Ethics and rights for online journalists: inseparable and obligatory?

By

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Paper submitted for "The End of Journalism?", International Journalism Conference 2008,
Centre for International Media Analysis, Luton, UK,
17th-18th October 2008

Abstract

Online media have enabled everyone to be a potential journalist. Today, virtually everyone can contribute to news making, for instance by sending tips and photos to newsrooms, by starting a weblog or by participating in online discussion fora. As a result, the definition of journalism is put under pressure. How a journalist should be defined, is not only central to sociological and professional debates, but it also has important legal repercussions. As there does not exist an internationally accepted legal definition of a journalist as such, there is no legal certainty as to whether self declared journalists on the Internet, like bloggers or other "citizen journalists", can be subject to journalistic ethical codes or conversely, can invoke certain rights such as the confidentiality of journalistic sources which in time have been solely attributed to professional journalists. This papers aims to give a critical analysis of the current insecure context in which online journalists operate, both from a legal and sociological point of view. After a literature review on the ethical and legal challenges posed by citizen journalism to the journalistic profession, the authors attempt to argue that while online journalism *ethics* cannot be regulated by the legislator and should be left to the "self-regulatory intentions" of practitioners, press *rights* should be guaranteed to all "journalists", regardless of whether they work on a professional or voluntary basis.

Introduction

Since the emergence of the virtual and interactive Internet, nearly everyone has worldwide access to information and is able to distribute information and opinions on a global scale, without having to rely on a publishing or broadcasting intermediary. All that is needed to publish the content (text, video, audio) on the Internet is Internet access. The fact that you can even act anonymously or under a pseudonym lowers the threshold for many people to publish something on the Internet, which in turn leads to an enormous increase of user-generated content. Although not all publishers of information on the Internet are journalists, professional journalists have definitely – and definitively – lost their monopoly as gatekeepers.

As a result, any definition of who is, and is not, a journalist has become difficult and disputable. This paper shows that the question of how a journalist should be defined, is not only central to sociological and professional debates, but it also has important legal repercussions. As there does not exist an internationally accepted legal definition of a journalist as such, there is no legal certainty, for instance, as to whether self declared journalists on the Internet, like bloggers or other "citizen journalists", can invoke certain journalistic rights such as the confidentiality of journalistic sources which in time have been

solely attributed to professional journalists. This papers aims to give a critical analysis of the current insecure context in which online journalists operate, both from a legal and sociological point of view.

According to E. Ugland & J. Henderson[1], the definition of a journalist matters in the context of at least two separate domains: the legal domain and the domain of professional ethics. Although both domains are related and overlapping, the relevance of "who is a journalist" depends on the context in which the question is posed. In the domain of constitutional law, courts and legislators have stressed the democratic need for an expansive definition of a journalist. However, when it comes to journalistic privileges, which have traditionally been granted to "professional journalists", the question is already a bit more complex, but still can be satisfactory answered with legal arguments. Within the professional ethical debate, however, the answer to the question of "who is journalist" requires a more philosophical and normative approach to the debate.

1. Freedom of expression

The right to express one's opinion and to receive or impart information and ideas is an essential foundation of a democratic society and one of the basic conditions for each person's self-fulfilment. As a human right it has been legally recognised in many national constitutions and several international treaties with regard to human rights.

Article 10 of the European Convention on Human Rights (hereafter: ECHR) provides the broadest, most modern and media neutral definition. The right to freedom of expression can be invoked by every person, whether natural or legal and regardless of his or her quality for instance journalists, publishers, editors, media companies but also bloggers, civil journalists, a participant of a discussion forum etcetera. In principle, every expression of an opinion is legally protected, irrespective of its informative, artistic or commercial nature, news value or quality.[2] A website of a broadcaster, (a picture on) a weblog, a sports commentary in an electronic newspaper and even advertisements are protected. Yet case law of the European Court of Human Rights points out that some content is more protected than others.[3] Furthermore, Article 10 covers the means of dissemination (print, television, radio)[4] since any restriction imposed on the means necessarily interferes with the right to receive and impart information.[5] Since the Internet has become the ultimate communication tool for traditional as

[1] E. UGLAND & J. HENDERSON, "Who is a journalist and why does it matter? Distengangling the Legal and Ethical Arguments", *Journal of Mass Media Ethics*, 2007, 22(4), 241-261.
[2] Declaration on the freedom of expression and information, adopted by the Committee of Ministers on 29 April 1982 at its 70th Session.
[3] E.C.H.R. Casado Coca vs. Spain, 24 February 1994. Political statements, for example, will receive more protection.
[4] "Regardless of frontiers", Association Ekin v. France, 17 July 2001, *Recueil/Reports* 2001, § 62.
[5] Autronic AG v. Switzerland, 22 May 1990, *Publ. Eur. Court H.R*, Series A, Vol. 178, § 47; Murphy v. Ireland, 10 July 2003, *Recueil/Reports* 2003, § 61.

well as new media players in the digital information society we can assume the European Court of Human Rights will recognize the protection of this distribution tool as well.

As Article 10 § 2 E.C.H.R. stipulates, freedom of expression can be subject to restrictions, limitations or other formalities under the following three conditions (Article 10, §2). *First*, the restriction has to be *"prescribed by law"*. One of the requirements flowing from this expression is that the regulation must be adequately foreseeable, *i.e.* it must be formulated with sufficient precision to reasonably foresee the consequences which a given action may entail. *Second*, the restriction must have a *"legitimate aim"*. The grounds upon which a restriction is allowed, are enumerated exhaustively in Article 10, §2 E.C.H.R.[6] and are interpreted in a restrictive way by the European Court. *Third*, the restriction has to be *"necessary in a democratic society"*, which implies the existence of a "*pressing social need*". Although a certain margin of appreciation is left to the states, the European Court of Human Rights will always take the end decision and evaluate whether the measure at stake was *"proportionate to the legitimate aims pursued"* and whether the reasons brought forward by the national authorities to justify it are *"relevant and sufficient"*. To find out whether that is indeed the case, the Court evaluates interferences in the light of the case as a whole, including the content of statements that were made, the consequences of a publication, the intentions of the author, etcetera.

2. The privileged position of journalists

Though press freedom has not been recognized as a separate fundamental right by international and European Conventions – as is the case in national Constitutions of several European countries – it is nonetheless established as a corollary of the fundamental right of freedom of expression.[7] The European Court of Human Rights has always applied a dynamic interpretation to Article 10 E.C.H.R. by using a stricter protection of the press freedom even though it has not been mentioned *expressis verbis* in Article 10 E.C.H.R.[8]

The European Court of Human Rights has stated on many occasions that it is incumbent on the press to impart information of public interest, even when they are shocking, disturbing or divisive.[9] Furthermore, the press not only has the task of imparting such information and ideas, the public also has the right to receive them.[10] In sum, the role of journalist is entwined with the protection of democracy which is why the Court regards a journalist as "watchdog"

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[6] "*National security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary*."

[7] J. ENGLEBERT, « Le statut de la pressem,du « droit de la presse » au « droit de l'information », *Rev. Dr. Ulb* 2007, N° 35, 273-274.

[8] J. ENGLEBERT, « Le statut de la pressem,du « droit de la presse » au « droit de l'information », *Rev. Dr. Ulb* 2007, N° 35, 278 ; M. ISGOUR, "La presse, sa liberté et ses responsabilités" in *Medias et Droit*, Anthemis, Louvain-La-Neuve, 2008, 84-85.

[9] Sunday Times v. U.K, *op.cit.*

[10] Sunday Times vs. U.K., *op.cit.*; Thorgeir Thorgeirson v. Iceland, 25 June 1992, *Publ. Eur. Court H.R.*, Series, A, Vol. 239, § 63.

in the society. The obligation of the press is of social nature, namely towards theirs co-citizens which are in need of accurate information of public interest. Thus, the "privileged" position of "the press" is closely related to specific duties and responsibilities that are imposed on them. The press has to ensure the proper functioning of a democracy, which means it is their right and duty to inform the public on matters of public interest. The European Court of Human Rights also expects that journalists fulfil this role in a responsible way, which means that it is being assumed that journalists act in good faith to provide accurate information in accordance with the ethics of journalism.[11] The right of journalists to disseminate information on matters of public interest is protected on the condition that they act in good faith, on the basis of correct facts and that they provide trustworthy and accurate information and taking journalistic ethics into account.[12] In the end it will always be up to a judge to decide - taking into account all relevant factual circumstances – whether these conditions are met or not.

2.1. Privileges for professionals

With regard to statutory law, the definition of "the press" and "a journalist" or "journalism" as such has been mainly left into the hands of self-regulatory professional associations, promulgating rather formal conditions which have to be fulfilled in order to qualify for membership. Generally they require the following: *a)* a (natural) person who *b)* at regular intervals *c)* publishes in established media, available to the general public and *d)* is able to make a living from his activity as a journalist. Some professional journalists associations, like the Belgian one, add other conditions such as a certain age which should have been reached (21years) and the prohibition of the combination of a journalistic profession with any other profession.

It seems defendable to attribute certain privileges only to a small group of professional journalists. E. Ugland & J. Henderson[13] give the example of public officials' freedom to provide access to the press room only to professional journalists with a press card, since a *"truly egalitarian access policy might not be feasible in light of (…) practical problems and administrative burdens"*. Not attributing press privileges, such as a press card or accreditations, to everyone does not endanger the free flow of information nor the freedom of expression which can be invoked by every citizen. Therefore, the institutional definition of the professional journalist has a legitimate legal basis and practical relevance. Nonetheless it has been argued that professional statutes *"that require a claimant to be engaged in newsgathering as part of their employment or 'for gain and livelihood' are hard to defend in a world where some of the most important news stories are broken by bloggers working without pay or institutional affiliations."*[14]

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[11] E.C.H.R. 14 February 2008, R. Ivanova v. Bulgaria

[12] E.C.H.R. 22 October 2007, Lindon, Otchakovsky-Laurens and July v. France ; E.C.H.R. 2 November 2006, Standard Verlags GmbH and Krawagna Pfeifer v. Austria ; E.C.H.R. 2 May 2000, Bergens Tidende and other v. Norway

[13] E. UGLAND & J. HENDERSON, *op. cit.*, p.252.

[14] Ibid., p. 251.

2.2. A "functional" definition of the journalist

In Belgium a legal definition was explicitly inserted in a new drafted legislation concerning the protection of the journalistic sources. Very soon after the adoption however, the legal definition was almost entirely quashed by the Constitutional Court following complaints of individuals falling outside the scope of the rigid definition. The Court held the complaint was pertinent in the sense that it excluded persons who did not practise journalistic activities at regular intervals (so just on an occasional basis) or on a voluntary basis (instead as an employee or freelance journalist). As stated by the Court, the protection of journalist sources is one of the cornerstones of press freedom. An adequate protection is crucial to enable the press to fulfil its role of watchdog and inform the public of matters of general interest. Excluding aforementioned persons would violate the press freedom which forms an integral part of the internationally protected human right of freedom of expression (*supra*). The European Court of Human Rights never mentioned "professionalism" as a condition to fulfil the role of watchdog, though in practice the cases brought before the Court did always concern professional journalists working in mainstream media. Consequently – as established by the Belgian Constitutional Court as well (*supra*) – it cannot be added as an overall condition to invoke press freedom. Finally, the Belgian Constitutional Court extended the scope of application of the Act to "*everyone who directly contributes, edits, produces or disseminates information aimed at the public via a medium*".[15] This functional, activity-oriented approach of the journalistic process has the advantage of being a flexible tool which allows a judge to examine whether a person can indeed invoke specific journalistic privileges, irrespective of job titles, labels, a person's employment or publication medium. Using this functional criterion, bloggers are no longer necessarily excluded from the right to protection of journalistic sources.[16]

The Belgian legal scholar J. Englebert goes one step further: he proposes to include the distribution of information as such ("information brute") in this definition. The distribution of information as such may not respond to the definition of "journalism" *stricto sensu*" – requiring that the information should at least be "treated" in some way and that deontological principles have been put into practice. However, Englebert argues that this "information brute" is a valuable source of information and should therefore not as such be excluded from specific journalistic privileges such as the right to protection of journalistic sources.[17] Such an approach implies that the mere provision of raw information is legally put on the same level

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[15] Constitutional Court Belgium nr. 2006/91 of 7 June 2006.; Also see the definition established by the Electronic Frontier Foundation, *Legal guide for bloggers*, http://www.eff.org/bloggers/lg/.

[16] A. FLANAGAN "Blogging: a journal need not make a journalist". *Fordham Intell. Prop. Media & Ent. L.J.* Vol. 16 (2006), p. 425-426; E. WERKERS, E. LIEVENS & P. VALCKE "Bronnengeheim voor bloggers?" [Confidentiality of sources for bloggers?]. *NjW.* No. 147 (2006), p. 630-636; E. WERKERS, E. LIEVENS & P. VALCKE, "Exploring the legal boundaries of online journalism", in P. MASIP & J. ROM (eds), Communication crossroads: limits and transgressions, IV International Conference Communication and Reality, Barcelona, Facultat de Comunicació Blanquerna Universitat Ramon Llull, 2007, Volume I, p. 457-469 ; M. ISGOUR, "La presse, sa liberté et ses responsabilités" in *Medias et Droit*, Anthemis, Louvain-La-Neuve, 2008, 86.

[17] J. ENGLEBERT, « Le statut de la presse, du « droit de la presse » au « droit de l'information », *Rev. Dr. Ulb* 2007, N° 35, 243, 253.

as journalism. We wonder whether it would be wise to open the window of press freedom and all its attributes to everyone active on the net.

3. Ethical self-regulation

Self-regulation – also called "positive regulation" as opposed to regulation imposed by the legislator – puts emphasis on what is good behaviour instead of stating what is prohibited [18]. In the case of journalism its first purpose is to support the public trust in the press. It provides (complementary) guarantees to persons who – intentional or not – stumbled into the media flow and delineates boundaries which should protect editorial staff and journalists against themselves.

3.1. Social responsibility of the press

From many points of view ethical codes[19] often merely specify what is known in civil law as the "*bonus pater familias*" rule and merely specifies the need that journalists act according to how a normal acting prudent journalist would have done in a similar situation.[20] These codes are also embedded within the social responsibility theory of the press, as it was first articulated by the Commission on Freedom of the Press in 1947[21]. The rationale behind the social responsibility theory of the press is that a democratic society needs quality news reporting, persons keeping a close eye to what affects the general interest and blunder made by public authorities. This could not be provided by an endless stream of information, founded upon unfounded facts and gossip produced by new information providers. One of the essential duties of the press is not only to inform the public about matter of general interest, but also to do that in a correct, conscientious and responsible way. Within the social responsibility model of the press, invoking the press freedom and its attributions - instead of the mere freedom of expression which can clearly invoked by everyone – also implies taking into account the ethical and social responsibilities and duties of the press.[22]

Jane B. Singer explains how in the second half of the 20th century journalism as an occupation has sought ways to "*resolve the apparent conflict between freedom and*

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[18] M. LATZER, Trust in the industry - trust in the users: self-regulation and self-help in the context of digital media content in the EU", Working Group 3, presented at the Expert Conference for European Media Policy, 9-11 May 2007, 43, available a http://www.leipzigeu2007.de/en/downloads/dokumente.asp

[19] The oldest journalistic ethical code goes back to 1954 when the Code of Bordeaux was adopted on the Congress of the IFJ (*International Federation of Journalists)*. The deontological principles reflected in the journalistic codes consist of several duties (veracity, authenticity, respect for the freedom of information and comment, usage of honest methods to retrieve information, respect for media pluralism, fair treatment of news facts, prudently reporting on delicate issues, distinguishing facts and comments, correction of inaccurate and harmful information, respecting other parties' rights, independence, prohibition of discrimination) and rights (press freedom, right of access to information, free gathering of news, editorial autonomy).

[20] J. ENGLEBERT, « Le statut de la presse, du « droit de la presse » au « droit de l'information », *Rev. Dr. Ulb* 2007, N° 35, 285.

[21] J.B. SINGER, « The socially responsible existentialist », *Journalism Studies*, 7(1), 2-18.

[22] M. ISGOUR, "La presse, sa liberté et ses responsabilités" in *Medias et Droit,* Anthemis, Louvain-La-Neuve, 2008, 84-85

responsibility." [23] One way to resolve this conflict has been the establishment of professional ethical codes delineating both journalists' independence of the state and market and their accountability and commitment towards the public they serve. It is beyond dispute that the professionalization of journalism has been shaped by the practitioners' embrace of these principles of public accountability and social responsibility.

3.2. The existentialism of the blogosphere

Though broadly accepted within the journalistic profession, the social responsibility thesis has its criticizers as well. One of them is John C. Merrill[24], who has pleaded for a much more liberal model of journalism that draws on the philosophy of existentialists like Jean-Paul Sartre and Albert Camus. In his book on "existential journalism", Merrill argues that journalists' responsibility is personal rather than social; rather than being accountable to the public, they can only be held accountable to themselves, in the sense that they are only responsible for their own personal choices and actions. For Merrill, the emphasis on journalists' individual freedom and choice implied that they should refrain from any form of professional organization or ethical code that might restrict the journalists' personal autonomy.

From an existential or libertarian point of view, the application of essential attributes connected with the usage of the press freedom does not depend on the respecting of ethical principles. J. Englebert, for instance, argues that everyone stating he acts as a journalist should be able to rely upon for example the protection of journalistic sources, regardless of the fact that he respected the ethical code or not. He further declares that ethical codes only come into play with regard to the civil liability of journalists but have nothing to do with the right to inform the public.[25]

Whereas existentialists have always been a minority within journalism, especially compared to the social responsible journalists, the emergence of the blogosphere has altered this picture dramatically. Using an activity-oriented definition of a journalist, one can say that bloggers are the first journalists who can work in complete independence, *"particularly in the existential sense of being capable of defining oneself solely through one's actions – or words."*[26] Some studies have already emphasized bloggers' deep attachment to this existential freedom, which explains why an ethical code for bloggers seems to be so *"difficult to operationalize*"[27]. The problem with this existential attitude of bloggers is that it has become difficult, if not impossible, for the public to know who can be trusted and who not. Jane B.

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[23] J.B. SINGER, *op. cit.*, p. 5
[24] J.C. MERRILL. *Existential journalism* (2nd ed), 1996, Ames: Iowa State University Press.
[25] J. ENGLEBERT, « Le statut de la presse, du « droit de la presse » au « droit de l'information », *Rev. Dr. Ulb* 2007, N° 35, 231, 283-284.
[26] J.B. SINGER, *op. cit.*, p. 9
[27] D.D. PERLMUTTER & M. SCHOEN. "If I break a rule, what do I do, fire myself?" Ethics codes of independent blogs, *Journal of Mass Media Ethics*, 2007, 22(1): 37-48, p. 37.

Singer argues that "*in the end, it is the notion of trust that resolves the question of why it even matters who is defined as a journalist*".[28] Therefore, she argues that journalists should redefine their role and identity by combining their existential freedom with notions of public accountability and social responsibility. She expects that in an online environment where anyone can publish anything, it will ultimately be the "socially responsible existentialist" that will be trusted and regarded as a "journalist". The re-conceptualization of the role and ethics of "journalism" – be it professional or citizen journalism – cannot be imposed from above, however, but should result from a self-regulatory dialogical process.[29]

4. Conclusion

Should a blogger still be treated differently to the traditional professional journalist, when both provide similar information? Is it possible to justify such a distinction in the 21st century, when everyone is a potential journalistic watchdog? Why should information posted on a blog by an expert, who is not employed by a publisher or producer but acts on his or her own accord, be treated differently?

On the basis of this brief review of legal, sociological and ethical arguments within the current debate on "who is a journalist", we can tentatively draw some conclusions:

1. With regards to the fundamental right of freedom of expression, the question of "who is a journalist" is irrelevant, in the sense that article 10 ECHR guarantees the freedom of expression to all citizens, regardless of their rank, status or profession.
2. However, legislators in different countries have granted a kind of "privileged" position to the press. In cases where freedom of the press is at stake, the European Court of Human Rights clearly uses a stricter protection for journalists. Authorities and the Court legitimize this privileged position of the press by referring to the role of journalists as watchdogs of democracy, but also by underlining the social responsibility of the press towards the public they serve. However, it is important to note that case law does not restrict the definition of "the press" or "the journalist" to professional journalism.
3. In the case of the Belgian legislation concerning the protection of journalistic sources, the legislator deemed this right (or: "privilege") too important to attribute it only to professional journalists. Instead of an institutional "occupation-oriented" definition of a journalist, the Belgian legislator has chosen for a functional, "activity-oriented approach", in which the journalist is defined as "*everyone who directly contributes, edits, produces or disseminates information aimed at the public via a medium*". Clearly such a significantly broader definition which puts the emphasis on the

[28] J.B. SINGER, *op. cit.*, p. 14
[29] M. KUHN. Interactivity and prioritizing the human: a code of blogging ethics. *Journal of Mass Media Ethics*, 2007, 22(1): 18-36.

journalistic activity exercised by a person and not his membership of a journalistic association - adopted by courts in Europe and in the United States - confirms the need to open the window to new forms of journalism which were not associated with the "traditional" press so far. Bloggers, citizen journalists, grass roots journalists - whatever the title used by or attributed to them – should be able to apply for a "watchdog" status when covering matters of general interest and taking into account the duties and responsibilities of a journalist as well.

4. Although the title of "professional journalist" is legally protected in many countries, it is up to a judge to decide in each concrete situation whether or not a citizen should be considered a journalist. As said, case law suggests that judges will in the first place focus on the activity, the content and the intention of the practitioner rather than on his/her title, occupation or professional status. Yet the European Court of Human Rights has stated on many occasions that a journalist can be expected to act ethically and in good faith. It is in this context that the often heard call for a code of ethics for citizen journalists should be situated. We do not plead for restrictive regulatory measures or compulsory membership of a federation for bloggers, but the fact that he or she can show to have taken several ethical principles into account to ensure that the published information is correct, can be a crucial aspect in the legal evaluation of a concrete situation.[30] Though ethical codes are not (legally) enforceable – they may lead to disciplinary sanctions by recognized self-regulating organizations – it is clear that courts do take the journalistic principles as codified within these texts, to evaluate whether a journalist has acted in a way that might have been expected from him compared to other colleagues and taking into account the public's expectations in relation to the press.
5. Nevertheless, we must bear in mind that the moral legitimacy of any code of ethics depends on the extent to which practitioners recognize it. Ethical codes cannot be imposed "from above", but need to be dialogically derived. Considering the non-conformist and existential stance of many bloggers, who consider ethical conduct as a personal choice rather than a social responsibility, one can wonder if an ethical code for non-professional journalists is feasible.

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[30] E. LIEVENS, E. WERKERS & P. VALCKE, "Exploring the legal boundaries of online journalism", in Masip, Pere & Rom, Josep (eds), Communication crossroads: limits and transgressions, IV International Conference Communication and Reality, Barcelona, Facultat de Comunicació Blanquerna Universitat Ramon Llull, 2007, Volume I, 457-469.

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Evi Werkers obtained her degree as Master in Law in 2004 and an advanced degree as Master in Cultural Management in 2005. In November 2005 she started working as a Legal Researcher at the Interdisciplinary Institute for Law and ICT (ICRI - K.U. Leuven - IBBT) where she specializes in copyright and media law. She cooperated in several IBBT-projects with regard to interactive Digital Television (CIcK), e-culture (VACF), e-learning (ASCIT) as well as various other projects (eDavid, MONIT, VINN). At the moment she participates in the multi-disciplinary research IWT-SBO project FLEET (FLEmish E-publishing Trends) of which this paper presents the first results and the IBBT project CUPID (Cultural Profile Information Database).

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