

**A CLASH OF VALUES: IMPACT ON CITIZEN
JOURNALISM ON THE INTERNET – MEANDERING
THROUGH THE ANONYMITY VERSUS
ACCOUNTABILITY DEBATE¹**

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Abstract

The emergence of socio-political media on the Internet has served to act as an alternative news and information relaying source. This phenomenon not only introduces a new kind of journalism but is also seen to bring pluralism to media. This is especially the case when traditional and mainstream media is strictly regulated by legal regimes or when readers are sceptical about gatekeeping arising from internal or external factors. The paper discusses how the tensions between the three elements of openness, privacy and accountability play out in such media activities.

This new media has been described as the Fifth Estate where discourse is open, interactive, citizen-to-citizen and democratic, introducing a new breed of citizen journalists who fuel debate within both national and international conversations. The technology that facilitates it provides innumerable platforms such as blogs and social networking sites that allow individuals the ease with which to do this.

These platforms accord the social media actor – the citizen journalist – a degree of anonymity and it is behind this veil of anonymity, the blogger for instance, can seek to provide information, opinion, commentary or critique. The nature of the content relayed becomes essential in that not all information or speech on these platforms should be served up with a cloak of protection and the speech maker accorded the right to privacy in protecting his/her identity. It has to be information that is

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important enough to be relayed to the public. The paper addresses if there is a place in the law for the recognition of such protection in the UK and the US.

The paper also highlights how speech made on these platforms by social media actors often raises the issue of accountability and the extent to which the right of free speech and expression is to be trumped by accountability. Disclosure of identity becomes important when it is essential to make the speech maker accountable in cases of defamation, employer-employee confidentiality, harmful speech and other instances of rule breaking. This brings it in conflict with anonymity when non-disclosure of identity and preservation of anonymity prevails where it involves a significant issue of public interest.

The paper seeks to highlight several decisions of the courts in the UK and in the US in addressing some of these tensions with a focus on how these have an impact on citizen journalism on the Internet.

Why the 'clash'?

The ability for individuals to generate media-worthy information on various platforms on the Internet has led to a phenomenon that has sparked revolutions and impacted political change. Facilitated by Web 2.0, this ability has led to the emergence of socio-political media on the Internet that serves to act as alternative news and information relaying source where Internet users can generate their own content. This phenomenon not only introduces a new kind of journalism in the form of citizen journalism but is also seen to bring pluralism to media. This is especially the case when traditional and mainstream media is strictly regulated by legal regimes or when readers are sceptical about gatekeeping arising from internal or external factors. The technology that facilitates it provides innumerable platforms, such as blogs and social networking sites that allow individuals the ease with which to do this.

This new media has been described as the Fifth Estate where discourse is open, interactive, citizen-to-citizen and democratic, introducing a new breed of citizen journalists who fuel debate within both national and international conversations. Citizen journalists increasingly see themselves as performing a

function that is analogous to that of journalists and take seriously the task of contributing to socio-political discourse in a meaningful and effective way. The Internet, as far back as 1995, has been seen as a 'vehicle of democratic discourse'² and this sentiment is echoing louder than ever. The Internet playing the role of a tool of democratization was envisaged by Dalzell DJ in *ACLU v Reno I* as early as 1997.³ Essential to the flourishing of this democratic discourse is the conducive nature in which the Internet allows such discourse, one of which is the ability for one's real personal identity to remain anonymous through the use of pseudonyms.

The 'clash of values' in the title of the paper refers to the position of conflict which may confront citizen journalists. Whilst the element of anonymity and the usage of pseudonyms is seen in certain situations as a means in which speech is encouraged, however, in an increasingly sophisticated and eloquent realm, the need for accountability has become an equally weighty value when appreciating discourse generated by citizen journalists. This has not always been the case for citizen journalists on the Internet. When the Internet and its various platforms are viewed in their vehicular role of carrying public discourse, the expectation on the part of both the readers and the participants alike has forced an elevation in the degree of sophistication and credibility of the discourse that takes place on these platforms. This need for anonymity and accountability creates 'interlocking and competing forces.'⁴ As Branscomb puts it, '...a right of absolute anonymity may foreclose accountability, whereas full accountability of users may mean the prohibition of anonymity' – although not necessarily pseudonymity.⁵ There is no denying that anonymity is a double-edged sword that carries with it the 'positive value in protecting the sources of certain information as well as the danger inherent in allowing individuals to speak and write without detection.'⁶

² Anne Wells Branscomb, 'Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspaces' (1994-1995) 104 Yale LJ 1639, 1641.

³ 929 F Supp 824 US DC Penn (1996).

⁴ *ibid.*

⁵ *ibid.*

⁶ (n 2) 1642.

The paper discusses how the tensions between these elements play out in such media activities.

Value of Anonymity to Citizen Journalists on the Internet

The US "marketplace of ideas" theory, through the pronouncements of the justices of the Supreme Court, may be instructive in grasping the general importance of anonymity. In his dissent in *Abrams v United States*,⁷ Justice Oliver Wendell Holmes argued that society's ultimate good is better reached by free trade in ideas and 'that the best test of truth is the power of the thought to get itself accepted in the competition of the market.' The US Supreme Court recognised the importance of anonymity in promoting freedom of speech in *N.Y. Times Co v Sullivan*⁸ as anonymity makes public discussion more 'uninhibited, robust and wide-open.'

Whilst disclosure of identity may add credibility, anonymity may allow the author to avoid negative consequences of wrongful retaliation and it will encourage contribution to the marketplace of ideas as it eliminates barriers to speaking and listening allowing, the inclusion of voices in public debate that might not otherwise be heard.⁹ The removal of barriers encourages citizens to voice against, and check abuses of, powerful organizations, corporations and governments. The fear to be named may be, or is very, real to the individual where retaliation or harm will follow disclosure particularly in cases implicating whistle-blowers or for political dissidents in authoritarian states who need to speak under a cloak of anonymity.¹⁰ In *McIntyre v Ohio Elections Commission*,¹¹ the US Supreme Court pointed out that the 'decision in favour of anonymity may be motivated by fear of economic or official retaliation.'

⁷ 250 US 616 (1919).

⁸ 376 US 254 (1964), 270.

⁹ Lyrissa B Lidsky and Thomas F Cotter, 'Authorship, Audiences and Anonymous Speech' (2007) 82 Notre Dame LR 1537, 1570-1573.

¹⁰ (n 2) 1642.

¹¹ 514 US 334 (1995), 341.

Anonymous speech became increasingly prominent in order to avoid SLAPP (an acronym for 'Strategic Lawsuits Against Public Participation') suits, a phenomenon which appeared in the 1970s where the aim of such suits was to deter citizens from public participation in voicing their opinions on matters of public concern and interest.¹² Internet speakers have used anonymity to avoid being sued in SLAPP suits but where there is a *prima facie* case of liability arising from defamatory statements or disclosure of confidential information, the courts have issued disclosure subpoenas.¹³ The basis for disclosure is relevant in the discussion on grounds of accountability.

Drawing a historical link to the tradition of anonymity in the UK, anonymous pamphlets have been produced in England from the beginning of print.¹⁴ In the Internet and Web 2.0 era, use of pseudonyms has become the norm in blogging and micro-blogging sites. In the UK, the decision of Justice Eady raised fundamental questions surrounding the arguments in the protection or disclosure of a blogger's identity.

The ruling by Justice Eady in *The Author of a Blog v Times Newspaper Limited*¹⁵ (hereinafter referred to as '*NightJack's case*') that the blogger *NightJack* could not have a reasonable expectation to anonymity premised on the fact that 'blogging is essentially a public rather than a private activity'.¹⁶ The case involved the author, *NightJack*, who brought an application for an interim injunction in the Queen's Bench Division of the High Court to restrain the defendant, Times Newspapers Limited, from revealing his identity. A journalist of *the Times*, Patrick Foster, had been able to deduce the real identity of *NightJack* through 'a process of

¹² George W Pring, 'SLAPPs: Strategic Lawsuits Against Public Participation' (1989-1990) 7 PACE Environmental LR 3, 5.

¹³ Joshua R Furman, 'Cybersmear or Cyber-SLAPP: Analyzing Defamation Suits Against Online John Does as Strategic Lawsuits Against Public Participation' (2001-2002) 25 Seattle U LR 213.

¹⁴ Comment, 'The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil' (1961) 70 Yale LJ 1084.

¹⁵ [2009] EWHC 1358 (QB).

¹⁶ *ibid* [11].

deduction and detective work, mainly using information available on the Internet'.¹⁷ But does the question in protecting anonymity turn on privacy or is it rather about promoting, or at least not inhibiting, freedom of expression? The analysis of the right to anonymity necessitates considerations from the perspective of both freedom of expression and privacy. This is because in the context of citizen journalists publishing under the cloak of anonymity, both elements are interdependent.

Protecting Anonymity of Citizen Journalists on the Internet in order to uphold the Right to Freedom of Speech and Expression

NightJack's ability to write the blog pivoted on the need for anonymity of his identity which enabled him to function under the said cloak without inhibitions and any negative retaliation from colleagues, his employer or individuals he came in contact with during the course of his work. With anonymity, the public could access *NightJack's* political and critical commentary on government with critique on ministers and public and social institutions like the police.¹⁸ The information produced as a result of blogging under a pseudonym sums up the key characterisation of how anonymity contributes to democratic discourse and encourages speech - provided it is accurate and reliable.

It raises an additional point for consideration in raising the argument for justifying anonymity. A strong case for protection of anonymity, subject to provisos where anonymity may be forfeited, is where there is no alternative platform to comment critically on matters of public importance and the decision of the speaker in electing a particular platform to speak was on the basis that it offered anonymity

¹⁷ (n 15) [3]. It was later discovered that this was not true. On 17 January, James Harding, the Editor of the Times, gave evidence to the Leveson Inquiry that Foster had to be disciplined as it had transpired that Foster had hacked into Richard Horton's emails. Foster was arrested on 29 August 2012 on suspicion of hacking into Horton's emails.

¹⁸ Eady J acknowledged the nature of the blog when he commented that the blog commented 'on a number of social and political issues relating to the police and administration of justice'; (n 15) [13].

to the speaker. In essence, anonymity allowed the freedom to speak - without anonymity, there will be limited or no discourse.

Therefore, could it be claimed that speech or expression on anonymous blogs is protected expression under Article 10 of the European Convention of Human Rights, bearing in mind the proviso to Article 10 in Clause 2? In the consideration of this claim, could we seek assistance from the US Supreme Court decisions involving anonymity as protected speech under the First Amendment of the US Constitution?

Use of anonymity is steeped in the US First Amendment tradition and several decisions of the US Supreme Court. The First Amendment forbids Congress to make laws 'abridging the freedom of speech, or of the press'. The tradition of anonymity or use of pseudonym has long been entrenched in the American jurisprudence and constitutional principles are invoked when this tradition is threatened.

Supreme Court decisions such as *Talley v California*,¹⁹ and *McIntyre v Ohio Elections Commission*,²⁰ both involving anonymous pamphlets, reaffirm that anonymous speech is protected under the First Amendment and both cases have observed the contribution anonymous speech has had on society's progress. In *McIntyre*,²¹ the court stated that: 'Anonymity is a shield from the tyranny of the majority.' The majority of the Supreme Court in *McIntyre* held that 'the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry'.²² The court in *McIntyre*, in deciding whether the author who did not name herself on handbills had the right not to put her name on them, further added in upholding authorial autonomy that 'an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the

¹⁹ 362 US 60 (1960), 64.

²⁰ 514 US 334 (1995), 341 note 4.

²¹ *ibid* 357.

²² (n 20) 342.

freedom of speech protected by the First Amendment'.²³ Fundamental to the understanding of freedom of speech is the limitation of such freedom. Hence, the right to speak anonymously is not absolute as seen in decisions such as *McConnell v FEC* where the Supreme Court highlighted dangers of anonymous speech.²⁴

Lidsky and Cotter's analysis of traditional First Amendment theory suggests that right of anonymous speech finds itself premised in, firstly, the belief that 'the audiences are capable of rationally assessing the truth, quality and other characteristics of core speech' and secondly, 'that more speech is generally preferable to less'.²⁵ The Internet and its various information-relaying platforms, whether blogs or social networking sites, have largely encouraged more discourse. There is information, commentary, opinion, criticism and a lot more that is easily available and accessible on any and every conceivable topic. The ability of audiences to rationally assess and discern good public discourse from the bad on such platforms takes place close to instantaneously, through a process of comments posted by readers and the ability to share and link the story to a critique. In the case of *Twitter*, this is done with tweets of 140 characters following other tweets. When a tweet storm is created, as was the case with 75000 tweeters naming Ryan Giggs, the footballer implicated in an alleged affair where an injunction had been obtained to keep his identity private, it can hardly be ignored that the tweet-propelled publicity forced parliamentary debate.²⁶

Protecting Anonymity of Citizen Journalists on the Internet under the Laws of Privacy

Article 8 of the European Convention of Human Rights could help in making a case whether there is a reasonable expectation of anonymity under the laws of privacy.

²³ *ibid.*

²⁴ 540 US 93 (2003), 128. In *McConnell*, the anonymous speech was in the form of political ads that were seen as dubious and misleading the public.

²⁵ (n 9) 1581-1588.

²⁶ 'Ryan Giggs named by MP as injunction footballer' *BBC News* (London: 23 May 2011) <<http://www.bbc.co.uk/news/uk-13503847>> accessed 14 June 2011.

Similarly *NightJack's* counsel submitted to the court that '*The Times* is subject to an enforceable duty of confidence not to reveal the Claimant's identity as the author of the blog; alternatively, that he has a reasonable expectation of privacy in respect of that information, in respect of which there is no countervailing public interest justification for its publication'.²⁷ In fact Justice Eady held that there was a countervailing public interest in the disclosure of the identity as the public are entitled to 'know how police officers behave'²⁸ and that 'the newspaper's readers would be entitled to come to their own conclusions about whether it is desirable for officers to communicate such matters publicly'.²⁹ In the circumstances, if this was the rationale for the need to disclose *NightJack's* identity, suffice to say disclosure of him as a police officer without the need to name him would have been helpful – an argument rejected by Justice Eady on the basis that in order for the public to assess the value of an opinion or argument, there was a need to know its source.³⁰

Justice Eady commented that *NightJack* could not have a reasonable expectation to anonymity premised on the fact that 'blogging is essentially a public rather than a private activity'.³¹ Are the activities of citizen journalists on the Internet such as blogging a public *rather than* a private activity? Assuming that the nature of such an activity is a "public" activity, does it follow that there is a right *to know* the person's name?

Westin defines privacy as a claim - a 'claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others'.³² Westin's proposition of the four states of privacy includes a state of anonymity which is 'the desire of individuals for times of "public privacy" where "the individual is in public places or performing public acts

²⁷ (n15) [2].

²⁸ (n15) [29].

²⁹ (n15) [31].

³⁰ (n15) [21].

³¹ (n 15) [11].

³² Alan Westin, *Privacy and Freedom* (Atheneum 1967), 7.

but still seeks, and finds freedom from identification and surveillance'.³³ In simple terms, the argument that is at the heart of the debate about privacy is the use and especially the misuse of information about an individual.³⁴

Tech-idealists view privacy as a necessity for an open society in the electronic age. Eric Hughes in *A Cypherpunk's Manifesto* adds that:

Privacy is not secrecy. A private matter is something one doesn't want the whole world to know, but a secret matter is something one doesn't want anybody to know. Privacy is the power to selectively reveal oneself to the world. [Emphasis added]³⁵

In *A v B plc and C*,³⁶ Lord Woolf CJ (as he then was) referred to Gleeson CJ's explanation in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*³⁷ on 'the difficulty of distinguishing between public and private information':

There is no bright line which can be drawn between what is private and what is not. Use of the term 'public' is often a convenient method of contrast, but there is a large area in between what is necessarily public and what is necessarily private. An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private property, it has such measure of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality, and the disposition of the property owner combine to afford. Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards

³³ *ibid.*, 32.

³⁴ Raymond Wacks, *Personal Information: Privacy and the Law* (Clarendon Press 1989) 1, 2.

³⁵ Eric Hughes, 'The Cypherpunk's Manifesto' <<http://www.activism.net/cypherpunk/manifesto.html>> accessed 30 May 2011.

³⁶ [2003] QB 195, 206.

³⁷ [2001] HCA 63, [42].

of morals and behaviour, would understand to be meant to be unobserved. The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private.

Can a person's identity be identified as private and in the context when a person is communicating through a very public means such as a blog? Lord Hope in *Campbell v MGN*³⁸ relying on the guidance of the Court of Appeal in *A v B plc and C*³⁹ set out the first question to be addressed – 'whether the information that was disclosed was private and not public'.⁴⁰ Where the answer is less obvious, then we are presented with the second question – 'whether disclosure of the information about the individual ("A") would give substantial offence to A, assuming that A was placed in similar circumstances and was a person of ordinary sensibilities.'⁴¹ Lord Hope added that 'The mind that has to be examined is that, not of the reader in general, but of the person who is affected by the publicity. The question is what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant and faced with the same publicity.'⁴²

In *Murray v Big Pictures Ltd*, the Court of Appeal citing Lord Hope above,⁴³ added that:

...the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant

³⁸ [2004] UKHL 22.

³⁹ [2003] QB 195, 206, para 11 (vii).

⁴⁰ (n 38) [92].

⁴¹ *ibid.*

⁴² (n 38) [99].

⁴³ *ibid.*

and the circumstances in which and the purposes for which the information came into the hands of the publisher.⁴⁴

Further, the European Court of Human Rights in its pronouncements in *Peck v United Kingdom*⁴⁵ and *von Hannover v Germany*⁴⁶ recognised pockets of privacy protected acts carried out in public. The argument put forward by counsel on behalf of Detective Peter Horton a.k.a. *NightJack* was that in protecting his anonymity turned on the question of privacy, in that he had reasonable expectation of privacy from having his identity revealed,⁴⁷ that he had taken steps to preserve his anonymity⁴⁸ and that there is a public interest in preserving the anonymity of bloggers. Writers such as Rosen suggest that the concept of privacy which could once be explained as the right to be left alone requires a different conception in that privacy is 'the ability to exercise control over personal information' and personal information is information which a person reasonably expects to exercise control over.⁴⁹ In a sense, pseudonymity is the exercise of that control – control over not having one's identity being revealed and hence, one's right to anonymity.

Considering the spirit of the comment by Gleeson CJ *supra*, from the last sentence without further extrapolation, suggests that a reasonable person of ordinary sensibilities would have arrived at the logical conclusion that Detective Peter Horton a.k.a. *NightJack* cherished his privacy by retaining his personal identity as anonymous and only presenting himself through his 'public' persona. His conduct of not revealing his true identity could have been drawn from the fact that he refused interviews, a book deal and in receiving his Orwell Prize award, he sent a representative in his place.

⁴⁴ [2008] EWCA Civ 446 [37].

⁴⁵ (2003) 36 EHRR 41; [2003] EMLR 287.

⁴⁶ (2005) 40 EHRR 1; [2004] EMLR 379.

⁴⁷ (n15) [2].

⁴⁸ (n15) [5].

⁴⁹ Jeffrey Rosen, 'The Purposes of Privacy: A Response' (2000-2001)89 Georgetown LJ 2117, 2120.

Accountability

In determining whether there is some countervailing public interest to justify disclosure, it may be at this stage we have to begin engaging with the issue of accountability. At which point will the right of the anonymous citizen journalist under articles 8 and 10 be trumped by the need for accountability?

Whilst anonymity may enable individuals to speak out free from political or social reprisals and has been 'assumed for most constructive purposes',⁵⁰ it is undeniable that anonymity on the Internet encourages harmful, hate and false speech when individuals can behave in an uncivil fashion as they think they are immune from reprisals. A very good illustration of this is the increased incidents of "trolling" on social network sites. Trolling is seen as the Internet equivalent of 'road rage, vandalizing a grave or kicking a man when he's down'⁵¹ which takes place on online forums, *Facebook* pages and online newspaper reader comments. The comments are insulting, insensitive, provoking in nature and in certain cases, threatening and harassing. As far back as 1994, Professor Trotter Hardy commented that 'Anonymity is power and I think it will be abused on the Net.'⁵² The potential to cause harm through anonymous messages on the Internet is far greater in comparison to any other medium. As it is not a medium that brings the speaker face-to-face with his/her subject, the ability to dehumanise the victims of harmful speech and remove the civility that comes with face-to-face encounters is greater.⁵³

Accountability in its basic form is the acceptance of responsibility for one's actions.⁵⁴ Accountability is essential in order to ensure that there is a basis for an

⁵⁰ (n 19) 65.

⁵¹ Tom de Castella and Virginia Brown, 'Trolling: Who does it and why?' *BBC News* (London: 14 September 2011) <<http://www.bbc.co.uk/news/magazine-14898564>> accessed 16 May 2012.

⁵² Peter H Lewis, 'Computer Jokes and Threat Ignite Debate on Anonymity' *New York Times* (New York, 31 December 1994) <<http://www.nytimes.com/1994/12/31/us/computer-jokes-and-threats-ignite-debate-on-anonymity.html?src=pm>> accessed 30 May 2011.

⁵³ (n 2) 1645.

⁵⁴ *ibid.*

innocent injured party to redress a grievance and in essence to uphold the importance of freedom of speech and expression in so far it is not to be used as a tool of abuse and harm. McQuail ties in media accountability to society - particularly the degree of accountability owed in balancing it in relation to public interest and freedom of speech.⁵⁵ McQuail was focused on "the core activity of the media" in identifying different players who were in the activity of publication and the duty of accountability as being attached to this core activity. McQuail links his exposition of the "media" to accountability:

The term 'media' can variously identify an industrial sector, a set of technologies, a set of firms and organizations with power in society, or an institution often referred to as 'the press'. None of these meanings captures what is central to the theme of this book, although all are relevant. In order to get to the heart of the matter, our attention focuses on the core activity of the media [added emphasis] since the earliest days of printing, which is to publish, to mediate between authors and original sources and an eventual audience or public, facilitating or realizing the act of publication. The term 'the media' collectively identifies all organizations, roles, means, and activities that contribute to publication. The latter means to bring expression into the open and to disseminate it further. Media accountability relates both to the purposes and also the consequences of publication. It refers to all ways in which public communication is 'accounted for', by its originators, its recipients, and those affected by it.⁵⁶

If citizen journalists on the Internet are to be viewed seriously as performing a function that is analogous to that of journalists, the yardstick for citizen journalists to measure against could be that of accountability standards of professional journalists. These standards are imposed both by law and the

⁵⁵ Denis McQuail, *Media Accountability and Freedom of Publication* (OUP 2003) 4,5.

⁵⁶ *ibid.*

profession and are often used as measures for gatekeeping by editors before information and news is published for public consumption. Owing to the lack of gatekeeping measures and absence of editors, the citizen journalist who does not work within a chain of command, is both the writer and editor all rolled up in one - who makes the final decision to publish. It is this lack of gatekeeping that makes a strong argument for accountability.

In the context of accountability in media or journalism, the balance between the rights of the media and that of other parties such as private citizens, corporations and state entities is spoken of where there is the need to balance freedom of speech against other interests. Media entities are faced with some key areas where accountability imposed by law must prevail in areas such as contempt of court when reporting legal proceedings, defamation, data protection in processing personal data including sensitive personal data and privacy.

In addition to the standards imposed by the law, journalistic codes have served to instil ethical values in the profession. The UK Press Complaints Commission (hereinafter referred to as 'PCC') is an independent body that self-regulates the press.⁵⁷ The PCC's Editors' Code of Practice,⁵⁸ is an evolving and voluntary code setting the benchmark for ethical standards in the profession. The code promotes *inter alia* accuracy of information published, respect for privacy, avoiding harassing and intrusive behaviour. Complaints based on claims of breaches of the code are received and investigated by the PCC as a mechanism of enforcement of the code.

On whether the code could extend to blogs, Baroness Buscombe, the then Chairman of the PCC, commented that since the blogosphere was increasingly becoming a source of breaking news which attracted high profile commentators, examining the possibility of the PCC extending its role to the blogosphere may be

⁵⁷ Press Complaints Commission Website <<http://www.pcc.org.uk/AboutthePCC/WhatisthePCC.html>> accessed 30 May 2011.

⁵⁸ Press Complaints Commission Website <<http://www.pcc.org.uk/cop/practice.html>> accessed 30 May 2011.

undertaken.⁵⁹ Buscombe sees that the activity of blogging as quite sophisticated having created its own “ecosystems” and asks if readers assume blogs as news and the blogosphere the new newspaper. The inclusion of bloggers for instance, she added, would be on a voluntary basis. In a letter to Buscombe, harsh criticism was levelled against these comments from several established bloggers who felt that the blogosphere would not benefit from PCC regulation as the code of practice was only seen as ‘no more than standard operating practice’ and that it had in essence failed to raise ‘ethical standards and practices of the majority of the national press, particularly the tabloids...’.⁶⁰

Balancing Article 8 and Article 10 rights of Citizen Journalists in the Claim for Anonymity against Accountability

Branscomb speaks of how ‘one might distinguish between potentially hazardous message sources and other more innocuous uses of anonymity, thereby enabling the law to insulate from liability the majority of information providers while imposing liability on those originating the abusive messages.’⁶¹ How will the courts achieve this?

In considering which element is to prevail – whether freedom of speech or the interests of others, the UK courts have always undertaken a balancing exercise where each case is decided on its merit. In this balancing exercise, the key matrix is that of “public interest” which is undefined. Section 12 of the Human Rights Act 1998 under the heading “Freedom of Expression” provides in subsection 4:

The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings

⁵⁹ Ian Burrell, ‘PCC to regulate UK bloggers?’ *The Independent* (London, 16 November 2009) <<http://ianburrell.independentminds.livejournal.com/8357.html>>

⁶⁰ Roy Greenslade, ‘Bloggers strike back at Buscombe’ *The Guardian* (London, 18 November 2009) <<http://www.guardian.co.uk/media/greenslade/2009/nov/18/peta-buscombe-pcc>>.

⁶¹ (n 2) 1661.

relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—

(a) the extent to which—

- (i) the material has, or is about to, become available to the public; or
- (ii) it is, or would be, in the public interest for the material to be published;

(b) any relevant privacy code.

When drawing in Article 10(1) and (2) of the Convention into the discussion, the exercise that the court will have to undertake will be in balancing the interest of the anonymous blogger who writes on socio-political issues against the risk of harm of such speech.

In the US, the right to speak is not absolute⁶² and where it comes into conflict with genuine and compelling interests of third parties, disclosure may be warranted. Where claimants are seeking redress arising from harmful speech, claimants seek a discovery subpoena from the court, popularly known as *John Doe* proceedings, to order ISPs, website host or social networking sites to disclose the identity of anonymous users. On numerous occasions, micro-blogging site, *Twitter*, has become embroiled in this issue. At the time of presenting the paper, *Twitter* had become the centre of controversy of rogue tweeters who named the identity of a footballer whose identity was protected by injunction⁶³ and the application made by a council in a Californian court to order for disclosure of an identity of a blogger who had made libellous statements on his blog.⁶⁴ Such a subpoena creates the risk of the loss of one’s privacy as an anonymous speaker if the claimant fails in the

⁶² (n 11) 353.

⁶³ Jon Kelly, ‘Super-injunctions: What could happen to rogue tweeters?’ *BBC News* (London: 23 May 2011) <<http://www.bbc.co.uk/news/magazine-13500030>> accessed 30 May 2011.

⁶⁴ ‘South Tyneside Council ‘gets Twitter data’ in blog case’ *BBC News* (London: 30 May 2011) <<http://www.bbc.co.uk/news/uk-england-tyne-13588284>> accessed 30 May 2011.

claim leading to potential abuse of the process arising from SLAPP suits. It bears on the courts to be prudent in issuing such disclosure subpoenas. Although there have been numerous standards used by the courts, the key to the unmasking and disclosure of anonymous speakers is to undertake a balancing exercise after the claimant successfully proves that attempts have been made to provide notice to the anonymous speaker and has evidenced a meritorious claim against the said speaker.⁶⁵ This is where the court weighs the defendant's First Amendment right to speak anonymously against the claimant's case for disclosure.⁶⁶

Where there were applications for the issuance of a subpoena in disclosing identities or information related to the identities of anonymous bloggers, the courts' approach may be instructive. In *re Subpoena Duces Tecum to America Online Inc.*,⁶⁷ a case involving defamatory statements made about a company and disclosure of confidential insider information, the Circuit Court of Appeal was of the view that allowing a subpoena for America Online (AOL) to reveal the identity of users of AOL chat rooms 'would constitute an unreasonable intrusion on their First Amendment rights'.⁶⁸ More importantly the court put forth the need to balance the competing interests in the matter in that '...whether a state's interest in protecting its citizens against potentially actionable communications on the Internet is sufficient to outweigh the right to anonymously speak on...[the Internet].' The court decided in favour of the company, issuing the subpoena accordingly but nevertheless was conscious of the risk of disclosing the identity of the users who may not have a fiduciary or contractual duty to the company.⁶⁹ In weighing the competing interests, the court felt that there was compelling state interest in protecting companies such as in this case 'from the potentially severe consequences that could easily flow from actionable communications on the information

⁶⁵ Matthew Mazzotta, 'Balancing Act: Finding Consensus on Standards for Unmasking Anonymous Internet Speakers' (2010) 51(3) Boston College LR 833, 855.

⁶⁶ *Independent Newspapers, Inc. v Brodie* 966 A 2d 432 (Md. 2009), 457; *Mobilisa, Inc. v Doe 1* 170 P 3d (Ariz Ct App 2007), 720-721; *Dendrite International Inc. v Doe No.3* 775 A 2d (NJ Super Ct App Div 2001), 760-761.

⁶⁷ No. 40570, 2000 WL 1210372 (52 Va Cir 26).

⁶⁸ *ibid* 33.

⁶⁹ *ibid* 37.

superhighway significantly outweigh the limited intrusion on the First Amendment rights of any innocent subscribers'.⁷⁰

In the UK, the disclosure procedure involves a *Norwich Pharmacal* application, named after the decision of the House of Lords⁷¹ where the conditions for such application were laid out. In essence, it is where the person against whom the order is sought has facilitated the wrongdoing, he therefore comes under a duty to assist the person who has been wronged by providing full information and disclosing the identity of the wrongdoers.⁷² The said procedure has been successfully used in removing anonymity of Internet users where the applications have been made against website hosts where users have made defamatory remarks on the website forums.⁷³ These applications have been successfully made on sites hosted outside the UK.⁷⁴

The use of the *Norwich Pharmacal* application has been used previously in lifting confidentiality of journalists' sources. However, in view of the European Court of Human Rights decision in *Financial Times v United Kingdom*⁷⁵ these may be seeing the end of their days. The European Court held a *Norwich Pharmacal* order, in compelling journalists to reveal confidential sources, to be in breach of Article 10 resulting in a chilling effect that would encroach upon the protection of journalistic sources as a vital element in journalistic freedom in a democratic society. In *Totalise*, at the Court of Appeal,⁷⁶ the court made it evidently clear that

⁷⁰ *ibid*; See also *Dendrite International Inc v John Doe* 775 A 2d 756 (NJ Super Ct App Div 2001).

⁷¹ *Norwich Pharmacal Co and others v Commissioners of Customs and Excise* [1973] 2 All ER 943.

⁷² *ibid* 948.

⁷³ *Totalise plc v The Motley Fool Ltd and another* [2001] EMLR 750; *Sheffield Wednesday Football Club Ltd and others v Hargreaves* [2007] EWHC 2375 (QB), [2007] All ER (D) 270 (Oct).

⁷⁴ *Applause Store Productions & Firsh v Raphael* [2008] EWHC 1781, [2008] All ER (D) 321 (Jul); *G & G v Wikimedia Foundation Inc* [2009] EWHC 3148 (QB), [2009] All ER (D) 92 (Dec); *Lockton Companies International & Others v Persons Unknown and Google Inc* [2009] EWHC 3423 (QB).

⁷⁵ (App No 821/03) 15 December 2009.

⁷⁶ *Totalise plc v The Motley Fool Ltd and another* [2001] EWCA Civ 1897 [24]-[25].

in making such an order, the court has to take cognizance of the Data Protection Act 1998 in that no order can be made unless paragraph 6 of Schedule 2 of the Act has been considered. This is where the order of disclosure has been made upon consideration of 'the rights and freedoms or legitimate interests of the data subject.' The court goes on to caution that this consideration must be made in light of Article 10. The unmasking of anonymous speakers may be limited in view of the above two recent cases where the exercise of issuing of such orders must not stifle Article 10 rights.

Returning to UK's experience in lifting anonymity in *NightJack's* case, the detective's employers were already aware of the identity of *NightJack* revealed to them by *the Times* before the publication of his identity to the world. There was no subpoena for which *the Times* had applied for as the discovery of *NightJack's* identity was done through 'a process of deduction and detective work, mainly using information available on the Internet'.⁷⁷ Even if Richard Horton was already known to be the *NightJack* and faced disciplinary proceedings against him by his employers, is there not an argument to be made that he may still have wanted to remain anonymous to the rest of the world? If as a result of weighing the competing interests, taken in a different scenario where his employers were unaware of his identity, the court may have decided that his employers have a right to know in order for them to commence disciplinary proceedings against him for breaching a code of conduct or ethics and the court would have ordered that his identity be revealed to them - the consequence of this would be that his right to continue to speak anonymously is relinquished but his right to be anonymous to the general public is not. It was acknowledged that *NightJack* had blogged responsibly by taking particular care in disguising the information, not commenting on pending and active cases within the meaning of the Contempt of Court Act 1981 nor flouting any court reporting restrictions.⁷⁸

⁷⁷ (n15) [3].

⁷⁸ (n15) [13].

Achieving a Balance

Much criticism has been levelled against the UK courts' first brush in deciding on the issue of anonymity of citizen journalists. The decision of the High Court in *NightJack's* case has been criticised for not appreciating the importance of anonymity in particular the privacy rights of Internet users and anonymity as an inducing factor for speech on the Internet.⁷⁹ Disclosure of identity under *John Doe* applications in the US and *Norwich Pharmacal* applications in the UK require a *prima facie* claim against the user. In *NightJack's* case, the identity - which was already known to his employer in order to expedite disciplinary proceedings - required no further disclosure to the public at large.

In achieving the balance between competing interests, there is a need for the examination of certain factors before anonymity can be lifted. The first is the appreciation of the value of speech which is being made by the anonymous speaker on the Internet through social media activity - in that it must be essential to democratic discourse and the silencing such speech as a result of removal of anonymity will impact of Article 10 right and the corresponding First Amendment provision. Secondly, is the need to ensure that other means have been utilised such as bringing the claim to the notice of the anonymous speaker in order for the matter to be dealt with in private or removal of the offending entry or post including perhaps an apology. Thirdly, is to ensure that the disclosure is necessary in that the claim against the anonymous speaker is meritorious and will achieve the desired aim of the claimant. And finally, whether the importance of endorsing anonymity, as it is important to both the speaker and the speech, outweighs the need to lift the cloak of anonymity in order to serve the claimant's action. It is essential to weigh up speech made by speakers who have high autonomous interest such as in political realms against the low risk of harm of such speech in order to take a position of

⁷⁹ Kirsty Hughes, 'No Reasonable Expectation of Anonymity?' (2010) 2(2) *Journal of Media Law* 169; Eric Barendt, 'Bad News for Bloggers' (2009) 1(2) *Journal of Media Law* 141.

non-disclosure.⁸⁰ The whole question of when is the justification for a limited right of anonymity appears to pivot on the value of the speech being made.

To borrow Branscomb's succinct view on the matter:

Anonymity should not be outlawed as a general principle; there are varying levels of anonymity, or at least pseudonymity, that are rational and justifiable...Whether or not anonymity is to be permitted or even encouraged depends upon the particular circumstances under which it is deployed, but it must be understood that many netizens are unlikely to waive their perceived right to personal autonomy, which some define as a right to genuine anonymity.⁸¹

The citizen journalist on the Internet who wishes for social media activity to continually contribute to genuine political, social and democratic debate in a meaningful way is confronted with the issue that anonymity is not an absolute guarantee. The point to be made is whilst the question of extent of the right of anonymity will continue to fuel debate, one of the ways in which the place for quality and credible discourse by social media actors can be achieved, and for such activity to prevail and increase in importance as a source of information and news, is in complying and measuring against a standard where a strong degree of accountability resonates.

Both the courts in the UK and in the US are increasingly taking this stand in view of the recent decision of the Californian court to subpoena *Twitter* for a release of information of an anonymous blogger in the UK who had allegedly made libellous statements. As it is the case with the Internet and its users, the astute ability to adapt to trends is second nature. We may well see that these decisions will serve to see speech on the blogosphere and the Internet's wide variety of forums rise to these expectations.

⁸⁰ (n 9) 1590-1591.

⁸¹ (n 2) 1675.