

Offshore Journalism

A project to maximize free speech by exploiting
different jurisdictions

Preliminary Report, June 2017

by Nicolas Kayser-Bril and Mario Tedeschini-Lalli

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Notice

This report is part of the Offshore Journalism Toolkit project by Nicolas Kayser-Bril and Mario Tedeschini-Lalli, with help by Anne-Lise Bouyer, Pierre Romera and Defne Altioek.

Most of the interviews for this project were held “on background”, meaning that the information could be used freely without naming the specific source, unless otherwise agreed. A list of the people who have generously accepted to talk to us can be found at the end of the report, and the authors are extremely indebted to them and grateful for their time and their suggestions.

The project was financed by [Google's Digital News Initiative](#).

Some of the working material could be found on our website www.offshorejournalism.com. We hope the present report and the feedback that we will receive will help us to go beyond the analysis, and offer possible solutions.

Web links were archived at Archive.is

NKB & MTL

Introduction

Time is no longer what it used to be

Content is disappearing from the servers of European publishers. The right to be forgotten, pressure from lawyers and outright censorship push editors to modify or delete articles. This is a serious and growing threat for the free movement of ideas. This project tries to outline some of the problems and discuss some possible solutions as well.

The problems arose because journalism has always been about current events and news, but the digital environment, which have characterized and shaped all human relations at the beginning of the 21st century, radically redefined it, opening it up to new functions that go beyond the traditional concept of currentness. This gave rise to an all new set of opportunities, as well as challenges. Unfortunately, some of the proposed solutions to these challenges seem to be cultural left-overs from the pre-digital days and risk stifling the opportunities, as well as long cherished freedoms. What follows focuses on those risks and tries to discuss ways to sidestep some of them.

In many languages, the root of the word itself (*journ-*) clearly indicates that it has to do with the chronicle of the day-to-day happenings of a community; at its best, journalism provides a reliable picture of events and reflections thereupon at specific moments in time, usually a specific day. For almost twenty years, the US television icon Walter Cronkite signed off on his CBS Evening News program saying “That’s the way it is...” followed by the day of the week and the date.¹ After all, that’s the way it was when the old saying “Today’s newspaper wraps tomorrow’s fish” was still held to be true (evolving hygiene standards and commercial customs notwithstanding).

It is just a matter of course that the Internet and the digital world upended, among many other things, this view of journalism. In the last two decades, we discovered that the journalism we were doing on the web would continue to have effects on society well beyond the moment it was published. Old journalists eventually understood that their so called “archives” were actually databases where yesterday’s or yesteryear’s content is technically indistinguishable from today’s – and tomorrow’s. Everything is potentially current and it actually becomes current as soon as it is dug up by clicking on a link. Hence the opportunities – and the problems.

From a legal, personal, business and also political point of view, any problem that arose from published pieces of journalism in the analog world had to do with the *consequences* of the act of publication; the act as such being something of the past, remedies could only be conceived in retrospective. So it was, and still is for all the norms, laws and procedures

¹ “And that’s the way it is”: Walter Cronkite’s final sign off, CBS News, March 6, 2014

meant to defend the reputation, the business, the societal interests that may be damaged by a piece of journalism – pre-emptive measures by public authorities to control information (government licences and authorizations, outright censorship and seizures of printed material) having been largely abandoned by democratic societies, although with a few exceptions, as we will see.

The frame was an easy one to define, if not to make it work: people were free to speak and express themselves in public, but if in so doing they committed a crime or damaged some legitimate interest protected by law, they were liable to suffer the consequences of their speech.

As mentioned earlier, in the digital universe everything available online – which doesn't necessarily mean everything that was ever written on the web² – is potentially current, even if it was produced and published months, years, sometimes decades before. When read or linked to, "old" material is bound to take on new meanings and activate new knowledge in a different context, independently from what the original author and publisher may have intended or foreseen. Metadata, tags, information architecture, all help in making content relevant for different historical contexts.

It's one of the most exciting challenges for journalism in the new environment. Journalists and publishers are no longer "writing for the present", they are actually producing information to be consumed across time, in different and unimaginable contexts. They are to all effects "writing for the future" too. Writing for the future means providing each information item with all the attributes that will make it findable by and relevant to a different public, at a different time. Whether or not publishers and journalists are fully aware of the possibility, this is a giant step in re-defining freedom of speech and freedom of the press.

As a matter of principle, the authors of this report maintain that freedom of the press in the digital environment – which is our all-absorbing environment anyway – include the freedom of "publishing for the future", and that limiting or curtailing it puts freedom of speech at risk. This doesn't necessarily mean that we do not recognize the new problems that come with the new opportunities, only that they should be dealt with taking into account the rights enshrined in Article 19 of the [Universal Declaration of Human Rights](#) and in Article 10 of the [European Convention of Human Rights](#), interpreted and applied in the digital context.

The fact that a piece of journalism will continue to inform and have consequences for citizens well past the time when it was first conceived, does indeed pose new problems. Addressing possible negative consequences of the publication is no longer something that will be done ex-post, but a measure that will influence and potentially limit the act of publishing itself – which is a continuous, cross-time event. If an online news item continues

² Interface obsolescence, websites death rate and broken links are among the major issues facing the digital architecture of knowledge. See: Mario Tedeschini-Lalli, [Reinventing "the past" in the digital world. History and online journalism in the age of technological obsolescence](#), Medium, December 18, 2015

to damage law-protected interests, shouldn't the law order to "stop publishing" that item?

Unfortunately, public opinion in many democratic countries seems increasingly ready to accept measures in the digital universe that would have been unacceptable in the analog world: mandated edits, de-indexing and de-linking (e.g: limiting "circulation") or outright forced cancellation, be it of provisional or permanent nature.

It's a totally new field in which authorities from different countries, and often from the same country, resort to different means. The limitations may be imposed directly at the source, at the publisher/newsroom's level, with orders to de-index, correct or eliminate a piece of content. Or they may be applied indirectly, forcing third parties to act in order to limit the consumption of the news item: it could be an order to Internet Service Providers (ISP) to deny access to a list of DNS addresses,³ thus shutting off specific audiences from specific websites, although the content might still be online; or it could be in the form of a request to Google and other search engines to de-link a specific item so that it will no longer appear in the results page of a search by specific terms (usually names of persons).

There may be many different motivations for such restrictive measures. They could be ordered to defend commercial and business rights (e.g. copyright violations), to defend the rights of abused minors (e.g. prevent the circulation of paedo-pornographic material), to defend real or perceived threats to national security (e.g. terrorism threats), to defend one's honor and reputation (e.g. libel and defamation), etc. But as the paradoxical effects of "publishing for the future" sank in, we have witnessed a growing recourse in the European legal space to the so-called "Right to be forgotten".

The "Right to be forgotten" seems to be a catch-all concept that is just now being defined and included in European and national law.⁴ It was originally conceived in the pre-digital age by some jurisdictions (France 1966, Italy 1985) as the right for individuals not to have their personal stories dug up from the distant past in a negative and by then irrelevant way.⁵ It was re-shaped as a by-product of the data protection legislation which "was originally conceived to give individuals rights of access and rectification concerning information held on them by states, companies, and organisations. It was not designed to regulate speech or

³ Domain Name System (DNS). It's the international system by which each node on the Internet is identified with a unique address. See: Daniel Karrenberg, *The Internet Domain Name System Explained for Non Experts*, Internet Society Member Briefing #16 ([https://www.Internetsociety.org/sites/default/files/The%20Internet%20Domain%20Name%20System%20Explained%20for%20Non-Experts%20\(ENGLISH\).pdf](https://www.Internetsociety.org/sites/default/files/The%20Internet%20Domain%20Name%20System%20Explained%20for%20Non-Experts%20(ENGLISH).pdf)).

⁴ Most of the information that follows we owe to the thorough, recent review and updated study of the phenomenon by Professor George Brock: *The Right to be forgotten. Privacy and the media in the digital age*, The Reuters Institute for the Study of Journalism, 2016 (<http://reutersinstitute.politics.ox.ac.uk/publication/right-be-forgotten-privacy-and-media-digital-age>)

⁵ "In 1985, the Italian supreme court first affirmed a *diritto all'oblio* (right to be forgotten) in a judgment which said that someone as an 'essential part of his personality, has the right not to have his intellectual, political, social, religious and professional heritage misrepresented'." Brock, *cit.*, Kindle position 526.

expression”.⁶ Which has had the paradoxical effect of transforming a “right to privacy” into “a right to a public face”.⁷

As Professor Brock noted⁸

“From the outset, European data protection assumed a superior right to amend, delete, or obscure information and specifies conditions under which this will apply. The right to information, free speech, or free expression entered the original laws as exemptions, if at all, not as rights which are to be balanced. (...) The formula of giving protection to ‘journalistic’ publishing is itself a problem in the digital age. (...) The law should rather protect disclosure in the public interest and not hinge on the professional identification of the person making the disclosure”.

This new field is being designed by European law - the recently updated [Regulation on Data Protection](#) - as well as jurisprudence.

As far as the law is concerned, the new regulation goes as far as explicitly defining the “right to be forgotten” as a “right to erasure”, in the very title of its article 17.⁹ Generic exceptions are provided for “freedom of expression” and research purposes,¹⁰ but if the recent past is any sign of what may happen in the future, it seems to indicate that authorities may be more willing to err on the side of the “right to erasure” than of “freedom of expression”.

With regard to jurisprudence, the main game changer has been the historical ruling of the European Court on the case known as “[Google Spain](#)”,¹¹ which in 2014 established that search engines may be forced to de-index information legally published online when it is no longer relevant. National authorities, be they data protection agencies or the courts, have also brought their rulings to bear on the “right to be forgotten” issue. In some cases – as we will see – going well beyond de-indexing or de-linking old material, but insisting that such material, although accurate and legally published, should be deleted. Even going as far as to affirm the existence of an expiration date of sorts for news, after which news may no longer be considered relevant, and the private interest to privacy or “oblivion” may trump the public

⁶ Brock, *cit.*, Kindle position 324

⁷ Brock, *cit.*, Kindle position 543

⁸ Brock, *cit.*, Kindle position 664-678

⁹ quoted and discussed by Brock, *cit.*, Kindle position 1595

¹⁰ “Paragraphs 1 and 2 shall not apply to the extent that processing [of the data] is necessary:

(a) for exercising the right of freedom of expression and information; (...) (d) for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) in so far as the right referred to in paragraph 1 is likely to render impossible or seriously impair the achievement of the objectives of that processing; (...)”

¹¹ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012CJ0131>

interest in knowing about facts that are part of the record.

We will not expand here on a legal and political discussion about the so-called “right to be forgotten”, and how competing rights could be balanced, which Professor Brock’s study and many others aptly try to define. There is in fact a number of issues that are relevant to professionals and citizens who hold dear the rights to inform and be informed, here are just a couple of them as quoted or mentioned by Brock:

- Who will act on behalf of the public interest in cases where information becomes relevant in the future? ¹²
- How does a data protection authority or a court set the timetable for the expiry of a fact’s significance? What happens if the significance alters? ¹³

Relevant to this project is the fact that, in the political discourse and the legal mood in much of Europe and in many other parts the world (the United States of America being the notable exception, where freedom of speech enshrined in the First amendment of the Constitution usually trumps privacy concerns ¹⁴) an ill-defined concept is being used to alter the record, just by postulating that there is “a right” to forget and be forgotten.

We have clearly acknowledged that digital publishing carries new problems, as well as new opportunities and freedoms, but we are concerned by views that try to assimilate the Internet and the digital world to an environment that no longer exist, thus stifling their potential.

Yes, it could be said that in a society where everything that was published is accessible, we lose the ability to forget. To protect us from hypermnesia, politicians, state authorities and judges are applying the ill-defined “right to be forgotten”. However, while some citizens are

¹² Professor Peggy Valcke, interview on LSE media blog, November 4, 2014, as quoted in Brock, *cit.*, Kindle position 928

¹³ Brock, *cit.*, Kindle position 931

¹⁴ The environment in the US risk changing as well after the 2016 presidential election. President Donald J. Trump clearly chose the press as one of the “enemies” that are working against his administration, and he repeatedly mentioned changing libel laws to make easier to sue a news organization. There is no federal libel law in the US (it’s regulated at the State level), but the constitutional jurisprudence around the First amendment of the Constitution (freedom of speech) may be influenced in the future by a cultural-political shift.

Even proposals to regulate an American “right to be forgotten” seem lately to be gaining some traction in the US. See: Eugene Volokh, N.Y. bill would require people to remove ‘inaccurate,’ ‘irrelevant,’ ‘inadequate’ or ‘excessive’ statements about others, *The Washington Post*, March 15, 2017 (https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/15/n-y-bill-would-require-people-to-remove-inaccurate-irrelevant-inadequate-or-excessive-statements-about-others/?utm_term=.f95d5dfddf77); Caitlin Dewey, How the ‘right to be forgotten’ could take over the American Internet, too, *The Washington Post*, August 4, 2015 (https://www.washingtonpost.com/news/the-intersect/wp/2015/08/04/how-the-right-to-be-forgotten-could-take-over-the-american-internet-too/?utm_term=.0d1e4ac85ff2).

using this right to reclaim a normal life, other players are using or attempting to use it to intimidate media outlets and demand that content be removed. We now face a situation where hypermnnesia may still exist – but for State agencies only.

Publishers and journalists seem not to be overly concerned by this trend. Some still go by a rule of thumb from the early days of the Internet that states that once a piece of content is published online, it has been mirrored and cached so many times that its removal is all but impossible. A person we interviewed holds this view, dismissing our concerns by saying that “there’s no such thing as destroying content online”. Others hold the view that, as in a paper archive, online publishing cannot be changed. “Once the shot is out, there’s no coming back” said the editor-in-chief of a French weekly in 2016.¹⁵ Such views were true of the open web of the 1990’s and early 2000’s. They do not hold today, when the vast majority of content is not text and is brokered or controlled by a few central organizations. A video hosted on Youtube or Facebook is unlikely to be copied in many locations upon publication. Instead, it will remain hosted at a central provider and its deletion, if it comes, will be final.

This project does not pretend to address all of the issues regarding the preservation of the digital archives, although we believe that the removal of content can have many deleterious effects, even if done voluntarily, because it may prevent people from being held accountable.¹⁶ Our aim is to reflect on the possibility of exploiting the extra-territorial nature of the Internet to resist, at least in part, to mandated removal or obscuration of journalistic content.

It all started in mid-2016, when the Italian Supreme Court of Cassation (*Corte di cassazione*) found against a small news website that did not erase a perfectly accurate and updated crime story fast enough, after a local court had so ordered, and in so doing established that news have in fact an expiring date.¹⁷ Mario Tedeschini-Lalli, one of the authors of this report, opined that perhaps journalists and publishers should begin to think about creating platforms for “offshore journalism”, in order to take advantage of more liberal jurisdictions.¹⁸ Nicolas Kayser-Bril, the other author, suggested that they should put up an actual project about it

¹⁵ Quoted in *L’info était bidon... mais elle est toujours en ligne sur ton site, coco*, by Yann Guégan, 18 August 2016 (<http://dansmonlabo.com/2016/08/18/linfo-etait-bidon-mais-elle-est-toujours-en-ligne-sur-ton-site-dactu-1142/>).

¹⁶ In late 2016, a conspiracy theory spread around a pizzeria that allegedly engaged in illegal activities. A website, InfoWars, fanned the flames of this “Pizzagate” conspiracy, which culminated in a man entering the pizzeria in Washington D.C. with an assault rifle (<http://www.snopes.com/pizzagate-conspiracy/>). After this attack, InfoWars deleted content that linked it to the conspiracy and claimed it never endorsed it. While the pages are archived at the Internet Archive, they contain very little text. The videos, hosted on Youtube, were deleted and lost for the public.

¹⁷ See following chapter.

¹⁸ Mario Tedeschini-Lalli, *Cassazione stabilisce che l'informazione ha una scadenza, archivi a rischio. Proposta per un giornalismo offshore*, *Giornalismo d'altri*, July 1, 2016 (<http://mariotedeschini.blog.kataweb.it/giornalismoaltri/2016/07/01/cassazione-stabilisce-che-linformazione-ha-una-scadenza-archivi-a-rischio-proposta-per-un-giornalismo-offshore/>)

and apply for funding from Google's Digital News Initiative (DNI), which was eventually granted. As he put it:¹⁹

“Many of the wealthiest Europeans have used offshore vehicles to legally optimize their tax burden. It makes sense for European media outlets to build and use offshore vehicles to optimize their freedom of expression, and their readers' freedom of thought.

(...) The Offshore Journalism Toolkit addresses legal threats that seriously hamper the capacity of Europeans to seek, publish and remember facts and opinions by providing news publishers with a series of components comprising everything they need to set up an offshore vehicle.”

We will attempt to describe cases that show how freedom of speech is actually in danger, as well as cases when, in different circumstances, extra-territoriality was in fact exploited to maximize it. We will then try discuss legal and practical possibilities that journalists and publishers may have to beat those risks, by putting their material under a different jurisdiction.

Last, but not least, as Nicolas wrote at the beginning of our work, we hope that “the project itself, not only its final tools, will help the journalism community focus on the ethical, political, and legal issues involved in preserving and enhancing freedom of expression in the digital era.”

¹⁹ Nicolas Kayser-Bril, *The Offshore Journalism Toolkit*, July 11, 2016 (<http://blog.nkb.fr/offshore-journalism>)

Where it all started

News with an expiration date

The idea of an Offshore Journalism project originated from an obscure news website that covers the 1,4 million people of the small Abruzzo region, a land in Central Italy between the Eastern coast and the Appennini mountains. When *PrimaDaNoi.it* first started covering local and hyperlocal news in 2005, their small newsroom could not imagine they would become in a while the centerpoint of a case about free speech that would end with a major Court affirming that news have an expiration date, and may have to be deleted.²⁰

The case is actually two different cases, the first one somehow influencing the second and legally more relevant one. Both have to do with the fact that perfectly correct, and accurate crime stories were resented by the people featured in them, and had to be deleted under court orders on the basis of the so called "*diritto all'oblio*", or right to be forgotten.

First came a story published on March 23, 2006, about a couple arrested for "attempted extortion" (*tentata estorsione*). In September 2007, the investigation ended and the two were acquitted of any wrongdoing. The website pulled out the original story from a year and half before and updated it, under the same URL, writing that the charges "were dropped altogether". A few more months passed, and on June 2008 the couple sued the State for "unjust detention". For the second time the newsroom updated the same, old story accordingly.

For the couple that was not enough, since the story – whose accuracy was never in dispute and was regularly updated – continued to show up in searches for their names, creating

²⁰ The case has received wide coverage, starting with *PrimaDaNoi.it* own articles, which embed some of the original court rulings: *La privacy vale più del diritto di cronaca, un giudice di Ortona condanna PrimaDaNoi.it*, March 30, 2011 (<http://www.primadanoi.it/news/Internet/5132/--La-privacy-vale-piu-del-diritto-di-cronaca-un-giudice-di-Ortona-condanna-PrimaDaNoi-it.html>); *Abruzzo. Ammazati dalla giustizia, condannati ancora per aver tenuto on line un articolo corretto*, January 16, 2013 (<http://www.primadanoi.it/news/abruzzo/536737/ABRUZZO-AMMAZZATI-DALLA-GIUSTIZIA-.html>); *Alessandro Biancardi, Diritto all'oblio. La Cassazione conferma: «cancellare sempre articoli anche se attuali»*, June 30, 2016 (<http://www.primadanoi.it/news/cronaca/567439/diritto-all-oblio-la-cassazione-conferma--cancellare-sempre-articoli-anche-se-attuali-.html>). Other sources: *Mario Tedeschini-Lalli, Cassazione stabilisce che l'informazione ha una scadenza, archivi a rischio. Proposta per un giornalismo offshore, Giornalismo d'altri*; July 1, 2016 (<http://mariotedeschini.blog.kataweb.it/giornalismoaltri/2016/07/01/cassazione-stabilisce-che-linformazione-ha-una-scadenza-archivi-a-rischio-proposta-per-un-giornalismo-offshore/>); *Guido Scorza, A ruling by the Italian Supreme Court: News do "expire". Online archives would need to be deleted*, *L'Espresso*, July 1, 2016 (<http://espresso.repubblica.it/attualita/2016/07/01/news/a-ruling-by-the-italian-supreme-court-news-do-expire-online-archives-would-need-to-be-deleted-1.275720>); *Athalie Matthews, How Italian courts used the right to be forgotten to put an expiry date on news*, *The Guardian*, September 20, 2016 (<https://www.theguardian.com/media/2016/sep/20/how-italian-courts-used-the-right-to-be-forgotten-to-put-an-expiry-date-on-news>).

problems on the job. They repeatedly asked for removal, calling the editor and sending formal take-down requests. The news organization refused to delete the story, the two asked the Italian Data Protection Authority to intervene.

On July 2009, the Authority denied action, and affirmed the right of the news site to keep the story online:²¹

“...while performing journalism activities, it is allowed to communicate personal data, even without consent by the interested person, within the limits of the essentiality of the information regarding facts of public interest. (...) The outcome of the preliminary investigation did not show the existence of conditions to set off an injunction. (...) The personal data were processed according to the relevant rules for purposes of journalism”.

Again, the couple was not satisfied and decided to sue the news organization before a court of justice. The case lingered on for a while – which is common by Italian standards – in the small Court of Ortona, which in March 2011 found against the publisher.

The judge ignored the Data Authority decision, and ruled that the right of the two people to “privacy, reputation, and honour” trumped in this case the right to inform and be informed. Since the last update of the story happened in June 2008, went the reasoning, months after that, in October, when the website was asked to remove it, the article had lost its public value.²²

“If one takes into account the fact that the disputed article was, and still is published on the daily’s (*quotidiano*) front page (*prima pagina*),²³ that said daily has wide local circulation, it is easily accessible and readable much more than printed newspapers,

²¹ Original: “...nell’esercizio dell’attività giornalistica, è consentito diffondere dati personali, anche senza il consenso dell’interessato, nei limiti dell’essenzialità dell’informazione riguardo a fatti di interesse pubblico, nonché delle pronunce del Garante in materia e all’esito dell’istruttoria preliminare non sono stati ravvisati i presupposti per promuovere un provvedimento dell’autorità”, concludendo, in relazione al caso specifico, che “il trattamento dei dati personali... è stato effettuato nel rispetto della disciplina di settore per finalità giornalistiche”. A PDF copy of the ruling is included, as a SCRIBD embed, in: [La privacy vale più del diritto di cronaca, un giudice di Ortona condanna PrimaDaNoi.it](#), PrimaDaNoi.it, March 26, 2011.

²² Original: “Se si tiene conto che l’articolo contestato è stato pubblicato, e lo è tuttora, nella prima pagina del quotidiano, che lo stesso ha ampia diffusione locale, è facilmente accessibile e consultabile molto più dei quotidiani cartacei, trattandosi di testata giornalistica on-line, appare evidente (...) che sia trascorso sufficiente tempo perchè le notizie con lo stesso divulgate potessero soddisfare gli interessi pubblici sottesi al diritto di cronaca giornalistica”. A PDF copy of the ruling is included, as a SCRIBD embed, in: [La privacy vale più del diritto di cronaca, un giudice di Ortona condanna PrimaDaNoi.it](#), PrimaDaNoi.it, March 26, 2011 (<http://www.primadanoi.it/news/Internet/5132/--La-privacy-vale-piu-del-diritto-di-cronaca-un-giudice-di-Ortona-condanna-PrimaDaNoi-it.html>)

²³ Of course, there was no “front page”, *PrimaDaNoi* being a website. The story was featured in the home page only on the day that the news came out, and it was since available in the website database.

since it is an online news organization, it seems evident that (...) [between the publication date, the last date and the direct request of removal] enough time has passed to satisfy the public interests that underpin the journalistic right to report (*diritto di cronaca giornalistico*)”.

The court ordered the website to delete the article and pay € 5,000 in damages, but... the site was authorised “to keep a paper copy” of the article for their record. *Primadanoi.it* was forced to comply with the ruling and deleted the story.

“Let’s imagine that the judge was right, what should we have done not to violate the judge’s law?”, asked at that time Alessandro Biancardi, editor and publisher of the website: “It’s clear: we should have deleted the article after six months, just because they asked us to, although there is no rule that says that. We should have imagined, god knows how, that the vital cycle of a news article is just six months”.²⁴

In his editorial, Mr. Biancardi tried to imagine what would happen if a politician were investigated and later acquitted, the people he surmised “would no longer have a right to know about the legal procedure regarding him”. “The constitution tells us that information is a vital good since it is tightly linked to democracy,” Mr. Biancardi wrote, adding that “In Abruzzo privacy applies”.

Mr. Biancardi had every reason to be worried, since in the meanwhile his site had been engulfed in a similar case.

It was, once more, a petty crime story. At the end of March 2008, in a restaurant of Pescara (the largest city in Abruzzo), four people from the same family were involved in a public brawl, during which two persons were stabbed. Police was summoned, the four were arrested. *PrimaDaNoi.it* reported what happened.

At the beginning of September 2010, one of the four asked in his own name and in the name of the restaurant he owned that the article be deleted, because it reflected badly on the business. On October 26, he sued *PrimaDaNoi.it* in the same court of Ortona invoking his interest not to have “his reputation exposed for an unlimited time even when with the passing of time public interest in the news has ceased”.

As said, in the spring of 2011 the website was ordered to delete the first story, and they decided then to delete the second one as well, hoping that it would settle the matter. Little they knew – in a ruling delivered almost two years later, at the beginning of 2013, the second judge found against the website anyway.

As a matter of course, the first request of the claimant was dismissed, since the article had already been unpublished, but the Court awarded him € 10,000 in damages (half for himself,

²⁴ La privacy vale più del diritto di cronaca, un giudice di Ortona condanna *PrimaDaNoi.it*, *PrimaDaNoi.it*, March 30, 2011 (<http://www.primadanoi.it/news/Internet/5132/--La-privacy-vale-piu-del-diritto-di-cronaca-un-giudice-di-Ortona-condanna-PrimaDaNoi-it.html>)

half for the business he owned) nonetheless. The damage was supposedly suffered “at least” during those six months between the take-down request in October 2010 and the actual deletion in May 2011. But the court found that

“...from the date of publication until the date of the direct warning [take-down request], enough time passed for the published news to satisfy the public interests that underpin the right to report (*diritto di cronaca*) and therefore that at least from the date the warning was received those data could no longer be processed (...). Persisting in processing those personal data, resulted in a violation of the claimants right to privacy and reputation”.²⁵

Apart from the time frame of the expiration date (six months in the first case, two years in the second one), which is not a secondary issue, the second sentence was almost a copy of the first. Mr. Biancardi and his lawyer could not believe it, all the more since the legal case originated by the original brawl was still dragging in the courts; it was by all journalistic standards of present interest. They decided to appeal to the Supreme Court of Cassation (*Corte di Cassazione*, Italy’s highest court in all legal matters, except constitutional ones).

The case seemed to be a clear-cut one, especially since in previous ones the Supreme Court had ruled mostly in favor of free speech and freedom of the press, sometimes asking for the original story to be updated. Even the State Prosecutor asked the Court to accept the appeal and void the verdict of the court of first instance. But the judges found otherwise.

On June 24, 2016, the Italian Supreme Court accepted the principle that news have an expiration date and that the time frame of two years defined by the Court in Ortona was reasonable. *PrimaDaNoi.it* succumbed.²⁶ The decision was even more paradoxical since, as the prosecutor pointed out, the criminal case that arose from the stabbing had its last court hearing just a month before, in May 2016.

“In effect the ruling affirms that the two people who stabbed each other in their restaurant suffered damages to their reputation (personal and of the restaurant) not because of the violence of their actions but because of the report about them that remained accessible on

²⁵ Original: “...dalla data di pubblicazione fino a quella della diffida stragiudiziale sia trascorso sufficiente tempo perché le notizie pubblicate potessero soddisfare gli interessi pubblici sottesi al diritto di cronaca giornalistica e che, quindi, almeno dalla data di ricezione della diffida il trattamento di quei dati non poteva più avvenire (...). Il persistere del trattamento dei dati personali ha determinato una lesione del diritto dei ricorrenti alla riservatezza e alla reputazione”. A PDF copy of the ruling is included, as a SCRIBD embed, in: *Ammazzati dalla giustizia, condannati ancora per aver tenuto on line un articolo corretto*, *PrimaDaNoi.it*, January 16, 2013 (<http://www.primadanoi.it/news/abruzzo/536737/ABRUZZO-AMMAZZATI-DALLA-GIUSTIZIA-.html>).

²⁶ Corte Suprema di Cassazione, Prima sezione civile, *Sentenza sul ricorso 7598-2013*, June 24, 2016. Original text of the ruling, all names deleted, as per Italian law. (<http://juriswiki-prod.s3.amazonaws.com/attachments/documents/553795/original/sentenza-corte-di-cassazione-13161-2016.pdf?1467626125>)

the web”, said Biancardi in an editorial.²⁷

“The press cannot be subject to authorization and censorship”, wrote Mr. Biancardi quoting Art. 21 of the Italian Constitution, “this ruling tells us instead that, after a while, one must be authorized to process personal data, and as a matter of fact, by de-indexing and deleting articles from the web, censorship is applied. A posthumous censorship, but censorship nonetheless”.

PrimaDaNoi.it is not relenting, they decided to go all the way to the European Court of Human Rights – no small feat for an organization that employs right now only four journalists – but in the meanwhile they struggle.

The website was subject to 15 right to be forgotten related lawsuits in the last seven years, on top of defamation cases, said Mr. Biancardi in an interview for this project:²⁸ “As we publish the verdicts of criminal cases, people attack us and ask us to remove... almost as they were ordering in a restaurant: ‘This, this, and that’, and they expect us to do it”.

The website received about 80-100 requests, it did delete about 15 pieces, said the editor, out of 700,000 items in the database. About 20 items were de-linked by Google. In fact, after the 2014 sentence of the European Court of Justice on the Google-Spain case *PrimaDaNoi.it*'s routine answer to take down requests has been to ask Google to de-link, “but this is taken as a slight,” says Mr. Biancardi, “and they sue you before a court of justice. They bring us before a civil court asking for deletion. We have mostly won our cases, although sometimes on technicalities, but we usually won”.

“Everytime I receive a take-down request”, he said, “I search on Google to see if there are other news sites with the same information. Sometimes I find other articles, sometimes I don't find any, although there were bound to be: clearly somebody must have deleted them. I think that, as soon as they get the takedown requests, they comply in order not to get into trouble. We, instead, take on the fight, but this limits us a lot. Maybe we do that as a matter of principle”.

“Yes, principles are principles, but it is difficult to continue to believe that what you think is right, and all the others are wrong... so, maybe in self-defence one may cave-in”, Biancardi added, “It is really most absurd, and grotesque to think that the Supreme Court is wrong! Right now, we are waiting for the European court ruling... We are obstinate, but what for? It is worse than fighting against windmills”.

²⁷ Alessandro Biancardi, *Diritto all'oblio. La Cassazione conferma: «cancellare sempre articoli anche se attuali»*, *PrimaDaNoi.it*, June 30, 2016 (<http://www.primadanoi.it/news/cronaca/567439/diritto-all-oblio-la-cassazione-conferma--cancellare-sempre-articoli-anche-se-attuali-.html>)

²⁸ February 15, 2017, by telephone

SEI IN > CRONACA

Rissa al ristorante, il questore chiude Positano e Alcyone per venti giorni



di WhatsApp 328 3290550 - 29 Marzo 2008 alle 14:35 | Letture: 9934



[color=990000][b]ARTICOLO CANCELLATO SU
RICHIESTA DELL'INTERESSATO [/b] [/color]

29/03/2008 13.51

skyscanner

Roma Ciampino
da Berlino Schoenefeld
da 43 € Scopri →

New York
da Milano
da 237 € Scopri →

New York
da Roma
da 331 € Scopri →

TECNOGASA
FRANCHISING NETWORK

2 locali in vendita
Mq. 65, Roma
(Pietralata)
€ 185 000
Cerca adesso

4 locali in vendita
Mq. 100, Roma (San
Lorenzo)
€ 395 000
Cerca adesso

Other cases

Removals and de-indexing

When the Italian Supreme Court of Cassation ruled that news have an expiration date and may therefore have to be deleted, as in the case of the Italian news site *PrimaDaNoi.it*,²⁹ it brought the controversial and ill-defined concept of a right to be forgotten to new problematic heights; all the more so since courts in other European countries have already started to affirm that “news” is contemporary, and that after a while the archives – as one lawyer we interviewed said – become “contemporary social history”. In Romania, for example, almost in the same months while the Italian Supreme Court was preparing its decision, a Bucharest Court ruled against Google that had appealed an order by the data protection agency to de-list some material, on the grounds that it was information about an individual with a public position and politically active. No way the content should be findable on Google, said the court:

“although at the moment of publishing the said information the data subject was a university teacher and a candidate for the position of mayor as well as for senator, such qualities are no longer applicable and, therefore, the necessity of informing the public is no longer justified.”³⁰

Even without considering the extremes of courts and data protection authorities defining a “time limit” to the availability of news information, we seem to witness an increase in requests to take down legitimate news items, mostly – although not only – on right to be forgotten grounds. They may come in the form of a court order, a formal legal brief, or just a simple request from the interested individual, but it doesn’t seem that most publishers and newsrooms have clearly defined guidelines as to how to deal with such request, certainly not common and public ones.

As Professor Brock noted³¹

“Editors, by watching the spread of concern about valueless or malign information, have become more sympathetic to requests to amend or even take down material they can’t defend. But editors will rarely talk or write about the subject in public. They are discreet about takedown procedures which they control for several reasons.

They may experiment with guidelines and change them as they go along; they would prefer to avoid the charge of inconsistency. If Google delinks a URL and a news site wants to protest, some disclose the fact. But other editorial judgements about web

²⁹ See previous chapter.

³⁰ Irina Garlasu, Roxana Ionescu and Iurie Cojocaru, *Romania - The right to be forgotten materialised in the Romanian Courts of Law*, DACbeachcroft.com, May 16, 2016 (<https://www.dacbeachcroft.com/en/articles/2016/may/romania-the-right-to-be-forgotten-materialised-in-the-romanian-courts-of-law/>)

³¹ George Brock, *The right to be forgotten*, *cit.*, Kindle position 1873-1896

content are dealt with more discreetly, not least from fear of triggering an avalanche of complaints which would be hard to handle.

The newsrooms of the *Guardian*, *El Pais*, and the online division of *France Télévisions* have all adjusted their procedures, gradually and discreetly, to deal more flexibly not only with the formal procedures for a right to be forgotten arising from Google Spain but to be broadly more sympathetic to people who claim to suffer from what they consider to be a hostile algorithm.

The new rules at *El Pais* commit the paper to updating information as far as is possible on convictions when they are appealed or reversed. But they do not commit to taking news reports down – simply to updating. Delisting of links is possible for something which is more than 15 years old. Serious crime is not delisted. But any reader of their websites would have difficulty in finding evidence of that change.”

This is more or less the situation that we found interviewing publishers and journalists for this project, although deleting some material seems to be more of a possibility than the policy of *El Pais*, as described by Professor Brock.

Most requests have to do with individuals asking personally or through their lawyers to delete an item that they feel is outdated, incorrect or simply no longer relevant – although still problematic for the person involved. They often involve small crime stories that keep popping up in searches on the person’s name years after the fact. It may also be serious criminal cases that were reported at the beginning, but ended in a final acquittal. Sometime, in Italy for example, a court may ask for the temporary seizure of an item, pending a defamation lawsuit against the news organization.

One egregious case, as told by one of the executives interviewed for this project, involved an Italian news organization publishing a story based on secret court documents both in print and online, but they also published the actual papers on the website. The story as such was legitimate, not so the publication of the documents, so a police officer was sent to the newsroom to notify an injunction to take down the material. When he arrived, he asked to take down everything, both the story and the documents, although the written order mentioned only the documents. The news organization resisted, but the officer called the judge and the judge said everything had to be taken down, notwithstanding the fact that the perfectly identical print version was still available in newsstands.

The number of cases vary widely, of course, depending on the dimension of the website and the number of items it produces. They range from a couple of dozen to a few hundreds a year. In every case, there doesn’t seem to be written guidelines, certainly not public guidelines.

The kind of positive responses vary widely too: correcting or updating the original item with new information, anonymizing the reports, or eventually taking down the story. Some try to use the Google Spain ruling as a defense of sorts, inviting claimants to turn the requests to Google, but most of the times it ends up with the news organization organizing the

de-indexing of the incriminated content.

- “We decide on a case-by-case basis. Sometimes, when a person had a legal affair but has changed, or has paid the fines that were requested to them, we decide to remove the articles”, an editor told us, “The decision is taken at the level of the editor-in-chief”.
- “We follow our nose”, admitted another editor; if the news is about a minor event of the past that has heavy consequences on an individual who is not a public figure, they usually accept to de-index the story from Google: “If it is clear that the item has no general interest, if it’s something that was published ten years ago, maybe after ten years you have the right to [de-link] ...”
- At one newspaper that receives up to a dozen take-down requests a month on different grounds, “if it’s not a political, business, major crime story”, they prefer to take it down, instead of arguing.
- The editor of a news websites told us that they interpret the right to be forgotten as something related to data and search engines, such as Google, not to journalistic content. Although they received request to take down material, they never accepted them, they may update or correct the item, but not delete it. In three or four cases in the last few years, they accepted to anonymize a report, putting initials instead of the full name, for people who may have been charged in a criminal case, but had the charges dropped after a while.
- The initials-instead-of-names solution is sometimes followed also by another, local news website. The editor explained a possible case: “Something silly” about 15 years ago, like a routine coverage of press conference about a drug bust during which police gave a list of names, that they reported, without much other information, but that name still pops up in searches. If it’s about “things not particularly important”, they may edit the name out of the story, or keep only the initials.
- A major newspaper receives dozens of removal requests a month, mostly on right to be forgotten grounds. It is “a sacrosanct right, if necessary requirements exist”, an executive told us, “but it is not clear what these requirements are”, especially in terms of the time frame. They don’t usually remove anything, preferring to de-index the material. Actual removals happen rarely, “less than ten times a year”, only as an extreme measure.
- Another major publisher asserts that they do not remove editorial content, instead – if warranted – they try to de-index the material from search engines. Nonetheless, the editorial side may decide on its own on easier-to-assess, non-legal material regarding minor issues in old pieces.

“Keep-the-stuff-and-deindex” seems to be the preferred solution in many cases, a move that could prevent the material to disappear from the archives, if not from search engines. The major problem is that the de-indexing procedure is complicated and doesn’t guarantee that the content will not be re-indexed after a while. To understand this, we should see how it works.

Search engines, whether mainstream ones such as Google or specialized ones such as the

Internet Archive - which, as the name implies, archives the web - operate by browsing vast quantities of web pages and indexing their contents. The browsing is done by automated scripts known as web crawlers. In order to avoid abuses, such as crawlers accessing the same page several times in a row, programmers of scripts and websites owners agreed on a series of rules, to be written in a file called robots.txt.³² The year was 1994 and the World Wide Web was made of less than 3,000 websites.

In the robots.txt file, website owners can give specific crawlers a series of orders. They can tell the Google crawlers to avoid a specific section of the site, they can prevent a specific crawler from indexing the whole site or they can tell all crawlers to avoid a specific page. Such files must not be used to prevent content from being indexed, as Google makes clear (they even wrote in bold that one “should not use robots.txt as a means to hide web pages from Google Search results”). It is merely a code of good conduct written in a time long gone.

Despite these shortcomings, many publishers use robots.txt files to prevent some pages from being indexed. As a result, the pages cannot be archived by digital libraries such as Archive.org (some archiving projects ignore robots.txt files, such as archive.is).

In addition to the robots.txt protocol, it is possible to ask the search engine to remove a specific URL from the results page to hide a piece of information from searches, but this is only a temporary measure, usually lasting three months.³³

To overcome these problems with permanently de-indexing a URL from a search engine, the publisher should introduce a “noindex” metatag in the original file of the URL – which cannot be read if a robots.txt instruction prevents the search engine from reading the file. A Catch-22 situation that may force publishers to employ resources to engage with claimants and iterate the procedure many times over – which in some instances seems to push them over the more radical solution of deleting the original page.

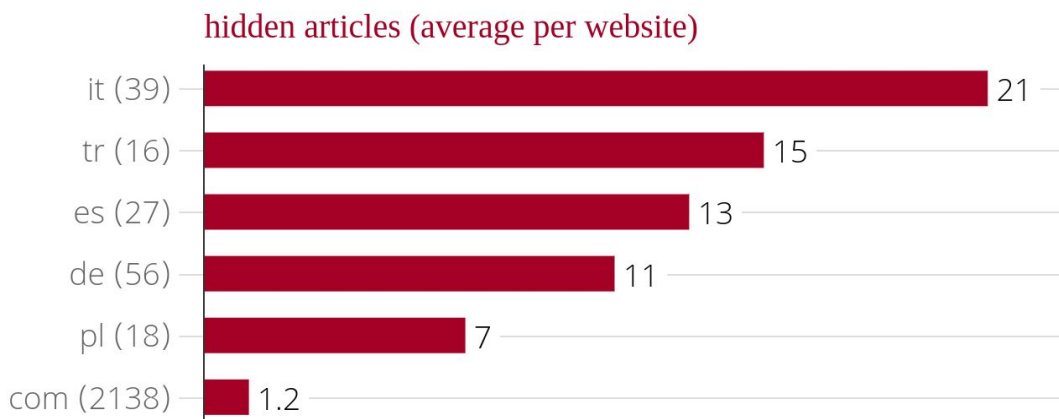
³² <http://www.robotstxt.org/orig.html>

³³ “Temporarily hide information from Google Search by filing a URL removal request. This takes effect in about a day, but it is only temporary (after about 90 days it will reappear in search results)”, see: Remove information from Google, Google.com, (https://support.google.com/webmasters/answer/6332384?hl=en&ref_topic=1724262)

Robots.txt

Robot.txt files are public. We looked at the files of all organizations listed under the “Newspaper” category of DBpedia, the structured-data equivalent of Wikipedia. Out of 5,200 websites, 3,600 files were extracted (some URLs in DBpedia were erroneous and some did not have robots.txt files). We could not run an analysis by country for lack of means, but did an analysis by top-level domains (the “.it” or “.de” after the name of the website), which is a close enough approximation.

European newspapers exhibit vastly higher than average numbers of hidden articles, with Italy topping the list with 21 articles, on average, hidden at every newspaper. The averages hide wide discrepancies. *La Repubblica*, for instance, hides over 200 articles, *Corriere della Sera* over 100.



Hidden articles per website on average (number of websites analyzed indicated in parenthesis)

The topics of the articles being prevented from being archived cover the usual “right to be forgotten” stories, where persons under suspicion or sentenced for a given crime are named. It is possible that the article in question pop up on top of search results on the name of the persons, making their job or partner searches much too difficult. However, many articles being removed from the archive deal with informations in the public interest. Some report accusations of child molestation against a former athlete (charges were later dropped because of the statute of limitations). Others have to do with a retirement home where patients were left in their own excrements for days. Others still report on companies filing for bankruptcy. Many articles were also depublished, which means, in the absence of an archived version, that the public will never know what they were about if they were not published in the paper version of the news outlet.

Some cases

Censorship and security the French way

In March 2015, the French Interior Ministry announced that five websites had been blocked, following a suspicion that these websites were promoting terrorism and spreading hate speech. This was the first time French police made use of its new powers introduced as part of a package of counter-terrorism measures³⁴ approved by the French parliament in November 2014, that allows such bans without court orders.

Visitors to the sites were redirected to a page from the French Interior Ministry. There, they were greeted by an image of a large red hand and text informing them of their deed: “You are being redirected to this official website since your computer was about to connect with a page that incites to terrorist acts or promotes terrorism publicly.”

Arbitrary censorship

“The first five sites are all run by groups listed by the intelligence agencies [as terrorist groups] and all advocate terrorism”, French Interior Minister Bernard Cazeneuve said in March 2015.

Islamic-news.info, created in May 2013, was one of the five websites censored. In an open letter published a few days after the police action,³⁵ its editor and publisher refuted this assertion. He explained that he was the only one behind the articles: “No group or organization close to the Islamic state or Al-Qaeda runs or finances it,” he wrote. (He preferred to remain anonymous to avoid reprisals).

It is indeed difficult to prove the accusations against this website. None of the archived articles of the website available on the Internet Archive³⁶ shows either support for terrorism or incitation to hatred. As for the other four censored websites, it's impossible for citizens, judges or anyone beyond the police to verify the allegations. The only source mentioning the problematic content is an article from *Le Monde*,³⁷ a French daily, saying that the reason given by the Interior Minister to justify its decision to block the website is that the author reproduced – without putting it in perspective – a speech by Al-Baghdadi, the leader of the

³⁴ LOI n° 2014-1353 du 13 novembre 2014 renforçant les dispositions relatives à la lutte contre le terrorisme, LegiFrance, (<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029754374&categorieLien=id>)

³⁵ “Moi, censuré par la France pour mes opinions politiques”, Numerama, March 18, 2015 (<http://www.numerama.com/magazine/32516-moi-censure-par-la-france-pour-mes-opinions-politiques.html>)

³⁶ https://archive.is/20170308/http://web.archive.org/web/*/islamic-news.info

³⁷ William Audureau and Soren Seelow, Les ratés de la première vague de blocages administratifs de sites djihadistes, *Le Monde*, March 18, 2015, (http://www.lemonde.fr/pixels/article/2015/03/18/les-rates-de-la-premiere-vague-de-blocages-administratifs-de-sites-djihadistes_4596149_4408996.html#8bPVWVMjk2r17ttQ2.99)

Islamic State, in which Al-Baghdadi invites “to trigger the volcanoes of jihad everywhere”, and that an audio file of the full speech was uploaded to the website. *Le Monde* added that it was not promotion of terrorism. The website never republished propaganda videos from the Islamic State.

According to an article in Numerama,³⁸ a French online media, the article in question, published by *Islamic-news.info* on 13 November 2014, analyzed the 17-minute speech of Al-Baghdadi to explain his political motivations and the military context. *Arrêt sur Images*, a French media watchdog, also notes that “the editor doesn’t make any comment, favorably or unfavorably, on Al-Baghdadi’s statements”, although he has an ambiguous position regarding the armed struggle in Syria.³⁹

What the police decides, ISPs do

No judge reviewed the decisions of the Interior Ministry. The process that ended up in a website being blocked is as follows. The police authorities⁴⁰ send a list of the specific pages (URLs) to the main French Internet Service Providers (ISPs) which must then block without delay their users from accessing these URLs.

The police should first ask the hosting service and the editors of the website to remove only the specified content but this step is optional and can be easily skipped.⁴¹ In practice, whole domains are blocked using DNS redirection at ISP level. This is what happened for *Islamic-news.info*. The legal information displayed on the website did not contain the name of the hosting service (although this information could have been easily verified by the police if it had run a command to locate the website’s servers).

No oversight

Upon reception of the list of websites to block, ISPs must enforce the DNS change immediately. That no abuse is committed by the police falls under the responsibility of a single person, designated within the French Commission on Digital Civil Liberties (CNIL, Commission Nationale de l’Informatique et des Libertés). The list of blocked websites is forwarded in an encrypted format by the police to this designated person. The designated person is one individual with no supporting staff, who, alone, is permitted to read the list of

³⁸ Guillaume Champeau, *Islamic-News a été censuré pour l’analyse d’un discours publié*, Numerama, March 19, 2015 (<http://www.numerama.com/magazine/32530-islamic-news-a-ete-censure-pour-l-analyse-d-un-discours-publie.html>)

³⁹ Justine Brabant, *Apologie du terrorisme: les ambiguïtés de Islamic-News.info*, *arretsurimages.net*, March 18, 2014 (<http://www.arretsurimages.net/articles/2015-03-18/Apologie-du-terrorisme-les-ambiguites-de-islamic-newsinfo-id7580>)

⁴⁰ The service is called the OCLCTIC, it’s headed by the Central Headquarters of the Judicial Police

⁴¹ *Rapport 2015 d’activité - CNIL*, p.16 (https://www.cnil.fr/sites/default/files/atoms/files/cnil_rapport_blocage_sites_Internet_2016_0.pdf)

blocked websites. In early 2015, this person received the list but could not verify that the websites had anything to do with terrorism – because the websites were blocked! After CNIL signaled the lack of logic of the process, the police provided screenshots and some details on the reasons leading to a website being blocked.

CNIL is composed of members from various government entities designated by the Prime Minister and is not, in fact, independent.⁴² The annual report of the designated person suggests that CNIL has very little power to remove a website from the list and to unblock.⁴³ CNIL can report and warn the authorities when a case seems to be abusive, but only the authorities can change the list and unblock a website. According to the CNIL report, eight websites have been unblocked by the authorities in 2016,⁴⁴ out of 68 blocked websites.

Islamic-news.info was unblocked since its 2015 censorship, but the actual website has been removed from its servers and is no longer available. The author decided to not maintain it and stopped paying for the hosting service. He said in his open letter that “the damage is already done” and that “the label of ‘terrorism’ has been stamped”. “No one can take it away, even the decision of a judge,” he added.

⁴² CNIL is technically an “independent authority”. However, its personnel is appointed by the Prime Minister and its budget depends entirely on the government. Furthermore, it is physically located within the French Ministry of Finances. See the official CNIL website for details: <https://www.cnil.fr/fr/la-cnil/membres>.

⁴³ Rapport 2015 d’activité - CNIL , *cit.*, p.16

⁴⁴ Rapport 2015 d’activité - CNIL, *cit.*, p.11

Some cases

Extreme removal: Cumhuriyet and Turkey's road to full censorship

What happens if a government doesn't want to spread certain news items in the age of the Internet? As concerns about national security and terror attacks increase, so do the legal and judicial tools to monitor and censor media outlets.

Turkey was always notorious with media crackdowns and governmental pressure on journalists. In Reporters Without Border's 2016 World Press Freedom Index, Turkey is ranked 151st out of 180 and, according to the Twitter Transparency Report released in March 2017, Turkey issues the largest number of censorship requests by court order.⁴⁵ Keep in mind that studies showed that Twitter under-reports censored tweets in Turkey and warned that similar trends might hold for other countries.⁴⁶

In this framework, discourses of national defense and public security provide a safe haven for the government to practice and legitimize censorship through judicial injunctions. The rise in number of court orders goes hand in hand with the increase in deadly attacks.

Nevertheless, one of the most serious crackdowns has been on the daily *Cumhuriyet's* writers and staff, following their famous "Turkish Intelligence Agency (MIT) truck" article. In 2015, editor-in-chief Can Dündar and Ankara bureau chief Erdem Gül have been charged with life imprisonment after the newspaper shared a video showing a transport of weapons to Syria, thereby offering proof of the Turkish government's support to the Islamic State. *Cumhuriyet* is one of the oldest Turkish newspapers and it has been renowned for its opposition towards government. However, with charges of revealing confidential information and being members of terrorist organization, many of the newspaper's staff including reporters, columnists and executives are currently in prison; the editor managed to find refuge in Germany, after months in jail.⁴⁷

What was the article about

In January 2014, the local prosecutor requested the Gendarmerie in the Southeastern city of Adana to stop and search lorries thought to be carrying weapons to jihadist groups to Syria, at a border crossing point controlled by ISIS (Bab al-Hawa). The government claimed that

⁴⁵ Twitter, Turkey, Transparency Report 2017, (<https://transparency.twitter.com/en/countries/tr.html>)

⁴⁶ Rima S. Tanash, Zhouhan Chen, Tanmay Thakur, Chris Bronk, Devika Subramanian, Dan S. Wallach, *Known Unknowns: An Analysis of Twitter Censorship in Turkey*,

Proceedings of the 14th ACM Workshop on Privacy in the Electronic Society, pages 11-20, October 12, 2016 (<http://www.cs.rice.edu/~rst5/twitterTurkey/paper.pdf>)

⁴⁷ See *A medium in exile to overcome censorship*, p.46.

the trucks were sending humanitarian aid to Syria and they belonged to the Turkish intelligence agency MIT. The arrest of intelligence agency members by the gendarmerie led to a huge scandal. The prosecutor who ordered the search and all gendarmerie officials who took part were removed from their positions and many of them were charged with life imprisonment.⁴⁸

One year later, in May 2015, Cumhuriyet published an article and a video on their website,⁴⁹ claiming that Turkish intelligence were helping to smuggle weapons to jihadist groups in Syria. The video shows security officers inspecting three trucks and uncovering missiles, mortars and anti-aircraft ammunition that were hidden underneath medical aid equipment. The media outlet claims that most of the ammunition was headed to ISIS and al-Qaeda and accused the government of committing a war crime.

After the publication of the article, government officials first claimed that the guns were headed to the “Free Syrian Army” opposition group, then denied the delivery altogether and shortly after Prime-Minister Ahmet Davutoğlu claimed “the humanitarian aid was going to our Turkmen brothers”.⁵⁰

On the day the article was published, a court in Adana issued an immediate gag order: all written, visual and online media outlets were banned from reporting or commenting on the scandal and all the content that had been published so far had to be removed under Law Nr. 3713, which is commonly referred as “Anti-Terror Law”.⁵¹ Thus, by order of the judge, the newspaper had to completely delete the content from the website. Shortly after, Can Dündar and Erdem Gül were arrested with charges of espionage and treason. Even though they were released after four months, many of the newspaper’s top staff, writers and a reporter were still in prison, as of April 2017.

How was the content blocked?

Once a censorship attempt occurs, several legal and judicial tools are developed to monitor and censor media outlets across the country. Turkish courts and prosecutors have the right to issue gag orders and ask for the removal of all written and online content if deemed necessary, with national security discourse playing a huge role to legitimize the courts’ rulings, as in the case of the *Cumhuriyet*’s article. Provisions of criminal law, such as Anti-Terror Law, are applied to online content. Thus, court opinions on media censorship rely

⁴⁸ Court Accepts Indictments on Illegal Search of MIT Trucks, Yeni Safak, May 15, 2014 (<http://www.yenisafak.com/en/news/court-accepts-indictments-on-illegal-search-of-mit-trucks-2022946>)

⁴⁹ https://www.youtube.com/watch?v=vFGWY51_wow

⁵⁰ Semih Idiz, Syria bound trucks put spotlight on Turkey, Al-Monitor, January 21, 2014 (<http://www.al-monitor.com/pulse/originals/2014/01/turkey-trucks-attention-syria.html>)

⁵¹ See Article 6 and Article 7, 3713 Law to Fight Terrorism, LawsTurkey, (<http://www.lawsturkey.com/law/law-to-fight-terrorism-3713>)

on “counter- terrorism, public interest, restoration of public order and prevention of crimes”.⁵²

Once a court issues the order, the Radio and Television Supreme Council (RTÜK) implements it in for broadcasting. Media outlets have to comply with the ban and they are forbidden to mention or comment on the forbidden content. RTÜK has the authority to sanction the broadcasters or even close the media outlets if they violate the orders.

For online material, the Telecommunication and Communication Presidency (TIB) was in charge of implementing the orders of prosecutors since 2007. Its jurisdiction is now transferred to the Information and Communication Technologies Authority (BTK) with the declaration of martial law after the July 2016 attempted coup. Under Law No.5651, commonly known as the “Internet Law”, banned content has to be removed within four hours once the court order is received by website owners. This law took effect in 2014 and expands TIB’s jurisdiction to allow blockage without prior court order, though it has to be confirmed by a court within 48 hours.⁵³

In this case, scholars estimate that government’s Internet authority TIB banned over 100,000 URLs and domains based on civil-code related complaints. Through TIB’s decisions Youtube, Facebook, Twitter, Instagram have been blocked multiple times with a single court order. If access to a single page cannot be blocked for technical reasons, the law allows the Internet service providers (ISPs) to block an entire domain.⁵⁴

ISPs also throttle Internet traffic (make Internet traffic slow), even if there is no legal ground for them to do so. However, researchers of Turkey Blocks, an independent group that monitors social media censorship, reveal that extrajudicial shutdown of social media applications and network throttling are employed right after terror attacks.⁵⁵ Access to *Cumhuriyet* has been throttled by TIB at least three times in last two years.⁵⁶ Furthermore,

⁵² Turkey Country Profile, Freedom on the Net 2016, Freedom House
(<https://freedomhouse.org/report/freedom-net/2016/turkey#sdfootnote22sym>)

⁵³ Burçak Unsal, The Constitutional Court’s decision on Internet law, Hurriyet Daily News, December 14, 2015
(<http://www.hurriyetdailynews.com/the-constitutional-courts-decision-on-Internet-law.aspx?pageID=238&nID=92470&NewsCatID>)

⁵⁴ Efe Kerem Sözeri, Turkey censors Facebook, YouTube, Twitter, news sites over terrorist photo, Daily Dot, April 6, 2015
(<https://www.dailydot.com/layer8/turkey-mass-censorship-twitter-youtube-facebook/>)

⁵⁵ Human Rights Watch, Open Letter to the Government of Turkey on Internet Blocking and Free Expression, October 29, 2015
(<https://www.hrw.org/news/2015/10/29/open-letter-government-turkey-Internet-blocking-and-free-expression>);, Social media blocked in Turkey, Turkey Blocks, August 25, 2016
(<https://turkeyblocks.org/2016/08/25/social-media-blocked-turkey/>)

⁵⁶ Abluka, Cumhuriyet, January 16, 2016
(<http://www.cumhuriyet.com.tr/haber/turkiye/465118/Abluka.html>)

after the “MIT trucks” piece, another *Cumhuriyet* article, about the financial activities of the Humanitarian Relief Foundation, an international NGO in relation to jihadist groups, was censored by court order and banned in Turkey.⁵⁷

What’s next?

It is almost a settled law now; at times of domestic crises, government resorts to censorship and throttle access to media platforms in Turkey. Despite legal and judicial constraints, journalists still seek digital tools to counter demands of content deletion. On the other hand, regular Internet users also try to find alternative ways to circumvent censorship and social media shutdowns through VPN. However, the government already ordered ISPs to block access to Tor and VPN services and leading service providers are implementing this order.⁵⁸

Many newspapers are even under the threat of losing their archives. 90-year-old *Cumhuriyet* is only one of them. In July 2016 only, 45 newspapers, three news agencies, 16 TV stations, 23 radio channels and 29 publishing houses were taken down on charges of producing propaganda for terror organizations⁵⁹ and the staff of some of the news organizations that were shut down claim that government-appointed trustees deleted the archives from the servers.⁶⁰ There is no confirmation that this actually happened, but it is a fact that Internet users cannot reach the archives of many seized newspapers such as *Zaman* (once one of Turkey’s top-selling newspapers), its English-language sister publication *Today’s Zaman* and *Birgün*.

This method is particularly harsh and terrifying since the purpose of deleting an archive is not only the removal of an unwanted content, but also an attempt to wipe out the existence of the newspaper from history, as if it never existed.

⁵⁷ Emre Döker, Aynı hakim bu kez sansür, *Cumhuriyet*, December 21, 2015 (<http://www.cumhuriyet.com.tr/haber/turkiye/451383/Aynihakimbukezsansur.html>)

⁵⁸ Tor Blocked in Turkey as government cracks down on VPN use, *Turkey Blocks*, December 18, 2016 (<https://turkeyblocks.org/2016/12/18/tor-blocked-in-turkey-vpn-ban/>)

⁵⁹ Silencing Turkey’s media: The government’s deepening assault on critical journalism, *Human Rights Watch*, December 15, 2016 (<https://www.hrw.org/report/2016/12/15/silencing-turkeys-media/governments-deepening-assault-critical-journalism>)

⁶⁰ Mustafa Akyol, After seizing *Zaman* newspaper, what’s next for Turkey?, *Al-Monitor*, March 11, 2016 (<http://www.al-monitor.com/pulse/originals/2016/03/turkey-what-next-after-seizure-of-newspaper.html>)

Solutions

Archiving content, private and public efforts

The need to preserve content published on the web is almost as old as the web itself. As soon as 1996, the Internet Archive, a non-profit activity managed by a Silicon Valley entrepreneur, started collecting and archiving web pages (the interface that lets the public access them was published in 2001). The goal was and remains primarily cultural in nature. According to its own website, the Archive “help[s] preserve [online cultural] artifacts and create[s] an Internet library for researchers, historians, and scholars.”⁶¹

Almost at the same time, public institutions recognized the need to preserve digital content. In 2003, UNESCO, the satellite institution of the United Nations tasked with cultural issues, had its members sign the Charter on the Preservation of Digital Heritage, which recognized the need to preserve digital content. In some countries, the Charter was followed by changes in national legislation regarding archiving, which adapted old texts to the new, digital reality.

Whether public or private, efforts to preserve web content follow two main directions. One is a large-scope, lacunary and open approach, and the other is a narrow-scope, comprehensive and closed one.

The large-scope, lacunary approach

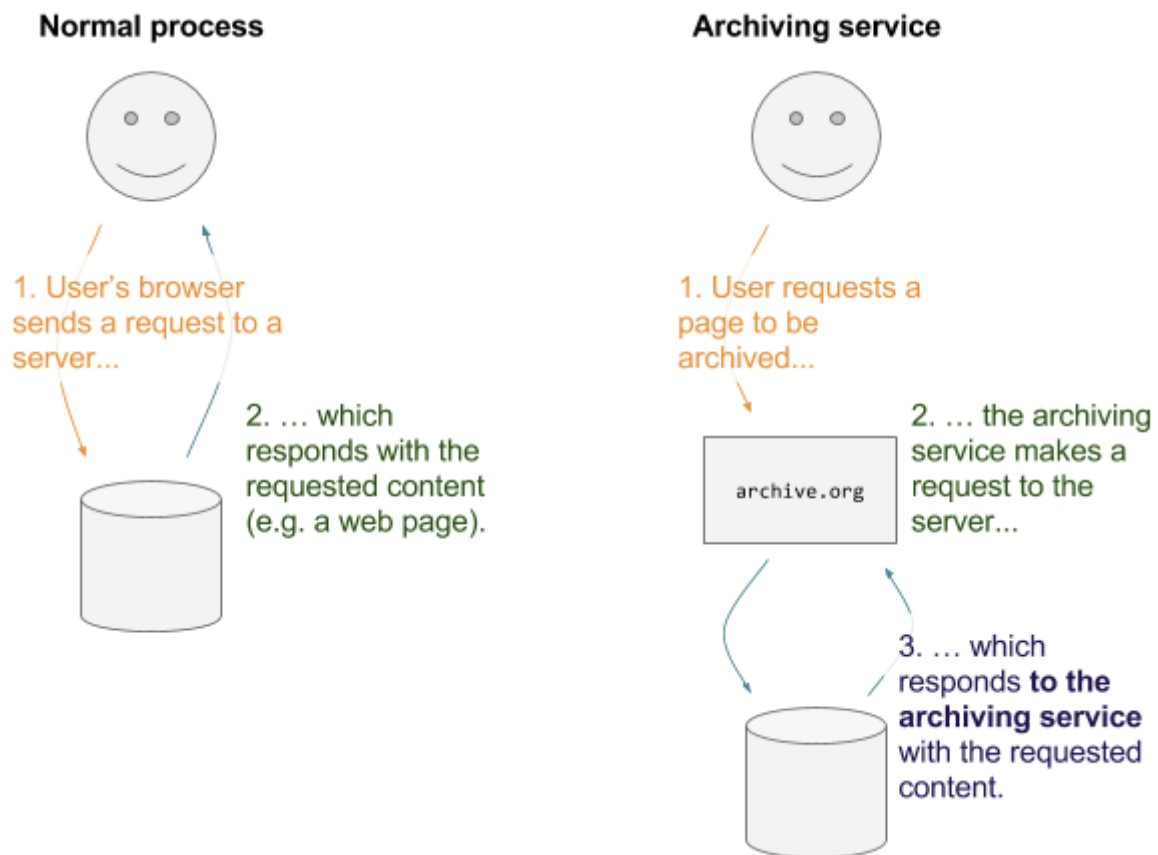
The most well-known way to archive the web is the approach followed by the Internet Archive. Users can submit a URL to the Archive, the server of the archiving service makes a request to the server of the page to be saved and copies the content returned by the server, sometimes including part of the linked assets such as stylesheets and script files (needed to render the page in a web browser) and images, though additional content, especially content stored in sub-pages or iframes, PDF files or Flash programs, is not saved. This is of special concern when a website embeds a Youtube video, for instance, because the video itself will not be saved and can be deleted on Youtube by its owner or by the platform itself.

Another issue has to do with proxying. When a page is archived, the page itself is not transmitted to the archiving service by the user who wants to archive the page. Instead, the user asks the archiving service to query the page and save it. The content that is returned by the server hosting the target page does not transit via the user who initiated the request. Using the HTTP header “X-Forwarded-For”, the archiving service can signal to the target server who the final user is but the target server can be programmed to respond in a specific way to a request emanating from an archiving service. Such specific response used to be publicly coded in the robots.txt files. However, since the Internet Archive announced that it would ignore the contents of those files,⁶² it is possible that servers that host content will

⁶¹ Why is the Internet Archive collecting sites from the Internet? What makes the information useful?, FAQ, Internet Archive, <https://archive.org/about/faqs.php#21>

⁶² Mark Graham, Robots.txt meant for search engines don't work well for web archives, Internet

change their strategies and code non-public scripts that prevent them from returning content to the archiving servers, or that return a different content from the one the user requesting the archiving sees. This issue is of particular concern for news content. Many news websites have paywalls in place, so that only logged in users can access the published content. The same is true of some content on walled-in platforms such as Facebook. In such cases, archiving services have no way to access the content to protect.



The Internet Archive is not the only organization enabling people to save webpages. Archive.is, a service that seems privately-run but whose owner and operator remains obscure, Teyit.link, a service set up in 2017 by Turkish verification platform Teyit.org, or Arquivo.pt, a service run by the Portuguese administration, work on the same model of archiving the open web and letting users submit a page for archiving and retrieving the archived version later. One service, Arquivo.pt, only lets users retrieve pages that have been archived more than a year previously, in order not to cannibalize the traffic of news websites.

Some services – the Internet Archive and Arquivo.pt – operate automated crawls of portions of the web independently of requests by users. They crawl lists of websites that have been

Archive Blogs,

<http://blog.archive.org/2017/04/17/robots-txt-meant-for-search-engines-dont-work-well-for-web-archives/>

deemed worthy of being archived, such as government websites or news publications.

Because of their large scope, such services rarely, if ever, preserve the entirety of an online property. When digital news outlets disappear, the holes in coverage show, and they can be huge. In January 2017, for instance, the main digital-only newsroom in Portugal, *Diário Digital*, was shut down by its publisher for financial reasons.⁶³ *Diário Digital* had been the largest and oldest online newsroom in the country and had operated continuously since 1999. It had no paywall and no specific robots.txt instruction that could have hampered archiving. Despite these advantages, most of the content of *Diário Digital* is not to be found on the Internet Archive or Arquivo.pt. No study has been made to know how many articles published by *Diário Digital* in its 17 years of operation have been lost or how important they were.

The narrow-scope, comprehensive approach

To prevent such losses, the second approach to archiving the web aims at being comprehensive. It is based on the concept of legal deposit which, in some countries, states that public libraries must archive all newspapers and books published anywhere on the territory. Such laws date back to the introduction of the printing press and their purpose was as much cultural preservation as control and censorship (by forcing publishers to send a copy of each issue to the national library, a country's ruler could oversee all content being published).⁶⁴

Legal deposit laws were adapted in the 2000's to encompass online content. Since then, many national libraries archive all content from most publishers under their national jurisdiction. Libraries make lists of websites that need to be archived, usually all websites under the national top-level domain name (e.g. all websites ending in ".fr" or ".dk") and specify how often the websites need to be saved, which can be as rarely as every year for unimportant websites to several times a day for newspapers. While the list of domains to preserve is in itself political,⁶⁵ this approach solves some of the limitations of the first one. Because of the legal obligation to archive content, publishers must cooperate with librarians: they must give access to paywalled articles and cannot block the crawlers of the national library. However, the technical limitations of crawling remain. Videos, content published on third-party websites (Facebook, Vine, Youtube etc.) and special applications such as infographics are not archived. One person interviewed for this report said that videos might be archived starting in 2018, though he could not be sure.

⁶³ *Diário Digital* online news service shuts down, *AlgarveDailyNews.com*, January 9, 2017 (<http://www.algarvedailynews.com/news/10777-diario-digital-online-news-service-shuts-down>)

⁶⁴ In France, legal deposit started in 1537 with the Ordonnance de Montpellier, for instance. See : Magali Vène, *L'Ordonnance de Montpellier*, Exposition François I^{er}, Bibliothèque nationale de France, (<http://expositions.bnf.fr/francoisler/arret/06-4.htm>)

⁶⁵ Valérie Schafer, *Archives : comment le Web devient patrimoine*, *TheConversation.com*, April 24, 2017 (<https://theconversation.com/archives-comment-le-web-devient-patrimoine-76487>)

More importantly, such archives are not publicly accessible. In France, for instance, the archived content can only be accessed from the national library itself. In Denmark, people requesting access to the archived content must be vetted (this is justified by the possibility that some of the archived content *could* contain personal information). As such, these archives barely comply with Art. 9 of the above-mentioned Charter on the Preservation of Digital Heritage, which states in that Article that the preserved content should be made accessible.

Extra-territoriality

The Offshore Journalism project aims to find ways to save journalistic content in jurisdictions with a more liberal view of freedom of expression, but the project would not be the first instance of journalists experiencing or actually exploiting the power of extraterritoriality on their digital work.

What follows is a partial overview of some of the techniques that were successfully applied to offset similar risks in the past, from the most radical and conscious one, to the most happenstance. Many cases refer to raw, unpublished source material (documents), not to any actual published project. The authors think, nonetheless, that similar solutions may also be applied to edited/published material.

Extra-territoriality

From hedge fund management to offshore journalism protection

When, in mid-October 2009, *The Guardian* revealed that a court order was preventing them from reporting on a parliamentary question about a story they had been covering – one of the most notorious cases of press injunctions in the English legal system⁶⁶ – a maverick and successful blog about British politics dug up the question, ignored the gag and published it – thus accelerating a course of events that eventually undid the order.⁶⁷

According to English law, all news organizations are bound to respect a gag order or they would risk fines and prison terms for contempt of court. The *Guido Fawkes* blog⁶⁸ ignored the gag and actually challenged the law firm that had asked for it, to come and get them:

“Note to Carter-Ruck – Guido’s publishers will only accept service as per the requirements of The Hague Convention. Come to Charlestown, the weather is fantastic...”

To make things clearer, they also provided a Google maps link to Charlestown, capital city of the tiny island-country of St. Kitts and Nevis, a well known offshore paradise of the Caribbean where the blog was registered.⁶⁹

Named after Guy “Guido” Fawkes, who took part in the failed 1605 “Gunpowder plot” to blow

⁶⁶ David Leigh, *Guardian gagged from reporting Parliament*, *The Guardian*, October 12, 2009 (<https://www.theguardian.com/media/2009/oct/12/guardian-gagged-from-reporting-parliament/>).

⁶⁷ Alan Rusbridger, *Trafigura: anatomy of a super-injunction*, *The Guardian*, October 13, 2009 (<https://www.theguardian.com/media/2009/oct/20/trafigura-anatomy-super-injunction>)

⁶⁸ <http://order-order.com/>

⁶⁹ *Guardian gagged from reporting parliament*, *Guido Fawkes*, October 12, 2009 (<https://order-order.com/2009/10/12/guardian-gagged-from-reporting-parliament/>)

out the Parliament,⁷⁰ the kiss-and-tell, no-holds-barred blog is in fact the most consequential, if not extreme example of “offshore journalism”. His founder, Paul Staines, set it up from the beginning as an offshore entity in order to offset possible lawsuits and court injunctions. He knew how to do it, since before becoming a full-time political blogger he had been a hedge fund manager.⁷¹

In an interview for this project,⁷² Paul Staines accepted to explain – if only in general terms – the corporate, legal and technical design of the *Guido Fawkes* blog:

“We deploy multi-jurisdictional legal obstacles, multi-jurisdictional technical defences (server hosting, DNS registration, uploading location) and financially defensive counter-measures akin to tax shelters that act as a protective litigation shield.

In 13 years, we have not been defeated in any court in any country. Most recently, the British Supreme Court recognised that we were outside the jurisdiction of the English legal system when it considered our breaching of the Elton John/David Furnish Super Injunction”.

That’s a reference to the case of singer Elton John and his husband David Furnish who, at the beginning of 2016, tried to stop the English media from reporting about an alleged racy case of extramarital sex by Mr. Furnish. They obtained an injunction to this effect on grounds of their right to privacy and to protect their children. The gag order, though, was only enforceable in England and Wales, and the story got its play on an American tabloid, on some Canadian news outlets – as Furnish was born in Toronto – and even on the print edition of *The Sunday Mail*, a Scottish newspaper, which has a print circulation outside of England and Wales.⁷³ The

⁷⁰ It was an attempt by a group of Catholics to blow out the Parliament killing the King and most of ruling class in order to ignite an uprising. The plot failed, Fawkes who was the explosive expert, was caught red handed and put to death, he thus became “one of British history’s greatest villains” for more than 400 years. To this day on 5 November every year his effigy “is still burned on bonfires across England in recognition of his part in the failed ‘Gunpowder Plot’”. See: BBC History, *Guy Fawkes* (http://www.bbc.co.uk/history/people/guy_fawkes)

⁷¹ See his profile by Gordon Rayner: *The colourful life of the man who brought down Damian McBride*, *The Daily Telegraph*, April 17, 2009 (<http://www.telegraph.co.uk/news/politics/5173475/Guido-Fawkes-the-colourful-life-of-the-man-who-brought-down-Damian-McBride.html>)

⁷² March 27, 2017, by telephone and email.

⁷³ *Why we chose to name A-list super injunction couple - and why we can't do so online*__

The Sunday Mail, April 10, 2016 (<http://www.dailyrecord.co.uk/news/scottish-news/chose-name-list-super-injunction-7724893#KELGrV6Kho7fO7qP.97>); Kathy English, *Is court-ordered secrecy futile in the digital age?: Public Editor*, *The Toronto Star*, April 15, 2016 (https://www.thestar.com/opinion/public_editor/2016/04/15/is-court-ordered-secrecy-futile-in-the-digital-age-public-editor.html); Chris Jancelewicz, *David Furnish, Elton John sex scandal: British media forbidden from covering couple*, *Global News*, May, April 19, 2016 (<http://globalnews.ca/news/2645974/david-furnish-elton-john-sex-scandal-british-media-forbidden-fro>

injunction was somehow self-defeating, as the gag itself became the news worldwide, and the main characters became easily identifiable online.

Among the news outlets that did publish the story along with the forbidden names was the *Guido Fawkes* blog, to all but legal purposes a very “English” website. On April 11, 2016, *Guido Fawkes* published a short version of the story with the image of the cover of the US tabloid. While belittling the importance of the story itself, the blog took it as a matter of principle (“Should press freedom be curtailed by the rich on the grounds that they don’t want their children to be embarrassed”?) and defiantly affirmed that – like *The Sunday Mail* in Scotland, or *The Toronto Star* in Canada,⁷⁴ they were “outside the jurisdiction of the injunction”.⁷⁵

The law firm apparently took the bait and sent a copy of the injunction to the blog “threatening to jail the editor for Contempt of Court”, which Staines was all too pleased to counter affirming that it served no purposes since the servers of the blog were in the United States and that the very article was “being typed in the Republic of Ireland”. He went on:

“There are no physical assets in the UK, there is no digital equivalent of a printing press, no device that can be seized or smashed. All the authorities can do is block access to the server, in the same way that China and Iran block access to the truth. Web users point their browsers at a server in the US and fetch the data back, we do not store published content in the UK. (...) Courts in both California and New York have ruled that foreign court judgments involving free speech can be enforced in the United States only if the foreign nation recognises absolute free speech values compatible with the First Amendment”.⁷⁶

The case went on with the Court of Appeal ruling that the injunction could be dismissed,⁷⁷ only

m-covering-couple/).

⁷⁴ The *Star* received a letter from a lawyer asking that the article were removed from the website or that it were “geo-blocked” for readers in England and Wales. The *Star* refused. Its Public Editor Kathy English, who did not name the couple in her column, explained: “I am not making a case that the sex life — extramarital, or otherwise — of this couple is a matter of public interest. I am not at all comfortable with the fact that defending principles of press freedom involves a legal battle to publish lurid details of anyone’s alleged ‘three-way sexual encounter’. But, like others who have weighed in on this controversy in Britain’s ‘serious’ press, I do see public interest in the interesting questions this injunction raises about global press freedom and media law within the borderless Internet and the lengths to which the super wealthy can and do go in Britain to use the courts to try to block embarrassing information in that country and beyond”. See: Kathy English, *Is court-ordered secrecy futile in the digital age?*, *The Toronto Star*, April 15, 2016 (https://www.thestar.com/opinion/public_editor/2016/04/15/is-court-ordered-secrecy-futile-in-the-digital-age-public-editor.html).

⁷⁵ *Lawyers only people enjoying celebrity three-some*, *Guido Fawkes*, April 11, 2016 (<https://order-order.com/2016/04/11/lawyers-only-people-enjoying-celebrity-threesome/>)

⁷⁶ *Ireland is not North Korea*, *Kim El John*, *Guido Fawkes*, April 12, 2016 (<https://order-order.com/2016/04/12/ireland-is-not-north-korea-kim-el-john/>)

⁷⁷ *Celebrity injunction should be lifted*, *Court of Appeals rule*, *BBC News*, April 18, 2016

to be reinstated by the Supreme Court,⁷⁸ but in all the proceedings - whatever the journalistic merit of the news items could be – the *Guido Fawkes* blog was able to continue publishing because of its three-layered defensive structure, as it can be gathered from published reports.

- **Corporate layer.** The publishing company, Global & General Nominees Limited, is based in St. Kitts and Nevis, while a totally different company,⁷⁹ deals with selling ads on *Guido Fawkes* as well as on other political blogs. Interviewed in 2009 by *The Daily Telegraph* about the corporate structure, Staines only admitted “to being an ‘adviser’ to Global & General Nominees”.⁸⁰
- **Technical layer.** The servers, as *Guido Fawkes* clearly explained in 2016,⁸¹ are kept in the United States to exploit the American constitutional jurisdiction where freedom of speech usually trumps concerns about privacy, security or politics. DNS were registered in yet another jurisdiction, according Staines’ statement to the authors.⁸²
- **Personal layer.** Paul Staines kept his official residence in Ireland “usually flying in from his family home to spend Tuesdays, Wednesdays and Thursdays in London”, according to a 2014 article on *Esquire*: “On top of that, after declaring himself bankrupt (due to an expensive and failed attempt to sue his former boss at a hedge fund), there is little point in going after him personally. All major assets are in the name of his wife, a former City lawyer”.⁸³

This is, of course, no guarantee that the website is totally out of reach, but until now the structure has been such that it put enough “friction” in the process to offer the blog the protection it looked for. Or, as he put it in a conversation with Edwin Smith of *Esquire*: “while someone ‘with unlimited funds’ could successfully sue the blog, for most mere mortals it would be a difficult task”.⁸⁴

(<http://www.bbc.com/news/uk-36073383>)

⁷⁸ Judgement. *PJS (Appellant) v News Group Newspapers Ltd (Respondent)*, The Supreme Court, May 19, 2016 (<https://www.supremecourt.uk/cases/docs/uksc-2016-0080-judgment.pdf>)

⁷⁹ Message Space, <https://www.messagespace.co.uk/>

⁸⁰ Gordon Rayner: The colourful life of the man who brought down Damian McBride, *The Daily Telegraph*, April 17, 2009 (<http://www.telegraph.co.uk/news/politics/5173475/Guido-Fawkes-the-colourful-life-of-the-man-who-brought-down-Damian-McBride.html>)

⁸¹ Ireland is not North Korea, Kim El John, *Guido Fawkes*, April 12, 2016 (<https://order-order.com/2016/04/12/ireland-is-not-north-korea-kim-el-john/>)

⁸² A “Whois” search shows the DNS to be registered with a German company.

⁸³ Edwin Smith, *Guido Fawkes: "The Lying In Politics Is On An Industrial Scale"*, *Esquire*, July 31, 2014 (<http://www.esquire.co.uk/culture/news/a6736/guido-fawkes-profile-westminster-paul-staines/>)

⁸⁴ See note above.

Documents, newsroom practices and digital files beyond the reach of the law

Transferring physical and legal ownership of unpublished content

(International Federation of Journalists, 1989-1999)

One of the first known instances of exploitation of different jurisdictions to favor freedom of expression did not involve the transfer of digital content, since it dates back to the days when analog still ruled the world, or it began to coexist with forms of digital supports, like CD disks. It did in fact involve a mere transfer of physical objects, as well as property rights. It wasn't even published content, but negatives and – later – digital memory supports of unpublished work by press photographers and videographers.

It first happened in London in 1988, when the Metropolitan Police demanded photos of pickets during the Wapping labor dispute “saying they wanted them to prosecute police who had assaulted pickets”.⁸⁵ Journalists objected on different grounds: as a matter of principle, it was not for the press to take part in prosecutions, do the job of the police and the courts; as practical matter, if people taking part in demonstration understood that journalists' material might be seized and used against them, they might turn against the journalists, who would be put at a personal risk, and would not be able to properly work.

The National Union of Journalists (NUJ) and its London Freelance Branch helped photographers to resist the request, by transferring their material to the International Federation of Journalists (IFJ), the worldwide federation of journalists' unions, which is based in Brussels.

“Then-General Secretary [of the NUJ] Harry Conroy and Aidan White, General Secretary of the International Federation of Journalists, testified that the four photographers who resisted police demands no longer had possession or control of the negs. The High Court had to agree that it could do nothing against the

⁸⁵ National Union of Journalists (NUJ), London Freelance Branch, *Fleeting image. Make your troublesome pix vanish*, *Freelance*, July 19, 1999 (<http://www.londonfreelance.org/9907run.html>). The “Wapping dispute” originated in 1986 with the decision Rupert Murdoch's News International to move The Times and The Sunday Times from their traditional Fleet Street Headquarters to Wapping, introducing digital composition, and printing methods. The unions went on strike and picketed for a year, but the newspapers never missed a day, and in 1987 the strike ended in failure. In the following years, all major British titles moved as well, both physically and in terms of technologies. In 1989 “charges of perjury, assault and conspiracy to pervert the course of justice [were brought] against 24 Metropolitan police following investigation by Northamptonshire Police into 440 complaints against 100 officers” during the demonstrations of early 1987. See: *News International dispute: from its origins*, in: SOGAT, NGA, AUEW, NUJ, *News International Wapping - 25 years on. The workers' story*, May 2011, p. 33 (<http://www.wapping-dispute.org.uk/sites/default/files/the-workers-story.pdf>)

photographers.”⁸⁶

In 1999, again the Metropolitan Police tried to get hold of photographic material shot during the June 18 anti-globalization demonstrations in London. *The Guardian*, *The Independent*, *The Times*, *Reuters*, the *BBC*, *ITN*, *Channel 4 News* and *Sky TV* resisted the request and a judge refused the police demand “to seize journalists’ films, notes and tapes from the events”, refusing to just “rubber stamp”, routine, “blanket” requests.⁸⁷

The union thought that the decision in this case did “not mean that courts will take the same line against future more carefully-worded demands”, and offered photographers to “hand over the problematic negs – or individual frames – *before* [they were] approached by the police or courts”, the same procedure that was court-tested in 1988.⁸⁸

When the appeal was published, the union had already helped “several photographers who took pictures on June 18”. Maybe four of them “sent their photos and materials to Brussels and formally into the custody of the IFJ”, recalls Aidan White, then General Secretary of the organization, now Director of the Ethical Journalism Network, who was interviewed for this project.⁸⁹

At the time pictures were usually saved on disks, but it was not enough simply to hand over the disks, “in order for it to work, the journalists had to recognize that for the purposes of journalism they had lost control over this material, that ownership had been effectively transferred to us,” White explained:

“If that hadn’t been the case, lawyers had advised us that it would be very easy to prosecute the journalists for a conspiracy to pervert the course of justice, by creating a false idea that the information was out of their hands and beyond their control, when everybody knew that they sent it to us, that we would look after it, and then we would give back to them when the heat was off. So, it had to be done on the basis that in reality they were giving ownership and total control over the material to us, and that actually meant that they were then free from prosecution.”

Thus, it was “a solution of sorts, not a very happy solution”, White acknowledged, “but it did prevent journalists to be put in a position where they could be taken to court, and be instructed by judges and the police to hand over the material. They could legitimately say ‘No, this is not something we agree with, and it’s a point of principle to the extent that we are

⁸⁶ National Union of Journalists (NUJ), London Freelance Branch, *Fleeting image. Make your troublesome pix vanish*, *Freelance*, July 19, 1999 (<http://www.londonfreelance.org/9907run.html>).

⁸⁷ NUJ, London Freelance Branch, *Not a rubber stamp*, *Freelance*, July 19, 1999 (<http://www.londonfreelance.org/9907pace.html>).

⁸⁸ National Union of Journalists (NUJ), London Freelance Branch, *Fleeting image. Make your troublesome pix vanish*, *Freelance*, July 19, 1999 (<http://www.londonfreelance.org/9907run.html>).

⁸⁹ Interview: February 22, 2017; email exchange: March 17, 2017

prepared no longer to have ownership of the material’.”

Friction seems to be the concept that was at work here, not necessarily an air-tight legal construct, but one good enough to protect journalists and their sources. The International Federation of Journalists is an entity subject to Belgian law, which is different from the British one as far as protection of sources is concerned.

According to White, “if the British police wanted to, they would have had to go to a Belgian jurisdiction to prosecute us to seize the material, and that wasn’t possible. And also, that would have turned into, not a national case, it would turn into a political case, it would have internationalized it.”

There are no recorded cases of this kind, but there may very well have been since the procedure has always been in place. “Of course, this sort of arrangement tends to be under the radar and only becomes relevant when there is a moment of crisis”, White said, “and this has become less an issue as police and security forces now regularly deploy their own camera people during these events”.

One product, one newsroom, two different labor laws (CNNItalia.it, 2001)

In 1999, Turner Inc., the owner of *CNN*, experimented for a while with a number of so called “language sites”, news websites in languages other than English, directed at an International readership. They began with the Spanish website, which was soon followed by Nordic languages (Danish, Swedish, Norwegian), Italian, Brazilian, Japanese and Arabic ones. Some of them are still there (*CNN en Español*, *Arabic CNN*, and *CNN Japan*⁹⁰), others are long gone, but the case of *CNNItalia.it*, which one of the authors of this report edited, offers an interesting case of conflicting jurisdictions, although on a totally different matter.

CNNItalia.it was an Italian joint venture between Turner and the Italian Gruppo Editoriale L’Espresso (GELE).⁹¹ The company’s only asset was actually the title of the news organization, it then entered into deals with Turner and GELE to provide technical, advertising, and human resources. As a result, two thirds of the newsroom, employed by GELE, were based in Rome (Italy), while a third, employed by Turner, was based in Atlanta (Georgia). The website operated this way from the end of 1999, through 2002. Then, for one more year, in a much more limited form, with another Italian partner.

This organization allowed the newsroom to cover the world constantly, exploiting the different time zones. The staff everywhere used CNN’s proprietary Content Management System via virtual desktops, and CNN’s own servers.

Between 1999 and 2002, there were no take-down request of any kind, but the newsroom

⁹⁰ <http://cnnespanol.cnn.com/>; <http://arabic.cnn.com/>; <http://www.cnn.co.jp/>.

⁹¹ Now GEDI Gruppo Editoriale (<http://www.gedispa.it>)

and the company experienced extra-territoriality in terms of the Labor law.

In 2000-2001, there were tough ongoing negotiations between the Italian Journalists' Union and the Italian Federation of Newspaper Publishers with regard to a new national contract for journalists. During the negotiations, as it is customary in Italy, the union called for one- or two-day strikes, that were generally observed by newsrooms across the country.

The Italian portion of *CNNItalia.it*'s newsroom, which was unionized as almost all newsrooms of major Italian news organizations are, respected the call to strike and in those days the website was not updated. Rather, it was not updated in the morning (Italian time), but as the Atlanta's shift kicked-in – in the early American morning, early afternoon in Italy – the website was again updated, albeit on a more limited scale, by non-unionized employees of a different company, in a different country, in a different continent.

As said, the newsroom did not receive any takedown request, on any grounds (at that time the so-called Right to be forgotten had still to be defined in the digital world), but we wonder what would have happened if any were received.

Challenges to the permanence of digital content do not happen only for legal reasons. In the case of *CNNItalia.it*, what injunctions did not do, the company actually did, in a thoroughly, devastating way. In 2003 the website folded, a late victim of the so-called Dot-com bubble bust. All the pages were taken offline and since then any *CNNItalia* URL ends up on a bilingual page saying: "Thank you for your interest in CNN. *CNNItalia.it* is no longer in service. Please log onto CNN.com International or CNN.com U.S. edition to receive the latest world news from CNN" (<http://edition.cnn.com/help/italia/>).

Enquiries made between 2010 and 2012 with CNN, revealed that the newsroom at that time didn't even know if they still had a backup of the material produced during four years of transnational work. Only the material scraped by the WayBack Machine of the Internet Archive can still be consulted (http://web.archive.org/web/*/http://cnnitalia.it).

A thumb drive in exchange for First amendment protection (The Guardian/Wikileaks, 2010)

On July 25, 2010 *The Guardian*, *The New York Times*, and other news organizations began publishing stories based on a trove of documents about the Afghan war obtained and released by Wikileaks. It was, at the time, the largest, and by far the most impactful release of secret documents by the organization founded by Julian Assange.

The physical and political dimensions of the release was not lost on Alan Rusbridger, then the editor of *The Guardian*, who earlier that year was given by Wikileaks access to the documents, half a million military dispatches from the Afghan fronts. In June, he called the executive editor of *The New York Times*, Bill Keller, to "circumspectly" enquire if his American counterpart (and competitor) might be interested in joining forces to analyze and

publish the material.⁹²

Keller was indeed interested, and in the following months a team of journalists from *The Guardian*, *The New York Times*, and the German news magazine *Der Spiegel* worked together to verify and sift through the material. But the cooperation was not only due to the complications of dealing with such a large number of documents, it also had political/legal motivations, as Rusbridger himself in 2013 would tell the story of his exchange with Keller:⁹³

“I strongly suspected that our ability to research and publish anything to do with this trove of secret material would be severely constrained in the UK. America, for all its own problems with media laws and whistleblowers, at least has press freedom enshrined in a written constitution. It is also, I hope, unthinkable that any US government would attempt prior restraint against a news organisation planning to publish material that informed an important public debate, however troublesome or embarrassing.”

Addressing the Committee to Protect Journalists annual ceremony in New York, the editor of *The Guardian* had already mentioned the fact that journalists could benefit from having readers, and supporters, in countries that put less pressure on news organizations than his,⁹⁴ he said he had pulled the Editor of *The New York Times* into the Wikileaks deal as a legal insurance of sorts against possible restriction on *The Guardian's* ability to report:

“Increasingly, they take on the constitutional and legal protections of countries which mercifully still do have strong roles and enshrined free speech (...) Essentially the deal was this: ‘I’ve got the memory stick, you’ve got the first amendment’ (...) It was not clear to me that British libel laws and the British laws around official secrecy would give the Guardian the defences it needed for a story like that.” [Emphasis added]

That is to say, to circumvent possible restrictive orders and injunctions, *The Guardian* hedged its bets by reaching out across the Atlantic to the American constitutional culture and jurisprudence. The way the story was reported, he said, showed how people “living in countries like China, like Brazil, like Liberia, and like Kyrgyzstan can, in a networked world, use the kind of solid protections [people] enjoy here in America to publish a truth that would be forbidden in their home countries”.

⁹² Bill Keller, *Dealing With Assange and the WikiLeaks Secrets*, *The New York Times*, January 30, 2011 (<http://www.nytimes.com/2011/01/30/magazine/30Wikileaks-t.html>).

⁹³ Alan Rusbridger, *David Miranda, schedule 7 and the danger that all reporters now face*, *The Guardian*, August 19, 2013 (<https://www.theguardian.com/commentisfree/2013/aug/19/david-miranda-schedule7-danger-reporters>).

⁹⁴ Adam Gabbatt, *Alan Rusbridger warns of increase in attacks on journalists*, *The Guardian*, November 21, 2011, which is the source of all the following details about the event (<https://www.theguardian.com/media/2012/nov/21/alan-rusbridger-warns-attacks-journalists>).

On November 28, 2010, *The Guardian* and *The New York Times* published new stories originated by another huge documents' trove obtained and released by Wikileaks, a collection of US diplomatic dispatches. Actually, at that point Wikileaks did not wish to have *The New York Times* among the news organizations working with them, but Rusbridger "quietly passed the Times the raw material that it had received",⁹⁵ arguably for the same reasons – on top of the expertise he could get from his American counterpart in analyzing American diplomatic communications.

A newsroom in a more liberal jurisdiction offsets gag orders
(The Guardian/NSA-GCHQ, 2013)

More or less the same pattern applied three years later, with the secret files of the National Security Agency (NSA) that Edward Snowden made public with the help of a handful of journalists.

The Guardian, together with the *Washington Post*, was among the first news organizations to report, in June 2013, about the secret efforts of the American intelligence agency to control communications worldwide. However, the story was not and could not be limited to what the Americans were doing, since the US were actively collaborating with allied intelligence services, namely the Government Communication Headquarters, or the GCHQ, the British agency responsible for Signal Intelligence (SIGINT) activities, or eavesdropping of every kind.

The Guardian first reported on June 7 that GCHQ had been able to see user communications data from the American Internet companies, because they had access to the Prism project of the NSA; then, on June 16, the GCHQ had intercepted the foreign leaders participating in the G20 summit that took place in London in 2009.⁹⁶

This was of course not well taken by the British government and their Intelligence agencies, who decided to energetically intervene. That's how Alan Rusbridger would tell the story at the end of August:⁹⁷

"A little over two months ago I was contacted by a very senior government official claiming to represent the views of the prime minister. There followed two meetings in which he demanded the return or destruction of all the material we were working on. The tone was steely, if cordial, but there was an implicit threat that others within

⁹⁵ Paul Farhi, [WikiLeaks spurned New York Times, but Guardian leaked State Department cables, The Washington Post, November 29, 2010](https://www.theguardian.com/media/2012/nov/21/alan-rusbridger-warns-attacks-journalists) (<https://www.theguardian.com/media/2012/nov/21/alan-rusbridger-warns-attacks-journalists>).

⁹⁶ Miren Gidda, [Edward Snowden and the NSA-files timeline, The Guardian, August 21, 2013](https://www.theguardian.com/world/2013/jun/23/edward-snowden-nsa-files-timeline) (<https://www.theguardian.com/world/2013/jun/23/edward-snowden-nsa-files-timeline>)

⁹⁷ Alan Rusbridger, [David Miranda, schedule 7 and the danger that all reporters now face, The Guardian, August 19, 2013](https://www.theguardian.com/commentisfree/2013/aug/19/david-miranda-schedule7-danger-reporters) (<https://www.theguardian.com/commentisfree/2013/aug/19/david-miranda-schedule7-danger-reporters>).

government and Whitehall favoured a far more draconian approach.

“The mood toughened just over a month ago, when I received a phone call from the centre of government telling me: ‘You’ve had your fun. Now we want the stuff back.’ There followed further meetings with shadowy Whitehall figures. The demand was the same: hand the Snowden material back or destroy it. I explained that we could not research and report on this subject if we complied with this request. The man from Whitehall looked mystified. ‘You’ve had your debate. There’s no need to write any more’.”

The risk for *The Guardian*, as far as its editor could see, lied with the possibility to have a court order the files destroyed and any further reporting on the subject legally forbidden:

“During one of these meetings”, he wrote, “I asked directly whether the government would move to close down the Guardian’s reporting through a legal route – by going to court to force the surrender of the material on which we were working. The official confirmed that, in the absence of handover or destruction, this was indeed the government’s intention. Prior restraint, near impossible in the US, was now explicitly and imminently on the table in the UK. But my experience over WikiLeaks – the thumb drive and the first amendment – had already prepared me for this moment.

“I explained to the man from Whitehall about the nature of international collaborations and the way in which, these days, *media organisations could take advantage of the most permissive legal environments* [emphasis added]. Bluntly, we did not have to do our reporting from London. Already most of the NSA stories were being reported and edited out of New York. And had it occurred to him that [Glenn] Greenwald [the reporter who broke, and followed up on the story] lived in Brazil?

“The man was unmoved. And so, one of the more bizarre moments in the Guardian’s long history occurred – with two GCHQ security experts overseeing the destruction of hard drives in the Guardian’s basement just to make sure there was nothing in the mangled bits of metal which could possibly be of any interest to passing Chinese agents. ‘We can call off the black helicopters,’ joked one as we swept up the remains of a MacBook Pro.

“Whitehall was satisfied, but it felt like a peculiarly pointless piece of symbolism that understood nothing about the digital age.”

In an interview for this project, Alan Rusbridger explained that if *The Guardian* didn’t destroy the material, they would be enjoined by the British state, “and everybody else around the world would be able to publish: the Washington Post would be able to publish, Glenn Greenwald would be able to publish out of Rio de Janeiro, and we would have been unable to publish from London”:⁹⁸

⁹⁸ Interview with one of the authors, March 17, 2017

“The First amendment is an amazing protection” he added: “With Snowden we were not protecting our source, since Snowden was already known as the source... we wanted just to be able to publish without interference from the State. In Britain that is difficult, because the state in Britain can exercise prior restraint, in America it is virtually impossible to prevent a newspaper from publishing something; it’s so much... a more convenient, safer environment to publish. It’s not simply source protection, it’s the simple ability to publish”.

Four hundred journalists in 80 countries and one secure database
(The Panama Papers, 2016)

The so called “Panama Papers” was arguably the most impressive international investigative reporting project to this date telling the story of the transnational jockeying by wealthy individuals and companies to exploit tax havens; a project that, at the same time, had to build a transnational infrastructure of its own to help the cooperative work of hundreds of journalists in over 80 countries,⁹⁹ keeping themselves and a huge number of documents safe.

The project originated in a massive leak from the database of Mossack Fonseca, a Panama based law firm that helps set up and manage shell companies for international clients. An anonymous source offered the German newspaper *Süddeutsche Zeitung* a trove of 11.5 million documents, covering a period from the 1970s to early 2016, that provided data about 214,000 companies.

The German paper thought that it would have been very difficult to manage and analyze 2.6 terabytes of data, which – according to SZ – is many times larger than all previous massive data leaks combined, including Cablegate/Wikileaks, Offshore Leaks, Swiss Leaks, and Luxemburg Leaks.

The *Süddeutsche Zeitung* asked the Washington based International Consortium of Investigative Journalists (ICIJ), to help manage the documents (emails, pdf files, photos, data), and coordinate an International effort that in the end involved about 400 journalists.

On April 3, 2016, after one year of painstaking work, the Panama Papers investigation results were made public, with each of the approximately one hundred participating world media organizations producing and publishing their own stories and documents, on issues and people relevant to their own public.

As SZ summarized: “The alleged offshore companies of twelve current and former heads of state [made] up one of the most spectacular parts of the leak, as do the links to other leaders, and to their families, closest advisors, and friends. The Panamanian law firm also [counted] almost 200 other politicians from around the globe among its clients, including a

⁹⁹ Frederik Obermaier, Bastian Obermayer, Vanessa Wormer, Wolfgang Jaschensky, *About the Panama Papers*, *Süddeutsche Zeitung* (<http://panamapapers.sueddeutsche.de/articles/56febff0a1bb8d3c3495adf4/>).

number of ministers”. The prime minister of Iceland, for instance, was forced to resign as a result of the investigation.

The data and communication structure that allowed the huge international team to work for a year in a secure environment, had also the consequence to provide single journalists and their newsrooms with a very useful technical and legal shield against unwanted requests or seizures by their respective local authorities.

This is exactly what happened at *L'Espresso* magazine, ICIJ's partner in Italy, as soon as they published their part of stories and of the database.¹⁰⁰ Raffaella Pallavicini, head of the Legal department of Gruppo Editoriale L'Espresso (GELE), in an interview for this project¹⁰¹ said that the Italian Financial Police (*Guardia di finanza*) and prosecutors arrived at the magazine with seizure orders for the documents, but the newsroom was able to say that they actually did not have copies of the documents, since they were hosted on servers owned by the consortium, and journalists could only access them remotely.

As in the case of *The Guardian's* Wikileaks and NSA documents, the physical and legal distance between the newsroom and their source material, helped the journalists avoid the consequences of injunctions and other kinds of state intervention.

A medium in exile to overcome censorship

(Özgürüz, 2017)

The case of Özgürüz, a pro-democracy Turkish news website, is more along the lines of traditional from-the-outside-in kind of transnational news outlets. Francisca Kues, who reported about it this year,¹⁰² said it is “a kind of pirate radio for Turkish journalists, informing the public amid a repressive regime that cultivates a hostile press freedom climate”, like the one of president Tayyip Erdoğan. From a technical point of view, it is also very similar to all International satellite TV broadcasters.

Özgürüz (Turkish word for “We are free”), was launched at the end of January 2017 by Can Dündar and Hayko Bağdat, two Turkish journalists both victims of the increasingly repressive regime. Dündar was editor in chief of the center-left Turkish newspaper *Cumhuriyet*, that – among other things – revealed the role of Turkish intelligence in the shipping of weapons to neighbouring, war-ravaged Syria. He was arrested in 2015,¹⁰³ released after three months in

¹⁰⁰ Panama Papers, tutti i nomi degli italiani coinvolti, L'Espresso, April 15, 2016 (<http://espresso.repubblica.it/inchieste/2016/04/05/news/panama-papers-database-tutti-i-nomi-italiani-coinvolti-1.257090>).

¹⁰¹ February 8, 2017

¹⁰² Franziska Kues, Persecuted at home, two journalists are bedeviling Turkish authorities from afar, Poynter, February 1, 2017 (<http://www.poynter.org/2017/persecuted-at-home-two-journalists-are-bedeviling-turkish-authorities-from-germany/447545/>).

¹⁰³ See *Extreme removal: Cumhuriyet and Turkey's road to full censorship*, page 26.

jail, and eventually sentenced to five years and ten months for revealing state secrets in May 2016. In July 2016, when Erdoğan declared a state of emergency after a failed coup, Dündar fled to Germany, where he began working on the *Özgürüz* project, together with Bağdat, another Turkish journalist in exile.

The website is a bilingual news product – Turkish/German – published with the help of *Correctiv*, a non-profit German news organization specialized in investigative reporting. As soon as the site was launched, Turkish authorities blocked access to it from Turkey, but with the help of *Correctiv*, they found ways to overcome the hurdle: “We are providing ways to bypass the blocks, for example by mirroring the website on other webpages. Right now, we are viewing the content on 15 to 20 other websites,” said to David Schraven, publisher and editor in chief of *Correctiv*, to Kues.

“We want to build a new, free medium. I hope that this platform may make it possible for us to do our work without constraints”, said Dündar to the German press the day of the launch: “It’s a medium in exile, based in Berlin”.¹⁰⁴

Piggybacking on international platforms (Collateral Freedom) (Mada Masr, 2017)

At the end of May 2017, just as this report was being finalized, the Egyptian government banned 21 news websites on the grounds that they were supporting terrorism and spreading false information,¹⁰⁵ including the website of the Qatar-based *Al Jazeera* all-news station. It was not the first time that the increasingly authoritarian Egyptian regime of president Abdel Fattah al Sissi rendered parts of the web inaccessible, but it was the first time that it had done so openly.

From a practical point of view, it was a move not unlike the one used by French authorities to prevent the access to five websites deemed to be promoting terrorism and hate speech:¹⁰⁶ content remained on the servers and it could still be accessed from outside the jurisdiction, but not from within.

Among the banned sites in Egypt was *Mada Masr*,¹⁰⁷ an independent, vibrant bi-lingual

¹⁰⁴ Online-Medium auf Deutsch und Türkisch. Geld könnte zum Problem werden, TAZ.de, January 24, 2017 (<https://www.taz.de/Online-Medium-auf-Deutsch-und-Tuerkisch!/5377314/>).

¹⁰⁵ Ahmed Aboulenein, Egypt blocks 21 websites for 'terrorism' and 'fake news', Reuters.com, May 25, 2017 (<http://af.reuters.com/article/worldNews/idAFKBN18K303?pageNumber=2&virtualBrandChannel=0&sp=true>)

¹⁰⁶ See *Censorship and security the French way*, page 22.

¹⁰⁷ <http://www.madamasr.com>, for the English version: <http://www.madamasr.com/en/>. We owe a debt of gratitude to journalists Marina Petrillo and Carola Frediani who alerted us on what was happening. Mada Masr was not notified of the block, neither could they have an official confirmation; as a matter of fact, they witnessed the block and their expert determined it was the consequence of a “RST injection attack”, which is a way to interfere in the regular exchange of data between computers on the Internet with a fake message that effectively turns off the exchange; a system used also by

website which is an Egyptian company operating in the country. To offset the ban, *Mada Masr* exploited extraterritoriality in a peculiar way, by piggybacking on the resources of big, international platforms, more or less along the lines of the *Collateral Freedom* initiative,¹⁰⁸ launched in 2013-2014 to circumvent local bans in different countries, with a special regard to China.¹⁰⁹

In the Chinese case, the idea was to copy on the Amazon “cloud” servers the pages of the websites banned by the Chinese authorities, thus putting them under Amazon’s dominion. To make that content unreachable in China, the government would be forced to deny access to the whole Amazon cloud, which would create a lot of problems for many Chinese companies who rely on the service. Instead of suffering the “collateral damage” of shutting out of the web “legitimate” Chinese interests, the government would opt for the “collateral freedom” of the “illegitimate” ones.

Mada Masr’s solution was slightly different.

They went on Facebook to confirm the block and announce that they would carry on:¹¹⁰

“...we will continue to publish through existing platforms, as well as our website. Look out for our coverage. There are ways of accessing our website for now through proxies and cached copies. It’s not ideal, but let’s be agile.

We are children of the margins; from there we emerge and re-emerge”.

Then, after a few hours:¹¹¹

Temporarily, we’ll be publishing on social media until we find the best way to transmit our content, while concurrently publishing on our website for those who can access it.

So, for a while, *Mada Masr* published their stories, with images and links, on Google Documents, then linked them on Facebook, and other social media accounts. Some of the material was later posted directly on Facebook as “notes”, and linked on Twitter.

It was a clever way to leverage the availability in the local jurisdiction of large digital

Chinese authorities for what is known as “the Great Firewall”. Mohamed Hamama, 24 hours later: What we know about the blocking of *Mada Masr*’s website, *madamasr.com*, May 26, 2017 (<http://www.madamasr.com/en/2017/05/26/feature/u/24-hours-later-what-we-know-about-the-blocking-of-mada-masrs-website/>)

¹⁰⁸ See Reporters Without Borders: <https://rsf.org/en/collateral-freedom>

¹⁰⁹ Jeff South, *Punching a hole in the Great Firewall*. The “Collateral Freedom” project, *China File*, March 21, 2014 (<http://www.chinafile.com/Punching-Hole-Great-Firewall>)

¹¹⁰

<https://www.facebook.com/mada.masr/photos/a.564476860276121.1073741826.557202771003530/1584268678296929>

¹¹¹ <https://www.facebook.com/mada.masr/posts/1584802568243540>

platforms and services based abroad, by betting on the political and economical cost that a direct censorship of such large players would entail for the local government.

 **Mada**
Ieri alle 15:42 · 🌐

How has the Egyptian government blocked access to the internet in recent months? Revisit our January report.



Infinite eyes in the network: Government escalates attack on secure communication
sent over the internet, interfering with the digital security tools that facilitate secure communication channels. While there is a history of the Egyptian government...

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Going “offshore”

Extra-territoriality was used in the past and it is still presently used to overcome legal and political hurdles in the way of free speech and freedom of the press. Some publishers we talked to seemed very interested in exploring the possibility: “It could be important without any doubt”, one editor told us, “arbitrage among different legal systems is used by corporations on a daily basis; clearly, from an editorial point of view it could be interesting to do the same.”

The digital environment, nonetheless, makes it at one time easier and more complicated to explore this kind of solutions. A company could of course go all the way in the direction taken by Paul Staines and the *Guido Fawkes* blog,¹¹² which may be complicated, and not politically acceptable for larger and established news publishers, not the least because critics may accuse them of trying to evade other national laws, like labor or tax laws. Solutions would thus have to be found in the arguably fuzzy ground between “totally local”, and “totally offshore”.



In the last few years there has been no lack of discussion in this field, both in terms of archiving possibilities,¹¹³ and of the actual establishment of a “safe haven” for journalism. Iceland, in particular, offered itself as the place where legal guarantees and physical condition could be easily leveraged to maximize freedom of speech. The Icelandic Parliament passed a resolution in 2010 to make the country an “International Transparency Haven”,¹¹⁴ and the International Modern Media Initiative (IMMI) was born out of it, with poet, activist and member of parliament Birgitta Jónsdóttir as its chairman. But in 2016, they seemed to struggle, and asked for financial support to create “A Switzerland of Bits”:¹¹⁵

IMMI was created as an organization independent from the government to ensure that the drafting process of the resolution would be a transparent and successful

¹¹² See chapter “From offshore hedge fund management to offshore journalism protection”, page 33.

¹¹³ See chapter “Archiving content, private and public efforts”, page 30.

¹¹⁴ Iceland to become International Transparency Haven, [International Modern Media Institute](https://en.immi.is/immi-resolution/), (https://en.immi.is/immi-resolution/); see also: Afua Hirsch, Iceland aims to become a legal safe haven for journalists, *The Guardian*, July 12, 2010, (https://www.theguardian.com/media/2010/jul/12/iceland-legal-haven-journalists-immi)

¹¹⁵ IMMI launches Indiegogo crowdfunder, [International Modern Media Institute](https://en.immi.is/2016/04/06/immi-launches-indiegogo-crowdfunder/), April 16, 2016 (https://en.immi.is/2016/04/06/immi-launches-indiegogo-crowdfunder/)

process. Currently IMMI is fighting for its survival and is primarily run by volunteer efforts. *If we are to deliver on our commitment we need your support.*

Whatever the system or the vehicle that any company or newsroom may want to adopt to exploit a journalistic safe haven (in the next chapter we will indicate some possible avenues to collectively explore), be it a flying-solo enterprise – easier for larger companies – or a cooperative effort, they should consider some issues that may limit the number or the efficacy of the available options. With the help of the editors, publishers and lawyers that we interviewed, we think we can boil them down to two:

1. publishers and journalists may still be liable under their local law, even if their content is saved in a different jurisdiction;
2. local authorities can and do resort to access denial from their jurisdiction to online content published elsewhere.¹¹⁶

The issue of persistent liability

This is a problem that most of our interviewees pointed out. Here are some of the points they made:

- “Imagine that *The Guardian* were to post something in the US, but the report was not part of a joint reporting project (as in the case of Wikileaks, or the Snowden material), that they were asked to take it down, and that they refused, would *The Guardian* still be liable under British Law”?
- “From a legal point of view, the person who is criminally liable is subject to the laws of the place where he lives. To register a website as a news organization according to the Italian press law one must state that the server one uses is in Italy. To have your server out of Italy puts you in an irregular situation from the start. (...) If you put the material on another server, if you are the one who published it in that place, they will ask you to remove it – you are legally liable anyway”.
- “If you are going to do this, you want to be able to put your archives in another country but it can’t be under the control of [the original news organization]; it has to be under the control of a third party, who is in a jurisdiction where it won’t be handed over, or the Right to be forgotten doesn’t apply, or something of that nature”.
- “One problem could be how to guarantee that people who might do this [use extraterritoriality to save content from mandated destruction] do not incur in a ‘second tier crime’, like obstruction of justice: when a court decides that a specific piece of content must be deleted, the fact that somebody knowingly organized such a mechanism could become liable. How can we protect him from the consequences of his acts?”

¹¹⁶ See the French and the Turkish case pages 23 and 26, respectively, or the Egyptian one, previous chapter, page 47.

Access denial issue

- “Moving the material elsewhere would not solve the problem, because enforcing and regulatory agencies like [the Italian Communications authority] AgCom may simply order Italian Internet Service Providers to inhibit the relative domain (DNS) – as it happens for copyright infringement, or paedopornography websites.”
- “Let’s say that we can make a pure analogy with tax havens. Let’s say we create in a wonderful place like Bahamas or Vanuatu an information heaven where all of this important journalism – for example produced by Russian journalists under great pressure during the Putin years – can be stored... once it is made available on the Internet some domestic laws may decide to attach liability at the point of download, not where it resides. So maybe it could be preserved in the sense of not destroyed, but be unable to be read.”

Possible solutions/Liability

It is, of course, possible to imagine solutions, but some of them may create new problems, that need new solutions. Again, here are some of the arguments:

- “It would be different if an offshore organization were to acquire ownership of the content, putting it beyond what the original publisher might want or could do. The foreign entity would assume responsibility for publishing.”
- “One way to get around [the persistent liability problem] is that you would set the server up in such a way that news organizations can post to it, but they cannot delete. So, once [a news organization] posts on that site in the US or in Moldova, it’s there forever. The [news organization] has no power, no control over it.”
- “If it’s within the EU any country’s law is enforced in any other country, so you have to find a country where this is not enforceable, and, say, you get a kind of offshore... and then, there were suggestions at one point Iceland would make themselves an offshore information haven, in a way that some country is a tax haven”.
- “A Possible way out? If the material is published under Creative Commons, and it’s not [the original publisher] who would actively save the content elsewhere, but a third party that may automatically take it away, then there would be no liability. It’s not me who sent the stuff abroad, I just built a database from which a third party can take the material and bring it elsewhere.”

The new, possible complication was pointed out by one of the editors we interviewed.

If the content is saved in a system where the original publisher can upload but cannot delete, he said, the publisher may be safe from a legal point of view in case some local authority orders to remove or change the content. But what happens if the original publisher and the original newsroom discover that the original article was posted in error or that it actually

contained some mistake and it needs to be taken down or corrected? The wrong piece of journalism may be “stuck forever”. If, instead, the original publisher is able to edit the piece, or ask somebody else to edit the piece, then they risk to be once again to be found in contempt of court, if they refuse to do it when so ordered.

One possible idea, the same editor suggested, is that a consortium or another international organization may be built to manage the system, with a governance structure that could decide in a very controlled way what will happen to the saved content once it entered the system. There may be a Board or a Governing council where all participating institutions seat, and that should vote to authorize editing of the material in extreme cases.

“If something goes up there that is really horrible, and [the news organization] says ‘Oh, my God, this is a terrible mistake’, [the news organization] could go to the Board and ask the Board to take it down – if it were an open-and-shut case the Board would approve, then it could be taken down. But otherwise [the news organization] could go to the Board and say: ‘Look, the government is making us make this request to the Board, so here it is...’ and maybe in an informal way it may be clear that this is not something [the news organization] supported, in which case the Board would say no and [the news organization] could go back to the authorities and say: ‘Sorry, there is a Board vote, the authorities can go to the Board, if they want, but it’s out of our hand’. This way you have a protection against request to be taken down, but you also have a safety mechanism if something really awful goes up.”

Possible solutions/Access denial

One interviewee, an editor, stressed “the importance of dispersal, not concentration” of content to be saved. To concentrate all of the material at risk in one place/organization would be “a little bit like creating a honey pot”, he said, “it be better to create lots of these places and to disperse these – how would you call it? – journalistic memories around the places, rather than have a place that became known for large collection of this sort of material, because that will put you in trouble.”

A distributed system may in fact make it more difficult for local authorities to limit access to a content. All the more if the material were protected under the dominion of important International titles like the *New York Times*, or – although unwittingly – saved on one of the big digital platforms like Google and Facebook, much like the Egyptian news website *Mada Masr* did in May 2017.¹¹⁷

Generally speaking, it should be noted that there is no air-tight solution to this kind of problem. The aim of any tool or organization set up try to save legitimate journalistic content from forced removal is to put enough friction into the system to make it hard.

It is also possible to devise limited systems that will only be stopgap tools, that will never serve the same purpose as the original content on the original websites, they may amount to

¹¹⁷ See previous chapter, p. 47.

nothing more than silos of content, as one of the lawyers we interviewed put it:

“If the third party – and let’s assume it’s in America, for example, under the protection of the First amendment or otherwise – is holding [the content] not to commercially exploit it, in competition with the news owner, but it’s holding it as a not-for-profit, in those circumstances it might well work. If it just holds it as an archive, which it can then be looked at as an archive by historians, social historians, as well as news people

[It would] be like a research library or a Library of Congress or a National Library where, you know, a copy of everything is filed...”

In the following, and final chapter we will discuss some of the possibilities that may be further explored and possibly implemented. Of course, as we said in the introduction, this doesn’t mean that we are not aware of some of the new problems that the digital environment, together with the great opportunities and freedom. As one of the journalists we interviewed said:

“In order to fight for and be listened to when we say ‘This information really matters, it serves a public interest and ought to be preserved’, we have to show that we recognize that digital technologies have changed the enduring nature of information and that something when published can do harm. I’m thinking of cases like when someone’s very young and they are the subject of publicity; they may say something or do something in a way that you and I would never have suffered from, because you and I were young in the pre-Internet days probably - might find it chasing them throughout their lives and is readily returned by increasingly sophisticated search algorithms.

“I’m suggesting that journalists who speak for freedom of speech, freedom of expression and freedom of information also know that nowadays in the digital world we have to open our minds to the effect that some data is inherently trivial, or harmful, or its usefulness has expired. Now there is a lot of difficult decision making inside of what I just said but I think we need to not come across as absolutists.”

Since we are not absolutists, the first item in the following “Possible future work” chapter will discuss how newsrooms deal or should deal with harmful material whose usefulness some may feel has expired.

Possible future work

This preliminary report is part of the larger Offshore Journalism Toolkit project set up to find ways to preserve legitimate journalistic content at risks of being deleted. Researching the issues and talking to stakeholders we have tentatively identified three possible avenues for further work, we propose to discuss them publicly, as they be developed both within and outside the project itself.

Guidelines for deletion

The interviews we led to prepare this report showed that all newsrooms, as well as some archiving services, face requests for deletion, court orders mandating the removal of a piece of content or cease-and-desist letters from lawyers. The frequency of such requests range from once a year to several times a week. The decision process to deal with such requests was, in every case, arbitrary. In most cases, the judgement of the editor-in-chief or her deputy was the only determinant for deletion or preservation, after consideration of the balance between legal risk and newsworthiness. One newsroom published a transparency report but stopped doing so after it acknowledged a lack of interest from their stakeholders.

To increase accountability and foster transparency, newsrooms could be helped in establishing clear guidelines for deletion, which journalists, readers and researchers could consult to better understand the deletion process. Tools to facilitate the production of transparency reports could be created to decrease the costs of such products and prevent their being removed after a first try in case of lack of interest.

A metatag standard for archiving

This report has shown that current archiving options were too expensive for publishers, who do not wish to set up copies of their content – when they are not legally prevented to do so – and that open archiving platforms could not preserve important articles, were it only because they do not know what content should be archived and what should not. Importantly, publishers cannot archive a piece of content once they have been asked to remove it; it would constitute contempt of court in case of a court-mandated order or the assurance of further trouble in case of a cease-and-desist letter.

As information architect Federico Badaloni first suggested to the authors,¹¹⁸ a solution to this double problem (lack of resources to set up mirrors and impossibility to create a copy after a request for deletion) would be for newsworthy content published online to have an HTML metatag that would indicate to crawlers what should be archived, what type of content (text and/or video) should be archived and what level of priority it has. With a such standard in place, crawlers created by third parties could ask archiving services to make a copy of a specific page, including its multimedia content if need be.

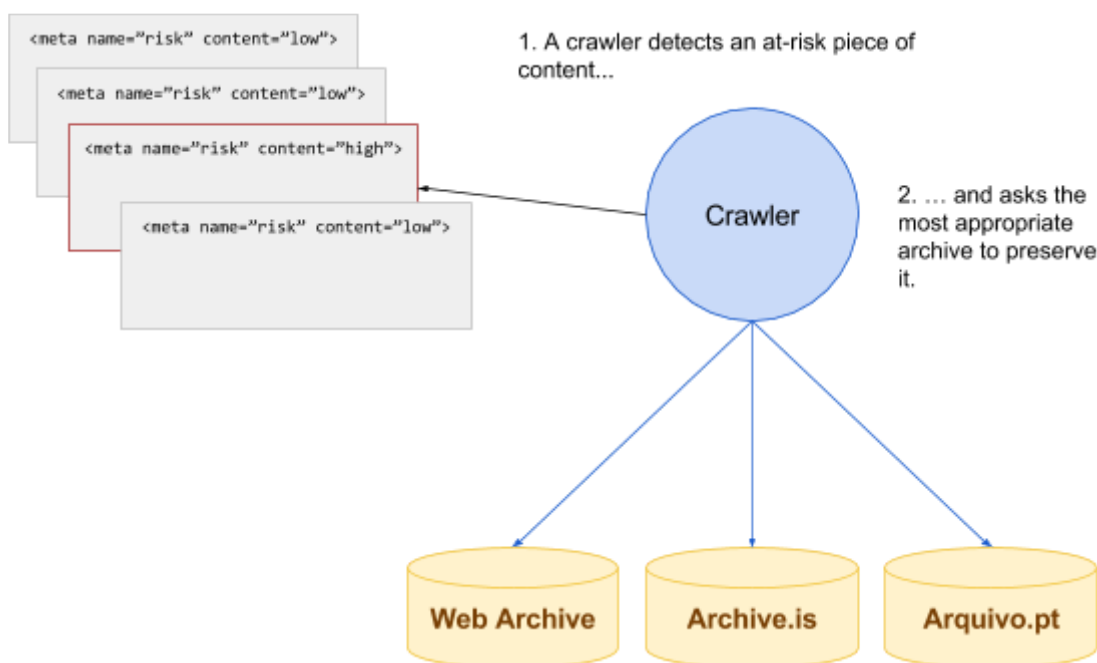
If a publisher feels that a piece of content is at risk of being removed, it could change the

¹¹⁸ Telephone interview, April 8, 2017, and subsequent talks in person.

value of the metatag to indicate that the piece should be archived. Such changes could be done automatically, for all articles published by the news outlet which contain original content, for instance. While a crawler could archive all content from a specific section, such as Crime, Politics or Finance, it would archive needlessly all the articles that are made from press releases or news wires, thereby jamming the pipes of the archiving services. A metatag would solve this issue.

A metatag that could specify if the multimedia content of a page (e.g. a Youtube video, an interactive app, a PDF or an audio segment) requires protection would let a crawler direct the content to the most adequate archiving service (e.g. the “moving image archive” of the Internet Archive for video).

With such a metatag, the publisher takes no legal risk as it did not initiate the copy process. In case of an order to remove the piece of content, the publisher would be able to remove it without hampering its archived version, of which they have no knowledge.



A “search & rescue” network

An open discussion and a subsequent agreement among stakeholders about the meta-description of journalistic items deemed at risk of deletion may trigger a wider discussion on what to do with “flagged” content, how do it, and who should do it.

One idea worth exploring is the creation of a “search and rescue” organization or network, somehow borrowed by what happens at sea: the activated metatag would be interpreted as a distress signal to be answered by either a passing ship or an institutionally dedicated organization like the Coast Guard.

- The “passing ship” could be any publication willing to host the content at risk, for a

limited or an unlimited amount of time, according to established rules.

- The “Coast Guard” could be a consortium (or more than one), able to pool technical, human and legal resources in order to institutionalize the process and offer support. The consortium/network could be formed by publishing companies, journalism organizations, NGOs, civil rights associations and institutions like libraries and archives.

A public discussion should include rules about what to save and how, the legal property status of the “saved” content, and also rules about the organization itself, namely how to protect publishers and newsrooms, while at the same time assuring that they may still have a say in what happens with the content they originally produced.

List of interviewees

- Guillaume Champeau, former head of Numerama, France
- Alessandro Biancardi, Editor, Primadanoi, Italy
- Drew Sullivan, director of OCCRP, Bosnia
- Massimo Russo, Digital Director, GEDI Gruppo editoriale, Italy
- Raffaella Pallavicini, Head of Legal Department, GEDI Gruppo editoriale, Italy
- Luigi Lobello, CTO, Digital division, GEDI Gruppo editoriale, Italy
- Daniele Manca, Dep. Ex. Editor, Corriere della Sera, Italy
- Manuela Bossi, Legal Affairs, Corriere della Sera, Italy
- Marco Castelnuovo, Mobile Editor, Corriere della Sera, Italy
- Luca Gelmini, Web Editor, Corriere della Sera, Italy
- Marco Giovannelli, editor and publisher, VareseNews, Italy
- Marco Giovannelli, President, Associazione Nazionale Stampa Online (ANSO), Italy
- Guido Scorza, Partner at eLEX, Italy
- Rainer Schüller, deputy editor-in-chief, Der Standard, Austria
- Vince Ryan, Project manager and advisor on CMS implementations, Source Fabric, Czechia
- Thomas Kent, President, RFE/RL, Czechia
- Raphaël Garribert, director, Les Jours, France
- Alan Rusbridger, former editor-in-chief, The Guardian, United Kingdom
- Giuseppe Federico Mennella, Ossigeno per l'informazione, Italy
- Alberto Spampinato, Ossigeno per l'informazione, Italy
- Vincent Fleury, France Médias Monde, France
- Mark Stephens, Media Lawyer at Howard Kennedy, LLP, United Kingdom
- Aidan White, Director & CEO, Ethical Journalism Network, United Kingdom
- Marta Peirano, Deputy Editor, ElDiario.es, Spain
- Alessandro Gennari, Digital Manager, Caltagirone Editore, Italy
- Benedetto Ponti, Media Law Professor, Università di Perugia, Italy
- Peter Gomez, Editor, Ilfattoquotidiano.it, Italy
- George Brock, Professor, City University of London, United Kingdom
- Daniel Gomes, Head of Arquivo.pt, Portugal
- Jakob Moesgaard, Danish digital archive, Denmark
- Paul Staines, Guido Fawkes Blog, United Kingdom & Ireland
- Paul Chadwick, Global readers' editor, The Guardian, United Kingdom
- Mehmet Atakan Foça, Teyit.org, Turkey
- Valérie Schafer, Historian at CNRS, France
- Federico Badaloni, Information Architect, GEDI Gruppo Editoriale, Italy
- Alessio Balbi, Digital Editor, Repubblica.it, Italy

Offshore Journalism

Preliminary Report

Website: www.offshorejournalism.com

Email: contact@offshorejournalism.com

The authors on Twitter:

@nicolaskb Nicolas Kayser-Bril

@tedeschini Mario Tedeschini-Lalli

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