



UPPSALA
UNIVERSITET

Openness and Secrecy

Media Law, KTH

Kacper Szkalej, LL.M.
kacper.szkalej@jur.uu.se

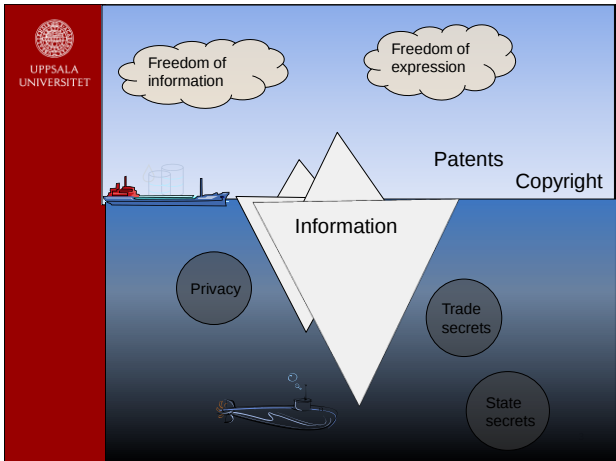


UPPSALA
UNIVERSITET

Structure

- Freedom of expression
- Freedom of information
- Trade secrets

2





UPPSALA
UNIVERSITET

Freedom of expression



UPPSALA
UNIVERSITET

Sources of law

- International / EU
 - UDHR, Art. 19
 - ICCPR, Art. 19
 - ECHR , Art. 10
 - EU Charter of Fundamental Rights, Art. 11
- National
 - Entrenched law (e.g. constitutions)
 - Lex specialis (e.g. press,TV and media laws)

5



UPPSALA
UNIVERSITET

ECHR – Art. 10

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...*
2. ...

6



UPPSALA
UNIVERSITET

Sweden

- Fundamental Law on Freedom of Expression
 - Yttrandefrihetsgrundlag (1991:1469)

Ch.1 Art.1(3) :

The purpose of freedom of expression (...) is to secure the free exchange of opinion, free and comprehensive information, and freedom of artistic creation

- Freedom of the Press Act
 - Tryckfrihetsförordning (1949:105)
- Instrument of Government
 - Kungörelse (1974:152) om beslutad ny regeringsform
 - Contains fundamental rights and freedoms



UPPSALA
UNIVERSITET

Sweden

- Freedom of the Press Act
 - Tryckfrihetsförordning (1949:105)

Art. 1. The freedom of the press is understood to mean the right of every Swedish citizen to publish

written matter,

without prior hindrance by a public authority or other public body,

and not to be prosecuted thereafter on grounds of its contents otherwise than before a court of law, or be punished otherwise than when the contents contravene an express provision of law enacted to preserve public order without suppressing information to the public.



UPPSALA
UNIVERSITET

United Kingdom

- Human Rights Act 1998
- No entrenchment
- A contrario
 - Everything is permitted except for what is expressly forbidden



UPPSALA
UNIVERSITET

Freedom of expression

- Purpose:
 - *Freedom to hold opinions*
 - *Freedom to seek, receive, and share information and ideas without interference by public authority*
 - *Scope is very broad*
- Human right
 - *Any person should be able to receive and share information*
- Technology neutral
 - *offline*
 - *online*
 - *TV, radio*
 - *newspapers*
 - *blogs etc.*

10



UPPSALA
UNIVERSITET

Freedom of expression

Handyside v United Kingdom (7 Dec 1976) (1979-80) 1 EHRR 737 para 48:
[Article 10] is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic' society.

Racist hate speech (*Jersild v Denmark* (1994) 19 EHRR 1)
Pornography (*Wingrove v United Kingdom* (App. 17419/90) (1997) 24 EHRR 1)

11



UPPSALA
UNIVERSITET

Freedom of expression

- Limitations only possible if necessary to serve a legitimate interest
- Special rules for TV, radio, newspapers etc.

12



UPPSALA
UNIVERSITET

Limitations – ECHR Art.10

1. ...

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.***

13



UPPSALA
UNIVERSITET

Limitations - examples

- Offences against a person or group
 - Threats
 - Hate speech
- Defamation
 - *Libel (writing)*
 - *Slander (oral)*
- Child porn
- Inciting imminent lawless action
- Certain other actions conflicting with other human rights
- State secrets
 - *Treason*

14



UPPSALA
UNIVERSITET

Sanctions associated with Art.10(2)

- National rules
 - *Jurisdictional matters*
 - *e.g. Edward Snowden*
- Tort (civil) law
 - *Injunctions*
 - *Damages*
- Criminal law
 - *Fines*
 - *Imprisonment*

15



UPPSALA
UNIVERSITET

Liability - examples

- Author
- Editor
- Content provider
- Host, search engine etc.
- Linker?

16



UPPSALA
UNIVERSITET

Freedom of expression - conflicts

Attorney General v The Observer Ltd and others
[1988] 3 All ER 545
(Spycatcher case)

- Peter Wright
- Breach of Official Secrets Act 1911
- Breach of confidence
 - *Sunday Times* – defence of prior publication (they had published before it was published in the US)
- Application for injunctions
- Published in the US

17



UPPSALA
UNIVERSITET

Freedom of expression - conflicts

- *Jersild v Denmark* (24 September 1994) Series A, No. 298; (1994) 19 EHRR 1
- Broadcast on Danish TV of a programme in which a group of self-confessed racist youths made (extremely) offensive remarks about certain ethnic groups.
- Presenter and head of the news section prosecuted and convicted.
- Incitement to violence?
- Not intended to propagate racist views, but address issue of public interest
- Reported to well-informed audience
- Imposed penalties 'not' necessary in a democratic society¹⁸



UPPSALA
UNIVERSITET

Balancing rights, *lex specialis*

- Marketing – Freedom of Expression
 - *Promoting a product vs expressing an opinion*
 - *Comparative advertising*
 - *Unfair marketing practices*
- Privacy – Freedom of Expression
 - *human right vs human right*
 - *Data protection*
 - *Defamation*
 - *General public interest*
 - *Context!*

19



UPPSALA
UNIVERSITET

Privacy v Freedom of expression

von Hannover v Germany (No. 2) [2012] ECHR 228

1. Whether the information contributes to a debate of general interest
2. How well known the person concerned is and the subject matter of the report
3. The prior conduct of the individual concerned
4. Consent, form, and consequences of the publication.
5. The circumstances in which the photos were taken.

- ECtHR: no breach of art. 8 ECHR (right to privacy)

20



UPPSALA
UNIVERSITET

Right to Property vs Freedom of Expression

Fredrik Neij and Peter Sunde Kolmisoppi (TPB) v Sweden
(Judgement 19 Feb 2013) App. 40397-12

The Court notes from the outset that the applicants were convicted for their involvement in the running of a website which made it possible for users to share digital material such as movies, music and computer games, which were copyright-protected. The Court has consistently emphasised that Article 10 guarantees the right to impart information and the right of the public to receive it. In the light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the sharing and dissemination of information generally

21



UPPSALA
UNIVERSITET

Right to Property vs Freedom of Expression

Fredrik Neij and Peter Sunde Kolmisoppi (TPB) v Sweden
(Judgement 19 Feb 2013) App. 40397-12

*In the present case, **the applicants put in place the means for others to impart and receive information within the meaning of Article 10 of the Convention.***

*The Court considers that the **actions taken by the applicants are afforded protection under Article 10 § 1** of the Convention and, consequently, the **applicants' convictions interfered with their right to freedom of expression.***

*Such interference breaches Article 10 **unless** it was "prescribed by law", pursued one or more of the legitimate aims referred to in Article 10 § 2 and was "necessary in a democratic society" to attain such aim or aims*



UPPSALA
UNIVERSITET

Right to Property vs Freedom of Expression

- Prescribed – copyright law
- Legitimate aim – protection of the rights of others
- *Swedish courts advanced relevant and sufficient reasons to consider that the applicants' activities within the commercially run TPB amounted to criminal conduct requiring appropriate punishment. In this respect, the Court reiterates that the applicants were only convicted for materials which were copyright-protected.*
- Proportionality of imprisonment and damages – OK, because they refused to take it away when told to do so.



UPPSALA
UNIVERSITET

Legal challenges

- Blogs and social media
 - *Liability for comments on blogs and statements on social media (status updates etc)*
 - *Social media – private or public sphere??*
- Filtering online-content by governments



UPPSALA
UNIVERSITET

Legal challenges

- Benefits and risks (legal, business, society, technology) of limiting freedom of expression for:
 - *Google*
 - *Facebook*

25



UPPSALA
UNIVERSITET

Righ to information



UPPSALA
UNIVERSITET

Legal sources

- International
 - *ECHR*
 - *EU Charter*
- EU
 - *TFEU*
 - *Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents (Public Access Regulation)*
 - *Directive 2003/98/EC on the re-use of public sector information (PSI Directive)*
- National
 - *Laws on access to information*
 - *PSI laws*

27



UPPSALA
UNIVERSITET

Right to information

- Extension of Freedom of Expression
- Human right
- Rationale
 - Facilitates public knowledge and discussion
 - Indirectly safeguards against abuse/mismanagement/corruption
 - Openness and transparency, good governance

28



UPPSALA
UNIVERSITET

Principles

- **The public** has access to public information
 - Access to documents/information
 - Limitations in cases of national security, privacy, health, etc. **and when information is not considered public information**
 - Who is **the public**?
- Re-use of public data
- National laws specify when & how information can be obtained
- Administrative law completes with requirements
 - e.g. if application needs to be made, response required within 14 or 30 days,
 - requests for information need to be handled immediately, etc

29



UPPSALA
UNIVERSITET

Starting point?

*Everything is secret except for what is expressly public information, or
everything is public information except for what is expressly a secret?*

- What should the law be?

30







UPPSALA
UNIVERSITET

TFEU

• Art.15 TFEU

1. In order to promote **good governance** and ensure the participation of **civil society**, the Union's institutions, bodies, offices and agencies shall conduct their work **as openly as possible**.

2 ...

3. Any citizen of the Union, **and** any natural or legal person residing or having its registered office in a Member State, **shall have a right of access to documents** of the Union's institutions, bodies, offices and agencies, **whatever their medium**, subject to the principles and the conditions to be defined in accordance with this paragraph.

33



UPPSALA
UNIVERSITET

Sweden

- Fundamental Law on Freedom of Expression
 - Yttrandefrihetsgrundlag (1991:1469)
- Freedom of the press Act
 - Tryckfrihetsförordning (1949:105)
 - The right to receive public information (offentlighetsprincipen)

Ch.2 Art.1:
For the purpose of promoting the free exchange of expression and comprehensive information (...) [anyone] shall have the right to receive public information/documents

- Instrument of Government
 - Kungörelse (1974:152) om beslutad ny regeringsform



UPPSALA
UNIVERSITET

United Kingdom

- Human Rights Act 1998
 - Limited usefulness => see the wording of s.1(2) (does not actually say: "you have a right of..")
- Freedom of Information Act 2000

s.1 General right of access to information held by public authorities.

(1) Any person making a request for information to a public authority is entitled—

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated₃₅ to him



UPPSALA
UNIVERSITET

Access to what?

- Information?
 - direct, express information ,or sets of data from which something can be concluded? (e.g. statistics?)
- Documents?
 - What is a document?
 - official documents with a signature, official seal of the public institution and date, or handnotes taken by an employee at the public institution or other raw, preparatory documents?



UPPSALA
UNIVERSITET

Document

- Regulation 1049/2001 – art.3

*(a) "document" shall mean **any content whatever its medium***
(written on paper or stored in electronic form or as a sound, visual or audiovisual recording)
concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility;

- **CONTENT NOT FORM**

37



UPPSALA
UNIVERSITET

Access to public information

- Physically at a specific location?
- Read information online?
- Duty to publish information by authorities?
- Right to receive a copy for free or for a fixed fee?
- Right to remain anonymous?

38



UPPSALA
UNIVERSITET

Re-use of public data

- Public sector information (PSI) – data held by public authorities
- PSI can be used by businesses to create products or services
 - GPS (geo-data), weather forecasts,, insurance services (statistics) etc.
 - Also for use in the "grey area" freedom of information- right to privacy – databases with info on where someone is living, contact details, paid tax etc.

39



UPPSALA
UNIVERSITET

Balancing rights

- Same problems as with expression of thought etc.
 - *Human right vs human right*
 - *Data protection, integrity vs re-using public data etc.*
- What is more important? Right to public insight into government actions or right to privacy?
 - *What's the harm?*

40



UPPSALA
UNIVERSITET

Challenges

- A lot of public data contains personal data
- Criminal records being used in job interviews
- Whistleblowing

41



UPPSALA
UNIVERSITET

Secrecy - Sweden

- Freedom of the Press Act
 - *Tryckfrihetsförordning*

Lists the interests that may be protected by keeping official documents secret:

- 1. national security or Sweden's relations with a foreign state or an international organisation;*
- 2. the central financial policy, the monetary policy, or the national foreign exchange policy;*
- 3. the inspection, control or other supervisory activities of a public authority;*
- 4. the interest of preventing or prosecuting crime*
- 5. Public economic interests*
- 6. The protection of personal or economic circumstances of private subjects.*
- 7. Preservation of animal and plant species*

42



UPPSALA
UNIVERSITET

Secrecy – Sweden

- Public Access to Information and Secrecy Act
 - *Offentlighets- och sekretesslag (2009:400)*
- Mostly of administrative character
 - How authorities should handle official documents

43



UPPSALA
UNIVERSITET

United Kingdom

- Freedom of Information Act 2000
 - Part II Exempt Information (ss.21-44)
- Official Secrets Act 1911
- Official Secrets Act 1920
- Official Secrets Act 1939
- Official Secrets Act 1989

44



UPPSALA
UNIVERSITET

Trade secrets



UPPSALA
UNIVERSITET

Legal framework

- **TRIPS** – data protection in Art.39 TRIPS
 - *Not to be confused with data protection legislation concerning processing of personal data.*
- Also indirectly: Paris Convention for the Protection of Industrial Property – Art. 10bis (unfair competition)
- National legislation
- Internal (company) policies
- Confidence clauses in agreements
- NDAs (non-disclosure agreements)

46



UPPSALA
UNIVERSITET

Legal framework

- **Sweden**
 - Act on the Protection of Trade Secrets
 - Lag (1990:409) om skydd för företagshemligheter
- **United Kingdom**
 - Equitable right
 - Breach of confidence

47



UPPSALA
UNIVERSITET

Trade secrets

any confidential business information which provides an enterprise a competitive edge may be considered a trade secret.

right to prevent information from being disclosed to or used by others without one's consent

e.g. industrial or commercial espionage

48



UPPSALA
UNIVERSITET

Trade secrets

- right applies to information that *is secret* (= not generally known among or readily accessible to people outside company) *has commercial value because it is secret*; and *has been subject to reasonable steps by the rightful holder of the information to keep it secret* (through confidentiality agreements? What about access control? Where should the line be drawn?)
- Duration: potentially unlimited
- Consequences after breach?

Injunctions? Damages?

Disclosed information will not be a secret anymore

49



UPPSALA
UNIVERSITET

Examples

- Compilations of data
- Algorithms and processes that are implemented in computer programs
- Manufacturing or repair processes,
- Techniques and know-how;
- Business strategies, business plans, methods of doing business, marketing plans
- Trade secrets encapsulate more than copyright or patents as there are no strict standards for the quality of data (such as originality or novelty)

50



UPPSALA
UNIVERSITET

Thank you!

51
