

Privacy, Free Speech, and Freedom of the Press:

Challenges for Media Regulation

Simon Jonas Hadlich

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Bruce Mutsvairo

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New media presents new challenges for reaching an ideal balance of the sometimes conflicting rights to privacy, free speech, and freedom of the press.

The emergence of new media challenges the existing balance between privacy and freedom of expression. Social media has led to a vast increase in content producers, blurring the line between journalists and their former audience. New technology facilitates anonymous and cross-border publishing. These developments raise a challenge for media regulation, which aims to strike a balance between privacy and freedom of expression. This essay, however, will argue that measures aimed at protecting privacy in a globalised media landscape are bound to collide with current standards of freedom of expression.

Defining new media, privacy and freedom of expression

There have been various, conflicting approaches to define the scope of the term 'new media'. Wardrip-Fruin and Montfort (2003, pp. 16) come up with no less than eight propositions to encircle the diverse technological, cultural, and institutional dimensions of new media, which indicates the difficulty to come up with a clear, coherent definition. Lievrouw (2002) describes "ubiquity", its

"recombinant nature" and "the prevalence of the network metaphor" (p. 4) as major characteristics of new media. Technologies often described as "new media" share common characteristics in that they utilize digital data processing, are distributed, and are networked.

Social media are a subdivision of applications that build up on new media information and communication technology (ICT), described by boyd [sic!] (2008) as "the set of tools, services, and applications that allow people to interact with others using network technologies". They are denoted by "users [...] shifting from just consuming information published by professional editors to contributing" media content themselves (Smith et al., 2008, cited in Brussee & Hekman, 2009) and the prevalence of such user-generated content (Kangas, Toivonen, & Bäck, 2007, cited in Brussee & Hekman, 2009). New media and social media share some characteristics that is at their cores, most importantly their networked character.

Benkler (2006) describes the emergence of a "networked information environment" based on the increasing pervasiveness of social media. Within this environment, the networked public sphere is characterized by "the shift from a hub-and-spoke architecture with unidirectional links to the end points in the mass media, to distributed architecture with multidirectional connections among all nodes in the networked information environment" and "the practical elimination of communications costs as a barrier to speaking across associational boundaries"

(p. 212). The emergence of this networked public sphere challenges existing conventions that balance the interrelated rights of privacy and freedom of expression.

Privacy, freedom of speech, and freedom of the press are all included in the Universal Declaration of Human Rights (n.d.). Privacy can be distinguished into "physical" and "information privacy" (Smith, 1994, p. 188), where the latter matters most in a media context. Concerns over information privacy regard "inappropriate access to identifiable information" (ibid.) about an individual. Freedom of speech (often called "freedom of expression") and freedom of the press are closely related and are both captured by article 19 of the Universal Declaration of Human Rights, which states that "everyone has [...] the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

Privacy on the one hand and freedom of speech and of the press on the other hand are both fundamental rights, but are often found to be in conflict. Possible areas of collision are media coverage of personal lives, and libel and defamation rules (Privacy International, 2004). Volokh (1999, pp. 60) concludes that information privacy laws are hard to reconcile with a strong free speech protection, but it has also been pointed out that privacy and freedom of speech are positively linked rights and strongly interdependent (Privacy International, 2004).

Even though they are universal human rights, privacy, freedom of speech, and freedom of the press take different forms in different social settings and national legislations. Freedom of expression is limited in many countries by several constraints, including hate speech legislation, anti-sedition laws, and laws that are thought to protect religious and ethical values (Press Freedom Index 2010, 2010). The scope of these limitations of freedom of expression, and their focus, differ from country to country. E.g. holocaust denial, which is illegal in Israel, Germany and some other European countries (Lechtholz-Zey, 2010), is protected under the First Amendment in the United States.

The importance and understanding of privacy, and respective laws, differ strongly in different societies (Olinger, Britz, & Olivier, 2005, p. 4). Some authors have argued that it is a concept most prevalent in Western societies. E.g., Olinger, Britz, & Olivier (2005, pp. 9) find that in the South African philosophy of life ubuntu, privacy plays a relatively small role. Similarly, Kitiyadisai (2005) writes that "the western concept of 'privacy' is not applicable to Thai social reality" (p. 17), adding that the Thai "conception of privacy is basically collectivistic – not, as Westerners tend to assume, individual" (p. 18). But as Jarvis (2010a) has pointed out, conceptions of privacy differ even between Western cultures such as Germany and the USA. In legislation, this division can be observed in the difference between the concepts of common law in England and its former colonies and civil law in continental Europe. A uniform 'Western' understanding of privacy does not exist. The balance that is found between privacy and freedom of

speech, then, differs between different societies and countries.

New media affects privacy and freedom of expression

The increasing salience of new media heavily affects the balance of privacy and freedom of expression. New technologies fundamentally change the creation, distribution and accessibility of media content, and raise new questions over the categorization and treatment of actors within the media. This section will explore the increased availability of recording technology and the higher accessibility of publishing means, as well as the resulting blurring of lines between producers and consumers of media content. Subsequently, it will deal with the increased feasibility of anonymous and cross-border publishing.

The last three decades have seen a vast increase in professional media production tools that are affordable to amateurs. Since the 1980s, personal computers (PCs) have increasingly become both cheaper and more powerful. They provide basic tools for text production as well as image and video manipulation that can be used by amateurs to produce media content. More recently, recording means such as digital photo and video cameras have been introduced that aim at the broad consumer market, allowing amateurs to produce multimedia content at near-professional level. The near ubiquity of cameras today, especially those integrated in mobile phones, means that many breaking

events are first recorded by amateurs, instead of professional journalists. News media now frequently use video footage and photos shot by amateurs in their reports (Kryazhev, 2010).

The emergence of social media in the early 21st century has made publishing means accessible for a broad public. It has decreased the cost of publishing to near zero; and has significantly lowered the amount of technical knowledge necessary to do so. Shirky (2008) describes the change that comes with this ubiquity of publishing means as paradigmatic, since it turns around the concept "filter, then publish" typical for broadcast media into a "publish, then filter". The availability of these affordable, accessible technologies has led to an increased number and diversity of media producers and publishers. Today, blogs, microblogs, photo- and videosharing platforms have an active userbase in the hundreds of millions, several times more than the number of professional journalists.

The increasing salience of social media is associated with a blurring of lines between media producers and consumers. Lessig (2002) describes a change from a read-only culture in the industrial information economy to a read/write-culture in the digital information economy. He bases this assumption on the observation that an increasing number of people participate in the media as both producers and consumers, a trend that is captured in neologisms such as "prosumers". In sight of these changes, Lessig advocates for free culture, for

which Stalder (cited in Currie, 2010) claims "reading and writing are overlapping activities", i.e. reader- and authorship are fundamentally merged. This effectively means that freedom of the press can no longer be distinguished from freedom of expression.

Social media contribute to profound changes in the concept of authorship that also have legal consequences. Shirky (2008) observes the emergence of previously unknown forms of collective authorship. This is manifested in Wikipedia, where individual authorship of articles is dismissed (Heffernan, 2010). Some platforms, such as 4chan, only allow for anonymous contributions. Changes in the conception of authorship are also manifest in the popularity of open licences such as Creative Commons in social media, which are used by authors to disclaim some of their rights granted by copyright legislation.

New media, and especially social media, facilitate anonymous publishing (Palme & Berglund, 2002). While the possibility of total anonymity on the Internet has been contested (ibid.), there exists a range of means to make identification of an author extremely unlikely. Many social media platforms, such as Twitter, Wordpress.com, and Google's Blogger, do not require users to indicate their real names. Anonymisation tools, e.g. TOR, and systems developed to circumvent censorship enable Internet users to further obfuscate their digital traces, making near-perfect online anonymity feasible even for amateurs.

The fundamentally global character of the Internet means that cross-border publishing has become the norm in the digital age. In fact, it takes additional efforts to restrict publication to a certain area. In some cases, content providers use geolocation software to prevent users in certain areas from accessing their publications (Associated Press, 2004); and a range of countries apply censorship methods to block certain foreign web sites. Yet online publications are regularly accessible from places which do not fall under the jurisdiction of their place of origin.

The emerging networked information environment (Benkler, 2006) challenges the balance between privacy and freedom of speech as it has evolved in the age of mass broadcasting. Professional journalists lose their role as the sole producers and transmitters of news as new actors enter the field, and new technologies broaden existing dimensions of media accessibility. Existing regulatory mechanisms aimed at protecting privacy struggle to cope with this development, prompting calls for new legislation and advanced means of regulation. Yet these reactions might put free speech at risk of being restricted more than before.

Challenges to media regulation raised by the emergence of new media

The emergence of a globally networked digital media landscape calls for

changes in media policy regarding privacy and freedom of speech. Especially the Internet's reach across borders challenges existing media regulation that is based on national legislation and law enforcement. The vastly increased number of media producers, changing concepts of authorship, and the feasibility of anonymous publishing effectively raise the question who to regulate.

In an increasingly globalised media landscape, where publications are regularly accessible across national borders, effective media regulation has to expand its scope beyond the nation state. Three possible approaches towards media regulation in the age of the Internet might be international harmonization of legislation, bi- and multilateral treaties, and national blocking schemes.

International harmonization of legislation aims to create internationally acknowledged legal standards which would allow for persecution across borders. There are attempts to harmonize international Internet regulation, especially in regard to copyright. US, EU, and a range of other countries are developing the Anti-Counterfeiting Trade Agreement, ACTA (European Commission, n.d.), which, "for the first time, creates a minimal level of harmonisation and transparency for the rules applicable to [intellectual property rights] infringements" on the Internet (European Union, 2010). Global harmonization of legislation regarding privacy and freedom of expression, however, seems unlikely to achieve given the differences between existing national systems.

Bi- and multilateral treaties aim to ensure the interoperability of differing national legislation. Some treaties with regard to the Internet have already been developed, particularly by the European Union and the United States. A common aim in these treaties is to ensure the operability of Internet-based services in other countries despite differing legislation. The Safe Harbor Agreement between EU and US, e.g., enables companies to legally transfer personally identifiable data regarding EU citizens to the US under the condition of ensuring privacy protection according to European standards ("U.S.-European Union Safe Harbor"). There is, however, no such international treaty yet regarding the relation of privacy and freedom of expression.

Some countries use a variety of censorship schemes to block foreign Internet content that does not abide to their national legislation. E.g., several Islamic countries block content that is deemed obscene, such as pornography. This does not necessitate cooperation with foreign countries, so there is no need for harmonization. Such blocks, however, can be circumvented with relatively simple measures, and thus fail to effectively make content inaccessible (Pursch & Bär, 2009, pp. 18).

The increased number of content producers, and wide-spread anonymity, has raised the question who to hold liable for online infringement. It has been suggested to hold Internet service providers (ISPs) and platform operators responsible for the actions of customers and users (Bhatnagar & Mishra, 2009).

It has also been suggested to require real name identification from Internet users in order to diminish anonymity (Ranum, 2010).

Some form of liability of ISPs and platform operators for third-party content exists in several countries, mostly in form of "notice and take down" regimes requiring them to delete infringing content after notice (Bhatnagar & Mishra, 2009). A more far-reaching form of third-party liability would include the obligation to control third-party content before publication, which would effectively make impossible many social media platforms which allow users to publish content such as text, photos, and videos. In Germany, there have been contradicting court rulings on this issue (Niggemeier, 2008).

To avoid holding third parties responsible, it has been suggested to diminish anonymity online, e.g. by requiring users to log in with an ID card. A similar goal has been pursued with the EU data retention directive, which mandates storage of IP addresses that can be used to trace down Internet users. The national data retention laws, however, have been ruled unconstitutional in Germany (Bundesverfassungsgericht, 2010), Romania and Bulgaria. Schneier (2010) has argued that "[i]mplementing an Internet without anonymity is very difficult" and would necessitate extensive surveillance. He concludes that "the old ideas of identification don't work on the Internet".

Media regulation that aims at reinforcing privacy legislation on the Internet

in the same way it was done in the age of print is bound to heavily restrict freedom of expression. According to Feldmann (2010), online speech "has been discriminated against" already in Germany, where "[t]he privacy regime imposes restrictions on this form of self expression that appear to conflict with our constitutional free speech guarantee." Holding ISPs and platform operators liable for third-party content, or even abandoning anonymity, would only exacerbate this situation.

Balancing privacy and freedom of expression

The major challenge for media regulation is to strike a balance between the protection of privacy and freedom of expression. Yet in the wake of the changes new media has brought, it might be necessary to renegotiate the meaning and scope of these concepts in order to move on to a media regulation for the networked information environment.

Post-privacy advocates have argued in favour of abandoning the concept altogether. Heller (2007) posits the "positive Überwindung von Privatheit"¹ which would lead the way to a "transparent society" as conceptualized by Brin (cited in Heller, 2010). Jarvis (2010b) goes even further, claiming that not publishing information is "stealing from the public". Radical openness, Heller and Jarvis claim, will benefit society more than enforcing privacy.

Endnotes

¹ Ger.: positive overcoming of privacy.

References

- Associated Press. (2004). Geolocation: Don't fence the Web in. *Wired*. Retrieved from <http://www.wired.com/techbiz/it/news/2004/07/64178>
- Benkler, Y. (2006). *The Wealth of Networks: How Social Production Transforms Markets and Freedom*. New Haven: Yale University Press.
- Bhatnagar, H., & Mishra, V. V. (2009). ISP liability for third party copyright infringement: A comparative analysis for setting international standard norms. *Acta Juridica Hungarica* 50(1), pp. 59-83.
- boyd, d. (2008). *Taken out of context*. Thesis, University of California Berkeley.
- Brussee, R., & Hekman, E. (2009). Social Media are Highly Accessible Media. Paper presented at the WWW/Internet 2009, Rome.
- Bundesverfassungsgericht. (2010). Konkrete Ausgestaltung der Vorratsdatenspeicherung nicht verfassungsgemäß. Retrieved from Bundesverfassungsgericht: <http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg10-011>
- Currie, M. (2010). Felix Stalder: Free Culture vs. Culture Flatrates. *Economies of the Commons* 2. Retrieved from the Institute for Network Cultures: <http://networkcultures.org/wpmu/economics/2010/11/04/felix-stalder-free-culture-vs-culture-flatrates/>
- European Commission. Directorate-General for Trade. (n.d.). Anti-counterfeiting. Retrieved from the European Commission: <http://ec.europa.eu/trade/creating-opportunities/trade-topics/intellectual-property/anti-counterfeiting/>
- European Union. RAPID. (2010). All you want to know about the Anti-Counterfeiting Trade Agreement (ACTA). Retrieved from the European Union: <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/508&format=PDF&aged=0&language=EN&guiLanguage=en>
- Feldmann, T. (2010). Data Protection and Free Speech in Germany. Retrieved from The Center for Internet and Society at Stanford Law School: <http://cyberlaw.stanford.edu/node/6547>

- Heffernan, V. (2010). Prize Descriptions. *The New York Times Magazine*. Retrieved from <http://www.nytimes.com/2010/11/07/magazine/07FOB-medium-t.html>
- Heller, C. (2007). Post-Privacy als Utopie. Retrieved from futur:plom: <http://futur.plomlompom.de/archiv/1843/post-privacy-als-utopie>
- Heller, C. (2010). Christian Heller: Post-Privacy. Retrieved from Lift: <http://liftconference.com/lift10/program/talk/christian-heller-post-privacy>
- Jarvis, J. (2010a). The German privacy paradox. Retrieved from BuzzMachine: <http://www.buzzmachine.com/2010/02/11/the-german-privacy-paradox/>
- Jarvis, J. (2010b). The German paradox - privacy, publicness, and penises. [Video]. Retrieved from <http://www.youtube.com/watch?v=pSqyEXLkrZ0>
- Kitiyadisai, K. (2005). Privacy rights and protection: foreign values in modern Thai context. *Ethics and Information Technology* 7, pp. 17–26. DOI 10.1007/s10676-005-0455-z
- Kryazhev, A. (2010). Blogs and Mass Media. [Panel at InterMedia, 2nd International Youth Innovation Forum Interra, 2010, September 24].
- Lechtholz-Zey, J. (2010). The Laws Banning Holocaust Denial. Retrieved from Genocide Prevention Now: <http://www.genocidepreventionnow.org/2010/06/laws-banning-holocaust-denial.html>
- Lessig, L. (2002). *The Future of Ideas*. New York, NY: Vintage Books.
- Lievrouw, L. A. (2002). Theorizing new media: A meta-theoretical approach. *MedienJournal*, 3, pp. 4-13.
- Niggemeier, S. (2008). Callactive ./. Niggemeier III. Retrieved from Stefan Niggemeier: <http://www.stefan-niggemeier.de/blog/callactive-niggemeier-iii/>
- Olinger, H. N., Britz, J. J., & Olivier, M. S. (2005). Western privacy and ubuntu - influences in the forthcoming data privacy bill. In P. Brey, F. Grodzinsky, & L. Inrona (Eds.), *Ethics of New Information Technology - Proceedings of the Sixth International Conference of Computer Ethics: Philosophical Enquiry (CEPE2005)*, pp. 291-306. Retrieved from <http://mo.co.za/abstract/ubuntu.htm>
- Palme, J., & Berglund, M. (2002). Anonymity on the Internet. Retrieved from Stockholms Universitet: <http://people.dsv.su.se/~jpalme/society/anonymity.html>

- Press Freedom Index 2010*. (2010). Retrieved from Reporters Without Borders:
<http://en.rsf.org/press-freedom-index-2010,1034.html>
- Privacy International. (2004). Overview -- Privacy and Free Speech. Retrieved from Privacy International:
[http://www.privacyinternational.org/article.shtml?cmd\[347\]=x-347-65427](http://www.privacyinternational.org/article.shtml?cmd[347]=x-347-65427)
- Pursch, G., & Bär, V. (2009). *Sperrverfügung gegen Internet-Provider*. Retrieved from netzpolitik.org: http://netzpolitik.org/wp-upload/bundestag_filter-gutachten.pdf
- Ranum, M. (2010). Schneier-Ranum Face-Off: Should we ban anonymity on the Internet? *Information Security*. Retrieved from http://searchsecurity.techtarget.com/magazineFeature/0,296894,sid14_gci1380347,00.html
- Schneier, B. (2010). Schneier-Ranum Face-Off: Should we ban anonymity on the Internet? *Information Security*. Retrieved from http://searchsecurity.techtarget.com/magazineFeature/0,296894,sid14_gci1380347,00.html
- Shirky, C. (2008). *Here Comes Everybody: The Power of Organizing Without Organizations*. London: Penguin Books.
- Smith, H. J. (1994). *Managing privacy: information technology and corporate America*. Chapel Hill: The University of North Carolina Press.
- Universal Declaration of Human Rights*. (n.d.) Retrieved from the United Nations:
<http://www.un.org/en/documents/udhr/>
- U.S.-European Union Safe Harbor*. (n.d.) Retrieved from the U.S. Department of Commerce: http://www.export.gov/safeharbor/eu/eg_main_018365.asp
- Volokh, E. (1999). *Freedom of Speech, Information Privacy, and the Troubling Implications of a Right to Stop People from Speaking About You*. Retrieved from The Independent Institute:
http://www.independent.org/pdf/working_papers/14_infomation.pdf
- Wardrip-Fruin, N., & Montfort, N. (Eds.). (2003). *The New Media Reader*. Cambridge, MA: The MIT Press.