ETHICS AND INFORMATION LAW: THE INTERFACE

25.11.2009
Pekka Heikkinen
SYNOPSIS

1. LAW AS A CLOSED SYSTEM
2. IS THERE SPACE FOR ETHICAL IMAGINATION IN LAW?
3. ETHICAL CHALLENGES OF LIBRARIANSHIP
SOME CONCEPTS

(Normative) ethics: what is the right way to act in certain situations

Law: a formal set of rules defining what is prescribed/forbidden

Information ethics: normative issues surrounding information control
  - e.g. plagiarism

Information law: copyright, data protection, freedom of speech, privacy, Act on Publicity
  - narrow definition
I. THE DOMINANT VIEW

-preumption that it is possible to separate law and morals; there is always only one right solution that can be found/deduced from the legal system itself (legal positivism)

-> law as a coherent system

-rationale: the need to guarantee autonomy and neutrality of the legal system

-problem: an inevitable conflict between textual logic and situational logic, written law is always incomplete
II. "THE SPACE TO SEE"

-the more precise and concrete rules of conduct written legal norms contain, the less ethical space they leave

-is there space for ethical imagination in law; "the space to see" beyond text (Zenon Bankowski)

How could ethics and law interact?

1) ideals inherent in law

2) social construction of legal norms
   -law is action and is shaped in interaction
   -example: professional rules of conduct
II.1. IDEALS INHERENT IN LAW

-the limits of law can be found in law itself

a) basic rights and human rights
   -their ethical dimension, interpretive norms
   -growing in importance
   -many of these relate specifically to information

b) gaps in statutory law
   -inevitable, but also deliberate
   -the state recognises limits of its competence
ONE EXAMPLE: COPYRIGHT

-all is not protected
-no legal definition for the public domain; is there “an ethical public domain”

-information is not protected (ideas/facts)

-Copyright Act 1§: “he who creates a work, shall have a copyright in that work”
-however, no definition what constitutes a ”work”
  -no esthetic criteria, also “bad art” is protected
  -no “sweat of the brow”, i.e. intellectual skill
THE ETHICAL BASIS OF COPYRIGHT LAW

- copyright protects creativity of action (process), not objects

- however, only action that is deemed original enough

- so you might say that the whole Act is based on ethical judgment!

ALSO:
- **private use** exemption (“it is not for the state to say what people can/can not do in their private life”)
- **citation rule** in the Finnish Copyright Act: “citation is allowed within the limits of good manners” (“contra bonos mores”)
- **”fair” use** in US Copyright Act (but: big differences to European law)
II.2. SOCIAL CONSTRUCTION OF LEGAL NORMS

“Law in books” vs. “Law as interaction”

-law is not given, but made by men

->which comes first, action or text:

a) **written law follows practice**
   - are legal norms based on ethical considerations; does law develop through hard cases (”hard cases make bad law”)

b) **practice supplements written law**
   - best practices (practical reason)
IMPORTANCE OF SOCIAL NORMS

-most of our everyday behavior is not based on legal norms but on shared perception (within a relevant community) on what is acceptable or not (Robert Ellickson: How neighbours settle disputes)

-it is very difficult to uphold legal norms that are not socially accepted

-piracy, file-sharing: has copyright law failed? How can it be morally justified (as an individual´s right to exclude others)?

-plagiarism: not a legal question, but defined by rules of conduct within a (research) community
APPLICATION OF WRITTEN RULES

-writer rules cannot capture the logic/plurality of our everyday situations

-the effects of written law are always filtered to practice through professional practices and norms

-could it even be possible to bypass strict interpretation of a legal rule, if its application would lead to impractical results for libraries? -> NO, however written law leaves SOME leeway
-ideals outside the law itself

-CAUTION: no wishful thinking!
III. ETHICAL CHALLENGES OF LIBRARIANSHIP

-ethical sensitiveness of a profession: what kind of choices have to be made

-special characteristic of the work of a library professional: these choices are to a great extend related to the use of and access to information -\rightarrow information ethics

-digitisation of information and cultural heritage create "hard cases" when rights have to be balanced; e.g. what are the rights of the photographer vis-á-vis persons appearing in these pictures?

-new constellations that challenge prevalent views on what is acceptable or not; ethical deliberation is needed
PROFESSIONAL ETHICS

- professional codes offer:

a) guidelines for making ethical decisions and applying ethical solutions to situations involving information provision and use

b) ideals and values that form the basis of this particular profession, e.g. physicist, journalist, researcher, lawyer -> most of these established professions have codified professional codes, organs of self-regulation etc.

- librarians: is there room for ethical deliberation vis-à-vis other information professionals
ETHICAL CODE IN FINLAND?

Tension:

-does “professionalism” equal to neutrality? Or is it something more than that? If so, what?


-the basic value is freedom of speech/expression; library is not a gate keeper

<-> however, in some situations a duty to ”discriminate positively” among clients
THANK YOU!