

“Chilling” restriction on freedom of expression? European Court of Human Rights grapples with conflicting freedoms

In a judgment that has been described by at least one technologist as “totally bonkers”, the European Court of Human Rights (“ECtHR”) has tackled the question of liability for comments on internet news portals. The decision makes an internet service provider (“ISP”) liable for comments published on its website, even though such comments are often made by anonymous third parties. Technology experts say that monitoring and managing comments on such sites could be prohibitively expensive or simply impossible.

Is this attempt to police cyberspace a Big Brother step too far? Certainly that is the view of one digital entrepreneur who asked:

“Do we build a global network of open communication for the benefits that this brings to humanity through improved understanding and shared knowledge, or do we tear it all down in case we offend [an oversensitive minority]?”

Technology is reshaping the world as we know it. It is argued that the courts are being forced to apply historical moral standards and behavioural expectations to scenarios which were unimaginable a short while ago: standards are not static and need to be revised as we evolve.

This case was a very modern example of conflicting freedoms under the European Convention on Human Rights and Fundamental Freedoms, with a head-on collision between the right to freedom of expression (Article 10) and the right to respect for private and family life (Article 8). The ECtHR summarised the problem as follows:

“...user-generated expressive activity on the Internet provides an unprecedented platform for the exercise of freedom of expression... However, alongside these benefits, certain dangers may also arise. Defamatory and other types of clearly unlawful speech, including hate speech and speech inciting violence, can be disseminated like never before, worldwide, in a matter of seconds, and sometimes remain persistently available online. These two conflicting realities lie at the heart of this case. Bearing in mind the need to protect the values underlying the Convention, and considering that the rights under Article 10 and 8 of the Convention deserve equal respect, a balance must be struck that retains the essence of both rights. Thus, while the Court acknowledges that important benefits can be derived from the Internet in the exercise of freedom of expression, it is also mindful that liability for defamatory or other types of unlawful speech must, in principle, be retained and constitute an effective remedy for violations of personality rights.”

This judgment forms part of a rapidly growing body of internet-related case law which includes *Godfrey v Demon Internet Limited* (2001, UK, defamation), *Roadshow Films Pty Ltd & Ors v iiNet Limited* (2012, Australia, copyright) and of course *Google Spain v Gonzalez* (2014, Spain/ECJ, data protection). One of the significant difficulties around internet law is the question of jurisdiction (ie “conflict of laws” or “private international law”): what law applies to information or services that can be accessed from a range of jurisdictions? Any ISP should take advice on these issues at an early stage.

Case: *Delfi AS v Estonia*

Type of claim: European Court of Human Rights; internet news portal; liability for comments on website; defamation; right to respect for private and family life (Article 8 ECHR); freedom of expression (Article 10 ECHR)

Judgment date: 16.06.15

More information:

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