

# OFFSHORE JOURNALISM

*A project to maximize free speech by exploiting different jurisdictions*

FINAL REPORT - MAY 2018  
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# About

The Offshore Journalism Toolkit was a project that ran in 2016 and 2017 with the aim of helping publishers store their content beyond the reach of censorship.

The project created a process to this end, as well as the tools to implement it (available on Github at <https://github.com/jplusplus/CrawlerToolkit/>) and research which are presented in this report.

## Credits



The Offshore Journalism Toolkit is a project by Mario Tedeschini-Lalli and Nicolas Kayser-Bril, with help by Anne-Lise Bouyer, Pierre Romera and Defne Altıok.

It was financed by *Google's Digital News Initiative*.

Official website: [www.offshorejournalism.com](http://www.offshorejournalism.com)

The final report has been curated by Donata Columbro, with help by Serena Carta.

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# **OFFSHORE JOURNALISM**

**Final report**

**May 2018**

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# The story of the Offshore Journalism Toolkit

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*Nicolas Kayser-Bril*

*Data-driven journalist.*

*One of the authors of the Offshore Journalism Toolkit.*

One day of July 2016, Mario Tedeschini-Lalli, head of innovation at Gruppo L'Espresso, an Italian media giant, published a blog post where he pointed out that much of the work we - online journalists - do will probably be lost forever if it is not archived. I joked with him on Twitter that we should apply for funding to Google's Digital News Initiative, were it only to put down in writing what should be done to preserve online content. Our application was tongue-in-cheek from beginning to the end.

Our slogan was "corporations use offshore vehicles to optimize pro-

fits, publishers should do the same to optimize freedom of expression". We even had a budget line for a €3,000 study trip in Iceland (we didn't do it).

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“corporations use  
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expression.**

We were stunned, a few months later, when Google actually gave us €50,000 to build the Offshore Journalism Toolkit. We first mapped the situation.

We called publishers to know when and in what circumstances their content was permanently removed from their servers.

We called archivists to know what public libraries were doing to pre-

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serve content for the next generations. We called lawyers to understand what publishers could do if a court ruled that an article needed to be removed. And we examined in-depth several instances where, in Europe, publishers had had to delete online content.

The results of several dozens interviews were very promising. It turned out that content deletion was much more widespread than we thought. Dozens or hundreds of news articles are being deleted, each month, from the archives of online news outlets. Some organizations were even bought by rich men for the sake of destroying their archive (most famously Gawker).

All the while, national libraries were archiving content, but were doing very little.

The idea of preserving interactive or video content, for instance, was still a plan for the far away future. And some cases were simply too absurd to be believed. The French censorship authority, for instance, is checked after the fact by a single civil servant from another body.

But this lone civil servant is simply given a list of URLs that were censored - and cannot access the web pages in question because they are blocked!

We set out to work. Our plan was to create a standard for an HTML meta element (a line of code written on top of a web page) that publishers could insert in their articles. We then built a simple robot, that could be set up by anyone, to crawl the web looking for the meta element in question and, each time it found a page containing it, archive it on different servers in several

countries. Once stored safely, the article wouldn't have been at risk if the original were to be deleted.

The beauty of this design lied in its legal leanness, for publishers didn't have to break the law to save their content (if a publisher archived an article after a judge ordered it censored, it would be contempt of court).

It was also extremely cost effective. Publishers just had to add a line to their web pages and anyone could then, for a few cents a month, run a crawler. It was a decentralized search-and-rescue network for journalistic content.

“***Publishers do not have an incentive to preserve content for future generations. After all, their job is to publish, not archive.***”

We tested the set-up with L'Espresso and PrimaDaNoi in Italy. Although it worked well, technically speaking, it did not take off. Publishers were very sympathetic to the idea of preserving content but, when we asked them to try out our system, very few went ahead. Probably because they saw it as an additional cost which, as low as it may be, would have made their already precarious situation worse.

Publishers do not have an incentive to preserve content for future generations. After all, their job is to publish, not archive. Our experiment is still useful. We now know that we must leverage other stakeholders, such as journalists and readers, to save our cultural heritage.

# Publishing for the future and freedom of the press

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**Mario Tedeschini-Lalli**

| *Journalist and a consultant on Digital Editorial strategies. One of the authors of the Offshore Journalism Toolkit.*

The Offshore Journalism Toolkit emerged as a possible way to solve the problem of the increasing amount of accurate and legally published journalism that is being deleted by order of local authorities, thus preventing future generations to access it. The idea was to attach a meta tag to any piece at risk, making it available for copying by organizations in more liberal jurisdictions. As the project comes to an end we can point to at least a couple of more general problems that arose.

- One is a cultural, maybe also financial problem in the industry. As Nicolas Kayser-Bril put it, “publishers do not have an incentive to preserve content for future generations. After all, their job is to publish, not archive”.

- Another one has to do with the basic assumption of our project that it would be possible to exploit different jurisdictions to maximise freedom of speech, the existence of which at present and in the future seems now less certain.

Our approach was mainly publisher-centric, but the cultural problem can and should be addressed first of all by journalists, if they are not on board it would be difficult that publishers would.

Although there are already a number of tools that let journalists save their own content,<sup>1</sup> the main issue here is to understand that “publishing” and “archiving” in the digital world is actually the same thing, or - as we pointed out in our report - that the potential “currentness” of any item

<sup>1</sup>Lauren Hazard Owen, [Here are three tools that help digital journalists save their work in case a site shuts down](#), IJNET, November 23, 2017

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digitally published in the past is a feature that expands across time our ability to inform and influence societies. We should all embrace the idea that “freedom of the press in the digital environment includes the freedom of ‘publishing for the future’, and that limiting or curtailing it puts freedom of speech at risk”.<sup>2</sup>

We see, instead, a creeping acceptance of the more historically limited concept of freedom of the press and of freedom of expression, rooted and stuck in our pre-digital past.

Of course, “publishing for the future” entails new responsibilities, as well as new opportunities. New correction and updating policies, for instance, should be discussed and implemented with the same degree of attention, human and technical resources assigned to “current publishing”. Overall, we think that an industry-wide dialogue about this issue involving all stakeholders should be organized, especially at the European level.

It could be an on-going, transparent process to try and re-define values, offer new criteria and devise new tools. The first step could be a call to discuss guidelines on erasure, editing or updating published content, which a news organizations could then make public.

As far as the jurisdictional assumption is concerned, many signs point to a growing nationalization of the Internet. On the one hand authoritarian regimes appear to be growing in number and in their power to muzzle free speech (even

within the European Union), on the other hand even in more liberal societies speech control seems to gain momentum, be it to allegedly combat terrorism, hate, or violence in general, or to guarantee the citizens’ privacy in the digital environment. The even louder call to regulate digital platforms and their power in these respects, may have the consequence of making the platforms the extra-judicial arbiters of free speech, which - coupled with the requested accountability to national governments - may push them to limit their use as a means to circumvent censorship

by local authorities. The most recent instance being the announcement by Signal, an encrypted messaging app, that Google and Amazon stopped letting the app use “domain fronting” within their cloud service, which is a way to make it available in countries that block it.<sup>3</sup>

Although we are not sure how, or if this trend can be successfully reversed, we think that the news industry as a whole should at least be aware of these risks,

and not fall in the trap of thinking that any platform-bashing is in the end a good thing for journalists and news publishers. Of course platforms have their responsibilities, and they could use much more oversight by citizens as well as rules to “help” them in terms of transparency and competition, but free speech should be the ultimate civic test on such measures - journalism, let’s not forget it, has a vested interest in free speech.

If and when journalists and publishers become aware of the kind of problems we tried to describe, they may come together with other sta

“***The potential “currentness” of any item digitally published in the past is a feature that expands across time our ability to inform and influence societies.***”

<sup>2</sup>Nicolas Kayser Bril and Mario Tedeschini Lalli, [Offshore Journalism. Preliminary report](#), June 2017

<sup>3</sup>Abrar Al-Heete, [Signal says Amazon, Google will no longer help it evade censorship](#), CNet.com, May 1, 2018



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keholders (human rights organizations, digital platforms, tech groups, etc.) to set up a distributed “Search & Rescue” service to save content at risk, thus making more difficult for governments to control journalistic content. The “stress signal” and its mechanism may be similar to the one we proposed or a different one, but we do believe such a service should exist.

“*Free speech should be the ultimate civic test on such measures - journalism, let’s not forget it, has a vested interest in free speech.*”

# Digital preservation of online news: challenges and best practices

## *Interview to William Kilbride*

**I** *Executive Director of the Digital Preservation Coalition*

*What is Digital Preservation Coalition's mission? What kind of matters do you address to and why?*

The DPC is first of all a membership organization. It exists because a group of organizations got together to share the challenge of looking after the digital data both in a long and a short term.

The coalition started in 2002 as a collaboration between a relatively small number of organizations in UK and Ireland, coming from the public sector and the so called “memory institutes”: uni-

versities, libraries, national archives, museums. All types of organizations that have a challenge in locking material for the long term because preservation is what they do.

Over the years, the number and the types of organizations getting involved in the problem of digital preservation have grown and diversified, and the DPC has reached out the international level. Today the Coalition helps everyone with the need to preserve and save data for long term, from commercial banks to nuclear industry, from universities and libraries to business companies.

Our mission is to help them to be able to secure for themselves digital assets for the long term, so that they can survive through different changes and technologies; but also to let digital resources become a robust and useful part of their corporate existence, their cultural memory, whatever the function they intend to serve can be supported with digital material.

We achieve our aim through six different kind of activities: we do work around advocacy, we do quite a lot of community engagement work, we help with training or workforce development, in capacity building, in developing model standards and good practices, we try to build sustainable platforms for good governance.

*What kind of challenges do you see in the digital preservation of online news?*

I see three main challenges.

Obsolescence. Typically, in the early history of the Coalition and digital preservation, there was a lot of focus on matters related with obsolescence - meaning what things you are going to do to make sure that your digital objects are protected. That became obvious over the years and it is still a big challenge.

Political interference. But what became obvious over the years as well is that there are other types of risks. So, last year we did a thing called "the bet list": we wanted to make a list of digital contents in danger to be seized - like the global red list of species in danger of extinction! The

things on the list were not what you would have expected to be if all you were concerned about was obsolescence. The nominations of the list included things like environmental data from US governmental scientific research. Now, it seems to me that US environmental data is suddenly at risk because Donald Trump is the President of the United States and he has perhaps a different view on climate science than the scientific community. So, the point here is that there are significant risks to the digitally world, because material can be easily deleted, easily falsified

and easily lost. Another good example of this trend comes from a study that shows that in 2009, two years after Tony Blair's having left office in UK, 40% of the links to web resources giving answers to Parliamentary requests and website citing evidence for public policy in the UK were broken and no longer available. That is a significant problem, because these were no random websites but answers to Parliament requests and links to important matters of public discourse! So, I think that we need an authentic legitimate record of what our politicians have said and done and this is something that digital

preservation can help us to do, to not overlook the fundamental servers.

Big companies. There is also a business issue here, a financial one we have seen growing in last years: sustainability. We see great services, bubbling up, becoming very popular for a short while and then disappearing. I think that the

***“ I think that we need an authentic legitimate record of what our politicians have said and done and this is something that digital preservation can help us to do, to not overlook the fundamental servers. ”***

reason why they are disappearing isn't because of technological problems, but because the company behind them has made business decisions to close servers, and there is not much we can do about that.

I think that what we need from some of the big tech companies like Facebook or Google is either some commitment to preserve and to transparent decision making about how and when the servers are getting off; but they also need to pay their taxes because national libraries and national archives need public resources to go on in their historical mission to record and preserve the public cultural memory.

*From your experience, what good practices in digital preservation at international level would you point out?*

I can struggle with this question because there are too few good examples! The classic example of someone who is doing a great job on web archiving has been for long Internet Archive. They are member of our Coalition and I won't say anything bad about them, but you have to remember that they have a weakness: they are for nonprofit and they don't have a legal mandate to do this.

They are effectively breaking the law every time they take a copy of a website, because they have no copyright permission to keep this stuff. The big legal challenge against them is the memory vs corporation's interests. So, if someone says something really truthful but that damages a big

corporation and it ends on Internet Archive, it is possible that Internet Archive is going to be sued and they won't simply be able to sustain that.

Speaking about the legal mandate takes me into the world of legal deposit libraries: there is quite a good network of them internationally that are taking a variety of copies of entire domains.

This is also a good piece of work and they are doing it under a legal framework. Their weakness here is that it's very difficult to access that material. In Scotland, for example, the National Library has a really great collection but you can see it if you only physically go there. And, of course, that's a problem.

There is also a very interesting work done by social science research.

I can mention Politwoops, a service able to capture deleted tweets from politicians. More generally, in a variety of academic disciplines there are really active communities in digital preservation; they really know what they are doing but the expertise from those relatively

small groups has not really reached to the broader journalistic or policy making worlds.

**“What we need from some of the big tech companies like Facebook or Google is either some commitment to preserve and to transparent decision making about how and when the servers are getting off.”**

# Freedom of expression in the digital era: how to preserve and enhance it?

## *Interview to Guy Berger*

*Director of UNESCO's Division of Freedom of Expression and Media Development*

***How serious is the threat of the right to be forgotten for the freedom of expression and the access to information in Europe?***

From the UNESCO's point of view, we interpret the right to freedom of expression as the right to seek and receive and the right to impart information. In the case of the "right to be forgotten" – meaning a right to be delisted as per the European Court of Justice decision, the right to *impart* is not directly limited as the information is

not required to be removed at source. So the impact is primarily on the right to *seek and receive*, because when a content is delisted then it becomes unfindable.

In other words, a right to be delisted is not so much an act of censorship of the right to express, but rather an intervention that limits the distribution of information and its discoverability.

Of course, the two dimensions of the full right have an interdependence; restraints on one do affect the other.

Certainly, it undermines the exercise of the right to meaningful express information, if no one can find that expression. But the immediate impact is on the right to seek and receive.

The issue then is to what extent a restriction such as delisting can be legitimate. In the European law, certain criteria have been set out as justifiable within the decision of the Court of Justice. In terms of international standards, there can be right to be delisted or even to have content removed entirely, depending on the applicability of international standards of legality, proportionality, necessity and legitimate purpose for any restrictions to be considered justifiable. In this wider perspective, restrictions can indeed be justified – such as in terms of the right to reputation versus the right to seek and receive information.

**“ People do need to have their right of reputation protected – but in a way that is not unjustifiably at the expense of the right of others to seek and receive information. ”**

For example, if you are victim of so-called revenge porn, you want and deserve to have it at least delisted if not also taken down.

On the other hand, if you are a politician or business person and you want to be delisted concerning your link to corruption, then the law shouldn't work in your favour. Public interest in free flow of information, including its discoverability, trumps a right to reputation in terms of findability in this latter case.

This matter of delisting needs to be very much independently monitored to assess the extent to which it is occurring in terms of international standards. People do need to have their right of reputation protected – but in a way that is not unjustifiably at the expense of the right of other to seek and receive information.

### *What is your call to European authorities?*

Making the delisting in response to every demand could really lead to a limitation of availability and findability of legitimate information.

It would not be about the right to reputation in many cases, but about violating the rights of individuals and the public to impart, seek and receive information as the basic norm.

Currently, Google does not accept everybody's wish to be delisted - they make investigations and verifications, but are required to follow the European Court of Justice's law when someone successfully contests a refusal by the company to delist certain links.

However, there is also a view by some countries in Europe that they have a responsibility to protect a citizen's rights to reputation even at the global level, i.e. that delisting should be made by Google globally. In other words, that it is not enough for Google to geo-customise its delisting, but should do this universally. This implies extending European jurisdiction to other jurisdictions. If this is pushed to the extreme, if Google is required to delist on all its presences on the basis of everybody's request in every jurisdiction, this

could radically reduce the utility of the internet.

In such a situation, the company would likely be pushed to automatically delist as a default stance, in response to any complaint, anywhere, because the burden of investigating would be overwhelming.

In this scenario, the nuance required for balancing rights would be eliminated – a swathe of links would simply disappear from the global internet irrespective of merits.

In light of all that, I would encourage European authorities to keep in mind the dangers of applying one region's jurisdiction on a global basis. This could come back to damage the availability of information of people in Europe and of other countries in other jurisdictions.

In addition, European authorities should look to international standards and the principles of proportionality and necessity in the way that the Court of Justice's law is implemented. More creative solutions should be explored – for instance, instead of delisting globally, a company could be urged to signal for instance that the specific link under contestation is delisted within European jurisdiction.

This “co-listing” approach could be easier to accommodate in terms of greater alignment to international standards of necessity and proportionality.

*UNESCO's project to define the Internet Universality concept includes four fundamental principles: R – that the internet is based on human Rights / O – that it is Open / A – that it should be Accessible to all / M – that it is nurtured by Multi stakeholder participation. How they can help the media to preserve and enhance the free movement of ideas?*

The ROAM elements are all relevant here. In particular, concerning the so-called European right to be forgotten, this issue should be approached within the recognised universal Rights framework (such as reputation versus expression). There are also risks to Openness and transparency (such as algorithmically driven take-down of links in response to complaints). On the other hand, Openness in the economic sense can enable competition between discovery engines, which can mitigate the risks of a single big actor being the central interpreter of the Court of Justice's decision. Accessibility is impacted, in that there is a need to enhance users' Media & Information Literacy to

understand the rationales and the risks of a right to be delisted. Lastly, because of the importance of upholding the right to expression in any balance with delisting, it is essential that journalists, publishers and editors should be involved in a multi-stakeholder dialogue when it comes to developing specific laws and policy at a country level.

**“If Google is required to delist on all its presences on the basis of everybody's request in every jurisdiction, this could radically reduce the utility of the internet.”**

# Digital preservation in the art sector: a different point of view

## *Interview to Dragan Espenshield*

I *Rhizome's Preservation Director*

*Digital preservation in the art sector: how does it work and what kind of solutions have been identified?*

Let's start by saying that digital preservation has been led by the library and archive fields: they have developed a lot of practices that the art world is trying to adapt with the aim to create its own strategies. Secondly, we need to find an agreement on what digital art is: there is the Instagram type of digital art - where a picture can be printed out and bought by a collector - which is not what we are interested in Rhizome. For us digital art is contemporary art engaged with digi-

tal technologies and the internet: we are focused on art that has been created for the internet and makes use of internet and software. The challenge in the arts right now is to have a say to define object boundaries. Many of the works we are dealing with are very specific to the technical cultural environment which are exchanged very quickly.

At Rhizome we work with Webrecorder, a tool we have developed, to preserve websites and we are using several other techniques like server containers or the emulation framework EaaS\* to run legacy software in legacy environments.

\*Emulation as a strategy for digital preservation is about to become an accepted technology for memory institutions as a method for coping a large variety of complex digital objects (<http://eaas.uni-freiburg.de/>).



*Can you mention a best practice in the art digital preservation?*

We have found that the web archiving approach that we have developed with Webrecorder is extremely productive and produces stable art effects even with technically complex websites that you don't have access to on the back-end side.

For what concerns software preservation, we are working with emulation as a service (EaaS) which is a project we have been involved in thanks to several research programs and it helps us to preserve software really well. Online material and software appear to be boundless and infinite and it seems hard to conceptualize the object that you want to preserve; so, the definition of an object and its boundaries has been the main focus for us. Lot of this is really a curatorial decision: you have to draw those boundaries artificially.

*What are the main challenges to be faced in the future?*

I think that the challenges I am facing and that software preservation is facing is the whole computing culture, that is moving away from protocols to products. For example, emails have an established and solid protocol that works and is based on open standards that you can go into.

On the contrary, very popular systems like iOS or Android are so lock down that it would be super difficult in the future to reproduce what they have

done. Even if you have a running copy of Android, it might not help you because the application that you might also have a copy of is not much of an application; as a matter of fact, all the computing is happening on a remote server and you can't get hold to that remote server, you never know what the content are because it is proprietary and because of business secrets.

So, what we are trying to develop are ways to void these black blocks systems and understand for example how you can capture network traffic and combine everything locally running software and reproduce behaviors of the software. But you will never be able to capture the completeness of a system that works like that.

Speaking again about challenges, I would like to point out a feedback to The Offshore Journalism project. Strangely in the arts we don't have the issue that we need to remove things: this is something that has been interiorized by the art world, there is a lot of freedom there.

Actually, it is very hard to fight for the deletion of art; if something has entered the museums circle it is pretty safe. Some artists have worked around this idea, creating an exhibition out of medical records, to show what the position of the art world is.

That is also a kind of offshore approach, isn't it?

## INTERVIEW

### *Tell us something more about your work at Rhizome.*

I am directing the Preservation Program which includes research and tool development, but also the preservation of art pieces.

Our own goal is to support artistic practices that engage technology, helping artists who want to engage with it in creating this type of art and institutions that owns these art pieces.

Digital preservation plays a big role in all of it. Actually, not many things have been figured out in digital preservation. How digital preservation usually works is on the term of computer, meaning that you need to conceptualize any system, any object in the running environments where the computer is actually turned on. That is the research focus that we have.

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*In the arts we don't have the issue that we need to remove things: this is something that has been interiorized by the art world, there is a lot of freedom there.*

# Metadata advantages: from digital preservation to fact checking

*Claudio Agosti*

| *Vice president of the Hermes Center, member of the Good Technology Collective*

**T**he internet naturally upsets every system used in the past to enter, distribute or file information. We all, contemporary consumers and information producers, especially if we consider ourselves as “innovation witnesses”, have the duty to impose a political agenda that doesn’t follow a profit mindset but that evaluates technology potentials with a view to public interest.

I find it fascinating and puzzling how history has been kept in the past and how people have created stories to acquit themselves, rewrite and

reinterpret facts. Nowadays this action has been digitalized – and I’m wondering if it is becoming stronger and if it will be entirely in Google’s hands (and no more in those of the Roman Catholic Church!). Thanks to this article, let’s now try to picture history, and this history is owned by mankind, and the only useful goal for society is an accessible, long-lasting filing that is resistant to changes of power.

Let’s now split this goal in smaller components. The first one is the “robust indexing” that in the digital world is made with proper metadata, i.e.

data that describe data. Nowadays a piece of news about a corruption scandal within a public institution lasts 24 hours; metadata that describe the institution, the crime, the amount of money, the context, the victims are all eternal information. Creating correct or wrong metadata is something that we try to do when we have to file more than a hundred photos. The skill to imagine index and tags enduring the passing of time and representing a usable value in the future is a challenge that coexists with the reliability of sources of information.

I believe that this is a metadata problem too: those who produce information should describe the context in a way to allow third parties to revise it easily. I will produce a parallelism with computing, in order to better explain what I mean. In computer security, you need to formalize interactions between software and users: in this way you become aware of the responsibility chain and you can verify the information flow.

For us engineers these are inputs, for a journalist they are information to be verified. The core is that the issue of algorithm gatekeeper and misinformation within social networks could take inspiration from the history of computer conflicts.

One of the most frequent attacks on the web is phishing. The attacker sends an e-mail that embodies a trusted reality, such as a bank, trying to arouse an action by the receiver; if the user is taken in, the attacker may steal him/her something. Therefore, we should consider misinformation

like a form of phishing: you can be victim without taking action but just by reading.

To continue this similarity, let's think about computer networks of the 80s that trusted only known contacts. In information society, this means reading only reliable sources. The suffering publishing industry of the last century would have liked this approach but it would be a disaster for citizen journalism and for independent bloggers.

The user exposed to misinformation is therefore comparable to a computer exposed to cyber-attacks. Computers have raised the number of indicators they used to assess a connection, evaluating the source (that in this similarity is represented by the publisher and the newspaper) and running content and context analysis. In this way we can have connections to unknown devices and stop them if we think they are unsafe. The idea is that if we could have a basket of additional information in each article, we as readers could do this selection too, alone or trust in the collaborative filter of the people we trust.

“***The skill to imagine index and tags enduring the passing of time and representing a usable value in the future is a challenge that coexists with the reliability of sources of information.***”

What does validate a piece of news? The verification of sources, context understanding, cross searches. These are metadata. Why aren't they transmitted and formalized? This wouldn't mean disclosing sources but, as far as possible, allowing readers to repeat the verification procedure. And in case of misinformation or false metadata, then the user could apply a ban as it happens between computers.

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The formalization of sources is carried out with a metadata structure; our applications would choose according to our instruction, and our priorities would be respected instead of undergoing algorithms with no neutral intelligence that try to imagine what counts for us.

Metadata are organized and planned in a lasting and reusable logic in order to identify different components inside the news. Where there is a historical assumption, there will be a link to the past, where there's an opinion, there will be the author's name and maybe his/her sources. You'll have to tell if someone has validated photos and who is their author. In short, the more metadata there are, the bigger will be the value coming from the information.

The journalist himself/herself has to learn to produce metadata: this would formalize even the verification effort that otherwise on digital media would go undetected. This happens because too often editorial products seem a box of text surrounded by advertisement as every other blog, portal or post that circulate on the web. The aim is to be able to give value and public acknowledgement to this validation, creating new business models based on metadata use in the publishing industry.

# Right to be forgotten and freedom of expression: in search of balance

**Ernesto Belisario**

*E-Lex law firm lawyer, member of the Italian Government's Board on Innovation and Digital Agenda*

**R**ight to be forgotten. This is how often we define the 'right to oblivion', yet it has now become a limiting definition.

The right to be forgotten is indeed one of the most important people's right in today's society of information.

While it can be confused with the right to personal identity (i.e.: the right that safeguards the public image of an individual) this right in fact concerns the safeguard of privacy of a person.

Initially this was meant as right to prevent the re-disclosure of news that are already of public domain after a long time; yet in web and social media era, being forgotten means to obtain the elimination of personal data when they are not relevant or no longer needed for the purposes for which they were collected in the first place.

In the online world, the right to be forgotten can be compromised not only by a re-publication of a piece of information, but also by the fact that such information just remains online.

On the other hand, by making sure information is removed, we allow for the individual's specific news and events – when there is no conflict of public interest, to be forgotten (or rather, to be no longer associated with such person). The right to be forgotten – after it was recognised by law<sup>4</sup> – has its foundations in the European legislation on personal data protection,<sup>5</sup> that by art. 17 establishes that the interested party has the right to obtain the cancellation of those details relevant to him or her without any further, unjustified delay.

According to such rule, necessity, proportionality, relevance and surplus of information must be complied with and guaranteed not only by newspapers but also by anyone publishing personal data online (on blogs, forums, etc.).

From a practical standpoint, the application of this new right becomes an answer to the non-trivial question of after how much time it is possible to claim the right to be forgotten? The lawmakers do not define a unique and absolute time limit,

<sup>4</sup>It should be noted, in particular the sentence of the Court of Justice, dated 13th May 2014, lawsuit C-131/12 (also referred to as "Google Spain").

<sup>5</sup>EU Regulation 2016/679 of the Parliament and of the Council on the safeguard of personal data (referred to as GDPR).

so each instance needs to be assessed on a case-by-case basis. Now, as there is often disagreement between those who claim the right and those who manage newspapers and news sites, this can lead to legal disputes.

Knowingly, one of the prerequisites for a piece of news to continue to be published is that there is a public interest in it. For example, if corruption accusations involving authorities arise, the public opinion has an interest in knowing who are the parties involved, what are the operation details and all the legal implications.

This means that the public interest in the events will last over time. Yet, after some time has passed since the events and no updates are given, such public interest ceases, hence prerequisites to claim the right to be forgotten arise.

That's exactly when it becomes difficult to establish a real balance between the right to be forgotten and the freedom of expression and speech. In Italy the Supreme Court of Appeal<sup>6</sup> has accepted the right to be forgotten for a politician who – under allegations of corruption – had been acquitted at trial and was complaining that after so many years the news was still public on the site of the newspaper in question.

The same Supreme Court of Appeal,<sup>7</sup> – this time subject to serious criticism -- declared that the right to be forgotten may be exercised when the trial is still ongoing and only after two years since the facts occurred, somewhat restricting – potentially, a lot – the right to report news.

<sup>6</sup> Supreme Court of Appeal, III Civil Division, 5th April 2012, no. 5525.

<sup>7</sup> Court of Cassation, Sec. I Civ., 24th June 2016, no. 13161.

# Tools for web pages and documents filing

**Andrea Borruso**

| *President of onData, a nonprofit organization focused on open data, civic technology and investigative journalism*

Find below a short list of tools and resources to file web pages and documents. Some of these are user-friendly, easy for everyone to use immediately; others may be suitable for expert users with some theoretical and/or instrumental knowledge.

## Internet Archive (IA)

Internet Archive (<https://archive.org/>) is a not-for-profit digital library aiming to allow an ‘universal access to knowledge’<sup>8</sup>. Along with Google cache, this is the most used online space to search for a copy of a no longer existing or previous versions of web pages. But that’s not all: this tool allows you to actively contribute to building the digital archive itself. Here are some ways to do it.

### Basic mode

This is the simplest mode: just open the ‘Wayback Machine’ homepage section (<https://archive.org/web/>), enter the URL of the page you want to file and click on ‘Save page’.

If the administrator of the website has not blocked the access to the crawlers,<sup>9</sup> the selected page will be filed.



**Save Page Now**

SAVE PAGE

Capture a web page as it appears now for use as a trusted citation in the future.

Only available for sites that allow crawlers.

<sup>8</sup>[https://www.wikiwand.com/it/Internet\\_Archive](https://www.wikiwand.com/it/Internet_Archive)

<sup>9</sup> <https://www.wikiwand.com/it/Crawler>



### Browser extensions

#### Wayback Machine

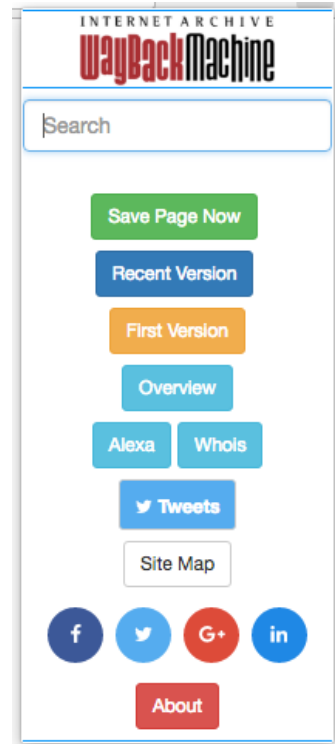
This is a really useful mode: just install an extension (available both for [Firefox](#) and [Chrome](#)) to get a button on your browser that allows you to save the current page, view its most recent version or even the first version already filed in the archive.

#### Bookmarklet

A bookmarklet is a JavaScript program that can be saved in the browser as a bookmark.

Wikipedia has created this feature for Internet Archive: you just have to drag & drop into your bookmarks and then click it every time you want to save the open page on your browser.

In the same page, you can find a bookmarklet, to view what you have already filed and another to use when a page no longer exist (dead page).



#### Upload form

This is an online form to upload one or more files (documents, videos, audio, etc.) you are entitled to share on Internet Archive.

You need to create a user account from this page <https://archive.org/create/> and then upload the files you want to archive.

You can enter into the form a set of metadata (added information on the files you are uploading), such as a description, keywords (tag), content creator, date of creation, language etc.

These details will make the search for the uploaded files on your Internet Archive easier and more efficient.

<b>Page Title *</b> 1481564845.76a33b9d02cc6d73542e4e0e9f26c ✓ <b>Page URL *</b> https://archive.org/details/1481564845.76a33b9d02cc6d73542e4e... ✓ <b>Description *</b> Add a description of the item page ✓ <b>Subject Tags *</b> Add keywords, separated by commas ✓ <b>Creator</b> Creator of the content ✓ <b>Date</b> Date work was created/published ✓ <b>Collection *</b> Community Media ✓ <b>Test item</b> No ✓ <b>Language</b> Language of the work ✓ <b>License</b> No license selected ✓ <b>More Options</b> <a href="#">Add additional metadata</a>	<b>Drag and Drop More Files Here or</b> <a href="#">Select files to add</a> <table border="1"> <thead> <tr> <th>Name</th> <th>Size</th> </tr> </thead> <tbody> <tr> <td>1481564845.76a33b9d02cc6d73542e4e9f26c.p7m</td> <td>29 KB</td> </tr> </tbody> </table>	Name	Size	1481564845.76a33b9d02cc6d73542e4e9f26c.p7m	29 KB
Name	Size				
1481564845.76a33b9d02cc6d73542e4e9f26c.p7m	29 KB				

### Command line tool

The ‘command line’ tool is a new executable that can be launched from the shell of your computer. It allows you to upload, download, to do metadata operations and searches:

<http://internetarchive.readthedocs.io/en/latest/cli.html>

It is written in Python so it is usable on any OS and can be [installed](#) very easily. Once it is done, the upload will start executing, just like this:

```
$ ia upload <identifier> file1 file2 --metadata="mediatype:texts"
```

### Note on OCR (optical character recognition)

For files like PDFs – resulting from a scan of text pages – IA automatically executes an optical character recognition (OCR). This is undoubtedly a feature that gives added value to this permanent digital space.

### DocumentCloud

This is both a tool and a catalogue to analyse, take note, publish and file documents, that aims to transform documents in data. The URL is <https://www.documentcloud.org>.

This tool allows users to upload different formats, among which PDFs and other file types supported by LibreOffice (Microsoft Word, Excel PowerPoint, Rich Text File and other various image formats such as TIFF, PNG, GIF and JPEG).

If in the files there’s some text that could be recognized by an optical character recognition program (as PDF or images coming from a scan), DocumentCloud will try to extract it.

Each uploaded document is analysed with “Thomson Reuters OpenCalais” in order to automatically extract any names of places, persons, organizations and dates from texts.

Once uploaded, you can choose to publish them and make them be available in the public search engine. In addition, there are easy modes to embed one or more files into other web pages.

Here are two modes to upload files.

### Via an online form

This is the easiest mode: a web page from which you can upload one or more files and organise them into collections (‘Project’).



### Via API

DocumentCloud can be used via API<sup>10</sup>, which allows developers to integrate it within software apps and procedures.

They are very easy to use even for bulk operations involving a large number of files where the process of metadatation made by uploading could turn out to be very demanding and with a high risk of errors. Here is the documentation:

<https://www.documentcloud.org/help>

### Wget

This is a free, open source command line app, very famous and widely spread: it is made to receive data and files through the most commonly used internet protocols (HTTP, HTTPS, FTP, FTPS, etc.):

<https://www.gnu.org/software/wget/>.

It has dozens of options such as those to make spider and copy operations on a website.

Site spidering allows you to extract URLs of all the pages in it to then create a copy in the archive.

For example, a sample of a command to do this with Wget is:

```
$ wget -k -K -E -r -l 10 -p -N -F -e robots=off --restrict-file-names=windows  
-nH http://sitoDaArchiviare.it/
```

### IFTTT

This is a free service (<https://ifttt.com>) that links web apps together and/or with IOT (Internet of things) hardware to create custom actions. You can create are hundreds of them and you also have the chance to automatically file data from the web.

For example: on a spreadsheet you can archive all the elements published at the same time on an RSS feed<sup>11</sup>. This way you can build a rich archive of titles, descriptions, publishing dates and URLs.

You only have to create an account and than activate the services you want to link. In this case, the RSS feed is a spreadsheet on GoogleDrive.

<sup>10</sup>[https://www.wikiwand.com/it/Application\\_programming\\_interface](https://www.wikiwand.com/it/Application_programming_interface)

<sup>11</sup><https://www.wikiwand.com/it/RSS>

## RESOURCES AND TOOLS

### TAGS

This is a free service (<https://tags.hawksey.info/>) that allows you to file on a spreadsheet all the results of a search on Twitter. It collects tweets from approximately the last 9 days; then you can make it work so it automatically updates over time, in order to collect data for long periods of time. Not all tweets are optimised or available through Twitter search interface, so TAGS does not gather the complete set of outputs.

You need a Twitter account and Google spreadsheet to use Google Sheet.

	A	B	C	D	E	F	G
1	id_str	from_user	text	created_at	time	geo_coordinates	user_lang
2	977071	sindaco nicola	Ragusa, annullato l'arresto dell'ex sindaco di Vittoria per voto di scambio <a href="https://t.co/AU4LI1ggqf">https://t.co/AU4LI1ggqf</a>	Fri Mar 23 06:35:47	23/03/2018 06:35:47		it
3	976936	aida_28	RT @Confagri_ANQA: #giovandidioconfagricoltura #Palermo elezioni: Francesca Giola presidente, Clelia Pandi e Emanuele Savona i vice. Comptime...	Thu Mar 22 21:39:42	22/03/2018 21:39:42		it
4	976936	Confagri_ANQA	#giovandidioconfagricoltura #Palermo elezioni: Francesca Giola presidente, Clelia Pandi e Emanuele Savona i vice. Com... <a href="https://t.co/qNvUhnQIB">https://t.co/qNvUhnQIB</a>	Thu Mar 22 21:38:51	22/03/2018 21:38:51		it
5	976936	Confagri_ANQA	#giovandidioconfagricoltura #Palermo elezioni: Francesca Giola presidente, Clelia Pandi e Emanuele Savona i vice. Com... <a href="https://t.co/qNvUhnQIB">https://t.co/qNvUhnQIB</a>	Thu Mar 22 21:38:51	22/03/2018 21:38:51		it
6	976862	geniodipalermo	Ragusa, annullato l'arresto dell'ex sindaco di Vittoria per voto di scambio <a href="https://t.co/yEP3odQmA">https://t.co/yEP3odQmA</a>	Thu Mar 22 16:44:36	22/03/2018 16:44:36		it
			RT @Meridistinea: Dopo due anni Sir Belleri rincontra sindaco e				

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[www.offshorejournalism.com](http://www.offshorejournalism.com)



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# **OFFSHORE JOURNALISM**

**Preliminary report  
June 2017**



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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 Altıok.

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](http://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**

# Time is no longer what it used to be

---

37

*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 21<sup>st</sup> 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.<sup>1</sup> 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 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 web<sup>2</sup> – 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 fo-

reseen. 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 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,<sup>3</sup> 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 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.<sup>4</sup>

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.<sup>5</sup> 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 expression”.<sup>6</sup> Which has had the paradoxical effect of transforming a “right to privacy” into “a right to a public face”.<sup>7</sup>

As Professor Brock noted:<sup>8</sup>

*“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.<sup>9</sup> Generic exceptions are provided for “freedom of expression” and research purposes,<sup>10</sup> 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](#)”,<sup>11</sup> 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 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? <sup>12</sup>

- 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? <sup>13</sup>

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 <sup>14</sup>) 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 hypermnnesia, politicians, state authorities and judges are applying the ill-defined “right to be forgotten”. However, while some citizens are 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 exists – 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.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup> Nicolas Kayser-Bril, the other author, suggested that they should put up an actual project about it and apply for funding from Google’s Digital News Initiative (DNI), which was eventually granted. As he put it: <sup>19</sup>

“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.”

# Notes

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

<sup>2</sup> 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

<sup>3</sup> 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.Internet-society.org/sites/default/files/The%20Internet%20Domain%20Name%20System%20Explained%20for%20Non-Experts%20\(ENGLISH\).pdf](https://www.Internet-society.org/sites/default/files/The%20Internet%20Domain%20Name%20System%20Explained%20for%20Non-Experts%20(ENGLISH).pdf)).

<sup>4</sup> 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>)

<sup>5</sup> “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.

<sup>6</sup> Brock, cit., Kindle position 324

<sup>7</sup> Brock, cit., Kindle position 543

<sup>8</sup> Brock, cit., Kindle position 664-678

<sup>9</sup> quoted and discussed by Brock, cit., Kindle position 1595

<sup>10</sup> “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; (...)”

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

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

<sup>13</sup> Brock, cit., Kindle position 931

<sup>14</sup> 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](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](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)).

<sup>15</sup> 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/>).

<sup>16</sup> 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.

<sup>17</sup> See following chapter.

<sup>18</sup> 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/giornalismodaltri/2016/07/01/cassazione-stabilisce-che-linformazione-ha-una-scadenza-archivi-a-rischio-proposta-per-un-giornalismo-offshore/>)

<sup>19</sup> 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 centerpiece 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.<sup>20</sup>

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 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:<sup>21</sup>

“...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 re-

garding 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.<sup>22</sup>

“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),<sup>23</sup> that said daily has wide local circulation, it is easily accessible and readable much more than printed newspapers, 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”.<sup>24</sup>

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, 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”.<sup>25</sup>

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.<sup>26</sup> 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 the web”, said Biancardi in an editorial.<sup>27</sup>

“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.<sup>28</sup> “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*, its 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”.





# Notes

<sup>20</sup> 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. Ammazzati 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>).

<sup>21</sup> 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.

<sup>22</sup> 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 perché 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>)

<sup>23</sup> 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.

<sup>24</sup> *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>)

<sup>25</sup> 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>).

<sup>26</sup> 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>)

<sup>27</sup> 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>)

<sup>28</sup> February 15, 2017, by telephone

## 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*,<sup>29</sup> 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 tea-*

*cher 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.”*<sup>30</sup>

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 noted:<sup>31</sup>

*“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 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 new 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.<sup>32</sup> 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.<sup>33</sup>

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.

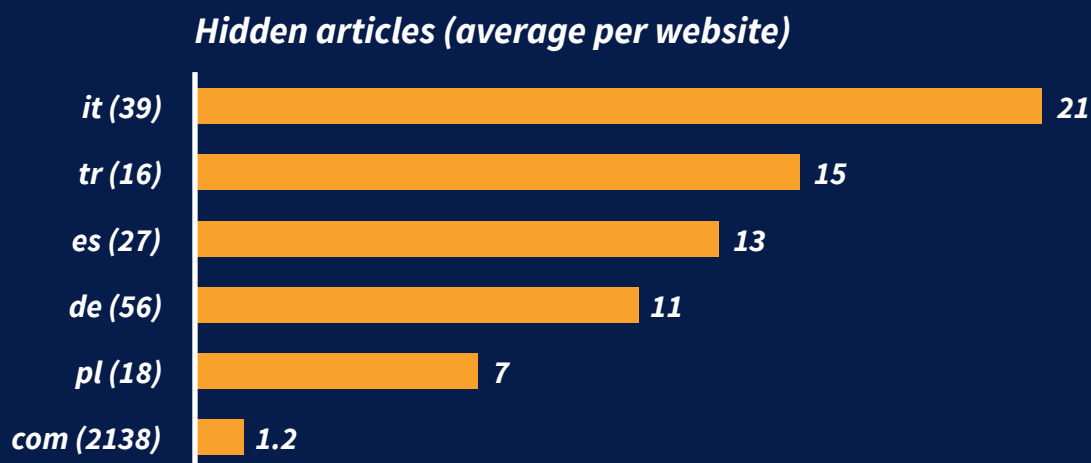
## Robots.txt

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.

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.



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

# Notes

<sup>29</sup> See previous chapter.

<sup>30</sup> 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/>)

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

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

<sup>33</sup> “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](https://support.google.com/webmasters/answer/6332384?hl=en&ref_topic=1724262))

*Some cases*

# Censorship and security the French way

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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 measures](#)<sup>34</sup> 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.”

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## 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,<sup>35</sup> 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 Archive<sup>36</sup> 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](#),<sup>37</sup> 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 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](#),<sup>38</sup> 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.<sup>39</sup>

## 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 authorities<sup>40</sup> 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 spe-

cified content but this step is optional and can be easily skipped.<sup>41</sup> 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 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.<sup>42</sup> The annual report of the designated person suggests that CNIL has very little power to remove a website from the list and to unblock.<sup>43</sup> 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,<sup>44</sup> 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.



# Notes

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

<sup>35</sup> “*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>)

<sup>36</sup> [https://archive.is/20170308/http://web.archive.org/web/\\*islamic-news.info](https://archive.is/20170308/http://web.archive.org/web/*islamic-news.info)

<sup>37</sup> 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-djihadi-stes\\_4596149\\_4408996.html#8bPWWMjk2r17ttQ2.99](http://www.lemonde.fr/pixels/article/2015/03/18/les-rates-de-la-premiere-vague-de-blocages-administratifs-de-sites-djihadi-stes_4596149_4408996.html#8bPWWMjk2r17ttQ2.99))

<sup>38</sup> 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>)

<sup>39</sup> 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>)

<sup>40</sup> The service is called the OCLCTIC, it's headed by the Central Headquarters of the Judicial Police

<sup>41</sup> *Rapport 2015 d'activité - CNIL*, p.16 ([https://www.cnil.fr/sites/default/files/atoms/files/cnil\\_rapport\\_blocage\\_sites\\_Internet\\_2016\\_0.pdf](https://www.cnil.fr/sites/default/files/atoms/files/cnil_rapport_blocage_sites_Internet_2016_0.pdf))

<sup>42</sup> 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>.

<sup>43</sup> *Rapport 2015 d'activité - CNIL*, cit., p.16

<sup>44</sup> *Rapport 2015 d'activité - CNIL*, cit., p.11

*Some cases*

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

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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.<sup>45</sup> Keep in mind that studies showed that Twitter under-reports censored tweets in Turkey and warned that similar trends might hold for other countries.<sup>46</sup>

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.<sup>47</sup>

## 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 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.<sup>48</sup>

One year later, in May 2015, Cumhuriyet published an article and a video on their website,<sup>49</sup> 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-Qa-eda 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”.<sup>50</sup>

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”.<sup>51</sup> Thus, by order of the judge, the newspaper had to completely delete the content from the website. Shortly after, Can Dünder 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 on “counter- terrorism, public interest, restoration of public order and prevention of crimes”.<sup>52</sup>

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 Au-

thority (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.<sup>53</sup>

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.<sup>54</sup>

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.<sup>55</sup> Access to Cumhuriyet has been throttled by TIB at least three times in last two years.<sup>56</sup> Furthermore, 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.<sup>57</sup>

## 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. De-

spite 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.<sup>58</sup>

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 organizations<sup>59</sup> and the staff of some of the news organizations that were shut down claim that government-appointed trustees deleted the archives from the servers.<sup>60</sup> 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.

# Notes

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

<sup>46</sup> Rima S. Tanash, Zhouhan Chen, Tanmay Thakur, Chris Bronk, Devika Subramanian, Dan S. Wallach, [Known Unknowns: An Analysis of Twitter Censorship in Turkey](http://www.cs.rice.edu/~rst5/twitterTurkey/paper.pdf), 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>)

<sup>47</sup> See A medium in exile to overcome censorship, p.46.

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

<sup>49</sup> [https://www.youtube.com/watch?v=FGWY51\\_wow](https://www.youtube.com/watch?v=FGWY51_wow)

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

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

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

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

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

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

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

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

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

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

<sup>60</sup> Mustafa Akyol, [After seizing Zaman newspaper, what's next for Turkey?](http://www.al-monitor.com/pulse/originals/2016/03/turkey-what-next-after-seizure-of-newspaper.html), 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

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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.”<sup>61</sup>

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.

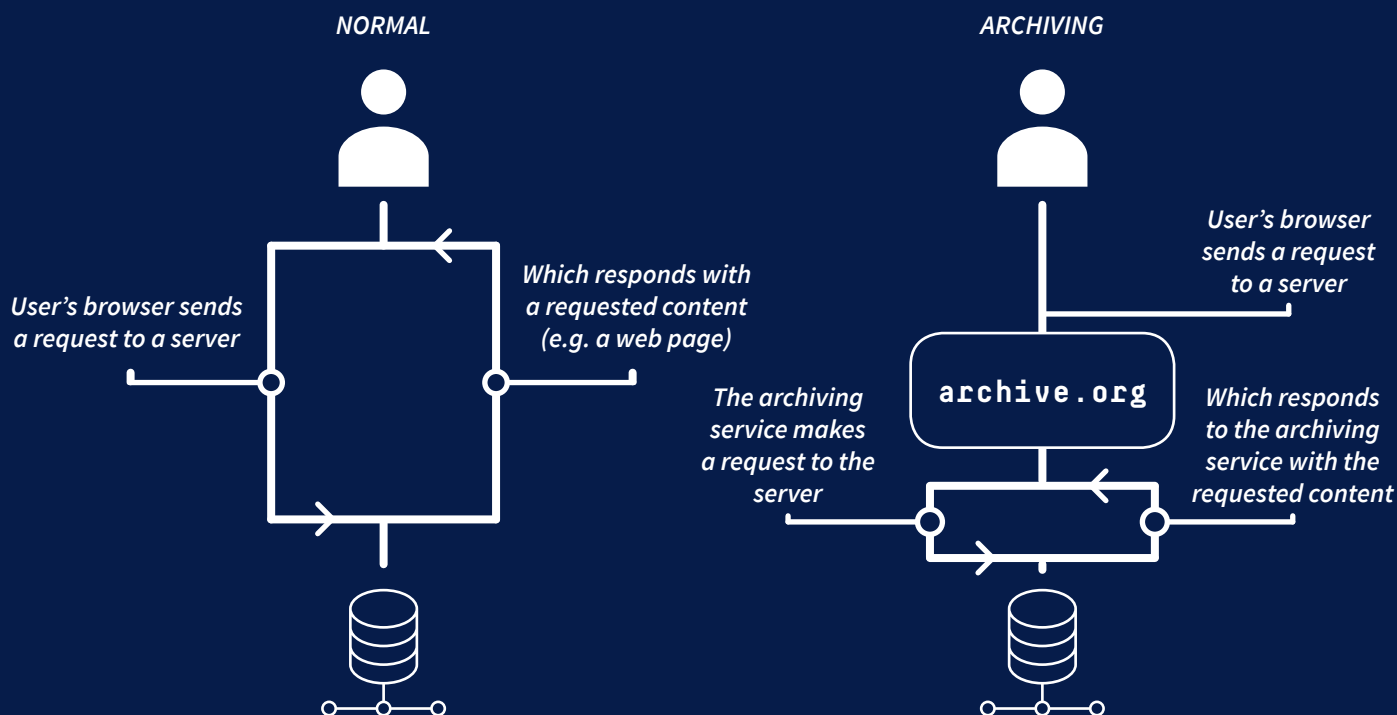
### **The large-scope, lacunary approach**

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,<sup>62</sup> it is possible that servers that host content will 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 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.<sup>63</sup>

*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).<sup>64</sup>

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,<sup>65</sup> 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.

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.



# Notes

<sup>61</sup> *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>

<sup>62</sup> Mark Graham, *Robots.txt meant for search engines don't work well for web archives*, Internet Archive Blogs, <http://blog.archive.org/2017/04/17/robots-txt-meant-for-search-engines-dont-work-well-for-web-archives/>

<sup>63</sup> *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>)

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

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

## *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 off-

set 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.

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# 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 system<sup>66</sup> – 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.<sup>67</sup>

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](#) blog<sup>68</sup> 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.<sup>69</sup>

Named after Guy “Guido” Fawkes, who took part in the failed 1605 “Gunpowder plot” to blow out the Parliament,<sup>70</sup> 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.<sup>71</sup>

In an interview for this project,<sup>72</sup> 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 injun-

ction 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.<sup>73</sup> The 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,<sup>74</sup> they were “outside the jurisdiction of the injunction”.<sup>75</sup>

The law firm apparently took the bite 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 autho-

rities 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”.<sup>76</sup>

The case went on with the Court of Appeal ruling that the injunction could be dismissed,<sup>77</sup> only to be reinstated by the Supreme Court,<sup>78</sup> 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,<sup>79</sup> 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”.<sup>80</sup>
- Technical layer. The servers, as Guido Fawkes clearly explained in 2016,<sup>81</sup> 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.<sup>82</sup>
- Personal layer. Paul Staines kept his official residence in Ireland “usually flying in from his family home to spend Tuesdays, Wednesdays and Thur-

sdays 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”.<sup>83</sup>

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”.<sup>84</sup>

# Notes

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

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

<sup>68</sup> <http://order-order.com/>

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

<sup>70</sup> 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) ([http://www.bbc.co.uk/history/people/guy\\_fawkes](http://www.bbc.co.uk/history/people/guy_fawkes))

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

<sup>72</sup> March 27, 2017, by telephone and email.

<sup>73</sup> [Why we chose to name A-list super injunction couple - and why we can't do so online](http://www.dailyrecord.co.uk/news/scottish-news/chose-name-list-super-injunction-7724893#KFLGr-V6Kho7f07qP97)

The Sunday Mail, April 10, 2016 (<http://www.dailyrecord.co.uk/news/scottish-news/chose-name-list-super-injunction-7724893#KFLGr-V6Kho7f07qP97>); Kathy English, [Is court-ordered secrecy futile in the digital age?](https://www.thestar.com/opinion/public_editor/2016/04/15/is-court-ordered-secrecy-futile-in-the-digital-age-public-editor.html): 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](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](http://globalnews.ca/news/2645974/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-from-covering-couple/>).

<sup>74</sup> 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. It's 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?](https://www.thestar.com/opinion/public_editor/2016/04/15/is-court-ordered-secrecy-futile-in-the-digital-age-public-editor.html), 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](https://www.thestar.com/opinion/public_editor/2016/04/15/is-court-ordered-secrecy-futile-in-the-digital-age-public-editor.html)).

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

<sup>76</sup> [Ireland is not North Korea, Kim El John](https://order-order.com/2016/04/12/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/>)

<sup>77</sup> [Celebrity injunction should be lifted. Court of Appeals rule](http://www.bbc.com/news/uk-36073383), BBC News, April 18, 2016 (<http://www.bbc.com/news/uk-36073383>)

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

<sup>79</sup> [Message Space](https://www.messagespace.co.uk/), <https://www.messagespace.co.uk/>

<sup>80</sup> Gordon Rayner: [The colourful life of the man who brought down Damian McBride](http://www.telegraph.co.uk/news/politics/5173475/Guido-Fawkes-the-colourful-life-of-the-man-who-brought-down-Damian-McBride.html), 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>)

<sup>81</sup> [Ireland is not North Korea, Kim El John](https://order-order.com/2016/04/12/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/>)

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

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

<sup>84</sup> See note above.

# *Extra-territoriality* **Documents, newsroom practices and digital files beyond the reach of the law**

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## *Transferring physical and legal ownership of unpublished content*

*International Federation of Journalists, 1980 - 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”.<sup>85</sup> 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 photographers."<sup>86</sup>

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.<sup>87</sup>

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.<sup>88</sup>

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 for-

mally 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.<sup>89</sup>

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 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<sup>90</sup>), 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).<sup>91</sup> 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 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 journa-



lists. 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 take-down 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](http://web.archive.org/web/*/http://cnnitalia.it)).

## ***A thumb drive in exchange for First amendment protection***

*The Guardian/Wikileaks, 2010*

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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.<sup>92</sup>

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:<sup>93</sup>

“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,<sup>94</sup> 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”.

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”,<sup>95</sup> 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.<sup>96</sup> 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:<sup>97</sup>

“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 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”.<sup>98</sup>

“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*

11

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,<sup>99</sup> 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 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.<sup>100</sup> Raffaella Pallavicini, head of the Legal department of Gruppo Editoriale *L’Espresso* (GELE), in an interview for this project<sup>101</sup> 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,<sup>102</sup> 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,<sup>103</sup> released after three months in 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”.<sup>104</sup>

## *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,<sup>105</sup> 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:<sup>106</sup> 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](#),<sup>107</sup> an independent, vibrant bi-lingual 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,<sup>108</sup> launched in 2013-2014 to circumvent local bans in different countries, with a special regard to China.<sup>109</sup>

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 put-

ting 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:<sup>110</sup>

“...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:<sup>111</sup>

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 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.





# Notes

- <sup>85</sup> National Union of Journalists (NUJ), London Freelance Branch, [Fleeting image. Make your troublesome pix vanish](http://www.londonfreelance.org/9907run.html), 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>)
- <sup>86</sup> National Union of Journalists (NUJ), London Freelance Branch, [Fleeting image. Make your troublesome pix vanish](http://www.londonfreelance.org/9907run.html), Freelance, July 19, 1999 (<http://www.londonfreelance.org/9907run.html>).
- <sup>87</sup> NUJ, London Freelance Branch, [Not a rubber stamp](http://www.londonfreelance.org/9907pace.html), Freelance, July 19, 1999 (<http://www.londonfreelance.org/9907pace.html>).
- <sup>88</sup> National Union of Journalists (NUJ), London Freelance Branch, [Fleeting image. Make your troublesome pix vanish](http://www.londonfreelance.org/9907run.html), Freelance, July 19, 1999 (<http://www.londonfreelance.org/9907run.html>).
- <sup>89</sup> Interview: February 22, 2017; email exchange: March 17, 2017
- <sup>90</sup> <http://cnn.espanol.cnn.com/>; <http://arabic.cnn.com/>; <http://www.cnn.co.jp/>.
- <sup>91</sup> Now GEDI Gruppo Editoriale (<http://www.gedispa.it>)
- <sup>92</sup> Bill Keller, [Dealing With Assange and the WikiLeaks Secrets](http://www.nytimes.com/2011/01/30/magazine/30Wikileaks-t.html), The New York Times, January 30, 2011 (<http://www.nytimes.com/2011/01/30/magazine/30Wikileaks-t.html>).
- <sup>93</sup> Alan Rusbridger, [David Miranda, schedule 7 and the danger that all reporters now face](https://www.theguardian.com/commentisfree/2013/aug/19/david-miranda-schedule7-danger-reporters), The Guardian, August 19, 2013 (<https://www.theguardian.com/commentisfree/2013/aug/19/david-miranda-schedule7-danger-reporters>).
- <sup>94</sup> Adam Gabbatt, [Alan Rusbridger warns of increase in attacks on journalists](https://www.theguardian.com/media/2012/nov/21/alan-rusbridger-warns-attacks-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>).
- <sup>95</sup> Paul Farhi, [WikiLeaks spurned New York Times, but Guardian leaked State Department cables](https://www.theguardian.com/media/2012/nov/21/alan-rusbridger-warns-attacks-journalists), The Washington Post, November 29, 2010 (<https://www.theguardian.com/media/2012/nov/21/alan-rusbridger-warns-attacks-journalists>).
- <sup>96</sup> Miren Gidda, [Edward Snowden and the NSA-files timeline](https://www.theguardian.com/world/2013/jun/23/edward-snowden-nsa-files-timeline), The Guardian, August 21, 2013 (<https://www.theguardian.com/world/2013/jun/23/edward-snowden-nsa-files-timeline>)
- <sup>97</sup> Alan Rusbridger, [David Miranda, schedule 7 and the danger that all reporters now face](https://www.theguardian.com/commentisfree/2013/aug/19/david-miranda-schedule7-danger-reporters), The Guardian, August 19, 2013 (<https://www.theguardian.com/commentisfree/2013/aug/19/david-miranda-schedule7-danger-reporters>).
- <sup>98</sup> Interview with one of the authors, March 17, 2017
- <sup>99</sup> Frederik Obermaier, Bastian Obermayer, Vanessa Wormer, Wolfgang Jaschensky, [About the Panama Papers](http://panamapapers.sueddeutsche.de/articles/56febff0a1bb8d3c3495adf4/), Süddeutsche Zeitung (<http://panamapapers.sueddeutsche.de/articles/56febff0a1bb8d3c3495adf4/>).
- <sup>100</sup> [Panama Papers, tutti i nomi degli italiani coinvolti](http://espresso.repubblica.it/inchieste/2016/04/05/news/panama-papers-database-tutti-i-nomi-italiani-coinvolti-1.257090), L’Espresso, April 15, 2016 (<http://espresso.repubblica.it/inchieste/2016/04/05/news/panama-papers-database-tutti-i-nomi-italiani-coinvolti-1.257090>).
- <sup>101</sup> February 8, 2017
- <sup>102</sup> Franziska Kues, [Persecuted at home, two journalists are bedeviling Turkish authorities from afar](http://www.poynter.org/2017/persecuted-at-home-two-journalists-are-bedeaving-turkish-authorities-from-germany/447545/), Poynter, February 1, 2017 (<http://www.poynter.org/2017/persecuted-at-home-two-journalists-are-bedeaving-turkish-authorities-from-germany/447545/>).
- <sup>103</sup> See Extreme removal: Cumhuriyet and Turkey’s road to full censorship, page 26.

<sup>104</sup> *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/l5377314/>).

<sup>105</sup> 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>)

<sup>106</sup> See *Censorship and security the French way*, page 22.

<sup>107</sup> <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 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/>)

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

<sup>109</sup> 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>)

<sup>110</sup> <https://www.facebook.com/mada.masr/photos/a.564476860276121.1073741826.557202771003530/1584268678296929>

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

# Going “offshore”

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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,<sup>112</sup> 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,<sup>113</sup> and of the actual establishment of a “safe haven” for journalism. Iceland, in parti-

cular, 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”,<sup>114</sup> 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”:<sup>115</sup>



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 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 – ea-

sier 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.<sup>116</sup>

## I *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?”

## I *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 pla-

ce 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.”

## I *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.”

## ***I 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 Interna-

tional 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.<sup>117</sup>

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 nothing

more that 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 has 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.

# Notes

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

<sup>113</sup> See chapter “Archiving content, private and public efforts”, page 30.

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

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

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

<sup>117</sup> See previous chapter, p. 47.



# Possible future work

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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.

## ***I 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.

## ***I 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,<sup>118</sup> 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.

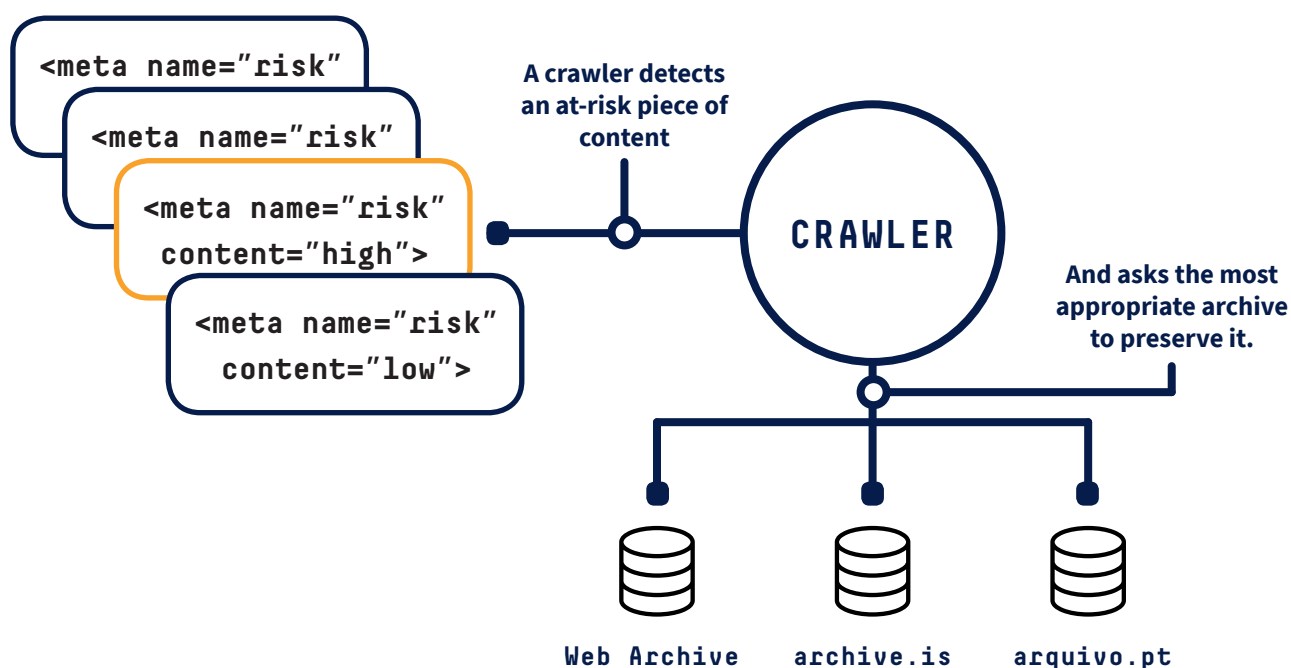
If a publisher feels that a piece of content is at risk of being removed, it could change the value of the metatag to indicate that the piece should be archived. Such changes could be done automatically, for all articles published by the news outlet which contain original content, for instance.

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



<sup>118</sup> Telephone interview, April 8, 2017, and subsequent talks in person.

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

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**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 Castelnovo**

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

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*Mario Tedeschini-Lalli*

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