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Beyond WikiLeaks: The Icelandic Modern Media Initiative and the Creation of Free Speech Havens

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On June 16, 2010, the Icelandic Parliament unanimously approved the Icelandic Modern Media Initiative (IMMI), a legislative package that turns the concept of "tax haven" on its head by offering fundamental protections for free speech and freedom of expression. This article offers a general picture of the political context in which the IMMI is set and describes the core free speech concerns identified in it as well as the legal reforms put forward to tackle them. To conclude, we examine both the possible legal implications of the IMMI and its general significance for the emergence of the networked public sphere in general and of the networked fourth estate in particular.

On June 16, 2010, the Icelandic parliament (the Althingi) unanimously approved a resolution tasking the government to implement the Icelandic Modern Media Initiative (IMMI), a legislative package that seeks "to protect and strengthen modern freedom of expression" (IMMI, 2010, para. 1). The free speech campaigners, advocacy groups, and media organizations (including WikiLeaks) that promoted the IMMI drew upon the concept of "tax haven" but turned it on its head "in the direction of creating a haven for freedom of information, speech and expression" (IMMI, 2010, para. 6). This article offers an overview of the origins of the IMMI that clarifies the political context in which it is set; describes and illustrates the various free speech conflicts the IMMI highlights and the legislative changes it introduces to address them; and briefly evaluates the significance of the IMMI against the background of what Yochai Benkler calls the "networked public sphere" (Benkler, 2006, p. 10) and the "networked fourth estate" (Benkler, 2011, p. 1). To that end, we examine the IMMI proposal in light of the diverse documentation surrounding

[1] We want to express our gratitude to Professor Langdon Winner for his inestimable comments and support. Of course, any remaining mistakes are alone our responsibility.

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it (both from activist and journalistic sources), the recent legal literature assessing its international reach, and a discussion we organized with the IMMI spokesman, Smári McCarthy, on November 2, 2010.[2]

Origins of the IMMI: "Never Waste a Crisis"

The origins of the IMMI can be traced back to January 2008, when a group of Icelandic campaigners who had been working on behalf of digital freedoms and the protection of the openness and neutrality of the Internet founded the Icelandic Digital Freedoms Society (abbreviation in Icelandic: FSFI). The FSFI was intended to serve as a grassroots lobbying organization that would advance those goals through a more formal structure. One of its earliest activities was the organization of the first Digital Freedoms Conference in Iceland on July 5, 2008.[3] Along with other local and international speakers, the FSFI invited Eben Moglen and John Perry Barlow to speak about free software, free knowledge, and free speech. Barlow's talk criticized the evolution of the Internet toward an ever tighter control of free speech online. He argued that a good way to reverse this trend would be to create "the Switzerland of bits," (Barlow, 2008) a challenging notion that has been explored in science fiction novels since the 1970s[4] and that resonated well with the audience (Hirsch, 2010). In the face of growing constraints upon digital freedoms, Barlow proposed the equivalent of an offshore tax haven for whistle-blowers and investigative journalists, a place where information rights online would be given full recognition and legal protection. Following this suggestion, the members of FSFI began looking into practical ways for Iceland to become a free speech haven, although the specific measures remained an enigma for them.

Three months later, the global financial collapse hit Iceland with devastating force, leading to the downfall of its three major commercial banks and placing the country on the verge of bankruptcy. For our purposes, there is no need to summarize the details of the crisis. What matters here is that the economic collapse triggered an increasingly widespread perception that it was not just the banking system, regulatory agencies, and government that had failed, but also Iceland's communications media. How was it possible that such devastating financial practices and policies went unnoticed by the press and electronic media, institutions trusted with the fundamental watchdog function in a democracy?

In the summer of 2009, the widespread perception that the media in Iceland had missed some disturbing signs of financial wrongdoing was seemingly confirmed by information released by the whistle-blower site WikiLeaks. On July 29, 2009, WikiLeaks published a confidential 210-page internal report presenting "an exposure analysis of 205 entities from around the world who owed 45 to 1250 million

[2] Audio available at http://www.archive.org/details/PrimeraParteSmeriMccarthyLaCasaInvisible and http://www.archive.org/details/SegundaParteSmeriMccarthyLaCasaInvisible

[3] See http://www.fsfi.is/atburdir/radstefna2008/reykjavik-digital-freedoms-conference-2008

[4] For a detailed description of the science fiction origins and meaning of the related concept of "data haven," see Schwabach (2006, pp. 71–73).

euros each" (WikiLeaks, 2009a, para. 1) to Kaupthing Bank, then the largest bank in Iceland. Dated September 25, 2008 (just days before the bank collapsed), the report unveiled the shady lending practices in which Kaupthing had been involved up to that time, including enormous high-risk loans granted to "insiders and unsecured"—namely, its largest shareholders. As the WikiLeaks summary observed, "The largest loans are to, effectively, Kaupthing itself" (WikiLeaks, 2009a, para. 13).

Kaupthing Bank's reaction was not long coming. Two days after the release of the report, the bank invoked Icelandic laws on bank-client confidentiality. Its lawyers e-mailed WikiLeaks, threatening to take legal action if the document was not removed immediately from the site. WikiLeaks' reply was clear and forceful: "No. We will not assist the remains of Kaupthing, or its clients, to hide its dirty laundry from the global community." (WikiLeaks, 2009b, para. 3). A surprising twist in the episode was that growing public interest of the leak attracted the attention of Iceland's national public service broadcaster (RÚV), which planned to air a report on Kaupthing Bank's loan book in its nightly newscast on August 1. Just minutes before airtime, however, Kaupthing Bank obtained an injunction by the Reykjavík District Commissioner preventing RÚV from broadcasting its report (Sigmundsdóttir, 2009a). In a final attempt to denounce efforts to gag the press, Bogi Agustsson, RÚV anchor, appeared on screen and explained why they could not air the prepared newscast, suggesting that viewers access the confidential materials on wikileaks.org.

Ironically, Kaupthing Bank's move to block media coverage of the leak achieved exactly the opposite result, as the bank later admitted.[5] The case sparked considerable "fury" among Icelanders (Ward, 2009) because it illustrated the danger of powerful institutions using regulations on banking secrecy to censor information of public interest in the midst of an economic collapse. The episode raised concerns about institutional transparency and democratic control, important symbolic issues for Icelanders since the establishment of the Republic of Iceland in 1944, a founding that recognized the supreme importance of freedom of speech. In fact, Iceland had held the first position of the *World Press Freedom Index* since 2002, and the sudden descent to ninth place in 2009[6] seemed to affect the national self-identity. Hence, it was no small matter for Icelanders to win back world leadership in that category.

Even before the financial crisis and WikiLeaks scandal, many in Iceland had begun to see an opportunity to attract foreign investments through the stimulation of new industrial sectors linked to communications and information services. In the aftermath of the banking collapse, such possibilities gained renewed attention and made the notion of "the Switzerland of bits" seem all the more plausible. It was in this context that the FSFI organized its second Digital Freedoms Conference at the University of Reykjavík on December 1, 2009.[7] The recent widespread celebrity acquired by WikiLeaks in Iceland as a result of the Kaupthing Bank leak convinced the FSFI to invite Daniel Schmitt (whose real name is Daniel

[5] See http://www.kaupthing.com/Pages/4226?NewsID=4213

[6] See http://en.rsf.org/spip.php?page=classement&id_rubrique=1001

[7] See http://www.fsfi.is/atburdir/radstefna2009/reykjavik-digital-freedoms-conference

Domscheit-Berg) and Julian Assange to speak about their project at its annual meeting. The FSFI outlined its preliminary ideas about reinventing Iceland as a free speech stronghold. As the discussions moved forward, it became evident that WikiLeaks possessed the legal expertise the FSFI would need to accomplish its goals. Daniel Schmitt and Julian Assange offered the FSFI a list of laws from several countries around the world that had helped WikiLeaks protect its sources and operate effectively. As Julian Assange explained at the Oslo Freedom Forum 2010:

> We, in the past three years, have been attacked over 100 times legally, and have succeeded against all those defenses by building an international, multi-jurisdictional network, by using every trick in the book that multinational companies use to route money through tax havens. Instead, we route information through different countries to take advantage of their laws, both for publishing and for the protection of sources. And that endeavor has been successful in putting over a million restricted documents into the historical record that weren't there before. (Assange, 2010)

As the FSFI and its collaborators began to implement operational concepts provided by WikiLeaks as the basis for IMMI, Assange and Schmitt made public pronouncements praising Iceland's opportune political, technological, and even meteorological conditions as a possible site for an offshore publication center. Both on Iceland's most famous talk show on November 29, 2009,[8] and at the 26th Chaos Communication Congress in Berlin on December 27, they mentioned that the motto inspiring their vision of "going from defense to attack" with regard to legal protection was "Never waste a crisis" (Assange & Schmitt, 2009).

Core Elements of the IMMI

At the 2009 FSFI Digital Freedoms Conference, participants agreed that the best option was to advocate specific legislation for action by Iceland's parliament. MP Birgitta Jónsdóttir suggested preparing a resolution to be introduced in the Althingi early in 2010. To that end, on January 15, 2010, Reykjavík hosted another meeting among FSFI members, local campaigners and politicians, and a few foreign advisors from different organizations, including Julian Assange, Daniel Schmitt, Jacob Appelbaum, and Rop Gonggrijp. Together they polished the final draft of the IMMI that would be introduced into the Althingi on February 16, 2010, with the support of one-third of the total membership of the parliament, representing all political parties. Four months later, after the issue had been discussed and vetted in the General Affairs Committee, the Althingi unanimously accepted a proposal

[8] See http://www.youtube.com/watch?v=FBzyPB5eEuI&feature=player_embedded

> intended to make Iceland an attractive environment for the registration and operation of international press organizations, new media start-ups, human rights groups and internet data centers . . . to strengthen . . . democracy through the power of transparency and to promote the nation's international standing and economy. (IMMI, 2010, para. 19)

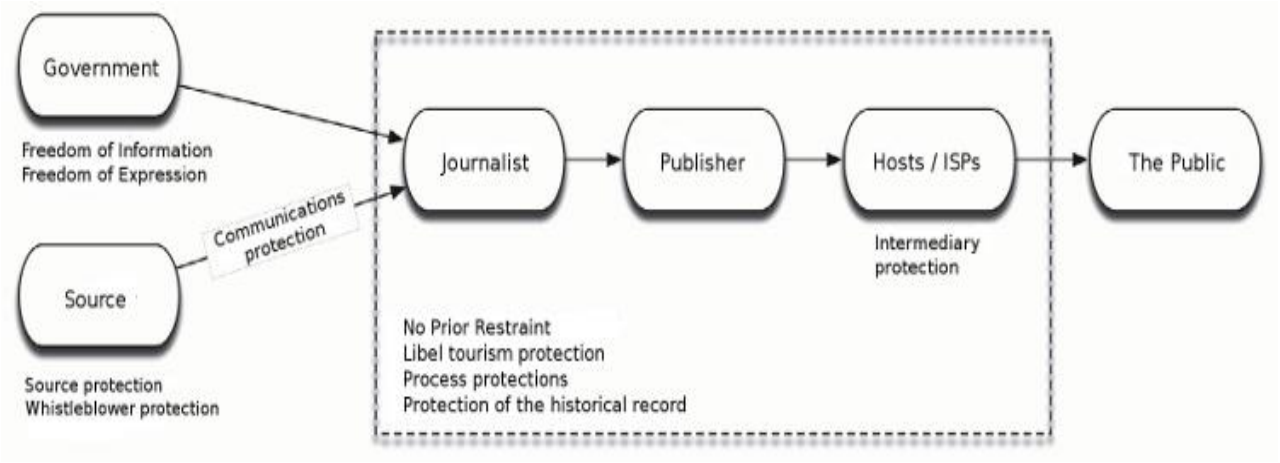

Figure 1. Overview of the IMMI.

(Illustration included in the IMMI's documentation.)

Table 1. Overview of the IMMI.

Subject Area	Conflict Tackled	Proposal	Status
Freedom of Information (FOI) Act	• Lack of government transparency • Noncompliance of 2009 Council of Europe (CoE) Convention and 1998 Aarhus Convention	• Open access to public documents • Online proactive disclosure • All exceptions must be explicit and weighed against the public interest	• Pending ratification • Ratification of Aarhus Convention by law 131/2011 • Updated FOI Act—scheduled 2012 • New proposed constitution (NPC): Article 15
Source protection	"Overly broad exception" to journalists' right not to disclose their sources	• Restrict this exception in accordance with CoE Recommendation R (2000)	• Complete • Media Act 38/2011 (Article 25) • NPC: Article 16
Whistle-blower protection	Threats to whistle-blowers' physical, financial, and employment security	• Absolute right to communicate information to the Althingi • Public interest defenses • Employment guarantees and economic rewards	• In development • Need for further investigation • Possible conflict between whistle-blower protection and privacy due to corporate personhood • NPC: Article 16
Communications protection	• Circumvention of source protection • Data retention • Vague exceptions to intermediaries' indemnity	• Forbid search of source–journalist communications • Eliminate data retention • Clarify these exceptions	• Pending ratification • Amendment proposal to the Electronic Communications Act (scheduled for 2012) • Refusal to adopt the Data Retention Directive (2012) • Preparation of report on intermediaries' indemnity (scheduled for 2012) • NPC: Articles 11 and 14
Prior restraint	Abuses to prevent public exposure of corruption	Strong limitations on prior restraint	• In development • NPC: Article 14**.**
Process protection	Chilling effect derived from strategic lawsuits against public participation (SLAPPs)	Anti-SLAPPs statutes	On hiatus
History protection	• Online "memory hole" due to libel law abuses • Application of "multiple publication rule" • Broad scope of libel law due to obsolete 1956 Print Act	• Limitation of time and maximum settlement for libel action • Reform of 1956 Print Act	• Pending • Media Act restricts journalists' liability in libel cases • Libel reform draft (scheduled for Autumn 2012**)**
Libel tourism protection	Chilling effect derived from international forum shopping	Nonrecognition of libel tourism judgments	• Complete/untested solution • Application of Article 34.1 of the Lugano Convention

Source: Own elaboration, based on Icelandic Modern Media Institute (2012).

Government: Freedom of Information Act

What were the most critical free speech concerns identified by IMMI promoters? How did the new legislative reforms respond to them? The first concern has to do with the current Icelandic Freedom of Information Act 50/1996, which does not comply with the international standards set in the 1998 Aarhus Convention[9] or with the 2009 Council of Europe Convention.[10] This noncompliance is identified in the IMMI as a promising opportunity to revise that law in accordance with "the 2009 Council of Europe and Organization of American States recommendations as well as particularly good and modern elements in the Freedom of Information laws of Estonia, Scotland, the UK and Norway" (IMMI, 2010, para. 48).

As a matter of fact, the IMMI proposal to reform the Freedom of Information Act reflects a radical commitment to transparency in government as a way of ensuring online general access to public information and effective democratic control: "The law should be based on the notion that government documents are in principle public unless an exceptional reason prevents publication" (IMMI, 2010, para. 53). Hence, the IMMI recommends that exceptions to this general rule are always weighed against the public interest, made immediately explicit on the Internet, and restricted to a reasonable period of time, after which documents withheld from public access will be automatically released.

As for the scope of the revised Freedom of Information Act, the IMMI suggests that it should be expanded to apply to all government bodies, all nongovernment entities operating on behalf of the government, and all entities fulfilling a public task funded by the government. In addition, the proposal recommends the establishment of an independent appellate body with binding execution and sanction power with a view to reinforce and speed up the handling of complaints.

Regarding the most "modern" aspects of the IMMI—its demand of "an actively Internet-published central register of all documents held (as opposed to merely produced) by an institution" (IMMI, 2010, para. 50)—represents an important attempt to move the government from publishing what is asked for (and nothing else) to releasing everything except certain materials (and having people request those). This conception of proactive publication of official information entails giving up the assumption that the general public necessarily knows what to request from the government. To this end, the online availability of an index of official documents that citizens could search by subject along with a guarantee that the law applies equally to paper and digital documents would provide a great advance in transparency.

[9] See http://www.unece.org/env/pp/treatytext.htm

[10] See https://wcd.coe.int/wcd/ViewDoc.jsp?id=1377737&Site=CM

Source and Whistle-blower Protection

The IMMI puts special emphasis on the protection of the confidentiality of journalistic sources as a critical requirement of freedom of the press. Even if the Icelandic law on criminal procedure 88/2008 recognizes journalists' right not to disclose their sources, its Article 119 introduces "an overly broad exception" (IMMI, 2010, para. 29) that could be contradictory to the limits to the right of nondisclosure promulgated in Principle 3 of the Council of Europe Recommendation R (2000).[11] Furthermore, the IMMI (2010, para. 29) suggests "to far exceed this recommendation" by modeling on Chapter 3 of the Swedish Freedom of the Press Act,[12] which specifies that a person who disregards her duty of confidentiality to her sources (whether through negligence or by deliberate intent) is subject to criminal liability with a penalty of a fine or imprisonment for up to one year.

The IMMI underscores the public interest of the revelations of corporate and government corruption and proposes measures to encourage whistle-blowers. In addition to the suggestion of an absolute right to communicate information to a member of the Althingi and of the introduction of public interest defenses for public servants who disclose classified information to avoid criminality, the IMMI turns to the U.S. Federal False Claims Act (31 U.S.C. §§ 3729-3733)[13] to find ways to protect those who report frauds against the government. Specifically, the IMMI (2010, para. 31) cites the clauses "providing [the whistle-blowers] employment guarantees that preserve seniority status and salary" and allowing the "*qui tam* relator" (a citizen who files a lawsuit on behalf of the government to recover stolen funds) to be awarded a portion of the proceeds from such action.

Communications Protection

The IMMI emphasizes the need to protect all communications between sources and journalists as a cornerstone of press freedom in democratic societies. Its primary model in this regard is the 2005 Belgian law on the protection of journalistic sources.[14] According to Dirk Voorhoof (2008), this law:

> not only formulates a broad notion of who is a journalist and what is protected information, it also reduces substantially the possibility of . . . any kind of investigative measures taken by the judicial authorities to circumvent the right of journalists not to reveal their sources. (p. 2)

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[11] See https://wcd.coe.int/wcd/ViewDoc.jsp?id=342907&Site=CM

[12] See http://www.riksdagen.se/templates/R_PageExtended____6333.aspx

[13] See http://www.taf.org/federalfca

[14] See http://www.lachambre.be/doc/flwb/pdf/51/0024/51k0024018.pdf

The Belgian law defines a journalist in Article 2 1º as "anyone who directly contributes to the gathering, editing, production or distribution of information for the public by way of a medium" (Voorhoof, 2008), and thus expands the right of nondisclosure to both professional and amateur actors. Most importantly, Articles 4 and 5 prohibits that communications between those broadly defined journalists and their sources are subject to search, seizure, and wiretapping, except if a judge requests such information to prevent crimes against physical integrity and there is no other way to obtain it.

Data retention is another critical issue for the protection of source–journalist communications, because it can constitute a way for the state to circumvent the aforementioned provisions. Mandated by EU Directive 2006/24/EC,15 this data retention policy was predated by the Icelandic Electronic Communications Act 81/2003 (as amended in April 2005), which requires that telecommunications providers automatically store records of all connection data for six months, a way to enable stronger enforcement of the law. The IMMI's recommendation to review this measure on account of "a general trend towards more privacy awareness" (IMMI, 2010, para. 35) gained momentum in the wake of the difficulties of several EU members to implement the EU Directive and of the recent challenge posed to it by the Federal Constitutional Court of Germany. Indeed, the Romanian Constitutional Court ruled in 2009 that the EU Directive transposition was likely "to transform *a priori* all users of electronic communication services or public communication networks into people susceptible of committing terrorism crimes or other serious crimes" (Romanian Constitutional Court, 2009, para. 31). Similarly, the German Constitutional Court declared on March 2, 2010, that the blanket data retention imposed by the EU Directive violated Article 10.1 of the German constitution, which guarantees the privacy of correspondence, posts, and telecommunications.[16]

Another important element of the IMMI is to secure source–journalist communications through intermediary protection. Even though Chapter V of the Act No 30/2002 on Electronic Commerce and other Electronic Services[17] acknowledges in principle the indemnity of telecommunications networks and Internet hosting providers, considering them as mere conduits, the IMMI expresses concern about the lack of definition of the exception for general court orders. Hence, it seeks the specification of the exact circumstances under which an Internet service provider or host can be held liable for the information it transmits or hosts.

[15] See http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006L0024:en:HTML

[16] See http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg10-011en.html

[17] See http://eng.idnadarraduneyti.is/laws-and-regulations/nr/1270

Prior Restraint

Following the outrage triggered by the injunction imposed on RÚV over its coverage of the Kaupthing Bank's loan book revelations as well as by the controversial circumstances surrounding it (Sigmundsdóttir, 2009b), Icelanders were particularly sensitive to the harmful impact of government restrictions of speech prior to publication. This concern was reflected in the IMMI, which explores mechanisms that guarantee strong limitations on prior restraint and prevent legal abuses intended to limit freedom of expression.

Process Protection

Another relevant issue addressed in the IMMI is the guarantee of equal access to justice as well as protection from abuses of legal process that can create a chilling effect upon investigative journalism and free speech. The IMMI recognizes that wealthy plaintiffs can stifle probing inquiries into their activities by embarking on legal battles that they do not expect to win to force the defendants to incur mounting legal costs that eventually make it financially unfeasible for them to pursue the case.

These practices of legal intimidation, generally referred to as SLAPPs (strategic lawsuits against public participation) (Canan, 1989; Pring, 1989), are especially threatening for small publishers and amateur investigative journalists, but are certainly not limited to them. In fact, the example the IMMI uses to illustrate this concern involves the Church of Scientology's libel lawsuit against *Time* magazine over the cover story "The Thriving Cult of Greed and Power," in which Behar (1991, p. 50) claimed that "Scientology poses as a religion but is really a ruthless global scam." The Church of Scientology (CSI) sought damages of $416 million, alleging Behar had published false and defamatory statements. However, every single argument it made before the U.S. District Court for the Southern District of New York was dismissed. On January 12, 2001, the U.S. Court of Appeals for the Second Circuit upheld the dismissal of the libel lawsuit brought by the CSI, claiming that it had not proved "actual malice" ("that the statement was made with knowledge of its falsity or with reckless disregard of whether it was true or false") established by *New York Times Co. v. Sulliv*an. Later the CSI appealed to the U.S. Supreme Court, which refused to reinstate the libel case on October 1, 2001. After 10 years of litigation and "effectively a multi-million dollar 'fine' [in legal costs] for engaging in quality, research based journalism" (IMMI, 2010, para. 38). *TIME* won the case. But the conclusion the IMMI draws from this episode is a stern one:

> It would have been impossible for a smaller publication to mount such a defence, and it would be impossible for *TIME* to take on many such battles, creating a "chilling effect" on quality journalism and interferring with the democratic process. (IMMI, 2010, para. 38)

To penalize such abuse of legal process and give small publishers the possibility to defend against wealthy claimants, the IMMI recommends a measure similar to California's anti-SLAPP statutes. This system gives victims of SLAPPs the opportunity to ask the court to regard the case as a freedom of speech issue at the outset of the lawsuit. If the motion is granted, the defendants are provided with a number of protections that may include the dismissal of the complaint and the obligation for plaintiffs to pay attorney's fees and costs incurred by the other side. This can also include the possibility of filing SLAPPbacks—that is, of seeking punitive damages from SLAPP filers after the underlying SLAPP has been dismissed.

History Protection

Another question tackled in the IMMI involves laws that define libel, an issue reminiscent of Orwell's *1984* and Winston Smith's job in the Records Department of the Ministry of Truth. Indeed, the proposal points to the possibility that historical documents might be altered to suit powerful interests, the nightmare Orwell describes.

As more and more information moves from multiple physical archives to centralized Internet servers, and as copyright laws make it very difficult to republish the information elsewhere on the Web, it is increasingly easy for powerful organizations to drop compromising information about them into the flames of digital "memory holes." Unlike the complaint against *TIME*, the libel law abuse here would consist in filing lawsuits long after the initial publication occurred, in an attempt to pressure the defendants to avoid mounting legal costs by removing old controversial articles from their online archives, replacing them with an innocent "Page not found" warning.

This concern is even more acute after the March 9, 2009, decision of the European Court of Human Rights denied allegations that:

> the rule under United Kingdom law whereby each time material is downloaded from the Internet a new cause of action in libel proceedings accrued constituted an unjustifiable and disproportionate restriction on [the] right to freedom of expression as provided in Article 10 of the European Convention of Human Rights. (*Times v. UK*, 2009, p. 2)

Although the Court also admitted the importance that member states introduce limitation periods for libel action "to ensure that those who are defamed move quickly to protect their reputations," (*Times v. UK*, 2009, p. 13) the IMMI observes that the Internet publication rule (also referred to as the multiple publication rule) "has been extensively abused to remove important articles on corruption from online newspaper archives long after they were published" (IMMI, 2010, para. 41). To illustrate this point, the IMMI offers the example of 2008 British billionaire Nadhmi Auchi's legal threats to have *The Guardian* and other British newspapers remove from their online archives several five-year-old articles reporting his conviction for corruption in the Elf-Acquitaine case.[18]

To prevent historically significant documents from being destroyed, the IMMI cites the French Criminal Law, which establishes a limitation period of three months for libel action and a ceiling for damages of €15,000.[19] Building upon this, the IMMI suggests that libel suits may not be filed after two months of the allegedly defamatory publication and that the maximum damage to be awarded to a successful plaintiff is €10,000. In any case, the IMMI admits that these selections of time and maximum settlement should be supported and informed by research at the European level about libel cases. To this end, it proposes building a data base of European libel suits including the publication date, the lawsuit filing date, the dates of any legal threats or settlement proposals, court verdicts, and incurred fines.[20]

Libel Tourism Protection

In recent years, a significant concern has been raised about another variant of abusive libel action known as "libel tourism." This term describes a practice of international forum shopping whereby wealthy and powerful claimants pursue (or threaten to pursue) libel actions in plaintiff-friendly jurisdictions regardless of where the parties are based. Although there are a number of countries whose libel laws are heavily weighted in favor of the plaintiff, Britain seems to be the most appealing destination for libel tourists (McFarland, 2009). According to Geoffrey Wheatcroft (2008, p. 32), the reasons why libel tourism "has become a lucrative trade for London lawyers" can be summarized as follows:

> Unlike the defendant in a criminal case or other civil suits—or in a US libel action—he is assumed to be in the wrong, and must prove that "the words complained of" are true. Under "no win, no fee," the plaintiff is gambling someone else's money, while the defendant is on a hiding to nothing. "True as to fact or fair as to comment" are the classic defences, but fair comment is subjective, and any attempt to justify or prove truth can be held to aggravate the gravity of the libel. And . . . our media have nothing like the

[18] See http://www.wikileaks.ch/wiki/Eight_stories_on_Obama_linked_billionaire_Nadhmi_Auchi_censored_from_the_Guardian,_Observer,_Telegraph_and_New_Statesman

[19] See http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070719

[20] See http://immi.is/Libel_Case_Law_Database

> protection that the U.S. press has been afforded since *The New York Times* won the Sullivan case in 1964. (Wheatcroft, 2008, p. 32)

In its *Free Speech Is Not for Sale* report, British press freedom organization Index on Censorship (one of the principal endorsers of the IMMI), along with English PEN (2009), points out two other important reasons for the status of England regarding libel tourism: the aforementioned application of the multiple publication rule and the intimidating effect of the "prohibitive" legal costs of defending a libel action in Britain.

McFarland (2009) identifies three main groups of libel tourists. The first includes celebrities, especially American stars (Verkaik, 2008). Thus, Wheatcroft (2008) describes the particularly curious *Vanity Fair* libel case in which Roman Polanski sued the New York magazine in London, but had to give evidence by video link from France to avoid extradition to the United States on a child sex charge dating back to 1977.

The second group is composed of "international business moguls" (McFarland, 2009, p. 7) and is typified by the libel suit brought by Boris Berezovsky against *Forbes* magazine over an article titled "Godfather of the Kremlin?" (1996) that accused him of gangsterism and corruption. A more significant example for our purposes is the defamation suit Icelandic Kaupthing Bank won against the Danish tabloid *Ekstra Bladet* in London in 2008 (Lowe, 2008). Two years before, *Ekstra Bladet* published a series of articles on recent Icelandic investments in Denmark, Sweden, and the United Kingdom in which it claimed that the bank was involved in tax evasion. After its first complaint against the tabloid was dismissed by the Danish press commission, Kaupthing successfully sued *Ekstra Bladet* in London on the grounds that the articles were available in English on the tabloid's website and that the then chairman of the bank lived there (Index on Censorship/English PEN, 2009; Lowe, 2007). Now that we know that the UK Serious Fraud Office is collaborating with the Icelandic Special Prosecutor's Office in the investigation of the 2008 Kaupthing Bank's failure (Bowers, 2011; Werdigier, 2011), one cannot help but notice a certain irony in the hospitality the British libel law offered to the investment bank just a few months before its collapse.

The third group of libel tourists are "citizens of middle eastern countries with alleged ties to terrorism" (McFarland, 2009, p. 7) among which the late Saudi billionaire Khalid bin Mahfouz gained special prominence in the aftermath of the 9/11 attacks. Indeed, the most notorious illustration of this variant of litigation is the lawsuit he and his two sons brought to the High Court of London against the American writer Rachel Ehrenfeld. Ehrenfeld's 2003 book *Funding Evil* reported that the Mahfouz family supported Islamic terrorist organizations directly and through various charities. The book was published only in the United States, and neither party in the case lived in London. Nevertheless, bin Mahfouz argued that because its first chapter had been available online at ABCNews.com and 23 copies of the book had been purchased through British websites, he was qualified to sue Ehrenfeld and her editor for harming his reputation in England.[21] According to Ehrenfeld's own account of the facts:

[21] See http://www.acdemocracy.org/ehrenfeld-vs-mahfouz.cfm

> Since March 2002, Saudi billionaire Khalid bin Mahfouz has sued or threatened to sue in England at least 36 writers and publishers, including many Americans, who have documented his financial contributions to al Qaeda and other Islamic terror groups, through his Muwafaq (Blessed Relief) foundation, and the Saudi National Commercial Bank he owned. . . . Bin Mahfouz's legal "victories" in London had the desired effect he and other Saudi terror financiers sought, silencing of the media even in the U.S. where the First Amendment protects writers and publishers. But . . . I refused to acknowledge the jurisdiction of a British court over a book published here. (2007, para. 1)

Ehrenfeld claimed she would not appear before the English courts because she "lacked the financial resources to defend [herself] in the English Courts far from [her] home, because of the formidable procedural burdens a libel defendant faces in the U.K., and because [she] disagree[d] in principle with [bin Mahfouz's] tactic" (*Ehrenfeld v. Bin Mahfouz*, 2005, p. 2).

As a result, the High Court of London entered a default judgment against her, enjoining further distribution of the allegedly defamatory statements in England and Wales, ordering Ehrenfeld to publish a correction and apology and awarding the Saudi family £110,000 in damages and legal costs. Ehrenfeld immediately countersued bin Mahfouz in a federal district court in New York, seeking a declaration that enforcement of the English judgment in the United States would contravene her First Amendment rights. Her claim was that

> the net result of this abuse of the legal process is that the defendant [bin Mahfouz] both hides the truth of his acts behind the screen of English libel law and seriously chills legitimate and good faith investigation into his behavior and links to terrorism. (*Ehrenfeld v. Bin Mahfouz*, 2005, p. 16)

Although the New York State Court of Appeals ultimately dismissed Ehrenfeld's suit for lack of personal jurisdiction over bin Mahfouz in December 2007, her efforts led to the New York state legislature enacting the Libel Terrorism Protection Act (LTPA). This legislation effectively overruled that decision by refusing to enforce any

> defamation judgment obtained in a jurisdiction outside the United States, unless the court before which the matter is brought sitting in this state first determines that the defamation law applied in the foreign court's adjudication provided at least as much protection for freedom of speech and press as would be provided by both the United States and New York constitutions. (LTPA, 2008, p. 1)

In addition, the LTPA asserted retroactive personal jurisdiction over libel tourists given these two conditions: first, that **"**the publication at issue was published in New York"; second, that the publisher or writer have "assets in New York which might be used to satisfy the foreign defamation judgment, or may have to take actions in New York to comply with the foreign defamation judgment" (LTPA, 2008, p. 2).

To prevent such abuse of legal process, the IMMI proposes to implement a framework for nonrecognition of foreign libel judgments and for retaliatory cases against libel tourists suing Iceland residents. To that end, it suggests careful reconsideration of the implications of the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which Iceland ratified on February 25, 2011. In the IMMI's view, the best option for Iceland is to avoid enforcing foreign defamatory judgments contrary to the country's protections of free speech. Support for this policy is contained in Article 34.1 of the Lugano Convention (2007, p. 14), which states that "a judgment shall not be recognised if such recognition is manifestly contrary to public policy in the State in which recognition is sought."

Conclusion: Legal Disharmonization for the Networked Public Sphere

The core elements the IMMI assembles from different legislations seek to build "a comprehensive policy and legal framework to protect the free expression needed for investigative journalism and other politically important publishing" as well as to "inspire other nations to follow suit by strengthening their own laws" (IMMI, 2010, para. 6). We will conclude by outlining the possible legal implications of the IMMI and its general significance for the emergence of the networked public sphere.

First, we offer a brief update about the current legal implementation of the IMMI, carried out with the support of the Iceland-based International Modern Media Institute (2012). Because the IMMI involves the modification of "at least 13 laws . . . in 4 ministries" (IMMI, 2010, para. 5), it will be difficult to know whether the proposed free speech haven actually accomplishes its ambitious goals until we have seen the various steps in the implementation process.

In that regard, the first step has been the introduction of strong source protections compliant with Council of Europe recommendation R(2000)7 in Article 25 of the new Media Law enacted by the Althingi in April 2011.[22] Andrew Scott (2011) has praised the international dimension of these measures as "novel and ingenious" (p. 345). Nonetheless, he has raised some doubts about the fact that, by moving to Iceland or routing their communications through Icelandic servers (in the same manner that WikiLeaks does through Sweden and Belgium), journalists can ask the courts not to grant any foreign request for source disclosure on grounds of comity. Most importantly, Scott questions the credibility of the threat of criminal prosecution envisaged by the IMMI against those foreign litigants or judicial officers who coerce Iceland-based journalists into breaking mandated confidences:

> One might expect that some litigants and prosecutors will not be easily deterred. Moreover, the courts of some states will no doubt be unimpressed by such an explicit design to impinge upon the dispensation of justice in accordance with nationally

[22] See (only available in Icelandic) http://www.althingi.is/altext/stjt/2011.038.html

> determined rules on the balancing of the interests of sources, journalists, and affected third parties. (Scott, 2011, p. 346)

The aforementioned Media Law also undertakes libel by narrowing the scope of the severely outdated 1956 Print Act. Among other provisions, Articles 50 and 51 exempt journalists from liability for the defamatory comments of their interlocutors. And the research project upon European libel suits is beginning to bear fruit: the International Modern Media Institute has drafted a libel reform bill due to reach parliament in autumn 2012.

On new sunshine provisions, there have been two significant advances. First, Iceland ratified the Aarhus Convention by law 131/2011; second, an updated information act containing the most important provisions included in the IMMI is pending ratification by the Althingi in 2012. Some observers have raised concern about the feasibility of such an evolution from reactive to proactive publication. Darbishire (2010) has examined the practical challenges of proactive disclosure in an extensive study combining a review of international declarations, jurisprudence, and academic literature with a survey of its implementation in several countries.

Another **i**mportant step planned for 2012 is a parliamentary vote on an amendment proposal to the Icelandic Electronic Communications Act that would not only revoke data retention but also forbid the interception and inspection of communications. Indeed, in early 2012, the Foreign Affairs Parliamentary Committee decided not to adopt the EU Data Retention Directive. Regarding intermediary protection, the International Modern Media Institute is collaborating with other organizations to propose legal and technical measures that counter increasing international threats to both Internet end points and intermediaries. The first results of this work are expected before the end of 2012.

With respect to libel tourism, the best (but still untested) solution seems to be to have Icelandic courts directly apply Article 34.1 of the Lugano Convention when they are confronted with defamation judgments obtained in foreign jurisdictions with weaker guarantees for free speech. Scott is again skeptical about this option, arguing that the IMMI sits at the cutting edge in terms of the intersection between private international law and human rights law:

> By refusing to enforce a judgment delivered in another jurisdiction, it might be asserted that the Icelandic court will have failed to vindicate a claimant's right to an effective remedy under Article 13 ECHR and will have in practice stripped the claimant of the vindication of his or her Article 8 right to reputation. The Icelandic law cannot presume that decisions reached, for example, under English libel law, are necessarily deficient in terms of compliance with Article 10 ECHR . . . English libel law has not been found to be significantly deficient in terms of its compliance with international standards of human

> rights protection in cases brought before the European Court of Human Rights. This is not to contend that there are no problems with the costs of libel proceedings. (Scott, 2011, pp. 349–351)

Although there is no doubt about the uncertainty of the questions of international private law raised by the IMMI and the general idea of free speech havens, we should not belittle the international concern surrounding the abuse of English libel law in recent years. Indeed, on July 30, 2008, that abuse was strongly denounced in the Concluding Observations of the United Nations Human Rights Committee (2008) on the report submitted by the United Kingdom on civil and political rights:

> The Committee is concerned that the State party's practical application of the law of libel has served to discourage critical media reporting on matters of serious public interest, adversely affecting the ability of scholars and journalists to publish their work, including through the phenomenon known as "libel tourism." The advent of the internet and the international distribution of foreign media also create the danger that a State party's unduly restrictive libel law will affect freedom of expression worldwide on matters of valid public interest. (Article 19)

The significant outrage triggered in the United States since Ehrenfeld's case resulted in the adoption of the libel tourism protections granted in the New York LTPA, first at the state level (in Florida, Illinois, and California) and finally at the federal level (with the unanimous passing of the SPEECH Act23 in the summer of 2010). Indeed, this international concern has not gone unnoticed in the United Kingdom, as reflected in the report the British Parliament's Culture, Media and Sport Committee (CMSC) produced in this respect:

> We hope that Government measures to reduce costs and to speed up libel litigation will help address the mismatch in resources between wealthy corporations and impecunious defendants, along with our recommendations to widen and strengthen the application of the responsible journalism defence. It is more than an embarrassment to our system that legislators in the US should feel the need to take retaliatory steps to protect freedom of speech from what they view as unreasonable attack by judgments in UK courts. . . . In cases where neither party is domiciled nor has a place of business in the UK, we believe the claimant should face additional hurdles before jurisdiction is accepted by our courts. . . . It is clear that a balance must be struck between allowing individuals to protect their reputations and ensuring that newspapers and other organisations are not forced to remove from the internet legitimate articles merely because the passage of time means that it would be difficult and costly to defend them. (CMSC, 2010, pp. 135–136)

[23] See http://www.gpo.gov/fdsys/pkg/PLAW-111publ223/html/PLAW-111publ223.htm

Nevertheless, Scott's skepticism over the IMMI's approach to libel tourism also involves a practical dimension related to the likely efficacy of its punitive elements. According to him, any provision authorizing countersuits to seek punitive damages from libel tourists would invite retaliation from them in other countries. This could eventually lead to a legal back and forth in which Iceland would be in a disadvantageous position:

> The potential problem for the IMMI is that the defendant—at least if it is a major media organisation that has relocated to Iceland—may often still have assets in the second jurisdiction against which the claimant may move. The converse is unlikely often to be true. (Scott, 2011, p. 352)

Even though Scott's argument is convincing with respect to retaliatory litigation,[24] it also highlights the prominence of the most original feature of the IMMI (the one that makes it "modern"): that the wide range of protections it combines are not only applied to "major media organisation[s]" but, more importantly, to what Benkler (2011) terms the "networked fourth estate." Otherwise, we could agree with Craufurd-Smith (2010) that the IMMI would not strictly be "unique" and that the Law on Freedom of Expression in the Media (the FEM) enacted in Luxembourg in 2004[25] could constitute a valid precedent of it. Indeed, although the FEM includes no provision for government transparency,[26] it integrates various free speech protections (some of which are quite similar to those proposed in the IMMI) into one over-arching law. Nevertheless, the fact that this law applies solely to the mainstream, professional media cannot be reduced to a mere matter of scope. In fact, it represents an essential difference between the FEM and the IMMI, explaining why there is practically no mention of Luxembourg in the IMMI's documentation.

Finally, it is important to underscore that some of the reforms described here could be conferred constitutional rank after the proposed new Icelandic constitution was approved in the nonbinding national referendum celebrated on October 20, 2012:[27] freedom of information and government transparency

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[24] Despite the fact that it is more likely that a wealthy libel plaintiff has assets in the United States than in Iceland, the SPEECH Act includes no provision authorizing U.S. authors or editors to seek monetary damages from foreign plaintiffs.

[25] See http://www.legilux.public.lu/leg/a/archives/2004/0085/a085.pdf

[26] Luxembourg is one of the only countries in the European Union (with Spain and Cyprus) that does not have a law guaranteeing the public's right to access official information yet. See http://www.access-info.org/en/european-union/176-luxembourg-transparency-eleven-years-and-counting

[27] See http://en.wikipedia.org/wiki/Icelandic_constitutional_referendum,_2012

(Article 15); protection of journalists, sources, and whistle-blowers (Article 16); communications protection and network neutrality (Articles 11 and 14); and prior restraint limitations (Article 14).[28]

These considerations about the possible legal incidence of the IMMI do not exhaust its potential significance as an (ongoing) research effort led by the International Modern Media Institute. Such effort helps us map the different free speech conflicts that may arise in the networked information environment and the wide range of communicators currently involved in them. In our opinion, this significance can be thoroughly understood against the background of the emergence of the "networked public sphere" (Benkler, 2006).

Benkler analyzes the changes in technology, economic organization, and social practices of information and cultural production that characterize a new stage in today's information economy, one he terms "the networked information economy." He focuses specifically on its implications for the public sphere, defined as "the set of practices that members of a society use to communicate about matters they understand to be of public concern and that potentially require collective action or recognition" (Benkler, 2006, p. 177). In his view, the combination of the distributed networked architecture of the Internet and the dramatic reduction of the basic material capital requirements of information production and dissemination enable a shift from the mass-mediated public sphere to the networked public sphere. This networked public sphere challenges the previous dominance of the mass media by providing a radically decentralized and cooperative response to their three main failures: (1) their relatively limited intake basin; (2) the excessive power their owners have to shape information and opinion; and (whenever this power is not exerted or sold to third parties) (3) their tendency toward lowest-common-denominator programming that discourages complex public discussions. As Benkler puts it,

> The networked information economy as it has developed to this date has a capacity to take in, filter, and synthesize observations and opinions from a population that is orders of magnitude larger than the population that was capable of being captured by the mass media. It has done so without recreating identifiable and reliable points of control and manipulation that would replicate the core limitation of the mass-media model of the public sphere—its susceptibility to the exertion of control by its regulators, owners, or those who pay them. (2006, p. 261)

The democratizing platform for the public sphere Benkler describes relies fundamentally on the increasing role that nonmarket actors and alternative media organizations can play in the distributed production of information, knowledge, and culture. Hence, alongside the traditional mass media, Benkler (2011, pp. 52–55) emphasizes the emergence of the "networked fourth estate" and maps the various models of organization it comprises: commercial platforms of different size and scope, like the *Huffington Post* and *Talkingpointsmemo*; investigative journalism nonprofits, like the different approaches to open

[28] See http://stjornlagarad.is/other_files/stjornlagarad/Frumvarp-enska.pdf

government typified by the Sunlight Foundation or WikiLeaks; and individual blogs and user-generated content platforms. Bearing in mind the WikiLeaks case, Benkler calls attention to the vulnerability of the "politically weak, technically-dependent on widespread information, communications and payment utilities**"** (ibid., p. 45) members of the networked fourth estate to denial of service attacks. These attacks are led by an extralegal public–private partnership between providers (that can directly cut off technical infrastructures and payments to the targeted organizations) and governments (that can instigate them to do so by situating those organizations in the sociopolitical frame of terrorism). Benkler argues that the emerging networked fourth estate is protected from attacks of this kind by the U.S. First Amendment. Hence, the WikiLeaks case can be seen as "the networked version of the Pentagon Papers" (ibid., p. 55) episode. The same argument can be applied to the legal threats we have analyzed in the context of the IMMI:

> We cannot afford as a polity to create classes of privileged speakers and press agencies, and underclasses of networked information producers whose products we take into the public sphere when convenient, but whom we treat as susceptible to suppression when their publications become less palatable. . . . Fortunately, clarifying that this freedom extends to "every sort of publication which affords a vehicle of information and opinion" and that "Liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher" is not a matter of policy discretion or moral belief. Our constitution requires it, and the Supreme Court's jurisprudence has made this clear. (Benkler, 2011, p. 42)

There is, however, another significant threat to the emerging networked fourth estate that does not arise from a restrictive application of legislation, but from an overreaching misapplication. As we saw in the *Ekstra Bladet* case, the same technical infrastructure that enables the rise of the networked public sphere can be used by libel tourists to justify their international forum shopping on the grounds that alleged defamatory statements can be accessed anywhere when they are published on the Internet. Even if the resulting globalized chilling effect strictly affects the fourth estate as a whole, it is obvious that the threat of mounting legal costs involved in libel suits can be especially intimidating for the small companies and nonprofits that compose the networked fourth estate.

This potential inversion of the Internet free speech architecture confronts us with the "risk of a 'lowest common denominator' approach to the freedom of expression of those who publish on the Internet," (CMSC, 2010, p. 57) as the organization Article 19 puts it. To better situate this risk, we will refer to the three strategies mapped by Lessig (2006) about how to resolve online conflicts that involve "competition among sovereigns" (pp. 302–310). In fact, the threat of libel tourism on the Internet brings into relief the limits of the strategy of mutual recognition and enforcement of judgments ("the many laws rule") with respect to the "uncertain intersection of private international law and the law of human rights" (Scott, 2011, p. 349). Indeed, this situation leads to the actual preeminence of the second strategy, "the one law rule," by which one government gets to enforce its (libel) law everywhere. The great irony is that

the same John Perry Barlow whose 1996 *Declaration of Independence of Cyberspace*[29] typified "the no law rule" strategy is currently bolstering a sort of legal hack to have one "Government of the Industrial World" create a free speech haven. Thus, we can see the IMMI as evidence that "the Net" has learnt the lesson about the reasons of the failure of the no law rule:

> Laws are enacted as a result of political action; likewise they can be stopped only by political action. . . . On Barlow's side, there had to be political action. But political action is just what the Net wasn't ready for. (Lessig, 2006, p. 305)

We define the strategy of creating a free speech haven as "legal disharmonization" to emphasize what the aforementioned "risk of a 'lowest common denominator' approach" has in common with the "international harmonization" of exclusive rights that Benkler (2006, p. 453) describes as "a one-way ratchet toward ever-expanding exclusivity." To reverse such restrictive tendencies, this legal disharmonization finds inspiration in WikiLeaks' "art of making do" (de Certeau, 1990, pp. 50–63) to "route information through different countries to take advantage of their laws" (Assange, 2010). Hence, the creation of a free speech haven by pulling together the world's best transparency-enabling laws could involve a sublimation of what Benkler (2011) considers "the first and most obvious" source of resilience of the networked fourth estate: "jurisdictional arbitrage" (pp. 29–30). Most importantly, "the Switzerland of bits" the IMMI intends to build in Iceland not only aspires to offer a safe haven for investigative journalists, human rights organizations, and whistle-blowers but also to spur international debate and similar legal reforms. As of this writing, the European Parliament has approved three resolutions supporting the IMMI, stating that its transposition can enable "both Iceland and the EU to position themselves strongly as regards legal protection of the freedoms of expression and information" (European Parliament, 2012, para. 27) In conclusion, we would argue that the proposal of free speech havens shares the same logic as legislation that secures tax havens in some nations but is founded on diametrically opposed principles: **"**It is hard to imagine a better resurrection for a country that has been devastated by financial corruption than to turn facilitating transparency and justice into a business model" (IMMI, 2010, para. 28).

[29] See https://projects.eff.org/~barlow/Declaration-Final.html

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