



UNIVERSITY OF HELSINKI



INSTITUTE OF INTERNATIONAL
ECONOMIC LAW

The new dimensions of freedom of speech

Media marketing, the internationalisation of its regulation, and rapid technological development cause continual problems of interpretation. Almost without exception, legal problems are connected to freedom of speech and its scope in the new commercialised and borderless technological environment. The project, to be run between 2007 and 2009, focuses on questions of freedom of speech. Freedom of speech will be examined in relation to other significant rights and freedoms in the field of communications such as trade and commerce, competition, contractual freedom, and copyright. In addition to rights and freedoms, the project will examine current problems related to media responsibility.

Research problems

A. *Commercial activity and freedom of speech*

1. The media and communications business is one of the fastest growing global industrial sectors. The European Union's strategy is based on increasing digitalisation, flexibility and market efficiency, and on maintaining cultural diversity with the aid of various support programmes. Diversity and pluralism in media and communications are important values connected to freedom of speech. The European Union has sought to ensure, by means of legal regulation, that the media reflects the normal range of opinion present in society. In practice this has meant regulation of the commercial media and communications business. Attempts have been made to promote the diversity of media and communications both by regulating communications and media markets and by regulating content. The diverse structure of media and communications markets, for its part ensures the plurality of the media. The European Union has strived to ensure pluralism by intervening in media ownership and in the concentration of power, by means of its antitrust regulations, and by promoting cultural and linguistic diversity. A great research challenge is to discover how free markets, different common public interests, and freedom of speech can be combined together, and how the European Union's antitrust and internal market regulations define European and national approaches to freedom of speech. Answering this question requires an international perspective and a critical examination of the European Union's power to act.

2. The content of mass-media has traditionally been divided into journalistic and commercial content. This distinction has also served as the basis for legal regulation which takes into account the extent to which a mass media entity is involved in marketing.

It is becoming increasingly difficult, however, to distinguish between journalistic and commercial content. This is especially true regarding the creation of content using new communications and media technology. Nor is the distinction between an advertisement and other types of announcements always self-evident. The content of regulations and the definitions used therein, such as *hidden advertising* and *product placement*, are to be judged according to whether they meet the aims of the regulation and are in line with the reality of mass media. From the perspective of freedom of speech, a situation where the mass media are guaranteed a high degree of protection as a channel for distributing information but subjected to interference in its commercial content, is a situation of extreme complexity that requires in depth research.

3. In recent years the European Union has pointedly promoted the use of regulatory methods to control markets, and member states have been encouraged to follow suit. From the Maastricht treaty onwards, many Commission white papers, be they in regard to the European style of governance or to the improvement of legislation, indicate an approach where the legitimacy of regulation is seen as emanating as much from its content as from its form. The most important of these new forms of regulation are co-regulation and self-regulation. Mass media are a central testing ground for these new forms of regulation, a testing ground where diverse legal issues, the principles and value judgements which form the basis for regulation, and the question of freedom of speech meet.

Research problems

- European antitrust and freedom of speech
- Freedom of speech and the regulation of advertising
- New regulatory methods and freedom of speech.

B. Publicity, the right to privacy, and freedom of speech

1. One of the aims of freedom of speech is to promote democracy and create the preconditions for the free and open movement of information. Conversely, publicity and the open availability of information are essential preconditions for effective freedom of speech. For the mass media, important sources of information are public information and various events and occasions open to the public. As technological development has changed the working environment, so the basis for legal regulation has come to be seen in a new light. Similarly, traditional concepts of information are changing: information is neither exclusively public nor exclusively private, but increasingly often a mix of private and public. The availability and opportunities for use of public information differ in a digital environment. Changes in the regulatory environment often have a conflicting effect on the availability of information: digital technology both widens the availability of information and enables it to be effectively controlled. Furthermore, when information becomes public, it can then be used for numerous different purposes. The original publisher or author of the information is, however, often impossible to trace. In addition, public acts private and emphasising on the protection of privacy may lead to a narrowing of the availability of information. Finally, the global decision-making arena suffers from

a lack of publicity which cannot be entirely compensated for by emphasising openness and transparency.

2. Immaterial rights are highly significant in the operation of information markets. The combined effect of regulation and technological development in the sector may, however, limit the de facto availability of information. The management and commercial exploitation of copyrights alone, do not meet the challenges of the digital-media environment in full. Practices in the management of immaterial rights and in the distribution of information should be developed in a balanced manner so that, from the perspective of freedom of speech, the unencumbered distribution of information is ensured by guaranteeing access to the source of the information. There are many unanswered questions that require research regarding the scope of copyright protection in secondary markets for information products. For example, exclusive rights to a sporting event may ensure funding, but comprehensive control of those rights may have a negative impact on freedom of speech in the mass media. When copyright to the recording of an event is then added to exclusive rights, the free exchange of information is encumbered. Multi-layered immaterial rights and contractual systems connected to public events and public information in general should be examined as part of the broader legal framework. Finding the correct balance between immaterial rights and freedom of speech is one of the central regulatory challenges to be faced in ensuring the functioning of the information society.

3. The production of commercial entertainment is making the use of content independent of time, place and equipment. Media content is becoming more diverse in form, and is being integrated into other forms of information production, search services and distribution. In place of passive viewing, consumers are increasingly creating their own services, communities and content. The digitalisation of content, the decrease in the cost of technology and the spread of broadband are changing the interaction between people and the distribution of information. Private is becoming public. With regard to interactivity, a key issue is copyright-protected material and its usage. For example, blogs often feature a combination of material belonging to different authors or entities. In this case no rules or precedents currently exist for the management or further use of such material.

Research problems

- The principle of publicity and freedom of speech in a digital environment
- Rights connected to freedom of speech and mass events from the perspective of contract and immaterial rights
- The impact of copyright management practices on freedom of speech in a digital environment

C. Responsibility and freedom of speech

1. Freedom of speech concerns not only the right of the mass media and others availing themselves of free speech to the free expression of information and opinion, but also the right of the audience to receive such information. Responsibility is, therefore, also a

component of Freedom of speech. With the help of modern communications technology, information is disseminated rapidly and to a wide audience. Consequently, the source and origin of the information may remain unclear. It is also increasingly difficult to distinguish between information based on fact, opinion, interpretation, error or falsehood. Once made public, erroneous information spreads easily and its effects can be felt ever more widely. This development leads to continual legal problems connected to liability, be they questions of damages related to contractual obligations or of other types of damages and their compensation. In addition to traditional liability for economic damages as defined in liability and indemnity law, attention should be directed at other possible bases for compensating for economic damages such as antitrust violations and regulations affecting securities markets.

2. Information which causes damage may be presented in a number of ways. What remains unclear, however, is whether a print periodical, its internet edition, its internet edition's discussion pages, audiovisual material or web chat forums have the same status regarding liability. In addition, the basis for attributing liability between different forms of media remains unresolved. The same ambiguity exists between web publications that require an editor and those that do not.

In practice, the public has greater faith in the content of journalistic media than in other forms of expression or advertisements. The courts have emphasised the credibility and reliability of the media in awards for damages. Nevertheless, practice varies. Research also needs to be carried out on whether there can be liability for damages if the injured party has paid for the information.

3. We require speed in our task of distributing up-to-date information. As a result, the time spent checking information before publication must be in sensible proportion to the importance of the matter and the need to publish the information promptly. In Finnish legal practice, minor errors are not always considered a basis for liability. There is, however, no research on, or policy guidelines for, the basis for such decisions or for the circumstances under which erroneous information does not incur liability.

Research problems

- The prerequisites for freedom of speech and liability for damages
- Freedom of speech and liability in the use of different communications technologies
- The regulation of responsibility and the rights of different agents exercising freedom of speech.

Researchers: Anette Alén, Eero Fromond, Sakari Huovinen, Riikka Rosendahl, Päivi Tiilikka, Tobias Bräutigam (ECI).

Additional information: <http://www.helsinki.fi/katti/english/researchprojects.htm>