

REDEFINING ‘MEDIA’ USING A ‘MEDIA-AS-A-CONSTITUTIONAL-
COMPONENT’ CONCEPT: AN EVALUATION OF THE NEED FOR THE
EUROPEAN COURT OF HUMAN RIGHTS TO ALTER ITS UNDERSTANDING
OF ‘MEDIA’ WITHIN A NEW MEDIA LANDSCAPE

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ABSTRACT

This article considers the impact of new media on freedom of expression and media freedom within the context of the European Convention on Human Rights and European Court of Human Rights jurisprudence. Through comparative analysis of United States jurisprudence and scholarship this article deals with the following three issues. Firstly, it explores the traditional purpose of the media, and how media freedom, as opposed to freedom of expression, has been subject to privileged protection, within a ECHR context at least. Secondly, it considers the emergence of new media, and how it can be differentiated from the traditional media. Finally, it analyses the philosophical justifications for freedom of expression, and how they enable a workable definition of the media based upon the concept of the media-as-a-constitutional-component.

1. INTRODUCTION

The media landscape is undergoing profound change, on an unprecedented scale and at an exponential pace, at the forefront of which, is new media¹. This communication revolution has been recognised within a variety of international arenas by, for instance, the United Nations Human Rights Committee (UNHRC)² and the President of the UN

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¹ P. Coe, 'The social media paradox: an intersection with freedom of expression and the criminal law', *Information & Communications Technology Law*, (2015), Vol. 24, Issue 1, 16-40, 16.

² Human Rights Committee, General Comment 34: Freedoms of opinion and expression, CCPR/C/GC/34 (GC 34) 12th September 2011, [15]; See also, O'Flaherty, 'Freedom of Expression: Article 19 of the ICCPR and Human Rights Committee's General Comment No 34', (2012) 12 *Human Rights Law Review* 627.

General Assembly³. Further, in early 2014, the House of Lords Select Committee on Communications Report on Media Plurality recognised the increasingly important role that new media is playing within society⁴. These views have been mirrored in the United States (US), where the influence of, specifically, social media was summed up in *New York v Harris*: ‘The reality of today’s world is that social media, whether it be Twitter, Facebook, Pinterest, Google+ or any other site, is the way people communicate’⁵.

New media has changed the way in which we communicate, giving rise to a culture of sharing and voluntariness⁶. Thus, it has created a new layer through which people organise their lives that, in turn, influences how individuals, communities and society interact, in a world where online and offline life is increasingly converging⁷. Yet, despite the accepted impact of new media on the way in which expression is communicated and received, Lord Justice Leveson devoted only ten of two thousand pages of his *Inquiry into the Culture, Practices and Ethics of the Press* to internet publications⁸. This is surprising, bearing in mind the reach of new media, and how its use compares to traditional media, in particular the press industry⁹. Indeed, in his Inquiry, Leveson LJ makes reference to the ability of new media, and specifically blogs and social networking sites, to reach vast amounts of people¹⁰. He also states that the internet is an: ‘ethical vacuum...[that] does not claim to operate by express ethical standards, so that bloggers and others may, if they choose, act with impunity.’¹¹ Specifically, the Inquiry recognises that: ‘[b]logs and other such websites are entirely

³ *UN Highlights Role of Press Freedom as Catalyst for Social and Political Change*, UN News Centre, <http://www.un.org/apps/news/story.asp?NewsID=41911&Cr=journalist&Cr1> accessed 28th April 2014.

⁴ House of Lords Select Committee on Communications 1st Report of Session 2013-14, Media Plurality, 4th February 2014, [46]-[52].

⁵ *New York v Harris*, 2012 N.Y. Misc. LEXIS 1871 *3, note 3 (Crim. Ct. City of N.Y., N.Y. County, 2012).

⁶ D.R. Stewart (ed), *Social Media and the Law*, (Routledge, 2013), viii; C. Shirky, *Here Comes Everybody*, (Allen Lane, 2008), 17.

⁷ J. Van Dijck, *The Culture of Connectivity A Critical History of Social Media*, (Oxford University Press, 2013), 4.

⁸ Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press*, November 2012, 168-177; 736-737. The Inquiry refers to: ‘...blogs, online news aggregators, publishers, social network sites and online hosts’ [4.1].

⁹ Coe, above n 1, 21-24.

¹⁰ In relation to blogs, Leveson LJ refers to *Guido Fawkes* that, according to its founder, Paul Staines, can, when big stories are being broken, be visited by up to 100,000 people per hour. The Inquiry also makes specific reference to the usage of social media sites, such as Facebook and Twitter. See Leveson Inquiry, above n 8, 168, [4.3]-[4.4], 173, [5.2] respectively.

¹¹ *ibid.* 736, [3.2].

unregulated¹² and that other new media companies, including social networking sites operate under different national laws, depending on where they are domiciled¹³.

This article investigates the impact of new media on freedom of expression and media freedom within the context of the European Convention on Human Rights (ECHR) and European Court of Human Rights (ECtHR) jurisprudence. With recourse to comparative analysis of scholarship and jurisprudence from the US, as well as jurisdictions such as New Zealand, this article offers a method for distinguishing media from non-media actors; therefore, identifying the beneficiaries of the right to media freedom. Moreover, it aims to provide a definition of *media* within a new media landscape.

This article begins, at section two, by distinguishing media freedom from freedom of expression. It establishes that the former provides enhanced protection, over and above the right to freedom of expression, for actors operating as part of the media. This leads on to a discussion, at section three, of the changing media landscape, the rise of new media and the emergence of citizen journalism. It considers the wider societal impact of this new breed of journalism, and the role it plays in facilitating public discourse.

The enhanced media freedom protection afforded to media actors within this new media landscape is the same regardless of whether the actor is operating as part of the traditional or new media. The issue is who, or what, can be classed as media, and therefore benefit from this protection. Section four argues that, in the context of new media and citizen journalism, the traditional approaches for distinguishing media from non-media actors at best lack merit, and are, at worst, redundant. Thus, through analysis of the philosophical foundations of freedom of expression, a new *media-as-a-constitutional-component* concept is advanced at section five. This concept is based on the premise that the performance of a constitutional function, rather than the education, training or employment of the actor, should define the beneficiaries of media freedom. Finally, drawing on the prevailing sections, and with reference to a public interest

¹² *ibid.* 171, [4.20]. Leveson LJ does acknowledge that the Huffington Post UK is unique in having (at the time) voluntarily subscribed to the Press Complaints Commission and abided by the Editors' Code of Practice.

¹³ *ibid.* 174-177.

requirement, this article concludes at section six by offering a new workable definition of the media.

2. MEDIA FREEDOM

DISTINGUISHING MEDIA FREEDOM FROM FREEDOM OF EXPRESSION

The traditional professional media, including the printed press, television, radio and film industry, continues to benefit from significant protection beyond that afforded to private individuals and non-media organisations. This position is evident within a number of jurisdictions. For example, pursuant to Article 11(2) of the Charter of the Fundamental Rights of the European Union (CFREU): ‘freedom and pluralism of the media shall be respected’. In Germany, Article 5(1)2 of the German Basic Law provides a separate provision for the specific protection of media expression, thus creating a clear distinction with free expression guarantees for private individuals: ‘[f]reedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed’¹⁴. Similarly, in the US, the First Amendment states that: ‘[c]ongress shall make no law...abridging the freedom of speech, or of the press...’¹⁵. Within a ECHR context, freedom of expression is protected by Article 10(1), and qualified by Article 10(2).

Although Article 10(1) does not specifically provide for protection of media freedom in distinction to that of private individuals and non-media institutions, in interpreting Article 10, the ECtHR has attached great importance to the role of the media¹⁶. Accordingly, the media’s contribution to democracy and democratic self-governance¹⁷, and its ‘role of public watchdog’¹⁸ have been clearly established by the jurisprudence of the Court. Indeed, it recognises a duty on the media to convey

¹⁴ See generally: J. Oster, ‘Theory and Doctrine of ‘Media Freedom’ as a Legal Concept’, (2013) 5(1) *JML* 57-78, 59; E. Barendt, *Freedom of Speech*, (2nd ed. Oxford University Press, 2005), 417-419.

¹⁵ However, despite a specific free press clause, the US position is very different, and is discussed below.

¹⁶ For example, see: *Bladet Tromso and Stensaas v Norway* (2000) 29 EHRR 125, [59]; *Bergens Tidende v Norway* (2001) 31 EHRR 16, [48]; *Busuioc v Moldova* (2006) 42 EHRR 14, [64]-[65]; *Jersild v Denmark* (1995) 19 EHRR 1; *Janowski v Poland (No 1)* (2000) 29 EHRR 705, [32].

¹⁷ For example, see: *Perna v Italy* (2004) 39 EHRR 28.

¹⁸ *The Observer and The Guardian v United Kingdom* (1991) 14 EHRR 153, [59]; *Goodwin v United Kingdom* (1996) 22 EHRR 123, [39]; *Thorgeirson v Iceland* (1992) 14 EHRR 843, [63]; *Bladet Tromso and Stensaas v Norway* (2000) 29 EHRR 125, [62].

information and ideas on political issues and public interest¹⁹, and the right of the public to receive this information²⁰.

The special position of the media in relation to freedom of expression, recognised by commentators such as Stewart J, Bezanson and West²¹, explains why the jurisprudence of, for instance, the ECtHR, interprets Article 10(1) to contain privileged protection of the media, even in the absence of express provisions to that effect. Media freedom is, therefore, *special* because, when a media actor is working toward a publication, they are subject to greater protection compared to that offered to non-media actors by freedom of expression. Thus, the fact that a statement can be classed as media expression, as opposed to expression by a private individual or non-media institution, adds to the burden of justifying its restrictions²².

In *Vejdeland and others v Sweden*²³ the applicants, who were not associated with the media, had been convicted for distributing homophobic leaflets in a secondary school. The ECtHR upheld the convictions, whilst observing: ‘[i]f exactly the same words and phrases were to be used in public newspapers...they would probably not be considered a matter for criminal prosecution and condemnation’²⁴. Thus, the special protection afforded to media expression permits the use of a wide discretion as to the methods and techniques adopted to report on matters, and how that material is subsequently presented²⁵. It allows the media to have recourse to exaggeration and even provocation²⁶, including the use of strong terminology or polemic formulations²⁷. Additionally, the ECtHR has held that this protection extends beyond the dissemination

¹⁹ *Lingens v Austria* (186) 8 EHRR 103, [26]; *Oberschlick v Austria (No 1)* (1991) 19 EHRR 389, [58]; *Castells v Spain* (1992) 14 EHRR 445, [43]; *Thorgeir Thorgeirson v Iceland* (1992) 14 EHRR 843; *Jersild v Denmark* (1995) 19 EHRR 1, [31].

²⁰ *Sunday Times v United Kingdom* (1979) 2 EHRR 245, [65]; *Fressoz and Roire v France* (2001) 31 EHRR 2, [51]; *Bergens Tidande v Norway* (2001) 31 EHRR 16, [52].

²¹ P. Stewart J, ‘Or of the Press’, (1975) 26 *Hastings Law Journal* 631, 633; R.P. Bezanson, ‘The New Free Press Guarantee’ (1977) 63 *Virginia Law Review* 731, 733; S.R. West, ‘Awakening the Press Clause’ (2011) 58 *UCLA Law Review* 1025, 1032. The US position is discussed in more detail below.

²² Oster above n 14, 59.

²³ [2012] ECHR 242.

²⁴ [2012] ECHR 242 per Judge Vucancic at [12].

²⁵ *Jersild v Denmark* (1995) 19 EHRR 1, [31]; *Bladet Tromsø and Stensaas v Norway* (2000) 29 EHRR 125, [63]; *Bergens Tidande v Norway* (2001) 31 EHRR 16, [57].

²⁶ *Prager and Oberschlick v Austria* (1995) 21 EHRR 1, [38]; *Thoma v Luxembourg* (2003) 36 EHRR 21, [45]-[46]; R. Clayton QC and H. Tomlinson QC, *Privacy and Freedom of Expression* (2nd ed. Oxford University Press, 2010), 271 [15.254].

²⁷ *Thorgeir Thorgeirson v Iceland* (1992) 14 EHRR 843, [67]; *Oberschlick v Austria (No 2)* (1998) 25 EHRR 357, [33]; Oster above n 14, 59.

of the journalist's or media organisation's own opinions, to encapsulate those expressed by third parties in the context of, for example, interviews²⁸.

The ambit of media freedom is not limited to stronger protection for media publications; instead, it extends to rights that are not, in any way, available pursuant to freedom of expression guarantees. Consequently, media freedom and freedom of expression differ in relation to the intensity of the protection and in respect of the scope of the protected action. This position equates to institutional protection of the media that, sequentially, guarantees rights that are not exclusively concerned with expression, but also relate to the media vis-a-vis its newsgathering or editorial activities, or even to the existence of an independent media²⁹.

Oster categorises the right to media freedom as being both defensive, in that it *protects* the media against interference, such as state action, and positive, as it *entitles* the media to state protection³⁰. This categorisation is animated by reference to a non-exhaustive list of ECtHR jurisprudence³¹. For instance, in relation to the defensive category, in *Halis Dogan and others v Turkey*, the Court held that media freedom includes the protection of the newspaper distribution infrastructure³². The case of *Gsell v Switzerland*³³ involved restrictions on road access to the World Economic Forum in Davos. Consequently, the Court recognised the existence of protection against state measures that could impinge upon the exercise of the journalist's profession. It has also been held that journalists cannot be made to give evidence concerning confidential information or sources, even if it has been obtained illegally³⁴. They are also exempt from certain data protection and copyright provisions³⁵. With regard to the positive category, states are required to: protect the media through the safeguarding of media

²⁸ *Jersild v Denmark* (1995) 19 EHRR 1.

²⁹ Oster above n 14, 60.

³⁰ *ibid.*

³¹ *ibid.* 60-61.

³² *Halis Dogan and others v Turkey* Application no. 50693/99 (ECtHR, 10th January 2006), [24]

³³ [2009] ECHR 1465.

³⁴ *Goodwin v United Kingdom* [1996] ECHR 16, [39]; *Radio Twist as v Slovakia* [2006] ECHR 1129, [62]; *Sanoma Uitgevers BV v Netherlands* [2010] ECHR 1273, [50].

³⁵ For example, see: Article 9 Data Protection Directive 95/46/EC, OJ L281/31; Article 5(3)(c) Copyright Directive 2001/29/EC, OJ L167/19.

pluralism³⁶; protect journalists from acts of violence in the course of their work³⁷, and from undue influence by financially powerful groups³⁸ or the government³⁹.

In contrast to ECtHR jurisprudence, the position in the US is markedly different. Despite commentators⁴⁰, and dissenting Supreme Court judgments⁴¹, arguing that the free press clause ‘or of the press’ in the First Amendment to the US Constitution creates a similar distinction to that provided by the CFREU, the German Basic Law and the jurisprudence of the ECtHR, this has been opposed by academics such as Volokh⁴², and resisted by the Supreme Court⁴³. Consequently, the dominant view in the US is based on the press-as-technology model. This model has roots in English common law⁴⁴, and is founded on the premise that media freedom should not be subject to privileges or duties over and above freedom of expression⁴⁵. According to Volokh, freedom of the press is technological. It is, therefore, available to all forms of communication classed as technologies, which covers everything⁴⁶. In Volokh’s assessment, freedom of the press does not just protect the press industry, but secures the right of everyone to use communications technology⁴⁷. Therefore, the ambit of the model extends to, not only

³⁶ *Informationsverein Lentia and others v Austria* [1993] ECHR 57, [32]-[34]; *TV Vest & Rogaland Pensjonistparti v Norway* [2008] ECHR 1687, [78].

³⁷ *Ozgur Gundem v Turkey* [2000] ECHR 104, [38 ff].

³⁸ Article 21(4)(2) EC Merger Regulation 139/2004, OJ L24/1; Part 5 Chapter 2 Communications Act 2003 ch 21.

³⁹ *Manole v Moldova* [2009] ECHR 1292, [109]; *Centro Europa 7 Srl and Di Stefano v Italy* App no 38433/09 (ECtHR, 7th June 2012), [133].

⁴⁰ See generally: M.B. Nimmer, ‘Introduction – Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?’ (1975) 26 *Hastings Law Journal* 631; C.E. Baker, *Human Liberty and Freedom of Speech*, (Oxford University Press, 1989), chs. 10-11; R.P. Bezanson, ‘Whither Freedom of the Press?’ (2012) 97 *Iowa Law Review* 1259; See also: T.B. Dyk, ‘Newsgathering, Press Access, and the First Amendment’, (1992) 44 *Stanford Law Review* 927, 931-932; P. Horwitz, ‘Universities as First Amendment Institutions: Some Easy Answers and Hard Questions’, (2007) 54 *UCLA Law Review*, 1497, 1505; West, above n 21, 1027-1029; For judicial argument see: Stewart J, above n 21, 634

⁴¹ See the dissenting judgments of: Stevens J in *Citizens United v FEC* 130 S Ct 876, 951 n 57 (2010); Powell J in *Saxbe v Wash Post Co* 417 US 843, 863 (1974); Douglas J *Branzburg v Hayes* 408 US 665, 721 (1972).

⁴² E. Volokh, ‘Freedom for the Press as an Industry, or the Press as a Technology? From the Framing to Today’, (2012) 160 *University of Pennsylvania Law Review* 459.

⁴³ See the majority decision in *Citizens United v FEC* 130 S Ct, 905; See also: *ibid.* (Volokh) 506-510 for a summary of other Supreme Court cases that have held the same.

⁴⁴ *R v Shipley (Dean of Saint Asaph’s Case)* (1784) 21 How. St. Tr. 847 (KB); *R v Rowan* (1794) 22 How. St. Tr. 1033 (KB); *R v Burdett* (1820) 106 Eng. Rep. 873 (KB), 887; 4 B. & Ald. 95, 132; see generally: *ibid.* (Volokh) 484-489.

⁴⁵ For example, see: D.L. Lange, ‘The Speech and Press Clauses’ (1975) 23 *UCLA Law Review* 77; WW van Alstyne, ‘the Hazards to the Press of Claiming a “Preferred Position”’ (1977) 28 *Hastings Law Journal* 761, 768-669; A. Lewis, ‘A Preferred Position for Journalism’ (1978-9) 7 *Hofstra Law Review* 595; C.E. Baker ‘Press Performance, Human Rights, and Private Power as a Threat’ (2011) 5 *Law & Ethics of Human Rights* 219, 230; *ibid.* (Volokh) 538-539.

⁴⁶ Bezanson, above n 40.

⁴⁷ Volokh, above n 42, 462-463.

the traditional media, and professional journalists utilising new media, but also to untrained citizen journalists, who communicate via mediums such as Facebook, Instagram, Twitter and YouTube.

This originalist interpretation⁴⁸ is prevalent in US jurisprudence and scholarship, both historically⁴⁹ and currently. Despite the Supreme Court recognising that the press operates ‘as a powerful antidote to any abuses of power by government officials’⁵⁰, it continues to reject the argument that the institutional press has any constitutional privilege in excess of other speakers⁵¹. Thus, the majority in *Citizens United v FEC*⁵², echoing previous judgments of Brennan J⁵³, agreed that the First Amendment protects ‘speech’⁵⁴, as opposed to the source of that expression, whether that emanates from a professional journalist or a casual Twitter user⁵⁵.

In conclusion, within the context of the ECHR and ECtHR jurisprudence, this section has established that the distinction between the freedom of expression right afforded to private individuals compared with that of non-media institutions, pursuant to media freedom, can be articulated as follows: if the expression emanates from a media entity, whether that be a journalist, or a media company, it will be subject to the privileged protection set out above; to the contrary, if the expression comes from a non-media entity, it will, nonetheless, be subject to general freedom of expression

⁴⁸ See: D. Anderson, ‘The Origins of the Press Clause’ (1982-3) 30 *UCLA Law Review* 455; Volokh, above n 42; D.L. Lange, ‘The Speech and Press Clauses’ (1975) 23 *UCLA Law Review* 77, 88-99; A. Lewis, ‘A Preferred Position for Journalism’ (1978-9) 7 *Hofstra Law Review* 595, 600; Bezanson, above n 40.

⁴⁹ *Republica v Oswald* 1 Dall. 319, 325 (Pa. 1788); *Commonwealth v Freeman*, HERALD OF FREEDOM (Boston), Mar. 18, 1791, at 5 (Mass. 1791); *In re Fries*. 9 F. Cas. 826, 839 (Justice Iredell, Circuit Judge, C.C.D. Pa. 1799) (no. 5126); *Runkle v Meyer* 3 Yeates 518, 519 (Pa. 1803); see generally: Volokh, above n 42, 465-468.

⁵⁰ *Mills v Alabama* 384 US 214, 219 (1966); see also: *Estes v Texas* 381 US 532, 539 (1965).

⁵¹ *Citizens United v FEC* 130 S Ct 876, 905 (2010); *Associated Press v United States* 326 US 1, 7 (1945); *Branzburg v Hayes* 408 US 665, 704 (1972); *Pell v Proconier* 417 US 817, 834 (1974); *Saxbe v Washington Post Company* 417 US 843, 848-849; *In re Grand Jury Subpoena, Miller* 397 F 3d 964 (DC Cir 2005), *cert denied* 125 S Ct 2977 (2005).

⁵² 130 S Ct 876 (2010).

⁵³ For example, see: *Dun & Bradstreet, Inc. v Greenmoss Builders, Inc.* 472 US 749, 781 (1985).

⁵⁴ *Citizens United v FEC* 130 S Ct 876, 905 (2010) (Scalia J concurring).

⁵⁵ However, the model is not immune to criticism and opposing views, from both US Supreme Court judges, and legal scholars. For example, see generally: *Bartnicki v Vopper* 532 US 514 (2001); *Minneapolis Star & Tribune Co. v Minn. Comm’r of Revenue* 460 US 575, 592-93 (1983); *Gertz v Robert Welch Inc* 418 US 323 (1974); see the dissenting judgments in *Citizens United v FEC* 130 S Ct 876 (2010) (in particular Stevens J at 951 n. 57); Powell J’s dissenting judgment in *Saxbe v Washington Post Company* 417 US 843, 863 (1974); Douglas J’s dissenting judgment in *Branzburg v Hayes* 408 US 665, 721 (1972); Stewart J, above n 21, 634; Dyk, above n 40, 931-932; Horwitz, above n 40, 1505; West, above n 21, 1027-1029. See also Bezanson’s rejoinder to Volokh’s article: Bezanson, above n 40..

protection. Furthermore, only journalists and media organisations can take advantage of the freedom bestowed upon the media as an institution, for example, with regard to newsgathering activities⁵⁶.

3. THE TRADITIONAL MEDIA AND THE AGE OF NEW MEDIA

(A) THE TRADITIONAL MEDIA

The origins of the traditional media, and in particular the press industry, may well be founded on freedom of expression philosophy⁵⁷, and the notion that, as the Fourth Estate, its primary function is to act as a ‘public watchdog’,⁵⁸ in that it operates as the general public’s ‘eyes and ears’ by investigating and reporting abuses of power⁵⁹. Prior to the evolution of the internet into a network available throughout the world and, in particular, the new media revolution, which transformed that network into an accessible form of mass media, creating an audience and producer convergence⁶⁰, traditional press and broadcast (television or radio) companies were the only media institutions that had the ability to reach mass audiences through regular publication or broadcasts⁶¹. Consequently, as observed by Leveson LJ in his Inquiry, in recent years, the traditional media, and in particular the press, has played a critical role in informing the public on matters of public interest and concern⁶². Furthermore, because of the traditional media’s ability to reach so many people, for the purposes of media protection, it was relatively easy to distinguish between expression conveyed by a media entity, to that communicated by a private individual⁶³.

However, in contrast to Leveson LJ’s examples of high quality investigative public interest journalism⁶⁴, there is no doubt that an increasing number of print and broadcast media outlets choose to engage with *sexy* stories that sell, as opposed to reporting on matters of public concern⁶⁵; a position that clearly correlates with the

⁵⁶ Oster above n 14, 61-62.

⁵⁷ See section 5(A) below.

⁵⁸ *Observer and Guardian v UK* (1992) 14 EHRR 153, [59].

⁵⁹ *A-G v Guardian Newspapers Ltd (No. 2)* [1990] 1 AC 109, 183 per Sir John Donaldson MR; See also: Barendt above n 14, 418.

⁶⁰ See generally: A. Bruns, *Blogs, Wikipedia, Second Life and Beyond: From Production to Producership*, (Peter Lang Publishing, 2008).

⁶¹ See generally: Van Dijck, above n 7, 3-23.

⁶² Leveson Inquiry, above n 8, 455-470.

⁶³ Oster above n 14, 62.

⁶⁴ Leveson Inquiry, above n 8, 455-470.

⁶⁵ Numerous examples are provided by the Leveson Inquiry at 539-591.

criticisms advanced below of Holmes J's marketplace of ideas theory⁶⁶. Thus, a number of commentators have argued that the media's public watchdog role gradually diminished towards the end of the twentieth century. Instead, the focus shifted onto commercially viable stories⁶⁷. Media ownership, and the power derived from it, means that there is a constant conflict between the traditional media's role as a watchdog, or gatekeeper, and commercial reality. Indeed, it has been observed that, during the twentieth century, there has been a dilution of news media ownership, which is now vested in a relatively small number of large and powerful companies. Accordingly, this ownership concentration has had a detrimental effect on investigative journalism⁶⁸. To the contrary, citizen journalists, through the use of new media are, in many instances, replacing the traditional media as the public's watchdog.

(B) THE AGE OF NEW MEDIA

Until relatively recently, the public were, to a great extent, limited as to what they were exposed to reading or seeing, by what large proportions of the traditional media chose to publish or broadcast. Such decisions may have come down to editorial control, based on, for instance, owner or political bias, commercial revenue, or both, rather than being based on the results of sound investigative journalism⁶⁹. However, the new media revolution, which has facilitated the convergence of audience and producer⁷⁰, and enabled this new breed of citizen journalist to communicate with, potentially, millions of people, means that the ability to reach mass audiences is no longer something that is monopolised by traditional media institutions and, therefore, cannot be relied upon to distinguish between media and non-media entities⁷¹.

⁶⁶ See section 5(C) below.

⁶⁷ For example, see: C. Calvert and M. Torres, 'Putting the Shock Value in First Amendment Jurisprudence: When Freedom for the Citizen-Journalist Watchdog Trumps the Right of Informational Privacy on the Internet' (2011) *Vanderbilt Journal of Entertainment and Technology Law* 323, 341; J. Curran and J. Seaton, *Power Without Responsibility – Press, Broadcasting and the Internet in Britain*, (7th ed. Routledge, 2010), 96-98; E. Cashmore, *Celebrity Culture*, (2nd ed. Routledge, 2014).

⁶⁸ S.L. Carter, 'Technology, Democracy, and the Manipulation of Consent' (1983-1984) *Yale Law Journal* 581, 600-607; P. Garry, 'The First Amendment and Freedom of the Press: A Revised Approach to the Marketplace of Ideas Concept' (1989) *72 Marquette Law Review* 187, 189; See also Leveson LJ's assessment of the commercial pressures on the press: Leveson Inquiry, above n 8, 93-98.

⁶⁹ This criticism is advanced by Barendt with regard to the marketplace of ideas theory (dealt with at section 5(C) below): Barendt above n 14, 12; See also: N. Davies, *Flat Earth News*, (Vintage, 2009); C. Cook, *More Telegraph writers voice concern*, 19th February 2015, <http://www.bbc.co.uk/news/health-31529682> accessed 19th May 2015.

⁷⁰ See generally: J. Rowbottom, 'To rant, vent and converse: protecting low level digital speech', (2012) *C.L.J.* 71(2), 355-383, 365.

⁷¹ Oster above n 14, 63.

New media platforms have changed the traditional media landscape forever, as they have altered our perceptions of the limits of communication and the reception of information. It is no longer the case that communication is constrained by boundaries, such as location, time, space or culture⁷², or dictated by a media organisation's ownership, political bias⁷³ or commercial partners⁷⁴. Unlimited access to multiple outlets and platforms that are instantaneously accessible allows users, forming what Benkler refers to as the 'networked public sphere'⁷⁵, to transmit and receive information to one and other, via platforms, such as YouTube, Facebook, Twitter, WhatsApp and Snapchat, without the need to consider the boundaries and restrictions mentioned above⁷⁶. This is illustrated by using statistics to compare the use of new media with traditional media. For example, the New York Times 2013 print and digital circulation was approximately two million⁷⁷, enabling it to proclaim that it was the '#1 individual newspaper site' on the internet, with nearly thirty-one million unique visitors per month⁷⁸. In contrast, YouTube, which is owned by Google, has one billion unique visitors per month⁷⁹ which, according to Ammori, equates to: 'thirty times more than the New York Times, or as many unique visitors in a day as the [New York] Times has every month'⁸⁰. According to WordPress' statistics, it hosts blogs written in over 120 languages, equating to over 409 million users viewing more than 15.5 billion pages each month. Consequently, users produce approximately 41.7 million new posts and 60.5 million new comments on a monthly basis⁸¹. As of December 2015, Twitter states that it has 320 million active users⁸² and normally 'takes in' approximately 500 million

⁷² See generally: F. Webster, *Theories of the Information Society*, (4th ed, Routledge, 2014), 20; I. Barron and R. Curnow, *The Future with Microelectronics: Forecasting the Effects of Information Technology*, (Pinter, 1979); G. Mulgan, *Communication and Control: Networks and the New Economies of Communication*, (Polity, 1991).

⁷³ For example, see *Rupert Murdoch will decide Sun stance on Brexit, says its ex-political editor*, 16th March 2016, http://www.theguardian.com/media/2016/mar/16/ruPERT-murdoch-sun-brexit-eu-referendum-trevor-kavanagh?CMP=twT_a-media_b-gdnmedia accessed 16th March 2016.

⁷⁴ For example, see: Cook, above n 69; See also: Barendt above n 14, 12.

⁷⁵ Y. Benkler, *The Wealth of Networks* (Yale University Press, 2006), 212.

⁷⁶ See generally: B. Wellman, 'Physical Place and Cyberspace: The Rise of Personalised Networking', (2001) *International Journal of Urban and Regional Research* 25(2), 227-51; Coe, above n 1, 21-22.

⁷⁷ C. Haughney, *Newspapers Post Gains in Digital Circulation*, New York Times, 30th April 2014, <http://www.nytimes.com/2013/05/01/business/media/digital-subscribers-buoy-newspaper-circulation.html> accessed 19th May 2015.

⁷⁸ New York Times Media Kit, <http://perma.cc/B5KA-VMGC> accessed 12th September 2014.

⁷⁹ Statistics YouTube, <http://perma.cc/S8W5-ZRM4>, accessed 19th May 2015.

⁸⁰ M. Ammori, 'The "new" New York Times: Free speech lawyering in the age of Google and Twitter', (2014), *Harvard Law Review*, vol. 127: 2259-2295, 2266.

⁸¹ <https://wordpress.com/about/> accessed 17th March 2016.

⁸² <https://about.twitter.com/company> accessed 17th March 2016.

Tweets per day, equating to an average of 5,700 Tweets per second⁸³. It has more visitors per week than the New York Times does in a month⁸⁴. Similarly, Tumblr hosts over 170 million microblogs⁸⁵ and, with 300 million visits per month, enjoys ten times more than the New York Times⁸⁶. According to Facebook, as of December 2015, it had 1.59 billion monthly active users, 934 million of which use their mobile applications to access the platform on a daily basis⁸⁷. Late 2013 saw Instagram's global usage expand by 15%, in just two months, to 150 million people⁸⁸. Latest figures show that this has now increased to 400 million⁸⁹. LinkedIn's current membership exceeds 400 million⁹⁰. These established platforms are only the tip of the new media iceberg. Pinterest continues to grow rapidly⁹¹, as do emerging platforms, such as Snapchat and WhatsApp⁹². Consequently, for many people, new media platforms have not just replaced the written word; they have become a substitute for the spoken word⁹³.

This reach of new media amplifies the way that the media, in general, envelopes our existence. Traditional media organisations no longer monopolise the news-gathering, communication or reception process, or indeed how we express emotions, opinions and ideas. Consequently, new media has become an increasingly important source of news⁹⁴ and both formal and informal method of communication. In light of the economic plight of the traditional media, citizen journalism is in the ascendance. This new breed of 'journalist' is increasingly playing the role of public watchdog, and

⁸³ <https://blog.twitter.com/2013/new-tweets-per-second-record-and-how> accessed 9th January 2015.

⁸⁴ Ammori, above n 80, 2266.

⁸⁵ *ibid.* 2272.

⁸⁶ J. Yarow, *The Truth About Tumblr: Its Numbers Are Significantly Worse than You Think*, Business Insider, 21st May 2013 <http://www.businessinsider.com/tumblrs-active-users-lighter-than-expected-2013-5> accessed 19th May 2015.

⁸⁷ <https://newsroom.fb.com/key-Facts> accessed 17th March 2016.

⁸⁸ <http://instagram.com/press/#>; UK Social Media Statistics for 2014, <http://socialmediatoday.com/kate-rose-mcgrory/2040906/uk-social-media-statistics-2014>, accessed 19th May 2015.

⁸⁹ <http://instagram.com/press/#> accessed 17th March 2016.

⁹⁰ <https://press.linkedin.com/about-linkedin> accessed 17th March 2016.

⁹¹ In 2011/2012 Pinterest had approximately 200,000 users in the UK. By the summer of 2013 this had grown to over 2 million: <http://socialmediatoday.com/kate-rose-mcgrory/2040906/uk-social-media-statistics-2014>, accessed 19th May 2015.

⁹² In February 2016 it was announced that WhatsApp had reached 1 billion active monthly users. See: 'WhatsApp reaches a billion monthly users' <http://www.bbc.co.uk/news/technology-35459812> 1st February 2016 accessed 17th March 2016.

⁹³ Coe, above n 1, 24.

⁹⁴ See generally: L. Durity, 'Shielding Journalist-"Bloggers": The Need to Protect Newsgathering Despite the Distribution Medium' (2006) 5 *Duke Law & Technology Review* 1; J.S. Alonzo, 'Restoring the Ideal Marketplace: How Recognizing Bloggers as Journalists Can save the Press' (2006) 9 *New York University Journal of Legislation and Public Policy* 751, 754.

aiding democratic participation⁹⁵. As Cram observes, new media has: ‘...transformed the average citizen’s hitherto largely passive experience of political debate led by elite opinion formers into something much more vibrant and more participative’⁹⁶. Other scholars, who have made this democratisation argument⁹⁷, have emphasised the empowerment⁹⁸ of what Volokh has referred to as ‘cheap speech’: ‘The new technologies... will, I believe, both democratize the information marketplace – make it more accessible to comparatively poor speakers as well as the rich ones – and diversify it’⁹⁹. This ability of new media to create a democratised digital public sphere has also been acknowledged by the US Supreme Court in *Reno v ACLU*¹⁰⁰, in which Justice Stevens stated that online chatrooms would enable anyone to become a ‘town crier with a voice that resonates further than it would from a soap box’¹⁰¹. More recently, the Council of Europe’s Committee of Ministers has stated:

‘Citizens’ communication and interaction in online environments and their participation in activities that involve matters of public interest can bring positive, real-life, social change. When freedom of expression and the right to receive and impart information and freedom of assembly are not upheld online, their protection offline is likely to be undermined and democracy and the rule of law can also be compromised’¹⁰²

By enriching public discourse through the reporting of matters of public interest and concern¹⁰³ new media is a paradigm of the argument from democratic self-governance¹⁰⁴. For example, the death of Osama Bin Laden was leaked on Twitter,

⁹⁵ See generally: Y. Kim and W. Lowrey, ‘Who are Citizen Journalists in the Social Media Environment?’ (2015) *Digital Journalism*, 3.2, 298-314, 301; S. Allan, *Online News: Journalism And The Internet: Journalism and the Internet*, (McGraw-Hill International, 2006); D. Gillmor, ‘We the Media: The Rise of Citizen Journalists’ (2004) *National Civic Review*, 93(3), 58-63; S. Robinson, ‘If You had been with us: Mainstream Press and Citizen Journalists Jockey for Authority over the Collective Memory of Hurricane Katrina’, (2009) *New Media & Society*, 11(5) 795-814; N. Thurman, ‘Forums for Citizen Journalists? Adoption of User Generated Content Initiatives by Online News Media’, (2008) *New Media & Society*, 10 (1) 139-157; M. Tremayne, *Blogging, Citizenship and the Future of Media*, (Routledge, 2006).

⁹⁶ I. Cram, *Citizen Journalists* (Edward Elgar Publishing, 2015), 3.

⁹⁷ For example, see the comments of Joe Trippi cited in M. Hindman, *The Myth of Digital Democracy* (Princeton University Press, 2009); *ibid.* (Cram).

⁹⁸ *ibid.* (Cram) 3-4.

⁹⁹ E. Volokh, ‘Cheap speech and what it will do’ (1995) 104 *Yale LJ* 1805, 1833. See also: P. Schwartz, ‘Privacy and democracy in cyberspace’ (1999) 52 *Vand L Rev* 1609; J. Rowbottom, ‘Media freedom and political debate in the digital era’ (2006) *Modern Law Review* 489.

¹⁰⁰ (1997) 521 US 844.

¹⁰¹ *ibid.* 862.

¹⁰² Para. 3, *Declaration by the Committee of Ministers on the protection of freedom of expression and information and freedom of assembly and association with regard to Internet domain names and name strings* (Adopted by the Committee of Ministers on 21st September 2011) <https://wcd.coe.int/ViewDoc.jsp?id=1835805> accessed 17th March 2016.

¹⁰³ Oster above n 14, 63; Calvert and M. Torres, above n 67, 344.

¹⁰⁴ See section 5(E) below.

before being published by any newspaper¹⁰⁵. Edward Snowden disclosed information regarding American surveillance programmes to blogger Glenn Greenwald, as he did not trust the New York Times to publish the material¹⁰⁶. Syria's President, Bashar al-Assad, and his opposing rebels have distributed competing propaganda via Instagram¹⁰⁷. Chelsea Manning, the US soldier convicted in 2013 for, inter alia, offences pursuant to the Espionage Act, leaked classified documents to WikiLeaks, as opposed to a traditional media outlet¹⁰⁸. As a result of the importance attributed to citizen journalism, this new breed of journalist has even gained official recognition as press¹⁰⁹. Incidentally, traditional media companies are now, largely, operating online outlets in addition to their staple method of communication¹¹⁰, whilst companies such as the Huffington Post, which may be classed as traditional professional media, operate exclusively online¹¹¹.

Never before has a form of media changed the *scale, pace or pattern* of human affairs to such an extent, within such a short period of time. However, although new media platforms are now a vital, and often the preferred method of imparting and receiving news¹¹², its contribution to matters of public interest cannot be overrated, just as traditional journalism should not be underestimated¹¹³. This is because new media facilitates the instantaneous, and often spontaneous, expression of opinions and venting

¹⁰⁵ B. Shelter, *How the Bin Laden Announcement Leaked Out*, New York Times, 1st May 2011, http://mediadecoder.blogs.nytimes.com/2011/05/01/how-the-osama-announcement-leaked-out/?_php=true&_type=blogs&_r=0 accessed 19th May 2015.

¹⁰⁶ Ammori, above n 80, 2265.

¹⁰⁷ N. Gaouette, *Assad on Instagram Vies with Rebel Videos to Seek Support*, Bloomberg, 19th September 2013, <http://www.bloomberg.com/news/2013-09-19/assad-on-instagram-vies-with-rebel-videos-to-see-support.html> accessed 19th May 2015.

¹⁰⁸ Benkler, above n 75, 348.

¹⁰⁹ See the High Court of Ireland case of: *Cornec v Morrice* [2012] IEHC 376; K.Q. Seelye, *White House Approves Press Pass for Blogger*, New York Times, 7th March 2005 http://www.nytimes.com/2005/03/07/technology/07press.html?_r=0 accessed 19th May 2015.

¹¹⁰ S. Glover, 'Who guards the Guardian?', *Prospect*, April 2016, 40-44

¹¹¹ Oster above n 14, 63.

¹¹² According to Ofcom's report, 'The Communications Market 2013', at [1.9.7], 23% of people use social media platforms, such as Facebook and Twitter, for news: http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr13/UK_1.pdf accessed 19th May 2015. For a US perspective, see the following *Pew Research Centre* reports: 'In Changing News Landscape, Even Television is Vulnerable', 27th September 2012 <http://www.people-press.org/2012/09/27/in-changing-news-landscape-even-television-is-vulnerable/>; 'The 2016 Presidential Campaign – a News Events That's Hard to Miss', 4th February 2016 <http://www.journalism.org/2016/02/04/the-2016-presidential-campaign-a-news-event-thats-hard-to-miss/>; 'News Habits on Facebook and Twitter', 14th July 2015 <http://www.journalism.org/2015/07/14/news-habits-on-facebook-and-twitter/> all accessed 16th March 2016

¹¹³ Oster above n 14, 63.

and sharing of emotions, thoughts and feelings¹¹⁴. Consequently, the internet is saturated with poorly researched, biased and meaningless material. For instance, in his Inquiry, Leveson LJ refers to Popbitch that, in his Lordship's opinion, is: 'clear in its ambition to entertain and understands itself to "poke fun" and comment on the "lighter" side of celebrity culture'¹¹⁵.

Despite the best intentions of some serious citizen journalists, they may still lack the education, qualifications and experience to distinguish themselves from professional journalists. Indeed, bloggers post information despite being uncertain as to its provenance and without verifying it for reliability, and instead, rely on readers to judge its accuracy¹¹⁶. To the contrary, a blog by a professional journalist may include spontaneous comments and conversation, whilst being supported by professional experience and resources¹¹⁷. Although John Stuart Mill's argument from truth is not concerned with these issues, the criticisms levelled at the theory later in this article clearly apply¹¹⁸. Furthermore, these concerns are paradigm examples of the rejoinders raised in relation to Holmes J's marketplace of ideas¹¹⁹. There exists a symbiosis between citizen journalism and the traditional media that has been articulated by a number of commentators. Essentially, this relationship is mutually beneficial because professional journalists and traditional media entities research and cover the findings of citizen journalism that, sequentially, adds credence to the citizen journalist's work and facilitates the wider dissemination of their research¹²⁰.

4 TRADITIONAL APPROACHES FOR DETERMINING THE BENEFICIARIES OF 'MEDIA FREEDOM'

¹¹⁴ Indeed, in April 2014 Facebook emailed its users to inform them that the messages function would be moved out of the Facebook application, due to its Messenger application enabling users to reply 20% faster than using Facebook.

¹¹⁵ Leveson Inquiry, above n 8,168 [4.3].

¹¹⁶ Alonzo, above n 109, 755.

¹¹⁷ Rowbottom argues for a high and low level distinction for speech that is based on the context within which the expression is made, as opposed to a value based distinction deriving from the content of the expression. See: Rowbottom, above n 70, 371.

¹¹⁸ See section 5(B) below.

¹¹⁹ See section 5(C) below.

¹²⁰ Oster above n 14, 57-78, 64; Calvert and M. Torres, above n 67, 345; Curran and Seaton, above n 67, 286.

Traditionally courts and scholars from different jurisdictions have used the following approaches to determine whom and what should benefit from the existence of a distinct right to media freedom: the press-as-technology model; the mass audience approach and; the professionalised publisher approach¹²¹. New media's creation of citizen journalism means that the ability to reach mass audiences is no longer the preserve of traditional media actors. This blurring of the lines between our perceptions of the traditional media and citizen journalists has created doctrinal uncertainty as to how the courts should determine the beneficiaries of media freedom. Arguably, in the context of new media, these approaches can no longer be relied upon to distinguish between media and non-media actors. As a result, this section will argue that although these approaches may once have been effective, they now lack merit and are, potentially, redundant.

(A) PRESS-AS-TECHNOLOGY MODEL

The dominant view in the US, based upon the press-as-technology model, is that the media should not be subject to any privileges or special duties¹²². Accordingly, there is no need to distinguish it at all and, as a result, this model does not provide the means to do so. This is because, so the press-as-technology movement argues, the Framers of the Constitution understood the words 'or of the press' to secure the right of every person to use communications technology, as opposed to laying down a right exclusively available to members of the publishing industry¹²³. As a result, in the view of the Supreme Court, the First Amendment protects speech not speakers, regardless of whether the source of the expression is a professional journalist or media organisation, or whether it's a casual social media user¹²⁴. Therefore, in the case of *Branzburg v Hayes*¹²⁵, White J, giving the opinion of the majority, resisted attempting to conceptualise the media, and define what it consists of. In White J's judgment, this is because: 'freedom of the press is a fundamental personal right' which is not confined to the mass media but, instead, attaches to 'every sort of publication which affords a

¹²¹ See generally: Oster above n 14, 64-68.

¹²² See generally: Volokh, above n 42.

¹²³ *ibid.* 463.

¹²⁴ *Citizens United v FEC* 130 S Ct 876, 905 (2010).

¹²⁵ 408 US 665, 704 (1972).

vehicle of information and opinion'¹²⁶. Thus, there appears a concern, echoed, although not necessarily supported, in the work of scholars such as Oster, Baker and Amar that, in attempting to define the media, there is a risk of creating either an over-inclusive or over-exclusive interpretation of journalism¹²⁷. The former could, potentially, be misused¹²⁸, while the latter could give rise to allegations of discrimination¹²⁹. This is because non-journalists, who regularly contribute to matters of public importance, such as business leaders, scientists and artists, would not fall within the province of the additional protection afforded to the media¹³⁰. However, this argument is largely without merit. Protecting the media with specific provisions or clauses, that provide extra privileges and duties, does not mean those who are not part of the institutional press would be deprived of their rights. For instance, within the context of ECtHR jurisprudence, artistic¹³¹ and commercial expression¹³² are subject to a relatively high level of protection. Similarly, Article 13 CFREU, and Article 5(3) of the German Basic Law protect freedom of science and freedom of the arts. Thus, there is no reason to suggest that, within these legal frameworks at least, privileged protection of the media would operate against business leaders, artists or scientists¹³³.

In addition to this argument, there are wider-reaching reasons why the press-as-technology model, and the resistance to defining the media and delineating between those who are subject to a right to media freedom over and above those that are simply entitled to the right to freedom of expression, are subject to criticism. In fact, there is a strong judicial and academic counter-movement in the US that not only correlates more closely with ECtHR jurisprudence, but also undermines the model within the new media era.

¹²⁶ *ibid.*.

¹²⁷ Oster above n 14, 65.

¹²⁸ C.E. Baker, 'The Independent Significance of the Press Clause under Existing Law' (2007) 35 *Hofstra Law Review* 955, 1013-1016.

¹²⁹ V.D. Amar, 'From Watergate to Ken Starr: Potter Stewart's "Or of the Press" A Quarter Century Later' (1999) 50 *Hastings Law Journal* 711, 714-715.

¹³⁰ *ibid.*; Oster above n 14, 65.

¹³¹ *Muller v Switzerland* (1991) 13 E.H.R.R. 212; *Otto Preminger v Austria* (1995) 19 E.H.R.R. 34; *IA v Turkey* (2007) E.H.R.R. 30.

¹³² *Markt Intern v Germany* (1989) 12 E.H.R.R. 161, [33].

¹³³ Oster above n 14, 65-66.

The specific media protection clauses enshrined within legal instruments, such as Article 11(2) CFREU and the First Amendment, in addition to those provisions safeguarding freedom of expression¹³⁴, strongly suggest that, for example, the EU and the Framers of the US Constitution, intended to distinguish the two, in that they could apply to different entities and mean something different. Taking the First Amendment as an example, scholars have argued that these provisions must mean something more otherwise they would be redundant¹³⁵. For Stewart J, the First Amendment free press clause operates as a structural guarantee to enable the press to fulfil its constitutional functions of acting as the Fourth Estate; to provide additional checks and balances on the government. Accordingly, the twin speech and press rights are: ‘no constitutional accident, but an acknowledgment of the critical role played by the press...’¹³⁶ Further, according to West, in addition to the Fourth Estate function, the press fulfils another primary role beyond the values served by the general right to freedom of expression: dissemination of information of public interest¹³⁷.

In today’s new media era, clearly the institutional press is not the only means to provide a check and balance on government, or convey matters of public interest. Other forms of media can, and do, fulfil this role effectively¹³⁸. Consequently, these views of the press clause are not exclusively institutional¹³⁹. The functions of the press identified by Stewart J and West, as being conducive to its constitutional role, continue to be served by a variety of traditional and new media¹⁴⁰. Therefore, when constitutions, statutes and normative theory require protection of the media in addition to freedom of expression, it is incumbent on the courts to delineate between the two, as demonstrated by ECtHR jurisprudence, despite the fact that such a challenging line-drawing exercise will generate controversial judgments¹⁴¹. Accepting the media as a discrete legal institution¹⁴² is vitally important within a new media era, in which we can be constantly bombarded by a cacophony of information from different *forms* of media. It is the

¹³⁴ See section 2 above.

¹³⁵ Stewart J, above n 21, 633; Bezanson, above n 40, 1261-1262. See also: Nimmer, above n 40, 640.

¹³⁶ *Houchins v KQED Inc.* 438 US 1, 17 (1978).

¹³⁷ West above n 21, 1069-1070.

¹³⁸ See section 3(B) above.

¹³⁹ Bezanson, above n 40, 1267.

¹⁴⁰ See section 3(B) above.

¹⁴¹ F. Schauer, ‘Towards and Institutional First Amendment’ (2004-5) 89 *Minnesota Law Review* 1256, 1260. See also: Baker, above n 143, 1016; West, above n 21, 1048.

¹⁴² Oster above n 14, 66.

fulfilment of the unique functions identified by Stewart J and West that serve to distinguish the media-as-a-constitutional-component¹⁴³ from mere media entertainment, as the activities of the latter are not subject to the same legal protection¹⁴⁴, at least within an ECtHR and CFREU context.

(B) MASS AUDIENCE APPROACH

According to the UNHRC, anyone with the ability to disseminate information to a mass audience could be considered to be media, and therefore be subject to the same privileges¹⁴⁵. Historically this approach could have enabled a distinction to be made between media and non-media actors as professional journalists, and the newspapers, publishers and broadcasters they worked for, tended to be the only entities with the ability to reach mass audiences. However, new media's creation of citizen journalists means that this ability is no longer the preserve of these organisations and their journalists or broadcasters. Instead, anybody with access to the internet can, theoretically, convey information to millions of people through a multitude of platforms. If you consider the reach of sporting celebrities such as Cristiano Ronaldo, Andy Murray and Lewis Hamilton through their social media accounts, based on the UNHRC's formulation, they would be considered journalists¹⁴⁶.

This situation is paradigmatic of the over-inclusive interpretation of media expression¹⁴⁷, as it captures virtually every internet publication, including, for instance, tweets by celebrity footballers. Furthermore, clearly the appearance and quality of information available on the internet, and via social media, varies drastically¹⁴⁸. Despite these inconsistencies, the mass audience approach would classify a casual tweet from Cristiano Ronaldo as being legally indistinguishable to a citizen journalist using their blog to report from a war zone. Therefore, it would be incorrect to classify all publications capable of reaching mass audiences as media: the internet, as a vehicle

¹⁴³ This concept is discussed in greater detail throughout the remainder of this article.

¹⁴⁴ D.A Anderson, 'Freedom of the Press' (2002) 80 *Tex. L. Rev* 429, 442.

¹⁴⁵ UN Human Rights Committee, General Comment No 34 (CCPR/C/GC/34), 12th September 2011, para. 44; Oster above n 14, 66-67.

¹⁴⁶ By way of example, at the time of writing, Cristiano Ronaldo has 37.1 million followers on Twitter alone. Also, on Twitter, Lewis Hamilton has 2.8 million, Rory McIlroy has 2.5 million and Roger Federer and Andy Murray have 3.2 million followers each.

¹⁴⁷ Oster above n 14, 65; Baker, above n 143.

¹⁴⁸ See section 3(B).

through which information can be conveyed, must not be confused with the media as a legal concept, just as the medium *paper* does not, necessarily, constitute the press¹⁴⁹. Consequently, it is imperative to identify diligent journalists operating within the media-as-a-constitutional-component, regardless of the form that takes, and distinguish these from media entertainment and *other* information.

(C) 'PROFESSIONALISED' PUBLISHER APPROACH

The Committee of Ministers of the Council of Europe and the jurisprudence of the ECtHR regularly refer to 'media professionals'¹⁵⁰. Thus, in cases such as *Perrin v UK*¹⁵¹ and *Willem v France*¹⁵² the ECtHR did not grant protection to private and non-professional internet publications. This view is mirrored in the US in that, for example, under New York shield law, only 'professional journalists' working for 'gain or livelihood'¹⁵³ are entitled to benefit from special journalistic dispensations¹⁵⁴. These positions lend support to an approach whereby a publisher must be connected with, and remunerated by, a traditional media company, and/or have undertaken formal journalistic education and training to benefit from privileges attributed to media freedom.

In contrast to the mass audience approach, this approach animates concerns of over-exclusivity¹⁵⁵, for reasons that are relevant within the context of new media. Firstly, who amounts to a professional journalist cannot be defined by membership of a professional body, as unlike lawyers and doctors, journalists are not required to be members of such organisations. Secondly, just because a person has not undergone formal journalistic education or training does not mean they cannot be diligent and

¹⁴⁹ Oster above n 14, 67.

¹⁵⁰ For example, see Appendix to Recommendation No R (2000) of the Committee of Ministers of the Council of Europe to Member States on the right of journalists not to disclose their sources of information; *Surek and Ozdemir v Turkey* App nos. 23927/94 and 24277/94 (ECtHR, 8 July 1999) para. 63; *Wizerkaniuk v Poland* App no. 18990/05 (ECtHR, 5 July 2011), para. 68; *Kaperzynski v Poland* App no. 43206/07 (ECtHR, 3 April 2012), para. 70.

¹⁵¹ App no. 5446/03 (ECtHR, 18 October 2005).

¹⁵² App no. 10883/05 (ECtHR, 16 July 2009).

¹⁵³ N.Y. CIV. RIGHTS LAW 79-h (a)(6) (2007).

¹⁵⁴ For a detailed discussion of US shield laws, see generally: E. Ugland, 'Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment' (2008) 3 *Duke Journal of Constitutional Law and Public Policy* 118.

¹⁵⁵ Oster above n 14, 65.

professional reporters. Equally, requiring that a person be employed by a professional media organisation eliminates anyone not subject to regular remuneration. This would include freelancers, bloggers and social media commentators, despite the fact their work may contribute to matters of public interest¹⁵⁶.

The ‘professionalised’ publisher approach is unconvincing when considering that private blogs can be the only source of news coverage from, for example, war zones, as was the case during the Arab Spring uprising¹⁵⁷. In contrast, educated and professionally trained journalists, employed by media organisations, do not always write or broadcast material that is in the public interest¹⁵⁸. Instead, this work may be subject to conflicting interests, such as commercialism¹⁵⁹. Thus, establishing a presumption that a tabloid journalist reporting on a kiss-and-tell story should be subject to greater legal protection, under the auspices of media freedom, than a private citizen journalist diligently blogging from an area embroiled in conflict, merely because the former is remunerated by a media organisation, and is professionally trained and educated is unmeritorious and illogical¹⁶⁰. The former could be classed as mere media entertainment; whilst the later is paradigmatic of the media-as-a-constitutional-component concept.

5 THE MEDIA-AS-A-CONSTITUTIONAL-COMPONENT

The previous section has established the shortfalls of the traditional methods adopted by courts and scholars for distinguishing between media and non-media actors: they simply do not fit in the new media arena. Based on a combination of jurisprudence and scholarship, and by recourse to the philosophical rationales underpinning freedom of expression and the media, this section will attempt to formulate a functional media-as-

¹⁵⁶ Ugland, above n 169, 136-137.

¹⁵⁷ See generally: D. McGoldrick, ‘The Limits of Freedom of Expression on Facebook and Social Networking Sites: A UK Perspective’ (2013) *HRLR* 13, 125-151.

¹⁵⁸ See generally: R.D. Barnes, *Outrageous Invasions Celebrities’ Private Lives, Media and the Law*, (Oxford University Press, 2010).

¹⁵⁹ See fn 74; E. Barendt, *The First Amendment and the Media*, 30-31 in I. Loveland (ed), *Importing The First Amendment Freedom of Speech and Expression in Britain, Europe and the USA* (Hart Publishing, 1998).

¹⁶⁰ Oster above n 14, 68.

a-constitutional-component approach that, theoretically and normatively, justifies the media as a distinct legal institution. It will argue that the performance of a constitutional function should define the beneficiaries of media freedom, as opposed to the individual being defined as media, simply based upon their employment or training. Ultimately, it seeks to establish the egalitarian principle that media freedom, and its privileges, attach to the constitutional component, and could therefore apply to anyone serving a constitutional function: that is, operating as the Fourth Estate and/or disseminating information of public interest to an audience.

(A) FREEDOM OF EXPRESSION JUSTIFICATIONS AND THEIR APPLICATION TO MEDIA FREEDOM

Justification for the protection of freedom of expression is underpinned by the following philosophical theories: (i) argument from truth; (ii) marketplace of ideas; (iii) argument from self-fulfilment; (iv) argument from democratic self-governance. This philosophical foundation is apparent, to varying degrees, within domestic jurisprudence and that of the ECtHR¹⁶¹. For instance, the House of Lords recognised the existence of all of these rationales in *R v Secretary of State for the Home Department, ex parte Simms*¹⁶², where Lord Steyn stated the often-repeated passage¹⁶³ that freedom of expression ‘serves a number of broad objectives’¹⁶⁴. This section seeks to advance the proposition that the argument from democratic self-governance, as supported by the argument from self-fulfilment, is better suited than the argument from truth and the marketplace of ideas, to underpin new media, and provide a workable definition of the media as a constitutional component, that effectively delineates it from non-media actors.

(B) THE ARGUMENT FROM TRUTH

¹⁶¹ In *Handyside v United Kingdom* (1976) 1 EHRR 737 the ECtHR referred, at least implicitly, to these theories, when it stated, at para. 49: ‘Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man.’ H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press, 2006), 39.

¹⁶² [2000] 2 AC 115.

¹⁶³ Lord Steyn’s judgment has been referred to numerous times within domestic jurisprudence. For a recent example see: *R (On the application of Lord Carlisle of Berriew QC and others) v Secretary of State for the Home Department* [2014] UKSC 60 per Lord Kerr at [164].

¹⁶⁴ [2000] 2 AC 115, 126.

The argument from truth is located in John Stuart Mill's 19th Century essay *Of the Liberty of Thought and Discussion*¹⁶⁵. Its overall thrust is that truth is most likely to emerge from totally uninhibited freedom of thought, and almost absolute freedom of expression¹⁶⁶. Consequently, thought and discussion protects individual liberty from its predominant threat¹⁶⁷, which is not 'political oppression'¹⁶⁸, but 'social tyranny'¹⁶⁹: a 'tyrannical majority'¹⁷⁰ that does not allow for autonomous thought, expression or opposition, but instead requires absolute accord with its own ideas and opinions¹⁷¹.

As will be seen below, in relation to the four facets of Mill's argument, it is subject to a conflict between the discoverability of truth, and the constant need for disagreement about that truth¹⁷². Mill argues that truth does not, always and immediately triumph, but rather, that it will continually be subject to rediscovery, and will eventually emerge victorious, despite suppression¹⁷³.

According to Schauer, for Mill, the issue is not certain truth; instead, his primary concern is 'epistemic advance'¹⁷⁴. Indeed, Mill regards truth, at times, as merely a by-product of open discussion¹⁷⁵. Thus, of paramount importance to Mill is not the discovery of truth, but the process of discussion and debate¹⁷⁶. Mill argues that the foundations and reasoning upon which opinions are based must be continually tested and, as result, the acceptance of alternative views by others, and ultimately the reliable discovery of truth, must derive from effective persuasion, rather than coercion¹⁷⁷.

The argument has four facets. Firstly, the state would expose its own fallibility if it suppresses opinion on account of that opinion's perceived falsity as, in fact, it may

¹⁶⁵ J. Mill, *On Liberty and Other Essays*, (Oxford University Press, 1991); J. Mill, *On Liberty, Essays on Politics and Society*, in J.M. Robson (Ed), *Collected Works of John Stuart Mill*, (University of Toronto Press, 1977). Other Millian essays are of importance to the theory. When required, they are cited in the footnotes.

¹⁶⁶ *ibid.* (Robson) 225-226; P. Wragg, 'Mill's dead dogma: the value of truth to free speech jurisprudence', (2013) *Public Law*, Apr, 363-385, 365; Fenwick and Phillipson, above n 176, 14.

¹⁶⁷ *ibid.* (Robson) 229.

¹⁶⁸ *ibid.* 220.

¹⁶⁹ *ibid.*

¹⁷⁰ *ibid.* 219.

¹⁷¹ *ibid.* 219-220; Wragg, above n 181, 365.

¹⁷² *ibid.* (Wragg) 365; The importance of truth is discussed in more detail below.

¹⁷³ *ibid.* 365.

¹⁷⁴ F. Schauer, *Free Speech: A Philosophical Enquiry*, (Cambridge University Press, 1982), 25.

¹⁷⁵ J. Gray, *Mill on Liberty: A Defence*, (2nd ed. Routledge, 1996), 110.

¹⁷⁶ F. Schauer, *Free Speech: A Philosophical Enquiry*, (Cambridge University Press, 1982), 20; This is discussed in relation to problems with the justifications below.

¹⁷⁷ Robson, above n 180, 217-223.

be true¹⁷⁸. Secondly, even if the suppressed opinion is objectively false, it has some value, as it may (and in Mill's opinion very commonly does) contain an element of truth¹⁷⁹. Thirdly, since the dominant opinion on any given subject is rarely, or never, the whole truth, what remains will only appear as a result of the collision of adverse opinions¹⁸⁰. Finally, notwithstanding the third facet, even if the received opinion is not only true, but the entire truth, unless it is rigorously discussed and debated, it will not carry the same weight, as the rationale behind it may not be fully and accurately comprehended¹⁸¹. Consequently, unless opinions can be frequently and freely challenged, by forcing those holding them to defend their views, the very meaning and essence of that true belief may, itself, be weakened, become ineffective, or even lost¹⁸². In Mill's words, the true belief: 'will be held as a dead dogma, not a living truth'¹⁸³.

Mill values open discussion and debate instrumentally *and* intrinsically¹⁸⁴, and argues that there should be: 'freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral or theological'¹⁸⁵. Accordingly, the very existence of disagreement is critical to the health of society¹⁸⁶ and the type or quality of expression is irrelevant, as the 'usefulness of an opinion is itself a matter of opinion' and to make an assessment of quality is an 'assumption of infallibility'¹⁸⁷. Thus, it appears that Mill envisaged the argument to apply to the expression of opinion and debate.

Despite Schauer's argument that the desirability of truth within society is almost universally accepted¹⁸⁸, and the fact that this view seems to correlate with Jacob LJ's dicta in *L'Oreal SA v Bellure NV*¹⁸⁹ that, pursuant to various international laws¹⁹⁰, 'the right to tell – and to hear – the truth has high international recognition'¹⁹¹, the

¹⁷⁸ See generally: Barendt above n 14, 8; *ibid.* 258.

¹⁷⁹ *ibid.* 229.

¹⁸⁰ *ibid.* 258.

¹⁸¹ *ibid.*

¹⁸² *ibid.*; See also: Wragg, above n 181, 365.

¹⁸³ *ibid.* 243, 258.

¹⁸⁴ Wragg, above n 181, 365; See also: H. Fenwick, *Civil Liberties and Human Rights* (4th ed. Routledge Cavendish, 2007), 302.

¹⁸⁵ Robson, above n 180, 226.

¹⁸⁶ Wragg, above n 181, 365.

¹⁸⁷ Robson, above n 180, 233-234; See also: K.C. O'Rourke, *John Stuart Mill and Freedom of Expression The genesis of a theory*, (Routledge, 2001), 108.

¹⁸⁸ Schauer, above n 191, 17; See also J. Feinberg, *Social Philosophy*, (Prentice-Hall, 1973), 26.

¹⁸⁹ [2010] EWCA Civ 535.

¹⁹⁰ Article 19 Universal Declaration of Human Rights; Article 19(2) International Covenant on Civil and Political Rights; Article 10(1) European Convention on Human Rights; Article 11(1) Charter of the Fundamental Rights of the European Union: [2010] EWCA Civ 535, [10].

¹⁹¹ [2010] EWCA Civ 535, [10].

assumption derived from the argument, that freedom of expression leads to truth, can be attacked on a number of fronts¹⁹². Firstly, there is not necessarily a causal link between freedom of expression and the discovery of truth¹⁹³. This is particularly pertinent with regard to the new media landscape, where anybody can express opinions or views, or disseminate information. Consequently, new media outlets are saturated with information that is inaccurate, misleading or untrue. Secondly, despite Jacob LJ's dicta, there is no right to truth per se¹⁹⁴. Further, contrary to Schauer's statement, arguably the dissemination of truth is not always a good thing. In some situations, the protection of other, countervailing values, should take precedent. Ironically, this is illustrated by the international instruments referred to by Jacob LJ in *L'Oreal*. Taking the ECHR as an example, Article 10(1) is qualified by Article 10(2), which enables expression, and therefore both truths and untruths, to be legitimately withheld on grounds of, inter alia, health or morals, national security, public safety, protecting the reputation and honour of private individuals, the prevention of disorder or crime and breach of confidence. Equally, this can be applied to trade secrets, medical information, data protection, confidentiality agreements, or official secrecy. Within the context of new media, the revenge porn phenomenon illustrates this dichotomy. This new offence, which exists by virtue of section 33 of the Criminal Justice and Courts Act 2015, was essentially created to combat individuals sharing, via text messages and social media, sexually explicit content of ex-partners without that person's permission¹⁹⁵. Although the explicit pictures, videos and accompanying text may well be 'true', the dissemination of this content could, clearly, harm the victim's health and morals, their reputation and honour and be a misuse of private information¹⁹⁶. Thus, as Barendt argues: '[i]t is not inconsistent to defend a ban on the publication of propositions on the ground that their propagation would seriously damage society, while conceding that they might be true.'¹⁹⁷

(C) THE MARKETPLACE OF IDEAS

¹⁹² For commentary criticising the argument from truth in relation to pornography, see: C. MacKinnon, *Feminism Unmodified*, (Cambridge University Press, 1987), 166; Fenwick and Phillipson, above n 176, 309-407.

¹⁹³ Schauer, above n 191, 15.

¹⁹⁴ Wragg, above n 181, 372.

¹⁹⁵ For further analysis see: Coe, above n 1, 13-14.

¹⁹⁶ Prior to the Criminal Justice and Courts Act 2015 coming into force, a number of criminal offences and civil causes of action were applied to revenge porn. See: Coe, above n 1, 13-14.

¹⁹⁷ Barendt above n 14, 8.

This theory originates from the jurisprudence of US judges. Although it is a distinct theory, it is generally regarded as deriving from Mill's argument from truth. The theory emanates from Justice Holmes judgment in *Abrams v United States*¹⁹⁸, in which it was asserted that: 'the best test of truth is the power of the thought to get itself accepted in the competition of the market.'¹⁹⁹ Subsequently, Holmes J's judgment garnered support from other influential judges, including: Justice Brandeis in *Whitney v California*²⁰⁰; Justice Hand in *United States v Dennis*²⁰¹ and *International Brotherhood of Electrical Workers v NLRB*²⁰²; and Justice Frankfurter in *Dennis v United States*²⁰³. According to the theory, an open and unregulated market, which allows for ideas to be traded through the free expression of all opinions, is most likely to lead to the truth and, consequently, increased knowledge²⁰⁴. Therefore, the examination of an opinion within the marketplace subjects it to a test that is more reliable than individual or governmental appraisal²⁰⁵.

One interpretation of the theory is that discovering truth is dependent upon unregulated competition in the actual, as opposed to ideal marketplace²⁰⁶. To the contrary, it is arguable that it is grounded in relativism, in that the ideas that emanate from the competitive market are the truth, leaving nothing more to be said²⁰⁷. Oster relies heavily upon this rationale to distinguish media from non-media actors²⁰⁸. In his view, because of the media's power and ability to communicate via multiple channels, the theory dictates that the media should be subject to protection and only minimal restriction. This is because this privilege for journalists encourages the dissemination of more information that, sequentially, generates more valuable, truthful information²⁰⁹. However, this reasoning is flawed, in that it is the very reasons used by Oster to support his approach that renders the theory unsuitable to that which it has been applied. Indeed,

¹⁹⁸ 250 US 616 (1919).

¹⁹⁹ *ibid.* 630-631; See also *Gitlow v New York* 268 US 652 (1925), 673 per Justice Holmes.

²⁰⁰ 274 US 357 (1927), 375-378.

²⁰¹ 181 F2d 201 (2d Cir 1950); *Dennis v United States* 341 US 494, 584 (1951).

²⁰² 181 F2d 34 (2d Cir 1950).

²⁰³ 341 US 494 (1951), 546-553.

²⁰⁴ See generally: Oster above n 14, 70; Alonzo, above n 109, 762.

²⁰⁵ F. Schauer, above n 191, 16; see also *ibid.* (Alonzo), 762.

²⁰⁶ B. Williams, *Truth and Truthfulness*, (Princeton University Press, 2002), 214-215; See also: Barendt above n 14, 12.

²⁰⁷ *ibid.* (Barendt) 12.

²⁰⁸ Oster above n 14, 70-71; J.S. Nestler, 'The Underprivileged Profession: The Case for Supreme Court Recognition of the Journalist's Privilege' (2005) 154 *University of Pennsylvania Law Review* 201, 211

²⁰⁹ *ibid.* (Oster and Nestler).

according to Barendt, whatever interpretation is adopted, the theory ‘rests on shaky grounds’²¹⁰ for reasons that can be applied to both traditional and new media²¹¹.

Firstly, if the assertion that one statement is stronger than another (whether these statements are communicated via a tweet, or a post on Facebook or YouTube, or whether they are printed in a traditional newspaper) cannot be intellectually supported and defended, the notion of truth loses its integrity²¹², as history demonstrates: falsehood frequently triumphs over truth, to the detriment of society²¹³. Secondly, the theory assumes that recipients of the communication consider what they read or view within the context of the *marketplace* rationally; deciding whether to accept or reject it, based on whether it will improve their lifestyle, and society generally²¹⁴. This assumption is unrealistic, and over-optimistic²¹⁵. Both criticisms are pertinent to new media, which proliferates a huge amount of information that is poorly researched or simply untrue, yet has the potential to, and very often does, emerge as the dominant view²¹⁶ regardless of the detrimental impact this may have on society. Thirdly, and of particular relevance to the traditional media, insofar as this theory relates to truth discovery, its integrity is contingent upon the sincerity and truthfulness of the speaker, and therefore assumes that the marketplace contains expression that solely represents the views of the proponents of, for instance, publications or broadcasts, as opposed to being conveyed on the basis of restrictions such as editorial control, ownership, political bias or increased commercial revenue through advertising and/or sales²¹⁷. This may be true within the context of new media, where there are, in theory at least, less restrictions. Although this is not always the case, as many bloggers may simply regurgitate false, bias or misleading information²¹⁸. In relation to the traditional media, this assumption

²¹⁰ Barendt above n 14, 12; See also: Barendt, above n 174, 43-46.

²¹¹ For a comprehensive critique of the theory see: Barendt, above n 14, 12.

²¹² *ibid.* 12.

²¹³ R. Abel, *Speech and Respect*, (Stevens & Sons Limited, 1994), 48; D. Milo, *Defamation and Freedom of Speech*, (Oxford University Press, 2008), 57.

²¹⁴ S. Ingber, ‘The Marketplace of Ideas: a Legitimizing Myth’, [1984] *Duke Law Journal* 1; J. Skorupski, *John Stuart Mill*, (Routledge, 1991), 371-372.

²¹⁵ Barendt above n 14, 12.

²¹⁶ This criticism reflects those leveled at Mill’s theory above. In particular, Schauer’s argument that there is not necessarily a causal link between freedom of expression and the discovery of truth. See section 5(B) above.

²¹⁷ Barendt above n 14, 12.

²¹⁸ See section 3(B) above.

is unrealistic, as many media outlets are driven by these restrictions, to the detriment of investigative journalism²¹⁹.

(D) THE ARGUMENT FROM SELF-FULFILMENT

Endorsement of this argument as a justification for freedom of expression of broad application²²⁰ can be found in the jurisprudence of a number of jurisdictions. In *Simms*, Lord Steyn stated that freedom of expression ‘...promotes the self-fulfilment of individuals in society’²²¹; in *Handyside v United Kingdom* the ECtHR considered that the right is ‘one of the basic conditions...for the development of man’²²²; Thurgood Marshall J, in the US Supreme Court case of *Procunier v Martinez* held that it ‘...serves not only the needs of the polity but also those of the human spirit – a spirit that demands self-expression’²²³.

The argument is based on the individual liberty paradigm; that individuals must be able to express themselves²²⁴. Pursuant to this theory, freedom of expression is afforded protection, as it is integral to an individual’s need for self-fulfilment and development²²⁵. Contrarily, suppression of expression is an affront to personal dignity²²⁶, as this undermines equality of respect afforded to individuals to exercise their moral powers of reason and rationality²²⁷. Consequently, if expression contributes to the speaker’s values and visions, it should be subject to protection²²⁸.

Scholars such as Nimmer, Nestler and Fargo and Alexander argue that media expression, by virtue of constitutional functions, is far less significant under this

²¹⁹ *ibid.*

²²⁰ A. Nicol QC, G. Millar QC and A. Sharland, *Media Law and Human Rights*, (2nd ed. Oxford University Press, 2009), 4, [1.07].

²²¹ [2000] 2 AC 115, 126.

²²² (1976) 1 EHRR 737 [49]; See also: *Bladet Tromso and Stensaas v Norway* (2000) 29 EHRR 125, [59]; *Bergens Tidande v Norway* (2001) 31 EHRR 16, [48].

²²³ 416 US 396, 427 (1974); See also: *Whitney v California* 274 US 357 (1927) in which Brandeis J held at 375 that: ‘...the final end of the state was to make men free to develop their faculties...[liberty is valued] both as an end and as a means.’

²²⁴ Oster above n 14, 73; C.E. Baker, ‘Scope of the First Amendment Freedom of Speech’, (1978) 25 *UCLA Law Review* 964, 996; V. Blasi, ‘The Checking Value in First Amendment Theory’, (1977) *American Bar Foundation Research Journal* 521, 545; T.M. Scanlon, ‘Freedom of Expression and Categories of Expression’, (1978-79) 40 *University of Pittsburgh Law Review* 519, 533 ff; Nestler, above n 223, 211.

²²⁵ M. Redish, ‘The Value of Free Speech’ (1982) 130 *University of Pennsylvania Law Review* 591.

²²⁶ Milo, above n 228, 78.

²²⁷ D.A.J. Richards, *Free Speech and the Politics of Identity* (Oxford University Press, 1999), 23; D.A.J. Richards, *Toleration and the Constitution* (Oxford University Press, 1986) 169.

²²⁸ Baker, above n 40, 68-69.

rationale compared with the argument from democratic self-governance²²⁹. This is because, pursuant to this argument, freedom of expression emanates from the role of the speaker, not the speaker's impact on society²³⁰. While a professional or citizen journalist may claim personal gratification and fulfilment from their publications, this rationale does not apply to media companies, as these entities cannot be fulfilled through expression as a natural person can. Thus, media freedom is not inherently valuable on a personal level²³¹. Instead, it is instrumentally and functionally valuable, as it protects individuals and legal persons fulfilling a constitutional role for society, rather than protecting expression for expression's sake.

However, to the contrary, within the context of new media, there is value within the argument, and the concept of individual autonomy, as they are inextricably linked to the argument from democratic self-governance, which it is argued below, underpins the media-as-a-constitutional-component concept for delineating media and non-media actors.

According to Schauer, self-fulfilment and autonomy are interrelated²³². The individual autonomy concept was first advanced by Thomas Scanlon. It is based on a right to receive information, and a right to be free from governmental intrusion into the process of individual decision-making²³³. In contrast to the arguments advanced by Nimmer et al, arguably, new media, and in particular social media, is better able to facilitate the free flow of information, at liberty from governmental and other constraints, compared to the traditional media, and can therefore aid the process of individual choice. Thus, the argument from self-fulfilment and the concept of autonomy play a role in distinguishing media from non-media actors, as they provide a premise for individuals to engage more fully with the democratic process and issues of public concern. As Schauer argues: '...it emphasizes freedom of speech as a principle embedded in a line of demarcation between the individual and the government'²³⁴. As

²²⁹ Nimmer, above n 40, 654; Nestler, above n 223, 212; A.L. Fargo and L.B. Alexander, 'Testing the Boundaries of the First Amendment Press Clause: A Proposal for Protecting the Media from Newsgathering Torts' (2009) 32 *Harvard Journal of Law & Public Policy* 1094, 1097.

²³⁰ Blasi, above n 239, 553.

²³¹ Oster above n 14, 73-74.

²³² Schauer, above n 191, 48.

²³³ T. Scanlon, 'A Theory of Freedom of Expression', *Philosophy & Public Affairs*, Vol. 1 No. 2 (Winter, 1972), 223; See also: Schauer, above n 191, 69; Barendt above n 14, 15-17.

²³⁴ Schauer, above n 191, 71-72.

a result, it shares characteristics with valuable features of the argument from democratic self-governance²³⁵.

(E) THE ARGUMENT FROM DEMOCRATIC SELF-GOVERNANCE

This argument is the most fashionable of the justifications in Western democracies²³⁶ and is best suited to underpin new media and support the notion of the media-as-a-constitutional component. It is based on the premise that the predominant purpose of freedom of expression is to protect the right of citizens to understand political matters in order to facilitate and enable societal engagement with the political and democratic process²³⁷. Ultimately, an informed electorate is a prerequisite of democracy. Therefore, ‘there must be no constraints on the free flow of information and ideas’²³⁸. According to Bork, speech regarding ‘government behaviour, policy or personnel, whether...executive, legislative, judicial or administrative’²³⁹ was the original subject that was perceived as being protected by the right to freedom of expression²⁴⁰. However, the scope of this approach was seen as being overly restrictive²⁴¹, as focusing purely on political expression to the exclusion of other matters of public interest gave rise to an ‘old-fashioned distinction between public and private power’²⁴². Consequently, Alexander Meiklejohn, with whom this argument is now primarily associated²⁴³, argued for the substitution of political expression with the wider, and less restrictive notion of ‘public discussion’, relating to any matter of public interest, as

²³⁵ *ibid.*

²³⁶ Barendt above n 14, 18; For example, see *Whitney v California* 274 US 357 (1927) per Brandeis J at 375-378 (1927); the ECtHR cases of, for instance, *Lingens v Austria* (1986) A 103, [42]; *Bladet Tromso and Stensaas v Norway* (2000) 29 EHRR 125, [59]; *Bergens Tidande v Norway* (2001) 31 EHRR 16, [48].

²³⁷ See generally: Sir J. Laws, *Meiklejohn, the First Amendment and Free Speech in English Law*, in I. Loveland (ed), *Importing the First Amendment, Freedom of Speech and Expression in Britain, Europe and the USA*, (Hart Publishing, 1998), 123-137; Nicol QC, Millar QC and Sharland, above n 235, 3 [1.06]; Barendt above n 14, 18.

²³⁸ Oster above n 14, 69.

²³⁹ R.H. Bork, ‘Neutral Principles and Some First Amendment Problems’ (1971) 47 *Indiana Law Journal* 1, 27-28.

²⁴⁰ Oster above n 14, 69.

²⁴¹ *ibid.* Milo, above n 228, 63-64.

²⁴² M.R. Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant*, (Ashgate Publishing, 2000), 48; See also: A. Kenyon, ‘Defamation and Critique: Political Speech and New York Times v Sullivan in Australia and England’, (2001) 25 *Melbourne University Law Review* 522, 539; R. Gilson and M. Leopold, ‘Restoring the “Central Meaning of the First Amendment”: Absolute Immunity for Political Libel’, (1986) 90 *Dickinson Law Review* 559, 574.

²⁴³ Nicol QC, Millar QC and A. Sharland, above n 235, 3 [1.06].

opposed to expression linked purely to the casting of votes²⁴⁴. Meiklejohn stated that public discussion is speech which impacts ‘directly or indirectly, upon the issues with which voters have to deal [i.e.] to matters of public interest’²⁴⁵. A result of this bifurcated interpretation of free speech is a two-tiered approach to freedom of expression²⁴⁶: expression that is not in the interest of the public, is not protected, and is therefore open to restriction to protect the general welfare of society²⁴⁷. In later writings, Meiklejohn clarified this wider view of ‘public discussion’, by stating that voting is merely the ‘external expression of a wide and diverse number of activities by means of which citizens attempt to meet the responsibilities of making judgments’²⁴⁸. Accordingly, education, philosophy and science, literature and the arts, and public discussions on public issues, are activities that will educate citizens for self-government²⁴⁹.

Historically, due to its reach, it was incumbent upon the traditional media to disseminate matters of public interest, and to act as the public watchdog and Fourth Estate; to provide a check and balance on government. Consequently, the ECtHR has consistently stated that media freedom provides one of the best means for the public to discover and form opinions about the ideas and attitudes of political leaders, and on other matters of general interest, and that the public has a right to receive this information²⁵⁰. However, this role can now be fulfilled by both the traditional media and, by virtue of new media, citizen journalists. Therefore, this argument helps to define the media by providing a clear delineation between media and non-media actors. Pursuant to its ‘public discussion’ scope, this rationale underpins the media-as-a-constitutional-component concept, as it supports media freedom protection, beyond that afforded to private individuals pursuant to the right to freedom of expression, for *any*

²⁴⁴ A. Meiklejohn, *Political Freedom: The Constitutional Powers of the People*, (Oxford University Press, 1960), 42; A. Meiklejohn, ‘The First Amendment is an Absolute’ [1961] *Supreme Court Review* 245, 255-257; Milo, above n 228, 63-64; Oster above n 14, 69.

²⁴⁵ *ibid.* (Meiklejohn, *Political Freedom: The Constitutional Powers of the People*) 79.

²⁴⁶ An advocate of this approach is C.R. Sunstein. See generally: C.R. Sunstein, *Democracy and the Problem of Free Speech*, (The Free Press, 1993); C.R. Sunstein, *The Partial Constitution*, (Harvard University Press, 1994).

²⁴⁷ Milo, above n 228, 62-63.

²⁴⁸ A. Meiklejohn, ‘The First Amendment is an Absolute’ (1961) *Supreme Court Review* 245, 255.

²⁴⁹ *ibid.* 257, 263; For judicial application of this wider interpretation of the theory see: *Reynolds v Times Newspapers Limited* [2001] 2 AC 127, (HL) per Lord Cooke at 220; *Jameel v Wall Street Journal Europe Sprl* [2007] 1 AC 359, (HL) per Baroness Hale at [158].

²⁵⁰ *Lingens v Austria* App no 9815/82 (ECtHR, 8 July 1986), para 42; *Oberschlick v Austria* (No 1) App no 1162/85 (ECtHR 23 May 1991), para 58; *Scharsach and News Verlagsgesellschaft v Austria* App no 39394/98 (ECtHR, 13 November 2003), para 30.

actor that contributes regularly and widely to the dissemination of matters of public interest and/or operates as a public watchdog.

(F) MEDIA PRIVILEGE AND RESPONSIBILITIES

The prevailing sections have established that media freedom grants protection beyond that afforded by freedom of expression to media actors fulfilling the media-as-a-constitutional-component concept. However, media that, pursuant to this concept, is subject to these privileges, beyond private individuals, is also subject to duties and responsibilities in excess of those expected of non-media entities. As has been discussed throughout this article, the reach of both the traditional and new media, including citizen journalists, does not just enable it to fulfil its constitutional functions. This power can be abused in equal measure. Due to the reach of the media, the potential impact of abuse of power is far greater than those emanating from private individuals. The media is not just capable of invading private lives of individuals, or damaging reputations, but it can also shape and mislead public opinion.

Therefore, the argument from democratic self-governance endorses a two-tiered approach to media expression²⁵¹. Firstly, public discussion should be protected. However, if the expression is not of public interest, it should not be afforded the same level of protection compared to that which is of public concern. This includes speech primarily concerned with commercial or financial matters²⁵², speech relating to private or intimate matters²⁵³, and hate speech²⁵⁴. Further, the argument from democratic self-governance rationale, and its public discussion ambit, dictates that the media's privileged protection, pursuant to it being a constitutional component, is subject to it acting ethically and in good faith, and publishing or broadcasting material that is based

²⁵¹ Oster, above n 14, 71-72.

²⁵² Barendt, above n 14, 392-416; From a US Supreme Court perspective see: *Central Hudson Gas & Electric Corp v Public Service Commission* 447 US 557 (1980); *Dun & Bradstreet Inc v Greenmoss Builders Inc* 472 US 749, 762 (1985). For ECtHR jurisprudence see: *Markt Intern Verlag and Klaus Beerman v Germany* App no 10572/83 (ECtHR 20 November 1989), para. 33.

²⁵³ *ibid.* (Barendt) 230; Fenwick and Phillipson, above n 176, 661; P. Keller, *European and International Media Law: Liberal Democracy, Trade and the New Media* (Oxford University Press, 2011), 307; *von Hannover v Germany (No. 1)* App no 59320/00 (ECtHR 24 June 2004) para. 65; *MGN Ltd v UK* App no 39401/04 (ECtHR 18 January 2011) para. 143; *Mosley v UK* App no 48009/08 (ECtHR 10 May 2011) para. 14.

²⁵⁴ Article 20(2) ICCPR states: 'Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'. For example, see: *Ross v Canada* App no 736/97 (UN Human Rights Committee, 18 October 2000) para. 11.5. For ECtHR jurisprudence, see: *Lehideux and Isorni v France* App no 55/1997/839/1045 (ECtHR, 23 September 1998), para. 47; *Norwood v UK* App no 23131/03 (ECtHR, 16 November 2004).

on reasonable research to verify the provenance of it and its sources. Incidentally, the only legal instruments that qualify the right to free speech or expression with express reference to these extra duties and responsibilities are Article 10(2) ECHR and Article 19(3) ICCPR. These qualification clauses apply to both media and non-media entities; however, according to Oster, their main purpose is to provide member states with a tool to combat abuses of power by the media²⁵⁵.

Consequently, the privilege afforded to the media, deriving primarily from the wide ambit of the argument from democratic self-governance, is based upon a utilitarian, consequentialist and functional understanding of media freedom. The media-as-a-constitutional-component concept means that media actors are protected for disseminating matters of public interest, and operating as the public watchdog/Fourth estate, and therefore fulfilling functions beneficial to society. However, this protection carries with it the *obligation* to fulfil these functions. If it fails to do this, it relinquishes its protection and may be subject to criminal or civil liability.

6 CONCLUSION: A NEW WORKABLE DEFINITION OF ‘THE MEDIA’

The High Court of New Zealand’s decision in *Slater v Blomfield*²⁵⁶ determined that a blogger could be considered a journalist for the purposes of section 68 of the New Zealand Evidence Act 2006 provided, inter alia: ‘(i) the medium used by the journalist disseminates the information to the public or a section of the public; (ii) what is disseminated is news and observations on news; and (iii) the person claiming to be a journalist is a person who, in the normal course of that person’s work, might be given information by informants in the expectation that it will be published in a news medium’²⁵⁷. Consequently, in dealing with these points, Asher J’s judgment provides a number of guiding principles that can be applied to a new workable definition of media. Firstly, an actor can begin publishing as non-media, and later become media once a certain level of work and content is achieved²⁵⁸. Secondly, an actor that regularly

²⁵⁵ Oster, above n 14, 72-73; These duties and responsibilities are particularly significant when applied as factors of the qualified privilege defence, as defined by Lord Nicholls in *Reynolds v Times Newspapers* [2001] 2 AC 127, 205 (see also: *Jameel v Wall Street Journal Europe Sprl* [2007] 1 AC 359, 383 per Lord Hoffmann; *Flood v Times Newspapers Ltd* [2012] UKSC 11, [30] per Lord Phillips), and now enshrined within section 4 of Defamation Act 2013.

²⁵⁶ [2014] NZHC 2221.

²⁵⁷ *ibid.* para. 34.

²⁵⁸ *ibid.* para. 36.

disseminates news to a significant body of the public can be a journalist²⁵⁹. Thirdly, just because an actor is a blogger/blog does not mean it cannot be considered as media. Indeed, ‘a blogger who regularly disseminates news to a significant body of the public can be a journalist’²⁶⁰. Fourthly, an actor that publishes a single news item would not qualify as media. Regular commitment to publishing new or recent information of public interest is required for, a blog for instance, to be considered news media. However, the quantity of stories does not have to be equivalent to a corporate news organisation²⁶¹. Finally, to determine whether an actor’s work within the context of the medium makes them media, the following factors are relevant: (i) whether the receiving and disseminating of news through a news medium is regular; (ii) whether it involved significant time on a frequent basis; (iii) whether there was revenue derived from the medium; and (iv) whether it involved the application of journalistic skill²⁶².

Based on the media-as-a-constitutional-component concept of media freedom that has been advanced throughout this article, it is suggested that an egalitarian principle should be adopted to define the media. This principle and its definition will focus on the functions that are performed by the media actors, as opposed to their inherent characteristics. Therefore, media freedom does not have to be a purely institutional privilege; it can apply to any actor that conforms to the definition. As a consequence of the requirement that these functions are fulfilled in order to satisfy the constitutional component concept, it will also give consideration to the obligations of the media. By applying the guidelines laid down in *Slater*, and scholarship and jurisprudence from both the US and Europe²⁶³, examined in prevailing sections, the following definition of media is proposed: (1) a natural and legal person (2) engaged in the process of gathering information of public concern, interest and significance (3) with the intention, and for the purpose of, disseminating this information to a section of the public on a regular basis (4) whilst complying with objective standards governing the research, newsgathering and editorial process. These standards would include, for

²⁵⁹ *ibid.* para. 54.

²⁶⁰ *ibid.*

²⁶¹ *ibid.* paras. 54, 65.

²⁶² *ibid.* paras. 74.

²⁶³ For instance, compare Oster and Ugland for definitions from a European and US perspective respectively: Oster above n 14, 74; Ugland, above n 169, 138.

instance, the time spent researching stories and ensuring the provenance and reliability of information.

As the media's privileged protection is based upon the constitutional component concept, which derives from the argument from democratic self-governance, one of the fundamental requirements for determining that an actor is operating as part of the media is its contribution to matters of public interest. Oster's argument that for this requirement to be fulfilled it must occur periodically²⁶⁴ is over-exclusive. Actors can fulfil the definition above, and operate as a constitutional component, on one-off occasions or on an ad-hoc basis²⁶⁵. This is particularly the case within a new media context, in which contributions to the public interest can be made via many different platforms.

Scholarship and jurisprudence from the US, England and Wales and the ECtHR suggests that this requirement could be met with differences of opinion. From a US scholarship perspective, it is likely to be opposed on a doctrinal basis, as content discrimination is not permitted under the First Amendment²⁶⁶. To the contrary however, according to Sunstein: '...it would be difficult to imagine a sensible system of free expression that did not distinguish among categories of speech in accordance with their importance to the underlying purposes of the free speech guarantee'²⁶⁷. Indeed, the US Supreme Court, the Supreme Court of Canada and the Court of Appeal, House of Lords and Supreme Court have made consistent reference to the public interest requirement. The courts have expressed this in a number of ways, including: 'public interest' or 'public concern'²⁶⁸; 'of political, social or other concern to the community'²⁶⁹; 'influences social relations and politics on a grand scale'; or is part of a 'debate about public affairs'; makes a 'contribution to the public debate'; stimulating 'political and

²⁶⁴ *ibid.* (Oster) 74.

²⁶⁵ *Editions Plon v France* App no 58148/00 (ECtHR 18 May 2004) para. 43; *Lindon, Otchakovsky-Laurens and July v France* App no 21279/02 and 36448/02 (ECtHR 22 October 2007) para. 47.

²⁶⁶ L.L. Berger, 'Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication' (2003) 39 *Houston Law Review* 1371, 1411; Baker, above n 143, 976.

²⁶⁷ C.R. Sunstein, 'Pornography and the First Amendment' (1986) 35 *Duke Law Journal* 589, 605.

²⁶⁸ For example see: *Gertz v Robert Welch Inc* 418 US 323, 246 (1974); *Dun & Bradstreet Inc v Greenmoss Builders* 472 US 749, 761 (1985); *Hustler Magazine v Falwell* 485 US 46, 50 (1988); *Bartnicki v Vopper* 532 US 514, 528, 533-534 (2001); *London Artists v Littler* [1969] 2 QB 375, 391 (CA) (per Lord Denning); *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 205 (per Lord Nicholls); *Jameel v Wall Street Journal Europe Sprl* [2007] 1 AC 359, 376 (per Lord Bingham); *Flood v Times Newspapers Ltd* [2012] UKSC 11, [24] (per Lord Phillips).

²⁶⁹ *Connick v Myers* 461 US 138, 146 (1983).

social changes'²⁷⁰; more than 'mere curiosity or prurient interest' with the public having a 'genuine stake in knowing about the matter published'²⁷¹. Similarly, the ECtHR's jurisprudence provides rich precedent supporting the public interest requirement. It has regularly referred to 'matters of general public interest' and 'matters of public concern' within a variety of different circumstances. The principle has been applied to, amongst many other things²⁷²: national and local level political speech and reporting²⁷³; criticism of public administration and justice²⁷⁴; abuse of police power²⁷⁵; criticisms of businesses and those operating businesses²⁷⁶. Hence, according to the ECtHR, publishing material relating exclusively to private matters or on 'tawdry allegations' and 'sensational and...lurid news, intended to titillate and entertain, which are aimed at satisfying the curiosity of a particular readership regarding aspects of a person's strictly private life' and serving to *entertain* rather than *educate* is not in the public interest²⁷⁷.

These situations referred to by the ECtHR relate to mere entertainment, as opposed to the fulfilment of a constitutional function pursuant to the media-as-a-constitutional-component and the proposed definition. In such situations, a publisher is not fulfilling their constitutional function, or role as public watchdog within a democracy. Consequently, they should not be subject to the privileges attached to media freedom. Thus, this proposed definition of the media has the potential to exclude from media privileges actors that have, traditionally, been considered part of the media, and

²⁷⁰ *Roth v United States* 354 US 476, 484 (1957); *New York Times v Sullivan* 376 US 254, 269 (1964); *Hustler Magazine v Falwell* 485 US 46, 53 (1988); *Lion Laboratories Ltd v Evans* [1984] 1 WLR 526, 530; *Francome v Mirror Group Newspapers Ltd* [1984] 1 WLR 892, 897; *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 205 (per Lord Nicholls).

²⁷¹ *Grant v Torstar Corporation* 2009 SCC 61, para. 105.

²⁷² For a more comprehensive list, see: Oster above n 14, 75.

²⁷³ *Bowman v UK App no 141/1996/760/961* (ECtHR 19 February 1998), para. 42; *Jerusalem v Austria App no 26958/95* (ECtHR 27 February 2001), para. 41; *Filatenco v Russia App no 73219/01* (ECtHR 6 December 2007), para. 40.

²⁷⁴ *De Haes and Gijssels v Belgium App no 19983/92* (ECtHR 24 February 1997), para. 37; *Pedersen and Baadsgaard v Denmark App no 49017/99* (ECtHR 17 December 2004), para. 71; *Perna v Italy App no 48898/99* (ECtHR 6 May 2003), para. 39.

²⁷⁵ *Thorgeir Thorgeirson v Iceland App no 13778/88* (ECtHR 25 June 1992).

²⁷⁶ *Fressoz and Roire v France App no 29183/95* (ECtHR 21 January 1999), para. 50; *Steel and Morris v UK App no 68416/01* (ECtHR 15 February 2005) para. 89; J. Oster, 'The Criticism of Trading Corporations and their Right to Sue for Defamation' (2011) 2 *Journal of European Tort Law* 255.

²⁷⁷ *Mosley v UK App no 48009/08* (ECtHR 10 May 2011), para. 114; *von Hannover v Germany (No 1) App no 59320/00* (ECtHR 24 June 2004) para. 65; *Hachette Filipacchi Associes v France App no 12268/03* (ECtHR 23 July 2009) para. 40; *Eerikainen and others v Finland App no 3514/02* (ECtHR 10 february 2009) para. 62; *Standard Verlags GmbH v Austria (No 2) App no 21277/05* (ECtHR 4 June 2009) para. 52; *MGN Ltd v UK App no 39401/04* (ECtHR 18 January 2011) para.143.

subject to the protection offered by media freedom, despite their purpose being to primarily treat ‘the private lives of those in the public eye’ as ‘a highly lucrative commodity’ by exposing aspects of people’s private lives or engaging in entertainment and sensationalism. These actors and entities do not conform to the requirements of the definition by publishing material that contributes to the dissemination of matters of public interest.