

## CHAPTER FOURTEEN

# Indymedia AND THE Law: Issues FOR Citizen Journalism

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This chapter considers some of the legal issues facing citizen journalists, especially those engaged in “radical” or activist reporting, in an online context. It suggests that the conceptualization of the citizen journalist must consider the status of this type of journalism in relation to law, the application of which is especially challenging in an online environment that is said to transcend jurisdictions. The extent of legal provisions recognizing citizen journalists as being privy to special protection are in dispute, though there appears to be a growing recognition of their claim to substantive rights as citizens *and* as journalists. In this chapter, I shall argue that state authority and law is adapting—if rather slowly—to take account of changes in international relations (or globalization) with important implications for citizen journalism’s forms and practices deserving of close attention.

To clarify this chapter’s agenda, allow me to identify three critical questions for citizen journalists to consider:

1. What rights are assigned and responsibilities required of journalists compared to citizens?
2. How are journalists recognized as such and what implications does this have for citizen journalists working in an online environment?
3. What complications are there for the state in assigning rights and demanding duties of citizen journalists in an online environment?

I shall proceed to illustrate some of the corresponding issues, in the first instance, with an overview of legal concepts that apply to journalists. Next, I will discuss material derived from a case study of Independent Media Centers (IMCs) based on my participant observation with IMC UK and IMC Bristol.

IMCs are parts of a global federated network of media centers that aim to provide a space for politically active citizens, or activists, to report their news without the normal constraints of economic and administrative power. They are particularly interesting as projects that attempt to harness the potential of the internet to be used in a way that avoids the implicit and explicit power relations that are said to stymie traditional journalism. As such they are supposed to allow anyone to “be the media,” not least by taking advantage of the perceived deterritorial, immaterial, and anonymous nature of the internet.

#### CITIZEN, JOURNALIST: RIGHTS, RESPONSIBILITIES, AND THE STATE

Online citizen journalism presents us with a conceptual conundrum: a citizen is the subject of a state, but the internet allows material to transcend the jurisdictional boundaries of the state. This conundrum, in my view, should not be seen as a discrete, novel problem, but rather placed in the broader context of change.

First, multiculturalism, migration, and competing obligations and loyalties create problems in the identification of legal subjects or citizens, on the one hand, and create legitimation problems for the state, on the other hand (see, for instance, Castles & Davidson, 2000). Second, the rise of multi-level governance has created a variety of sources of legal power and levels of citizenship (Held, McGrew, Goldblatt, and Perraton, 1999). Third, the supposed globalization (or perhaps, more accurately, internationalization) of politics and economics has outgrown the national basis of lawmaking, resulting in a profound shift in the constitution of people as political subjects and the state’s claim to authority (Hardt & Negri, 2000; Falk, 2000; Jayasuriya, 1999). For many citizen-activist journalists, such as those working in IMCs, there is the further problem of the legitimacy of the state—many contest that they have a duty to obey what they conceive to be a manifestly and systemically unjust state.

These problems are compounded in the online environment where internationalization, virtuality, and deterritorialization are said to threaten the capacity of the state both to award rights and manage responsibilities as they relate to citizens and journalists. An online citizen journalist’s copy may be written in Malaysia, about an event in Sudan, uploaded in Singapore to a server in Sweden by a German citizen. At what point is the citizen journalist recognized as such, and thereby awarded rights and/or held accountable for certain responsibilities? If rights are only made real by states, to which jurisdiction might the citizen appeal?

Can the journalist choose which state's right to claim or which responsibilities to adhere to? Should she be held to the Malaysian Press Institute's adherence to the principles of Rukunegara (the basis of the Malaysian state), which includes contributing to nation-building and upholding the standards of "social morality"? Perhaps most importantly, when can a state claim jurisdiction? Is it reasonable that citizen journalists should adhere to Germany's Töben ruling, which extends its Holocaust denial laws across all jurisdictions? Whose secrets, security, criminal code, and so on should such journalists obey?

Traditionally, journalists in liberal democracies have enjoyed basic rights, such as freedom of speech and freedom of the press, freedom from arbitrary arrest, and freedom of information provisions *as citizens*. That is, they have enjoyed *generally* applicable (to citizens) rights guaranteed by constitutional provisions (whether codified or not). At the same time, journalists have also enjoyed *specific* rights, awarded to them in recognition of their role in democratic states. As such, the ability to observe, scrutinize, and check power, and report to a public that governs itself, is made possible by journalistic rights and protections—specifically, with respect to questions of access, permissible speech, and legality of certain practices.

Citizen journalists may be concerned to secure rights of access (usually with a press card) and journalistic protection, for these are often not afforded to citizens as such. Access rights are those that allow journalists—usually gaining recognition through their attachment to institutions—to enter certain, sometimes restricted, institutions or areas *as journalists*. Speech rights for journalists sometimes go beyond those afforded to ordinary citizens, in the form of journalistic privilege—either absolute or qualified, usually offering protection against libel charges.<sup>1</sup> In the United Kingdom, absolute privilege only applies if the whole discourse is reported *contemporaneously*. Qualified privilege is reporting that may break a law, but which can claim a public interest qualification or a notion of duty to report.

The protection of journalistic material (or "shield laws") allows journalists to collect and store information of public importance. In the United Kingdom, section 10 of the 1981 Contempt of Court Act recognizes the journalist's right to protect a source but allows an exception if "disclosure is necessary in the interests of justice, national security or in the prevention of disorder or crime," unless outweighed by "public interest." Similarly, the 1984 Police and Criminal Evidence (PACE) Act protects "journalistic material," defined as "material acquired or created for the purposes of journalism," but in neither piece of legislation is "journalism" itself defined.

The rights available to journalists are usually awarded to institutions (rather than journalists as such), primarily because they offer some security for the state: institutions function to control workers and their products, especially through

selection and socialization of personnel (Etzioni, 1967; Hatch, 1997). This approach makes the institution a legal subject with responsibility for legal compliance.

Many citizen journalists are *not members* of institutions or organizations, however. As we shall see, in the case of IMCs, for instance, the boundaries between who is and is not an Indymedia journalist are fluid, and there is no traditional hierarchy of editorial responsibility.

Citizen journalists may well find it difficult to gain recognition *as journalists*. Consequently, access rights and protections may not be forthcoming. This is especially pertinent when recognition is institutionalized. In the United Kingdom, for example, membership in the National Union of Journalists (whose press card is invaluable for access) is still in large part restricted to those who earn an income from journalism. IMC participants do not. However, a vast array of rights is available to them *as citizens*. In some countries, such as the United States since the 1972 *Branzburg v. Hayes* judgment, constitutional provisions for free speech prevent the federal government from making a distinction between citizens and journalists, though some states have opted to implement state-level shield laws. Citizen journalists who are concerned to be recognized as journalists in the United States may, then, have fewer concerns than expected elsewhere.

Nevertheless, recognition remains an important issue for activist citizen journalists online. Legal subjectivity is an essential mechanism for claiming rights, yet requires responsibility to obey laws. On one hand, a citizen journalist may seek rights as a journalist. On the other, he or she may seek protection in anonymity, virtuality, and the sense of freedom that stems from exploiting the supposed deterritorialization and jurisdictional complications provided by the internet, especially in states where liberal rights are not forthcoming. In this instance, the citizen journalist may reject the status as either a general (citizen) or specific (journalist) legal subject. These issues will now be illustrated in the case of IMCs.

## INDEPENDENT MEDIA CENTERS

IMCs are key examples of radical forms of use of the internet. Born of the traditions of radical media projects that started with pamphleteering in the 17th and 18th centuries, through to radio and television in the 20th and 21st centuries, IMCs provide those excluded from mainstream media with the opportunity to “do it yourself.” IMCs do not depend on any external institutional assistance and only continue to exist as long as ordinary citizens participate in decision making and related aspects of running an online media project. Consequently, issues, campaigns, and events that slip through the mainstream news net take center stage on IMCs and are reported and discussed in a manner far removed from mainstream discourses—reporting is frequently irreverent, controversial,

judgmental, and active. IMC journalists do not consider themselves to be objective or neutral but stand on the side of the marginalized. As such, they are often “embedded” into the communities, movements, or campaigns they write about, embracing their subjectivities. They are not just advocacy journalists, but activist journalists.

IMCs are probably the closest thing we have to an autonomistic citizen journalism movement. Although individual IMCs make their own specific rules, they are held to global Principles of Unity (PoU). The PoU explain that IMCs must adhere to principles of equality, decentralization, and local autonomy. The emergence of new IMCs must derive from the “self-organization of autonomous collectives that recognize the importance in developing a union of networks.” They must be organized on a not-for-profit basis, must “recognize the importance of process to social change and...[be] committed to the development of non-hierarchical and anti-authoritarian relationships,” and thereby “organize themselves collectively and be committed to the principle of consensus decision making and the development of a direct, participatory democratic process that is transparent to its membership.” IMCs must consider “open exchange of and open access to information a prerequisite to the building of a more free and just society.” They must be “based upon the trust of their contributors and readers, [and] shall utilize open web based publishing, allowing individuals, groups and organizations to express their views, anonymously if desired.” They must have a strong commitment to openness, by sharing resources, knowledge, skills, and equipment, while being committed to the use of free source code, thereby increasing the “independence of the network by not relying on proprietary software” (IMC, 2008).

As long as the PoU are adhered to, each IMC develops its own editorial policy and mode of operation. Though the degree of independence of each IMC means that generalizations are somewhat difficult, most IMCs can be roughly described as “anti-capitalist,” attracting citizens who tend to be involved with “radical” groups, campaigning and taking actions against the bureaucratic-capitalist state. Taking a position of opposition to the state means that the normal mode of operation of news organizations is rejected. This means that there are no agreements, tacit or otherwise, between IMCs and the states in which they are situated. Indeed, relations are usually ones of opposition.

The fact that IMCs are based on a critique of what they see as a compliant corporate media system that operates in a grossly unfair social system means that compliance with the “rules of the journalistic game” is not forthcoming. This position of opposition to the state leads to conflicts that play out through the medium of law. Legal conflicts illustrate the frictional borders between activist citizen journalism and state power and demonstrate the persistence of the state in an international and virtual media environment, as will be illustrated in the following case studies. While Indymedia arose as an “alternative globalization” movement, it

is arguable that its development from a global site to a network of sites that follow the contours of nation-states that the reality of the nation-state persists.

#### VIRTUALITY AND LEGAL SUBJECTS: LIBEL

Because of the commitment of IMCs to the right of free speech, copy on IMC sites (with the exception of some features) has no editorial input, faces no prior restraint, and should only be removed from an IMC site if it breaches editorial guidelines (such as no discrimination, no advertising, and no copy from mainstream bureaucratic organizations). Thus IMCs receive sporadic complaints from institutions and individuals who have been defamed, or from their lawyers. Unlike mainstream organizations, IMCs do not have legal teams but instead depend on volunteers—of which I am one—who might have some knowledge of law, to staff the legal list. Copy may be removed or edited if the charges are considered to be quite reasonable—for instance, the police sergeant accused of being a pedophile without any justification (January 2006), though more “political” cases will be fought.

On September 13 and 21, 2007, IMC UK received letters from Schillings law firm on behalf of the Uzbek billionaire Alisher Usmanov demanding the removal of an article written by the former British diplomat Craig Murray. Murray had accused Usmanov of being a heroin trafficker, a thug, and a criminal in his book and on his website. However, the latter’s UK-based hosting company was served with a notice from Schillings. When Murray’s website hosts took down his website, the article in question appeared on blogs around the world, many of which were also served with notices from Schillings, and some of which complied. The article was then posted to IMC UK, prompting the lawyer’s letter.

The legal list was only notified of the letters some time after they were received, but soon initiated a discussion about how best to proceed. The volunteers were split between those who wanted to keep the original article and those who wanted to modify it.

IMC UK is a difficult “legal subject” insofar as most participants use pseudonyms, participation is fluid with people coming and going, and insofar as there is no formal hierarchy of office, participants may be regarded as virtual beings. This initially led some participants to consider themselves secure from such threats; however, it was suggested by some on the list that although most participants could not be identified (IMCs tend not to log IP addresses), an aggressive lawyer might realize that someone with a real identity must sign agreements with the web server company, domain name registrars, and so on. Such persons may be considered liable as legal subjects. However, the main thrust of the discussion was that IMC UK should claim journalistic rights under UK law.

As the discussions progressed over many weeks, participants contacted the original author to try to find out whether the publisher of the original book had had its legal department verify the claims made in it. Murray did not respond. Although no one was able to decide conclusively the veracity of the article, some participants declared themselves prepared to go to court to defend it. However, without verification of the claims, no truth-defense could be made, so some participants argued against the idea. The “Reynolds Judgment” might have offered a public-interest defense had the claims been proven untrue, but the fact that there was no attempt to include the (potential) claimant’s position would have invalidated this defense.

While this was going on, a participant noted that a Member of the European Parliament had repeated Murray’s claims in parliamentary debate. Some proposed that IMC UK could keep the article up and claim statutory qualified privilege. However, the claim was based on a misunderstanding. In the sense intended by some of the participants, privilege was understood as the right to report comments made in Parliament (in this case the European Parliament). However, privilege tends to be considered to extend only to the words directly reported *in context* and does not then extend to the rest of an article.

Although there was some consideration that it would be unlikely that a court would award significant damages to Usmanov, on the basis that he was a billionaire and IMC UK is a not-for-profit and has no significant assets, most participants (besides some of the more “radical” participants who stood aside) agreed to a proposal to rewrite the article as a front-page story (the original was buried deep within the site) about an attack on IMC UK by Usmanov, repeating the original claims *as allegations*.

Shillings did not contact IMC UK again with regard to Usmanov, but libel notices from others have continued. In this instance, the institutional virtuality of IMC UK may have prevented effective legal action from taking place. However, libel law has adapted to the “deterritorialized” internet, with countries such as the United Kingdom allowing people to “libel shop” when something is published internationally, that is, to choose the jurisdiction in which libel cases will be heard.

#### THE STATE, DETERRITORIALIZATION, AND JURISDICTION: SECURITY

Just as libel law is adapting to internationalization, so too are “security” laws. So-called anti-terrorism laws have multiplied and intensified since 2001. Such laws have had significant effects on the ability of journalists and ordinary individuals to seek information about the state, yet increase the capacity of state authorities to survey and investigate citizens. Indeed they provide some evidence

to challenge the “end of the state” (Ohamae, 1996) thesis that developed states retain an ultimate monopoly over coercive resources.

One of the promises of the online environment was that it would transcend political boundaries, that states would be unable to control it. However, citizen journalists as material beings are legal subjects whether they like it or not, and their tools are similarly subject to laws as material items. Thus, the internet does not entirely transcend jurisdictional control. It may not be as easy to control as licensed media or institutionalized media, but control *can* be exerted over all material items, especially when issues of security are in play.

On Thursday, October 7, 2004, the Indymedia UK website went offline. Few of the participants were aware of how and why this happened—the site just disappeared. It was not, however, just IMC UK that went down. Another 21 IMC sites were also brought down. The problem for IMC UK was that its site was hosted on the servers of a US hosting company, which had been requested to comply with a subpoena from the Federal Bureau of Investigation.

In 2003–2004 an Italian magistrate was investigating a number of “terrorist” acts committed in Italy and elsewhere in Europe, in particular the attempted bombing of Romano Prodi, responsibility for which was admitted by a contributor to an Indymedia web site. However, the magistrate found that the site was not hosted in Italy, but in the United States—exploiting deterritorialization to receive greater constitutional protection. Therefore, in April 2004, she requested that the US Judicial Authority obtain log files from Indymedia’s web-hosting company, Rackspace. The magistrate had requested that the US authorities subpoena Indymedia Global for IP logs. However, although Rackspace is a US company, the servers in question were physically located in the United Kingdom. This meant that the FBI could not directly comply with the request. Instead it had to make the request to the UK authorities. The important point about these requests is that they were made under the Mutual Legal Assistance Treaty, an agreement among countries to cooperate on legal investigations across borders without necessarily having formal laws in common.

We see here, then, mechanisms in place that affirm jurisdictional control over citizen journalists: they are still subject to law as countries adapt to a changing legal environment. Indeed, the international scope of the internet does not mean that it escapes countries and their laws, but instead that it may be subject to the laws of many countries.

#### THE STATE, RECOGNITION, AND THE ACTIVIST JOURNALIST: INCITEMENT

A notable feature of mainstream journalism is that it tends, usually in the name of neutrality, to take a passive relation to the world around it. Neutrality is not,



however, motivated only by principle or professional values. For example, incitement laws effectively prevent mainstream journalists from taking an advocacy role, at least on certain topics.

The promise of activist citizen journalism has always been to report actively from within movements. However, the issue of incitement to commit crime presents reporters with problems. If facts are not neutral, how can a proposed mass trespass of a military base be reported? How can the disabling of nuclear submarines be reported actively without incitement?

Under the United Kingdom's 2006 Terrorism Act, the issue of incitement has become especially problematic, wherein the *encouragement* and *glorification* of "terrorist acts" domestically and *overseas* constitutes a crime. Indeed, encouragement applies to "a statement that is likely to be understood by *some* or all of the members of the public to whom it is published as a direct or *indirect* encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism." Again, the limit of the supposed virtuality and borderlessness of the internet becomes apparent.

Of course incitement is not restricted to terrorist acts; it is more often applied in relation to crime. In June 2005 the police raided Bristol IMC and seized its web server under the Police and Criminal Evidence (PACE) Act and arrested a participant for incitement to criminal damage. The server was seized as the police sought access to the IP log (as did the FBI in the IMC UK case above) to identify the person who had written a story about a "direct action" they had initiated. (In this case materials were thrown at a train carrying cars from the port through the city of Bristol in a protest about climate change.)

In keeping with other IMCs, Bristol IMC preserves the anonymity of participants by deleting IP logs. The police had originally requested the IP logs, but when they were not forthcoming, they confiscated the server. Naturally, even this course of action was unfruitful. As Bristol IMC was merely a conduit, it claimed no responsibility for the posting, the author being entirely anonymous. One of the key arguments that the IMC put to the police was that the server should have been treated as "journalistic material" using the same PACE Act under which it was seized. In the first instance it was immediately clear that because Bristol IMC is not recognized as a journalistic institution in the same way as, say, the *Bristol Evening Post*, it was not treated equivalently. Its irreverence worked against it.

Further to this, although the argument that its servers be treated as journalistic material was well supported by other organizations that sympathized with Bristol IMC, such as the National Union of Journalists, it was somewhat misplaced. In the first instance, journalistic privilege is not protected in the same way as, say, lawyer's privilege. Journalistic privilege (in this instance to protect a source and journalistic material) is significantly qualified. Although journalistic material

is protected under the PACE Act, that protection can be easily overturned by a judge or even by the invocation of special procedures. Furthermore, as outlined above, the protection of journalistic material is subject to other issues, especially the “public interest.” It is clear that a judge would see the action as criminal damage, and its reporting as the glorification of vandalism, and therefore there is no public-interest defense.

Bristol IMC has since instituted a system of editing so that when the collective is informed that copy might be considered to incite criminal activity, the particular passages are edited and replaced with a disclaimer.

## CONCLUSION

Activist citizen journalism will always be at a disadvantage compared to mainstream journalism—politically, economically, culturally, and legally. IMCs advocate causes and actions and may report in ways that do not correspond with the rules of the journalistic game, norms, or laws. Because of this, neither IMC journalists nor other citizen journalists can simply and straightforwardly claim the rights afforded to journalists. It is not enough to claim privilege, for privilege is dependent upon adherence to the rules.

Though adherence to a legal system that is considered to reflect and sustain gross inequalities may not be desirable for IMCs, better knowledge of the law would help IMCs and citizen journalists more generally. Such knowledge would prevent participants from assuming journalistic protections are greater, and jurisdictions lesser, than they actually are. It might also enable them to consider claiming more general laws and rights as citizens rather than as journalists as such.

Some of the characteristics of citizen journalism mean that legal problems are not as great as they might initially appear to be. Though there are figures who are more easily identifiable, it would prove difficult to link them personally to legal transgression. Also, in libel cases, the visibility of the publication counts for a great deal—citizen journalists might claim that the number of people who read a specific story is very small, and perhaps of politically marginal importance, so large libel awards against them are unlikely.

The political decision of IMCs (and many bloggers) to protect participants through the use of pseudonyms and deletion of IP logs has proven effective. However, the question must be asked whether this will be allowed to continue and whether repressive aspects of law withdraw or advance in the face of new media practices. If it does not continue, citizen journalism will lose one of its most potent protections but may, perhaps, gain recognition as a journalistic enterprise proper.

## NOTE

1. While the United Kingdom has some of the strictest libel laws in the Western world, they have been loosened somewhat with the 2001 “Reynolds Judgement.”

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