

FUTURE OF INTERNET NEWS PORTALS AFTER THE CASE OF
DELFI

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The thesis analyzes liability of Internet news portals for third-party defamatory comments. After the case of *Delfi AS v. Estonia*, decided by the Grand Chamber of the European Court of Human Rights on 16 June 2015, a portal can be held liable for user-generated unlawful comments.

The thesis aims at exploring consequences of the case of Delfi for Internet news portals' business model. The model is described as a mixture of two modes of information production: traditional industrial information economy and new networked information economy. Additionally, the model has a generative comment environment. I name this model "the Delfian model".

The thesis analyzes three possible strategies which portals will likely apply in the nearest future. I will discuss these strategies from two perspectives: first, how each strategy can affect the Delfian model and, second, how changes in the model can, in their turn, affect freedom of expression.

The thesis is based on the analysis of case law, legal, and law and economics literature. I follow the law and technology approach in the vein of ideas developed by Lawrence Lessig, Yochai Benkler and Jonathan Zittrain. The Delfian model is researched as an example of a local battle between industrial and networked information economy modes.

The thesis concludes that this local battle is lost because the Delfian model has to be replaced with a new walled-garden model. Such a change can seriously endanger freedom of expression.

Keywords: Internet, Freedom of Expression, Liability, User-Generated Content, Collateral Censorship

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LIST OF ABBREVIATIONS

UN	United Nations
EU	European Union
USA	United States of America
UK	United Kingdom
ECtHR	European Court of Human Rights
CJEU	Court of Justice of the European Union

1 INTRODUCTION

1.1 Battle between Two Modes of Information Production

We are living in the period of transformation of the information economy¹. During the 20th century only one model of production – the industrial information economy – dominated on the market. This mode is based on centralized and commercialized production of finished goods by a small number of professional producers – media. Then, finished goods are distributed to passive consumers. Nevertheless, an ever expanding reach of the Internet and radically decreased prices of powerful personal computers have created new opportunities to make and exchange information. Now, the means of production and distribution are in the hands of widely dispersed Internet audience. The entry barrier which required a considerable capital investment has failed. Consequently, the main input – human creativity – can be used without depending on commercial corporations. Internet users have become active participants of a new information environment. Although Internet users are producers of information, they still remain social beings willing to cooperate and share. Therefore, according to Yochai Benkler, there have been created conditions for developing nonmarket and nonproprietary production, which, in its turn, may lead to establishing a new mode of information production – “networked information economy”.²

The networked information economy is based on social production which does not rely on proprietary strategies and price systems. Since constraints of physical capital were removed, creative Internet users can produce and exchange information.³ Moreover, under some conditions, nonmarket social production may be even more efficient than market production. Information production has three basic inputs: first, existing information, a public good which cost is zero; second, the declined costs of computers to communicate and process this information in order to produce new information goods; third, “human communicative capacity”. Consequently, the third input is decisive. Certainly, it can be traded on the labor market. However, the market cannot mediate the whole variety of relations through which people exchange experiences,

¹ Y. Benkler, *The Wealth of Networks. How Social production Transforms markets and Freedoms*, Yale University Press 2006, p. 386.

² See note 1, pp. 9 - 22.

³ See note 1, p. 6.

ideas, expressions. Therefore, only social production is the best suited mode to translate social practices into economic terms.⁴

Moreover, the networked information economy is based not only on individual production but also on “peer producing and sharing” practices. Radically decentralized Internet users willing to collaborate and share both inputs and outputs have received an opportunity to produce information in loose cooperation.⁵ This production is not affected by market or managerial considerations. It is organized as a “commons-based social production”⁶.

Since social production is driven by people, its outputs will be more likely interesting and valuable for consumers. In the end, there will be a multitude of niche products instead of several superstar projects which are so typical for market production⁷. New social practices have already led to success in open software development, investigating journalism, multiplayer online games.

However, the new networked information economy is a competitor of the old industrial economy. Conflicts between these modes are especially acute since the contemporary global economy is increasingly information dependent. The main question is who will gain control over the most precious resource in the digital environment, namely information⁸. According to Lawrence Lessig, tightening control over the Internet is an inevitable consequence of this battle. The control can be gained by changing the Internet’s architecture by industrial economy companies⁹. At the same time, according to Jonathan Zittrain, the networked information economy may lose the battle because some Internet users abuse their collaborators’ trust and make harmful inputs into joint production¹⁰.

⁴ Y. Benkler, *The Wealth of Networks. How Social production Transforms markets and Freedoms*, Yale University Press 2006, pp. 52 – 54.

⁵ See note 4, p. 99.

⁶ See note 4, p. 60.

⁷ See note 4, pp. 54, 55.

⁸ About the battle to control information see Y. Benkler, *The Wealth of Networks. How Social production Transforms markets and Freedoms*, Yale University Press 2006 and B. Frischmann, *Infrastructure. Social value of shared resources*, Oxford University Press 2012.

⁹ L. Lessig, *Code version 2.0*, Basic Books, New York 2006, p. 5.

¹⁰ J. Zittrain, *The Future of the Internet – And How to Stop It*, Yale University Press & Penguin UK 2008, p. 99.

Besides supporters, Benkler's idea that the networked social economy is a serious competitor has also critics¹¹. For example, according to Brett Frischmann, the networked social production has potential to compete only in some spheres¹². Nevertheless, Benkler's prediction that winners of the battle will be those who contrive to utilize the potential of the networked social production for its own business models¹³ has turned to be true regarding new Internet media.

A successful example of benefitting from the networked social production is a business model exercised by some Internet news portals. The model as a mix of articles produced under the traditional industrial mode and comments to those articles which are the result of the networked social production by Internet users. For instance, Delfi, the largest portal on the Estonian Internet media market, publishes every day approximately 300 articles which attract 10 000 comments¹⁴. However, Delfi's business model was recently questioned in the case of *Delfi AS v. Estonia* (henceforth *Delfi*) decided by the ECtHR on 16 June 2015¹⁵. It was concluded that an Internet news portal was a publisher of user-generated defamatory comments and therefore liable for defamation.

Thus, on the one hand, the judgment in *Delfi* has clarified the issue of liability for third-party comments which news portals assessed as a "grey area" and, at the same time, as the most important factor for their moderating practices¹⁶. On the other hand, consequences of this judgment are unclear and may be far-reaching. They may affect Internet intermediaries' practices on filtering third-party defamatory content. As noted in *J19 and J20 v. Facebook Ireland*, it is uncertain whether the judgment can be seen as a turning point from which intermediaries can be required to monitor user-generated

¹¹ See N. Carr, Calacanis's Wallet and the Web 2.0 Dream, Rough Type Blog (19 July of 2006) available at <http://www.routhtype.com/?p=466>, assessed on 10 October 2015; R. Tushnet, TPRC on Peer Production: Opening Comment, 43 (B)log (30 September 2006) available at <http://tushnet.blogspot.fi/2006/09/tprc-on-peer-production-opening.html>, accessed on 10.10.2015.

¹² B. Frischmann, Cultural Environmentalism and the Wealth of Networks, 74 University of Chicago Law Review 1083, 2007, pp. 1108 – 1114.

¹³ Y. Benkler, The Wealth of Networks. How Social production Transforms markets and Freedoms, Yale University Press 2006, p. 380.

¹⁴ ECtHR, *Delfi AS v. Estonia*, no 64569/09, Judgment of the Court (First Section) of 10 October 2013, para. 8 and ECtHR, *Delfi AS v. Estonia*, no 64569/09, Judgment of the Court (Grand Chamber) of 16 June 2015, para. 83.

¹⁵ ECtHR, *Delfi AS v. Estonia*, no 64569/09, Judgment of the Court (First Section) of 10 October 2013 and ECtHR, *Delfi AS v. Estonia*, no 64569/09, Judgment of the Court (Grand Chamber) of 16 June 2015.

¹⁶ The World Association of Newspapers (WAN-IFRA), Online comment moderation: emerging best practices, October 2013, pp. 31, 51, available at <http://www.wan-ifra.org/reports/2013/10/04/online-comment-moderation-emerging-best-practices>, accessed on 29.11.2015.

content on a larger scale and apply new tools to combat defamation¹⁷. The CJEU could clarify this issue. However, the court in Luxembourg has not yet considered a case similar to *Delfi*¹⁸.

Furthermore, liability for user-generated comments may force intermediaries to control speech in a more severe manner. Internet news portal may become private censors. Such a consequence raised among Internet communities a deep concern over possible oppressive influence on freedom of expression on the Internet. 69 organisations, connected both to the Internet industry and the protection of human rights, have submitted a letter supporting Delfi's request to the Grand Chamber of the ECtHR to reassess the judgment.¹⁹

The judgment in *Delfi* may also affect the architecture of news portals. If under the pressure of liability news portals have to build new digital walls to guard their websites from defamatory comments, the landscape of the Internet may be changed.

1.2 Research Questions and Limitations

The first research question of this thesis is how a business model employed by Internet news portals can be described. I name this model "Delfian". This model presupposes

¹⁷ High Court of Justice in Northern Ireland, *J19 and J20 v. Facebook Ireland* [2013] NIQB 113, paras. 31, 32.

It should be noted that this concern is mainly based on the opinion that Article 15 of the Directive on Electronic Commerce precludes all intermediaries from general monitoring. If it is so, Delfi has to breach Article 15 and start monitoring all comments to filter out defamatory ones. Nevertheless, I do not agree with this opinion; therefore, I do not discuss it in the thesis. In my view, only those intermediaries which are within the safe harbour of Article 14 of the same directive cannot be required to exercise general monitoring. As Delfi is a publisher or a content service provider of comments rather than a hosting provider, Article 15 does not apply.

¹⁸ On 11 September 2014 the CJEU decided in the case of *Papasavvas* that a publisher of a digital version of a newspaper is liable for defamation contained in a newspaper article (See CJEU, case C-291/13, *Papasavvas* [2014], Judgment of the Court (Seventh Chamber) of 11 September 2014, not yet published). However, this case does not concern the issue of liability for third-party defamatory content.

¹⁹ The letter is available at <http://www.laquadrature.net/en/civil-society-calls-on-the-echrs-grand-chamber-to-overturn-delfi-v-estonia-ruling>, accessed on 18.11.2015.

Among those who signed the letter are ARTICLE 19, Association of American Publishers, Inc, Association of European Journalists, Bloomberg, Center for Democracy and Technology, Dow Jones, Electronic Frontier Finland, European Digital Rights (EDRi), European Information Society Institute (EISi), European Newspaper Publishers' Association (ENPA), Forbes, Google, Inc, Greenpeace, Sanoma Media Netherlands B.V., The New York Times Company.

reactive post-moderation of comments. Therefore, I exclude from the scope of the thesis Internet news portals which exercise the pre-moderation of comments before publishing them on the portal.

The second research question is how the case of *Delfi* can affect the future of Internet news portals employing the Delfian model and based in the EU. This research question is divided into three sub-questions. The first sub-question concerns a first possible future strategy – to move into a country with no liability for user-generated defamatory comments. I will consider two destinations: the USA and Russia. Then, I will discuss the weak point of this strategy, namely a possibility to bring proceedings before British courts. This strategy depends only on a liability regime for third-party defamatory content. All other aspects which should be taken into account before moving business into another state are out of the scope of the analysis. The second sub-question is a second strategy – to change the Delfian model in such a way that a portal owner cannot be deemed to be the publisher of comments. The third sub-question is a third strategy – to change the Delfian model and start filtering comments in accordance with the judgment in *Delfi*.

My hypothesis is that the ECtHR has erroneously concluded that news portal liability for user-generated defamatory comments will not force *Delfi* to change its business model²⁰. In my view, the only way to preserve the Delfian model is to pursue the first strategy and migrate into a state with no-liability regime. Adopting the second and the third strategies will require an Internet news portal to replace the Delfian model with new business models. In comparison with the Delfian model, new business models will restrict freedom of expression in a severe way.

In this thesis I will only discuss liability for defamatory comments. Consequently, liability for other kinds of unlawful speech is out of the scope of my research. By defamation I mean deliberate dissemination of untrue statements which may damage the economic interests of a defamed person.

²⁰ ECtHR, *Delfi AS v. Estonia*, no 64569/09, Judgment of the Court (Grand Chamber) of 16 June 2015, para. 160.

1.3 Methodology and Methods

I will follow the law and technology approach in the vein of ideas developed by Lawrence Lessig²¹, Yochai Benkler²² and Jonathan Zittrain²³.

The first research question will be discussed from the perspective of two theories: the theory of wealth of networks developed by Benkler and the theory of generativity developed by Zittrain. Benkler's theory will be utilized to explain the Delfian model as a mixed model with one part belonging to the industrial information economy and the other part belonging to the networked information economy. Zittrain's theory will allow me to highlight not only benefits of the Delfian model but also its weaknesses. I will demonstrate that the Delfian model has a generative element.

The second research question includes three sub-questions discussing three strategies. The last two strategies will be assessed from two perspectives. Firstly, I will research to what consequences for the Delfian model these strategies can lead. Secondly, I will analyze how changes in the business model can affect Internet users' freedom of expression. The second perspective will be discussed from the position of the concept of collateral censorship.

1.4 Sources and Structure

Sources of the thesis include books and journal articles. The thesis is also based on the analysis of legislature and case law of the EU, the USA, the UK and Russia. Additionally, one Australian and one Canadian case are discussed. Furthermore, sources include materials of the UN, the Council of Europe and the ECtHR's case law.

Although I build on the previous legal theories, it is my own idea to describe the business model utilized by Internet news portals, the Delfian model, from the perspective of Benkler's and Zittrain's theories. Since the whole thesis will be written from this original point of view, there is no previous research from which I can directly find support or counterarguments for my opinion.

²¹ L. Lessig, *Code version 2.0*, Basic Books, New York 2006

²² Y. Benkler, *The Wealth of Networks. How Social production Transforms markets and Freedoms*, Yale University Press 2006.

²³ J. Zittrain, *The Future of the Internet – And How to Stop It*, Yale University Press & Penguin UK 2008.

The structure of the thesis consists of seven chapters. Chapter two describes the Delfian model. Subchapter 2.3 explains the basics of Zittrain's theory of generativity. Chapter three discusses the case of *Delfi*. In the following three chapters I will explore consequences which the case can have on the future of Internet news portals. Chapter four considers the first strategy to move in the USA or Russia. Chapter five researches the second strategy to split up the Delfian model in such a way that the portal cannot be seen as a publisher of comments. Part 5.3.1 explains the concept of collateral censorship. Chapter six discusses the third strategy to comply with the judgment in *Delfi*. Chapter seven contains my conclusions.

2 DELFIAN MODEL

2.1 About the Chapter

Internet news portals can be divided into two groups. The first group includes those portals which actively moderate comments before publishing. This group is outside the scope of the thesis. The second group includes portals which rely on *ex post* moderating. My thesis is focused on the second group. *Ex post* moderating means that all comments which have gone through automatic filtering appear on a portal. After that, a comment can be deleted only as reaction to complaints usually notified through a notice-and-take-down procedure. Alternatively, a comment can be deleted on the portal owner's initiative. Such a model was utilized by Delfi, an Estonian news portal operator, before the case was heard by the ECtHR. Because of the portal's name, the model is called "Delfian" in the thesis.

2.2 Delfian Model from the Perspective of Benkler's Theory

2.2.1 Two parts of the Delfian model

The Delfian model is an example of how the traditional mass media industry benefits from the networked social production. The Delfian model consists of two parts. The first part represents a newspaper but in a digital format. Content is distributed through a chain of Internet access providers instead of distributors selling printed copies. On the portal there are articles written by hired journalists. Articles can be produced in-house or by other content providers. In the latter case the whole article is available through a link to a relevant website. The second part is a comment environment. It is an "environment" rather than a collection of comments because Internet users have an opportunity to reply to a comment and receive an answer from the author or from another user. Thus, besides producing and sharing information, users communicate about it.

The comment environment is a crucial part which turns an Internet newspaper into a news portal. Internet users can post a comment under any article published on the portal. Users can leave their comments either without any registration or after submitting some personal details. Nevertheless, this kind of registration does not require

users to reveal their true identities. Moreover, there is no previous moderation of comments. In principle, post-moderation is possible but it is not active. Although the portal owner keeps to himself a technical possibility to delete any comment, this option is used, if at all, only as a reactive means. A comment can be removed on the portal owner's initiative to combat "bad" code which disturbs the functioning of the comment environment. Besides, a comment can be removed by the portal if a user claims that the comment is insulting and requires the portal owner to delete it. Nevertheless, a comment appears in exactly the same version in which it has been written by its author. However, some restrictions on commenting may be imposed. Firstly, there can be guidelines declaring what kinds of speech are intolerable. Secondly, there can be automatic filters to sort out and block comments which include certain words or spam.

2.2.2 Benefits for the news portal owner. Enhanced efficiency

Comments to an article present an additional entertainment product. It attracts new public; therefore, it allows the portal owner to increase advertisement revenues. Nevertheless, the production of such an important part is purposely assigned to Internet users rather than to professional journalists. Social production is preferred not only because commentators produce content for free. Besides, there are several aspects which make social production more efficient in this case.

First of all, the comment environment is, in my opinion, an example of "commons-based peer production". This term is used by Benkler to describe production based on "peer producing and sharing" practices. Such a situation requires three conditions. First, there are radically decentralized Internet users who want to produce and share information products. Second, these users have some extra time and "communication capacity" which they can devote to social production. Third, users have a platform to collaborate²⁴.

As regards the Delfian model, all these three conditions are present. Readers attracted by an article are willing to converse about an interesting topic. Those readers who have time and courage to see a response to their comments can take part in discussions. By commenting Internet users produce and share information products. All necessary facilities for communicating and producing comments are already at the dispose of

²⁴ Y. Benkler, *The Wealth of Networks. How Social production Transforms markets and Freedoms*, Yale University Press 2006, p. 60.

commentators. The portal owner is interested in the comment environment and provides a platform for it.

However, to gain success, a commons-based peer production project needs two features: “modularity” and “granularity”. Modularity means that a project can be split into smaller elements – modules. Each module is an independent contribution²⁵. It is crucially that a participant can choose what and when he wants to contribute. It guarantees flexibility and freedom which market production cannot offer. Granularity depends on the size of a module. The smaller the size, the more people can participate and find a task which corresponds to their knowledge. Then, such fine-grained contributions are integrated into the whole project.²⁶

The Delfian model satisfies both modularity and granularity requirements. The comment environment consists of comments which are modules of this project. Each comment is independent of others. A commentator himself decides when he has time to write a comment or answer another commentator. Furthermore, a size of a comment, which although depends on a commentator’s choice, is usually quite small and represents a remark. Once appeared, a comment is immediately integrated into conversation.

Another aspect which makes social production more efficient is lower in comparison with market production transaction costs²⁷. If commentators were hired by the portal owner, it would cause two problems.

First, it would not be apparent how to allocate tasks among hired commentators. Should they all comment each article or should certain articles be assigned to certain commentators? If commenting each article were obligatory, it could lead to a large number of dull comments. On the one hand, commentators would be obliged to comment topics about which they have little to say and, on the other hand, commentators would have less time to comment interesting for them articles. Therefore, efficient production would be harmed. If the portal owner chose to assign articles for commenting, it would require knowledge about each commentator’s abilities. Obtaining

²⁵ Although in some projects, as Benkler points out, contributions need to be interdependent. For example, interdependence is necessary for peer-to-peer projects.

²⁶ Y. Benkler, *The Wealth of Networks. How Social production Transforms markets and Freedoms*, Yale University Press 2006, pp. 100, 101.

²⁷ See note 26, p. 106.

such knowledge would lead to considerable transaction costs which, in the end, do not guarantee the absence of erroneous allocation. On the contrary, social production allows a commentator herself to choose which article she is best suited to comment.

Moreover, the social production model exploits peer review practices to polish possible mistakes of self-identification²⁸. For example, Delfi utilizes a practice according to which any user can click a special button to designate a comment as intolerable thereby indicating a poor quality of the comment. Many portals allow readers to evaluate comments. Consequently, comments which have received higher grades can be placed at the top.

Second problem, which might be caused by relying on market production, is a contract which the portal owner would have to sign with a commentator. This again would require considerable transaction costs. In contrast to market, social production functions without formalities.

Thus, both problems can be eliminated if market production is replaced with social production.

Moreover, it would be difficult to price commentators' activity. For example, a price can be set on the basis of how many comments have been written. However, such a pricing system is not adequate because does not evaluate the quality of comments. Social production, which is not based on pricing, is more flexible and allows users to comment as much as they will regardless of the quality of each contribution.

Moreover, social production attracts those commentators who will not produce content under a market model. Such commentators evaluate their contributions as dear for them but undervalued by market. Following the motivation crowding out theory, these people will not sell their contributions at a low price, but they will donate due to social considerations²⁹.

Consequently, social production eliminates not only the pricing problem but also guaranties that more comments will be posted.

²⁸ Y. Benkler, *The Wealth of Networks. How Social production Transforms markets and Freedoms*, Yale University Press 2006, p. 112.

²⁹ See note 28, p. 115.

The last aspect making social production more efficient is a more valuable output. Market production relies on professional journalists who may err as to what content may be interesting for consumers. Commentators will never be mistaken in this regard because they themselves are consumers. Since commentators are closer to the public, comments with all likelihood can be an interesting and valuable product for readers. Moreover, comments can compensate shortsightedness of an article by bringing to the fore questions and opinions which are really burning. Therefore, the comment environment can produce more valuable content and, at the same time, compensate failures of the first part of the Delfian model.

2.2.3 Benefits for commentators and readers. Enhanced freedom of expression

Thus, it is a reasonable choice to exploit social production for generating the comment environment. It ensures that as many commentators as possible are involved. Commentators are attracted by flexibility of cooperation and freedom to comment. They produce a valuable product for free. On the other hand, readers are more satisfied because comments are posted by users who are closer to public than professionals. Social production guarantees lower transaction costs and mechanisms for self-correction. Nevertheless, the Delfian model brings benefits not only to the portal owner. The model enhances Internet users' opportunity to express their opinion.

The freedom of expression is reinforced in comparison with market production. Since there is no need to set up a firm to produce information goods, any Internet user can in a moment turn into a commentator and start producing information. An Internet news portal offers users a ready-made platform for discussion on which Internet users can debate about articles or any other topics of their own choice³⁰.

Furthermore, a commentator can produce independently of mass media model. She needs no permission or contract to place her content onto the portal. In comparison with letters to editor, which can be published only after verification, editing and approving, comments become publicly accessible immediately after typing. The author herself decides whether or not her comment worth publishing. There is no gatekeeper between

³⁰ It should be noted that many news portals, including Delfi, prohibit off-topic commenting. Nevertheless, there is no means to prevent it in practice. Moreover, if an off-topic comment triggers a valuable discussion, the portal owner may be even interested in it because new topics for future articles can be revealed.

her and the public. At the same time, a commentator avails herself of the market production part of the Delfian model. She receives news article to comment and public attracted by those articles to read her comments.

Readers also benefit from the Delfian model. A traditional mass media model has only one channel through which information generated by media is received by consumers. The mass media owner decides what kind of information and from what perspective is to be formed into an article. Then, this ready-made information product is distributed to readers. Adding a comment environment allows readers to familiarize themselves with alternative points of view. Consequently, an article on the news portal is not a finished product. By reading both parts, the official position presented in an article and informal opinion offered by commentators, readers have more chances to perceive the situation multilaterally. By supporting or disagreeing with comments, readers naturally come to a point where they have to frame their own position.

Thus, the Delfian model allows Internet users to change their attitude to information from passive consumers to active participants. Some users become commentators who even produce information products. Other users remain readers but with a more deliberate and independent position. At the same time, the news portal owner receives more efficient production of information. Consequently, the Delfian model is beneficial both from the portal owner's and Internet users' perspectives.

2.2.4 Control over the comment environment

However, the mutually beneficial coexisting of the two parts may be not always peaceful. A conflict may arise around the portal owner's efforts to control the comment environment. The portal owner has to keep a technical control in order to guarantee efficient production. This production can be damaged both from outside and inside. Outside forces may be interested in exploiting the comment environment to draw attention to their own products. The portal owner has to monitor the environment and delete spam and unauthorized advertisements. From inside the comment environment may be damaged by commentators who post unlawful content, including defamatory comments. Following a court decision, the portal owner can be obliged to delete the content in question. Taking this possibility into consideration, the owner has to keep control over any comment. At the same time, giving control to commentators is

dangerous for the Delfian model. Commentators' ability to delete their comments can deplete the comment environment and endanger production. Therefore, the technical architecture of the Delfian model is shaped in such a way as to empower only the portal owner to delete any content in the comment environment and, at the same time, to prevent commentators from exercising any control over posted comments.

Nevertheless, the portal owner's control is not unlimited. Even if the environment cannot be reconfigured at the technical level to return control over comments to their authors, the portal owner's power can be circumvented at the content layer. Harmful content will appear again and again because of a generative nature of the Internet. The theory of generativity is explained in the next subchapter. Then, the theory is applied to the Delfian model.

2.3 Zittrain's Theory of Generativity

2.3.1 Hourglass architecture and the notion of generativity

The theory of generativity created by Jonathan Zittrain³¹ offers an explanation why the Internet has become so successful. The Internet architecture is represented as an hourglass model. The physical layer is laid at the foot of the hourglass. The application layer crowns the model³². The protocol layer is in the middle. The framers of Internet Protocols left it up to all interested parties to fill the bottom and the top. In principle, anyone can add to physical layer his own wire or wireless infrastructure or add to the application layer her own code. What exactly will be added is unpredictable. The same hourglass model can be applied to the personal computer architecture. Operation systems which are in the middle have been left by their designers unfinished so that any hardware or a third-party code can be added. Although Apple requires its own hardware to be at the bottom, this solution is an exception.³³

³¹ See J. Zittrain, *The Future of the Internet – And How to Stop It*, Yale University Press & Penguin UK 2008.

The author highlights that the concept of generativity is closely related to other notions. Moreover, it is partly built upon them. The "cousins" of the theory of generativity are the free software approach, the affordance theory, theories of the commons.

³² Zittrain identifies also content and social levels on the top of the application level.

³³ See note 31, pp. 69, 70.

Such an hourglass architecture encourages an “unanticipated change through unfiltered contributions from broad and varied audience”³⁴. This quality is named “generativity”. Both the Internet and connected to it personal computers are generative and form a generative network. Moreover, the notion of generativity includes also a social dimension because it describes how users interact with the network and with each other. In order that a generative ecosystem appears, users must be active contributors rather than passive consumers. Since the generative system offers more personal freedom to anyone to improve the existing content and to add her own, it represents an open platform for innovation³⁵.

2.3.2 The Internet and proprietary networks

This generative nature has allowed the Internet to become a dominant network. Its early competitors, such as America Online, Prodigy and CompuServe, lost due to their closed nature. Such closed networks provided their subscriber with a certain set of services. All content originated from one source – the owner itself or providers which had a contract with the owner. Subscribers were passive users and in no way programmers. They could exchange messages with other subscribers and play simple collective games. However, they could not establish their own forums and had to participate only in those discussions which were proposed by the owner. Subscribers could not upload an application or modify the network design. A third party’s contribution to the development of the network was allowed only after receiving the network owner’s permission.

Thus, such proprietary networks, as walled gardens, were perfectly protected from harmful code; therefore, they were more attractive from the point of security. However, the rejection of a free inflow of innovation made the development of this closed model too slow³⁶. The Internet with its open endpoint structure allowing any user, an amateur or an entrepreneur, to contribute to its development soon left closed networks far behind.

³⁴ J. Zittrain, *The Future of the Internet – And How to Stop It*, Yale University Press & Penguin UK 2008, p. 70.

³⁵ See note 34, pp. 70, 71.

³⁶ For example, from 1984 to 1994 CompuServe’s number of subscribers grew from 100 000 to 2 000 000, but the set of services offered remained almost the same. (See Amy Harmon, *Loyal Subscribers of CompuServe Are Fearing a Culture Clash in Its Takeover*, N.Y.Times, Feb. 16, 1998, at D8).

2.3.3 Two principles of Internet ideology

A new Internet ideology is grounded on two main principles: the “procrastination principle” and “trust-your-neighbour approach”³⁷. According to the first principle, users at any layer of the network architecture should and can solve arising problems by themselves. It means that, for example, a software provider can add its product to the net and do not worry about possible conflicts with other soft- or hardware. Users will take such a conflict as an everyday challenge and find ways to surmount the problem. This overcoming represents a step in the Internet evolution. The trust-your-neighbour approach presupposes that users will not intentionally demolish the network. Consequently, anonymous using is intrinsic to the Internet framework. Thus, through the lenses of the Internet ideology, users are seen as active participants interested in contributing to the network development.³⁸

Moreover, users contribute to their development as human beings as well. The enhanced freedom to express oneself is rooted in generativity which has at the center the freedom to experiment with a new code³⁹.

2.3.4 A generative network and a walled garden

This ideology is natural to a research cooperation through which the Internet was created. However, the ever-growing use of the Internet and its commercialization has revealed the vulnerability of the Internet and has rendered the idea of mutual trust if not damaging but at least naïve. The Internet is open for all innovations either contributing to its proliferation or parasitizing on it, or even undermining its functionality. Viruses, spyware, spam is that part of the Internet environment that users would prefer to exclude. However, antivirus software is unable to protect the network as long as users themselves allow a code from an unproven source to be installed on their computers.

This dilemma may be decisive if at some moment the demand for secure environment prevails over the desire for freedom. This change will satisfy the interests of both Internet service providers, which need a more stable and predictable environment, and

³⁷ J. Zittrain, *The Future of the Internet – And How to Stop It*, Yale University Press & Penguin UK 2008, p. 31.

³⁸ See note 37, pp. 31, 32.

³⁹ See note 37, p 168.

regulators, which need more control and surveillance⁴⁰. Therefore, some lock down of the Internet may become inevitable. It can give a chance to the old model of closed networks to regain its popularity. Users may chose to become again passive consumers shielded from “bad” code in a walled garden.

The main negative aspect of such a change is that walls will filter out not only bad but also good code from unprivileged sources. Such a situation is acceptable from the perspective of the end neutrality theory. In the middle the network can still stay neutral and allow any piece of information travel among endpoints. However, if at these endpoints users’ computers do not open the door, preserving neutrality becomes meaningless⁴¹.

2.3.5 Generative pattern and the paradox of generativity

Generative systems are powerful and weak at the same time. Benefits and dangers can be seen in a “generative pattern” which includes six stages. First, an idea is generated outside the system. Second, the idea, which is still incomplete, moves between the layers of the hourglass model in order to receive its flaws fixed by other users. Third, since anyone can contribute and adapt the idea to his own needs, the “influx of usage” nourishes the system. Fourth, the idea receives an unexpected success, which means that an unpredictable change in the system has happened. Fifth, the successive usage is losing its dynamic because the popularity of the idea has attracted users willing to parasitize on it. The openness of the system leads to security problems. Sixth, this undesirable usage triggers an “enclosure movement”. Thus, we witness the paradox of generativity⁴².

The paradox leads to a situation where the very generativity which made the Internet so successful forces it to stumble. On the one hand, the openness of the Internet makes it vulnerable to misuse. On the other hand, a focus on security hampers the development of the Internet.

⁴⁰ J. Zittrain, *The Future of the Internet – And How to Stop It*, Yale University Press & Penguin UK 2008, p. 4.

⁴¹ See note 40, p. 165.

⁴² See note 40, p. 99.

2.3.6 Dangers of losing generativity

Therefore, it is likely that there will be a return to the closed sterile model without generative potential but, at the same time, without security problems. Possible solutions such as tethered appliances, software as a service and closed proprietary networks may be a sound choice when they exist in parallel with generative personal computers and the Internet⁴³. However, a mass movement away from generativity may change the whole information environment. Locking down the Internet will make it more vulnerable to regulation. However, it may lead to overreactions and control abuses from the side of regulators. The loss of generativity – a weapon against control – will make us unprotected.

At the same time, the rescue of generativity, which is both powerful and fragile, is a perplexed task. On the one hand, some intervention is needed to combat harmful code. On the other hand, it leads to the intensification of control over the network which was initially designed to resist such control. Consequently, tightening the screw may lead to the dawn of a generative network⁴⁴.

2.4 Delfian Model from the Perspective of Zittrain's Theory

2.4.1 Five features of the comment environment as a generative system

According to Zittrain, a generative system has five characteristics, namely “leverage”, “adaptability”, “ease of mastery”, “accessibility”, “transferability”. These characteristics can have different degrees of generativity. Nevertheless, the more generative these five

⁴³ Zittrain's prediction about the lock down of the Internet has been criticized for “hyper techno-pessimism” (See Adam Thiere's posting to PFFBlog, Oh Farts! The Droid, the iPhone & the Lessig-Zittrain Thesis, 12.11.2009 available at http://blog.pff.org/archives/2009/11/oh_farts_the_droid_the_iphone_the_lessig-zittrain.html, accessed on 20.11.2015).

Moreover, according to D. Post, A. Murray, B. Frischmann, locking down the Internet due to the loss of generativity only one of possible scenarios. Coexisting with walled gardens may be even beneficial because it gives Internet users several options to choose. Some may prefer walled gardens. (See D. Post, The Theory of Generativity, Fordham Law Review, Volume 78, Issue 6, Article 2, 2010, pp. 2762-2763; B. Frischmann, Avoiding a Cliff Dive, Science, 25.08.2008, Vol. 321, Issue 5888, p. 491; A. Murray, Information Technology Law. The Law and Society (Second edition, OUP 2013), p. 576).

⁴⁴ J. Zittrain, The Future of the Internet – And How to Stop It, Yale University Press & Penguin UK 2008, p. 35.

features are, the more extensive audience can make unfiltered contribution, which, in its turn, leads to a more anticipated change.⁴⁵

The first feature is leverage. A system is generative if it allows users to benefit from imbedded technologies⁴⁶. The comment environment is highly leveraging. One the one hand, it vastly enhances opportunities to write comments in comparison with traditional mass media model. In order to get his comment published in a newspaper, a reader has to spend time, money and efforts to write a letter to an editor, to send the letter, and then to wait until the letter is gone though editorial control mechanisms, approved and published, if it is published at all. A letter which consists of a few sentences or even of one word is unlikely to be written or, even if written, is unlikely to be published. In the Delfian model's comment environment every comment can be instantly published without difficulty. On the other hand, the comment environment even more leveraging than another model of social production, namely blogs. If, having read a news article, an Internet user wants to express his opinion on the topic and chooses to do so through a blog, he has to undertake troubles to find a suitable hosting service and software, to set up a blog and define its design. Even if he finds a platform which offers free of charge services and predetermined design solutions, he cannot be sure that his blog will be read by anyone. On the contrary, commenting on a news portal guarantees that his comment will attract attention because the public interested in the same topic is already present and looks through all comments to the article.

The second feature is adaptability. The more additional functions besides the main task a system can offer to users, the more generative such a system is. The main task of the comment environment is to comment articles form the first part of the Delfian model. Nevertheless, nothing prevents commentators to discuss any topic of their own choice⁴⁷. Moreover, the comment environment may be used for other purposes. For example, it can be a virtual place for meeting friends and talking about news known only among them. The comment environment may be a notice board to place, for example, information about selling a car. Comments can be used to find likeminded people who may become even friends, virtual or real. Although there are platforms better suited for

⁴⁵ J. Zittrain, *The Future of the Internet – And How to Stop It*, Yale University Press & Penguin UK 2008, pp. 71 -74.

⁴⁶ Leverage is a feature attributable also to non-generative systems. Zittrain provides examples with a range from a sheet of paper which is used to put and preserve a text to an airplane which is used as a speedy means to move to a remote point (See note 45, p. 71).

⁴⁷ See note 30 on p. 11.

these tasks, the comment environment can be assessed as adaptable. Furthermore, the comment environment can be adapted for “bad code” purposes. It can be filled with advertisements, spam, links to other sites, including sites with malware. It can be filled with “bad content” such as defamatory comments, hate speech, threats. Automatic filters which can be employed by the portal owner to prevent such content can be easily circumvented. For example, to deceive a filter banning comments which include words with certain stems from a list, commentators change the order of letters or miss one letter so that a word in the end does not match anything in the list but still looks recognizable⁴⁸.

The third feature of generative systems is ease of mastery. The more users with average skills can use a system, the more generative the system is. Using the comment environment does not require special skills. It is shaped by the portal owner in the most convenient and understandable way so that a broad public can participate in information production. Although using the comment environment for “bad” purposes, for example for spam, can demand additional knowledge, commentators do not need to create “burglary” tools by themselves since such tools are already available and many of them are free of charge and simple in exploitation. Therefore, the comment environment is easy to use.

The fourth feature is accessibility. The more users can access the system, the more generative it is. The Delfian model does not require subscription or a payment for access. Since any access restriction may impair social production of information products, the Delfian model is open for access. Moreover, even if a certain commentator is prohibited from access, such a ban can be easily circumvented. If the ban is based on a commentator’s name, which is usually a pseudonym, the access to the comment environment will be reopened as soon as the name has been changed. If the ban is based on a computer IP number, the user can comment again from another computer. Consequently, the comment environment is highly accessible.

The fifth feature is transferability. Zittrain explains this characteristic as a system’s ability to transfer changes generated by users of technology to other users. The easier ways by which other users can obtain and exploit such changes are, the more generative

⁴⁸ The World Association of Newspapers (WAN-IFRA), Online comment moderation: emerging best practices, October 2013, p. 12, available at <http://www.wan-ifra.org/reports/2013/10/04/online-comment-moderation-emerging-best-practices>, accessed on 29.11.2015.

the system is⁴⁹. The comment environment's technology is a technology of writing. The technology's code is to experiment with is a word. As soon as a new word has appeared in someone's comment, other commentators can see and use it in their own postings. Such a word can be from a professional or teenagers' slang, can be invented by a commentator, can be a result of an accidental mistake or purposely written in a wrong way. Regardless of the origin, if a new word is interesting, other commentators adopt it and start using. Thus, a new practice appears, spreads and can be used further to build on. From this perspective, the comment environment is highly transferable.

Thus, the comment environment possesses all five features; therefore, it is a generative system. It allows a broad audience to make unfiltered contributions, which, in turn, generates unpredictable changes in practices of commenting. The most popular practices receive a long life in the comment environment and contribute to its further development.

2.4.2 Strength and benefits of the comment environment as a generative system

According to Zittrain, the main strength of a generative system is that it offers an environment encouraging change⁵⁰. From the inside perspective, change may be positive or negative. A virus disrupting the operation of a network is a negative change. A new useful application is a positive change⁵¹. The comment environment can also assist such changes. A comment which triggers a sound discussion is an example of a positive change. A comment which insults or mocking participants of the discussion and, in the end, deadens it is an example of a negative change. From the outside perspective, a change can also be positive or negative. A peer-to-peer file sharing program can be assessed by copyright holders as a negative change. A program developed to circumvent Internet censorship set by an authoritarian regime can be seen as a positive change⁵². As regards the comment environment, comments can lead to a negative outside change if they, for example, highlight a poor quality of an article. Then the author of the article, despite of being a professional and experienced journalist, may lose his job because he is not popular with commentators. Nevertheless, this change may turn to be positive if the reason of commentators' anger is a fabrication in the

⁴⁹ J. Zittrain, *The Future of the Internet – And How to Stop It*, Yale University Press & Penguin UK 2008, p. 73.

⁵⁰ See note 49, p. 79.

⁵¹ See note 49, p. 80.

⁵² See note 51.

article. Thus, the comment environment can assist change both from the inside and outside perspective and therefore possesses the main strength of a generative system.

Besides encouraging change, a generative system provides two main benefits. The first benefit is an innovative output in the result of an unexpected change. The second one is a participatory input of a large number of active users⁵³.

Non-generative systems can produce only incremental innovations⁵⁴. They are concentrated on constant improving existing services and adjusting them to consumers' needs. However, non-generative systems are unable to offer a breakthrough product, a disruptive innovation. The main reason is the rejection of outside contributions. From this point of view, the first part of the Delfian model is non-generative. Even if the style of articles can be constantly improved, it has to remain within settled borders. Journalists are expected to follow certain rules prescribed both by law and professional ethic.

On the contrary, commentators are not limited by considerations of a future journalistic career. They are not professionals; therefore, their way of thinking and expressing has not been affected by standards of the journalistic branch. Besides non-standardized practices, commentators have access to different sources of information in comparison with journalists. Moreover, a comment to an article is a product of the networked social economy where it is natural to ask and receive help from a neighbour. There is no market competition and secretly kept know-how. Any contribution is welcomed. Therefore, the comment environment can produce a product which will never appear in a newspaper.

Furthermore, commentators as part of the public possess perfect knowledge on what information is interesting for readers. Therefore, the comment environment can produce a product which may be more valuable for readers than articles on the news portal. Readers can move from the title of an article directly to comments to it because readers may be more interested in their neighbours' opinion than in the news portal's official position. Consequently, comments can have a disruptive innovative potential. Thus, the

⁵³ J. Zittrain, *The Future of the Internet – And How to Stop It*, Yale University Press & Penguin UK 2008, p. 80.

⁵⁴ See note 53.

comment environment is a generative system because it can produce the first benefit, namely an innovative output.

The second benefit, a participatory input, means that a generative system offers an opportunity to be in contact with other people, to cooperate with them and to develop themselves as creative individuals. The main point which makes this participation attractive for a user is that she can do it on her own terms. A mere existence of several prescribed ways of participation (leverage) is not enough to make a system generative. These ways need to be adaptable and accessible⁵⁵. It is possible only if a system has a polyarchical structure in which there is no gatekeeper and no prescribed rules. This structure does not filter out contributions on the basis of its quality, which allows everyone to participate and develop her own idea independently or in cooperation⁵⁶. This participation occurs in two steps: first, a user makes her contribution; second, other users build on her contribution. Then, this joint product becomes part of the user community. Owing to multiple acts of such participation, the community evolves and reinforces itself⁵⁷.

The second benefit is intrinsic to the comment environment because it is based on two underlying principles of the Internet ideology. According to the procrastination principle, the environment is kept open and there is no attempt to delete a comment until a problem appears. According to the trust-your-neighbour principle, Internet users themselves reveal “bad” content. For example, any user of Delfi can press a button to attract attention to a defamatory comment. Furthermore, there is always an option to contact the portal owner and require him to block certain content. Moreover, an offended person may prefer not to claim protection and tolerate defamation. Since there is no need to check every comment at the entrance door, a broader inflow of comments penetrates into the comment environment.

The Delfian model invites anyone to become a participant of the commentator community. A commentator himself decides how and when he contributes to discussions. Guidelines offered by the portal owner are voluntary to comply with. Even if a user is required to indicate that she has read the guidelines and agreed with them,

⁵⁵ J. Zittrain, *The Future of the Internet – And How to Stop It*, Yale University Press & Penguin UK 2008, p. 93.

⁵⁶ See note 55.

⁵⁷ See note 55, p. 90.

there is no practical means to secure the fulfillment of these rules. Furthermore, a filter preventing comments with obscene words can be easily circumvented; therefore, its effect on the comment environment can be neglected. Besides, there is no rule defining intercourse among commentators. A commentator may prefer to post a comment and stop. He may launch into already existing discussions and exchange remarks or may initiate a new discourse. He may also find companions to set their own rules regarding a way to produce comments. For example, they can agree that each posts only one word then another proceeds by also posting one word. Commentators can adapt already-known practices or invent new. Furthermore, production is protected because commentators cannot delete or edit other's contributions. Once a comment has been posted, it can be used by others not only to criticize or praise but also as a building block of their own comments. By building on previous comments, discussions evolve and produce new information products. Since there is no obligatory rule and no gatekeeper, the comment environment has a polyarchical structure. The comment environment evolution is driven by an unfiltered inflow of comments from a broad public which builds on previous comments. Therefore, the comment environment has the second benefit of a generative system, namely a participatory input.

A separate issue worth mentioning is a role of a person empowered by the portal owner to delete comments if necessary. Such a person is perceived by commentators as an external force. She does not participate in social production and does not belong to the community. She is from the upper part of the Delfian model. Her interferences usually assessed by commentators as hostile and damaging. Nevertheless, interfering is inevitable and triggered by commentators' misconduct.

2.4.3 The comment environment and the paradox of generativity

The comment environment as a generative system suffers from the paradox of generativity. The paradox is reinforced by the owner's attempts to preserve control and commentators struggles against it. On the one hand, openness to any contribution including harmful content makes the comment environment too vulnerable to be left without control. Overwhelming the comment environment with spam, annoying advertisement, lies and hate speech can scare away commentators and readers. It can damage social production and the whole Delfian model. On the other hand, too intense control also hampers social production. Commentators need freedom to produce

efficiently. Readers need to be sure that the comment environment produces an alternative opinion and does not represent a mere extension to an article. Therefore, both absence of control and its presence are disadvantageous to the Delfian model. However, a right balance has to be found.

In summary, the Delfian model represents a mixed model which combines articles, a part from the industrial economy model, and a comment environment, a part from the new networked information economy. This mixture guarantees more efficient production. The theory of generativity provides grounds to differentiate the Delfian model from news portals which exercise pre-moderation of comments. These portals can be seen as walled gardens with a perfectly secured from defamatory content but non-generative comment environment. On the contrary, the Delfian model's comment environment is generative and therefore can evolve and produce innovative information products. At the same time, it is unprotected from defamatory comments. Overwhelming with defamation may trigger an enclosure movement and force the portal owner to turn a generative comment environment into a walled garden. However, this transformation can happen irrespective of the portal owner's plans but due to a regulator's or a court's decision. The decision of the ECtHR in the case of *Delfi*, which is discussed in the following chapter, is an example of how a court decision can lead to the extinction of the Delfian model.

3 CASE OF DELFI AS V. ESTONIA

3.1 About the Chapter

This chapter is not intended to give a full report on this case. I will discuss the case from the perspective of possible effects on the Delfian model. The Court has not analyzed Delfi's business model but has concluded that the portal is not forced to change it. My supposition is opposite and will be developed in the following subchapters.

3.2 Facts and Legal Basis of the Case

3.2.1 How Delfi controlled the comment environment

The Delfian model is beneficial both for economic efficiency and freedom of expression. However, the comment environment's generativity makes the model open to defamatory comments. Defamation represents a serious danger to the functioning of the model because defamatory comments can discourage commentators from participating in social production. Without being able to distinguish truthful comments from defamatory ones, commentators may start building on unlawful content, which undermines the value of downstream production. Moreover, although commentators can leave defamatory inputs outside social production, these comments remain still visible and can cause readers to switch to another news portal with a sterile comment environment.

Besides, a defamatory comment can lead to significant costs for the portal owner if a defamed person chooses to bring legal proceedings not against the author of a comment but against the portal. This scenario is possible in two situations. First, the portal owner is a publisher of third-party defamatory comments and therefore directly liable for content published on its website. This rule is traditionally applied to print media. Second, a portal owner is not a traditional publisher rather an intermediary which can avail itself of a safe harbour limiting Internet service providers' responsibility. In the second case the portal owner becomes liable only under certain conditions.

This safe harbour is based on two main principles. According to the first principle, an intermediary is not liable if its role is limited to hosting information generated by a third

party.⁵⁸ This activity should be of “a mere technical, automatic and passive nature”, which presupposes that an intermediary has “neither knowledge of nor control over” such information.⁵⁹ The requirement of the absence of control is especially important. As stated in Article 14.2 of the Directive on Electronic Commerce⁶⁰, an intermediary providing a hosting service is not liable only if a user of its service is not “acting under the authority or the control” of the intermediary. Provided that there is no control, an intermediary is not liable if stated in Article 14.1 of the Directive on Electronic Commerce two conditions are satisfied. These two conditions are as follows:

(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

*(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.*⁶¹

As clarified by the CJEU in *L'Oréal and Others*, an intermediary is liable if as a “diligent economic operator” it should have received awareness of the unlawful nature of information.⁶²

⁵⁸ See Council of Europe, Declaration on freedom of communication on the Internet of the Committee of Ministers of the Council of Europe, adopted at the 840th meeting of the Ministers' Deputies on 28 May 2003, Principle 6 and Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), Recital 42, Articles 12 – 14, OJ L 178 17.07.2000, pp. 0001 - 0016.

⁵⁹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), Recital 42, OJ L 178 17.17.2000, pp. 0001 – 0016.

⁶⁰ See note 59, Article 14.

⁶¹ The EU's position coincides with the Council of Europe's position that in case where the role of an intermediary is not limited to hosting of third-party content, an intermediary can be found liable along with the author of content if conditions similar to those indicated in Article 14.1 (a) and (b) of the EU's Directive have been broken. See Declaration on freedom of communication on the Internet of the Committee of Ministers of the Council of Europe, adopted at the 840th meeting of the Ministers' Deputies on 28 May 2003, Principle 6:

[...] In cases where the functions of service providers are wider and they store content emanating from other parties, member states may hold them co-responsible if they do not act expeditiously to remove or disable access to information or services as soon as they become aware, as defined by national law, of their illegal nature or, in the event of a claim for damages, of facts or circumstances revealing the illegality of the activity or information [...]

⁶² CJEU, Case C-324/09, *L'Oréal and Others* [2011], Judgment of the Court (Grand Chamber) of 12 July 2011, ECR I-0611, para. 120.

According to the second principle, an intermediary providing a hosting service cannot be obliged to monitor all content hosted. Furthermore, it cannot be required to “actively seek facts or circumstances indicating illegal activity”⁶³.

Delfi supposed that it only hosted comments and therefore could rely on the safe harbour⁶⁴. Consequently, after balancing conflicting interests of commentators, readers and injured persons with own benefits from enhanced efficiency, the portal introduced a certain control mechanism to combat defamatory comments. First, rules of commenting prohibited to post comments with threats, obscene expressions, insulting statements, and comments which incite unlawful acts. Second, an automatic filter was employed to delete those comments which contained words with stems from a list of obscene words. Third, the generative nature of the comment environment allowed the portal to recruit Internet users for stopping defamation. Following the trust-your-neighbour approach and the procrastination principle, a comment which appeared despite the portal owner’s barriers became problematic only if Internet users assessed it as intolerable and chose to solve the problem of “bad” code by pushing a special button to mark a comment and thereby attract to the comment a portal moderator’s attention. Additionally, Internet users could send a notice about an intolerable comment to the portal owner⁶⁵.

This mechanism allowed the portal owner to keep a fragile balance between freedom for social production and necessary interventions into commenting to cut off defamatory content. Therefore, enhanced efficiency could be preserved. At the same time, the mechanism was constructed to satisfy the requirements of Article 14 and keep the portal within the safe harbour. Delfi did not review comments before publishing on the website; therefore Delfi expected that it would allow the portal to claim that it was unaware until receiving a notice. Consequently, a prompt removing of a notified comment should guarantee that Delfi was not liable for user-generated defamation.

However, Delfi’s expectations turned to be wrong. On the one hand, commentators ignored the rules of commenting and posted defamatory comments. On the other hand,

⁶³ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), Article 15.1, OJ L 178 17.07.2000, pp. 0001 - 0016, and Council of Europe, Declaration on freedom of communication on the Internet of the Committee of Ministers of the Council of Europe, adopted at the 840th meeting of the Ministers’ Deputies on 28 May 2003, Principle 6.

⁶⁴ ECtHR, *Delfi AS v. Estonia*, no 64569/09, Judgment of the Court (First Section) of 10 October 2013, paras. 53, 56 – 58.

⁶⁵ See note 64, para. 10.

Internet users chose not to mark these comments; consequently, defamation remained unnoticed by the portal until an injured person sent a relevant letter. Although the defamatory comments were at once removed, subsequent proceedings demonstrated that it was not sufficient to escape liability.

3.2.2 Domestic proceedings

On 24 January 2006 Delfi published an article under the title “SLK [Saaremaa Shipping Company] Destroyed Planned Ice Road”. The article reported that it had become impossible to get to some islands because ice roads had been smashed by the ferries of the shipping company.⁶⁶

Among 185 comments posted to the article there were 20 comments which the company owner evaluated as defamatory. On 9 March 2006 Delfi received a letter from the company owner who required the portal to delete the comments. On the same day the comments were deleted. Nevertheless, Delfi refused to pay non-pecuniary damages, approximately EUR 32 000⁶⁷. Consequently, Delfi faced civil proceedings.

At first, an Estonian court decided in favor of Delfi. It was found that the comment environment was a separate part of the portal and should not be confused with Delfi’s journalistic activity. Since Delfi played a passive, neutral role regarding the comments, it could not be found to be a publisher. However, this decision was appealed; and the further proceedings Delfi lost.

The main reason of losing was control over comments which Delfi preserved for itself. Empowering commentators to delete their inputs into social production would undermine the functioning of the Delfian model. Therefore, the portal architecture was designed to keep control over comments only for the portal owner. Yet, at the same time, such control presupposes some degree of active involvement into the process of production. Consequently, Delfi overstepped a line separating a passive intermediary and a content provider.

This peculiarity was noticed in the further proceedings and led to the conclusion that providing a platform for a comment environment was a journalistic activity. Delfi was

⁶⁶ ECtHR, *Delfi AS v. Estonia*, no 64569/09, Judgment of the Court (First Section) of 10 October 2013, paras. 7, 8, 12.

⁶⁷ See note 66, paras. 14, 15.

deemed to be a content service provider rather than a technical intermediary⁶⁸. Delfi's control over the comment environment was found to be present because of two facts: first, Delfi had introduced rules of commenting and, second, only Delfi could delete comments. Therefore, Delfi was regarded as a publisher of the comments along with their actual authors. Moreover, it was highlighted that revenues from advertising which depended on the number of comments posed Delfi in a position similar to the publisher of a traditional print media which had to edit content before publication in order to prevent defamation. Thus, Delfi was found liable for the defamatory comments. Nevertheless, the sum of compensation was limited from EUR 32 000 to 320.⁶⁹

3.2.3 Issues of Internet media and private censorship

On 4 December 2009 Delfi lodged proceedings before the European Court of Human Rights (henceforth the Court). According to Delfi's view, Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (henceforth the Convention)⁷⁰ was broken because the portal had been found liable as a publisher for third-party comments. Delfi insists that it only hosts comments and therefore should be regarded as a passive, technical intermediary⁷¹.

Besides the question whether Delfi is a publisher, the Court has brought to the fore two additional issues: whether Delfi should be treated differently in comparison with print media and whether Delfi's liability may lead to private censorship.

⁶⁸ While an intermediary does not possess knowledge about the nature of content hosted and does not have control over it, a content provider has an active position because it not only invites Internet users to post content but also controls this content.

⁶⁹ ECtHR, *Delfi AS v. Estonia*, no 64569/09, Judgment of the Court (First Section) of 10 October 2013, paras. 17 – 29.

⁷⁰ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5. Article 10 of the Convention reads as follows:

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.

⁷¹ See note 69, para. 56.

The UN's materials taken by the Court into account emphasize that new Internet media are in principle different from traditional print media and therefore should not be subject to the same regulations. Interactivity of online media allows an immediate response to defamatory content, which may directly disprove defamation and re-establish the reputation of an injured person.⁷²

In the Delfian model an injured person can disarm a defamatory comment by posting her comment as an answer to it or by arguing with other participants of the comment environment. An injured person can also post a link to materials supporting her position or ask others for help. Thus, in comparison with print media, reputation can be protected more effectively because there is no need for an intermediary's involvement and no need to wait a considerable time for a response to be published.

Furthermore, the UN's materials emphasize that forcing or empowering a private intermediary to censor should be precluded. Moreover, only the author of an unlawful material should be liable for it.⁷³ However, an intermediary can be deemed liable if it has treated content as its own or if an intermediary regardless of a court injunction has not deleted the content.⁷⁴

Since Delfi deleted the defamatory comments following the injured person's request, there is no doubt that Delfi would remove a comment following a relevant court order. However, one reason precludes me from saying that according to the UN's approach Delfi is not liable for defamatory comments. The reason is that it is unclear whether the portal owner treats comments as his own content. Certainly, Internet users realize that comments are not generated by the upper part of the Delfian model. Users do not perceive the portal owner as a speaker. Nevertheless, the portal owner's exclusive power to delete any comment may be seen as editorial control over third-party speech and therefore may give ground to claim that equally to traditional publishers a portal publisher stands in an original speaker's shoes and treats comments as its own content.

⁷² UN Human Rights Council's Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Report of 16 May 2011 to the Human Rights Council (A/HRC/17/27), para. 27.

⁷³ See note 72, para. 43.

⁷⁴ UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, the Joint Declaration adopted on 21 December 2005.

The Council's of Europe materials also address the problem of private censorship and differences between traditional and new Internet media although in a more moderate tone than the UN's approach.

Regarding private censorship, it is noted that a certain "risk" of private censorship does exist.⁷⁵ However, this risk is acknowledged only for a model such as Facebook where an intermediary provides a platform for which it does not have an editorial responsibility. Therefore, a Facebook model cannot be regarded as equal to media at all.⁷⁶ Concerning Internet media, it is recommended to "extend" to them all necessary legal instruments to ensure that freedom of expression is protected and, at the same time, "undue self-restraint and self-censorship" is prevented.⁷⁷

Thus, it appears that private censorship exercised by Internet media, as well as by traditional media, is deemed to be a problem only if censorship has become too severe. Moreover, the recommendation to "extend" traditional rules to new Internet media demonstrates that these two media models are seen as similar rather than different.

Regarding traditional and Internet media, the Council's of Europe materials declare that restrictions on Internet media should not be stricter than on print media⁷⁸. It is recommended to create a new broad definition of media which should include all new forms of Internet media. The common characteristic feature of such media is that they have an editorial control over content. Nevertheless, it is acknowledged that there can be some differences between forms of Internet media, which requires a "differentiated and graduated" approach to their responsibilities⁷⁹.

Thus, the stress is laid on possible differences between various Internet media while differences between Internet and traditional print media appear to be insignificant. Following the Council of Europe's approach, a portal owner exercising editorial control should be held liable for third-party defamatory comments.

⁷⁵ Council of Europe, Recommendation CM/Rec(2011)7 of the Committee of Ministers to member States On a new notion of media, adopted on 21 September 2011, Appendix, para. 63.

⁷⁶ See note 75, para. 36.

⁷⁷ See note 75.

⁷⁸ Council of Europe, Declaration on freedom of communication on the Internet of the Committee of Ministers of the Council of Europe, adopted at the 840th meeting of the Ministers' Deputies on 28 May 2003, Principle 1.

⁷⁹ See note 75, para 7.

Since there is no clear common approach to issues of private censorship and possible differences between traditional and Internet media, the Court's position is crucial for the future of the Delfian model. Moreover, in my opinion, the only chance for Delfi to win the case was to convince the Court that dangers of private censorship exercised by Internet media should preclude the portal's liability. Delfi's argument that it is placed within the safe harbour was unpromising from the very beginning. The Estonian courts rightly decided that Delfi was a publisher with an active role. However, the news portal liability will lead to deleting any suspicious comment because in comparison with traditional media Internet news portals face massive posting and unable to distinguish promptly defamatory speech from truthful comments. It, in turn, will inevitably cause discrimination among Internet users. Therefore, to protect freedom of expression, the Court should offer a special approach to Internet news portals' liability.

3.3 Judgment of 10 October 2013 by the First Section of the ECtHR

3.3.1 *Delfi as a host*

On 10 October 2013 the Court issued its judgment. The domestic courts' conclusion that Delfi is not a host has been indirectly upheld by saying that the portal possesses "a substantial degree of control" over the comment environment⁸⁰. As the application of Article 14 of Directive on Electronic Commerce is possible only if a user is not "acting under [...] the control of the provider", the existence of such control means that the portal cannot be a host.

This conclusion is not surprising. It follows from the nature of the Delfian model, which produces a joint content product: an article and comments to it. Although comments are created by Internet users, it is the news portal that is a real provider of content because only it can delete comments and any other content on its website. Indeed, it is a purpose of the Delfian model to combine the two different modes of production in one model under the control of the portal owner. Consequently, a news portal cannot be split into a digital newspaper and a hosting facility for comments.

⁸⁰ ECtHR, *Delfi AS v. Estonia*, no 64569/09, Judgment of the Court (First Section) of 10 October 2013, para. 89.

According to Article 14.2 of the E-Commerce Directive, the safe harbour does not apply if the provider has control over users' actions.

3.3.2 *Delfi as the publisher of comments*

The Court notes that holding Delfi liable for third-party comments interferes with the portal's freedom of expression. Nevertheless, interference can be justified if, firstly, it is "prescribed by law"; secondly, it has one of the "legitimate aims" enumerated in Article 10; and, third, it is "necessary in a democratic society".⁸¹

Although the Court does not directly discuss differences between traditional and new Internet media, its assessment of lawfulness is connected to this issue.

According to Delfi, the interference is not prescribed by law because in domestic law there is no obligation to monitor before publication all content posted by third parties on an Internet news portal⁸². The defendant, in the face of the Estonian government, takes the opposite position and submits that such an obligation can be clearly inferred from domestic laws and case law about traditional media according to which both the publisher and the author of publication are liable for defamation⁸³. This rule should apply to new Internet media as well⁸⁴.

The Court agrees with the defendant's position. Although the Court acknowledges that Internet news portal liability for user-generated defamatory comments is a "novel area related to new technologies"⁸⁵, the applicant should have expected that rules on print media publisher liability extend to the Internet as well.

Following the Court's previous case law, a norm should be deemed as prescribed by law if it is expressed in a sufficiently precise manner which allows a person, even if after receiving a legal consultation, to predict consequences of his activity. Moreover, it is not required that all possible consequences can be foreseen. The norm can be general in terms but still sufficiently precise if it has been clarified through case law.⁸⁶ The Court notes that Estonian law clearly states a general rule about print media publisher liability for third-party defamatory content. Since maintaining the comment environment has

⁸¹ ECtHR, *Delfi AS v. Estonia*, no 64569/09, Judgment of the Court (First Section) of 10 October 2013, paras. 69, 70.

⁸² See note 81, para. 53.

⁸³ See note 81, para. 60.

⁸⁴ ECtHR, *Delfi AS v. Estonia*, no 64569/09, Judgment of the Court (Grand Chamber) of 16 June 2015, para. 84. Here the defendant submits the same position but makes some additional clarifications.

⁸⁵ See note 81, para. 75.

⁸⁶ See note 81, para. 71.

been regarded by the Estonian courts as equal to a journalistic activity, the same liability rules can be extended to new Internet media.⁸⁷

As may be concluded from previous case law, the Court's position as to whether rules governing traditional print media are still foreseeable when the rules are extended to Internet media mainly depends on whether domestic courts has already discussed this issue. For example, in *Editorial Board of Pravoye Delo and Shtekel v. Ukrain* the Court found that a rule under which the press bore responsibility for reprinting defamatory materials published in the Internet was not prescribed by law. Although the Ukrainian Media Act immunized the press in case of reprinting unlawful materials previously published in other registered media, there was no clarification either in legislature or case law whether this rule should be applied in a situation where content had been reprinted from Internet sites which were not registered as media. Therefore, in the Court's view, it was impossible to foresee whether or not a newspaper should be held liable for reprinting from the Internet⁸⁸. A different logic was used in *Times Newspapers (nos. 1 and 2) Ltd v. the United Kingdom*. Although the rule that each republication of a defamatory article is a cause for a new suit has been applied since 1849 to newspapers, the extension of this rule to Internet newspapers was reaffirmed in 2001 in the case of *Godfrey v. Demon*⁸⁹. The Court inferred from this that the applicant should have foreseen consequences; therefore, the rule was prescribed by law⁹⁰.

In the case at issue the Court follows its logic in *Times Newspapers (nos. 1 and 2) Ltd v. the United Kingdom*. Domestic case law has been assessed as stating sufficiently unequivocal that Internet news portal are liable on the same grounds as print media⁹¹. However, it is worth noting that domestic cases to which the Court refers concern proceedings against publishers of newspapers and their liability for articles⁹². Cases concerning liability of Internet media for third-party comments were decided by

⁸⁷ ECtHR, *Delfi AS v. Estonia*, no 64569/09, Judgment of the Court (First Section) of 10 October 2013, para. 75.

⁸⁸ ECtHR, *Editorial Board of Pravoye Delo and Shtekel v. Ukrain*, no 33014/05, 5 May 2011, paras. 60 – 62, 66.

⁸⁹ High Court of Justice, *Godfrey v. Demon Internet Ltd* [2001] QB 201. The reaffirmed judgment was issued on 23 April 1999.

⁹⁰ ECtHR, *Times Newspapers (nos. 1 and 2) Ltd v. the United Kingdom*, no 3002/03 and 23676/03, 10 March 2009, paras. 20, 21, 38.

⁹¹ See note 87.

⁹² See note 87, paras. 38, 39.

Estonian courts after the case of *Delfi*⁹³. Nevertheless, there is a document which, in the defendant's and the Court's opinion, should have alarmed Delfi. In September 2005, more than a year before the defamatory comments appeared on the portal, one of Estonians newspapers published an answer to its open letter to relevant public authorities. The letter concerned a problem of insulting speech on the Internet websites, including Delfi. According to the answer, injured persons could claim protection before courts on the same grounds as if content had been published in the press⁹⁴.

Moreover, the Court highlights that Delfi, as an entrepreneur and professional publisher, could have received a legal consultation and assessed risks connected to its activity⁹⁵.

Thus, it has been found that the interference is prescribed by law. Consequently, norms on liability of traditional publishers can be extended to Internet portals exploiting the Delfian model. It has seriously reduced Delfi's chances to win the case. The future of the Delfian model now depends on whether the Court finds that liability leads to the problem of private censorship.

3.3.3 *Delfi as a private censor*

Unfortunately for Delfi, the Court has not address the problem of private censorship. The only point of the Court's assessment which can relate to this issue is the requirement of legitimate aim. Delfi submits that only the authors of the comments infringed Article 8 of the Convention, which protects the right to respect for private life. Therefore, holding Delfi, an intermediary between parties, liable for commentators' activity does not seek a legitimate aim⁹⁶. The defendant contradicts that since the news portal has control over the comments, Delfi should protect the reputation of the injured person. Therefore, the interference with Delfi's freedom of expression is justified⁹⁷.

The Court disagrees with Delfi that only the authors of the comments should be pursued for defamation. According to Article 10.2 of the Convention, the authors' freedom of

⁹³ ECtHR, *Delfi AS v. Estonia*, no 64569/09, Judgment of the Court (Grand Chamber) of 16 June 2015, para. 43.

⁹⁴ ECtHR, *Delfi AS v. Estonia*, no 64569/09, Judgment of the Court (First Section) of 10 October 2013, para. 11 and ECtHR, *Delfi AS v. Estonia*, no 64569/09, Judgment of the Court (Grand Chamber) of 16 June 2015, para. 15, 129 which clarify the content of the letter.

⁹⁵ See note 93, para. 76.

⁹⁶ ECtHR, *Delfi AS v. Estonia*, no 64569/09, Judgment of the Court (First Section) of 10 October 2013, para. 54.

⁹⁷ See note 96, para. 61.

expression can be limited to protect the reputation of other persons. In the case at issue, the same legitimate aim is sought by requiring Delfi to delete the comments and pay non-pecuniary damages. Therefore, the Court finds that the interference is made with a legitimate aim.

It means that Delfi can be required to delete third-party speech. Moreover, this requirement has a legitimate aim and therefore cannot lead to problems of private censorship. Thus, following the Court's perspective, the Delfian model does not deserve a special approach and Delfi cannot escape liability.

3.3.4 Flaws in Delfi's control mechanism

Lastly, the Court analyzes the third requirement as to whether the interference represents an unnecessary restriction on freedom of expression in a democratic society. This analysis is interesting as an instruction on how an Internet news portal shall control a comment environment in order to avoid liability.

The applicant submits that the interference is unnecessary. The injured person's rights have been already protected through an option to lodge proceedings against the authors of the comments. Furthermore, Delfi has secured the protection of reputation by employing a special mechanism which allows any user to press a button and attract the moderator's attention to a particular comment⁹⁸. As follows from the applicant's argument, the owner of the company might himself have pressed the button and the comments would have been promptly removed. Moreover, the injured person does not have any complaints to the article itself. The article's moderate and objective style which is within all legal limitations could not cause offensive comments. Consequently, if there is no connection between the article and the defamatory comments, the interference with the portal's freedom of expression is unnecessary⁹⁹.

According to the defendant, the interference is not too restrictive. Delfi gains revenues from advertising which depend on the number of comments. The more the number of comments, the more profit Delfi receives. Consequently, Delfi should be seen as a commercial operator which should have prevented harm to other persons' rights. The portal failed to preclude defamation because the applied filter and button system turned

⁹⁸ ECtHR, *Delfi AS v. Estonia*, no 64569/09, Judgment of the Court (First Section) of 10 October 2013, para. 55.

⁹⁹ See note 98, para. 55.

to be insufficient. The portal moderator is the only person who is able to remove a comment. In the case at issue, the portal could easily have identified the comments as defamatory and deleted them on its own initiative. Moreover, Delfi has not only breached its duty, but the portal has hindered the injured person to pursue the authors since the portal does not require commentators to reveal their true identities.¹⁰⁰

The Court has decided to analyze four factors: first, the comments and the environment in which they appeared; second, Delfi's measures to prevent defamation; third, the liability of the commentators; and, fourth, effects of Delfi's liability on its business.¹⁰¹

Considering the first factor, the Court explores whether Delfi's own actions caused the defamatory comments. The defamatory nature of the comments is deemed to be obvious and therefore left without further consideration. The article itself does not contain any offensive remarks and includes the company owner's vision. The article has attracted negative opinion because the company's activity impaired the position of many people. Thus, a negative response should have been expected as highly probable. Moreover, the moderator should have been alarmed because the number of comments exceeded average figures. Therefore, the Court concludes that had Delfi been more cautious, it could have predicted the situation, reacted and escaped liability.¹⁰²

The analyzing of the second factor, Delfi's measures to prevent defamation, has led to a conclusion consistent with the domestic courts position that the measures applied are unsatisfactory. Moreover, the Court agrees with the Estonian courts and the defendant that the fact of receiving revenues which depend on the number of comments is a relevant argument which outweighs the balance not in favor of Delfi. The Court adopts the same view as the defendant that a choice of technical measures to prevent defamation is still left to Delfi, which makes the interference less restrictive.

Regarding the third factor, the commentators' liability, the Court agrees with the defendant's argument that Delfi's indulging anonymous commenting is a serious obstacle in pursuit of the authors. Therefore, if the only option available for the company owner to protect his rights were to sue the authors, it would not be sufficient.

¹⁰⁰ ECtHR, *Delfi AS v. Estonia*, no 64569/09, Judgment of the Court (First Section) of 10 October 2013, paras. 62, 64 – 67.

¹⁰¹ See note 100, para. 85.

¹⁰² See note 100, paras. 84, 86.

The Court highlights that the architecture of the comment environment depends on Delfi. Thus, if the news portal has decided to allow non-registered users to comment, it has to bear consequences of such a choice. However, the decisive argument against Delfi has been inferred not from anonymity but from another characteristic feature of the Internet. Once a comment has been posted on the Internet, content can receive immediately almost a world-wide public and can remain accessible in the network forever. Although it is cumbersome for Delfi to detect and delete every piece of defamatory content, it would be almost impossible for a private person to do so. Moreover, the balancing in favor of the injured person has not been shaken by an argument that in such a case a news portal rather than the author of defamation will always be a defendant. The Court refers to previous case law which states that even if victims of defamation may in most cases prefer to suit a media company with deep pockets instead of actual defamers, this choice does not mean that an interference with the publisher's freedom of expression is too severe¹⁰³.

Consequently, the Court concludes that the company owner's right to protection of reputation has outweighed Delfi's freedom of expression.¹⁰⁴

Regarding the last factor, effects of Delfi's liability on its business, the Court pays attention to the sum of non-pecuniary damages. Because the sum of EUR 320 looks very modest, the Court concludes that Delfi can pay the damages without any difficulty.¹⁰⁵

Thus, the Court decides that Delfi's freedom of expression has not been infringed. Holding Delfi liable for defamatory third-party comments is a justified and proportionate solution.

The Court names five elements as underlying its decision. First, it is a clear unlawful nature of the comments. Second, it is the fact that Delfi, a commercial and professional operator, published the article which triggered the defamatory comments. Third, Delfi failed to employ effective measures to combat defamation. Forth, Delfi allows anonyms

¹⁰³ ECtHR, *Krone Verlag GmbH & Co. KG v. Austria (no. 4)*, no. 72331/01, 9 November 2006, para. 32.

¹⁰⁴ ECtHR, *Delfi AS v. Estonia*, no 64569/09, Judgment of the Court (First Section) of 10 October 2013, paras. 91, 92.

¹⁰⁵ See note 104, para. 93.

to comment; therefore, another route to pursue the authors has been made by Delfi too cumbersome for an injured person. Fifth, the sum of damages is insignificant.¹⁰⁶

The Court's judgment means that a more active involvement of a portal moderator will become inevitable. However, it has remained unclear whether a portal moderator has to become a security guard who checks every comment before allowing it to appear in the comment environment or a portal moderator only has to react to already published comments. Since pre-monitoring looks very close to prior restraints on speech, a wave of concern arose after the Court's judgment among Internet industry and human rights organisations and helped the case to be brought for reconsideration before the Grand Chamber.

3.4 Judgment of 16 June 2015 by the Grand Chamber of the ECtHR

3.4.1 Three objections

Three basic objections to the Court's decision have been arisen in third parties' submissions¹⁰⁷.

First, maintaining the comment environment should not be equitable to a journalistic activity. The Court should have distinguished two parts of Delfi's website (or two parts of the Delfian model in terms of the thesis). Making articles available, Delfi acts indeed as a content service provider or a publisher. On the contrary, providing the comment environment, Delfi acts as a hosting service provider which cannot be regarded to be a publisher.¹⁰⁸

¹⁰⁶ ECtHR, *Delfi AS v. Estonia*, no 64569/09, Judgment of the Court (First Section) of 10 October 2013, para. 94.

¹⁰⁷ There are altogether four submissions by The Helsinki Foundation for Human Rights, Article 19, Access, Media Legal Defence Initiative (MCIDI), and jointly by The European Digital Media Association (EDiMA), The Computer & Communications Industry Association (CCIA Europe), EuroISP (a pan-European association of European Internet Service Providers Association).

¹⁰⁸ See The Helsinki Foundation for Human Rights' submission in *Delfi AS v. Estonia*, no 64569/09, decided by the Grand Chamber on 16 June 2015, para. 94 and para. 17 of the submission available at http://www.hfhr.org.pl/obserwatorium/images/Delfi_amicus.pdf, accessed on 20.12.2015; See Article 19 submission in *Delfi AS v. Estonia*, no 64569/09, decided by the Grand Chamber on 16 June 2015, para. 97 and para. 26 of the submission available at <https://www.article19.org/data/files/medialibrary/37592/Delfi-intervention-A19-30052014-FINAL.pdf>, accessed on 20.12.2015;

The second objection highlights the danger of monitoring comments before making them public. Delfi has to resort to this measure *de facto* in order to escape liability. Such pre-monitoring should be assessed as a prior restraint and an example of censorship.¹⁰⁹

The third objection concerns differences between traditional and new Internet media. These differences preclude traditional norms about publisher liability from being extended to Internet media.¹¹⁰

3.4.2 The Court's answer to the first objection regarding hosting

On 16 June 2015 the Grand Chamber of the Court issued its decision which upheld the judgment of 10 October 2013. The analysis of the Grand Chamber follows the same structure and comes to the same conclusions as in the first decision.

Regarding the first objection that Delfi should be seen as an intermediary merely hosting comments the Grand Chamber takes the same position as the previous chamber (henceforth the First Chamber). Both Chambers simply avoid considering this issue. It is noted that a conclusion as to whether or not Delfi is a passive technical intermediary depends on interpretation of Estonian law by domestic courts. The Court can verify only conformity of domestic law and its interpretation with the Convention¹¹¹. Nevertheless, the Grand Chamber, as well as the First Chamber, indirectly supports the domestic court's conclusion that Delfi is not a host. The Grand Chamber repeats the Estonian Supreme Court's arguments that Delfi actively invites users to post comments, is interested in their number and tries to regulate them by setting the rules of commenting.

See EDiMA, CCIA Europe and EuroISPA joint submission in *Delfi AS v. Estonia*, no 64569/09, decided by the Grand Chamber 16 June 2015, para. 108 and paras. 9, 21, 22 of the submission available at <http://cdn.ccianet.org/wp-content/uploads/2014/06/CCIA-EDiMA-EuroISPA-submission-on-Delfi-case-June-2014.pdf>, accessed on 20.12.2015.

¹⁰⁹ See The Helsinki Foundation for Human Rights' submission in *Delfi AS v. Estonia*, no 64569/09, decided by the Grand Chamber on 16 June 2015, para. 23 of the submission; and See EDiMA, CCIA Europe and EuroISPA joint submission in *Delfi AS v. Estonia*, no 64569/09, decided by the Grand Chamber on 16 June 2015, para. 109 of the case and para. 14 of the submission; See Media Legal Defence Initiative's submission in *Delfi AS v. Estonia*, no 64569/09, decided by the Grand Chamber on 16 June 2015, para. 103 and p. 5 of the submission available at <http://www.mediadefence.org/sites/default/files/files/20140606%20Delfi%20intervention%20FINAL.pdf>, accessed on 20.12.2015.

¹¹⁰ See The Helsinki Foundation for Human Rights' submission, para. 94 of the case and paras. 9 – 11 of the submission; See Article 19 submission, para. 97 of the case and para. 96 of the submission; See EDiMA, CCIA Europe and EuroISPA joint submission, para. 107 of the case and para. 7 of the submission; See Media Legal Defence Initiative's submission, paras. 101, 102 of the case and pp. 2, 7 of the submission.

¹¹¹ ECtHR, *Delfi AS v. Estonia*, no 64569/09, Judgment of the Court (First Section) of 10 October 2013, para. 74 and ECtHR, *Delfi AS v. Estonia*, no 64569/09, Judgment of the Court (Grand Chamber) of 16 June 2015, para. 127.

Furthermore, the portal has reserved for itself a technical possibility to delete a comment. Thus, the Grand Chamber states that it agrees with the domestic court and the First Chamber that Delfi has control over the comment environment¹¹². Moreover, the Grand Chamber highlights that Delfi's role goes "beyond that of a passive, purely technical service provider"¹¹³. This way of thought can be easily traced further and leads to a conclusion that Delfi is not a host.

3.4.3 The Court's answer to the second objection regarding censorship

Regarding apprehensions that pre-monitoring of comments might be equal to censorship, the Grand Chamber highlights that, first of all, there are other Internet platforms for speech besides news portals. The requirement that Delfi has to delete unlawful comments is a justified obligation which cannot turn the portal into a private censor.¹¹⁴

Moreover, the Grand Chamber clarifies that the Estonian courts took into account differences between traditional and Internet media and did not require Delfi to pre-monitor content rather to review comments after publishing¹¹⁵. However, the Court has referred to the Estonian Supreme Court decision which, in my opinion, can be interpreted in two opposite ways. The Estonian Supreme Court notes that the nature of the Internet is such that a portal moderator cannot be obliged "to edit comments before publishing them in the same manner as applies for a printed media publication"¹¹⁶. Following the wording, it may be concluded that since the editor of a newspaper reviews and modifies if necessary all content before publication, Delfi's moderator has not to do so. However, quite the opposite, it may be concluded that Delfi's moderator still has to pre-monitor comments but not in exactly "the same manner" as the editor. For example, because total monitoring can be highly difficult due to posting content on a massive scale, the moderator may be required to review not all comments, but only those which has been revealed as suspicious by an automatic filter.

¹¹² ECtHR, *Delfi AS v. Estonia*, no 64569/09, Judgment of the Court (Grand Chamber) of 16 June 2015, paras. 145, 144.

¹¹³ See note 112, para. 146.

¹¹⁴ See note 112, para. 157.

¹¹⁵ See note 112, paras. 126, 153.

¹¹⁶ See note 112, para. 112.

Consequently, there is no surprise that four judges of the Grand Chamber in their joint concurring opinion observe that the Court has erred in its interpretation of the Estonian Supreme Court's judgment. The judges note that choosing to read the judgment as not requiring pre-monitoring has allowed the Court to evade a sensible issue of prior restraints on speech. Although it is more comfortable to understand the judgment as obliging Delfi to monitor comments only after they have been made public, the domestic courts plainly required Delfi to "prevent" defamatory comments from appearing, which is possible only by monitoring each comment before publication¹¹⁷.

Even if the Court has erred in the interpretation of the domestic judgment, the Court has set a new standard that a news portal cannot be obliged to pre-monitor comments. At the same time, a reactive monitoring exercised in the Delfian model is not anymore sufficient to escape liability. The new standard is active follow-up monitoring. It means that all comments after publishing have to be reviewed in order to detect a defamatory comment and remove it before a notice on its unlawful nature is received.

3.4.4 The Court's answer to the third objection regarding differences between Internet news portals and traditional media

The third objection concerns differences between traditional and new Internet media. These differences should preclude rules on publisher liability from extending to the operator of a news portal. The Grand Chamber has made it clear that it is aware of differences. It observes that "because of the particular nature of the Internet, the "duties and responsibilities" that are to be conferred on an Internet news portal for the purposes of Article 10 may differ to some degree from those of a traditional publisher, as regards third-party content"¹¹⁸.

The Grand Chamber highlights three differences. First, although the Internet has vastly enhanced opportunities to exercise freedom of expression, it has seriously endangered the right to the protection of reputation. Therefore, in comparison with traditional print media, an Internet news portal has a higher negative potential to damage reputation¹¹⁹. Second, in comparison with print media, an Internet news portal is an audiovisual

¹¹⁷ Joint concurring opinion of judges Raimondi, Karakas, De Gaetano and Kjølbros in case *Delfi AS v. Estonia*, 64569/09, decided by the Grand Chamber on 16 June 2015, paras 5 – 7.

¹¹⁸ ECtHR, *Delfi AS v. Estonia*, no 64569/09, Judgment of the Court (Grand Chamber) of 16 June 2015, para. 113.

¹¹⁹ See note 118, para. 133.

platform which can influence public in a much greater degree¹²⁰. Third, once appeared on the Internet, content can be accessible world-wide and almost forever. Thus, unlawful speech on an Internet news portal is more dangerous than in a newspaper¹²¹.

However, the Grand Chamber has not said what follows from these declarations. In *Editorial Board of Pravoye Delo and Shtekel v. Ukrain*, where defamatory content appeared on the Internet and then was reprinted in press, the Court, after declaring almost the same dangerous differences of the Internet in comparison with press, observes that the Internet “is not and potentially will never be subject to the same regulations and control” as created for print media¹²². It appears that the dangerous features of the Internet should lead to a conclusion that Internet media should bear a stricter responsibility than print media. Nevertheless, according to the new standard stated by the Grand Chamber, an Internet news portal, in comparison with print media, is not required to edit comments before publishing. Consequently, a more relaxed regime has been introduced.

However, The Grand Chamber has not answered a concern that thousands of comments cannot be edited with the same precision and deliberation as letters to editor¹²³. It appears that the Grand Chamber does not see a significant problem with the verification of comments. Since in the present case the comments are obviously unlawful, the Grand Chamber leaves outside the scope of its consideration situations where the assessment of a comment can be more difficult.

3.4.5 New standard as to how an Internet news portal shall control the comment environment

Thus, the Grand Chamber has rejected the objections and come basically to the same conclusion as the First Chamber that Delfi’s liability for third-party defamatory

¹²⁰ ECtHR, *Delfi AS v. Estonia*, no 64569/09, Judgment of the Court (Grand Chamber) of 16 June 2015, para. 134.

¹²¹ See note 120, para. 147.

Interestingly, the Grand Chamber supports its position by the CJEU’s decision in the case of *Google Spain and Google* (See CJEU, Case C-131/12, *Google Spain and Google* [2014], Judgment of the Court (Grand Chamber) of 13 May 2014, published in the Electronic reports of Cases) where it has been found that the right to respect for private life outweighs both Google’s right to conduct a business and Internet users’ right to information.

¹²² ECtHR, *Editorial Board of Pravoye Delo and Shtekel v. Ukrain*, no 33014/05, 5 May 2011, para. 63.

¹²³ See Article 19 submission in *Delfi AS v. Estonia*, 64569/09, decided by the Grand Chamber on 16 June 2015, para. 10 of the submission available at

<https://www.article19.org/data/files/medialibrary/37592/Delfi-intervention-A19-30052014-FINAL.pdf>, accessed on 20.12.2015.

comments does not infringe the portal's freedom of expression. Nevertheless, there are two new important aspects in the Grand Chamber's conclusion. First of all, the Grand Chamber has changed the qualification of the comments from defamation to hate speech and speech inciting violence. Second, it has been clarified how Delfi shall control the comment environment. The Grand Chamber has highlighted that Delfi is not required to exercise pre-monitoring of comments. Delfi only has to delete unlawful content without delay after it has appeared on its portal. Furthermore, Delfi has to remove unlawful comments on its own initiative without waiting for a notice from an injured party.¹²⁴

Thus, a new standard has been set. An Internet news portal is a publisher of user-generated content. Nevertheless, in comparison with traditional print media, a portal is not required to monitor content before publishing. If a traditional publisher is liable for defamatory content once it has appeared in a newspaper, a portal is liable only if defamation has not been promptly deleted after publication.

3.5 Choice

Compliance with the new standard will require Internet news portals to rebuild their architecture. According to Lessig, the main challenge of such a process is to choose how Internet users' interests are to be taken into account¹²⁵.

The Grand Chamber has acknowledged that the present case requires a choice to be made. Although the Internet in general and platforms for commenting in particular have enhanced freedom of expression, the right to the protection of reputation has been endangered as never before.¹²⁶ If liability is to be placed only on the authors of defamatory comments, reputation will unlikely receive adequate protection. If liability is to be placed on a news portal, freedom of expression may be impaired. Therefore, a choice of the right solution depends on a proper balancing.

The Estonian government has presented a view that an injured person does not possess sufficient resources to monitor all comments, identify defamatory ones, and then send

¹²⁴ ECtHR, *Delfi AS v. Estonia*, no 64569/09, Judgment of the Court (Grand Chamber) of 16 June 2015, para. 162.

¹²⁵ L. Lessig, *Code version 2.0*, Basic Books, New York 2006, p. 39.

¹²⁶ See note 124, para. 110.

each time notices to a news portal. Furthermore, the process of notification takes some time. It means that in the conditions of the Internet where information spreads with a lightning speed reputation may be already incurably damaged. Reaction to a defamatory comment has to be very quick. Otherwise, when defamation has been refuted, there will be no public to witness it because readers' attention has switched to another comment. Therefore, it is justified to place responsibility on a news portal which is the best placed party to secure the right to the protection of reputation.¹²⁷

The Grand Chamber has accepted this view that a large commercial news portal is better suited to combat defamation. Moreover, an additional supportive argument has been offered that if a comment targets a group of persons, there may be no one who takes the insult personally and notifies a news portal.¹²⁸ Thus, if a news portal is not liable for such a comment, defamation will with all likelihood stay at place.

Making a choice also depends on whether or not anonymity on the Internet is to be preserved. The Estonian government observes that, on the one hand, identification of the computer from which a comment has been sent is technically possible. However, identification of an actual author can be unrealistic. Consequently, if only authors are liable for defamatory comments, it will be hard to escape a situation where the defendant cannot be found at all. Thus, reputation will be left without protection. On the other hand, requiring a news portal to introduce obligatory prior registration based on revealing the real identity will be too onerous for Internet users. Therefore, from both perspectives, it is reasonable to place liability on a news portal without introducing a special norm on mandatory registration.¹²⁹

The Grand Chamber agrees with the government that anonymity should be preserved. Although in some cases, as for example in *K.U. v. Finland*¹³⁰, which concerns a crime and criminal proceedings, revealing of the true identity is justified, in the case at issue,

¹²⁷ ECtHR, *Delfi AS v. Estonia*, no 64569/09, Judgment of the Court (First Section) of 10 October 2013, para. 63.

¹²⁸ ECtHR, *Delfi AS v. Estonia*, no 64569/09, Judgment of the Court (Grand Chamber) of 16 June 2015, para. 158.

¹²⁹ See note 127, para. 64.

¹³⁰ ECtHR, *K.U. v. Finland*, no 2872/02, 2 December 2008, para.49.

which concerns a tort and civil proceedings, displacing of anonymity should not be required.¹³¹

Therefore, following the Estonian government's and the Court's position, Delfi should be held liable. Such a choice is better for Internet users because they can still avail themselves of anonymity and post comments. Consequently, their freedom of expression is not in danger. At the same time, this choice is also better for injured persons because defamatory comments will be deleted by a news portal on its own initiative. Consequently, the right to the protection of reputation is adequately safeguarded. Thus, only one interest at stake is still waiting for its place in the balancing. It is news portals' freedom of expression.

Delfi's freedom of expression depends on whether regardless of liability it is still able to continue publishing. According to the government, Delfi's liability does not affect its business model. The government has observed that after the domestic courts' decision Delfi employed a team of five moderators who review all comments after posting on the portal. Despite this fact, the number of comments has arisen almost twice as much. Commenting without registration is still allowed. The share of deleted comments does not exceed ten percent. Moreover, EUR 320 as compensation is too little a sum to cause any harm to Delfi's business. Furthermore, in the future Delfi does not have to pay anything at all. In the following after *Delfi* proceedings against Internet news portals domestic courts were satisfied with prompt deleting of defamatory comments after publishing and therefore did not impose on the defendants any non-pecuniary damages.¹³² The Court has agreed with the government and stated that since Delfi's business model has not to be changed, the portal's freedom of expression has been proportionally restricted to secure the right to the protection of reputation¹³³.

Thus, after balancing, the Court has made a choice in favour of the protection of reputation. However, in my opinion, the Court has erred that its judgment will not affect Delfi's business model. A team of moderators reviewing all comments is a new element in the architecture of the Delfian model. A danger for the model follows not from the

¹³¹ ECtHR, *Delfi AS v. Estonia*, no 64569/09, Judgment of the Court (Grand Chamber) of 16 June 2015, paras. 147, 149.

¹³² See note 131, paras. 89, 92.

¹³³ ECtHR, *Delfi AS v. Estonia*, no 64569/09, Judgment of the Court (First Section) of 10 October 2013, para, 160.

number of persons engaged in monitoring but from monitoring all contributions. Now, a moderator, as a gatekeeper, has to decide what comment is to be included into networked social production. Moreover, this gatekeeper cannot rely on combating bad comments by the comment environment itself. Since a risk that other commentators will allow a defamatory comment to participate in the production has become too costly, a total control over comments has to be placed on the portal owner. In such a case, the comment environment will be turned into a walled garden instead of being preserved as a generative system.

Moreover, such a change in the model's architecture can lead to discrimination against lawful comments and consequently restrict commentators' freedom of expression. I will discuss this problem from the perspective of the concept of collateral censorship in Chapters 5 and 6. Had the Court included in the balancing commentators' freedom of expression which can be seriously jeopardised by the change in the architecture, the choice may have been different.

However, the consequences of the Court's judgment are such that the only way to preserve the Delfian model is to migrate in a country with no liability for defamatory comments. The following chapter discusses this strategy. Otherwise, the Delfian model has to be changed. Chapters 5 and 6 explore effects of such changes on the model in general and on the comment environment in particular.

4 MOVING TO A COUNTRY WITH NO LIABILITY FOR THIRD-PARTY DEFAMATORY COMMENTS

4.1 About the Chapter

This chapter begins the analysis of the strategies left after *Delfi* for an Internet news portal utilizing the Delfian model. At focus of this chapter is the first strategy – moving to a country with no-liability regime for user-generated defamatory comments. This strategy is discussed only from the perspective of liability for third-party unlawful speech. All other issues which should be taken into consideration when business is to be moved into another country are out of the scope of the analysis.

4.2 Moving to the USA

4.2.1 Ideological grounds of immunization

Defamation law in the USA is greatly influenced by the First Amendment¹³⁴ which protects freedom of speech from restrictive laws¹³⁵. In contrast to the US approach, Article 10 of the Convention accepts that freedom of expression can be limited to protect reputation if such limitations are “prescribed by law and are necessary in a democratic society”. Differences between the US and Convention approaches are routed in different ideology underlying the protection of speech. The society in the USA “accords greater weight to the value of free speech than to the dangers of its misuse”¹³⁶.

Although the approaches are different, both the USA and EU take the same position that defamatory content is unlawful. The First Amendment does not protect defamatory speech. Moreover, both the USA and EU try to recruit Internet intermediaries for combating defamation¹³⁷. Nevertheless, in the USA it has been done in a radically

¹³⁴ It was highlighted by the High Court of Justice in the English case of *Godfrey v. Demon Internet Ltd* [1999], EWHC QB 214; [1999] 4 ALL ER 342, and by the High Court of Australia in *Dow Jones & Company Inc v. Gutnick* [2002], HCA 56; (2002) 77 ALJR 255.

¹³⁵ The First Amendment to the Constitution of the USA reads as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances

¹³⁶ U.S. Supreme Court, *McIntire v. Ohio Electronics Commission* [1995], 514 U.S. 334, para. 357.

¹³⁷ In the USA the aim of immunization is to encourage private filtering (see 4.2.2 Immunization. Practical grounds).

different way through the immunization of content service and hosting service providers from liability for user-generated defamatory comments¹³⁸.

The immunization represents a policy choice which aim is to “encourage the unfettered and unregulated development of free speech”¹³⁹. Ideological grounds for the immunization can be traced to the “theory of the truth and the marketplace of ideas” founded by Mill and Milton¹⁴⁰. The theory states that even lies deserve protection. A collision between falsehood and truth is always beneficial for society. Other points of view should be promoted to escape the establishment of the presumption that the first statement is always true because no one protests¹⁴¹. Market and “free trade in ideas” secure that a truthful statement wins¹⁴². Therefore, an open discussion is necessary to reveal the truth¹⁴³. Following to the “doctrine of honest comment”¹⁴⁴, “wrong, exaggerated or prejudiced” opinion should be protected if it concerns issues of public interest and is honestly done¹⁴⁵. Such “pernicious” statements should not be restricted because market competition between statements from different sources neutralizes falsehood¹⁴⁶.

In the EU one of the aims of the Directive 2000/31/EC on Electronic Commerce is also to facilitate private filtering. According to Recital 40,

[...] this Directive should constitute the appropriate basis for the development of rapid and reliable procedures for removing and disabling access to illegal information; such mechanisms could be developed on the basis of voluntary agreements between all parties concerned and should be encouraged by Member States; it is in the interest of all parties involved in the provision of information society services to adopt and implement such procedures; the provisions of this Directive relating to liability should not preclude the development and effective operation, by the different interested parties, of technical systems of protection and identification and of technical surveillance instruments made possible by digital technology within the limits laid down by Directives 95/46/EC and 97/66/EC.

¹³⁸ It is stated, for example in *Zeran v. America Online* [1997], 129 F.3d 327, (4th Cir. 1997), that hosting service providers are covered with the immunization.

It is stated, for example in *Carafano v. Metrosplash.com* [2003], *Inc.*, 339 F.3d 1119 (9th Cir. 2003), that content service providers are covered with the immunization.

¹³⁹ Ninth Circuit Court of Appeals, *Batzel v. Smith* [2003], 333 F.3d 1122 (9th Cir. 2003), para. 1.

¹⁴⁰ Dario Milo, *Defamation and Freedom of Speech*, Oxford University Press, 2008, p. 56; see also Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, California LR 2355, 2000, Volume 88, Issue 6, Article 11.

¹⁴¹ John Mill (1859), *On Liberty*, Penguin Books edn, 1974, pp. 115–116.

¹⁴² U.S. Supreme Court, *Abrams v. United States* [1919], 250 US 616 (1919) 630.

¹⁴³ Richard Moon, *The Constitutional Protection of Freedom of Expression*, Toronto: University of Toronto Press, 2000, p. 13.

¹⁴⁴ Dario Milo, *Defamation and Freedom of Speech*, Oxford University Press, 2008. p. 58.

¹⁴⁵ House of Lords, *Telnikoff v. Matusevitch* [1992] AC 343, HL 357.

¹⁴⁶ U.S. Supreme Court, *Gertz v. Robert Welch Inc* [1974] 418 U.S. 323.

4.2.2 *Practical grounds of immunization*

The immunization was done in 1996 by introducing § 230 of the Communication Decency Act.¹⁴⁷ According to the rule of § 230(c)(1), “[N]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”

This rule was introduced as a reaction to the case of *Stratton-Oakmont v. Prodigy*¹⁴⁸, the circumstances of which are similar to the case of *Delfi*¹⁴⁹. Prodigy’s network was positioned as a service promoting family-based values. Consequently, a team of five moderators was employed to review posted comments, sort out and block offensive content. However, several defamatory comments appeared on a bulletin board. Prodigy, as well as Delfi, was found to be a publisher due to its active role and therefore liable for third-party defamatory content. This conclusion was based on two arguments. First, Prodigy itself acknowledged that it exercised editorial control. Second, Prodigy, as well as Delfi, introduced guidelines on using its service, in which it was prohibited to post certain content, and furthermore employed an automatic filter.¹⁵⁰

In contrast to the judgment in *Stratton-Oakmont v. Prodigy*, in the earlier case of *Cubby v. CompuServe*¹⁵¹ it was decided that CompuServe, a provider of a network similar to Prodigy’s, was not a publisher of defamatory comments posted on its bulletin board due to the absence of editorial control. The court stated that CompuServe should be regarded as a merely passive distributor of defamatory content and could only bear responsibility if the provider was aware of content’s defamatory nature¹⁵².

Therefore, refusing from editorial practices might look as the best solution to evade responsibility for third-party defamatory content. It meant that service providers could prefer the CompuServe model and allow any content, even harmful, to appear on their

¹⁴⁷ 47 U.S. Code § 230 (2006).

¹⁴⁸ U.S. New York Supreme Court, *Stratton-Oakmont, Inc v. Prodigy Services* [1995], 1995 WL 323710 (N.Y.Sup. 1995).

¹⁴⁹ Interestingly, that Delfi also employed a team of five moderators after the portal was found liable by the domestic courts. *Stratton-Oakmont* presents an example of situation where a suit was lodged due to the moderator team’s failure to detect and block defamatory comments. Any moderator team, including Delfi’s, cannot be secured from such an omission.

¹⁵⁰ See note 148, para. 4.

¹⁵¹ U.S. District Court of the Southern District of New York, *Cubby, Inc v. CompuServe Inc* [1991], 776 F.Supp. 135 (S.D.N.Y. 1991).

¹⁵² See note 151, para. 141.

facilities. However, abandoning filtering was not a desirable outcome for the US legislator. Consequently, the immunization was proposed. Although the First Amendment considerations were highlighted in the proposal¹⁵³, it was acknowledged that *Stratton-Oakmont v. Prodigy* might discourage Internet intermediaries from participating in the combat against user-generated unlawful content¹⁵⁴. Therefore, the practical aim of the immunization was to incentivize intermediaries to utilize filters.

For this reason, a special rule was added to the new law. It is known under the name of “Good Samaritan” clause. According to this rule, a provider is not responsible for blocking lawful, protected by the First Amendment content if such blocking occurred when a provider was filtering in good faith user-generated content to remove unlawful speech.

Therefore, providers have received the immunization from liability twice. Firstly, they are not liable if allow defamatory content to appear. Secondly, they are not liable if they do not allow lawful content to appear. The second portion of immunization seems to be in conflict with the values of the First Amendment. Nevertheless, this step back in the protection of free speech was necessary to reach agreement with the Internet industry¹⁵⁵.

In the result of this trade-off, Internet intermediaries have obtained a freedom to choose their business model which can be based on blocking undesirable content or can be open even for defamatory comments. The state’s interests have been secured by encouraging those providers which are willing to participate in the combat against defamation on the Internet to “self-police” their facilities without fear that they will be called to account for blocking lawful content¹⁵⁶.

Thus, the immunization was introduced mainly due to rational grounds. The prime aim is not to support lawful speech but to encourage private filtering even if at the expense of the protection of free speech.

¹⁵³ See 141 Cong. Rec. 16,013 – 14, 16,025 (1995); 141 Cong. Rec. 22,045 – 46 (1995).

¹⁵⁴ According to 47 U.S. Code § 230 (b)(4), one of the aims of this section is to eliminate obstacles “for the development and utilizing of blocking and filtering technologies”.

¹⁵⁵ J. Zittrain, A History of Online Gatekeeping, *Harvard Journal of Law & Technology*, Vol. 19 № 2, 2006, pp. 260 – 263.

¹⁵⁶ In the case of *Blumenthal v. Drudge*, the judge assessed the immunization as a “some sort of tacit quid pro quo arrangement with the service providers community”, which allows providers “self-police” if they choose to do so (See U.S. District Court for the District of Columbia, *Blumenthal v. Drudge* [1998], 992 F.Supp. 44 (D.D.C. 1998), para. 52).

4.2.3 *Delfian model and immunization*

As stated in *Zeran v. America Online*, the rule of § 230 created “a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service”¹⁵⁷. Consequently, “plaintiffs who contend that they were defamed in an internet posting may only seek recovery from the original source of the statement”¹⁵⁸.

Thus, a bulletin board model has been fully protected from defamation claims. In subsequent cases other business models have received right for the immunity as well. In *Barrett v. Clark* the publisher of a news group was immunized from liability for user-generated defamatory content¹⁵⁹. In *Blumenthal v. Drudge* the publisher of a gossip column received immunity¹⁶⁰. In *Stoner v. eBay*¹⁶¹ an online auction website was acknowledged to be immunized under §230. In *Schneider v. Amazon* defamatory comments were posted by readers of a book sold on Amazon’s website. The website owner was found non-labile for user-generated defamatory comments¹⁶².

In my opinion, an Internet news portal, as a “provider of an interactive computer service” in terms of §230¹⁶³, will with high likelihood be deemed immunized as well. As highlighted in *Batzel*, the provider of any computer service is immunized if such a service is offered to a multitude of Internet users through entitling them to access the provider’s server¹⁶⁴. Utilizing the Delfian model to encourage Internet users to produce comments demonstrates that the portal owner takes an active position in creating a joint information product. Nevertheless, as stated in *Blumenthal v. Drudge*, it is a deliberate

¹⁵⁷ Fourth Circuit Court of Appeals, *Zeran v. America Online* [1997], 129 F.3d 327, (4th Cir. 1997), para. 331.

The lawfulness of such a broad interpretation has been confirmed in subsequent cases: *Ben Ezra, Weinstein, & Co. v. America Online* [2000], 206 F. 3d 327 (10th Cir. 2000), Cert. denied, 531 U.S. 824 (2000); *Jane Doe One v. Oliver* [2000], 755 A.2d (Conn. Super. Ct. 2000).

¹⁵⁸ See note 157, para. 40.

¹⁵⁹ California Supreme Court, *Barrett v. Clark* [2001], WL 881259 (Cal. Sup. Ct. 2001), para. 9.

¹⁶⁰ U.S. District Court for the District of Columbia, *Blumenthal v. Drudge* [1998], 992 F.Supp. 44 (D.D.C. 1998), paras. 49, 50.

¹⁶¹ California Supreme Court, *Stoner v. eBay, Inc.* [2000], 56 U.S>P.Q.2d (BNA) (Cal. App. Dep’t Super. Ct. 2000).

¹⁶² Washington Court of Appeals, *Schneider v. Amazon, Inc.* [2001], 31 P.3d Wash, Ct. App. 2001, para. 40.

¹⁶³ According to §230 f(2),

The term “interactive computer service” means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

¹⁶⁴ Ninth Circuit Court of Appeals, *Batzel v. Smith* [2003], 333 F.3d 1030 (9th Cir. 2003), para. 2

choice by the US legislator to immunize even those providers which have “an active, even aggressive role in making available content prepared by others”¹⁶⁵.

However, there is a danger of finding a news portal to be a co-creator or co-developer of comments and therefore liable on the same grounds as the original speaker. The immunity is valid only for publishing materials of another content provider¹⁶⁶. In cases where a provider takes part in creating or developing third-party content, such a provider can be found responsible for that content. This issue was at focus in *Batzel*, where the court had to decide whether the author of the defamatory e-mail was the only content provider or the publisher who had included this e-mail in his newsletter was a co-developer of the defamatory e-mail. It was concluded that selecting e-mails before publication and editing their content cannot amount to developing or creating of information.¹⁶⁷ In my view, the same logic can be applied to a news portal. Therefore, all news portals, including those which utilize the Delfian model, are immunized from the liability.

4.2.4 Results of immunization

Thus, in contrast to the ECtHR’s position in *Delfi*, the US approach treats Internet publishers differently in comparison with publishers of traditional print media. While a newspaper publisher is responsible for publishing a defamatory letter sent by a reader, an Internet news portal publisher is non-labile for making accessible a defamatory comment posted by a user. At the same time, the immunization from liability does not mean that US news portals do not moderate comments. For example, the New York Time’s news portal employs a team of moderators who read all comments before publishing except those comments which are posted by a team of 200 “trusted commentators”¹⁶⁸. Nevertheless, the absence of liability gives the news portal owner an opportunity to choose what business model to employ. A portal may prefer to turn its comment environment to a walled garden, but it may decide to use the Delfian model.

¹⁶⁵ U.S. District Court for the District of Columbia, *Blumenthal v. Drudge* [1998], 992 F.Supp. 44 (D.D.C. 1998).

¹⁶⁶ According to §230 f(3),

The term “information content provider” means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

¹⁶⁷ Ninth Circuit Court of Appeals, *Batzel v. Smith* [2003], 333 F.3d 1031 (9th Cir. 2003), para 5.

¹⁶⁸ The World Association of Newspapers (WAN-IFRA), Online comment moderation: emerging best practices, October 2013, p. 24, available at <http://www.wan-ifra.org/reports/2013/10/04/online-comment-moderation-emerging-best-practices>, accessed on 29.11.2015.

The diversity of business models is the result of the deliberate choice made by the US legislator in 1996. Moreover, this choice was done taking into account Internet users' interests in free speech. These interests outweighed defamed persons' right to the protection of reputation. Nevertheless, defamed person can protect themselves by refuting lies. It is expected that the truth will be revealed through such a dialogue.

4.3 Moving to Russia

4.3.1 Immunization of registered Internet media

Moving to Russia can be another opportunity for an Internet news portal to preserve the Delfian model. In Russia all registered Internet media are immunized from liability for third-party defamatory comments¹⁶⁹. Such a choice is especially interesting taking into account that Russia, in contrast to the USA, is a member of the Convention. Consequently, Russia has to protect freedom of expression as required by Article 10 and the case law of the ECtHR.

Although Russia follows the Convention approach according to which speech can be in principle restricted¹⁷⁰, it has chosen to relieve Internet media from the burden of liability. Since the history of protecting freedom of expression is short and the Russian legislator is not in the habit of writing preambles with explanations as to why a certain way of regulation has been preferred, it is almost impossible to reveal ideological or practical grounds for the immunization. Nevertheless, one apparent reason for the

¹⁶⁹ It should be noted that Russian law does not use the term "defamation". Article 152 of the Civil Code provides protection against untrue information which impairs honor, dignity and business reputation. As clarified by the Supreme Court, it is equal to using the term of "defamation" in the ECtHR's practice. For example, untrue information which impairs honor, dignity and business reputation accuses a person of breaching a law, of dishonest behavior in personal, public or political sphere, of unfair business practices (See Resolution № 3 of the Plenum of the Supreme Court, On Practice in Cases on the Protection of the Honor and Dignity of Citizens, and Also the Business Reputation of Legal and Natural Persons, 24 February 2005, paras. 1 and 8, published in Rossiiskaya Gazeta № 50, 15.03.2005).

Moreover, Russian courts in cases on the protection of reputation have to take into account the ECtHR's position regarding interpretation of Article 10 of the Convention (See Federal Law № 54 On the Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols to it, 30 March 1998, Article 1, published in Rossiiskaya Gazeta № 67, 07.04.2008).

However, in 2012 defamation was criminalized through introducing into the Criminal Code Article 128.1 (Federal Law № 141-Ф3 of 28.07.2012, published in Rossiiskaya Gazeta № 174, 01.07.2012).

¹⁷⁰ As stated in Article 29 of the Russian Constitution, freedom of expression can be limited by federal laws.

immunization is to encourage new Internet media to follow the official procedure of registration because only registered media are immunized.

The immunization has not been done by inventing new rules rather by extending traditional media law to the Internet. While the Estonian courts and the ECtHR decided that rules on print media could be applied to Internet news portals as well, the Russian Supreme Court in 2010 decided that norms on television programmes could be extended to Internet media. As stated in the Mass Media Law¹⁷¹, media are not responsible for third-party content if this content has been made public without previous recording and editing. For example, media are not liable for defamation expressed by a guest in a programme which is broadcasted in a live-regime. As clarified by the Supreme Court, owners of Internet media are not responsible for user-generated comments provided that there has been no moderation of these comments before publication¹⁷².

Consequently, news portals utilizing the Delfian model are immunized from liability for third-party defamatory comments. It means that there is no need to change the model and employ a team of moderators. The portal owner does not need to control the comment environment and to delete content as soon as a complaint about it has been received. Since undue interference does not stifle social production, the model can produce efficiently information goods. At the same time, the immunization secures that readers and commentators can enjoy the enhanced freedom of expression.

Since the portal is not required to delete defamatory comments, there have been expressed concerns that a defamed person could be left without protection¹⁷³. Nevertheless, there is one way to oblige the portal to remove a defamatory comment. An injured person has to obtain a court decision which, first, acknowledges that the comment in question indeed represents defamation and, second, orders the portal to delete it. Even if the author of a comment cannot be identified, it is not an obstacle for receiving such a decision. Although there is no defendant, an injured person still can

¹⁷¹ Federal Law № 2124-1 On Mass Media of 27 December 1991 (in the version of 30.12.2015), Article 57.5, amended by Federal Law № 464-ФЗ, 30.12.2015, published in Rossiiskaya Gazeta № 1, 11.01.2016.

¹⁷² Plenum of the Supreme Court, Resolution № 15 On the Application by Courts the Federal Law on Mass Media, 15 February 2010 (in the version of 09.02.2012), para. 23, published in Rossiiskaya Gazeta № 132, 18.06.2010 and № 35, 17.02.2012.

¹⁷³ See M. Svintsova, Reaction to defamation according to Russian civil legislation, Justiceinform, Moscow 2013.

bring a suit according to a special procedure¹⁷⁴. If the fact of defamation has been proved, a court will issue a decision requiring a portal to remove the content.

This option leaves no room for an argument on which the Estonian government insisted in *Delfi*. It was highlighted that since Delfi allowed anonymous users to post comments it was too burdensome for an injured person to investigate who was the author even if it was possible to identify a computer from which a defamatory posting had been made. Consequently, an injured person might be precluded from bringing proceedings because a defendant was unknown. From this argument the government concluded that a “greater liability” should be placed on a news portal¹⁷⁵.

However, the solution applied in Russia can still be criticized. On the one hand, bringing a suit without identifying a defendant requires considerable time and other resources from an injured person. If a comment were to be deleted upon receiving a mere notification from a person who thinks that the comment is defamatory, it would be less costly. Furthermore, in such a case a defamed person cannot claim non-pecuniary damages. Yet, on the other hand, deleting upon receiving a court decision guarantees that the right to freedom of expression and the right to the protection of reputation were taken into account by a judge. Furthermore, besides removing, a court can require a news portal to publish refutation to a defamatory comment. Therefore, reputation can be restored in a more effective way in comparison with a mere deletion of defamation.

4.3.2 The danger of liability coming from another side

However, the Delfian model can still be affected because a defamatory comment gives grounds to the state in face of the Surveillance Committee¹⁷⁶ to accuse registered Internet media of breaching the Mass Media Law. One of the tasks of the Surveillance Committee is to preclude media from misusing the freedom of press. Freedom of press

¹⁷⁴ This option is provided in Article 152.5 of the Civil Code, and its application is supported by the Supreme Court in Resolution № 3 of the Plenum of the Supreme Court, On Practice in Cases on the Protection of the Honor and Dignity of Citizens, and Also the Business Reputation of Legal and Natural Persons, 24 February 2005, para 2, published in Rossiiskaya Gazeta № 50, 15.03.2005. Despite the criminalization of defamation in 2012, this option is still available.

¹⁷⁵ ECtHR, *Delfi AS v. Estonia*, no 64569/09, Judgment of the Court (First Section) of 10 October 2013, para. 64; and ECtHR, *Delfi AS v. Estonia*, no 64569/09, Judgment of the Court (Grand Chamber) of 16 June 2015, para. 91.

¹⁷⁶ The Surveillance Committee, the full name of which is The Federal Service on Surveillance in the field of communications, information technologies and mass communications or shorter in Russian Roskomnadzor, which is the abbreviation of three words: Russian Committee of Surveillance It is a government body controlling many aspects of not only mass media’s activities but activities on the Internet in general.

can be abused *inter alia* by using media for the deliberate dissemination of defamation¹⁷⁷. As clarified by the Surveillance Committee in its Order¹⁷⁸, an official reads comments left on a news portal. If a suspicious comment has been detected, the official makes a screenshot, prints it out, and sends it to a specialist with necessary competence to verify whether the comment in question is unlawful. If the unlawful nature of the comment has been confirmed, a notification is sent to the portal.

Once a notification has been received, the portal owner can choose either to delete the comment in question or to change it. As ruled by the Supreme Court, the portal owner can treat such comments as letters to editor and modify published comments in order to transform an unlawful language into lawful expressions¹⁷⁹.

There is also a third option – to leave the comment without moderation. In such a case the portal owner loses the immunization and turns into a publisher with full responsibility for the comment. Nevertheless, only a court has power to decide that the comment represents defamation and the portal owner has breached his obligation not to misuse the freedom of press.

Thus, the Delfian model can be left untouched because the portal owner is not obliged to moderate comments on his own initiative. His responsibility is limited to reacting to the Surveillance Committee's notifications. At the same time, the enhanced freedom of expression can be repressed even more severely than in case of reacting to Internet users' notifications. First of all, as at focus is not defamation but misusing of freedom of press, the result of losing a suit is not a payment of non-pecuniary damages to a defamed person but a court order to stop activity as a media company. Secondly, it is hard to imagine how a defamatory comment can be edited in such a way as to become lawful. As stated in the Mass Media Law, the language of letters to editor must be changed without affecting the original meaning¹⁸⁰. Since the meaning of a defamatory comment is to convey lies, changes in the language can hardly help to turn it into a

¹⁷⁷ Federal Law № 2124-1 On Mass Media of 27 December 1991 (in the version of 13.07.2015), Article 4, amended by Federal Law № 464-ФЗ, 30.12.2015, published in Rossiiskaya Gazeta № 1, 11.01.2016.

¹⁷⁸ Roskomnadzor, Order № 420 Approving the Procedure of Sending Notifications on Admissibility of Misuse of Freedom of Press to Mass Media Which Are Disseminated in Information Telecommunication Networks Including the Internet, of 6 July 2010, para. 3 of the Supplement to the Order, unpublished.

¹⁷⁹ Plenum of the Supreme Court, Resolution № 15 On the Application by Courts the Federal Law on Mass Media, 15 February 2010 (in the version of 09.02.2012), para. 23, published in Rossiiskaya Gazeta № 132, 18.06.2010 and № 35, 17.02.2012.

¹⁸⁰ See note 177, Article 42.

truthful statement. Therefore, the risk of shutting down the business and challenges of moderating defamatory comments may discourage the portal owner to keep notified comments on his portal. Nevertheless, if the portal owner contrives to moderate defamatory comments in the right way, it can be a beneficial outcome both for the social production because the number of contributions can stay the same and for freedom of expression of the author of a defamatory comment because her unchanged opinion can be still visible in the comment environment.

4.3.3 Liability of unregistered as media Internet news portals

Thus, the Delfian model can be preserved by Internet news portals registered as media. However, this conclusion does not make much sense for a foreign portal considering moving its business to Russia. Due to recent amendments in the rules of registration which began coming into force from January 2016 onwards, foreign natural or legal persons, and even a Russian company with foreign capital, cannot establish a media company. Furthermore, a foreign company cannot possess more than 20 % of the authorized capital of a Russian legal person which establishes a media company. The aim of these amendments is to prevent foreign companies from direct or indirect influencing Russian media¹⁸¹. Consequently, a European news portal cannot establish a media company in Russia.

Nevertheless, it is still possible to move business into Russia if foreign news portals decide to operate as unregistered Internet media.

Operating as unregistered Internet media¹⁸² is a common practice. It is in no way an underground movement or a reaction to the amendments. A newspaper which is published both in a printed and digital form has to be registered. Nevertheless, if a newspaper has only a digital version, registration is not required and the Mass Media Law is not applied¹⁸³. Thus, an Internet news portal is not obliged to obtain registration. Yet it can choose to go through a registration procedure according to the Mass Media Law and thereby receive immunity from liability for defamatory comments. If a news

¹⁸¹ Federal Law № 305-ФЗ On Amending the Federal Law on Mass Media, 14 October 2014, Articles 1.3 and 2, published in Rossiiskaya Gazeta № 238, 17.10.2014.

¹⁸² An unregistered Internet media is not an official definition, but it is used in practice.

¹⁸³ Federal Law № 2124-1 On Mass Media of 27 December 1991 (in the version of 30.12.2015), Article 8, amended by Federal Law № 464-ФЗ, 30.12.2015, published in Rossiiskaya Gazeta № 1, 11.01.2016.

portal operates without registration, it is not distinguished from any other Internet websites which are regulated by the Law on Information¹⁸⁴.

Although unregistered news portals do not possess the immunity provided by the Mass Media Law, portals are still not liable for third-party defamatory comments. As clarified by the Constitutional Court in 2013¹⁸⁵, the owner of an Internet website could not be held liable for defamatory content created by another person. In the case in question a defamatory comment was placed in an Internet website forum (forum.isurgut.ru) by an anonymous author. All comments were published without previous moderation. An injured person availed himself of the above-mentioned option to bring a suit according to the special procedure without identifying a defendant. It was acknowledged by a court that the comment was defamatory. Then, the defamed person brought proceedings against the owner of the website. The defamed person claimed non-pecuniary damages but lost the case. It was concluded that since the Internet forum website was not registered as media, its owner could not be seen as the publisher or even disseminator of comments. Therefore, the website owner was not liable for defamation and could not be obliged to delete the third-party defamatory comment. The Constitutional Court agreed that the website owner was not liable for user-generated defamation but disagreed regarding the absence of obligation to delete the comment. As clarified by the Constitutional Court, both registered and unregistered as Internet media websites have to remove defamatory comments according to a court decision¹⁸⁶. Nevertheless, this obligation cannot be a sign of website liability for third-party defamatory comments rather a way of protecting reputation¹⁸⁷. Moreover, as highlighted by the Constitutional Court, a website owner is objectively limited in possibility to verify the truthfulness of a comment. Therefore, to require such verification will contradict the protection of freedom of expression. Thus, the website owner cannot be obliged to delete allegedly defamatory comments and cannot be held liable for refusing to remove them until defamatory nature of the comments has not confirmed by a court¹⁸⁸.

¹⁸⁴ Federal Law № 149-ФЗ On Information, Information Technologies and on the Protection of Information, 27 July 2006 (in the version of 31.12.2014), published in Rossiiskaya Gazeta № 165, 29.07.2006 and № 1, 12.05.2015.

¹⁸⁵ Constitutional Court, Resolution № 18 On Verification in Connection with the Complaint of E. Krylov Whether Rules Contained in Paragraphs 1, 5 and 6 of Article 152 of the Civil Code Comply with the Constitution of Russia, 9 July 2013, published in Rossiiskaya Gazeta № 157, 19.07.2013.

¹⁸⁶ See note 185, para. 4.

¹⁸⁷ See note 185, para. 4.1

¹⁸⁸ See note 186.

Although the case concerns an Internet forum, in my opinion, the same conclusion should be applied to a situation where defamatory comments appear on a news portal. The portal owner is not liable for third-party defamatory comments because he, as well as a forum operator, do not know whether or not the information in question is true. Moreover, as stated by the Constitutional Court, the liability of a website owner is precluded by general principles according to which no one without guilt can be held responsible¹⁸⁹.

4.3.4 A future of unregistered as media Internet news portals

Thus, unregistered news portal employing the Delfian model appear to be in a position at least not worse than registered Internet media. Unregistered portals have to react only to court decisions. If they have not deleted comments after receiving a court order, portal owners do not turn into publishers and still are not liable for third-party defamation. They are liable only for disregarding the court order.

However, this situation may be changed in the nearest future. The regulation of unregistered news portals' activities may follow a similar scheme which was introduced for bloggers in August 2014¹⁹⁰. According to this scheme, a blog, which is described as a website or an Internet page with publicly available information, is not seen as Internet media¹⁹¹. Therefore, a blogger cannot avail himself of the protection for freedom of press provided by the Mass Media Law. At the same time, a blogger has to bear responsibilities equal to those imposed on media. For example, he has to verify the truthfulness of information before publication even if this information has been received from readers of his blog¹⁹². Consequently, a blogger has to employ pre-moderation of all comments to escape liability for user-generated defamatory content. If this solution is to be also applied to unregistered news portals, the Delfian model will have to be abandoned.

¹⁸⁹ Constitutional Court, Resolution № 18 On Verification in Connection with the Complaint of E. Krylov Whether Rules Contained in Paragraphs 1, 5 and 6 of Article 152 of the Civil Code Comply with the Constitution of Russia, 9 July 2013, para. 3, published in Rossiiskaya Gazeta № 157, 19.07.2013.

¹⁹⁰ Federal Law № 97-ФЗ On Amending the Federal Law on Information, Information Technologies and on the Protection of Information, 5 May of 2014, Article 1.2, published in Rossiiskaya Gazeta № 101, 07.05.2014.

¹⁹¹ Nevertheless, a blogger can obtain registration as Internet media and consequently receive the privilege of being non-labile for defamatory comments.

¹⁹² Federal Law № 149-ФЗ On Information, Information Technologies and on the Protection of Information, 27 July 2006 (in the version of 31.12.2014), Article 10.2, published in Rossiiskaya Gazeta № 165, 29.07.2006 and № 1, 12.05.2015.

Thus, Russia does not appear to be a secure place to which a European news portal employing the Delfian model should move. Although operating without registration as media is still an opportunity to escape liability and save the Delfian model, it is likely that this “door” will be soon closed.

4.3.5 Results of immunization in Russia in comparison with the USA

In the result of the immunization in the USA Internet news portal owners can choose which business model to prefer. They can choose to turn the comment environment into a walled garden or preserve the Delfian model. Those portals which will to police their comment environments are encouraged to apply private filters.

The immunization in Russia also gives portal owners an opportunity to preserve the Delfian model. Even uncovered by the immunization unregistered portals can utilize the model because they are not held liable for third-party defamatory comments. However, the state does not see Internet intermediaries as fellow-fighters against defamatory content. Consequently, the encouragement of private filtering is not at focus. Policing of comment environments created by registered news portals has been entrusted to the public authority, the Committee of Surveillance. Thus, the immunization has left room for the enhanced freedom of expression. Owners of news portals are not forced to pre-monitor comments. Yet, at the same time, the Committee of Surveillance has been introduced as a super-controller over the comment environment.

In comparison with Russia, the USA provides a better climate for the Delfian model. The portal owner does not have to delete defamation or police the comment environment in search of suspicious content or even to react to claims because of the fear of possible litigations. However, the proliferation of the Delfian model in the USA or the exploitation of the model in Russia may be endangered by the probability of overseas proceedings before British courts. The following subchapter discusses this issue.

4.4 Pulling back to the EU. Proceedings before British Courts

4.4.1 Liability of British Internet news portals. Effects of *Delfi*.

In 2009 the High Court of Justice decided *Imran Karim v. Newsquest Media Group Ltd*¹⁹³, a case with circumstances similar to *Delfi*. The defendant was a large English media company which on 6 June 2008 published on the Croydon Guardian website an article with perfectly lawful content which was automatically placed on several other websites owned by the defendant. The article heading was "Crooked solicitors spent client money on a Rolex, loose women and drink". The article attracted some defamatory comments. According to the wording of the judgment, the comments were placed on "bulletin boards on websites hosted by the defendant"¹⁹⁴. On 5 February 2009 the defendant received a notice from the claimant and on the same day deleted both the article and the comments in question.

The court concluded that the news portal was not liable for defamation because it was entitled to a defence introduced by Regulation 19 of the Electronic Commerce (EC Directive) Regulations of 2002, which transposed the EU Directive on Electronic Commerce into UK law. The rule is the same as in Article 14 of the Directive¹⁹⁵. It was highlighted that, first, commentators did not act "under the authority or control" of the owner of the news portal; and, second, the owner did not have "actual knowledge" about defamation until it had been notified by the injured person. Furthermore, after obtaining the knowledge, the portal removed the content on the same day.¹⁹⁶

Thus, according to this judgment, an Internet news portal should be seen as a hosting service provider rather than a publisher of user-generated comments. However, the

¹⁹³ High Court of Justice, *Imran Karim v. Newsquest Media Group Ltd* [2009], EWHC 3205 (QB).

¹⁹⁴ See note 196, para. 2.

¹⁹⁵ Regulation 19 reads as follows:

Where an information society service is provided which consists of the storage of information provided by a recipient of the service, the service provider, if he otherwise would, shall not be liable for damages or for any other pecuniary remedy or for any criminal sanction as a result of that storage where

a) the service provider 1) does not have actual knowledge of unlawful activity or information and where a claim for damages is made is not aware of facts or circumstances from which it would have been apparent to the service provider that the activity or information was unlawful or 2) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information and

b) the recipient of the service was not acting under the authority or the control of the service provider.

¹⁹⁶ High Court of Justice, *Imran Karim v. Newsquest Media Group Ltd* [2009], EWHC 3205 (QB), para. 15.

Court in *Delfi* has come to the opposite conclusion. The Court states that the portal owner does have control over users' comments and does have knowledge even before the notification. Such a different conclusion in a case with similar circumstances may lead to reviewing the standard established in *Imran Karim*. If the *Imran Karim* standard is to be replaced by the *Delfi* standard, an Internet news portal domiciled in the USA may be found liable by British courts. Therefore, the following parts of this subchapter discuss under what conditions a British court can decide to hear an action against a foreign publisher.

4.4.2 The UK as a destination for “libel tourism”¹⁹⁷

The foundation for bringing litigations before a British court, although defamatory content has been published in another country, was laid in 2000 in the case of *Berezovsky v. Forbes*¹⁹⁸. Mr. Beresovsky, the resident of Russia, brought a suit against Forbes, a US magazine. In an article published in the USA he was accused of being a criminal behind whose business was “a trail of corpses, uncollectible debts and competitors terrified for their lives.” Although both parties were residents of other states and the content in question was published overseas, it was found that defamation occurred in the UK; therefore, a British court had jurisdiction to hear the case. Jurisdiction on the basis of *lex loci delicti* was established because of two facts. First, 1 915 copies of the magazine were distributed in England and Wales¹⁹⁹. Second, Mr. Berezovsky had reputation to protect in the UK because he had strong business and

¹⁹⁷ British law distinguishes defamation expressed in speech – slander and defamation expressed in writing or otherwise recorded – libel. Defamatory comments posted on a news portal represent an example of libel.

The term “libel tourism” is used regarding the UK because the state has become a popular place to lodge proceedings in which both parties are residents of other states.

This situation has become possible because British law does not accept so called single publication rule which applies for example in the USA. In the USA the only one forum with jurisdiction to hear a case is the place of publisher's domicile even if a defamatory content has been republished in other jurisdictions. According to UK law, each republication can lead to a separate action. Consequently, if a defamatory content has been published in several jurisdictions, including the jurisdiction of England and Wales, British courts are deemed as an appropriate forum for an action about that part which happened in the UK even if defamation has occurred in other jurisdictions as well.

¹⁹⁸ House of Lords, *Berezovsky v. Forbes Inc. & Michaels* [2000], UKHL 25; [2000] 1 WLR 1004; [2000] 2 All ER 986; [2000] EMLR 643.

At first instance, it was found that Russian but not British courts had jurisdiction. Nevertheless, the Court of Appeal decided that the case should be heard in the UK because the plaintiff had a strong connection with the country. The House of Lords upheld this judgment.

¹⁹⁹ The article was also accessible on the Forbes' website. It was estimated that about 6 000 Internet users might read the article. However, the fact of online publication was not considered further. Consequently, this case remains an example of ruling about traditional print media.

personal connections there. On the contrary, in the USA connections were minimal; and in Russia only 19 copies had been distributed.

A similar approach to establishing the place where defamation occurred was introduced in the CJEU's case law and affected the British case of *Berezovsky v. Forbes*. In *Shevill v. Presse Alliance S.A.*²⁰⁰ decided by the CJEU, a British resident suffered from a defamatory article published in France and distributed in England and Wales only in 230 copies. She brought proceedings before British courts. The CJEU clarified that the court of a Member State where the publisher was established was empowered to hear an action about all damages caused²⁰¹. Nevertheless, a court of each Member State where a defamatory article was distributed and an injured person had reputation also possessed jurisdiction over the case although limited to deciding on local damages. The choice of forum was up to an injured person²⁰².

The approach established by the British courts in *Berezovsky v. Forbes* allows a resident of any country in the world to bring a suit for defamation if, first, the unlawful article has been distributed in the UK and, second, an injured person has reputation to protect there. These principles were extended to content published on an Internet website in two following cases. In 2002 the High Court of Australia confirmed in *Dow Jones v. Gutnick*²⁰³ that a defamatory article was published in Australia because it was made available on a website accessible in that country. Dow Jones, a US publisher, made available on its news website, WSJ.com, an article which defamed Mr. Gutnick, a resident of Australia. Undoubtedly, he possessed reputation in Australia. The issue of distribution, crucial for print media, was irrelevant in case of Internet media. Consequently, the focus was shift to defining a place of publication. It was stated that publication required not only making content but also transmitting the content to readers. Although the article was placed on a server in the USA, Internet users in Australia could read the article only if they had downloaded it. Only after downloading, the article could harm reputation. Therefore, the harm and the tort itself occurred in Australia²⁰⁴. Thus, the article was deemed to be published in Australia. Moreover, it was highlighted that the publisher itself had chosen to make the content available through

²⁰⁰ CJEU, Case C-68/93 *Shevill and Others v. Presse Alliance* [1995], Judgment of the Court of 7 March 1995, ECR I-415.

²⁰¹ See note 200, para. 25.

²⁰² See note 200, para. 33.

²⁰³ High Court of Australia, *Dow Jones & Company Inc v. Gutnick* [2002] HCA 56; (2002) 77 ALJR 255.

²⁰⁴ See note 203, paras. 7, 44.

the Internet. By doing so, the publisher must take into account that an international publication could lead to actions in an array of jurisdictions²⁰⁵.

In 2004 in *King v. Lewis*²⁰⁶ the High Court of Justice in London took for granted that placing a defamatory article on an American website was equal to publication in the UK because the article could be downloaded by British Internet users²⁰⁷. Furthermore, the Court of Appeal disagreed that jurisdiction could be established only if the publication targeted the public in the UK. The court decided that such a criterion would be too subjective²⁰⁸. In contrast to the Australian case, here the plaintiff Mr. Don King, a famous boxing promoter, was a US resident as well as the defendant Mr. Judd Burstein, an attorney representing Mr. Lewis in the USA. Consequently, the existence of reputation in the UK should be confirmed. It was found that King possessed reputation because he was known worldwide and had extensive business and financial connections in the UK²⁰⁹.

4.4.3 *Jameel principle*

As follows from this line of cases, a publisher domiciled in the USA can face proceeding in the UK under two conditions: first, if defamatory content has been made accessible for Internet users in the UK and, second, if a defamed person is able to demonstrate that she has reputation to protect there. Furthermore, as highlighted in *King v. Lewis*, a defamed person does not need to prove damage to reputation because damage is presumed and can be compensated in part that equal to local damages²¹⁰.

Nevertheless, a different approach limiting the inflow of potential cases was introduced in 2005 in the case of *Jameel v. Dow Jones*²¹¹. Dow Jones published on the website

²⁰⁵ High Court of Australia, *Dow Jones & Company Inc v. Gutnick* [2002] HCA 56; (2002) 77 ALJR 255, para. 192.

²⁰⁶ High Court of Justice, *King v. Lewis* [2004], EWHC 168 (QB).

Actually, already in 2002 in the case of *Loutchansky v. Times Newspapers Ltd. and others* (Nos. 2 – 5) ([2001] EWCA Civ 1805; [2002] QB 783; [2002] 2 WLR 640; [2002] 1 All ER 652; [2002] EMLR 241), it was acknowledged that placing a defamatory article on a website was equal to publication. Yet this case involves an English publisher; therefore, it is not discussed in this thesis. Even earlier in 2001 in *Godfrey v. Demon Internet Ltd* ([1999] 4 All ER 342, [2000] 3 WCR 1020; [2001] QB 201), it was held that content placed on a website become published every time when it was accessed by an Internet user.

²⁰⁷ See note 206, para. 15.

²⁰⁸ Court of Appeal, *King v. Lewis* [2004] EWCA Civ 1329, [2005] EMLP 4, para. 34.

²⁰⁹ See note 208, paras. 23, 24.

²¹⁰ See note 206, paras. 17, 18.

²¹¹ Court of Appeal, *Jameel (Yousef) v. Dow Jones & Co. Inc.* [2005] EWCA Civ 75; [2005] QB 946; [2005] 2 WLR 1614; [2005] EMLR 353.

WSJ.com an article that some of the richest persons in Saudi Arabia financed Al Qaeda. The article contained a link to a list with the names of these persons. Among them was mentioned Mr. Yousif Jameel. He required that Dow Jones removed the list from the website, but the publisher refused. As a consequence, the suit was lodged before British courts. It was estimated that the website had approximately 6 000 subscribers in the UK. However, only five subscribers followed the link; and three of them were “members of the claimant’s camp”²¹².

Although the Court of Appeal refused to depart from the presumption of damage in defamation cases, it highlighted that if the damage were to be awarded, the amount would be so small that it would not worth not only a candle but a candlewick²¹³. The publishing for five subscribers could not be assessed as “a real and substantial tort”; therefore, hearing the case would constitute an abuse of process²¹⁴. Since this case, the requirement to demonstrate that a real and substantial tort has taken place is known under the name of the Jameel principle or test.

The court concluded that Jameel’s reputation could not be damaged where the defamatory content had been read only by 5 persons, 3 of which were from his own “camp”. It allowed the court to state that since there was nothing to protect, the proceedings did not have a legitimate purpose to protect the right to reputation according to Article 8 of the Convention. Therefore, the protection of freedom of expression in accordance with Article 10 of the Convention required the court to stop proceedings²¹⁵.

The Jameel principle has been confirmed in a line of subsequent cases. For example, in *Al Amoudi v. Brisard*, the claimant, a resident of Saudi Arabia, failed to sue defendants from Switzerland because he could not prove that the defamatory content in question had been downloaded by anyone²¹⁶. Nevertheless, it should be taken into account that the proof of downloading can be easily received if content has appeared on a website

²¹² Court of Appeal, *Jameel (Yousef) v. Dow Jones & Co. Inc.* [2005] EWCA Civ 75; [2005] QB 946; [2005] 2 WLR 1614; [2005] EMLR 353, para. 17.

²¹³ See note 212, para. 69.

²¹⁴ See note 212, para. 70.

Nevertheless, the court acknowledged that if there had been a risk that a wider audience would read the content, the action could have been allowed to proceed (at para. 74). In the present case the risk was eliminated because the content had been removed in the end.

²¹⁵ See note 212, para. 55.

²¹⁶ High Court of Justice, *Al Amoudi v. Brisard & Another* [2006], EWHC 1062 (QB), paras. 13, 36, 39.

operated by a professional media publisher. In *Slutsker v. Romanova*, the defamatory content was placed in a blog hosted on the website operated by Echo Moscow, one of the most famous Russian media. The defendant was the author of the blog posting but not the owner of the website. Perhaps because of this, the claimant was kindly provided by Echo Moscow with information on how many entries to the blog had been made from the UK²¹⁷.

4.4.4 Four issues for an Internet news portal to consider if the standard set in Delfi is to be applied in the UK

If the new standard set in *Delfi* prevails over the domestic standard stated in *Imran Karim*, the owner of news portal can be found liable for third-party comments. Therefore, if, for example, an Estonian Internet news portal decides to move its business under the US jurisdiction, it should consider possible litigations in England. The following four issues should be taken into account.

First, an injured person has to demonstrate that she possesses reputation to protect in the UK. Visits to see friends in this country are not sufficient to demonstrate reputation²¹⁸. Nevertheless, in rare cases reputation may be shown even if an injured person has never been in the UK. In such a case, a defamatory publication creates and, at the same time, undermines reputation. For example, if an Estonian businessman has been defamed just before traveling to London in order to establish business contacts there, it may be found that his reputation has been damaged in the UK²¹⁹. On the other hand, proceedings before British courts should contribute to the restoration of his reputation. Otherwise, an abuse of process may be found. For example in *Karpov v. Browder* the aim of the claimant, a Russian resident, was the removal of his name from the “Magnitsky list” issued by the U.S. Treasury. The defendants’ website referred to the list. The court stated that it did not possess power to order the removal and therefore could do nothing to the protection of reputation²²⁰. Thus, the jurisdiction of a British court was denied.

²¹⁷ High Court of Justice, *Slutsker v. Romanova* [2015,] EWHC 545 (QB), para. 62.

²¹⁸ High Court of Justice, *Karpov v. Browder* [2013], EWHC 3071 (QB), para. 71.

²¹⁹ See note 219, paras. 50, 62.

²²⁰ See note 218, paras. 90, 140.

The same principle that proceedings should lead to restoration the claimant’s reputation in practice applies in cases with domestic parties (See *Cammish v. Hughes* [2012] EWCA Civ 1655; [2013] EMLR 13, para. 60 and *Euromoney Institutional Investor Plc v. Aviation News Limited and others* [2013], EWHC 1505 (QB), paras. 142 – 144).

Second, an injured person has to prove that the defamatory content in question has been downloaded at least by a substantial number of unidentified Internet users from the UK. An argument that there is a large community of Estonian speakers who might have downloaded the content will not suffice²²¹. Proving downloads is so important that in *Subotic v. Knezevic* the claimant tried to provide such a proof with the help of a firm specialized in investigating whether certain content has been read or downloaded within the UK jurisdiction²²².

Third, from January 2014 the option to bring a defamation action in the UK has been limited by requiring a court to ascertain that the UK is the most appropriate forum²²³. Before 2014 the principle of *lex loci delicti* prevailed. Now, a court should consider all alternatives and find a “natural forum” with which a case has the closest connection. The wider publication abroad and the weaker connections of an injured person to the UK are, the less probable is that a British court will be found to be a natural forum. Nevertheless, even if the most appropriate forum is based abroad, a British court can still hear a case provided that a foreign jurisdiction does not guarantee a fair process²²⁴.

Fourth, the amount of damages awarded is usually high. For example, GBP 75 000 have been awarded for a posting in Tweeter, although only 65 people read it. An Internet publication which was read by 550 people has led to awarding of GBP 60 000 as damages.²²⁵ In one of the recent cases *Sloutsker v. Romanova* the defendant was ordered to pay GBP 110 000²²⁶. This sum appears to be quite “modest” taking into account that the defamatory content was placed on several popular media websites.

²²¹ For example, a similar argument that there is a large community of Serbian speakers was rejected in *Subotic v. Knezevic* (See High Court of Justice, *Subotic v. Knezevic* [2013], EWHC 3011, paras 45, 47).

²²² High Court of Justice, *Subotic v. Knezevic* [2013], EWHC 3011, para. 41

²²³ Section 9 of the Defamation Act 2013

²²⁴ High Court of Justice, *Sloutsker v. Romanova* [2015], EWHC 545 (QB), paras. 39, 42.

²²⁵ See note 224, para. 78.

²²⁶ See note 224, para. 98.

5 CHANGING DELFIAN MODEL IN PURSUIT OF THE SAFE HARBOUR FOR A HOST

5.1 About the Chapter

This chapter provides the analysis of the second strategy left after the case of *Delfi*. In order to become a host and therefore escape publisher liability for defamatory comments, an Internet news portal has to transform the Delfian model. The two parts of the model have to be separated and made independent. As a result, the Delfian model will be split up.

5.2 Consequences for Delfian Model

5.2.1 *Obstacles on the way to become a host*

The Court has stated that Delfi is not a technical, passive intermediary²²⁷; therefore, the safe harbour of Article 14 of the Directive on Electronic Commerce does not apply. The Court highlights two points which have led to such a conclusion.

First, Delfi has purposely placed the comment environment onto the portal thereby encouraging users to comment its articles²²⁸. Consequently, a transformation into a host requires a news portal to separate comments from articles. Making comments visible only after clicking a special button under an article is obviously not sufficient²²⁹. Comments should be placed on a different platform. A very popular solution is placing under each article a link to the news portal's page on social media in order to post comments there. In such a case, owners of news portals suppose that since commenting occurs on another platform, for example on Facebook, they are not responsible for content placed outside of their own websites²³⁰.

²²⁷ ECtHR, *Delfi AS v. Estonia*, no 64569/09, Judgment of the Court (Grand Chamber) of 16 June 2015, para. 146.

²²⁸ See note 227, para. 144.

²²⁹ This practice is widely used. Nowadays, Delfi itself does not show automatically comments rather information that a certain number of comments have been posted. To read comments, a user has to press a special button.

²³⁰ The World Association of Newspapers (WAN-IFRA), Online comment moderation: emerging best practices, October 2013, p. 43, available at <http://www.wan-ifra.org/reports/2013/10/04/online-comment-moderation-emerging-best-practices> accessed on 14.11.2015.

However, in my opinion, this measure cannot guarantee that a news portal will be found non-liaible. For example, as decided in *Ali v. Associated Newspapers Ltd*, a British case, an interview to which a link was placed on a blog is not an integral part of that blog. However, it has been highlighted that it is not a general rule and the issue of integration should be decided depending on the circumstances of each case²³¹.

In my view, placing comments on a Facebook page demonstrates that comments are indeed cut out off the portal. However, a full disintegration has not occurred. A link under articles still looks like an invitation to comment them. Moreover, in *Delfi* the Court has concluded that the defamatory comments were caused by the article because of its provocative topic²³². The same may be said about comments placed on a Facebook page because they appear as a reaction to a certain provocative article. Therefore, such a link still connects articles and comments sufficiently strong to demonstrate that they are still parts of the same information production model. Moreover, if a news portal requires a previous registration on its news website to post comments on its page on Facebook, it also demonstrates a connection between an article and comments to it.

The second point highlighted in *Delfi* is that the portal has introduced the rules of commenting, which underlines the portal's active role²³³. Consequently, a news portal should deter itself from imposing any guidelines. This solution is much easier to implement than the requirement of disintegration, although it is not without some loss for a portal. The absence of guidelines hinders a news portal from expressing its own policy on commenting and may lead to an impression that all portals are alike. At the same time, guidelines represent a mere formality. The case of *Delfi* has demonstrated that these rules are commonly ignored by users.

Thus, to become a host regarding comments, a news portal has to make the two parts of the Delfian model disintegrated and independent. Furthermore, a portal should not impose guidelines on commenting. Comments should be placed on a separate platform which is not linked to articles.

²³¹ High Court of Justice, *Azad Ali v. Associated newspapers Limited*, [2010] EWHC 100 (QB), para. 28.

²³² ECtHR, *Delfi AS v. Estonia*, no 64569/09, Judgment of the Court (First Section) of 10 October 2013, para. 86.

²³³ ECtHR, *Delfi AS v. Estonia*, no 64569/09, Judgment of the Court (Grand Chamber) of 16 June 2015, para. 145.

Moreover, even if such separation has occurred, it will not eliminate the main obstacle on the way to reach the safe harbour provided by Article 14. The Court has found that the portal exercises “a substantial degree of control” because only the portal but not a commentator can delete a comment²³⁴. On the contrary, where content is hosted, authors of comments exercise power over their own content and can remove it. Therefore, to avail itself of the safe harbour, a news portal has to abandon any attempts to control the comment environment. It sounds like a complete nonsense for a provider which tries to use the enhanced benefits of networked social production in the comment environment to develop its own service.

5.2.2 From the Delfian model to new business models. Should an article and comments to it be connected with a link?

In order to escape liability, the Delfian model has to be split into two websites: a website with articles and a website on a platform which satisfies the requirements for a host. Furthermore, the architecture of the second part of such a split model has to be radically transformed so that users can delete their comments while the owner of the news portal does not have such an option. A technical possibility to remove a comment should be in the power of a hosting provider but not of a person who operates the news portal’s page on social media platforms. As a result, the portal owner will have to replace the Delfian model with a new business model.

Depending on whether or not these two websites are connected with a link, there are two possible models. The first solution does not include a link. The absence of a link, on the one hand, guarantees that the news portal owner is not liable for defamatory comments. Yet, on the other hand, if comments are totally unconnected to articles, there is no join information product. In my view, this solution does not appear to be a sound choice. The news portal owner will not be interested in placing comments onto independent platforms because of the following considerations.

First of all, if there is no link between an article and comments to it, there is no benefit for the news portal from the networked social production. The purpose of the Delfian model is to allow a publisher to improve traditional information production at the expense of the new networked information economy. In case of abandoning the Delfian

²³⁴ ECtHR, *Delfi AS v. Estonia*, no 64569/09, Judgment of the Court (Grand Chamber) of 16 June 2015, para. 146.

model, the news portal owner will receive the opposite result. News articles will feed social production on, for example, a Facebook page without receiving any benefits from such support. Secondly, the networked social production will avail itself of expensive news content generated by the news portal even without breaching copyright. Although a form in which an article is expressed may be copyright protected, facts on which the article is based can be freely used by anyone for commenting. Yet even revealing or purchasing the information about such facts is an expensive activity. Thirdly, possible losses may be even bigger if some part of the news portal's audience will go directly to a page for commenting in order to follow news. Indeed, if a news article is retold on such a page and supplemented with comments, the public bored with traditional products by the old industrial model may ignore the website with news. Consequently, the audience of the news portal can be divided and some part of the public may be lost in this process. In the end, the news portal will receive a competitor in the face of the website with comments. It is exactly the same result which eliminating is the purpose of the Delfian model. Thus, instead of development in information production, the industry has to make a step back and find other ways to control information in the new circumstances of networked information economy.

Nevertheless, the danger of competition from the website with comments may be exaggerated. Since comments are hosted, commentators can delete them at any time. As commenting is often build on the discussion of previous comments, removing a comment from a chain can turn the whole conversation into a complete mess. If commentators do not cooperate to solve this problem, outputs of the networked social production can be of poor quality.

The second solution is splitting up articles and comments but, at the same time, connecting them with a link. Although I have already expressed above the opinion that disintegration may not happen if comments are placed on a social media page which can be accessed following a link under an article, it is not certain that a court will not found otherwise.

Besides the already mentioned case of *Ali v. Associated Newspapers Ltd*, there is another example which may support the model with a link. In 2011 the Supreme Court of Canada in *Crookes v. Newton* found that hyperlinks to defamatory content placed on another website were equal to "footnotes" because they only directed "to another source

without repeating it”²³⁵. In this case Mr. Newton posted an article under the title “Free Speech in Canada” and added a hyperlink to another website with a defamatory article. The injured person, Mr. Crookes, asked Mr. Newton to remove the link. However, the latter refused to do so. Consequently, Mr. Crookes brought a suit claiming that Mr. Newton should be found liable as a publisher of defamation. The defendant argued that a hyperlink was equal to a footnote and was content neutral. Moreover, placing the link did not give the defendant any control over the defamatory article which could be changed by its author at any time. The Canadian court agreed with the defendant that a link to defamatory content did not represent the publication of such content²³⁶.

However, the court made other observations which, in my view, should be considered by the news portal owner. Firstly, the court has acknowledged that placing a link does not mean that anyone has followed it and read the defamatory content²³⁷. The court has come to such a conclusion due to the lack of evidence that the link was used. Despite the fact that Newton’s article had received 1 788 readers, the injured person failed to prove that anyone of them did click on the link and accessed the website with the defamatory article²³⁸. Regarding the news portal split up into two websites, to prove that a defamatory comment has been accessed does not appear to be problematic. First of all, if there is a comment to an article, it indicates that a link has been followed. If there is a defamatory comment which has attracted a remark from at least one Internet user, it proves that defamation was read.

Secondly, the court has highlighted that the defamatory content already existed when the link was placed by the defendant. Even if the link may expand the audience of the defamatory content, defamation had appeared independently of whether or not the link to it was subsequently placed by Newton²³⁹. On the contrary, defamatory comments may appear on the news portal’s page only after a news article has been published; therefore, such defamation cannot be seen as independent.

²³⁵ Supreme Court of Canada, *Crookes v. Newton* [2011], SCC 47, 19 October 2011, paras. 11, 96. It is likely that a US court will come to the same conclusion as well. As found in *Carter v. B.C. Federation of Foster Parents Assn.* [2005], (2005 BCCA 398, 42 B.C.L.R. (4th) 1, para. 12), placing the internet address of a forum with defamatory comments is not a republication of defamation.

²³⁶ Supreme Court of Canada, *Crookes v. Newton* [2011], SCC 47, 19 October 2011, para. 44.

²³⁷ See note 236, paras. 11, 108, 111.

²³⁸ See note 236, paras. 62, 63, 127.

²³⁹ See note 236, para. 26.

Thirdly, it has been found that the link does not represent an invitation to read the defamatory article. However, the court notes that an article as such, in principle, can encourage users to follow a link. Moreover, in the article in question there are some words suggesting that the link should be used. Nevertheless, these words do not amount to an invitation.²⁴⁰ In the Canadian case the link was incorporated in the text of the article in the following way: “[...].This time by politician Wayne Crookes.”²⁴¹ In comparison with this way, placing a link under a news article to the news portal’s page in order to post and read comments may be assessed as an invitation.

Nevertheless, provided that a link will not be deemed as an encouragement for defamatory comments, the splitting up of the Delfian model may be a sound solution. In such a case, efficient social production can be preserved, although the comment environment is on another website. At the same time, losing of control over comments by the portal owner may represent a danger because spam or advertisements will not be deleted. Nevertheless, the splitting up allows to eliminate costs on monitoring and moderating comments and, of course, costs caused by defamatory litigations.

However, commentators’ power to remove own content still remains a problem as in the first model with two unlinked websites. It is hard to predict how this control may affect networked social production. Nevertheless, it can be presumed that commentators are interested in preserving their comments. If a commentator deletes her comment, perhaps, it is because she herself evaluates her input as insignificant; therefore, social production loses a contribution of a very little value.

Howsoever, both of the described solutions represent new business models which differ from the Delfian model due to the absence of a crucial element, namely control over the comment environment by the news portal owner. Consequently, the Delfian model has to be abandoned.

Nevertheless, the abandoning of the Delfian model does not necessarily lead the proliferation of defamatory content in the comment environment. Now, it is a task for a hosting provider, for example Facebook, to consider its possible liability for defamatory user-generated content if, according to Article 14, after obtaining knowledge or awareness about defamation which occurred on its digital premises, it has not promptly

²⁴⁰ Supreme Court of Canada, *Crookes v. Newton* [2011], SCC 47, 19 October 2011, para. 12, 72

²⁴¹ See note 240, para. 7.

removed the content at issue. Usually, a hosting provider is informed about defamatory content through a so called notice-and-take-down procedure. How this procedure affects commentators' freedom of expression is discussed in the following subchapter.

5.3 Consequences for Freedom of Expression from the Perspective of the Concept of Collateral Censorship

5.3.1 The concept of collateral censorship

As explained in the previous subchapter, one of *Delfi's* possible consequences can be replacing of the Delfian model with a new business model which presupposes the division of the news portal into two websites. On one website there are news articles published by the portal owner. Comments to those articles are placed on the other website which is on a hosting platform. Content on the second website is published by commentators because comments are not posted under "the control or authority" of the portal owner. Besides commentators, only a hosting provider possesses a technical possibility to delete a comment. Will the hosting provider, which is a distributor of content, treat comments differently in comparison with a publisher? The concept of collateral censorship provides means to find an answer.

The concept of collateral censorship²⁴² offers a peculiar view on the phenomenon of private censorship. The concept exploits the term "censorship" from a technical perspective. Without taking into consideration policies or legal background, the concept states that collateral censorship occurs every time one private party due to the pressure of being held liable controls the speech of another private party²⁴³.

²⁴² Among proponents of this theory are the founder of the theory and author of the term "collateral censorship" M. Meyerson (See M. Meyerson, *Authors, Editors, and Uncommon Carriers: Identifying the "Speaker" Within the New Media*, 71 *Notre Dame L. Rev.*, 1995); J. Balkin (See J. Balkin, *Free Speech and Hostile Environments*, *Colum. L. Rev.*, Vol. 99, Issue 8, 1999); C. Mulligan (See C. Mulligan, *Technological Intermediaries and Freedom of Press*, 66 *SMU L. Rev.*, 2013); S. Kreimer (See S. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, *U. Pa. L. Rev.*, Vol. 155, Issue 1, 2006); F. Wu (See F. Wu, *Collateral Censorship and The Limits of Intermediary Immunity*, *Notre Dame L. Rev.*, Vol. 88:1, 2011).

²⁴³ J. Balkin, *Free Speech and Hostile Environments*, *Colum. L. Rev.*, Vol. 99, Issue 8, 1999, p. 2298.

Introducing liability for third-party speech inevitably leads to collateral censorship. Consequently, the only way to escape such an effect is to immunize a party with a possibility to control others' speech from liability for third-party generated content.²⁴⁴

However, a government may choose to stimulate collateral censorship in order to draw a private party in combating unlawful content, including defamation. The aim is to place an author's speech under an indirect state control. Although a state does not censor, it directly influences a censoring party's activity through imposing liability rules. Relaxing or strengthening liability rules allows a state to regulate an author as well.²⁴⁵ As a result, an allegedly defamatory content is placed under doubled pressure. On the one hand, it can be removed following a court order. On the other hand, it may be suppressed on a censoring party's own initiative. Furthermore, it can be done in a way which a court might not have accepted if a suit had been brought before it.²⁴⁶

Quite naturally, a censoring party looks at somebody else's speech differently than an actual author. An author has a stronger interest in his own words. A censoring party is unable of standing in author's shoes and always underestimates his speech. As a consequence, speech is suppressed on a grater scale because it is restricted even on those occasions where an author would not self-censor. Since censorship occurs without a proper attention to the value of speech both for its author and for the society, speech is censored "collaterally".²⁴⁷ This "additional suppression" in comparison with self-censorship represents the main characteristic feature of collateral censorship²⁴⁸.

Moreover, imposing liability for third-party unlawful speech always threatens freedom of expression because liability stimulates the removal of lawful content as well. Since a line between lawful content and a defamatory statement is thin, a censoring party tends

²⁴⁴ J. Balkin, Free Speech and Hostile Environments, Colum. L. Rev., Vol. 99, Issue 8, 1999, p. 2301; and F. Wu, Collateral Censorship and The Limits of Intermediary Immunity, Notre Dame L. Rev., Vol. 88:1, 2011, p. 296.

However, F. Wu highlights that immunization from liability does not mean that any incentives to censor speech are eradicated. For example, a filter against defamatory content may be employed because of customers' demand.

²⁴⁵ J. Balkin, Old-School/New-school Speech Regulation, Harvard L. Rev. Vol. 127:8, 2014, p. 2298.

²⁴⁶ J. Balkin, Free Speech and Hostile Environments, Colum. L. Rev., Vol. 99, Issue 8, 1999, p. 2299.

S. Kreimer names this phenomenon, when a state places on Internet intermediaries a power to censor in order to obtain indirect control over speech, a "censorship by proxy" (See S. Kreimer, Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link, U. Pa. L. Rev., Vol. 155, Issue 1, 2006 p. 14).

²⁴⁷ See note 246, p. 2299

²⁴⁸ F. Wu, Collateral Censorship and The Limits of Intermediary Immunity, Notre Dame L. Rev., Vol. 88:1, 2011, p. 296.

to restrict speech even if statements may turn to be true; while an author takes a risk and chooses to speak rather than to be silent.²⁴⁹ Although benefits from removing unlawful speech are undisputed, they cannot compensate losses caused by blocking lawful content as a side effect²⁵⁰.

Despite the fact that collateral censorship always restricts freedom of expression, this practice may be justified if a censoring party adopts an author's speech and treats it almost as her own. This occurs, for example, when a newspaper's editor decides whether or not to modify a reporter's article.

On the contrary, problems for freedom of expression arise if private parties are incentivized to control speech which they can perceive only as belonging to a stranger.²⁵¹ For example, if a distributor controls third-party speech, at least two problems should be highlighted. First, a distributor, in comparison with a publisher, does not have the right to editorial control of an author's speech. Second, a distributor cannot be expected to possess sufficient knowledge of the nature of content.²⁵² Moreover, a distributor cannot feel the proud of being the author of a statement and cannot be inspired by the same beliefs as the author. In fact, there is nothing to outweigh a distributor's fear of possible costly litigations.²⁵³ Therefore, a distributor censors speech much stricter than its author and stricter than a publisher. Taking all this into account, it can be said that in the digital age freedom of expression has become even more endangered because nowadays Internet intermediaries, as new distributors, are seen by a state as the best placed party to combat defamation.²⁵⁴

If a distributor never has the same incentives as a publisher to censor, it is unjustified to place on a distributor the same liability as on a publisher. Therefore, a legal regime created for authors and publishers should not be extended to distributors.²⁵⁵ However, under Article 14 of the Directive on Electronic Commerce, this regime applies if a

²⁴⁹ M. Meyerson, *Authors, Editors, and Uncommon Carriers: Identifying the "Speaker" Within the New Media*, 71 *Notre Dame L. Rev.*, 1995, p. 117.

²⁵⁰ See note 249, p. 301.

²⁵¹ J. Balkin, *Free Speech and Hostile Environments*, *Colum. L. Rev.*, Vol. 99, Issue 8, 1999, pp. 2299, 2300.

²⁵² See note 251, p. 2301.

²⁵³ See note 249, p. 117.

²⁵⁴ J. Balkin, *Old-School/New-school Speech Regulation*, *Harvard L. Rev.* Vol. 127:8, 2014, pp. 2310, 2311.

²⁵⁵ F. Wu, *Collateral Censorship and The Limits of Intermediary Immunity*, *Notre Dame L. Rev.*, Vol. 88:1, 2011, p. 297.

distributor, a hosting provider, has failed to delete unlawful content after obtaining awareness or knowledge about this content. In such a case, a distributor is deemed to become a publisher. However, from the perspective of collateral censorship, different incentives preclude a distributor from turning into a publisher.

5.3.2 Dangers of collateral censorship by a hosting provider

In my view, the portal owner, as well as a traditional publisher, can treat comments almost as own speech. In order to achieve the efficient production by the comment environment, the portal owner has to take into account both economic and behavioural incentives of commentators. Although a portal moderator, compared to an editor, has to review content posted on a massive scale, a moderator still does not look at commentators who she supervises as at strangers. In the Delfian model, both articles and comments are valued as necessary and interdependent parts of information production. Therefore, censorship by the portal owner can be justified. However, in new business models, censoring comments is a hosting provider's task. From the perspective of the concept of collateral censorship, the hosting provider will censor in an unjustified way because it has different incentives in comparison with the original speaker.

First, motives of authors and the hosting provider do not coincide²⁵⁶. Commentators post their contributions to the networked social production mainly due to motives unconnected with a monetary award. Their motives can be egoistic such as receiving attention, praise or reputation. Commentators can just want to criticise slightly or rudely. Certainly, commentator's motives can include even a desire to defame someone. At the same time, Internet users can post comments to help other commentators and readers to look at an article's topic from a different perspective. They can want to share knowledge because they perceive it as their obligation before society. On the contrary, the hosting provider lacks any of such motives.

Furthermore, the hosting provider is not affected by any considerations of social production because the provider employs a different business model which is typical for traditional industrial economy production. The hosting provider does not participate in the production of a joint information product; therefore, any issues concerning the mixed information production by the portal owner and commentators are irrelevant.

²⁵⁶ F. Wu, *Collateral Censorship and The Limits of Intermediary Immunity*, *Notre Dame L. Rev.*, Vol. 88:1, 2011, p. 304.

Form the hosting provider's perspective, commentators are only passive consumers of its service and their comments do not differ from any other content.

Second, authors are in a better position to evaluate risks of possible litigations²⁵⁷. Commentators are expected to know whether or not their comments are true. Moreover, in case of litigations, commentators can prove the lawful nature of comments much easily than the hosting provider which has no idea about facts underlying a conflict between a defamer and an injured party. A commentator may be even willing to face litigations because, for example, he hopes to benefit in monetary terms. On the contrary, a risk-averse hosting provider will try to evade any defamatory proceedings.

The Court's argument in *Delfi* that the topic of the article should have alarmed the news portal publisher appears to be reasonable. However, the same reproach cannot be addressed to the hosting provider. First of all, the latter cannot be expected to follow what article and under what title has been published on the portal's website. Furthermore, since the hosting provider does not produce an article, the provider has no information on underlying problems described in it. Consequently, the hosting provider cannot be required to suspect that defamation may appear on its facilities. The only way to reveal a defamatory comment is to be informed by a notice from an injured person. Without knowing anything about the background of a dispute and without having any stake in it, the hosting provider will only rely on an injured person's opinion.

Third, with deleting a comment, author loses all benefits received from producing this content. Contrariwise, the hosting provider loses only an insignificant part of total revenues.²⁵⁸ Although revenues depend on advertising and are connected with the amount of the content hosted, removing some comments even as an every-day practice cannot significantly reduce benefits. Even in a highly improbable situation where the removal of a lawful comment impels other participants of the same comment environment to abandon the hosting provider's platform, other users of the hosting service will stay; therefore, the provider will not lose all benefits.

Fourth, the price of a comment for the hosting provider is always much less than for the author. The hosting provider cannot include in the price benefits receiving from the

²⁵⁷ F. Wu, Collateral Censorship and The Limits of Intermediary Immunity, *Notre Dame L. Rev.*, Vol. 88:1, 2011, p. 307.

²⁵⁸ See note 257, p. 308

pride of authorship and social benefits from a comment. The price of a hosted comment does not depend on its value. Each comment brings a marginal benefit and its price is equal to a price of hosted kilobytes. As a comment usually needs a very little place on hosting facilities, a comment's price is very low. Moreover, since the portal owner is interested in the hosting provider's service, deleting comments will not induce the portal to move to another provider's facilities. At the same time, costs of keeping an allegedly defamatory comment are always much higher than for an author. Even if the real identity of an author is known, an injured party will likely prefer to lodge proceeding against the hosting provider in pursuit of a bigger compensation of damages. Consequently, the hosting provider, in comparison with the original speaker, has a stronger incentive to remove a comment due to a lower price and higher costs.

Thus, the hosting provider has different incentives in comparison with a commentator. However, the hosting provider faces the same liability if it has failed to remove content expeditiously after receiving a notice. The hosting provider can perceive this paradoxical situation only as unjustified. Therefore, the provider will try to evade it. In order to escape liability, the hosting provider is ready to pay an insignificant for its business price and remove any allegedly defamatory comment. It means that even lawful comments will be likely deleted; therefore, commentators' freedom of expression can be unduly restricted.

Moreover, readers' right to receive information can be restricted as well. Social costs resulted from removing comments are borne by the public. Such costs may be greater in comparison with benefits from the protection of reputation. These two competing interests require a proper balancing. However, the hosting provider, in comparison with a court, lacks competences and incentives to make such a balancing exercise. The hosting provider will avail itself of the cheapest option and use a notice as a decisive signal that a notified comment, irrespective of its nature, is to be removed.

The hosting provider's inclinations to remove a notified comment without deliberation and delay may lead to abuses of a notice-and-take-down procedure. Anyone can pretend to be insulted by a critical comment and require the hosting provider to delete it. Even if this comment is true, the hosting provider will likely remove it.

Moreover, a notice may create prejudice against the author of a notified comment. Since the hosting provider does not have incentives and time to investigate the issue, it is likely that all subsequent postings from the same author will be removed as well. In such a case, if content is lawful, a danger to the author's freedom of expression is obvious. However, in *Tamiz v. Google Inc* such a practice was assessed as exercising "reasonable care" by the hosting provider²⁵⁹. It was acknowledged that the nature of previous comments posted by a particular user could allow the hosting provider to remove his subsequent postings in a "speedier" way than usual²⁶⁰.

Thus, in comparison with the publisher, the hosting provider will censor speech stricter and will tend to block every allegedly defamatory comment in order to keep the shield of the safe harbour. A question as to whether such a comment contributes to the networked social production will not arise. Moreover, the hosting provider will unlikely deliberate whether a comment should be preserved to protect its author's freedom of expression and will not consider readers' interests.

5.3.3 A chance to escape censorship by a hosting provider. Wall with graffiti tactic and a counter-notice mechanism

Nevertheless, there is one tactic which might allow the hosting provider to distance from combating user-generated defamatory content. It is to claim that its service should be seen as equal to a wall with graffiti. This tactic was tried by Google in 2012 in *Tamiz v. Google Inc*²⁶¹. Mr. Tamiz brought a suit before British courts. He claimed that eight defamatory comments had appeared in the blog "London Muslim", which was placed on Google's platform Blogger.com. Mr. Tamiz notified Google. The latter refused to remove the content and forwarded the notice to the author of the blog.

Initially, the High Court of Justice agreed with Google that the hosting provider was like an owner of a wall on which anyone could draw graffiti; therefore, Google was not liable for the defamatory comments on Blogger's virtual walls.²⁶² Google insisted that liability would force it to become a censor. Since Google did not possess knowledge whether or not the comments were truthful, Google was not in a position to decide

²⁵⁹ Court of Appeal, *Payam Tamiz v Google Inc* [2013], EWCA Civ 68, para. 43.

²⁶⁰ See note 259.

²⁶¹ High Court of Justice, *Payam Tamiz v. Google Inc* [2012] EWHC 449 (QB)

²⁶² See note 261, paras. 10, 38, 39, 61.

whether or not to remove the content²⁶³. Furthermore, Google could not be expected to take for granted allegations contained in the notice²⁶⁴. The court accepted these arguments and added some practical considerations that it would be technically impossible to control all material posted due to huge amounts²⁶⁵. It was stated that Google was not obliged “to take any positive step” to remove defamatory content even if Google had received a relevant notice²⁶⁶.

However, the Court of Appeal rejected the wall with graffiti argument²⁶⁷. The court referred to a case of 1937²⁶⁸ in which an owner of a golf club was found liable for a defamatory statement written on a wall of the club. In that case, although the owner did not commit any positive act to publish defamation, the owner was found liable since it had done nothing to delete the unlawful content²⁶⁹. In the case at issue the court decided that after receiving the notice, Google “associated itself with” the comments and therefore became responsible for not deleting them²⁷⁰.

Thus, the wall with graffiti tactic has failed. The hosting provider has to remove a comment after receiving a relevant notice from an injured person. Furthermore, to stay under the shield of the safe harbour of Article 14, a comment has to be deleted “expeditiously”²⁷¹. In conditions where the hosting provider, first, has no interest in supporting third-party speech and, second, has a limited time to take a decision whether or not to keep the content, the provider will very likely remove notified comments.

Nevertheless, there is still one possible safeguard for commentators’ freedom of expression, namely a counter-notice mechanism.²⁷² In such a case, the author of a comment receives an opportunity to protect his speech by, for example, providing evidence that his comment contains truthful information.

²⁶³ High Court of Justice, *Payam Tamiz v. Google Inc* [2012] EWHC 449 (QB), para. 35.

²⁶⁴ See note 263, para. 60.

²⁶⁵ See note 263, para. 35.

²⁶⁶ See note 263, paras. 39, 61.

²⁶⁷ Court of Appeal, *Payam Tamiz v Google Inc* [2013] EWCA Civ 68, paras. 23, 33

²⁶⁸ See Case *Byrne v. Deane* [1937] 1 KB 818.

²⁶⁹ See note 268, paras. 27, 29.

²⁷⁰ See note 267, para. 34.

²⁷¹ As stated in Article 14.1 (b) of the Directive on Electronic Commerce, after receiving a notice, the provider shall “expeditiously remove or disable access to the information”.

²⁷² See K. Stump, (When) Should Defamatory Content Disappear from a Website?, in Katja Weckström (ed.) *Governing Innovation and Expression: New Regimes, Strategies and Techniques* (Turku, Finland: University of Turku) 2013, p. 127 – 128.

However, in my view, this mechanism can do little for the protection of freedom of expression. It is doubtful that the hosting provider will employ this solution. Keeping in touch with authors, reading their responses, sending the provider's decision to an injured person is costly and time-consuming. Moreover, if the hosting provider decides to preserve a comment because its author insists on it, the hosting provider is in no way safeguarded from liability for this comment. The hosting provider becomes associated with the comment and therefore responsible for defamation on the same grounds as its author. Therefore, the hosting provider should investigate the issue in order to become sure that the comment is lawful. This, in turn, will lead to additional costs. Costs will arise if the hosting provider has erred in its assessment that a comment is not defamatory and consequently faces litigations. The probability of a mistake is high not only because defamation may require a difficult legal analysis, but also because the final decision has to be taken in a hurry. Thus, a counter-notice mechanism is unlikely to be applied by the hosting provider.

Even if contrary to business logic the hosting provider employs this mechanism, it is doubtful that an author will use it. First, the author of an anonymous comment will likely be asked to reveal her identity. Second, before sending a counter-notice, she has to assess whether a risk of defamatory proceedings is high and whether she possesses sufficient resources for legal representation. The perplexity of risk assessment and lack of resources can chill a desire to speak. Although an author values her speech much higher than the hosting provider, she may come to the same conclusion as the provider that it is less costly to remove a comment. This conclusion can be to some extent supported by data received from researching a counter-notice mechanism in case of allegedly copyright infringing content. According to this research, most users prefer not to send counter-notices even if chances of winning a suit are considerable²⁷³.

Since a counter-notice mechanism places additional costs both on hosting providers and on authors, the mechanism is unlikely to be used. Consequently, this mechanism is not an adequate tool to prevent the dangers of collateral censorship by the hosting provider. Thus, in comparison with the Delfian model, the new business models will restrict commentators' and readers' freedom of expression in a severe way.

²⁷³ R. Tushnet, *Power Without Responsibility: Intermediaries and the First Amendment*, 76 GEO. WASH. L. REV. 986, 2008, p. 1003.

6 CHANGING DELFIAN MODEL TO COMPLY WITH THE NEW STANDARD

6.1 About the Chapter

This chapter is focused on the third strategy which Internet news portals will likely to prefer to the strategies discussed in the previous chapters. This strategy does not require an Internet news portal to move into another country or split up a portal into two websites. The strategy's basic idea is to start filtering comments according to the new standard set in *Delfi*. Complying with the new standard will lead to abandoning the Delfian model and turning the comment environment into a walled garden. It is a radical change of the business model. Therefore, before building walls around the comment environment, four alternative solutions will be considered in part 6.2.3.

6.2 Consequences for Delfian Model

6.2.1 *The new standard. Total post-moderation instead of reactive moderation*

The Court has stated that in order to escape liability for user-generated defamatory comments, a news portal has to detect them without delay after appearing on its portal²⁷⁴.

Delfi was not prepared to satisfy such a high standard. The portal's system to combat defamatory content was based on reactive moderation. When unlawful comments leaked into the comment environment despite the automatic word-based filter, it was expected that Internet users would press the special button in order to alarm a moderator about such comments. However, in the case at issue the button was not pressed. Consequently, the comments were accessible during six weeks until the injured person's letter came. As soon as Delfi received the letter, the allegedly defamatory content was deleted. The portal supposed that this reaction was sufficient to escape liability.

Yet the Court has highlighted that a news portal shall not wait until an injured person reacts to a defamatory comment. Quite the contrary, a portal shall find and delete

²⁷⁴ ECtHR, *Delfi AS v. Estonia*, no 64569/09, Judgment of the Court (Grand Chamber) of 16 June 2015, para. 154.

unlawful content on its own initiative²⁷⁵. Thus, reactive moderation has been rejected and the system with the button has turned to be a mere additional option or almost a decoration which cannot help to evade liability.

Consequently, Delfi had to resort to manual post-moderation by a special team which reviewed all posted comments and decided which comment could stay on the portal and which comment was to be deleted. Such a team consisting of five moderators was hired by Delfi in 2009²⁷⁶.

Thus, Delfi changed its moderation practices. Instead of reacting to problematic comments brought to the portal' attention by users, Delfi had to introduce a total monitoring of all comments by moderators.

6.2.2 Problems of the new standard

The post-moderation of comments provokes concerns about transparency of this process. It is problematic to secure that a moderator will not accidentally or deliberately hamper lawful speech. If a comment has been blocked, the public may never know what was written by its author; therefore, a portal moderator's abuses may remain unrevealed.

The portal owner should be prepared to be asked to clarify why a certain comment has been blocked. It may require from the portal to employ a complex mechanism in which introducing a team of moderators is only a first step. The team of moderators represents a human filter through which all comments pass. According to recommended Guidelines on Internet filters²⁷⁷, users should be informed that their content is being filtered. If content has been blocked, users "should have the possibility to challenge the blocking or filtering of content and to seek clarifications and remedies."²⁷⁸ Moreover, the Member States in cooperation with private Internet intermediaries should guarantee

²⁷⁵ ECtHR, *Delfi AS v. Estonia*, no 64569/09, Judgment of the Court (Grand Chamber) of 16 June 2015, para. 153.

²⁷⁶ ECtHR, *Delfi AS v. Estonia*, no 64569/09, Judgment of the Court (First Section) of 10 October 2013, para 30.

²⁷⁷ Council of Europe, Recommendation CM/Rec(2008)6 of the Committee of Ministers to member states on measures to promote the respect for freedom of expression and information with regard to Internet filters (adopted on 2 March 2008), Appendix, Guidelines.

²⁷⁸ See note 277, para. 1.

“that content filtered by mistake or error can be accessed without undue difficulty and within a reasonable time”²⁷⁹.

To comply with these Guidelines, the news portal should, first of all, inform its users that comments are filtered by moderators and some of comments can be removed if moderators assess them as defamatory. This requirement is easy to implement. Indeed, a special notice that comments are moderated can be often seen on various websites. Furthermore, when a comment has been blocked or removed by a moderator, users are usually informed about it. However, the Guidelines proposes a further step, namely to introduce a counter-notice mechanism through which authors of rejected comments can oppose blocking. It should be noted that deleting a comment cannot be recommended because if the comment has been blocked by mistake, which is revealed after considering its author’s protest, the “acquitted” comment has to be unblocked.

Thus, complying with the new standard and the Guidelines can significantly complicate the regulation of the comment environment. On the one hand, the portal can no more rely on notices from injured persons because the portal itself has to detect defamation. On the other hand, revealed defamatory comments should be immediately blocked rather than deleted because the portal has to communicate with their authors regarding the nature of the comments. Making unblocked comments visible again for the public means that the portal has accepted the risk of litigations. Therefore, the mechanism has to be complemented with an investigatory stage before unblocking. During the investigatory stage a portal should undertake an independent examination in order not to rely on evidences provided by the authors of blocked comments due to authors’ inclination to overestimate the value of their speech. Furthermore, already at this stage a legal council should be involved to assess what defences could be used in case of litigation.

Thus, compared to reactive moderation the new standard may significantly increase costs of providing for the comment environment.

²⁷⁹ Council of Europe, Recommendation CM/Rec(2008)6 of the Committee of Ministers to member states on measures to promote the respect for freedom of expression and information with regard to Internet filters (adopted on 2 March 2008), Appendix, Guidelines, para. 1.v.

6.2.3 *Four alternative solutions*

Since complying with the new standard may be too burdensome for the news portal's business, the portal owner can prefer to find an alternative solution which could allow him to escape liability for user-generated defamatory comments or, at least, mitigate liability costs. This part of the thesis discusses four solutions: first, obliging commentators to reveal their true identity; second, closing the comment environment in part or completely; third, tolerating liability cost; fourth, charging those commentators who want to defame.

The first solution has been proposed by the Court in *Delfi*. The Court has justified Delfi's liability *inter alia* by referring to the fact that the portal allows anonyms to comment; therefore, there is "no realistic probability that the authors of comments will be held liable"²⁸⁰. The Court has proposed that information about commentators' true identity can be obtained, for example, by requiring users to register through a Facebook account or even through an online banking system²⁸¹.

However, in my view, there is no sense for the portal to consider introducing a mandatory registration based on the true identity because this solution cannot help to evade liability for user-generated comments. The portal, as a publisher, is responsible for published materials along with authors. Even if the real name of the author of a defamatory comment is known, it in no way precludes an injured person to claim damages from the portal. Moreover, an injured person will with all likelihood prefer to sue an Internet news portal, a media company with deep pockets, instead of a commentator, a natural person with less monetary resources. Therefore, this solution should be rejected because it cannot prevent the portal's liability.

At the same time, this solution can seriously deplete the comment environment because fewer commentators will post comments under their real names. Anonymous authors are usually the most active contributors²⁸². For example, Delfi after the proceedings has divided its comment environment into two sections: for registered and anonymous

²⁸⁰ ECtHR, *Delfi AS v. Estonia*, no 64569/09, Judgment of the Court (Grand Chamber) of 16 June 2015, para. 162.

²⁸¹ See note 280, para. 148.

²⁸² The World Association of Newspapers (WAN-IFRA), Online comment moderation: emerging best practices, October 2013, pp. 30, 31, available at <http://www.wan-ifra.org/reports/2013/10/04/online-comment-moderation-emerging-best-practices>, accessed on 29.11.2015.

commentators. Although there is no verification of whether a commentator has revealed her true identity, most commentators prefer to comment anonymously. On 29 November 2015 at 12.45 pm there were 25 articles with comments on Delfi's website²⁸³. 2 articles received only anonymous comments. Among other 23 articles, the most popular article²⁸⁴ received 114 comments: 14 comments from registered users and 100 from anonymous authors. Only once the number of comments posted in each section was almost equal: 13 comments from registered users against 16 comments from anonymous users. Thus, in all 25 cases the number of anonymous comments is much more than the number of comments from registered users.

However, it is not certain that higher numbers of comments can guarantee a higher quality of production. There is a view that only registered with real identity commentators can produce valuable contributions²⁸⁵. For example, according to The Wall Street Journal, commentators who are "hiding behind a cloak of anonymity" are average readers but not effective producers of information products²⁸⁶. This position has been challenged by a study conducted by Disqus, an online commenting software provider. The study is focused on comparing quality of comments posted by anonymous and registered users. According to Disqus, commentators using pseudonyms post not only more comments than registered with true identity commentators but also post more comments which attract a positive reaction from other users of the same comment environment²⁸⁷.

In my opinion, the portal owner can evaluate only the quality of an article. However, the quality of a comment can be assessed only by the public. Different and unpredictable evaluations made by the public guarantee that the mixed model which avails itself of networked social production is more efficient than a traditional newspaper. Those portal owners who suppose that they are in a position to evaluate the quality of comments do not see differences between production by readers and by journalists and therefore undervalue the potential of the networked social economy.

²⁸³ The articles were published in Russian at <http://rus.delfi.lv/news/daily/versions>, accessed on 29 November 2015.

²⁸⁴ The articles title "Nil Ushakov about crashed airplane and acts of terrorism in Paris". Nil Ushakov is the mayor of Riga.

²⁸⁵ The World Association of Newspapers (WAN-IFRA), Online comment moderation: emerging best practices, October 2013, p. 31, available at <http://www.wan-ifra.org/reports/2013/10/04/online-comment-moderation-emerging-best-practices>, accessed on 29.11.2015.

²⁸⁶ See note 285.

²⁸⁷ See note 285, p. 32.

Even if the Wall Street Journal position is right and the portal can only benefit from requiring users to reveal their true identities, it cannot affect my conclusion that the first alternative solution should be rejected because it cannot save the portal from liability for defamatory comments posted by commentators under their real names.

The second possible solution is to close commenting facilities to articles with risky topics. The Court in *Delfi* has highlighted that the article's provocative topic triggered unlawful speech. Delfi should have foreseen such a reaction and pay additional attention to the protection of reputation.²⁸⁸ Consequently, to disable commenting to some articles appears to be a sound solution. Indeed, this tactic is widely applied. Some news portals just do not allow users to comment articles about accidents, court hearings or other topics if portals anticipate any risk of litigations²⁸⁹.

For example, in September 2015 MTV, one of the largest Finnish Internet media portals, announced that it would disable the possibility to comment certain topics. MTV's editor-in-chief Merja Ylä-Anttila explained that this decision had been adopted due to, first, an increase in unlawful speech after the refugee crisis in Europe and, second, an overload which the team of moderators had faced.²⁹⁰

Another version of this solution is to close the whole comment environment for some time. Such a tactic was used by another Finnish media portal, Helsingin Sanomat, which at the same time with MTV decided to shut down the comment environment on its supplement *Nyt* for two weeks. *Nyt*'s news director Jussi Pullinen said that this pause was necessary to find new ways of combating defamation.²⁹¹ However, the comment environment was still closed on 29 November of 2015.

Undoubtedly, closing comment sections to some articles or even shutting down the whole comment environment guarantees with hundred-per-cent certainty that no defamatory comment, as well as no other comment at all, will appear. At the same time, it means a return to the traditional industry model in which information is produced

²⁸⁸ ECtHR, *Delfi AS v. Estonia*, no 64569/09, Judgment of the Court (First Section) of 10 October 2013, para. 86.

²⁸⁹ The World Association of Newspapers (WAN-IFRA), Online comment moderation: emerging best practices, October 2013, p. 17, available at <http://www.wan-ifra.org/reports/2013/10/04/online-comment-moderation-emerging-best-practices> on 29.11.2015.

²⁹⁰ See article "Finnish News Sites Rein in Unruly Comment Section", published by Yle on 01.09.2015, available at http://yle.fi/uutiset/finnish_news_sites_rein_in_unruly_comment_sections/8272612, accessed on 29.11.2015.

²⁹¹ See Note 290.

exclusively by media. Such a solution is impossible for an Internet news portal exploiting the mixed model. Nevertheless, those portals which do not value additional information production by commentators may resort to this option.

The third alternative solution is not to react to the Court's judgment. The portal owner may come to a conclusion that costs of the filtering mechanism are more than liability costs; therefore, there is no economic incentive to combat defamation. Such a conclusion is right provided that the amount of damages awarded to a defamed person is tolerable for the portal. For example, Delfi had to pay only EUR 320 as non-pecuniary damages. At the same time, the share of defamatory comments revealed by the team of moderators during one month was less than 0.5 % of 190 000 comments received²⁹². It means that Delfi spent apparently much more than EUR 320 on filtering out defamation. If it had not filtered at all, the portal might have been better off.

However, this impression is illusionary. First of all, there is no information as to how much Delfi had to spend on legal representation before the Estonian courts and the court in Strasbourg. Secondly, proceeding may be lodged before British courts (See Subchapter 4.4). In such a case, the amount of damages may be GBP 110 000 (approximately EUR 150 000)²⁹³ instead of EUR 320.

Besides, the cost of litigations can become even more considerable if suits are brought before courts of other Member States of the EU. In *eDate and Martinez*²⁹⁴ the CJEU has decided that an injured person can lodge proceedings not only before a court in those Member State where a website publisher is established or where an injured person has "the centre of his interests", but, instead of this option, an injured person can claim local damages before courts of each Member States where defamatory content has been accessible. Thus, a news portal can in theory face 28 proceedings in 28 Member States.

Moreover, if litigation costs were less than cost of the filtering mechanism, Delfi would not have employed the team of moderators. Nevertheless, this team is still working²⁹⁵.

Therefore, the third alternative is too costly and should be rejected.

²⁹² ECtHR, *Delfi AS v. Estonia*, no 64569/09, Judgment of the Court (First Section) of 10 October 2013, para 30.

²⁹³ High Court of Justice, *Slutsker v Romanova* [2015] EWHC 2053 (QB), para. 98.

²⁹⁴ CJEU, joined case C-509/09 and C-161/10, *eDate Advertising and Others* [2011], Judgment of the Court (Grand Chamber) of 25 October 2011, ECR I-10269.

²⁹⁵ According to information available at <http://rus.delfi.lv/about/comments/>, accessed on 28.11.15.

The fourth solution is to replace liability costs from the portal owner to commentators. For example, the portal may allow anyone to post a defamatory comment for a payment in order to compensate costs of possible proceedings lodged against the portal.

A similar solution has been proposed by D. Lichtman and E. Posner regarding Internet access providers. It is offered to charge risky consumers with a higher price than reliable consumers. In such a case, competition among service providers should secure that prices will not overstep a provider's liability costs. If prices increase too much, consumers will go away from an "overzealous" provider to its competitors. Moreover, even if the inclusion of liability costs into the price of service can force some customers to terminate their contracts, it does not necessarily mean that the total number of customers will decrease. It is likely that the outflow of risky users may cause the inflow of law-abiding customers attracted by a more secure environment.²⁹⁶

However, in my view, this solution cannot be a sound choice for Internet news portals. In comparison with Internet access providers, news portals receive revenues from advertising rather than from subscription. Introducing a payment for a defamatory comment may appear, on the one hand, an exotic option and, on the other hand, the encouragement of unlawful conduct.

Consequently, a more sensible tactic is to offer commentators to pay for publishing their comments without moderation. It can allow the portal to sort out risky users because those commentators who are certain in the lawful nature of their content will not pay and agree to an examination by the team of moderators. Those commentators who are not sure that their comments will not be blocked and value their speech sufficiently high as to pay may consent to take on themselves the portal's litigation costs. However, in such a case, the author of a defamatory comment can find himself in a situation where he has to pay twice. If a suit is brought against him but not against the portal, he can be obliged to pay his litigation costs additionally to the previous payment for the same comment to the portal. Even if a commentator is still interested in the payment, he is unlikely ready to pay a high price. Yet the price can be only high. The portal, which benefited monetarily from publishing risky comments, cannot expect that a court, even in Estonia, rules to pay insignificant damages. Had Delfi charged users for publishing

²⁹⁶ D. Lichtman & E. Posner, *Holding Internet Service providers Accountable*, *Supreme Court Economic Review*, 14, 2006, pp. 241 – 244.

comments without moderation, Estonian courts might have agreed with the initial claim of EUR 32 000. What could be a price of a comment which may cause so considerable expenses? Obviously, it cannot be sufficiently low to attract commentators. Therefore, risky users with all likelihood prefer the post-moderation of their comments and hope that the team of moderators does not detect the unlawful nature of their comments.

Therefore, the charging a user for publishing comments without moderation does not appear to be a sound solution.

Thus, all four alternative solutions do not appear to be a reasonable choice. In my opinion, news portals will follow the new standard set in *Delfi* and consequently turn their comment environment into walled gardens.

6.2.4 *Complying with the new standard. Loss of generativity*

Although complying with the standard set in *Delfi* will require an expensive reformation of the business model, this solution is the most probable strategy for a news portal. As a result, a mixed model can be preserved, but the generative nature of comment environment will be lost.

The comment environment will be turned into a walled garden because the new standard does not allow unfiltered contributions. Although the Court has highlighted that pre-moderation before publishing is not required, from the perspective of the networked social production post-moderation has even more damaging effects. If a comment is blocked before publishing, the comment environment is deprived of one contribution, but other comments are not affected directly. On the contrary, if a comment is removed after it has appeared on the portal, comments which are already built on it will be directly damaged. This negative effect cannot be precluded by removing a comment expeditiously because this comment could already find a broad response among commentators. Deleting such a comment is equal to an act of “sabotage” which depreciates new products created before the interference and connected to the deleted contribution. Thus, the whole conversation can be messed up; consequently, the subsequent production may be questioned.

Furthermore, generativity will be lost because the polyarchical structure of the comment environment has to be replaced with a gatekeeper structure. The polyarchical structure

does not filter out contributions on the basis of its quality and therefore guarantees one of the two main benefits of generative systems, namely the participatory input of a large number of commentators. The new standard requires the portal owner or a moderator to become a gatekeeper who allows everyone to come in but keep them in quarantine. Only after examining whether a comment has lawful nature, the comment receives permission to “reside” in the comment environment.

Contrary to the Court conclusion that Delfi’s business model will not be affected, the transformation of a polyarchical comment environment into a gatekeeper structure environment represents a radical change. This change is fundamental because the comment environment ideology has to be altered. The polyarchical comment environment is based on two principles. According to the procrastination principle the environment is kept open and there is no attempt to delete a comment until a problem appears. According to the trust-your-neighbour principle commentators by their own reveal “bad” comments. The new business model has to deny these principles. It has to be built as a walled garden which is policed by the portal owner.

Moreover, since the first benefit, the participatory input, vanishes, the second benefit – the innovative output as a result of unfiltered contributions – can be forgotten as well.

Thus, complying with the new standard will lead to abandoning the Delfian model. Instead of the Delfian model, news portals are forced to return to a walled garden model which was employed by closed networks before the Internet became the dominant network. Interestingly, that in case of news portals the enclosure movement predicted by Zittrain is caused not by consumers’ aversion to defamatory comments but by a court’s interference in the functioning of the comment environment.

6.3 Consequences for Freedom of Expression from the Perspective of the Concept of Collateral Censorship

6.3.1 Incentives of the moderator of a walled garden

Ideally, post-moderation of all comments should lead to providing for a comment environment which is perfectly secured from “bad” code. However, it is likely that not only unlawful but also lawful comments will be blocked. From the perspective of

collateral censorship (see part 5.3.1), the censoring party prefers to block third-party speech if the censor does not possess the same incentives as the speaker. Whether or not the news portal moderator has the speaker's incentives depends on the analysis of four elements: first, motives; second, the evaluation of litigation risks; third, benefits and losses of speech publication; fourth, the price of speech. I will analyze these elements regarding both the news portal moderator and the newspaper editor in order to highlight differences in censoring speech by traditional print media and Internet news portals. A moderator in the Delfian model cannot be compared with a moderator of a walled garden because the Delfian model does not presuppose an active involvement of moderators. The task of a moderator in the Delfian model is to react to complaints from Internet users. The task of a moderator of a walled garden is to act as a gatekeeper.

My supposition is that while the newspaper editor can have almost the same incentives as the author of a letter to the editor, the portal moderator has different incentives than the author of a comment. Therefore, portal liability for defamatory comment is unjustified from the perspective of collateral censorship.

The first element of the analysis is motives. The editor has the same motives both for censoring a reader's letter or censoring an article. The editor sees clearly what role each letter can play in the creation of the joint information product: the next issue of the newspaper. Although the author of a letter is not the newspaper's employee, the third-party content is treated with the same care as content produced by own journalists. The editor can feel proud for the speech which he agreed to publish and can share the same beliefs as the author. If the newspaper had a digital format, the letter would be published in the upper part of the website together with articles. Then, the letter as well as articles could attract comments.

On the contrary, the news portal moderator cannot treat a comment in the same way as an article. The moderator realizes that comments belong to another production model which has been added by the portal owner as a supplement to the main part of the website, namely articles. Although an article and comments to it represent a joint information product, an article is published independently of comments which can be posted in a special section only after the relevant article has appeared. Therefore, the moderator assesses comments as less important than articles.

Since comments come from the public but not from journalists, the moderator looks at commentators as at strangers. Actually, the moderator is not expected to perceive a comment from its author's position. Quite the contrary, the moderator should be an objective and impartial supervisor which guards the comment environment from defamation and secures that commentators do not cause harm to the portal owner. The main motive is to combat defamation rather than to support the information production by commentators. Therefore, different motives place the moderator and commentators on the opposite sides of "barricades".

Second element to analyze is benefits and losses from speech. The editor can capture almost the same benefits as the author. The editor is interested that valuable letters appear in the newspaper because even one letter can attract additional attention and increase sales. Moreover, the editor can perceive social benefits of the author's speech. Besides benefits, the editor can realize losses in case if the letter is not published. Perhaps, the editor's moral losses are lower than for the author, but economic losses may be even higher.

Compared to the editor, the moderator does not look for valuable comments which could increase revenues. Contrariwise, she reads comments to reveal those which are dangerous and may lead to losses for the portal. She takes into account only portal owner's interest to escape liability costs. In her opinion, defamatory comments cannot have any benefits for the portal. Since all comments are assessed as potentially defamatory and harmful for the portal owner, the value of any comment is very low. If a potentially harmful comment has been detected, the moderator will delete it without considering possible losses for the author or the public.

While the moderator does not tolerate defamatory speech, the editor, as well as the author, may be interested in unlawful content. Although the editor can be suspected in feeling the desire to insult, the interest in defamation can be based mainly on economic considerations to increase sales in the result of a public scandal. Even the danger of litigating can be accepted because benefits from negative promotion can be higher than liability costs. Losses caused by liability can be recaptured by revenues from selling newspaper copies. However, an Internet news portal gets revenues mainly from advertising; therefore, it is not interested in scandalous reputation which can scare away advertisers.

Thus, the moderator is not affected by benefits and losses which speech has for its author. Deleting a comment is a loss for the commentator, but from the moderator's point of view it is rather a benefit than a loss for the portal.

The third element of the analysis is the evaluation of litigation risks. Since letters are incorporated in the newspaper, they are adopted as own content. The editor becomes responsible for harm caused by defamatory statements contained in the published letters. The news portal publisher is liable for defamatory comments as well. Nevertheless, if from the portal publisher's perspective liability for defamatory comments is a result of moderators' failure to block unlawful content, for the newspaper publisher facing liability is a deliberate choice. In contrast to the portal moderator, the newspaper editor possesses necessary competences to distinguish defamation. Furthermore, the number of letters is insignificant; therefore, the editor has sufficient time to evaluate each letter and if necessary to contact its author in order to receive additional information or even to make his own investigation. The editor's expertise and relaxed time limits can secure that even if a defamatory letter has been published, it is not due to the editor's mistake rather because the publisher is interested in defamation. Therefore, the editor can obtain even better knowledge than the author in order to evaluate the risk of litigating.

On the contrary, the moderator does not possess sufficient knowledge to evaluate litigation risks. Although the moderator is closer to the facts of a possible dispute than a hosting provider, compared to the editor, the moderator has a mere technical role. She does not participate in the information production. She is a security guard. The guard has to assess a comment without any proper investigation as to whether or not the comment in question is true. It is sufficient if a comment is potentially harmful. The moderator is especially strict because the consequences of a mistake can be very costly. If the newspaper publisher can choose in which Member States the newspaper is distributed and therefore can limit possible litigations to one or several states, the portal publishes worldwide. Content on an Internet portal is simultaneously accessible in all of the Member States and can theoretically lead to proceedings in 28 States. Since defamation law has not been harmonised, the moderator needs to be an expert in all 28 defamation laws in order to be sure that the comment at issue is not actionable. It is unlikely that the moderator is such a specialist. Although the author is hardly an expert

in defamation laws either, he can be expected to know whether his comment is true and have evidences to support his position.

The fourth element of the analysis is the price of defamatory content. The editor values every reader's letter even if it has defamatory nature. On the contrary, the moderator sees comments as dangerous rather than valuable content. She reads almost thousand comments a day and therefore does not have time to consider their input into the comment environment. Consequently, the price of each comment is very low. Suspicious comments do not have any positive value at all. If a comment has been blocked, the costs of losing the content will be borne only by the author and society but not by the moderator.

Thus, compared to commentators, the moderator has different incentives regarding all of the four elements. Therefore, from the perspective of collateral censorship, Internet news portals liability for user-generated defamatory comments cannot be justified.

6.3.2 Dangers of collateral censorship by the moderator of a walled garden

Dangers of collateral censorship follow from blocking any suspicious, even lawful, content by the moderator. She is likely to abuse her control over comments because of two reasons.

First of all, it is difficult to distinguish defamatory content. For example, the comments in *Delfi* might have been assessed by British courts as "mere vulgar abuse" rather than defamation²⁹⁷. In *Tamiz v. Google* the judge, decided that only comments with allegations of criminal offences might amount to defamation²⁹⁸. Yet the comments in *Delfi* do not contain such allegations. Thus, a British Internet user might have been astonished if his comment had been blocked by an Estonian moderator as defamatory. Furthermore, the judge confessed to being unable to decide whether or not one of the comments was defamatory²⁹⁹. Taking into consideration that UK defamation law is called "schizophrenic" by Dario Milo³⁰⁰, the judge's doubts are not surprising.

²⁹⁷ Eileen Weinert, "Oracle at "Delfi" - European Court of Human Rights holds website liable for angry reader comments", *Entertainment Law Review*, 2014, 25(1), p. 31.

²⁹⁸ High Court of Justice, *Tamiz v. Google* [2012], EWHC 449 (QB) of 2 March 2012, paras. 26-30.

²⁹⁹ See note 298, para. 27.

³⁰⁰ Dario Milo, *Defamation and Freedom of Speech*, Oxford University Press, 2008, p. 84.

Even *Delfi* can be seen as one more example that distinguishing defamation is a difficult task even for a court. The Grand Chamber highlighted that the comments have clear unlawful nature; therefore, there could be no difficulty for the portal to recognize them³⁰¹. This conclusion seems to be illogical taking into account the history of this case. All domestic courts and the First Section of the Court have decided that the comments are undisputedly defamatory³⁰². However, the Grand Chamber has rejected this assessment and concluded that the comments represent hate speech and speech inciting violence³⁰³.

Secondly, the moderator has to make a difficult assessment of a comment expeditiously, that is in a hurry. Furthermore, she may face hundreds of comments a day. For example, in August 2009 five moderators employed by Delfi reviewed 190 000 comments. It means that each moderator examined in average 1225 comments a day. The numbers are so high because moderators have to review all comments rather than only those which are posted after articles with provocative topics. Although the Court has recommended the portal to be on guard when it publishes an article of a considerable public interest because it indicates a higher-than-average risk of attracting negative comments³⁰⁴, news portals' practice shows that the public can be interested both in breaking news and topics which are under discussion for many years, such as climate change³⁰⁵. In my view, defamatory comments do not need any provocation to appear. They may be just caused by angry mood. Consequently, a defamatory comment can be posted to any article.

Thus, if a comment appears to be risky, the moderator of a walled garden can abuse her power and block any suspicious comment to secure a sterile comment environment. As a result, the freedom of expression of those commentators who post lawful content can be endangered. Therefore, readers' right to receive information is likely to be unduly restricted.

³⁰¹ ECtHR, *Delfi AS v. Estonia*, no 64569/09, Judgment of the Court (Grand Chamber) of 16 June 2015, para. 114.

³⁰² ECtHR, *Delfi AS v. Estonia*, no 64569/09, Judgment of the Court (First Section) of 10 October 2013, para. 84.

³⁰³ See note 301, para. 114.

³⁰⁴ See note 301, para. 86.

³⁰⁵ The World Association of Newspapers (WAN-IFRA), Online comment moderation: emerging best practices, October 2013, p. 18, available at <http://www.wan-ifra.org/reports/2013/10/04/online-comment-moderation-emerging-best-practices>, accessed on 29.11.2015.

7 CONCLUSIONS

7.1 Main Findings and Suggestions for Future Research

The Delfian model represents a mixed model which combines articles, produced by the industrial information economy model, and the comment environment, generated by the new networked social economy. This mixture guarantees a more efficient production for portal owners and an enhanced freedom of expression for Internet users. Moreover, the Delfian model's comment environment is generative and therefore can evolve and produce innovative information products. However, it suffers from the paradox of generativity. It means that the openness of the comment environment to any contributions may lead to overwhelming with defamation. It may trigger an enclosure movement and force portal owners to turn a generative comment environment into a walled garden. The ECtHR's judgment in *Delfi* is an example of how this transformation can be caused not by portal owners' plans or Internet users' abhorrence of defamation but by a court decision.

After the judgment in *Delfi*, Internet news portals in the EU have to consider three strategies. In my view, the third strategy, namely following the new standard set in *Delfi*, will be the most popular. This strategy requires news portals to abandon the Delfian model and reconfigure comment environments into walled gardens. As a result, generativity will be lost because the polyarchical structure of the comment environment has to be replaced by a gatekeeper structure. The portal owner or a moderator has to become a gatekeeper who allows all comments to come in but keep them in quarantine. Only after examining whether or not a comment represents defamation, the comment receives permission to "reside" in the comment environment.

The second strategy, namely splitting up the Delfian model to reach the safe harbour for a host, appears to be challenging. Although many news websites have their pages with comment sections on various social media platforms, it is not certain that website publishers will not be seen as publishers of comments. Firstly, a link to an article connects a page with a news website; therefore, comments are still integrated into the joint information production. Secondly, although commentators can delete their comments, it is not sufficient to say that comments are not controlled by the portal. The portal owner can avail himself of the safe harbour for a hosting provider only if the

operator of portal page, for example on Facebook, does not possess a technical possibility to remove a comment. Otherwise, both commentators and the portal owner are publishers.

Nevertheless, my suppositions are theoretical and require further research to verify how portals will react to the decision in *Delfi*. Moreover, it is necessary to explore how British courts will react to the new standard. It is likely that injured persons will use *Delfi* to claim that the standard set in *Imran Karim* is not sufficient to protect reputation. If British courts agree to apply the Delfi standard, it will undermine the first strategy, namely moving into a county with no-liability regime for user-generated defamatory comments. Portals which by migrating into the USA have received the immunization and therefore preserved the Delfian model may be pulled back to the EU to face litigations before British courts.

Although further research is necessary, two conclusions can be already made. First, *Delfi* represents a choice in favor of walled gardens which will be more dangerous to freedom of expression in comparison with the Delfian model. Second, return to the walled-garden system is a loss for the networked social economy in the battle, which affects negatively both news portal owners and Internet users.

7.2 Choice: Walled gardens as a Future of Internet News Portals in the EU

The Internet is an environment which can be rebuilt to make it more vulnerable to regulation³⁰⁶ and less generative³⁰⁷. According to Lessig, private parties with power over the Internet architecture are interested in tightening control over it³⁰⁸. As a rule, the architecture of the Internet is rebuilt according to business models; and then law reflects such changes³⁰⁹. Interestingly, the case of *Delfi* represents an example of how the Internet architecture and news portals' business models have to be reconfigured according to a choice made by a court. *Delfi* demonstrates how the "second generation

³⁰⁶ See L. Lessig, *Code version 2.0*, Basic Books, New York 2006; and D. Post, *The Theory of Generativity*, *Fordham Law Review*, Volume 78, Issue 6, Article 2, 2010.

³⁰⁷ See J. Zittrain, *The Future of the Internet – And How to Stop It*, Yale University Press & Penguin UK 2008.

³⁰⁸ L. Lessig, *Code version 2.0*, Basic Books, New York 2006, pp. 5, 6.

³⁰⁹ J. Zittrain, *A History of Online Gatekeeping*, *Harvard Journal of Law & Technology*, Vol. 19 № 2, 2006, p. 263.

of architecture build by commerce” is to be reconfigured into the “third generation” which is shaped according to regulators’ instructions³¹⁰. In *Delfi* the Court has agreed with all arguments submitted by the Estonian government and disagreed with the objections expressed by the Internet industry and human rights protection organisations. Since, according to Lessig, regulators prefer architectures which allow more control over the Internet³¹¹, the Court’s choice in favor of walled gardens with sterile and perfectly controlled comment environments is not surprising. However, it is alarming that such a choice has been made by the Court expected to protect first of all human rights but not regulators’ interests.

The Court could have taken another, perhaps, more political than legal position and could have declared that interests of freedom of expression requires no-liability regime for news portals in case of publishing defamatory third-party comments. In my view, if the business model utilized by the Estonian portal had been seen as a Delfian model, the Court could have realized to what negative consequences to freedom of expression changes in the model can lead. Had it been so, the Court would have included in the balancing commentators’ and readers’ right to freedom of expression. Therefore, the choice might have been different. However, the Court has not made a proper balancing. Moreover, the problem of private censorship has been deemed not existing in this case. Thus, news portal has been empowered to build private fences.

As a result, generativity of comment environments will be lost. David Post argues that generativity is not as fragile as Zittrain supposes; therefore, its potential to self-protection should not be undervalued³¹². However, this argument cannot be admitted in the case of the Delfian model. The Delfian model’s potential for self-defence has been already exhausted to circumvent automatic filtering. Introducing total post-moderation will extinguish adaptability and accessibility, two of the five generative features of the comment environment. Adaptability allows commentators to use the comment environment for other purposes than commenting certain articles. Because such practices violate the rules of commenting, the moderator will likely remove any content which is in conflict with the rules. Consequently, comments on other topics than discussed in articles or friendly chats between and inside commentator communities

³¹⁰ L. Lessig, *Code version 2.0*, Basic Books, New York 2006, p. 7.

³¹¹ See note 310, p. 24.

³¹² D. Post, *The Theory of Generativity*, *Fordham Law Review*, Volume 78, Issue 6, Article 2, 2010, p. 2763.

will be eradicated. Accessibility allows commentators who are prohibited from accessing the comment environment to circumvent bans by changing their nicknames or by posting comments from another computer. However, total post-moderation makes these practices meaningless. Even if a banned commentator comes into the comment environment through a backdoor, he still needs a permission from the moderator to stay inside.

Moreover, the loss of generativity can hardly be compensated by a variety of news portal models. Since the third strategy is likely to be the most popular, Internet news portals will utilize only the walled-garden model or even close comment environments at all.

7.3 Loss in the Battle

As highlighted by Zittrain, the networked social economy has gained success because Internet users did not misuse its enhanced benefits³¹³. The choice to preclude the overflow of defamatory comments by extinguishing generativity triggers the enclosure movement from the Delfian model to walled gardens. Such a result is not in the interests of news portal owners. Although the mix of two modes of production is still possible, the enhanced efficiency is likely to be damaged by the new control mechanism. Moreover, since the loss of generativity precludes an unexpected change and innovations, comment environments of portals based in the EU cannot evolve at the same pace with generative comment environments of US news portals. Besides, the mixed production may be stopped if the burden of liability costs forces European portal owners to close comments environments. In such a case, European news portals will have to return to the old model of industrial information economy. This step back is a loss in the battle for news portal owners.

The walled-garden model is not in the interests of Internet users either. Under the burden of liability costs the moderator will tend to block any suspicious comment. As a result, lawful comments can be blocked as well. Consequently, the enhanced freedom of

³¹³ J. Zittrain, *The Future of the Internet – And How to Stop It*, Yale University Press & Penguin UK 2008, p. 99.

expression will be endangered. Thus, it is a loss for commentators and readers of news portals.

Certainly, the loss in the battle in case of Internet news portals does not mean that the whole battle will be lost. However, this local defeat may have not only commercial but also political consequences. Perfectly controlled walled gardens can provide users with a “comfortable” and “safe” environment to “have intelligent conversations”³¹⁴, but they do not have space for independent public discussions.

³¹⁴ According to Gowker, a US blog, news portals have an obligation to moderate comments to guarantee Internet users a safe environment in which they can feel comfortable. (See The World Association of Newspapers (WAN-IFRA), Online comment moderation: emerging best practices, October 2013, p. 9, available at <http://www.wan-ifra.org/reports/2013/10/04/online-comment-moderation-emerging-best-practices>, accessed on 29.11.2015.