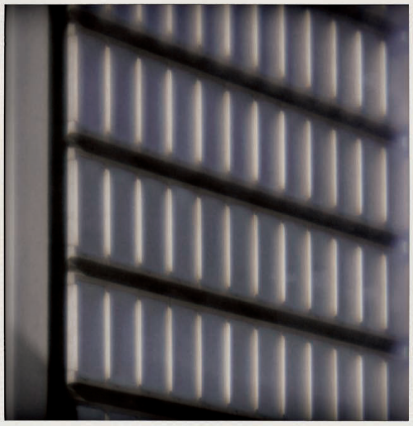
Critical Perspectives on the European Mediasphere



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Critical Perspectives on the European Mediasphere

The intellectual work of the 2011 ECREA European media and communication doctoral summer school

Ljubljana, 2011

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Who are you calling a journalist – can one form of communication command special protection?

Francis Shennan

1. Dis-United States

On 10 June 2011, West Virginia became the 40th US state to have a "shield law" come into force. This gives journalists almost absolute protection from prosecution for contempt if they refuse to disclose their confidential sources, or documents or other information which could identify those sources.

The protection applies in civil, criminal, administrative and grand jury proceedings. Disclosure of the sources can be compelled only if it is "*necessary to prevent imminent death, serious bodily injury or unjust incarceration*"[1].

West Virginia already had qualified protection for journalists' sources following the state Supreme Court's decision in the case of Hudok v. Henry[2].

The new law states:

> *Reporter means a person who regularly gathers, prepares, collects, photographs, records, writes, edits, reports, or publishes news or information that concerns matters of public interest for dissemination to the public for a substantial portion of the person's livelihood, or a supervisor, or employer of that person in that capacity.*

This definition puts West Virginia among a smaller group of states whose shield laws do not discriminate between the platforms or media employed by the "reporter". Two months earlier the Governor of Arkansas signed

1 H.B. 2159, adding §57-3-10, "Reporters' Privilege," to the Code of West Virginia.
2 Hudok v. Henry, 182 W. Va. 500, 389 S.E.2d 188 (1989).

into law a bill substituting the word '*media*' for the words '*newspaper, periodical or radio station*' and inserting the words '*television or Internet news source*' into its law on the disclosure of sources[3].

Yet three days before West Virginia's new law came into force, the Supreme Court of New Jersey rejected a blogger's claim to the protection of that state's shield law because the law required some connection to a publication that is similar to traditional media[4].

This has relevance for jurisdictions in Europe, where legal protections specific to journalists and journalism have been introduced in the last three decades. Prior to that, any legal protection in the United Kingdom, for example, for what we call journalism derived from the citizen's right to free expression. With the rise of mass communications, a concept of journalism, however defined, emerged, claiming distinction from other forms of communication in fulfilling a specific role in society. Yet the only legal protection or privilege attaching to it applied to reports of proceedings in Parliament and the courts if they were fair, accurate and contemporaneous reports.

In 1981, however, under the influence of the European Court of Human Rights, the UK introduced the first statutory right to protect sources for journalists. This right was strengthened through case law. There followed other recognition of the role of journalists: exemption from major provisions of the Data Protection Act for material held for 'literary or journalistic' purposes; the defence of fair dealing for reporting current events under the Copyright, Designs & Patents Act; exemption from regulation for financial journalists under the Financial Services & Markets Act; qualified privilege for news reporting laid down in the cases of Reynolds v Times Newspapers[5] and Jameel v Wall Street Journal Europe[6].

Until the late twentieth century, journalism was effectively limited to those with access to large-scale public communication, eg staff and freelance contributors to print and broadcast outlets. It was therefore assumed that what was called journalism could be clearly identified.

3 Arkansas Code § 16-85-510.
4 Too Much Media LLC v. Hale, 20 A.3d 364 (N.J. 2011).
5 Reynolds v Times Newspapers [1999] 3 WLR 1010 (HL).
6 [2006] UKHL 44

2. DIS-UNITED STUDIES

Socio-legal studies of journalism tend to split at the hyphen: sociological studies of the role of journalism and journalistic culture on the one side, and legal studies of the effect of legislation and litigation on the other. There have been brief studies on the definitions of 'journalist' but not of journalism per se.

Sociological studies have ranged across the role and culture of journalists, the history of journalism (Conboy, 2002, 2004), its perceived functions (McNair, 1998, 2000, 2003; Schudson, 2002), its news values (Harcup & O'Neil, 2001) and its part in agenda-setting (Walgrave & Aelst 2006) and the self-images and adopted roles of journalists and their modus operandi (Johnston, Slawski & Bowman, 1976; Wilhoit and Weaver, 1996; Weaver and Wu, 1998; Deuze, 2005). These have included the adaptation of journalists to new technology (Cottle and Ashton, 1999; Singer, 2004), news production (Tuchman, 1973; Gans, 1979) and journalistic processes (Becker and Vlad, 2009).

The legal focus has been on the existence and application of media law (Robertson and Nicol 2002) or critical examination of its effects (Walker, 2004). There have been brief studies of legal definitions of 'journalist', mostly in a US context (Clay, 1999) and mostly focusing on the right to protect sources (Berger, 2003; Abramowicz, 2008). Flanagan (2005) did examine the UK context and included consideration of the Data Protection Act and qualified privilege, but her focus was specifically blogging. Legal issues concerning "citizen journalism" were also raised by Rappaport and Leith (2007) in the US.

As well as these studies describe the practice and culture of journalists, though, it is uncertain that they come close enough to a definition of journalism to suggest a definitive test for a form of communication that should receive enhanced protection from actions by others to enforce what would otherwise be their legitimate legal rights. The predominantly descriptive role of legal studies fails to suggest a coherent jurisprudence as the basis for future regulation.

The gradual accumulation of legal rights attaching to journalists, allied to proliferating media, has left unanswered the question of who can call himself or herself a journalist. The development of the worldwide web and other technologies makes available cheap online publication and

broadcasting, including blogs, social networking sites, pod- and vod-casting. Some of these attract large audiences and some claim to be engaging in journalism.

Also unanswered is the question of whether the 'traditional' journalist is always a journalist. Is he or she entitled to these legal rights when he or she blogs, expresses opinions, or only when s/he fulfils a certain standard of journalistic behaviour? And what of those who employ journalists? The moral impetus of, and the legal rights won by, the media rest on their role as the Fourth Estate: essential guardians of the right to know and to free expression in a democratic society. Yet their business model has usually been that of the autocratic or corporate private-sector owner, free to direct editorial resources to find or disregard information, and espouse or suppress opinions in the light of personal or company advantage. This model also allows owners to direct resources away from editorial inquiries. Is this business model fully compatible with the legal rights enjoyed by the journalists they employ? Can an employed journalist exert any independence from his or her employer?

This in turn raises the question of whether existing studies provide satisfactory criteria for distinguishing the journalist from the non-journalist, or indeed what we call journalism from other forms of communication. And it raises the question of whether the criteria for deciding whom the law will recognise as a journalist is technological, occupational or functional.

3. TECHNOLOGICAL CRITERIA

The nineteenth and early twentieth centuries saw the print media develop from pamphlets and relatively short-run books to the mass production of books, newspapers and magazines. The twentieth century saw the creation and spread of mass broadcast media in radio and television. The late twentieth and early twenty-first centuries saw the widespread adoption of the Internet, the worldwide web, blogging, Twitter, texting, mobile video, print and video-on-demand, social media sites, e-commerce etc. This explosion in new media, technological platforms, devices and forms of communication – along with the radically different power structures that accompany them – have led some to postulate that the new media represent a new public sphere or Fifth Estate (Dutton 2009). Others argue that news is simply being delivered in different containers (van der Wurff 2008).

Although jurisdictions may distinguish between media in terms of regulation, eg Ofcom's responsibility for broadcast media other than the BBC in the UK, and the Federal Communications Commission's responsibility for terrestrial television in the US, they do not distinguish between them in relation to criminal or civil law.

Thus former New Zealand cricketer Chris Cairns was allowed to continue his libel action over a Twitter message posted by cricketing administrator Lalit Modi, even though an expert testified that only 35 people had seen it[7].

The basis for the New Jersey Supreme Court's decision on 7 June[8] not to extend shield law protection to blogger and private investigator Shellee Hale in a defamation case was that the state's law required a person using it to have a connection to a publication similar to traditional media, whether online or not.

Chief Justice Stuart Rabner said it did not mean

> *that a newsperson must be employed as a journalist for a traditional newspaper or have a direct tie to an established magazine. But he or she must have some nexus, relationship, or connection to 'news media' as that term is defined.*[9]

Jim Lakely, co-director of the Centre on the Digital Economy at Chicago's Heartland Institute policy research group, was quoted as saying in The Star-Ledger:

> *Putting aside the wisdom of shield laws, they should not exist to protect only certain classes of Americans a court defines as 'journalists.' Freedom of the press is not truly free if the definition of 'press' is left up to the whim of a judge*[10].

New Jersey media lawyer Bruce Rosen was quoted as saying in a Reporters Committee for Freedom of the Press story that the ruling should make it easier for traditional and online journalists to persuade a court the shield law applies to them. *"If you collect news and it's clear you're connected to a news organization, you'll be fine,"* he said, but *"if you're not connected*

7 Mr Justice Tugendhat, preliminary hearing, High Court in London, November 2010.
8 Too Much Media LLC v. Hale, 20 A.3d 364 (N.J. 2011).
9 Ibid.
10 Holly Miller, Research Assistant, Silha Center for the Study of Media Ethics and Law, University of Minnesota,

with any news organization and you're venting online, you may not have those protections"[11].

He added: *"For the general public, it makes it harder for individual bloggers to have automatic protection. They're going to have to pass the test"*[12].

4. OCCUPATIONAL CRITERIA

An occupational definition of journalist would focus on the employment or self-employment of the person in the work of producing communications which are predominantly journalistic. The traditional journalist is predominantly a private-sector employee, who has an unprescribed but apparent level of training, has a clear sense of his or her role and accepts or purports to accept basic codes of practice.

One would expect at least a notional adherence to the concept of 'objective' news and feature reporting, subject to following the opinion/political line of the publication or publisher, with a greater or lesser ability to resist internal company interference in editorial, and sense of the role of journalist in relation to sources (Cook 1998; Davis 2007; Berkowitz 2009). However, this may have limits, for example, in relation to the alternative or fringe Press.

The new West Virginia law, for example, requiring the journalist to earn a *"substantial portion"* of his livelihood from reporting or supervising reporting, would cover full-time and part-time freelance journalists but would exclude unpaid bloggers. The protection is not limited to specific media; as such, paid online journalists should fall under the statute. This creates a situation where the key criterion in determining whether the journalist has legal protection rests on how commercially successful he or she is.

The other distinguishing factor is in the dissemination to the public of *"news **or** information that concerns matters of public interest"*. Almost all information that is new to a recipient could be characterised as 'news'. The definition of the 'public interest' has never been definitively decided. This has not prevented courts in many jurisdictions from delivering rulings on whether or not information is in the public interest (eg Jameel v Wall Street Journal Europe)[13], although their decisions have not met with uni-

11 Ibid.
12 Ibid.
13 [2006] UKHL 44.T

versal approval (eg Mosley v News Group Newspapers)[14].

5. FUNCTIONAL CRITERIA

A functional definition of journalist would focus on the role of the journalist and the journalistic process, which would allow that anyone might exercise a journalistic function at a certain time. This too may have limits, for example, in disbarring distorted or opinionated journalism from legal protection.

In the course of its decision not to allow the shield law to apply to the blogger Hale, the New Jersey Supreme Court did remove some obstacles to future appellants. The lower appellate court had held that anyone hoping to have the protection of the shield law had to show that they followed professional journalistic standards or have traditional media credentials. The Supreme Court did not insist on this.

It would be enough that the blogger had a recognised connection with a recognisable news outlet, even if it were exclusively online. In removing the need to follow professional journalistic standards, the judgment would open the door to the "citizen journalist" to seek protection. Whether this is a legitimate term in relation to journalism and how much difference there is between this and the traditional contributor or journalist's informant is still open to debate. If the definition is that applied by West Virginia – the dissemination of news or information of public interest – then this person would be eligible for journalist's privilege. Similarly, applying the West Virginia definition would open the door to protection for the openly campaigning writer or group, which is probably further than the New Jersey court would wish to go.

Accepting a functional definition of journalism may necessitate recognising the changing role of journalists in relation to contributed or user-generated content. This may alter the traditional understanding of the gatekeeper theory (White 1964). Those such as Bruns (2005) believe journalists no longer control news flow and the journalist's function is now that of *"gatewatching"*. This implies a more passive role and raises the question of who should benefit from any legal protections for journalism.

14 [2008] EWHC 1777 (QB).

6. CONCLUSION

Defining the essence of journalism has largely been the preserve of the aphorist, whether portraying journalism as the first draft of history or the journalist as a machine which turns coffee into copy. Yet distinguishing it from the constant flow of information from numerous sources should be a worthwhile exercise. Developing a rationale for protecting communications we deem fundamental to the functioning of society should strengthen the protection journalism enjoys in democratic societies. That in turn should make restrictions on it more difficult to enact.

Such a comprehensible rationale would be of practical benefit: to lawmakers in drafting laws for the media, to journalists in understanding the activities that can legitimately attract legal protection, and to the owners and managers of news organisations large and small. If they understand their role in relation to the legal rights that journalism can expect, they will understand their duty not to hamper the exercise of those rights.

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