Law and Media
Nordplus project

UNIVERSITY OF TAMPERE

WRITTEN SUBMISSION IN ACCORDANCE WITH RULE 44 OF THE RULES OF THE COURT IN THE CASE OF **Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland** (APPLICATION NO. 931/13) PENDING BEFORE THE GRAND CHAMBER OF THE EUROPEAN COURT OF HUMAN RIGHTS

BY NORDPLUS LAW AND MEDIA NETWORK (www.lawandmedia.org)

1. INTRODUCTION

The Law and Media Network includes four partners from the Nordic and Baltic countries (the University of Tallinn (Estonia), the University of Latvia, the University of Iceland, and the University of Tampere (Finland)). The main objectives of the network are to: 1) establish a network of universities to reconceptualize the relationship between the law and the media; 2) ensure innovative outcomes of network/project activities through the exchange of ideas and mutual learning among different specialists and scholars; and 3) deliver an intensive course that illuminates legal issues in the media industry. The long-term targets of the network are to outline new ways of teaching law and media students and to establish recommendations for the media community.

We recognize that the case of **Satakunnan Markkinapörssi** is an important opportunity for the Court to lay down principles that can be applied in similar types of digital media environment cases. The Court's case-law is based on the presumption that they are source-neutral. However, it is important to consider whether certain media environment-related issues should be acknowledged and whether these factors should be relevant in tailoring existing tests to correspond to the demands specific to new media.

In our submission, we aim to discuss the particular factors in the digital media environment that should be taken into account in the balancing of the right to a private life and the right to freedom of expression.

In addition, this intervention encourages the Court to develop its case-law further by adopting an interpretation on such questions that were not elucidated in the cases of **Delfi AS v. Estonia** (GC, 16 June2015) and **MTE and Index.hu v. Hungary** (Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary (2 February 2016)).

2. GENERAL OBSERVATIONS ON FREEDOM OF EXPRESSION IN THE DIGITAL MEDIA ENVIRONMENT

2.1. DIGITAL MEDIA VS TRADITIONAL MEDIA PARTICULARITIES IN STRASBOURG

New technology enables Internet-based media and users to utilize and disseminate text, sound, pictures, video, books, films, games, music, and other forms of expression in digital form across the world. This is termed the technological convergence of media. Digital

media produces a diverse and constantly changing media environment. The forms of digital media differ from each other considerably. Often, the common features of digital media are that the format is digital and the purpose is to share some sort of information. Besides these features, digital media do not necessary share other similarities.

Nevertheless, Facebook, Twitter, Snapchat, Reddit, YouTube, Periscope, Instagram, Pinterest, WhatsApp, and several other social media applications have their inherent differences compared to traditional media in addition to each other. For example, YouTube includes records of lectures from the top universities of the world, entertaining cat videos, well-recognized video bloggers, and much more besides. Instagram, Facebook, and Twitter combine the sharing of text, video, and pictures. These applications, however, do share several common features.

Due to the diversity of the applications, how long the data is available differs, as does how credible the data is, how easy it is to delete, what the role of the publisher/platform plays in supervision, what the overall reach of the information is, and whether the producers of the information can be regarded as journalists. The principles for developing case-law applicable to the digital media environment are still under development. Judge Spano, for example, stated in a recent presentation that he believes a grand conclusion cannot be derived from Delfi; it is only the first step in a fluctuating area of law. The Court has elaborated on certain issues, but many unresolved issues remain.[1]

We believe that in the Satakunnan Markkinapörssi case, it is important for the Grand Chamber to develop principles related to freedom of expression in light of the present-day conditions and consider how the established principles apply in the digital media context.

The Court has sometimes suggested that there is a need to differentiate between traditional media and the digitally based media. For example, in the case of **Editorial Board of Pravoye Delo and Shtekel v. Ukraine** (5 May 2011), the Court explains how the new media environment is causing different requirements in the criteria of lawfulness. Because the Internet is a novel medium, it requires a different approach to the traditional media. These inherent differences should be taken into account at the legislative stage.

> 68: It is true that the Internet is an information and communication tool particularly distinct from the printed media, especially as regards the capacity to store and transmit information. The electronic network, serving billions of users worldwide, is not and potentially will never be subject to the same regulations and control. The risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press. Therefore, the policies governing reproduction of material from the printed media and the Internet may differ. The latter undeniably have to be adjusted according to the technology's

[1] See Judge Spano on 18 January 2016, The Internet and the ECHR, A Paradigm Shift http://tv.coe.int/ECHR/video.php?v=ECHR_20160118_Spano

> specific features in order to secure the protection and promotion of the rights and freedoms concerned.

Do the current international trends support the further distinguishing and differentiation of digital media and traditional media?

The UN Human Rights Council gave its statement (16 July 2012 A/HRC/20/2) on the freedom of expression and the Internet in 2012. It does not favour separate approaches. Instead, it:

> *Affirms* that the same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one's choice, in accordance with articles 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

UNESCO has published a couple of recent surveys on freedom of expression and the media. One of the essential trends (World Trends in Freedom of Expression and Media Environment, UNESCO 2014) is the expansion of access to media. The expanding diversity of news media content, the Internet, digitalization, and online search capacities have enabled people to participate in information production and news flows.

The EU has also considered the importance of freedom of expression in the digital media environment by drafting **EU Human Rights Guidelines on Freedom of Expression Online and Offline** (12 May 2014).[2] According to these guidelines:

> 16. The Internet and digital technologies have expanded the possibilities of individuals and media to exercise the right to freedom of expression and freely access online information. Any restriction that prevents the flow of information offline or online must be in line with permissible limitations as set out in international human rights law.

The Guidelines also refer to media neutrality: "Freedom of opinion and expression further includes the freedom to express and impart information and ideas of all kinds that can be transmitted to others, in whatever form, and regardless of media."

Technology neutrality is also one of the key principles of the regulatory framework for communications. The concept appears in EU telecoms legislation, EU data protection regulation, and in the OECD (OECD Council Recommendation on Principles for Internet Policy Making 2011) principles for Internet policy. Technology neutrality should mean that the same principles apply regardless of the technology used. These principles should be adopted to diminish the traditional dualism of media regulation (print media/electronic media) and to prevent the creation of new, technology-based silos (print media/electronic media/online (digital) media).

However, even though the UN, EU, and UNESCO do not support the special treatment of digital media, it should be noted that these statements are general in their nature and do not take into account context dependency. Thus, even though the international trends do

[2] See http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/142549.pdf

not support the Court in developing separate balancing tests for digital media, the particularities of each digital media should be taken into account, case by case.

An approach that would automatically separate the legislation in accordance to the form of media can be problematic, especially as the form of digital media is in constant change. For example, MySpace and IRC-Galleria were once mainstream digital media in Finland, but currently both have lost their significance.

We invite the Court to develop a coherent model based on the main principles established in traditional media cases (Von Hannover II and Axel Springer) but at the same time to elucidate rules that should be taken into account in the digital media context.

2.2. BROADENING THE DEFINITION OF JOURNALISTS

The case of Satakunnan Markkinapörssi provides a key opportunity to discuss the review of the existing definition of "journalist". Technological innovations have created new opportunities to disseminate information, and individuals can participate and contribute in decision-making processes. Some of the people involved in digital media are professional journalists or are of at least comparable status. Traditional and recognized journalists have ethical codes, self-monitoring bodies, and their own professional NGOs and benefits, such as access to press conferences, etc., to which others do not have access.

Some of the digital media forms are similar to the traditional media. A blog can be run by a journalist or scientists, but, alternatively, it can be run by any anonymous individual. The division between columnists and bloggers is no longer clear, as even the traditional media houses often have bloggers on their websites. Maintaining a blog has become a profession that some people make a living from, which supports the idea that such individuals could be regarded as similar to journalists. Edited blogs may be similar to traditional magazines or at least the websites run by media houses, as the editors of such blogs can be professionals. For example, in the scientific context, the approval of the blog editor may not be sufficient; the publication of blog writing may require an independent peer-review before publication. In addition, web-based magazines can be run by anyone. These magazines can look like traditional media and contain well-established information, but there may also be provocative pages practising hate speech.

In addition, it should be considered whether the importance of the content matter defines who can receive similar protections as traditional journalists, and whether the definition of journalism is necessary in the sense of the protection of freedom of speech. If an individual publishes three posts about unpublished material on riots in Russia and receives significant coverage, can that person be regarded as a journalist, even though the length of activity is short? Does the length of the activity itself impact the assessment: if one has written a blog for five years every day, can one be regarded as journalist if all posts are related to handicrafts? If a blogger has diversity of content, but has fewer than ten readers, can that person also be regarded as a journalist?

The EU guidelines point out that new opportunities and the new environment means that there is a need to be protected beyond the personal scope of traditional journalists. It is important to extend definitions towards a wider scope of those under protection, e.g.

"citizen journalists", bloggers, social media activists, and defenders of human rights who use digital media to reach a mass audience. However, EU guidelines are still very broad in their definition, and there should be a further-developed test on who can be regarded as journalist in the digital media context.

While it is logical to extend the personal scope of those protected, it can be asked whether the changed role of journalism should also have an impact on the balancing test that is based on the traditional media setting. What are the unchanged characteristics, and which factors must be reconsidered – or at least reassessed according to how much weight should be put on a particular factor – in the balancing test?

3. MAIN QUESTIONS OF INTERPRETATION CONCERNING FREEDOM OF EXPRESSION IN THE DIGITAL MEDIA ENVIRONMENT TO BE DEVELOPED

3.1. THE CHILLING EFFECT IN THE DIGITAL MEDIA ENVIRONMENT

One of the key concepts that is applied in Strasbourg's freedom of expression case-law is the "chilling effect". In the context of the protection of journalistic sources the Court introduced the terminology in **Goodwin v. the United Kingdom** (27 March 1996):

> § 39. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 (art. 10) of the Convention unless it is justified by an overriding requirement in the public interest.

Since then, the chilling effect has been discussed before the Court in relation to different regulatory frameworks. The chilling effect has been found in particular when classic defamation cases have resulted in prison sentences (see e.g. the case of **Cumpănă and Mazăre v. Romania**, 2004, § 116). The chilling effect discussion is closely understood in the context of journalism and the press as the "public watchdog".

It is relevant for the Court to elaborate on whether the chilling effect can be different in the new media environment. This issue was raised in the case of **Delfi AS v. Estonia**. The applicant complained about the chilling effect concerning the regulations that placed liability on the applicant company to take actions against private communications on the discussion forum. In the joint dissenting opinion of judges Sajó and Tsotsoria, the "chilling effect" of the Supreme Court's line was mentioned when the dissenting judges considered that the unforeseeability of the laws (vaguely worded, ambiguous, and therefore unforeseeable laws that have a chilling effect on freedom of expression) contributed to a chilling effect.

The Court has referred to the Delfi case cautiously. In the recent judgment of **Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary** (2 February 2016) (MTE case), the situation is different from the Delfi case according to the Court. In the MTE case, the Court has acknowledged another chilling effect regarding the liability for third-party comments:

> § 86: Such liability may have foreseeable negative consequences on the comment environment of an Internet portal, for example by impelling it to close the commenting space altogether. For the Court, these consequences may have, directly or indirectly, a chilling effect on the freedom of expression on the Internet. This effect could be particularly detrimental for a non-commercial website such as the first applicant.

This chilling effect argumentation is an essential legacy of the freedom of expression case-law. It would therefore be relevant for the Court to explain in what circumstances there is a chilling effect, and if the criteria introduced in the MTE case were relevant.

3.2. JOURNALISM IN THE DIGITAL MEDIA ENVIRONMENT

We consider the Satakunnan Markkinapörssi case to provide an opportunity for the Grand Chamber to clarify the established proportionality test in the digital media environment. One of the important questions relates to the role of journalism in this argumentation. According to the Nordplus Law and Media Network, this is the area of law where the Court needs to take further steps.

The Court's case-law has created a very accurate test on the Axel Springer and Von Hannover no 2 cases in order to balance between articles 8 (right to private life) and 10 (freedom of expression). In **Niskasaari and Otava Media Oy** (23 June 2015), the test is confirmed to include following factors (§ 49):

> (i) contribution to a debate of general interest;
>
> (ii) how well-known is the person concerned and what is the subject of the report;
>
> (iii) prior conduct of the person concerned;
>
> (iv) method of obtaining the information and its veracity;
>
> (v) content, form and consequences of the publication; and
>
> (vi) severity of the sanction imposed.

In the Delfi case and its digital media context, the Court acknowledged that the relevant factors to be considered in the proportionality test were the context of the comments, the measures applied by the applicant company in order to prevent or remove defamatory comments, the liability of the actual authors of the comments as an alternative to the applicant company's liability, and the consequences of the domestic proceedings for the applicant company.

The Court has developed its approach on stressing the duties and responsibilities of journalists, which include acting in good faith and providing accurate and reliable information. There are dangerous developments in the digital media, because across Europe, propaganda websites are considered the opposition of mainstream media; in Finland they are even referred to as "counter media". These propaganda websites do not follow the code of conduct related to journalism. The sites are used for the dissemination of hate speech and propaganda using fabricated stories.

In the aftermath of *Delfi v. Estonia*, it is important that the Court either introduces a clear test on journalism that could be applied at the national level or abolishes all attempts to define journalism. We think it is also important to have an approach that takes into consideration the EUCJ and relevant domestic case-law in the digital media context.

One of the findings that should be taken into account in the balancing process is the existence of a new type of media company, one which plays a role more as a service provider rather than fitting into the role of the press as a public watchdog. The basic idea is related to identifying similar roles that were also relevant in the Delfi case. Can we also introduce a similar type of liability to those who are more or less an intermediary service provider, and should we understand the technical system and its impacts?

The recent MTE case introduces a new category, claiming that it was relevant that the first applicant is a non-commercial website. It is important to consider whether or not a commercial or non-commercial status is a relevant distinguishing factor when making comparisons between different intermediaries that provide services in the field of digital media. If we consider, e.g. different smart phones/tablet applications that can purchased from the store, is their protection dependent on whether the application was paid for or free?

The Court has also used the definition of journalism in the cases **Niskasaari v. Finland** (journalistic hue) and **Pentikäinen v. Finland** (20 October 2015):

> However, the concept of responsible journalism, as a professional activity which enjoys the protection of Article 10 of the Convention, is not confined to the contents of information which is collected and/or disseminated by journalistic means. That concept also embraces, *inter alia*, the lawfulness of the conduct of a journalist, including, and of relevance to the instant case, his or her public interaction with the authorities when exercising journalistic functions. The fact that a journalist has breached the law in that connection is a most relevant, albeit not decisive, consideration when determining whether he or she has acted responsibly.

Will the Court thus create different standards for journalism and other forms of dissemination of information? The Court should be careful in introducing very narrow categories. From a freedom of speech perspective, this would not be ideal because digital media is an important platform for citizen media and it has expanded the forums for debate in democratic societies.

3.3. PUBLIC DATA AND PUBLISHING

We would also like to contribute to the discussion of public data and publishing (§ 68). Our interest is to debate the conditions of when and under what limitations information can be published, especially in the situation when the news media has direct access to the information in accordance with national legislation. The balancing act before the Chamber needs some further development, and we would like to provide necessary considerations for the Court. We think that this case is important for the transparency of government activities, and the EU Charter of Fundamental Rights (art. 42 Right of access to documents) in particular is important for this topic.

Access to information is one of the cornerstones for participating in democratic debate and the precondition for the media in the role of public watchdog. The most essential question is whether all available public information should also be published. For example, in the environmental context, the Court regards positive obligations under Articles 2 and 8 to possibly require a guarantee of access to information. The requirement is related to the enabling of individuals and communities to assess risks related to the environment. However, the question under concern, namely tax information, does not have a similar function in preventing risks, but it is rather more related to transparency and tradition.

Strasbourg and Luxembourg take different approaches. In the recent Google Spain case (C-131/12, 13 May 2014), the EUCJ did not achieve balance, but instead focused only on the one side of the equation. Although the EU Charter of Fundamental Rights provides protection to both parties in Articles 8 (Right to personal data) and 11 (Freedom of expression and information), there is no balance between the freedom to receive and impart information and the protection of personal data. The judgement only mentions Articles 7 and 8. Thus, the model from the EU is insufficient, and this should be acknowledged.

Many counties have different traditions on publicity. The transparency of national authorities and the right of access to public data varies significantly, and there would be no European consensus on issues such as that in the present case, namely the publishing of tax information. However in the Finnish tradition, tax information is public information, but mass publication of that information is a violation of privacy. The Court should clearly present the criteria determining when publishing public information can be prohibited.

The public interest argument is often related to the national context. This context should be taken into account, and it is logical that when we are speaking about major public interest, it will contribute to the narrow margin left to national authorities.

The public interest can be defined as that interest which aims to combine a number controversial interests in order to achieve objectivity. Achieving an objective public interest requires the identification of all the alternative and suitable options and the exclusion of other options. However, there is a risk that the exclusion of subjective views may result in a public interest-serving majority view and disregard the interest of vulnerable groups.

An alternative view for constructing a public interest position is to define the interest that all the members of the community are able to share, and thus the diversity of interests will result in the general, public interest. The view is connected to contextualism and relativism.

In Finland, transparency is a highly important societal value. A recent example is the so-called hallintarekisteri-gate. EU law did not require transparency of ownership in relation to the governing register of stocks, so Finland negotiated an exception in order to maintain transparency. The exception was granted for Finland, but when politicians chose not to use the granted exception, there was long and lively public debate in favour of transparency and the application of the granted exception.

It is also important to remember that the Council of Europe has recently adopted recommendations promoting the availability and accessibility of diverse and pluralistic

information, as these factors impact the free, transboundary flow of information on the Internet.[3]

4. CONCLUDING SUMMARY

The Nordplus Law and Media Network would like to thank the Court for the opportunity to comment on the interpretation of freedom of expression in the digital media context. We would like to conclude by presenting clear general and specific observations before the Grand Chamber so that the Court can further develop case-law in the digital media environment.

According to the Law and Media Network, the existing Strasbourg case-law, in the aftermath of *Delfi v. Estonia*, needs further clarification in order to diminish the great level of uncertainty that exists in the field of freedom of expression and the right to privacy in the digital media environment. Many commentators and media actors have considered the Delfi case to be very context-oriented and thus interpretation is ambiguous and confusing. This need to develop case-law was recently shown in the case of MTE and Index.hu vs Hungary, where the distinguishing factors contributed to different outcomes.

First and foremost, we invite the Court to establish clear and consistent standards on the freedom of expression and the right to privacy within digital media that can also be easily applied at the national level. These standards should take into consideration the fluctuating nature of the field of law in question. Although it is important to understand the differences between media applications, this should not lead to a case-by-case approach, which would lack the required foreseeability.

In addition, we consider it necessary that the Court clarifies its approach to the chilling effect concept in the digital media environment. The Court has observed that the liability of digital media can have a severe chilling effect, but the circumstances in which this is particularly detrimental to the freedom of expression needs to be developed further.

The role of journalism is one of the essential questions in the digital media environment. We consider it important for the Court to explain and further elaborate its approach on journalism. We also think that it is important to have an approach that takes into consideration the EUCJ and relevant domestic case-law in the digital media context. It is problematic if the definitions of “journalist” are too narrow. The important consideration in this context is that the digital media provides an important platform for democratic debate and citizen media.

Finally, we urge the Court to contribute to the discussion on public data and publishing in its reasoning. There is a need for a test that acknowledges the importance of the freedom to receive and impart information as an essential right protected by the Convention, and with its judgment the Court could provide clear criteria as to when publishing public information is prohibited.

[3] **Recommendation CM/Rec(2015)6 of the Committee of Ministers to member States on the free, transboundary flow of information on the Internet.**

5. CONTRIBUTORS TO THE INTERVENTION

The contact person is Jukka Viljanen, and the other members of the Tampere team who participated in writing this submission are Riku Neuvonen, Pauli Rautiainen, and Heta Heiskanen. The submission has also been co-written by Associate Professor Mart Susi of Tallinn University and Professor Eiríkur Jónsson of the University of Iceland.

On behalf of the NORDPLUS Law and Media Network

Tampere, 18 February 2016

Jukka Viljanen

Adjunct Professor of Human Rights Law, University Lecturer of Public Law

University of Tampere, Finland

Address: University of Tampere, School of Management, Kanslerinrinne1, Pinni A 2039, 33014 University of Tampere, Finland

jukka.viljanen@uta.fi

tel. +358-40-1901268