
Media online archives
– a source for historical research or a threat to privacy?
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Executive summary: Media online archives – a source for historical research or a threat to privacy?

"**Media online archives**," as used in this report, means a repository of everything which media organizations publish in their Internet services and which is under editorial control. It covers, in particular, journalistic articles, but also advertisements and official announcements published at the request of public authorities. Third-party content, however, (for example comments made by website readers under journalistic articles) has been excluded from the scope of the research. The "age" of information or its presentation (whether stored in separate "archive sections" or simply left long-term on the media's website) are not decisive factors for qualifying content as an element of "media online archives".

The digital revolution brought about a change for media archives, from limited accessibility and obscurity of paper publications to long-term and wide accessibility of online information. It is a great opportunity for media organizations which can now reach more readers, anywhere in the world and at any time, not only with news, but also with their historical content. It is also a great opportunity for us – media consumers, as online archives enhance significantly our access to information. Thanks to search engines, we can quickly retrieve the publication we need, compare it with other sources and share it with other users.

At the same time, the wide accessibility of media online archives may be a curse for those who have been the subject of news which they find inaccurate, defamatory, outdated, irrelevant or disclosing intimate facts about their lives. This type of information makes it difficult for some people to escape their burdensome past or malicious gossip, and may undermine their future opportunities.

In the course of the work of the "Observatory of Media Freedom in Poland," run by the Helsinki Foundation for Human Rights, we have observed an increasing pressure on media practitioners to "unpublish" archival content available on the Internet. Such requests were often not justified. Sometimes, they concerned content that, although inconvenient or embarrassing, should remain public record, since it was related to matters of legitimate public concern. Media organizations lacked clear guidelines on how to respond to such requests and balance two conflicting rights: the freedom of expression on the one hand and the right to privacy on the other.

The primary purpose of this research was, therefore, to identify the existing legal and ethical standards with regard to maintenance and management of media online archives, and analyze the current practice of media organizations in this area. The report that is the outcome of our research describes the main opportunities and threats resulting from the shift from analogue to digital media archives, and suggests practical and legal tactics to address them. The report proposes human rights oriented solutions, specifically tailored to the Internet reality. The solutions are aimed at protecting the integrity of media online archives, without unjustifiably hindering the legitimate interests of individuals "haunted" by unwelcome media reports.

Main research questions:

• What are the practical aspects and the main challenges for media practitioners related to the maintenance and management of media online archives?

• What are the legal and ethical implications of long-term, wide accessibility of media online archives? How have these challenges been addressed in laws, ethical codes and jurisprudence? To what extent do the legal and ethical frameworks and the case law correspond with the standards established by the ECtHR?

• What should a balanced response to requests to unpublish archival media content online look like? What should the criteria of evaluating such requests be, and what are the alternative, more proportionate measures that could be applied?

Data collection

The research was conducted between August and November 2015 and had two components:

(1) online survey conducted among national and local media publishers in Poland;
(2) desk research conducted in three Central European countries: Poland, Hungary and the Czech Republic.

The desk research consisted of: the analysis of international standards, national legal and ethical frameworks and case law related to media online archives, as well as the analysis of how archival content is presented and arranged on websites of popular newspapers in each of the three countries.

Who can benefit from the research?

The findings of the research may be particularly useful for **media organizations** dealing with requests to alter archival publications online. It may help them to apply proportionate and adequate measures, develop the self-regulatory editorial policies to facilitate the decision-making process as well as shield them against unjustified pressure to remove content. The target of the report are also **media lawyers and judges** who deal with cases related to media online archives. Ideally, the report will also serve as a reference for **scholars and NGO activists**, in particular those working in the area of freedom of expression, right to privacy and digital rights.

As regards the **geographical scope**, the research addresses a problem recognized and discussed by media organizations and lawyers across the world. Therefore, its implications remain valid beyond countries covered by the study, and can become an element of the ongoing global debate on the scope of the so-called "right to be forgotten" on the Internet.

Main findings

Media online archives in practice. Survey results

The online survey was conducted among 23 local and national media organizations in Poland. Its findings are covered in Chapter 1 that provides:

- basic characteristics and information on the relationship between printed editions and corresponding websites;
- information on requests to unpublish online content – their number, source, justification, as well as the ways they are dealt with;
- information on the practical aspects of handling requests to unpublish online content.

Key points

- All survey respondents received requests to unpublish content.

- Only a small proportion of respondents received requests about official announcements, and the majority of the requests were related to journalistic material. Some requests concerned tags that were not generated by humans, but by bots.

- Out of all respondents less than a half have guidelines, procedures or established customs related to the management of online archives.

• When faced with a request, all national media consulted a lawyer, but only a half of the local media sought professional legal advice.

Besides an Internet website, the majority of the surveyed media have a printed edition. A large proportion of respondents have been publishing information on their websites for 10 or more years. New information is usually published everyday. In 13 out of all 23 cases the website has been registered as a separate title in the court register of dailies and periodicals.

According to the survey results, all respondents received requests to unpublish content from their websites, which proves how common the phenomenon has become. At the same time, the number of requests received within the last 5 years varied. In general, the national media handled a higher number of requests – two of them received more than 50 requests. A significant majority of the local media received 10 or fewer requests.

All but one respondent received requests that concerned the unpublishing of journalistic content. Requests pertained not only to texts but also photos. It is interesting to highlight, particularly bearing in mind the CJEU decision in the Google Spain v. AEPD and Mario Costeja González case, that only a small proportion of respondents received requests that concerned official announcements. Moreover, some requests related to tags, i.e. labels generated by simple computer programs that perform highly repetitive operations, called bots, to identify the content of a longer text. This is a new challenge for editors and, potentially, a novel source of liability.

The majority of respondents received requests from private individuals as well as representatives of legal persons, while less than a half received demands from public authorities (including politicians). About a quarter of respondents acknowledged that demands were sent by courts and law enforcement bodies, as well as public figures (e.g. celebrities). The survey showed that in the majority of cases requests were submitted directly by the interested party. This proves that the field is not yet professionalized and it is still not very common to hire lawyers or companies specializing in online reputation management to perform this task. Persons who requested the unpublishing of content most often claimed that it was offensive or defamatory. Others argued that it was inaccurate, obsolete, or it concerned criminal past.

The respondents listed various criteria that are taken into consideration when handling a request. The survey results show that they may be related either to the content itself (especially its truthfulness), journalistic ethics (whether due diligence was exerted), legal issues, as well as the weighing of public and

private interests. A significant majority of respondents tend to comply with requests at least in some instances. 4 respondents stated, however, that they never do. Interestingly enough, 2 local newspapers stated that they always complied with requests. Since the majority of respondents, at least in some cases, positively respond to requests, it may come as a surprise that also the majority is in principle against such a practice. This is the case both with the local and national media.

A significant majority of respondents stated that they had altered the material on their websites in some way, without however removing it. The different kinds of interventions included updating, adding information, anonymization, website „maintenance" (replacing non-functioning links) or rectification.

In view of the fact that all respondents received requests to unpublish content, it is somewhat disquieting that out of 23 respondents, only less than a half have guidelines, procedures or established customs on online archive management. In the majority of cases, no guidelines have been put in place. A significant part of those who said that guidelines existed, were media with national outreach. Guidelines have been formalized only in the case of two national media. In one case, they are publically available. The survey revealed that the decision whether to comply with the request is usually taken by the editor in chief. When deciding upon requests to unpublish online content, all national media consulted a lawyer. This is not always the case with regard to the local media – only a half of them sought professional legal advice.

Current legal and ethical frameworks

Chapter 2 analyzes the legal and ethical frameworks relevant for the maintenance and management of media online archives. It is based on the examination of international and national instruments in Poland, Hungary and the Czech Republic.

Key points

• No major differences exist between the three countries as regards the legal and ethical regulations applicable to media online archives.

• There are no comprehensive, specific legal provisions on media online archives.

• Media online archives are not precisely regulated by most publically available journalistic ethical codes or codes of conduct.

Even though archival media content on the Internet is not specifically regulated either by laws or journalistic ethics, it is clear that some general rules apply to it. Provisions ensuring freedom of expression and the right to privacy as well as national civil and criminal laws aimed at the protection of reputation apply equally to digital and non-digital publications. Therefore, they may be used for altering archival media content on the Internet. Similarly, traditional standards of journalistic accuracy, transparency, and respect for the right to privacy are also relevant for managing and maintaining media online archives. In addition, some ethical codes provide more specific guidelines on particular aspects of retaining archived materials. These include the obligation to adequately mark archival content and the prohibition to use it in a biased or manipulative way.

Judicial trends

Chapter 3 presents a selection of court cases concerning the maintenance and management of media online archives. The case law analysis revealed that both international courts (ECtHR, CJEU) and some national courts have dealt with this issue. The most important judgments at the international level were delivered by the ECtHR. They were passed in the following two cases: Times Newspapers Ltd. v. United Kingdom and Węgrzynowski and Smolczewski v. Poland. Moreover, the CJEU "Google Spain" judgment may have an important impact on the accessibility of media online archives. At the national level, the analysis of the case law was conducted in Poland, Hungary and the Czech Republic, and concerned 19 cases. The majority of them (15) were identified in Poland, there was no relevant case law found in the Czech Republic.

Key points

• Both European and domestic courts established some important standards on media online archives.

• The majority of the courts acknowledged that maintaining media online archives is one of the most important tasks of journalists in the Internet era, next to their traditional function of a "public watchdog".

• In most cases, the courts decided that unpublishing of journalistic articles was not justified, and they allowed only less intrusive remedies.

• The reach of archival media publications may be suppressed not only by limiting their availability on the website, but also by restricting their accessibility via search engines.

The majority of courts recognized that maintaining and managing media online archives falls under the scope of the freedom of expression as an important tool for education and source of historical data. At the same time, the courts emphasized that online publications pose a greater risk for the right to privacy than offline publications, due to their wide accessibility. However, there is still no clarity, neither in the European nor domestic case law, as to what is the "nature" of harm caused by online publications and whether "single publication rule" or "Internet publication rule" should be applied. Nevertheless most courts agreed that media organizations may sometimes be required to alter their online archives. Still, even if the plaintiff's rights have been violated by a journalistic publication, it is usually sufficient to append the piece with an explanatory note informing the public about the disputable, defamatory, inaccurate or outdated character of its content.

The case law analysis allowed for the identification of five main factors that may help in assessing requests to unpublish, or otherwise alter, content in media online archives, and in adopting appropriate remedies. These factors include: (1) type of publication and its purpose, (2) nature of information, (3) relevance of information (change of circumstances related to the passage of time), (4) question of fulfilment of certain obligations by media organizations with regard to their online archives and (5) status of the plaintiff.

According to the CJEU's opinion expressed in the "Google Spain" case, search engine operators may be asked to delist a link to a certain website from the search results, provided that certain conditions are met. This possibility creates a new challenge for media online archives. The research revealed, however, that so far few disputes regarding archival media content on the Internet have been referred to the national Data Protection Authorities in Poland, Hungary and the Czech Republic.

The case law, in comparison to available legal and ethical frameworks, provided more specific guidelines on managing archival media content on the Internet. The judicial guidelines may serve as the primary source of reference for developing legal standards in this area. Most of the recommendations included in the report were based on the case law analysis.

Key recommendations

• In principle, media online archives should not be altered. As a general rule, archival online publications constitute a public record, and as such should remain complete and permanently available on the website in their original shape; they should not be removed or changed.

• In principle, unpublishing journalistic articles is not justified. If necessary, appending media online archives is a preferable and acceptable measure.

• Requests to unpublish archival online content should be complied with only in exceptional circumstances, when less intrusive measures do not constitute an effective remedy. If applied, unpublishing should always be limited to the necessary extent. Media organizations should, for example, consider anonymizing or removing only the disputable parts of the publication instead of deleting the entire piece.

• Media online archives must be maintained in accordance with the principle of transparency and accuracy. The archival character of online publications must be visibly marked on the website and any subsequent changes to the content should be communicated to the readers in a clear way. Media organizations should also correct errors or inaccuracies in their online archives, if they become aware of the circumstances which suggest that the material should be altered.

• The media cannot be expected to constantly monitor the relevance and accuracy of all archival content. There should be no legal obligation to monitor and update news reported on the Internet. Publishers should not be held liable for keeping the archival content online simply because it has become outdated.

• Media laws should include specific legal provisions on media online archives.

• Maintaining and managing media online archives should be covered by journalistic ethical codes. Media organizations should also create self-regulatory editorial policies for maintaining and managing media online archives. They should be publically available, and they should provide the criteria for evaluation of the requests to alter archival content, as well as describe fair and transparent procedures for examining such requests. Media organizations should consider consulting ethical bodies and lawyers in their decision-making process.

• Media organizations should be aware of the new challenges related to media online archives, such as restricting access to archival publications via search engines, the phenomenon of "archive trolling" and disputes concerning the content generated by bots (not by journalists).

Introduction

From analogue to digital – a revolutionary shift for media archives

Traditionally, archival newspaper publications were held in library stocks or databases of editorial offices. In a paper-based society, information from the past would over time naturally fade away from people's memory and its impact on the present would diminish. That has changed now. The process of "sedimentation" of information[1] was challenged by the development of online communication. In the Internet age, new ways of storing, disclosing and retrieving information have increased access to old news reports and eliminated the "real world" barriers in getting to them. Information is not less accessible over time anymore and does not get buried so easily under newer stories. Instead, thanks to search engines, it can quickly be recalled, combined with other sources and republished.

The digital shift and new information practices are a great opportunity for media organizations. They can now reach more readers, anywhere in the world and at any time, not only with their current news, but also with historical content. From the readers' perspective, the existence of media online archives enhances their access to information. A significant role of media online archives in this respect has been recognized in the recent jurisprudence of the European Court of Human Rights ("ECtHR"). The ECtHR observed that they "make a substantial contribution to preserving and making available news and information" and they "constitute important source for education and historical research".[2] Moreover "maintaining and making available to the public archives containing news which has previously been reported" was considered by the ECtHR one of the most important tasks of the contemporary journalists in the Internet era, besides the exercise of their traditional "public watchdog" function.[3] Preserving archival information online is thereby not only an opportunity for the media, but also a commitment.

[1] "Information sedimentation – solutions, adapted to the infosphere, that enable us, individually and as a society, to remember without recalling; to live with, but also beyond, experience; to acknowledge without constraining" – see: J. Powles, L. Floridi, *A manifesto for the future of the ‚right to be forgotten' debate*, The Guardian, 22 July 2014, http://www.theguardian.com/technology/2014/jul/22/a-manifesto-for-the-future-of-the-right-to-be-forgotten-debate, accessed: 25 November 2015).

[2] The ECtHR judgment Times Newspapers Ltd v. United Kingdom from 10 March 2009, applications nos. 3002/03, 23676/03, par. 45 and the ECtHR judgment Węgrzynowski and Smolczewski v. Poland from 16 July 2013, application no. 33846/07, par. 59.

[3] Ibidem, Times Newspapers Ltd v. United Kingdom, par. 27 and Węgrzynowski and Smolczewski v. Poland, par. 59.

At the same time, media online archives may pose a threat to the right to privacy of those who have been the subject of news which they find inaccurate, outdated, irrelevant or disclosing intimate facts from their lives. Undoubtedly an increased accessibility of unflattering information about a person may undermine their future opportunities, making it impossible for some people to escape their burdensome past or malicious gossip.[4] It is therefore understandable that people affected by these unwelcome online news reports would often prefer them to vanish from the Internet. In the course of the work of the Observatory of Media Freedom in Poland, one of the legal programmes run by the Helsinki Foundation for Human Rights ("HFHR"),[5] we started to observe an increasing pressure on publishers and journalists to remove such publications from their websites. Some of these requests, however, concerned journalistic materials which seemed accurate and balanced, and in which the society still had a legitimate interest. Thus "unpublishing"[6] them would feel like "rewriting history," and would lead to an unjustified restriction of the freedom of expression.

> ***Protection of reputation or "archive trolling"?[7]***
> *One of the cases recently reported to the HFHR concerned a request addressed to the local newspaper to unpublish a journalistic article from 2003 describing a conflict related to the local nursing house, which ensued between a charity organization and a private company. The company wanted the article to be taken down, as the conflict had already been*

[4] According to Jeffrey Rosen "the fact that the Internet never seems to forget is threatening (…) our ability to control our identities, to preserve the option of reinventing ourselves and starting anew.(…) [P]ermanent memory bank of the Web increasingly means there are no second chances (…). Now the worst thing you've done is often the first thing everyone knows about you". See: J. Rosen, *The Web Means the End of Forgetting*, New York Times, 21 July 2010, http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html?pagewanted=all&_r=0 (accessed: 20 November 2015).

[5] See Annex 4 for more information on the Helsinki Foundation for Human Rights and the Observatory of Media Freedom in Poland.

[6] „Unpublishing" is a word that is used in this report to describe the removal of content from media online archives in response to a request from a reader (or its representative). To our knowledge, it was first used in the paper *The longtail of news: to unpublish or not to unpublish*, summarizing one of few studies conducted so far on how media organizations handle the "requests to unpublish". Therefore, we have decided to use this term as well. See: K. English, *The longtail of news: to unpublish or not to unpublish*, Toronto Star 2010, http://www.apme.com/?Unpublishing (accessed: 25 November 2015).

[7] This notion refers to the phenomenon of the so-called "copyright trolling". The phenomenon has not been legally defined, but according to literature, a copyright troll does at least one of three things systematically: asserts rights it does not have, makes poorly substantiated claims, or seeks disproportionate remedies. The troll may, therefore, be characterized as an opportunistic plaintiff that seeks to exploit litigation for various benefits. See: M. Sag, *Copyright Trolling, An Empirical Study*, 100 Iowa Law Review, 1105/2015, p. 9.

settled. It claimed that the publication was no longer relevant. The newspaper, however, was not approached by the company directly, but by a reputation management company which acted on its behalf. The reputation management company specialized in targeting potentially damaging online content as part of its commercial activity. Its representative kept sending meritless letters to the publisher, threatening them with criminal liability and the obligation to pay extensive damages, if the paper continued to keep the article online. The publisher believed that the request lacked any legitimate grounds and that the story was published in the public interest. Therefore, the publisher eventually denied removing the material from the website, but at the same time felt intimidated by the reputation management company's modus operandi and for that reason sought the HFHR's assistance. We found this incident worrying, as it could have suggested that pressurizing publishers to clear their online archives of inconvenient content may have already become one of the tools used in contemporary public relations.

Nevertheless, information archived online, even though originally legitimately published, may at some point become irrelevant, devalued or disproportionally harmful. Materials that were once justifiably published may later lose the justification for their distribution. When confronted with requests to unpublish archival content from its website, a publisher always has to balance the person's interest in removing the information with the public intrest in accessing it. Unpublishing may not, therefore, be an appropriate response, and publishers should in some instances consider applying other less intrusive measures, such as updating or correction. These may be justified, for example, in the case of information about past criminal proceedings against a person who was eventually acquitted or with respect to an article which was subsequently found defamatory by the court. Providing a person concerned, but also other readers, with a follow-up to the original story helps to ensure the high quality of information. It is also a way to make the archival online content conform with the long-established journalistic values, such as accuracy, fairness, accountability and transparency. What is more, responsible retention and management of media online archives is important not only for the individual haunted by information causing undesirable repercussions, but also for the "society which may be chilled by the prospect of permanence."[8]

[8] M. L. Ambrose, *It's about time: privacy, information life cycles, and the right to be forgotten*, Stanford Technology Law Review, 16/2013 p. 108. The problem of the chilling effect that may be created by the Internet's perfect memory was also mentioned in: V. Mayer-Schonberger, *The Virtue of Forgetting in the Digital Age*, Princeton University Press 2009, p. 5.

This report addresses the need for practical and legal tactics in response to the opportunities and threats created by the shift of media archives from analogue to digital. The digital revolution brought about a change for media archives, from limited accessibility and obscurity of paper publications to long-term and wide accessibility of online information. As a consequence, the management of archival content has become one of the great challenges at the intersection of the freedom of expression and the right to privacy in the contemporary Internet media. This paradigm shift has to be addressed in the development of new policies supporting media practitioners in taking good decisions while responding to requests to unpublish content from their online archives. Moreover, there is a need for creating legal approaches specifically tailored to the Internet reality, which would enable reconciliation of the two conflicting rights mentioned above. The search for those new standards has been the principal motive behind this report.

Remarks on terminology

The key concept of this report, namely "**media online archives,**" shall be understood broadly as a repository of all materials that are published in the Internet services of a media organization and are under editorial control. It includes both information stored in separate "archive sections" as well as news available on the media organizations' websites for a long time. The notion of "media online archives" refers primarily to journalistic articles published online, but it also extends to content such as advertisement or public announcements (thus, to all kinds of content that can be found in offline newspapers). Third-party content, however, (for example comments made by website readers under journalistic articles) has been excluded from the scope of this study.

It should also be noted that for the purposes of this report the notion of "media online archives" is not limited to materials published in the past, but covers current stories as well. That is because the distinction between what is "historical content" and what is "news" is difficult to determine in the online environment, as all publications are usually quickly covered by another layer of more recent information. Archival content can, therefore, mean articles published a few hours ago, but also ten years ago. Nevertheless, it should be noted that, while questioning fairly recent publications because they are inaccurate, biased, defamatory etc. is common for both online and offline media, questioning a publication which is ten years old is a new challenge that came along with the development of online services. This challenge results in the need for creating new standards of "**maintenance**" of media online archives (how the archival content is organized, marked etc. on the website) and for their "**management**" (how media respond to requests to **unpublish**[9] or edit archival content). More

[9] See supra note 6. for a definition of "unpublishing".

information about the practical aspects of media online archives and different models of their organization has been described in Chapter 1 of the report.

Finally, a few remarks have to be made on the notion of the "**media**". The study focuses on websites that are run for the purpose of disseminating information about different areas of public interest by media organizations which, by definition, fulfil a "public watchdog" role in a democratic society. This includes websites which reflect information communicated in printed press or broadcast media (such as websites of newspapers and radio stations) as well as news portals that do not have their offline versions, but perform tasks traditionally attributed to the media.[10] Social media platforms and other websites run for non-journalistic purposes fall out of the scope of this study.

Overview of the report and note on methodology

The report summarizes the study on the maintenance and management of media online archives which was conducted by the research team between August and the end of November 2015. The research team consisted of five researchers with legal background from three countries: Dorota Głowacka (coordinator), Joanna Smętek, Zuzanna Warso (Poland, Helsinki Foundation for Human Rights), Eva Ondřejová (Czech Republic, independent lawyer) and Gábor Polyák (Hungary, Mertek Media Monitor). The researchers' biographical notes are available in Annex 3.

In the course of the study, the researchers employed qualitative methods. The study had two components. The first part was an online survey conducted among national and local media publishers in Poland. The survey was focused on examining the practical experience of publishers in managing media online archives (in particular their modes of conduct when responding to requests to unpublish content, the frequency and nature of such requests). To our knowledge, such a survey has never been conducted in Poland before. The results of the survey are presented in Chapter 1 of the report.

The second part of the study consisted of desk research related to international standards with regard to media online archives as well as national legal and ethical frameworks and case-law in this respect in three Central European countries: Poland, Hungary and the Czech Republic. The results of this part of the study are summarized in Chapters 2 and 3 of the report. Moreover, the

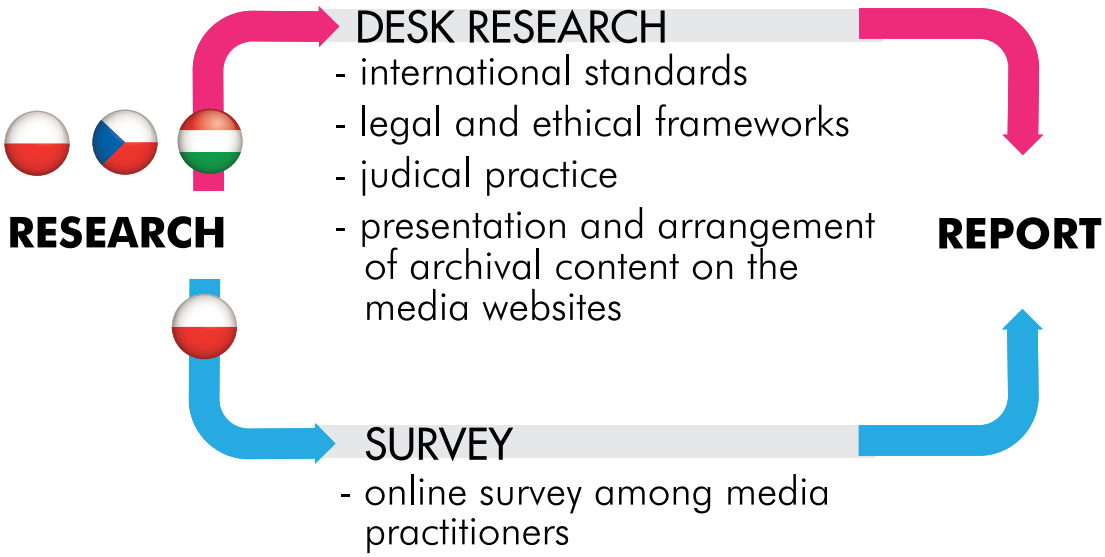
[10] Deliberately, we have decided to use the term "media" in a broad sense, without linking it to any legal definition, but rather by referring to its role in a democratic society. That is because in many countries the legal definition of "media" or "press" has become problematic in the age of Internet publications. Many national media laws have not been adapted to the development of online communication and, therefore, it is not clear which websites should be considered "media" or who in the cyberspace should be called a "journalist" in a legal sense.

researchers analyzed the presentation and arrangement of archival content on the websites of five newspapers in each of the three countries (summarized in Chapter 1). Detailed information on the methods applied by the researchers, the scope of the analyzed data, sources and materials used in the course of the study etc. are discussed in specific parts of the report.

The aim of the report is to address the following research questions:

- What are the practical aspects and the main challenges for media practitioners related to the maintenance and management of media online archives?
- What are the available human rights standards in this area?
- What are the legal and ethical implications of long-term, wide accessibility of media online archives? How have these challenges been addressed in laws, ethical codes and jurisprudence? To what extent do the legal and ethical frameworks and the case law correspond with the standards established by the ECtHR?
- What should a balanced responses to requests to unpublish archival media content online be? What should the criteria of evaluation of such requests be and what are the alternative measures that could be applied?
- What are the recommendations which could be followed by media practitioners and the judiciary in their decision-making processes with regard to the maintenance and management of media online archives?

Overview of the structure of the report:



Target of the report

The findings of this report may be particularly useful for media practitioners and lawyers dealing with media law. Hopefully, the report may help media organizations to shield themselves against unjustified requests to unpublish archival online content. Moreover, it may help them decide on more balanced solutions which reconcile the interest in preserving certain pieces of information on the Internet with the right to privacy of people affected by their publications. The report also aims at raising legal awareness among publishers, editors and journalists with regard to the maintenance and management of media online archives. It can perhaps support the development of self-regulatory guidelines in this respect. In addition, the study will hopefully seem interesting to lawyers representing media organizations and representatives of the judiciary, and will encourage them to apply the human rights standards presented in this report. Last but not least, since the challenges related to media online archives are of a global nature and the findings of this research prove pertinent for the ongoing debate on the scope of the so-called "right to be forgotten" on the Internet, the report may possibly inspire researchers in other countries to conduct similar studies. Ideally, the report will also serve NGO activists, in particular those working in the area of freedom of expression, right to privacy and digital rights, as a useful background for their educational, advocacy and strategic litigation activities.

Chapter 1

Media online archives in practice

1.1. Organization of archival content online

Introduction

In order to glimpse how online media archives are organized in practice, project partners from all three countries analyzed up to 5 websites of popular newspapers in each of the countries involved.[11] The analysis is not meant to offer a comprehensive picture of practice, but rather show a reader's perspective on visible options for online presentation of archival material. The primary aim was to look at the methods used by publishers to mark the archival character of Internet publications (so that the reader realizes that they may contain outdated information), avenues of access to archival content online and whether access is granted to all users freely or is subject to certain restrictions (such as registration and/or payment).

Poland

In Poland, the analysis encompassed 5 websites which were chosen from a group of major national newspapers: gazeta.pl, gazetaprawna.pl, polityka.pl, tygodnikpowszechny.pl, wyborcza.pl.[12] The analysis was conducted from a perspective of a website user.[13] Of 5 analyzed websites, four have paper editions – two weeklies (Tygodnik Powszechny and Polityka) and two dailies (Gazeta Wyborcza and Dziennik Gazeta Prawna).[14] Only gazeta.pl does not have a paper edition.

A comparison between printed versions of papers and websites shows that in the case of all four websites which have paper editions, their websites contain the same material but also additional content. Gazeta.pl publishes its own content and reposts materials from other websites associated with the same publisher (for example wyborcza.pl).

[11] The analysis was conducted between 1 September and 31 October 2015.

[12] It should be noted that both gazeta.pl and wyborcza.pl are published by the same publisher Agora S.A. and are a part of an extensive group of related websites maintained by this publisher. Gazeta.pl also reposts content from other websites from this group.

[13] It should not be confused with the conclusions from the survey which will be presented in the next part of this chapter.

[14] For the sake of clarity, it should be noted that Dziennik Gazeta Prawna is composed of the economic and legal parts which used to be separate papers. The legal part is called Gazeta Prawna. Gazetaprawna.pl is the electronic version of Gazeta Prawna.

Access to published material varies among websites. Only in the case of gazeta.pl is the content fully free of charge. In the case of all other analyzed websites access to content is at least partly, and often mostly, paid. Payment may be required, for example, for all or some content published in the paper edition, or all content beyond the available free-of-charge article limit, etc. This concerns both current and archival materials.

As to the frequency of publication, websites are updated with new content every day or almost every day. Content published on all analyzed websites is marked with a time stamp, i.e. the date and time of publication are clearly visible. In one case, the date of the last update is also marked (gazetaprawna.pl). All those materials can be accessed through external (e.g. Google) and internal search engines and by exploring various sections for older content.

Apart from the time stamp distinguishing archival content, 4 websites have some sort of an "Archive" section or link. Only gazeta.pl does not have any such dedicated tab or link.

- In the case of tygodnikpowszechny.pl, the "Archive" tab that leads to a subpage is placed at the top of the page among other tabs.[15] It contains all published issues beginning with no. 04/2012. The archive does not have a separate search engine, but the table of content for each issue is available free-of-charge upon clicking on the relevant cover. Access to archived electronic versions of articles is, in many but not all cases, granted upon payment.

- The link to the "Archive" of polityka.pl is placed at the top of the page among other sections and it leads to a separate website.[16] The archive gathers articles from the printed edition published since 1998. It also contains bibliographic data for articles published before 1998, since January 1993. The archive can be browsed for free via an internal search engine; however, full access is paid and available to subscribers of the digital version of Polityka who are logged in.

- The website wyborcza.pl does not have its own separate archive, but at the bottom of the page, it contains a link to a separate website housing the digital archive of Gazeta Wyborcza's printed edition.[17] The archive contains all articles which appeared in print since 1989. The archive can be browsed for free via its internal search engine, but access to particular articles is provided upon payment.

[15] Available at: www.tygodnikpowszechny.pl/archiwum.
[16] Available at: archiwum.polityka.pl.
[17] Available at: www.archiwum.wyborcza.pl/Archiwum/0,0.html.

- The website gazetaprawna.pl does not have a separate "Archive" section; however, it provides a link to the e-edition of Dziennik Gazeta Prawna. The website for the e-edition links to the "Archive" section.[18] The archive contains e-editions of all Dziennik Gazeta Prawna issues since 2002. Access to this archive is granted upon payment.

Archival content can also be accessed through e-editions of printed press. All 4 websites which have printed equivalents contain information on access to their e-editions in various formats (e.g. PDF, MOBI, EPUB). E-editions are available upon payments and can be purchased either from the analyzed website (e.g. on gazetaprawna.pl by purchasing a subscription to the e-edition) or through other platforms (Amazon, publio.pl, nexto.pl).

Hungary

In Hungary, the analysis concentrated on 5 popular news websites: hvg.hu, index.hu, mno.hu, nol.hu, origo.hu. Of those websites, 3 have printed versions (hvg.hu, mno.hu and nol.hu), while the remaining 2 only publish news online. The printed version of hvg.hu is a weekly and the other 2 are dailies.

The content on all websites is marked with a time stamp, i.e. the date of publication, but also with the date of the last modification. Interestingly, in the case of origo.hu, materials can also contain additional notification which says "the article was last updated X days ago. Its content might be outdated".

Two analyzed websites – index.hu and origo.hu – do not have a separate archive database, and old articles are freely accessible. The search and access do not require any kind of registration either. The archived content is also available through internal and external search engines.

In addition to the time markers, three websites also contain some sort of an "Archive" section:

- The hvg.hu website has a digitized archive of the printed version of the weekly. The archived articles are available as regular online versions. In order to gain access to the archived content, the reader has to register and log in on the website. Without it, only a short introduction is available. In the case of articles from the current issue, by default only introductions are available. The archive is accessible via search engines.

[18] Available at: edgp.gazetaprawna.pl/archiwum.

• The website mno.hu contains the online archive of its printed version, but only from 2003 onwards. The content of a newspaper automatically becomes part of the online database after eight days. The archive itself is not completely free. After the upload of the new content, the access is free for 30 days. After that period the content is accessible upon payment of a fee. The website and its archive can be accessed via search engines.

• The nol.hu website has an archive subpage, but its place on the website is not immediately visible.[19] The access to the content of the archive is free. Every article has its own link, with – usually – the title of the article and a code of numbers (without the "/archivum" subpage name).

In the case of websites, there is often no clear distinction between an archive and new articles, and only the date of publication can give a sufficient clarification as to the character of the content. However, a separate archive is not required, since a search engine is enough to find the sought article. In the case of digital archives of printed versions, the access is conditional, for example upon registration or payment of a fee.

Czech Republic

In the Czech Republic 4 websites were analyzed: respekt.cz, reflex.cz, blesk.cz, idnes.cz. All 4 websites have printed editions. In 2 cases printed editions are published daily (blesk.cz, idnes.cz) and in 2 – weekly (respekt.cz, reflex.cz).

Content published on all analyzed websites is marked with a time stamp, i.e. the date of publication or date and time of publication under the article title. In the case of respect.cz, the date of last modification is also visible. In the case of 2 websites which have a daily print edition, there were no separate archive tabs specifically for website content. However, idnes.cz contained a link to the digital edition of its printed equivalent which contained an archive section for the printed edition.[20] Issues available in the archive date back to 17 August 2009.

The remaining 2 websites for weekly newspapers contained a separate „Archive" tab:

• The website respekt.cz has an „Archive" tab at the top of the page. The tab leads to an archive subpage.[21] The archive contains electronic versions of articles published in print, dating back to 1990. Tables of content for each

[19] Available at: nol.hu/archivum.
[20] Available at: www.mfdnes.cz/archiv.aspx.
[21] Available at: www.respekt.cz/tydenik/2015.

issue are available for free. But, access to archived articles is granted upon payment, either as a purchase of an issue or as part of a digital subscription.

• On reflex.cz, the archive section is available, although not clearly marked. Covers of archival issues are displayed at the top of the page. They lead to the archive section.[22] The section contains material published since 2001. Tables of content are available for free upon choosing a particular issue. But, access to particular articles is granted upon payment of a fee.

Conclusions

A comparison of the situation in 3 project countries does not reveal significant differences in the presentation of archival content. All websites make archival content available, although not necessarily from the point of their creation. There were no situations when a website would present only the most recent content and bar access to the rest.

Archival content can be presented in a number of ways (some papers offer all options): directly on the website, in a dedicated „Archive" tab (separate website), through e-editions. It can be marked differently, but most websites show at least the date of publication. Sometimes, the date of last modification or an additional note on the archival character of content are also published.

It is quite common to make access to archival content available upon payment of a fee. This is mostly the case of websites which have printed editions. It is always the case in relation to access through e-editions. When it comes to website content, it may vary and depend on the general policy on access to content (whether it is paid or free).

It seems that, from a reader's perspective, a separate „Archive" tab is not necessary for all website content. In particular, it seems not necessary when the articles are published solely online, are marked with a date and time of publication and can be searched for via different search engines. Given that such content is extremely fluent and dynamically updated, and becomes archival in a matter of hours, if not minutes, letting it be „buried" under other materials seems to be a fairly rational solution.

However, in the case of websites which have a printed edition, a separate „Archive" tab for content which appears in both editions provides more clarity and an intuitive place where such archival content is sought more efficiently. It does function more as a library catalogue than a website archive, especially

[22] Available at: www.reflex.cz/archiv-vydani/detail/11/2015/46/.

when the archive has its own search engine and offers advance search options. Freely available tables of content and article previews in the case of some archives (mostly of weekly newspapers) are an additional advantage, as they allow one not only to get a glimpse of the issue's content, but also decide on the purchase.

1.2. Survey results

Methodology

The survey analyzed in this part of the report was conducted among representatives of the Polish media, both local and national, between August and November 2015. It addressed three major issues: the relationship between the printed and online editions, as well as the basic features of the Internet version; requests to unpublish online content; and the practicalities of handling such requests.

The survey had the following aims:

- to capture the prevalence of requests to unpublish online content from media archives;
- to provide information on who submits the requests and whether they do it personally or via hired professionals;
- to establish what types of content are usually targeted by the requests and on what grounds;
- to shed light on how the media respond to requests, what criteria they use, and who makes the final decision;
- to find out what the approaches towards unpublishing are, as well as inquire about other ways of interfering with online content.

Researchers aimed at reaching a wide selection of respondents, including tabloids, dailies, weeklies and magazines representing or promoting different political views.

The identification of respondents was facilitated by HFHR's previous experience – HFHR's "Observatory" program has so far provided legal aid to ca. 100 journalists and, from 2012 to 2014, organized 42 study-visits to local editorial offices across the country.[23] In order to identify potential survey participants

[23] See: D. Glowacka, A. Ploszka, Local press and its legal problems. Report from study visits in local editorial offices conducted between 11. 2012- 06.2014 (in Polish),Warsaw, Helsinki Foundation for Human Rights 2014,, http://www.obserwatorium.org/images/raport_podsumowujacy%20wizyty%20studyjne_25062014_DG2.pdf (accessed: 18 November 2015).

from national media, researchers made use of the information available on their websites as well as various contacts established in the course of day-to-day work. The survey was sent to 5 titles that HFHR knew had dealt with requests to remove or rectify online content.

We faced a number of challenges in the recruitment of respondents. Perhaps thanks to HFHR's previous engagements and the size of local media outlets, the challenges were less pronounced at the local level. It was much more difficult to recruit respondents at the national level, and the process had roughly two parts - when official recruitment channels were dominant and when professional or personal contacts were employed. The latter channel proved much more effective. The problems included, among others, identification of effective contact options (as generic, official emails or phone numbers almost always failed), identification of a competent person to fill in the survey (as some media outlets have complex internal structures and the responsibilities are spread) and time constraints on the part of respondents (as this was the election period in Poland). In the course of recruitment, one interlocutor from a national newspaper indicated that we were unlikely to receive a filled out survey, since its editor in chief has more important occupations. Another national newspaper declined filling out the survey, as it did not gather relevant statistical data.

In the end, the researchers reached out to 20 editorial offices of local press and 20 national media. In most cases an email with a link to the survey was preceded by a phone call. The respondents were asked to fill out the survey within a week. A follow-up reminder was sent one day before the deadline. If necessary, additional phone calls were made and emails sent. In the case of papers with countrywide outreach, the same procedure was followed. Ultimately, the researchers collected 11 replies from national and 12 from local media.

Research findings

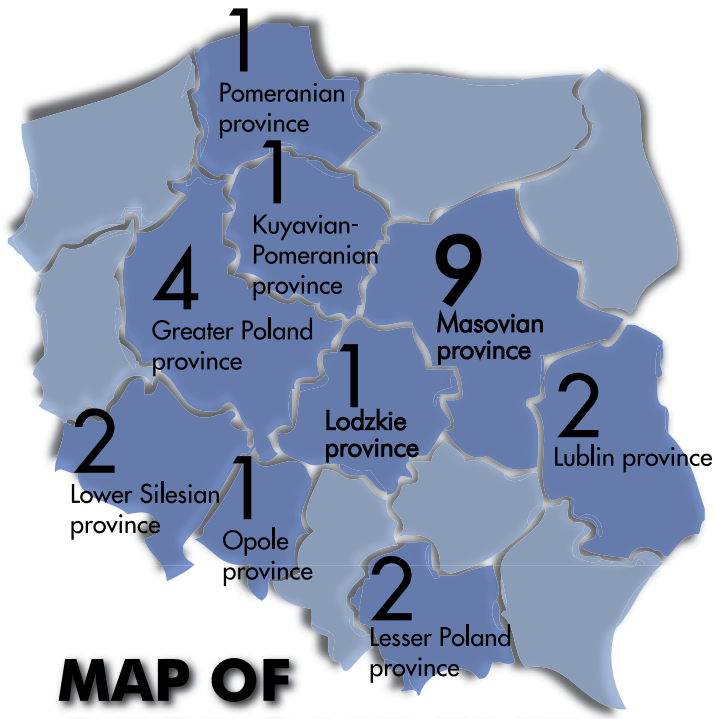
Whom we surveyed?

12 local papers

11 national media

Division into provinces:

Greater Poland province: 4
Pomeranian province: 1
Kuyavian-Pomeranian province: 1
Lesser Poland province: 2
Opole province: 1
Lower Silesian province: 2
Lublin province: 2
Lodzkie province: 1
Masovian province: 9
All other provinces: 0

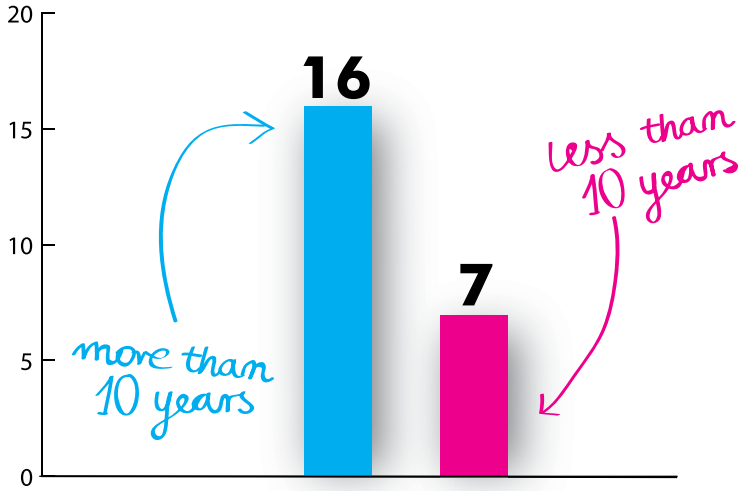


MAP OF RESPONDENTS

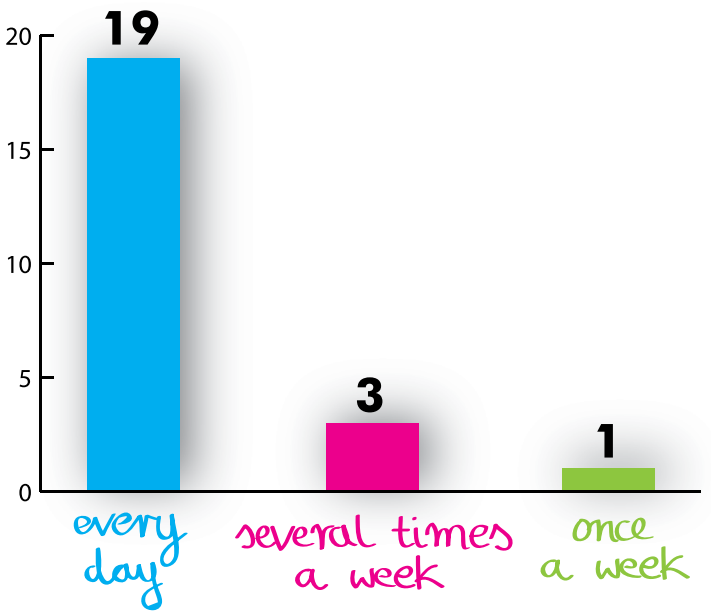
The map of respondents, taking into account the regions where they operate. In the case of national media, the map indicates the province where their head office is located. Most of those offices are located in Warsaw, hence the prevalence of respondents in the Masovian province.

The majority of respondents have been publishing information on their websites for 10 years or more. New information is usually published every day. A significant majority, in addition to running an Internet website, publishes a printed edition of the newspaper or magazine.

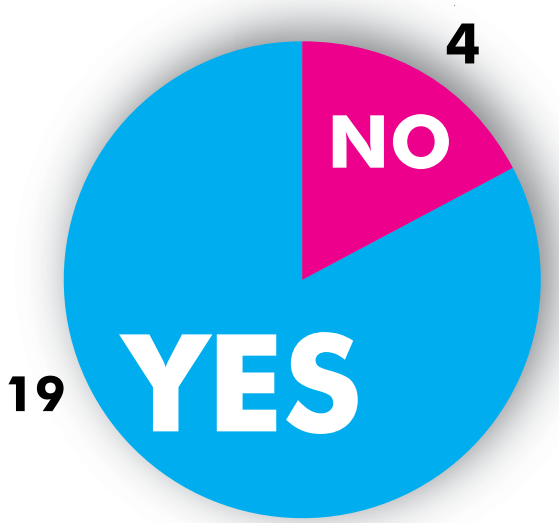
For how many years have you been publishing on an Internet website? (Q1)



How often do you publish new information on your Internet website? (Q3)

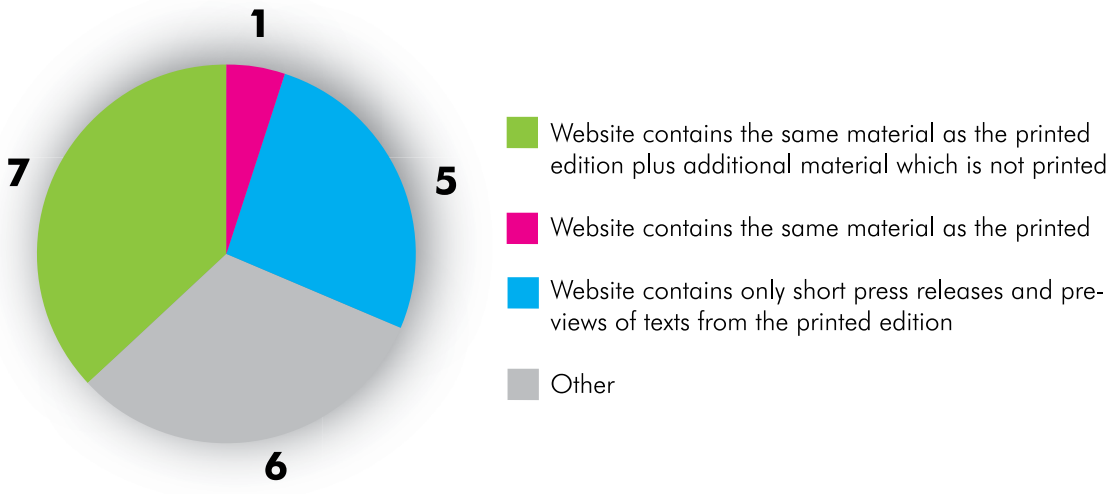


Apart from an Internet website, do you publish a printed edition of your newspaper? (Q4)



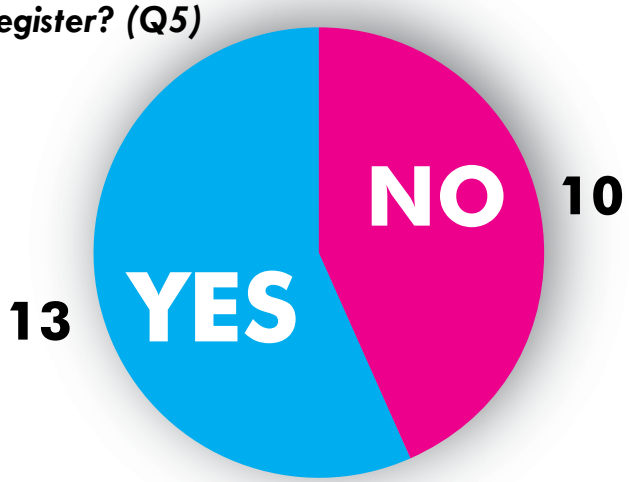
The relationship between the website and the printed edition of a newspaper or magazine varies. In a few cases the website contains the same material as the printed edition plus additional material. It is, however, also quite common that only short press releases and previews of texts are published online. Rarely does the website contain exactly the same material as its printed edition.

What is the relationship between the printed edition of the paper and its online edition? (Q4a)



When it comes to the website's registration as a separate press title, in 13 out of all 23 cases the website has been registered individually in the court register of newspapers and magazines.

Has your website been registered as a separate title in the court register? (Q5)



The registration of dailies and periodicals is governed by the Press Law (particularly Articles 20-21). A publisher is obliged to lodge a motion for registration with the court. One of the primary purposes of this institution is to protect the names of newspapers already existing on the market. The court may deny registration only if the motion is incomplete or if registration would constitute an infringement of the right to legal protection of another press title. According to Article 45 of the Press Law, a failure to comply with the registration requirement is a minor offence and the publisher may be sentenced to a fine of up to 5.000 PLN (ca. 1 250 euro). According to the Polish Supreme Court, the obligation to register applies to all media that meet the criteria of dailies or periodicals set forth in the Press Law (Article 7), irrespective of whether they are published online or offline.[24] *In practice, given that the Press Law was adopted in 1984, its provisions, including those on registration, are not compatible with contemporary circumstances, especially due to the recent advances in information technology. The fact that the provisions are outdated makes it difficult to determine whether a particular website fulfills the Press Law criteria, and therefore whether it should be registered.*

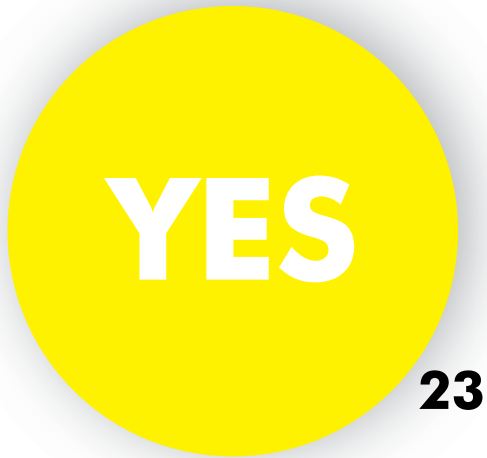
[24] The judgment of the Supreme Court in Poland, 2 March 2010, case no. II KK 174/08.

Requests to unpublish content

The survey's goal was to explore the experiences with handling requests to unpublish content. In the first place, the respondents were asked if they had received such requests. The question explicitly focused on journalistic material, advertisement, public announcements and other material that normally undergoes editorial control, and did not concern requests to remove content added by website users, particularly comments under articles or messages posted by internet users on a forum.

The survey revealed that 100 percent of respondents had received requests to unpublish content.

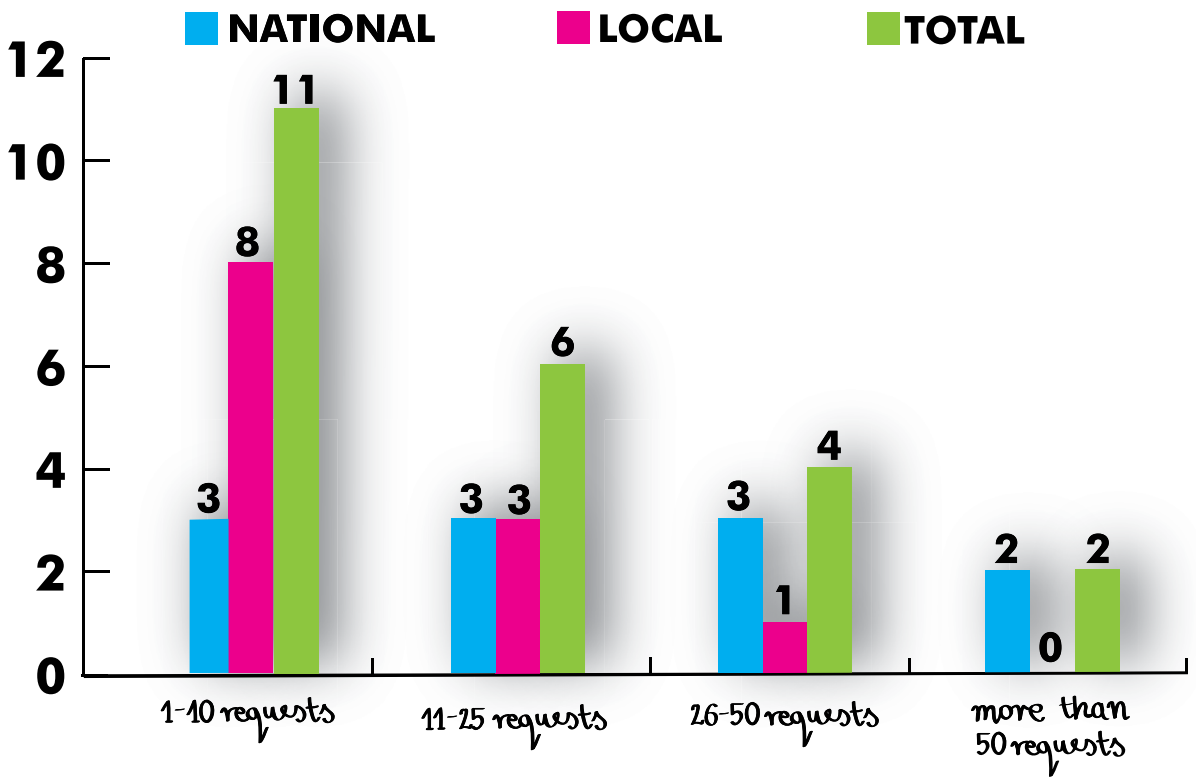
Have you ever received a request to remove material (or its fragment) published on your Internet website? (Q6)



In order to preliminarily assess the scale of the phenomenon and how common it has become, the respondents were asked to give an estimate number of requests they had received within the previous 5 years. The numbers varied. In general, national media handled a higher number of demands.

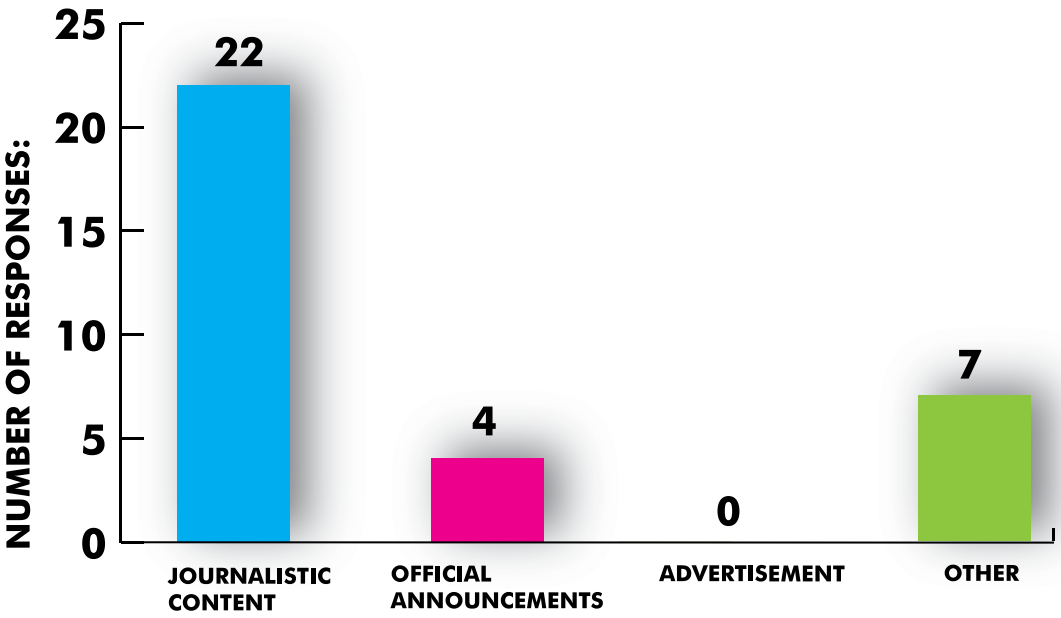
A vast majority of the local media received 10 or fewer requests. In the case of the national media the responses were more diverse. Only 3 respondents handled 10 or fewer requests, and the majority were faced with a larger number. At the same time, only a small part of national respondents received more than 50 requests.

How many requests (approximately) have you registered within the last 5 years? (Q7)

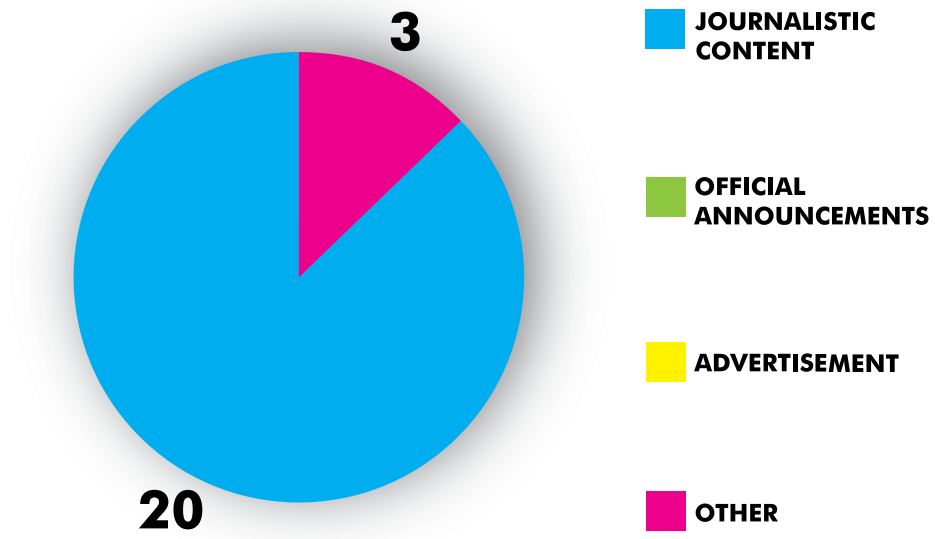


All but one respondent received requests concerning journalistic content and only few received demands regarding official announcements (e.g. arrest warrants, court information, public announcements). Persons filing requests did not demand the unpublishing of advertisements. Materials produced by journalists were subject to requests most often. Even though the survey explicitly excluded user comments, the respondents also indicated those as other targets of requests.

What type of material was subject to requests for online content removal (respondents could choose more than one answer)? (Q11)



Which material was subject to requests of online content removal most often? (Q11a)



In 2015, company Y., the publisher of magazine X., requested, through their lawyer, that we remove two texts concerning their problems with publishing the magazine and paying their debts, including to journalists. The publisher thought that the material contained untrue information and that it besmeared him. At the same time, the publisher requested 50 000 PLN in damages. We did not remove any of the materials from the website.

An inhabitant of X. requested that we remove newspaper material about a restaurant located on the premises she owned. The restaurant was run by a young woman who, due to financial difficulties, was not able to pay the rent on time. At one point, the place was flooded and the owner of the building demanded damages from the woman. Our journalist described the conflict between the two women with due diligence. The owner of the tenement house requested that we remove the text from our website, stating that it showed her in a bad light.

In 2013, we published an article describing the lobbying activity of a company from Warsaw. Our journalist described how company X. at the request of company Y. influenced, among others, journalists so that with their publications they helped block the changes in the law on recycling and reprocessing of batteries. In his investigative material, our journalist showed what steps company Y. had taken to block the law on reprocessing of used batteries. It hired company X., which was set up by two former investigative journalists. The article named many publishers and authors who used in their publications the materials prepared by company X., acting as if at that company's request.

One of the recent cases concerned police information on a search for a perpetrator of vandalism. The publication was accompanied by surveillance footage. After capturing the perpetrator, the police requested that we remove the video.

Requests pertained not only to texts but also photos. In one case a newspaper received a request from a person who demanded the removal of a photo, even though they were depicted only in the background.

A girl who posed in bikini and underwear two years ago finished studies and started working for a law firm. She requested the removal of her photos from the Internet.

A popular politician, who had been well-known as a musician, was not satisfied with a photo accompanying an article about him. He claimed that it portrayed him in a bad light. In the opinion of the editor, a photo from a concert presenting the politician not in a suit showed his real self. The protagonist himself, however, believed that it was not serious enough. The musician, at that time a presidential candidate, threatened that he would boycott an already arranged interview. Eventually, the politician gave the interview and the photo was removed.[25]

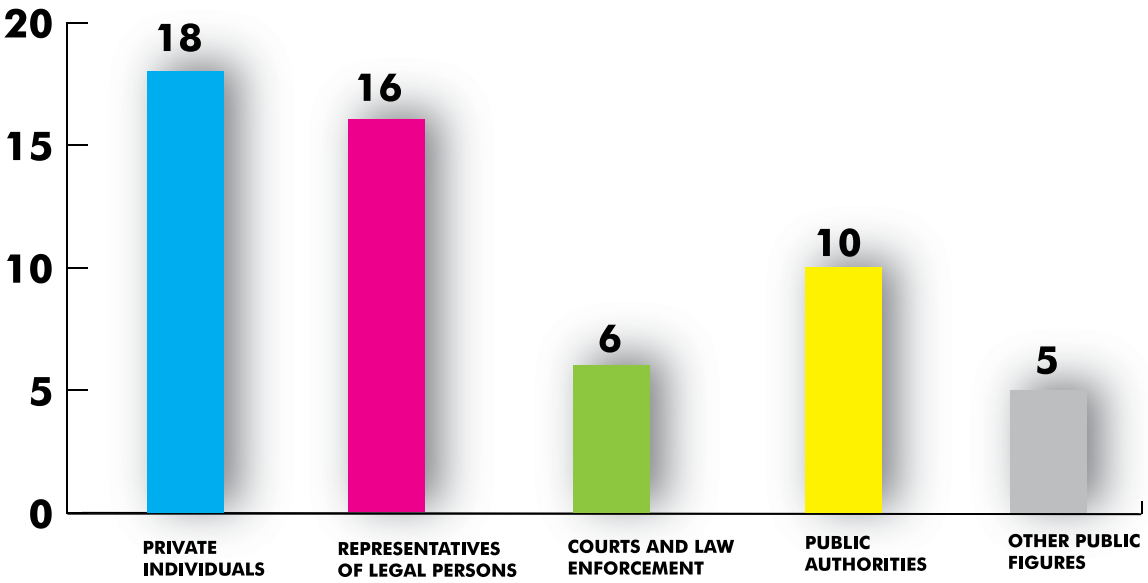
Some requests did not concern journalistic material, official announcements or advertisements, but tags (i.e. labels that highlight what a longer text is about). Interestingly, the additional content in some cases is not produced by journalists, but generated by bots – simple computer programs that perform highly repetitive operations. This is a novel challenge that publishers have to face in the course of managing online materials. It may also be a source of liability for content produced not by actual people.

Many of the recent requests concern the removal of tags. Some of the tags are created manually on the basis of a given text, but there are also bots that add tags on the basis of the most frequent Google searches. Under one of scandal-focused texts, a bot added a tag: „(person's name) arrested". The tag was removed, but the text was left intact because it did not raise any legal concerns.

The researchers were also interested in knowing who filed requests to unpublish online content. The majority of respondents received requests from private individuals as well as representatives of legal persons. Less than a half received demands from public authorities (e.g. politicians). About a quarter of respondents acknowledged that they had received demands from courts and law enforcement bodies, as well as other public figures (e.g. celebrities).

[25] The example was given by one of the respondents, however, for it to be understood outside of the national context the name of the politician has been removed and instead the description contains a reference to his previous occupation.

Which groups of stakeholders requested removal of online content (respondents could choose more than one answer)? (Q8)

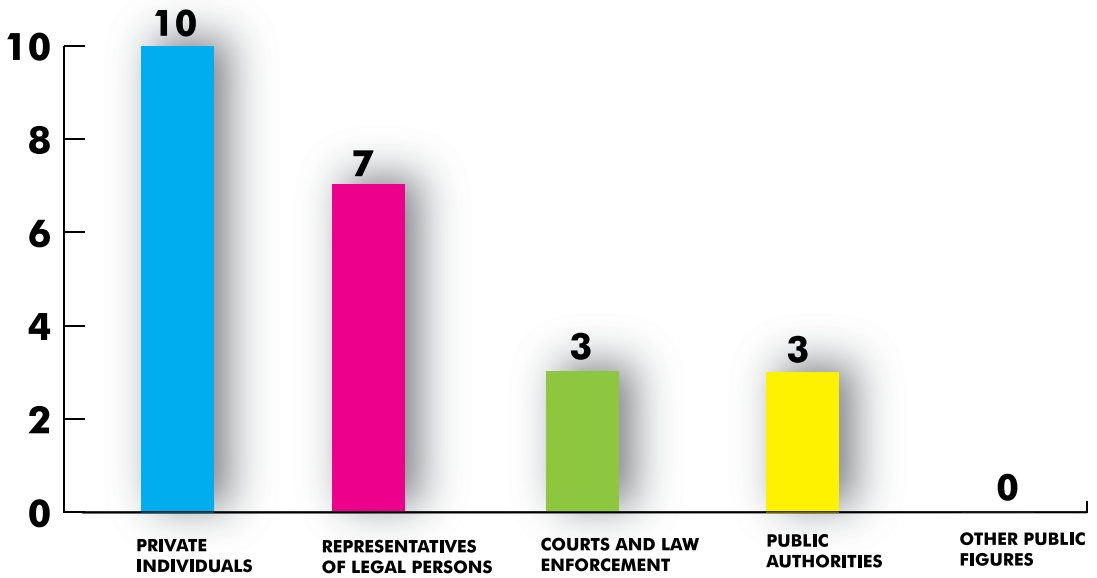


The mayor of X. wanted us to remove a text on the charges brought against him by the prosecution.

A person offering preparation of monographs as a service requested removal of an archival publication on how one of his books had turned out to be plagiarism. When someone wrote his surname in Google, this article showed up as the first one. The publication was not removed.

In addition, the respondents were asked to identify the person/institution (among the ones indicated in the previous question) who most often submitted the request to unpublish content. It turned out that private individuals and legal persons were much more active in this respect than public bodies such as courts, law enforcement agencies and public authorities.

Which group of stakeholders requested removal of online content most often?(Q8a)



Moreover, the survey inquired who approached the media and requested the removal of online content – namely, whether the people concerned would contact the media directly or they would hire a lawyer or a reputation management company to represent them in the course of the process. The aim was to establish the extent to which the activity of filing requests to unpublish online content has been professionalized. The respondents were asked to grade particular categories of persons on a scale from 1-3, where 1 indicated the highest frequency. The choices included: interested parties, lawyers on behalf of interested parties, and representatives of reputation management companies.

The survey showed that in the majority of cases individuals whom the material concerned filed the requests personally (15 indications of the highest frequency) or did it via a lawyer (9 indications of the highest frequency). It is still not very common to hire companies specializing in online reputation management to perform this task (only twice was this option indicated as the most frequent). The results suggest that, particularly with regard to reputation management companies, the activity of submitting requests to unpublish online content is not yet a popular service.

According to the media representatives, persons filing requests tend to put forward different reasons for demanding the unpublishing of content. They may state that the content is:

- inaccurate,
- obsolete (outdated),
- **offensive or defamatory,**
- concerns their criminal past, and therefore should be unpublished.

Offensive or defamatory character of the journalistic material is the reason quoted most often.

> *A person referred to in an article that described his fraudulent activities requested that we remove content from our archive, arguing that the described case concerned an event which had taken place 13 years ago and the text caused huge damage to his image, and gave space for abuse and actions which aimed to defame and harass him.*
>
> *One publication was removed at the request of a man who committed an offense and served his time. He said he would like to start a new life. Since this was a young man who committed a crime of passion, we decided to remove the content related to his past.*

The respondents were also given the possibility to list other justifications they had come across. Besides the grounds listed above, persons who demanded unpublishing would state that the content:

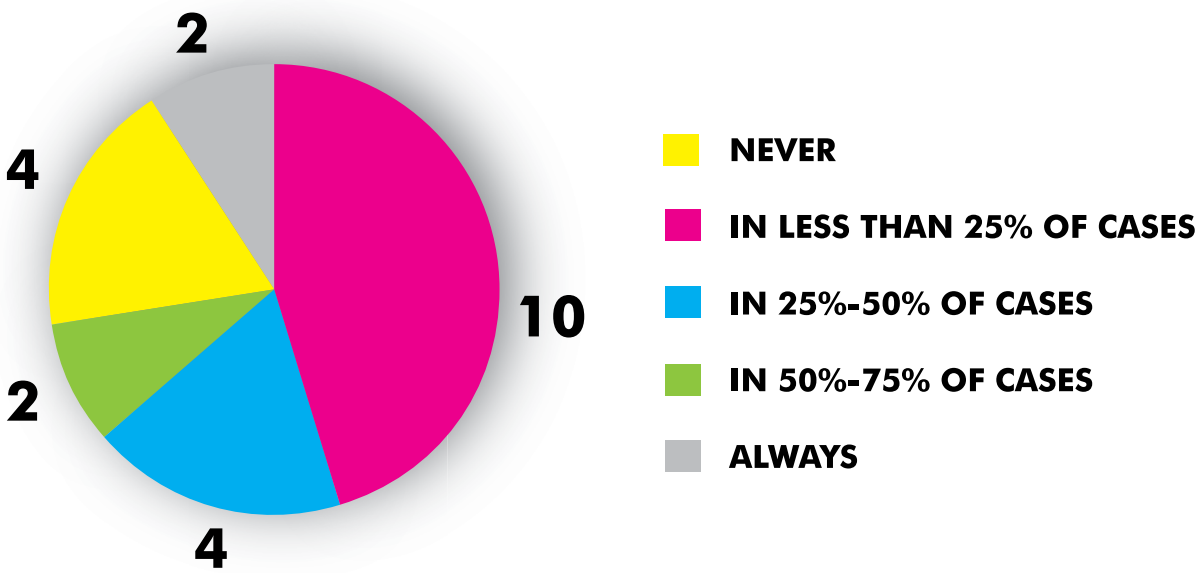
- was "dangerous" for the reputation of their company,
- put them in a bad light,
- stated something else than the person expected,
- violated copyrights.

Others withdrew consent for their personal data to be used in an article, or put forward a court decision that justified unpublishing.

On the basis of a decision handed by the civil court, we had to remove content from our website. The judgment against us for violation of personal interests of a politician ordered removal of an article which, in the judge's opinion, violated personal interests and contained untrue information. Interestingly, in relation to the same case, we were acquitted in criminal proceedings for defamation under article 212 of the Criminal code. In the judgment, 3 judges wrote that we published truthful information. The Supreme Court rejected our cassation appeal, and a pending case in the European Court of Human Rights is the epilogue to this story.

The survey had the aim of investigating how the media respond to requests. A significant majority of respondents tend to comply with requests in some cases. At the same time 4 respondents stated that they never did it. Interestingly enough, 2 local newspapers stated that they always complied with requests.

In what percentage of cases (approximately) did you decide to remove online content upon receiving a request? (Q12)



The survey contained an open question about the issues taken into consideration in order to make a decision whether to unpublish content. When faced with a request to unpublish online content, the respondents pay heed to:

- legal provisions, particularly the Press Law;
- legal basis of the request (Is there a court order?);
- truthfulness of information;
- journalistic due diligence, journalistic standards;
- compassion, best interest of the person, their well-being;
- validity of the request, whether the claimant „is right";
- potential success in court;
- public interest;
- ethics;
- PR viability of a court case;
- "peace of mind", convenience.

In April 2012, the president of one of the local companies requested that we remove from the website an article about her company published on 10 February 2010. As she argued: „The indicated article violates our personal interests, including the reputation of the company." The editor in chief declined to remove the text, justifying it in the following manner: „The material was prepared with due care for all journalistic standards and it presents a situation in two big companies at the turn of 2009 and 2010. I would like to remind you that the article contained an extensive statement of your authorship. Allow me to note that, in the two years that have passed since the article was written and published, I have received no rectification or clarification concerning the potential mistakes or untrue statements which would allegedly be contained in the text."

A girl calls – she does not look good in a prom photo. A guy calls – he does not want a photo of him with his son on the Internet, etc. [this respondent stated that upon a request they always removed content]

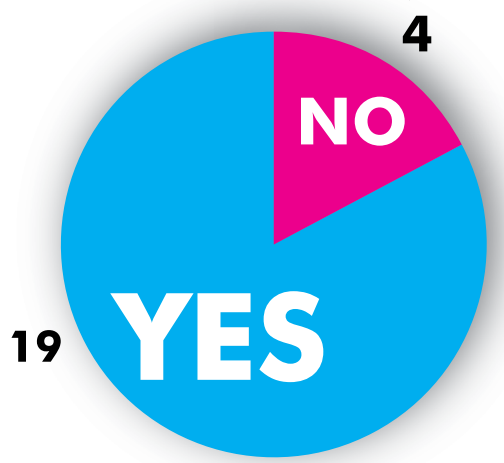
A private person, who performed a public function (local government) in the past, sued us after a couple of years after the publication concerning their public activity, requesting removal of publications about them from our archive. The person

claimed that information in those publications was untrue. As a result of a court settlement, the paper, in an attempt to avoid a lengthy and costly trial, agreed to remove the text from its internet archive, considering that the case was old and the person did not have such public significance anymore.

The survey inquired whether, besides unpublishing, media representatives interfered with archival content in any other way. A significant proportion of respondents answered that they did alter the material on their websites without, however, removing it. The answers substantially varied, which may indicate a lack of consistent practice among Polish papers.

Have you ever interfered with archival content in any other way than its removal (e.g. by publishing a rectification, updating information, posting a link to an article describing a follow-up to the initial story, anonymizing personal data of protagonists, etc.)? (Q19)

OTHER ACTIONS:



The most common ways of altering or "interfering" with content include:

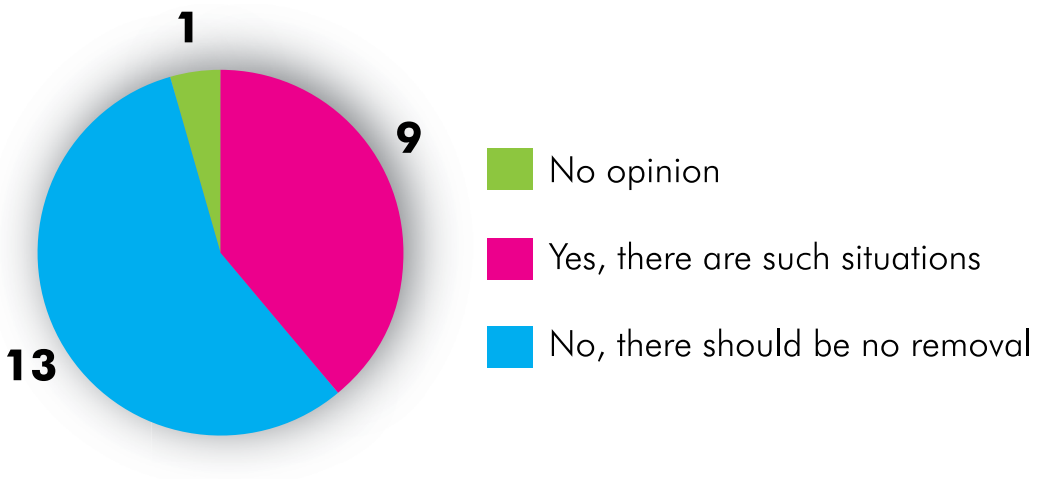
- updates/continuation [e.g. in the case of a missing person – information if the person is found; adding a link to the follow-up of the story];
- adding information [e.g. a statement from the party that previously, when the publication was prepared, had no opportunity to express their opinion; placing an explanation or commentary from the editor];
- anonymization upon the request of the person, deleting images of the person;
- removing a fragment of a text in order to make it anonymous;
- website "maintenance" [i.e. replacing hyperlinks that do not work];

- correcting substantive or editorial mistakes;
- rectification[26] [e.g. placing online the rectification that appeared in the printed edition];
- adding apologies.

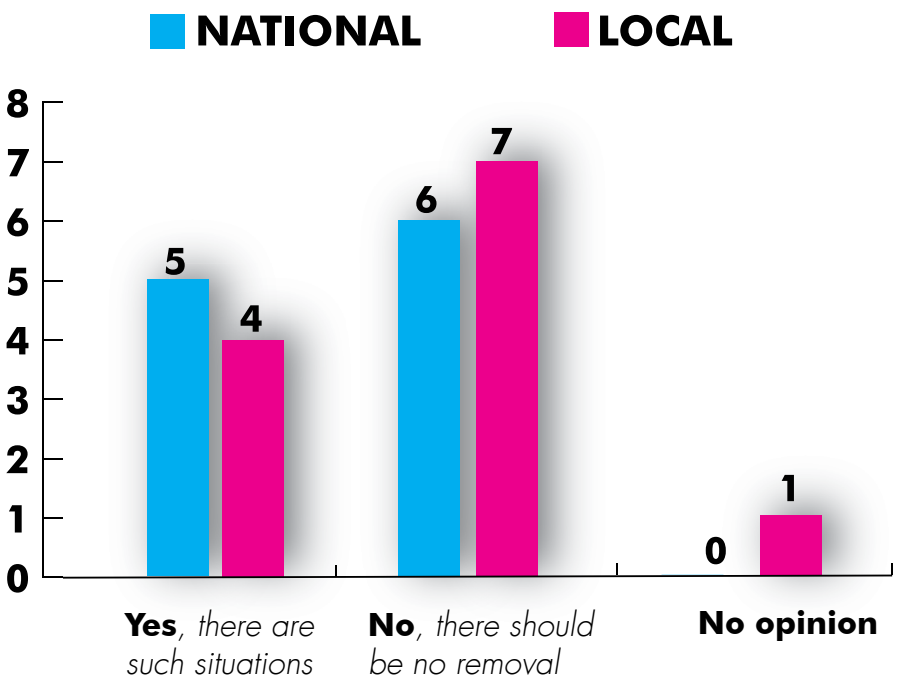
In their answers, 9 respondents stated that publications older than a given period of time were moved to a special tab „Archive". Two said that older publications were automatically made unavailable ("expired"). In 2 cases editors verify archival content and remove or update that which has become outdated.

Besides inquiring about the practice, the survey had the aim of exploring the approaches towards unpublishing content. In general, the majority, albeit slight, is in principle against such a practice. As regards the two groups, both the national as well as local media more often stated that they were against the removal of archival content, however in the case of the local media the discrepancy between those for and against was more visible. The respondents who were against agreed that deletion would be a violation of the integrity of press archives. The fact that the majority was, in principle, against the removal may come as a surprise, especially in the light of the fact that also the majority tends to comply with the request in some cases, and only 4 respondents stated that they never did that (see above, Q12).

Do you think that there are such situations in which archival content should be deleted from the newspaper's website? (Q18)



[26] For more information on the institution of rectification see the chapter on „Legal and ethical frameworks".



Those respondents who agreed that there were situations when archival content should be unpublished, listed the following circumstances that could justify the removal:

- the publication provides false information;
- there is no longer a need for the information on the persons concerned to be public (e.g. in the case of a disappearance) or the arrest warrant is out of date, and the person sought has been acquitted;
- infringement of personal rights;
- an obvious mistake;
- a person/company/institution demonstrates the legitimacy, validity, rationality of unpublishing content.

A woman disappeared and her relatives searched for her. She was eventually found, nothing bad had happened, there was no crime involved. The family asked us to remove the material and we did.

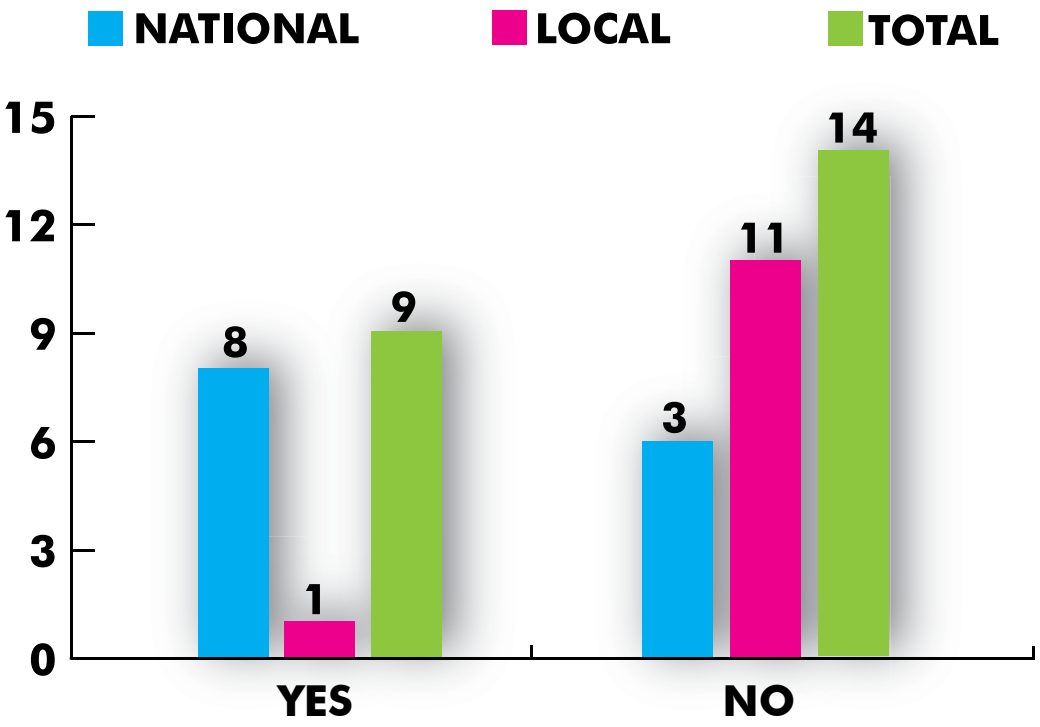
Technology allows you to correct/update publications on the Internet, and it is difficult not to use this opportunity. Keeping errors in the archives can cause more harm than good. In the case of the printed press, errors were hidden. In the case of electronic press every mistake is still alive. It is better to correct it than keep it for archival purposes.

The practice of unpublishing

One of the goals of the survey was to find out whether the media that publish their content online have established any formal or informal guidelines on how to deal with information that is no longer "news".

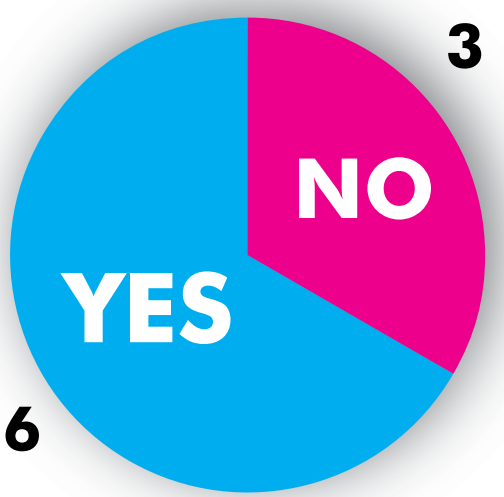
Of the 23 respondents, less than a half indicated that they did have guidelines, procedures or customs on online archive management, while the majority stated that such guidelines had not been put in place. The majority of those who said that guidelines existed were media with national outreach.

In your paper, are there any guidelines/procedures/customs related to the management of archival content published online?(Q17)



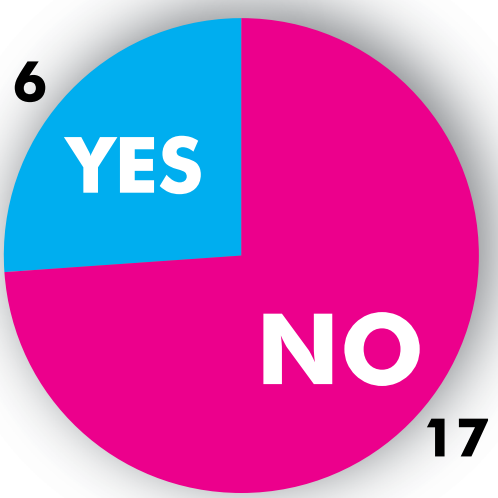
The significant part of existing guidelines include a procedure related to requests to unpublish online content, e.g. contain criteria applied when considering requests, determine the way in which a decision is made, etc. Among the media that do have guidelines, only two have them formalized. Both are national media outlets. In one case, the guidelines are publically available.

Do the guidelines concern the procedure related to requests to remove online content, e.g. contain criteria applied when considering requests, determine the way in which a decision is made, etc.? (Q17c)



As regards consulting a lawyer, the survey showed that, when deciding whether to comply with a request, all national respondents sought professional legal advice. This was, however, the case in only a half of the surveyed local media.

Did you consult a lawyer when considering requests for removal of content from your website?(Q16)



> *The name and surname of the person who submitted a request were listed in a box under an article from 2007. The box contained a list of people sought under a police arrest warrant. In 2014, the person requested that we remove the article from the Internet archive stating that this information was „untrue," „not in compliance with the current state of affairs" and that it damaged their good name. According to our lawyer, the archival article had a clearly indicated date of publication, which should be enough of a signal for a reader that the box described the state of affairs on the date of publication. The article was not removed from our internet archive.*

In the vast majority of cases (20), editors were involved in deciding whether to comply with a request. In some cases they made the decision together with a website administrator, in-house lawyer, publisher or the owner. In a small proportion of cases the decision was made by a publisher alone (2) or a legal team (1).

Conclusions

The fact that all respondents received requests to unpublish content proves that in the case of media with online presence it has become a very common phenomenon.

At the same time, bearing in mind the outcry and publicity surrounding the CJEU decision in the Google Spain case, which concerned the removal of a link to an announcement published upon the instruction of the Spanish Ministry of Labor and Social Affairs,[27] it may be interesting to highlight that only a small proportion of respondents received requests about official announcements, and the majority was related to journalistic material. Curiously, some requests applied to tags that were not generated by humans, but by bots. For publishers and editors it is a new challenge, and potentially a novel source of liability.

In light of the fact that the majority of respondents at least in some cases positively respond to requests to unpublish content, it may come as a surprise that a significant proportion is in principle against such a practice. At the same time, given that all respondents received requests to unpublish content, it is rather

[27] The judgment of the Court of Justice of the European Union, 13 May 2014, case no. C-131-12.

disquieting that of 23 less than a half have guidelines, procedures or customs on online archive management, while in the majority of cases the guidelines have not been established.

In the course of study-visits that had taken place before launching the survey, HFHR lawyers noted that local media tend not to rely on professional legal assistance. This is not solely due to limited resources, but also the fact that at the local level access to lawyers who specialize in media law is quite limited.[28] The survey confirmed these previous observations. When faced with a request, all the national media consulted a lawyer, but only a half of the local media sought professional legal advice.

See Annex 1 (p. 90) for the full text of the survey conducted among media practitioners in Poland and Annex 2 (p. 96) for infographics summarizng the main survey results.

[28] See: D. Glowacka, A. Ploszka, Local press and its legal problems. Report from study visits in local editorial offices conducted between 11. 2012-06.2014 (in Polish),Warsaw, Helsinki Foundation for Human Rights 2014, http://www.obserwatorium.org/images/raport_podsumowujacy%20wizyty%20studyjne_25062014_DG2.pdf (accessed: 18 November 2015).

Chapter 2
Legal and ethical frameworks

2.1. Legal framework

Introduction

It has already been highlighted in the report that online media in many aspects differ essentially from their traditional equivalents. These differences concern in particular the wide and long-term accessibility of materials published on the Internet. The character of online communication may therefore require that states develop alternative legal approaches adapted to the specific nature of this medium. The need for creating laws designed specifically for online content has been stressed on many occasions by the ECtHR. In the Węgrzynowski and Smolczewski v. Poland judgment, the ECtHR held that "the Internet is an information and communication tool particularly distinct from the printed media, especially as regards the capacity to store and transmit information. The electronic network, serving billions of users worldwide, is not and potentially will never be subject to the same regulations and control."[29] In another judgment, Editorial Board of Pravoye Delo and Shtekel v. Ukraine, the ECtHR underlined that the absence of clear domestic regulations with regard to online communication may seriously hinder the exercise of the vital function of journalists as "public watchdogs."[30]

The aim of this part of the report is to analyze to what extent the existing laws address the challenges related specifically to media online archives. The first section of this chapter provides an overview of international human rights legal instruments and standards that may be applicable in this area. It examines in particular numerous "soft law"[31] documents developed within the Council of Europe ("CoE"), the European Union ("EU") and the United Nations ("UN"). Moreover it analyzes the domestic legal frameworks in Poland, the Czech Republic and Hungary, in order to verify whether they could apply to archival media publications on the Internet.

[29] Op. cit., par. 58.

[30] The ECtHR judgment Editorial Board of Pravoye Delo and Shtekel v. Ukraine of 5 May 2011, application no. 33014/05, par. 64.

[31] In international law, the soft law consists of legally non-binding instruments such as opinions, declarations, recommendations developed by various bodies. Even though they lack a binding force they may have a practical effect and play an important role in increasing the effectiveness of international agreements and other legally binding instruments. Soft law may contain useful guidelines on applying or interpreting international norms.

International standards

The basic human rights relevant for handling media online archives are the freedom of expression and the right to privacy. At the international level, the freedom of expression is protected inter alia by Article 10 of the ECHR,[32] Article 11 of the European Union Charter of Fundamental Rights[33] ("Charter") and Article 19 of the International Covenant on Civil and Political Rights[34] ("Convenant"). The case law of the ECtHR made it clear that the freedom of expression was not designed to fit any particular medium and that Article 10 applies equally to offline and online content, and that it extends explicitly to preserving archival publications on the Internet.[35] Moreover, according to many soft law documents, the freedom of expression should be respected in a digital as well as in a non-digital environment, and should not be subject to restrictions other than those provided for in the ECHR, Charter or Covenant, simply because the communication is carried out in a digital form.[36] These documents solidify the role the Internet plays in the context of media activities and its importance for the exercise of the freedom of expression. At the same time, the ECHR, the Charter and the Covenant ensure the right to privacy.[37] The importance of adopting adequate legal framework to guarantee the protection of this right on the Internet has also been stressed in the ECtHR case law[38] and soft law.[39]

[32] Article 10.1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

[33] Article 11.1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.

[34] Article 19.1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.

[35] The ECtHR judgments: Węgrzynowski and Smolczewski v. Poland, op. cit., Times Newspapers Ltd. v. United Kingdom, op. cit.

No binding legal instrument, under any of the three international human rights systems, has precisely regulated the maintenance and management of media online archives. In fact, there is only one soft law document developed within the CoE framework that specifically addresses the problem. According to Article 1 of the Recommendation of the Committee of Ministers to member states on the right to reply in the new media environment:[40] "Any natural or legal person, irrespective of nationality or residence, should be given a right of reply or an equivalent remedy offering a possibility to react to any information in the media presenting inaccurate facts about him or her and which affect his/her personal rights." Pursuant to Article 7 of this Recommendation: "If the contested information is kept publicly available in electronic archives and a right of reply has been granted, a link should be established between the two if possible, in order to draw attention of the user to the fact that the original information has been subject to response." The Recommendation recognized therefore the need to append archived articles available online with comments or rectifications, in order to present the full story in the most comprehensive way possible.

[36] CoE: Committee of Ministers, Recommendation CM/Rec(2014)6 on a Guide to human rights for Internet users, 16 April 2014; Committee of Ministers, Declaration CM(2005)56 on human rights and the rule of law in the Information Society, 13 May 2005; Committee of Ministers, Declaration on the protection of freedom of expression and information and freedom of assembly and association with regard to Internet domain names and domain strings, 21 September 2011; Committee of Ministers, Recommendation CM/Rec(2012)4 on the protection of human rights with regard to social networking services, 4 April 2012; Committee of Ministers, Recommendation CM/Rec(2011)8 on the protection of the universality, integrity and openness of the Internet, 21 September 2011; Committee of Ministers, Recommendation CM/Rec(2007)16 of the Committee of Ministers to member states on measures to promote public service value of the Internet, 7 November 2015;
EU: EU Human Rights Guidelines on Freedom of Expression Online and Offline, 12 May 2015; UN: Human Rights Council, The promotion, protection and enjoyment of human rights on the Internet, 29 June 2012; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression: Report, no. A/HRC/17/27, 16 May 2011; Joint declaration on freedom of expression and the Internet signed by the UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur on Freedom of Expression and ACHPR Special Rapporteur on Freedom of Expression and Access to Information, 1 June 2001.
[37] Article 8 of the ECHR, Article 7 of the Charter, Article 17 of the Covenant.
[38] The ECtHR judgments: P. K.U. v. Finland from 2 December 2008, application no. 2872/02.
[39] CoE, Committee of Ministers, Recommendation CM/Rec(2014)6 on a Guide to human rights for Internet users, op. cit.; Committee of Ministers, Recommendation CM/Rec(2012)4 on the protection of human rights with regard to social networking services, op. cit.; Committee of Ministers, Recommendation CM/Rec(2007)16 of the Committee of Ministers to member states on measures to promote public service value of the Internet, op cit.; EU, EU Human Rights Guidelines on Freedom of Expression Online and Offline, op. cit.
[40] CoE, Committee of Ministers, Recommendation of the Committee of Ministers to member states on the right to reply in the new media environment, 15 December 2004, Article 26.

Other international human rights instruments refer solely to the general right to reply in the media, and impose an obligation to correct false or erroneous information "automatically and speedily, and with all relevant information provided."[41] They also underline the significance of the long-held journalistic standards such as the duty of accuracy, truthfulness, impartiality and the commitment to comply with the principles of professional ethics.[42] Even though these provisions are not Internet specific, they may be useful in the context of media online archives. That is because one can draw from them the duty to manage archival publications on the Internet in a way that would allow the reader to gain access to high-quality, accurate and up-to-date information. In the absence of more precise regulations, media practitioners should therefore rely on these general standards when managing their archival publications online. They may also serve as the basis for developing more detailed rules in this particular area in the future.

National legal frameworks

The study of legal instruments conducted in Poland, the Czech Republic and Hungary revealed that domestic laws do not contain any specific provisions referring to media online archives. It does not mean, however, that archival publications online are beyond any regulation. In all three countries, there are general constitutional provisions as well as civil, criminal, press and – in some instances – data protection law provisions that can be applied to the management of online journalistic content.

The basic guarantees of the freedom of expression and freedom of the press,[43] as well as the right to privacy and protection of personal data,[44] are set out in the Polish, Hungarian and Czech constitutional laws. The legal systems of all three countries also contain criminal provisions on defamation[45] and civil law regulations on the protection of personal rights.[46] These provisions may be

[41] CoE, Parliamentary Assembly, Resolution 1003 (93). Ethics of journalism, 1 July 1993; see also: CoE, European Convention on Transfrontier Television, 1 May 1993, Article 8.

[42] CoE, Parliamentary Assembly, Resolution 1003 (93). Ethics of journalism, op. cit., Articles 13, 21.

[43] Poland: Article 14 and 54 of the Constitution of the Republic of Poland; Hungary: Article IX section (2) of the Fundamental law of Hungary; Czech Republic: Article 17 of the Charter of the fundamental rights and freedoms.

[44] Poland: Article 49 and 51 of the Constitution of the Republic of Poland; Hungary: Article VI section (2) of the Fundamental law of Hungary; Czech Republic: Article 10 of the Charter of the fundamental rights and freedoms.

[45] Poland: Article 212 of the Criminal Code from 6 July 1997 (Journal of laws: 1997.88.553); Hungary: Article 226 of the Act C of 2012 on the Criminal Code, no. 2012/92, in force since 1 July 2013; Czech Republic: Article 184 of the Criminal Code, Act no. 40/2009 Coll.

[46] Poland: Article 23-24 and 448 of the Civil Code from 23 April 1964 (Journal of laws: 1964.16.93); Hungary: XI and XII Chapters of the Act V of 2013 on the Civil Code, no. 2013/31, in force since 15 March 2014; Czech Republic: Articles 81 – 117 and 2951 – 2971 of the Civil Code, Act no. 89/2012 Coll.

a basis for remedies aimed at protecting values such as private life, reputation or image[47] both with regard to offline and online media publications. In the course of civil proceedings in the three countries, the plaintiff may rely on remedies (e.g. the demand to terminate the violation and restore the previous state) that differ depending on the circumstances of a particular case. The plaintiff may, for example, demand that the unlawful information on the website is edited or blocked, or explanatory note or apologies are added next to the original publication. Plaintiffs may at the same time seek compensation, if moral and/or pecuniary damage occurred (the defendant may be also obliged to make a donation for charitable purposes).

In all three countries, there are laws regulating specifically press activities.[48] However, none of the legal acts in this area addresses precisely the issue of media online archives. The press laws in Poland and Hungary may still be relevant for handing this problem, as they apply to both online and offline media content. In contrast, the Czech Press Act is not applicable to Internet publications. The practical difficulty in Poland is that the Press Law was originally created with regard to traditional media and has not been adapted to the specificities of online communication.[49] Nevertheless, the general principles laid down by the Polish and Hungarian laws, such as truthful reporting, journalistic accuracy,[50] and the right to reply[51] (limited to rectification of false statements),[52] which apply to print publications, should also apply to the Internet accordingly.

Interestingly the Polish Press Law sets out special deadline for rectification of journalistic materials online (this provision was added in 2012 and is the only one in the Press Law that explicitly refers to "electronic form of a journal or magazine"). According to Article 32.1 of the Press Law: "the editor-in-chief is required to publish a rectification in an electronic form of a journal or magazine, within 3 working days from the date of receipt of the request."

[47] Under the Polish law, the right to image is protected also under the Act on Copyright and Neighboring Rights from 4 February 1994 (Journal of laws: 1994.24.83).

[48] Poland: Press Law from 26 January 1984 (Journal of laws: 1984.5.24); Hungary: Act CIV on Freedom of the Press and on the Basic Rules Relating to Media Content, no. 2010/170, in force since 1 January 2011; Czech Republic: Press Act, Act no. 46/2000 Coll.

[49] For example in the Hungarian press law "online journals and news portals" have been included in the definition of the "press product" (Article 1.6); whereas in Poland the definition of the "press" (Article 7) remains unchanged since 1984 and does not explicitly mention online publications.

[50] Poland: Articles 6 and 12 of the Press Law; Hungary: Article 10 of the Act CIV on Freedom of the Press and on the Basic Rules Relating to Media Content.

[51] Poland: Articles 31a-33 of the Press Law; Hungary: Article 12 of the Act CIV on Freedom of the Press and on the Basic Rules Relating to Media Content.

[52] In Poland and Hungary the polemics and questioning opinions are not covered under the right to reply (rectification).

In the case of printed journals, a rectification has to be published "in the nearest edition being prepared for printing, and in the absence of a technical capacity, in the subsequent edition, but no later than within seven days of receipt of the request" (Article 32.1.2).

There is also a noteworthy provision under the Press Act in the Czech Republic, even though – as mentioned above – in general it is not applicable to online publications. Apart from the right to reply (§ 10), it sets out the "right to subsequent statement" (§ 11). It imposes the obligation to publish the information about the final outcome of the legal proceedings if the newspaper previously reported on them. The information can be published at the request of the concerned individual (for example the defendant in the case). Taking into account the long-term preservation of media online archives, the "right to subsequent statement" seems to be a measure that would be particularly useful in the Internet environment.

Finally, in Hungary and the Czech Republic data protection laws can be used in order to alter media content online.[53] They contain general principles for data processing mechanisms and specific rights for data subjects, such as the right to rectification, erasure, or supplementing of personal data.[54] In practice a data subject who considers themselves to be a victim of a data protection violation in a newspaper publication may request that the publisher changes specific facts with respect to this person which were used in the given article. This is due to the fact that journalists and publishers can be liable for data protection breaches, and their activity can be subject to the control of the national Data Protection Authority.[55] This is particularly interesting in the light of the fact that such a situation would not be possible in Poland due to the inclusion of the so called "journalistic exemption" in the Polish Act on Protection of personal

[53] Hungary: Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information, no. 2011/88, in force since 1 January 2012; Czech Republic: Act on the Protection of Personal Data, Act no. 101/2000 Coll.

[54] Hungary: Article 14 of the Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information; Czech Republic: Article 21b of the Act on the Protection of Personal Data.

[55] See for example information about the case in which the Czech Data Protection Authority found that a newspaper breached data protection law when it published details of a private conversation between the prime minister and his mistress: https://www.uoou.cz/zverejneni%2Dosobnich%2Dudaju%2Dpochazejicich%2Dz%2Dodposlechu%2Dnebo%2Dzaznamu%2Dtelekomunikacniho%2Dprovozu/d-14874/p1=1099 (accessed: 26 November 2015).

data.[56] The journalistic exemption introduces certain limitations with regard to the application of data protection laws in as far as they are necessary to reconcile the right to privacy with the rules governing freedom of expression. In Poland, the data protection regime could not in principle be applied to cases concerning the disclosure of personal data in newspapers. Individuals affected by such publications may only rely on general criminal or civil law measures concerning the defamation or protection of personal rights.[57] In all three countries, however, the data protection laws can be used in order to limit the accessibility of media content through search engines. After the decision of the Court of Justice of the EU in the Google Spain v. AEPD and Mario Costeja González case,[58] a data subject may approach the search engine operator with a request to delist from search results links to certain websites displayed following a search made on the basis of the person's name. In principle, this tool can therefore be used also with regard to content available on the websites of the media in order to make it harder for Internet users to connect a particular person with the unwelcome publication via search engine. In practice, however, it seems that it does not have a major impact on media online archives (see Chapter 3 for more information).

2.2 Ethical framework

The development of online journalism created new challenges not only for legislators, but also in the area of media ethics. Among the numerous ethical questions related inter alia to verification of Internet sources or the use of social networking services by journalists, the management and maintenance of media online archives may be one of the most problematic issues. The following section of the report analyzes whether this challenge has been addressed in the existing ethical regulations of journalistic deontology in Poland, Hungary and the Czech Republic.

[56] See Article 3a.2 of the Polish Act on Protection of personal data from 29 August 1997 (Journal of laws: 1997.133.883): "Except for the provisions of Art. 14-19 and Art. 36 paragraph 1, the Act shall not apply to press journalistic activity within the meaning of the Act of January 26, 1984 – Press Law (Journal of Laws No. 5, item 24, with later amendments) and literary and artistic activity, unless the freedom of expression and information dissemination considerably violates the rights and freedoms of the data subject." This provision implements Article 9 of the UE Directive 95/46/EC of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

[57] See the judgment of the Supreme Administrative Court in Poland, 19 May 2011, case no. I OSK 1086/10.

[58] The judgment of the CJEU from 13 May 2014, case no. C-131-12.

The study revealed that the most comprehensive ethical rules that could be useful with regard to media online archives have been developed in Poland. The research in Poland concerned 8 ethical and self-regulatory codes or sets of guidelines which had been drawn up either by particular media organisations[59] or associations of journalists and publishers, such as the Association of the Polish Journalists, Association of the Journalists of the Republic of Poland or the Polish Chamber of Press Publishers.[60] Most of these documents do not contain any explicit references to media online archives. Only one of them – The Code of Ethics of Journalists[61] refers specifically to the maintenance of archival content in "electronic media," by stressing that it should be "adequately marked." The requirement to mark the archival character of all journalistic materials is underlined also in the Ethical Journalistic Principles of the Polish Television – information, opinions, reportages, documents, education[62] (it does not specifically relate to online media though). None of these documents, however, provides further guidelines on how this principle should be understood by media practitioners and implemented in practice, especially in the online environment. So far, the most precise recommendation with regard to media online archives has been made by the Polish Chamber of Press Publishers. It has not been included, however, in the self-regulatory code developed by this organisation, but in one of the Statements of Chamber's Board from 21 May

[59] Polish Radio, Zasady Etyki Zawodowej w Polskim Radiu S.A. (Ethical Principles of the Polish Radio), http://www.krrit.gov.pl/Data/Files/_public/pliki/publikacje/analiza2006_07.pdf; Polish Television, Zasady etyki dziennikarskiej w Telewizji Polskiej S.A. – informacja, publicystyka, reportaż, dokument, edukacja (Ethical Journalistic Principles of the Polish Television – information, opinions, reportages, documents, education), http://s.tvp.pl/repository/attachment/0/e/e/0eea386c0fa98ad0c49f73f1a9f7c8e71445347977947.pdf; Polish Television, Zasady postępowania dziennikarzy TVP S.A. w okresie kampanii wyborczej i w czasie wyborów (The Code of Conduct for Journalists of the Polish Television during the election campaign), http://centruminformacji.tvp.pl/15793040/zasady-postepowania-dziennikarzy-tvp-sa-w-czasie-kampanii-wyborczej-i-w-czasie-wyborow (all accessed: 23 November 2015).

[60] Conference of Polish Media, Karta Etyczna Mediów (Media Ethical Charter), http://www.krrit.gov.pl/Data/Files/_public/pliki/publikacje/analiza2006_07.pdf; Conference of Polish Media, Dziennikarski Kodeks Obyczajowy (Code of Practices of Journalists), http://www.krrit.gov.pl/Data/Files/_public/pliki/publikacje/analiza2006_07.pdf; Polish Journalists' Association, Kodeks Etyki Dziennikarskiej (Journalistic Code of Ethics), http://www.sdp.pl/s/kodeks-etyki-dziennikarskiej-sdp; Association of the Journalists of the Republic of Poland, Dziennikarski Kodeks Obyczajowy (Code of Practices of Journalism), http://www.krrit.gov.pl/Data/Files/_public/pliki/publikacje/analiza2006_07.pdf; Polish Chamber of Press Publishers, Kodeks Dobrych Praktyk Wydawców Prasy (Code of Good Practices of the Publishers), http://www.iwp.pl/pliki/KDPWP.pdf (all accessed: 23 November 2015).

[61] Op. cit., Article II.8.

[62] Op. cit., Article IV.4.

2009.[63] The Statement recommended that publishers add explanatory notes to online versions of press articles that had been successfully challenged before the court. According to the Statement: "The Board of the Polish Chamber of Press Publishers, taking into account good publishing practices regarding inter alia the protection of personal rights, recommends adding to articles available in newspaper online archives the information about unfavourable final judgments in cases against publishers (for example by giving references to those judgments)." The Chamber suggests, therefore, that if – for example – the court finds the newspaper's article defamatory, the publisher should inform the readers about the judgment on its website, next to the original publication.

Another noteworthy self-regulatory document is the Code of Conduct for Journalists of the Polish Television during the election campaign. It explains how journalists should handle historical materials used to report current events. According to the Code: "Archival material used in the programs has to be related directly and in substance to the subject of information or reporting. It is forbidden to use it in a tendentious manner, e.g. to ridicule a politician or to win him the public, or to gain the audience's support for a particular thesis. While broadcasting, archival material should be clearly marked and accompanied by a date."[64] Although this provision is mentioned in the electoral context and it does not relate directly to media online archives, it introduces principles valuable for fair and responsible use of archival content by journalists, and as such may serve as the basis for developing more general standards.

Other analyzed journalistic codes of ethics available in Poland do not explicitly refer to archival publications (neither online nor offline). They all, however, include various provisions regarding journalistic accuracy, transparency, respect for privacy of people who are subject of news, and the obligation to rectify false or inaccurate information. One example is the Media Ethical Charter drawn up by the Conference of Polish Media (consisting of representatives of journalistic organizations, publishers, producers as well as radio and television broadcasters). Pursuant to the Charter, journalists should make sure that all the information is truthful and pictured in the right context. Should there be any inaccuracies, they have to be immediately corrected.[65] Despite the general nature of these ethical principles, they may prove very relevant when applied in the context of media online archives.

[63] Polish Chamber of Press Publishers, Stanowisko zarządu Izby Wydawców Prasy w sprawie udostępniania w internetowych archiwach gazet i czasopism artykułów, co do których zapadł prawomocny wyrok w postępowaniu sądowym (Statement of the Polish Chamber of Press Publishers concerning maintaining articles in media online archives which were subject to final court's judgment), 21 May 2009.

[64] Op. cit., § 14.

[65] Op. cit., Principle of truth.

As regards the principles of journalistic ethics in the Czech Republic[66] and Hungary,[67] the ethical and self-regulatory codes include only general principles of accuracy and the obligation to rectify false information (similar to the ones available in Poland). In both countries, none of the journalistic codes of ethics which have been analyzed in the course of this study contained provisions specifically referring to the maintenance or management of media online archives.

2.3. Conclusions

Chapter 2 of the report provided an analysis of the legal and ethical frameworks relevant for the maintenance and management of media online archives. It was based on the examination of international and national instruments in Poland, Hungary and the Czech Republic. The main finding is that dealing with archival media content on the Internet is not specifically regulated either by law or journalistic ethics at the moment. At the same time, it is clear that general freedom of expression and the right to privacy standards as well as national civil and criminal law measures aimed at the protection of reputation apply equally to digital and non-digital environments. They may, therefore, be used for altering online publications as well. A person referred to in a harmful, irrelevant or outdated journalistic material on the Internet may refer to provisions on defamation or the protection of personal rights and – depending on the circumstances of the case – ask for the unpublishing or modification of online content (such a request may not always be legitimate though – see Chapter 3 for more information). Moreover, standards of journalistic accuracy and the duty to publish a rectification of false statements provided both in the press laws in Poland and Hungary[68] and the journalistic ethical codes in all three countries are also applicable to media online archives. These provisions can currently serve as the basis to append, correct or update archival online content in order to preserve the high quality of information. Such interventions,

[66] Journalists' Syndicate, Etický kodex (Code of Ethics), http://www.syndikat-novinaru.cz/etika/kodex, (accessed: 25 November 2015).

[67] Community of Hungarian Journalists, Etikai kódex (Code of Ethics), http://muk-press.hu/?page_id=26 (accessed: 25.11.2015); National Association of Hungarian Journalists, Újságírói etikai kódex (Code of Ethics of the Hungarian Publishers), https://muosz.hu/cikk.php?page=bizottsagok&id=3221&fo=8&iid=5; Association and the Media Council of the National Media and Infocommunications Authority, Magatartási Kódex (Code of Ethics of the The Hungarian Publishers' Association and the Media Council of the National Media and Infocommunications Authority), http://tarsszabalyozas.hu/magatartasi-kodex; Forum of Editors in Chief, Önszabályozó etikai irányelvek (Guideline to Ethics), https://foszerkesztokforuma.files.wordpress.com/2012/01/etikai-iranyelvek_vegleges.pdf (all accessed: 25 November 2015).

[68] In Czech Republic the obligations of accuracy and rectification also exist under the law, but the Press Act is not applicable to the Internet.

when necessary, should become a common practice among media practitioners to ensure the accuracy and comprehensive nature of their online archives.

In general, the comparison of the legal and ethical frameworks in the three Visegrad states shows that, as regards regulations that could be applied to media online archives, no major differences exist between these countries at the moment. There are only two significant differences that could be highlighted. The first difference is the question of non-applicability of the Czech Press Act to online journalistic publications while in Poland and Hungary the press laws apply to Internet media. The second difference concerns the provision regarding "journalistic exemption" in the Polish Act on Protection of personal data which results in the limited use of this Act with respect to media publications. In contrast, in the Czech Republic and Hungary the data protection laws can be applied to journalistic activities.

There are also certain provisions in national laws or ethical codes that should be emphasized as particularly important in the context of media online archives. These include the provisions of the Polish ethical codes on the obligation imposed on the media to adequately mark archival content. Moreover, there is a self-regulatory provision in Poland imposing certain limitations with regard to the use of media archives in the current news such as a prohibition to use them in a biased or manipulated way. Another provision that could be useful for digital media is the "right to subsequent statement" provided by the Czech Press Act. Such an obligation with regard to media content on the Internet would be consistent with the recommendation of the Polish Chamber of Press Publishers, which suggested adding to archival newspaper online articles information about unfavourable final judgments passed in cases against publishers. It would also be justified due to the long-term preservation of online news and the nature of the Internet, where content can be easily modified. In fact, the implementation of such a measure would be even more practical with respect to online media than in the case of printed publications.

Chapter 3

Case law

Chapter 3 intends to present decisions of both international (section 3.1) and national courts (section 3.2) that concern privacy violations in the context of publishing archival media content on the Internet. The aims of this case law analysis are to examine the reasoning of the courts when deciding upon requests for unpublishing content from media online archives, to compare legal approaches in Poland, the Czech Republic and in Hungary, and to verify to what extent they comply with the human rights standards established in international jurisprudence. In the face of imprecise legal and ethical frameworks (see Chapter 2), it is perhaps the case law that could provide guidelines for media practitioners and lawyers, on how to approach the problem of the maintenance and management of media online archives. Moreover the section 3.3 of this Chapter is an attempt to reflect on the impact of the CJEU "Google Spain" judgment[69] concerning the so-called "right to be delisted" in the context of media online archives at the national level in Poland, Hungary and the Czech Republic.

3.1. International case law

In Europe, the ECtHR established important standards related to the management of media online archives in two cases: Times Newspapers v. United Kingdom[70] and Węgrzynowski and Smolczewski v. Poland.[71]

The first case concerned the British newspaper The Times and two articles it published in 1999. The articles' protagonist, G.L., found them defamatory and brought a civil lawsuit against the newspaper. While the first case was still pending, the articles were available on the website of The Times. Therefore, in 2000 G.L. initiated a second action for libel. Following this, the newspaper added on the website a disclaimer that the articles were subject to litigation. In the course of the second proceedings, the defendant asserted the statute of limitations relying on the so-called "single publication rule". According to The Times, "the only actionable publication of a newspaper article on the Internet is that which occurs when the article is first posted on the Internet." Based on this, the newspaper argued that the second action had been brought too late, after the expiry of the statute of limitations period. The British courts dismissed this argument and stated that "in the context of the Internet, (…) a new cause of action accrued every time the defamatory material was accessed

[69] Op. cit.
[70] Op. cit.
[71] Op. cit.

('the Internet publication rule')" (par. 13). The Times brought the case to the ECtHR arguing that the Internet publication rule constituted an unjustifiable and disproportionate restriction of its right to freedom of expression as provided in Article 10 of the Convention (par. 26).

The ECtHR first underlined that the Internet played an important role in the process of dissemination of information. It also noted that "the maintenance of Internet archives is a critical aspect of this role" and that they "fall within the ambit of the protection afforded by Article 10" (par. 27). Furthermore, the ECtHR recognized the essential role of media online archives for education and historical research (par. 45). It also underlined that "while the primary function of the press in a democracy is to act as a 'public watchdog', it has a valuable secondary role in maintaining and making available to the public archives containing news which has previously been reported" (par. 45).

At the same time, the ECtHR stressed that "the margin of appreciation afforded to States in striking the balance between the competing rights is likely to be greater where news archives of past events, rather than news reporting of current affairs, are concerned" (par. 45). According to the ECtHR the duty to ensure the accuracy of historical publications may, therefore, be more stringent than in the case of current news.[72] In this context the ECtHR noted that, until the commencement of the second libel proceedings, the newspaper had failed to add to the online versions appropriate information on the ongoing litigation. It also emphasized that the domestic courts had not suggested the removal of the article from the website, and that the requirement to add a disclaimer to the online article had not constituted a disproportionate interference with the freedom of expression. Therefore the ECtHR found no violation of Article10. The ECtHR did not consider it necessary to analyze the broader chilling effect created by the Internet publication rule. Although it accepted the application of this rule in this particular case, it also observed that in principle bringing legal proceedings after a significant lapse of time might be regarded as a violation of the freedom of expression (par. 48). In the case at hand, the libel actions related to the online articles had been commenced ca. 15 months after the initial publication and The Times could effectively defend itself. Thereby, according to the ECtHR "in these circumstances, the problems linked to ceaseless liability for libel do not arise." The general question whether the Internet publication rule or the single publication rule should apply to online publications was, therefore, not definitely resolved in the judgment.

[72] "(T)he duty of the press to act in accordance with the principles of responsible journalism by ensuring the accuracy of historical, rather than perishable, information published is likely to be more stringent in the absence of any urgency in publishing the material" (par. 45).

The standards related to the protection of media online archives were later developed by the ECtHR in the case Węgrzynowski and Smolczewski v. Poland. The case concerned two lawyers from Poland, Szymon Węgrzynowski and Tadeusz Smolczewski. In 2003 the domestic court allowed their claim for the protection of personal rights against the daily Rzeczpospolita. In an article it was suggested that the applicants benefited financially from obscure business contracts and contacts with politicians, acting as liquidators of insolvent state--owned companies. The domestic courts ordered the newspaper to publish an apology and to pay 30 000 zlotys (7,5 000 euros) to a charity. The judgment was enforced. In 2004, the lawyers filed another lawsuit concerning the fact that the same article was still available in the online archive of "Rzeczpospolita" and there was no reference to the prior judgment. The applicants argued that this led to a continuing violation of their rights, especially since the article was easily accessible through search engines. The applicants demanded the removal of the article from the archive, an apology and compensation. The domestic courts, however, dismissed the claim, arguing that the publication in online archives has a historical dimension (it was published online on the same date as the print version of the newspaper) and that harm suffered by S. Węgrzynowski and T. Smolczewski, caused by this publication, had already been compensated. The lawyers complained to the ECtHR arguing a violation of Article 8 of the ECHR (the right to privacy).[73]

The ECtHR accepted the national courts' decision and unanimously found no violation of Article 8. The ECtHR noted that Internet publications might be associated with a particular risk to the protection of private life, higher than in the case of printed press (par. 98).[74] At the same time, it confirmed the importance of the media online archives, emphasised already in the Times Newspapers v. UK judgment. According to the ECtHR, media online archives served the public interest. They are subject to the guarantees of the freedom of expression and maintaining them is one of the most important tasks of the contemporary media (par. 59).

The important contribution of this judgment to the development of the Strasbourg standard in the area of media online archives is that the ECtHR addressed more specifically the problem of unpublishing archival media content available

[73] The overview of this case is based on its description provided in: D. Glowacka, *The balancing of freedom of expression and the right to be forgotten on the Internet in the jurisprudence of European courts*, Seminar „Towards European Constitutionalism 2014", Warsaw University, 20-21 May 2014, http://pl.zpc.wpia.uw.edu.pl/wp-content/uploads/2014/05/The-balancing-of-freedom-of-expression-and-%E2%80%98the-right-to-be-forgotten%E2%80%99-on-the-Internet-in-the-jurisprudence-of-European-courts.pdf (accessed: 28 November 2015).

[74] See also the ECtHR judgment Editorial Board of Pravoye Delo and Shtekel v. Ukraine, op. cit., par. 63.

on the Internet. In this context the ECtHR underlined that "it is not the role of judicial authorities to engage in rewriting history by ordering the removal from the public domain of all traces of publications which have in past been found, by judicial decisions, to amount to unjustified attack on individual reputations" (par. 65). The ECtHR acknowledged, however, that "it would be desirable to add a comment to the article on the website informing the public of the outcome of the civil proceedings in which the courts had allowed the applicants' claim for the protection of their personal rights" (par. 65). In conclusion, the ECtHR did not find unpublishing justifiable and considered the addition of a disclaimer to the original publication to be sufficient.

Apart from the ECtHR case law, an important judgment which should be mentioned in the context of media online archives was delivered by the CJEU in the Google Spain v. AEPD and Mario Costeja González case.[75] It did not concern a request to unpublish media content from a website. It involved, however, a different, less direct, interference with journalistic archives on the Internet, namely limiting their accessibility via search engines.

Mr. Costeja González requested the removal from Google's search results a reference to information available in the Internet archive of one of the Spanish newspapers. The information concerned Mr. Gonzales's old financial liabilities and insolvency proceedings against him. It was published in 1998 at the request of Spanish authorities both in the paper and online edition of the newspaper. The newspaper refused to remove the information from its website even though Mr. Gonzales claimed the debt was not valid anymore and the information was no longer relevant. He then turned to Google and asked for delisting the reference to the newspaper's website so that it would not link to it when the man's name was entered in the search engine. Google refused to delist the link to the information. Eventually, the case was referred to the CJEU for a preliminary ruling.

The CJEU ruled that the operator of a search engine is obliged to remove from search results, displayed following a search made on the basis of a person's name, the links to information lawfully published on a third-party's website, if the information is "inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of its processing." The search engine operator may, however, dismiss such a claim, if the general public has a "preponderant interest" in being able to access the information. The "preponderant interest" may, for example, be related to the fact that the data subject has an important role

[75] Op. cit.

in public life.[76] As a consequence, it seems that search engine operators should be particularly cautious when asked to delist references to journalistic articles that, presumably, concern matters of legitimate public interest. The CJEU judgment provided, however, a tool that can be used to lessen the impact of certain media online publications, by making the access to them more difficult.

3.2. National case law

Introduction

The following section of Chapter 3 summarizes the findings from the case law analysis conducted in Poland, the Czech Republic and Hungary. The main criterion in selecting cases for the study was whether the principal legal problem revolved around the maintenance and management of media online archives. In particular the research was to cover cases in which the courts had to consider requests to unpublish or otherwise alter archival media content on the Internet. It focused on cases relevant for the identification of judicial criteria for accepting or rejecting such requests.

The purpose of this case law review was to examine the current judicial practice related to media online archives in the three countries and to verify to what extent it is consistent with the standards established by European courts which were outlined in Chapter 3.1. It also aimed at identifying good judicial practises in this area which could be recommended to other European countries.

According to the initial concept of the research, the project partners in each country were to identify 6 to 10 judicial decisions delivered between 1 January 2000 and 30 June 2015. In order to find the relevant jurisprudence the researchers used the following methods and tools: official and publically available case law databases (online and offline), commercial online legal databases, Internet-based desk research, freedom of information requests to public authorities and contacts with publishers. The researchers also relied on their own experience by referring to cases that they have worked on, or by contacting other lawyers or NGOs providing legal aid to media practitioners.

Overview of the identified cases

The national case law reports from Poland, Hungary and Czech Republic revealed that the number of judgments concerning media online archives that could

[76] The overview of this case is based on its description provided in: D. Glowacka, *The balancing of freedom of expression…*", op. cit. More information about the facts of the case and the CJEU judgment is available in the official press release no. 70/14, http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-05/cp140070en.pdf (accessed: 28 November 2015).

be included in the study varied significantly in the three countries. In **Poland 15 judgments**[77] have been identified, in **Hungary 5 judgments** and in the **Czech Republic – no relevant judgments have been reported.** While the difference in the number of available cases in Poland and Hungary turned out hard to explain (apart from the difference with respect to the size of the population in the two countries[78]), the report provided by the project partner from the Czech Republic contained a possible explanation on this matter. In the Czech Republic, the legal actions are brought mainly against printed materials. Once the courts find their content e.g. defamatory, the publishers immediately remove the article in question also from their online archives, even if the plaintiff did not specifically make such a request. That is because all the online copies of the article are considered its "republications" and from the moment the printed version is found unlawful, they can give rise to a subsequent legal action against the publisher. The common practice among media practitioners is, therefore, to also remove the incriminating material from their websites in order to avoid another sanction.

All the judgments identified in Poland and Hungary concerned civil law proceedings for the protection of personal rights. The requests to unpublish (or otherwise alter) archival online content were formulated by plaintiffs as one of the measures aimed at remedying the violation. Additionally, the plaintiffs usually asked for other remedies, for example to publish an apology on the defendant's website or to pay compensation. The vast majority of cases concerned newspapers' articles published simultaneously in their print and online editions. Plaintiffs usually made requests to remove or edit articles available through the main website of a given medium. There was, however, one demand to remove an article explicitly from the "website", its "archives section"[79] and also from the "e-edition" of this newspaper.[80] In another case, the plaintiff asked to unpublish an article from the website and to delete it from all the newspaper's servers and hard-drives.[81] As regards the time-period in which the reported judgments were delivered, most of the case law in Poland comes from 2012-2015, while in the case of Hungary from 2008-2012.

[77] See the Bibliography for the full list of Polish, Hungarian and Czech judgments included in this part of the study.

[78] Population in Poland: 38 562 189 (2015), population in Hungary: 9 897 541 (2015) source: TheWorld Factbook.

[79] In other cases these two categories were not differentiated even though some media keep their archival materials available both on their websites and in a separate "archives sections" or even a separate website housing a digital archive (see Chapter 2.1. to see different modes of organisation of archival media content online).

[80] The judgment of the Appeal Court in Warsaw, 29 January 2015, case no. VI ACa 499/14.

[81] The judgment of the Appeal Court in Warsaw, 18 August 2014, case no. VI ACa 1591/13.

Types of requests for remedies

In Poland, among the 15 cases which were included in the study, 14 concerned unpublishing information from media online archives and 1 case was about adding an apology to the archived material without removing it. Among the 14 cases concerning unpublishing, in 12 cases plaintiffs requested removal of the whole publication or its excerpt from the websites. In 1 case, the publisher removed the publication in question before the trial started, following the plaintiff's notice. Nevertheless the plaintiff believed it should have been unpublished earlier and still claimed compensation before the court. In 1 case, the plaintiff only asked for an apology to be added on the website, but the court obliged the publisher to remove the defamatory parts of the text anyway.

In Hungary, among the 5 judgments, in fact only 4 regarded media online archives: 2 cases concerned requests for unpublishing information from the website, 1 request concerned rectification and 1 – compensation for unlawful publication of the plaintiff's image online. The 5th Hungarian case was related to the use of the plaintiff's archival photo (the plaintiff was a child at the time it was taken) in the logo promoting one of the festivals in Budapest.[82]

In conclusion, **19 cases will be analyzed in the following part of the report** – 15 cases from Poland and 4 from Hungary. All presented judgments are final.

Types of information concerned and status of the plaintiffs

The vast majority of cases both in Poland and Hungary concerned journalistic articles. Only in 2 Polish cases were other kinds of materials involved. They fell under the category of "official announcements" (one arrest warrant[83] and one piece about the ongoing proceedings against a certain individual published in order to search for more victims who might have been interested in joining the trial[84]). As regards the "age" of the publications in both countries, most of them were originally published in the last 5 years preceding the initiation of court proceedings. The oldest publication came from 1999 (the plaintiff requested for it to be unpublished in 2012). The publications concerned various topics which can be divided into the following categories: 1) defamatory statements including false information (9 cases), 2) publications related to the criminal past of the plaintiff (6 cases[85]), 3) publications disclosing facts from private

[82] In this case the Hungarian courts ruled that the re-use of archival picture of the plaintiff, taken when the plaintiff was a child without her consent violated her personal rights. See the judgment of the Budapest-Capital Regional Court of Appeal, 28 September 2011, case no. 2.Pf.20.922/2007/5.

[83] The judgment of the Appeal Court in Białystok, 26 June 2015, case no. I ACa 230/15.

[84] The judgment of the Appeal Court in Lodz, 28 August 2013, case no. I ACa 350/13.

[85] For example journalistic articles informing about the plaintiff's previous engagement in criminal acts or publications of arrests warrants on the newspaper's website.

life that can be burdensome for the plaintiff's reputation (2 cases[86]), and 4) publications unlawfully disclosing the plaintiff's identity in a special context (2 cases[87]).

With regard to the status of the plaintiffs – both in Poland and Hungary they were in a vast majority natural persons (16 cases), among whom most individuals could be characterized as "public figures." However, only in 1 case, was the plaintiff a politician performing a public function. The rest of the requests came from other categories of "public figures" who had been subject to legitimate interest of the society. This included well-known individuals playing important roles in different aspects of public life, such as journalists or actors (3 cases) or individuals "who knowingly entered the public arena"[88] by – for example – engaging in criminal acts (6 cases). In 6 cases, the plaintiffs could be considered "private individuals." In 3 cases, the plaintiffs were legal persons (private company or a local government).

Judicial assessment of requests to unpublish

In Poland, out of 14 cases which concerned unpublishing archival media content, in 9 cases such claims were rejected by domestic courts and in 5 cases the courts ordered to remove the whole publications or their parts from the website.

• Request to unpublish rejected, no violation of personal rights

In 3[89] out of 9 cases in which requests to unpublish were rejected, national courts found no violation of the plaintiff's personal rights and dismissed their full claims. In these 3 cases, the courts found that the publisher could not be held liable for keeping in their media online archives historical information about criminal proceedings run in the past against an individual, even though after certain passage of time and change of circumstances, information has

[85] For example journalistic articles informing about the plaintiff's previous engagement in criminal acts or publications of arrests warrants on the newspaper's website.

[86] One of the cases concerned disclosing information from the plaintiff's intimate life. The second case concerned disclosing information about receiving social aid benefits by the plaintiff.

[87] In one case the publication disclosed the identity of one of the parties to the case pending before the court. In the second case the image of a person working as a jailor was published without his consent.

[88] The ECtHR uses this term to refer to people whose conduct attracts legitimate attention of the public opinion for example because they participated in some public events, engaged in criminal activity etc. See the ECtHR judgment Krone Verlag Gmbh & Co. KG v. Austria, 26 February 2002, application no. 34315/96, par. 37.

[89] The judgment of the Appeal Court in Białystok, 26 June 2015, case no. I ACa 230/15; the judgment of the Appeal Court in Warsaw, 17 June 2014, case no. I Aca 74/14; the judgment of the Appeal Court in Lodz, 28 August 2013, case no. I ACa 350/13.

become irrelevant. In one of these cases,[90] concerning an article reporting on a past arrest warrant (later invalidated), the plaintiff argued that a user might have a misconstrued impression that the information still available on the website (published originally when the arrest warrant was issued) reflected actual facts. The court disagreed with that by stressing two factors. First of all, the article had a visible date of original publication. Secondly, the publisher added a disclaimer informing about the invalidation of the arrest warrant followed by the discontinuation of the criminal proceedings against the plaintiff (the disclaimer was added after the plaintiff had approached the publisher asking for removal of the material before taking legal action). According to the court, such a disclaimer was a "clear message to users" that the information contained in the original content of the article may not be current and therefore does not constitute a "reliable source of knowledge about the actual activities of the plaintiff".

> *It is not justified to agree with the view (…) that in the popular consciousness, the Internet always functions as a source of the most current and up-to-date information, only because of the continued possibility to edit content. (...) The Internet would lose much of its assets, if we reduced its role to a constantly updated "encyclopaedia" that is "cleaned" from historical content. Archived information, that is often outdated, becomes a rich source of information for those seeking knowledge or entertainment. It should be noted that in this respect the Internet is no different from traditional media. Analogue editions of newspapers, magazines and television programs are also stored in the archives, except that accessing them by users is much more difficult.*[91]

The court considered, therefore, that marking the article with a visible date of original publication and adding a disclaimer informing the users about the follow up to the story are sufficient and adequate means to protect the plaintiff's personal rights. By contrast, the obligation to unpublish the information would have been "an illegal form of censorship and interference in the autonomy of the press, which is reflected by the possibility of collecting and archiving journalistic materials." Moreover, the court found that the journalist could not be expected to "keep track of the fate of people subject to their publications" as this would "disorganise journalistic work and distort its meaning."

This view was shared by the court in another case out of the 3 in which the plaintiffs' claims for protection of personal rights were fully dismissed. The case concerned the material about criminal proceedings run in the past against the plaintiff, published at the request of the police many years ago, on the website

[90] Ibidem, case no. I Aca 74/14.
[91] Ibidem.

of a TV program on criminal matters.[92] The material had a specific purpose – it was primarily addressed to victims of the plaintiff's criminal activity who could be interested in joining the trial against him. The plaintiff argued that the information should have been unpublished immediately after his conviction had become final as from that moment the publication was no longer relevant. The publisher removed the information from the website a few years later, soon after they received the notice from the plaintiff, which he sent once he was released from prison. Interestingly, the court in principle agreed with that view that the material should have been unpublished after it had become no longer relevant. However, it was the police's duty to notify the publisher about it and to ask for its removal from the website. The TV station did not have the obligation to verify the validity of information at its own initiative and, therefore, cannot be held liable for keeping the material in the online archive. The court confirmed thereby that journalists should not be expected to follow all of the stories they ever reported on, especially if the content was not a journalistic article but the announcement published at the request of a public institution.

> *[U]nder Polish law, there is no requirement for the defendant to regularly monitor the archive of its website and analyze all the data in terms of whether particular cases have already found their ending, and whether it is appropriate to keep them available on the website. (...) The imposition of the obligation to audit any matter placed previously on the website and check its current relevance would be impractical and in fact impossible. (...). Undoubtedly, the defendant has the right to act in trust for law enforcement agencies, reasonably assuming that if police previously authorized the publication of the perpetrator's image and data, once the publication ceases to be justified, the police shall inform the defendant.*[93]

- **Request to unpublish rejected, violation of personal rights**

In 6[94] of out 9 cases in which requests for unpublishing were rejected, the courts found that the publication which was subject to proceedings violated plaintiff's personal rights. Even though the courts decided that the violation occurred, they nevertheless dismissed the specific requests to unpublish the archival media content, by stressing it was not a justified and proportionate remedy to protect the plaintiffs' reputation. The Polish Supreme Court found in one of these cases that unpublishing "would lead to an unjustified repression for the defendant"

[92] Op. cit., case no. I ACa 350/13.

[93] Ibidem.

[94] The judgment of the Appeal Court in Warsaw, 19 March 2015, case no. I ACa 1362/14; the judgment of the Appeal Court in Warsaw, 29 January 2015, case no. VI ACa 499 /14; the judgment of the Appeal Court in Warsaw, 6 June 2014, case no. VI ACa 1409/13; the judgment of the Appeal Court in Cracow, 21 January 2014, case no. I ACa 1405/13, the judgment of the Appeal Court in Warsaw, 12 December 2012, case no. VI ACa 259/12; the judgment of the Supreme Court, 28 September 2011, case no. I CSK 743/10.

and the "court cannot be reduced to the role of a censor requiring 'excision' of the entire text or its parts."[95] At the same time, in all these cases the courts decided that the plaintiff should have the right to protect their privacy in the online environment and that traditional remedies (such as publication of an apology in the printed version of the newspapers or sole compensation) would have not been adequate and effective. Therefore, depending on the circumstances of the case, an appropriate and not too repressive way of remedying a violation may be a modification of the online content by adding an explanatory note, rectification or apologies to the original publication. Such modification would allow the reader to realise that the article contains defamatory statements or learn about the follow up of the reported story. Moreover, the Polish Supreme Court underlined that the same article kept in the online archives, even though with regard to its printed version it had already been established that it contained unlawful content, can still be a basis of another legal action.

> *It is not acceptable that the defamatory content on the Internet remains available online without any restrictions, as this would lead to a permanent violation of personal rights, and any earlier judgment ordering to publish an appropriate statement (for example an apology – ed.) in connection with the printed edition of the newspaper would not guarantee sufficient protection for the victim. It should be underlined that a statement published in the paper edition, along with the newspaper itself 'lives one day' while the online archive still contains defamatory material. Accordingly (…) it should be considered that the publication of the material in the online edition of the newspaper and keeping it in the online archive, after the same content published in the paper edition was already considered defamatory, can be a basis for seeking protection defined in Art. 24 of the Civil Code (protection of personal rights – ed.).*[96]

A disproportionate and too repressive character of unpublishing content from media online archives was the main argument used by the courts for rejecting this remedy. In many of these cases, the courts did not provide detailed justifications for their decisions in this respect. In some cases, the courts would solely rely on the ECtHR jurisprudence described in Chapter 3.1 to justify their positions, without analyzing other factors relevant for the assessment of the requests to unpublish. One of the courts additionally pointed out that removing the original publication would undermine the significance of another remedy requested by the plaintiff, namely an apology which was to be placed next to the original article. According to the court, an apology referring to the "non-existing" material would be unclear for Internet users, who would not be able to understand the context of its publication.[97]

[95] Ibidem, case no. I CSK 743/10.
[96] Ibidem.

Interestingly, in 2 judgments[98] the courts emphasized that unpublishing was not necessary because the articles no longer affected the plaintiff due to the long passage of time that lapsed from their original publication.

> *It should be remembered that the news published in newspapers, especially dailies, has a short life in the public consciousness. Due to the very large number of new information published every day, only exceptionally one goes back to the information in old editions of newspapers. In addition, news about the financial situation of the company[99] quickly becomes outdated and entities interested in determining its current situation (…) will not reach for historical issues. For the current and future contractors of the plaintiff, the present situation is what matters, and therefore, the fact that a few years ago a journalist wrote about the company's risk of bankruptcy does not currently affect the plaintiff (…). Thus, leaving an article which contains incriminatory content unchanged online no longer prejudices the plaintiff's reputation.*[100]

The last argument may seem surprising in the context of new information practices on the Internet which allow for quick and easy retrieval of materials published in the past. It is also not consistent with the position of the majority of the courts expressed in the analyzed national and international case law. That is because the majority of courts reiterated that online publications pose greater risk to the right to privacy than paper media reports, or even stressed the "permanent nature" of a personal rights violation caused by defamatory publications available on the Internet.

Lastly, it is noteworthy that in 4[101] out of 6 Polish cases in which the request to unpublish was eventually rejected (despite the fact that a violation of personal rights occurred), the lower instance courts initially allowed for removal of content. Only later did the appellate court change those judgments and refuse to grant this remedy in the review process. This may suggest that lower instance courts in Poland may be more willing to accept unpublishing in their jurisprudence, while higher instance courts are more likely to find it too restrictive for the freedom of expression.

[97] The judgment of the Appeal Court in Warsaw, 6 June 2014, case no. VI ACa 1409/13.
[98] The judgment of the Appeal Court in Warsaw, 29 January 2015, case no. VI ACa 499 /14, the judgment of the Appeal Court in Cracow, 21 January 2014, case no. I ACa 1405/13.
[99] The article contained inaccurate information about the financial condition of a company which was the plaintiff in the case.
[100] Op. cit, case no. VI ACa 499/14.
[101] Op. cit., cases nos.: I ACa 1362/14, VI ACa 499/14, VI Aca 1409/13, I ACa 1405/13.

In Hungary, among 4 identified cases concerning media online archives, there were 2 in which the plaintiffs asked for unpublishing of the whole Internet publication or its parts. In one of them such request was rejected.[102] In this case the publisher claimed before the court that he had removed the publication before the trial started. However, the article in question, even though not accessible through the newspaper's main website or via search engines, was in fact available in the archival database on the website, where it could be reached by those readers who knew the original URL code. The plaintiff did not manage to demonstrate before the court that the article was still available on the Internet; therefore, the court ruled only with regard to the obligation of the defendant to pay compensation, and dismissed the request for unpublishing. In this judgment, the court did not, however, discard unpublishing as an unacceptable remedy in a more general way.

- **Request to unpublish accepted**

In 5 cases in Poland the courts ordered unpublishing archival media content (whole publication or its parts) in order to remedy the violation of the plaintiff's personal rights. In 1 case, the newspaper was obliged to unpublish the whole journalistic article disclosing the individual's name in the material concerning irregularities in social assistance without the plaintiff's consent.[103] The article revealed that the plaintiff was one of the beneficiaries of social assistance. The court found that such information available in the online media, even though true, may undermine the plaintiff's reputation and, therefore, should be removed. The court did not consider any alternative measures of protection in this case, simply accepting all the claims formulated by the plaintiff.

In two other cases the court obliged the newspapers to unpublish those parts of the articles concerning the plaintiffs which violated their personal rights and to add apologies on their websites. One case concerned disclosing the plaintiff's name in the context of court proceedings to which he was a party.[104] The court found that the publication violated the plaintiff's personal rights because the newspaper breached Article 13.2 of the Press Law which prohibits disclosing identities and images of some individuals involved in legal proceedings. Interestingly, the court ordered to unpublish the content even though the plaintiff had not asked for it in his claim. In another case, the court ordered to remove from the journalistic article the excerpt including unfair, exaggerated opinions about the plaintiff's engagement in criminal activity (the plaintiff requested unpublishing with respect to the whole article, so his claim was accepted

[102] The judgment of the Budapest-Capital Regional Court, 10 April 2008, case no. 22.P.24.117/2007/2.
[103] The judgment of the Appeal Court in Cracow, 16 October 2014, case no. I ACa 945/14.
[104] The judgment of the Appeal Court in Cracow, 19 September 2012, case no. I ACa 703/12.

only partially; the court also rejected the request to delete the article from the newspaper's hard-drives and servers).[105]

In the last 2 cases in which the courts allowed for unpublishing, the publishers were obliged to remove only the plaintiffs' names from the articles. In one of these cases, the plaintiff specifically requested such "anonymization."[106] In another case, the plaintiffs asked for unpublishing of some larger parts of the journalistic material that referred to him.[107] In both cases, the court granted these requests only with regard to removing the information allowing for the plaintiffs' identification. Interestingly, in the second case the court justified its decision by saying that adding a sole apology or a note by the publisher explaining that the article contained defamatory statements about the plaintiff – would have not provided him with sufficient protection.

> *[I]nternet archives are a very easily accessible source of information for basically unlimited audience. While in the paper edition, the traditional activity of searching for archival article requires some effort, on the Internet it is enough to enter a key phrase in the search engine, which in this case could be the plaintiff's personal data, in order to easily find the desired publications. At the same time there are no time restrictions on the availability of the archived article. (…) [D]espite the fact that the defendant published information about the outcome of the proceedings concerning the protection of personal rights between the plaintiff and the publisher, the violation of the plaintiff's rights continues (…) [It needs to therefore be] considered what is the appropriate way to prevent further infringements (…). In the opinion of the Court of Appeals (…), deletion of the whole chunks of text is too far-reaching. (…) It will be sufficient to remove only the plaintiff's name from the publication".*[108]

In Hungary, in 1 case the court ordered to remove the defamatory parts of the publication which wrongly suggested that the plaintiff had committed crimes, along with the plaintiff's name.[109] The court found this measure adequate to remedy the violation. At the same time, it made some interesting remarks on the nature of personal rights' violation caused by online publications. It came to the conclusion that unlawful online article does not result in a continuous violation of the plaintiff's rights. According to the court, online articles are not any different in this respect from print materials (which may also be available for a long time after the original publication, for example in library stocks). The

[105] The judgment of the Appeal Court in Warsaw, 18 August 2014, case no. VI ACa 1591/13.
[106] The judgment of the Appeal Court in Warsaw, 8 May 2014, case no. 1061/13.
[107] The judgment of the Appeal Court in Cracow, 19 September 2013, case no. I ACa 815/13.
[108] Ibidem.
[109] The judgment of the Budapest-Capital Regional Court of Appeal, 25 October 2012, case no. 2.Pf.20.658/2012/5.

violation occurs, therefore, when an article is first published on the website. It is noteworthy that such finding has also been shared in the Supreme Court's case law in Poland, but only as to when the statute of limitations starts to run. In the above-mentioned judgment, the Polish Supreme Court stated that accepting the continuous character of personal rights violation in the case of online publications would cause an unjustified precedence of the right to privacy over freedom of expression, because the author of the publication would be endlessly exposed to the risk of a lawsuit.[110] Such view is also consistent with another Hungarian judgment in which the court decided that the publisher may be held liable for unlawful publication even though it was available on the website only for a short period of time.[111] The court found that disabling access to the article or otherwise restricting its accessibility do not change the fact that the damage has already been done. Thus, the defendant should anyway remedy the violation (in this case, however, the plaintiff did not request for unpublishing, but the defendant was obliged to apologize and pay compensation).

Judicial assessment of requests for other remedies

In Poland in only 2 cases included in the study did the plaintiff ask for other kinds of interference with media online archives without requesting unpublishing. In both cases, the plaintiffs wanted an apology to be added to the newspaper's website with regard to the article violating their personal rights. In one of the cases, the court accepted the request for an apology, but also obliged the publisher to remove some parts of the article from the website (even though the plaintiff did not ask for the latter – see case no. I ACa 703/12 discussed above). In another case, the court accepted the request for an apology and underlined that it considered this measure sufficient to protect the plaintiff's reputation.[112] What is interesting in this case, is that the plaintiff also requested that the publisher be ordered to "refrain from violating the plaintiffs' personal rights in the future." The question arouse whether keeping the unlawful article online would constitute a "future violation" of the plaintiff's personal rights. The court did not answer this question directly, but anyway dismissed that request as too broad and imprecise. The court stated that if it had accepted such a claim it might have led to the removal of the original article. Such a remedy however – according to the court – would be inadmissible and disproportionate (the court referred in this respect to the ECtHR judgment in the Węgrzynowski and Smolczewski case[113]).

[110] Op. cit., case no. I CSK 743/10.

[111] The judgment of the Court of Appeal of Győr, 12 February 2009, case no. Pfv. IV.21.035/2011/4.

[112] The judgment of the Appeal Court in Warsaw, 10 July 2014, case no. I ACa 19/13.

[113] Op. cit.

In 1 Hungarian case,[114] the plaintiff also asked for an alternative remedy to unpublishing, namely for a modification of the newspaper's website by adding a rectification to the original article which contained inaccurate information on drug trials. The article was published in both online and paper versions of the newspaper. Interestingly, the court granted rectification, but only with regard to the printed newspaper and not with respect to its website. Thus, the judgment created a situation where the printed article was rectified, but the archived online version remained unchanged. Unfortunately, the court did not provide a precise justification for such a decision. It seems, however, that according to the court, the rectification in the next issue of the printed version of the newspaper is sufficient, since the periodical also has its e-edition (digital edition reflecting print edition) and the text of the rectification will eventually appear online as well.

3.3. Impact of the CJEU "Google Spain" judgment on media online archives

As already discussed in section 3.1, according to the CJEU ruling in the Google Spain v. AEPD and Mario Costeja González case,[115] a data subject may approach a search engine operator with a request to delist links from the search results to certain websites, displayed following a search made on the basis of the person's name. In the case before the CJEU, Mr. González did not want the search engine to link to an outdated official announcement about the insolvency proceedings run against him in the past, which was still available in the online archive of a Spanish newspaper. This case has shown that requests to delist links from search engines may be a way to diminish the impact of unwanted materials available in media online archives, by restricting their accessibility for Internet users. Such materials remain on the original website, but are more difficult to find via search engines. Following the CJEU ruling, search engine operators started receiving requests to remove links from search results. Such requests may also concern links to media websites and thus raise serious concerns among publishers. Many consider them as a tool used in order to "hide" inconvenient journalistic stories and hinder freedom to disseminate and receive information.[116]

[114] The judgment of the Supreme Court of Hungary, 28 September 2011, case no. Pfv. IV.21.035/2011/4.

[115] Op. cit.

[116] See for example: J. Ball, *EU's right to be forgotten: Guardian articles have been hidden by Google*, theguardian.com, 2 July 2014, http://www.theguardian.com/commentisfree/2014/jul/02/eu-right-to-be-forgotten-guardian-google (accessed: 29 November 2015); A. Paleit, J. Fontanella-Khan, J. Pickard, Google's removal of BBC article raises censorship fears, cnn.com, 3 July 2014, http://edition.cnn.com/2014/07/03/business/ft-google-story-removal/index.html (accessed: 29 November 2015).

This part of the report is aimed at looking at the impact of the CJEU judgment in the context of media online archives at the national level, in Poland, Hungary and the Czech Republic. Unfortunately neither search engine' operators nor the media organizations in the three countries provided any statistical data on requests to delist links to media websites which would allow to determine the actual scale of the problem. The data provided by Google, which is the most popular search engine, in its Transparency Report[117] reveal that among the ten top sites in the world, from which URLs were removed, there are no websites of the media in the sense used in this report (see "Remarks on terminology"). The top ten list mainly includes social media platforms. However, the report briefly mentions cases involving media websites where it presents examples of requests which Google received from data subjects,[118] unfortunately without providing more general information or statistics in this respect. In this study, the impact of the CJEU ruling was, therefore, analyzed on the basis of information about disputes between data subjects and search engine operators with regard to the "right to be delisted" cases which were referred to the national data protection authorities in Poland, Hungary and the Czech Republic. In the case when a search engine operator rejects a request to delist a link from its search results, the data subject may file a complaint with the national data protection authority. The researchers asked data protection authorities in the three countries whether they had come across such cases concerning specifically media online archives.

The data collected from the data protection authority in Poland showed that it received 21 complaints with respect to the so-called "right to be delisted" in general in the period between 13 May 2014 and 30 June 2015.[119] However, only 1 complaint concerned the website of the media. In Hungary, in the same reference period, there were 16 such complaints, including 11 complaints related to media content.[120] In contrast, in the Czech Republic the data protection authority claimed that so far it had not received any complaints concerning "the right to be delisted."[121]

[117] Google Transparency Report, https://www.google.com/transparencyreport/removals/europeprivacy/?hl=en-GB (accessed: 1 December 2015). The report informs that in general Google has received 1.2 million requests to delist so far, among which the company removed approximately 42% of the URLs from the search results.

[118] The example of the case from Great Britain presented in Google Transparency Report: „After we removed a news story about a minor crime, the newspaper published a story about the removal action. The Information Commissioner's Office ordered us to remove the second story from search results for the individual's name. We removed the page from search results for the individual's name.".

[119] Information provided by the Polish data protection authority on 16 September 2015 (no DOLiS-067-39/15/MKR/84582). At the time of the receipt of this response all the cases were still pending and none of them has been finalized.

[120] Information provided by the Hungarian data protection authority on 3 November 2015.

[121] Information provided by the Czech data protection authority on 21 September 2015.

The data collected from data protection authorities showed that, at least in Poland and the Czech Republic, there were no or few disputes over delisting links to media online archives. This may suggest two options. One possibility is that most of the requests regarding media content are accepted by search engines and, therefore, do not result in disputes before data protection authorities. This would be worrying from the perspective of the freedom of expression. Since journalistic materials, presumably, concern public interest, search engine operators should be particularly cautious and reluctant towards delisting links to this kind of content. As already mentioned in section 3.1, a search engine operator should dismiss requests to delist if the general public has a "preponderant interest" in being able to access the information and it seems that the "preponderant interest" is particularly likely to occur in the case of media publications. The second possibility is that, at least for the time being, the CJEU ruling has not affected media online archives in Poland and Czech Republic, and the general number or requests concerning this kind of content is relatively low. As a consequence, there have so far not been many such cases referred to the data protection authorities.

In Hungary, the proportion of cases concerning journalistic articles online, among complaints with regard to the "right to be delisted" referred to the national data protection authority, is much more significant than in Poland (11 out of 16 complaints). On the one hand, this may suggest that data subjects in Hungary were in general more active when it comes to requests to delist links related to media websites than data subjects in the other two countries. On the other hand though, this may as well suggest that search engine operators were more likely to decline such requests.

Taking into consideration the important role of media online archives for the freedom of expression and contemporary journalism, it would be important to examine the impact of the CJEU ruling in this area, especially in order to establish if the "right to be delisted" may be unjustifiably overused in this context. To this end, however, more reliable data are needed, in particular data from search engine operators revealing the number of requests they receive from data subjects with regard to media websites. Moreover, the publishers who, for example, get notifications from Google whenever a request to delist a link to their website is granted, but also data protection authorities, should nevertheless keep a watchful eye on this phenomenon.

3.4. Conclusions

Chapter 3 presented a selection of case law concerning the maintenance and management of media online archives. The case law analysis revealed that both international and national courts have faced this problem. What is more, the guidelines formulated in the available jurisprudence turned out to be much more precise than those contained in the legal and ethical frameworks summarized in Chapter 2. The standards established in the case law could, therefore, serve as a primary source of reference for media practitioners and lawyers when dealing with media online archives. One should keep in mind, however, that this area of law is still relatively new for courts and the jurisprudential standards are still being developed.

At the international level, the two most important judgments were delivered by the ECtHR in cases Times Newspapers Ltd. v. United Kingdom and Węgrzynowski and Smolczewski v. Poland. In both cases, the ECtHR stressed that maintaining and managing media online archives falls within the scope of Article 10 of the ECHR. What is more, ECtHR noted that it constitutes one of the most important tasks of contemporary journalism and plays an important role for education and historical research. At the same time, the ECtHR confirmed that the accuracy of historical publications may be more stringent than those reporting on the current affairs, which by definition are perishable. Moreover, online publications pose a greater risk for the right to privacy than offline publications due to their accessibility. Consequently, there is a need for an adequate remedy to protect this right in an Internet environment, a remedy adapted to the specificities of this particular medium. However, in principle such a remedy should not lead to the "rewriting of history" by unpublishing journalistic articles from media online archives when the plaintiff's rights can be protected by less intrusive measures. According to the ECtHR, in the two examined cases it was sufficient to add a comment or an explanatory note to the original article on the website, informing the public about the disputable, defamatory or outdated character of the content. Such an approach is more proportionate and better reconciles the protection of the right to privacy with the protection of free expression.

At the national level, the case law research was conducted in 3 countries – Poland, Hungary and the Czech Republic. In the end, 19 civil law cases concerning the protection of personal rights were analyzed. The judicial approaches in the three countries are, however, hard to compare as the case law analysis revealed that a vast majority of cases related to media online archives were identified in Poland (15 cases), while there were only 4 relevant cases in Hungary and no cases in the Czech Republic.

In most cases, the national courts recognized the specific nature of Internet publications, the special role of media online archives, as well as their specific impact on the freedom of expression and the right to privacy, which is different than in the case of analogue media. The courts underlined that media online archives facilitate access to information, including historical content. At the same time, they may be more harmful for an individual's private life than traditional media archives because of their wide accessibility via the Internet. Therefore, the analogy between offline libraries and online archives was often considered misleading. For this reason, many courts acknowledged the need for the application of Internet-specific remedies with regard to privacy violations in the online environment. Such approach is consistent with the ECtHR jurisprudence. However, there is still no clarity, neither in the European nor domestic case law, as to what is the "nature" of harm caused by online publications. On the one hand, some courts emphasized its "permanent" character, meaning that as long as the burdensome publication is available on the Internet it is likely to keep causing harm (the harm is not done only when the article is first published, but every time it is accessed on the website). As a consequence, the same article preserved in online archives, even if its printed version had already been pronounced to contain unlawful content, can still be a basis for another legal action. On the other hand, the courts tend to reject the "continuous" nature of this harm when considering the statute of limitations, which starts to run on the date of the original publication. In this context, most courts applied the "single publication rule" (established for traditional newspapers) to online publications, explaining that the so-called "Internet publication rule" would endlessly expose the author of the publication to the risk of a lawsuit and thus would go against freedom of expression.

A vast majority of analyzed cases concerned requests to unpublish media content (or its parts) on the Internet. Rarely did the plaintiffs request an alteration of online content in other ways, for example by adding an apology or rectification on the website. Since plaintiffs are likely to ask for the most radical measure, the courts' critical assessment of the proportionality and adequacy of their claims in this respect is particularly important. In the majority of the analyzed cases, the courts agreed that the interference with the journalistic archival articles should not amount to the erasure of the content, which was considered an excessive remedy. One of the courts dismissed even the request in which the plaintiff did not specifically ask for unpublishing, but his claim was so general and imprecise that the court found that there was a risk it might be interpreted as allowing the removal of the original article and therefore it was considered unacceptable. Such an approach, again, complies with ECtHR guidelines. It is noteworthy, in this respect, that 6 courts in Poland explicitly referred to one of the two ECtHR judgments when justifying their decisions.

Nevertheless, it should be noted that both in Poland and in Hungary, there were a few cases in which courts' decisions did not correspond with the Strasbourg standards. In some of them the defendants were obliged to unpublish whole articles or their parts, even though the alternative, less radical measures, such as adding an apology or an explanatory note, would suffice to protect the plaintiff's rights. This shows that domestic jurisprudence still requires better harmonization in this area and ECtHR guidelines need to be further promoted among legal practitioners. That is especially important in Hungary and the Czech Republic, as both project partners reported that ECtHR judgments relating to media online archives have not reverberated in their respective countries.

Interestingly, the analysis of domestic case law revealed certain limitations for the application of the ECtHR standards in media online archives cases. There were cases in which these standards proved insufficient. For example, in the case of publications which unlawfully disclosed private information about individuals (such as the fact of receiving social aid benefits or facts from the intimate sphere), the solution proposed by the ECtHR, namely adding an explanatory note or an apology on the website, clearly would not provide the victim with an effective remedy. That kind of unwelcome information, which should have never been published, even when appended, would remain a burden. In that kind of cases, some courts decided that a more radical response may be justified, such as the anonymization of the journalistic article or, even, removing the whole piece from the website.

The case law research allows for a conclusion that applying the most proportionate and adequate remedy requires a very careful analysis of the specific circumstances of each case, and in particular its certain aspects. Even though in principle unpublishing of journalistic articles was considered unjustified and the courts tended to authorize only less intrusive measures, some courts accepted that there may be instances where striking the right balance between the conflicting interests of a media organization and the plaintiff justifies more far-reaching measures. The analysis of the case law presented in Chapter 3 allowed for the identification of the main factors which the courts took into consideration when conducting such a balancing exercise and deciding upon the most appropriate remedy. The relevant factors were:

- **type of the publication and its purpose**

In the analyzed case law, the plaintiffs' requests usually concerned journalistic articles and only rarely other types of content, such as official announcements.[122] Journalistic articles should, by definition, contain publicly relevant information. It means information concerning those events which are subject to the legitimate concern of the society and about which the readers should, in principle, be informed. Hence, journalistic articles do not have an explicit "expiry date", even though their role might change due to the lapse of time. When originally published, they are a source of knowledge about current events, whereas with the passage of time they become less "newsworthy" (and perhaps the interest in their distribution diminishes to some extent), but they are still important as historical record, documenting the past. Keeping them online is therefore still justified. In contrast to journalistic articles, official announcements usually have a very concrete and "short-term" purpose. For example, a police warrant is lawfully published in an online newspaper in order to help apprehend the suspect. Once this purpose is fulfilled, there may no longer be any reason to keep the outdated announcement on the Internet.

- **nature of information**

According to the analyzed case law, there are three main categories of journalistic articles whose unpublishing the plaintiffs usually request. The first category comprises publications deemed defamatory by the plaintiffs who argued that the publications presented untrue or misleading information, burdensome for the plaintiffs' reputations. These publications contained unlawful information from the date of their release. The second category are publications which contain true information which was, however, unlawfully disclosed. This may be information from private or intimate life or confidential information protected by specific regulations (for example the Polish Press Law prohibits disclosing data of certain categories of individuals engaged in legal proceedings unless certain conditions are met). The third category of publications contain true information revealing inconvenient facts from the person's past. This category may include, for example, media reports on criminal proceedings run against the plaintiff some years ago. Unlike the first two categories of publications, in the case of the last category the information was lawfully published, but has since become outdated or irrelevant.

With regard to the first category of publications, most courts allowed only for appending archived articles available online with comments, apologies or rectifications after they had found that the article violated the plaintiff's personal

[122] As already underlined in the introductory part of this report, the research was focused only on materials that normally undergo editorial control and it did not cover the requests to remove the so-called "user-generated content," such as readers' comments posted under online articles.

rights. They considered that remedy sufficient to protect the plaintiff's privacy, and rejected claims to unpublish the article as too excessive. Such approach follows the ECtHR guidelines. As regards the second category, the courts often decided to remove the publication or its parts (usually they would remove only the plaintiff's name or certain excerpts of the article revealing his/her identity; unpublishing of the whole article was still considered by most courts to be overly radical). They justified it by emphasizing that solely appending the original article would not provide the plaintiff with sufficient remedy. Certain information should never have been disclosed, and the publisher's admission in an explanatory note next to the original publication would not help the plaintiff whose sensitive data has already been revealed. As regards the third category of publications which concerned lawful but outdated or irrelevant information, the courts' approach was the most nuanced. The remedies adopted by the courts in this kind of cases were mostly dependent on other factors related to the nature of information, such as the information's contribution to a debate on a matter of public interest, the sphere of privacy which was targeted by the information (level of its intrusiveness), as well as other factors listed below. The identified patterns in judicial reasoning show that qualifying a journalistic article to one of the three categories is highly relevant for the assessment of the case and proportionality of the remedy sought.

- **relevance of information**

Most requests for unpublishing concerned materials not older than 5 years. However, it was not so much the "age" of information or passage of time itself that was considered by courts as an important factor in the assessment of the plaintiffs' claims, but the change of circumstances and the plaintiff's status which resulted from the passage of time. If facts presented in the article no longer reflected the plaintiff's current situation, the need for protecting the plaintiff's rights was more likely to prevail over the public interest in retaining the publication in its original shape. Thus, the courts were more likely to oblige the defendant to alter the archival content on the website, for example by its anonymization.

- **fulfilment of certain obligations by media organizations with regard to their online archives**

The analyzed case law suggests that the primary obligation of the publisher is to visibly mark the archival character of the publication on the website (for example by highlighting the original date of publication or information that the content has historical value). On the other hand, most courts agreed that media organizations cannot be expected to constantly monitor and update news about all the events they have ever reported online. Publishers should not be held liable for keeping the archival content online simply because it

has become out of date. They may, however, be obliged to add follow up information to a story when requested to do so by a person concerned by the publication. For example, a newspaper does not have to unpublish information about a criminal trial against a certain individual, published at the time the proceedings were ongoing, if the accused later acquitted. However, the person concerned should be entitled to legitimately ask the published to add information about the final outcome of the proceedings next to the original publication. The analyzed jurisprudence also suggests that if a case concerns an official announcement which is outdated, it is the duty of the public body responsible for such publication to inform the publisher that the announcement is no longer valid and should be taken down. The media are not obliged to verify the validity of such publications at their own initiative.

- **status of the requestor**

The case law analysis revealed that most frequently the requests to unpublish came from public rather than private figures. The publications on public figures are usually more likely to generate legitimate public concern than in the case of private individuals. What is more, in principle public figures have to accept wider limits of journalistic criticism and deeper interference with their private lives. As a consequence, if the information concerned public figures, the courts were more likely to decide that the public interest in keeping the original material online outweighed this person's right to privacy. On the other hand, if the information concerned a private individual, the courts were more likely to oblige the publisher to alter the archival content.

As already underlined, the analysis of cases related to media online archives in the light of all five factors listed above may help the courts to balance the conflicting interests and make their decisions on adequate and proportionate remedies. All these factors may play an important role in evaluating a person's right to have certain online information retained, appended or taken down, when grounds for its retention no longer stand.

The above-listed factors may also be useful for media organizations when deciding on the most appropriate responses to requests to unpublish content. By taking these factors into consideration, the publishers may be able to better manage the archival content online, as well as better reconcile the freedom of expression perspective with the plaintiff's legitimate interests. The knowledge of judicial trends in this area may also have a pragmatic value for publishers, as it may shield them against unjustified and excessive claims for removal of publications available on the Internet and, at the same time, provide guidelines on how to minimalize the risk of legal sanctions.

Chapter 3 also highlighted that archival media publications may be suppressed not only through limiting their availability on the website, but alternatively also through restricting their accessibility via search engines. The possibility to ask the search engine operator to delist a link to a certain website from the search results, provided certain conditions are met, was confirmed by the CJEU in the so-called "Google Spain" judgment. The research revealed that so far in Poland, Hungary and the Czech Republic, there have not been many disputes referred to the national Data Protection Authorities in this respect. However, the extent to which this tool is used in reality in order to "hide" unwanted archival media publications is hard to define due to the lack of sufficient data. In general though, some individual cases have already proven that the "right to be delisted" may pose a threat to the freedom of expression if overused. Therefore its application with regard to media online archives should be subject to particularly careful scrutiny, in order not to become an alternative way of "censoring" unwelcome materials.

Conclusions and recommendations

Research results presented in this report confirmed that the management of media online archives is one of the most current and pressing challenges related to the development of digital journalism and the conflict between the freedom of expression and the right to privacy in the context of contemporary media. The research encompassed data gathered in the course of analyzing international standards, national legal and ethical frameworks, case law, as well as practical aspects of the functioning of online archives, seen both from the reader's and the publisher's perspectives. Based on this data, main conclusions and recommendations have been drawn below. The research was conducted in Poland, Hungary and the Czech Republic,[123] however since the problem it addresses has already been recognized as increasingly frequent in other countries,[124] its findings may be useful for any media organization, legal practitioner or court, who deal with requests to alter archival publications on the Internet.

General overview

• Maintaining and managing media online archives falls under the scope of the freedom of expression. Keeping the content on the Internet and sharing information from the past is one of the main tasks of the contemporary media, important for education and historical research. The availability of media online archives is a matter of public interest and therefore their integrity should be protected. Their upkeep enhances both the right of media practitioners to freely disseminate their stories, as well as readers' access to information.

• Media organisations must, nevertheless, take into consideration the possible negative impacts of their online archives. In particular, they should consider the consequences that a continued publication may have for the legitimate interests of the individuals concerned, such as their right to privacy or safety. When archival publication is outdated, inaccurate or reveals sensitive facts from private life, the media may be required to apply proportionate and adequate measures in order to protect those legitimate interests, without excessively suppressing the freedom of expression.

[123] The survey among media practitioners was conducted only in Poland.

[124] C. Elliott, *The readers' editor on... changing or deleting content in the digital archive*, The Guardian, 21 July 2013, http://www.theguardian.com/commentisfree/2013/jul/21/guardian-readers-editor-digital-archive); D. Jordan, *Should the BBC unpublish any of its online content?*, BBC Blog, 17 June 2014, http://www.bbc.co.uk/blogs/aboutthebbc/entries/90151d0f-ae5f-3c11--8ae4-858f67454ed1 (both accessed: 29 November 2015); K. English, *The longtail of news*… op.cit.

• Requests to unpublish content from media online archives are a common challenge for journalists in the Internet era. While the removal of a publication from the website is the most radical interference with archives' integrity, all media organisations which participated in the survey received requests to unpublish content. Only a small proportion of respondents received requests concerning official announcements, and the majority was related to journalistic materials. This trend was also reflected in the cases included in the case law review. At the same time the number of requests in most cases was not vast. The national media handled a higher number of requests, while a significant majority of the local media received 10 or fewer requests within the last 5 years. Only 2 respondents received more than 50 requests, and both of them were national media.

• Media organisations lack guidelines on how to maintain their online archives and deal with requests to unpublish content. Neither legal nor ethical regulations in the countries covered by the research contained comprehensive, specific regulations on media online archives. Laws and most of the officially available ethical codes provided only general provisions related to journalistic accuracy. While these may and should apply in the digital context, they are not sufficiently precise. Moreover, out of the 23 respondents less than a half had guidelines, procedures or customs on online archive management, and in the majority of cases such guidelines have not been established.

• Important standards on media online archives have been developed in the case law. Contrary to legal and ethical frameworks, both the European case law (mainly the ECtHR's judgments) and – especially in case of Poland – the domestic jurisprudence provided more specific principles with regard to the management of archival media content on the Internet. At the moment these principles may serve as the primary source of reference for developing legal standards in this area.

How to maintain and manage media online archives?

• In principle, media online archives should not be altered. As a general rule archival online publications should be perceived as a public record, should remain complete and permanently available on the website in their original shape, and should not be removed or changed. The Internet is not solely a source of information on current events, but also of historical content. The outdated or embarrassing character of information does not always justify the modification of archival materials. In some situations, however, there may be legal and/or ethical reasons that could justify certain interference with the integrity of the archives. Such interference must always comply with the freedom of expression

standards, in particular be necessary and proportionate (specific criteria for the interference have been elaborated below).

• **Unpublishing of journalistic articles is in principle not justified.** Unpublishing is, in most cases, a too far-reaching measure which should not be applied. Even if the plaintiff's rights have been violated by the journalistic publication, it is usually sufficient to protect them with less intrusive remedies, such as appending the piece with an explanatory note informing the public about the disputable, defamatory or outdated character of its content. Such an approach has been taken by the ECtHR and significant part of national courts. Moreover, removing the original publication may undermine the effectiveness of other remedies sought by the plaintiff, for example the obligation of the publisher to publish an apology (if the original text is unpublished, readers will not be able to understand the context of the apology). The removal also impairs also the transparency of the online archive. It may raise suspicion about the hidden information, and therefore draw even more attention. As a result, the unpublishing may have the unintended consequence of publicizing the information more widely; if the material had already been republished on other websites, it may start to live its own life ("Streisand effect").

• **Appending media online archives is a preferable measure, and an alternative to unublishing.** Online publications, if outdated, inaccurate, unfair or defamatory, may pose a serious threat to the legitimate interests of the person concerned. This is a consequence of their "permanent" availability and wide accessibility on the Internet. What is more, the content available in the media online archives cannot be considered a fully objective and accurate reflection of the reality and history. That is, for example, because the media tend to be more eager to report on bad news, such as crimes and convictions, than good news, such as acquittals and rehabilitations, simply because the former attract more attention.[125] Therefore, individuals should have instruments to address this asymmetry. It is also accepted that the accuracy requirement of historical publications may be more stringent than those reporting on current events, as they are less "perishable" and there is no urgency in disclosing them. Appending the archival content with an apology, update of the story ("subsequent statement"), rectification, or information about the unlawful or disputable character of the content is, therefore, a balanced measure that in many cases may be legitimately required from media organizations. In such situations, appending media online archives should not be perceived as "erasing history".

[125] J. Powles, *Why the BBC is wrong to republish 'right to be forgotten' links*, The Guardian, 1 July 2015, http://www.theguardian.com/technology/2015/jul/01/bbc-wrong-right-to-be-forgotten (accessed: 28 November 2015).

• Requests to unpublish archival online content should be complied with only in very exceptional circumstances. There may be specific cases in which the plaintiffs' interests in removing the information outweighs the interest in retaining it, especially when appending archival publication is not an effective remedy. For example, removal may be justified if the media unlawfully disclosed the information from the plaintiff's private sphere and it continues to cause significant distress for the person concerned. Moreover, a lower threshold for retaining information should be used with regard to non-journalistic publications such as outdated but still burdensome official announcements (for example arrest warrants), which have already fulfilled their primary purpose. They should be unpublished especially if it is the public institution who decided to publicize them that asks for their removal. Such an approach towards unpublishing seems justified considering publishers' current practice. The vast majority of respondents admitted in the survey to accepting some requests for removal. At the same time, even though the survey revealed that the majority of respondents were generally against the idea of unpublishing (13 out of 23), many of them (9) believed there were legitimate reasons that could sometimes justify it. In light of the above, it is also important that the practice of unpublishing is always limited to the necessary extent. Media organizations should, for example, consider anonymization or removing only the disputable parts of the publication instead of deleting the entire piece.

• There are five main factors that may help in assessing the requests to unpublish, or otherwise alter, content in media online archives, and in adopting appropriate remedies. These factors were identified on the basis of the case law and elaborated in Chapter 3.4. They include: (1) the type of publication and its purpose, (2) the nature of information, (3) the relevance of information (i.e. the change of circumstances related to the passage of time), (4) the question of fulfilling certain obligations concerning their online archives by media organizations; and (5) the status of the plaintiff. These factors may help, in the context of a particular case, to properly balance the plaintiff's expectation of privacy and the freedom of expression interests; and may be useful for media organizations, their lawyers, as well as for courts dealing with such cases.

• Media online archives must be maintained in accordance with the principle of transparency. Media organizations may have certain obligations with regard to maintaining their online archives. In particular the archival content on the website should be visibly marked not to confuse the readers as to the "age" of information and the fact that it may have a historical character. The original date of publication should be highlighted and all the subsequent revisions and corrections should also be communicated to the readers. When

rectification is necessary, instead of changing the content of publication, it may be more appropriate to publish the correction next to it, in an apparent way and in a place where it is likely to be read along with the original material. The content may be also labelled as archived to inform readers that it may be inaccurate due to the lapse of time. It should be noted that the obligation to mark the archival character of the publication has already been recognized by some journalistic ethical codes or self-regulatory policies with regard to both online and offline communication. As a consequence, if the requirement of transparency is met, a media organization is less likely to face sanctions in case of a legal dispute. The survey and analysis of the media websites showed that currently most of the media comply with the obligation to visibly mark the date of the original publication. The other measures, however, such as marking subsequent changes, or using special "Archive" labels/tabs, are less common.

• **Media online archives must comply with the principle of accuracy.** The duty to ensure accuracy of historical publications available in media online archives constitutes currently an element of responsible journalism, and may justify the need to make changes in the archival content. Media organizations should therefore maintain their archives with due care. For example, they should update stories when specifically and justifiably requested by the person concerned. They should also consider publishing subsequent statements when they themselves become aware of circumstances that suggest the material should be altered. Similarly, a rectification should be added, if it is discovered that the original publication contained errors.

• **Media cannot be expected to constantly monitor the relevance and accuracy of all archival content online.** The principle of accuracy does not extend to a general, legal obligation to monitor and update all news published on the Internet. Publishers should not be held liable for keeping the archival content online simply because it has become out of date. If, for example, the official announcement lost its validity, it is the duty of the institution who originally asked for publishing it, to inform the publisher about it and ask for removal.

A need for legal, ethical and editorial guidelines

• **Legal regulations on media online archives should be developed.** Adopting specific legal provisions concerning maintaining and managing archival media publications on the Internet should be considered as an important element of adjusting the current media laws (press laws) to the digital reality. Developing an international soft law document dedicated to this problem would also be desirable and it would certainly facilitate such media laws reforms at the national level.

• **Maintaining and managing media online archives should be covered by journalistic ethical regulations.** There can be situations when altering an archival publication may not be required from a legal point of view, but nevertheless may be justified for ethical reasons. The survey revealed that media organizations already take into account ethical considerations, when examining requests to unpublish content from their online archives. The removal could be justified inter alia by compassion and the consideration for the well being of the person requesting the removal, i.e. their family life or future prospects of finding a job. The ethical considerations may weigh in favor of unpublishing or otherwise altering online content, even if there is no legal obligation to do so. That is why it is important that journalistic deontology is supplemented by specific ethical regulations related to media online archives.

• **Media organizations should develop self-regulatory editorial policies for maintaining and managing media online archives.** The policies or codes of conduct should in particular cover guidelines on how the requests to unpublish archival content should be dealt with within a media organization. Guidelines should be publically available. They should guarantee that each request is considered on its merits and provide criteria taken into account in the decision-making process. The policy should include both legal and ethical considerations, as well as outline the procedure of examining requests. In particular it should explain how people can reach the publisher with their claim, how it will be processed, how long it will take, and what information is required for such an examination (the procedure should clarify that a requestor has to demonstrate the grounds for his/her claim and that a request unaccompanied by any justification will not be effective). Moreover, it should be determined who in the organization is responsible for examining the requests and deciding upon them. The media should also consider including an ethical body (if established within the organization) in assessing requests and consulting a lawyer. In principle a publication should not be removed/changed while the request is being examined.

• **When developing new legal, ethical and editorial guidelines, the relevant standards established by the ECtHR and domestic case law, summarized in Chapter 3, should be taken into consideration.** The judicial standards in the area of media online archives may help in shaping appropriate regulations. Ensuring their application in internal policies may also reduce the risk of legal sanctions, in case of a legal dispute concerning requests to alter archival publications. The study of the case law revealed that the majority of domestic cases followed the line of reasoning established by the ECtHR; there were, however, exceptions. Moreover, not in all countries did the ECtHR standards reverberated to the same degree. The national jurisprudences require, therefore, a better harmonization in this respect, and the ECtHR guidelines need to be further promoted among legal practitioners and judges at the national level.

New challenges

• Search engines play an important role in accessing media online archives. The standards that concern maintaining and managing media online archives should therefore cover the relationship between media organizations and the search engines linking to their content. When it is justified to remove or alter content from online archives, the media organization should explain to the requestor that the modification may not be immediately reflected in the search results, but it may take some time before the website is re-indexed by the search engine. In extreme or urgent situations (for example when there is a threat to the requestor's safety) the media organization should consider informing the search engine operator about the change to its website, so that the search engine can remove it more promptly from its indexes and cache. One of the most challenging problems concerning free access to media online archives may be delisting links to journalistic publications from search engines' search results, without unpublishing it from the media website. Since media online archives are a matter of public record, the threshold for delisting from search engines links to the archives should be in principle as high as the threshold for removing content from the original source. Search engine operators should therefore apply similar criteria. In general the limitation of accessibility of media online archives via search engines is a problem that needs further research.[126]

• Media organizations should be aware of the new challenges related to media online archives that were discovered in the course of the research or arise from the researcher's previous experience. Media organizations should be particularly cautious about groundless requests that are an element of public relations, and are not in fact aimed at the protection of individuals' legitimate interests ("archive trolling"). The survey revealed that in the majority of cases requests were submitted by the interested parties directly. The fact that it is still not very common to hire lawyers or companies specializing in online reputation management to file requests proves that this activity is not yet professionalized. Therefore the phenomenon of the so-called "archive trolling" did not prove to be particularly common. Nevertheless it remains a possible threat for the future. Another challenging phenomenon revealed by the survey was requests to unpublish that concerned tags generated not by humans, but by bots. This may potentially be a novel source of liability for media organizations.

[126] Some of the questions that should be discussed are the following: could there be justified situations in which the material should remain available in its original shape on the media website but at the same time the link to it could be legitimately delisted from general search engines in response to the data subject's request? Also: are there situations in which media organizations could be entitled to keep a publication online but should be obliged to use the robots exclusion protocol (robot.txt) in order to remove the site from search engines indexes?

Annex 1

Media online archives – a source for historical research or a threat to privacy?

Survey

I. Part one – general information

1. For how many years have you been publishing on an Internet website?

2. What area does your internet website cover?
a) Whole country
b) Province
c) District or commune (town/city)

3. How often do you publish new information on your Internet website?
a) Every day
b) Several times a week
c) Once a week
d) Once a month
e) Less than once a month

4. Apart from the Internet website, do you publish a printed edition of your newspaper?
YES/NO

In case of a negative answer to question no. 4, please go to question 5.

4a. What is the relation between the printed edition of the paper and its online edition?
a) Website contains the same material as the printed edition plus additional material which is not printed.
b) Website contains the same material as the printed edition.
c) Website contains only short press releases and previews of texts from the printed edition.
d) Other:

4b. What is the territorial scope of the paper edition?
a) Whole country
b) Province
c) District/commune (town/city)

4c. How often is the printed edition published?
a) Every day
b) Once a week
c) Once a month
d) Less than once a month

5. Has your website been registered as a separate title in the court register of newspapers and magazines?
YES/NO

II. Part two – requests to remove/block archival content – scale and practice

6. Have you ever received a request to remove material* (or its fragment) published on your Internet website?
*This includes journalistic material, advertisement, official announcements and other material controlled by the editorial board; the question does not concern requests to remove content added by website users, e.g. comments under articles or messages posted by internet users on a forum.
YES/NO

[If no, please go to part three of the survey.]

7. How many such requests (approximately) have you registered within the last 5 years?
a) 1-10
b) 11-25
c) 26-50
d) More than 50

8. Usually, how old was the content which was subject to a removal request?
a) Requests usually concern current content from the last month
b) Published within a year prior to the request
c) Published within 3 years prior to the request
d) Older than 5 years
e) Older than 10 years

9. Which groups of stakeholders requested removal of online content?
a) Private individuals (serving no public function and unknown to the wider public which is the target of the website)
YES/NO
b) Representatives of legal persons (e.g. companies)
YES/NO
c) Courts and law enforcement bodies (e.g. police, prosecution)
YES/NO
d) Representatives of public authorities (e.g. politicians)
YES/NO
e) Other public figures (e.g. well-known artists, sportspeople, businesspeople)
YES/NO

9a. Which group of stakeholders requested removal of online content most often?
a) Private individuals (serving no public function and unknown to the wider public which is the target of the website)

b) Representatives of legal persons (e.g. companies)
c) Courts, law enforcement bodies (e.g. police, prosecution)
d) Representatives of public authorities (e.g. politicians)
e) Other public figures (e.g. well-known artists, sportspeople, businesspeople)

10. Who most often directly requested removal of online content? [Please assign values from 1 to 3 to the categories of people listed below: 1 suggests the category which requested removal most often, 2 – less frequently and 3 – never.]

a) Requests were submitted by directly interested persons.
b) Requests were submitted by lawyers on behalf of interested persons.
c) Requests were submitted by representatives of companies (e.g. marketing) specialized in online reputation management.

11. What were the reasons for requesting removal of online content?
a) Information was inaccurate
YES/NO
b) Information was obsolete
YES/NO
c) Information concerned the criminal past of the requesting person
YES/NO
d) Information had an offensive, defamatory character
YES/NO
e) Information was for other reasons harmful for the requesting person [Please specify]
YES/NO

11a. Which of the above-listed reasons was quoted most often?
a) Information was inaccurate
b) Information was obsolete
c) Information concerned the criminal past of the requesting person
d) Information had an offensive, defamatory character
e) Information was for other reasons harmful/uncomfortable/embarrassing for the requesting person [Please specify]

12. What type of material was subject to requests of online content removal?
a) Material created by journalists
YES/NO
b) Official announcements (e.g. arrest warrants, court information, public announcements)
YES/NO
c) Advertisement
YES/NO
d) Other [Please specify below]
YES/NO

12a. Which of the above-listed types of material was subject to requests of online content removal most often?
a) Material created by journalists
b) Official announcements (e.g. arrest warrants, court information, public announcements)
c) Advertisement
d) Other

13. In what percentage of cases (approximately) did you decide to remove online content upon receiving a request?
a) We have never removed any content upon a request.
b) Less than 25%
c) Between 25-50 %
d) Between 50-75 %
e) Between 75-99%
f) 100% of cases

14. Please briefly describe one such situation when you received a request to remove online content (regardless of whether you decided to remove the content or leave it on the website).

15. What criteria did you usually apply when considering the requests for removal of content from your website? Why did you decide to remove particular content or refuse a person who demanded it?

16. Who from the newspaper's editorial board made a decision in this respect?

17. Did you consult a lawyer when considering requests for removal of content from your website?
YES/NO

III. Part three – general rules of online archive management

18. In your paper, are there any guidelines/procedures/customs related to the management of archival content published online?
YES/NO

If yes:

18a. Are they formalized, e.g. in the organization's rules? YES/NO

18b. Are they publically available (e.g. published on a website)? YES/NO

18c. Do the guidelines concern the procedure related to requests to remove online content (e.g. contain criteria applied when considering requests, determine the way in which a decision is made, etc.)? YES/NO

19. Do you think that there are such situations in which archival content should be deleted from the newspaper's website?
a) I am against removing archival content from the newspaper's website – it would have been a violation of the integrity of press archives.
b) Yes, there are situations which justify removal of archival press content [Please specify]

20. Have you ever interfered with archival content in any other way than its removal (e.g. by publishing a rectification, updating information, posting a link to an article describing a follow-up to the initial story, anonymizing personal data of protagonists, etc.)?
YES/NO

[If yes, please indicate how]

21. How is archival content marked on the website? [You can choose more than one answer.]
a) There is a note beside the publication marking it as archival.
b) The date of the publication is visible.
c) Archival content is published in a separate tab on the website (e.g. „Archive").
d) Other [Please specify.]

22. Is any of the following sentences true?
a) Publications older than [a given period] are moved to a special „Archive" tab.
YES/NO
b) Publications older than [a given period] are automatically made unavailable ("expire").
YES/NO
c) Publications older than [a given period] are not indexed by search engines.
YES/NO
d) The editorial board verifies archival content on the website and removes or updates that which has become outdated.
YES/NO

23. Do you know if there are any specific regulations on the management of archival content which is published by newspapers on their Internet websites?
YES/NO

If you have any other comments, we will be grateful if you could include them in the box below:

MEDIA ONLINE ARCHIVES

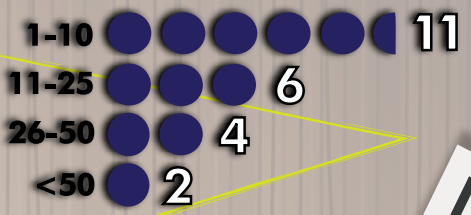
- A SOURCE FOR HISTORICAL RESEARCH OR A THREAT TO PRIVACY?

Survey among media practitioners in Poland

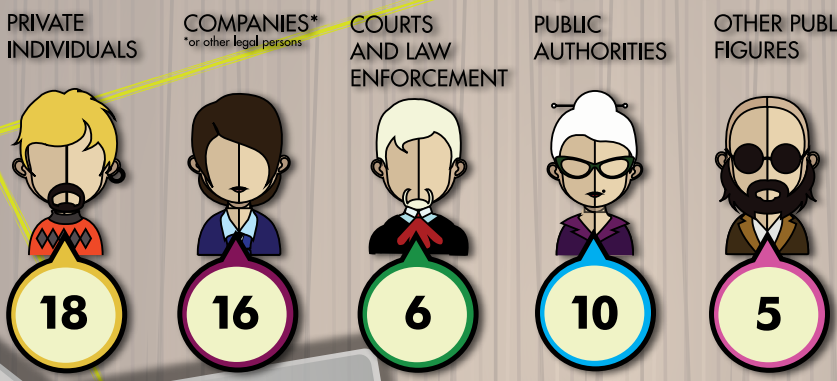
HAVE YOU RECEIVED REQUESTS TO UNPUBLISH ONLINE CONTENT?

YES 23

HOW MANY WITHIN THE LAST 5 YEARS?



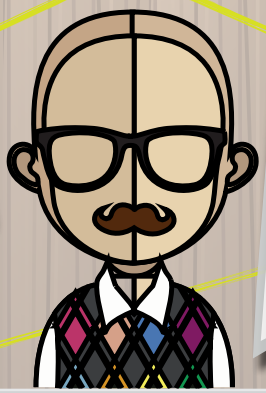
HAVE YOU RECEIVED REQUESTS FROM:



REASONS

CONTENT SAID TO BE:

- INACCURATE
- OBSOLETE
- CONCERNED CRIMINAL PAST
- **OFFENSIVE/DEFAMATORY**
- OTHER*



CRITERIA TO ASSESS REQUEST:

- TRUTHFULNESS OF INFORMATION
- JOURNALISTIC DUE DILIGENCE
- "COMPASSION" / INTEREST OF THE PERSON
- SUCCESS IN POTENTIAL COURT CASES
- PASSING OF TIME
- PUBLIC INTEREST
- LEGAL PROVISIONS
- "PEACE OF MIND"/CONVENIENCE

FOLLOWING A REQUEST HOW OFTEN DO YOU UNPUBLISH ONLINE CONTENT?

OTHER INTERVENTIONS?

SOURCE: HR

Annex 3

About the authors

Dorota Głowacka – lawyer at the Helsinki Foundation for Human Rights (HFHR), coordinator of the HFHR's Observatory of Media Freedom in Poland program, expert in media and Internet law. She is also a Ph.D candidate at the Law Faculty of the University of Lodz. Dorota is currently a national expert in the FRANET research network within the EU Agency for Fundamental Rights (FRA) and the coordinator of the working group on data protection and privacy rights in the project "HELP in the 28" run by the Council of Europe. She is an alumna of the Summer Doctoral Programme at the Oxford Internet Institute and the summer school "Online Free Expression and Communication Policy Advocacy: A Toolkit for Media Development" at the Central European University in Budapest. She was the coordinator of the research "Media online archives - source for historical research or a threat to privacy?".

Joanna Smętek - lawyer and research coordinator at the HFHR. Currently, she is an assistant project coordinator and helps manage HFHR's research cooperation with the EU Agency for Fundamental Rights. Since June 2014, she has also been involved in research on pre-trial detention conducted by HFHR in cooperation with Fair Trials International. Joanna is a secretary of the editorial board of the HFHR's publication "Quarterly of Human Rights". She holds an M.A. in law from Warsaw University where she also studied English Philology.

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Project partners

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Annex 4

About the Helsinki Foundation for Human Rights

Helsinki Foundation for Human Rights (HFHR) is a non-profit Polish NGO founded in 1989, working for the public interest and the rule of law in Poland and abroad. Currently, the HFHR is one of the most experienced and professionally active organizations engaged in the field of human rights in Europe.

The main areas of HFHR's activity include: monitoring of human rights violations, education and providing legal aid, in particular with regard to strategically important cases. The HFHR also provides expert consultations on human rights to international organizations, NGOs, state institutions (such as parliamentary committees, police officers, judicial officials, prison officials, border guards etc.) and individuals. Since 2007, the HFHR has held consultancy status at the United Nations Economic and Social Council (ECOSOC).

More information about the HFHR: www.hfhr.pl/en

Observatory of Media Freedom in Poland is one of the HFHR's legal programs founded in 2008, specifically focused on increasing the protection related to freedom of expression in both traditional media and on the Internet. The Observatory undertakes legal actions with regard to strategic cases of Polish journalists, bloggers or artists acting in the public interest. The Observatory's activity includes monitoring of court proceedings and preparation of legal submissions (such as amicus curiae briefs) before national courts and the ECtHR. The program also provides professional pro bono legal assistance for journalists who cannot afford regular legal aid.

Moreover the Observatory is involved in advocacy in the area of the freedom of expression and engages in research and educational activities (organizing seminars and trainings for journalists and lawyers as well as publishing books, reports and manuals related to media law and digital rights issues).

More information about the Observatory: www.obserwatorium.org

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