

ELECTRONIC MEDIA AND FREEDOM OF PRESS

Responsibility of ethnic and racist agitation, child pornography, brutal violence and defamation in the internet

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1. CONSTITUTION AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

In Finland, the basic objective of media policy is freedom of speech. The principle, designated as “freedom of expression”, is included in the Constitution of Finland (revised in 2000).

Section 12 – Freedom of expression and right to access to information

1. Everyone has the freedom of expression. Freedom of expression entails the right to express, disseminate and receive information, opinions and other communications without prior prevention by anyone. More detailed provisions on the exercise of the freedom of expression are laid down by an Act. Provisions on restrictions relating to pictorial programmes that are necessary for the protection of children may be laid down by an Act.

Furthermore, in Finland the European Convention on Human Rights is implemented to legislation as an Act to be directly applied besides the Constitution and therefore above normal legislation. According to this human rights convention:

Article 10 – Freedom of Expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

2. GENERAL REGULATIONS OF MASS MEDIA

Complementing the above cited Section of the Constitution, the Act on the Exercise of Freedom of Expression in Mass Media (revised in 2004) contains more detailed provisions on the exercise of the freedom. In the application of the Act, interference with the activities of the media shall be legitimate only in so far as it is unavoidable, taking due note of the importance of the freedom of expression in a democracy subject to the rule of law.

The Act provides *medium-neutral regulation* of freedom of speech, although “publishing” activity is regulated more in detail than mere spreading of “network messages”. Concerning *publisher*, it has to name a responsible editor or editors for the publication. He/she can be *fined besides the author for publishing information that breaks Finnish laws*.

The most important change that directly affects the audiovisual sector is that the *right to reply* now also *applies to network publications* and broadcast programmes that are broadcast on a repeated basis (previously the right to reply did not apply to radio and television programmes and there were no rules concerning network publications). A private individual, who has a justifiable reason for considering a message offensive, has the right to have a reply published in the same publication or programme. The procedure for handling demands for reply or correction has become more bureaucratic.

The ground for the imposition of *a fine for editorial misconduct* is that the responsible editor of a publisher intentionally or negligently “fails in an essential manner in his or her duty to manage and supervise editorial work”. The failure has to be “conductive to the occurrence of an offence arising from the contents” of a message (Section 13).

The chapter 5 contains provisions concerning coercive measures, for instance *release of identifying information for a network message, order to cease the distribution of a network message and seizure of a publication*.

However, usually the publisher has the right – and even a journalistic obligation – to keep *source of a message anonymous*. This is utmost important, as many cases of political corruption have come to day light from whistle blowers who want to hide behind the publisher. The editor or responsible editor, however, in granting the anonymity of his/her sources, endangers him/herself being fined if there is afterwards no evidence to support the claims made in the media.

3. INTERNET SERVICES

The current Finnish legislative goals emphasize the support for an efficiently functioning market. The present government programme (June 2003), under the heading “The Policy on Information Society and Communications”, sets as goal to boost competitiveness and productivity. Another aim is to maintain Finland’s position as one of the world’s leading producers and users of information and communications technology. More citizen-focused aims are to promote social and regional equality, and to improve citizens’ well-being and quality of life through *effective utilization of information and communications technology*. The new Communications Market Act (2003) – covering all communication networks from mobile to digital terrestrial broadcasting networks – aims at securing that *networks and services are available*

to all users through the country, and that they are technologically advanced, of high quality, reliable, safe and inexpensive. Therefore online services get all the time more importance.

However, the Act on the Exercise of Freedom of Expression in Mass Media is driven mostly by the traditional publication and publisher ideology in that it regulates first and foremost institutional publications, regardless of media. According to the Act a responsible editor shall be designated for *a periodical, a network publication and a programme*. A network publication means a set of network messages, arranged into a coherent whole comparable to a periodical, from material produced or processed by the publisher, and intended to be issued regularly. All programmes and network publications shall be recorded and retained for at least 21 days.

Thus *there is no obligation to name a responsible editor for portals and chat groups* and only the Penal Code applies to these. *Individual web-pages and community discussion sites, etc., fall in the scope of the law only if the contents are criminal* (see below). In addition, even discussion forum of online newspapers and other media do not fall within the regulation on responsible editor as long as the publisher does not moderate the messages in forum.

A court may order any service provider to *disable access to the information* stored by her if the information is clearly such that keeping its content available *to the public* is punishable or basis for civil liability. A court can also give an order *to release the information required for the identification* of the sender of a network message and to cease the distribution of a network message. A court may also order that a *notice of the judgment* concerning a violation of honor and privacy must be *published* free of charge and reasonably extensively in the media in question.

The above mentioned protection of the sources of news applies to all kinds of net publications including those provided by private persons. As a consequence, bloggers enjoy this protection than can be characterized exceptional in the global perspective.

Act on Provision of Information Society Services, Section 16, § 1

On application by a public prosecutor or a person in charge of inquiries or on application by a party whose right the matter concerns, a court may order the service provider, referred to in Section 15, to disable access to the information stored by him/her if the information is clearly such that keeping its content available to the public or its transmission is prescribed punishable or as a basis for civil liability. The court must urgently process the application. The application cannot be approved without reserving for the service provider and the content producer an opportunity to be consulted except if the consultation cannot be arranged as quickly as the urgency of the matter so necessarily requires.

4. AGE RATING SYSTEM; APPROVAL OF MEDIA FOR MINORS

Since 2001, *there is no film censorship* in the strong sense of the word in Finland. The same applies to interactive games. There is no legal authority to order bans or cuts to audiovisual programmes in preventive control of child pornography, sexually obscene pictures, excessive violence, or racist and ethnic agitation.

The legal authority to limit the freedom of speech is restricted to *giving age categories* (K7, K11, K15, and K18). An age limitation may be given when a program is likely to have a detriment effect on the development on the development of children through its violent, sexual, shocking or other comparable content. Programmes are classified for public exhibition (in cinemas etc.) and for distribution for private consumption (DVD, programming-on-demand).

Furthermore, preventive control of audiovisual programmes concerns only dissemination of depictions of *brutal violence* (The Penal Code, Ch. 17 § 17) and images offending *sexual decency* (Ch. 17 § 18-18b – sexually offending images involving children, violence, or animals). It does *not protect sanctity of religion* (Ch. 17 § 10), *minorities from ethnic or racist agitation* (Ch. 17 § 8), or *personal reputation* (Ch. 24 § 8) or dignity from defamation (Ch. 24 § 9-10). The Finnish Board of Film Classification is, however, the authority often consulted by the prosecution in criminal cases involving audiovisual programmes.

5. ADVERTISING

Advertising is regulated by Consumer Protection Act (1978), Product Liability Act (1990) and several other statutes. This wide area of regulations governs marketing rules for minors, the use of environmentally oriented claims in marketing, price expressions as a marketing method, promotional games – and of course prohibitions of advertising of cigarettes, partly alcohol and partly of medicines.

6. RESTRICTIONS OF INFORMATION IN THE PENAL CODE OF FINLAND

Criminal law remains as one of the most national areas of law. Only Convention on Cybercrime directly harmonizes some particular criminal policy issues such as child porn internationally. Thus, here I refer only to Finnish legislation.

Chapter 11 - **War crimes and offences against humanity** (578/1995)

Section 8 - ***Ethnic agitation*** (578/1995)

A person who spreads statements or other information among the public where a certain race, a national, ethnic or religious group or a comparable group is threatened, defamed or insulted shall be sentenced for *ethnic agitation* to a fine or to imprisonment for at most two years.

Chapter 17 - **Offences against public order** (563/1998)

Section 10 - ***Breach of the sanctity of religion*** (563/1998)

A person who

(1) publicly blasphemes against God or, for the purpose of offending, publicly defames or desecrates what is otherwise held to be sacred by a church or religious community, as referred to in the Act on the Freedom of Religion (267/1998), or - - -

shall be sentenced for a *breach of the sanctity of religion* to a fine or to imprisonment for at most six months.

Section 17 - ***Distribution of depictions of violence*** (563/1998)

(1) A person who offers for sale or for rent, distributes or to that end manufactures or imports a film or other motion picture recording depicting brutal violence shall be sentenced for *distribution of depictions of violence* to a fine or to imprisonment for at most two years.

(2) The provision in paragraph (1) does not apply, if the depiction of violence is to be deemed justifiable because of the informative nature or manifest artistic value of the film or recording. If the contents of the film or recording have been screened by censors and certified for presentation according to the Act on the Censorship of Pictorial Recordings (775/2000), the provision in paragraph (1) does also not apply. If the producer or importer of the recording has evidently had the intention of subjecting the recording to such censorship before offering it for sale or for rent or conveying it, the production or import is not punishable under paragraph (1). (777/2000)

Section 18 - ***Distribution of sexually obscene pictures*** (650/2004)

(1) A person who manufactures, offers for sale or for rent, exports, imports to or through Finland or otherwise distributes sexually obscene pictures or visual recordings depicting

- (1) children,
- (2) sexual violence or
- (3) bestiality

shall be sentenced for *distribution of sexually obscene pictures* to a fine or imprisonment for a maximum of two years.

(2) An attempt shall be punished.

(3) The provisions laid down in section 17(2) apply also to the pictures and visual recordings referred to in this section.

(4) A person under 18 years of age and a person whose age cannot be determined but who can be justifiably assumed to be under 18 years of age is regarded as a child.

Section 18a - ***Aggravated distribution of sexually obscene pictures depicting children*** (650/2004)

Section 18b - ***Illegal exhibition or distribution of audiovisual programmes to a minor***(650/2004)

A person who publicly exhibits or distributes

(1) audiovisual programmes which have not been classified for exhibition or distribution under section 8 of the Act on the Classification of Audiovisual Programmes to a person younger than 18 years of age,

(2) audiovisual programmes in breach of the age classification imposed under section 8 of the said Act, or

(3) unclassified audiovisual programmes to a person younger than 18 years of age which, had the programme been classified, should have been banned under section 8 of the said Act or imposed a higher age classification for exhibition and distribution than the age of the person in question

shall be sentenced for *illegal exhibition or distribution of audiovisual programmes to a minor* to a fine or imprisonment for a maximum of six months.

Section 19 - ***Possession of sexually obscene pictures depicting children*** (650/2004)

A person who has in his/her possession an illegal photograph, video tape, film or other realistic visual recordings depicting a child referred to in section 18(4) having sexual intercourse or participating in a comparable sexual act or depicting a child in another obviously obscene manner shall be sentenced for *possession of sexually obscene pictures depicting children* to a fine or imprisonment for a maximum of one year.

Section 20 - ***Unlawful marketing of obscene material*** (563/1998)

(1) A person who, for gain, markets an obscene picture, visual recording or object which is conducive to causing public offence, by

(1) giving it to a person under 15 years of age;
(2) putting it on public display;
(3) delivering it unsolicited to another; or
(4) openly offering it for sale or promoting it by advertisement, brochure or poster or by other means causing public offence,
shall be sentenced for *unlawful marketing of obscene material* to a fine or to imprisonment for at most six months.

(2) A sentence for unlawful marketing of obscene material shall also be passed on person who, in the manner referred to in paragraph (1)(4), offers for sale or promotes an obscene text or sound recording which is conducive to causing public offence.

Section 24 - ***Criminal liability of a legal person*** (650/2004)

The provisions laid down on criminal liability of a legal person apply to - - the distribution of depictions of violence, the distribution of sexually obscene pictures, the aggravated distribution of sexually obscene pictures depicting children, the possession of sexually obscene pictures depicting children and the unlawful marketing of obscene material.

Chapter 24 - **Offences against privacy, public peace and personal reputation** (531/2000)

Section 8 - ***Invasion of personal reputation*** (531/2000)

(1) A person who unlawfully
(1) through the use of the mass media, or
(2) in another manner publicly

spreads information, an insinuation or an image of the private life of another person, so that the act is conducive to causing that person damage or suffering, or subjecting that person to contempt, shall be sentenced for an *invasion of personal reputation* to a fine or to imprisonment for at most two years.

(2) The spreading of information, an insinuation or an image of the private life of a person in politics, business, public office or public position, or in a comparable position, does not constitute an invasion of personal reputation, if it may affect the evaluation of that person's activities in the position in question and if it is necessary for purposes of dealing with a matter with importance to society.

Section 9 - ***Defamation*** (531/2000)

(1) A person who
(1) spreads false information or a false insinuation of another person so that the act is conducive to causing damage or suffering to that person, or subjecting that person to contempt, or
(2) makes a derogatory comment on another otherwise than in a manner referred to in subparagraph (1)

shall be sentenced for *defamation* to a fine or to imprisonment for at most six months.

(2) Criticism that is directed at a person's activities in politics, business, public office, public position, science, art or in a comparable public position and that does not obviously overstep the limits of propriety does not constitute defamation referred to in paragraph (1)(2).

(3) A sentence for defamation shall be imposed also on a person who spreads false information or a false insinuation on a deceased person, so that the act is conducive to causing suffering to a person to whom the deceased was particularly close.

Section 10 - ***Aggravated defamation*** (531/2000)

If, in the defamation referred to in section 9(1),

(1) the offence is committed by using the mass media or otherwise by making the information or insinuation available to a large number of people, - - - and the defamation is aggravated also when assessed as a whole, the offender shall be sentenced for *aggravated defamation* to a fine or to imprisonment for at most two years.

Section 11 - **Definition** (531/2000)

Domestic premises are defined as follows: homes, vacation homes and other residential premises, such as hotel rooms, tents, mobile homes and vessels with sleeping capacity, as well as the stairwells and corridors of residential buildings and the private yards of the residents and their immediate outbuildings.

Section 12 - **Right to bring a charge** (531/2000)

(2) The public prosecutor shall not bring a charge for invasion of personal reputation, defamation or aggravated defamation, unless the injured party has reported the offence for the bringing of a charge. However, the Prosecutor-General may order that a charge be brought, if the offence has been committed by using the mass media and if a very important public interest requires that a charge be brought.

(3) An offence referred to above in section 9(3) may be reported for the bringing of a charge by the surviving spouse, sibling, direct descendant or direct ascendant of the deceased, as well as by a person who lived in the same household with the deceased or a person to whom the deceased was particularly close.

International criminal law does not pose a problem, as long as the perpetrator can be tried in Finland. If he/she is abroad, there are few if any chances of getting procedures of international co-operation in criminal matters going. The situation is nearly the same also concerning the European arrest warrant, applied in the EU.

On the other hand, if the suspect is found in Finland, the home jurisdiction of the domain is not relevant. Finnish law applies to an offence committed in Finland. According to the Penal Code, Chapter 1:

Section 10 - **Place of commission** (626/1996)

(1) An offence is deemed to have been committed both where the criminal act was committed and where the consequence contained in the statutory definition of the offence became apparent. An offence of omission is deemed to have been committed both where the offender should have acted and where the consequence contained in the statutory definition of the offence became apparent.

(2) If the offence remains an attempt, it is deemed to have been committed also where, had the offence been completed, the consequence contained in the statutory definition of the offence either (i) would probably have become apparent or (ii) would in the opinion of the offender have become apparent.

(3) An offence by an inciter and abettor is deemed to have been committed both where the act of complicity was committed and where the offence by the offender is deemed to have been committed.

(4) If there is no certainty as to the place of commission, but there is justified reason to believe that the offence was committed in the territory of Finland, said offence is deemed to have been committed in Finland.

7. CASE STUDY FOR THE 1ST AMENDMENT FORUM – EDITORIAL LIABILITY FOR USER CREATED CONTENT

DESCRIPTION

There is a part in a magazine's webpage, which publishes only content created by the user community (text, pictures and video). Anyone can register and start creating content with the tools provided by the magazine. All community created content waits until magazine editors check whether the content is not against the law and whether it looks trustworthy. Editors have the power either to edit or publish the content as such. They can also check the information substance in the content and comment back to ask for clarifications before publishing.

All community created content worth publishing gets eventually published. Some of the most interesting contributions are shown on the magazine front page. Magazine does not pay for contributors when publishing takes place online. Only if the content is later published in the print version, does the author get compensated.

PROBLEM AND ADVICE

The problem here is, first, potential *indirect liability for editors* (and the magazine itself). If the editors would not review all submissions, they could claim they did not have actual knowledge of the content. They would be merely hosting it under their magazine's webpage.

Second, the editors might be *even directly liable* if they edit the content substantially and become co-authors. It is thus recommended that any editing is kept at bare minimum.

One additional way to mitigate the problem is to require all contributors to click through an assurance, where they state not to have copied from elsewhere (*copyright clause*) and they do not post any illegal content such as hate speech or illegal pornography (*legality clause*). The flip side of the assurance is that there are potentially less contributors because of increasing risks. *It may also fall short of releasing the editors from liability.*

QUESTIONS FOR LIABILITY EXCEMPTION IN THE FINNISH LAW

1. Does the law cover the service (hosting, search engine, moderating, etc.)? **Yes** → Potential liability
2. **No** → Did the provider have actual knowledge about content which violates Penal Code's provisions on hate crime or the distribution of illegal pornography? **Yes** → Potential liability
3. **No** → Is the content produced or co-produced by a party which is working under direct supervision of the provider? **Yes** → Potential liability
4. **No** → Has the provider failed his/her duty to follow take-down notices or related decisions by Court of Law? **Yes** → Potential liability