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# Caution! You are now exercising editorial control!

## – Exploring initiatives to raise the quality of User Created News, and their legal side-effects

AF NATALI HELBERGER OG SILVAIN DE MUNCK<sup>1</sup>

### 1. Introduction

For most users, User Created Content is primarily a means to communicate and express themselves in relation to friends and family. For others, the User Created Content phenomenon is an opportunity and stepping stone to reach beyond their personal sphere and to post news, commentary, ideas, or reflections out into the public forum. These are the amateurs that contribute content to traditional media offers such as the BBC and CNN or write for specialised citizen journalism platforms such as OhMyNews, Agora Vox, or Daily Kos. They make their own broadcasting on Pandora.tv or provide political and expert commentary on BoingBoing, Balkinization, and the Volokh Conspiracy – to name but a few examples. In so doing, they contribute to domains that so far were reserved to the professional realm. They make User Created News (UCN).

User Created News deserves to be taken seriously. UCN is not only an additional source of valuable information, it also has the potential to contribute to more diversity in reporting. UCN is characterized by alternative standards and attitudes towards the audience (“one of you”). These result in different topics being covered and in different forms of presentations. For example, while “real” journalists tend to consider aspects such as “having

a clear point of view” or “offering commentary” rather low-ranking indicators of journalistic quality, these are features that actually characterize many blogs and contribute to their popularity with the audience (Gladney, Shapiro & Castaldo 2007).<sup>2</sup> Citizen reporters, moreover, operate outside established routines. Independence from traditional production routines, pressures, and standards can provide further added value and represents the very power of UCN in general and citizen journalism in particular (see e.g. Carpenter 2009; Benkler 2007; Schaffer 2007).

In response, traditional news media, but also specialized UCN media, increasingly seek ways to integrate UCN into their journalistic routines. Citizen journalism has started to play a role in professional journalism also. Integrating UCN into their services, however, confronts news media with a major challenge: They need to find ways to unleash the potential of UCN while making sure that the contributions of citizen journalists satisfy the expectations of an audience that is used to a certain standard of professional quality. When doing so, news media operate not only within the boundaries of market demands, profitability, and the decentralised and unpredictable modes of operation of citizen journalists, but also within the terms of the existing legal framework.

The overall goal of this article is to study how news media experiment with different strategies to guarantee the quality of UCN and to what extent the existing legal framework leaves them sufficient room for “creative play” in doing so. To this end, the article will first identify some of the main strategies that news media use to improve and maintain the quality of UCN. The analysis will draw on a number of case studies from traditional and new, specialised UCN media. The selection of these examples has been guided by the different strategies being used, rather than by the wish to provide a comprehensive overview of news media that implement UCN.<sup>3</sup> Also, the focus in the case studies has been on companies/platforms that are well known and large (for traditional media companies) or that are at the forefront of developments (for specialised platforms). In a second step, the article will then explain if and if so how these different strategies may trigger (undesirable) legal side effects and legal responsibilities. The principal focus of this second part of

the analysis is European law, in particular the provisions of the E-Commerce Directive (ECD).<sup>4</sup> In addition, the article will study examples of the directive's implementation into national law and how national judges have interpreted its provisions. The legal discussion is a principled one and does not deal with aspects of jurisdiction or applicability to specific services, particularly non-European services. Instead, it discusses more generally the legal implications of the various forms of quality management discussed in the first part of this article. The article will show that the present legal framework can act as a serious disincentive for quality engagement with UCN in the first place.<sup>5</sup>

## **2. Integration and professionalization of User Created Content**

In the following section, we will examine a number of examples of how traditional media companies and specialised UCN news platforms integrate UCN into their service offer and journalistic routines and which strategies have been developed to monitor and improve the quality of UCN.

### **2.1 UCN in traditional media**

#### **2.1.1 Integration of UCN in traditional media**

Traditional media companies have, at least to a certain extent, picked up on UCN. A 2008 study by the Bivings Group examines how the top 100 US newspapers (based on circulation) are investing in their web programs and evolving their websites from simple news delivery mechanisms into online communities (The Bivings Group 2008). The study found that 58 % of the top newspapers in the US have some form of user created content incorporated in their service offering. All of these websites offer users the option to send in and share photos related to news events, 31 % welcome user generated videos and 25 % user generated news articles. While media companies are providing more opportunities for participation, there is evidence that they are retaining a traditional gate-keeping role (Hermida & Thurman 2008). The use of user generated content seems to be more about collecting content (PEW 2009) from users than actually having

them participate in the news production process and agenda setting (Hermida 2009). Moreover, established media often confine UCN to domains like “popular culture” or “everyday life”. They provide amateurs with little or no opportunity to generate news/information-oriented content (Ömebring 2008), and even when they do so, amateurs’ contributions are clearly separated from the general news offering and from the main website of the media companies. For example, UCN at The Times only covered travel (this initiative has already been stopped), and at the New York Times<sup>6</sup>, it is mainly about posting photos and personal stories of collectible cars<sup>7</sup> and posting announcements to the Weddings and Celebrations section.<sup>8</sup>

There are newspapers, however, that do take citizen participation a step further. The French daily Le Monde provides blogs to its subscribers and encourages readers to keep electronic journals on their travels, the best of which can be accessed through the travel pages of the newspaper’s website. Moreover, the paper has started a subsidiary, LePost.fr, a social media and newsroom of journalists who produce their own content and co-produce news with users. Approximately 2 % of the readers produce content (8,000 comments a day, 500 posts a day), and in 2009, LePost.fr published some 500 amateur articles a day versus 40 from professionals. The paper uses active amateurs to help *“collect and add value to information by proposing smart angles, aggregating, finding witnesses, etc. ... They are following the news for us, on print, TV, radio, news sites, but also blogs. They are sending us valuable links with quotes. And sometimes, they are helping us on fact checking.”*<sup>9</sup>

Besides newspapers, broadcasting media companies are also getting involved in UCN. CNN has a platform called iReport.<sup>10</sup> This is CNN’s public journalism initiative that allows people to contribute pictures and videos of breaking news stories from their own towns and neighbourhoods. This service is aimed at providing users with an opportunity to share local stories that are of particular interest to users. The stories are not edited, fact-checked, or screened, before they are published on the iReport site. Some of the reports will be checked by CNN, after they have been identified as important or urgent. Once cleared by the CNN staff, these reports will become part of CNN’s news coverage.

CNN also provides users with “assignments”, which are ideas for stories that CNN expects to be covering soon. The most compelling iReports resulting from these assignments can end up on CNN television and CNN.com.

At the BBC, UCN has also begun to be institutionalised as a form of newsgathering (Newman 2009), consolidating the existing relationship between journalists and the audience. The BBC has a dedicated UCN hub,<sup>11</sup> a team of 23 journalists (up from three in 2005) in the BBC’s integrated newsroom. The team liaises with editors and journalists about what kinds of UCN are needed, collects UCN from users, connects citizen amateurs with journalists as required, and processes audience material.<sup>12</sup> The team of journalists goes through comments and submissions for news content and for eyewitnesses to pass on to radio and TV as potential interviewees. Sources for content include the “Have Your Say”<sup>13</sup> and “Your news, your pictures”<sup>14</sup> websites. A greater degree of participation occurs in the context of the BBC iPM<sup>15</sup> show that provides a blog where people can discuss ideas with the production team and view and comment on stories that are being lined up for the weekly PM programme broadcast on BBC Radio 4. The blog also has a Facebook page. This is another example of a media company allowing users to actively participate and set the agenda for programming.

### **2.1.2 Quality control and incentives to create high quality content**

Traditional media companies such as the BBC and CNN that integrate UCN in their regular activities have a vested interest in guaranteeing a certain quality standard (in technical terms as well as in professional, artistic, and creative terms). This can be an incentive for these media companies to not only provide users with easy-to-use and cheap software tools, but also to guide and educate users on how to make UCN that is of sufficient technical, artistic, and professional quality to be broadcast or published. Vice versa, for users the opportunity of having “five minutes of fame” and their contributions broadcast can provide an additional incentive to make better quality UCN.

The notion of media quality is ambiguous and difficult to define or measure. “Quality” can have several dimensions: It can be described in terms of sufficient quality, so that people are will-

ing to pay for content, but also in terms of having a certain professional, creative, technical, or artistic quality. The lawfulness of a contribution can also be an aspect of media quality. The notion of “quality” is not static and can change due to technical or social developments (Carpenter 2008 and 2010; Porto 2008). Having said this, there seems to be some agreement, at least among journalists, that many traditional journalistic values that ensure the quality of a news publication also apply online (Van der Wurff & Schönbach 2010; Gladney, Shapiro and Castaldo 2007; O’Sullivan & Heinonen 2008). Not surprisingly, studies have also demonstrated that journalists tend to measure citizen journalism in terms of established professional journalistic quality criteria (Van der Wurff & Schönbach 2010; O’Sullivan & Heinonen 2008).

For example, the BBC Editorial Guidelines note that the BBC is “committed to delivering the highest editorial and ethical standards in the provision of its programmes and services both in the UK and around the world”. The guidelines go on to describe in detail how BBC staff is expected to deal with issues such as truth and accuracy, impartiality and diversity of opinion, editorial integrity and independence, the public interest, fairness, privacy, harm and offence, children and accountability. In the course of a study about the way the BBC deals with UCN, interviews with journalists from the BBC demonstrated that also with regard to UCN, “most are aware on a daily basis of the need to ‘filter everything through the BBC journalism lens’” (Wardle and Williams 2008).

In order to do so, the BBC, as do other platforms using UCN, utilizes three main methods for monitoring content:

- Checking content before it is made available to the public (pre-moderation). Material cannot be accessed by visitors to the website until the moderator has seen it and decided it is suitable for posting.
- Checking content after content has been published (post-moderation). Moderators decide whether content is suitable to remain on the website.
- Having content checked by users (reactive moderation). Readers can alert the moderator to an inappropriate or offensive message.

Most UCN platforms use a combination of post- and reactive moderation for monitoring content on their platforms. However, when content is used in the traditional media offering, for example before putting it on TV or publishing it on a main news site, pre-moderation is carried out. Moreover, the BBC has a team of journalists who actively look for UCN contributions to the regular news by screening comments (for example on “Have Your Say”) and submissions from users. At LePost.fr, all the content is filtered after publishing by a team of professional journalists to make sure that there is no illegal content, that users follow the guidelines, and that they are not propagating rumours. Then, the newsroom (journalists) reviews any contributions. Each journalist is also in charge of a small group of active amateurs and acts as their coach, teaches them the basics of the journalist’s job, tries to encourage them, and even meets them in person. All content received is checked according to techniques of “fast fact checking”.<sup>16</sup>

## **2.2 UCN in User Created Media**

### **2.2.1 UCN on specialized platforms**

In this paragraph, we explore the services of three UCN platforms that are not affiliated with a traditional media company. Traditional media companies use UCN to complement their main news production by professional staff, while citizen journalism platforms depend on UCN as their primary source of content.

DailyMotion<sup>17</sup> started out as a citizen journalism site, but has developed over the course of time into a general media/information UCN platform that is aimed at sharing video. Although it is no longer a platform specifically for news, as the second largest video platform after YouTube it does play an important role in the distribution of (news) content. The platform was initially started in France, but expanded internationally, providing the service in 20 languages and offering seven localized versions. Any visitor can watch all the public videos, but only registered and logged-in users can contribute to the platform (upload videos, comment, rate, tag, etc.) and use the social features (create a group of contacts, share videos with friends, etc.).



OhMyNews<sup>18</sup> is an (international) citizen journalism platform. Everybody can read stories, but again only registered and logged-in members can submit content, chat with other citizen reporters, and suggest story ideas. To join OhMyNews International as a citizen reporter, the user must agree to the terms of the membership registration agreement and provide some personal information. The application is reviewed by an OhMyNews editor, and if the user has been approved as a citizen reporter, he/she can log in to his/her Reporter's Desk from the website's homepage. In 2009, the site had some 2.5 million page views a day and employed about 70 full-time staffers, including 46 journalists.<sup>19</sup> More than 70,000 citizens contributed to the Korean site, and 6,000 wrote for its English-language sister site.<sup>20</sup> Almost all content on the OhMyNews international website is generated by users.

AgoraVox<sup>21</sup> is a citizen journalism platform with a worldwide scope focusing on high quality news stories that feature events or objective facts, which can be checked and are as exclusive as possible. Distribution takes place via the Internet and via podcasts. The site prioritizes stories that are fact based, are enriched with references, and that provide true informational input. Users can submit content directly to the website, send photos and videos via MMS, pass on news by phone or an RSS-feed. By publishing stories on AgoraVox, authors agree that all or parts of their stories may be freely reproduced on third-party websites or off the Internet by other media. Content is available to readers without registering. Contributing stories, commenting, and voting, however, is restricted to registered and logged-in users. In 2008, the site counted approximately 34,000 contributors to its French version and 1,600 contributors to its English version (Le Borgne-Bachschtmidt, de Munck & Helberger 2009).

### **2.2.2 Quality control and incentives to create high quality content**

Specialised UCN media experiment with different types of checks and balances to ensure the quality and trustworthiness of the content they host, with varying degrees of intervention. Nowadays, the objective of DailyMotion, for example, is to provide a platform for sharing video on any topic. Monitoring activities focus primarily on protected or harmful content and rely heav-

ily on reactive moderation and technological solutions. A more proactive approach to stimulating creativity and quality of UCN is adopted in DailyMotion's MotionMaker<sup>22</sup> program (also called Creative Content program). DailyMotion is not clear in its definition of "quality". According to DailyMotion, "the selection criteria remain entirely at our discretion".<sup>23</sup> Within the MotionMaker program, users are provided with additional functionalities that are not available to regular users. In order to join the program, the user must register under the appropriate creative user category (filmmaker, reporter, musician, entertainer, or extreme) and accept the special terms and conditions. Once he has registered as a MotionMaker, he must label his videos as "creative content". The videos are then transmitted to the DailyMotion team, which will review them (pre-moderation) for compliance with "MotionMaker standards" (which are not specified on the website) in order to validate the MotionMaker status. According to DailyMotion, the MotionMaker program registered 13,000 creators in November 2008, approximately 1 % of its total base of registered members.

Stricter and more elaborate control mechanisms are being used by OhMyNews. OhMyNews editors read each submitted story, fact-check them, and edit them for style, making them more polished and attractive for the readers (pre-moderation). The platform reserves the right to disclose information pertaining to the material in order to satisfy legal or regulatory requirements or legal government requests and to refuse to edit or post material or information. All citizen reporters are required to abide by a strict Code of Ethics. The stories undergo a complete editing process, from basic editing for things like spelling errors and sentence structure to headlines. OhMyNews has started a school in Korea dedicated to citizen journalism. Professional journalists and senior OhMyNews reporters teach classes on journalism basics and how to launch online publications.

AgoraVox has set up a strict three-stage moderation process (pre-moderation and reactive moderation). The process includes checks by a revision committee (authors and members of the parent company) and an AgoraVox team before publishing and checks by users/readers after publishing. The revision committee checks the compliance of the submitted stories with

the AgoraVox editorial policy, and when doubt remains, it may initiate complementary investigations. The revision is carried out by AgoraVox authors as well as by strategic watch and information search experts from the parent company (Cybion<sup>24</sup>). Any AgoraVox author who has published at least four stories automatically becomes a moderator. All moderators are asked to vote individually on each story according to its news value, its pertinence, and its originality. Only stories with sufficient votes get published. This process aims to filter out the stories that do not fit AgoraVox's editorial policy and to ensure that the stories published possess the quality of well-argued information and original citizen expression. If a story is approved by the committee, a member of the AgoraVox staff will finalise and publish it. Once published, readers can vote and comment on the stories to bring corrections, clarifications, and complementary information.

## **Preliminary conclusions**

Particularly new media are experimenting with a variety of instruments of quality control, some of which involve users to varying degrees. In so doing, they are seeking solutions to the probably most challenging problem of UCN: how to manage and maintain a satisfactory level of quality of the users' manifold contributions. Already this very limited analysis has demonstrated that a more extensive and systematic study of the various mechanisms to produce and distribute quality UCN could provide invaluable lessons for the future of journalistic routines.

The closer UCN comes to the core activities of traditional news media, the more tightly it is subjected to control, and the more intense are the efforts to raise its quality to a more or less professional level in the form of moderation, editing, providing users with instructions and guidelines, but also by educating users.

The following section will explain what the legal consequences are if traditional and new news media take UCN seriously. More specifically, it will examine to what extent editorial involvement and integration of UCN into the offer of traditional and new media companies triggers legal responsibilities under e-commerce law, audiovisual law, and press law.

### 3. Legal implications

Editorial involvement can trigger legal responsibilities. The more actively traditional and new media are engaged in selecting, editing, and monitoring UCN, the more likely it is that they can be held liable for the quality and lawfulness of the news submitted by their users.

#### 3.1 Searching for a safe harbour

A key provision for online media that engage with UCN is the so-called “hosting exemption”. The hosting exemption has its origin in the European E-Commerce Directive and can be found in the national laws of all European countries. The hosting exemption touches upon a vital question for the UCN context: To what extent do measures to integrate UCN and to safeguard its quality trigger legal responsibility for the lawfulness of users’ contributions? It is worth noting that the provision deals with the exclusion from liability; it is no legal ground for establishing liability. The latter is a matter for the national rules on copyright law, defamation, pornography, unfair commercial practices, and last, but not least media law.

News media are not responsible for the lawfulness of UCN, if they qualify as a “hosting service”. According to Article 14 of the E-Commerce Directive, “hosting services” are not liable for the lawfulness of the information stored by their users, providing the operator of the service has no actual knowledge of the unlawfulness or infringing character of a particular contribution. The reasoning behind the provision is that it would exceed the technical, personnel and financial capacities of certain services to force them to monitor the activities of their users. It, moreover, would expose them to incalculable legal and financial risks that stand in no relation to their actual business model. Typically, this is the case for services with no or limited involvement with the content of third parties such as email or web-hosting services, that is services that rent server space for certain web applications.

The question of when making place for UCN on a traditional or new media platform qualifies as a hosting service is not an easy one to answer. It can certainly not be answered on a general level; the decision will depend on the individual business model

of a platform. The more a platform is involved with the content that it hosts, the less likely it is to qualify as a hosting service.<sup>25</sup> The difficult question is to determine the turning point at which UCN platforms are no longer mere hosts (with the consequence that under certain circumstances, they can be held fully responsible for the content posted by third parties).

The literature and, to the extent they exist, court judgements are divided concerning this question. Probably the least problematic are situations in which a service actively monitors and selects user created content before placing it on the site. Such services do more than mere technical hosting, they have control over the content stored, and it is likely that courts will find that they do not qualify for the application of Article 14 of the ECD (respectively the national provision that implements Article 14 of the ECD) (Jürgens & Veigel 2007; Jondet 2008). Many of the types of services discussed in the second part of this paper would probably fall under this category, including services like OhMyNews and AgoraVox, but also the BBC and LePost.fr, which all engage professional journalists or editors to filter and select the content.<sup>26</sup> Similarly, sites that reserve the right to remove content that are in conflict with e.g. the house rules could be found by courts to fall outside the scope of the exception.<sup>27</sup> Less clear is the case of services like CNN's iReport or DailyMotion, which do not engage in pre-moderation. Arguably, their notice-and-take-down practice is in line with the requirements of the ECD and cannot be considered editorial involvement. Something different probably applies for DailyMotion's MotionMaker program. Here, the selection and labelling of activities probably exclude the applicability of the hosting exemption. And the fact that some of the iReport contributions get selected if sufficiently relevant or urgent to be later made part of the CNN news coverage again could be an example of involvement with the content.

Along the same lines, it has been argued that inviting particular types of content, e.g. content with regard to a particular theme or region or event, exclude the qualification as hosting services (Holmes & Ganley 2007).<sup>28</sup> In this sense, a strategy of working with "assignments" could be a reason for courts to argue that a service cannot invoke the hosting exemption for UCN stored on its site. Similarly, to the extent that platforms invite specific

topical contributions like the New York Times' invitation to post personal stories and photos about collectible cars or the call to submit travel reports to The Guardian or Le Monde, this may go beyond mere hosting.

There is some controversial discussion of the question of whether the fact that a UCN platform earns revenues with the content itself (e.g. by reselling it to third parties) rather than with the hosting of such content already excludes the application of the liability exemptions for hosting services (Latham Butzer & Brown 2008).<sup>29</sup> The question could be relevant for a number of citizen journalism sites that use their platform for talent scouting and selling material to news agencies like the (former) Dutch platform Skoeps.

UCN platforms that present user created content as part of their own content offer might also not qualify for the hosting exemptions (Pankoke 2000).<sup>30</sup> This will be true for traditional media that make UCN part of their news coverage. But even the reservation of exclusive usage rights with respect to the contributions could be interpreted by courts as an indicator that a platform intends to present user created content as its own.<sup>31</sup> Controversial is the question of whether the fact that a site offers rough structures for users in which to place their content would in itself be an indicator of direct involvement with the content and speak against the site's qualification as a mere storage service.<sup>32</sup> By providing different formats for users' contributions like space for blogs, electronic travel journals, Q&A sessions, polls, have your say's, etc., UCN sites could provide courts with an argument not to apply the hosting exemption. In situations in which a site reserves the right to categories and move content into other, more fitting categories, this could and has already been interpreted as a reason not to apply the exemption.<sup>33</sup> Much will depend on the interpretation of national courts. In the French MySpace case, for example, the Paris Court of First Instance found that offering a specific, frame-based structure for members to present their personal information and adding advertisements to the individual sites was a reason to consider MySpace a publisher (instead of a hosting service).<sup>34</sup> In another case, the Court of First Instance claimed, by contrast, that what was relevant was not the structure or presence of advertisements, but whether the user or

the operator of that platform was "at the origin of the dissemination".<sup>35</sup> And the Advocate General Jääskinen at the European Court of Justice responded to the argument that eBay could not invoke the hosting exemption because it instructed clients in the drafting of the advertisements and monitored the content of the listings: "I would find it surreal that if eBay intervenes and guides the content of listings in its system with various technical means, it would by that fact be deprived of the protection of Article 14 regarding storage of information uploaded by the users".<sup>36</sup>

An interesting and in the context of UCN obviously relevant question is to what extent "user executed control" over the content can be attributed to the operator of the UCN platform with the effect of disqualifying the site from the application of liability exemptions (for more detail, see Jürgens & Veigel 2007). Much will depend on how the relationship "user-UCN platform" is organized, and if the user can be said to be commissioned or otherwise instructed by the site's operator, or whether users act more or less independently.<sup>37</sup> For example, in the case of AgoraVox, amateur moderators attain the moderator status automatically after having published more than four stories, which could be an argument against attribution. Having said this, the platform instructs the amateur moderators on the criteria to use when voting and commenting on stories, which could weigh in favour of attribution.

If a service has been found to fall under the hosting qualification, another crucial question is the extent of its legal responsibilities. Once the provider of a media service has knowledge of infringing UCN, it must act "expeditiously" to remove or to disable access to the infringing information (the so-called "notice and take down procedure"). There is in principle no general obligation to monitor the lawfulness of UCN. But ... there has been a tendency, albeit controversial, to burden platforms that host User Created Content with rather far-reaching pre-publication monitoring duties similar to those of publishers. Some argue that at least for the commercially successful User Created Content platforms it would be possible and not unreasonably cumbersome to invest greater efforts in the monitoring and detection of unlawful content (Feldmann 2006, Spindler 2002).<sup>38</sup> In a similar direction goes the argument that since User Created Content

Platforms provide users with means to upload unlawful content, they are obliged to monitor all user contributed content prior to its publication (Nordemann 2010).<sup>39</sup> Again others suggest to limit such pre-publication monitoring duties to evidently infringing content, particularly harmful content (paedophilia, racism, crimes against humanity), protected content, and defamatory content.<sup>40</sup> Finally, an argument has been made to require (commercial) User Created Content platforms, once they have been alerted to unlawful content, to put into place all (technical) means necessary to avoid new postings of this content and to render access to such unlawful content impossible (Nordemann 2010).<sup>41</sup>

In addition to the legal responsibilities under e-commerce law, editorial involvement can also trigger the application of sector specific obligations under audiovisual and press law, as the next sections will explain.

### **3.2 UCN as “broadcasting”**

Media that invite users to submit videos and that do not fall under the hosting exemption could fall under what was formerly known as broadcasting law. With the Audiovisual Media Services Directive,<sup>42</sup> some of the rules that applied formerly exclusively to broadcasting services now also extend to newer, more interactive forms of presenting audiovisual content and could possibly also cover UCN that is presented in the form of video (for a more detailed discussion, see Helberger, in: Le Borgne-Bachschmidt, de Munck & Helberger 2009). Although electronic versions of newspapers and magazines are explicitly excluded from the directive's scope (recital 28 of the Audiovisual Media Service Directive), many online newspapers that implement UCN are not confined to written text, but also include user videos. If the inclusion of (user generated) videos is more than a merely incidental activity, audiovisual law could also apply to these parts of e.g. The Guardian or Le Monde.

Practically, this means that operators of news media that incorporate UCN might have to make sure that the users' contributions comply with the rather far-reaching requirements of audiovisual law. They will thus be obliged to ensure that all the content uploaded by users does not contain any hate speech,



that the content presented respects the protection of minors, that it is accessible for disabled persons, and that the platform promotes European works. Moreover, there are detailed restrictions on advertising and certain transparency obligations.

A key element in the decision of whether audiovisual law applies or not is again the notion of editorial involvement. Audiovisual law only covers “organised” UCN. The entity that exercises editorial control over an audiovisual media service also qualifies as media service provider, with the consequence that it is responsible for ensuring conformity of the service with audiovisual law.<sup>43</sup>

Unlike the ECD, the Audiovisual Media Service Directive does define editorial responsibility. According to Article 1 (c) of the Audiovisual Media Service Directive, editorial responsibility means:

“The exercise of effective control both over the selection of the programmes and over their organization either in a chronological schedule, in case of television broadcasting, or in a catalogue, in the case of on-demand audiovisual media services.”

So far, there has been little experience in case law with the application of the national laws implementing the Audiovisual Media Service Directive, also because most countries have only very recently implemented the directive.<sup>44</sup> It should be noted that the directive has left it to the member states to further specify the notion of editorial control (recital 25 of the Audiovisual Media Service Directive). It remains to be seen if and how member states and the national regulatory authorities for the media will also apply the directive to a) traditional media that implement UCN and b) UCN platforms, taking account *inter alia* of the criteria that have been discussed above.

One argument why UCN platforms might not control the selection of the programs could be the fact that users, and not the platform, decide which content they post.<sup>45</sup> Or as a French court noted, what distinguishes the role of a publisher (as opposed to the mere technical role of a hosting service) is that the publisher is personally at the origin of the dissemination.<sup>46</sup> Having said this, in situations in which platforms actively solicit or encourage the contribution of content, as e.g. in the context of DailyMotion’s MotionMaker program, it is again possible that courts might find

that audiovisual law applies.

### **3.3 UCN as press products**

Media that integrate UCN and act outside the hosting exemption might also need to make sure that UCN is in compliance with the national rules that apply to press products. Note that unlike audiovisual law, press law has not been harmonized in Europe, and the regulation of the press differs from member state to member state. Moreover, in most countries, the press is not or is only partly regulated by specific press laws. Instead, self-regulation and the application of general laws such as criminal law and civil law prevail. It would go beyond the scope of this paper to give a comparative account of how the press is regulated (for a valuable comparative overview, see XIX 1993) or how this regulation might apply to UCN.

One common feature in many legal or self-regulatory instruments, however, is that publishers occupy a special position and are commonly held responsible for ensuring that press products respect the specific and general laws and the (often high) standards for journalistic quality. For example, German law lays down specific duties of editors and publishers to monitor publications and make sure that they are free from illegal content.<sup>47</sup> Failure to comply with this duty can even result in liability for the content that originates from others.<sup>48</sup> Similar principles exist in other European member states.<sup>49</sup> Regarding the responsibility of a newspaper for third party content, which UCN is, much will depend on the extent to which UCN can be attributed to the publisher or editor of the publication. Again, involvement with the content might be an indication that the newspaper assumes responsibility (Pankoke 2009).

### **Preliminary conclusions**

The more intensively traditional but also new media companies engage in controlling the quality of UCN and make it part of their service, the more likely it is that they can be held legally responsible as media service providers or publishers for ensuring the lawfulness and quality standards of such content, as dictated by law or self-regulation. To this extent, the present legal

situation explains and reinforces the earlier observed trend of established and new media companies to either refrain more or less completely from interference with UCN or to exercise strict editorial control over UCN.

#### 4. Discussion

This article has studied examples of initiatives to manage the quality of the contributions of citizen journalists. It observed a trend to “professionalise” UCN by submitting it to professional editorial control, applying professional standards and educating amateurs in the ways of professional journalists. This trend towards professionalization of UCN has also been confirmed by other studies on the implementation of UCN into traditional news media (for an overview, see Schaffer 2007). Partly, this trend reflects and is fuelled by policies and ambitions to promote a high standard of journalistic quality and reliability of news media for the audience. Partly, the professionalization of UCN is also the result of the applicable legal framework and the ensuing threats and legal responsibilities (Schaffer 2007; Thurman 2008; Scott 2009). Similarly, isolating UCN from the overall editorial offer or restricting UCN to relatively inconsequential and “safe” domains like travel diaries, everyday life, or hobbies is also a form of legal risk management.

The influence of the legal framework on the way news media deal with UCN has positive and less positive aspects. On the bright side, it would not appear unreasonable that UCN and amateur creators should be made to observe the laws that seek to protect the interests of viewers, authors, competitors, and vulnerable groups. This is all the more so as UCN is gaining popularity among viewers. It is difficult to see why UCN or its amateur producers should operate in a law-free space. Also, the application of legal and self-regulatory quality standards could alleviate some of the concerns about the quality of UCN. Equally, it seems justified that media service providers and publishers should not be able to circumvent legal safeguards by having recourse to amateur productions instead of professional productions.

On the downside, the restricted scope of the hosting exemption, in combination with the far-reaching obligations of editors

and publishers under media and press law, places a heavy strain on all those services that want to take the active users seriously and integrate UCN in one way or another into their service offer. For more general UCN platforms that do not have serious aspirations as “news media”, the present legal framework can act as a serious disincentive to engage in any form of quality control or editorial involvement with UCN. But also more dedicated UCN services face a considerable level of legal uncertainty and take risks when experimenting with new forms of quality control. What is still lacking is a comprehensive, harmonized, and more differentiated legal approach that takes into account the specific circumstances of UCN platforms<sup>50</sup> and provides them with some “legal breathing space” to experiment with new ways of integrating UCN into their offers.

Applying traditional media law fully to UCN risks burning the village to roast a pig.<sup>51</sup> Existing rules in media law have been written with professional media service providers and publishers and professionally produced content in mind. This is particularly evident in audiovisual law. Until not too long ago, the production and dissemination of audiovisual content was far too costly for anyone other than professional entities. This explains the many and detailed rules on advertising, the strict provisions on internal and external diversity, but also rules such as the one that establishes quotas for the share of European works in a program. Some rules could be probably also applied usefully and beneficially in a UCN context, such as the rules on protection of minors, prohibition of hate speech, the obligation to separate editorial content from commercial speech, etc. Other provisions, however, do not fit the UCN context at all. To mention but one example: National media laws can obligate the entity that exercises editorial responsibility to make sure that the editorial content expresses plurality of opinion. “User Created Diversity”, however, is a spontaneous process and as such only very limitedly manageable through editorial control. “A fundamental fact of citizen media is that what citizens choose to publish is unpredictable” (Schaffer 2007).

UCN is different and operates differently, also and foremost because it is made by amateurs and outside professional routines (Carpenter 2008). The present legal framework further

reenforces the observed trend towards the “professionalization” of UCN, which must lift UCN somewhere near the written and unwritten quality standards that are expected in traditional news media. Such a “cult of the professional”, however, also risks to forego or even purposefully ignore the added value of UCN as an innovative, sometimes experimental perspective on news and a chorus of new, independent voices that make the media more diverse.

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<sup>2</sup> According to a report by Universal McCann, blogs are on the way to becoming a mainstream media, with 73 % of all active Internet users regularly reading blogs, Universal McCann (2008): *Power to the People*. Social Media Tracker. Wave.3, available online at: <http://www.scribd.com/doc/3836535/Universal-Mccann-on-Social-Media>.

<sup>3</sup> For a more complete overview, see Le Borgne-Bachs Schmidt, de Munck S. & Helberger et al. 2009.

<sup>4</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive

on electronic commerce”) OJ L 178/1 (17.07.2000).

- <sup>5</sup> The research for this article has been concluded in December 2010.
- <sup>6</sup> CyberJournalist.net (2007): “New York Times launches user-generated features”. Available online at: <http://www.cyberjournalist.net/new-york-times-launches-user-generated-features/>
- <sup>7</sup> <http://www.nytimes.com/pages/automobiles/collectiblecars/index.html>
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- <sup>10</sup> <http://www.ireport.com/>
- <sup>11</sup> [http://www.bbc.co.uk/blogs/theeditors/2008/10/reaching\\_out.html](http://www.bbc.co.uk/blogs/theeditors/2008/10/reaching_out.html); <http://reportr.net/2009/09/09/how-the-bbc-views-ugc-as-newsgathering/>
- <sup>12</sup> Reportr.net (2009): “How the BBC views UGC as newsgathering”. Available online at: <http://reportr.net/2009/09/09/how-the-bbc-views-ugc-as-newsgathering/>
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- <sup>20</sup> Elizabeth Woyke (2009): “The Struggles Of OhMyNews”. Available online at: <http://www.forbes.com/forbes/2009/0330/050-oh-my-revenues.html>
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Lewis. Available online at: <http://www.streamingmediaeurope.net/2008/09/30/dailymotion-more-than-just-ugc>

<sup>23</sup> <http://www.dailymotion.com/legal/motionmaker>

<sup>24</sup> <http://www.agoravox.com/about-us/Qui-sommes-nous>

<sup>25</sup> The ECD defines hosting services as services that “consist of the storage of information provided by a recipient of the service”, Article 14 (1) ECD. Hosting services in the sense of the ECD are only services whose activities are “of a mere technical, automatic, and passive nature, which implies that the information society service provider has neither knowledge of, nor control over the information which is transmitted or stored”, recital 42 of the ECD. European Court of Justice, Combined Cases C-236/08 and C-238/08, 22.5.2010 (Google France and Google), arguing that the hosting exemption only applies to services that do not play an “active role of such a kind as to give it knowledge of, or control over, the data stored”.

<sup>26</sup> Note that this analysis does not deal with jurisdictional issues and the question to what extent non-European services like OhMyNews or CNN would fall under European law or the law of the European member states. Instead, the discussion is a principled one, using the services discussed as examples for certain editorial policies.

<sup>27</sup> District Court Amsterdam, Case 417312/HA ZA 09-185, 20 november 2010 (123Video). The decision confirms earlier decisions in the Netherlands such as District Court Utrecht, Case 250077 / HA ZA 08-1124, 26.09.2009 (Mininova).

<sup>28</sup> Tribunal de Grande Instance de Paris, 13 July 2007 (Nord-Ouest Production v Dailymotion). Available online at: <http://www.legalis.net>.

<sup>29</sup> In this sense Tribunal de Grande Instance de Paris, 5 June 2007 (Lafesse v MySpace). Available online at: <http://www.legalis.net>. Court d’appel de Paris, 7 June 2006, (Tiscali Media vs. Dargaud Lombard). Available online at: <http://www.legalis.net>. Different: Tribunal de Grande Instance de Paris, 15 April 2008 (Lafesse et. al. vs Dailymotion). Available online at: <http://www.legalis.net>, arguing that the law itself does not prohibit hosting services to earn revenues, e.g. through advertising. See also Tribunal de Grande Instance de Paris, 13 July 2007 (Nord-Ouest Production vs. Dailymotion), *ibid*, pointing out that the distinguishing factor is whether the operators of that service are personally “at the origin of the transmission” (“est personnellement à l’origine de la diffusion, raison pour laquelle il engage sa responsabilité”).

<sup>30</sup> In this sense e.g. Regional Appeals Court Hamburg, Urteil v. 26.09.2007 (Haftung für fremde Bilder-Uploads), Application No. 5 U 165/06.

This may explain why, as explained earlier in this paper, especially traditional media tend to separate UCN from the general news offering and the main website of the media companies. More recently, District Court Hamburg, Case 308 O 27/09, 3.9.2010 (YouTube), claiming that already by prominently displayed own logos users were lead to believe that the platform presents content as being that of the platform; but see also the critical commentary on the decision by P. Christiane, *MultiMedia und Recht* 2010, p. 835-836.

- <sup>31</sup> In this sense e.g. District Court Köln, Case 28 O 690/07, 9.4.2008 (Online Rotlichtführer).
- <sup>32</sup> For example, Regional Appeal Court Köln, 28 May 2002, Case 15U221/01 (Steffi Graf). *MultiMedia und Recht* 2002, pp. 548; District Court Hamburg, Case 308 O 27/09, 3.9.2010 (YouTube), Tribunal de Grande Instance de Paris, 5 June 2007 (Lafesse v MySpace), *ibid*: "elle ne se limite pas à cette fonction technique; qu'en effet, imposant une structure de présentation par cadres, quelle met manifestement à la disposition des hébergés"; Court d'appel de Paris, 7 June 2006, (Tiscali Media vs. Dargaud Lombard), *ibid*. Different: Tribunal de Grande Instance de Paris, 15 April 2008 (Lafesse et. al. vs Dailymotion), *ibid*, arguing that merely providing a structural context does not amount to editorial choice of the content placed into that structure, this choice would remain with the user.
- <sup>33</sup> Much will depend, however, on judicial interpretation in the concrete case. For example, in the Netherlands a judge found that by reserving the possibility to remove that are in conflict with the house rules or move video films in different, more appropriate categories, the video website in question showed a level of control that disqualifies it for the application of the hosting exception, District Court Amsterdam, Case 417312/HA ZA 09-185, 20 November 2010 (123Video). The decision confirms earlier decisions in the Netherlands, such as District Court Utrecht, Case 250077 / HA ZA 08-1124, 26.09.2009 (Mininova).
- <sup>34</sup> Tribunal de Grande Instance de Paris, 5 June 2007 (Lafesse v MySpace), *ibid*. In this sense also District Court Utrecht, Case 250077 / HA ZA 08-1124, 26.09.2009 (Mininova).
- <sup>35</sup> Tribunal de Grande Instance de Paris, 13 July 2007 (Nord-Ouest Production v Dailymotion), *ibid*. In this sense also Tribunal de Grande Instance de Paris, 19 October 2007 (Zadig Productions v Google). Available online at: <http://www.legalis.net>
- <sup>36</sup> Opinion of Advocate General JÄÄSKINEN, delivered on 9 December 2010, Case C-324/09, (L'Oréal SA v. eBay), para. 146.

- <sup>37</sup> Jürgens & Veigel (2007) give as an example of a situation in which no legally relevant link between site operator and user exists, a site that grants users "automatically" the status of a moderator after a certain duration of membership or amount of content contributed.
- <sup>38</sup> In this sense also e.g. the Dutch District Court Zwolle, Case 106031 / HA ZA 05-211, 3.5.2006 (Stokke).
- <sup>39</sup> Tribunal de Grande Instance de Paris, 13 July 2007 (Nord-Ouest Production v Dailymotion), but also see the more recent judgements Tribunal de Grande Instance de Paris, 29 April 2009 (Magdane v Dailymotion) and Cour d'appel de Paris, 14 April 2010 (Omar s.v. Dailymotion) arguing that legal responsibilities only arise after Dailymotion has been made aware of the unlawfulness of a content.
- <sup>40</sup> In this sense e.g. District Court Amsterdam, 1 November 2007 (Prinz Willem-Alexander c.s. v. Vereniging Martijn), published in: 1 Mediaforum 2008, p. 34-36 (arguing that the operator of a forum for paedophiles has further-reaching monitoring obligations with respect to the protection of privacy than the protection of copyright. In this sense also K. Koelman, commenting the judgement in 1 Mediaforum 2008, p. 36-37. For an overview of the German jurisdiction, see Norde-mann 2010.
- <sup>41</sup> Tribunal de Grande Instance de Paris, 19 October 2007 (Zadig Productions v Google), *ibid*; Tribunal de Commerce de Paris, 20 February 2008 (Flach Film et autres v Google France), *ibid*. German Federal High Court of Justice, 11 March 2004, No. I ZR 304/01 (Rolex). In this sense also District Court Hamburg, 18 July 2006, No. Az.: 324 O 116/06, concerning responsibility for unlawful forum content. Available online at: <http://www.fore-n-und-recht.de/urteile/Landgericht-Hamburg-20060718.html>. See also Regional Appeal Court Düsseldorf, 7 June 2006, No. 1-15 U 21/05: the Regional Appeal Court Düsseldorf has developed a test to determine what measures to detect future infringements could reasonably be expected from a forum provider. Factors that the court took into account were the technologies available, their cost, the damage which the infringement causes, and the profit or commercial gain for the provider. There, the court also said that non-profit forum providers cannot be expected to screen individual forum postings because of the high costs involved.
- <sup>42</sup> Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual

Media Services Directive) OJ L 95/1 (15.04.2010).

- <sup>43</sup> Note that the definition of media service provider is not restricted to traditional news media, but is principally also open to cover new media such as UCN platforms. Article 1d stipulates that “‘media service provider’ means the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organized.”
- <sup>44</sup> The deadline for implementation was 19 December 2009.
- <sup>45</sup> In this sense for example the contribution of ASIC on the transposition of the AVMSD into French law, Contribution ASIC sur le transposition en droit français de la directive 2007/65/CE du 11 décembre 2007, dite directive “Services de médias audiovisuels”, p. 3. Available online at: [http://www.lasic.fr/IMG/pdf/Contribution\\_ASIC\\_-\\_Transpo\\_SMA\\_-\\_31mars2008.pdf](http://www.lasic.fr/IMG/pdf/Contribution_ASIC_-_Transpo_SMA_-_31mars2008.pdf).
- <sup>46</sup> Tribunal de Grande Instance de Paris, 13 July 2007 (Nord-Ouest Production v Dailymotion), *ibid*.
- <sup>47</sup> See § 20 (2) German Landes Presse Gesetz (State Press Law). See more in detail Soehring J. (1990): „Das Recht der journalistischen Praxis“. AfP Praxisreihe. Schäfer Verlag. Stuttgart. The application of these rules to the case of UCN platforms would depend on the question if UCN platforms would fall under the scope of the relevant national provisions, a question that cannot be further examined in this context.
- <sup>48</sup> See e.g. 19 (2) Landes Presse Gesetz.
- <sup>49</sup> E.g. France: Art. 93-2 subsq. of loi du 29 juillet 1982 sur la communication audiovisuelle; Netherlands: Art. 48, 71e (1) Mediawet.
- <sup>50</sup> One example of a national initiative in this regard is the recent adoption of specific rules regarding “online press services” in the French Law HADOPI, LOI no. 2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur internet, JORF no. 0135 du 13 juin 2009, 9666. See also the discussion of this law in Jasserand C. and Van der Sloot B.: “Aansprakelijkheid van online-pers voor User Generated Content” (to be published) .
- <sup>51</sup> “Any content-based regulation of the Internet, no matter how benign the purpose, could burn the global village to roast the pig.” Judge Stewart Dalzell, ACLU -v- Reno, 11 June 1996.