

Freedom of Expression and Privacy on Social Media: The Blurred Line Between the Private and the Public Sphere

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Abstract

Social media platforms have transformed the dynamics of freedom of expression and freedom of information. They have the capacity and the potential to facilitate and improve the dissemination of news and other media products beyond traditional distribution platforms. Simultaneously, this also means a broader exposure of citizens to diverse content formats, sources of information as well as a plurality of viewpoints. Social media thus constitute a fundamental factor for news organizations to reach out to and interact with their audiences. This implies the necessary adaptation of “traditional” media content to the characteristics of online platforms and their diverse audiences, much broader than just those represented by the consumers of legacy media. The emergence of social media platforms has also enhanced and transformed some of the traditional features of journalism as we knew it. Journalism is no longer the preserve of professional journalists. However, journalism activities are still characterized and framed by professional standards and ethical codes imposing certain principles and values in the process of collecting and disseminating information (accuracy, impartiality, independence, accountability). Nevertheless, due to technological transformations, ethical standards must also be adapted to the new scenario. Both privacy and freedom of expression are fundamental human rights protected in Europe and globally by applicable human rights instruments. These rights may, however, come in conflict. These conflicts have been addressed, numerous times, by the case law of the European Court of Human Rights, which has developed an elaborated jurisprudence focusing on whether the domestic authorities struck a fair balance between the two rights. The general standards regarding the balance between freedom of expression and privacy in Europe need to be considered in light of the specific manifestations of individual autonomy within social media, as well as of the different interactions that take place in such environment and of the access to and use of social media publications by journalists and media actors.

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Social media platforms have their own terms and conditions, which regulate many different aspects of the service they provide to their users. Online platforms have their own internal policies regarding the collection and handling of information from users. Platforms' policies may also aim at preserving users' safety and dignity within the social space by providing control and foreseeability when it comes to the use and impact of the content they share. In addition to this, platforms have also generally adopted rules to particularly prevent acts of so-called *doxxing*, consisting of searching for and publishing private or identifying information about someone on the internet with malicious intent. In general, these actions are considered as forms of abuse, harassment or cyberbullying and are not allowed on most big platforms. The connection between the basic principles that guide the protection of ideas such as privacy, safety, or freedom of expression by both States and social media companies, together with the growing impact of the international and regional human rights standards on the latter, anticipate the development of new models based on the cooperation between and contributions from tech companies, regulators, media actors, and civil society.

1. Introduction

Social media platforms have transformed the dynamics of freedom of expression and freedom of information understood as the right to seek, receive, and impart information, as enshrined in human rights law, particularly article 19 of the International Covenant on Civil and Political Rights and article 10 of the European Convention on Human Rights.

In 2018 the Committee of Ministers of the Council of Europe (CoE) adopted a Recommendation “on the role and responsibilities of Internet intermediaries”¹. Among other aspects, the CoE emphasizes the importance of intermediaries as framers of users' freedom of expression through moderation and ranking of content. This takes the CoE to the conclusion that intermediaries “exert forms of control which influence users' access to information online in ways comparable to media, or they may perform other functions that resemble those of publishers”. In addition to this, “intermediary services may also be offered by traditional media, for instance, when space for user-generated content is offered on their platforms”.

¹ Available online at: <https://rm.coe.int/1680790e14>



While differences between intermediaries and media entities are significant, particularly in terms of exercise of editorial control and liability for content, large technology companies play an increasing role in terms of distribution of news and digital advertising. What happens in the social space mediated by intermediaries has implications in terms of formation of the public opinion, particularly when new technologies are used to disseminate media content, either by traditional or by new entities and individuals engaged in different forms of journalism. This brings to this new territory pre-existing media regulation and self-regulation debates on matters including ethical standards, use of sources, respect for privacy and data protection, among many others.

The intermediaries that will be considered in this paper are, as already mentioned, social media platforms. Following the terminology and classification established by the Digital Services Act (DSA)², we will focus on hosting services that, at the request of a recipient, store and disseminate information to the public, i.e., to a potentially unlimited number of third parties (articles 3.h) and 3.k) DSA). More particularly, and due to their significant impact on dissemination of content across European Union member States, the platforms considered will be those labelled as “very large” according to article 33 DSA³. These are Big Tech players providing a huge scale number of users’ uploaded content such as Twitter, Facebook, and Instagram (Meta), TikTok or YouTube, and are broadly denominated as “social media”.

Social media spaces are privately managed to provide services to their users. Tech platforms develop their own rules, usually in form of terms of service or community standards, and collect, generate, retain, and process a wealth of information and data from and about users. It is important however to properly separate between, on the one hand, the relationship of social media users (including not only individual users but also organizations such as media entities) and tech companies, based on the mentioned standards, and, on the other hand, issues connected to the editorial responsibility and liability of media companies and journalists who use social media as a distribution platform, a journalistic source, and/or a tool to interact with their audience.

² Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC

³ Online platforms and online search engines which have a number of average monthly active recipients of the service in the Union equal to or higher than 45 million.



This paper will firstly present how journalism is impacted by the presence and intermediation of these large technological companies, as well as the way in which journalists and different types of media entities use social media both as a publishing/distribution platform and as a source of information to perform their activities. Secondly, and considering current standards regarding the protection of the right to privacy as a legitimate limit to freedom of expression (particularly as set by the case law of the European Court of Human Rights), the paper will analyse possible ways to differentiate between public and private social media spaces, as well as possible restrictions regarding the use, particularly by journalists and media institutions, of purported private information disseminated via social media platforms by different types of users.

2. Journalism and Social Media Platforms. A Rich and Multi-faceted Relationship

Progressive usage of social media platforms by traditional media

In its Report on “Journalism, media, and technology: trends and predictions” for 2023, the Reuters Institute describes a paradoxical environment for news consumption. Russia’s invasion of Ukraine, the impact of global warming, along with the after-effects of the COVID pandemic might create the conditions for good and reliable journalism to thrive, although, at the same time, fear and uncertainty and the depressing and relentless nature of the news agenda has the demonstrated effect of turning many people away from it⁴.

News organisations are in the process of fully assuming that not embracing digital distribution platforms will put them at a severe disadvantage. According to the Report, the next few years will not be defined by how fast news organizations and more generally media entities become digital, but by how they transform digital content to meet rapidly changing audience expectations. It is particularly interesting to note how an increasing number of publishers expect to get significant revenue from tech platforms for content licensing. This reflects previous negotiation efforts, as well as the direct or indirect consequences of certain policies or ongoing discussions on the imposition of legal and regulatory obligations in this area⁵. In any

⁴ Full Report is available online here: <https://reutersinstitute.politics.ox.ac.uk/journalism-media-and-technology-trends-and-predictions-2023>

⁵ About the complex relationship between platforms and the press see the series of articles published by the *Columbia Journalism Review* and the *UCLA Institute for Technology, Law & Policy*,



case, not all platforms are to be seen in the same way in this field. For example, nowadays publishers seem to be willing to pay less attention to Facebook or Twitter and might instead put much more effort into TikTok⁶, Instagram, and YouTube, due to their popularity with younger people.

There is no doubt that social media platforms have the capacity and the potential to facilitate and improve the dissemination of news and other media products beyond traditional distribution platforms. Simultaneously, this may also encompass a broader exposure of citizens to diverse content formats, sources of information as well as a plurality of viewpoints. However, in order to avoid the potential harmful effects that such openness in terms of dissemination and access might entail (particularly from malicious actors) it is also important, as recommended in a Report commissioned by the Council of Europe, to implement properly designated policies to guarantee that potential market failures in the production of independent, professional, quality journalism are addressed, to secure an efficient and competitive media market place, and to ensure that citizens develop the media and information literacy necessary to navigate the new distribution environments effectively in their own best interest⁷.

Social media thus constitute a fundamental factor for news organizations to reach out to and interact with their audiences. This also implies the necessary adaptation of “traditional” media content to the characteristics of online platforms and their diverse audiences, which are much broader than the traditional consumers of legacy media.

It is important to note that this phenomenon takes place in an environment where actors other than “professional” news and media organizations can reach similar or even more predominance and visibility. This allows civil society organizations, activists (particularly in restrictive environments where traditional media is strictly controlled by authorities), protestors and individual creators to disseminate opinions,

available online at: https://www.cjr.org/special_report/disrupting-journalism-how-platforms-have-upended-the-news-intro.php

⁶ When it comes particularly to TikTok, another recent study from the Reuters Institute describes in detail how this platform TikTok has become more attractive for news publishers looking to engage younger audiences. In this sense, News organisations are attracted by the fast-growing audience and younger demographic, but they are also motivated by the desire to provide reliable news, amid fears about widespread misinformation on the platform. See Nic Newman, *How Publishers are Learning to Create and Distribute News on TikTok*, Oxford: Reuters Institute, 2022. Available online at: <https://reutersinstitute.politics.ox.ac.uk/how-publishers-are-learning-create-and-distribute-news-tiktok>

⁷ Rasmus Kleis Nielsen, Alessio Cornia, Antonis Kalogeropoulos, *Challenges and opportunities for news media and journalism in an increasingly digital, mobile, and social media environment*, Strasbourg: Council of Europe, 2016. Available online at: <https://rm.coe.int/16806c0385>



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ideas, and information without the intermediation of the *media establishment* and without the need to count on unreachable technical or financial capacities. On the other hand, using social media platforms for these purposes, including by legacy media, also means to *accept* the internal rules that tech companies use to surface, prioritize, publicize, and some cases also to bury user-generated content⁸.

As such, social media not only has an impact on the distribution of news and media content, but also on the visibility of social media movements, protests, and individual creations⁹. As already mentioned, social media may also provide a platform for those who engage in unprofessional and unethical practices, as well as other malicious actors disseminating illegal or *harmful* content, including content that might negatively affect the right to privacy, as it will be discussed in the next section. Does this mean that certain types of elaborated or *responsible* content might deserve a special treatment and protection by social media platforms?

This last discussion has a main manifestation in the broader debate about a so-called “media exemption”, which was proposed during the elaboration of the DSA. The notion and need for such exemption are usually articulated in the sense that since the media sector is legally liable for what they publish, therefore, it should not be subject to the additional editorial control of online platforms that unilaterally decide their terms and conditions for all their users. This position mixes two different elements: the editorial responsibility that publications hold and exercise when it comes to respect for applicable legislation as well as professional and ethical standards on the one hand, and the role of online platforms in the establishment and enforcement of content policies to avoid harm, promote civility and protect users when engaging in conversations and mutual interactions, on the other. Therefore, compliance with one aspect does not necessarily guarantee alignment with the other. In any case, the possibility to establish some specific safeguards and preferred treatments has been re-introduced in the draft of the project proposal for a Regulation establishing a common framework for media services in the internal market, also known as the

⁸ Recommender systems have become of central importance in these debates. They have been traditionally considered as opaque or even “black boxes”, although the DSA has introduced some provisions to enhance transparency and accountability in this area. See Paddy Leerssen, “The Soap Box as a Black Box: Regulating Transparency in Social Media Recommender Systems”, *European Journal of Law and Technology* Vol 11 No 2 (2020) and “An end to shadow banning? Transparency rights in the Digital Services Act between content moderation and curation”, *OSF Preprints*, 28 September 2022, <https://doi.org/10.31219/osf.io/7jg45>

⁹ On this matter, see Zeynep Tufekci, *Twitter and Tear Gas. The Power and Fragility of Networked Protest*, New Haven & London: Yale University Press, 2017.



European Media Freedom Act (EMFA) and will for sure reopen the debate on this issue¹⁰.

Open journalism and social media content as a journalistic source. Ethical approaches

The emergence of social media platforms has also enhanced and transformed some of the traditional features of journalism. One of these transformations is usually described or defined as the emergence of Open Journalism. According to an exhaustive report on this matter published by the OSCE Representative on Freedom of the Media¹¹, Open Journalism is an umbrella term that covers a variety of collaborative and cooperative forms of journalism, for instance between professional journalists and recognized experts on the topics they are covering, or between professional journalists and members of the general public. This means that journalism no longer remains the preserve of professional journalists and there can be interaction with the public during all stages of the news production process. That interaction can continue after the publication of the news item, for example by posting comments about the item or by post-publication verification and fact-checking. It is therefore obvious that social media plays a fundamental role in facilitating and fostering these new journalistic practices.

It is important to stress that this openness does not lead to a scenario where “everybody is a journalist”, or to the disappearance of journalism as a profession/activity. Journalism activities, as broadened up as they may have been, are still characterized and framed by professional standards and ethical codes imposing certain principles and values in the process of collecting and disseminating information (accuracy, impartiality, independence, accountability). It is also true, however, that due to the mentioned transformations, ethical standards must also be adapted to the new scenario. This is still an open discussion where lack of clear standards and parameters creates some reluctance from legacy media professionals to make full use or extend their activities to the territory of social media.

¹⁰ See Joan Barata, “Protecting Media Content on Social Media Platforms: The European Media Freedom Act’s Biased Approach”, *VerfBlog*, 25 November 2022. Available online at: <https://verfassungsblog.de/emfa-dsa/>

¹¹ OSCE Representative on Freedom of the Media, *Open Journalism: The Road Traveled and The Road Ahead*, Vienna: OSCE, 2017. Available online at: <https://www.osce.org/files/f/documents/1/1/384432.pdf>



In 2022, the newspaper *The Guardian* released an updated version of their own social media guidelines with the purpose of helping employees “navigate their own use of social media and to provide advice, guidance and support where possible”¹². Guidelines elaborated by media companies usually see social media use as an accessory and a voluntary tool where special care is needed to clearly differentiate between personal opinions and representation of media institutions. Important elements are also guaranteeing online safety, particularly by not disclosing certain types of personal information and establishing preventions regarding the dissemination of breaking news and newsgathering. However, it is not common to find references to more complex ethical conundrums, including limits to the use of private information or a general delineation between private and public spaces on social media.

The Independent Press Standards Organisation (IPSO) is the self-regulatory body of most newspapers in the United Kingdom. In 2022 it published a Guidance which provides a framework for thinking through questions about using material taken from social media, based on the enforceability of their general ethical rules¹³.

Regarding privacy in particular, when assessing the disclosure or use of allegedly private information by journalists, the Guidance establishes the necessity to consider to what extent an individual has made their own disclosures of information, as well as the fact that journalists must not assume that the absence of privacy settings means that information posted on social media by any individual can be necessarily published, since the “nature of the material, the context of the story and the material features”, must also be considered. As a matter of principle, the public interest section of the Code of Practice requires that IPSO “consider the extent to which material is already in the public domain or will become so”. Regarding the publication of specific elements obtained from social media accounts such as profile pictures or statuses, the Guidance also indicates, if they are publicly viewable and do not reveal anything private, this would not normally breach the Code.

The Guidance also tries to address some more complex and delicate matters, such as when a piece of content posted by the user of a social media platform can be considered as belonging to the public domain. This is particularly relevant in cases where material is not freely accessible online but has been published to a large group of people, for example, within a “private group” on a site like Facebook, or a

¹² Available online at: <https://www.inpublishing.co.uk/data/GNM-social-media-guidelines.pdf>

¹³ Available online at: <https://www.ipso.co.uk/resources-and-guidance/social-media-guidance/>



specialist site that requires a login and password. Besides the consideration on whether the content meets the public interest requirement, the Guidance also requires journalists to consider, in these cases, “how many people would have been able to view the material, their relationship to the subject of the material and/or the person who posted it, and whether the person who posted it and/or the subject would have had a reasonable expectation that it would not be circulated further”. A possible indicator to be used in this area would be possible additional comments published by the user sharing information.

A more specific area with relevant privacy implications would be the reporting about a deceased person. IPSO’s ethical standards indicate to refrain from using photographs from social media which may show the deceased engaged in “embarrassing activity” (sic) and consider the timing of an article and the risk of breaking the news of someone’s death to their family after seeing uncorroborated reports on social media.

The next section will focus on the legal implications of the use of social media by individuals and organizations to publish and disseminate different types of materials, as well as regarding the use of social media content by journalists and media entities for reporting purposes. In other words, the following part of this paper will analyze to what extent it is possible to clearly identify and preserve spaces of privacy within the context of social media platforms, as well as how the protection of the right to privacy in the mentioned context might entail the establishment of limits to the right to freedom of expression and freedom of information.

3. Privacy and Freedom of Expression within the Context of Social Media Platforms

Introduction

Both privacy and freedom of expression are fundamental human rights protected in Europe under the Charter of Fundamental Rights of the European Union (the Charter) (articles 7 and 11, respectively) and the European Convention on Human Rights (ECHR) (articles 8 and 10, respectively).

The right to privacy encompasses the right to respect for private and family life, home and correspondence, the main purpose being to protect against arbitrary interferences in such spaces. According to the European Court of Human Rights (ECtHR), article



8 ECHR does not only establish limits to State interference in such areas but also embraces positive obligations for competent authorities to rightly guarantee the proper enjoyment of private life and reputation by individuals¹⁴, including the adoption of measures designed to secure effective respect even in the sphere of the relations of individuals between themselves¹⁵.

Freedom of expression and freedom of information are essential human rights that protect individuals when holding opinions and receiving and imparting information and ideas of all kinds. It also presents broader implications, as the exercise of such rights is directly connected with the aims and proper functioning of a pluralistic democracy¹⁶. On the other hand, freedom of expression and freedom of information, as well as the other rights protected in the Convention, are not absolute and therefore may be subject to certain restrictions, conditions, and limitations. However, article 10.2 ECHR clearly provides that such constraints are exceptional and must respect a series of requirements, known as the three-part test. This test requires that: 1) any interference must be provided by law, b) the interference must pursue a legitimate aim included in such provision, and 3) the restriction must be strictly needed, within the context of a democratic society, in order to adequately protect one of those aims, according to the idea of proportionality¹⁷. A nominally identical test would also apply to possible restrictions to the right to privacy and reputation.

The applicability of these international standards means that at the national level, all member states of the international community must recognize and protect a minimum of freedom of expression for all individuals while at the same time providing sufficient and adequate protection to the right of private and family life, home and correspondence.

Rights included in articles 8 and 10 ECHR may come in conflict. These conflicts have been addressed in numerous times by the case law of the ECtHR, which has developed an elaborated jurisprudence focusing on whether the domestic authorities struck a fair balance between the two rights. It should be noted that the Court has stressed that the outcome of any application does not vary according to whether it

¹⁴ See *Marckx v. Belgium*, Application No. 6873/74. Judgement of 13 June 1979 and *Mosley v. the United Kingdom*, Application no. 48009/08. Judgement of 10 May 2011.

¹⁵ See *Cumpana and Mazare v. Romania*, Application No. 33348/96. Judgement of 17 December 2004.

¹⁶ See the elaboration of such ideas by the ECtHR in landmark decisions such as *Lingens v. Austria*, Application No. 9815/82, Judgment of 8 July 1986, and *Handyside v. The United Kingdom*, Application No. 543/72, Judgment of 7 December 1976.

¹⁷ See for example *The Sunday Times v. UK*, Application No. 6538/7426. Judgment of April 1979.



has been lodged under article 8 by the person who claims a violation of his right to privacy, or under 10 by an individual journalist or a media entity defending their right to disseminate a certain piece of information, since as a matter of principle both fundamental rights deserve equal respect, which also encompasses a similar margin of appreciation from States¹⁸. As concluded by Dirk Voorhoof within an exhaustive assessment of the applicable case law, balancing clearly dominates the legal reasoning of the Court¹⁹.

Balancing privacy and freedom of expression in the case law of the ECtHR

As it was just mentioned, the ECtHR has already established significant criteria to guide the balancing process between freedom of expression and the right to privacy.

In the landmark ruling *Von Hannover v. Germany* (no. 2)²⁰, the Court reiterates that “the concept of private life extends to aspects relating to personal identity, such as a person’s name, photo, or physical and moral integrity”. Therefore, protection provided by article 8 ECHR “is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings” (§ 95). The Court also insists on the fact that there is “a zone of interaction of a person with others, even in a public context, which may fall within the scope of private life”. In this sense, protection of one’s image presupposes the individual’s right to control the use of that image, including the right to refuse publication thereof” (§ 96). In addition to this, privacy has been directly connected to the idea of human dignity in cases of “flagrant and extraordinarily intense violation” of private life, consisting of unauthorized recording intimate aspects of private life and consequent threats of public humiliation²¹.

More broadly, it can be asserted that article 8 proscribes the communication of information that would damage the honour or psychological or moral integrity of individuals; or prejudice their personal enjoyment of the right to respect for private

¹⁸ See *Couderc and Hachette Filipacchi Associés v. France*, Application no. 40454/07. Judgement of 10 November 2015.

¹⁹ Dirk Voorhoof, Freedom of Expression versus Privacy and the Right to Reputation. How to Preserve Public Interest Journalism, in Stijn Smet and Eva Brems (eds.), *When Human Rights Clash at the European Court of Human Rights. Conflict or Harmony?* 2017, Oxford University Press, pp. 148-170.

²⁰ Application nos. 40660/08 and 60641/08. Judgement of 7 February 2012.

²¹ *Kadija Ismayilova v. Azerbaijan*, Applications nos. 65286/13 and 57270/14. Judgement of 10 January 2019.



life²². Robert Post uses the term dignitary privacy to refer to privacy rules that define and enforce social norms of respectful expression, in contrast with data privacy rights, which define and enforce the proper bureaucratic handling of data (articles 7 and 8 of the Charter, respectively)²³. As it has already been stressed several times, this paper focuses on the former and not on the latter.

The notion of private life is not precisely defined by the Court and might be seen as a relatively broad one. The Court itself has admitted that privacy is not susceptible to an exhaustive definition since it is connected to an understanding of the notion of personal autonomy which can therefore embrace multiple aspects of the person's physical and social identity²⁴. Privacy must not be interpreted in the sense of focusing on an inner circle of relations that would entirely exclude the outside world not encompassed within that circle²⁵. It also embraces the right for each individual to construct their social identity by developing relationships with others (including in the professional sphere)²⁶. However, the right to privacy cannot be understood as guaranteeing the right as such to establish a relationship with one particular person²⁷.

On the other hand, the Court has also underscored the duty of the press to impart information and ideas on all matters of public interest, as part of their vital role of “public watchdog”²⁸. Another relevant element here is the fact that according to the Court, “the methods of objective and balanced reporting may vary considerably, depending among other things on the media in question. It is not for this Court, nor for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting” (*Jersild v. Denmark*, § 31)²⁹. In other words, the exercise of the right to seek and impart information is protected by the Convention particularly vis-à-vis journalists and media actors, although this shall not be interpreted in the sense of giving any State authority (including but not only courts) the power to determine the ethical and professional standards that shall guide these activities. This would be the territory of media self-regulation and co-regulation which needs to be preserved as independent from State interferences.

²² See *Axel Springer AG v. Germany*, Application no. 39954/08. Judgement of 7 February 2012.

²³ Robert Post, *Data Privacy And Dignitary Privacy: Google Spain, The Right To Be Forgotten, And The Construction Of The Public Sphere*, *Duke Law Journal* Vol 67: 981 (2018).

²⁴ See *Aksu v. Turkey*, Applications nos. 4149/04 and 41021/04. Judgement of 15 March 2012.

²⁵ See *Desinov v. Ukraine*, Application no. 76639/11. Judgement of 25 September 2018.

²⁶ See *Bărbulescu v. Romania*, Application no. 61469/08. Judgement of 6 September 2017.

²⁷ See *Evers v. Germany*, Application no. 17895/14. Judgement of 28 May 2020.

²⁸ See *Bladet Tromsø and Stensaas v. Norway*, Application no. 21980/93. Judgement of 20 May 1990.

²⁹ Application no. 15890/89. Judgement of 23 September 1994.



The Court in *Von Hannover v. Germany* (no. 2) presents the criteria laid down in the case law where the right to freedom of expression is being balanced against the right to respect for private life (§ 108-113):

- a) Contribution to a debate of general interest. The definition of what constitutes a subject of general interest obviously depends on the circumstances of the case. The Court has generally included in this notion information relating to political, sports, cultural/artistic and celebrities' affairs. However, details of individuals' private life, independently from their notoriety, with the sole aim of satisfying public curiosity in that respect would not fit in the definition of public interest.

- b) How well known is the person concerned and what is the subject of the report? The Court establishes a basic distinction, in terms of privacy protection, between private individuals and persons acting in a public context, as political figures or public figures: whilst a private individual unknown to the public may claim particular protection of his or her right to private life, the same is not true of public figures. Another relevant distinction would play between reporting facts capable of contributing to a debate in a democratic society, relating to politicians in the exercise of their official functions for example, and reporting details of the private life of an individual who does not exercise such functions. It is however important to insist on the fact that although in certain special circumstances the public's right to be informed can even extend to aspects of the private life of public figures, satisfying public curiosity about strictly private and intimate aspects of individuals' life is not legitimate reason to disclose information connected to this area. Even in the case of public persons, they still shall be able to rely on a legitimate expectation of protection of and respect for their private life³⁰.

- c) Prior conduct of the person concerned. This aspect particularly refers to the prior individual's behavior when granting access to certain aspects of their private life, as well as whether the information had already been publicly disseminated. In any case, the mere fact of having cooperated with the press

³⁰ For example, in the case of *Ruusunen v. Finland* (Application no. 73579/10, Judgement of 14 April 2014), the ECtHR upheld a decision by national courts considering that the publication of details regarding the private sex life of Finland's then-current Prime Minister in a book written by his ex-girlfriend breached the Prime Minister's right to privacy.



on previous occasions cannot serve as an argument for depriving the person concerned of all protection.

- d) Content, form, and consequences of the publication. The way in which a photo or report are published and the manner in which the person concerned is represented in the photo or report also are factors to be taken into consideration, as well as the type of dissemination (open, limited, local, regional, global...). In particular, the Court has stressed that that a person's image constitutes one of the chief attributes of his or her personality, as it reveals the person's unique characteristics and distinguishes the person from his or her peers. The right to the protection of one's image is thus one of the essential components of personal development.
- e) Circumstances of the collection of the information disseminated. In this area it is important whether the person disclosed the information to third parties by themselves and accepted subsequent publication or not, and particularly whether certain pieces of information were obtained using subterfuges or illicit means.

These general standards regarding the balance between freedom of expression and privacy in Europe still present uncertainties and might even be questionable. Just to put an example, the criterium of the prior conduct of the person concerned may eliminate certain aspects of individual autonomy by limiting the capacity to decide in different stages of life the extension of each person's private sphere.

In any case, these standards need now to be considered in light of the specific manifestations of individual autonomy within social media, as well as the different interactions that take place in such environment and the access to and use of social media publications by journalists and media actors.

Privacy v. freedom of expression in the social media environment

The expanding area of conflicts between privacy of freedom of expression, particularly in connection with the emergence of new forms of communication, has been analyzed by Dirk Voorhoof³¹. A first factor would be easier access by citizens to the direct creation and dissemination of content via platforms that do not exercise

³¹ Freedom of Expression versus Privacy and the Right to Reputation. How to Preserve Public Interest Journalism, cit.



editorial control. This generates the subsequent distribution of an increasingly massive number of pieces of user-generated content consisting sometimes in revealing aspects of the private life of third parties on all types of topics and via a wide range of supports. Moreover, in many cases individuals produce and disseminate content that reveals several aspects of their own private life and personal data, which can become available to a higher-than-expected number of people, including journalists and mainstream media. In addition to this, the author also points at the fact that developments in communication technologies in general (including CCTV, search engines, digital surveillance, databases, big data journalism, digital cameras, drones, and smartphones) as well as their increasing usage for many different purposes, may increase the risk of unsolicited media exposure of aspects of private life, and loss of control over the digital distribution, via different platforms, of private information.

Are there private spaces on social media platforms to be protected under Post's idea of dignitary privacy? This question would not refer, in principle, to intrinsically private messaging services provided by many media platforms, but to content posted by users of social media platforms with the aim of reaching out to and interacting with a more or less limited or defined number of third users. This distinction is not, however, as clear-cut as it might appear at first sight. Most social messaging services may also be used by groups, and platforms such as Facebook even facilitate the interaction between chat groups and social media groups, thus clearly blurring such distinction.

As it has already been mentioned, the right to privacy embraces the right for each individual to construct their social identity by developing relationships based on the agreement of sharing a common space. It also ensures the development, without outside interference, of the personality of each individual in his relations with other human beings. These preserved spaces also incorporate an individual expectation of non-intrusion and active protection from public authorities. Once again, the question is whether such spaces of privacy may also exist on social media.

Before trying to give some possible and provisional answers, it is important to underscore from a broader perspective that there still is a territory to explore by privacy scholarship when it comes to questions such as the role of privacy in a complex information environment, what are the specific issues that law should look



to address in this context, and what are the set of questions that are unique to our field³².

Private individuals (i.e., persons who would not fit in the common definition of public figures), use social media as a tool to stay in touch with a certain number of persons, including close family and friends, as well as other personal and professional acquaintances, sometimes located in other geographical areas. In the case of the latter, social media has precisely become an instrument to remain connected, since otherwise certain relationships might be lost. Information shared in these interconnected spaces usually refers to family and socially limited developments (weddings, holidays, celebrations, encounters...) or consists of the dissemination of commentaries or opinions, sometimes on matters of public interest (posting of news articles, sharing of content from politicians and celebrities, etc.).

Generally speaking, and independently from the technical restrictions to access implemented by individuals themselves, these spaces are perceived by their users as something different from a completely open public forum. These are open spaces in the sense that whatever is posted creates a certain level of exposure regarding personal and professional life developments, as well as expressed ideas and opinions. However, they are closer to the dynamics of an in-person meeting at a household or a limited social event (a shared meal or celebration in a public establishment, for example) than to an editorially elaborated publication on matters of public interest for the general public, with the aim of influencing the formation of the public opinion.

Therefore, an analysis of such spaces in light of the principles guiding the protection of the fundamental rights considered in this paper would lead to the following general conclusions:

- a) Private individuals have a general right to preserve the information that they share through their social media accounts regarding several aspects of their personal, social, and professional lives. This expectation of privacy applies in principle vis-à-vis the use and publication of such content by third parties, particularly journalists and media actors. In the case of other private individuals, ability to access the mentioned pieces of content must not be

³² Even tough from a US perspective, see Maria P. Angel, and Ryan Calo, Distinguishing Privacy Law: A Critique of Privacy as Social Taxonomy (February 3, 2023). 123 *Columbia Law Review* (forthcoming 2023), Available at: <http://dx.doi.org/10.2139/ssrn.4347191>



understood per se as an authorization to republish or share with third parties or other groups³³.

- b) The conclusion above is without prejudice to the need for a proper assessment regarding the possible application of the so-called household exemption to social media users when managing their own social media accounts. This exemption refers to the specific legal area of data protection. Pursuant to article 2.2.c) of the General Data Protection Regulation (GDPR)³⁴, provisions included in this norm do not apply to the processing of personal data by a natural person in the course of a “purely personal or household activity”.
- c) The conclusion mentioned in paragraph a) may also apply to certain pieces of information, and particularly images or videos, posted by public figures on their personal social media accounts and regarding intrinsically private aspects of their individual and family life. Establishing a limit between private and public (virtual) spaces in relation to a public figure might present some challenges. In this area, specific technical restrictions and limitations implemented, as well as the very nature of the content involved versus the public dimension of the individual in question will be key factors.
- d) Privacy considerations applicable to social media content posted by individuals may also encompass elements that are visible by default, such as profile pictures and statuses.
- e) Exceptions to the mentioned protections would apply to cases where there is an overriding public interest in disclosing information originally disseminated within a private social media environment, including within a limited number

³³ In the case of *Darío v. La Opinión de Zamora*, the Constitutional Court of Spain confirmed the Supreme Court’s award of damages to a man whose social media photographs had been published by a Spanish newspaper. The man had sued the newspaper after a report on his brother’s suicide had included photographs from the man’s private Facebook account. The Constitutional Court recognized that there is a balance to be found between a newspaper’s right to freedom of expression and an individual’s right to privacy, and held that the publication of private photographs which were not directly related to a matter of public interest was an infringement of the right to privacy. The Court stated that the mere sharing of images on social media by an individual does not authorize the use of those images by third parties without the individual’s consent. See an analysis in English of this decision at: <https://globalfreedomofexpression.columbia.edu/cases/dario-v-la-opinion-de-zamora/>

³⁴ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.



of contacts, a social media group or a chat group. These would be cases of involvement of the individual in matters of clear public interest and where the dissemination of certain pieces of content could make an actual contribution to the provision of relevant and accurate information. Of course, depending on the circumstances, the dissemination of the content in question might still require the adoption of certain measures to avoid disclosing the identity of the involved private individual inasmuch as they do not constitute, per se, a matter of public interest. This is an area where, in any case, usual caveats regarding the identification of minors, victims and other vulnerable individuals shall apply.

- f) Other cases where exceptions might be considered include the deliberate and declared intention to reach the general public by expressing ideas and opinions or disseminating content (images, videos, documents...) aiming at presenting facts on matters of public interest. Moreover, depending on the process followed in the collection and presentation of this last type of content, such activities might deserve the protection provided to journalistic acts, even if not performed by professional journalists or media actors.

This being said, it is also necessary to introduce a series of clarifications.

Firstly, possible violations of privacy rights derived from the dissemination of content by other social media users must, in principle, be considered within the general framework of the intermediary liability exemptions contemplated both in the eCommerce Directive³⁵ and the DSA. In other words, social media service providers and intermediaries in general should neither play a legal or adjudicatory role in determining the balance between the right to freedom of expression and the right the privacy of their users, nor be held liable for users' publications allegedly infringing an individual's right to privacy in the absence of a decision adopted by the competent State authorities (generally, by the judiciary). As established in the landmark decision of *Delfi AS v. Estonia*³⁶, a distinction needs to be clearly made when it comes to the responsibility for the dissemination of content posted by private individuals, between professionally managed Internet news portals which publish news articles and invite readers to comment on them, and other Internet fora, such as a social media platform

³⁵ 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.

³⁶ Application no. 64569/09. Judgement of 16 June 2015. See also *Tamiz v. United Kingdom*, Application no. 3877/14. Judgement of 19 September 2017.



where the platform provider does not offer any content and where the content provider may be a private person posting all types of information “as a hobby” (sic).

Secondly, it is not the object of this paper to cover matters related to the protection of the so-called *right to be forgotten* (RTBF) in the European Union, nowadays statutorily protected under article 17 GDPR as the *right to erasure*. It is important to note that the RTBF is not primarily connected with the general privacy protections enshrined under article 7 of the Charter, but to the right to the protection of personal data according to article 8 of this instrument. However, the landmark *Google Spain* ruling³⁷ established a connection between the processing of personal data deriving from search engine’s indexing activities on the one hand, and the possible violation of the right to privacy in the sense of articles 7 of the Charter and 8 ECHR on the other hand. This was the case inasmuch as indexing services give visibility or amplify certain aspects of the private life of individuals who do not play a role in the public sphere³⁸.

The RTBF has thus several different components and angles, although for the purposes of this article it is important to single out a very specific aspect: the fact that, for the first time, an EU legal regime encompasses a concrete set of obligations in the area of privacy for online service providers instead of common publishers or speakers³⁹. In addition to this, RTBF provisions also present not-fully resolved challenges when it comes to balancing data protection rights with the right to freedom of expression. As indicated by Daphne Keller, the CJEU’s *Google Spain* ruling itself did not identify the publisher’s expression rights as a balancing factor that Google should consider in removing search results. In addition, articles 17 and 85 GDPR refer to freedom of expression and journalistic purposes as legitimate grounds for data processing, although there is also lack of clarity about whose free expression rights a service provider should consider when adjudicating a RTBF request⁴⁰. More broadly, the structure and process of the RTFG under EU legislation does not count on clear balancing criteria, it generates over-removal risks deriving from a data protection-focused regime, and delegates relevant decisions on private technology companies as well as data protection national authorities, the latter not having a

³⁷ Judgment of the Court (Grand Chamber), 13 May 2014. Case C-131/12.

³⁸ See an interesting analysis in Robert Post, cit., and Fiona Brimblecombe, Gavin Phillipson, Regaining digital privacy? The new right to be forgotten and online expression, *Canadian Journal of Comparative and Contemporary Law*, 4 (1) (2018), pp. 1-66.

³⁹ See Daphne Keller, The Right Tools: Europe’s Intermediary Liability Laws and the EU 2016 General Data Protection Regulation, *Berkeley Technology Law Journal*, Vol 33:297 (March 22, 2017).

⁴⁰ P. 353.



specific mandate in terms of defining the scope and protecting the right to freedom of expression.

Thirdly, besides private individuals and small businesses, social media platforms have become a fundamental tool for journalists, media companies, big businesses in general, public figures, political organizations, NGOs, and other *public* actors to disseminate their own messages and reach out to the general public as part of their political, commercial, social or advocacy activities. These social media accounts, information, and different types of content they disclose cannot be considered as private or semi-private spaces according to what has been presented in this subsection. In the particular case of journalists and media companies, and aside from voluntary ethical and professional standards established in this area, information posted on social media must be seen as a publication comparable to any other support and subject to the same responsibility regime. This means, obviously, that liability exemptions for online intermediaries shall also be applied to content distributed through online platforms by the mentioned actors. In addition to this, it is important to note that social media accounts of public figures and similar actors generally allow any private user to freely react and post comments to the comment being disseminated. These comments are placed in a public space and therefore privacy claims from their authors would not be valid in reference to this specific context (for example, in cases where a user's comment becomes viral and puts the individual at the center of a public debate). A very last question for consideration in this area would be whether the case law criteria of the ECtHR regarding liability for third party comments to online publication⁴¹ also applies to this second level of intermediation (i.e., social media users who manage public accounts that allow other users' comments)⁴².

Lastly, it is also important to incorporate into these considerations the specific nature of the social media platform or hosting service involved. In this sense, while certain online platforms are particularly designed to provide and facilitate the management of a space for limited socialization, other platforms are by definition more open and oriented towards promoting the dissemination of ideas and opinions on matters of

⁴¹ *Delfi AS v. Estonia, Magyar Tartalomszolgáltatók Egyesülete (MTE) and Index.hu Zrt v Hungary*, Application no. 22947/13. Judgement of 2 February 2016, and *Rolf Anders Daniel Pihl v Sweden*, Application no. 74742/14. Judgement of 9 March 2017, among others.

⁴² In *Sanchez v. France*, the ECtHR recently held that the conviction of a politician for failing to promptly delete unlawful comments published by third parties on the public wall of his Facebook account did not breach his rights under article 10 despite his apparent lack of knowledge of the comments. Application No. 45581/15. Judgement of the Grand Chamber of 15 May 2023.



public interest by different types of users, who are also given the opportunity to remain anonymous or use a pseudonym.

Privacy, freedom of expression and terms of service

As already mentioned, social media platforms have their own terms and conditions, which regulate many different aspects of the service they provide to their users. Hosting providers do generally moderate content according to their own private rules. Content moderation consists of a series of governance mechanisms that structure participation in a community to facilitate cooperation and prevent abuse. Platforms tend to promote the healthiness of debates and interactions to facilitate communication among users⁴³. Platforms adopt these decisions on the basis of a series of internal principles and standards. Examples of these moderation systems are Facebook's Community Standards⁴⁴, Twitter's Rules and Policies⁴⁵ or YouTube's Community Guidelines⁴⁶. In any case, it is clear that platforms have the power to shape and regulate online speech beyond national law provisions.

Regarding privacy, we can make a distinction between two types of rules and standards. Firstly, online platforms have their own internal policies regarding the collection and handling of information from users⁴⁷. These policies are also usually aligned with the minimum standards established in applicable legislation, the GDPR being a very significant example of this within the EU region (and even beyond that). Secondly, platforms' policies in the area of privacy may also aim at preserving users' safety and dignity within the social space by providing control and foreseeability regarding the use and impact of their shared thoughts, photos, and details of their lives, particularly when it comes to who can see and interact with that information. This entails both the adoption of rules and standards directly protecting users, as well as the collection and use of information about a person to identify, remove, and prevent certain online experiences⁴⁸.

In addition to this, platforms have also generally adopted rules to particularly prevent acts of so-called *doxing*, consisting of searching for and publishing private or

⁴³ James Grimmelmann, "The Virtues of Moderation", 17 *Yale J.L. & Tech* (2015).

⁴⁴ <https://www.facebook.com/communitystandards/>

⁴⁵ <https://help.twitter.com/en/rules-and-policies>

⁴⁶ <https://www.youtube.com/howyoutubeworks/policies/community-guidelines/>

⁴⁷ See for example Google's privacy policies: <https://policies.google.com/privacy?hl=en-US>

⁴⁸ See Meta's recent paper on these matters, available at: <https://about.fb.com/wpcontent/uploads/2022/07/Privacy-Within-Metas-Integrity-Systems.pdf>



identifying information about someone on the internet with malicious intent. In general, these actions are considered as forms of abuse, harassment, or cyberbullying and are not allowed on most big platforms⁴⁹. In some cases, platforms have also struggled with the need to incorporate their own exceptions regarding the dissemination of information about public users or private individuals involved in newsworthy events or public discourse on issues or events of public interest (for example Twitter, although Elon Musk's leadership has created some turbulences and incongruences in this area). These rules and standards are obviously based on each platforms' own set of fundamental community civility values, although it is also obvious that existing legal standards also provide a useful source of inspiration⁵⁰.

It is in any case important to underscore once again that platforms policies need to be read and interpreted in parallel with existing and applicable legal provisions in each jurisdiction. Users may of course resource to available legal remedies when they understand that their rights (including privacy) have been violated by the actions of a third party. Platforms' own policies constitute a different and separate layer, included in the service that each online intermediary offers to their clients, based on their own business model. This being said, the connection between the basic principles that guide the protection of ideas such as privacy, safety, or freedom of expression by both States and social media companies, as well as the growing impact in this environment of international and regional human rights standards, anticipate the development of new models based on cooperation between and contributions from tech companies, regulators, media actors, and civil society.

4. Conclusion

This paper has shown the relevance of debates about freedom of expression and privacy in the online public sphere, and particularly within the specific context of the services provided by social media platforms. These debates incorporate the necessary adaptation of the notions of journalism and media activities, as well as understanding the way social media platforms can become new formats for both the dissemination and collection of relevant information for reporting purposes.

⁴⁹ See specific policies in this area from TikTok (<https://www.tiktok.com/community-guidelines?lang=en>), Meta (<https://transparency.fb.com/en-gb/policies/community-standards/privacy-violations-image-privacy-rights/>), YouTube (<https://support.google.com/youtube/answer/2802268#>) or Twitter (<https://help.twitter.com/en/rules-and-policies/personal-information>).

⁵⁰ See Thomas E. Kadri, Kate Klonick, Facebook v. Sullivan: Public Figures and Newsworthiness in Online Speech, *Southern California Law Review* Vol 93: 37 (2019).



The paper has also examined how the existing parameters in European human rights case law regarding the balance between freedom of expression and privacy can also apply to social media spaces, and the parameters to be considered in order to properly define the limits between publicity and privacy in such environment. Lastly, social media policies covering some of the problems considered in this paper have also been presented and contextualized.



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