

Richard De Mulder, Leadership and the Icelandic Hope for a New Media Law

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My colleague De Mulder is one of the most creative spirits in Information law in Europe. He must therefore be interested in a small country which tries to establish leadership in a new innovative concept of information regulation: Iceland.

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Introduction

One of the specific interests of Richard De Mulder was and is the way how states govern information and internet law.² He must therefore have an interest in reading how a small country tries to retain leadership within a huge banking crisis and tries to enact most modern media law regulations.

On June 16th 2010, the Icelandic Parliament unanimously passed a proposal tasking the government to introduce a new legislative regime to protect and strengthen modern freedom of expression, and the free flow of information in Iceland and around the world.³ IMMI has been the subject of a parliamentary speech of the Minister of Culture in January 2011. The Minister described the competence problems caused by the proposal which covers not only items related to media, but also to telecommunications and industry. Furthermore, she held that the precise drafting of the necessary bills need money which is not foreseen in her budget. Nevertheless, the Parliamentarian will have to be transformed into legislative changes so that now the time for expert discussions has started. However, this proposal cannot be seen only from the Icelandic point of view. As Iceland is not only a member of the European Economic Area (EEA) but also applying for full EU-membership,⁴ it is essential to consider the European perspective before such a legislative package can be successfully drafted.

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² See Pieter Kleve & Richard De Mulder 2008, 'Anomalies in Internet Law'. Or Pieter Kleve & Richard De Mulder 2007, 'Privacy Protection and the Right to Information: In Search of a New Symbiosis in the Information Age.'

³ <http://immi.is/> (last visited 10-08-2010).

⁴ http://www.ecas.europa.eu/iceland/index_en.htm (last visited 10-08-2010).

1. Source Protection

The protection of sources, also referred to as the confidentiality of sources or reporter's privilege⁵, is a right accorded to journalists which shall guarantee that authorities cannot simply oblige a journalist to disclose the identity of an anonymous source if they do not wish to do so⁶. It is thus strongly connected to the right to freedom of the press and hence the freedom of expression and the freedom of information, protected by Article 10 of the European Convention on Human Rights.⁷ The U.S. equivalent to this is the 1st Amendment to the Constitution. Admittedly, under Icelandic national law journalists have a right to refuse to reveal their sources. However, this no longer applies, if a court ruling states otherwise.⁸ This exemption is viewed by many as overly broad, as it may factually put guarantees by law up for negotiation to the courts. An example for a code that puts very high stakes on interventions with the freedom of the press is the Swedish Freedom of the Press Act. Under this law, all people in Sweden are free to communicate every information to the press which they deem important and necessary to make public while the publisher of the information may not identify the source if it wishes to remain anonymous.⁹ In fact, it is even punishable under Swedish law to try to find out who has leaked the respective information. Nonetheless, even under these strict circumstances there are explicit exemptions in Swedish law, where the right to anonymity does not apply.¹⁰

Article 10 of the Convention basically provides that everyone has the right to freedom of expression, "including the right to hold opinions and to receive and impart information and ideas without interference by public authority". Yet, Article 10 (2) of the Convention clarifies that those freedoms are not granted infinitely and can be subject to exemptions in the form of conditions, restrictions and even penalties.

To understand the scope of this restriction on the right to freedom of expression it helps to take a look at the cases of *Goodwin v. UK* from 1996¹¹ and *The Sunday Times v. UK* from 1991.¹² In the landmark ruling of *Goodwin* the applicant, a journalist, received information from an anonymous source regarding the financial status of a company. The respective company obtained court orders preventing the journalist from publication of the confidential

⁵ Joyce 2007, p. 558.

⁶ Cf. Goodale 2008; http://en.wikipedia.org/wiki/Protection_of_sources (last visited 10-08-2010).

⁷ Regarding the situation in the U.S.: Judith Miller case; Bates 2010.

⁸ As stated on <http://immi.is/?l=en&p=vision> (last visited 10-08-2010).

⁹ Cf. Swedish Freedom of the Press Act, Chapter 3, http://www.riksdagen.se/templates/R_PageExtended_6333.aspx (last visited 10-08-2010).

¹⁰ Cf. Swedish Freedom of the Press Act, Chapter 3, Article 3, Paragraph 2 http://www.riksdagen.se/templates/R_PageExtended_6333.aspx (last visited 10-08-2010).

¹¹ *Goodwin v. The United Kingdom* (1), (1996) 22 EHRR (European Human Rights Reports) 123.

¹² *The Sunday Times v. The United Kingdom* (No. 2), no. 13166/87 (1991) ECHR 50 (26-11-1991).

information and compelling the applicant to disclose the identity of the source. Appeals to the Court of Appeal and the House of Lords remained unsuccessful. Finally, the European Court of Human Rights (ECHR) had to resolve the issue whether the order for disclosure of the source was *prescribed by law* and *necessary in a democratic society* for the protection of the rights of the company. It held that as publication of the information was already prohibited by injunctions, the order for disclosure of the source was in breach of Article 10 of the Convention because it was no longer necessary. In *The Sunday Times v. UK* the British newspaper successfully challenged government injunctions against the serialization of the book *Spycatcher* which contained the memoirs of an MI5 agent and which was banned in the UK. Both decisions illustrate what the court examines under Article 10: First, there has to be a sufficiently precise exemption stated by the law. Second, there has to be a legitimate aim for the disclosure of the source. Third, and most important of all, the court weighs the interests of the conflicting parties to find out whether or not a restriction of rights provided by Article 10 meets the criterion of being "necessary in a democratic society". In *Goodwin* the ECHR thus expressly pointed out the risks of not meeting this criterion: If journalists would be forced to reveal their sources the vital role of the press as a "public watchdog" might be seriously undermined due to the chilling effect that such disclosure would have on journalists' ability to cultivate sources and gather news. Consequently, the court examines whether there are less intrusive means to prevent further damage, e.g. an injunction which prohibits further publication of the issue without having to order revelation of the source.¹³ A journalist's right not to reveal his or her source can furthermore not be withdrawn depending on whether the information in question is true or false. Source protection is rather a genuine element of the right to freedom of information¹⁴ and a prerequisite for the freedom of the press¹⁵ protected by article 10 of the Convention. To outweigh the protection of journalistic sources there have to be particularly compelling reasons.¹⁶

Consequently, the broad exemption in Icelandic law, allowing courts to rule that a journalist has to disclose his sources without stating precise exemptions in the law, violates Article 10 (2) of the Convention and is thus not in accordance with European human rights provisions. To meet the requirements of Article 10 of the Convention, changes in Icelandic law will have to be made when drafting the legislative package during the IMMI process. A closer look at French law might also be worthwhile here. Under latest French law from 2010,¹⁷ journalists are free not to disclose their sources unless there is an overriding requirement in the

¹³ *Financial Times Ltd. v. The United Kingdom*, no. 831/03, 15 December 2009; also cf. case comment of Mora, Paul David, *Savage*, Ashley, *Entertainment Law Review* 2010, 21(4), 137-140.

¹⁴ ECHR: *Tillack v. Belgium*, no. 20477/05, 27 November 2007 = NJW 2008, 2565, see also the decision of the German Constitutional Court BVerfG, 1 BvR 538/06 - "CICERO".

¹⁵ *Yoskuil v. the Netherlands*, no. 64752/01, 22 November 2007, NJW 2008, 2563.

¹⁶ *Financial Times Ltd. v. The United Kingdom*, loc. cit.; Mora, *Savage*, loc. cit.

¹⁷ <http://www.assemblee-nationale.fr/13/ta/ta0387.asp> (last visited 10-08-2010).

public interest. This appears to be in line with the requirements of Article 10 (2) of the Convention¹⁸. On the other hand, the above findings probably also limit the scope for a new Icelandic law. As Article 10 (2) explicitly states that the exercise of the aforementioned freedoms “carries with it duties and responsibilities” and the ECHR balances the interests of the conflicting parties, one must assume that EU-law leaves no room for an absolute, hence completely unrestrainable right to non-disclosure of sources.

2. Data Retention

According to the Icelandic telecommunications law no. 81/2003 Iceland's telecommunication providers are obliged to keep records of all connection data for 6 months.¹⁹ The reason for this law being into effect is the EU Directive 2006/24/EC which requires data retention for not less than six months.²⁰ However, this topic was and still is under vital discussion²¹ although the EU had authority to issue the directive under the Treaty establishing the European Community.²²

On 2 March 2010, the German Constitutional Court declared German data retention laws unconstitutional as they are in breach of the fundamental right to privacy of correspondence and telecommunication²³ in Article 10 of the German Constitution. Nevertheless, the court's decision does not affect the directive itself. Data retention to the extent demanded by the directive is not unconstitutional in the first place. To be exact, the court only ruled that the specific German legislation did not meet the requirements of the German Constitution. It also did not judge the provisions under the ECHR. According to this judgment, transposition of the EU Directive is still possible (in Germany) as long as retained data is strictly limited to crimes that mean a threat to life or freedom of individuals or a threat to the country or one of its federal states. Also, the data has to be stored decentrally, using the highest security level possible at any given time. Judging from the tenor of the decision, it might be a good idea to implement exemptions for special groups like priests, doctors, lawyers, and even journalists as their business is affected most by the provisions in the directive.

The Romanian Constitutional Court came to a similar conclusion with regards to the respective Romanian provisions on data retention, also taking Article 8 of

¹⁸ Cf. ECHR *Tillack v. Belgium*, loc. cit.

¹⁹ As stated on the IMMI website.

²⁰ Directive 2006/24/EC, Article 6, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:105:0054:0063:EN:PDF> (last visited 31-05-2011).

²¹ Cf. Konstadinides 2010, p. 88 and Liebwald 2006, pp. 49-56.

²² *Ireland v. European Parliament*, C-301/06, 10 February 2009, E.C.R. I-593 (ECJ (Grand Chamber)), ZUM 2009, 398.

²³ Federal Constitutional Court of Germany, 1 BvR 256/08, “Vorratsdatenspeicherung”, http://www.bverfg.de/entscheidungen/rs20100302_1bvr025608.html (last visited 31-05-2011).

the Convention on Human Rights into account, which guarantees the right to a private life.²⁴ The argumentation of the court: The right to a private life necessarily implies the secrecy of the correspondence. Because those kinds of rights are only granted conditionally it is not the law itself which harms the right to a private life or to freedom of expression. Whoever uses his communication rights to e.g. commit a crime, cannot – of course – possibly claim those rights to justify their unlawful actions. But the fact that data retention provisions treat all subjects of law equally makes data retention itself “likely to overturn the presumption of innocence and to transform *a priori* all users of electronic communication networks into people suspected of committing terrorism crimes or other serious crimes”.²⁵ That again would of course be against fundamental democratic principles.

It is not far to seek that under these premises Icelandic data retention laws might as well not withstand review under the ECHR. Effective changes need to be made here. The right approach is yet in question. One might either tend to go to the extreme and completely dismiss data retention from the agenda, or narrow it down to strictly limited purposes – the former in a way being the Swedish approach, the latter being the German approach. Although total rejection of data retention might be the most liberal solution, this would certainly impinge upon EU law. The European Commission has already filed a complaint against Sweden for inaction on the implementation of the Directive as Sweden did not implement the Directive within the given timeframe.²⁶ However, it is worth stating that the ECJ has not yet decided on the conformity of the Directive with fundamental rights such as Article 8 of the Convention but will most probably sooner or later have to rule on that.²⁷

3. Process Protection – Libel tourism

Concerning process protection and libel tourism the criticism in the IMMI proposal remains unclear. The point in question is why courts in the UK claim jurisdiction over publications or remarks that have been published or made in Iceland. But it is not pointed out how a new Icelandic law could possibly hinder courts in the UK to do so.

²⁴ The Romanian Constitutional Court, Official Monitor no. 798, 23-11-2009, http://www.ccr.ro/decisions/pdf/ro/2009/D1258_09.pdf; see <http://www.legi-internet.ro/english/jurisprudenta-it-romania/decizii-it/romanian-constitutional-court-decision-regarding-data-retention.html> for an unofficial English translation (last visited 10-08-2010).

²⁵ <http://www.edri.org/edrigram/number7.23/romania-decision-data-retention> (last visited 10-08-2010).

²⁶ Olsson, Tobias; Olsson, Lova, ‘Sverige stäms för datalagring’, SvD 26-05-2009, http://www.svd.se/nyheter/inrikes/sverige-stams-for-datalagring_2954845.svd (last visited 31-05-2011).

²⁷ In *College Van Burgemeester en Wethouders van Rotterdam v M.E.E. Rijkeboer* (C-553/07) [2009] 3 C.M.L.R. 28. At [47], the Court stressed that “the importance of protecting privacy is highlighted (...) in the preamble to the Directive and emphasised in the case-law of the Court (see, to that effect, *Österreichischer Rundfunk and Others*, paragraph 70; (...); Case C-275/06, *Promusicae* [2008] ECR I-271, paragraph 63; (...).”

Apart from this unclear criticism, the situation concerning UK defamation law is indeed problematic when it comes to defending against libel torts because it is deemed heavily in favour of the plaintiff.²⁸ Unlike the defendant in a criminal case or other civil suits he is assumed to be in the wrong. Due to this presumption that derogatory statements are false, the defendant has to prove that the statements he made are true.²⁹ Participation in legal battles is oftentimes very cost-intensive³⁰ so that publishers of alleged libellous material might refrain from defending themselves. This does not only apply in cases where the publisher is not economically capable to do so but also when it is simply not in their economic interest. On top of that, the outcome of a case cannot always be foreseen from the start. In the UK, this led to the introduction of conditional agreements between law firms and their clients referred to as “no win no fee” agreements.³¹ Those agreements put the duty to pay a lawyer’s bill under the condition that the case is won. However, this does of course not affect the losing party’s duty to pay for damages and expenses on the winning party’s side. The worrying effect: Plaintiffs under “no win no fee” practically gamble someone else’s money under very limited risks.³² On top of that, establishing defences against libel allegations is often not so easy. The defence of “fair comment” is often hindered because comment is always subjective and not always easy to distinguish from facts which can naturally not be “fair” but are either true or false.³³ This sets defendants out to “the mercy of the caprice of juries and the malice of judges”.³⁴

To understand the European perspective, one can first of all take a look at the case *Steel and Morris v UK*, also called the “*McLibel case*” on 15 February 2005, before the ECHR.³⁵ In the original case, McDonald’s sued Steel and Morris for distribution of a pamphlet against McDonald’s.³⁶ Although McDonald’s won before the English courts, Steel and Morris went before the ECHR, claiming violation of their right to a fair process as the process took ten years and resulted in excessive fees and damages. The ECHR found that this is a violation of Article 6.1 – the right to a fair hearing – and Article 10 – the right to freedom of expression – of the Convention. It stated that “it is essential, in order to safeguard the countervailing interests in free expression and open debate, that

²⁸ Wheatcroft, Geoffrey, ‘The worst case scenario’, *The Guardian* 28-02-2008, <http://www.guardian.co.uk/commentisfree/2008/feb/28/pressandpublishing.law> (last visited 31-05-2011).

²⁹ Bodewig 2004, pp. 543-545; Harte-Bavendamm & Henning-Bodewig 2009, marginal no 260.

³⁰ Multinational Monitor 1-09-1995, <http://www.allbusiness.com/legal/529154-1.html> (last visited 19-08-2010); also see http://news.bbc.co.uk/2/hi/uk_news/8404803.stm and http://news.bbc.co.uk/2/hi/uk_news/8468846.stm (last visited 19-08-2010).

³¹ On the historical development see Abel 2001.

³² Cf. Wheatcroft, loc. cit; also see Hardy & Smith 2005/06 on the risks for abuse of no win no fee agreements.

³³ Cf. *Hunt v Star Newspaper* [1908] 2 KB 309, Tab 3, at 319-320, CA.

³⁴ *Wheatcroft*, loc. cit.

³⁵ *Steel and Morris v. The United Kingdom*, no. 68416/01 [2005] ECHR 103, 15 February 2005, (2005)

⁴¹ EHRR 22.

³⁶ *McDonald’s Restaurants v Morris & Steel* [1997] EWHC QB 366.

a measure of procedural fairness and equality of arms is provided for.” The court found that an award of damages for defamation must be reasonably proportionate to the injury to the reputation suffered. Although the rewarded sum had never been enforced by McDonald’s the fact that it remained enforceable led to the conclusion by the court that the award of damages is disproportionate.

The conclusions for the situation in Iceland are as follows. It is indeed possible for Iceland to refuse to recognize British judgments. Article 34 of the Lugano Convention, which Iceland signed, contains a provision about the so called *ordre public*, which sets the basic principles of domestic moral values or public policy. Pursuant the Lugano Convention a judgment issued in another member state shall be recognized in the other states. The only possible exception is when such a judgment is fundamentally contrary to public policy in the state in which recognition is sought.³⁷ A concept of public policy is strictly national and ought to operate only in exceptional cases only for exceptional application so that the *ordre public* is only to be considered where the recognition of a judgment would infringe a fundamental principle.³⁸ An example for a court ruling under the *ordre public* from Germany illustrates this. In 1992, the Federal Court of Justice of Germany – which can be referred to as the German Supreme Court – denied the enforceability of punitive damages under German law.³⁹ It argued that excessive damages would violate the constitution. A fundamental principle in Germany is that there is compensation for damages only for the restitution of the status quo ante.⁴⁰ Nevertheless, there is no general rule on public policy. The application of the *ordre public* doctrine is always a matter of the specific case. That also means that it is not possible to enact a general law about that.

In the U.S. the reverse principle is into effect. There domestic courts in general shall not recognize a foreign judgment in defamation cases unless the domestic court determines that the defamation law applied in the foreign jurisdiction provided as much protection for freedom of speech and press in the relevant case as would be provided by the U.S. Constitution.⁴¹

To sum these findings up: Iceland can refuse to recognize British court decisions under Article 34 of the Lugano Convention. As far as excessive fees in the UK are concerned, they violate the European Convention on Human Rights and besides those fundamental principles of Icelandic tort law. But there is one danger: As soon as Iceland acquires full EU membership the EU Directive 805/2004/EC will come into effect. In Article 6 this Directive creates a

³⁷ Cf. Diebold 2008, p. 56.

³⁸ Gottwald in *Münchener Kommentar zur Zivilprozessordnung* Volume 3 3rd ed. 2008, marginal no 11.

³⁹ BGH, Az. IX ZR 149/91 v. 4-06-1992.

⁴⁰ Cf. § 249 I BGB.

⁴¹ Bill Text 111th Congress (2009-2010), S.3518.IS, sec. 4102

European Enforcement Order for uncontested claims. This means that in those cases no member state can invoke *ordre public* any more.

4. SLAPP

A quite dubious topic in this context is called **SLAPP** which is an acronym for Strategic Lawsuit Against Public Participation.⁴² Those lawsuits aim at the intimidation and silencing of critics by burdening them with the costs of lawsuits.⁴³ The *McLibel* case is seen as a typical example of such strategic procedural tactics. Typically in a SLAPP lawsuit the plaintiff does not even expect to win the case. Others might also be intimidated to participate in the debate, fearing that otherwise they might be sued as well. In combination with a “no win no fee” agreement the defendant bears most of the costs for his defence against false allegations.

In the U.S. this topic has gained special attention. As SLAPPs pose a threat on the 1st Amendment right to free expression in the U.S. there are unique variants of anti SLAPP legislations in America by now.⁴⁴ Their aim is to protect legitimate litigants from procedurally coercive tactics and minimize costly litigation.⁴⁵ The perhaps most famous U.S. anti SLAPP legislation is the California Code of Civil Procedure, sec. 425.16-18, as the overwhelming majority of all U.S. anti SLAPP cases is brought forth in California.⁴⁶ The burden of proof is on the filer of a SLAPP which harks back to difficulties faced in the *McLibel* case as under English law the burden of proof for any disparaging statement is on the defendant. If an anti SLAPP motion to strike by the defendant is successful, he or she is entitled to recover for most of the attorney’s fees and costs.

Despite their honourable aim the effectiveness of anti SLAPP legislation is often questionable. Although California has even strengthened its anti SLAPP laws to resolve cases faster this only led to an increasing number of cases. The goal to reduce costly litigation was thus not accomplished. The greatest problem of anti SLAPP legislation appears to be specificity. Most existing anti SLAPP laws consist of such vague words although years of case law would provide for much more specific wording. As one cannot possibly overlook the wide reach of such imprecise phrasing, abuse of the law is only one of the possible consequences.⁴⁷

⁴² Pring 1989.

⁴³ Barker 1993, pp. 395-396.

⁴⁴ Cf. e.g. sec. 425.16 of the California Code of Civil Procedure, <http://www.casp.net/statutes/cal425.html>; for further reference to anti SLAPP laws in other states see <http://www.legal-project.org/149/anti-slapp-statutes-in-the-us-by-state> (last visited 31-05-2011).

⁴⁵ Hoffberg 2006, pp. 97-98.

⁴⁶ http://en.wikipedia.org/wiki/Strategic_lawsuit_against_public_participation#United_States_2 (last visited 19-08-2010).

⁴⁷ *Olsen v. Harbison* (2005) 134 Cal.App.4th 278 at 283; *Episcopal Church Cases* (2009) slip opn., Case No. S155094; also see M. Dylan McClelland, ‘SLAPPlash: the Courts Finally turn on California’s Anti-Continued...

Defendants can be offered the opportunity to “SLAPP back” - to raise a counterclaim to a SLAPP (usually for abuse of process or malicious prosecution). However, there is an ongoing discussion to the effectiveness of SLAPP backs which on the one hand allow vindication, but might yet not be very affective on the other hand as costs for the original SLAPP suit have to be covered first and the counterclaims are often difficult to prove.⁴⁸ The aimed goal of anti SLAPP legislation reverses itself as soon as anti SLAPP laws are used to squash otherwise legitimate lawsuits: Any defamation lawsuit might *a priori* be considered as SLAPP so that the presumptive application of anti SLAPP laws can practically be used as a defence. This can burden parties with meritorious claims and chill parties with nonfrivolous ones.⁴⁹ In a grading dispute a UC Davis professor felt that he had been subject to racial discrimination and in the end sued the university. UC Davis however was able to (mis-)use anti SLAPP legislation to get the case thrown out, even burdening the professor with their attorney’s fees and costs – all in line with California’s anti SLAPP provisions and the backing of the courts.⁵⁰

In *Palazzo v. Ives*⁵¹ the court therefore stated: “By the nature of their subject matter, anti SLAPP statutes require meticulous drafting (...). There is a genuine double-edged challenge to those who legislate in this area.” As the *McLibel* case has shown, SLAPP as such is – of course – to be condemned in Europe as well. But in the end it will have to be examined whether or not specific legislation is really necessary and whether those laws can be so thoughtfully and carefully written that they will also be affective.

5. History Protection

The IMMI proposal states that the ECHR had confirmed that, for the purposes of the law of libel, an internet publication should be considered to be “published” afresh every time a reader views it. The ruling also found that libel proceedings brought against a publisher after a significant lapse of time may well, in the absence of exceptional circumstances, give rise to a disproportionate interference with press freedom.

SLAPP Motion’, see http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=m_dylan_mcclelland, 2009, (last visited 19-08-2010) for further case reference.

⁴⁸ *Barker*, loc. cit. at pp. 432 f.

⁴⁹ *Navellier et. al. v. Sletten*, 29 Cal.4th 82, 124 Cal.Rptr.2d 530, 52 P.3d 703, 29-08-2010, dissenting opinion, <http://www.casp.net/cases/Navellier%20v.%20Sletten%20I.html> (last visited 31-05-2011).

⁵⁰ The case is however not finished yet: http://www.davisvanguard.org/index.php?option=com_content&view=article&id=2729:uc-davis-uses-anti-slapp-provisions-to-kill-discrimination-lawsuit&Itemid=114, (last visited 16-08-2010).

⁵¹ 944 A.2d 144 (R.I. 2008).

The case the IMMI proposal refers to is *Times newspaper Ltd. (Nos 1 and 2) v. The United Kingdom*⁵² before the ECHR. This decision refers to an old UK case from 1849 called *Brunswick v Harmer*⁵³ which laid down the common law rule that each publication of a defamation gives rise to a separate cause of action. In 2001 the British High Court indeed held that internet material is published anew every time it is accessed,⁵⁴ known by now as the “internet publication rule”. The counter concept to this rule is the “single publication rule”. Despite of that, the case remains a mere national UK case which is on top of that based on a very old precedent. The ECHR does not really confirm the internet publication rule – as is stated in the IMMI proposal – it only says that the interpretation of “publication” by the UK courts does not violate the Convention.

The IMMI proposes to restrict the possibility to file a lawsuit on two months after publication. But this does not solve the problem at all because the definition of publication still remains unclear.⁵⁵ Besides, we have to bear in mind that Iceland can refuse to recognize British decisions like *Times* under Article 34 of the Lugano Convention anyway. So if a change of law should really be deemed necessary, one should rather link the restriction to knowledge than to publication: A change of the Civil Procedure Act could provide for a clause that injunctions can only be granted within a short period of time after the plaintiff knows or should know the content on the web.

6. Whistleblowers' Protection

Whistleblowing means raising concerns about wrongdoing occurring in an organization or body of people.⁵⁶ As an example, wikileaks.org has recently come to mainstream fame, publishing worrying internal documents of the U.S. Forces about the Iraq War whilst keeping the sources anonymous.⁵⁷ Whistleblowing can be either internal or external: internal meaning reporting wrongdoing to officials etc. inside the organization itself, external meaning making the information available to the public. The goal of whistleblowing schemes is to protect whistleblowers from retaliation by their superiors or employers.⁵⁸ As stated in the IMMI proposal, Iceland plans to change “laws regarding the rights and duties of official employees (no. 70/1996) such that official employees be allowed to break their duty of silence in the case of

⁵² <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=3002/03%20%7C%20times%20%7C%20newspaper%20%7C%20ltd&sessionId=58081069&skin=hudoc-en> (last visited 31-05-2011).

⁵³ *Duke of Brunswick v Harmer* [1849] 14 QB 154.

⁵⁴ *Godfrey v Demon Internet Limited* [2001] QB 201.

⁵⁵ For a discussion on different approaches see Wright 2003; Pierotti 2002; case comment on *Time Newspaper v. United Kingdom* in E.H.R.L.R.: 2009, 4, 586-588; Wyant 2008.

⁵⁶ <http://en.wikipedia.org/wiki/Whistleblower> (last visited 19-08-2010); for definition questions also cf. Johnson 2008.

⁵⁷ <http://www.wikileaks.org/wiki/Category:Iraq> (last visited 19-08-2010).

⁵⁸ Cf. Johnson 2008, p. 1334.

extreme circumstances of public interest. Similar changes could be made to municipal governance law (no. 45/1996) regarding employees of municipal governments.”⁵⁹

The EU Article 29 Group – or Article 29 Data Protection Working Party, short WP 29 – has issued an opinion on 1 February 2006⁶⁰, dealing with the issue of compliance of internal whistleblowing schemes (such as whistleblowing hotlines or websites) with EU data protection rules set out in Directive 95/46/EC.⁶¹ That applies to whistleblowing schemes in the fields of accounting, internal accounting controls, auditing matters, fight against bribery, as well as banking and financial crime.

Under Article 7 of the Directive, companies must take all reasonable technical and organizational precautions to secure, that data processing is secure and kept confidential. Article 7 (f) of the Directive requires balancing the legitimate interests pursued by the processing of personal data on the one hand and the fundamental rights of the data subject on the other. This balance of interest test should take various issues into account, such as proportionality, subsidiarity, the seriousness of the alleged offenses that can be notified and the consequences for the data subjects. What will also be necessary are adequate safeguards, as Article 14 of the Directive provides that when data processing is based on Article 7 (f), individuals have the right to object the processing of data relating to them at any time if there are compelling legitimate reasons.⁶² Acknowledging that whistleblowing schemes may be a helpful tool for organizations to monitor their compliance with various regulations the WP 29 emphasizes, that all whistleblowing schemes must comply with EU data protection law. In the implementation of whistleblowing schemes the fundamental right to the protection of data, in respect to both the whistleblower and the accused person, must thus be ensured throughout the whole process of whistleblowing.⁶³

That means that although EU law does not provide for an obligation to implement general whistleblowing schemes, Iceland must comply with the provisions laid down by the EU data protection directive, should it choose to realize such a system. It has to take into account the need for protection of the person concerned, fair procedure, and the right to object data processing on reasonable, legitimate grounds. From this it follows that a very difficult balancing of interests will be necessary. The U.S. model can again serve as a bad counterexample: As data protection concerns are much less pronounced,

⁵⁹ Cf. IMMI proposal.

⁶⁰ http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2006/wp117_en.pdf (last visited 31-05-2011).

⁶¹ http://ec.europa.eu/justice_home/fsj/privacy/docs/95-46-ce/dir1995-46_part2_en.pdf (last visited 31-05-2011).

⁶² Cf. p. 9 of the opinion, loc. cit.

⁶³ Cf. p. 18 of the opinion, loc. cit.

U.S. whistleblowing schemes might often be not in full compliance to EU data protection provisions.⁶⁴

7. De Mulder and Iceland

The example of Iceland shows that leadership in internet governance is a multi-facet issue involving trial and error mechanisms and an international view on the international players. Leadership can only be managed with a view on existing networks, links, limitations. Iceland might thus be a country with a unique media law, but only in the framework of EU and ECHR regulations. Congratulations to Richard de Mulder - to his 65th birthday and to his leadership in IT jurisprudence.

References

Abel 2001

Richard L. Abel, 'An American Hamburger Stand in St. Paul's Cathedral: Replacing Legal Aid with Conditional Fees in English Personal Injury Litigation', 51 *DePaul Law Review*, Winter 2001.

Barker 1993

John C. Barker, 'Common-Law and Statutory Solutions to the Problem of SLAPPS', 26 *Loyola of Los Angeles Law Review* 395, 1993.

Bates 2010

Stephen Bates, 'Garland V. Torre And The Birth Of Reporter's Privilege', 15 *Communication Law and Policy*, 91, 2010.

Bodewig 2004

Theo Bodewig, 'Das Recht des Unlauteren Wettbewerbs in Großbritannien: Ein Dreiklang von Fallrecht, Gesetzesrecht und Selbstkontrolle', *GRUR International* (Gewerblicher Rechtsschutz und Urheberrecht – Internationaler Teil) 2004, pp. 543, 545.

Diebold 2008

Nicolas F. Diebold, 'The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole', *Journal of International Economic Law*, volume 2008/11, issue 1, pp. 43-74.

Goodale 2008

James C. Goodale et. al., *Reporter's Privilege*, Practising Law Institute, 952 PLI/Pat 161, 2008.

Hardy & Smith 2005/06

Hardy, Tim, Smith, Laura, 'Conditional Fees: the new blackmailing tool?', *Euro Law* 2005/06, 54, 18.

⁶⁴ Cf. Marchini 2006, pp. 309-313.

Harte-Bavendamm & Henning-Bodewig 2009

H. Harte-Bavendamm & F. Henning-Bodewig (Hrsg.), *Kommentar zum Gesetz gegen den unlauteren Wettbewerb (UWG)*, 2009.

Hoffberg 2006

Rebecca Ariel Hoffberg, 'The Special Motion Requirements of the Massachusetts Anti-SLAPP Statute: A Real Slap in the Face for Traditional Civil Practice And Procedure', 16 *Public Interest Law Journal* 97, 98, 2006. <http://www.bu.edu/law/central/jd/organizations/journals/pilj/vol16no1/documents/16-1HoffbergNote.pdf>.

Johnson 2008

Johnson, Robert, 'Whistling While You Work: Expanding Whistleblower Laws To Include Non-Workplace-Related Retaliation After *Burlington Northern v. White*', 42 *University Of Richmond Law Review* 1337, 2008.

Joyce 2007

Daniel Joyce, 'The Judith Miller Case and the Relationship between Reporter and Source: Competing Visions of the Media's Role and Function' *Fordham Intellectual Property, Media & Entertainment Law Journal*, Volume XVII, book 3, 555, 2007.

Kleve & De Mulder 2008

Pieter Kleve & Richard De Mulder, 'Anomalies in Internet Law', *Proceedings of the 22nd Bileta Conference*, University of Hertfordshire: Hatfield, June 2008, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1138822.

Kleve & De Mulder 2007

Pieter Kleve & Richard de Mulder, 'Privacy Protection and the Right to Information: In Search of a New Symbiosis in the Information Age', *Cyberlaw, Security & Privacy*, S.M. Kierkegaard, eds., International Association of IT Lawyers, pp. 201-212, 2007.

Konstadinides 2010

Theodore Konstadinides, 'Wavering between centres of gravity: Comment on Ireland v Parliament and Council', *European Law Review*, 35(1) 2010.

Liebwald 2006

Doris Liebwald, 'The New Data Retention Directive', *Medien und Recht International* 1/2006, pp. 49-56.

Marchini 2006

Renzo Marchini, 'Conflict of Laws: Anonymous Whistleblowing Hotlines under Sarbanes Oxley and European Data Protection Laws', *Privacy & Data Security Review*, May 2006.

Pierotti 2002

Neal P. Pierotti, 'Does Internet Information Count As Printed Publication?', 42 *IDEA – The Journal of Law and Technology* 249, 2002.

Pring 1989

George W. Pring, 'SLAPPs: Strategic Lawsuits Against Public Participation,' *Pace Environmental Law Review* 1989.

Wright 2003

Jennifer M. Wright, 'A Contemporary Patent Act: Finding A Useful Definition Of "Printed Publication" In The Age Of The Internet And On-Line Research', 85 *Journal of the Patent & Trademark Office Society* 732, 2003.

Wyant 2008

Michelle A. Wyant, 'Confronting the Limits of the First Amendment: A Proactive Approach for Media Defendants Facing Liability Abroad', 9 *San Diego International Law Journal* 367, 2008.