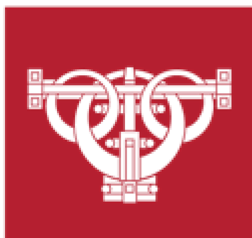

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LIABILITY OF INTERNET INTERMEDIARIES AS AN OBSTRUCTION OF THE FREEDOM OF EXPRESSION

BACHELOR THESIS

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DECLARATION OF HONOUR:

I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

(Signed) ....

RIGA 2018

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SUMMARY

This Thesis looked upon current legal regime established by the European Court of Human Rights with regard to the liability of Internet intermediaries for user-generated commentaries and examined how detrimental it is to the freedom of expression. The aim was to find legal, economic and social imperfections of the current state of affairs and propose theoretical solutions. The case Delfi AS v. Estonia was taken as a reference point, since it was the first time the ECtHR addressed this particular issue. Consequently, the said case was analysed from four different perspectives. The first part of research addressed its compatibility with the existing ECtHR standards with regard to the media in pre-Internet era. The second part was dedicated to the comparative analysis between ECtHR view on intermediary liability and the US approach to the issue, as both of them abide by the rule of precedent. The third part offered an innovative view of taking into account different media business models, as well as linking the economic prosperity with the freedom of speech level. The last part of the research analysed scholarly criticism of the Delfi judgment, pointing out the most serious imperfections observed by the academics. The main findings of this research are as follows. The honourable Court in Strasbourg to a large extent disregarded its own standards of treatment of the media and mistakenly failed to identify comments sections as a discussion of public interest. The chilling effect that precludes other intermediaries from allowing user comments was absolutely neglected by the ECtHR. The harmful impact on the media sector economy was also not taken into account by the Court. Finally, the paper offered several proposals on how to the ECtHR could enhance depth of its legal analysis and accuracy of judgments with regard to liability of Internet intermediaries for user-generated comments.

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1. FOREWORD

The technological advancement, apart from being a universal good for the whole mankind, is also a source of novel legal challenges. A historical example: the truly marvellous invention of telegraph, which gave us the way to communicate each other at hitherto impossible speed, gave jurists of those times lots of headache, such as the liability for delayed message or grammatical mistake. Unsurprisingly, not even the best legal professionals can foretell how to regulate a matter that does not exist yet. The online space is today's telegraph - with its very own marvels and juristic challenges. One of the greatest features of Internet is the possibility to comfortably exercise one's right to freedom of speech, freedom of expression. Today people gladly enjoy this gift of the global network, among others, while lawyers and judges (even though they also participate in this feast of freedom, when off duty) are left to deal with the disputes arising from this "enjoyable usage". Internet is not something brand new, yet, legal disputes concerning manifold of its aspects continues to clutter up court archives and rise hot academic debates. Blogs, comment sections, public chat rooms or interest groups - all these brilliant and safe ways to voice your concerns about literally anything, became a major source of debates between the experts in law, public policy, economics and other related fields.

One of such controversial topics is the liability for anonymous statements - and there is no mistake in this sentence. Once verbal harm is done, whether it is defamation, hate speech or even incitement to violence, there is a possibility to find someone accountable. It may be the offender himself, if his personality becomes uncovered. The European legal culture also allows that the claim may be brought against the website, which gives users, both nameless and voluntarily identified, the platform for expressing their views and fails to monitor potentially unlawful commentary. In both cases judiciary is required to work on a very thin border between two, sometimes conflicting, human rights. What fundamental principle of the democratic society possesses greatest importance - to have a possibility to express oneself without a fear of censorship or to demand a fair remedy for false and harmful speech? They both are equally important in general, however, in each and every specific case one of them prevails over another.

Meanwhile, the European Court of Human Rights, does not provide any guidance for cases when anonymous perpetrator is technically identifiable, with the support of Internet intermediary or solely by the state authorities. It may be costly, it may be difficult to discover, but it may be possible. From that perspective, is it fair and just for the domestic and later on

international courts to leave all the accountability on the shoulders of intermediary? Moreover, the Court in Strasbourg fails to acknowledge the potential harmful impact that its ruling may have on the media industry and other far-reaching repercussions that the society is likely to face with regard to the freedom of press.

Not every Internet intermediary is an online media portal. Yet, the media sector owns a considerable piece of the overall Internet traffic. Pursuant to the 2011 report "The Role of Internet Intermediaries in Advancing Public Policy Objectives" by OECD, the following definition in the best way describes main traits of intermediary:

> Internet intermediaries bring together of facilitate transactions between third parties on the Internet. They give access to, host, transmit and index content, products and services originated by third parties on the Internet or provide Internet-based services to third parties.[1]

Information, which users of the media portals generate, usually in a form of comments, falls within a scope of giving access and transmitting content independently and voluntarily created by third parties.

Liability of the Internet intermediaries in ECtHR judicature is represented mainly by the outcome of the case Delfi AS v Estonia - as long as it is the first ruling in this regard, any future case depends on it. The outcome itself have spoken in favour of privacy rights and not the freedom of speech. As it is always in the case of conflicting fundamental rights, both sides have their advocates. The ultimate goal of this paper is to find a fresh, different outlook on how the liability of intermediaries could have been handled by the Strasbourg Court, have it taken into account several subjects, matters and interests it did not in reality. **The research question, thus, can be defined as follows: if the Court have taken into consideration more arguments in favour of the freedom of expression, could there have been delivered a more precise, more accurate and more balanced judgment?** A decision that would satisfy all interested parties in general, both private individuals and the world of media?

Clearly, the ECtHR ultimate task is to examine judgments of the domestic courts of Council of Europe members states, in order to evaluate their compatibility with statutes of the human rights Convention. However, within its line of reasoning throughout the judgment, the honorable Court usually comments on the variety of issues, not limited to the compatibility (sometimes not even limited to the law concepts exclusively); those commentaries later on play a major role in future cases of similar nature. Because of that, proposals, which at first

[1] Organisation for Economic Co-operation and Development. "The Role of Internet Intermediaries in Advancing Public Policy Objectives." OECD Publishing. Paris. p. 20. Available on: http://www.oecd-ilibrary.org/science-and-technology/the-role-of-Internet-intermediaries-in-advancing-public-policy-objectives_9789264115644-en. Accessed: March 25, 2018.

glance may seem a bit too revolutionary and unrealistic, can fit the traditions of European Court of Human Rights and truly contribute to the discussion.

For example, what if the court happened to provide its position on the unmasking of anonymous speech and shifting the liability from Internet intermediaries' shoulders? The very existence of the official court's position (meaning the judgment itself, not judges' concurring or dissenting opinions) on the issue of anonymity, undoubtedly, will have an impact on the domestic judgments in Council of Europe member states. When the position of the ECtHR is quite well defined, any judge of the local Supreme court would think twice before proclaiming a dissenting verdict. Certainly, there is a potential for development and revision of older standards. In case when a person responsible for offensive or anyhow unlawful comments is easily identifiable, claims are usually brought against the said individual, and the platform of communication is irrelevant. However, when the perpetrator remains anonymous, it is impossible to make him accountable for his actions and instead of him, now the Internet intermediary is at gunpoint. Even knowing the fact that intermediary itself did not originated this information, but only provided a platform to do so.

The whole issue is an important topic of law and society because of multiple factors. There only have been a few precedents of liability of intermediaries for users' defamatory or hate speech comments. The penalties imposed on Internet portal in all cases were utterly moderate, having rather a symbolic meaning than being a somehow perceptible fine.[2] Usually portals are acting proactively and delete comments that are inconsistent with their user policy. Or do so after user-sent reports. In either event it is unlikely that slandered individual would go for a lawyer to sue news agency or popular forum, demanding compensation or public apology whatsoever. The man on the street could argue that considering such a miserable amount of cases[3] and insignificant penalties, there is no real problem at all. However, even a single lawsuit has precedence power over further cases. And because of that, there is a threat to online newspapers, news portals, non-commercial organizations and almost anything that one considers media outlet. Free and independent media are essential cornerstones of each and every democratic society. Not a single political regime with intolerant view on freedom of expression is a democracy - because public elections is not the one and only trait of democracy, as some people still think today. One can even trace a correlation between popularity of such view and level authoritarian mood in the country; take for instance, today's

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[2] Delfi AS v. Estonia, no. 64569/09, para. 27, ECHR 2015. Available on: http://hudoc.echr.coe.int/eng?i=001-155105.

[3] Ronan Ó Fathaigh. "The chilling effect of liability for online reader comments." European Human Rights Law Review no. 4 (2017): p. 389-390. Available on: ThomsonReuters Westlaw. Accessed: April 24, 2018.

situation of Russia or Poland. In the western world (generally, countries where democratic values prevail) mass media importance cannot be underestimated. Its alternative name, the Fourth Estate, allegorically puts it on a par with parliament, government and courts - all the typical branches of the *trias politica* rule or separation of powers.[4]

Without a thoroughly described methodology of research it would be quite difficult to deliver an academic product of high quality, as well as for tutors to grasp the flow of working process and consistency of the expressed ideas. In order to look at the liability of Internet intermediaries in a new fashion, this thesis encompasses a set of four different perspectives. Each of them will allow to see the current state of affairs through the prism of hypothetical assumptions, that the Court may theoretically consider in the future.

The first part of this thesis will comprise long-established standards of the ECtHR regarding the boundaries of freedom of expression, born out of the most noticeable court rulings, as well as the general rules of the game set up by the Article 10 of the ECHR. This point is exceptionally important before rushing to the essential questions of this research. It is crucial to first understand how the ECtHR could set up limits for the freedom of expression, disregarding the online presence of this freedom (and only then move to the realm of Internet. Together with the actual case law of ECtHR, this segment of the thesis will assess academic writings on the topic or court decision commentary. The application of established standards of the European Court of Human Rights will be demonstrated by the example of Jersild v. Denmark, a lawsuit about the boundaries of freedom of expression in for the media, quite well-known in academic circles. This particular case was chosen because of three reasons. On the one hand, it perfectly summarizes all of the existing paradigms of ECtHR with regard to the free speech. On another, this trial itself has become a reference point for more than 40 cases.[5] What is more, nature of Jersild case very much resembles the nature of main proceeding with respect to liability of Internet intermediaries. With some little distinction though - absence of the Internet component. When analysing a lawsuit before the ECtHR, one cannot simply disregard already acknowledged standards. But pursuing a desire to add at least a bit of novelty to this quite common element, there will be an attempt to draw a parallel between two cases - Delfi and Jersild.

The second part of this research project will look at the issues of anonymity notion and how those issues were approached in the United States, by assessing the scholarly literature and the

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[4] Encyclopædia Britannica. "Separation of powers." Available on: https://www.britannica.com/topic/separation-of-powers. Accessed: March 24, 2018.
[5] Case significance of Jersild v. Denmark. Global Freedom of Expression. Columbia University. Available on: https://globalfreedomofexpression.columbia.edu/cases/jersild-v-denmark/. Last accessed: April 30, 2018.

case law, including both judgments and opinions. The United States and their legal traditions were chosen for a reason. First, a comparison between two fundamentally different legal cultures, such as American and European, usually provokes a fruitful discussion on whether one legal solution is more appropriate than another; can the latter be replaced? And second, despite safeguarding human rights in mostly civil law countries, the ECtHR itself much more resembles the US courts with their rigorous rule of precedent. Here the thesis will provide reader with such answers as: whether unmasking hidden users could be the right practice to implement? What kind of precedents there were and how they evolved?

In the third part of this paper, consequences of the liability of Internet intermediaries will be explored from the economic and business perspectives rather than legal one. Since there are several quite different revenue models for online platforms, each of them will be analysed from the point of economic damage that platform may suffer, in case of extensive application of intermediary liability. Here main source of information will be the OECD report on the importance of Internet intermediaries for the economy, combined with the deliberate actions that web-platform may take in order reduce liability risks, such as burdensome excessive moderation, censorship policies and etc. Additionally, here one will have a chance to find out about the positive correlation between the economic growth of the country and the level of the freedom of press; how these two concepts foster each other simultaneously and what conclusions national governments may arrive to, after exploring this interrelation and causality.

The fourth part of the thesis will encompass the variety of critical opinions with respect to the judgment in Delfi AS v. Estonia. One may argue that retroactive critique is something anyone can do and where were those voices, when the adjudication just started. Indeed, it is relatively easy to find major and minor flaws retrospectively. But the again, would there have been possible any improvement at all, without the harsh afterword? Finally, the last section will summarize all of the finding of preceding sections altogether. Then it will try to come out with a brand new, innovative way to upgrade current state of affair with regard to liability of Internet intermediaries on European continent. By combining smaller enhancements, there is a chance to sculpt a complete, just and accurate improvement, that will work in the best interests of the society.

The findings of this research are based on an exhaustive amount of academic literature and case law (mostly the ECtHR, also a bit of US jurisprudence), as well as international and national statutory law (from the European Convention on Human Rights to several national acts), to better support the evidence. The literature includes a few solid legal grimoires (see,

for example, Cyberspace Law: Cases and Materials) and a variety of scholarly writings in recognized academic journals on topics of law (The Modern Law Review, The American Journal of International Law, Boston University Law Review and others), economics (such as the Journal of Media Economics) and even psychology, the latter two for the purpose of economic analysis of the freedom of expression. Additionally were used officials reports, for the sake of statistics and several dictionary references, when it was necessary to clarify the word. Going back to the academic articles, ethical rules of objectivity in the research requires different opinions to be represented, rather that the pile of similar views under the different authorship; this paper abides by said rules to the fullest extent possible.

2. THE ECTHR STANDARDS FOR THE MEDIA IN PRE-INTERNET ERA

The battle between freedom to hold and express opinions and other fundamental rights of people was under the supervision of the European Human Rights Court long before the all-consuming era of massive Internet communication. The existing standards or tests, that ECtHR applies when assessing issues of somehow questionable speech, were tailor-made in the ongoing course of cases. Here the narrative will consist of showing how the Court can regulate and limit the freedom of expression, what kind of requirements apply to make the restriction justifiable and, most importantly, how these rules were represented in the actual case law. One particular case deserves some extra attention - Jersild v. Denmark. It at the same moment encompasses the majority of the most prominent preceding ECtHR decisions, gives a landmark for more than four dozens of succeeding trials[6] and is of a similar essence as the main lawsuit of the entire thesis.

With regard to the topic of this paper, liability of media agents (but not necessarily a classic media) for “authorless” remarks made online, the most suitable patterns of ECtHR logics would be litigations of hate speech incidents or incitement to violence and defamation. Norms of hate speech treatment in this context will be considered of higher importance, hence the main case of the subsequent analysis - Delfi AS v. Estonia - concerns primarily anonymous hate speech. Then infringement of reputation rights of others: it can take many shapes, starting with commercial reputation and criticism of public figures and politicians to maintaining authority of the judiciary.[7] Without getting into myriads of cases resembling each other, because that then would require a separate volume for each type of reputational right,

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[6] Ibid.

[7] Dominika Bychawska-Siniarska, “Protecting the Right to Freedom of Expression under the European Convention on Human Rights. A handbook for legal practitioners.” Council of Europe (2017): p. 11. Available on: https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814. Accessed: March 28, 2018.

this subchapter will provide a general overview of ECtHR standards for defamatory statements. That will be necessary in forecasting probable outcomes and providing recommendations, if some of this rights happen to be demeaned by merciless online commentators.

2.1. Justifiable limitations of the freedom of expression

The preamble to the European Convention on Human Rights expressly states the values and principles that the Convention stands for: fundamental freedoms of people which are necessary for effective functioning of a democratic political system.[8] Freedom of expression, among other freedoms, is not only important as an independent right, but also has a central role in the protection of other rights and freedoms under the Convention. Without a free speech protected by autonomous and impartial judiciary there cannot be a democratic country, there cannot be a democracy.[9] For several times the ECtHR has also underlined the role of free press in a democratic society and freedom of expression in general. In case Lingens v. Austria honourable Court for the first time formulated that the right to voice one's opinions, beliefs and concerns is one of the adamant principles that makes modern-day community a democratic one:

> [F]reedom of expression … constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfillment.[10]

It once again shows that Strasbourg judges understand and hold free speech in high esteem. Later on this statement was reiterated and reaffirmed in cases of similar nature concerning Article 10, such as Şener v. Turkey[11], Thoma v. Luxembourg[12] and others.[13] The press, as part of freedom of expression, also was not forgotten by the ECtHR - according to the Court it "plays a pre-eminent role in a State governed by the rule of law."[14] The article 10 of the Convention is divided into two parts. The first one establishes protected rights more precisely: the right to freedom of expression must also comprise the freedom to hold opinions and to obtain and transmit information or ideas; and that to be without unjust interference of public

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[8] Convention for the Protection of Human Rights and Fundamental Freedoms: p. 5. Available on: https://www.echr.coe.int/Documents/Convention_ENG.pdf. Accessed: March 28, 2018.
[9] Bychawska-Siniarska, "Freedom of Expression under the ECHR." p. 11.
[10] Lingens v. Austria, no. 9815/82, para. 41, ECHR 1986. Available on: http://hudoc.echr.coe.int/eng?i=001-57523.
[11] Şener v. Turkey, no. 26680/95, para. 39, ECHR 2000. Available on: http://hudoc.echr.coe.int/eng?i=001-58753.
[12] Thoma v. Luxembourg, no. 38432/97, para. 43, ECHR 2001. Available on: http://hudoc.echr.coe.int/eng?i=001-59363.
[13] Bychawska-Siniarska, "Freedom of Expression under the ECHR." p. 11.
[14] Castells v. Spain, no. 11798/85, para. 43, ECHR 1992. Available on: http://hudoc.echr.coe.int/eng?i=001-57772.

authorities.[15] Simultaneously, this right guaranteed by the article may itself clash with other fundamental right protected under the Convention, such as the right to fair trial or to respect of private life. Article's second part governs justifiable reasons to interfere with or restrict one's freedom of expression - and the majority of disputes arises when the national government seeks to protect values and interests from that very part.

The three-part test that the Court goes through each and every time is enshrined into part 2 of the Article 10. At first, the interference of authorities with exercise of the right to freedom of expression shall be prescribed by national law. For instance, in case of a person convicted for hate speech, the very crime of hate speech must be embodied into national penal or civil code, adopted by the national parliament. As a general rule of thumb, whatever sanction is applied towards one's freedom of speech, it has to have grounds in written and public legal provisions. Talking about the rules of common law culture or principles of public international law, there were only very few cases when the Court relied[16] on them as on a rightful ground for interference; mainly because granting legitimacy for any restriction in a democratic world requires such verification steps as parliamentary debates and open elections.[17] For the first time in ECtHR history this statement appears in the judgment of case The Sunday Times v. UK case. Quite lengthy, but since every piece of that tenet expresses the position of the Court for years ahead, it is worth to show the complete wording:

> Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.[18]

Once this step is done, interference with one's right to exercise freedom of expression shall pursue one of the legitimate aims mentioned into second paragraph of the Article 10. Their list is exhaustive and is limited to the following: national security, territorial integrity, public safety, prevention of crime and disorder, protection of health, morals, reputation and rights of others, preventing the disclosure of confidential information and maintaining the authority

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[15] Convention on Human Rights, art. 10, para. 1.

[16] Groppera Radio AG and Others v. Switzerland, no. 10890/84, para. 65-67, ECHR 1990. Available on: http://hudoc.echr.coe.int/eng?i=001-57623; Autronic AG and v. Switzerland, no. 12726/87, para. 51, ECHR 1990. Available on: http://hudoc.echr.coe.int/eng?i=001-57630.

[17] Bychawska-Siniarska, "Freedom of Expression under the ECHR." p. 39.

[18] The Sunday Times v. The United Kingdom, no. 6538/74, para. 49, ECHR 1979. Available on: http://hudoc.echr.coe.int/eng?i=001-57584.

and impartiality of the judicature.[19] Hence, whenever national court is urged by a prosecutor or a claimant to enforce a legal provision that in a certain way limits the freedom to express, the court has duty to clearly identify interests, rights or values protected by this provision. Consequently, it has to examine whether the above-mentioned interest or value falls within the scope of Article 10.2. And only in case the answer to that question is positive, court may proceed with the imposition of sanctions and penalties.[20] A short theoretical example: if newspaper article damages someone's dignity and honour, then national court will declare protection of reputation and rights of others as a legitimate aim for interference. Or supposing that said tabloid publishes materials that critically illuminate some ongoing trial of great public interest. In that case this newspaper may face a confiscation of the whole production unit. It will be legitimate on the basis of maintaining the authority and impartiality of the judiciary, supposing that too harsh article may obstruct the justice.

Finally, the restriction to the freedom of expression has to be necessary in a democratic society, and that is what the ECtHR analyses at last. It is very similar to the legal proportionality test - whether the goal is proportionate to the sanction applied to achieve that goal? And whether the same effect is achievable by less repressing means? For the supreme goal of the restriction to be in harmony with the sanction there shall exists pressing social need, a notion first formulated in case Observer and Guardian v. UK: "[t]he adjective 'necessary', within the meaning of Article 10 para. 2 … implies the existence of a 'pressing social need.'"[21]

The question of how the ECtHR treats the freedom of speech and arising academic debates are extremely heated among scholars Yet there is one observation they all agree with: honourable Court in Strasbourg has always been struggling to balance out prevention of unlawful speech and protection of freedom of expression, as point out researcher Antoine Buyse from the Netherlands Institute of Human Rights. This issue lacks consensus among the Court and academia the most, and also among judges themselves, considering the amount of dissenting opinions in Article 10 related cases.[22] While most of the scholars in this area agree that there shall exist a definite equilibrium between freedom of expression and socially justified restrictions, zealous advocates of the free speech speak against the conventional wisdom. Heli Askola from the Monash University insists that it is naive to suppose that the

[19] Convention on Human Rights, art. 10, para. 2.
[20] Bychawska-Siniarska, "Freedom of Expression under the ECHR." p. 43.
[21] Observer and Guardian v. The United Kingdom, no. 13585/88, para. 59(c), ECHR 1991. Available on: http://hudoc.echr.coe.int/eng?i=001-57705.
[22] Antoine Buyse. "Dangerous Expressions: The ECHR, Violence and Free Speech." International and Comparative Law Quarterly 63, no. 2 (2014): pp. 497–500, 502. doi:10.1017/S0020589314000104.

mere fact of prosecution or conviction for an unlawful speech will one day suddenly remove all the hatred from public discussions and the problem needs to be solved at its origin.[23] This view, however, no matter how theoretically attractive it is, looks as excessively radical and disregarding deficiencies of the reality.

2.3. Jersild v. Denmark: drawing a parallel with Delfi

Long before the first lawsuits regarding liability of Internet intermediaries were brought before the Strasbourg Court, quite an intriguing case had captured the attention of jurisprudence professionals and researchers in the year of 1995. It would be an interesting challenge - to draw an analogy between two cases of different nature, press coverage and anonymous comments, and a substantial time gap of 20 years between them. Cases Jersild v. Denmark and Delfi AS v. Estonia have one very similar trait - responsibility for the statements of third persons. Differences and similarities of these two cases will be discussed further on, in order to find out whether a direct analogy can be drawn between them.

In short, producers of the popular Danish television programme wanted to create a documentary film about recently founded nationalistic group of young people with utmost radical views on immigration, “The Greenjackets”. For that purpose, three members of Greenjackets group were invited for an interview. During the conversation between the host and the guests, all three members of the extremist movement have made a few spiteful and offensive remarks towards non-Danish population of Denmark, mainly black-coloured immigrants from the African continent. The clearest and, probably, the most derogative example of their words would be a statement that “[a] nigger is not a human being, it’s an animal, that goes for all the other foreign workers as well, Turks, Yugoslavs and whatever they are called”[24] (the exact wording of Greenjacket speech included for purely scientific reasons and reader’s familiarization with the matter; author of this paper neither wishes to promote such views, nor agrees with). Following the documentary appearance on Danish television, a complaint was filed to the Minister of Justice; the initiated investigation resulted in a criminal proceedings under the instruction of Public Prosecutor. Besides the fact that three interviewed Greenjackets were convicted later on, for different offences, including hate speech, the City Court of Copenhagen has also imposed a monetary fine on TV host Mr.

[23] Heli Askola. “Taking the Bait? Lessons from a Hate Speech Prosecution.” Canadian Journal of Law and Society 30, no. 1 (2015): p. 71. doi:10.1017/cls.2014.15.

[24] Jersild v. Denmark, no. 15890/89, para. 11, ECHR 1994. Available on: http://hudoc.echr.coe.int/eng?i=001-57891.

Jersild and his editorial supervisor Mr. Jensen, with an alternative of imprisonment for five successive days.

The court has motivated its logic in a way that Mr. Jersild (case applicant) first, "had himself taken the initiative of making the television programme"[25] and second, "had been well aware in advance that discriminatory statements of a racist nature were likely to be made during the interview."[26] For the court it meant that the journalist himself incited interviewees to voice their xenophobic commentary and by not providing objective counterbalancing views in the programme, he has violated the national Penal Code.[27] In an ensuing series of appeals, first to the High Court of Eastern Denmark and then to the Supreme Court, did not succeed as the argumentation of Danish judges remained unchanged: in this particular case public interest in protection against racial discrimination prevails over the interest in freedom of expression. Additionally, it was emphasized that the question of disputed measures conformity with the Convention (Article 10, in particular) was not raised during the trial.[28] By doing that court arbitrarily liberated itself from observing ECtHR standards. At the end it that resulted in applicant's victory.

The Strasbourg court did overrule the verdict of the Supreme Court of Denmark, reaching certain conclusions, that may appear helpful for one wishing to critically assess the problem of liability of intermediaries for third-party content in Europe. Similarly to the Delfi AS. v Estonia[29], out of the criterias to be met in order to justify interference with the freedom of expression, applicant contested the necessity of taken measures in a democratic society (in Delfi it was also claimed that the interference is not prescribed by law,[30] whereas here it was not questioned). The main line of Court's reasoning consisted of the following observations. At first the Court noted that the journalist himself did not express any of the derogatory remarks, but merely provided a platform for others to do so as a representative of a television programme. That fact obliges the Court to examine necessity of journalist's conviction within the frames of established standards of treatment of the press,[31] using case law as a reference point. While the freedom of expression by itself plays a vital role in forming a healthy society, it has even greater significance for the press. Just as the media sharks shall not go beyond the limit of what constitutes "the protection of the reputation or rights of others", they have a duty

[25] Ibid, para. 14.
[26] Ibid.
[27] Ibid.
[28] Ibid, para. 18.
[29] Delfi AS v. Estonia, para. 72.
[30] Ibid, para. 69.
[31] Observer and Guardian v. The United Kingdom, para. 59.

to transmit the information or ideas of public concern, even if such information may be distressing or outrageous.[32]

As the Court once acknowledged during proceedings of Prager and Oberschlick v. Austria, in the eyes of the law media industry enjoys certain extent of freedom. And if taken with all due responsibility, it also may involve potential resort to the exaggeration or provocation.[33] As seen from the final decision, case of Jersild was not exempt from this principle. This approach towards the media realm was lately reaffirmed in next ECtHR decisions[34] and explained in detail by legal scholars.[35] The Court is undoubtedly aware of all the negative effects resulting from either censorship, or excessively harsh regulation of the freedom of the media.[36] For instance, in any case when the disputed expression cannot be qualified as an incitement to violence, authorities cannot "restrict the right of the public to be informed"[37] by imposing criminal liability on the press.

It is quite evident that in the last two decades the ECtHR was, if not promoter, but certainly a strong advocate of the free speech, especially with regard to the media. Yet, those standards were surprisingly ignored in the Delfi AS v. Estonia proceedings; to what extent exactly - will be shown in the upcoming chapters.

3. THE US APPROACH TOWARDS THE ANONYMOUS SPEECH

In order to find different perspective of how anonymous speech can be handled, apart from the continental-European approach, one can consider legal views from another part of the Atlantics. Up until now ECtHR did not review cases where claimant was somehow repressed by authorities for his unwillingness to disclose anonymous authors on the Internet, but did imposed direct liability on Internet intermediary just recently in Delfi AS v. Estonia. The common law culture of United States offers something that differs quite a lot from what ordinary European lawyer would expect. This section that is dedicated to the legal ecosystem, different from the European one, suggests a nothing but a simple comparison between two. However, both the ECtHR and American legal order abide by similar precedent rules, making

[32] Jersild v. Denmark, para. 31.
[33] Prager and Oberschlick v. Austria, no. 15974/90, para. 38, ECHR 1995. Available on: http://hudoc.echr.coe.int/eng?i=001-57926.
[34] Sürek and Özdemir v. Turkey, no. 23927/94 and 24277/94, para. 63, ECHR 1999. Available on: http://hudoc.echr.coe.int/eng?i=001-58278.
[35] Antoine Buyse. "Dangerous Expressions: The ECHR, Violence and Free Speech." International and Comparative Law Quarterly 63, no. 2 (2014): p. 501. Accessed: April 20, 2018. doi:10.1017/S0020589314000104.
[36] Ibid.
[37] Sürek and Özdemir v. Turkey, para. 63; Şener v. Turkey, para. 42.

it possible to compare absolutely different, at first glance, systems. Obviously, since the US Code plays no role in the decision-making process of ECtHR, there is no room for harshly critical comments based on its opposition to the European legislation. However, a comparative element always was an excellent tool for those who strive the progress of legal thought on their own land. Ideas represented in this chapter will be merely used to assume theories of 'what if', without zealously rushing to the reckless conclusions on how European nations shall change their 'deluded' mind.

Before examining opinions of the notable American jurists, it is vital to start with outlining the very difference between responsibility of Internet intermediaries under European legal traditions and those of the US culture. Section 230(c)(1) of the Part V of the Telecommunications Act of 1996, commonly referred as Communications Decency Act, contains the following statement:

> No 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.[38]

These words unambiguously establish a statewide immunity to any cause of action that allows to hold Internet service providers accountable for content generated by third-parties. From the judicial point of view, this section of US Code disallows national courts to review claims that would otherwise treat Internet service providers as the actual publishers of the information. In other words, legal actions that seek to make service provider liable for its editorial policies, including those that favour anonymous comments, are completely prohibited and will not pass relevant criterias.[39] This thorough description of how exactly Telecommunications Act will affect online service providers and those who seek justice for their slandered reputation appeared for the first time in the landmark proceedings of Zeran v. America Online, at the first stage of appeal.

In brief, an anonymous user of the America Online posted defamatory and untrue information on behalf of Mr. Zeran and using his phone number. Zeran had started to receive threatening calls and tried to sue America Online as information publisher, because in his view AOL did not act promptly to resolve this difficult situation; multiple courts consistently delivered verdicts in favour of AOL, the Internet intermediary. And there was no surprise for any legal observer. Back in 1996 when the Communications Act was amended, in so-called preamble to the section 230, Congress firmly noted that rapidly evolving array of Internet and other

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[38] Telecommunications Act, U.S. Code 47 (1996), § 230(c)(1). Available on: https://www.law.cornell.edu/uscode/text/47. Accessed: April 14, 2018.

[39] Zeran v. America Online, Inc. 129 F.3d 327 (4th Cir. 1997). Available on: https://www.eff.org/files/zeran-v-aol.pdf.Accessed: April 14, 2018.

computer services that offers the US citizen massive opportunities for political debate, cultural enrichment and intellectual development[40] shall be promoted, by preserving "the vibrant and competitive free market that presently exists for the Internet ... unfettered by Federal or State regulation."[41] Argumentation deducted from Zeran case of became then a reference point for numerous further decisions, owing to the common law traditions of the United States. Following cases only adhered to the recognized doctrine, such as in Fair Housing Council of San Fernando Valley v. Roommates.com or in Jones v. Dirty World Entertainment Recordings LLC:

> Even having notice that users may be using its site to make discriminatory statements is not sufficient to invade … [online service provider's] immunity;[42] and [The Communications Decency Act[43]] bars claims lodged against website operators for their editorial functions, such as the posting of comments concerning third-party posts, so long as those comments are not themselves actionable.[44]

Indeed, such a modern, technology friendly and vibrant approach of US legislature faced a warm welcome in academic world. For example, professor of Yale Law School, Jack M. Balkin, in his article regarding the future of freedom of expression in a digital environment expressed the opinion that even if exemption from liability granted by the section 230 may be sometimes overprotective, it is still a masterful jewel of American legislation. Because entrepreneurs have been freed from the burden of liability, they were able to create vast amount of various programmes, applications and services that bring comfort and pleasure in people's everyday life.[45] Usually it is quite difficult to identify someone on the Internet in order to bring a lawsuit, simply because this someone's speech is anonymous or he resides outside the country of damaged party. These frequent obstacles motivate one to sue online intermediary, where the defamatory statement appeared, which is far easier. Apart from that, financial position of a company is often better off in comparison to that of a private individual. That would be another incentive to overlook factual offender and sue directly the service provider,[46] which is highly undesirable for the reasons mentioned before.

Additionally, by imposing liability of intermediaries one does foster the concept of collateral censorship - when the constant fear of potential liability urges service provider to limit or completely disallow third party content. Not only that kind of a grim reality would hinder

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[40] Telecommunications Act, § 230(a)(1), (3).
[41] Ibid, § 230(b)(2).
[42] Fair Housing Council of San Fernando Valley v. Roommates.com, LLC. 521 F.3d 1157 (9th Cir. 2008). Available on: http://cdn.ca9.uscourts.gov/datastore/opinions/2008/04/02/0456916.pdf. Accessed: April 18, 2018.
[43] Alternative short title of the Telecommunications Act of 1996.
[44] Jones v. Dirty World Entertainment Recordings LLC. 755 F.3d 398 (6th Cir. 2014). Available on: http://www.opn.ca6.uscourts.gov/opinions.pdf/14a0125p-06.pdf. Accessed: April 18, 2018.
[45] Jack M. Balkin. "The Future of Free Expression in a Digital Age." Pepperdine Law Review 36, no. 2 (2009): p. 434. Available on: https://digitalcommons.pepperdine.edu/plr/vol36/iss2/9. Accessed: April 14, 2018.
[46] Ibid.

civic engagement, public debate and so on, but also it would be an obstruction to the technological advancement. If the prospective developer cherishes the idea of creating popular online platform, most likely he will think twice and thrice, assuming all the litigation risks that may arise out of the user-generated texts.[47] On a long run additional business risks always lead to the slower development[48] of that particular sector; which is of course harmful for the economy and overall population wellbeing. Inevitable threat of liability would play a role of the sword of Damocles, discouraging many enthusiasts from entering the market and contributing the progress.

These postulates of Congress were also commented in appellate judgment of the aforementioned case Zeran v. America Online, by the Chief Judge Wilkinson. He mentions, in particular, that Congress did realise the danger that delict lawsuits impose on freedom of expression in the flourishing era of Internet. Holding service providers liable for the communications of third parties meant for the Congress another obsessive policy of speech control.[49] Further on Judge Wilkinson points out that nothing in these words obstructs justice for the actual culprits, authors of defamatory statements - but they and only they shall feel the full weight of that justice. Imposing liability on intermediaries would beyond doubt have a chilling effect on other computer-related enterprises.[50] Moreover, it would be simply unachievable for service providers to monitor myriads of user publications and examine them for potential problems. Encountered with the probable liability for each and every message posted throughout its servers, web medium would have significant incentive to either brutally restrict user communication or discard it entirely.[51] Great unity among legislative and judicial branches of US government, accompanied by the warm welcome of academic world, has created some kind of an unshakable paradigm that serves for the sake of free speech. As a result Americans have what they have - a truly marvelous safe haven for any information distributor or aggregator, that allows public discourse; but at the same time - land of uncertainty for individuals or organizations whose good name may fell victim to an anonymous wrongdoing.

On the other hand, not all the jurists from the United States completely agree and hail current state of affairs. Law professor Bryan H. Choi in his essay “The Anonymous Internet”

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[47] Ibid, p. 435-436

[48] Investopedia - Financial Dictionary. “Business Risk.” Available on: https://www.investopedia.com/terms/b/businessrisk.asp. Accessed: April 15, 2018.

[49] Daniel J. Solove. *The Future of Reputation: Gossip, Rumor, and Privacy on the Internet* (New Haven: Yale University Press, 2007), p. 152.

[50] Raymond S. R. Ku. *Cyberspace Law: Cases and Materials,* 4th ed. (New York: Wolters Kluwer, 2016), p. 221.

[51] Zeran v. America Online, Inc. 129 F.3d 327.

underlines the imperfections of the existing dogma and tries to discuss a possible trade-off between rights of Internet service providers and individual's privacy. Back in the day, immunity granted by the section 230 was a driving force of Internet expansion, that brought it to our daily routine. But now, when Internet has reached its maturity stage (at least, the majority thinks it is), controlling legislation became old not only in terms of age, but also in terms of societal usefulness. First moment that strikes the eye is a huge disparity between offline liability and online liability: while the classic publishers and distributors of printed periodicals must abide by specific rules that regulate defamatory speech, their online vis-à-vis are nearly exempt from any kind of liability. Dissemination of ghoulish remarks becomes way too easily achievable. Simultaneously, attempts to purge the offensive comments are doomed to failure most of the time.[52]

Then again, to remain within a certain degree of objectivity, prof. Choi agrees that despite pleas for enhancement, there is no clear answer on whether immunity given by section 230 has reached the point, when it does more harm that benefit. Even though tightened criterias for liability exemption would "certainly aid in deterring defamation and sanitizing the Internet"[53], there are serious doubts about financial and technical capabilities of information operators. And highly likely that being unable to withstand new costs, Internet intermediaries will sooner or later engage into practices of collateral censorship, already mentioned before.[54] Which in its turn will negatively affect online environment in whole, disturbing freedom of thought exchange.

While the previous speakers, indeed, demonstrated a lot of hospitality to the immunity of the Internet service providers, they did not discuss the challenge of imposition of liability on actual perpetrators via different means of unmasking individual anonymity. However, American jurist Ethan B. Siler in his commentary for the Wake Forest Law Review did rise rise that question. At first he flags that even considering the fact that online spread anonymous speech enjoys the protection of the famous First Amendment,[55] some specific versions of it do not; libelous statements would be the simplest example that comes to one's mind.[56] The first perception of people being defenceless before the defamatory speech, that may come after analysing Telecommunications Act exclusively, is far from reality - in the

[52] Bryan H. Choi. "The Anonymous Internet". Maryland Law Review 72, no. 2 (2013): pp. 531-532.
[53] Ibid, pp. 532-533.
[54] Ibid.
[55] Reno v. American Civil Liberties Union. 521 U.S. 844, 870 (1997). Available on: https://supreme.justia.com/cases/federal/us/521/844/case.html. Accessed: April 20, 2018.
[56] Ethan B. Siler. "Yelping the Way to a National Statutory Standard for Unmasking Internet Anonymity." Wake Forest Law Review 189 (2016): p. 192. Available on: Academic Search Complete, EBSCOhost. Accessed: April 20, 2018.

United States defamation laws are respected in a full manner. Due to the federal legislation inspected in previous paragraphs, it is just the intermediaries who are mainly exempt from effects of these laws; slanderers are not.[57]

Those who seek reimbursement for their damaged reputation have to sue the anonymous author directly; it is evident that the author must be at first identified or the whole claim makes no sense. In order to do so, potential applicant, after submitting his claim, must request a subpoena duces tecum[58] or a court order that would oblige Internet service provider to disclose personality of the anonymous speaker.[59] But before authorizing such a decree, the court has to find a balance between one's right to express his concerns anonymously and another's right to be safe from the libelous speech.[60] Quick note: that challenging task immediately remind one of the traditions of European Court of Human Rights in Strasbourg, where so many time judges were asked to strike a balance between two conflicting fundamental rights - freedom of expression and respect for private life, for example, as it is directly related to the topic of discussion. American courts try to balance out two notions as serious as their European colleagues. In case subpoenas are granted to easily, it would immediately give rise to the chilling effect, scaring away online authors from writing any kind of critical comments out of fear of facing horrendous legal expenses.[61] It is not quite difficult to assume what fatal effects such practices would have on a free speech within a country.

On the other hand, absolute reluctance to issue mentioned subpoenas on the basis of inadequate evidence will lead to the total disrespect of individual's reputation and neglect of one's right to protect his good name. Gathering a sufficient proof will become too costly for the majority, deterring people from bringing defamation claims and seeking justice.[62] And that is besides complete moral degradation of the society as a whole., because uncontrolled defamation on the Internet will provide infinite opportunities for dishonest businessmen to badmouth their market rivals. If one wishes to continue this grim chain of logic, this potential situation will result in substantial number of misled customers and closure of decent companies. In either event, it is up to the court to decide, which fundamental rights prevails over another, in each particular case, as long as there is no decision of the US Supreme Court

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[57] Ibid, p. 193.
[58] Black's Law Dictionary, 10th ed. (2014). "Subpoena duces tecum."
[59] Mallory Allen. "Ninth Circuit Unmasks Anonymous Internet Users and Lowers the Bar for Disclosure of Online Speakers." Washington Journal of Law, Technology & Arts 7 , no. 2 (2011): p. 80. Available on: https://digital.lib.washington.edu/dspace-law/bitstream/handle/1773.1/1066/7WJLTA75.pdf;sequence=4. Accessed: 22 April, 2018.
[60] Siler. "Unmasking Internet Anonymity." p. 193.
[61] Ibid, 194.
[62] Ibid.

that would bound courts of state jurisdiction. Although there are several rationales for granting subpoenas that derive from the case-law,[63] United States lack nationwide standard (both judge-made and black letter law) that could move all decisions in the same direction. Furthermore, written law in this regard is not a common practice even at the state level.[64]

Continuing with the critical discussion on whether the right to remain anonymous is that essential, it would be fair to mention following moment. Not so long ago some scholars in the US (modern cradle of a free speech, who would have thought!) had expressed views, that today would be considered rather regressive, radical and exceptionally obsolete than simply conservative. At the beginning of 21st century, when the Internet was expanding for the masses, there were some beliefs that anonymous speech rather lowers the quality of important public discussions than enhances it - due to lack of credence and accountability.[65] Remaining unknown to the audience, potential speaker removes all the chains of responsibility for his discourse - and immediately loses trust of the public.[66] Human psychological mechanisms work in a very specific way: insufficient or completely missing information about the person we listen to makes it difficult to learn on the experience of previous listeners, evaluate person’s reputation, credibility of his words. On the subconscious level of human brain, impossibility to inspect the speaker and his background diminishes the degree of trust he is granted with.[67] Abovementioned views, however, have never gained widespread popularity in both academic and professional circles and now are almost forgotten, fortunately for the advocates of anonymity and anonymous writers themselves.

While the American system offers different approach from the European one, it does not mean that continental culture of law cannot progress to the heights of its US counterpart, in terms of freedom of expression. Especially in the age of evolving computer technologies, that today are playing far more important roles than yesterday.

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[63] Ibid. 194-199.
[64] Ibid, 199.
[65] Craig R. Scott. “Benefits and Drawbacks of Anonymous Online Communication: Legal Challenges and Communicative Recommendations.” Free Speech Yearbook 41, no. 1 (2004): pp. 131, 139. Accessed: April 24, 2018, doi:10.1080/08997225.2004.10556309.
[66] Ibid.
[67] Helen Nissenbaum. “Securing Trust Online: Wisdom or Oxymoron?” Boston University Law Review 81, no.3 (2001): p. 646-647. Available on: HeinOnline. Accessed: April 24, 2018.

4. ECONOMIC HARM TO THE MEDIA AS A RESULT OF INTERMEDIARY RESPONSIBILITY

The effect of unbound or badly managed Internet intermediaries liability would be, apart from the purely societal loss, permanent financial losses by mass media companies and operators. If the amount of influential politicians and business moguls successfully suing media outlets increases in geometric progression, news portals and similar service providers will very quickly understand that even fair and objective criticism will lead to their liquidation. Rich variety of fines, damages and compensations will simply leave them without livelihood. And society that has allowed such situation to happen (by electing authoritarian politicians, who in their turn appoint ultra conservative judiciaries) will not see any kind of independent press or public activism for a considerable period of time. Consequently, absence of an open debate will create a fertile soil for the spread of corruption, misuse of public funds and absolute permissiveness of powers that be.[68] What is more, overall Internet penetration across the country and popularity of the social media are negatively correlated with corruption indices, especially in parts of the world where the freedom of press is severely restrained.[69]

Different Internet media editions have different revenue models to support their activity. It would be valuable to analyse the variety of business models in relation to their deficiency towards mismanaged legal regime for liability of intermediaries, in order to understand. In other words, in case media portals are required to strictly monitor each and every activity of their readers, what types of commercialization would be the most and the least vulnerable.

According to the methodology of Organisation for Economic Co-operation and Development, there are four main types, with their own subclasses, of revenue models for Internet intermediaries. Media, among them, use these strategies to achieve financial sustainability and cover their basic costs, such as rent of working premises and staff salaries.

4.1. Potential influence by business model type

4.1.1. Advertising model

First model is a quite common technique for most media outlets and is their primary source of income. It is called advertising model. It allows, say, online newspaper to provide services

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[68] Aymo Brunetti and Beatrice Weder. “A free press is bad news for corruption.” Journal of Public Economics 87, no. 7-8 (2003): pp. 1820-1821. Available on: ScienceDirect. Accessed: May 2, 2018.
[69] Chandan Kumar Jha and Sudipta Sarangi. “Does social media reduce corruption?” Information Economics and Policy 39 (2017): pp. 66-68. Available on: ScienceDirect. Accessed: May 2, 2018.

and create content at no cost for its readers, whereas expenses and profits are covered by the advertisers. Apart from the very basic placement of banners, this method also includes electronic mail advertising for those users who did provide their address and selling user data - anonymous and not.[70] Clearly, this original business model is proven to be the most effective way of financing activities of large and popular media undertakings. However, among non-profit organisations or public forums such methods are either inefficient or stand against organisations policy. Possibility for active communication among users and expressing one's views on a particular topic is one of the ways of audience retention; interested person will spend more time on a portal, hence, increasing chances to be successfully affected by sponsored content.[71] If the regulation of intermediaries liability is such an extensive burden for the media outlet, that it is more rational to simply close the comments section rather than monitor and moderate it, amount of time average user spends on the webpage will drop. It is hard to predict to what extent, but persons who do not hesitate engage into online discussions with people they barely know, usually are also prone to pay more attention to flashing ads and promotional emails.[72]

4.1.2. Fee-based model

The second business model, also widely popular in media circles, utilizes fee-based approach. Popularized by the leading business and financial newspapers, such as The Economist, Wall Street Journal and Financial Times, it allows users to choose either free, but content-restricted version of the newspaper (via paywall[73]) or buy a monthly subscription for unlimited access to the articles, surveys and interviews .It also includes pay-per-item model, when instead of subscribing to the whole newspaper, user buys one single article.[74] Subscription obviously requires users to register and share portion of their personal data, including credit card number and name. In this case, when anonymity or use of fake accounts is hardly possible, the liability most likely to fall on the actual author of illicit commentaries, rather than the media portal. This approach gives editorial board an opportunity to effectively diminish risks related

[70] OECD. "The Role of Internet Intermediaries." p. 31.
[71] Yandex Advertising Network. "Commercial interests of the Internet users." Available on: https://yandex.ru/company/researches/2017/commercial_interests. Accessed: 27 March, 2018.
[72] Natalie J. Stroud, Emily Van Duyn and Cynthia Peacock. "News Commenters and News Comment Readers." Center for Media Engagement, Moody College of Communication at the University of Texas at Austin (2016): pp. 5-6. Available on: https://mediaengagement.org/research/survey-of-commenters-and-comment-readers/. Accessed: 27 March, 2018. /// Kay Lehman Schlozman, Sidney Verba and Henry E. Brady. "Weapon of the Strong? Participatory Inequality and the Internet." Perspectives on Politics 8, no. 2 (2010): pp. 493-494. Accessed: March 27, 2018, doi:10.1017/S1537592710001210.
[73] Joseph Lichterman. "Here are 6 reasons why newspapers have dropped their paywalls." Nieman Lab. Available on: http://www.niemanlab.org/2016/07/here-are-6-reasons-why-newspapers-have-dropped-their-paywalls/. Accessed: 10 April, 2018.
[74] OECD. "The Role of Internet Intermediaries." p. 33.

to defamation or hate speech lawsuits. It is worth to mention, from the commercial perspective, that such revenue model works only for media with certain degree of popularity, quality and trustworthiness. It also would be quite unwise to write off the human perception of prestige: a lot of people feel “important” while they are flicking through a copy of The Financial Times with a cup of sugarless espresso nearby. Whereas it successfully functions for a magazine of The Economist size, local town newspaper will barely survive under these conditions.

5.1.3. Brokerage model

The brokerage model is another type of commercialization for Internet intermediary, via commission on transactions or membership fees. It mainly exists for the purposes of electronic commerce and is hard to imagine serving needs of the media.[75] However, many service and product aggregators, such as hotel reservation website Booking.com or various electronic eBay-like shops practice system of customer reviews, that also should be treated as opportunity to raise one’s voice, including critical remarks about the quality of provided service or delivered goods. Even though commission-based model is doubtfully applicable in the world of regular media, it cannot be absolutely thrown overboard - because in the world of advancing technology customer reviews became a notable part of freedom of expression.

4.1.4. Voluntary donations model

As an addition, the model of voluntary contributions exists, where loyalty of users plays the supreme role. Donations is not a standard example of revenue model, as it neither guarantees stable cash inflow, nor that it will cover at least operating costs. It has gained its popularity from the massive spread of blogging culture; citizen journalist has found a way to get financial aid to support their activities.[76] Even though donations are made from identifiable user-accounts with the real personal data, comment section, if website has such, usually requires no or very simple registration procedure - with no possibility to detect commenter. Non-profit organisations and citizen journalists, who may use donation model, are usually very limited in finances, in comparison with large media corporations and even local town magazine. Providing possibility for users to leave anonymous responses puts them at risk of potential claims. If the legal practice regarding liability of intermediaries is unreasonably harsh to the latter, it may become dangerous to leave comment section unmoderated. Whereas closure of it may have a discouraging effect on that part of audience who would like to contribute money in exchange for a public platform for discussions.

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[75] Ibid, p. 34.
[76] Ibid, p. 34.

4.2. Positive correlation between press freedom and economic development

Liability of the Internet service providers and the effects it has on the financial well-being of a particular media company involves an analysis of a relatively small sector of the national economy, even in highly developed countries.[77] But this is not where the story ends. First published in Journal of Media Economics, a recent study by the Pakistani economists depicts a visible correlation between liberal attitude towards media freedoms and economic prosperity of the country. Data of the recorded economic growth in sample countries (plus the amount of foreign direct investments) on one hand, together with the indices of press freedom in those countries on another, shows, that there is reciprocal positive effect between them.[78] In other words, free and independent media industry fosters economic development of the country.

Simply because foreign investors and to-be businessmen are aware of the real state of affairs within a country, they can plan and make their commercial decisions accordingly, at the same time avoiding great amount of risks that usually comes with the lack of market knowledge. And vice versa, inflow of oversea funds and overall welfare of the population creates favourable environment for independent journalists, reporters and other fact-finders, as local authorities adopt media friendly policies[79] in an attempt to strengthen the trust of investors and trade partners. All of the above indicates that freedom of the press is an essential ingredient of a long-run economic growth.[80]

Again, it is important to preserve a realistically sober attitude: nobody should expect soaring wages and return on the capital just from the fact that media industry in a particular country breathes free. It is one component out of the mass, that are necessary for sound economy. A stable physical integrity of anyone on the planet requires numerous preconditions, not just one or two. A person can quit smoking, but if his or her diet consists mostly of the McDonald's-like food, well, probably person's health will look questionable. Those observations in any manner are not undermining the fact that judges in Strasbourg court are there to address questions of the law, not economics. However, such significant benefits of freedom of expression cannot be just thrown overboard as something not essential or unconnected to

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[77] James Manyika and Charles Roxburgh. "The great transformer: The impact of the Internet on economic growth and prosperity." McKinsey Global Institute (2011): p. 2. Available on: https://www.mckinsey.com/industries/high-tech/our-insights/the-great-transformer.

[78] Abdullah Alam and Syed Zulfiqar Ali Shah. "The Role of Press Freedom in Economic Development: A Global Perspective." Journal of Media Economics 26, no. 1 (2013): pp. 16-17. Accessed: April 23, 2018, doi:10.1080/08997764.2012.755986.

[79] Ibid, p. 18.

[80] Ibid, p. 16.

reality. If it happens in future, that would be the greatest ignorance of our time. But that is of course an unlikely and highly pessimistic assumption.

5. LIABILITY OF INTERMEDIARIES IN RECENT CASE LAW

The story behind the problem of this thesis begins in 2015 when Grand Chamber of the ECtHR had delivered a paramount verdict in case Delfi AS v. Estonia, that held Baltic news website liable for anonymous third-party comments containing hate speech. This decision was first of its kind, establishing precedence power over future proceedings of similar nature - liability of Internet intermediaries in context of the European Convention on Human Rights. Up until now there are only three adjudicated disputes of that matter: Delfi AS v. Estonia, as well as MTE v. Hungary and Pihl v. Sweden. Even though in both cases succeeding Delfi, outcome resulted in favour of the intermediaries, they have followed the Delfi pattern and lacked detailed legal analysis.

Hence, the case establishing precedence rule shall be subject to the analysis. It is highly possible that in light of the preceding observations a new outlook on the treatment of intermediary liability in the web may appear; or at least a set of theoretical proposals. First in this chapter, as one most likely expects, research will scrutinise Delfi case, focusing on a special test created for this very lawsuit. Then the narrative will shift to the critical assessment of the outcome of Delfi trial, by looking at the opinions of respected academics, lawyers and also "dissident" judges, who have been present at the moment when Delfi verdict was announced.

5.1. Delfi AS v. Estonia

5.1.1. Background of the case

Delfi, the applicant, is an online media portal, that publishes news articles on its website and allow readers to participate in a public discussion, posting both registered and anonymous comments. For the general public Delfi's comment section is notoriously known for the unrestrained and notably vulgar lexicon of its participants. Notwithstanding the issue of dubious reputation, Delfi has implemented a notice-and-take-down system for its users, which allowed basically any reader, even not registered, to flag a particular comment as insult, mockery or incitement to hatred or violence. Flagged message would be then inspected by moderation officer. Additionally, Delfi had an autonomous system that reacts on specific

triggers - such as obscene words and collocations.[81] Back in the year 2006 journalists of Delfi have published critical article about transportation company SLK that broke the natural ice roads between Estonian mainland and some small islands. During winter colds frozen surface of the sea is allowed for public usage as a road; whereas SLK, providing ferry service, benefits on conveyance of people from the mainland to islands and back. As usual, comments section was open for readers to express their view about the situation reported in article. Taking into account quite selfishly outrageous actions of SLK (from the ordinary people perspective) and common practices among commentators, it was not a big surprise that out of the 185 comments in total, about couple of dozens of them were addressing threats and offensive language personally to the company owner. Six week after the appearance of hateful comments, lawyers of the company owner requested Delfi to remove them and claimed monetary compensation for moral harm. Although comments were removed on the very day of request, Delfi rejected to pay out compensation.[82]

Following that refusal, company owner brought a lawsuit to the Harju County Court against said media portal. The first instance court dismissed this claim, arguing that Delfi does not bear liability for comment under the local Information Society Services Act, which is a mere incorporation of the European Union Directive on Electronic Commerce into Estonian legal system. In its paragraphs dedicated to the definition of ‘restricted liability’ (official meaning of the word ‘limited’ in this particular Act) the Information Society Services Act provides the following wording on when and under what conditions notion of restricted liability applies.

First, when a service consists of the mere transmission of information provided by a recipient of the service into a publicly available data, or the provision of access to a public data communication network, the service provider does not bear liability for the information transmitted, provided that he does not interfere with the transmission process by modifying information or selecting its receivers.[83] Next, the service provider is also not liable for storing automatic and temporary information under the same conditions. In case executive or judicial authorities have issued a removal order for this particular information, service provider avoids liability when he has responded to that order without delay.[84] At last the service provider has no responsibility over the information stored at the deliberate and acknowledged request of service recipient, knowing the fact that “provider does not have actual knowledge of the contents of the information and … is not aware of facts … from which the illegal activity …

[81] Delfi AS v. Estonia, para. 13.
[82] Ibid, para. 16-20.
[83] Estonia. Information Society Services Act 2004 (1 January 2015), para. 8. Available on: https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/513012015001/consolide. Accessed: 11 April, 2018.
[84] Ibid, para. 9.

is apparent." In all events of storing the information that happens to be illegal and infringes third party rights, service provider is also free from liability, if he acts promptly when satisfying removal requests by individuals damaged by the dissemination of this information.[85]

However, victorious media portal was defeated in a set of subsequent appeal hearings. In a first one by the owner of ferry business, when Tallinn Court of Appeal held that the court of first instance had mistaken in its judgment and erroneously relied on Information Society Services Act (replication of e-commerce Directive) instead of Obligations Act, which would have protected honour and dignity of company owner.[86] Case then returned back to the Harju County Court and got a decision in favour of the company owner. At last, following an appeal submitted by Delfi's lawyers, case had reached the doorstep of the apex of Estonian judicial system - the Supreme Court. The last instance court had supported and endorsed the ruling of the previous one; with a slightly modified argumentation, yet the same essence.

5.1.2. Court's criteria

The matter of the dispute between parties to the case was not whether the Estonian state pursued a legitimate aim when imposing sanctions on Delfi, because applicant at the very beginning agreed on the inappropriate and hateful nature of the comments and removed them. But it was the proportionality of applied measure and its necessity in democratic society, which the applicant had questioned. Additionally, the applicant claimed that restriction of his right to freedom of expression was simply not prescribed by national law, as there was no legislation or case-law that prescribes judge to interpret an intermediary as a publisher of information, that intermediary was unaware of before the notice. Just the opposite, the applicable law to this situation, which includes EU Directive, Estonian Act and Council of Europe Declaration on freedom of communication on the Internet, does not allow imposition of liability on Internet intermediaries for user-generated content.[87]

Members of the Grand Chamber had fully agreed on the aspects of the case that their colleagues from the ordinary Chamber have found crucial for their legal analysis. Namely, four factors played were the leading ones: the context of the disputed comments, the measures applied by Delfi administration in order to avert or remove humiliating messages, possibility of the alternative to hold accountable the actual commentators instead of media outlet, and the

[85] Ibid, para. 10.
[86] Delfi AS v. Estonia, para. 24.
[87] Delfi AS v. Estonia, para. 69.

consequences of the proceedings at national level for the applicant company.[88] According to the Court those four moments were absolutely necessary for the accurate "assessment of the proportionality of the interference in issue within the scope of the Court's examination,"[89] i.e. the necessity of the domestic measures in a democratic society.

The first out of four aspects, nature of the commentaries, created almost no dispute at all, because all parties to the conflict agreed on the spirit of the comments being excessively vulgar and inciting hatred or violence against very specific person: Delfi had promptly deleted them from its website after becoming aware of the problem, Estonian courts had clearly established their degrading essence to the human dignity and ECtHR had agreed with all arguments in this regard.[90] However, the Supreme Court of Estonia and lately the ECtHR had also considered valid the following:

> [I]n the comment environment, the applicant company actively called for comments on the news items appearing on the portal. The number of visits to the applicant company's portal depended on the number of comments; the revenue earned from advertisements published on the portal, in turn, depended on the number of visits. Thus, the Supreme Court concluded that the applicant company had an economic interest in the posting of comments.[91] … The Court therefore finds that the Supreme Court based its reasoning on this issue on grounds that were relevant for the purposes of Article 10 of the Convention.[92]

It is nothing but a common sense that does not need scholarly proof: newspapers and magazines existed before and actually exist today without any form of public comment section. And it is the quality of the content provided, expertise of the staff journalists and the topicality of the issues covered, what makes media company either popular (and economically viable), or unpopular (and hence, unprofitable). Neither the Supreme Court, not the ECtHR provided an explanation why they believe that Delfi *depended* (emphasis added) on the number of comments rather than the published materials.

As for the liability of the actual authors of the comments, the ECtHR observes both advantages and disadvantages of stealthy online presence. The Court takes into account that anonymity allows Internet users to stay invulnerable against theoretical reprisals as well as contributes to the free flow of ideas and information. Although, the Court notes next, technological capability of computer networks poses a hidden danger that cannot be ignored: speed of the Internet media in comparison to the traditional one may significantly deteriorate

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[88] Delfi AS v. Estonia, para. 142-143.
[89] Ibid.
[90] Ibid, para. 20, 114.
[91] Ibid, para. 144.
[92] Ibid, para. 146.

the impact of the unlawful, defamatory speech.[93] With regards to personalities of the real offenders, the Estonian courts have granted orders for disclosure of IP addresses of commentators who had posted presumably offensive comments and, therefore, names and home addresses of the holders of IP addresses in question. Even though the law enforcement agencies has shown ambiguous result of their investigation, in some cases it was absolutely possible to identify location and prospective owner of the personal computer from which the defamatory messages were published.[94] Yet, the claims were brought solely against the Delfi., since the Estonian legislation provides an opportunity to choose against whom the claim will be filed. Besides that, the Court supposed that

> [T]he uncertain effectiveness of measures allowing the identity of the authors of the comments to be established, coupled with the lack of instruments put in place by the applicant company for the same purpose [of identification] with a view to making it possible for a victim of hate speech to effectively bring a claim against the authors of the comments, are factors that support a finding that the Supreme Court [of Estonia] based its judgment on relevant and sufficient grounds.[95]

It means that even being aware of the fact that possibility to identify alleged perpetrators exists, the ECtHR has supported the view, that it is not necessary as long as the national law gives an opportunity to successfully sue the perfectly known entity, Delfi, and disregard real authors of the defamatory comments.

The third factor that had influence on the legal analysis performed by the ECtHR touches upon the steps made by the Delfi administration in order to prevent widespread dissemination of harmful speech. Here the reasoning of the Court revolved around the fact, that taken measures has shown themselves insufficient. Delfi administration was unable to promptly remove defamatory comments without delay after publication, because their filtering mechanisms allowed unlawful messages to stay for more than a month, that would not happen if automatic filtration worked in a proper way. Furthermore, the Court expressed its firm opinion on the fears of collateral censorship motivated by legal overprotection. It stated that obligations to effectively monitor hate speech and incitements to violence "can by no means be equated to 'private censorship'".[96]

The last aspect, domestic consequences for the applicant company, was explained by the ECtHR quite briefly. Petty amount of the penalty invalidates disproportionality arguments, but business model of Delfi did not have to undergo any changes in order to satisfy local court ruling. Simultaneously, Strasbourg judges indirectly commented the possibility of chilling

[93] Ibid, para. 147.
[94] Ibid, para. 150.
[95] Ibid.
[96] Ibid, para. 153-159.

effect so far, with mentioning the term itself though. Consequences for other media players in post-Delfi era were as follows: operators "have taken down the offending comments but have not been ordered to pay compensation for non-pecuniary damage."[97] To sum up the key arguments by ECtHR in the most accurate way, final quote of the judgment will be provided:

> Based on the concrete assessment of the above aspects, taking into account the reasoning of the Supreme Court in the present case, in particular the extreme nature of the comments in question, the fact that the comments were posted in reaction to an article published by the applicant company on its professionally managed news portal run on a commercial basis, the insufficiency of the measures taken by the applicant company to remove without delay after publication comments amounting to hate speech and speech inciting violence and to ensure a realistic prospect of the authors of such comments being held liable, and the moderate sanction imposed on the applicant company, the Court finds that the domestic courts' imposition of liability on the applicant company was based on relevant and sufficient grounds, having regard to the margin of appreciation afforded to the respondent State. Therefore, the measure did not constitute a disproportionate restriction on the applicant company's right to freedom of expression. Accordingly, there has been no violation of Article 10 of the Convention.[98]

5.1.3. Criticism

Before examining the academic articles outstanding lawyers from all around the world, it is impossible to by the wordy dissenting opinion by judges Sajó and Tsotsoria, that followed the Grand Champer's final decision. Only these two judges remained in opposition to the majority, that implicitly hints at quite a great degree of consensus among the Grand Chamber. Yet, sometimes those who find a courage to speak up against the majority, deserve more attention that those who joined it. Perhaps, this is the very same situation with Delfi, taking into account that it was the first case of its kind. Nevertheless, it is important to scrutinize this dissenting opinion. Among other concerns, judges Sajó and Tsotsoria have found it necessary to draw a parallel between this case and Jersild v. Denmark. They indicate an extremely obvious neglect of long-established principles by their colleagues.[99] Even not familiar with all ECtHR niceties, any lawyer will be bewildered by the incoming moment. The court in its line of reasoning mentions one of dogmas, originated from the Jersild case and re-cited for many times in others:

> Punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so.[100]

[97] Ibid, para. 160-161.
[98] Ibid, para. 162.
[99] Ó Fathaigh. "The chilling effect of liability for online reader comments." p. 390-391.
[100] Jersild v. Denmark, para. 35; Thoma v. Luxembourg, para. 62.

So the court explicitly agrees, by citing decision of the past, that penalizing a press representative for the statements of third parties made during a professional conversation, would severely damage abilities of the media industry to contribute to the public discussion and raise important societal problems. And then, unbelievably, but this rule was simply ignored by the court when it had passed the decision. Not even a word from the prominent, standard-making case was mentioned in court's rationale of Delfi AS v. Estonia. "[T]his principle is simply not discussed in the judgment,"[101] as both judges summarized this surprising phenomenon.

Unsurprisingly, Estonia was the first country where the academic criticism came from. It necessary to mention, that article to be discussed right now concerns the first ECtHR judgment in Delfi case, mady by the First Section in 2013, not the Grand Chamber's ruling of 2015. While those are two different proceedings, the second one reaffirms previous decision, allowing scholars to consider articles about any of the two. Estonian law researcher Mart Susi had observed that the decision in Delfi case raises two important questions.

The first one challenges Court's view that under the Estonian law interference with the media portal's freedom of expression was forecastable beforehand. Chamber's opinion reflected an idea that broader, more general legal norms can sometimes suit better than the pack of detailed provisions, when the utmost goal is to derive just conclusions on the basis of legal foreseeability. According to Susi, approach of such kind is pretty lightheaded: not only it leaves the concept of legal certainty meaningless, but also expects non-jurists to analyse general principles of law and by doing so come to the forecastable result. While the Court's enthusiasm to improve legal literacy among mortals may be highly appreciated in the future, in today's reality those expectations are rather draconic than enlightening and educational. Mart Susi also believes that relying on general norms in order to hold an online media portal accountable for third-party comments does not conform with deriving liability from either constitutional provisions, or ethical values. All of a sudden, the Court had demonstrated "the aspiration … to move away from interpretation of the law to assume a legislative function,"[102] leaving academics who have noticed it in perplexity.

The second question raised by the Estonian law professor is whether the existing standards established by ECtHR for the conventional media players, such as printed periodicals or television, can be used for media models of newer generation, like the on in the Delfi case. On

[101] Delfi AS v. Estonia, dissenting opinion, para. 39.
[102] Mart Susi. "Delfi AS v. Estonia." The American Journal of International Law, 108, no. 2 (2014): p. 299. Available on: Academic Search Complete, EBSCOhost. Accessed: April 28, 2018.

the one hand, Court's criterias had been developed when the Internet was nothing but a brave ambition of a small group of scientists and novelists. On another, the Court disregarded its well-known doctrine of looking at the Convention as the living instrument that allows to adjust the decision to the modern reality. Despite the fact that very purpose of this tradition is to assist judges in novel cases, which the Delfi appears to be, the Court stuck to the course of action dictated by famous three-part test.[103] Hence, disallowed itself to review the actual necessity of the restriction prior to answering whether it was prescribed by national law. Who knows, maybe if Strasbourg judges have chosen to inverse order of the procedure, they would have come to the fundamentally different conclusions. But after all, the existing legislation quite often falls behind the newborn societal norms. Here logic of the Court once again demonstrated this inherent problem of law.[104] Additional flaw of this judgment detected by Mart Susi is that the Court have failed to take an advantage of "the first of its kind" judgment and advise national courts and governments of Council of Europe member states on how to ensure the protection of privacy in the era of anonymous Internet.[105]

Another critical view on the Delfi case was delivered by an Irish professor of law Neville Cox. Notwithstanding that aim of his articles was to find discrepancies between ECtHR jurisprudence and UK Defamation Act (which is not the concern of this thesis), he also has expressed overall opinion about several aspects of the case. First of all, for several times the Court had indicated insignificance of the domestic fine, imposed on media company by national court and insisted, among other things, that tiny amount of the penalty itself justifies the restriction of the freedom of expression and by no means makes said restriction disproportionate. The Court turned a deaf ear to the nature of applicant's business model and did not attribute any importance to the "simple concept of people being allowed to have their views posted in a contemporaneous and uncensored fashion".[106]

Continuing with this line, the Court also had never assessed whether the unmoderated discussion with regard to some socially important topic should be taken into account when there is need to balance out one's reputation and other's freedom of speech. Then Mr. Cox continues with critical and fairly deserved commentary. He argues that among dozens of lines of the judgment, the Court had demonstrated zero interest to the potential chilling effect, that ruling of the Supreme Court of Estonia may have on others from the online media

[103] First, the restriction is prescribed by law; second, it has legitimate goal; at last, it is necessary in a democratic society.
[104] Susi. "Delfi AS v. Estonia." p. 299-300.
[105] Ibid, p. 302.
[106] Neville Cox. "Delfi AS v Estonia: The Liability of Secondary Internet Publishers for Violation of Reputational Rights under the European Convention on Human Rights". The Modern Law Review 77, no. 4 (2014): pp. 626, 628. Available on: Academic Search Complete, EBSCOhost. Accessed: April 29, 2018.

industry.[107] At the end of the day, being unsure of the legality of a particular comment, website owner will tend to limit this niche - damaging both their way of running a business and country's overall index of the freedom of expression. Same questions were raised by other scholars. For example, Dr Richard Caddell from the Cardiff University believes that "the position taken by the court in Delfi provides a series of causes for concern."[108]

Moreover, it is possible to find another contradiction in the final decision. The Court first reiterates its traditional opinion about the role of press and journalism in a democratic society,[109] but then neglects one circumstance. Despite all of the obscenity and offensive nature of the comments, they were directly referring to news of a substantial public interest. There is no doubt that those comments did not corresponded to the concept of societal interest themselves, but it may become an alarming trend when the Court simply refuses or considers inessential to evaluate public concern; for example, to discover what was the cause of offensive speech in question and represent its findings inside the judgment.[110]

Finally, there is another moment that speaks not in favour of depth of the judicial analysis in Delfi case. The Strasbourg Court did not bother itself with the examination of each and every post out the 20 comments that were the backbone of the initial lawsuit against media holding. Yet, that kind of analysis could have contributed to the understanding whether and to what extent a particular comment negatively affected right to respect for privacy of ferry company owner, who had sued Delfi originally.[111] The Court applied similar practice back in 2004, when the entire Von Hannover v. Germany case revolved around the nature of paparazzi photographs showing holydays of the Monaco royal family; the Court inspected all visual materials to determine how many of them actually had violated right to respect for private life.[112]

6. CONCLUSION AND PROPOSALS

Before reaching this point, certain preconditions have been made. The recently established position of the European Court of Human Rights on the liability of Internet intermediaries on

[107] Ibid.
[108] Richard Caddell. "The last post? Third party Internet liability and the Grand Chamber of the European Court of Human Rights." Communications Law 21, no. 2 (2016): p. 52. Available on: ThomsonReuters Westlaw. Accessed: May 1, 2018.
[109] Delfi AS v. Estonia, para. 79.
[110] Cox. "Delfi AS v Estonia." p. 626.
[111] Ibid.
[112] Von Hannover v. Germany, no. 59320/00, para. 61-68, ECHR 2004. Available on: http://hudoc.echr.coe.int/eng?i=001-61853.

example of Delfi AS v Estonia case, now can be looked upon from new, different angles, in context of the freedom of expression. This part of the paper seeks to find an answer on whether there could have been better, more careful adjudication? Of course, the word 'better' is rather frivolous and by itself means almost nothing, especially in the area of law. Here this notion contains the following. Are there any elements of the law, morals and general public utility, that were unintentionally left overboard by the famous Court in Strasbourg? Did the Court take into account *all* interested parties? And by all it means also those outside the courtroom procedure, not submitting any claims, not even aware of these proceedings. Is it possible to find some contradictions inside the wording of the judgment? Would it be bold enough to suppose that any of the proposed arguments can actually be considered by ECtHR judges in future? In an attempt to answer those questions and consequently provide the academic world with critical, improvement-eager view on the current ECtHR standpoint, this research has engaged into set of separate discussions. They include research findings stated in chapters about existing ECtHR standards of media freedom, the United States doctrine that handles issues of anonymity and intermediaries, economic perspective of intermediary liability with connections to the freedom of press, as well as academic criticism of the exact Delfi judgment. Altogether these realms give an opportunity to rethink the whole issue or, if that might be considered a bit radical, lay the foundation for future debates.

First came the tenets that the Court have developed with regard to the general freedom of expression and its relation to media world. Throughout the years of activity, the Court created very definite and reliable standards; they have proven their efficiency in a number of cases where they were relied upon. Separately the prominent case of Jersild v. Denmark was examined, because its nature, apart from the lack of Internet those days, resembled the very essence of Delfi. Both cases fit the same formula: person A is being held liable for the dissemination of clearly unlawful messages made by person B. In Jersild, the convicted journalist himself did not express any of the derogatory remarks, but merely provided a platform for others to do so as a representative of a television programme. The Court stated, that notwithstanding the fact that media outlets shall not go beyond the limit of what constitutes "the protection of the reputation or rights of others", they also have a duty to inform the society about important public concerns, even if such information may be distressing, outrageous or provocative. Moreover, if taken responsibly, press activities may also involve potential resort to the exaggeration or provocation, as ECtHR judges explicitly noticed in Jersild, merely reaffirming the findings of even older case - Prager and Oberschlick v. Austria. The analysis of the case law of pre-Internet era indicated, that the Court highlights the "intermediary" nature of Delfi more that its "media" and "public platform" facets. And

this, despite the fact that social interaction between commentators was related to the topic of great public concern. If done otherwise, the Court, probably, could have reached more balanced outcome.

The second part of the analysis was dedicated to the comparative element, namely, the US approach on imposing liability on the online operators. The reason for an overseas choice is made up of two arguments. First, a comparative analysis between two fundamentally different system of laws, in this example - American and European, is an magnificent instrument for those who strain after the progress of jurisprudence and academic debate. And second, the rule of precedence used by the ECtHR is analogous to the practice of US courts, with the exemption that Convention is a 'living instrument' and deserves some degree of elasticity. As one can see, the American culture in this regard differs significantly from the continental one. The Internet intermediary is by federal law exempt from any kind of liability for user-generated content; local lawsuits similar by their essence to the Delfi case have proven this rule. Although, it is highly unlikely that judges in Strasbourg will even mention this as their argumentation, outside of their primary job they might engage into philosophical discussions about the law with their colleagues and among other things debate about American legal traditions. After all, that is how different ideas and approaches are being exchanged in all human activities. And yet the law is extremely inelastic disciple, it is not an exception.

The third part of research evaluated harmful effects, that may potentially result from imposing liability on Internet intermediaries for the third-party comments. First, the excessive regulation and fear of liability can make the comments section so burdensome for the media outlet, that it will be is more rational to simply terminate users' conversation rather than actively monitor and moderate it. And as long as the commentary is one of the customer engagement tools, the amount of time average user spends on the webpage will drop, damaging intermediary's financial position. Internet service providers, media among them, significantly contribute to the global economy. Apart from the obvious harm to the online media financial well-being, there is another effect: recent studies observe a positive correlation between index of the press freedom and speed of the economic development. Freedom of expression creates a transparent business environment, what in its turn attract foreign investors and decreases corruption levels. These arguments, if taken into consideration by the Court, could have supported to outweigh the importance of freedom of expression in its battle with

At last but not least, the Delfi case itself was analysed; now from the point of view of its imperfections and serious shortcomings. Critical remarks from acknowledged legal scholars,

as well as the dissenting opinion of two judges taking part in Delfi trial, made it clear that ruling was far from perfect and disregarded several quite significant arguments. The first significant drawback was pointed out by two dissident judges, Sajó and Tsotsoria. They argued that the ECtHR did not follow its own standards, when passed a decision in Delfi: punishment of journalist or media outlet for disseminating of statements made by third persons would seriously hinder the contribution of the press to discussion of matters of public concern. And even more, the Court mentioned that standard, but failed to apply to the online portal in question; according to the dissenting opinion, the ECtHR contradicted itself in the very judgment. The scholars of law who had analysed the outcome of Delfi case also found several weaknesses in Court's logic. First, the Court's opinion that the liability of intermediaries was foreseeable from the general principles of Estonian law was considered too harsh. The Court suddenly moved away from its traditional interpretation of law to assume the implicit legal function. What is more, honourable Court applied its three-pronged test, developed long before the existence of Internet, without taking into account modern realities and looking at the Convention as a "living instrument", a famous practice for novel legal challenges. Consequently, such approach disabled the ECtHR from examining necessity of the restriction in the first place and whether it is prescribed by law in the second.

The next target for academic criticism became Court's insistence that moderate amount of imposed fine makes the restriction absolutely proportionate. However, the Court ignored the nature of Delfi's business and how the moderate fine could evolve to substantial costs. More importantly, judges in Strasbourg had paid very little attention to the potential chilling effect of their decision. Other media outlets may consider it less perilous to abolish user comments entirely, in order to protect themselves from liability risks; they may lose certain customer segment, but would not have to bear additional expenses. That move can damage both business models of the media companies and freedom to participate in public discourse. Furthermore, the ECtHR did not comment on the societal interest of the issue that provoked hateful remarks. Despite the obscene and derogatory nature of comments, they were directly related to news of a significant public interest; it may become a disturbing tendency when the Court fails to examine public interests deeper and demonstrate its findings. The last important aspect of Delfi addressed by the academic scholars, also touches upon depth of the legal analysis. The Court did not bother itself with the analysis of each and every comment out the 20 in total; notwithstanding the fact that such practice had been established by the case law, namely, Von Hannover v. Germany.

Considering the critical remarks by scholars of law, in future adjudications it would be desirable to conduct more comprehensive analysis, taking into consideration not only the dry black letter law, but also preconditions of the lawsuit and public interest. It is also quite important to bear in mind the elastic nature of the Convention, especially in case of novel challenges. Speaking about the novelty, it is also crucial to keep in mind long-term effects of the judgment, the precedence rule it establishes and dangers of the chilling effect, that inaccurate judgment may carry within itself.

By combining the observations of dissident ECtHR judges and scholars of law, analysis of the various media business models and evidence from the empirical studies on how the freedom of press is linked to the economic prosperity, one can confidently claim that the paramount Delfi judgment is far from perfect. Heated debates in the academic circles only reaffirm the importance, even vital necessity of research works on the topic of intermediary liability in a modern cyber era. To conclude, it is worth to say that if the Delfi case existed in an isolation, then its final ruling would have been perfectly proportionate and reasonable, taking into consideration more than a moderate monetary fine and obnoxious nature of the comments. But the mechanism of the ECtHR case law works quite the opposite, by establishing landmarks for future proceedings. Thus, the task of the famous court in Strasbourg is to make its decisions farsighted, in the best interest of the people.

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