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Rights and responsibilities when using UGC to report crisis events

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On 26 December 2004 when the tsunami struck, none of Reuters' 2,300 journalists or 1,000 stringers were on the beaches. "For the first 24 hours," Tom Glocer, the former head of Reuters pointed: "the best and the only photos and video came from tourists armed with telephones, digital cameras and camcorders. And if you didn't have those pictures, you weren't on the story" (Glocer, 2006).

By the time the Nepal earthquake happened a decade later, video of the scene was posted within minutes on YouTube. Drone footage, and live streaming by the Periscope app were used by the media and there was even a tie-up between the BBC and the chat app Viber (Reid, 2015).

Use of user-generated content[1] by mainstream media outlets has risen dramatically, particularly in crisis events and humanitarian disasters where dramatic stills and video taken by onlookers is often considered "more newsworthy than professional content" (Hermida and Thurman 2008:344). The result however has often been a smash-and-grab approach with insufficient consideration by journalists about how to treat the creators of this content. This chapter aims to address some of the key issues that journalists now face when considering the human rights of the people who create such content, and the responsibilities these media outlets have when distributing it more widely than the creator ever thought possible.

Of particular interest are the rights to privacy, intellectual property and freedom of expression. These are well-established rights both legally and

[1] The term 'user-generated content' is highly contested, with many alternatives being suggested, including 'citizen journalism', 'citizen witnessing' and 'accidental journalism', but it is generally accepted as the least bad option. In this context I am using as a basis the OECD's definition – that it requires some kind of creative effort, publication and it is created outside normal professional routines and practices – i.e. it is produced by non-professionals, "without expectation of profit or remuneration but the primary goals being to connect with peers, level of fame and desire to express oneself" (OECD, 2007).

normatively in traditional journalism, but the use of content created by ordinary people has thrown up new issues. Different countries have different legal regimes but these are universal issues. In this chapter, I will focus on UK and European examples, using as a basis the European Convention on Human Rights and Article 8 (which states that everyone has the right to respect for private and family life, home and correspondence), Article 1 Protocol 1 (which states that everyone has the right to peaceful enjoyment of possessions) and Article 10 (which provides the right to freedom of expression). But this is meant as a starting point for debate rather than a comprehensive legal summary, and any discussion should go further than specific legal regimes to encompass professional and self-regulatory norms.

1. Intellectual property

As the earthquake struck Haiti on 12 January 2010, Daniel Morel took photographs that would appear on front pages around the world, thanks to the decision he made a couple of hours later to post them via Twitpic[2].

Morel had a four-year fight in the courts to successfully prove that AFP and Getty who had picked them up and distributed them to their clients had infringed his copyright by lifting his pictures from Twitter (Estrin, 2013)[3]. But Morel was not an 'accidental journalist' – someone caught up in the disaster, and posting on social media because he had nowhere else to display his work. If it took Morel, an experienced former Associated Press photographer, nearly four years to resolve this, creators of UGC who upload pictures rather than sell them directly are even more vulnerable.

Key questions that journalists who use other people's video, photographs or tweets should be asking themselves are as follows:

What is the nature of the work?

Is it copyright protected?

Who was the author, and who is the rightful owner?

What might exceptions/defences to copyright protection be?

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[2] A website that allows people to post pictures on to Twitter

[3] Morel successfully sued AFP and Getty Images – see *Agence France Press v Morel* [S.D.N.Y.. 2014]. He won $1.22m after a jury ruled that the organisations had willfully infringed his copyright of eight pictures

What possible problems with reuse and linking might there be?

The nature of the work (whether it is a photograph, film clip, sound or text) is significant because different rules often apply to different forms of content. For example (as discussed more fully later) in the UK regime there is no 'fair dealing' defence for photographs.

But can a UGC work be copyright protected? Certainly, copyright is protected under Article 1 Protocol 1 of the ECHR as a property right. But content created in the aftermath of a disaster is often hurried, muddled and unedited – it is not carefully designed or created. But copyright often focuses on the *expression* of an idea rather than the idea itself, and does not concern itself with the quality or merit of a piece of work. So judgments from the European Court of Justice (ECJ) may favour creators of UGC. For example, in the case of *Painer v Standard VerlagsGmbH &Ors* [ECJ, 2011], Eva-Maria Painer, who had taken a portrait of Natascha Kampusch[4], and then found it reproduced without her consent in newspapers successfully sued media companies saying she was entitled to copyright. Pertinent to UGC creators the court ruled that because Painer had chosen how to frame the shot, the angle and the atmosphere, and then also selected which snapshot to use afterwards, even a standard portrait could be protected by copyright.

In fact the main problem may be establishing authorship – both for creators claiming ownership or mainstream media looking for permissions in fast-moving news events. This goes further than copyright and also embraces moral rights as well (that is, rights of attribution, the right to have it published anonymously or pseudonymously and the integrity of the work).

The 2016 Brussels terror attacks saw a case in point. Anna Ahronheim, a defence correspondent with a Middle East TV channel, shared a video on Twitter of the explosions at the airport. It was retweeted nearly 27,000 times and Ahronheim was commonly credited with it – even though she had merely taken the video from a WhatsApp group. Even after the agency Storyful tracked down the real creator, Pinchas Kopferstein, and Ahronheim tweeted "Just FYI, this is NOT my video. Im [sic] not in **#Brussels**. It was shared with me on whatsapp.I

[4] The Austrian kidnap victim who was held in a cellar for eight years before escaping in 2006

dont have a name for credit but please DONT use mine",[5] she was still commonly credited (Cobben, 2016).

David Clinch, of Storyful concluded that journalists were asking the wrong questions when seeking to establish the ownership of such content:

> Instead of asking 'can we use it?' journalists need to ask: where does this video come from, where were you when this happened? Do you have any other images to show that you were there?
> (quoted in Cobben, 2016)

Agencies such as Scoopt and Demotix (now both defunct) were set up to help UGC creators get credit or earn money for their work. One survivor Storyful, continues to search, verify and distribute UGC. But it has subscription agreements with newsrooms such as the BBC, *Wall Street Journal*, and ABC (the company itself was bought by News Corp) and thus its focus is more on providing verified content to the traditional media, rather than focusing on the UGC creators. In its frequently asked questions page, Storyful says it does not sell content or make a commission, it instead "requests permission to use content…on behalf of our clients" (storyful.com/faq)

Defences

When newsworthy stories need reporting, there are however defences to copyright – principally the media's right to freedom of expression and, in the UK, what is known as 'fair dealing'. In the first case, the media often mounts a vigorous defence. To take one example, in *British Broadcasting Corporation (in the case of HM Advocate v Kimberley Mary Hainey) Petitioners* [ScotHC, 2012] the BBC argued that in a high-profile case the judge should release pictures of a murdered two-year-old. These had been shown to the jury, but were not originally given to the media because the it was argued that the copyright was owned by Kimberley Hainey, who had taken the pictures (and who was also on trial for her son's murder[6]), otherwise it was an unjustifiable interference with

[5] This second tweet was retweeted 10 times in comparison by 8 April 2016
[6] Her conviction was later quashed on appeal in 2013

the media and public's right to freedom of expression under Article 10.

Lord Woolman ordered the release of six photographs citing *Ashdown v Telegraph Group Ltd* [EWCA 2001] and *Tarsasag A Szabadsagjogokert v Hungary* [ECHR, 2011] as allowing greater press freedom and making sure the "law cannot allow arbitrary restrictions which may become a form of indirect censorship" (para 27, cited by Lord Woolman in para 37).

The media in the UK (and similar jurisdictions such as Australia, Canada and New Zealand) also have another defence for infringing copyright – what is known as 'fair dealing'. Less flexible than the US concept of fair use, fair dealing covers use of copyrighted material for research, criticism and reviews, parodies but most pertinently for news reporting. Photographs however are exempted from this.

This debate came to the fore after coverage of three nights of rioting in London in August 2011, when the BBC used pictures posted on people's Twitter feeds to illustrate the mayhem. Andy Mabbett, a blogger, took issue with a BBC report on 6 August, which used pictures labelled 'from Twitter'. Mabbett wrote to the BBC, complaining:

> You may have found them via that website but they would have been hosted elsewhere and taken by other photographers, whom you did not name and whose copyright you may have breached. You have done this with other recent news stories such as the Oslo attacks. This is not acceptable. In future, please give proper credit to photographers. (Mabbett 2011)

A representative of the BBC initially replied:

> Twitter is a social network platform which is available to most people who have a computer and therefore any content on it is not subject to the same copyright laws as it is already in the public domain. (cited in Mabbett, 2011)

However, following an outraged response from Mabbett, the then BBC News social media editor, Chris Hamilton, admitted the corporation's initial response was inaccurate. He said that the BBC always made strenuous efforts to reach copyright holders although "in exceptional situations, i.e. a major news story,

where there is a strong public interest in making a photo available to a wide audience, we may seek clearance after we've first used it" (Hamilton 2011).

Reuse, linking and consent

But is it fair to (re)publish work from internet sites with the defence of reporting current events, if that material was not initially made widely available? It may seem self-evident that anything on an internet site is already published, and the Court of Justice of the European Union's ruling in *Svensson v Retriever Sverige AB* [EUECJ, 2014a] was that once content has been made available to the public, it does not breach copyright to make it available by linking to it.

This may be the legal position. But it can be argued that the originator did not intend for it to be published more widely– and that journalists should bear in mind the intentions of the creator and the impact of reuse particularly when caught up in such traumatic events.

Consent as it applies to journalism practice goes beyond legal constraints and raises peculiarly difficult problems, especially in the aftermath of disasters when an eyewitness/survivor/victim's ability to fully comprehend the consequences of what they are doing may be diminished. And while obtaining consent is a basic ethical requirement for journalists, it is often implicitly rather than explicitly understood.

Muller (2013:37), in his investigation into the 2009 Australian 'Black Saturday' bushfires, puts forward the idea of the 'four abilities' model described by Grisso and Appelbaum (1998, cited in Muller, 2013). This measures people's capacity to consent by assessing their ability: 1. to make a choice; 2. understand the meaning of what is being proposed; 3. to appreciate the implications and consequences; and, 4. when equipped with the necessary facts, to be able to arrive at a reasoned decision.

Muller (2013:39-42) talked to the survivors of the fires and found that while most had ability 1, not everyone had abilities 2 and 3, and ability 4 was almost entirely absent. The journalist therefore has to take responsibility for recognizing and respecting a survivor's autonomy.

At this point, some researchers may feel it is wrong for journalists to approach survivors; however, in an important news story such as a

humanitarian crisis, it would be wrong to erase the voices of the victims and leave them silent.

2. Privacy

When a crime, tragedy or natural disaster occurred in the past, a journalist was faced with rites of passage: the doorstep and the deathknock[7] confronting the survivors or their families face to face. The growth of social networking sites has changed all this. Any 'collect' [a family photograph from the past] in the media these days is likely to have come from Facebook. As Paul Fievez, a former night picture editor wrote:

> Within seconds of a story breaking, news and picture desks are all assigning reporters, photographers and picture researchers to log-in to Facebook, Twitter, Linked-In, Friends Reunited. All of the other social networks and personal websites are Googled and scoured for pictures and information (Fievez 2011).

Unlike other jurisdictions, the law of England did not specifically recognise a right to privacy until 2 October 2000 when the *Human Rights Act 1998* came into effect, so the media and the courts are still wrestling with weighing up the conflicting needs of the ECHR's Article 8 guaranteeing a right to privacy, and Article 10 which safeguards freedom of expression.

Initially Article 8 seemed to take precedence, particularly following *von Hannover v Germany* [ECHR, 2004] (in which the ECHR ruled respect for the private life of Princess Caroline of Monaco had been breached by photographs of her shopping or on holiday in public places), *McKennitt v Ash* [EWHC, 2005] and *CC v AB* [EWHC, 2006] when a prominent sportsman secured an injunction after a betrayed husband wanted to publicise the sportsman's adulterous relationship with his wife.

But subsequent cases have seen the pendulum swing back to Article 10 favouring freedom of expression, – those of *Axel Springer AG v Germany* [ECHR, 2012a] and *Von Hannover v Germany no 2* [ECHR, 2012b]. In the first, the

[7] These shorthand terms refer to a reporter waiting outside someone's house for a comment, or trying to persuade a grieving family to talk about the deceased.

European Court of Human Rights ruled that Article 10 was violated after the German newspaper *Bild* was prevented from revealing the arrest and conviction of a well-known actor for drugs possession. In the second, *Frau im Spiegel* had taken pictures of Princess Caroline on a skiing holiday while her father was very ill; she claimed this was a breach of Article 8, but the court ruled that the photographs contributed to a debate in the public interest.

These cases were focused on public figures. What about ordinary members of the public? To take one possible scenario: if someone films the survivor of an earthquake which is then used by the BBC and viewed by millions, has privacy been breached?

Peck v UK [ECHR 2003] suggests that those who use UGC of dramatic events without seeking the permission of those they feature may lay themselves open to legal action. This case revolved around Geoffrey Peck who was suffering from depression and tried to commit suicide on his local high street. But the local council had installed CCTV, and when an operator saw what was happening, s/he called summoned medical help. To show how useful CCTV could be, the council later released both photographs and short clips to local newspapers and TV.

The ECHR found that releasing these images without Peck's consent, and without masking his identity sufficiently infringed his right to privacy under Article 8.

This has however been seen as a problematic case. First it could be argued that natural disasters have a public dimension that suicides usually do not. Second, Robertson and Nicol argue that Peck "*created* a public event by his actions" (2007:275) [their emphasis]. The reality is, though, that courts would have to consider Peck's case in weighing up any action taken by for example, an earthquake victim, clearly in distress, broadcast on the evening news.

This argument came into focus again in 2015 after the use of Jordi Mir's footage in the aftermath of the attacks on the Charlie Hebdo offices in Paris. He had filmed the attackers Cherif and Said Kouachi in the act of killing a police officer, Ahmed Merabet and uploaded the video onto Facebook, before deleting it 15 minutes later (Satter, 2015). By then, however, he had lost control of the film: it had been uploaded to YouTube and widely used. Merabet's brother later said

they were traumatised by the continual reuse of the footage, and attacked journalists, saying:

> How dare you take that video and broadcast it? I heard his voice. I recognized him. I saw him get slaughtered and I hear him get slaughtered every day. (Alexander, 2015)

Mir, who said his decision to upload had been a 'stupid reflex reaction' turned down offers of payment, while authorising some media organisations to use the film as long as they cut the moment of death; some, he said, continued to run it without permission (Satter, 2015; Sargent, 2015).

These discussions around privacy encompass self-regulatory and sociological considerations here too. As the privacy theorist Helen Nissenbaum points out, the fundamental problem with social media is a breakdown in what she calls "contextual integrity" (Nissenbaum 2004: 138).

Nissenbaum explains that privacy means different things in different situations, and that it is violated when people do not respect two types of contextual norms – those of appropriateness (what information may be shared) and those of flow and distribution (with whom the information is shared). Grimmelmann (2009) calls this a 'flattening' of relationships – the erosion of the fine divisions in social relationships that there are in real life. When material is pilfered from social networking sites by the media, then this transgression of contextual norms is taken even further.

In the most extreme cases, this can result in widespread vilification and even loss of a job and social status, as in the case of Lindsey Stone. Her bad-taste photograph in which she pretended to shout and swear in front of a sign asking for silence and 'respect' at the Arlington National Cemetery, led to her being 'trolled' and then fired after it was shared widely online (Ronson, 2015). Zimmer (2010), in his critique of the contextual privacy failings of the Taste, Ties and Time case[8], concludes:

[8] Researchers used Facebook to carry out a longitudinal study into undergraduates in an unidentified New England private college (Lewis et al, 2008). It was quickly identified as Harvard and thus students themselves could be identified.

> Future researchers must…recog[nize] that just because personal information is made available in some fashion on a social network does not mean it is fair game for capture and release to all (Zimmer 2010:323).

For those who have found images and text scattered over the media in the aftermath of a traumatic situation, self-regulation in the UK at least has offered scant comfort. The former regulator, the Press Complaints Commission took the view that there should be an expectation that information posted online should not be republished "unless they, and/or the information they have published, are newsworthy" (Gore, 2009) – but that definition of 'newsworthiness' was broad. This led to the PCC's upholding newspaper's rights to publish of a civil servant's tweets about feeling hungover at work, a serving police officer's view on the death of Ian Tomlinson at the G20 protests[9] – despite the comments being behind strict privacy settings and even a spoof MySpace page written by an Oxford student who went on to kill himself.

The PCC did rule there were limits – most seriously in the Mullan case concerning survivors of the Dunblane massacre[10] - where it was made clear that it was not acceptable to trawl the net for information.

At the time of writing, the Independent Press Standards Organisation (IPSO), the PCC's 'successor', had not dealt with many cases involving social media, (personal communication, 10 November 2015), although it did uphold a complaint of breach of privacy in *A woman v Lancashire Evening Post* (2015) where pixelated (non-sexual) photographs of children taken from Facebook had been used to illustrate a story about how these pictures had been found on a file-sharing website for paedophiles.

The General Data Protection Regulation, which has just come into force may help with its 'right to be forgotten' (that is, to delete data that was previously publically available from social networking sites) and the need to have more explicit consent to process private information. This is in the aftermath of cases such as *Google v Costeja Gonzales* [EUECJ 2014b] – Mario

[9] A newspaper vendor who died in the 2009 G20 summit protests. An inquest later ruled he had been unlawfully killed

[10] Mullan, Weir, Campbell (PCC, 2009.) The *Sunday Express* had trawled Facebook for comments and pictures made by the Dunblane survivors as they turned 18, and wrote a piece criticising their drinking habits.

Costeja Gonzales had fought for home foreclosure notices from a decade earlier to be deleted. After the ruling, Google rapidly launched an online form by which members of the public could identify search links that were irrelevant, outdated, inadequate, inaccurate or without public interest. By March 2015, nearly 220,000 requests to 'be forgotten' had been made to Google, 95 per cent of them by private citizens (Tippman and Powles, 2015).

While there have been concerns from academics about the way Google has taken the initiative and about lack of transparency over the delisting process (Goodman, 2015), it is possible that the right to be forgotten could be used by people who find their social media content and profiles used (or abused) by mainstream media in the aftermath of traumatic events.

3. Defamation

Disasters are moments of crisis, and high drama. The stories that the media often tell include heroism – but also cowardice, bad behaviour and even corruption. There is also considerable potential for the producers of the content themselves to defame someone online.

A common story in the aftermath of a disaster is the amount of looting that goes on – as was the case after the Haiti earthquake, for example (Pilkington, 2010). What if someone – whether through genuine belief or otherwise – tweeted, retweeted, put up a picture on Flickr or video on YouTube insinuating that a clearly identified person had been involved in looting – and it was then republished by a mainstream media site?

These problems are still being debated. In the UK, for example, tweeters should be aware that the Defamation Act 2013 covers anything on the internet and any forms of electronic communication. They may also want to bear in mind cases of 'Twibel' (defamation via Twitter), such as *Cairns v Modi*,[EWHC 2012] [11] in which a New Zealand cricketer received £75,000 for a defamatory comment about match-fixing, despite the fact the tweet had only been seen by 65 people and the website by 1,000.

Perhaps the most well-known case in the UK is Lord McAlpine's action against Sally Bercow [EWHC, 2013]) after her tweet "Why is Lord McAlpine

[11]Cairns was also subsequently found not guilty in a perjury case (Norquay, 2015).

trending? *innocent face*" (in relation to false claims of sex abuse). The wife of the Speaker of the House of Commons eventually settled out of court, paying undisclosed damages after the tweet was ruled to be defamatory in a preliminary ruling.

But it is not just the tweeter who risks a suit. Websites – including media organisations – which allow derogatory tweets or online messages to be put on their sites, may also find themselves liable. In the UK, 'secondary' publishers such as internet service providers (ISPs) can avoid liability for defamation under provisions in the E-Commerce Regulations if they are "mere conduits" – i.e. they do not initiate the transmission of defamatory comments, select who receives the comments or select or modify information -although if alerted to such material they must act 'expeditiously' to ensure the information is deleted or access disabled.

The problem was this provided a clear disincentive for website operators to actively moderate their sites. To try to deal with this, the UK's Defamation Act 2013 gave website operators a new defence for defamation: if the ISP can "show that it was not the operator who posted the statement on the website" then it would be for the claimant to pursue the person who actually put up the UGC. So in the Lord McAlpine case, for example, he pursued Sally Bercow and other tweeters for their defamatory comments. However if the claimant can prove it is not possible for them to identify the person who posted the statement, s/he can give the website a notice of complaint which the operator must respond to.

In cases of serious online defamation, most website owners act rapidly – for example, Twitter quickly took down numerous tweets in the McAlpine case. The problem is in the greyer areas – is something defamatory or honest comment? – and when anonymous posters do not identify themselves. In the aftermath of a humanitarian disaster, there could be comments from whistleblowers or ordinary members of the public questioning the aid effort or why so many people have been affected.

Finally, instead of putting defamatory comments directly on a website, people might put up hyperlinks to such material instead. In the Canadian case *Crookes v Newton* [SCC, 2011] the Supreme Court ruled that merely including hyperlinks to defamatory material is not equivalent to publishing that content;

instead such links should be considered similar to footnotes or references. Only when a hyperlinker presents content in a way that actually repeats the defamatory content will s/he be considered a publisher and be potentially liable.

4. Conclusion

In the aftermath of the 7/7 bombings, John Naughton wrote of his concern at the idea of 'cameraphone ghouls' (Naughton, 2005), whose first reaction was to film the tunnels and the injured after escaping serious injury themselves. A decade on, Tony Kemp, the first medic at the scene of the Shoreham air crash in August 2015, said those who did the same there were in 'shock' and 'victims' too, while police warned against posting such graphic footage online (Merrill, 2015).

Despite Naughton's disgust, user-generated content is now a firmly established part of disaster reporting in the mainstream media. The idea of reporting an earthquake, a tsunami, a flood or a cholera outbreak and not using footage filmed or tweets written by amateurs seems unthinkable for most media professionals. The result has been a laissez-faire attitude to the public's words and images, often while paying lip service to consent, privacy and taste.

While copyright has been more widely accepted in the use of images, with text it continues to be contentious and the application of copyright law to user-generated content remains sketchy. The basics of consent – even with no monetary recompense at stake – still appears to be a fraught area, with confusion over whether republishing requires additional permission.

With successive cases, privacy appears to have moved on from the argument that if putting something online means that it is fair game for the media to reproduce it to considering the implications of the ability to send an impulsive tweet or picture around the world in seconds. But the complications of other people's access to an individual's online pictures, coupled with the idea that a new artifact may be created once an image or post has been shared and commented on, that is completely devoid of context, means that much still rests on normative and deontological journalistic approaches.

At the time of writing there is little empirical data on whether 'Twibel' defamation cases are on the increase, but the potential for such defamation

remains high. What may also need to be considered is the fact that caution by ISPs may result in the deletion of fair comments (such as why an aid effort took so long to get through, the role of a government minister in safety regulations, a whistleblower's account of the housing that could not withstand an earthquake)

Finally there is one last issue to be considered. The growth of apps such as Periscope suggest that our chances of being confronted by graphic content is higher – and for families or survivors to see distressing scenes played on over and over again. So this new ability of a citizen, to establish him or herself as a co-witness, is not the same as controlling how a story is framed.

All too often, the focus is on obtaining copyright approval rather than engaging in a conversation with a (possibly) traumatised individual. Rarely, it seems, do journalists think about what it is like for an eyewitness to be repeatedly contacted on Twitter or Facebook after being caught up in a disaster. While the legal and regulatory aspects need to be considered, and intellectual property, privacy and freedom of expression as outlined by the ECHR and other conventions need to be respected, in these particularly traumatic stories, journalists should also bear in mind the situation the creator of content finds themselves in; just because they are not meeting them face to face rather than via a website.

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