

Thorny branches of the ‘tolerated weed’: Some remarks on the protection of journalists’ sources in South Africa

Introduction

The last decade has seen a worldwide upsurge in events that highlight a pivotal constituent of media freedom - the protection of journalists’ sources. A recent groundbreaking report on the issue indicates that countries as wide-ranging as Luxembourg, New Zealand and El Salvador have recently adopted legislation to deal with the matter. Draft legislation is currently under consideration in the United States, Australia, Canada and the Netherlands.¹ Courts in several jurisdictions have also had occasion to consider the matter, including the United States,² Canada,³ Germany,⁴ Ireland⁵ and the United Kingdom.⁶ The

^{*}It has been said that ‘in the garden of evidence, privilege is a tolerated weed’ (Norton *Privileges* 27 (1973) *Arkansas LR* 200).

¹Banisar *Silencing sources: An international survey of protections and threats to journalistic sources* (2007) 4. The report was commissioned by Privacy International, a privacy, human rights and civil liberties watchdog, as part of its Freedom of Information Project (www.privacyinternational.org/foi).

²In the controversial matter of *In re Grand Jury Subpoena, Judith Miller* 397 F3d 964, 986-1004 (DC Cir 2005), prominent *New York Times* journalist, Judith Miller, was jailed by the United States Court of Appeals for the District of Columbia Circuit for refusing to disclose the name of her anonymous source. In October 2004, Miller was held in civil contempt of court for not disclosing confidential information as demanded by a grand jury. She was subpoenaed to disclose documents and testimony related to her conversations with a specified government official concerning the identity of Valerie Plame, an ‘undercover’ CIA agent, the disclosure of which led to an investigation. Miller refused to comply with the subpoena and was jailed. She was eventually released from jail on 2005-09-29, after her confidential source, I Lewis ‘Scooter’ Libby’, Vice President Dick Cheney’s Chief of Staff, permitted her to disclose his identity. See Carney ‘The protection of journalists’ confidential sources: An examination of the “Valerie Plame Affair” and beyond’ (2007) 12 *Communication Law* ; see Joyce ‘The Judith Miller case and the relationship between reporter and source: Competing visions of the media’s role and function’ (2007) 17 *Fordham*

European Court of Human Rights has dealt with the same matter on a number of occasions since it handed down its landmark judgment in *Goodwin v United Kingdom*,⁷ most notably in the recent cases of *Tillack v Belgium*,⁸ *Voskuil v Netherlands*⁹ and *Sanoma Uitgevers v Netherlands*.¹⁰ The International Criminal Tribunal for the Former Yugoslavia has also considered the issue in the, admittedly somewhat different, context of a testimonial privilege for a war correspondent.¹¹

Protection of journalists' sources

The protection of media sources, at the most basic level, involves the intersection of two fundamentally important public interests. On the one hand, the public has an interest in the free and unfettered dissemination of ideas and information, which in turn demands that journalists should be able to fulfil their newsgathering function without fear of compelled disclosure of information about sources.

Intellectual Property Media and Entertainment LJ 555.

³See *R v National Post* [2008] ONCA 139. In this matter, a journalist received what appeared to be a copy of a Business Development Bank of Canada (BDBC) loan authorisation for a hotel in then Prime Minister Jean Chrétien's home constituency. The document, if genuine, could show that Chrétien had a conflict of interest in relation to the loan. BDBC officials claimed, however, that the document was a forgery and complained to the police. The police then obtained a search warrant and assistance order requiring the *National Post* to produce the document, and the envelope in which it was sent, in order to conduct forensic tests that might identify the person who sent them. The trial court ruled that the search warrant and assistance order violated s 2(b) of the Canadian *Charter of Rights and Freedoms* and that the documents were protected by the journalist-confidential source privilege. The Crown successfully appealed the matter to the Ontario Court of Appeal and the *National Post* then lodged an appeal to the Supreme Court. On 2009-05-22, the Supreme Court of Canada heard the appeal, but the judgment has not yet been handed down.

⁴(BVerfG) 1 BvR 538/06.

⁵*Mahon Tribunal v Keena* [2009] IESC 64.

⁶*Mersey NHS Trust v Ackroyd (no 2)* [2007] EWCA Civ 101.

⁷[1996] 22 EHRR 123.

⁸[2007] ECHR 20477/05.

⁹[2007] ECHR 64752/01.

¹⁰Application no 38224/03 (2009-03-31).

¹¹*Prosecutor v Radoslav Brdjanin & Momir Talic*, Decision on Interlocutory Appeal, case no IT-99-36-AR73.9, P50, ICTY Appeals Chamber 2002-12-11. See also Kraut 'A critical analysis of one aspect of *Randal* in light of international, European and American human rights conventions and case law' (2004) 35 *Columbia Human Rights LR* 337; Welgemoed *Media law aspects of the news-gathering function of journalists in a conflict zone* LLM thesis UNISA (2007).

On the other hand, the public has an interest in effective law enforcement and due administration of justice, which requires that all facts relevant to the dispute must be presented.¹²

In *Branzburg v Hayes*,¹³ the important judgment on the disclosure of media sources in the United States, Stewart J set out three assumptions on which the claim for protection of sources depends:

- (a) journalists require informants to gather news;
- (b) confidentiality is essential to a sustained relationship between the journalist and the source; and
- (c) the lack of protection for confidential media sources not only prevents sources from providing news-gatherers with information, but that it also leads to self-censorship on the part of the media.¹⁴

Journalists routinely refuse to disclose information about their sources out of allegiance to their ethical obligations.¹⁵ In *R v Parker*,¹⁶ one of the earliest reported South African cases dealing with the issue, the appellant was a journalist who refused to answer certain questions based on his adherence to ethical obligations:¹⁷

My reason for refusing to answer these questions is a basic journalistic ethic. Many journalists receive confidential information from many sources. It is absolutely essential to the trust that a newspaper must have with its readers, if it is to succeed, that these sources remain confidential.

Another argument commonly advanced in support of source protection is based on the fear that journalists may be seen as the investigative arm of prosecuting authorities.¹⁸ Journalists are often

¹²Abramowicz 'Calculating the public interest in protecting journalists' confidential sources' (2008) 108 *Columbia LR* 1949 at 1951.

¹³408 US 665, 92 S Ct 2646. In *Branzburg*, the United States Supreme Court rejected a claim by journalists that they have a journalistic privilege based on the First Amendment of the United States Constitution.

¹⁴*Id* 728.

¹⁵Retief *Media ethics: An introduction to responsible journalism* (2002) 190. The majority of journalistic codes of conduct contain express provisions regulating this relationship. The South African Press Code provides, for instance, that '(t)he press has an obligation to protect confidential sources of information'. Along the same lines, the Editorial Code of the SABC provides that '(w)e shall not disclose confidential sources of information'.

¹⁶1965 4 SA 47 (SRA).

¹⁷*Id* 48.

¹⁸Bates *The reporter's privilege: Then and now* (2000) 1.

involved in the gathering of information regarding matters which are simultaneously under investigation by the police. It is also possible that investigating agencies may become aware of certain incidents as a result of information contained in a publication.¹⁹

Arguably the most substantial argument used to support the protection of confidential sources is that that compelled disclosure has a 'chilling effect' on the free flow of information which, in turn, results in the 'drying up' of news sources.²⁰ The argument, in basic terms, is that newsgathering is an essential activity in a democratic state. In order to properly engage in this activity, newsgatherers often need to rely on sources for their information. However, sources may not always be willing to provide sensitive and controversial information. The possible revelation of their identities, or other information regarding sources disclosed, often makes people unwilling to provide the information. Not only will a lack of protection for sources negatively affect the independence of newsgatherers, it may lead to a reluctance to approach sources in the first place. In addition, newsgatherers may fear physical harm when investigating news in certain environments.²¹

Claims relying on the chilling effect of compelled disclosure also extend to the effect disclosure orders may have on the media industry itself.²² Carney notes that compelled disclosure infringes upon the autonomy of media outlets to dictate their own news coverage; in order to avoid the costs involved in fighting disclosure orders, media organizations may avoid reporting about controversies,

¹⁹In *S v Cornelissen; Cornelissen v Zeelie NO* 1994 2 SACR 41 (W), it was argued, on behalf of the journalist in question, that subpoena powers were used as a means to embark on a 'fishing expedition' when proper police investigation would have provided the information sought from the journalist. The court agreed with this contention, stating that there was no indication that any member of the investigating team had attempted to follow any of a number of other avenues in order to obtain the information sought from the journalist.

²⁰In *Ashworth Hospital Authority v Mirror Group Newspapers Ltd* [2002] UKHL 29; [2002] 1WLR 2033 the House of Lords expressly recognised that '(a)ny disclosure of a journalist's source does have a chilling effect on the freedom of the press ... (t)he fact that journalists' sources can be reasonably confident that their identity will not be disclosed makes a significant contribution to the ability of the press to perform their role in society of making information available to the public.

²¹Brabyn 'Protection against judicially compelled disclosure of the identity of news gatherers' confidential sources in common law jurisdictions' (2006) 69 *Modern LR* 895 at 922.

²²Carney 'Theoretical underpinnings of the protection of journalists' confidential sources: Why an absolute privilege cannot be justified' (2009) 1 *Journal of Media Law* 106.

even where these reports contain information that may be of significant public importance.²³

As mentioned, the legal position regarding protection of journalists' sources in South Africa²⁴ remains unclear. In the absence of appropriate legislation, the interpretation of section 205 of the Criminal Procedure Act²⁵ by the Constitutional Court²⁶ may serve as a shield to protect sources.²⁷ In apartheid South Africa, claims for source protection were primarily based on professional ethics and the courts of the day were reluctant to recognise this privilege. Under the current constitutional dispensation, these claims will have to be evaluated through the prism of the constitutional guarantee of freedom of expression and its constituent right to freedom of the press and other media.²⁸

At a general level, the protection of journalists' sources, also commonly referred to as 'journalistic privilege', is usually attacked on two grounds.²⁹ In the first instance, critics contend that to protect the gathering and dissemination of information by the media equates to making an exception of the media as institution, and hence journalists should not be able to claim testimonial privilege to protect confidential communications in circumstances where ordinary citizens are not able to do so.

²³Van Gerpen *Privileged communication and the press: The citizen's right to know versus the law's right to confidential source evidence* (1979) 97.

²⁴Van Niekerk 'Journalistic privilege: Need for a new approach?' (1969) 86 *SALJ* 100 posed the question whether the South African law is not 'in need of serious reconsideration in light of changed circumstances and of a better understanding of the role of a free Press in a free society'. See also Van Rooyen 'The disclosure of journalists' sources in South African law' (1995) 11 *SAJHR* 132; Nel 'Disclosure of confidential news sources' (1997) *Codicillus* 9; De Klerk *Journalistieke privilegie: 'n kritiese analise van die joernalis se regsplig om vertroulike bronne van inligting bekend te maak met besondere verwysing na die reg op vryheid van uitdrukking* LLM thesis (UP) (2005).

²⁵51 of 1977.

²⁶In *Nel v le Roux* 1996 3 SA 562 (CC) the court ruled that a witness is not obliged to answer any question which violates a fundamental right, unless there can be a reasonable or justifiable limitation of the right in the opinion of the judicial officer. This may be interpreted as providing a journalist with a 'constitutional just excuse'.

²⁷Swanepoel 'Shielding those who highlight the emperor's new clothes - does the Constitution demand a journalistic privilege?' (2007) *Pretoria Student LR* 18 at 22.

²⁸Milo, Stein and Penfield 'Expression' in Woolman, Roux and Bishop (eds) *Constitutional law of South Africa* (2006) paras 42-36 provide a piercing and comprehensive exposition of the topic, which includes a discussion of how a court may embark on balancing the relevant constitutional rights.

²⁹Castiglione 'A structuralist critique of the journalist's privilege' (2007) 23 *Journal of Law and Politics* 115 at 131.

Secondly, critics argue that defining who is a 'journalist' is a formidable challenge to the recognition of such a privilege.³⁰ Technological, cultural, ideological, and economic changes in the way in which information is gathered and disseminated pose significant challenges to the establishment of criteria for distinguishing a 'journalist' from any other citizen.³¹

This article addresses these two be potential obstacles to the recognition of protection of journalists' sources in South Africa. The aim is to advocate an approach based on careful scrutiny of the values served by the protection of journalists' sources and to indicate that, if such an approach is followed neither of these obstacles is insurmountable.

A basic tenet of democracy is the notion that individuals are autonomous beings who should have access to the widest possible range of information in order to make informed decisions regarding political, social and economic aspects of their lives.³² From this it follows that freedom of expression is central to the maintenance of democracy, since the constraint of a free flow of information to the public will jeopardize the ability of the individual to make these choices.³³

Freedom of expression is specifically protected in the South African Constitution by section 16 and forms part of a cluster of rights³⁴ which, according to Roux,³⁵ have come to be seen as integral to the operation of a democratic system of government. In *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security*,³⁶ the Constitutional Court described the right to freedom of expression as 'part of a web of mutually supporting rights ...

³⁰*Id* 132.

³¹Berger 'Shielding the unmedia: Using the process of journalism to protect the journalist's privilege in an infinite universe of publication' (2003) 39 *Houston LR* 1371 at 1378.

³²Greenawalt 'Free speech justifications' 1989 (89) *Columbia LR* 145; Emerson 'Toward a general theory of the First Amendment' (1963) 72 *Yale LJ* 877 at 882.

³³The democratic rationale, of which Alexander Meiklejohn is seen as the most prominent proponent, is one of a number of traditional justifications for the protection of freedom of expression (Meiklejohn *Free Speech and its relation to self-government* (1948)). See text accompanying n 51-55.

³⁴Other rights in this cluster include those protected by s 17 (the rights to assembly, demonstration, picket and petition), s 18 (the right to freedom of association) and s 19 (political rights such as the right to form a political party, to vote, to take part in political activities).

³⁵Roux 'Democracy' in Woolman (n 15) paras 1-48.

³⁶1996 1 SACR 587 (CC).

(which) ... may be conceived as underpinning an entitlement to participate in an ongoing process of communicative interaction that is of both instrumental and intrinsic value'.³⁷

It is widely recognised that the media plays a vital role in facilitating this flow of information, opinions and ideas to the public. Media structures are uniquely situated to carry out its investigative function, and they have adequate personnel and the expertise to quickly gather and process information.³⁸ Mass media structures also have the financial capacity and the technologies to put their findings before a mass audience.³⁹ In *Reynolds v Times Media Ltd*,⁴⁰ the House of Lords emphasised the importance of media freedom as follows:⁴¹

It is through the mass media that most people today obtain their information on political matters. Without freedom of expression by the media, freedom of expression would be a hollow concept. The interest of a democratic society in ensuring a free press weighs heavily in the balance in deciding whether any curtailment of this freedom bears a reasonable relationship to the purpose of the curtailment. In this regard it should be kept in mind that one of the contemporary functions of the media is investigative journalism. This activity, as much as the traditional activities of reporting and commenting, is part of the vital role of the press and the media generally.

In South Africa the media has played an undeniably important role in keeping the public informed about matters of public concern and, particularly, in exposing the wrongdoings of the apartheid dispensation. A Constitutional Court Justice poignantly emphasised the importance of the media in a recent keynote address:⁴²

The role of the media in a constitutional democracy is crucially important. This is so not only because freedom of the press and other media and the freedom to give and receive information is a constitutionally guaranteed right, but because the legitimacy of courts and indeed the very constitutional order depends on reporting, comments and discussions in the media. The role the free media have played in

³⁷*Id* 597.

³⁸Hakimi 'The media as participants in the international legal process' (2006) 12 *Duke Journal of Comparative and International Law* 12.

³⁹Fenwick and Phillipson *Media freedom and the Human Rights Act* (2006) 2.

⁴⁰[1999] 4 All ER 609, [2001] 2 AC 127, [1999] 3 WLR 1010, [1999] UKHL 45.

⁴¹*Id* 622 (emphasis added).

⁴²Van der Westhuizen 'A few reflections on the role of courts, government, the legal profession, universities, the media and civil society in a constitutional democracy' (University of Pretoria Faculty of Law Prestige Lecture Series, 17 September 2008).

building our democracy and human rights awareness cannot be underestimated and has to be applauded.

The media is frequently portrayed as a watchdog which has to guard the interests of the public.⁴³ The metaphor of the media as watchdog goes back as far as the nineteenth century⁴⁴ and has specifically been acknowledged in *Government of the Republic of South Africa v Sunday Times Newspaper*.⁴⁵ Our courts have frequently echoed the importance of the media in ensuring the free flow of information to the public.⁴⁶ In *Khumalo v Holomisa*, the Constitutional Court interpreted this right as conferring a constitutional obligation on the media to ensure that citizens are sufficiently informed to secure their meaningful participation in the democratic process.⁴⁷ With reference to the judgment of the High Court of Australia in *Theophanous v Herald and Weekly Times*,⁴⁸ O'Regan J emphasised that this paramount role of the media is crucial in ensuring the Constitution's commitment to accountability, responsiveness and openness, as pronounced in section 1(d) of the Constitution:⁴⁹

In a democratic society, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society. If the media are scrupulous in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy. If they vacillate in the performance of their duties, the constitutional goals will be imperilled. The Constitution thus asserts and protects the media in the performance of their obligations to the broader society, principally through the provisions of section 16.

⁴³*Jersild v Denmark* [1995] 19 EHRR 1.

⁴⁴Gleason *The watchdog concept: The press and the courts in nineteenth-century America* (1990) 50.

⁴⁵1995 2 SA 221 (T) 227.

⁴⁶*National Media Ltd v Bogoshi* 1998 4 SA 1196 (SCA) para 6; *South African National Defence Union v Minister of Defence* 1999 4 SA 469 (CC) paras 24 and 28.

⁴⁷2002 5 SA 401 (CC).

⁴⁸(1994) 124 ALR 1 at 61.

⁴⁹*Khumalo* (n 53) para 24.

Media freedom and 'exceptionalism'

Some constitutional scholars have argued that the independent constitutional significance of the media as set out by O'Regan in *Khumalo* may translate into the need for a certain measure of protection so that the media may fulfil its constitutional mandate.⁵⁰ A particularly contentious issue relates to the extent to which the media, as an institution, should or should not be given legal protection superior to that permitted to the individual on the basis that the media constitutes 'an essential bastion of free expression in a democracy'.⁵¹ The view that 'press exceptionalism'⁵² would offend the principal of equal treatment of all who communicate was endorsed by Cameron J in *Holomisa v Argus Newspapers Ltd*:⁵³

It does not follow, however, from the special constitutional recognition of the importance of media freedom, or from the extraordinary responsibilities the media consequently carry, that journalists enjoy special constitutional immunity beyond that accorded ordinary citizens ... (i)t is thus consistent to reject 'press exceptionalism' while at the same time emphasising that, because of the critical role that the media play in modern democratic societies, the law of defamation must leave them free to speak on matters of public importance - though no more free than other citizens - as fully and openly as justice can possibly allow.

More recently, the Supreme Court of Appeal confirmed this view in *Midi Television (Pty) Ltd t/a e-TV v Director of Public Prosecutions (Western Cape)*, emphasising that 'the constitutional promise of a free press is not one that is made for the protection of the special interests of the press'.⁵⁴

In an attempt to harmonise the rejection of a privileged position for the press with claims for protection of journalists' sources, a consideration of the underlying rationales for the protection of freedom of expression in general may be a useful starting point.

⁵⁰Marcus and Spitz 'Expression' in Chaskalson *Constitutional law of South Africa* (1996) paras 20-21.

⁵¹Burchell *Personality rights and freedom of expression: The modern actio injuriarum* (1998) 5.

⁵²This is a term used by Lewis, who notes that '(p)ress exceptionalism - the idea that journalism has a different and superior status in the Constitution - is not only an unconvincing but a dangerous doctrine'; Lewis *Make no law: The Sullivan case and the First Amendment* (1991) 210.

⁵³1996 2 588 (W) 610.

⁵⁴2007 5 SA 540 (SCA).

Stated in simple terms,⁵⁵ free expression is valued because it aids in the search for truth. The gist of this is that the truth can only be discovered if there is openness to competing or opposing opinions.⁵⁶ In addition to the argument of truth, free expression is seen as ‘an indispensable tool of self-government in a democratic society’. The essence of this theory is that a variety of viewpoints lead to a politically sophisticated electorate.⁵⁷ A third argument emphasises the important role of free expression in maintaining the moral responsibility, autonomy and dignity of the individual.⁵⁸ Ronald Dworkin is one of the most prominent proponents of this theory and it is his view that citizens who are denied moral responsibility are indeed insulted by a government who denies those citizens the right to hear the widest possible range of opinions, regardless of whether these opinions may be dangerous or offensive.⁵⁹

All of these arguments will not be applicable to the recognition of freedom of speech in all contexts. Claims for media freedom, for instance, are most often based on the democracy argument, which may be seen as most appropriate in the context of media freedom.

Barendt identifies three perspectives on the relationship between justifications for freedom of expression and media free speech claims.⁶⁰ The first is that the two are really equivalent and that ordinary individuals are treated in the same way as the press and other media.⁶¹ This is the approach which predominates in the United States, where it is accepted that the free speech claims of the mass media are indistinguishable from those of other speakers. While this approach promotes equal treatment of all speakers and avoids claims of preferential treatment for the media, it can be criticised for

⁵⁵There is a voluminous body of scholarship on the justifications for the protection of free expression. See Schauer *Free speech: A philosophical enquiry* (1982); Burchell (n 47) 1; Burns *Communications law* (2009) 46.

⁵⁶For a comprehensive exposition of this rationale, see Schauer (n 51) 15.

⁵⁷In *Roth v United States* 354 US 476 at 484, the United States Supreme Court interpreted this as the ‘unfettered interchange of ideas for the bringing about of political and social changes desired by the people’.

⁵⁸Emerson (n 28) 879; Scanlon ‘A theory of freedom of expression’ in *Philosophy and public affairs* (1972) 1 at 204.

⁵⁹Dworkin *Freedom's law: A moral reading of the American Constitution* (1996) 200.

⁶⁰Barendt *Freedom of speech* (2005) 419. These three models are discussed and amplified by Fenwick and Phillipson (n 45) 20.

⁶¹Barendt *ibid.* He also cites Lange ‘The speech and press clauses’ (1975) 23 *University of California LR* 77; Van Alstyne ‘The hazards to the press of claiming a “preferred position”’ (1977) 28 *Hastings LJ* 761.

assuming that the specific mention of freedom of the press is redundant in the constitutional text.⁶²

According to the second perspective, freedom of the press is seen as having a meaning distinct from freedom of expression. Accordingly, mass media institutions are privileged because of their constitutional role in the free flow of information to the public.⁶³ One of the staunchest modern supporters of this view is undoubtedly (former) United States Supreme Court Justice Potter Stewart, who saw the press as a separate entity worthy of independent institutional protection by the First Amendment.⁶⁴ In Stewart's view, the Framers of the First Amendment recognized a distinction between individual speech and institutional press rights and did not intend for them to mean the same thing.⁶⁵ To the extent that this translates into a privileged position for the media, this perspective has to be rejected; there are contexts where special privileges for the media may run counter to general free speech claims.⁶⁶ This would clearly amount to the kind of 'press exceptionalism' which was expressly rejected by our courts in the *Holomisa* and *Midi Television* judgments.⁶⁷

A third possible perspective on the relationship between press freedom and freedom of expression would extend privileges to the media only in those contexts where media speech claims promote and enhance the general underlying values of freedom of expression.⁶⁸ This perspective draws on the insights of Lichtenberg, who advocates protection of press freedom only to the extent that it promotes those values at the core of freedom of expression generally.⁶⁹ This approach features clearly in the jurisprudence of the German Constitutional Court, where freedom of the media is viewed as instrumental to

⁶²Fenwick and Phillipson (n 45) 23.

⁶³This has been referred to as the 'special privileges' model; Fenwick and Phillipson (n 45) 25.

⁶⁴Stewart 'Or of the press' (1957) 26 *Hastings Law Journal* 631. See also Abrams 'The press is different: Reflections on Justice Stewart and the autonomous press' (1978-1979) 7 *Hofstra LR* 563.

⁶⁵Stewart *id* 633. See also Fargo 'The concerto without the sheet music: Revisiting the debate over First Amendment protection for information gathering' (2006) 29 *University of Arkansas Little Rock LR* 1 at 11.

⁶⁶Fenwick and Phillipson (n 45) 25.

⁶⁷See text accompanying n 49-50.

⁶⁸Barendt (n 66) 421. Fenwick and Phillipson (n 45) 27 refers to this as the 'differentiated privileges' model.

⁶⁹Lichtenberg 'The foundations and limits of freedom of the press' in Lichtenberg (ed) *Democracy and the mass media* (1990) 104.

general free speech claims and only guaranteed to the extent that it amplifies the general values of free expression.⁷⁰

The benefits of the third perspective have been considered extensively by Milo in the context of defamation law.⁷¹ He notes that, in this specific context, 'media freedom should be upheld if and to the extent that, it fosters the democracy value of freedom of expression'.⁷² He also notes that one of the obstacles to awarding of special rights to the media in the defamation context is how to define a member of the media. The next section of this article indicates that this may also be problematic in the context of protecting journalists' sources.

Defining 'journalist'

The difficulties of defining who are regarded as 'journalists' for purposes of the protection of confidential news sources is borne out by a wealth of scholarship on the issue.⁷³ There are no minimum qualifications required in order to practice as a journalist. Journalists are also not subject to disciplinary action by any professional bodies in the same way as are medical practitioners or lawyers, for example. The fact that journalism is an unlicensed profession is said to be conducive to their independence from government control and the licensing of the media is widely rejected as a characteristic of an authoritarian state.⁷⁴

The difficulty in defining the scope of 'journalism' was one of the main reasons why the United States Supreme Court rejected claims for the recognition of such a privilege.⁷⁵ The court voiced concern that:

(t)he administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as

⁷⁰Barendt (n 66) 423-424.

⁷¹Milo *Defamation and freedom of speech* (2008) 88.

⁷²*Ibid.*

⁷³See generally Bergeri (n 37); Elrod 'Protecting journalists from compelled disclosure: A proposal for a federal statute' (2003) 7 *New York University Journal of Legislation and Public Policy* 115; Alexander 'Looking out for the watchdogs: A legislative proposal limiting the newsgathering privilege to journalists in the greatest need of protection for sources and information' (2002) 20 *Yale Law and Policy Review* 97.

⁷⁴Hachten and Giffard *Total onslaught: The South African press under attack* (1984) 77.

⁷⁵*Branzburg v Hayes* (n 17) 686-688.

much as of the large metropolitan publisher who utilizes the latest photocomposition methods.

Some commentators have observed that, if the definitional lines are drawn too narrowly, the foundational assumption of source privilege (free flow of ideas and information) may be undermined.⁷⁶ If, on the other hand, the net is cast too wide, the privilege may be 'diluted'. The courts in the United States have effectively formulated a three-part test to determine whether a specific individual qualifies as a 'journalist' for purposes of confidential source protection: there must be an intent to disseminate news;⁷⁷ the individual must be involved in the activity of investigative reporting;⁷⁸ and the product or content disseminated must amount to news.⁷⁹

The emergence of the Internet as an increasingly important news source⁸⁰ has compounded the complexity of defining who qualifies as a journalist for purposes of source protection.⁸¹ One commentator has observed that the solo blogger is the 'lonely pamphleteer' of the internet era'.⁸² Gant identifies three characteristics of the Internet which are specifically relevant to journalism: it is inexpensive to access and use; it is relatively unrestrained by government regulation; and it creates the possibility of interaction between many

⁷⁶Abramowicz (n 18) 1953.

⁷⁷In *Von Bulow ex rel Auersperg v Von Bulow* 811 F 2d 136 (2d Cir 1987), the Court formulated a test requiring that the person claiming protection for sources should have had the intention, at the beginning of the newsgathering process, to disseminate the information to the public.

⁷⁸In *Shoen v Shoen* 5 F 3d 1289, 1293 (9th Cir 1993), the court added a second prong to this test, indicating that the content gathered and the product disseminated must amount to 'news'.

⁷⁹Calvert 'And you call yourself a journalist? Wrestling with a definition of "journalist" in the law' (1999) 103 *Dickinson LR* 411 at 426. Calvert notes that this test is deceptive in its simplicity since it may result in 'definitional circularity': 'using the term news to define who is a journalist opens up as many definitional problems as it solves, especially when news is defined as whatever journalists say it is' (439).

⁸⁰In the influential case of *Reno v American Civil Liberties Union* 929 F Supp 824, 883 (ED Pa, 1996), a United States District judge described the Internet as 'the most participatory form of mass speech yet developed'.

⁸¹Banisar (n 2) 31 notes that '(m)ost major media organisations have created sites and have dedicated staff who provide content for the sites. Due to the rapidity of electronic publishing, stories often appear on these sites before they appear in printed versions.' See also Toland 'Internet journalists and the reporter's privilege: Providing protection for online periodicals' (2009) 57 *University of Kansas LR* 461.

⁸²Macrander 'Bloggers as newsmen: Expanding the testimonial privilege' (2008) 88 *Boston Univ LR* 1075 at 1088.

users at the same time.⁸³ In *Miller*, Sentelle J raised the issue by asking ‘(d)oes the privilege also protect the proprietor of a web log: the stereotypical “blogger” sitting in his pajamas at his personal computer posting on the World Wide Web his best product to inform whoever happens to browse his way?’⁸⁴ Citizen journalism⁸⁵ (which includes ‘blogging’⁸⁶) undoubtedly benefits the free flow of information and free expression generally: infinitely larger numbers of people can take part in public discourse and this has significantly expanded the marketplace of ideas.⁸⁷

Courts in the United States are increasingly prepared to extend source protection to bloggers. In *O’Grady v Superior Court of Santa Clara County*⁸⁸ the question was whether an independent Internet news provider can claim protection under the First Amendment. In this case, Apple Computer filed complaints against twenty-five anonymous defendants whom it suspected of revealing confidential information and trade secrets to the operators of blogs devoted to news about the company and its products. The trial court allowed the company to subpoena the bloggers for information about the identities of the alleged ‘leaks’, but the California Court of Appeal, held, on appeal, that the bloggers were journalists and were entitled to protection under the qualified First Amendment privilege. As a result, the Court of Appeal refused to compel them to reveal the identities of their sources.

In *Wolf v United States (In re Grand Jury Subpoena)*⁸⁹ a freelance blogger videotaped a 2005 anarchist protest in San Francisco which coincided with the G8 summit in Scotland. He sold portions of the video footage to television stations and also posted excerpts on the

⁸³Gant *We’re all journalists now: The transformation of the press and reshaping of the law in the Internet age* (2007) 24-25.

⁸⁴*Miller* (n 3)1156-1157.

⁸⁵The term refers generally to those who make use of the multitude of technology available for the dissemination of information, ideas and opinions; Gant (n 89) 25. Banisar (n 2) also observes that ‘(b)loggers, pod-casters, citizen journalists, e-zines and other types of information dissemination have stepped in and now often provide information to more people than the old technologies’ (31).

⁸⁶A ‘blog’ is shorthand for ‘web log’. Blogs are web-based publications generally consisting of periodic postings and articles typically arranged in reverse chronology. The use of blogs has increased rapidly in 1999 when free blogging software became widely available; Gant (n 79) 25.

⁸⁷Papandrea ‘Citizen journalism and the reporter’s privilege’ (2007) 91 *Minnesota LR* 515.

⁸⁸39 Cal App 4th at 1456.

⁸⁹201 Fed Appx 430 (9th Cir 2006).

Internet. Federal officials suspected that Wolf's unaired video contained footage of protesters damaging a San Francisco police car, and a subpoena was issued, ordering him to turn over the unaired portions of his tape. He refused to comply with the subpoena and was jailed for more than seven months for contempt of court.

One possible approach to the definitional dilemma is to assess the degree to which 'new' forms of citizen journalism promote the underlying interests of protecting journalists' sources.⁹⁰ This approach rejects a general assumption that the public interest in newsgathering will always be served by the protection of the journalists' privilege. It is suggested that the contours of the privilege should be aligned with the rationale for privilege: the extent to which it serves the public interest. Rather than determining whether a person falls within the definition of 'journalist' as a preliminary enquiry, such a determination should be only one of the factors taken into account as part of a balancing exercise.⁹¹

Conclusion

It is axiomatic that the media plays a crucial role in promoting foundational free speech values. Media freedom is particularly instrumental to the democracy rationale of free speech.⁹² This should not, however, result in 'an unthinking acceptance of media free speech claims'.⁹³ Media claims to free speech rights may often be at loggerheads with other free speech values.⁹⁴ For this reason it is vital to carefully scrutinize media speech claims and recognise that it deserves protection only to the extent that it amplifies the values underlying democracy.

It has been argued here that such a critical evaluation of media freedom is useful for two reasons. In the first instance, it creates space for the recognition of special media privileges in particular contexts where the general free speech values mandate these privileges. A 'differentiated privileges' model accommodates demands from journalists that they safeguard source confidentiality in order to fulfil their constitutional obligation. At the same time, it appeases concerns that protection of journalists' sources may amount to 'press

⁹⁰Abramowicz (n 18) 1985.

⁹¹*Ibid.*

⁹²Milo, Stein and Penfold (n 34) para 42.5.

⁹³Fenwick and Phillipson (n 36) 20.

⁹⁴*Ibid.*

exceptionalism'. In the second instance, this approach avoids a situation where protection is only reserved for traditional journalism. For purposes of the protection of journalists' sources, it is preferable to define journalism according to the values it serves, regardless of the form it takes.

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