Legislation & Jurisdiction

Nico van Eijk

Regulating Old Values in the Digital Age

"Nieuwe wijn in oude zakken": New wine in old bags. This Dutch saying, taken from the Bible[1], fully applies to regulating the Internet, the information age, the digital age, the World Wide Web, or whatever term one uses to indicate the fact that electronic communications are at the core of our present society (for practical reasons I will stick to the term "the Internet"). It's new wine in old bags.

What is meant by this? This paper will try to make clear that the Internet is not something that changes fundamental rights such as freedom of information. Freedom of information includes the right to receive and impart information as it has been defined throughout history and – within a European context – has been included in national constitutions and international treaties such as the European Convention on Human Rights. These old values – the old bags – are the foundations of society and should not be called into question because someone is pouring in a new wine called Internet.

The Internet is primarily a technology, a network enabling communications. The Internet is not something that changes the world. It's people who cause change by using technologies. It is quite common to fall into this trap of idolizing technological progress. Just to give an example: there is this book from the 1970s, which is full of beautiful predictions about the benefits of interactive cable television networks: free choice, new services, active participation of citizens, contribution to

1 Matthew 9:17: "Neither do you put new wine into old wine-skins."

further democratization, and so on. None of these were realized with the creation of cable television networks. Just recently, a huge amount of money was spent in the Netherlands to create a "Kenniswijk" ("Information-rich Neighbourhood").[2] A part of the city of Eindhoven was to get high-speed Internet access (by building a fibre network that reached all the way to individual homes[3]) and strong support for the introduction of new (Internet) services. Introducing fibre turned out not to be a financially viable option and hardly any new service materialized. During a presentation of the project, information was given about one of those so-called innovative services: a babysitter who could watch six children in six different apartments at the same time using web cams. When I asked what would happen if two children got sick at the same time, there was no answer…

The following three examples, rather randomly picked, further illustrate the dilemma. The issues discussed are a) the confusing notion of Internet governance, b) the "evils" of search engines and c) the risk of technology-neutral regulation.

Internet Governance. "Internet governance" is one of the most abused concepts. For some, it relates to the position of ICANN[4], responsible for managing the underlying structure of the Internet, in particular regarding the assignment of domain names. Others see it as a legitimation for extensive governmental influence on the content of the Internet. The recent World Summit on the Information Society conference (WSIS, held in Geneva in December 2003) is a good example of what can go wrong, despite the fact that it ended with a rather balanced Declaration of Principles and Plan of Action.[5] Originally set up by the International Telecommunications Union (ITU) to strengthen its own position, the conference somewhat back-

fired and produced lengthy political statements, sketching all the dangers and risks of the Internet and aiming for more state control over content – clearly a different interpretation of "Internet governance".

It's surprising to see how much this WSIS "thing" appears to be a replica of discussions that took place in the 1970s and 1980s about satellites. Satellites would change the world and lead to new ways of spreading knowledge, but were also seen as a threat. Borders would disappear, allowing for propaganda from capitalists or communists to indoctrinate innocent citizens. Marshall McLuhan preached his global village and UNESCO published the McBride report *Many Voices, One World,* proclaiming a "New World Information and Communication Order (NWICO)"[6]. In this environment, countries receiving satellite signals wanted prior control over satellite content and nations around the equator were claiming ownership of satellites in orbital positions above their countries.

We should try not to make the same mistake with the Internet. Let's not create unnecessary global involvement or claim new technological developments are reason enough for political intervention. There is little need for global regulation of the Internet. It takes away attention from the real underlying

2 <www.kenniswijk.nl>

3 Also called "Fibre to the Home" or FttH.

4 <www.icann.org>

5 World Summit on the Information Society, Declaration of Principles, Document WSIS-03/GENEVA/DOC/4-E, Geneva, 12 December 2003; Plan of Action, Document WSIS-03/GENEVA/DOC/4-E, Geneva, 12 December 2003. Documents can be found at <http://www.itu.int/wsis/>

6 Unesco, *Many Voices, One World* (Paris: Unesco, 1980). On the relationship between the WSIS and the McBride Report, see for example: Claudia Padovani, "Debating communication imbalances: from the MacBride Report to the World Summit on the Information Society, An application of lexical-content analysis for a critical investigation of historical legacies", Social Science Research Council at <http://www.ssrc.org/programs/itic/publications/knowledge_report/memos/Padovanimemo4.pdf>

fundamental problems – the traditional paradigm shift from goals to means – thus creating the risk of ending up with less protection of the freedom of information. And let's not forget: the whole satellite discussion ended with hardly any global regulation. Satellites are mostly dealt with on the national and regional level. There is no specific global jurisdiction on information distributed by satellites. Ultimately the international community was able to handle most issues based on the existing system of fundamental rights. It took some time to realize this, however.

Search Engines. Search engines are a second case that can be used to underline the need for sticking to existing values. The most popular search engine, Google, became a public company.[7] Out of nothing, a 27 billion euro company was created. But with what kind of services does Google intend to make money? Well, its main activity is selling the attention of end-users to advertisers. It does so by showing advertising that matches the searches of its users. It is a good thing that Google is not hiding this: several other search engines prefer not to disclose their commercial approach. However, there is one big question: How does Google's search engine actually work and what happens in the black box that generates search results? This is an important issue, because Google is a dominant gateway to information. Nowadays, electronic content can't be found without using search engines. In a way, they replace library indexes and other existing search facilities.

How exactly search engines make their selection is still a big mystery. Like Microsoft Windows, the source code of Google is not public and we have to rely on what Google tells us about its functions. For example, the brochure of the public offering first mentions the fact that Google gives "relevant and useful

information" and that it "only takes the interests of users in mind", but that on the other hand a search might also result in "pertinent, useful commercial information". It is common knowledge that there are ways to get your website on the first search page. Not so long ago Google was manipulated and the words "funny hair" were linked with the web page of the Dutch Prime Minister, Jan Peter Balkenende. There are other examples of these so-called Google bombs. Some time ago typing in the question "Who is more evil than the devil?" would give "Microsoft" as a search result. Google tries to fight these manipulations. One could say that in such a case, Google is manipulating the manipulation. But how Google really works remains a well-kept mystery. The examples cited so far are rather innocent, but what about these two: Google has entered into negotiations with one of the largest scientific publishers, which – if correctly interpreted – might result in a situation where users are directed towards paid publications instead of towards free versions of the same publications (published by the researchers themselves).[8] Secondly, search engines accessible from China are configured to produce politically correct results.[9]

Search engines directly or indirectly influence the freedom to receive and impart information. They facilitate access to information, but at the same time can foreclose the access to information. Search engines can be manipulated by the operator, providers of information and those who retrieve information. Artificial search results can be created and end-users are – for commercial or ideological reasons – directed toward specific information. The users are left in the dark. Fortunately, the impact of search engines is receiving more attention. In Germany,

7 <http://www.google-ipo.com/> or <http://www.google-watch.org/goo-s1.zip>

8 "Reed and Google in talks to share revenue", *The Observer*, 19 September 2004.

9 <http://www.google-watch.org/china.html>

a special non-profit organization has already been created for the promotion of search engine technology and free access to information. In German it sounds even more impressive: "Gemeinnütziger Verein zur Förderung der Suchmaschinen Technologie und des freien Wissenszugangs" (SuMa-eV).[10] This organization wants search engines to be "free, versatile, and non-monopolistic". Another critical follower of search engines is www.google-watch.org.

To prevent the erosion of access to information as a basic value, the application or modification of existing legislation could be an option. For example, consumer protection regulation might oblige search engines to inform end-users about the way they operate. Or they could be obligated to make the source code public. Moreover, it might be advisable to give the public policy aspects more emphasis by making available transparent public facilities similar to transparent public library indexes or comparable facilities that offer an alternative to the commercially available services. Even the WSIS Action Plan recognizes the importance of this issue when it states the need to "h) Support the creation and development of a digital public library and archive services, adapted to the Information Society, including reviewing national library strategies and legislation, developing a global understanding of the need for 'hybrid libraries', and fostering worldwide cooperation between libraries."[11]

Technology-Neutral Regulation. The third example concerns the notion of technology-neutral regulation as a goal in its own right. A lot of legislation and regulation which attempts to reflect underlying values is based on static technological concepts. Nonetheless, these technological concepts evolve. Old ones sometimes disappear (the telegraph), others get new functions (film), and new ones are added (CD, DVD, the Internet).

Because of this process, legislation often lags behind new developments. Existing legislation no longer works or it creates all kinds of complexities. For example, in some countries the regulation of television depends on whether or not a screen is involved. This automatically makes television regulation applicable to computer screens and therefore to the Internet.

It is often said that in this new information age, we should no longer make a distinction between technologies. In principle, such an approach is good. However, the question then arises: What kind of regulation should apply to the Internet? For example, should the "telecom model" (known for the absence of content control) be used or are we better served with the "broadcasting model" (known for its content regulation)? If this is the real question, the outcome is clear: with the increasing importance of the Internet as an information resource, one may expect that more and more elements of the broadcasting model will enter the arena of Internet regulation, certainly when the Internet becomes a substitute for traditional broadcasting reception. However, this question is based on a false proposition. A technologically neutral approach should be based on the catalogue of fundamental rights. This could mean that regulation will not always be technologically neutral, but will partly depend on the technology used. This is nothing new. For example, take the jurisprudence of the European Court for Human Rights. It gives more freedom to certain types of expression in a closed, private environment such as a theatre or gallery than to expressions that are located in areas without restrictions and accessible to an undefined audience. In such a case, the regulation is not technology-neutral, but the underlying fundamental right is.

10 <http://www.suma-ev.de>

11 Page 4.

Conclusion. Many more examples can be given. In a rather fragmented way, this paper has tried to illustrate that there are a lot of questions and tensions surrounding the regulation of the Internet.

First of all, most of these derive from the fact that often things are turned upside down. We think the Internet is something special and make it our point of departure for regulatory intervention or non-intervention. It should be done the other way around. The source of inspiration should be basic constitutional values, such as the freedom of information and its interpretation in jurisprudence. These values are a "living instrument" allowing us to interact with the factual circumstances, resulting in tailor-made regulation where necessary.

Secondly, the Internet has grown up and lost its innocence. The old idea of the Internet being a (or even "the") place for free exchange of ideas and opinions should be looked at in a more realistic way. This has been illustrated with the example of search engines. These gateways to the information available on the Internet are not neutral or objective, but can be a source of serious manipulation. The borders between use and abuse are seriously blurred. Regulation can be an adequate instrument to increase transparency.

Thirdly, the rather unregulated environment of the Internet also has led to a "control vacuum", which has translated into a substantial "governance" issue, where powers are being claimed that do not match with the basic constitutional values. However, lessons can be learned from the past where new technologies (satellites) were seen as a legitimation for the introduction of new governmental control over content. These attempts largely failed. There are no reasons to make the same mistakes again with the Internet.

Morris Lipson

In the Name of Protecting Freedom of Expression: Rejecting the Wrong Rule for Liability for Internet Content

It might be thought that publishing content over the Internet is pretty much like publishing material in a newspaper. As this paper explains, courts in particular have been tempted to think so. However, this fact, in combination with the fact that restrictions on the publication of content vary widely from jurisdiction to jurisdiction, yields the result, probably unintended, of a very significant threat to freedom of expression. This paper describes that threat, and recommends a way of avoiding it.

A Range of Content Restrictions. Different national and subnational legal regimes, often supported by international instruments, have content restrictions on publication (not to say, expression more generally) which may differ quite considerably. The consequence is that the publication of material in one jurisdiction, perfectly legal and non-actionable there, may well be subject to criminal or civil liability in other jurisdictions. For the purposes of what follows, I will restrict my attention to variations in restrictions on hate speech and defamation, though the points made in this paper apply with equal force to other (varying) content restrictions: on obscenity or pornography, blasphemy or sedition, among others.

Take hate speech first. In the United States, it is well settled that the publication of racially vilificatory material is protected under the First Amendment of the United States Constitution unless it is directed to inciting or producing imminent

lawless action and is likely to incite or produce such action.[1] This is a very high threshold: publications which cast clear and vulgar aspersions on racial groups, which express the strong desire that certain groups be deported or eliminated altogether, are protected unless it can be shown that they are intended to produce violence and in fact are likely to produce such violence imminently. In the United Kingdom, the test for restricting certain racial content is the substantially weaker one of whether the challenged speech is intended to stir up racial hatred and "is likely" to stir it up. By the terms of the applicable statute, at least, no showing needs be made of the *imminence* of any allegedly likely violence, or indeed of any likely *violence* at all.[2] Again, jurisdictions including Austria, France and Germany have blanket restrictions on Holocaust denial. Finally, broad and potentially far-reaching bans are common: to take one example, Article 156 of the Criminal Code of Uzbekistan prohibits the premeditated "insulting [of] citizens' feelings … committed with the purpose of … agitating … intolerance or separation between groups [which are distinguished racially or ethnically]".[3]

It must be said that international instruments reflect a far from consistent approach to what sort of expression may be prohibited as hate speech. Article 20(2) of the International Covenant on Civil and Political Rights requires the enactment of national legislation which prohibits only the advocacy of racial hatred "that constitutes incitement to discrimination, hostility or violence". In contrast, Article 4(a) of the International Convention on the Elimination of All Forms of Racial Discrimination prohibits not only the incitement of racial discrimination, but also the dissemination of "ideas based on racial superiority or racial hatred". The Additional Protocol to the Convention on Cybercrime goes even further, in both directions so to speak, in that it invites Parties to enact prohibitions which can be very broad (for example, on the mere "dis-

tribution" of racist material through a computer system [Article 3], or on the public insulting of persons "for the reason that they belong" to a racial or ethnic group [Article 5]); but it also permits Parties to opt out of these provisions (or effectively to do so). The effect is explicitly to recognize and mandate substantial differences in restrictions on hate speech.[4]

Similar, and similarly dramatic, variations in criminal defamation laws exist across jurisdictions. In Azerbaijan, for instance, you can be imprisoned for as much as two years if you defame someone, and you can go to prison for as much as six months just for insulting them.[5] Many countries have special, and particularly objectionable from the point of view of freedom of expression, criminal penalties for insulting the President or other heads of state, or for insulting public institutions or even national flags; enhanced criminal penalties are often a part of such regimes.[6] In many countries, prosecutions

1 *Brandenburg v. Ohio*, 395 US 444 (1969).

2 1986 Public Order Act, Section 18.

3 The European Court of Human Rights has found on numerous occasions that a similarly broadly-worded provision in the Turkish Criminal Code has been employed to restrict expression which is protected under Article 10 of the European Convention on Human Rights. See e.g., *Okcuoglu v. Turkey* (8 July 1999, Application No. 24246/94); *Karatas v. Turkey* (8 July 1999, Application No. 23168/94).

4 It is perhaps worth noting that, at the time of writing, there are 23 signatories to the Additional Protocol, but there have been no ratifications.

5 Articles 147 and 148, respectively, of the Criminal Code of 2000.

6 For instance, the Criminal Code of Albania prohibits intentionally insulting: "an official acting in the execution of a state duty or public service, because of his state activity or service" (Article 239); "an official acting in the execution of a state duty or public service, because of his state activity or service" (Article 240); "the President of the Republic" (Article 241); "a judge or other members of trial panel, the prosecutor, the defence lawyer, the experts, or every arbitrator assigned to a case because of their activity" (Article 318); "prime ministers, cabinet members, parliamentarians of foreign states, diplomatic representatives, or [representatives] of recognized international bodies who are officially in the Republic of Albania" (Article 227); and "the flag, emblems or national anthem of foreign countries and international organizations" (Article 229). It is well to point out that this sort of enhanced coverage is precisely the opposite of what international law requires, recognizing as that law does that public officials should be required to accept more, rather than less, criticism. See e.g., *Lingens v. Austria* (8 July 1986, Application No. 9815/82) para. 43; *Thoma v. Luxembourg* (29 March 2001, Application No. 38432/97) para. 47.

under such laws occur with alarming frequency. On the other hand, however, some jurisdictions, such as Bosnia and Georgia, have actually abolished criminal defamation provisions altogether. And other countries which have criminal defamation on the books have not seen prosecutions under such provisions for many years.[7]

To repeat the principal point thus far: A racial comment, or a critical comment about a public official, may be fully protected in one jurisdiction, while at the same time sanctionable by the criminal regimes (or actionable in the civil regimes) of other jurisdictions. Indeed, some jurisdictions support the punishment, either criminal or civil, for expression which is almost certainly protected under the international law of freedom of expression.

The Newspaper Rule for Assessing Liability in Foreign Jurisdictions. Consider the situation of a newspaper publisher, facing the fact that content in his or her newspaper may not constitute illegal or civilly actionable expression in the jurisdiction where the newspaper is typically read, but would be punishable or civilly actionable in other jurisdictions. To set the stage for the special problem posed for Internet publishers by the variation of content restrictions across jurisdictions, let us ask the following: *Would the newspaper or the editor be legally liable in the event that the article in question finds its way into one of the latter jurisdictions?*

The answer is: it depends. Note, first, that publishers, particularly those whose newspapers cross national frontiers, have well-established distribution networks. Newspapers are shipped throughout the newspaper's home country, and abroad as well, to vendors who have sales arrangements with the newspaper, and to individual subscribers.

In these cases, it is highly foreseeable to the publisher that copies of the newspaper will find their way to these foreign vendors and subscribers and will be read in those jurisdictions. Indeed, it is not only foreseeable – the publisher fully intends that copies of the newspaper be sent to and read in those jurisdictions. Under these circumstances, it is appropriate, and courts and other tribunals have not hesitated in concluding, that if the newspaper contains material falling under a hate speech ban, or if it is defamatory, in one of the jurisdictions to which copies are sent, the newspaper and publisher (and perhaps others affiliated with the newspaper) will be liable for that content in that jurisdiction.[8]

This situation, which makes reasonable sense, is to be sharply distinguished from the situation in which a newspaper with certain problematic content finds its way by accident, so to speak, into a jurisdiction in which such content is illegal, notwithstanding that the content is legal in all the jurisdictions of the paper's distribution network. For example, a tourist from Uzbekistan purchases a newspaper published in the United States at LaGuardia Airport in New York. It contains racially vilificatory material relating to an ethnic community in Uzbekistan. The tourist drops the newspaper on a seat in the arrivals lounge at Tashkent airport where it is picked up by an airport employee who takes it home with her and reads it there. The newspaper has no subscribers or vendors in Uzbekistan. The reader finds the material offensive, takes it to the authorities who determine that it is illegal racist content under Article 156 of the Criminal Code, and they prosecute the publisher.

7 A similar variation can be seen in civil defamation regimes.

8 See e.g., *Shevill v. Presse Alliance S.A.*, Case C-68/93 (1995) 2 A.C. 18; *Berezovksy v. Michael* (2000) 2 All ER 986 (both relating to defamation, but usefully illustrating the general principle).

It is quite clear that in this circumstance, the publisher should not be held liable, and in most jurisdictions would not be so held. Why? Because it was not reasonably foreseeable by the publisher that the newspaper would be read in Tashkent; the publisher took no steps at all to get the newspaper to that jurisdiction and had no control over the fact that it would end up there. Under these circumstances, courts would hold that, in fact, the newspaper *was not published* in that jurisdiction; and on that basis would not impose liability on it there.

This hypothetical situation illustrates what I would like to call the "newspaper rule" for liability for newspaper content. According to this rule, a publisher is legally liable for content deemed illegal or otherwise actionable by a given jurisdiction as long as two conditions are met: (1) a copy of the newspaper actually reaches the jurisdiction and is read there; and (2) the publisher had reason to know that the newspaper would probably be read there – because, most prominently, the jurisdiction is in the distribution network of the newspaper. This liability rule, most crucially, imposes liability in every place in the newspaper's distribution network *where the newspaper is read, regardless of where it is produced or where the content was written.*

Applying the Newspaper Rule to Internet Publications. Publication on the Internet is fundamentally different from publication by newspaper, in ways directly relevant to the newspaper rule. Suppose someone writes an article with racial content. It is written in the United Kingdom, uploaded and stored there on the author's website. The author knows, or should know, that the moment that the material is posted on his website, it is instantly accessible by virtually any person virtually anywhere in the world.[9] To put it another way: fun-

damentally unlike the typical newspaper, the Internet makes virtually every person with Internet access *within the distribution network* of any Internet publisher. And, equally crucially, this is a fact which virtually every Internet user knows, or should know.

What, therefore, if we employ the newspaper rule for fixing liability for materials posted on the Internet? It's simple really: (1) since the newspaper rule subjects a newspaper to potential liability for any content actionable in any jurisdiction within its distribution network, (2) since virtually every place with a computer connected to the Internet is within the distribution network of every website, then (3) application of the newspaper rule to Internet publication subjects an Internet publisher to liability *in virtually every jurisdiction in the world.*

As we have already seen, however, different jurisdictions have radically different content restrictive regimes; some have restrictions on allegedly defamatory material, or on allegedly racist material, which go far beyond what is permissible in one's home jurisdiction. Some, indeed, have restrictions which are not mandated by the international law of freedom of expression. Yet, if the newspaper rule is also the rule for Internet publication, the Internet publisher would be "legitimately" liable for content which is legal and protected in his or her home jurisdiction (and which might also be protected by international law), as long as (1) it is prohibited in a jurisdiction which has Internet access and (2) someone actually downloads it there.

9 I say "virtually" for two different but related reasons. First, if I have sophisticated technical skills and some software, I can restrict access to my website, for example, only to persons who have taken out a subscription. In that case, only persons of whom I have knowledge (or should have) will have access to the site. At the other end, there may be some form of sophisticated blocking or shielding software employed by a particular server which would prevent access to my website, or to the particular content in my article on that website, for any would-be user attempting to gain access employing that server. These, however, are relatively exceptional situations.

Some Cases. Surprisingly, to some at least, it would appear that the trend has indeed been to apply the newspaper rule to Internet publication. There is, for example, the attempted prosecution of Frederick Toben, who had posted material denying the Holocaust on a website in Australia. Toben was arrested in 1999 on a visit to Germany and was tried there, in part for inciting racial hatred. That part of the prosecution was based on the fact that the materials on his website had been downloaded in Germany. The trial court had dismissed the charge because the offending materials "existed" outside Germany, but the *Bundesgerichtshof* reversed, holding that German laws prohibiting the glorification of the Nazi party could be applied to materials situated outside Germany as long as they were downloaded within the jurisdiction.[10]

A defamation case brought in Australia applied similar reasoning. *Dow Jones & Company Inc. v. Gutnick*[11] concerned the uploading by the *Wall Street Journal* of a story which made critical comments about Gutnick, an Australian businessman. The story was written in the United States, and was uploaded and stored on a computer there. Gutnick downloaded the story in Australia, read it there, took offence and sued the *Wall Street Journal* for defamation in Australia. It is highly likely that the material in question would not have been found to be defamatory in the United States, but could well have been so found under the defamation laws of the Australian state where the download occurred. Again, the *Wall Street Journal* argued that publication occurred in the United States, where the material was uploaded and stored; Gutnick disagreed, arguing that publication occurred where download occurred – in Australia. At a crucial point in its reasoning, the court wrote that "those who post information on the World Wide Web do so knowing that the information they make available is available to all

and sundry without any geographic restriction". The court's point appears to be that in this respect the same applies to Internet and newspaper publishers. As newspaper publishers know about and control their distribution networks and have full knowledge of where the content of their newspapers is likely to be read, it is appropriate to impose liability on them for any content found problematic anywhere in their distribution networks. In the same way Internet publishers have full knowledge that the reach of the materials they publish is everywhere (that is, the whole world is in their distribution network), and therefore imposing liability in any jurisdiction in which the material is downloaded is entirely proper. On this basis, the court took the case.

Conclusion. Applying the newspaper rule to Internet publication subjects Internet publishers to the content restrictions of virtually every country on earth, regardless of whether such content restrictions exist in the jurisdictions where such publishers live,[12] and regardless of whether the foreign restrictions comply with the international freedom of expression standards. Application of the newspaper rule will subject persons living in regimes whose laws fully protect freedom of expression to the laws of regimes which regularly censor, and whose public officials otherwise keep a stranglehold over the press

10 See "German Hate Law: No Denying It", available at <www.wired.com/news/politics/0,1283,40669,00.html>. Another case of the same ilk involved Yahoo!, Inc., which operated an automated online auction site from the United States. Nazi memorabilia were offered for sale on the site – perfectly legally in the United States, but illegal in France. Persons in France were able to access the site. The French Union of Jewish Students brought suit against Yahoo! for violating France's prohibition on Holocaust denial. The French court found a basis for taking jurisdiction of the case based on the fact of the availability of the materials, by download, in France.

11 (2002) HCA 56.

12 As often as not, of course, Internet publishers are individuals, writing and working from their own homes and uploading their materials on their home personal computers.

and others by the use and abuse of content-restrictive laws. Of course, this may not be a particularly fearsome prospect for those Internet publishers who do not expect ever to find themselves in jurisdictions far from home where they may be subject to suit. On the other hand, it may well cause a great many persons to think twice before uploading material protected "at home" because of what may happen to them when they travel abroad.[13] The potential for the chilling of expression, in other words, is considerable.

A full respect for freedom of expression requires a different treatment for Internet publication. The Internet, as has often been noted, is a liberating tool, a tool with which ordinary individuals can reach out across the globe to communicate with others on matters of concern to them. It is a means of transcending borders and differences. Yet, a rule which catapults the unknown laws of unknown places into the communication space of persons living in freedom-protecting countries has precisely the opposite effect: of stifling expression for fear of legal – often criminal – liability abroad.

It may not be perfectly clear what the precisely right liability rule for Internet publication is. Perhaps it is to impose liability only where material uploaded is actionable in the jurisdiction of upload. Perhaps it is to impose liability in those jurisdictions where materials are downloaded provided that the author is "substantially connected" to the download jurisdiction. But what is certain is that, in the name of freedom of expression at least, *the newspaper rule must not be the rule of liability for Internet publishers.*

13 Not to mention the simple fact that many Internet publishers will not wish to face the possibility of having criminal convictions or civil judgements entered against them in foreign jurisdictions even if they have no intention of travelling there, and even if such judgments would not be enforceable in their home jurisdictions.

Lee Hibbard

Internet with a Human Face – A Common Responsibility*

Introduction

- The right to freedom of expression for the purposes of Article 10 of the European Convention on Human Rights (ECHR) is a fundamental guarantee for media freedom. This freedom is "technology neutral" and therefore remains unchanged by the Internet as an important tool in informing and shaping public opinion by providing information which has been gathered and processed in accordance with professional standards in order to scrutinize public authorities and other power holders in society.
- The Council of Europe considers that "independent, professional journalism adhering to ethical standards will not be less important in the Information Society than before. The provision of relevant, timely and well-researched information by media professionals will continue to be essential in laying the foundations of an informed public debate about current affairs and public policy."[1]
- The Internet has, however, brought about greater media speed and greater volumes of information to the public via the media and has also multiplied the number of Internet (new media) actors which can be argued to threaten both

* This paper reflects the views of the author and not necessarily those of the Council of Europe.

1 Paragraph 14, "Democracy, human rights and the rule of law in the Information Society" – Contribution by the Council of Europe to the second Preparatory Committee for the WSIS (February 2003).

the quality of information by the Internet and, as a corollary, the future of traditional and electronic media. Both the speed and the volume of information on the Internet and the arguable lack of transparency in decisions made regarding Internet content call for particular care to be taken by (media) content producers and disseminators, notably in order not to harm human dignity and the rights of individuals, especially minors.

Freedom of Communication on the Internet and the Media

- The Council of Europe is particularly concerned about the right to freedom of information and to receive and impart information and ideas without interference by public authorities for the purposes of Article 10 ECHR. The Organisation believes therefore that attempts to limit public access to communication on the Internet for political reasons or other motives are contrary to democratic principles.
- In the 2003 Declaration on the freedom of communication on the Internet, the Council of Europe member States made several important declarations which positively affect media freedom on the Internet *inter alia*:

  a. member States should not subject content on the Internet to restrictions which go further than those applied to other means of content delivery (Principle 1),

  b. self-regulation and co-regulation is encouraged (Principle 2),

  c. public authorities should not – through general blocking or filtering measures – deny access by the public to information, regardless of frontiers (Principle 3),

d. fostering access to the Internet and the active participation of the public on the Internet is important (Principle 4),

e. freedom to provide services via the Internet (Principle 5) should not be restricted,

f. the importance of limits on the obligations (liabilities) of service providers for Internet content, coupled with the introduction of co-responsibility (Principle 6),

g. the principle of anonymity *inter alia* in order to enhance freedom of expression (Principle 7).

- These principles, adopted by Council of Europe member States, reinforce the importance of freedom of expression and information while at the same time stressing a more limited role for member States in controlling such (media) freedoms on the Internet. These principles empower the (new) media in regulating themselves on the Internet and should inspire them to take an active and participatory role in promoting the wider democratic participation of individuals in public life with the help of interactive new technologies.

Council of Europe Legal and Political Instruments

- The Council of Europe has developed a series of international legally binding instruments directly and indirectly concerning the Internet. These include the Convention on Cybercrime (CETS 185) and its Additional Protocol[2], Convention for the protection of individuals with regard to automatic processing of data (CETS 108) and its Additional

2 Convention on Cybercrime (CETS 185) which *inter alia* criminalizes new types of crime using information communication technologies, and its Additional Protocol concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (CETS 189) which is a reaction to highly offensive material that undermines human dignity (thereby displaying a zero tolerance attitude to such content).

Protocol[3], all of which reflect the belief that cyberspace is not a lawless area in which member States have an obligation to uphold the law, using their national laws, in order to protect individual rights and freedoms.

- This is reinforced by a series of politically binding instruments[4] positively regulating the media environment with regard to the media and violence, the media and video games (games being considered as a form of "mass media") and, more recently, regarding new media and the right to reply which is currently under preparation as a Council of Europe Recommendation.
- Moreover, the Council of Europe has produced a series of political (non-legally binding) statements[5], and more recently has consolidated its position with regard to the Information Society for the purposes of the World Summit on the Information Society (WSIS) by underlining *inter alia*:
  a. respect the rule of law on the Internet: "the Rule of Law will be a reality when state regulation, co-regulation and self-regulation work together under national legislation and international standards to build a clear regulatory framework in full respect of Human Rights";[6]
  b. the importance of quality information on the Internet as barriers fall and "public authorities try to support citizens in reaching for reliable and comprehensive information through all media";[7]
  c. the vital role of the traditional media, including local and community radio, in programming, producing, and distributing diverse, high-quality content in the Information Society and providing moderated platforms for public debate.[8]

- These legal instruments and political statements impact directly and indirectly on media freedom on the Internet and provide clear proof of the commitment of Council of Europe member States to promoting all media, including new media, as responsible, professional and independent.

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3 Convention for the protection of individuals with regard to automatic processing of data (CETS 108) and its Additional Protocol regarding supervisory authorities and transborder data flows (CETS 181) which calls for *inter alia* national data protection laws that strike a fair balance between respect for privacy of individuals and the free flow of information between peoples.

4 Recommendation (97)19 concerning the (determination of responsibilities for the) portrayal of violence in electronic media; Recommendation (92)19 on video games as mass media which concerns a review of member States' legislation regarding video games – as a form of mass media – containing racist content, discrimination, hatred and violence in order to protect young people; Recommendation (89) 7 of principles on the distribution (as well as regulation of systems of classification and control) of videograms having a violent, brutal or pornographic content which also includes references to various dissuasive measures and the application of criminal law; Recommendation (2001) 8 on self-regulation concerning cyber-content (self-regulation and user protection against illegal or harmful content on new communications and information services) which promotes the development of content descriptors, content selection tools, content complaints systems etc., in order to raise the levels on information and awareness of content.

5 Political Message from the Committee of Ministers of the Council of Europe to the World Summit on the Information Society (WSIS) (Geneva, 10–12 December 2003); 1999 Committee of Ministers Declaration on European policy for new information communication technologies which encouraged self-regulation and development of technical standards and systems codes of conduct; 1997 Council of Europe Summit called for "a European policy for the application of new information communication technologies with a view to ensuring respect for human rights (…) fostering freedom of expression and information (…)"; 1997 5th Ministerial Conference on Mass Media Policy on "the Information Society: a challenge for Europe", and its Action Plan encouraged *inter alia* self-regulation by providers and operators of new information communication technologies (e.g. codes of conduct etc.), the study of misuse of new information communication technologies in spreading ideology and activities contrary to human rights and thereby to formulate proposals or other (legal) action to combat such misuse, the examination of the opportunity and feasibility of establishing warning, co-operation and assistance procedures, and the study of practical and legal difficulties in combating dissemination of hate speech, violence and pornography.

6 Paragraph 13 of the Political Message from the Committee of Ministers of the Council of Europe to the World Summit on the Information Society (WSIS) (Geneva, 10–12 December 2003).

7 Idem, paragraph 4.

8 Idem, paragraph 5.

European Forum on "Internet with a Human Face – A Common Responsibility" (Warsaw, 26–27 March 2004)

- The title of my presentation bears the same title as the recent European Forum that was organized by the Council of Europe and the Safe Borders Consortium that was co-sponsored by the European Commission through its Safer Internet Action Plan – "Internet with a Human Face – A Common Responsibility" – which took place in Warsaw on 26 and 27 March 2004. This title evokes, in my opinion, the important need to visualize and to understand the Internet better in order for us all – including the media – to take greater responsibility for it.
- This Forum was one of the latest activities of the Council of Europe to address some of the challenges posed by the Internet, in particular as regards the protection of vulnerable groups such as minors regarding harmful content. The Forum concluded *inter alia* that cyberspace should not be a lawless area and that member States have an obligation to uphold the law in this field as well as others in order to protect individual rights and human dignity. Both national and international law are therefore of particular importance as is self-regulation and co-regulation of the media profession.
- The Forum was unable to resolve the quagmire regarding legal responsibility and jurisdiction for Internet content, and such legal uncertainty does not help to strengthen media freedom when faced with defamation proceedings. Instead, the Forum encouraged international co-operation across governments, other agencies, industry and advocacy groups, and emphasized the need for greater awareness raising, media literacy and a better understanding of (harmful) content. All of this underlines the fact that the Internet is a com-

mon and shared responsibility requiring a co-ordinated and strategic approach by embracing all Internet actors with the participation of all relevant media.

7th European Ministerial Conference on Mass Media Policy (Kiev, 10–11 March 2005)

- European media policy will be examined and developed in the light of the forthcoming European Ministerial Conference on Mass Media Policy, to be held in Kiev in March 2005, which will address *inter alia* human rights and regulation of the media and new communication services in the Information Society. On this occasion, it is quite clear that the results of the European Forum will be taken into consideration by the European Ministers in particular as regards the roles and (ethical) responsibilities of different Internet actors including the media and the (media) freedom of communication on the Internet.
- At the same time, the Organisation is aware of the potential of the Internet and the media and is currently addressing the impact[9] of the Information Society on the interpretation of human rights and their protection using the Internet and other means of electronic communication as part of the Council of Europe's contribution to the 2005 Tunis World Summit on the Information Society.

9 In considering any such impact, one member State is interested to know: (i) whether the right to freedom of expression applies equally to the old media as to new media operating on the Internet, (ii) whether regulation aimed at protecting minors from violent films applies equally to films broadcast on television as to films broadcast on the Internet, and, more broadly speaking, (iii) how should fundamental human rights, such as the right to respect for private life and the right to freedom of expression, be interpreted in a world that is becoming more and more digital?

Conclusions

- It is clear that the Council of Europe is a bastion of media professionalism and independence in Europe and that the 46 member States of the Organisation are committed to preserving and promoting the right to freedom of expression and information for the purposes of the "technology neutral" Article 10 ECHR.
- On the occasion of the 7th European Ministerial Conference on Mass Media Policy in Kiev in 2005 the media will (hopefully) reflect and reassert media freedom on the Internet. At the same time however, the media are independent and they must assert and (re?)position themselves to accommodate the growth in the number of media appearing on the Internet landscape.

The Media Freedom Internet Cookbook

- In the light of what I have considered in this report, my recommendations for *The Media Freedom Internet Cookbook* are quite straightforward:

  a. Promote media freedom (on the Internet) emanating from Article 10 ECHR and the case-law of the European Court of Human Rights as well as from relevant Council of Europe legal instruments and political declarations;

  b. Promote media integrity and professionalism on the Internet; this could be achieved indirectly by using the media to actively promote the public's use of interactive technologies and its participation in political life,

  c. Actively lobbying the WSIS process to promote professional media on the Internet,

d. Follow, endorse and, where possible, participate in the Council of Europe's ongoing work in the media, in particular as regards its intergovernmental work to be carried by its Group of Specialists provisionally entitled Group of Specialists on Human Rights in the Information Society (MM-S-IS),

e. Encourage self-regulation and co-regulation initiatives regarding the media and the Internet.