gathering, commenting and elaboration of current news aimed at inter-personal communication; an element of creativity; and finally, the timeliness of information.¹⁴² Thus, the courts went beyond the criterion of membership in setting the

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been for a long time limited because of the general approach of the Italian constitutional order to regulations and rulings coming from international bodies (Zaccaria, 2009). According to the constitutional interpretation of the strength of the Italian Constitution and the hierarchical system of the sources of law, an international treaty, such as the ECHR, could not prevail over constitutional laws and principles (Zaccaria, 2009), since it is executed with a ordinary law of the Parliament. The situation changed in 2007, when the Italian Constitutional Court in two seminal cases (decisions n. 348/2007 and 349/2007) acknowledged the position of the ECHR as an interposed law (*norma interposta*) in the Italian constitutional adjudication (a sort of parameter of constitutionality, although the Constitutional Court stressed the need for the ECHR to be consistent with the Constitution). This entails a wider possibility for judges to apply directly or interpret Italian law in light of ECtHR case law and Article 10 ECHR case law in specie.

¹⁴¹ In Germany, the Federal Constitutional Court applies the same reasoning as the ECtHR regarding freedom of the press as an essential element in the system of checks and balances which is vital to a democratic society. Decision 27 February 2007, Cicero case, 1 BvR 538/06 – 1 BvR 2045/06.

In France, the Conseil constitutionnel endorsed the view of the ECtHR, rejecting all prior authorisation in the case of written publications, although it accepts such authorisation in the audiovisual field (181 DC 10 and 11 October 1983 and 82-141 DC, 27 July 1982).

¹⁴² See Italian Supreme court: “*La nozione dell’attività giornalistica, in mancanza di una esplicita definizione da parte della legge professionale 3 febbraio 1963, n. 69 o della disciplina collettiva, non può che trarsi da canoni di comune esperienza, presupposti tanto dalla legge quanto dalle fonti collettive, con la conseguenza che per attività giornalistica è da intendere l’attività, contraddistinta dall’elemento della creatività, di colui che, con opera tipicamente (anche se non esclusivamente) intellettuale, provvede alla raccolta, elaborazione o commento delle notizie destinate a formare oggetto di comunicazione interpersonale attraverso gli organi d’informazione, mediando tra il fatto di cui acquisisce la conoscenza e la diffusione di esso attraverso un messaggio (scritto, verbale, grafico o visivo) necessariamente influenzato dalla personale sensibilità e dalla particolare formazione culturale e ideologica*” (Cass. civ., 23 novembre 1983, n. 7007; Riviste: Mass. 1983); “*E’ di natura giornalistica la prestazione di lavoro intellettuale volta alla raccolta, al commento e all’elaborazione di notizie destinate a formare oggetto di comunicazione interpersonale (che può indifferentemente avvenire mediante l’apporto di espressioni letterali, o con l’esplicazione di espressioni grafiche, o ancora mediante la collocazione del messaggio) attraverso gli organi di informazione*” (Cass. 1/2/96 n. 889, pres. Mollica, est. De Rosa, in D&L 1996, 687); “*Per attività giornalistica deve intendersi la prestazione di lavoro intellettuale volta alla raccolta, al commento e alla elaborazione di notizie destinate a formare oggetto di comunicazione interpersonale attraverso gli organi di informazione; il giornalista si pone pertanto come mediatore intellettuale tra il fatto e la diffusione della conoscenza di esso..... differenziandosi la professione giornalistica da altre professioni intellettuali proprio in ragione di una tempestività di informazione diretta a sollecitare i cittadini a prendere conoscenza e coscienza di tematiche meritevoli, per la loro novità, della dovuta attenzione e considerazione*” (Cass. Civ., sez. lav., 20 febbraio 1995, n. 1827); “*Il carattere creativo dell’attività giornalistica non significa che essa debba essere necessariamente oggetto di un rapporto di lavoro autonomo. In realtà, fermo restando il carattere essenziale della creatività, essa può costituire prestazione di un rapporto di lavoro autonomo o subordinato, a seconda delle modalità della collaborazione tra il datore di lavoro e il giornalista. Tuttavia, il vincolo della subordinazione assume una particolare configurazione nel rapporto di lavoro giornalistico, per la natura squisitamente intellettuale dell’attività del giornalista, per il carattere collettivo dell’opera redazionale, per la peculiarità dell’orario di lavoro e per i vincoli posti dalla legge per la pubblicazione del giornale e la diffusione delle notizie.*” (Cass., sez. lav., 14 aprile 1999, n. 3705).

boundaries between professional and non-professional activity.¹⁴³ From a different perspective, the application of data protection rules has also widened the concept of journalistic activity since it provides an exception for the data subject's consent in the case of an exercise of journalistic activity by a non-professional¹⁴⁴. When news production is carried out with a view to making the content public, the data protection authority has also widened the scope of the definition of what constitutes journalism.¹⁴⁵

In the French case, the definition of journalistic activity provided by the Labour code has been interpreted in order to identify the elements that qualify professional activity, namely the intellectual activity (or *souffle artistique*) and the relation with current affairs.¹⁴⁶

Where a legal definition of journalist is lacking, as in the UK, again courts have proved to be the relevant actors in providing the criteria for setting the boundaries between journalistic activity and the exercise of freedom of expression. In particular, this has arisen in cases involving the law of defamation, which is particularly restrictive in the UK. The courts there have held in certain circumstances 'responsible journalism' might provide a defence in a defamation action. This was dependent on a number of conditions, including whether the information was a matter of public concern and whether steps had been taken to verify it; this amounted to a test of 'responsible journalism'.¹⁴⁷ However, as Lord Hoffman noted in a later case, 'the defence is available to anyone

¹⁴³ "Rientra nell'ambito del lavoro giornalistico l'attività di colui che, in modo creativo e con opera tipicamente intellettuale, provveda alla raccolta, elaborazione e commento delle notizie destinate a formare oggetto di comunicazione attraverso gli organi di informazione di massa, con un apporto espressivo o critico, non risultando sufficiente, ai fini di detto riconoscimento, la mera iscrizione nell'albo dei giornalisti (nella specie, l'impugnata sentenza, confermata dalla Cassazione, aveva ritenuto che l'impiegato di azienda editoriale, che non svolga con continuità attività di vera selezione o ricerca delle notizie, né di modifica, elaborazione, coordinamento o aggiunta di materiale, non ha diritto alla qualifica di giornalista, anche se partecipa alla c. d. <cucina redazionale> - id est passaggio pezzi e collaborazione all'impaginazione - ma con apporti originali soltanto sporadici, e, quand'anche risulti iscritto all'elenco dei pubblicitari)" (Cass. civ., sez. lav., 21 febbraio 1992, n. 2166; Riviste: Foro It., 1992, I, 3322, n. Moccia; Orient. Giur. Lav., 1992, 301).

¹⁴⁴ See Cassazione penale sez. II, 11 novembre 2008, n. 45046, "la Cassazione ha osservato che non solo il materiale acquisito era stato prodotto da persona non iscritta all'albo dei giornalisti; non solo esso era stato raccolto in violazione delle istruzioni del Garante ("il fotografo è comunque tenuto a rendere palese la propria identità e attività di fotografo ed astenersi dal ricorrere ad artifici"); ma altresì era stato realizzato in un contesto diverso da quello del "prodotto intellettuale giornalistico". Difatti, l'art. 137 Codice Privacy, potrebbe validamente invocarsi solo nel caso in cui le "fotografie, pur realizzate da un non giornalista, vengano pubblicate o comunque, costituiscano parte integrante di un articolo o di un prodotto formato da un giornalista e destinato alla pubblicazione". Nel caso di specie, invece, era risultato che le immagini fotografiche erano state immediatamente "offerte" alla vittima al fine di "ottenere un corrispettivo in denaro proprio in virtù della mancata pubblicazione" e, cioè, del "definitivo ritiro dal mercato del materiale giornalistico in questione".

¹⁴⁵ See Tribunale Civile di Milano, Sezione Prima, 14 ottobre 1999.

¹⁴⁶ See *inter alia* "Le journaliste professionnel est celui qui a pour occupation principale, régulière et rétribuée d'apporter une collaboration intellectuelle et permanente à une publication périodique en vue de l'information de lecteurs", (Cass. Soc., 5 March 1987), similarly in Conseil d'Etat, 1 April 1992, Legipresse, dec. 1992, 97.III. 138. The definition of journalist is accorded also to those that "que en son role de maquettiste participe du role de la redaction par la liberté qui lui est reconnue de choisir des photographies et des titres, voire de modifier des textes [...] qu'il s'agit donc d'une fonction qui dépasse la seule mise en forme pour l'impression, mais qui participe de la réalisation de la présentation graphique des textes et photos et, de manière générale, de tous les éléments visuels du journal" (Trib. Paris, 19 June 1996, J.-P. Lemaire v MPP, Legipresse, jan. 1997, 138.III.15); "Il est constant que la participation de XX à des émissions télévisées consacrées à des sujets d'actualité ne se borne pas à la présentation et à l'animation des débats et magazines, mais comprend également la conception et la préparation de ces émissions, qu'ainsi le requérant exerce les fonctions de recherche, de mise en forme et de communication d'informations d'actualité, caractéristiques de l'activité journalistique" (TA Paris, 2 dec. 1980).

¹⁴⁷ The 'responsible journalism' defence emerged during the case of *Reynolds v Times Newspapers* [2001] 2 AC 127., when the House of Lords held that journalists making statements that were subsequently found to be defamatory and untrue were protected in law if the story had been researched and presented professionally and the subject matter was in the

who publishes material of public interest in any medium'. The case, thus, does not provide a defence limited only to professional journalists; rather the key question will be whether the information about a matter of public interest.¹⁴⁸ Anyone can invoke this privilege, though it has most often been applied in a journalistic context and while journalists have to act in "good faith" and on an "accurate factual basis", they are not required to guarantee the accuracy of the facts.

In other European countries, the conflict between privacy and journalistic activity has been the trigger to define the boundary of journalistic activity. The national implementation of Art. 9 of the Data Protection Directive mentioned above regarding the possibility for member states to provide for exemptions or derogations from its provisions for the processing of personal data carried out solely for journalistic purposes is the main reference.¹⁴⁹ In particular, in a case involving an online rating platform, the German Bundesgerichtshof addressed the requirement that processing be "*exclusively for their own journalistic-editorial purposes*", which could only be said to have been met "*when the opinion forming effect for the general public is a defining element of the offering and does not merely play a subsidiary role*".¹⁵⁰ Thus, the online rating platform providing the mere activity of collecting and transmitting users' contributions does not constitute journalistic purposes, even if the contributions are journalistic/editorial in nature. In a different context, the UK Supreme Court had to decide on the meaning of an exemption from the Freedom of Information Act 2000 which meant that the BBC did not have to provide access to information held for purposes of journalism. It decided that even if material was held only partly for the purposes of journalism it did not have to be disclosed. The Court's decision was based on the powerful public interest that broadcasters should be free to gather, edit and publish news and comment on current affairs without the inhibition of an obligation to make public disclosure of their work. This would be defeated if the coexistence of non-journalistic purposes resulted in the loss of immunity. The Court also considered that there was no contravention of Article 10 of the European Convention on Human Rights as it did not create a general right to

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public interest. The purpose of introducing this defence was to "*enable the court to give appropriate weight, in today's conditions, to the importance of freedom of expression by the media on all matters of public concern*". In his speech in *Reynolds*, Lord Nicholls set out 10 guidelines which, depending on the circumstances, the courts could use to determine whether the defence applied:

- The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
- The nature of the information, and the extent to which the subject-matter is a matter of public concern.
- The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.
- The steps taken to verify the information.
- The status of the information. The allegation may have already been the subject of an investigation which commands respect.
- The urgency of the matter. News is often a perishable commodity.
- Whether comment was sought from the claimant. He may have information others do not possess or have not disclosed. An approach to the claimant will not always be necessary.
- Whether the article contained the gist of the claimant's side of the story.
- The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.
- The circumstances of the publication, including the timing.

¹⁴⁸ *Jameel v Wall Street Journal* [2006] UKHL 44, para. 54.

¹⁴⁹ In Sweden, the Supreme Court (293-00 – Ramsbro) affirmed that the fact that electronic or other media published texts containing insulting or deprecating data or judgements does not mean that this takes away its character of journalistic purpose. On the contrary, such a fact is to be looked upon as a normal ingredient within the scope of a critical societal debate.

¹⁵⁰ German Bundesgerichtshof, case VI ZR 196/08 – Spickmich.de.

freedom of information, and, even if it did so, a state could still legislate to protect information held for the purposes of journalism.¹⁵¹

8.2.3. The distinction among different media

It should be emphasised that courts have also addressed the issue of new media, and the possibility of including online expression in journalistic activity. This has been done directly, by qualifying the Internet as equal to the other traditional media,¹⁵² or indirectly by according the same privileges and defences to those individuals providing their activity online, as far as the same criteria are also satisfied for the online activity.¹⁵³

There are two interesting examples of the equivalence of online media to traditional media as they show different paths in the evolution of the regulatory framework regarding the role and definition of journalistic activity.

¹⁵¹ *Sugar (Deceased) v British Broadcasting Corporation* [2012] UKSC 4.

¹⁵² In Sweden, the Supreme Court (decision 15/06/2001, Nytt Juridiskt Arkiv, 2001, 445) affirms that “according to art. 1.9 of the Fundamental Law on Freedom of expression, the provisions of this law concerning radio programmes also apply where a printed periodical makes available to the general public, in response to a special request and using electromagnetic waves, information taken directly from a register containing material for automatic data-processing purposes”. The Supreme court held this position to be applicable when the owner of a Swedish printed periodical made texts available on the Internet irrespective of the fact that the Internet server was located in the USA. As the owner had not appointed an editor responsible for Internet information, he was consequently responsible himself for this information.

¹⁵³ In Italy, the civil and labour court addressed on several occasions the extension of the same labour conditions (in particular regarding social security contributions) for journalists carrying out their activity in online journals. “*In sede di opposizione a decreto ingiuntivo, la Sezione Lavoro del Tribunale di Roma, nel respingere le eccezioni mosse dalla Uomini & Affari s.r.l. (esercante attività di comunicazione su WEB attraverso la realizzazione del quotidiano on-line “Affari Italiani” e come “service” per la testata giornalistica “Mediaset on-line” (ora TG-COM) e per altri siti), ha confermato la sussistenza dell’obbligo contributivo fatto valere dall’Inpgi riconoscendo la natura giornalistica delle prestazioni di lavoro rese nell’ambito dell’informazione on-line. Ha motivato, infatti, il Giudice che la consacrazione legislativa della natura editoriale del prodotto elettronico (intervenuta con legge 7.3.2001, n. 62) non toglie che anche in relazione al periodo precedente l’attività dei redattori dei giornali elettronici possa essere qualificata come giornalistica, ove rispondente ai consolidati canoni enucleati dalla giurisprudenza di legittimità: creatività, intellettualità, funzione informativa e critica, utilizzazione dei mass-media, mediazione intellettuale tra notizia e prodotto finito, anche sotto forma di regolazione del flusso di notizie. Sicchè, la previsione contrattuale del redattore on-line, adeguata all’affermazione di nuove tecniche di diffusione delle informazioni, appare meramente specificativa delle peculiari modalità operative di una figura professionale già originariamente ascrivibile all’ampia ed aperta definizione normativa del giornalista*”, (Tribunale di Roma, Lavoro, 17/3/2007, n. 5203); “*Ai fini del riconoscimento della natura giornalistica dell’attività, non assume rilievo la circostanza che la Caltanet S.p.a. non abbia un suo giornale, sia pure elettronico, e che non vi sia una testata con tale nome. Fatta tale premessa, la Sezione Lavoro della Corte d’Appello di Roma, riesaminando le prove assunte in primo grado, ha confermato la sentenza del Tribunale che aveva accertato la natura giornalistica dell’informazione resa dal portale di proprietà di Caltanet S.p.a. e dell’attività svolta da una giornalista assunta per la realizzazione della pagina web “Ultime Notizie”. E’ stato ritenuto corretto l’accertamento della natura giornalistica dell’attività svolta dalla dipendente perché caratterizzata dalla mediazione della notizia (elaborata sotto il controllo del capo redattore) ed il pubblico, sia pure nei limiti del tipo di informazione, evidentemente sintetica, richiesta da un portale internet. Ugualmente condivisibile è stata anche ritenuta la riconducibilità delle mansioni espletate dalla giornalista alla qualifica di redattore che, secondo costante giurisprudenza di legittimità, si caratterizza per il requisito della quotidianità della prestazione, in contrapposizione con la mera continuità propria della figura del collaboratore fisso*”, (Corte d’Appello di Roma, Lavoro, 12/4/2006, n. 7558); “*In sede di opposizione a decreto ingiuntivo, la Sezione Lavoro del Tribunale di Roma, nel respingere tutte le eccezioni mosse dalla Kataweb News s.r.l., il cui oggetto sociale è la produzione e distribuzione di editoriali e multimediali, ha confermato la sussistenza dell’obbligo contributivo fatto valere dall’Inpgi riconoscendo la natura giornalistica delle prestazioni di lavoro rese nel “portale” on-line Kataweb con riguardo alla redazione di videonews. Ha motivato, infatti, il Giudice che nella fattispecie (atipica rispetto ai tradizionali strumenti e mezzi di diffusione della notizia), sussiste l’espletamento di quella attività contraddistinta dalla creatività, dalla funzione informativa e critica, comportante l’utilizzazione dei mezzi di comunicazione di massa, mediazione tra notizia e prodotto finito.*” (Tribunale di Roma, Lavoro, 19/5/2006, n. 10021).

In France, courts have been the pioneers in extending the regulatory framework provided for the press to new media, not only in the recent years regarding Internet-based communications, but also in previous decades from the beginning of broadcasting activity.¹⁵⁴ Courts filled the gap of the legislative framework extending the application of Law 29 July 1881 on the freedom of the press to online publications,¹⁵⁵ as a form of 'audiovisual communication'.¹⁵⁶ However, when the legislator revised the existing regulatory framework, affirming that the concept of 'audiovisual communication' could not be applicable to online publication, it distinguished the two introducing a new framework category of "communication to the public via electronic means" that could embed both audiovisual and online communication.¹⁵⁷ Given that this new regulatory framework would have the consequence of excluding the application of audiovisual communication rules to online content, legislative reform was adopted so as to apply the same rules provided for press and broadcasting journalists also to those that only exercise their activity in online publications (Art 93-2, Loi n. 82-652, 29 July 1982). More recently, complete equivalence among the different types of media publication has been acknowledged by law, as Art 1, Loi n. 86-897, 1^o August 1986¹⁵⁸ provides that press publication means "*tout service utilisant un mode écrit de diffusion de la pensée mis à la disposition du public en général ou de catégories de publics et paraissant à intervalles réguliers*". *Inter alia*, online press publication is "*tout service de communication au public en ligne édité à titre professionnel par une personne physique ou morale qui a la maîtrise éditoriale de son contenu, consistant en la production et la mise à disposition du public d'un contenu original, d'intérêt général, renouvelé régulièrement, composé d'informations présentant un lien avec l'actualité et ayant fait l'objet d'un traitement à caractère journalistique, qui ne constitue pas un outil de promotion ou un accessoire d'une activité industrielle ou commerciale*". Therefore, the law provides the boundary for professional and non-professional online communication, defining as main characteristics of the former editorial control over the content and its regular updating.¹⁵⁹

A different path has been followed in the UK, regarding in particular social media. Here, the courts expressly acknowledge social media as a form of communication that can be used for journalistic purpose, in particular when disseminating information covered by injunctions. In spring 2011, English courts were asked several times to grant interim injunctions to protect the privacy of claimants vis-à-vis tabloids and others newspapers.¹⁶⁰ Injunctions prevent publication of any information about the claimant and the details of the case not only on the part of those to whom the injunctions are addressed but also by third parties that have notice of the injunction.¹⁶¹ This obligation is applicable not only to paper and electronic publications, but also to information availability on social media, in particular on

¹⁵⁴ This extension was initially provided by the jurisprudence (e.g. Trib. Bourges, 19 July 1934; Cour Cass. Crim. 8 October 1979, in Gaz. Pal. 1980, p. 399), then adopted by law. As a matter of fact, Law n. 83-1317, 13 December 1985, acknowledged that among press crimes there should be also those committed through the means of audiovisual communication, being conceptually included due to the fact of publication.

¹⁵⁵ Cass. crim. 30 January 2001, Boll. n. 28.

¹⁵⁶ See Article 2, Law n. 86-1067, 10 September 1986 on press freedom.

¹⁵⁷ See Law n. 2004-669, 9 July 2004 on electronic communication and audiovisual services. The "electronic communication to public" is defined as "les émissions, transmissions ou réceptions de signes, de signaux, d'écrits, d'images ou de sons, par voie"; whereas the "online communication to the public" as "*électromagnétique toute installation ou tout ensemble d'installations de transport ou de diffusion ainsi que, le cas échéant, les autres moyens assurant l'acheminement de communications électroniques, notamment ceux de commutation et de routage*".

¹⁵⁸ Modified by Loi 2009-669, 12 June 2009.

¹⁵⁹ It should be emphasised that the SNJF addressed the issue of online journalism and the result was that the principles enshrined in the Charte des devoirs are applicable regardless of the specific medium involved. See the assemblée nationale sur les media...

¹⁶⁰ See the number of injunctions accorded between March and May 2011. <http://inforrm.wordpress.com/privacy-injunctions-2010-2011/>.

¹⁶¹ The so-called 'spycatcher doctrine'. See . *AG -v- Newspaper Publishing Plc* (1988) 1 Ch 333.

Twitter. Courts clearly affirmed that the use of Twitter by journalists – either directly or through pseudonymous – is to be assessed as a publication on the online newspaper and, consequently, would have the same effect of breaching the injunctive order.¹⁶²

Given the lack of control¹⁶³ and possible anonymous publication by journalists through concealed accounts, the PCC reacted by proposing a working group analysing under which conditions Twitter could be introduced in their jurisdiction. Before any decision could be taken on a common industry basis, British media companies addressed the issue by setting their own guidelines regarding social media use. Thus, journalists employed in several media outlets should now comply with the specific rules defined by their own employer, for instance requiring journalists not to provide news on social networks if it was not published on the company news services in advance, thus retaining control over the content available on all the distribution systems. This approach was quickly adopted both by commercial broadcasters such as Sky News,¹⁶⁴ and by public service broadcaster the BBC.¹⁶⁵ It is interesting that the idea was also shared by foreign media companies such as the American AP¹⁶⁶ and the Spanish EFE.¹⁶⁷

In this case the sequence of reaction is very clear: the courts extended the definition of journalistic activity to social media publication, then the self-regulatory body proposed an intervention on the point which was immediately overtaken by industry, as media outlets did not wait for the revision of the PCC code but imposed specific obligations directly on their journalists.

Another interesting example where the two perspectives are combined is in the Belgian case. Here, constitutional and civil courts provide for a different interpretation of the principle of freedom of expression enshrined in the constitution, which also affected the extension of the freedom of the press. The Belgian Supreme Court strictly interpreted Art 25 of the Belgian Constitution regarding freedom of the press as applying exclusively to the *written* press,¹⁶⁸ excluding both radio and broadcasting and also the Internet. Instead, the Constitutional court interpreted the principle of freedom of expression principle, in particular when applied to journalistic privileges, such as the protection of sources. The position of the constitutional court is more than clear in the decision that it provided regarding the newly adopted legislation regarding the protection of journalists' sources. Here, the court extended a defence towards anyone providing informative activity, regardless of whether they are professional journalists or not.¹⁶⁹ Here, the position of the Constitutional Court clearly contrasted with the position

¹⁶² See above par. 5.

¹⁶³ PCC has no jurisdiction over Twitter.

¹⁶⁴ See the report available at <http://www.guardian.co.uk/media/2012/feb/07/sky-news-twitter-clampdown>.

¹⁶⁵ See at http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/14_07_11_news_social_media_guidance.pdf.

¹⁶⁶ See the Associated Press *Social Media Guidelines for AP Employees*, January 2012, available at <http://www.ap.org/pages/about/pressreleases/documents/SocialMediaGuidelinesforAPEmployees-RevisedJanuary2012.pdf>. In particular the guidelines affirm: “*Don’t break news on social networks that we haven’t published in AP’s news services. If you have a piece of information, a photo, video or audio that is compelling, exclusive and/or urgent enough to be considered breaking news, you should make it available to AP services before you consider putting it out on social media. There may be occasional exceptions to this rule, but they must be prearranged with your manager and approved by a Nerve Center manager. If material you have gathered meets our standards for quality and accuracy, but for a variety of reasons isn’t sent to our subscribers, it is acceptable to share it on social networks. This includes material we commonly refer to as “cutting room floor” content -- material that doesn’t make it into our services because of space and time limits.*”

¹⁶⁷ See at <http://www.abc.es/gestordocumental/uploads/Sociedad/guiaefe.pdf>.

¹⁶⁸ See Cassation, 9 December 1981 and Cassation, 2 June 2006. Instead, lower courts and the court of appeal started to extend at the protection provided for ‘press offences’ to the Internet, Besien, B. Van (2011), Does media policy promote media freedom and independence? The case of Belgium, cit.

¹⁶⁹ Constitutional Court, 7 June 2006. The decision analysed the Act of 7 April 2005 on the Protection of Journalistic Sources that protected journalists from investigative measures (such as the interception of communication, surveillance and judicial home search and seizure) if this could breach the secrecy of their sources. The decision had the effect of

taken by the national professional association (AGJPB) during the consultation in the Parliament, which showed a clear protectionist approach aimed at reducing the field of application of the aforementioned law only to professional journalists who were members of their association.¹⁷⁰

9. Regulatory Dialogues: The Relationship between the Case-Law and Private Regulation of Journalism

The foregoing analysis shows that the process of broadening and expanding the definition of journalism beyond the conventional boundaries has primarily been undertaken by European and domestic courts in litigation taking place between third parties and content producers, seeking ‘journalistic’ protection. Although a few exceptions exist,¹⁷¹ the general trend in the countries analysed shows that courts have not only expanded the privileges and derogations but they have also redefined the ethical and deontological rules regarding the content producers, with different criteria to distinguish between journalists and non-journalists.

There is a clear trend towards the expansion of the protection granted by freedom of expression but it is far from clear where the boundaries should be drawn, how differentiated the application of rules should be in relation to the various content producers and how editorial control should be defined in order to allocate duties to monitor and consequent liabilities along the supply chain.

The case by case approach and the differences among MS, however, are far from systematic and, despite the common trend, national courts have indicated different patterns.

This case law poses a daunting set of challenges to European and national professional and industry self-regulation. It requires that codes of conduct and codes of ethics define what the boundaries of professional journalism are and how rules concerning activities and content should be applied to different actors involved in the media world.

In particular, choices should be made about the line between professional and non-professional journalism, between commercial and non-commercial activity, and how regulation should differ accordingly. While the expansion of privileges and derogations in order to reflect new forms of news production and dissemination is certainly to be welcomed, the protection of other fundamental rights ought to remain the leading concern for the balancing exercise. Courts, in particular national courts, are not well equipped to produce coherent principles at EU level. They certainly take into account general constitutional principles but often reflect national constitutional traditions and regulatory architectures, which, as showed, still diverge significantly. The role of constitutional principles is paramount and private regulatory decisions should comply with decisions coming from the ECtHR and ECJ. From this perspective it is extremely important that both the Council of Europe and the Commission restate the principles in recommendations to Member States and to private regulators engaged in regulating the matter. Given the role of professional national regulation only a multilevel architecture will be able to enhance coordination and improve consistent implementation of European constitutional principles.

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changing the wording of the act, as the original text read: “1° journalists, i.e. anyone working freelance or as an employee, as well as any legal entity, who regularly makes a direct contribution to the gathering, editing, production or distribution of information for the public through a medium”. Due to the changes made by the Court, an appeal to the protection of sources can now also be made by bloggers, for example, publishing news stories or opinions online at regular intervals. See Besien, B. Van (2011), Does media policy promote media freedom and independence? The case of Belgium, cit.; and also J. Englebert, “Le statut de la presse: du droit de la presse au droit de l’information”, 35 *Revue de la Faculté de Droit de l’Université Libre de Bruxelles (Les propos qui heurtent, choquent ou inquiètent)* (2007), 231.

¹⁷⁰ See Englebert, “Le statut de la presse”, cit., p. 254.

¹⁷¹ See Psychogiopoulou, E., D. Anagnostou, A. Kandyla (2011), Does media policy promote media freedom and independence? The case of Greece, available at <http://www.mediadem.eliamep.gr/wp-content/uploads/2012/01/Greece.pdf>.

The role of private regulators, different as they may be, suggests that horizontal coordination among them to distil practices and design common policies is necessary. The goal here is not the definition of a benchmark and the selection of best practices in a competitive mode. Rather it is the necessity to identify reasons for differentiation and address how these differences can affect the right to be informed.

Private regulatory instruments are slowly adjusting to the case law. They react by adopting a more inclusive approach to what constitutes journalism and to whom the rules should be applied. Clearly those who face the strongest difficulties are the regimes organised around membership. It is hard for them to have jurisdiction over non-members and often there is resistance on both sides (insiders and outsiders) to broaden the scope of membership of professional bodies. National variations are still important and harmonising drivers come from the industry rather than the profession.

10. Rethinking Private Regulation and Journalism in European Law

Private regulation of editorial activity and journalism is a key instrument to ensure freedom of expression and pluralism in a democratic society. The private sphere within media is highly differentiated and numerous significant conflicts of interests have to be managed. These conflicts are not only those traditionally described between the industry and the profession but they also occur both within the industry among content and service providers and within the profession between insiders and outsiders.

We have seen that two trends are emerging with the consolidation of new media: the increasingly integrated approach to media and the expansion of privileges and responsibilities to a wide category of content producers. These trends have been primarily driven by litigation and to a limited extent by the industry producing new instruments to allocate responsibilities between content and service providers along the supply chain.

Professional bodies are slowly reacting at different paces to this process but there is a clear mismatch between case law and codes and among codes across European countries. These divergences undermine the equal application of the freedom of expression across MS and may discourage the creation of transboundary content producers.

The challenges facing professional bodies involved in journalism requires a new approach both in terms of principles and in terms of governance. In terms of principles the boundaries between professional and non-professional and between commercial and social content production must be redetermined. Yet, a more radical change is necessary to define how to establish jurisdiction and to administer common rules among media and across European countries. A membership-based approach is bound to fail. Membership is too rigid and strict an organisational principle. The rapid evolution of the organisational models, driven also by technological changes, calls for a more flexible approach, based on voluntary adhesion to the private regulatory instrument. It is the effect of the journalistic activity rather than the identity of the provider of the information that should become the regulatory pillar to distinguish among different regulatory regimes. Clearly the new regime should take seriously the issue of incentives and design rewards and social sanctions that can promote the integrated approach.

In terms of governance the reforms should lead to a new multilevel architecture, which coordinates industry and professional regulation across Europe. The weak coordination among professional bodies at the European level can be addressed in different ways. Stronger coordination among private professionals (?) could be reached by empowering a European network of private regulators with rule-making and monitoring, leaving enforcement to a decentralised level. A weaker model could be based on mutual recognition of rules concerning the boundaries and common monitoring tools. Mutual recognition should primarily be concerned with rules but compliance and enforcement should also be considered.

A key question concerning the multilevel architecture of the professional regulation of journalism is related to compliance and enforcement. Clearly, as the recent UK experience concerning the PCC shows, informal enforcement is insufficient. Decentralised enforcement at the MS level can work if the interaction between private and public regulators and between them and the Courts is well designed and effective. The role of cooperative enforcement, both through formal and informal means, has to play a central role. On the one hand *ex ante* prior restraint must be very limited and it can only be justified when other fundamental rights are at stake. This is true both for regulators and courts. *Ex post* enforcement on the other hand, often has limited impact and compensation is a weak deterrent. Violations, except for those which are associated with individual reckless misbehaviour, are often the result of the inadequate organisational design of the journalistic activity which has become much more interdependent than it used to be. Cooperative enforcement applies when the supply chain or the organization rather than the individual journalist is the problem, even when the violation has been committed by an individual.

