

## THE RIGHT OF REPLY

### *A Comparative Approach*

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#### I. Introduction

The different philosophical foundations underlying freedom of speech all have a different vision on it. We can say – though not without the danger of serious oversimplification – that the libertarian (or autonomy-based) theories emphasise it as a negative freedom, that is, freedom from any state intervention, for example from prior restraints. Others claim that it comprises a positive aspect as well – some kind of access to free speech, which should be made available by the state.<sup>1</sup> This view roots in the recognition of the importance of free speech in a democratic society: democracy cannot work without the free flow of information – especially in the media – and freedom should not be the prerogative of those who own the media.<sup>2</sup>

These claim-rights<sup>3</sup> – which are recognized in most jurisdictions – must be narrowly construed, and the right balance must be found between the two different aspects of the right to free speech. Monroe Price suggests four broad categories of law-imposed access to the media: ownership access, producer access, common carrier access and “Hyde Park corner” public access.<sup>4</sup> The second category contains regulation that requires a television station or cable operator to take certain categories of programmes (for example news or children’s programmes), give access to certain individuals or bodies to make the political process work (parties, individual candidates), or give access if certain circumstances occur. The right of reply fits into this

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<sup>1</sup> On the positive-negative distinction of rights see ISAIAH BERLIN: *Two Concepts of Liberty*. In BERLIN: *Four Essays on Liberty*. Oxford: Oxford University Press, 1969.

<sup>2</sup> This is the famous aphorism of A. J. Liebling, see LIEBLING: *The press*. New York: Ballantine Books, 1964, 30–31.

<sup>3</sup> ERIC BARENDT: *Freedom of Speech*. Oxford: Oxford University Press, 2005<sup>2</sup>, 102.

<sup>4</sup> MONROE E. PRICE: *An Access Taxonomy*. In ANDRÁS SAJÓ– MONROE E. PRICE (eds.): *Rights of Access to the Media*. Boston: Kluwer Law International, 1996, 1., at 3.

latter category, as it is only available if “something” happens – usually a person is attacked in the media or some defamatory allegations are published about him. Several different kinds of reply laws are in force in European states, but England so far rejected its introduction. The United States has an interesting legal history in terms of reply rights. In this paper I am trying to assess the general arguments for and against the right of reply, examine the present situation in the US, in England, and on the European level, offer a brief comparison of the different solutions, and examine the future of the right of reply.

## II. Rationales for the Right of Reply

The right of reply means that if somebody is attacked or defamed in the media – in certain conditions, which can vary from state to state – that person has the right to have his answer published in the same medium where the original statements were published.

So what is the role of the right of reply? It can be justified by two different arguments: first is the more effective or more fitting protection it can provide for the damaged reputation. The right supports those who are otherwise in a weaker position than those who have the control over the media. This “weakness” – in terms of the person’s capability to defend her reputation by legal means – can arise when a private person, who does not comprise any power to make her voice heard in the media, is attacked, or, perhaps more usually, when the law itself creates an immunity from libel actions, as in qualified privilege, and thereby deprives the defamed of any protection.<sup>5</sup>

It is widely accepted that the award of damages cannot efficiently restore the harmed reputation. It does not require the same publicity as the libellous statement possibly enjoyed, and it may occur long after the libel “has spread its poison”.<sup>6</sup> The right of reply can offer a somehow more efficient tool to restore reputation.

The second argument for the right of reply is even more powerful. It is concerned with the robust public debate any democratic society should maintain. Jerome Barron finds it ironical, that the famous *New York Times v. Sullivan* decision,<sup>7</sup> which fashioned a new defense for the media against defamation actions in the US, created a new imbalance in the communication process, exactly in the name of the uninhibited, robust, and wide-open debate. According to him, the actual effect of the rule is to perpetuate the freedom of the few who are working in the press.<sup>8</sup> Some special defences – though not as wide as *Sullivan* – were created in many other countries for publications which are in the general public interest.

These defences, while encouraging the media to play its “watchdog” function more effectively, cannot help to correct the published falsehoods. Without any right

<sup>5</sup> JOHN FLEMING: Retraction and Reply: Alternative Remedies for Defamation. *University of British Columbia Law Review* (1978) 12, 15. at 16.

<sup>6</sup> *Ibid.*, at 15.

<sup>7</sup> 376 U.S. 254 (1964).

<sup>8</sup> JEROME A. BARRON: Access to the Press – A New First Amendment Right. *Harvard Law Review* (1967) 80, 1641. at 1656–57.

of reply, it is possible that a false statement is left as the only source of information – at least in the paper in which it was published. The readers, the public should have a chance to gain knowledge of the true facts and the opinion of the person affected. Obviously, in the case of public figures, they almost always have the opportunity to make their voices be heard in the public sphere – but no one can expect from the average reader/viewer to read more than one paper or watch more than one public affairs programme. Thereby his knowledge about a particular case can be distorted without the right of reply. The main purpose of reply rights is to guarantee the plurality of opinions published in the press concerning public debates, where the parties have no equal means.

The right takes not only the reputational interests, but also the interests of the public into account: the obligation to publish the reply is justified by the need to inform the people on the broadest possible basis and to make diverse sources of information available for them.<sup>9</sup>

Obviously, there are widespread attacks against any argument for the introduction of the right of reply in the United Kingdom or the United States. Most importantly, it is argued that the reply right would “chill” public discourse, rather than enhance it.

The right is inevitably a restriction of the freedom of the press, more specifically of the editor’s freedom. The obligation to publish a reply puts a burden on the press in the form of costs and loss of profits, therefore the possibility of such a disadvantage may cause the press to refrain from publishing any controversial statements or opinions, where there can be expected a possible request for reply. The medium is compelled to publish a statement which is not its own, which it does not agree with.

The argument about the “chilling effect” is in a sense flawed. It considers press freedom as an individual right of the editor or the owner. “The editor does have a right to publish a vicious attack on the conduct of government, because that gives an airing to controversial ideas. But it is surely doubtful whether a right not to publish a reply to a possibly defamatory article serves these values to the same extent.”<sup>10</sup> If we think about press freedom as a right which entails some social responsibility, most importantly to provide the necessary information to the public, the chilling effect argument is not convincing. Though we can always feel a kind of history-fuelled natural resistance against any state action which brings about the intervention into the affairs of the press, the modern media world simply cannot provide its inevitably necessary services for the society without the involvement of the state as a regulator.

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<sup>9</sup> The struggle for maintaining the diversity in the media has started, even in the US, where the resistance against any state intervention to media freedom is the strongest. See for example OWEN M. FISS: Free Speech and Social Structure. *Iowa Law Review* (1986) 71, 1405.; CASS R. SUNSTEIN: A New Deal for Speech. *Hastings Communications and Entertainment Law Journal* (1994) 17, 137.; JUDITH LICHTENBERG: Foundations and limits of freedom of the press. In LICHTENBERG (ed.): *Democracy and the Mass Media*. Cambridge: Cambridge University Press, 1990, 102.; LEE C. BOLLINGER: *Images of a Free Press*. Chicago: University of Chicago Press, 1991. The right of reply is only one possible aspect of this wide area.

<sup>10</sup> ERIC BARENDT: Inaugural Lecture – Press and Broadcasting Freedom: does anyone have any Rights to Free Speech? *Current Legal Problems* (1991) 44, 63. at 71.

As Wojciech Sadurski observes, the suggestion that the duty to publish replies would be a counter-incentive for publishers to print controversial materials, is only a speculation. The argument that the right of reply would thus limit the public debate is almost bizarre, “since it is the refusal of a right to publish the opposite side of a given controversy which limits the diversity of viewpoints”.<sup>11</sup> According to him, it seems equally plausible to speculate that replies would be attractive to many readers, and that they would improve the circulation of a paper.

Thomas Scanlon also argues that reply laws are not “on the face of it, inconsistent with the right of freedom of expression. Everything depends on what the consequences of such statutes would be...”.<sup>12</sup> If they help to enhance the robust public debate, they are justifiable.

Now I turn to two jurisdictions and the European law, which all rejected the *general* right of reply, but – at least at some point – accepted some limited reply right.

### III. The Right of Reply in the United States

The first major decision by the Supreme Court concerning a reply law was *Red Lion Broadcasting v. FCC*.<sup>13</sup> It examined the constitutionality of the Federal Communications Commission’s fairness doctrine, which required that some discussion of public issues must be presented on broadcast stations, and that each side of those issues must be given a fair coverage. It contained a specific right of reply element: if, during the presentation of a controversial issue an attack was made – “upon honesty, character, integrity or like personal qualities of an identified person or group” – the attacked person must be given an opportunity to reply. The same obligation applied if a political candidate’s views were endorsed or opposed, so the broadcaster should give the opposed candidate or the opponents of the endorsed candidate the opportunity to respond.

The Supreme Court unanimously upheld the regulations. It is worth citing the decision, because it recalls and sums up the main arguments discussed in section II.:

“[The] people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, which is paramount. [...]

[We cannot] say that it is inconsistent with the First Amendment goal of producing an informed public capable of conducting its own affairs to require a broadcaster to permit answers to personal attacks occurring in the course of discussing controversial issues...

Otherwise, station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views

<sup>11</sup> WOJCIECH SADURSKI: *Freedom of Speech and its Limits*. Boston: Kluwer Academic Publishers, 1999, 82.

<sup>12</sup> THOMAS M. SCANLON: Content Regulation Considered. In JUDITH LICHTENBERG (ed.): *Democracy and the Mass Media*. Cambridge: Cambridge University Press, 1990, 350.

<sup>13</sup> 395 U.S. 367 (1969).

on public issues, people and candidates, and to permit on the air only those with whom they agreed. There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all...”

This democratic vision views broadcasting media as a trustee of the people. The *Red Lion* decision stands alone in the long line of decisions concerning the meaning of the First Amendment, as it considers the right of the community explicitly superior to the individuals’ right to free speech.

It perhaps came as a surprise in the light of *Red Lion*, that only five years after the decision the Court – again unanimously and without any reference made in its judgment to *Red Lion* – struck down a Florida legislation which required the printed press to give right of reply to candidates for political offices who were assailed regarding their personal character or official record.<sup>14</sup> The first part of the decision seemed to acknowledge the power of the argument made in favour of reply laws, similarly to *Red Lion*:

“[Newspapers] have become big business and [the press] has become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion. [The] result of these vast changes has been to place in a few hands the power to inform the American people and shape public opinion. [There] tends to be a homogeneity of editorial opinion, commentary and interpretative analysis.”

Right after that, the Court ruled in favour of the autonomous press:

“[The] implementation of a remedy such as an enforceable right of access necessarily [brings] about a confrontation with the express provisions of the First Amendment. [...] Compelling editors or publishers to publish that which “reason” tells them should not be published is what at issue in this case. The Florida statute operates as a command in the same sense as a statute or regulation forbidding [the newspaper] to publish specified matter. [...] The Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors.”

The two decisions are in considerable tension. The spectrum scarcity and the state of technology, which at that time limited the available number of broadcasting channels, cannot explain this ambiguity. As it was rightly recognized, there were more radio and television stations than daily newspapers in the United States even in the seventies.<sup>15</sup>

Many commentators celebrated the *Miami Herald* decision as a victory of press freedom and blamed the Court for the fatal mistake it made in *Red Lion*.<sup>16</sup> They argued that the free media market, even with considerable failures, is always better

<sup>14</sup> *Miami Herald Publishing v. Tornillo*, 418 U.S. 241 (1974).

<sup>15</sup> LUCAS A. POWE: Or of the (Broadcast) Press. *Texas Law Review* (1976) 55, 39. at 55–56.

<sup>16</sup> Just a handful of examples from the vast amount of literature: KENNETH A. KARST: Equality as a Central Principle in the First Amendment. *University of Chicago Law Review* (1975) 43, 20.; VINCENT BLASI: The Checking Value in First Amendment Theory. *American Bar Foundation Research Journal* 1977, 521.; EDWIN C. BAKER: *Human liberty and freedom of speech*. Oxford, New York: Oxford University Press, 1989.; ETHAN KLINGSBERG: Beyond the Voice and Intended View Conception of Speech: Expanding the First Amendment Goal of Rich Public Debate to Protect a Multiplicity of Discourses. In SAJÓ – PRICE i. m.

than the one which is regulated by the state. This distrust in government has deep roots in First Amendment theory; conceivably it does not take the threat of the possibility of private censorship brings about to press freedom into account with serious weight.

Other students of the First Amendment celebrate *Red Lion* and hold that *Miami Herald* was wrong. For them ensuring that people are presented with a wide range of views about public issues is necessary for making democracy work and this aim can justify state intervention.<sup>17</sup>

I found only one leading scholar so far who thinks that both *Red Lion* and *Miami Herald* were right. Lee Bollinger construed his own theory about the First Amendment according to which the differential treatment of broadcasting and the press is justifiable because it strikes the right balance between regulation and non-regulation.<sup>18</sup>

Finally, in 1987, the FCC repealed the fairness doctrine, so contemporary US law does not recognize any right of reply.

It does recognize – at least in some states – retraction statutes, which are similar to reply laws in some sense. According to them, if the defendant publishes a suitable correction of his previous – defamatory and untrue – statement, his liability is relieved and the damages he should pay if losing in litigation are lowered.<sup>19</sup>

#### IV. The Right of Reply in England

Though there were some attempts – last time in February, 2005 with the *Right of Reply and Press Standards Bill* – to introduce the general right of reply to English law, they never succeeded. Nevertheless, there are some – statutory or self-imposed – rules which are similar to or require the recognition of the right of reply.

Clause 2 of the Press Complaints Commission's – the self-regulatory body for the printed press – *Code of Practice* requires all newspapers to give opportunity to reply: "A fair opportunity for reply to inaccuracies must be given when reasonably called for." The right of reply is a provision of Clause 4 of the National Union of Journalists' *Code of Conduct*, which says: "A journalist shall rectify promptly any harmful inaccuracies." These rules are self-imposed by the press industry and cannot be legally enforced.

In broadcasting, due impartiality and due accuracy in all their programmes are statutory requirements for all broadcast media.<sup>20</sup> Although these do not provide any

<sup>17</sup> CASS R. SUNSTEIN: A New Deal for Speech. *Hastings Communications and Entertainment Law Journal* (1994) 17, 137.; CHARLES W. LOGAN: Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation. *California Law Review* (1997) 85, 1687.; JEROME A. BARRON: Rights of Access and Reply to the Media in the United States Today. *Communications and the Law* (2003) 25, 1.

<sup>18</sup> LEE C. BOLLINGER: Freedom of the press and public access: toward a theory of partial regulation of the mass media. *Michigan Law Review* (1976) 75, 1.

<sup>19</sup> On the retraction statutes see FLEMING (n. 5. above), 25–30.

<sup>20</sup> *Communications Act* 2003, s. 319. (2) c)–d).

explicit right of reply, the impartial coverage of a particular topic usually involves that all relevant opinions must be presented, so its outcome is generally similar to reply laws.

The *Broadcasting Code* of Ofcom<sup>21</sup> requires all broadcasters that “If a program alleges wrongdoing or incompetence or makes other significant allegations, those concerned should normally be given an appropriate and timely opportunity to respond.”<sup>22</sup> In case of breaching the Code, Ofcom has the power to sanction.<sup>23</sup>

The BBC’s self-imposed code, the *Producers’ Guidelines* also identifies a right of reply.<sup>24</sup>

These mean that reply rights exist in the regulated broadcasting media but remain a self-imposed, largely moral duty in the unregulated printed press.

There are some rules in the law of defamation which are close to reply rights.

Under the *Defamation Act 1996*<sup>25</sup> the defendant loses its statutory qualified privilege defence<sup>26</sup> “if the plaintiff shows that the defendant was requested by him in a suitable manner a reasonable letter or statement by way of explanation or contradiction and refused or neglected to do so.”

In the recently expanded common law qualified privilege,<sup>27</sup> which applies to some inaccurate publications made about public matters in the general public interest, the privilege only applies when the journalist behaved responsibly. The guidelines – offered by Lord Nicholls in the leading judgment by the House of Lords – that help to evaluate “responsible journalism” require judges to examine “whether comment was sought from the plaintiff” (n. 7.) and “whether the article contained the gist of the plaintiff’s side of the story” (n. 8.). These rules aim to reach a somewhat similar goal as reply laws.

## V. The Right of Reply in Europe

Article 23 of the European Council’s *Television without Frontiers Directive*<sup>28</sup> requires all member states to provide all persons, whose reputation and good name have been damaged by an assertion of incorrect facts, a right of reply or equivalent remedies. The further provisions deal with some procedural problems. The obligation only applies to broadcasters. It is still an open question if it can/should be applied to all – non-linear and other new forms of – media services. However, the proposal for the new amendment of the *Directive*<sup>29</sup> leaves Article 23 untouched. The exact wording of article 23, which refers to every “television programme”, can be interpreted to

<sup>21</sup> Set up under s. 326. of the *Communications Act 2003*, and the *Broadcasting Act 1996*, s. 107.

<sup>22</sup> Ofcom *Broadcasting Code*, 7. 11.

<sup>23</sup> Under *Broadcasting Act 1990*, s. 40–42.

<sup>24</sup> See ch. 5. of the *Code*.

<sup>25</sup> s. 15. (2).

<sup>26</sup> Part II. of Schedule.

<sup>27</sup> *Reynolds v. Times Newspapers* [2001] 2 AC 127.

<sup>28</sup> 89/552/EEC, as amended by 97/36/EC.

<sup>29</sup> Released in December, 2005.

include all services. There are other signs of the Council intending to preserve and extend the right of reply: its Liverpool working group, which dealt with the proposals for the forthcoming amendment, suggested that the “key players” (states, public service broadcasters etc.) insisted on keeping the right of reply, while the commercial sector strictly opposed it.<sup>30</sup>

Meanwhile, in 2006, the European Parliament and the Council adopted a Recommendation “*On the Protection of Minors and Human Dignity and the Right of Reply in Relation of the Competitiveness of the European Audiovisual and Information Services Industry*.”<sup>31</sup> The recommendation, which is not binding the member states, calls for the introduction of measures in order to ensure the right of reply across all media, including on-line services.<sup>32</sup>

Parallel to the European Union, the Council of Europe has created its own – binding and non-binding – set of rules on media. In 1974, the Committee of Ministers adopted the *Resolution on the Right of Reply – Position of the Individual in Relation to the Press*.<sup>33</sup> In that recommendation the Council proposed the introduction of the right of reply for all media in the member states, in relation to the publication of incorrect facts, and facts or opinions which interfere with one’s privacy or attack her honour, dignity or reputation. The Council of Europe’s *Convention on Transfrontier Television* in 1989 recognized in its Article 8 a similar right of reply in the broadcasting media as the above mentioned EC Directive. In 1993 the Parliamentary Assembly announced a *Resolution on the Ethics of Journalism*.<sup>34</sup> Among the principles was the correction of false or erroneous statements. The Resolution also called for the implementation of the 1974 Resolution.<sup>35</sup> Lastly, the Committee of Ministers adopted a new Resolution in 2004, “*On the Right of Reply in the New Media Environment*” which recommends the member states the extension of the right of reply for all off-line and on-line media services – but only in relation to incorrect facts.

## VI. Comparing the Different Reply Laws

Through highlighting its possible advantages, this paper has so far tried to discuss the arguments for and against the right of reply. We focused on the jurisdiction of the United States and England – two legal systems which mostly reject these justifications – and European law, which deals with the right only on the general level. It is worth now to briefly compare the different existing reply laws, thus advocating some reconsideration of this topic by common law lawyers.

<sup>30</sup> Liverpool – Final report of the working group 1, Protection of minors and human dignity; Right of reply. <http://europa.eu.int>.

<sup>31</sup> 2006/952/EC.

<sup>32</sup> Also available at <http://europa.eu.int>.

<sup>33</sup> Resolution (74) 26, adopted on 2 July 1974. – all instruments of the Council of Europe are available at [www.coe.int](http://www.coe.int).

<sup>34</sup> Resolution 1003 (1993).

<sup>35</sup> See paras 26–27.

First of all, from common law perspective it is perhaps surprising, how widespread the right of reply is.<sup>36</sup> Almost every European civil law countries offer some form of legally enforceable reply right. Among those countries are Austria, France, Germany, Hungary, Italy, Netherlands, Norway, Spain, Switzerland and many others.

Article 14 of the *American Convention of Human Rights* of 1969 also declares the right of reply under conditions specified by law. The original draft of the South African constitution also included the right, but it was abstained from the final version.<sup>37</sup> Several constitutional courts dealt with the question of the constitutionality of reply laws, and arrived to the same conclusion: because the legislature is bound to ensure the protection of the individuals' personality, and the right of reply is one amongst the different tools of that protection, and because it is also important for the achievement of the diverse and pluralistic public debate needed in a democratic society, it cannot be held as an unconstitutional limitation on free speech.<sup>38</sup>

On the other hand, the common law countries (USA, United Kingdom, Australia, Canada, New Zealand) so far resisted from introducing any explicit right of reply. The reason behind this could form the topic of an interesting research on its own. The existing common law belief that the only effective remedy for defamatory statements is the award of damages could be one particular reason – in England neither the prior restraint of allegedly defamatory statements is available in practice, though the law would allow its application.

The main objection against the right of reply, its possible chilling effect is not a great concern in European jurisdictions. Most commentators confidently state that these rules do not “chill” any speech on public issues.<sup>39</sup> There are some implied guarantees in the law for avoiding that: replies may not be longer than the original story, but the paper must give it due – equal – prominence; it is insufficient to publish it as a reader's letter, for example. In most countries it must be confined to factual assertions and so cannot include personal opinion. Usually, the exercising of reply rights does not affect the availability of any other legal remedies, but, in some countries, it can reduce the amount of damages awarded<sup>40</sup> – similar to retraction statutes.

The fact/opinion distinction can be crucial for the availability of reply rights. In most countries, the right can be exercised only against factual statements. In France, a response can be requested against critical opinions as well<sup>41</sup> – this is the broadest

<sup>36</sup> See generally SANDRA COLIVER: Comparative Analysis of Press Law in European and other Democracies. In *Press Law and Practice – A Comparative Study of Press Freedom in European and other Democracies*. Article 19 – International Centre Against Censorship, 1993, 272–273.

<sup>37</sup> STEPHEN SEDLEY: Information as a Human Right. In JACK BEATSON – YVONNE CRIPPS (eds.): *Freedom of Expression and Freedom of Information. Essays in Honour of Sir David Williams*. Oxford: Oxford University Press, 2000, 243.

<sup>38</sup> BVerfG Decision of 14 January 1998, *Europäische Grundrechte Zeitschrift* (1998), 227–234. – decision of the German Constitutional Court; 57/2001. (XII. 5.) AB határozat – decision by the Hungarian Constitutional Court.

<sup>39</sup> ROGER ERRERA: Press Law in France. In *Press Law and Practice...* (n. 36. above), 68.; ULRICH KARPEN: Freedom of the Press in Germany. In *Press Law and Practice...* (n. 36. above), 87–88.

<sup>40</sup> COLIVER (n. 36. above), 272–273.

<sup>41</sup> ERRERA (n. 39. above), 68.

possible application of any reply right. In Italy, the right – available in the broadcasting media – is intended to protect human dignity, as well as reputation.<sup>42</sup>

The differentiation between allegedly defamatory and “simply” critical factual statements is also necessary. There are some countries, where the publication of any fact which is in the latter category is enough to trigger the right – there is no need to argue that it was false or defamatory.<sup>43</sup> If any factual statement is published, which casts any person in a negative – and not necessarily false – light, he is automatically entitled to request a response.

In other countries the attacked persons must demonstrate that the allegations were false and defamatory.<sup>44</sup> This is the weakest application of the right of reply. If the applicant claims that the statements were false, usually the paper carries the burden of proof. This rule is consistent with the common European principles of the law of defamation (if such exist at all).<sup>45</sup>

The right of reply is usually available in the electronic media context also,<sup>46</sup> but broadcasting laws tend to impose other obligations to broadcasters as well. The “impartiality” and “accuracy” provisions – which also exist in England but not in the US – have similar aims and effects as reply laws. However, the breach of these provisions – say, by the broadcasting of defamatory statements about a person – do not invoke any right to take the case to court if the request for the reply is rejected. Nevertheless, the different regulatory bodies of national broadcasting can impose serious sanctions. That is the reason why these requirements may be called “indirect” rights to reply. As we have seen, this kind of indirect right exists in England as well. These tend to achieve similar results as explicit reply laws but still do not constitute any legally enforceable right of reply. The law of defamation – as we have seen – can also offer some kind of indirect rights to reply.<sup>47</sup>

## VII. The Future of the Right of Reply

Many commentators think that in the new media environment all argument for access or reply rights will be meaningless, because scarcity will come to an end with new technology and the diversity of opinions could flourish without any limitation. These fairly optimistic views all tend to miss some important points: the sociological problem of the possible fragmentation and segmentation of society caused by the new

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<sup>42</sup> RACHAEL CRAUFURD SMITH: *Broadcasting Law and Fundamental Rights*. Oxford: Clarendon Press, 1997, 201.

<sup>43</sup> *Ibid.* 272. – This is the German, Dutch, Norwegian and Spanish solution.

<sup>44</sup> This is the Hungarian law, for example.

<sup>45</sup> See the “presumption of falsity” in the United Kingdom and the *McVicar v. UK* (2002) decision by the European Court of Human Rights, 35 EHRR 22.

<sup>46</sup> ERIC BARENDT: *Broadcasting Law – A Comparative Study*. Oxford: Clarendon Press, 1993, 162–163.

<sup>47</sup> The reply element of UK’s Reynolds test is also recognized in other common law jurisdictions. See the decision of the High Court of Australia in *Lange v. Australian Broadcasting Corporation* (1997), 189 CLR 520.

media technologies;<sup>48</sup> the enormous market advantage of the present media giants which seems to be distorting the competition; the habits and opportunities of people in gathering information, which naturally focus only on a few – usually the most powerful – actors in the media;<sup>49</sup> and the reputational interests which most effectively could be served in the very same medium where the harmful statements were published.

Though convergence in the media (between the printed press, broadcasting, and the internet) long became a truism, some distinction still makes sense. Acknowledging this, European law and national laws tend to maintain the right of reply in the sphere of broadcasting and printed press. The big question is, what, if any, obligations should be imposed to online services? It is difficult – if not impossible – to tell what counts as “press” in the online context.<sup>50</sup> The online editions of printed newspapers surely do. Is regular updating enough to define the material as “press”? Possibly not – just think about blogs. Though they are not exempt from defamation law, it is doubtful if they should be covered under a reply law. Though on European level there were and possibly will be some attempts to extend the application of reply laws to the internet, the enforceability of such a law is at least questionable.

The media around us is rapidly changing, so its regulation is needed to be reconsidered over and over again, but, even against a strong tendency of liberalisation, the European “paradigm” of free speech will preserve the right of reply in some form – at least in broadcasting and the press. In the balancing process – as opposed to the US system – the rights of the community may sometimes prevail over the individuals’ rights.

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<sup>48</sup> CASS R. SUNSTEIN: The Future of Free Speech. In LEE C. BOLLINGER – GEOFFREY R. STONE (eds.): *Eternally Vigilant – Free Speech in the Modern Era*. Chicago: University of Chicago Press, 2002.

<sup>49</sup> BOLLINGER (n. 9. above), 140–141.

<sup>50</sup> DAVID A. ANDERSON: Freedom of the press. *Texas Law Review* (2002) 80, 429. at 436–446.

