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Images of the digital: On the European Court of Human Rights’ judgment in the CASE OF DELFI AS v. ESTONIA.¹

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The Delfi case is of interest from several angles with regards to intermediary liability online, and the inherent challenge of balancing freedom of expression and protection against defamation is of course a key issue in a modern, highly digitalized society. Several commentators have already expressed a fear for the ruling to have severe consequences for freedom of speech and I will here merely reflect a bit from a pragmatic and conceptual perspective, and thereby argue that the case 1) needs to be placed in a techno-temporal context, that is, how the practices of commentary moderation have developed since 2006 when the Delfi news article in the case was posted, and that it 2) highlights the fact that how we understand digital phenomena, such as how comments made in connection to an online article should be seen as part of the publication or not, is largely metaphorical, and hence, negotiable and to some extent a construct.

The techno-temporal context

With regards to posts and articles online and their interconnected comments made by other than the author of the post or article, much as happened since 2006 – that is, time and technological development is important for this topic. The publication on the Delfi portal took place during a time when Facebook still was not even publicly released yet (and now it's the second most visited site in the world with over 1.4 billions active users of the social media service) and the first generation of iPhone was still one year away (which now has become 6 generations signalling a transgression to a highly “appified” and mobile internet access practice). This – not the least – says something important about the difference in pace between developments in the digital economy and legal decision-making. News portals have since developed their instruments for reducing anonymity and increasing users’ sense of accountability when posting comments. Many sites are moderating comments these days; either by demanding the commentators to log in, for example through Facebook account, or by the flipped method that no comment is published unless it is approved, or imposing levels of pseudonymity in terms of what is demanded for logging in on the actual site (The Delfi news portal had anonymous comments as well as

¹ This text represents the English first version that was translated and published in the Latvian weekly legal journal *Jurista vards*, in a theme issue on the Delfi case. <http://www.juristavards.lv/doc/267018-delfi-spriedums-no-cita-skatpunkta/> 28. JŪLIJS 2015 /NR. 29 (881).

registered comments and used word-based filters to filter out bad comments). Consequently, this development has created a “comment management” market for ventures specializing in this task. Perhaps most importantly, the trend with regards to individuals’ interactions online is a highly intermediated realm – the social media platforms as third-party intermediaries are in a sense signifying the modern web. Even if this specific case only regards a more traditional form of news content and comments on the same site, one must reflect upon to what extent a heightened liability for platform for how people comment signifies a major change. Is this a sign of tendency towards a more structural liability as opposed to a more individual one? Is this a trend for the future Internet as being more moderated in “the code” by the providers of services that we as individuals interact?

The Strasbourg court makes news portals more likely to be held liable for the content that will be written by others in commentaries, which likely will lead to even more regulated commentary monitoring, or worse, encourage news portals to close down their comments sections entirely. If the Internet in the late 90’s was a highly anonymous and unregulated “space”, the Court in this case adds to the tendency of connecting online activity to offline identity. We then need to reflect upon what is lost and gained in a less anonymized online environment. It is for example a pretty common belief these days that differences between civility and politeness across the platforms are thought to result from the difference in the level of anonymity and accountability afforded users. Research even suggests a sort of “Facebook effect” with regards to online comments (Rowe, 2015).² In a study comparing the content of discussion on the Washington Post Facebook and the Washington Post website, it was shown that the often perceived less anonymity that is the case through Facebook commenting increases the level of civility. But is it an increased civility at the cost of a decreased freedom of speech?

Understanding the digital

I have elsewhere analysed how law meets new digital phenomena, and showed how important the metaphors are being used for this understanding – such as in conceptual battles in the Swedish court case against the founders of The Pirate Bay, TPB (Larsson, 2013). In the case with TPB there was a sort of rhetorical struggle with regards to which extent it should be regarded as a “platform”, a “bulletin board” or mainly a “search engine” (for torrents), and this led to if the founders’ actions were understood as active or passive in abetting the file sharing being committed by others. There are similarities to the Delfi case, where the Estonian County Court in the first instance found that the administration of

² <http://www.digitaltrends.com/social-media/tying-your-facebook-account-to-your-online-comments-makes-you-less-of-an-internet-troll-says-study/>

comments was of a "mechanical and passive nature" (para 23). The Court of Appeal noted that Delfi's "activity was not of a merely technical, automatic and passive nature" (para 29).

What is then an "infrastructure", a "mere conduit" and a "platform"? Is it mainly a technical structure securing a transmission or is it also a social media "platform" that through its coded architecture moderates billions of commentaries all over the world simultaneously? As noted, the Strasbourg court displays a rather slim and technical definition, leading to more liability for online news portals including commentary functions. Either way, we are bound to re-use concepts already established in a physical domain in order to understand and talk about the digital phenomenon, and the concepts we re-use will have an impact on the normativity of the new phenomenon. It is relevant for how we behave and how we shape social norms around digital behaviour as well as – perhaps of most relevancy here – how courts regulate. Also the courts are depending on how digital phenomena are understood, and the Strasbourg court seems to display a rather analogue view of news outlets and their liability for whatever comments people are writing in connection to a news post, possibly leading to a more structural approach on liability, as opposed to an individual.

Stefan Larsson is Head of Lund University Internet Institute (LUii) in Sweden. He holds a Phd in Sociology of Law, a PhD in Spatial Planning and an LL.M. He is a sociolegal researcher who in general studies issues in the intersection of conceptual, legal and social change, particularly in relation to digitisation and the Internet.

See more: <http://luiu.lu.se/about/stefan-larsson/>

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