Copyright © 2022 by Cherkas Global University

Published in the USA
International Journal of Media and Information Literacy
Issued since 2005
E-ISSN 2500-106X
2022. 7(2): 639-650

DOI: 10.13187/ijmil.2022.2.639
https://ijmil.cherkasgu.press

Right to Replay: Contemporary Problems of the Media Legislation Development

Vladyslava M. Zavhorodnia [a], Anna S. Slavko [a], Sergey I. Degtyarev [a, b, *]

[a] Sumy State University, Ukraine
[b] Cherkas Global University, Washington, USA

Abstract

The right of reply is one of the "stumbling blocks" in the media market regulation. It is challenging to regulate this issue correctly. The problem lies at the intersection of civil law (as a personal non-property right), human rights (in the context of the right to privacy and family life, as well as freedom of the press and freedom of expression), administrative law (in the aspect of media regulation) and national security. Nonetheless, legal science and practice in different countries offer many solutions and options. This study aims to explore and analyze these options and make conclusions for identifying and protecting the right of reply in the context of global trends and European integration processes.

Based on an analysis of scientific publications, international documents, national legislation of selected countries, and judicial practice, the authors conclude on the essence of the right of reply and its relationship to the right to rectification (right of correction). The right of reply is the right that allows any subject to respond to the publication in the mass media of certain information concerning his honor, dignity, business reputation, etc., by posting in the same mass media the response itself, provably and adequately forming a certain point of view on the subject of discussion among the consumers of information content. This right is related to the right to rectification but is different.

Jurisprudence in implementing the right of reply is focused on balancing the right to privacy and freedom of expression. The main guidelines for achieving such a balance are formulated in the Case Law of the ECtHR. This practice, combined with the principles and norms enshrined in EU law, should be regarded as a reference point for the systemic development of Ukrainian legislation in this context. A comparison of selected aspects of the legislation on audiovisual services (right of reply) shows that Ukraine's current legislation must fully comply with the Directive. However, the Draft Law on the media, which is currently being considered by parliament, does not conflict with EU law regarding the right of reply.

Keywords: audiovisual services, media, fundamental freedom, freedom of information, right of reply, right to rectification.

1. Introduction

The field of audiovisual services is essential both from the point of view of consumer protection and from the perspective of information security of the whole society. It is seen that in this area, government regulation should solve several mutually exclusive problems:

1) Ensure that the public is correctly informed about current events;
2) Prevent manipulation of information and its distortion;
3) Create appropriate conditions for the freedom of expression realization;

* Corresponding author
E-mail addresses: s.degtyarev@yur.sumdu.edu.ua (S.I. Degtyarev)

4) Prevent cases of leakage of information constituting a state or trade secret;
5) Protect intellectual property rights to audiovisual products;
6) Prevent cases of hate speech and harassment, etc.

The researchers provide a similar list of challenges for the audiovisual industry in Ukraine, emphasizing, however, the need to bring the standards of telecommunications services to European standards (Matskevych, 2016).

In Ukraine, the providing of audiovisual services is regulated by several legislative acts, among which the central place is occupied by the Laws "On Television and Radio Broadcasting", "On Information", "On Advertising", "On the National Council of Ukraine on Television and Radio Broadcasting", "On State secret", "On telecommunications", "On the foreign broadcasting system of Ukraine" and others. Also, there are many bylaws and quite an impressive volume of law enforcement practice and jurisprudence in this area. Nevertheless, regulation in this area must be improved and in line with basic European standards. The need to approximate the national legislation on the media to the European Union law is also conditioned by the obligations that Ukraine undertook in the framework of the EU-Ukraine Association Agreement (Association Agreement..., 2014) and the EU Commission's Recommendations for Ukraine's EU candidate status (Recommendations..., 2022).

According to Article 396 of the EU-Ukraine Association Agreement "The Parties shall cooperate to promote the audiovisual industry in Europe and encourage co-production in the fields of cinema and television. Cooperation could include, inter alia, the training of journalists and other professionals from both the printed and electronic media, as well as support to the media (public and private), so as to reinforce their independence, professionalism and links with other European media in compliance with European standards, including standards of the Council of Europe" (Association Agreement..., 2014). Article 397 states that gradual approximation to the EU law and regulatory framework and international instruments in the area of audio-visual policy shall be carried out in particular as set out in Annex XXXVII to the Agreement (Association Agreement..., 2014).

As per the Annex XXXVII "Audio-visual policy" Ukraine undertakes to gradually approximate its legislation within the stipulated timeframes to Directive 2007/65/EC of 11 December 2007 amending Council Directive 89/552/EEC on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities and as repealed by Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) and European Convention on Transfrontier Television of 1989 (Association Agreement..., 2014).

To implement these provisions under the Action Plan for the implementation of the EU-Ukraine Association Agreement, the bills on audiovisual services must be adopted.

Despite significant progress in this area (e.g., the Draft Media Law (Draft, 2022) was adopted on August 30, 2022), we still need to speak of establishing uniform standards. One of the "stumbling blocks" in the discussion about media market regulation is the right of reply.

It is challenging to regulate this issue correctly. The problem lies at the intersection of civil law (as a personal non-property right), human rights (in the context of the right to privacy and family life, as well as freedom of the press and freedom of expression), administrative law (in the aspect of media regulation) and national security. Nonetheless, foreign legal science and practice offer many solutions and options. This study aims to explore and analyze these options and make conclusions for identifying and protecting the right of reply in the context of global trends and European integration processes.

2. Materials and methods

The theoretical basis of this study was formed by the works of researchers devoted to general issues of media regulation, freedom of speech, privacy, combating defamation, and fact-checking (Grossman, 2001; Hong, 2022; Lebid et al., 2020; Matskevych, 2016; Plotnikova et al., 2021; Slavko et al., 2020) as well as special studies concerning the right of reply (Jonson, 2022; Hempel, 2018; Koltay, 2013; Rikhter, 2019; Surculija Milojevic, 2015). To achieve the study's objective, the authors explored relevant international treaties, resolution and recommendations of international intergovernmental organizations, the EU law. A comparative legal methodology was applied to determine the key approaches to regulating the right of reply based on the national

legislation and judicial practice analysis of Ukraine, the USA, Germany, and Poland. The choice of these countries is due to both the presence of developed media legislation (the USA, Germany) and experience in implementing EU standards (Germany, Poland). The case law of the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACHR) was examined to define the approaches formed in regional human rights protection systems.

3. Discussion

In the first place, we would like to focus on such aspects as the right of reply and the right to rectification. These rights are closely related but are different. Researchers note that the right to rectification or correction usually provides a brief correction of false or inaccurate statements. I.e., it does not enable the publication of any content other than this; the statement calls, in official and bland terms, the public's attention to the falsehood of the published facts and indicates the actual state of affairs. In comparison, the right of reply allows the injured party to present their position comprehensively regarding the disputed issue; i.e., it is not limited to rectifying false information (Koltay, 2013). Some countries, including Ukraine, consider the right of reply as a type of implementation of the right to rectification. At the same time, there is no unified understanding of the relationship between these rights in doctrine and legislation.

The main reason for the right of reply is to hear the other side. The media has the power to change someone's life entirely by only one allegation, and therefore an individual has to have a right to respond to something that he/ she considers false or simply inadequate information about him/herself (Surculija Milojevic, 2015).

At the same time, the press has been and continues to be the watchdog of society, exposing its vices and shortcomings. Media must enjoy the freedom of expression and not be persecuted by those who abuse the right of reply.

The Right of Reply under International Law and the EU Law

The right of reply is provided for both the national and international levels. It logically flows from two rights: the right to freedom of expression and the right to privacy, which are enshrined in many international instruments. For example, Article 19 of the Universal Declaration of Human Rights guarantees the right to freedom of thought and expression: "this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers" (Universal Declaration…, 1948).

Such a right is also guaranteed by Article 19 of the International Covenant on Civil and Political Rights (International Covenant…, 1966). At the same time, these instruments include the right to privacy (Article 12 of the Universal Declaration of Human Rights: "no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks" (Universal Declaration…, 1948)).

The next stage in developing the right of reply in international law was the adoption of the International Convention on the Right of Correction in 1953 (Convention, 1953). This Treaty obliges the media to act within the framework of editorial ethics, respecting human rights and taking responsibility for the accuracy of the information disseminated.

In 1952 an attempt was also made to adopt an International Code of Ethics (for journalists). It was drafted by the Economic and Social Council (Resolution 442B (XIV)) and provided for both the right of correction and the right of reply (Resolution…, 1952). The UN General Assembly recommended further work in this area involving specialists (directly from the media). Using the achievements of the Economic and Social Council, some professional organizations of journalists have adopted national codes of journalistic ethics.

At the regional level, the right of reply is enshrined, inter alia, in the American Convention on Human Rights (American Convention…, 1969). According to Article 14 "anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish. The correction or reply shall not in any case remit other legal liabilities that may have been incurred. For the effective protection of honor and reputation, every publisher, and every newspaper, motion picture, radio, and television company, shall have a person responsible who is not protected by immunities or special privileges" (American Convention…, 1969).

At least the following conclusions can be drawn from the above text:

1) the authors of the Convention do not distinguish between the concepts of "right of reply" and "right of correction";

2) the national legislation of member states should develop the conditions and mechanisms of implementation of this right;

3) the right of reply is not the only instrument for protecting honor, dignity, and business reputation that may exist in a state. It is also possible to prosecute those who disseminate incorrect information. There must be at least one official, not endowed with immunities, within each media outlet who can be held liable.

Several scholars have also emphasized that the American Convention on Human Rights allows invoking the right of reply in situations where not only statements but also "ideas" are offensive. However, the Spanish-language version of the Convention does not seem to contain such provisions (Rikhter, 2019). The lack of opportunity to correct so-called "value judgments" is also noted by C. Grossman – it is essential to reiterate that the right of correction cannot legitimately include value judgments (Grossman, 2001).

The particularities of implementing the right guaranteed by Article 14 of the Convention have been the subject of interpretation by the IFCHR. Thus, in Advisory Opinion OC-7/85 of August 29, 1986 on the application of Costa Rica, the Court stated:

“That Article 14(1) of the Convention recognizes an internationally enforceable right to reply or to make a correction which, under Article 1(1), the States Parties have the obligation to respect and to ensure the free and full exercise thereof to all persons subject to their jurisdiction;

That when the right guaranteed by Article 14(1) is not enforceable under the domestic law of a State Party, that State has the obligation, under Article 2 of the Convention, to adopt, in accordance with its constitutional processes and the provisions of the Convention, the legislative or other measures that may be necessary to give effect to this right;

That the word "law," as it is used in Article 14(1), is related to the obligations assumed by the States Parties in Article 2 and that, therefore, the measures that the State Party must adopt include all such domestic measures as may be necessary, according to the legal system of the State Party concerned, to ensure the free and full exercise of the right recognized in Article 14(1). However, if any such measures impose restrictions on a right recognized by the Convention, they would have to be adopted in the form of a law” (Advisory Opinion…, 1986). Therefore, the right of reply in the context of the IACHR case law is understood as “self-executing” (Hennebel&Tigroudja, 2022: 471).

Nevertheless, in assessing the validity of this right, C. Grossman notes that “there are many ways of expressing opinions, so assuring correction by the same means (e.g., location, size, format) inadequately protects freedom of expression” (Grossman, 2001).

Although the European Convention for the Protection of Human Rights and Fundamental Freedoms does not explicitly protect the right of reply, there has been a long-standing debate in Council of Europe law. For example, Resolution (74) 26 of the Committee of Ministers of the Council of Europe adopted Minimum rules regarding the right of reply to the press, the radio and the television, and to other periodical media (Resolution…, 1974). According to the Rules, the right of reply belongs to any natural or legal person about whom false information has been disseminated. However, the right of reply is not absolute. It may be limited by time (if the person's claim was not received within a reasonable time after publication), scope and content (if the statement does not concern the publicized facts or exceeds a reasonable scope) and the rights and freedoms of others (the statement violates the rights of others or contains an insult or does not concern a general interest).

Recommendation 1215 (1993) of the Parliamentary Assembly of the Council of Europe on the ethics of journalism suggests that national governments ensure legislative guarantees of the organization of the media in a way that ensures the exercise of the right of reply (Recommendation…, 1993).

In 2004, the Recommendation Rec (2004)16 of the Committee of Ministers to member states on the right of reply in the new media environment was adopted. It contains similar guarantees of the right of reply but expands the list of cases in which the exercise of the right can be limited and enshrines the right to publish the reply for free (Recommendation…, 2004).

The practice of the ECtHR (and formerly the European Commission of Human Rights) also provides some material for understanding how the Council of Europe understands the right of reply. For example, in Ediciones Tiempo v. Spain, the complainant was a publisher that published

the magazine Tiempo. The magazine published an article entitled "Mercorsa: how to become a millionaire at the expense of Spanish society." In this article, the former head of Mercorsa, a public company, was accused of mismanagement and that the company had acquired large debts. The head of the company demanded the exercise of his right of reply by preparing the text of a statement to be made public by the publisher. However, the applicant refused to publish the text of the statement, claiming that it contained false information.

The national trial was quite controversial: first, the head of the company had been denied to publish the rebuttal statement because it contained value judgments. Later the appeal court obliged the publisher to publish the statement, from which the value judgments were removed. The applicant (publisher) considered that the obligation to publish the disclaimer constituted an interference with the right to freedom of expression/press freedom. Considering the statement's admissibility, the European Commission of Human Rights pointed out that the right of reply is a guarantee of pluralism in a democratic society and must be respected. Consequently, the application is ill-founded and inadmissible (Ediciones Tiempo, 1989).

Some aspects of the right of reply exercise were considered in Eker v. Turkey. The applicant was the local newspaper editor who published a critical article about the Union of Journalists. The head of the Union of Journalists wished the newspaper to publish a rebuttal response, which the applicant refused to do. Eventually, the local Court ordered the applicant to publish the reply from the Union of Journalists in his newspaper. Accordingly, the applicant complained of violating his right to a fair trial (Article 6) and freedom of expression (Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms). The Court noted that the obligation to publish a response is a normal element of the legal framework governing the exercise of freedom of expression by the press. As such, it cannot be considered excessive or unreasonable. "Indeed, the right of reply, as an important element of freedom of expression, falls within the scope of Article 10 of the Convention. This is due not only to the need to allow false information to be challenged, but also to ensure a plurality of views, especially in areas of general interest, such as literary and political debate" (Eker, 2017).

However, the Court recalled that the restrictions provided for by Part 2 of Article 10 still apply to this right. It should be borne in mind that the State's obligation to guarantee freedom of expression does not grant individuals or organizations an unfettered right to access the media to promote their views. On the contrary, newspapers and other private media should generally have discretionary "editorial" authority in deciding whether or not to publish articles, comments, or letters from individuals. In exceptional circumstances, however, an individual may legally demand publication of a rebuttal, response, or even a libel judgment. Therefore, there are situations where the State may have a positive obligation to ensure an individual's freedom of expression in such media. In any case, the State must ensure that the denial of access to the media does not constitute an arbitrary and disproportionate attack on an individual's freedom of expression and that such a denial may be appealed to the competent national authorities (Eker, 2017). In the end, the Court found no violation of Articles 6 and 10 in this case.

Researchers note that the findings from this case may expand the concept of "admissible" response content and the scope of the remedies that will be used to enforce the right of reply (Hempel, 2018).

In Kaperzynski v. Poland, the applicant refused to publish the response of the local municipality to his critical article on water quality. He was held criminally liable for this – the punishment included a ban on his journalistic activities for two years. As the ECtHR found, in this case, the national court found that the applicant failed to inform the mayor that he would not publish his response. The court also found that the applicant did not give any reasons for his refusal. This obligation is defined in Article 33 § 3 of the Polish Press Act. In addition, the national court found that the applicant had not published the mayor's letter either in whole or in a form that could be considered compatible with the profile and format of the newspaper. The court agreed with the conclusion of the first instance that the applicant had not fulfilled his professional obligations in this aspect (Kaperzynski, 2012).

At the same time, the ECtHR considered that a criminal penalty depriving a media worker of the right to engage in his or her professional activities should be regarded as very severe. Furthermore, it exacerbates the risk of creating a chilling effect on the conduct of public debate (§ 74). The above, as well as the judgment of the domestic Constitutional Court on the particularities

of the exercise of the right of reply, enabled the ECtHR to find a violation of Article 10 of the Convention because interference was not necessary in a democratic society (Kaperzynski, 2012).

Generally, the Council of Europe welcomes the enshrinement in the national legislation of the right of reply, considering it guarantees pluralism in a democratic society. The right of reply enables individuals to defend their honor, dignity, and business reputation and engage in public debate. However, the right of reply is not per se an infringement of the right to freedom of the press. However, the right of reply is not absolute and is exercised subject to appropriate conditions: the reply must be relevant, submitted within a reasonable time after publication, not contain insults or infringements of the rights of third parties, not be excessive in length, etc.

The field of media and audiovisual services in general is also very important for the EU. The regulation of audiovisual services is mentioned twice in the founding treaties of the EU.

In particular, Article 167 of the Treaty on the Functioning of the EU provides that "action by the Union shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the artistic and literary creation, including in the audiovisual sector". Article 207 of the TFEU establishes procedural exceptions to the Council's activities. In particular, the Council acts unanimously to discuss and conclude agreements in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity (Consolidated versions…, 2012).

The central act of EU law in this area is Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (Directive…, 2010). According to Article 28 "any natural or legal person, regardless of nationality, whose legitimate interests, in particular reputation and good name, have been damaged by an assertion of incorrect facts in a television programme must have a right of reply or equivalent remedies" (Directive…, 2010). Unfortunately, there is no systematic practice at the EU level regarding the interpretation of the content of the right guaranteed by Article 28 of the Directive.

The Right of Reply under National Law

The member states of the Council of Europe mostly have relatively uniform approaches to regulating the media sphere, particularly the mechanism for exercising the right of reply. In Germany, the right of reply derives directly from the Basic Law, which guarantees the right to defend one's honor, dignity, and business reputation. In addition, the right of reply is provided for in the relevant articles of the press laws of the federal states. For example, Article 10 of the Saxon Press Act provides that the responsible editor and publisher of a periodical print publication shall print a response from the person or body affected by the allegation of the fact made in the printed work. At the same time, the publication is exempt from the obligation to print a reply if: the counter-report has illegal content; the content of the counter-report is not limited to factual information; the challenged part refers to advertising used exclusively for commercial purposes; the person or body concerned has no legitimate interest in the publication, or the reply is not of a relevant volume (the reply is considered relevant if its volume does not exceed that of the denied initial report). The counter-statement must be printed free of charge in the same part of the printed work and the same font as the negated text without inserts or omissions in an issue that is not closed to print (Sächsisches Gesetz, 2019).

The right of reply has also been the subject of examination by the German Federal Constitutional Tribunal. In particular, in a decision of February 8, 1983, the Federal Constitutional Court analyzed Hamburg's broadcasting law. In the context of that case, the Court noted that "someone whose cases are publicly discussed in the media has the right to speak out in the same place, with the same publicity and in the same forum with his representation; that person can defend himself immediately and therefore particularly effectively, whereas any additional civil and criminal law means to protect the individual in the main proceedings usually lead to success only at a time when the public already forgets the main process" (Beschluß…, 1980). Both the general right of the individual [to reply] and freedom of speech, however, form essential components of the constitutional structure of the Basic Law. Neither of these constitutional provisions can claim fundamental precedence. If a conflict arises, they should be brought into accord as far as possible.

In a more recent ruling, the German Federal Constitutional Court explains why it does not consider it necessary to initiate proceedings on the right of reply. The questions for the courts of

general jurisdiction were whether previous neglect of the opportunity to submit thoughts and objections regarding journalistic material could result in the inability to exercise the right of reply in the future. The Court emphasized that "the right of reply provisions are designed to protect the individual from the dangers of having his private affairs discussed in the press. They are analogous to freedom of expression in the press, which the person concerned, whose information is inaccurate, cannot oppose at all, with the prospect of the same journalistic effect" (Beschluss, 2018). At the same time, the Court emphasizes that the right of reply is an opportunity that does not depend on a person's prior statements and conduct, and the refusal to comment to journalists at the stage of preparation of material for publication cannot deprive the subject of information material of the right of reply (Beschluss, 2018).

Article 31 of the Polish Press Law provides the right to reply and the right to correction. In particular, at the request of an interested natural person, a legal entity, or an organizational unit that is not a legal entity, the editor-in-chief of the relevant magazine or other publication is obliged to publish, without charge, a factual correction of incorrect information contained in the press material. The correction shall be sent to the post office of the postal operator or submitted to the location of the relevant editorial office in writing by 21 days from the material's publication date. The text of the correction cannot exceed the double volume of the fragment of the press material to which it refers and cannot occupy more than double the airtime of this fragment of the message. The correction should be made in Polish or the language of publication (Ustava…, 1984).

The decision of the Warsaw Court of Appeal Sygn. akt V ACa 55/22 dealt with the complaint of the editor-in-chief of a publication, who was forced by the court of the first instance to publish a rebuttal. The disproved article concerned an employee of the ministry who was a member of five supervisory boards. Accordingly, the article referred to him as a "record-breaker" and questioned him about his level of earnings. The official decided to exercise his right to reply and sent a refutation which the newspaper refused to make public. At the suit of the ministry official, the court of the first instance ordered the publication to publish the statement with specific corrections. In particular, the discussion concerned the notion of "record-breaker" used in the material, which the edition called a value judgment, thus not subject to correction. Nevertheless, according to the court, factual data could be easily verified. It also discussed the volume of the possible response, not exceeding double the size of the material to be refuted. The Court of Appeals rejected the publisher's complaint, stating that "a correction is a special mechanism for enabling the public to learn the position of the other party to the dispute, allowing the person concerned to take his/her position and present his/her version of events and making it public through the same media (in which information about him and his image was previously published). Correcting the press is not an objective statement of the facts. Adopting this concept of correction means that the subject of litigation is, first and foremost, controlling the legality of the editor-in-chief's refusal to publish the correction" (Wyrok…, 2022).

Thus, in Poland and Germany, the right of reply is understood primarily as the right to correct information in journalistic materials that do not correspond to reality. This right derives from the need to provide tools to protect the reputation and confidentiality of the individual and is a way of responding quickly to the humiliation of honor, dignity, and business reputation. In doing so, the German Federal Constitutional Court explicitly emphasizes the need to comply a balance between the right of reply and freedom of the press.

A different approach to the right of reply has developed in the United States. In the early twentieth century, U.S. law and law enforcement practice shaped the right of reply in the context as it is understood in the Council of Europe. In particular, the Radio Act of 1927 stipulated that all radio broadcasts should be made "for the public interest, convenience, and necessity" (Radio Act…, 1927).

It also established the Federal Communications Commission, which later played a central role in shaping communications policy, including the right of reply. Similar provisions were later confirmed by the Communications Act of 1934 (Communication Act…, 1934).

In 1941, the U.S. Federal Communications Commission presented the so-called "Mayflower Doctrine", which expanded the right of reply (Mayflower, 1950). In particular, the Commission's decision of the same name stated that "Freedom of speech on the radio must be broad enough to providefull and equal opportunity for the presentation to the public of all sides of public issues. Indeed, as one licensed to operate in a publicdomain the licensee has assumed the obligation of presenting all sides of important public questions, fairly, objectively and without bias. The public

interest-not the private-is paramount. These requirements are inherent in the conception of public interest set up bythe Communications Act as the criterion of regulation" (Decisions…, 1941).

After eight years of criticism from the industry, the Federal Communications Commission was forced to replace the Mayflower Doctrine with the Fairness Doctrine (McCraw, 2009).

The U.S. Supreme Court's decision in Red Lion Broadcasting Co. v. Federal Communications Commission (1969) was quite notable in this context. The Federal Communications Commission in the case explained that the plaintiff, Red Lion Broadcasting Co. had failed to meet its obligations under the integrity doctrine. The station broadcast a program that was a personal attack on a certain Mr. Cook. Accordingly, the Commission ordered it to send the transcript of the broadcast to Cook and to allow time for a response, regardless of whether Cook would pay for it. In reviewing this case, the U.S. Supreme Court pointed out the following:

- the First Amendment is relevant to public broadcasting, but it is the right of viewers and listeners, not the right of broadcasters, which is paramount (§386-390);
- the First Amendment does not protect private censorship by broadcasters whom the government licenses to use a limited resource that is denied to others (§390-392).

In addition, the court affirmed that the Federal Communications Commission acted within its authority when it required a radio station to provide opportunities to respond to a person attacked in a broadcast (Red Lion Broadcasting, 1969).

However, as early as 1974, in the case of Miami Herald Pub. Co. v. Tornillo, the Supreme Court made different points. The Miami Herald Publishing Co. refused to publish the administration candidate's response to an editorial criticizing him. However, the publication had such a duty under state law, allowing the candidate to sue the publisher accordingly. The U.S. Supreme Court finally reached the case and pointed out that the need to publish "responses" without explanation violated the First Amendment of the U.S. Constitution. According to the Supreme Court:

- the statute exacts a penalty on the basis of the content of a newspaper by imposing additional printing, composing, and materials costs and by taking up space that could be devoted to other material the newspaper may have preferred to print (§§ 256-257);
- even if a newspaper would face no additional costs to comply with the statute and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the statute still fails to clear the First Amendment's barriers because of its intrusion into the function of editors in choosing what material goes into a newspaper and in deciding on the size and content of the paper and the treatment of public issues and officials (§ 258) (Miami Herald Pub., 1974).

This case marked the beginning of the decline of the honesty doctrine. However, for a long time, the Federal Communications Commission tried to maintain at least two fundamental elements of the doctrine: personal attack and political editorial rules.

4. Results

The foregoing suggests that the right of reply has not lost its relevance for a long time. With the development of social networks and Internet media, responding to an attack on honor, dignity, and business reputation has become even more challenging (Slavko et al., 2020), requiring proper legal regulation and streamlined judicial practice. Ukraine's obligations under the Association Agreement and as a candidate for EU membership provide for the approximation of Ukrainian legislation to European standards.

In the current Law of Ukraine on Television and Radio Broadcasting, the right of reply (Article 65) and the right of correction (Article 64) are distinguished. However, they have the same procedure for protection under Article 64 (Pro telebachennia…, 1993). For example, the right of refutation arises if a broadcasting organization has disseminated degrading and/or false information. The law does not clearly define the requirements for a refutation statement and the conditions under which a television and radio organization may refuse to make it public. Hence, a general analysis of the provisions of the law suggests some requirements. The deadline for submission is no less than 14 days from the moment of dissemination of information; the form is written. The obligation of the television and radio organization to disseminate the refutation or the response of the person arises on the condition that it cannot prove the authenticity of the data it promulgates.

The provisions of Article 37 of the Law of Ukraine "On Print Media (Press) in Ukraine" (Pro drukovani zasoby…, 1992) are more detailed. They limit the deadline for submitting a

refutation to one year, contain conditions under which an edition can refuse a refutation, etc. At the same time, the law refers to the response as a form of refutation.

A rather illustrative example of the exercise of the right of reply in Ukraine is the application of Melnychuk v. Ukraine, which the ECtHR considered. The applicant published a collection of poems, which was criticized in the pages of the publication in local newspaper "Berdychivska zemlya". The applicant demanded to publish a response in the same edition. The newspaper refused because of the vulgar language and insults in the response text. The Court noted that "as a rule, newspapers and other private media should be free to exercise editorial discretion in deciding whether to publish articles, comments and letters submitted by individuals. However, there may be exceptional circumstances in which a newspaper may be legally obliged to publish, such as a rebuttal, an apology, or a defamation judgment. Consequently, there may be situations where the State may have a positive obligation to ensure the individual's freedom of expression in such media". ECtHR held that in the present case, the state "fulfilled a positive obligation to protect the applicant's right to freedom of expression by ensuring that he had a reasonable opportunity to exercise his right of reply by submitting a response to the newspaper for publication. Moreover, he had an opportunity to challenge the newspaper's refusal in court" (Melnychuk, 2005). Thus, the ECtHR confirmed the adequacy of the Ukrainian legislation and law enforcement practice to the requirements of the Council of Europe.

An analysis of contemporary jurisprudence regarding the requirement for the media to refute information (in particular, the decision of the Mariupol Prymorskyi District Court of the Donetsk Region of October 30, 2020 (Rishennia..., 2020) and the Holosiivskyi District Court of Kyiv of April 19, 2022 (Rishennia..., 2022) shows several common trends. In most cases, plaintiffs regard media materials as humiliating their honor, dignity, and business reputation. They, therefore, require not only a refutation but also compensation for the moral damage caused. Most plaintiffs cannot prove that the information disseminated in the media is false. Courts consider much of the information cited in journalistic materials to be value judgments not subject to refutation. Plaintiffs generally have no desire to exercise the right of reply and demand only that the information be refuted. In all of the cases analyzed, refutation of the information and satisfaction of other claims were denied.

5. Conclusion

The right of reply is the right that allows any subject to respond to the publication in the mass media of certain information concerning his honor, dignity, business reputation, etc., by posting in the same mass media the response itself, provably and adequately forming a certain point of view on the subject of discussion among the consumers of information content. This right is related to the right of correction but is different.

The right to reply on radio and television is not implemented as effectively as in the print media. The reason may lie both in the imperfection of legal provisions and in the abuse of the right to refutation and the right to reply on the plaintiffs' part. When analyzing court jurisprudence, it should be remembered that in such cases, the courts must strike a balance between the right to privacy and freedom of expression. The main benchmarks for achieving such a balance are articulated in the jurisprudence of the ECtHR. This practice, combined with the principles and norms laid down in EU law, should be regarded as a benchmark for the systemic development of Ukrainian law in this context.

Articles 396-398 of the EU-Ukraine Association Agreement set out the basic principles of cooperation between Ukraine and the EU in television and radio broadcasting and Ukraine's commitment to approximate national legislation to EU legislation. Within two years of the agreement's entry into force (September 1, 2017), national legislation was supposed to be approximated to Directive 2010/13/EU, but this has yet to happen. This fact indicates that Ukraine still needs to fulfill its obligations under this paragraph of the Association Agreement.

A comparison of selected aspects of the legislation on audiovisual services (right of reply) shows that Ukraine's current legislation must fully comply with the Directive. However, the Draft Law on the media, which is currently being considered by parliament, does not conflict with EU law regarding the right of reply.

References

Advisory Opinion…, 1986 – Advisory Opinion OC-7/85 of August 29, 1986 "Enforceability of the Right to Reply or Correction (Arts. 14(1), 1(1) and 2 American Convention on Human Rights)". [Electronic resource]. URL: https://www.corteidh.or.cr/docs/opiniones/seriea_07_ing.pdf

American Convention…, 1969 – American Convention on Human Rights: "Pact of San José, Costa Rica". Signed at San José, Costa Rica, on 22 November 1969 No. 17955. [Electronic resource]. URL: https://treaties.un.org/doc/publication/unts/volume%201144/volume-1144-i-179 55-english.pdf

Association Agreement…, 2014 – Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (2014). [Electronic resource]. URL: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A22014A0529%2801%29

Beschluß…, 1980 – Beschluß des Ersten Senats vom 8. Februar 1983 in dem Verfahren zur verfassungsrechtlichen Prüfung des Hamburgischen Gesetzes zum Staatsvertrag über den Norddeutschen Rundfunk vom 1. Dezember 1980, soweit es sich auf § 12 Abs. 2 Satz 1 des Staatsvertrages bezieht [Electronic resource]. URL: https://www.servat.unibe.ch/dfr/ bv063131.html#Rn008 [in German]

Beschluss…, 2018 – Beschluss vom 09. April 2018 – 1 BvR 840/15 In dem Verfahren über die Verfassungsbeschwerde. [Electronic resource]. URL: https://www.bundesverfassungsgericht.de/ SharedDocs/Entscheidungen/DE/2018/04/rk20180409_1bvr084015.html [in German]

Communication Act…, 1934 – Communications Act of 1934. [Electronic resource]. URL: https://transition.fcc.gov/Reports/1934new.pdf

Consolidated versions…, 2012 – Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union. Consolidated version of the Treaty on the Functioning of the European Union – Protocols –Annexes – Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon. *OJC*. 326 (2012). Pp. 0001-0390. [Electronic resource]. URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT

Convention…, 1953 – Convention on the International Right of Correction. New York, 31 March 1953. [Electronic resource]. URL: https://treaties.un.org/pages/ViewDetails.aspx?src =TREATY&mtdsg_no=XVII-1&chapter=17&clang=_en

Decisions…, 1941 – Decisions and Reports of the Federal Communications Commission of the United States. March 1, 1940 – August 1, 1941. [Electronic resource]. URL: https://world radiohistory.com/Archive-FCC/FCC-Reports-Vol-8-1940-03-1941-08.pdf

Directive…, 2010 – Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive). [Electronic resource]. URL: https://eur-lex.europa.eu/ legal-content/EN/ALL/?uri=CELEX:32010L0013

Draft, 2022 – Proekt Zakonu Pro media [Draft Media Law]. 2022. № 2693-д. [Electronic resource]. URL: https://itd.rada.gov.ua/billInfo/Bills/Card/3115

Ediciones Tiempo, 1989 – Ediciones Tiempo v. Spain. Decision of 12 July 1989. [Electronic resource]. URL: https://hudoc.echr.coe.int/eng?i=001-82128

Eker, 2017 – Eker v. Turkey. ECtHR. Judgement of 24 October 2017. [Electronic resource]. URL: https://hudoc.echr.coe.int/eng?i=001-177928

Grossman, 2001 – *Grossman, C.* (2001). Freedom of Expression in the Interamerican System for the Protection of Human Rights. *ILSA Journal of International & Comparative Law*. 7: 619-647.

Hempel, 2018 – *Hempel F.* (2018) The right of reply under the European Convention on Human Rights: an analysis of Eker v Turkey App no 24016/05 (ECtHR, 24 October 2017). *Journal of Media Law*. 10(1): 17-36. DOI: 10.1080/17577632.2018.1458403

Hennebel, Tigroudja, 2022 – *Hennebel, L., Tigroudja, H.* (2022). The American Convention on Human Rights: A Commentary. Oxford University Press, 1541 p.

Hong, 2022 – *Hong, M.* (2022). Regulating hate speech and disinformation online while protecting freedom of speech as an equal and positive right – comparing Germany, Europe and the United States. *Journal of Media Law*. 14(1): 76-96. DOI: 10.1080/17577632.2022.2083679

International Covenant…, 1966 – International Covenant on Civil and Political Rights, Adopted on 16 December 1966 by the United Nations General Assembly resolution 2200A (XXI)1966 [Electronic resource]. URL: https://www.ohchr.org/en/instruments-mechanisms/instruments/ international-covenant-civil-and-political-rights

Jonson, 2022 – *Johnson, B.G.* (2022). Right of Reply. In The International Encyclopedia of Journalism Studies (eds T.P. Vos, F. Hanusch, D. Dimitrakopoulou, M. Geertsema-Sligh and A. Sehl). DOI: 10.1002/9781118841570.iejs0094

Kaperzynski, 2012 – Kaperzyński v. Poland. ECtHR. Judgement of 3 April 2012. [Electronic resource]. URL: https://hudoc.echr.coe.int/eng?i=001-110171

Koltay, 2013 – *Koltay, A.* (2013). The Right of Reply in a European Comparative Perspective. *Acta Juridica Hungarica*. 54(1): 73-89.

Lebid et al., 2020 – *Lebid, A., Degtyarev, S., Polyakova, L.* (2020). A study into the skills of using data verification tools as a media information literacy instrument for university students. *International Journal of Media and Information Literacy*. 5(2): 184-190.

Matskevych, 2016 – *Matskevych, O.O.* (2016). Dyrektyva pro audiovizualni media-posluhy ta zakonodavstvo Ukrainy pro avtorske pravo [Audiovisual Media Services Directive and Ukrainian copyright law]. *Teoriia i praktyka intelektualnoi vlasnosti*. 4: 43-50. [in Ukrainian]

Mayflower, 1950 – The Mayflower Doctrine Scuttled (1950). *The Yale Law Journal*. 59(4): 759–770. [Electronic resource]. URL: https://doi.org/10.2307/793155

McCraw, 2009 – *McCraw, S.K.* (2009). Right to Respond and Right of Reply. The First Amendment Encyclopedia. [Electronic resource]. URL: https://www.mtsu.edu/first-amendment/article/1013/right-to-respond-and-right-of-reply

Melnychuk, 2005 – Melnychuk v. Ukraine. ECtHR. Decision of 05 July 2005. [Electronic resource]. URL: https://hudoc.echr.coe.int/eng?i=001-70089

Miami Herald Pub., 1974 – Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974). [Electronic resource]. URL: https://supreme.justia.com/cases/federal/us/418/241/

Plotnikova et al., 2021 – *Plotnikova, M., Zavhorodnia, V., Dehtiarov, S., Polyakova, L.* (2021). The Role of Decisions by the European Court of Human Rights in Shaping the Content of New Media Literacy Education. *International Journal of Media and Information Literacy*. 6(2): 376-386. DOI: 10.13187/ijmil.2021.2.376

Pro drukovani zasoby..., 1992 – Pro drukovani zasoby masovoi informatsii (presu) v Ukraini [On Print Media (Press) in Ukraine] The Law of Ukraine. November 16, 1992. № 2782-XII. [Electronic resource]. URL: https://zakon.rada.gov.ua/laws/show/2782-12#Text

Pro telebachennia..., 1993 – Pro telebachennia i radiomovlennia [On Television and Radio Broadcasting]. The Law of Ukraine. December 21, 1993. № 3759-XII. [Electronic resource]. URL: https://zakon.rada.gov.ua/laws/show/3759-12#Text [in Ukrainian]

Radio Act..., 1927 – Radio Act of Feb 23, 1927. [Electronic resource]. URL: https://www.fcc.gov/document/radio-act-1927-established-federal-radio-commission

Reccommendation..., 1993 – Recommendation 1215 (1993) of the Parliamentary Assembly of the Council of Europe on the ethics of journalism. [Electronic resource]. URL: http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=15249&lang=en

Recommendation..., 2004 – Recommendation Rec (2004)16[1] of the Committee of Ministers to member states on the right of reply in the new media environment. Adopted by the Committee of Ministers on 15 December 2004. [Electronic resource]. URL: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805db3b6

Recommendations..., 2022 – EU Commission's Recommendations for Ukraine's EU candidate status. 2022. [Electronic resource]. URL: https://www.eeas.europa.eu/delegations/ukraine/eu-commissions-recommendations-ukraines-eu-candidate-status_en?s=232

Red Lion Broadcasting, 1969 – Red Lion Broadcasting Co., Inc. v. FCC. 395 U.S. 367 (1969). [Electronic resource]. URL: https://supreme.justia.com/cases/federal/us/395/367/

Resolution..., 1952 – Freedom of information and of the Press: draft International Code of Ethics. United Nations. Resolutions adopted by the General Assembly at its Seventh Session during the pe-riod from 14 October to 21 December 1952. [Electronic resource]. URL: https://digital library.un.org/record/212214

Resolution..., 1974 – Resolution (74) 26 on the right of reply. Position of the individual in relation to the press. Adopted by the Committee of Ministers on 2 July 1974. [Electronic resource]. URL: https://rm.coe.int/16805048e1

Rikhter, 2019 – *Rikhter, A.* (2019). Legal Review of the Right of Reply as Prescribed by the Statute on Periodic Press and News Agencies of Slovakia. OSCE. The Representative on Freedom of the Media, March. [Electronic resource]. URL: https://www.osce.org/files/f/documents/8/c/414362.pdf

Rishennia..., 2020 – Rishennia Prymorskoho raionnoho sudu m. Mariupolia Donetskoi oblasti [The Decision of the Mariupol Prymorskyi District Court of the Donetsk Region of October 30, 2020. № 266/3214/20. [Electronic resource]. URL: https://reyestr.court.gov.ua/Review/92533288

Rishennia..., 2022 – Rishennia Holosiivskoho raionnoho sudu m. Kyieva [Decision of the Holosiivskyi District Court of Kyiv] of April 19, 2022. № 761/43451/18. [Electronic resource]. URL: https://reyestr.court.gov.ua/Review/105738173

Sächsisches Gesetz, 2019 – Sächsisches Gesetz über die Presse vom 3. April 1992 (SächsGVBl. S. 125), das zuletzt durch Artikel 13 des Gesetzes vom 11. Mai 2019 (SächsGVBl. S. 358) geändert worden ist. [Electronic resource]. URL: https://www.revosax.sachsen.de/vorschrift/ 4197-SaechsPresseG#p10 [in German]

Slavko et al., 2020 – *Slavko, A., Zavhorodnia, V., Shevchenko, N.* (2020). Protection of One's Honor, Dignity, and Business Reputation on Social Networks: Issues and Ways to Resolve Them. *International Journal of Media and Information Literacy*. 5(2): 205-216. DOI: 10.13187/ijmil.2020.2.205

Surculija Milojevic, 2015 – *Surculija Milojevic, J.* (2015). The right of reply: A tool for an individual to access the media. *Godisnjak Fakulteta politickih nauka*. 9: 225-238. DOI: 10.5937/GodFPN1513225M

Universal Declaration..., 1948 – Universal Declaration of Human Rights. Proclaimed by the United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 A). [Electronic resource]. URL: https://www.un.org/en/about-us/universal-declaration-of-human-rights

Ustava..., 1984 – Ustava z dnia 26 stycznia 1984 r. Prawo prasowe. [Electronic resource]. URL: https://sip.lex.pl/akty-prawne/dzu-dziennik-ustaw/prawo-prasowe-16791474 [in Polish]

Wyrok..., 2022 – Wyrok w imieniu Rzeczypospolitej Polskiej. Dnia 1 czerwca 2022 r. Sąd Apelacyjny w Warszawie V Wydział Cywilny. [Electronic resource]. URL: https://www.saos.org.pl/judgments/469498 [in Polish]