FACEBOOK, TWITTER, YOUTUBE AND THE OTHERS: OUR ONLINE REPRESENTATIVES WITH AND WITHOUT FREE SPEECH IMMUNITY

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THE MANIFESTATION OF THE WEBSITE OPERATORS' GENUINE ROLE IN THE UNITED STATES AND THEIR MISCONCEIVED FUNCTION IN EUROPE

by

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Abstract

The growing number of online defamation, harassment, hate speech and other types of illicit communication circulating on the Internet gives rise to concerns worldwide. Fighting against harmful conducts in the cyberspace committed by third parties in the form of user generated content cannot be successful without the involvement of the website operators, the online service providers. But the opinions are divided on the question, whether online service providers should bear legal liability if they fail to eliminate the illegal communication on their webpage. This goal is extremely difficult to be achieved in the context of the freedom of expression rules. The study compares the legal systems of the United States and the prevailing approaches in Europe, – namely in the European Union and in the member states of the Council of Europe – and gives an explanation why is legal immunity an essential element of the online service provider's genuine role, called as "online representative." Furthermore, the study gives an analysis why is the law unable to define the function of the "online gatekeeper" properly and how is this notion misconceived in Europe.

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Introduction

Immunity is a privilege only for a few. The state exempts persons from the legal liability attached to their acts only in exceptional cases. Such non-liability is principally provided for parliamentary representatives, diplomats, judges or arbitrators but the ordinary persons, who do not have a special role in the society and who are acting only in their own interest instead of someone else's usually do not enjoy this kind of privilege.[1] Granting exemption for someone whose action caused damage seems paradoxical and usually entails criticism.[2] As the United States Judge Oliver Wendell Holmes remarked, the absence of any remedy available for the injured party means that "the suitor" has "no legal rights and the persons who injured them [have] no corresponding legal duty."[3] Justice Holmes further added that "legal obligations that exist but cannot be enforced are ghosts that are seen in the law, but that are elusive to the grasp."[4]

In 1996, the U.S Congress enacted the Communications Decency Act[5] (hereinafter: CDA) – also called Title V of the Telecommunications Act of 1996 – containing a provision which provides

[1] In the United States, the Federal Tort Claims Act [Federal Tort Claims Act (June 25, 1946, ch.646, Title IV, 60 Stat. 812, "28 U.S.C. Pt.VI Ch.171" and 28 U.S.C. § 1346(b)] originally closed the door in front of any tort claims by citizens against the state. Today, the act contains a limited waiver of sovereign immunity and permits citizens to pursue some tort claims against the government. [see: CTI Reviews, 'Business Law, The Ethical, Global, and E-Commerce Environment' (Cram101 Textbook Reviews, 2016)]. In the European Union, the Article 8 and Article 9 of the Protocol on the privileges and immunities of the European Union provides immunity for the members of the European Parlament. [see: Protocol (No. 7) on the Privileges and Immunities of the European Union <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012E%2FPRO%2F07> accessed 16 March 2018] In respect of judical and arbitral immunity see: Dennis R. Nolan, Roger I. Abrams, 'Arbitral Immunity' (1989) Berkeley Journal of Employment & Labor Law Vol. 11, Iss. 2. <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1184&context=bjell> accessed 16 March 2018

[2] The critics of political immunity argue that the non-accountability lets politicians act with impunity and encourages criminals to run for office. [see: The Economist, 'Why Politicians are Granted Immunity from Prosecution' (2016) <https://www.economist.com/blogs/economist-explains/2016/05/economist-explains-21> accessed 16 March 2018]

[3] G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (Oxford University Press, 1995) 374

[4] *The Western Maid* [1922] 257 U.S. 419; 42 S. Ct. 159; 66 L. Ed. 299; 1922 U.S. LEXIS 2422, 433

[5] Communications Decency Act, 47 U.S. Code § 230 - Protection for private blocking and screening of offensive material

a broad liability shield to Internet companies when a lawsuit turns on user-generated content.[6] According to the CDA the website operators generally do not bear legal liability for displaying their users' communication even if it is illegal.[7]

Consequently, the U.S. online platform operators are protected from secondary liability even in relation with serious crimes. This was demonstrated by a case in 2009, when an online service provider, operating a website under the domain Craigslist.org, avoided liability for contents which helped to commit murder and other continuously committed criminal acts, like robbery.[8] The website enabled users to interact in online discussion forums.[9] One of the users, a twenty-two-year-old medical school student under the moniker "Craigslist killer" murdered a woman who he had fraudulently solicited through the Craigslist-platform.[10] The perpetrator had also other victims who suffered different serious harms. In the subsequent lawsuit *Dart v. Craigslist, Inc.* the court held that Craigslist caused postings only in the sense of providing a place where people can share their messages, just like phone companies and courier services[11] and it had no obligation to prevent violation of law by monitoring the communication transmitted through the website and by filtering out the offensive postings or suspicious, violent usernames.

[6] Alan Rozenshtein, 'It's the Beginning of the End of the Internet's Legal Immunity' (Foreign Policy, 2017), <http://foreignpolicy.com/2017/11/13/its-the-beginning-of-the-end-of-the-internets-legal-immunity/> accessed 11 March 2018
[7] ibid.
[8] See: Shahrzad T. Radbod, 'Craigslist - A Case for Criminal Liability for Online Service Providers?' (2010), Berkeley Technology Law Journal, Vol. 25, Iss. 1. <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?referer=https://www.google.hu/&httpsredir=1&article=1838&context=btlj> accessed 11 March 2018
[9] Radbod (n 8), 597
[10] ibid.
[11] *Thomas Dart v. Craigslist Inc.* [2009] 665 F. Supp. 2d 961; 2009 U.S. Dist. LEXIS 97596, 17

In contrast to the U.S system, the European Union decided not to free Internet companies from worrying about liability for what their users post online.[12] The Electronic Commerce Directive[13] (hereinafter: ECD) – adopted in the year 2000 – offers safe harbors only in respect of the online services determined in the Section 4 of the ECD[14] and considered to be insignificant from a liability perspective. To be protected, the online service providers must fulfil specific requirements, such as the absence of having 'actual knowledge' of the illegal content and the 'expeditious removal' of the problematic material.[15] Pursuant to these rules the online service providers must act as private gatekeepers and in certain cases they must be able to defend the users from online harms.

The two different considerations show uncertainty regarding to the role and the legal nature of the website operators. To understand the reasons of this inconsistency it is necessary to sum up the most important characteristics of the Internet. According to Leonard Kleinrock, one of the Internet's founding fathers,[16] these are the followings:[17] (i) the Internet technology is everywhere; (ii) it is always accessible; (iii) it is always on; (iv) anyone can plug in from any location with any device at any time; (v) it is invisible.

The above remarks reflect that the Internet is different than any other previously available means of communication: it has practically unlimited features and is able to serve all of its

[12] See: Xavier Amadei, 'Standards of Liability for Internet Service Providers: A Comparative Study of France and the United States with a Specific Focus on Copyright, Defamation, and Illicit Content' (2001) Cornell International Law Journal, Vol. 35, Iss. 1., 216-217 <https://scholarship.law.cornell.edu/cilj/vol35/iss1/4/> accessed 10 December 2017
[13] Council Directive (EC) 2000/31 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') [2000] OJ L178
[14] Council Directive (EC) 2000/31 (n 13), Section 4
[15] Council Directive (EC) 2000/31 (n 13), Article 14 (1)
[16] Leonard Kleinrock is an American computer scientist who took part in inventing a network considered as a precursor of the Internet. See: Marina Dundjerski, *UCLA: The First Century* (Third Millenium Pub Ltd, 2012), 173
[17] Leonard Kleinrock, 'An Internet Vision: the Invisible Goal Infrastructure' (2003), Ad Hoc Networks, Vol. 1, Iss. 1, 3<https://www.lk.cs.ucla.edu/data/files/Kleinrock/An%20Internet%20Vision%20The%20Invisible%20Global%20Infrastructure.pdf > accessed 3 October 2017

functions at once.[18] The Internet has empowered individuals to develop new forms of expression, reach new audiences and quickly disseminate information around the world.[19] From emails and blogs, to YouTube and Twitter, Internet-platforms enabling people to express themselves and engage in far-flung conversations.[20] But apart from its benefits the drawback of the Internet is that it made the illegal communication very easy to perpetrate. Online defamation,[21] hate speech,[22] online harassment[23] are among the threats which are considered as serious problems related to the cyberspace. Whereas everybody have a perception of the above harms, in reality they are complex notions without a universal meaning and each country is free to set its own ceiling for the protection of various expressions.[24] The publication of *Mein Kampf* could be prohibited in Germany and France by the criminal law but protected as free speech in the United States.[25] Criticism of a ruler could be criminalized in Zimbabwe but unrestrained in South Africa.[26] Furthermore, even within one country the scope of the existing freedom expression rules is not self-evident for any citizens but it is a complicated issue generating debates between the legal

[18] Stuart Biegel, *Beyond Our Control?: Confronting the Limits of Our Legal System in the Age of Cyberspace* (The MIT Press, 2003), 26-27

[19] Laura Tribe, 'Freedom of Expression Online: a Mirror of Freedom of Expression in Traditional Media?' (Canadian Journalists for Free Expression, 2013) <https://www.cjfe.org/freedom_of_expression_online_a_mirror_of_freedom_of_expression_in_traditional_media>

[20] ibid.

[21] See: Sanette Nel, 'Online Defamation: the Problem of Unmasking Anonymous Online Critics' (2007), The Comparative and International Law Journal of Southern Africa, Vol. 40, No. 2, 193-214 <http://www.jstor.org/stable/23252662> accessed 22 March 2018

[22] See: Tarlach McGonagle, 'The Council of Europe Against Online Hate Speech: Conundrums and Challenges' (Council of Europe – Expert Paper, 2013) <https://www.epra.org/attachments/the-council-of-europe-against-online-hate-speech-conundrums-and-challenges> accessed 22 March 2018

[23] See: Anirban Sengupta, Anoshua Chaudhuri, 'Are Social Networking Sites a Source of Online Harassment for Teens? Evidence from Survey Data' (2013), Childen and Youth Services Review, Vol. 33, Iss. 2., 284-290 <https://doi.org/10.1016/j.childyouth.2010.09.011> accessed 22 March 2018

[24] Kurt Wimmer, 'Toward the Rule of Law: Freedom of Expression' (2006) The Annals of the American Academy of Political and Social Science, Vol. 603. Law, Society, and Democracy: Comparative Perspectives, 203 <http://www.jstor.org/stable/25097766?read-now=1&seq=2#page_scan_tab_contents> accessed 23 March 2018

[25] ibid.

[26] ibid.

professionals as well.[27] The prismatic nature of freedom of expression paradigm is remarkable when it has adverse effect in another country.[28] Today, since the Internet technology is everywhere, this is possible. A U.S. publisher can be held liable for defamation in Australia or France, even if the publicized content is protected by the U.S. Constitution.[29]

Another feature of the cyberspace is that in comparison with other communication means it enables an unusually high level of network traffic intensity. As the Internet is always on and it is accessible for everybody its large-scale availability results in trillions of bytes circulating on the network at any given time.[30] As a consequence, detecting illegal or offensive data may need a huge amount of work.[31]

What should the Internet service providers do to protect the people from illegal contents, is a matter of debate.[32] Can they play the role of online gatekeepers whose duty is to ensure the safe and secure online environment? If the answer is the negative, what is their true role? Does the U.S. immunity provision exist because the online service providers are not gatekeepers, but they fulfil another special function in the community? These research questions will be answered in a freedom of expression context. It is assumed, that the imposition of legal liability on the online

[27] See: Martin H. Redish, 'The Value of Free Speech' (1982) University of Pennsylvania Law Review, Vol. 130. <http://scholarship.law.upenn.edu/penn_law_review/vol130/iss3/2.> accessed 23 March 2018
[28] ibid.
[29] In the case *Dow Jones & Co. Inc. v. Gutnick* the Australian court held that an online newspaper-site operated from website servers located in the United States can be liable for an article under the Australian law (see: *Dow Jones & Company Inc v Gutnick*, HCA 56, 10 December 2002). In *LICRA v. Yahoo!* the French court decided to rule in the case of the online auction website operated from the United States (see: *Ligue contre le racisme et l'antisémitisme et Union des étudiants juifs de France c. Yahoo! Inc. et Société Yahoo! France*, Tribunal de grande instance (T.G.I.) Paris, 2000, No RG:00/0538).
[30] Ashley Packard *The Boarders of Free Expression* (Hampton Press, Inc., 2009), 8
[31] As the internet policy expert, Gary Chapman pointed out: "trying to locate illegal or offensive data on the net would be harder than trying to isolate two paired words in all the world's telephone conversations and TV transmissions at once. And this difficulty grows worse every hour." See: Biegel (n 22), 52
[32] See: Melanie Jose, 'Internet Service Providers: Mere Conduits of Data, or Gatekeepers to the Threshold of Cybercrime? What Role do ISPs Play in Ensuring a Safe and Secure Online Environment?' (2017), International In-House Counsel Journal, Vol. 10., No. 38. <https://www.iicj.net/library/detail?key=1040> accessed 23 March 2018

service providers for illegal user generated contents cannot lead to an effective protection against online harm, because the online service provider cannot determine those materials which are not protected by the free speech rules. Furthermore, it is assumed that the online service providers have a different role as the online gatekeeper when they represent their users' communication.

To find answers to the above research questions the thesis is going to analyze the legal status of the online service providers in the United States and in the European Union, as well as under the system of the European Convention of Human Rights. The choice of these jurisdictions is based on the presupposition that since the selected regimes have different perceptions about the role of the online service providers, through inspection of the relevant legal provisions and the case law the research questions can be answered.

The study is divided as follows. To understand the possible reasons of the online service provider's liability a general observation is provided about those significant factors which usually come up as the basis of their legal responsibility. Then, an analysis is provided about the liability regime prevailing in the United States. Based on the findings resulting from the interpretation of the law and the court decisions the study interprets the online service providers' role in the United States. Thereafter, the legal regimes prevailing in the European Union and the case law of the European Court of Human rights are evaluated. On the ground of the result, the study explains why it is erroneous to treat online service providers as private gatekeepers in the context of freedom of expression. Lastly, the outcome of the research is summarized in the conclusion.

Chapter 1 - Considerations Behind the Secondary Liability

Before starting to examine the role of the service providers in certain legal regimes, it is necessary to review who are the persons on the Internet whose secondary liability can arise in respect of user generated contents and what are those freedom of expression provisions which are relevant for the scope of this study. Afterwards, the chapter sets out the possible liability factors based on which the OSP can be characterized as a wrongdoer. Finally, it is discussed why is the application of the existing liability rules problematic in connection with the Internet.

1.1 What is online service provider and user generated content?

It is not easy to navigate between the actors who provide different Internet services, because there are many of them.[33] There is a spectrum of service providers who are more or less involved in the dissemination of the online electronic contents.[34] At one end of the spectrum is the company that operates the cables and routers that make up the backbone of the Internet.[35] These, by analogy with a postal or telephone service, are generally immune from liability for the content passing through their systems.[36] For example, AT&T in the United States or Deutsche Telekom in Europe provide these services. They can be named as internet service providers or in short ISPs. Next are

[33] As the Council of Europe and the European Internet Services Providers Association remarks, internet service providers offer a variety of services to their customers in different segments, be it as access providers or as providers of other information society services, e.g. application-providers, content-providers and/or host-providers [Council of Europe in co-operation with the European Internet Services Providers Association, 'Human rights guidelines for Internet service providers' (2008), 3 <https://rm.coe.int/16805a39d5> accessed 12 March 2018]

[34] Timothy Pinto, Niri Shan, Stefan Freytag, Elisabeth Von Braunschweig, Valerié Aumage, 'Liability of Online Publishers for User Generated Content: a European Perspective' (2010) Communications Lawyer, Vol. 27., Nr. 1., 5 <https://www.americanbar.org/content/dam/aba/publishing/communications_lawyer/pinto.authcheckdam.pdf> accessed 15 October 2017

[35] ibid.

[36] ibid.

the entities that are technical hosts of websites, in the sense that they provide the servers on which the website is stored.[37] Cloud host providers, like Google or Microsoft are the most well-known examples in this category. Finally, there are those who design and control the websites onto which the users upload content.[38] They are the online service providers (hereinafter: OSP) who are the subjects of this study.[39] There are thousands of OSPs in the world who offer various types of online services: Google and Yahoo! provide online searching services, eBay and Amazon operate online shopping and auction platforms, YouTube allows to share videos on its website, just to mention a few of them.[40]

Most of the OSPs give Web 2.0 services, meaning that their business is mainly concerned with user collaboration and sharing.[41] Apart from displaying the self-engineered contents – which belong to the Web 1.0 environment – the Web 2.0 service provider OSPs give the opportunity to their users to create and share various types of contents (hereinafter: UGC) with the public.[42] The UGC can have many forms, including text-based UGC (e.g. web-blogs), graphics-based UGC (e.g. photos, memes), audio UGC (podcasts) and video UGC.[43]

[37] ibid.
[38] ibid.
[39] There are scholars who refer to the online service providers as „New Online Media Services" (NOMS). See: Andrej Školkay, 'The Regulation of New Online Media Services (NOMS)' (LSE-Media Policy Project, 2015) <https://www.researchgate.net/deref/http%3A%2F%2Fblogs.lse.ac.uk%2Fmediapolicyproject>,
[40] Computer Business Research, 'What is an Online Service Provider' <http://www.computerbusinessresearch.com/Home/ebusiness/online-service-provider> accessed 29 September 2017
[41] The term „Web 2.0", originated from Media Inc - owned by Tim O'Reilly - in 2004, is used to convey a set of principles and practices that describe a second generation (from the traditional „Web 1.0") of online services. Traditional Web 2.0 services include blogs, wikis, multimedia sharing services, content syndication, podcasting and content tagging services. Newer Web 2.0 services include social networking, aggregation services and various other categories of services. See: Carlisle E. George, Jackie Scerri, 'Web 2.0 and User Generated Content: Legal Challages in the New Frontier' (2007) Journal of Information, Law and Technology, Vol. 2., 3-4 <https://ssrn.com/abstract=1290715> accessed 12 March 2018
[42] George, Scerri (n 35), 4
[43] ibid.

1.2. Illegal online contents in the context of freedom of expression

The use of UGCs brought many legal challenges in various fields of law including intellectual property law, privacy law or data protection law.[44] Consequently, several constitutional values – such as respect for private life or freedom of conducting business – are affected by UGCs. As a form of communication the primary question is in a legal sense whether the given UGC is protected by the freedom of expression rules or falls it instead into the category of illicit communication such as defamation or hate speech.[45] In case if the "speech" is not protected, the Web 2.0 business can be potentially treated as "broadcaster" of illegal material unless it makes efforts to take every precaution to keep the users safe.

Nevertheless, requiring the OSP to prevent the dissemination of illegal UGC means that the OSP should be familiar with the relevant freedom of expression rules such as the First Amendment of the U.S Constitution, the Article 11 of the Charter of Fundamental Rights of the European Union as well as by the Article 10 of the European Convention of Human Rights[46] to be able to decide, whether the certain UGC is legal or illegal. Since there is no clear formula how to balance the freedom of speech against other fundamental values, this might be extremely difficult, if even not impossible task for the OSP. The difficultness is more obvious if we consider that the exact meaning of the freedom of expression is the subject of debates both within the various communities, as well as between legal professionals.[47] The complexity of the question is reflected

[44] See: George, Scerri (n 35), 5-8
[45] ibid.
[46] The Constitution of the United States – First Amendment; Charter of Fundamental Rights of the European Union (2000/C 364/01), Article 11; Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4.XI.1950), Article 10
[47] For example, in respect of balancing freedom of expression against freedom of religion, the Muslim Council of Britain argues that "a free discourse... on the merits of Islam and Muslims...is of course necessary in an open society, but to urge others to hate, and thereby oppress, an entire faith community must be unacceptable at all times and all places" See: Sandy Starr, 'Understanding Hate Speech' [in: Moller, & A. Amouroux (Eds.) *The Media Freedom*

also in the fact, that sometimes even the highest level of court decision is necessary to solve legal disputes on the field of freedom of expression.[48] In the light of this, it seems to be unrealistic to calculate with the possibility that the OSP will be able to gauge the nature of the UGC under the freedom of expression rules.

1.3. Possible factors of secondary liability

The general perception about the UGC is, that it is primarily the communication of the users. Consequently, the OSP can only be liable for an illegal UGC as a secondary infringer, also called as by-stander.[49] On what factors the secondary liability may rest depends on the tort liability system of the given state, unless the OSP enjoys immunity, like in the United States. With the exception of some countries – like China, where the OSP and the user may bear joint and several liability for the UGC[50] – the jurisdictions provide limitations to the OSP's secondary liability. The application of either solution is based on the presupposition, that the OSP is not innocent, because it participates in the creation of the unlawful content. But if a state does not ensure the OSP with non-accountability, the level of the dominance of the OSP's contribution must be somehow measured, and also the nature of its assistance ought to be analyzed in order to be able to decide over its liability. To do this, different circumstances can be considered which can be denoted as "liability factors". These factors are introduced below.

Internet Cookbook (OSCE, 2004) 125-141] 127 <https://www.osce.org/fom/13836?download=true> accessed 12 March 2018] citing Inayat Bunglawala, 'Law on incitement to religious hatred' – responding to Will Cummins' (Muslim Council of Britain, 16 July 2004 <http://www.mcb.org.uk/letter76.html>)

[48] See for example: *Minersville School District v. Gobitis*, [1940] 310 U.S. 586; 60 S. Ct. 1010; 84 L. Ed. 1375; 1940 U.S. LEXIS 1136; 17 Ohio Op. 417; 127 A.L.R. 1493 [An explanation about the case is available in the following podcast: Ken White, 'Make No Law – The First Amendment Podcast' (Legal Talk Network, 31 January, 2018) <https://legaltalknetwork.com/podcasts/make-no-law/2018/01/fighting-words/> accessed: 2 February 2018]

[49] This is commonly accepted by the majority of the scholars. See: Graeme B. Dinwoodie (ed.) *Secondary Liability of Internet Service Providers* (Springer, 2017)

[50] Article 34 of the Chinese Tort Liability Act, cited in: Xinbao Zhang *Legislation of Tort Liability Law in China* (Springer, 2017), 67

1.3.1. The assistance provided by the online service provider

The imposition of secondary liability can be based on the acts of the by-stander wherewith it assists and materially contributes to the direct infringement.[51] In case of Web 2.0 services it is self-evident that the UGC cannot be created without the intermediation of the OSP. Hence, it must be decided, what kind of contributory activities must be handled as violation of law.

The provision of the CDA which exempts the OSPs from the liability is the Section 230, stipulating that *[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider*.[52] This rule is basically the recognition that the OSP's assistance is nothing else than publishing, just as what a publisher does in relation to an author's book or an article in a newspaper. But in the physical world, liability rules based on illegal-texts may apply not only to the original authors but also to the publishers.[53] This principle was changed by the CDA when it transformed the online publisher's responsibility into a "ghost" being unable to entail legal consequences. Moreover, the CDA acknowledges that the OSP not just simply assists the user with publishing his or her ideas but it is itself the speaker of the UGC, therefore it is also the OSP's own communication.

The legal system of the European Union gives an entirely different interpretation. In Europe the UGC is absolutely the user's communication, to which the OSP provides technical assistance. The

[51] Michael J. McCue, 'Secondary Liability for Trademark and Copyright Infringement' (Lewis, Roca, Rothgerber, Christie LLP, online publication available on the website of the United States law firm), 1 <https://www.lrrc.com/files/Uploads/Documents/M.%20McCue%20Utah%20Cyber%20Symposium%20SECONDARY%20LIABILITY%20Sept%2023.pdf> accessed 12 March 2018

[52] 47 U.S. Code § 230 (c) (1) (1996)

[53] According to the U.S. law, in the physical world, if you believe a newspaper has libeled you, you can sue the reporter, the editors, the publishing company, and even, in certain circumstances, the distributors. See: Mark Sableman, 'ISPs and content liability: The original Internet law twist' (Thompson, Coburn LLP, online blog available on the website of the United States law firm, 2013) <https://www.thompsoncoburn.com/insights/blogs/internet-law-twists-turns/post/2013-07-09/isps-and-content-liability-the-original-internet-law-twist> accessed 12 March 2018

European Union law determined those types of technical assistances in the production of the UGC which are generally not illegal.[54] From the list of these safeguards, the most relevant activity for the OSP is hosting, – which means storing the information shared by the user – because one of the OSP's main job is the preservation of the UGC on a server.[55] But storing the content is often just one part of the entire service package and usually it is not the OSP's core business.[56] For example, YouTube not only stores the uploaded videos but also makes them available to other users for watching and sharing. Therefore, qualification for the hosting exemption can appear to be complicated already at the first sight of the safe harbor provisions.

1.3.2. The knowledge of the online service provider

In the European Union, where the UGC is not the OSP's communication, the host provider's knowledge about the UGC's illegal nature is decisive during the assessment of the secondary liability.[57] This approach is borrowed from the U.S. copyright law where the Digital Millennium Copyright Act (hereinafter: DMCA)[58] provides similar rules. The DMCA case law shows that it can be problematic also in copyright cases to make sure that the OSP was indeed aware about an infringement.[59] Even so, the European liability regimes are focusing primarily on the knowledge

[54] Council Directive (EC) 2000/31 (n 12), Section 4
[55] Council Directive (EC) 2000/31 (n 12), Article 14
[56] iLINC Legal & Technology Briefs, 'The Limited Liability of Internet Intermediaries in the EU' (2015), 2 <http://www.ilincnetwork.eu/wp-content/uploads/2015/08/3-LB-The-Limited-Liability-of-Internet-Intermediaries-in-the-EU-Update.docx.pdf > accessed 10 January 2018
[57] Council Directive (EC) 2000/31 (n 12), Article 14 (1) a)
[58] Digital Millennium Copyright Act, 17 U.S. Code § 512
[59] For example, in the case of *Viacom International, Inc. v. YouTube, Inc.* the U.S. court held, that however it was "persuaded that the plaintiffs may have raised a material issue of fact" regarding the existence of the OSP's awareness about infringing videos stored on its website, but at the same time "it was unclear" whether the videos referenced by the plaintiffs are the "clips-in-suit". See: *Viacom International, Inc. v. YouTube,* [2012] *Inc* 676 F.3d 19; 2012 U.S. App. LEXIS 6909; Copy. L. Rep. (CCH) P30,231; 102 U.S.P.Q.2D (BNA) 1283, 37

factor and they try to detect every other circumstance based on which the illegality of the UGC can be considered as apparent.[60]

Regarding to the above approach it must be noted, that knowledge is nothing more than a person's firm belief,[61] one's mental state. Considering what degree of knowledge is sufficient to incur liability is a difficult process, applied for example in the field of criminal law.[62] To avoid dependence on similarly laborious methods of assessment legal systems usually establish certification proceedings – like the notarial deed or the land registry and the company registry systems – to authenticate the most important "beliefs". This is necessary to ensure trade certainty. Similarly, the DMCA attempts to create legal clarity by determining what compulsory elements a takedown notice sent by a copyright owner to the infringer OSP must contain.[63] Tough, similar process is nonexistent in the European regimes.

1.3.3. The relationship between the online service provider and the user

The common law publisher liability in the physical world is based on the doctrine of *respondeat superior* meaning that the employer publisher is liable for the statements of the authors in the publisher's medium.[64] The rationale behind this legal theory is that the employer directs the employee's work, provides the means of performance, and enjoys all rights to exploit the results.[65]

[60] Miquel Peguera, 'The DMCA Safe Harbors and Their European Counterparts: A Comparative Analysis of Some Common Problems' (2009) Columbia Journal of Law & the Arts, Vol. 32., 488 <https://ssrn.com/abstract=1468433> accessed 12 January 2018
[61] The Law Dictionary <https://thelawdictionary.org/knowledge/> accessed 4 April 2018
[62] J. Ll. J. Edwards, 'The Criminal Degrees of Knowledge' (1954) The Modern Law Review, Vol. 17., No. 4., 294 < https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1468-2230.1954.tb02157.x > accessed 4 April 2018
[63] DMCA (n 58), 17 U.S. Code § 512 c) (3)
[64] Charles D. Tobin, Drew Shenkman, 'Online and Off-Line Publisher Liability and the Independent Contractor Defense' (2009) Communications Lawyer, Vol. 2., Nr. 2., 1 <http://www.ballardspahr.com/~/media/files/bioattachments/tobin%20publications/online-and-offline-publisher-liability-and-independent-contractor-defense-march-2009.ashx?la=en.> accessed 12 March 2018
[65] ibid.

After the CDA's immunity rule, taking into consideration whether such relationship exists between the OSP and the user is not necessary. In the U.S., claims based on the OSP's alleged failure to "exercise a publisher's traditional editorial functions" such as monitoring or screening other parties' transmissions or deciding whether to withdraw or delete content have no legal basis whatsoever.[66] Notwithstanding, there are plaintiffs who refer to the elements of the OSP-user relationship factor, and argue that the OSP's encouraged or invited the user to create illegal UGCs.[67] Such reasoning is sometimes buttressed up with a reference to the OSP's monetary interest by insisting that it makes money from the UGC. As an example, a Florida judge called the OSPs "silent partners in criminal enterprises for profit."[68]

In contrast to the United States, in a European lawsuit the OSP's income from the UGC can activate its secondary liability.[69] It happened in the case *Google v. Vivi Down* where the Italian court held that given that the online service generates huge revenues, the OSP shall bear the responsibility if something goes wrong with the online services.[70] There are also voices coming from the public finding this approach reasonable: the UK's Institute of Race Relations in seeking to outlaw hateful content from the popular media argues that "the press freedom that was fought

[66] Tobin, Shenkman (n 64), 3 citing *Sandler v. Calcagni* [2008] 565 F. Supp. 2d 184; 2008 U.S. Dist. LEXIS 54374; 36 Media L. Rep. 2286

[67] See the case *Jones v. Dirty World Entertainment Recordings LLC* where the plaintiff argued that defendants "directly encourage[d] people to post offensive and defamatory content that will get noticed." [John Dean, 'Are Internet Providers, in Fact, at Risk for Defamation Liability? (Verdict – Legal Analysis and Commentary from Justitia 2013) <https://verdict.justia.com/2013/09/20/are-internet-providers-in-fact-at-risk-for-defamation-liability> accessed 13 March 2018) citing *Jones v. Dirty World Entertainment Recordings LLC*, [2014] 755 F.3d 398; 2014 U.S. App. LEXIS 11106; 2014 FED App. 0125P (6th Cir.); 42 Media L. Rep. 1984

[68] Harold Abelson, Ken Ledeen, Harry R. Lewis *Blown to Bits: Your Life, Liberty, and Happiness After the Digital Explosion* (Addison-Wesley Professional, 2008), 247 citing Florida Supreme Court Judge Fred Lewis

[69] In the case *Delfi AS v. Estonia* the court found the remark of the Estonian Supreme Court noteworthy, which stated that the higher the number of the UGCs is, the higher the income of the OSP can be. See: *Delfi AS v. Estonia* (App no. 64569/09) ECtHR 16 June 2015, 11

[70] See: Bruno Carotti, 'The Google – Vivi Down Case: Providers' Responsibility, Privacy and Internet Freedom' [in: Sabino Cassese, Bruno Carotti, Lorenzo Casini, Eleonora Cavalieri, Euan MacDonald (eds.) *Global Administrative Law: The Casebook* (3rd edition) (Institute for International Law and Justice, 2012)], 180 < https://www.academia.edu/7798550/The_Google_Vivi_Down_Case_Providers_Responsibility_Privacy_and_Internet_Freedom> accessed 11 February 2018

for in previous centuries is not the freedom of large corporations to be involved in the industrialized production of racism for profit."[71]

Nonetheless, it is a farfetched approach to treat the UGC-associated revenue as a basis of the OSP's liability and as an evidence for the encouragement to post malicious material. Earning money, is neither illegal nor unethical. Moreover, making profit is not a strong evidence for the existence of the OSP's authority over the user. Much more should be required for holding, that the OSP exercised significant control which could be regarded as appropriate causal link between the harm and the OSP's activity. As Judge Whitford observed in a case decided in the United Kingdom: "[a]n ordinary person would, I think, assume that an authorization can only come from somebody having or purporting to have an authority and that an act is not authorized by somebody who merely enables or possible assists or even encourages another to do that act, but does not purport to have any authority which he can grant to justify the doing of the act."[72]

Indeed, Twitter without tweets would be a meaningless website and could not generate any profit. Hence, Twitter encourages users to tweet and it shows them how to do it.[73] But this does not mean, that Twitter emboldens its users to violate the law. Instead, the tweets are formulated freely by the people who want to share their views.

1.4. Are the existing liability rules necessarily obsolete in an online environment?

The question of what role the OSP should have in relation to unwanted UGCs, is affected not just by how the liability factors are interpreted but also by our perception of the cyberspace. It can

[71] See Starr (n 47), 126 citing Arun Kundnani, 'Freedom to hate?' (Institute of Race Relations, 2003) <http://www.irr.org.uk/2003/may/ak000012.html> (reproduced from Campaign Against Racism and Fascism)
[72] Paul S. Davies *Accessory Liability* (Bloomsbury Publishing, 2015), 192 citing Judge Whitford in the case *CBS Inc v Ames and Records and Tapes Ltd* [1982] Ch 91
[73] Twitter website contains a "How to tweet" section <https://help.twitter.com/en/using-twitter/how-to-tweet> accessed 13 March 2018

be argued that the Internet is too complex for bearing resemblance to the physical world. However, it is true that the Internet is a unique medium, but it is still not an alternate universe. That was recognized by the U.S. Congress, as well. The CDA expressly provides. that it is intended *to encourage the development of technologies (...)* and *to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer*.[74]

By emphasizing the importance of technological development in the fight against online harms, the Congress refers to the fact that the problem is not merely a legal issue but also a matter of technology and therefore the collaboration of the Internet intermediaries with the authorities, as well as with each other is indispensable. The reason of this is, that the differences between the online environment and the physical world occur only because the technology enables their existence. As these deviations were activated they can be possibly disabled by the developers.

It is obvious, that the potential pervasiveness of a defamatory message shouted from a megaphone in the street cannot be as high as the dispersal of a message posted on an online bulletin board. But it is not true, that the circle of the audience is necessarily unlimited and no obstacles can be created in the online world.[75] Moreover, although it is not contentious that the Internet offers a unique opportunity to speak anonymously – which may enhance the probability of online defamation[76] and other illegal activities – but anonymity is relative in the cyberspace, because

[74] 47 U.S. Code § 230 a) (3), (5)
[75] As Jack Goldsmith and Tim Wu remarked, "[G]overnments strengthened borders on the Net by employing powerful "top-down" techniques to control unwanted Internet communications from abroad." [Jack Goldsmith, Tim Wu *Who Controls the Internet?: Illusions of a Borderless World* (Oxford University Press, 2006), 49]
[76] The reason of this is that anonymity grants the sense of more security, meaning fewer chances of being caught by sending harmful materials to or about the victim, and that sense of safety may increase the tendency to use the Internet to harm victims. See: Dragoş Cucereanu *Aspects of Regulating Freedom of Expression on the Internet* (Intersentia, 2008), 184

unless unusual precautions are taken all user activities can be linked with a machine, thus the user can be potentially identified.[77]

To sum up the above, at least theoretically, the attributes of the cyberspace can be changed, and its nature can be brought closer to the physical world by innovation. If this would happen, the issue of liability for online conducts will be less disturbing and the role of the OSP will be less different as the role of other communication means being available in the physical world.

[77] Sara Nogueira Silva, Chris Reed, 'You Can't Always Get What You Want: Relative Anonymity in Cyberspace' (2015) SCRIPTed – A Journal of Law, Technology and Society, Vol. 12, Iss. 1., 39 <https://script-ed.org/wp-content/uploads/2015/06/silva_reed.pdf> accessed 13 March 2018

Chapter 2 - The Role of the Online Services Providers in the United States

To see what the role of the OSP in the United States is first the CDA's immunity rule must be interpreted. After that, the relevant case law is analyzed. Based on the findings it is explained, why the non-accountability is necessary for the OSP in relation with the UGCs. Lastly, the chapter provides an interpretation of the OSP's genuine role in the Unites States.

2.1. The scope of the immunity and the misconcepts about it

In the United States, the previously introduced liability factors are insignificant due to the Section 230 of the CDA which grants immunity to the OSP. The popular narrative of the immunity provision in the United States is that it constitutes the cornerstone of online freedom of expression and any attempts to alter it will spell the death of the Internet.[78] Indeed, the CDA provides a very broad liability exemption for the Internet-companies. However, contrary to the popular characterization that the CDA's immunity is complete regarding any content posted by the users, there are some limitations under the act.[79]

First, Section 230 expressly states that no Internet entity has immunity from federal criminal law, intellectual property law or communications privacy law.[80] By means of this, every OSP is subject to thousands of laws, including child pornography laws, obscenity laws, stalking laws and copyright laws.[81] For example, in respect of copyright infringement, the OSP's liability will be

[78] Mary Anne Franks, 'The Lawless Internet? Myths and Misconceptions About CDA Section 230'(Huffington Post, 2014) <https://www.huffingtonpost.com/mary-anne-franks/section-230-the-lawless-internet_b_4455090.html> accessed 10 March 2018
[79] ibid.
[80] Franks (n 78) citing CDA (n 5) 47 U.S. Code § 230 (e) (1),(2),(4)
[81] Franks (n 78)

determined according to the DMCA. This is the reason why, the CDA approach is considered as vertical: it is applicable only in relation to freedom of expression cases.[82]

Second, Section 230 immunity only applies to online intermediaries of third-party content, meaning that the OSP can be exempted from the liability solely in respect of UGCs.[83] Thus, co-creators of the UGCs are not protected.[84] Accordingly, online-news portals cannot claim that they are not liable for the article on the website written by journalists employed and supervised by them.[85] This is reflected in the scope of people covered by the CDA. It distinguishes providers of *interactive computer services* from *information content providers*.[86] An interactive computer service *provides or enables computer access by multiple users to a computer server*, whereas an *information content provider* is any person responsible *in whole or in part, for the creation or development of information*.[87] In other words, the OSP must qualify for being a provider of interactive computer services to be protected from liability for the actions of others, but at the same time it must avoid to become an information content provider because OSPs cannot be exempted from liability for their own illegal conduct.[88] Similarly, any natural person cannot claim immunity for unlawful conduct simply because he or she engages in it online.[89]

To grant immunity the CDA decided to refer to a traditional tort law rule, the publishers' liability and said that no OSP shall be treated as the publisher of any UGC.[90] Prior to the CDA the court had the duty to analyze the relevant liability factors, including the OSP's knowledge about

[82] Peguera (n 60), 482-482
[83] Franks (n 78)
[84] ibid.
[85] See: Tobin, Shenkman (n 64), 1
[86] Franks (n 78) citing CDA (n 5) 47 U.S. Code § 230 (f) (2),(4)
[87] ibid.
[88] ibid.
[89] ibid.
[90] CDA (n 5) 47 U.S. Code § 230 (c) (1) (1996)

the UGC. As the pre-CDA cases demonstrate, the application of these factors leads to inconsistency in the court decisions, as well as to legal uncertainty.

2.2. Liability factors: the one-time sources of discrepancies

Before the enactment of the CDA in 1996, there was no common understanding in respect of the legal nature of the OSP is. The courts were divided over the question of whether websites should be liable for third-party postings.[91] The issue was a traditional common law tort problem under the principles of which a person who publishes a defamatory statement made by another bears the same liability for the statement as if he or she had initially created it.[92] Unlike publishers, the mere distributors – bookstores, newsstands, libraries – are generally not liable for the content of the material they distribute unless the distributor knew or should have known that the statement was illegal.[93] The theory behind this principle is that it would be an excessively onerous burden for the distributors to gain knowledge about the statements by reading every publication before they sell it.[94] This means that prior to the CDA the United States courts had to examine the OSP's knowledge if they found that it is rather a distributor than a publisher. The result was the unpredictability of the outcome of the cases.

Since in connection with the distributors the state of knowledge must be proven and whereas the publisher status requires no additional burden of proof in respect of the awareness, it was sensible for a defendant OSP to argue that it was a distributor instead of a publisher. This is what

[91] Thomas Koenig, Michael Rustad *Global Information Technologies: Ethics and the Law* (West Academic, 2017), 142
[92] Margo E. K. Reder, Jonathan J. Darrow, Sean P. Melvin, Kabrina K. Chang *Cyberlaw: Management and Entrepreneurship* (Wolters Kluwer Law & Business, 2015), 469
[93] ibid.
[94] ibid.

happened in the case *Cubby v. CompuServe* in 1991.[95] The two companies between whom the dispute arose both operated their own websites and they were competitors of each other in the online news business.[96] Cubby claimed that on separate occasions the website of CompuServe published false and defamatory statements relating to Cubby's website.[97] The article which contained the challenged statement was written by a third party with whom CompuServe had no contractual or any other direct relationship.[98] CompuServe did no editorial activities but retained a company who carried out monitoring services.[99] In its decision, the court rejected Cubby's argument that CompuServe was a publisher, and said that "CompuServe has no more editorial control over such a publication than does a public library, book store, or newsstand, and it would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statements than it would be for any other distributor to do so."[100] As a distributor CompuServe could have been liable for the UGC only if it knew about the defamatory statement but as the court stated, Cubby failed to prove that this was the case.[101] In this respect, the court observed that "the large number of publications it carries and the speed" of the uploads were important aspects in their decision whether CompuServe was aware of the defamatory nature of the statement in question.[102]

[95] *Cubby, Inc. v. CompuServe Inc.* [1991] 776 F. Supp. 135; 1991 U.S. Dist. LEXIS 15545; 19 Media L. Rep. 1525, 8
[96] *Cubby, Inc. v. CompuServe Inc.* (n 95), 1-3
[97] ibid.
[98] ibid.
[99] ibid.
[100] *Cubby, Inc. v. CompuServe Inc.* (n 95), 12
[101] *Cubby, Inc. v. CompuServe Inc.* (n 95), 16
[102] Reference to the large number of comments and the speedy uploads may appear to be strange in a case from 1991, but it must be noted, that at the time of the dispute CompuServe, AOL and Prodigy Communications were the "big three" commercial online services. The largest of these, AOL, accounted for 4.5 million of the 8.1 million total users of major on-line services. See: Matthew C. Siderits, 'Defamation in Cyberspace: Reconciling Cubby, Inc. v. CompuServe, Inc. and Stratton Oakmont v. Prodigy Services Co.' (1996), Marquette Law Review, Vol. 79, Iss. 4., 1067 <http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1557&context=mulr> accessed 20 October 2017

After *Cubby*, the OSPs could have been slightly reassured, on the basis that they must care merely about the distributor liability and the significant part of the burden of proof is with the plaintiff who will have difficulties to evince the OSP's awareness of the illegal UGC anyway. But in 1994, things completely changed. In the case *Stratton Oakmont v. Prodigy* the court held that Prodigy was a publisher of the defamatory UGCs posted by an unidentified user on Prodigy's online bulletin board.[103] At the time of the initiation of the lawsuit Prodigy had over two million users subscribed to its online services.[104] The company labelled itself as a "family-oriented network", taking responsibility for the published articles on the website by applying editorial control and also a screening program.[105] It turned out, that it was a bad idea. The court explained, that yet it is "in full agreement" with the *Cubby* decision, but that was a different case. Here, "Prodigy's own policies, technology and staffing decisions (…) have altered the scenario and mandated the finding that it is a publisher."[106] With its decision, the court sent a strange message to the OSPs, namely institution of strict standards to prevent any defamatory language from reaching the website, means risking losing legal defense.[107] Instead, the rational thing to do is taking a totally hands-off approach,[108] because the more passive the website is the less likely will the court decide that is was aware of the illegal UGC.

2.3. How immunity brought legal insecurity to an end

After *Stratton Oakmont* it was obvious that something must be done by the legislator about the liability of online intermediaries, otherwise the legal rules would deter an Internet-company from

[103] *Stratton Oakmont, Inc. v. Prodigy Services Co.*, [1995] 1995 N.Y. Misc. LEXIS 712; 24 Media L. Rep. 1126, 1
[104] Siderits (n 102), 1077
[105] ibid.
[106] *Stratton Oakmont, Inc. v. Prodigy Services Co*. (n 103), 14
[107] Siderits (n 102), 1080
[108] ibid.

removing objectionable material from its services.[109] The issue to be decided was, that which category provided by the traditional common law of tors – publisher or re-publisher, distributor, speaker – circumscribes the best what Internet-companies are. The Congress brought the battle of the possible scenarios to an end with a Solomonic decision and said, that the OSP can fall under every category: it can be not just the publisher but also the speaker of the UGC. However, it further added, that the OSP's legal nature does not matter because it is exempted from the legal liability according to the following: *[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.*[110]

The above rule is a showdown with the necessity of dealing with any of the liability factors: neither the OSP's knowledge, nor the its assistance or its relationship with the user have a relevance. After the CDA these circumstances have merely a "ghostly" existence in the United States. Though, to be victimized by online defamation, hate speech or fraud is a desperate situation – especially when the perpetrator acts anonymously, and the plaintiff is unable to file a suit against the original speaker[111] – and the ghosts of the liability factors are often challenged by those who think their right was infringed online, based on the hope that they can win. In these cases, the courts provided the plaintiffs with reasonings why the OSPs should not be treated as online gatekeepers. Furthermore, the courts explained how the OSP's own, self-engineered material should be determined and why the OSP does not have immunity in respect of these contents.

[109] Ryan W. King, 'Online Defamation: Bringing the Communications Decency Act of 1996 in Line with Sound Public Policy' (2003), Duke Law & Technology Review, Vol. 2, Iss. 1., 2-3 <https://scholarship.law.duke.edu/dltr/vol2/iss1/22/> accessed 4 January 2018

[110] CDA (n 5) 47 U.S. Code § 230 (c) (1) (1996)

[111] Heather Saint, 'Section 230 of the Communications Decency Act: The True Culprit of Internet Defamation' (2015) Loyola of Los Angeles Entertainment Law Review, Vol. 36., Iss. 1., 39 <http://digitalcommons.lmu.edu/elr/vol36/iss1/2/> accessed 14 March 2018

2.3.1. Quick evaluation of online communication: impossible to do

On 25 April 1995, an unidentified person posted a message on AOL's online bulletin board advertising "Naughty Oklahoma T-Shirts."[112] The slogan was a tasteless reference to a terrorist attack which happened just a few days earlier in Oklahoma City where two U.S. citizens, fond of anti-government views, bombed the Alfred P. Murrah Federal Building, killing and injuring many people.[113] Those interested in purchasing the shirts were instructed to call "Ken" at the home phone of Kenneth Zeran.[114] As a result, Zeran received a high volume of calls comprised of angry messages, including death threats.[115] Zeran called AOL, notified the company about the incident and an AOL employee assured him that the posting would be removed from the website.[116] But in the following days the perpetrator kept posting similar messages and eventually, after receiving abusive phone calls approximately every two minutes, the involvement of the police became necessary, who surveilled Zeran's home to protect his safety.[117] Finally, Zeran decided to sue AOL for defamation.[118]

Zeran argued that tough the CDA immunizes publishers it leaves the distributors' liability intact.[119] Accordingly, he referred to *Cubby* and claimed that if it is proven that the online distributor was aware of the statement's defamatory nature, – and, stated Zeran, as a consequence of his notification it must have been – it is liable.[120] Zeran's argument was rejected by the court on

[112] *Zeran v. America Online, Inc.* [1998] 524 U.S. 937; 118 S. Ct. 2341; 141 L. Ed. 2d 712; 1998 U.S. LEXIS 4047; 66 U.S.L.W. 3799, 3
[113] See: Sehryll Shariat, Sue Mallonee, Shelli Stephens Stidham, 'Summary of Reportable Injuries in Oklahoma' (Oklahoma State Department of Health, 1998) <https://www.ok.gov/health2/documents/OKC_Bombing.pdf> accessed: 14 March 2018
[114] *Zeran v. America Online, Inc.* (n 112), 5
[115] *Zeran v. America Online, Inc.* (n 112), 6
[116] ibid.
[117] ibid.
[118] *Zeran v. America Online, Inc.* (n 112), 7
[119] *Zeran v. America Online, Inc.* (n 112), 13
[120] ibid.

the basis that since *Cubby* does not suggest that the distributors are not merely a subcategory of publishers.[121] In the court's interpretation the requirement of "distributors must at a minimum have knowledge of the existence of a defamatory statement as a prerequisite to liability" means not that there are different categories of actors in the online world, instead it merely refers to different liability standards.[122]

The court's interpretation contradicts with the fact that the different liability standards are attached to different and separate categories of actors in the traditional common law tort system. But if one considers, that the Internet is not a single network but rather a "federation of networks,"[123] a merger of all the existing communication means, the court's interpretation is consistent with the design of the cyberspace. Accordingly, even if the knowledge factor would be relevant, the online-distributor's knowledge cannot be evaluated from substantially different perspective since they do business in the same online environment. The court correctly recognized that if the notification is irrelevant in one case it cannot be relevant in another.

Moreover, the court pointed out that the difference between the traditional print publisher and an OSP is, that the latter, upon notification, would be required to fulfil rapid investigations and to make on-the-spot editorial decisions, which is an "impossible burden in the Internet context."[124] This means, that expecting the OSP to have knowledge about illegality would be an unfair condition. With its decision, the court considered the online gatekeeper role as an impossible

[121] *Zeran v. America Online, Inc.* (n 112), 14
[122] ibid.
[123] Tim Wu, 'Is Internet Exceptionalism Dead?' [in Berin Szoka, Adam Marcus (eds.), 'The Next Digital Decade – Essays on the Future of the Internet (TechFreedom, 2010), 184] <https://ssrn.com/abstract=1752415> accessed 25 September 2017
[124] *Zeran v. America Online, Inc.* (n 112), 19

mission for the OSP, confirming that a speedy evaluation of complex freedom of expression questions is beyond anyone's power.

2.3.2. The editorial control does not amount to co-creation

To pierce the "non-liability veil" the plaintiff must prove that the displayed UGC was not a third-party content, but it was created by the OSP itself. Sidney Blumenthal – at that time an assistant to the U.S President in the White House – and his wife, Jacqueline Blumenthal tried to do so.[125] However, with a bad strategy.

In 1997, Matt Drudge posted an article to his online gossip column called as the Drudge Report that contained the alleged defamatory statement about the Blumenthals.[126] Drudge articles on the Drudge Report were subjects to his written license agreement with AOL, whereupon Drudge received a flat monthly "royalty payment" for his stories.[127] Furthermore, according to the agreement, AOL had the right to "remove content that AOL reasonably determine[s] to violate AOL's standard terms of service".[128] The Blumenthals claimed that this clause amounts to the "editorial" control and it establishes AOL's liability.[129]

The Blumenthals used a wrong tactic since the editorial control is just a supporting argument in favor of holding AOL as a publisher, which liability category is protected by the CDA. For this reason, the court highlighted in its decision that the Blumenthals should have corroborated that

[125] *Blumenthal v. Drudge* [2001] 2001 U.S. Dist. LEXIS 1749; 29 Media L. Rep. 1347
[126] *Blumenthal v. Drudge* (n 125), 2
[127] *Blumenthal v. Drudge* (n 125), 5
[128] *Blumenthal v. Drudge* (n 125), 6
[129] The plaintiffs argued, that „the Washington Post would be liable if it had done what AOL did here". See: *Blumenthal v. Drudge*, 992 F. Supp 44 (n 125), footnotes 13

AOL was not simply the editor but the co-creator of the articles.[130] In the absence of such proof, the claim was rejected.[131]

2.3.3. What does co-creation mean?

After *Blumenthal* reinforced that editorial activities do not amount to co-creation of the UGC the question of at what point a site or service crosses the line between being a facilitator of third-party content and a co-creator of that content was still standing. Several cases are available to give the answer. According to the court decisions, the content is co-created (i) when the OSP interjects its own unlawful content into a material submitted by a user; (ii) when the OSP modifies a user's submission to create an effect that was not there previously; (iii) when the OSP presents user content in a manner that conveys a different meaning than the user's submission standing alone; or (iv) when the OSP expressly encourages the users to violate the law.[132]

To explain what the interjection of self-engineered material means, a decision was made in 2008, in the dispute between the Fair Housing Council of San Fernando Valley and the OSP named Roommates.com, LLC.[133] The OSP operates a website called Rommates.com, designed to match people renting out spare rooms with others looking for a place to live.[134] The users are requested by Roommates.com to answer different questions.[135] Some of them are multiple-choice questions where the user can only choose from the answers offered by the platform, the options of which are not open for any modification by the user.[136] As the plaintiff sued Roommates.com for

[130] *Blumenthal v. Drudge* (n 125), 14
[131] ibid.
[132] 'The Coral Project'-blog, 'Internet Comments and the Law' (2015) <https://blog.coralproject.net/internet-comments-and-the-law/> accessed: 24 March 2018
[133] *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, [2008] 521 F.3d 1157; 2008 U.S. App. LEXIS 7066; 36 Media L. Rep. 1545
[134] *FHC v. Roommates.com* (n 133), 1
[135] ibid.
[136] *FHC v. Roommates.com* (n 133), 4

discrimination the OSP argued that the answers for its questionnaire are given by the users, consequently they are UGCs, unable to entail any liability.[137] The court rejected this argument and pointed out that by pre-defining the answers Roommates.com is a co-creator of the communication.[138] In addition, because the communication possibly violated the anti-discrimination rules of the law of California, it is not protected by the First Amendment.[139]

As regards to what "modification and disfiguring the original meaning of the communication" means the Sixth Circuit Court of Appeals made an explanation in 2014 in a widely criticized decision over a legal dispute between Sarah Jones, a high school teacher and member of the cheerleading squad for the NFL-team of Cincinnati Bengals and the gossip website called "The Dirty".[140] Defamatory comments were posted on the website about Jones, accusing her of having sex with most of the Bengals football players.[141] Based on just these circumstances the case could have been an ordinary online defamation issue. But a set of unusual factors blurred the picture. One of them was that the website expressly invited the users to post "dirt" about people.[142] But at the same time, no encouragement of committing criminal offences or other legal breach was stated on the website. The Dirty was "merely" a very unethical and immoral online forum, but the fact that the website intentionally chose to become a place where the users can throw scorn on anybody is not an invitation to violate the law. Moreover, a bit sarcastically, such approach just decreases the probability of the defamation under the U.S. law: it was demonstrated by the case *Hustler Magazine v. Falwell* that if someone posts an offending comment to a website, the credibility of

[137] *FHC v. Roommates.com* (n 133), 3
[138] *FHC v. Roommates.com* (n 133), 12
[139] ibid.
[140] See: Saint (n 111) and Franks (n 78)
[141] Christine N. Waltz, Robert L. Rogers III, 'Sixth Circuit's Decision in Jones v. Dirty World Entertainment Recordings LLC Repairs Damage' (2014) Communications Lawyer, Vol. 30, Nr. 4, 1
[142] Waltz, Rogers III (n 141), 2

which is widely questioned, the chances of a defamation are much lower, since most people does not take statements coming from gossip hubs seriously.[143]

The other unique circumstance was the behavior of the website administrator and online blogger Nik Richie who not just screened each and every submission and selected only the most scandalous ones to post, but also added his own – very explicit – commentary to the UGCs and published them under the screen-name "The Dirty Army."[144] That content-development was enough for the District Court to treat Richie as a co-creator of the UGCs and hold him responsible for libel.[145] But the appellate court reversed the decision.[146] It pointed out that an OSP cannot loose CDA-immunity merely by adding comments to a defamatory statement of a third party.[147] To become a co-creator the UGC itself must be altered materially. For instance, stated the court, when "the editing renders the comment defamatory, such as by removing "not" from the statement "[Name] did not steal the artwork."[148] But a website operator cannot be responsible for commenting UGCs *post hoc*.[149]

Seeing the appellate court's precise distinction between the self-engineered and the user-created content it becomes apparent as well that Jones could have won a case: she simply should have attacked Richie himself and claim that his commentaries amounted to defamation. But Jones had not alleged that Richie's own editorial comments were defamatory.[150] She decided to attack the ghost instead and got involved into a hopeless combat.

[143] See: *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46; 108 S. Ct. 876; 99 L. Ed. 2d 41; 1988 U.S. LEXIS 941; 56 U.S.L.W. 4180; 14 Media L. Rep. 2281, 53
[144] Saint (n 111), 58
[145] Waltz, Rogers III (n 141), 2
[146] *Jones v. Dirty World Entertainment Recordings LLC* 755 F.3d 398; 2014 U.S. App. LEXIS 11106; 2014 FED App. 0125P (6th Cir.); 42 Media L. Rep. 1984
[147] Waltz, Rogers III (n 141), 3
[148] *Jones v. Dirty World Entertainment Recordings LLC* (n 146), 30
[149] *Jones v. Dirty World Entertainment Recordings LLC* (n 146), 42
[150] Waltz, Rogers III (n 141), 3

2.4. The website's genuine role: online representative

The CDA created legal certainty. Its language is clear, and the courts can interpret it without significant deviations from each other's decisions. However, it is apparently not able to protect the citizens from online harm. Under its provisions the OSP has a completely different role than the online gatekeeper. But neither the wording of the CDA nor the court decisions offer an express interpretation about the role what the OSP plays in the United States. Nevertheless, the immunity rule implicitly contains an answer to this question, which answer is presented below.

2.4.1. The problems connected to the gatekeeper role

Before providing an alternative for the interpretation of the OSP's rule it must be noted that there are scholars – also in the U.S. – who argue that the websites should act as internet gatekeepers. Critics are concerned about the lack of viable legal remedies available to the victims of online-harms and they support the reconsideration of the liability factors.[151] According to a proposal it would be necessary to distinguish between active and passive websites by imposing the liability to those, which provide a forum for legally actionable activities, actively exercise editorial control of users' content and protect the anonymity of their users.[152] Some objections are not restricted only to the legal wrongs. There are arguments stating that the simply misleading information posted by users who lack expertise in a certain topic must also be removed.[153] Others

[151] Saint (n 111), 39
[152] Saint (n 111), 40
[153] In Australia, a citizens' group critical of vaccination has come under heavy attack, with pro-vaccination campaigners and politicians trying to shut down the group and restrict its speech. See: Brian Martin, 'Censorship and Free Speech in Scientific Controversies' (2015) Science and Public Policy, Vol. 42, No. 3, 377 <http://www.bmartin.cc/pubs/15spp.html> accessed 25 March 2018

contend that websites letting people to post profane, low quality communications have a "culpable nature"[154] like brothel houses or smoky pubs.[155]

If such logic applied to public debates were considered sufficient to curtail comments, the implications would be far-reaching, and series of questions could be raised.[156] Would this approach mean, that the gatekeeper-OSP must ensure a certain level of ethical standard of the UGCs? If yes, who will decide what the standard should be? The OSP itself or some official body that adjudicates such matters? In case of illegal UGCs like online defamation, the applicable legal standard is provided by the law and the relevant authorities are entitled to handle the legal issues. Letting the OSP make similar decisions would mean that a private individual would decide over legal matters. As a result, those who seek to impede the speech of their opponents would be able to exploit the situation by legitimately invoking defamation or hate speech provisions anytime when they disagree with an opinion, which otherwise does not violate any law.

Furthermore, if the application of the law would be not just an opportunity but an obligation, the OSP would certainly protect its own private interests and would decide to suppress the speech of others to avoid liability.[157] Doing so, it would hinder not just those UGCs which are illegal according to the OSP's belief, but also those which are only probably illegal[158] and even those which are in fact true or mere opinion or otherwise not actionable.[159] This behavior is called as collateral censorship.[160] The legal liability would pressurize the OSP to apply such censoring and

[154] Saint (n 111), 40
[155] Saint (n 111), 43
[156] Martin (n 153), 384
[157] Felix T. Wu, 'Collateral Censorship and the Limits of Intermediary Immunity' (2011) Notre Dame Law Rewiev, Vol. 87, Iss. 1, 295-296 <https://scholarship.law.nd.edu/cgi/viewcontent.cgi?referer=https://www.google.de/&httpsredir=1&article=1005&context=ndlr> accessed 20 January 2018
[158] Wu (n 157), 296
[159] ibid.
[160] ibid.

as a result it is highly likely that the website engineers of the OSP will create their own legal provisions in the cyberspace in the form of content filtering mechanisms.

2.4.2. Similarities between the parliamentary immunity and the online immunity

The identify the real character of the OSP in the United States it most be noted that that the principle of the freedom of expression, which is a core value in every democratic county is extraordinarily important in the U.S. legal system. The First Amendment's[161] language of *Congress shall make no law…abridging the freedom of speech* provides a very broad protection and it serves as a source of a set of values, because it contributes to the public's recognition of truth, to the growth of public knowledge, because it is necessary to the operation of a democratic form of government, because it is important to individual self-realization, and because it is an important aspect of individual autonomy.[162] In short, freedom of expression is the tool by which people become capable to participate in the life of the community.[163]

People can take part in the society in person but sometimes they select somebody else to represent them. In this case the communication of the selected representee will be attributed to the representor. One form of the indirect participation in the community is when people elect parliamentary representatives. The electorates vote for certain politicians in the belief that their respective member of the parliament will represent their interests. The elected parliamentary members deliver speeches, which are undoubtedly their own communication, but they do it to represent a group of people who gave them the authorization to do so. The elected representatives are generally immune from legal liability. This is called parliamentary immunity which is a widely

[161] U.S. Const. am. 1. (n 46)
[162] Richard Moon, 'The Social Character of Freedom of Expression' (2009), Amsterdam Law Forum, Vol. 2, No. 1., 43 <https://ssrn.com/abstract=1876381> accessed 4 April 2018
[163] ibid.

accepted principle: members of virtually all national parliaments in the world enjoy parliamentary immunity.[164] The reason of this type of immunity according to the ECtHR is that the representative does not act in favor of him or herself but "represents his" or her "electorate, draws attention to their preoccupations and defend their interests."[165] Therefore freedom of expression is especially important for the elected representative of the people:[166] in order to enable parliamentarians to exercise their mandate without undue external influence[167] a politician must enjoy as much freedom as possible in formulating and disseminating his political views.[168]

In short, the aim of parliamentary immunity is to create an environment where the representative is not interested in the modification or distortion of the communication and where the collateral censorship is nonexistent. This must be ensured not just in the physical but in the online world as well. One's communication should not be subsequently modified or removed by the OSP and the author should not be blocked merely because his or her opinion is contrary to the others or it is not communicated in the manner as someone else thinks it would be appropriate. Such online censorship would limit the freedom to impart information on the one hand, and the freedom to receive information on the other.[169] This is recognized by the CDA by laying down that its goal is *to maximize user control over what information is received by individuals*.[170]

[164] Sascha Hardt, 'The Case Against the Introduction of 'Political Immunity' in the Netherlands' (Montesquieu Institute, 2014), 5 <https://www.montesquieu-instituut.nl/9353262/d/policypaper/policy_paper_04.pdf>
[165] *Castells v. Spain* (App no. 1798/85) ECtHR 23 April 1992, para 42
[166] ibid.
[167] Sascha Hardt, 'Parliamentary Immunity - A Comprehensive Study of the Systems of Parliamentary Immunity of the United Kingdom, France, and the Netherlands in a European Context' (Intersentia, 2013), 4 <https://cris.maastrichtuniversity.nl/portal/files/1439730/guid-55b44d63-b482-4e81-b66e-cfc1a4cef467-ASSET1.0> accessed 5 April 2018
[168] Hardt (n 167) citing the Amsterdam Court of Appeals in the Wilders-case, 262
[169] Open Letter by Index on Censorship, 'Article 13: Monitoring and filtering of internet content is unacceptable' (2017) <https://www.indexoncensorship.org/2017/10/article-13-monitoring-filtering-internet-content-unacceptable/> accessed 25 March 2018
[170] CDA (n 5) 47 U.S. Code § 230 b)

The CDA accomplished the above objective by granting immunity to the OSP, because the immunity maximizes the authority of a representor over a representee. Due to the non-accountability the representee can serve the representor's interest without fearing the legal consequences. When the OSP displays a UGC, its job is to pass the information in an unchanged form. Doing so, it publishes the communication of the users under its own website name, as the part of its homepage, as its own expression.

This is one of the most important differences between the OSP and a postal service or a telephone company. Unlike the delivered letter or the transferred voice or data communication, which have a separate existence from the service provider's appearance, the UGC has a strong visual connection with the OSP which is embedded in the website. Even if it is displayed under – frequently fictitious – usernames the UGC becomes remarkable mostly because of the OSP's website is has a certain level of popularity, probably its design and logo is well known, and it is visited by many users. From a third-party perspective, the UGC is not simply a communication of a user but more importantly something which is available on Facebook, on Twitter or on one of the other websites. The UGC is associated primarily with the OSP, however it is not entirely attributed to him. The confirmation, that the UGC is indeed the OSP's own but not self-inflicted expression is in the immunity provision of the CDA: [n]o provider (…) shall be treated as (…) speaker of the UGC, reinforcing that the OSP's role is the representation.

From this perspective, the situation is similar in the case of a parliamentary representative's communication. Everybody knows that he or she is the one who is formulating the words, but it is also known, that at the same time the opinion of a group of people can be heard, who gave authorization for representation.

It must be emphasized, that immunity is not meant to benefit the privileged individuals personally. Instead, it is meant to ensure that these individuals could do their jobs which is the representation of the community in connection with a democratic value or basic public interest. Other types of immunities are intended to fulfil similar aims. Judges enjoy freedom of speech in the discharge of their public duties without fear of consequences[171] in order to preserve their impartiality. Correspondingly, arbitral immunity protects arbitrator from attacks by parties which can restrain the arbitrator from giving a principled decision.[172] And likewise, diplomatic immunity exists to ensure the efficient performance of the functions of diplomatic missions as representing States.[173] In the U.S., the OSP is designated to protect the value of the freedom of speech, this is the public good in consideration of which it was provided with immunity.

From this perspective, the consideration of the above explained three secondary liability factors seems to be a misunderstanding. The assistance provided by the website operator is nothing else but accepting an individual's commission for representation. The knowledge of the OSP about its own communication provided as a representative is axiomatic. And the relationship between the OSP and the user is just the opposite of what it is assumed upon the gatekeeper-approach: the user is the one who has the authority over the OSP, not on the contrary. The user is encouraging the OSP to create the UGC, because the OSP is his or her online representative. This is the OSPs genuine role, which it can easily fulfil even without any further legal or other type of guidance.

[171] Van Vechten Veeder, 'Absolute Immunity in Defamation: Judicial Proceedings' (1909) Columbia Law Review, Vol. 9., No. 6., 469 <http://www.jstor.org/stable/1109136> accessed 26 March 2018
[172] Nolan, Abrams (n 1), 229
[173] Vienna Convention on Diplomatic Relations and Optional Protocols (1961), Introduction <https://www.state.gov/documents/organization/17843.pdf> accessed 26 March 2018

Chapter 3 - Online Service Providers as Private Gatekeepers in Europe

Neither in the European Union nor in the system of the European Convention on Human Rights are the OSPs exempted from the legal liability. Consequently, the European Court of Justice (hereinafter: ECJ) and the European Court of Human Rights (ECtHR) have the duty to assess the above introduced liability factors when they decide about the OSP's secondary liability. This chapter explains how this obligation results in similar discrepancies in the European case law as it happened in the United States in the times before the immunity. It is demonstrated, that without proper legal instructions the OSP cannot be able to stop the diffusion of the objectionable online communication, because this task is ill-suited for website operators. After explaining the idiosyncrasies of the legal system of the European Union, which is necessary to understand how the liability rules work the chapter provides a description about the ECD's liability provisions. Thereafter, the courts' interpretation about the meaning of the gatekeeper function is analyzed. First, the decisions of the ECJ and the Member State's national courts is introduced, afterwards the ECtHR's difficulties with the determination of the websites' role are analyzed. Lastly, the chapter gives an explanation why is the gatekeeper function misconceived under the European liability systems.

3.1. The multi-faceted legal systems and the consequent uncertainty

Whereas the liability in the U.S. is granted on a federal level the law of the European Union is a multi-level governance system that encompasses a variety of authoritative institutions at supranational, national and subnational levels of decision making.[174] The hierarchy or norms in

[174] Marko Trnski, 'Multi-level Governance in the EU' [in: István Tarrósy, Gerald Rosskogler (eds.), *Regional Co-operation as Central European Perspective* (Proceedings of the 1st DRC Summer School, Pécs 2004)], 23 <https://www.drc-danube.org/drc-summer-school/papers/2004/> accessed 27 March 2018

the EU is based on primary legislation and secondary legislation.[175] The primary legislation is made of the Lisbon Treaty, – the agreement that amended the Treaty on European Union, the Treaty of Rome[176] and gave legally binding status to the Charter of Fundamental Rights of the European Union[177] – unwritten general principles established by the Court of Justice of the European Union (CJEU) and international agreements. Secondary legislation is made of all the acts which enable the EU to exercise its powers: regulations, directives, decisions, recommendations and opinions.[178] This legislation is aimed at harmonizing the laws of the Member States, thereby ensuring that similar rules will apply to each online service provider in all Member States.[179]

As part of the secondary legislation, the ECD is delimiting the jurisdiction of EU Member States to prescribe rules for OSPs which are established within the EU.[180] It sets out objectives that the EU Member States must achieve and the individual countries can devise their own laws on how to reach these goals.[181] As a result, not all of the national laws necessarily contain a verbatim adoption of the ECD's language.[182] Moreover, since the ECD sets out only minimum standards, every

[175] Summaries of EU legislation, 'EU Glossary of Summaries: European Union (EU) Hierarchy of Norms' <https://eur-lex.europa.eu/summary/glossary/norms_hierarchy.html> accessed 27 March 2018

[176] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (2012/C 326/01) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT> accessed 27 March 2018

[177] Charter of Fundamental Rights of the European Union (2012/C 326/02) <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>

[178] TFEU (n 176) Article 288

[179] Mark F. Kightlinger, 'A Solution to the Yahoo! Problem? The EC E-commerce Directive as a Model for International Cooperation on Internet Choice of Law, (2003) Michigan Journal of International Law, Vol. 24., 722 <https://uknowledge.uky.edu/cgi/viewcontent.cgi?article=1355&context=law_facpub> accessed 27 March 2018

[180] Kightlinger, (n 179), 721

[181] European Union: explanation on 'Regulations, Directives and other acts' (2018) <https://europa.eu/european-union/eu-law/legal-acts_en> accessed 16 March 2018

[182] But in respect of the ECD's safeguard provisions, most of the EU Member States transposed the language word by word. See: European Commission, 'Online services, including e-commerce, in the single market' (Staff Working Document) SEC (2011) 1641 final, available at: http://ec.europa.eu/internal_market/e-commerce/docs/communication2012/SEC2011_1641_en.pdf, 26

Member State can adopt its own, stricter rules.[183] Therefore, the relevant liability rules for the OSP may be similar but they are not identical in each Member States. Due to the partial harmonization the rules pertaining to the liability of the OSPs is diverging on the national level resulting in different regulatory standards.[184] To achieve the uniform interpretation of the EU law even if it has different wording after the transposition into the domestic law, national courts can refer questions to the ECJ and ask it for preliminary ruling,[185] which has a binding effect only on the national court that submitted the question and on other courts in the same domestic procedure.[186]

In respect of freedom of expression, a complicated system exists in Europe where there are at least three possible judicial avenues for the residents to assert their human rights: first, the national courts; second, if once the domestic remedies are exhausted, the ECtHR; and if the matter falls within the competence of the EU, either the national courts, or the ECJ, or both.[187] The reason of the dividedness is that the Charter of Fundamental Rights of the European Union (hereinafter: Charter) and the European Convention of Human Rights (hereinafter: Convention) are both equally binding legal instruments, whereby two corresponding European courts, the ECJ and the ECtHR are concerned with human rights protection.[188] The latter court, based in Strasbourg, accepts complaints by individuals alleging a breach of Convention articles by acts or omissions of

[183] See: Article 288 of the Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (2012/C 326/01)
[184] European Commission: Staff Working Document (n 182), 25
[185] See Article 267 of the Treaty on the Functioning of the European Union (TFEU)
[186] European Parliament Think Tank, 'Preliminary Reference Procedure' (2017) <http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2017)608628> accessed 16 March 2018
[187] Sionaidh Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) Human Rights Law Review, Vol. 11., Iss. 4., 647 <https://academic.oup.com/hrlr/article/11/4/645/618628> accessed 30 March 2018
[188] Elena Butti,'The Roles and Relationship between the Two European Courts in Post-Lisbon EU Human Rights Protection' (Jurist, 2013) <http://www.jurist.org/dateline/2013/09/elena-butti-lisbon-treaty.php>

the authorities of one of the forty-seven Contracting Parties of the Council of Europe.[189] The former court, having its seat in Luxembourg, is the guardian of the Charter and decides in specific cases whether acts or omissions of the EU institutions and/or certain acts or omissions of the authorities of one of the Member States of the European Union are in conformity with the guarantees provided in the Charter.[190] Freedom of expression is protected both by the Charter[191] as well as the Convention.[192] This unique situation will endure unless the EU eventually accedes to the Convention as it is prescribed by the Lisbon Treaty, but at the same time debarred by the ECJ.[193] Without accession the EU applicants – since the EU requires all of its Member States to be parties of the Convention – may face with charges of double standards and conflicting rulings in the two separate systems.[194]

As a part of the mosaic of this very complicated framework, the ECD's endeavor of removing obstacles to cross-border online services in the EU and providing legal certainty[195] appears to be ambitious. This goal could be only achieved by unambiguous legal provisions. But it is demonstrated below, that ECD's rules are far from being clear.

3.2. The rules imposing legal liability on the gatekeepers in the European Union

Looking at the ECD liability provisions it is apparent that they represent a technology-based approach. Instead of using well known definitions, like publisher or distributor, they determine

[189] Frank Emmert, Chandler Piché Carney, 'The European Union Charter of Fundamental Rights vs. The Council of Europe Convention on Human Rights and Fundamental Freedoms – A Comparison' (2017) Vol. 40., Iss. 4., 1051 <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2674&context=ilj>
[190] ibid.
[191] CFREU, Article 11 (n 176)
[192] Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4.XI.1950)
[193] See: Opinion 2/13 of the Court (Full Court) (18 December 2014), ECLI:EU:C:2014:2454, <http://curia.europa.eu/juris/document/document.jsf?docid=160882&doclang=EN> accessed 27 March 2018
[194] Douglas-Scott (n 187), 658-659
[195] EU Digital Single Market information about the e-Commerce Directive <https://ec.europa.eu/digital-single-market/en/e-commerce-directive> accessed 27 March 2018

technical processes and describe particular activities of operating and giving access to the Internet.[196] It is also remarkable, that the ECD framework revolves primarily around intellectual property law and copyright law.[197] The reason of this is that the ECD is strongly influenced by the U.S. copyright law and many of its provisions closely resembles to the DMCA.[198] But despite its copyright oriented language, the ECD has a horizontal approach and it is applicable in respect of freedom of expression related UGCs, as well.

The technical processes determined by the ECD cannot lead to legal liability. These processes, called also as safe harbors, are hosting, caching and mere conduit.[199] From the OSP's perspective, the relevant liability exemption is hosting, which means basically the mere storage of the information. As the ECD provides, hosting happens, when *an information society service is provided that consists of the storage of information provided by a recipient of the service*.[200] But today, the services provided by the OSP are far more complex than simple content hosting,[201] and the existence of additional conducts or circumstances can make it difficult to avoid liability. Nevertheless, the real threat for the OSP is the provision according to which the OSP cannot rely on the safe harbor if it had *actual knowledge of the illegal activity or information* on its website.[202]

[196] András Koltay *Comparative Perspectives on the Fundamental Freedom of Expression* (Wolters Kluwer, 2017), 381
[197] Christina Angelopoulos, Annabel Brody, Wouter Hins, Bernt Hugenholtz, Patrick Leerssen, Thomas Margoni, Tarlach McGonagle, Ot van Daalen, Joris van Hoboken, 'Study of Fundamental Rights Limitations for Online Enforcement Through Self-regulation' (Institute for Information Law, 2016), 25 <http://www.ivir.nl/publicaties/download/1796>
[198] Bart van der Sloot, 'Welcome to the Jungle: The Liability of Internet Intermediaries for Privacy Violations in Europe' (2015) Journal of Intellectual Property, Information Technology and Electronic Commerce Law (JIPITEC) Vol. 6., Iss. 3, 211 <https://www.ivir.nl/publicaties/download/1720.pdf > accessed 16 March 2018
[199] Council Directive (EC) 2000/31 (n 13), Article 12, 13, 14
[200] Council Directive (EC) 2000/31 (n 13), Article 14 (1)
[201] How dramatically web hosting changed since the enactment of the ECD, see: Mario Viola de Azevedo Cunha, Luisa Marin, Giovanni Sartor, 'Peer-to-peer Privacy Violations and ISP liability: Data Protection in the User-generated Web' (2012) International Data Privacy Law, Vol. 2, No. 2., 51 <https://ssrn.com/abstract=1935985>
[202] Council Directive (EC) 2000/31 (n 13) Article 14 (1) a)

Upon obtaining actual knowledge the OSP must *act expeditiously* to remove or to disable access to the illegal UGC.[203]

Whereas the above rules are harmonized at the EU level the harmonization is absent in respect of the approaches to the secondary liability and conceptual differences exist between the standpoints represented by the various authorities.[204] It must be emphasized that failing to comply with any element of the safe harbor does not mean the OSP's immediate exposure to legal liability.[205] That will only arise if the standard for secondary liability is also met under the applicable national law, varying state by state.[206] As most importantly, national implementation and court practice differ between Member States when assessing the ways of obtaining actual knowledge.[207] Some Member State require a notification about the illegal UGC by the authorities or other third parties in order to assume actual knowledge by the OSP, whilst others leave it to the courts to determine whether the OSP was aware of the problematic content.[208] The indeterminateness of what actual knowledge means is the main source of the legal uncertainty dominating under the EU liability regime.

Overall, it is a reasonable interpretation, that the prescribed duties places the OSP in the online gatekeeper role, since in case of obtaining knowledge, it must decide which content can remain online and which should be removed.[209] Nevertheless, the legislator's intention to ease the burden

[203] Council Directive (EC) 2000/31 (n 13) Article 14 (1) b)
[204] Graeme B. Dinwoodie, 'A Comparative Analysis of the Secondary Liability of Online Service Providers' [in: Graeme B. Dinwoodie (ed.) *Secondary Liability of Internet Service Providers* (Springer, 2017)], 34
[205] Dinwoodie (n 204), 38
[206] ibid.
[207] Aurélie Van der Perre, Thibault Verbiest, Gerald Spindler, Giovanni Maria Riccio, Etienne Montero, 'Study on the Liability of Internet Intermediaries' (2007), 14 <http://ec.europa.eu/internal_market/e-commerce/docs/study/liability/final_report_en.pdf> accessed 1 April 2018
[208] ibid.
[209] Aleksandra Kuczerawy, 'Online platforms and the Digital Single Market: Towards Responsible Policy-making?' (KU Leuven - CiTiP, 2017) <https://www.law.kuleuven.be/citip/blog/online-platforms-and-the-digital-single-market-towards-responsible-policy-making/>

of the gatekeeper function is visible, because the ECD prescribes that the OSP cannot be obliged to execute general monitoring of the UGCs posted to its website.[210] Therefore liability can mainly arise once the OSP receives a notification by third parties, a report which provides it with actual knowledge.[211] But since notification alone does not automatically trigger a removal obligation, when faced with a notification of illegal content, OSPs are expected to make an independent assessment of the content's status.[212] But it must be emphasized again, that assessment of illegality is a complex issue even for the courts, not to mention private persons without relevant expertise. The European case law demonstrates the court's expectations in this respect.

3.3. The overwhelming dependency on the courts' discretion in the European Union

Being technology oriented, the ECD safe harbors are problematic to be applied for issues where the technology is only a secondary parameter, like in case of determining the publisher's liability. In the case *Papasavvas v. O Fileleftheros* the ECJ faced with the problem that a Cypriot online newspaper which published a defamatory statement could be exempted from the liability, since it hosted the problematic article.[213] To avoid defects, the ECJ explained, that a publisher "has, in principle, knowledge about the information which it posts and exercises control over that information."[214] This case illustrates, that the ECD is an unnecessarily rigid but at the same time also a very vague rule. As a result, even the basic notions are dependent of the interpretation of the liability factors, like the OSP's knowledge and consequently the activities which legal nature is unambiguous in the physical world becoming subjects of the court's discretion when conducted

[210] Council Directive (EC) 2000/31 (n 13), Article 15
[211] Angelopoulos, Brody, Hins, Hugenholtz, Leerssen, Margoni, McGonagle, van Daalen, van Hoboken (n 197), 54
[212] Angelopoulos, Brody, Hins, Hugenholtz, Leerssen, Margoni, McGonagle, van Daalen, van Hoboken (n 197), 54-55
[213] Case C-291/13 *Sotiris Papasavvas v. O Fileleftheros Dimosia Etairia Ltd* [2014]
[214] *Papasavvas v. O Fileleftheros* (n 213), para 45

online. However, it would be difficult to imagine a court determining the absence of the actual knowledge of an online newspaper in respect of a published article, such decision is theoretically possible. The below decisions show that the courts have even bigger leeway when interpreting the hosting exemption.

3.3.1. Perplexity and diverse interpretations in respect of hosting

The interpretation of hosting is practically speaking the EU-version of the question, "did the OSP know about the illegal communication on its webpage?" The ECD assumes, that in case of the OSP's passiveness, the answer is no. According to the Recital 42 of the ECD, the hosting exemption can cover only cases where the activity of the OSP *is of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge nor control over the information which is transmitted or stored*.[215] The necessitating of passiveness raises the question, that where is the threshold at which the OSP must be already treated as being active. Following the preliminary reference raised by the French *Cour de Cassation*, the ECJ was supposed to give an interpretation in this respect in the case *Google v. Louis Vuitton*.[216]

Google, in cooperation with AdWords set up an automated mechanism able to show the most relevant advertisements to each user by utilizing their submitted keywords. Some of the advertisements displayed counterfeit versions of fashion goods, whereupon the trademark owner company, Luis Vuitton sued Google. In the preliminary reference procedure, the Advocate General contested that Google could qualify for the hosting exemption. According to him the reason of this

[215] Council Directive (EC) 2000/31 (n 13) Recital 42
[216] Joined Cases C-236/08, C-237/08 and C-238/08 [2010] *Google France, Google, Inc. v Louis Vuitton Malletier*, OJ C134, 22.5.2010 para 2

is that hosting must be a purely technical activity and it cannot be incorporated into an advertising system.[217] He further remarked that the automatic advertising scheme created a pecuniary interest for Google, whereby it was not a neutral intermediary.[218]

Albeit the Advocate General's opinion was not followed, the ECJ gave no sufficient clarification what passiveness means. It merely laid down, that Google's monetary interest is not sufficient to establish that the OSP is active.[219] It also added, the keyword selection dependent automatism cannot be treated as an evidence of Google's actual knowledge about the infringement.[220] But the ECJ neither gave exact justification for these statements nor provided guidance how the liability factors should be interpreted.

The ECJ showed the signs of confusion in the case of *L'Oréal v. eBay* again and could not manage to give an accurate definition of what passiveness means. The online auction website, eBay displayed counterfeit of goods labelled with L'Oréal's trademarks and as a consequence the latter cosmetics company sued eBay.[221] As the ECJ explained, when the OSP's assistance entails optimizing the presentation of the offers for sale in question or promoting those offers, it can be considered as an active role.[222] But it left to the national court to decide, what optimizing and promoting means. The ECJ's decision is embarrassing after the *Google France* case since it would be difficult to contest, that the keyword-based automatic advertisement system was not organized

[217] Opinion of Mr Advocate General Poiares Maduro delivered on 22 September 2009. Google France SARL and Google Inc. v Louis Vuitton Malletier SA (C-236/08), Google France SARL v Viaticum SA and Luteciel SARL (C-237/08) and Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others (C-238/08) para 139
[218] Opinion of Advocate General Poiares Maduro (n 217) para 144-145
[219] *Google France v. Louis Vuitton* (n 216) para 116
[220] *Google France v. Louis Vuitton* (n 216) para 117
[221] Case C-324/09 *L'Oreal v Google*, OJ C 269, 10.09.2011, 26-50, para 106.
[222] *L'Oreal v Google* (n 221) para 116

and should not be deemed as a promotion. But this time, these viewpoints were not considered as important.

Although the above cases are intellectual property issues, they are relevant also from a freedom of expression perspective. They demonstrate that for the assessment of the OSP's knowledge about a defamatory or other type of UGC which violates the freedom of expression rules, neither clear definitions, nor clear instructions are available for the courts and their discretion has only minor limitations.

3.3.2. The interpretation of the gatekeeper role varies state by state, court by court

By juxtaposing the decisions of the Spanish and the Italian courts in cases dealing with video sharing websites it is remarkable how differently the national courts interpret the definitions which stem from the ECD. In Spain, Telecinco, a cable TV company alleged that YouTube hosted videos infringing Telecincos's intellectual property rights. Telecinco sued, asserting that YouTube had actual knowledge about the breach and therefore it is not a mere host provider. The Madrid Court dismissed the plaintiff's claim, holding that neither the notification sent by Telecinco to YouTube, nor the presence of Telecinco's "fly" logo inserted into the videos are sufficient evidences for YouTube's actual awareness of the infringement.[223]

In contrast to the Spanish approach, a different trend emerged in the Italian first instance courts at around the beginning of the 2010s, under which the liability became likely to be imposed on providers of video sharing platforms.[224] Primarily the district courts in Rome and in Milan began

[223] See Chapter Three, Court's Assessment of *Gestevison Telecinco, S.A., Telecinco Cinema, S.A.U. v. YouTube LLC* (Madrid Civil Court of Appeal, Judgement no. 11/2014) <https://www.hlmediacomms.com/files/2014/02/Telecinco-v-Youtube_EN.pdf> accessed 26 February 2018

[224] Francesco Spreafico, 'Hosting providers: Passive vs. Active' (Kluwer Copyright Blog, 2012) <http://copyrightblog.kluweriplaw.com/2012/01/31/passive-vs-active-hosting/> accessed 27 March 2018

to differentiate between active and passive hosts and attached distinct liability standards to each.[225] In the case *RTI S.p.A. v. Italia On Line S.r.l.* the Milan district court noted that the ECD hosting exemption is outdated since the modern OSP does not limit its activity to offer the storage of memory but has a specific role in the process of organizing the contents uploaded by users.[226] According to the court these OSPs are active hosts and they cannot benefit from the hosting exemption. This approach was applied by the Milan district court also in the *Google v. Vivi Down* case, where Google was held liable for an uploaded video on which teenagers bullied an autistic boy.[227] Google removed the video after having been officially contacted by the police but until the removal the offensive material was available for watching it for two months.[228] Eventually, the Milan Court of Appeals reversed the district court's decision.[229]

The examples show, that the ECD's hosting exemption does not identify unequivocally what role the OSP should have in respect of the illegal UGCs which may lead to completely different interpretations. The OSP may be treated as a mere intermediary in one country, but it can be considered as a gatekeeper in another jurisdiction.[230] De facto the situation can be, that courts at different instances take turns to hold the OSPs liable or protected for harmful contents.

[225] Thomas Margoni, 'Did Anybody Notice It? Active and Passive Hosting in Italian Case Law on ISP Liability (Kluwer Copyright Blog, 2012) <http://copyrightblog.kluweriplaw.com/2012/05/11/did-anybody-notice-it-active-and-passive-hosting-in-italian-case-law-on-isp-liability/> accessed 28 March 2018

[226] ibid.

[227] Carotti (n 70), 177

[228] ibid.

[229] Laura Liguori, Federica de Santis, 'The Italian 'Google Vividown' Case: ISPs' Liability For User-Generated Content' (Medialaws, 2013) <http://www.medialaws.eu/the-italian-google-vividown-case-isps-liability-for-user-generated-content/> accessed 28 March 2018

[230] As an example, in France the legislation determines the illegal content without concrete reference to a certain legal definition and denotes the harmful UGC as 'manifestly illegal', whereby the judges are in the position to decide upon which type of UGCs can be the host providers condemned for not expeditiously removing materials. [La Quadrature du Net, 'Legal Liability of Internet Service Providers and the Protection of Freedom of Expression Online - Response to the European Commission's consultation on the e-Commerce directive' (2010), 4 <http://www.laquadrature.net/files/LQDN-20101105-Response_e-Commerce.pdf> accessed 23 January 2018]

3.3.3. Obscurity in the interpretation of the general monitoring ban

The prohibition towards monitoring obligations concerns solely monitoring of a general nature, but Article 15 of the ECD does not prohibit monitoring obligations in specific cases, nor does it affect orders to conduct monitoring, issued by national authorities in line with the national legislation, as it is provided by the Recital 47 of the ECD.[231] The Recital 48 of the ECD furthermore requires the OSP to apply a reasonable duty of care to detect and prevent illegal activities,[232] but the ECD gives no clarification what exactly duty of care entails.[233] This unclarity leads to contradictory decisions. Whereas in the cases *Scarlet v. SABAM*[234] and *SABAM v. Netlog*[235] the ECJ confirmed that the OSP cannot be required to install filtering systems by which it would be able to monitor all user content indiscriminately, the decision in the case of *UPC Telekabel Wien v. Constantin Film*[236] represents a slightly different approach.

It must be noted, that the Recital 45 of the ECD makes it clear, that the ECD do not affect the possibility of ordering injunctions of different kinds.[237] Accordingly, if a national authority orders the OSP to remove a UGC or block the access to it, the OSP must comply with the request. As it was laid down by the *UPC Telekabel* judgement, in order to protect the freedom of expression rules the OSP's injunctions must be 'strictly targeted' to ensure that Internet users could still access any information which they had a lawful right to view.[238] Anyhow, it is obvious that in connection

[231] Peggy Valcke, Aleksandra Kuczerawy, Pieter-Jan Ombelet, 'Did the Romans Get it Right? What Delfi, Google, eBay, and UPC TeleKabel Wien Have in Common [in: Mariarosaria Taddeo, Luciano Floridi (eds.) *The Responsibilities of Online Service Providers* (Springer, 2016)], 109
[232] ibid.
[233] Valcke, Kuczerawy, Ombelet (n 231), 110
[234] Case C-70/10 *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2011]
[235] Case C-360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog NV* [2012]
[236] Case C-314/12 *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH* [2014]
[237] Elena Izyumenko, 'The Freedom of Expression Contours of Copyright in the Digital Era: A European Perspective' (2016) The Journal of World Intellectual Property, Vol. 19., Iss. 3-4., 127 <http://atrip.org/wp-content/uploads/2016/12/2015-2Izyumenko.pdf> accessed 30 March 2018
[238] *UPC Telekabel Wien GmbH v. Constantin Film* (n 223) para 56

with the defamatory and similarly harmful online communications a strictly targeted injunction cannot be accomplished without the evaluation of every content posted on the website, otherwise the OSP cannot fulfil its obligation to apply a reasonable duty of care, and that would mean general monitoring.

Whereas the *UPC Telekabel* decision was a copyright issue, in case of defamation, the strictly targeted requirement can be even more problematic. This is demonstrated by a currently ongoing preliminary reference procedure, where the question is, whether Facebook must remove and block certain comments, which are however not verbatim repetitions of a previously posted defamatory comment, but they share some similarities.[239] The problem is clear: if the OSP is required to remove or block only the UGCs which are completely the same, word by word, picture by picture, meme by meme, the user can easily circumvent the injunction by choosing different, but still denigrating expressions. Still, the identicality or similarity of the language cannot be decisive *per se*, because the same sentence or photo in a different context will not necessarily have an illegal nature. Since a proper evaluation cannot be done without the comparison of different UGCs the task is probably not feasible without general monitoring, which should be reflected in the forthcoming decision, as well. But whatever the ECJ's answer will be, it is obvious that since the national courts have problems with applying the ECD's monitoring related provisions, more precise provisions should be introduced.

[239] Case-18/18 *Eva Glawischnig-Piesczek v Facebook Ireland Limited* [2018] - Request for a preliminary ruling from the Oberster Gerichtshof (Austria) lodged on 10 January 2018

3.4. The contradictory interpretation of the gatekeeper role by the ECtHR

Regarding comments written and posted by users the OSP can invoke the available freedom of expression rules to avoid liability. It has direct access to the national constitutional law protection as well as to the freedom of expression provision of the Charter, – stated in its Article 11 – which corresponds to the Article 10 of the Convention[240] and in respect of which the latter serves as an interpretative tool.[241] Nevertheless, the Charter is addressed to the institutions, bodies, offices and agencies of the European Union and to Member States only when implementing EU law.[242] So its scope is not universal.[243] Furthermore, it must be noted that the EU is primarily an economic integration and its centre of gravity lies not at the protection of fundamental rights.[244] Accordingly, freedom of expression issues are primarily in the competence of the ECtHR. This is expressly acknowledged by the EU, as it is intended to promote Council of Europe's standards on freedom of expression by encouraging the implementation of the ECtHR rulings under Article 10 of the Convention and application of its case law by national judiciaries.[245] In light of the above, the OSP may rely more likely on the Convention – after the exhaustion of domestic remedies – in case of legal disputes related to UGCs affected by the freedom of expression principle.

[240] Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02), Explanation of Article 11 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32007X1214%2801%29> accessed 31 March 2018

[241] Article 52 (2) of the Charter is intended to ensure the necessary consistency between the Charter and the ECHR by establishing the rule that, in so far as the rights in the present Charter also correspond to rights guaranteed by the ECHR, the meaning and scope of those rights, including authorised limitations, are the same as those laid down by the ECHR. [Explanations Relating to the Charter (n 232), Explanation on Article 52]

[242] Parlamentary Questions – Answer given by Vera Jourová on behalf of the Commission (3 April, 2017) E-000782/2017, <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2017-000782&language=EN>

[243] Douglas-Scott (n 187), 652

[244] Douglas-Scott (n 187), 646

[245] EU Guidelines on Freedom of Expression Online and Offline (2014), 14 < https://ec.europa.eu/europeaid/sites/devco/files/170703_eidhr_guidelines_single_02_freedom_expression_on_off_0.pdf> accessed 31 March 2018

With its decisions, the ECtHR can interpret the function of the OSP in the fight against UGCs which are violating the freedom of expression principle. The ECtHR applies the Convention, hence it does not need to have regard to the ECD and its norms, such as prohibition against general monitoring.[246] To the contrary, the ECtHR as a subsidiary to national systems safeguarding human rights[247] ensures the availability of the rights enshrined in the Convention for everyone under the jurisdiction of a contracting state.[248] In its decisions, as a standard approach, the ECtHR weighs one right or interest against the other[249] – primarily the public interest and the private interest – and applies particular tests, like the rule of law test or the democratic necessity test.[250] There is a considerable degree of discretion available for the ECtHR during the execution of the above balancing tests.

The ECtHR handed down two, directly contradictory judgements only a few months after the other regarding to defamatory and offensive comments posted to the forum sections operated by online news portals.[251] Both decisions consider the OSPs as online gatekeepers, but in respect of its exact obligations in connection with this function, opposite conclusions were reached.

[246] Dinwoodie (n 204), 55
[247] *Scordino v. Italy* (no. 1) (App no. 36813/97) ECHR 29 March 2006, para 140
[248] Role of the European Court of Human Rights <http://explorehumanrights.coe.int/the-european-court/role-of-the-european-court-of-human-rights/?lang=en> accessed 31 March 2018
[249] Bart van der Sloot, 'The Practical and Theoretical Problems with Balancing - Delfi, Coty and the Redundancy of the Human Rights Framework' (2016) Maastricht Journal of the European and Comparative Law, Vol. 23, Iss. 3., 439 <https://bartvandersloot.nl/onewebmedia/Balancing.pdf> accessed 31 March 2018
[250] See: Steven Greer, 'Human Right Files No. 15 - The exceptions to Articles 8 to 11 of the European Convention on Human Rights' (Council of Europe Publishing, 1997) <https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-15(1997).pdf> accessed 31 March 2018
[251] Christina Angelopoulos, 'MTE v Hungary: New ECtHR Judgment on Intermediary Liability and Freedom of Expression' (Kluwer Copyright Blog, 2016) <http://copyrightblog.kluweriplaw.com/2016/03/05/mte-v-hungary-new-ecthr-judgment-on-intermediary-liability-and-freedom-of-expression/?print=print> accessed 30 March 2018

3.4.1. Absolute liability shifting to the website operator

In the case *Delfi AS v. Estonia* the applicant Estonian digital newspaper website published an article about a local ferry operator and its shareholder containing the information about the company's intention to destroy ice roads with the aim to make more money from its ferry services.[252] About twenty of the incoming comments triggered by the article contained offensive language, directed against the company's shareholder.[253] Despite that after the request of the ferry company Delfi removed the comments the shareholder sued the news portal.[254] In the lawsuit, the Estonian Supreme Court held that Delfi should have prevented the publication of the offensive comments.[255] Albeit Delfi invoked the ECD's hosting exemption the Supreme Court decided that the case is a freedom of expression issue and judged it accordingly.[256]

The ECtHR had to decide, whether the Estonian law violated the Convention or were the measures taken by the national court *necessary in a democratic society* and therefore allowed by the Article 10.[257] By balancing the public and the private interests, the ECtHR determined several liability factors and decided, that the Article 10 was not violated.[258] The pivotal remark of the decision was, that the comments were clearly unlawful on their face and thus they did not fall within the freedom of expression principle.[259] Because the communication was undoubtedly and obviously illegal, Delfi should have removed the comments immediately after they were posted.[260] With its decision, the ECtHR practically made a requirement of filtering the UGCs *ex ante*, instead

[252] *Delfi AS v. Estonia* (App no 64569/09) ECtHR 16 June 2015, para 2
[253] *Delfi AS v. Estonia* (n 252), para 3
[254] *Delfi AS v. Estonia* (n 252), para 3-6
[255] *Delfi AS v. Estonia* (n 252), para 8
[256] van der Sloot (n 249), 444
[257] Article 10 (2) of the Convention for the Protection of Human Rights and Fundamental Freedoms
[258] *Delfi AS v. Estonia* (n 252), para 162
[259] *Delfi AS v. Estonia* (n 252), para 153
[260] *Delfi AS v. Estonia* (n 252), para 11

of *ex post* compared to the time of the OSP's reception of the notification about the illegality. This means, that third-party notification is not necessary at all in case of apparently illegal contents and the OSP should be able to execute a freedom of expression evaluation in respect of the manifestly problematic UGC on its own. What type of UGC constitutes an obviously illegal expression, it remained undefined by the decision.

The *Delfi* decision can be considered as strange from many aspects. It not just imposed a much stricter liability on the OSP as it has under the ECD, but it did so without an adequate reasoning. For example, the ECtHR gave no explanation why the comments were obviously illegal. Where it gave reasoning, it was insufficient: it confirmed, that Delfi's economic interest in posting comments equals with control over the comment environment.[261] But the most disturbing part of the decisions was, that if the OSP "knew, or ought to have known, that illegal comments would be or had been published" it can be held liable.[262] This approach is completely at odds with the ECD case law and also puts the OSP in an impossible situation. As the joint dissenting opinions of András Sajó and Nona Tsotsoria emphasized, such general monitoring requirement can only lead to the discontinuation of offering a comments feature and collateral censorship applied by the OSPs.[263]

3.4.2. Reconsideration of the prerequisites of liability shifting

Shortly after *Delfi*, in a case having very similar factual background, the ECtHR seemed to have acknowledged the above cited dissent and it held that the Article 10 of the Convention was

[261] *Delfi AS v. Estonia* (n 252), para 144
[262] *Delfi AS v. Estonia* (n 252), para 11
[263] Delfi AS v. Estonia Judgement, Joint Dissenting Opinion of Judges Sajó and Tsotsoria, para 1

violated.[264] The applicants, MTE – a non-profit association of OSPs – and Index, an operator of a major Hungarian online news portal published articles about fraudulent real estate management websites.[265] Both articles attracted offensive comments of readers who disparaged the real estate portal, wherefore the latter site sued MTE and Index.[266] The Hungarian courts found that Index and MTE were liable for the unlawful comments.[267]

Most importantly, in contrast with *Delfi*, the ECtHR considered that the obligation of filtering and removal comments without prior notification amounts to requiring excessive and impracticable forethought.[268] Furthermore, the ECtHR distanced itself from the concept of the manifestly illegal communication and clarified that vulgarity in itself is not decisive in the assessment of an offensive expression.[269] To corroborate its decision, the ECtHR supplemented the liability factors used in *Delfi* and placed a great emphasis on the circumstance that the published articles were not devoid of factual basis,[270] therefore the comments were not capable of making any impact on the already tense situation.[271]

In *MTE-Index*, the ECtHR reconciled the liability standards under the Convention and the ECD, but the limitations of the *Delfi* judgment do not exonerate OSPs from being online gatekeepers regarding to illegal UGCs. However, the decision shows that gatekeeping in a freedom of expression context is a delicate function which cannot be done automatically but only on a case by case basis.

[264] *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* (App no 22947/13) ECtHR 2 February 2016 para 2
[265] *MTE and index.hu v. Hungary* (n 264), para 11
[266] *MTE and index.hu v. Hungary* (n 264), para 15
[267] *MTE and index.hu v. Hungary* (n 264), para 19-25
[268] *MTE and index.hu v. Hungary* (n 264), para 82
[269] *MTE and index.hu v. Hungary* (n 264), para 76
[270] *MTE and index.hu v. Hungary* (n 264), para 72
[271] *MTE and index.hu v. Hungary* (n 264), para 85

3.5. The misconceived function of the websites

It can be observed, that despite it is the core factor neither the EU law nor the ECtHR was able to give an appropriate description of the circumstances which constitute actual knowledge. The task is left to the national authorities and the domestic tort law, who are, however, struggling to provide consistent solutions, increasing the legal uncertainty. This is the aspect which is not disregarded by the role mode of the EU system, the DMCA. The U.S act determines the items that must be included to a notification when filing a complaint of copyright infringement: among others, the notice must enshrine that the sender is indeed a copyright owner or other duly authorized person and it must identify in sufficient detail the copyrighted work.[272] Therefore, a U.S. OSP does not need to be an expert to evaluate the notification, it can automatically detect the problem. Similar protection is missing in Europe.

However, in relation to the freedom of expression issues, the implementation of an effective notice-and-takedown system is not feasible considering that speeches and other types of communication cannot be characterized on their face. In some cases, like terrorist content or online child abuse the nature of the expressions are clearer, but when it comes to defamation or hate speech it very difficult to give clear-cut answers. This is the reason of the European courts' inability to define the meaning of actual knowledge in the context of freedom of expression. Free speech principles are too comprehensive to put them into a formula what everybody can understand.

At the same time, the problems are becoming more and more serious. Today, the illegal online communication encompasses not just online defamation or hate speech – which both can be also

[272] DMCA (n 58) 17 U.S.C. § 512 (3) (a)

considered as criminal acts – but also new forms of threats, like cyberbullying or revenge porn[273] which were unknown in the pre-Internet age. Moreover, the network is an effective communication mean for conveying child pornography, organizing terrorist attacks, committing online frauds or spreading fake news. These extremely serious threats completely overshadowing the benefits of the freedom of expression.

Since the OSP is in the most advantageous position to take effective precautions it must somehow help to make the cyberspace safer. But as the U.S. system demonstrated, the OSP's role is representation and everything else is a function which is therefore only feasible if it is automatized. However, automatism cannot exist without precise legal rules and as both the U.S. and the European case law demonstrated, the clarification of the provisions in connection with freedom of expression rules is not entirely feasible. The determination of the illegal UGCs is only possible by referring other rules which at the same also cannot be applied automatically. An example for this approach is the German Network Enforcement Act (Netzwerkdurchsetzungsgesetz, in short NetzDG) which categorizes the manifestly unlawful contents as those that offends certain sections of the German Criminal Code.[274] This is still not the proper legal solution, since evaluation of criminal acts cannot be done automatically and therefore NetzDG cannot be an effective rule. Without straightforward definitions, the mere imposition of legal liability will not make the OSP able to become an online gatekeeper and the latter task will remain a misconceived function.

[273] See: Jenna K. Stokes, 'The Indecent Internet: Resisting Unwarranted Internet Exceptionalism in Combating Revenge Porn' (2014) Berkeley Technology Law Journal, Vol. 29., Iss. 4 <https://doi.org/10.15779/Z386D9C> accessed 25 November 2017

[274] Act to Improve Enforcement of the Law in Social Networks (Network Enforcement Act) [Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken (Netzwerkdurchsetzungsgesetz – NetzDG) vom September 1., 2017] <https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/NetzDG_engl.pdf;jsessionid=829D39DBDAC5DE294A686E374126D04E.1_cid289?__blob=publicationFile&v=2> accessed 12 March 2018

Conclusion

When the Dutch far-right political populist and parliamentary representative Geert Wilders agitated against Islam and Muslim immigrants on numerous occasions in xenophobic statements, the local authorities ordered his prosecution.[275] Although Wilders enjoyed the privilege of the parliamentary immunity, he made his statements outside the Dutch Assembly, where he was not protected by the law.[276] Oddly enough, this case is relevant from the perspective of the OSP's liability for illegal UGC. As it was emphasized in connection with the U.S. immunity rule, the assignment of representing a fraction of the public opinion[277] is a common role shared by the parliamentary members and the website operators, which cannot be properly accomplished without immunity.

The logic behind the measures taken by the Dutch authorities against Wilders is based obviously on the necessary differentiation between the political sphere and the private sphere, more precisely on not allowing politicians to be immune in case of a speech which bears no discernible connection to the exercise of the parliamentary mandate.[278] Similar distinction must be made in respect of the OSP's self-engineered content and the UGC, because only the latter can be considered as communication through which the website represents the user. Therefore, the same question can be raised in connection with Wilders and the OSP: what communication falls under the scope of the immunity?

In case of the OSP, the U.S. courts gave a precise answer. The U.S. system makes a clear distinction between the OSP's "sovereign" communication and the third-party contents and at the

[275] Hardt (n 267), 259-262
[276] Hardt (n 267), 259-260
[277] Hardt (n 164), 12
[278] Hardt (n 164), 8

same time it acknowledges, that the UGC is also the OSP's own expression because it is published and spoken by the OSP. But instead of imposing the same burden as the one which those publishers have who exercise true editorial functions, it provides the OSP with immunity. By doing so, the U.S. legislator implicitly recognizes that the OSP's genuine role in the society is to serve the public interest vested in the freedom of speech and to represent the people's ideas online.

In Europe, the legislator conferred the OSP with the gatekeeper role without giving unambiguous instructions to the website operator about its obligations. It was neglected, that in the absence of clear legal provisions and guidance, the OSP cannot be able to help in the fight against the illegal online conducts. This is so, because the OSP's processes are built on automatism, whereby it cannot evaluate legal provisions and it is not capable to apply complex balancing tests regarding to fundamental rights.

As none of the European legal regimes could define what illegality means in a freedom of expression context, it is unclear how could the OSP be able to elaborate a technical solution which would hinder the spread of illegal communication. If the requirement would be a non-automatized solution where the legal evaluation is necessary, the OSP would hold a position like those who are designated to decide over legal disputes. Such approach would just lead back to the question, whether the OSP should enjoy non-liability, similarly to the judicial immunity.

According to above the findings, two submissions can be made. The first one is, that the OSP's genuine role in the society is to represent its users' and to convey their expressions. To maintain its interest in the fulfilment of this role the OSP must enjoy immunity, since the presence of penalties would outweigh the benefits of its mission. The second one is, that imposition of legal liability in the absence of precisely defined and uncomplicated obligations can ruin the OSP's genuine role, because the two functions could only be reconciled if the extent of the gatekeeper

requirement would be circumscribed. In the absence of such legal clarity, the OSP will not be able to fulfil neither its online representative role, nor its online gatekeeper function.

The above submissions are the results of the legal analysis. But setting aside the legal issues, simpler questions can be raised. Is it fair to impose legal liability to the OSP in a situation where the legislator itself is not able to appropriately define what the stringent obligation is? No, it is not. However, it is necessary to attach legal consequences to the OSP's moral obligation of making its best efforts to save the people from terrorist attacks, murder, fraud, harassment, defamation, hate speech and other types of harms? Yes, it is. The conflicting answers may purport that the solution cannot be provided by the law. Nonetheless, whoever will be able to solve the problem he or she will probably focus on the fact, that the root of the controversy is not the OSP but instead the human beings, blood and flesh[279] who sit behind the virtual curtain and post illegal UGCs.

[279] Wu (n 123), 181

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