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ONLINE HATE-SPEECH AND ANONYMOUS INTERNET COMMENTS: HOW TO FIGHT THE LEGAL BATTLE IN SLOVENIA?

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ABSTRACT

The aim of this paper is to establish, who, according to the Slovenian civil and criminal law, may be liable for damage caused by unlawful commenting resulting in hate speech. To achieve this, remedies available under Slovenian civil and criminal law are analysed and special attention is given the their efficiency in practice. Although legal remedies against hate speech are in line with international standards set by Council of Europe and Court for Justice of the EU, the case law in Slovenia is scarce and expected to even decline due to recent changes in the criminal definition of the offence.

Key words: online hate speech, legal remedies, civil law, criminal law, internet service provider, anonymous internet comments.

CIVILNO IN KAZENSKO PRAVNO VARSTVO PRED SOVRAŽNIM GOVOROM V ANONIMNIH KOMENTARJIH NA INTERNETU V SLOVENIJI

IZVLEČEK

V članku se avtorja ukvarjata z vprašanjem, katere osebe so v slovenskem civilnem in kazenskem pravu odgovorne za škodo, ki nastane s širjenjem sovražnega govora v spletnih komentarjih. Posebno pozornost namenita anonimnim komentarjem, saj v Sloveniji trenutno ni mogoče zahtevati razkritja identitete anonimnega komentatorja za potrebe civilnega postopka. Avtorja ugotavljata, da so kazenskopravni standardi varstva sicer skladni s smernicami Sveta Evrope, vendar pa je v praksi varstvo šibkejše, število obsodb pa bo verjetno v prihodnje še nižje na račun sprememb v pravni kvalifikaciji. Pravnomočnih sodnih odločb v primeru internetnih kršitev je malo, sodna praksa v Sloveniji se šele razvija.

Ključne besede: sovražni govor na internet, pravno varstvo, civilno pravo, kazensko pravo, anonimno spletno komentiranje, ponudniki internetnih storitev.

INTRODUCTION

In recent decades, apart from being an indispensable tool in business and private life, the Internet has brought along numerous challenges for lawyers (Hoeren, 2014). One of the classical legal issues concerns the limits of the freedom to publish on the Internet. Unfortunately, in Slovenia (and elsewhere in the world) commenting on Internet websites, blogs, forums and social networks is often misused to spread hate speech (Földi, 2012, 8). For lawyers, this phenomenon raises a difficult question of who could and should be held legally accountable for hate speech published by anonymous commentators on the Internet.

Just as any other expression of ideas and views, commenting and "speaking" on the Internet (as a form of freedom of expression) is limited by the fundamental rights of others – right to privacy, reputation and honour, family life... While it was easy to point at the individual "hate speaker" in the old age, when speeches were made on the streets, in the parks, on TV and radio, the Internet's omnipresence combined with numerous opportunities to hide behind anonymity has complicated the process of identification of the commentator (McGonagle, 2013). In addition, most comments are posted on public websites, with the (technical and/or substantive) assistance of web editors, who often encourage and even benefit from the amount of the comments. In this complex environment, the legal battle is one of the many to be fought.

It is undisputed that the primary responsibility for the unlawful content is borne by the authors (commentators) themselves. However, as it is currently almost impossible to identify the anonymous authors of comments on the Internet (Földi, 2012, 8), it is, for the protection of the victims, even more important to establish the potential liability of other persons enabling, promoting or benefiting from comments posted on the web: web editors, publishers and website owners.

Online hate speech has been a subject of a number of recent social studies (Erjavec, 2012; Erjavec & Poler Kovačič, 2012a, 2012b; Milosavljević, 2012; Poler Kovačič & Vobič, 2012). They focus on language and communicational aspects of online hate speech. Neither civil nor criminal liability for online hate speech in Slovenia has yet been a subject of comprehensive and up-to-date legal analysis, although some authors (Teršek, 2008; Krivic, 2012) have tackled specific questions concerning criminal law definition of hate speech. The present article aims to fill this gap in the field of legal issues of online speech. It has to be stressed that legal rules on civil and criminal liability for hate speech have not been subject to any unification, neither within the EU nor within any other international community (McGonagle, 2013, 27). To achieve this, remedies available under Slovenian civil and criminal law will be analysed. In order to examine whether Slovenian law is in line with international standards, the case law of the Court of the EU and the European Court of Human Rights (ECtHR) will be studied. This means that the analysis will be mostly based on Slovenian legal sources, while the comparative data is presented only to show the state of the art developments in comparable legal environments.

THEORETICAL FRAMEWORK: HATE SPEECH AND LIABILITY FOR (ANONYMOUS) INTERNET COMMENTS IN LEGAL THEORY AND PRACTICE

Research of online hate speech

Online hate speech has recently been addressed in a study by László Földi for Council of Europe (Földi, 2012). The aim of the study was to detect campaigns against online hate-speech, whereas the legal problems of civil and criminal liability were not addressed. It is interesting to note, however, that the analysis of different (including legal) studies and researches on the topic of online hate-speech showed that

> *there are very few researches and the legal approaches are so different in the European countries that there is no possibility to combat against the spread of extremism or hate. Hate speech does matter, because words have consequences and can lead to violence, but it seems that in Europe it is not a priority at the moment. Most of the studies that have been produced after 2000 were written in the United States and Canada (Földi, 2012, 8).*

In a 2013 expert paper, Tarlach McGonagle also tackled the online hate speech. He mainly focused on international human rights treaty law and put forward a number of recommendations for policy making and future lines of actions (McGonagle, 2013, 35). In addition, he stressed the importance of the legal liability for hate speech online along with its jurisdictional perspective (McGonagle, 2013).

In Slovenia, Teršek (2008) and Krivic (2012) have been writing on legal issues of hate speech definition. They are mostly concerned with the question of relationship (borderline) between freedom of speech and hate speech. This article is not focused on the definition of the hate speech but rather seeks the answer to the question who and why shall bear liability in case of an obvious online hate speech.

Recent research of liability for user generated internet content

The question of who is liable for damage caused by unlawful commenting resulting in hate speech is strongly linked with the general issue of liability for user generated internet content. While there is no specific study

on the liability for hate-speech comments (McGonagle, 2013, 28), numerous authors have been researching the liability of the internet service providers for third party content (Hoeren, 2014, 464). A recent study on national approaches to the liability of internet intermediaries by Ignacio Garrote Fernandez-Diez showed that in the EU, due to the lack of procedures for issuing takedown notices, questions as to when and how intermediaries have knowledge of the alleged act, and then how much time intermediaries have to respond expeditiously to the notice, are the bone of contention among jurisdictions (Fernandez-Diez, 2014).

In other words, the question of civil and criminal liability of intermediaries for the unlawful third party content is far from being uniformly settled. As the focus of this article is to analyse national Slovenian legislation and practice, the direct applicability of the above studies for Slovenia is limited.

METHOD

In order to find out who, according to the Slovenian civil and criminal law, may be held liable for damage caused by online hate speech, international studies, Council of Europe's Acts and domestic criminal and civil legislation will be analysed. To complete the analysis, we shall examine the field legislation governing both civil and criminal liability as well as media and electronic commerce. The most important legal sources include the Slovenian Constitution, Criminal Code, Code of Obligations, Media Act, Electronic Commerce Market Act, Acts of Council of Europe and Directive 2000/31/EC on Electronic Commerce. Because criminal liability is mostly governed by Criminal Code and the relevant Acts of Council of Europe, they will be our primary source in the next chapter. On the other hand, the civil law liability is more complex as it crosses different legal fields: torts, vicarious liability, liability of the Internet intermediaries, which has been subject of harmonisation within the EU. To achieve a reliable result, we will therefore analyse the Code of Obligations, Media Act, Electronic Commerce Market Act and Directive 2000/31/EC on Electronic Commerce. The comprehensive analysis of relevant recent Slovenian case law (both criminal and civil) will be presented. The case law is published in IUS INFO database.

RESULTS

Regulation of Hate Speech in the Acts of Council of Europe

The normative activities of the various bodies of the Council of Europe, as well as the case law of the European Court of Human Rights demonstrate that modern Europe has an ambivalent attitude toward the freedom of expression and its restrictions.

On the one hand, freedom of expression is a fundamental requirement for safeguarding democracy, the rule of law and human rights (Declaration on the freedom of expression and information, 1982) or "one of the basic conditions for its progress and for the development of every man" (ECtHR Judgment in the case of Handyside v. United Kingdom, 1976), which applies "also to those that offend, shock or disturb the State or any sector of the population" (ibid.).

On the other hand, according to some European jurists, the European democratic social order should be protected against the growing threat of "aggressive nationalism […], intolerance or totalitarian ideologies" (Declaration of the heads of state and government of the member states of the Council of Europe, 1993), also by preventing the abuses of freedom of expression posed by hate speech (Committee of Ministers of the Council of Europe, Recommendation No. R (97) 20 on »hate speech«, 1997). Or as ECtHR stated in the case of Gündüz v. Turkey (2003): »[T]olerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance), provided that any 'formalities', 'conditions', 'restrictions' or 'penalties' imposed are proportionate to the legitimate aim pursued."

Paradoxically, both the requirement of the need to ensure a broad margin of freedom of expression, as well as the finding that the institutions of a democratic society are not able to defend themselves from racist propaganda without censorship or punishment, have common historical grounds (Macdonald, 1993, 474). The establishment and maintenance of freedom and democracy in society require, on the one hand, enabling generally unrestricted discussion about the events that are important to the public. On the other hand, it is necessary precisely for this reason (i.e. for the protection of a free and democratic society) to prohibit and punish abuses of freedom of expression, opposed to the values on which the European Convention on Human Rights (ECHR) is founded (Harris, 2009, 443; Macdonald, 1993, 474).

In Recommendation No. R (97) 20 on "Hate Speech", the Committee of Ministers of the Council of Europe defined hate speech as "all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, antisemitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin."

In its regulatory activities, the bodies of the Council of Europe have focused on preventing the transmission of racist and xenophobic statements over the Internet (see, Convention on Cybercrime 2001; Additional pro-

tocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, 2003). The Council of Europe calls on European countries to define any dissemination of racist and xenophobic material through the computer systems as a crime in their legal systems.

With the Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, the EU endeavoured to »further approximat[e] Member States' criminal laws in order to ensure the effective implementation of comprehensive and clear legislation to combat racism and xenophobia« (OJ L 328/55, 2008) with the definition of a common European criminal law approach against racism and xenophobia. The criminal prosecution of the perpetrators of such crimes should be instituted *ex officio*, therefore without regard to the victim's wishes, as victims are especially vulnerable and are opposed to judicial proceedings out of fear.

Since the criminal prosecution of the authors of hate speech interferes with their freedom of expression and since there is a need to ensure a balance between freedom of expression and rights of the protected minorities, only those acts of inciting hatred, violence and intolerance should be incriminated that have been committed in such a way as to threaten or disturb public peace or mean a threat, an abusive remark or an insult. The perpetrators of such crimes should be punished by imprisonment of one to three years.

Regulation of Hate Speech in Slovenian Criminal Law

Hate speech is defined as a crime in Article 297 of the Criminal Code of the Republic of Slovenia. It is provided, *inter alia*, that the crime is committed by a perpetrator who publicly provokes or stirs up hatred, strife or intolerance based on nationality, race, religion, ethnicity, gender, descent, financial situation, education, social status, political or other beliefs, disability, sexual orientation, or any other personal circumstances, and the act is committed in such a way as to threaten or disturb public order and peace, or by means of a threat, an abusive remark, or an insult. The perpetrator shall be punished by imprisonment of up to two years.

If the offence has been committed by publication in mass media or on a webpage, the editor or the person acting as the editor shall be sentenced to the punishment referred to in paragraphs 1 or 2 of the same Article, except if it was a live broadcast in which he/she was not able to prevent the offence, or a post on a webpage which enables its users to publish in real time or without prior control.

The new regulation brought some important changes to the earlier criminal law definition of hate speech. Before the amendment, the perpetrator did not have to threaten or disturb public order or peace or to commit the act by means of a threat, an abusive remark, or an insult to commit such a crime. Thus, the current definition of hate speech in the Slovenian Criminal Code was amended in such a way as to be more lenient to the perpetrator.

Another important change in the regulatory framework of the offence of hate speech refers to the manner in which the offence is committed: according to the Criminal Code currently in force, the editor (or deputy editor) of the webpage, which committed the offence shall also be punished. The regulations contain an exhaustive list of exceptions to this rule.

The cited amendment to the Slovenian Criminal Code, which entered into force on 15 May 2012, was clearly adopted on the basis of the aforementioned Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law. As can be seen from a comparison of that Framework Decision and the amendment to the Slovenian Criminal Code, Article 297 of the Slovenian Criminal Code, which is currently in force, contains all the recommendations of the Framework Decision.

In a normative sense, therefore, a criminal law regime of hate speech in Slovenian law is consistent with the Council of Europe's guidelines. We could not find any significant deviations from these guidelines, nor from the case law of the ECtHR, in the modest case law of Slovenian courts on the issue.

Regulation of Liability for Hate Speech in Slovenian Civil Law

In addition to the criminal law, the regulation of civil liability is equally important. It differs from the criminal law regulation in terms of sanctions (usually in the form of damages), legal procedure (proceedings only between the parties, without the prosecutor's office and the police), as well as in the standards of proof and the circle of potentially responsible individuals. A state under the rule of law must ensure that a victim can be granted satisfaction in both criminal and civil proceedings, in the latter claiming damages or other relief.

Unlike in criminal law, it is not possible to institute civil proceedings against an unknown person. Due to a (too) high level of protection of personal data, Slovenian legislation currently does not allow the easy identification of the authors of anonymous posts using the IP address (or other information). Whereas, therefore, in the case of anonymous authors disseminating hate speech identification of the defendant is not possible, or at least not easy, it is important to determine whether other persons (intermediaries) could also be held civilly liable for hate speech. For commenting on the Internet in addition to the author of the post there has to be at least one more person who enables the comment to be posted.

The Civil Liability of the intermediaries (Internet Service Providers) in EU legislation and case law

The role of information society service providers and other intermediaries is not as clear as it is in the traditional media. One has to deal with the editors and owners of websites[1] (e.g. blogs), the editors and moderators of forums, the publishers and editors of online media (online news sites), as well as the persons who enable a comment to be posted in a purely technical way/manner (for example, the owner of the server or the Internet service provider). The specific role of this third-party intermediary can vary quite a bit, ranging from only providing a server (e.g. leasing space on the server on which the comment is posted) without any control over the posted content whatsoever to editing and redacting comments in the same way as in the traditional media – with an editor verifying every text individually and then deciding whether it will be posted in line with editorial policy. Sometimes, the same person may perform several of these different roles.

The key question, therefore, is which of these persons can be (jointly) liable under the rules of civil law for damages due to hate speech from online posts. Slovenian and EU legislation stem from the principle that the liability for such damage can only be attributable to a person who is aware of the unlawful acts, and yet fails to act (Hoeren, 2014).

Internet service providers are not liable in the case of purely technical tasks, such as exclusive download and caching, as they do not control the transmitted content in the course of carrying out these tasks (they have neither the obligation nor the right to control). If the service provider also stores the data and provides access to third parties (hosting), his role becomes more active, so he can be exculpated only in the case of ignorance or if he, as provided by the law, respects the system of abuse reporting and removes objectionable content (notice-and-take-down procedures). A classic example of the latter group of providers are companies that sell or lease space on their servers (hosting).

For these three categories of Internet service providers the law therefore allows exculpation (relief) of civil liability by a simple system of reporting the controversial content and a corresponding immediate reaction by the provider (removal of such content). The burden of control is shifted to the injured party, which is obliged to review the online content and to urge the Internet service provider to remove any controversial posts, while the provider clearly has no duty to provide universal control of the published content. It is crucial that the purpose of the legislation presented is to relieve those information society service providers of liability who do not engage with the content of the posted information, and provide only neutral technical services that enable the operation of the information society.[2]

The EU Court case law is similar. In the case of L'Oréal, the Court clearly stated that the mere fact that we are dealing with a provider of information society services does not mean that it is entitled to the privilege under Article 14 of the Directive, since that depends on its role in relation to the customers. If its role is active (e.g. optimization of the presentation of offers for sale, or a promotion) and not just technically neutral, the exception could not be invoked (see, C-324/09, 2009; L'Oreal and Others, 2011).

The Civil Liability of the Editor and Other Persons i n the case law of ECtHR

The ECtHR recently ruled on these issues (in the case *Delphi v. Estonia*) when it adjudicated whether the liability for damages of the publisher of a news web portal for offensive comments posted under articles on the portal, mostly by anonymous and unregistered users, violates freedom of expression guaranteed by Article 10 of the ECHR (Cerar, 2013, 22). The judgment is interesting because both the regulation of liability for the violation of personal rights in the media and the implementation of the EU Directive 2000/31/EC on electronic commerce in Estonian law are entirely comparable to Slovenian regulation of these matters (Official Gazette of RS, 2006). The ECtHR was of the opinion that it is permissible to legally treat the publisher of a news site in the same manner as a publisher of traditional media, and not as an information society service provider who usually has no control over the published content. Therefore, the publisher is also liable for anonymous posts under the general rules of the law of obligations.[3] The ECtHR therefore held that national legislation under which the publisher of a news site who enables and encourages hostile online posts by anonymous users on his/her website is liable for them, is not contrary to the ECHR.[4]

1 The blog's editor is the person who is responsible for its publication and for editing the comments. The editor may also be a contributing writer, but not necessarily. The website owner is the person who has registered a web domain.

2 The ECJ explicitly stated so in the cases C236/08 to C238/08 *Google France and Google* [2010] ECR I2417 of 23 March 2010, C324/09 *L'Oréal and Others* of 12 July 2011 and C-70/10 *Scarlet Extended* of 24 November 2011.

3 More on the possibilities and limitations of the exculpation of Internet service providers on the basis of Directive 2000/31/EC on electronic commerce, see the case law of the ECJ in Cases C-236/08 to C-238/08 Google France and Google [2010] ECR I 2417 of 23 March 2010; C-324/09 L'Oréal and Others of 12 July 2011; and C-70/10 Scarlet Extended of 24 November 2011.

4 It is interesting that the publisher removed the controversial comments (which were not hate speech, but a direct insult to specific individuals) as soon as he was made aware of them, but he is nevertheless liable for damages for the time (a few weeks) they had been posted.

The Slovenian case law on liability for hate speech in criminal law

Decisions of the High Courts

The Supreme Court of the Republic of Slovenia has not yet adjudicated in relation to an offence referred to in Article 297 of the Slovenian Criminal Code. However, the Slovenian high courts have so far ruled four times with regard to this crime. There were three convictions and one acquittal. All three convictions had been brought before the amendments to the Slovenian Criminal Code were adopted on 15 December 2012. The acquittal was issued at a time when the amendment to the Criminal Code was already in force.

An analysis of the acquittal shows that the defendant was acquitted precisely because the conditions enacted by the amendment to Article 297 of 15 December 2012 were not present in the case (Judgment of the High Court of Ljubljana No. II Kp 65803/2012, 2013). The High Court thus stated in its judgment that only such conduct which, depending on the specific circumstances, threatens or disturbs public peace and order counts as public incitement to hatred, violence or intolerance. A concrete threat must be present which must be manifested in an immediate danger, interference with the physical or mental integrity of individuals, or interfering with the exercise of rights or duties of individuals, state authorities, local communities and persons with powers conferred by public law in a public place.

Actions promoting or inciting hatred or intolerance must be of such a nature that they did not lead to violations of public order and peace in the environment and situation in which they were committed solely due to the timely intervention of the competent authorities or individual participants or other bystanders or due to timely cessation of hate speech.

The other three cases in which the High Court convicted the defendants concerned the public incitement of hatred against Roma and homosexuals (Judgments of the High Court of Ljubljana No. II Kp 24631/2010, 2011; II Kp 24633/2010 2011; II Kp 5357/2010 2011). The High Court decided all three cases before the amendment to the Criminal Code of 15 December 2012 entered into force, i.e. when the element of threatening public peace and order was not included in the definition of the offence. In all three cases, the High Court reasoned that all the elements of the alleged offence had been present.

Based on the four judgments, we conclude that the tightening of the threshold for the offence defined in Article 297 of Slovenian Criminal Code and amended on 15 December 2012, will affect the share of convictions and acquittals in future cases. To put it differently, in light of the introduction of an additional element to the offence, i.e. the threat to public order and peace and threats, an abusive remarks and insults by the perpetrator, relatively lower proportion of convictions is expected.

In her Annual Report of 2011, the Slovenian Human Rights Ombudsperson expressed disagreement with what is, in her opinion, the excessively restrictive attitude of the legislature and case law toward hate speech as a criminal offence (Annual Report of 2011 of Human Rights Ombudsperson, 2011, 26). In this critique of the Slovenian criminal law regime of hate speech, she obviously missed the fact that the Slovenian normative definition of hate speech as a criminal offence is consistent with the Council of Europe's guidelines and the case law of the Slovenian courts in this area does not deviate from the case law of the ECtHR. The manifestly high place of freedom of expression in the hierarchy of human rights in the European and Slovenian legal arena dictates the relatively restrictive prosecution of hate speech.

Tomaž Majer's online hate speech: a controversial decision

Despite the above findings, pursuant to which it may be inferred that the Slovenian legal regulation of hate speech is in accordance with Council of Europe's guidelines, in practice one can find cases in which law enforcement agencies have been more tolerant toward the perpetrators of hate speech then some other European countries and the ECtHR.

A typical example of the exercise of freedom of expression, which could be classified as hate speech according to the criteria set out in the case law of the ECtHR, but which the District Prosecutor's Office in Ljubljana considered a permissible form of exercising the freedom of expression, is a "letter" which was posted on the Slovenian Democratic Party website, signed by a person as Tomaž Majer. The letter attracted enormous public attention and provoked a wide spread debate.

In the letter, unfortunately no longer available on the party's website, its author stated, *inter alia*:

– That one of the reasons for the victory of Zoran Janković, a mayor of Ljubljana, in the parliamentary elections was "generosity" in granting citizenships to immigrants from the former Yugoslav republics;

– That immigrants from former Yugoslav republics account for as many as 350.000 Slovenian citizens with voting rights; this number is also due to their high "fertility";

– That the majority of these people voted for the candidate for whom they were told they must vote, or else fear losing their citizenship;

– That these immigrant voters had the number of the candidate which they had been told to vote for written on their hands, so as not to make a mistake when casting their vote;

– That because of these voters, Slovenia will have a Serb and socialist tycoon in a single person as a Prime Minister.

According to Majer's statement, immigrants make up a large part of the entire Slovenian population due to

inappropriate Slovenian policy decisions ("generosity with citizenships"), which affects the political affiliation of the Slovenian electorate. Or, to put it differently, the large number of "Southerners", who became Slovenian citizens because of misguided state policies, have a significant impact on who will be elected to public office in Slovenia. Because of these voters, Slovenia will have a Prime Minister of foreign origin with unappealing personality traits ("a Serb and a socialist tycoon"). Majer is further implying that immigrants:

- Do not have their own political will, but they exercise their right to vote following the instructions of others;
- Are uneducated, thinking that the state will strip them of their citizenship if they do not follow the instructions to vote for a particular candidate;
- Are unintelligent, since they have to write the number of their preferred candidate on their hands, so they do not forget it.

In light of the definition from the Recommendation No. R (97) 20 on "Hate Speech" cited above, which defines hate speech, *inter alia*, as an utterance that spreads "xenophobia […] or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin" it is obvious that Majer's text is a typical form of hate speech. Despite these findings, the District Prosecutor's Office in Ljubljana dismissed the Information Commissioner's criminal complaint against the author of the letter on the grounds that the act was not a criminal offence, because it did not threaten public order in accordance with the cited amendment to Article 297 of the Criminal Code, which was already in force by the time, and because the disputed words could not be classified as "threatening, abusive or insulting" forms of speech (Decision of the District Public Prosecutor's Office in Ljubljana No. Kt (0)5875/11-MJ-tp, 2012.).

The cited reasoning indicates that the District Prosecutor's Office used the lack of a "threat to public order and peace" as it is prescribed by the amended Criminal Code to justify its decision regarding the controversial letter; this is also in line with the case law. Thus, in the reasoning of its decision the District Prosecutor's Office literally summarized the position of the High Court in Ljubljana as follows: "[A]ctions promoting or inciting hatred or intolerance must be of such a nature that they did not lead to violations of public order and peace in the original context and situation solely due to the timely intervention of the competent authorities or individual participants or other bystanders or due to the timely cessation of hate speech" (Judgment of the High Court in Ljubljana No. II Kp 65803/2012 of 11 December 2013).

The prosecution's explanatory note says nothing, and certainly does not clarify why the prosecution believes that "Majer's" claim that immigrants from former Yugoslavia are unintelligent, ignorant and that they pose a threat to the interests of the Slovenes are not offensive toward the immigrants. The prosecution's decision to dismiss the complaint is thus clearly unconvincing.

The example of Tomaž Majer could lead us to conclude that, even though the criminal law regime of hate speech conforms to the guidelines of the Council of Europe in principle, the Slovenian law enforcement authorities deviate from these guidelines in some cases. Such an understanding of the restrictions on freedom of expression is probably based on a non-critical use of the "doctrine of clear and present danger" imported from American case law to the European legal arena as is clear from certain theoretical legal contributions (Teršek, 2008).

The Slovenian case law on liability for online hate speech in civil law

Although Slovenian courts have not yet ruled explicitly on the civil liability for hate speech, they did make some important decisions on service providers' responsibilities for the posting of unlawful content by users, e.g. in the case of offensive statements on blogs or insulting comments in forums. These decisions are crucial to understand the liability for hate speech as can be easily applied mutatis mutandis.

Case Law on Service provider's liability for unlawful content in Slovenia

The High Court in Ljubljana recently noted that the provider of hosting services for blogs (blog.siol.net, sued for damages) could exculpate itself with respect to its liability for abusive blog posts if it reacted to calls by the injured party in a timely manner.[5] However, the Court did not give any details regarding the provider's liability.[6]

Even more interesting is the actual situation in case II Cp 4539/2010 of 15 December 2010 before the same High Court. The Court had to adjudicate on a motion for a temporary injunction by which the administrator of a forum would be required to remove offensive posts from the website without undue delay and be prohibited from

5 See judgment by the High Court in Ljubljana No. I Cp 3037/2011 of 9 May 2012. The case concerned a text posted on one of most-read blogs by provider blog.siol.net. The provider does not generate its own content, but it publishes blogs by registered users.

6 There was no need for the details since it was uncontested that the provider did not react after the injured party called for the withdrawal of the controversial content. Thus, the basic grounds for its exculpation were not met.

re-posting similar content.[7] The court of first instance rejected the motion, but the appellate court overturned its decision. The appellate court expressly rejected the reasoning of the court of first instance, which held that one's honour and reputation cannot be encroached upon by posts on online forums (chat rooms), since "online chat rooms do not have the same power as the media, and the average web user is expected to treat the value judgments posted in chat rooms with some reservation [...]". The High Court pointed out that even if the information on a web forum is not necessarily reliable, it is not possible to conclude that it can never affect the reputation of a doctor. The court decision is particularly important because the liability of the website owner was obviously not a problem (either for the defendant or for the court), meaning that claims against webpage owners, including temporary injunctions, are allowed in Slovenia, too.

In another recent case (I Cp 1033/2013 of 19 November 2013) the High Court in Maribor convicted the author of a controversial article (an opinion piece posted on the website) as well as the site's publisher and editor-in-chief. The defendant had to revoke the article, publish the judgment, and pay damages. Interestingly, the Court held that the immunity under Article 11 of the Electronic Commerce Market Act does not apply to the website owner, since he employs the editor in a full-time job and cannot invoke his "ignorance" of the contents of the posted opinion piece, which was approved by the editor. It is debatable whether the same argument would hold for users' comments, but it must be recognized that the court's decision in that case was courageous and well-reasoned.

Liability of online media for Hate Speech in Slovenia

It is undisputable that online news sites (in Slovenia www.siol.net, www.delo.si, www.dnevnik.si, www.rtvslo.si, www.pozareport.si) are by their substance media in terms of Article 2 of the Media Act. Namely, as specified in Article 2(1) of the Media Act (2001), they are "electronic publications […] of editorially formulated programming published daily or periodically through the transmission of written material, vocal material, sound or pictures in a manner accessible to the public." It is essential that published articles on online news sites are edited in the same way as in traditional media, with the difference that in traditional media comments by readers are also under editorial supervision. However, online comments are not (or at least the editorial policy is significantly weaker). The case law also affirms the view that online news sites are regarded as media (High Court in Ljubljana No. V Kp 201/2010, 2010 and High Court in Ljubljana No. II Cp 1587/2004, 2004).

But to answer the question whether online media are liable for the hate speech of their users (the authors of posts), it is still necessary to determine whether the websites can be granted relief of liability that applies to information society service providers according to the EU Directive 2000/31/EC on Electronic Commerce and the Slovenian Electronic Commerce Market Act (Official Gazette of RS, 2006). If so, they may be liable only if and when they learn about the violation, meaning that they are not liable for hostile posts that they are not aware of.

We believe that news and other websites, as well as blogs and forums should not be exculpated when it comes to hostile comments posted under editorially controlled content. Comments on news sites are not separated from posted articles (the site's own content), which makes them part of a coherent set of content. It is therefore legitimate and justified that the same person (the publisher of the news site) is liable for the legality of the entire content (both their own articles and the comments posted below them). That person is usually an editor who is treated as an employee within the meaning of Article 147 of the Slovenian Code of Obligations, which prevents him/her from being sued directly. In this case, the enabling of commenting constitutes a supplement to the publisher's own content rather than a neutral technical activity. If there are grounds for the fault liability of website operators, then there are even more grounds for prohibitory injunctions (prohibition of future violations) according to Article 134 of the Code of Obligations.

Therefore, the publisher should be liable even if editor removes the controversial post as soon as he/she is informed of it or has received a request to that effect.

Liability for Hate Speech in Posts on Blogs and Forums

The same goes for commenting on blogs and in forums and other user websites. The administrator of the blog is usually the person who registered the blog (domain). If that is not the same person as the editor who is responsible for the publication of posts on the blog, the editor may also be held liable for anonymous posts.

Even forums have moderators who are supposed to supervise posts, which are an essential part of online communities. If the moderator allows anonymous posts without any form of control and the forum is publicly accessible, we think that both the moderator and the administrator of the forum should be liable for posted

7 The plaintiff (a physician) claimed that the defendant is the publisher of a website on which there was a thread entitled "Dr. A – surgery of varicose veins" in the section "online chat room". The plaintiff claimed that the thread contained some untruths and lies regarding him. The aim of the untruths and distorted facts was to discredit the plaintiff as a physician and seriously violate his personal rights, especially his honour and reputation. The plaintiff alleged that the defendant enabled random authors to post unauthorized comments and thus allowed the violation of his personal rights. He demanded the removal of the controversial posts from the forum and that the re-posting of similar content should be banned.

content. In these cases, liability cannot be avoided even if the controversial post has been removed upon the request of the injured party (if, of course, it was accessible for an amount of time which can cause damage). Liability also cannot be avoided just by using disclaimers or general clauses excluding liability (usually included in the general terms and conditions). We believe, therefore, that the operators of websites, at least if allowing anonymous comments, are obliged to check every anonymous comment prior to posting it. And if the comment is manifestly unlawful, it should not be allowed to appear on the website.[8]

DISCUSSION AND CONCLUSION

Since existing legal studies on the subject of online hate speech have neglected the question of civil and criminal liability for online hate speech, this article tries to fill this research gap.

Although victims of hate speech spread by anonymous online commentators enjoy sufficient criminal law protection on the legislative level, they are much less protected in practice of Slovenian judiciary. We estimate that the introduction of an additional element to the offence will probably result in the relatively lower proportion of convictions. Additional elements to the criminal definition of the offence generally cause decrease of convictions as the threshold for charges is lifted.

A practical evidence supporting the conclusion that criminal sanctions against online hate speech are not sufficiently effective is the case of Tomaž Majer, which shows that even though the criminal law regime of hate speech conforms to the guidelines of the Council of Europe in principle, the Slovenian law enforcement authorities might deviate from these guidelines. The reason may be twofold: on the one hand, public prosecutors and judges are not familiar with the (the non-mandatory) guidelines provided by Council of Europe; on the other, the guidelines still present abstract and general principles rather than concrete solutions; their uniform application to specific cases of hate speech therefore remains a challenge.

Currently, the biggest and most acute problem in Slovenian civil law is the inability of the injured party to identify the tort-feasor. The injured party has no legal grounds to obtain the identification data (such as IP number) that would enable him to bring a civil action. Due to the constitutional protection of the right to privacy and communication confidentiality (Constitutional Court judgment in the case Up-106/05, 2008) and due to a lack of legal regulation of the collision between the rights of anonymous commenters and offended individuals in Slovenia, the information on the defendant (directly responsible for the damage) can only be obtained through criminal proceedings (The Information Commissioner No. 0712-1/2012/1999, 2012). We believe that the current legal regulation does not conform to the Constitution, because in the conflict between the fundamental rights of injured party and the author's right to freedom of expression, the latter has an absolute priority, which almost certainly represents a violation of Article 8 of the ECHR. In the case of *K.U. v. Finland* (2008), the ECtHR held that Finland, which like Slovenia did not provide the victim (in that case, a twelve-year-old boy whose information was posted on a dating website) a legal possibility to identify the perpetrator, breached the ECHR. For the time being, anonymous commenters in Slovenia can post whatever they want with basically no risk.

In the future, it will be necessary to arrange a special procedure by which the affected person can demand the disclosure of the identity of the authors of anonymous posts (and other persons who act illegally on the Internet).[9] Another practical solution could be for service providers to consistently require their users to register with their contact information, including their name, surname and address. The incentive for such a practice could come from a simple statutory provision that the owner of the website shall be considered the author of every anonymous post on his/her website.

8 A similar position was adopted by the German Hamburg Regional Court in case 324 O 794/07 of 4 December 2007. The court had to decide whether the author and owner of a blog has an obligation to review manifestly unlawful comments posted on his blog by the users. The Court emphasized that the meaning of the due diligence should be determined on the case-by-case basis. However, the standard of due diligence of the blog administrator in situations where there is a high probability of insulting comments, requires the obligation of prior review of all comments. The courts in Hamburg (Regional Court and High Court) are well known for their strict views regarding freedom of expression, as an exception to other German case law.

9 This is a real and growing problem elsewhere as well, as confirmed by a recent bold decision by a news website in Croatia (jutarnji.hr), which publicly posted the most primitive, hostile and offensive comments and included the names and photographs of their authors. See http://www.jutarnji.hr/mracna-strana-hrvatske--ovo-su-pritajeni-ekstremisti-medu-nama/1140564/.

DISCORSO INCITANTE ALL'ODIO ON-LINE E COMMENTI ANONIMI SU INTERNET: COME COMBATTERE LA BATTAGLIA LEGALE IN SLOVENIA?

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RIASSUNTO

Lo scopo di questo articolo è stabilire chi sia, secondo la Legge civile e penale slovena, responsabile dei danni causati dai commenti antigiuridici nei discorsi intrisi di odio. Per raggiungere questo obiettivo ci sono a disposizione dei rimedi legali nell'ambito del diritto civile e penale sloveno, e una particolare attenzione viene rivolta alla loro efficacia nella pratica. Anche se le vittime di discorsi di odio, che vengono diffusi on-line da commentatori anonimi, godono di una certa tutela adeguata da parte del diritto penale a livello legislativo, sono molto meno protetti nella pratica della giurisprudenza slovena a causa di recenti cambiamenti nella definizione di reato. D'altra parte, invece, il problema più urgente del diritto civile sloveno è l'incapacità della parte lesa di identificare l'autore del reato. Gli autori ritengono che le notizie e i siti web, come pure i blog e i forum, siano responsabili dei discorsi di incitamento all'odio dei commentatori per via del controllo editoriale dei contenuti che non sono in conformità con la definizione tecnica dei fornitori di servizi. I gestori di siti web che consentono commenti anonimi sono tenuti a verificare ogni commento anonimo prima di essere pubblicato.

Parole chiave: discorsi di odio su internet, rimedi legali, diritto civile, diritto penale, offerente di servizi internet, commenti anonimi su internet.

SOURCES AND BIBLIOGRAPHY

Additional protocol to the Convention on Cybercrime Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed through Computer Systems (2003): http://conventions.coe.int/Treaty/en/Treaties/Html/189.htm (1. 4. 2014).

Annual Report 2011 of Human Rights Ombudsperson (2011): http://www.varuh-rs.si/fileadmin/user_upload/pdf/lp/Letno_porocilo_Varuha_za_leto_2011.pdf (1. 4. 2014).

Constitutional Court of the Republic of Slovenia judgment in the case Up-106/05 of 2 October 2008 (2008): http://odlocitve.us-rs.si/usrs/us-odl.nsf/o/DA-175692EA4709BAC12574E3003EB895 (1. 4. 2014).

Convention on Cybercrime (2001): Http://conventions.coe.int/Treaty/en/Treaties/Html/185.htm (1. 4. 2014).

Declaration on the Freedom of Expression and Information, adopted by the Committee of Ministers of the Council of Europe on 29 April 1982 (1982): https://wcd.coe.int/ViewDoc.jsp?id=686067&Site=COE (1. 4. 2014).

Declaration of the Heads of States and Governments of the Member States of the Council of Europe (1993): https://wcd.coe.int/ViewDoc.jsp?id=621771 (1. 4. 2014).

Decision of the District Prosecutor's Office on Ljubljana no. Kt (0)5875/11-MJ-tp (2012): Ljubljana, State Prosecutor General of the Republic of Slovenia.

ECJ judgment in the cases C-236/08 to C-238/08 *Google France and Google* [2010] ECR I 2417 (2010): http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62008CJ0236&from=EN (1. 9. 2014)

ECJ judgment in the case C-324/09 *L'Oréal and Others* (2011): http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30d6e07307529723 4f23b022cdcf3c375160.e34KaxiLc3qMb40Rch0SaxuOb3f0?text=&docid=107261&pageIndex=0&doclang=EN &mode=lst&dir=&occ=first&part=1&cid=164379 (1. 9. 2014).

ECJ judgment in the case C-70/10 *Scarlet Extended* (2011): http://curia.europa.eu/juris/document/document.jsf?text=&docid=115202&pageIndex=0&doclang =EN&mode=lst&dir=&occ=first&part=1&cid=164470 (1. 9. 2014).

ECtHR Judgment in the case of *Handyside v. United Kingdom*, application no. 5493/72 (1976): http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001--57499#{"itemid":["001-57499"] (1. 4. 2014).

ECtHR judgment in the case *Gündüz v. Turkey*, application no. 35071/97 (2003): http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61522#{"itemid":["001-61522"]} (1. 4. 2014).

ECtHR judgment in the case *Le Pen v. France*, application no. 18788/09 (2010): http://echrblog.blogspot.co.uk/2010/05/hate-speech-decision-on-le-pen.html (1.4. 2014).

ECtHR Judgment in the case of *K.U. v. Finland*, application no. 2872/02 (2008): http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-89964#{%22itemid%22:[%22001-89964%22]} (1. 9. 2014).

ECtHR Judgment in the case of *Delphi v. Estonia*, application no. 64569/09 (2013): http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-126635#{%22itemid%22:[%22001-126635%22]} (1. 9. 2014).

Hamburg Regional Court judgment no. 324 O 794/07 (2007): http://medien-internet-und-recht.de/volltext.php?mir_dok_id=1521 (1. 9. 2014).

High Court in Ljubljana judgment no. II Cp 1587/2004 (2004): http://www.sodisce.si/vislj/odlocitve/34697/ (1. 4. 2014).

High Court in Ljubljana decision no. V Kp 201/2010 (2010): http://sodisce.si/znanje/sodna_praksa/visja_sodisca/2012032113048790/# (1. 4. 2014).

High Court in Ljubljana judgment no. II Kp 65803/2012 (2013): http://www.sodisce.si/znanje/sodna_praksa/visja_sodisca/2012032113063414/ (1.4.2014).

High Court in Ljubljana judgment no. II Kp 24631/2010 (2011): http://sodisce.si/znanje/sodna_praksa/visja_sodisca/2012032113063415/ (1. 4. 2014).

High Court in Ljubljana judgment no. II Kp 24633/2010 (2011): http://www.sodisce.si/znanje/sodna_praksa/visja_sodisca/2012032113044062/ (1. 4. 2014).

High Court in Ljubljana judgment no. II Kp 5357/2010 (2011): http://www.sodisce.si/znanje/sodna_praksa/visja_sodisca/2012032113063416/ (1.4.2014).

High Court in Ljubljana judgment no. I Cp 3037/2011 (2012): http://sodisce.si/znanje/sodna_praksa/visja_sodisca/2012032113044794/ (1. 9. 2014).

High Court in Ljubljana judgment no. I Cp 3037/2011 (2012): http://sodisce.si/znanje/sodna_praksa/visja_sodisca/2012032113044794/ (1.9.2014).

High Court in Maribor judgment no. I Cp 1033/2013 (2013): Maribor, High Court.

Information Commissioner of the Republic of Slovenia, opinion no. 0712-1/2012/1999 (2012): https://www.ip-rs.si/varstvo-osebnih-podatkov/iskalnik-po-odlocbah-in-mnenjih/odlocbe-in-mnenja-varstvo-osebnih--podatkov/?tx_jzvopdecisions_pi1[showUid]=2210&cHash=a5817d2b73b2ff932a79ed01dd8efb3a (1. 4. 2014).

Recommendation No. R (97) 20 on »Hate Speech« (1997): http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/dh-lgbt_docs/CM_Rec(97)20_en.pdf (1. 4. 2014).

Cerar, M. (2013): Odgovornost novičarskega portal za komentiranje bralcev. Pravna praksa, 44, 1, 22–23.

Erjavec, K. (2012): Novinarsko opredeljevanje in razumevanje sovražnega govora. Teorija in praksa, 49, 1, 95–111.

Erjavec, K., Poler Kovačič, M. (2012a): Novinarstvo in internet: značilnosti piscev sovražnega govora v ko-

mentarjih pod spletnimi novinarskimi prispevki. Teorija in praksa, 49, 1, 190–203.

Erjavec, K., Poler Kovačič, M. (2012b): "You Don't Understand, This is a New War!" Mass Communication & Society, 15, 6, 899–920.

Garrote F.-D.(2014): Comparative analysis on national approaches to the liability of internet intermediaries for infringement of copyright and related rights. http://www.wipo.int/export/sites/www/copyright/en/doc/liability_of_internet_intermediaries_garrote.pdf (1. 9. 2014).

Harris, D., O'Boyle, M., Warbrick, C. (2009): Law of the European Convention on Human Rights, Second Edition. Oxford, Oxford University Press.

Hoeren, T. (2014): Internetrecht. http://www.uni-muenster.de/Jura.itm/hoeren/itm/wp-content/uploads/Skript-Internetrecht-April-2014.pdf, (1. 9. 2014).

Krivic, M. (2012): Kje je meja med svobodo govora in sovražnim govorom? Pravna praksa, 1, 6.

Lemut-Strle, R. (2009): Osebnostne pravice proti internetni anonimnosti. Pravna praksa, 38, 13–15.

Macdonald, R., Matcher, F., Petzold, H. (2003): The European System for the Protection of Human Rights. Dodrechts, Martinus Nijhoff Publishers.

McGonagle, T. (2013): The Council of Europe against online hate speech: Conundrums and challenges, Expert paper, doc.no. MCM 2013(005), the Council of Europe Conference of Ministers responsible for Media and Information Society, 'Freedom of Expression and Democracy in the Digital Age: Opportunities, Rights, Responsibilities', Belgrade, 7-8 November 2013.

Milosavljević, M. (2012): Regulacija in percepcija sovražnega govora: analiza dokumentov in odnosa urednikov spletnih portalov. Teorija in praksa, 49, 1, 112–130.

Poler Kovačič, M., Vobič, I. (2012): Poročanje o sovražnem govoru poslancev v luči novinarske (ne)objektivnosti. Teorija in praksa, 49, 1, 131–148.

Teršek, A. (2008): Sovražni in napadalni govor – nazaj k doktrinarnim lekcijam Vrhovnega sodišča ZDA. Pravna praksa, 4, II–VI.