Appendix III

DRAFT RECOMMENDATION Rec (2004) ...
OF THE COMMITTEE OF MINISTERS TO MEMBER STATES
ON THE RIGHT OF REPLY IN THE NEW MEDIA ENVIRONMENT[1]

(Adopted by the Committee of Ministers on ...
at the ... meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.*b.* of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage;

Recalling its Resolution (74) 26 on the right of reply – position of the individual in relation to the press, the provisions of which should apply to all media;

Noting that, since the adoption of this Resolution, a number of major technological developments have taken place, necessitating a revision of this text in order to adapt it to the current situation of the media sector in Europe;

Recalling, furthermore, that the European Convention on Transfrontier Television refers not only to the right of reply but also to comparable legal or administrative remedies;

Reaffirming that the right of reply should protect any legal or natural person from any information presenting inaccurate facts concerning that person and affecting his or her rights and considering consequently that the dissemination of opinions and ideas must remain outside the scope of this Recommendation;

Considering that the right of reply is a particularly appropriate remedy in the on-line environment due to the possibility of instant correction of contested information and the technical ease with which replies from concerned persons can be attached to it;

Considering that it is also in the interest of the public to receive information from different sources, thereby guaranteeing that they receive complete information;

Acknowledging that the right of reply can be assured not only through legislation, but also through co-regulatory or self-regulatory measures;

Emphasising that the right of reply is without prejudice to other remedies available to persons whose dignity, honour, reputation, or privacy rights have been violated in the media;

Recommends that the governments of the member States should examine and, if necessary, introduce in their domestic law or practice a right of reply along the lines of the following minimum principles, without prejudice to the possibility to adjust its exercise to the particularities of each type of media, or any other equivalent remedy, which allows a rapid correction of incorrect information in on-line or off-line media:

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[1] As revised at the 11th meeting of the MM-S-OD (17-18 June 2004).

Definition

For the purposes of this Recommendation:

The term “medium” refers to any means of communication for the periodic dissemination to the public of information, whether on-line or off-line, such as newspapers, periodicals, radio, television and web-based news services.

Minimum principles

1. Scope of the right of reply

Any natural or legal person, irrespective of nationality or residence, should be given a right of reply offering a possibility to react to any information in the media presenting inaccurate facts about him or her which affect his/her personal rights.

2. Promptness

The request for a reply should be addressed to the medium concerned within a reasonably short time from the publication of the contested information. The medium in question should make the reply public without undue delay.

3. Prominence

The reply should be given, as far as possible, the same prominence as was given to the contested information in order for it to reach the same public and with the same impact.

4. Free of charge

The reply should be made public free of charge for the person concerned.

5. Exceptions

By way of exception, national law or practice may provide that the publication of the reply may be refused by the medium in question in the following cases:

i. if the length of the reply exceeds what is necessary to correct the contested information;
ii. if the reply is not limited to a correction of the facts challenged;
iii. if it constitutes a punishable offence;
iv. if it is considered contrary to the legally protected interests of a third party;
v. if the individual concerned cannot show the existence of a legitimate interest;
vi. if the reply is in a language different from that in which the contested information was made public;
vii. if the contested information is a part of a truthful report on public sessions of the public authorities or the courts.

6. Safeguarding an effective exercise of the right of reply

In order to safeguard the effective exercise of the right of reply, the media should make public the name and contact details of the person to whom requests ~~to publish~~ for a reply can be addressed.

For the same purpose, national law or practice should determine to what extent the media should be obliged to conserve for a reasonable length of time a copy of information or programmes made publicly available, or at least while a request for inserting a reply can be made, or while a dispute is pending before a tribunal or other competent body.

7. Electronic archives

If the contested information is kept publicly available in electronic archives and a right of reply has been granted, a link should be established between the two if possible, in order to draw the attention of the user to the fact that the original information has been subject to a response.

8. Settlement of disputes

If a medium refuses a request to make a reply public, or if the reply is not made public in a manner satisfactory for the person concerned, the possibility should exist for the latter to bring the dispute before a tribunal or another body with the power to order the publication of the reply.

Appendix IV

Draft Explanatory Memorandum to the draft Recommendation on the right of reply in the new media environment

Introduction

1. In 2002, the Council of Europe's Steering Committee on the Mass Media (CDMM) requested its Group of Specialists on on-line services and democracy (MM-S-OD) to review Resolution (74) 26 on the right of reply – position of the individual in relation to the press, in the light of technological developments in the media sector in order, as appropriate, to adjust its principles to these developments.

2. Resolution (74) 26 stipulates a right of reply regarding the press, radio and television and other periodical media. This right is also guaranteed in Article 8 of the European Convention on Transfrontier Television as regards transfrontier television programme services. Furthermore, provisions on the right of reply are to be found in the press laws or broadcasting laws of many member States.

3. Given the technological developments which have taken place in the media sector over the last few years, and in particular the development of on-line services distributed through Internet, the question naturally arises whether the right of reply should also be applied to these new kinds of services, such as newspaper web sites.

4. Having analysed the matter in detail, the MM-S-OD decided to thoroughly revise Resolution (74) 26 and draw up a new Recommendation which would replace this Resolution, add new services to those already expressly mentioned in the Resolution and establish horizontal principles which would apply to all services covered by the Recommendation.

5. In the off-line world, the periodicity of the publication had been considered as a crucial condition for granting a right of reply. The reasoning behind this was that only in the case of periodical publications would the reply reach the same public which had become aware of the contested information. In the on-line context, the notion of periodicity can be retained in the sense that there has to be an intention to renew the information made available more or less frequently. Otherwise, there is little likelihood that the same public will be attracted again and little sense in imposing a right of reply. Furthermore, given the existing variety of regulatory solutions at the national level, it was decided to cover as a minimum only those services which contain edited information and can be considered directed at the public (see further explanation in paragraph 10).

6. Different drafts of the Recommendation were made public on the Council of Europe's web site and a number of individuals and organisations used the opportunity to send in comments. In addition, a hearing with media law experts and representatives of professional organisations was organised on 10 February 2003. Furthermore, the Standing Committee on Transfrontier Television analysed the draft Recommendation at its meetings on 7-8 July 2003 and on 20-21 November 2003. Finally, the Group of Specialists on freedom of expression and other fundamental rights (MM-S-FR) was also consulted at its meeting on 12-13 January 2004. This valuable input was duly taken into account when finalising the draft Recommendation.

7. The Recommendation sets out minimum principles, indicating that member States have flexibility in going beyond them, for example, by extending the right of reply to other services than those identified in the definition of "medium". Member States could also decide to go beyond the minimum principles by granting a right of reply to other entities than natural or legal persons affected personally by a contested piece of information. Some countries grant such a right, for example, to organisations fighting racism and intolerance.

8. There is also flexibility as regards the possibility to adjust the exercise of the right of reply to the particularities of each type of media. Newspapers, television stations or on-line news portals will all have different ways of satisfying their obligation to give equal prominence to the reply as was given to the original information.

9. Finally, it is indicated in the preamble that the right of reply can be secured not only through legislation but also through co-regulatory or self-regulatory measures. Furthermore, other equivalent remedies may be foreseen, provided that they allow any natural or legal person to react rapidly and effectively to inaccurate information which concerns him or her.

Definition

10. Here the term "medium" is defined. Basically the term covers traditional media, in particular the press, radio and television, and any service which is edited and directed at the public. This definition includes websites which are edited in a journalistic sense, but does not refer to information of a private nature, which cannot be considered relevant for the formation of public opinion. It also excludes search engines where information is automatically selected without any editing taking place. Essentially, the aim of the definition is to cover those types of new services available on publicly accessible networks which are similar to traditional media.

Minimum principles

1. Scope of the right of reply

11. As stated in the 1st principle, the right of reply should be granted to any natural or legal person mentioned in the media, irrespective of nationality or residence, whose personal rights are affected by information in the media, presenting inaccurate facts about him or her. The term "information" may include text, sound and/or images. The principle employs the word "affected", implying that it is not a condition that the contested information is actually defamatory or a violation of personal rights. Minor inaccuracies regarding named persons, such as the misspelling of a name, would, however, not necessarily call for a right of reply.

12. The Recommendation only covers factual inaccuracies and not opinions. The difference between the two has been highlighted in several judgments of the European Court of Human Rights.

2. Promptness

13. One of the merits of the right of reply as a remedy against inaccurate information in the media is that it provides a simple and fast response mechanism. In line with this, Principle 2 highlights the importance of promptness, both in requesting the insertion of a reply and in reacting on behalf of the media.

14. The principle states in its 1st paragraph that the request for a reply should be addressed to the medium concerned within a reasonably short time from the publication of the contested information. As concerns the traditional media, this is fairly straightforward, leaving usually no doubt about the time of the publication. For on-line media, however, the question arises whether to calculate the time-lapse from the time of first publication or rather from the time when the information is no longer available on-line. Here, the views differ radically. Calculating the time-lapse from the first publication is obviously convenient for publishers who would not have to worry about requests for replies long after first publication. For the persons concerned this may, however, be less acceptable since they may not become immediately aware of the published information and while it is available on-line, it continues to be consulted by users of the service.

15. The text of the Recommendation does not go further than laying out the basic principle, namely that the request for a reply should be addressed to the medium within a reasonably short time from the publication of the contested information. When applying this principle, member States could consider that while a piece of information is kept in a prominent, easily accessible part of an on-line publication, it can be considered that the publication is continuous. Once the piece of information is relegated to archives where it can only be found with the help of search tools, it could be considered that the "publication" in the meaning of Principle 2 is over.

3. Prominence

16. In order for the right of reply to be effective, it is imperative that the medium in question takes measures to ensure that the response reaches the same attention as the contested information. Therefore, the Recommendation stipulates in Principle 3 that the reply should be given, as far as possible, the same prominence as was given to the contested information.

17. It is, however, impossible to stipulate that the reply should always be published in exactly the same place as the original information, leaving no room for editorial discretion. Here, it will be an important consideration whether a newspaper, to take an example, has tried in good faith to give the necessary prominence to the reply, taking also into account the seriousness of the matter, the length of the reply as well as even the extent to which other events of the day called for an extensive and prominent space in the newspaper. For other media, similar considerations apply. A reply to a news report on radio should if possible be read out in the same programme on one of the following days. However, it cannot be excluded that it might be considered sufficient to mention only the essence of the reply on radio and refer to the web site of the radio station for full details. Where television is concerned, the reply ~~should~~ could take the form of a written text or be read by a presenter.

18. In order to give the same prominence to the reply as was given to the contested information on web sites, the most straightforward way to do so would be to publish the reply or a clearly visible link to it next to the contested information. If the contested information is no longer available on-line or has been relegated to less visible parts of the web site, as a general rule it seems fair to insist that the reply be published in the same place as where the contested information was originally placed. Links to replies should in any case enable a simple and direct access to them.

19. Furthermore, the reply should be made publicly available in a prominent place for a period of time which is at least equal to the period of time during which the contested information was publicly available.

20. In the case of regular e-mail newsletters, the reply should be sent to all those who received the contested information.

4. Free of charge

21. Media which publish replies should not hinder the effective exercise of the right of reply by requesting payment for giving space to the response and ensuring that it reaches the target audience. This does not mean, however, that the media have to incur any additional costs such as in preparing a reply with the help, for example, of audiovisual means.

5. Exceptions

22. Several exceptions need to be accepted to the right of reply in addition to those limits already inherent in the right itself as defined above.

23. Thus, the medium in question can refuse to publish a reply if it is longer than necessary to correct the contested information or if it contains statements or elements which go beyond responding to the allegedly inaccurate information *(5.i and 5.ii).* On the basis of the exception in 5.ii, the medium can, for example, refuse to publish a reply which contains abusive language or untrue statements.

24. Furthermore, the medium cannot be obliged to carry a reply which in itself contains statements where there is reasonable ground to believe that they constitute a punishable offence *(5.iii).*

25. Similarly, if a reply infringes on the legally protected interests of a third party, the medium cannot be obliged to publish it. This would be the case, for example, if the reply violates copyright held by a third person *(5.iv)*.

26. Furthermore, the medium in question can refuse to publish a reply if the person concerned cannot demonstrate the existence of a legitimate interest *(5.v)*. This would be the case, for example, if the inaccuracy which a person complained about was so trivial that it could not possibly affect the personal rights of the person. Another example might be if somebody requested the insertion of a reply in order to propagate racist or xenophobic statements, thus abusing his or her freedom of expression. Media should also have the possibility to deny the publication of a reply if the aim of the sender is obviously other than protecting his or her personal rights, for example if it is to silence critical voices. Similarly, political satire should not give rise to a right of reply. Furthermore, there may be no legitimate interest in having a reply published if the media has already corrected the inaccuracy in a manner satisfactory for the person concerned.

27. The media should also have the possibility to refuse to publish a reply if it is a reaction to a reply which has already been published. This kind of exception can be found in the laws of some member States. The media should in any case have the possibility to put an end to a continued exchange of replies and counter-replies between the same parties.

28. If the reply sent in is in a language different from that of the contested information, the medium can also refuse to publish it and it cannot be expected to provide for the translation of the reply *(5.vi~~i~~)*. This exception is supported by the consideration that the aim of the reply is to correct inaccurate information which had been brought to the attention of a part of the public and that this same part of the public needs to be able to understand the reply.

29. Finally, an exception may be allowed if the contested information was a part of a truthful report on the public sessions of public authorities including the courts *(5.vi~~i~~i)*. This is an exception to be found in some national laws, the purpose being that the right of reply should not be used as a vehicle to contest what is said in public sessions of the courts, parliaments, local government councils, etc.

6. Safeguarding an effective exercise of the right of reply

30. This principle stipulates firstly that the media under the meaning of the Recommendation should indicate clearly to readers, viewers and listeners where to address a request for replies.

31. Secondly, it addresses the situation when there is disagreement between the medium and the person requesting a reply about the existence or the content of the contested information. For the print media, this is hardly a problem since a copy will exist, if not in the files of the media enterprise at least with the police authorities or the national library. Broadcasting laws normally also contain an obligation for broadcasters to keep a copy of their programmes for a certain period of time. As regards on-line media, the situation is more complicated. Principle 6 suggests that member States may introduce an obligation for all media, including on-line media, to keep a copy of published information for a certain reasonable period of time. It may be considered good professional practice to do so and should not be too burdensome, bearing in mind that the Recommendation covers mainly professional media. That being said, it has to be left to the member States to decide how far

reaching this obligation will be with respect to the on-line media, where this might have some financial consequences due to the need to invest in appropriate computer facilities.

7. Electronic archives

32. This principle addresses the situation when the contested information remains available on-line, for example, in electronic archives ~~even~~ after a reply has been published. In this case, it seems fair to demand from the concerned medium to guarantee direct access to the reply.-

8. Settlement of disputes

33. The last principle highlights the need for a possibility to bring a dispute before a tribunal or another body which has the power to order the publication of a reply if the request was justified. This could be an ordinary court, or an independent regulatory or self-regulatory body.