


Commentators as prosumers: A legal perspective on their futures

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Abstract

Internet technologies have empowered commentators to participate in information production. This phenomenon has been studied as citizen journalism and media convergence. However, one perspective has remained underdeveloped: commentators are empowered as prosumers who are neither consumers nor producers. Commentators prosume comments for themselves and their communities rather than for sale. Therefore, in terms of Toffler, prosumers can raise the Sector A economy, which is typical of agricultural society, and which is overshadowed by the market or the Sector B economy in industrial society. This article highlights prosumers' freedom to post lawful comments and the implications for this freedom coming from moderation standards imposed in the EU by the European Court of Human Rights and the Digital Services Act. The analysis led to the construction of three models of information production/prosumption and the anticipation of their futures. The article concludes by suggesting how prosumers' freedom to post lawful comments and moderators' control over comments prosumption can be balanced better from a legal perspective.

KEYWORDS

Digital Services Act, freedom of expression, Future, internet, prosumption, user-generated content

1 | INTRODUCTION

Posting comments on online sites, which vary from news portals to social media platforms, has empowered commentators to enter the public sphere controlled traditionally by professional mass media and, hence, has contributed to democratization (Benkler, 2006; Chung, 2007; Gant, 2007; Gillmore, 2004; Shirky, 2008). Although commenting is used to discredit, disseminate propaganda, and hate speech, commentary greatly contributes to public discourse because commentators pay attention to public affairs, controversial topics, and issues concerning their own country (Boczkowski & Mitchelstein, 2012; Domingo et al., 2008;

Gerhards & Schäfer, 2010; Reich, 2011; Thurman, 2008; Weber, 2014). This empowerment has received much attention from media and communication scholars who research commentary as part of media convergence and participatory journalism. The present article seeks to shed light from another viewpoint by highlighting commentators as prosumers. This aspect remains underdeveloped, even though Jönsson and Örnebring (2011, p. 131) have already mentioned commentators as prosumers in the context of user-generated content and media power. The context of my research lies in the legal field and includes a critical perspective on current EU norms that, while aiming at unlawful online speech, leave lawful comments without comprehensive protection.

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The term prosumer was introduced by Toffler (1981) to refer to people who produce/develop products for themselves but that are not for sale. According to Toffler (p. 284), prosumers are involved in Sector A economy, which is usually invisible because attention is given to the market or Sector B economy. A Sector A economy is characterized the agricultural society (p. 283). Industrial society changed the paradigm and led the market to the forefront (p. 284). During the information society period, A-Sector prosumers receive opportunities for new empowerment (p. 292). Toffler calls this new trend the rise of the prosumer (p. 283).

According to Benkler (2006), social production led by internet users does not only coexist but also successfully competes with industrial production led by professionals. Although Benkler does not refer to prosumers, he nevertheless focuses on the turn of passive consumers into active producers who have taken the means of production in their own hands. Active internet users can create a networked public sphere with more critical opinions and a self-reflective culture (pp. 9–22). Zittrain (2008), also without referring to prosumers, highlights the innovative potential of production led by internet users and, at the same time, warns about extinguishing this potential. On the one hand, the internet ethos accepts all user-generated contributions, even conflicting, because users should find a way to solve the problem (procrastination principle) and because users should not aim at causing harm to the network (trust-your-neighbor approach) (p. 31). On the other hand, the authors of valuable contributions can require building walls around the network to clean up the community. This demand for a safer environment might outweigh the desire for freedom and trigger a “movement toward the enclosure” (p. 99). This movement can reinforce mass media and professional journalists as providers of sterile information products (p. 165). Thus, the future of the internet depends on finding the right balance between freedom and regulation (p. 35).

The present article borrows from and builds on these theoretical premises to highlight the correlation between comment presumption and freedom of expression. Comments presumption needs freedom. The current article calls this freedom a freedom to prosume. Thus far, prosumers do not have the legal right to freedom to prosume. However, they, as internet users, possess the right to freedom of expression, which has been firmly established in the case law of the European Court of Human Rights (ECtHR). At the same time, the ECtHR requires moderators of online forums to remove illegal content. Therefore, freedom to prosume, here as part of freedom of expression, depends on finding the right balance between the freedom to comment and the moderator's control over it. This balanced solution is necessary to prevent enclosure movement. Enclosure leads to the transfer of power over comments presumption from A-Sector commentators to B-Sector platform moderators. Moderators are called on to clean up the environment by removing prosumers' contributions that are harmful from the point of view of the B-Sector moderator. This development can challenge the future of the trend that I call the rise of prosumer-commentator. I specifically look at EU legal materials to understand how they can affect balancing and thereby the trend.

The present article proceeds as follows: The next section explains my methodology. The third section presents commentators as prosumers in light of ECtHR case law. First, I introduce the relevant cases by dividing them into three categories. Second, based on the division, I create three models of information production/prosumption and analyze the implications of the case law for a balancing solution in each of them. The fourth section presents commentators as prosumers in light of the Digital Services Act (DSA). First, I explain the relevant provisions of the DSA. Second, I analyze their implications for the models' balancing solutions. The discussion section analyses the findings from the rise of prosumer-commentator perspective while suggesting directions for further research. The last section concludes with assumptions about the future of the models and suggests how prosumers' freedom to post lawful comments and moderators' control over comments presumption can be balanced better from a legal perspective.

2 | RESEARCH QUESTIONS, MATERIALS, AND METHODS

As the main research question, I ask about the current state and the future of commentators as prosumers. I seek to answer this question from both legal and future studies perspectives. Materials include case law of the ECtHR and EU Regulation 022/2065 of October 19, 2022 on a Single Market for Digital Services, known as the DSA. By the fall of 2023, the ECtHR issued eight decisions regarding liability for user-generated comments: *Delfi AS v Estonia* App no. 64569/09, June 16, 2015; *Kucharczyk v. Poland*, App no. 72966/13, December 17, 2015; *MTE and Index v. Hungary*, App no. 22947/13, February 2, 2016; *Pihl v. Sweden* App no. 74742/14, March 9, 2017; *Tamiz v. UK* App no. 3877/14, September 19, 2017; *Høiness v. Norway* App no. 43624/14, March 19, 2019; *Jeziar v. Poland*, no. 31955/11, June 4, 2020; and *Sanchez v. France*, App no. 45581/15, September 2, 2021. These legal materials oblige internet service providers to moderate illegal comments. However, as already highlighted (Erixon, 2021, pp. 8, 9), the threat of liability for third-party content can push providers to overmoderate and remove legal comments, which endangers the freedom of expression. The current article adds to this argument in a new way: the threat of liability can change the balance between prosumers' freedom to comment and moderators' control over comments. Unbalancing leads to an enclosure movement that endangers the freedom to prosume and questions the future of the rise of prosumer-commentator.

The results of the desktop qualitative analysis are assessed from the prosumer perspective to develop three models of information production/prosumption. Each model depicts the relationships between Sector A and Sector B economies. In all the figures included in the article, Sector A is consistently depicted using round forms, while Sector B is depicted using square forms. The results are also assessed from the perspective of future studies to detect weak signals (Ansoff, 1975; Coffman, 1997; Hiltunen, 2008, 2013). I hypothesize that these signals can lead to a change in the balance

between the freedom to prosume and control over it. Among various and debated understandings of weak signals (Holopainen & Toivonen, 2012; Rossel, 2011; van Veen & Ortt, 2021), I rely on Hiltunen's (2013, p. 63) definition: weak signals are "signals of emerging changes that can become something great in the future—or not." As an analytical framework, she has introduced the concept of a future sign that consists of three dimensions: a weak signal, an emerging issue, and interpretation (2008, p. 252). A weak signal is an objective phenomenon that can affect an emerging issue. Interpretation is a subjective dimension that depends on how the observer understands the meaning of a weak signal. In the context of my research, the future sign framework includes legal provisions (weak signals), which can be interpreted as affecting the rise of the prosumer-commentator (an emerging issue). I interpret the meaning by using legal doctrinal analysis.

Importantly, Hiltunen (2008, p. 32) does not list laws and court decisions as good sources for identifying weak signals. I argue that these materials should be scanned for provisions that can indirectly affect emerging issues without the purpose of regulating them. More precisely, the analyzed legal materials do not mention prosumers. However, they do contain provisions that can indirectly affect the future of comments prosumption by directly regulating moderation practices.

The current article traces weak signals throughout three time periods: before the case of *Delfi*, after *Delfi*, and after the DSA. In 2016, *Delfi* introduced the new rule of content moderation, which requires certain kinds of online service providers to review all the comments to disable without delay illegal content. I build the line of development by first scanning the materials for relevant weak signals and then grouping them into two categories: visible and hardly visible. The former are new legal requirements present in the text. The latter are not present in the text, so I interpret their absence as a signal not to change the balancing. Third, I depict my balancing metaphor. This line is used to discuss the directions of changes in balancing to make assumptions of the future for prosumers-commentators.

3 | COMMENTATORS AS PROSUMERS IN THE CONTEXT OF ECTHR CASE LAW

3.1 | Liability for user-generated comments in the ECTHR case law

Regarding the internet, the ECTHR has acknowledged the empowerment of users to exercise freedom of expression as never before but also emphasized the unprecedented dissemination of unlawful content (*Delfi*, para. 110). Although the ECTHR has never referred to commentators as prosumers, its case law does impact their future, depending on whether the ECTHR places duties and responsibilities on moderators. The present article divides cases into three groups. The first group contains decisions regarding comments on articles published by online portals (*Delfi*, *Kucharczyk*, *MTE*, and *Index*). The

second group addresses comments posted on a forum website that does not contain any editorial content to comment on but has a link to articles published on the online portal (*Høiness*). The third group concerns comments on postings published by bloggers and social media account holders (*Pihl*, *Jeziar*, *Tamiz*, *Sanchez*).

Regarding the first situation, the ECTHR decided that a commercial online news portal was liable for clearly unlawful comments and must delete them without delay after publication. In *Delfi*, the online news portal *Delfi* exercised a substantial degree of editorial control over comments because only it, but not commentators, made the final decision on whether to remove a comment. However, *Delfi* empowered users to participate in reviewing comments by pressing a special button near a comment to attract a moderator's attention. Following the Committee of Ministers of the Council of Europe (2011, Appendix, para. 32), involving users in peer review is an editorial process exercised by the media, even though it is usually imperceptible to the audience. In the examined case, users did not press the button, which led to keeping 20 unlawful comments on the portal. After 6 weeks, the injured person sent a complaint. *Delfi* reacted by removing the comments on the same day. However, according to the ECTHR, this reaction was insufficient. The ECTHR ruled that the news portal should not wait for a complaint but rather should remove unlawful content without delay after this content appears on the website (*Delfi*, paras. 153–54, 162). The present article refers to this rule as **the Delfi Moderation Standard**. According to *Delfi*, not only publishing news articles but also creating comment sections represented part of the media outlet's professional activities. The number of comments correlated with the amount of advertising revenue. Yet, in contrast to the publisher of a printed media publication, the portal publisher could not be required to edit comments *ex ante* because it was the commentator rather than the portal that initiated the posting of comments (para. 112). However, *Delfi* was a portal that engaged users in commenting because, by integrating comment sections in the portal, *Delfi* invited users to "complement the news with their own judgments and opinions" (para. 144). As a result, the ECTHR imposed on portal **duties and responsibilities** to moderate clearly illegal comments (para. 113).

Index and MTE (paras. 91, 62) confirmed the *Delfi* Moderation Standard as well as the concept of special duties and responsibilities of news portals to combat clearly unlawful speech. Importantly, the *Index and MTE* highlighted that these duties and responsibilities could differ depending on the situation. For example, in contrast to *Delfi*, *MTE* published opinions rather than news articles. Furthermore, *MTE*, as a nonprofit association, did not have economic interest in commentary. The same conclusions were reached by the ECTHR in *Kucharczyk*. The online portal in this case, similar to *MTE*, did not have economic interest in comments posted under profiles. In this case, the ECTHR did not find the comments in question unlawful and left the issue of duties and responsibilities without discussion.

In summary, the ECTHR decided that, in principle, a notice-and-take-down system with a rapid response to complaints might be sufficient to balance the freedom to comment and control over it. However, if comments amounted to hate speech and direct threats to

the physical integrity of individuals, internet portals could be held liable for failing to remove such comments without delay after publication. Moreover, *Delfi* highlighted that this moderation standard

"did not concern other internet fora, such as a social media platform where the platform provider does not offer any content and where the content provider may be a private person running a website or blog as a hobby." (para. 116)

The second situation, where the provider does not offer any content to comment on, was considered in *Høiness*. In this case, Hegnar Online framed its information environment differently from *Delfi* and *MTE*. Hegnar Online separated its own news articles and comments by placing them on two different websites. Hegnar Online invited users to comment on a forum website linked to the portal with articles. Users could also use a button to complain to the portal about inappropriate comments. Furthermore, the portal moderators could remove inappropriate comments on their own initiative. In the examined case, a few threads were posted to discuss a topic introduced in articles on the portal. The targeted person complained about three comments. Two of them were removed by the moderator without delay. The third one was already deleted by the moderator at the time of receiving the complaint. The ECtHR highlighted that this case concerned "an online news agency and a forum host" (*Høiness*, para. 68). The forum, in contrast to the comments sections in *Delfi*, as well as in *Intex* and *MTE*, was separate from the presentation of news and, because of the lack of integration, was not a continuation of the editorial content published by the online news agency (para. 71).

Similar to the first situation, the ECtHR decided that, in principle, a notice-and-take-down system with a rapid response to complaints might be sufficient to balance freedom of commenting and control if comments did not amount to defamation. However, it was not clear from the Court's reasoning whether the *Delfi* Moderation Standard should apply if the comments were unlawful. In contrast to *Delfi*, *Index*, and *MTE*, the ECtHR **did not mention Hegnar's duties and responsibilities** as a media outlet. Furthermore, the ECtHR said that Hegnar's forum was separate from the portal and only hosted comments. This can lead me to conclude that the *Delfi* Moderation Standard is not applicable in the second situation. Rather, rules regarding a hosting provider's liability, Article 6 of the DSA, should apply. Following Article 6, a hosting provider is liable for unlawful comments only if a reasonable period has elapsed after the portal is informed about this unlawful content. Furthermore, hosting providers cannot be obliged to perform the total monitoring of user-generated comments (Article 8).

The third situation concerns comments posted on social media platforms, websites, or blogs. I divide the relevant cases into two subgroups. The first subgroup addresses comments on blogs run by a nonprofit association and includes *Pihl* and *Tamiz*. The second subgroup concerns comments on blogs/social media websites run

by a private person as a hobby. The subgroup includes *Jeziar* about blogging and *Sanchez* about social media.

In *Tamiz*, Google, as the hosting provider of the [Blogging.com](#) platform, did not moderate the allegedly defamatory comments but forwarded the complaint to the author of the blog, who removed them without delay. The ECtHR did not find Google liable and left the liability of the blogger without assessment because it was not the focus of the case. In *Pihl*, allegedly defamatory comments remained on the blog website for 9 days before the moderator removed them immediately after receiving the complaint. In both cases, the ECtHR did not find the comments unlawful. Nor did it apply the *Delfi* Moderation Standard. However, the ECtHR noticed that the standard could be applicable if the comments in question were clearly unlawful (*Pihl*, para. 36). In *Jeziar*, the ECtHR found the comments unlawful but decided that the blogger could not be held liable because he had removed the comments immediately after publication. Thus, in *Pihl* and *Jeziar*, the ECtHR indirectly supported the *Delfi* Moderation Standard for blogs run by nonprofits or private persons.

In *Sanchez* (para. 98), the ECtHR directly applied the Standard and decided that the owner of the Facebook account was liable for not removing unlawful comments. The owner of the account made his Facebook wall publicly available and empowered any of his Facebook friends to post comments on it. Two of them posted unlawful comments. One of the comments was removed by its author within 24 h; the other one was removed by the account holder in 3 months. The ECtHR found it justifiable to hold the account holder guilty and to place **special monitoring obligations** on him (*Sanchez*, paras. 18, 93, 99, 100). However, the ECtHR clarified that the requirement to remove unlawful comments faster than within 24 h after posting was "excessive and impracticable" (para. 96). Moreover, as established earlier in *Pihl* (para. 31) and *Jeziar* (para. 58), monitoring obligations could not include the premonitoring of comments.

As a summary of the third situation, the total postmoderation following the *Delfi* Moderation Standard was necessary for social media account holders to avoid liability for clearly unlawful comments. Most likely, the Standard should apply to bloggers as well.

3.2 | Models of information production/ presumption and weak signals in ECtHR case law

The first group of decisions concerns commenting on articles published by internet portals. Figure 1 depicts this situation. Prosumers post comments in A-Sector comment sections that are connected to and based on the article/opinion published by B-Sector portals. These two parts are coupled and controlled by the portal on its platform.

According to the ECtHR, the portal has duties and responsibilities to review all comments to identify clearly unlawful ones and to disable access to them without delay after publication. This *Delfi* Moderation Standard presents a visible signal of changing moderation practices. Before the standard, internet portals could base moderation on prosumers' reviews. Prosumers flagged harmful

comments to notify the B-Sector moderator, who made the final moderation decision. Therefore, from the perspective of balancing the freedom to prosume and control over it, balancing was performed in favor of prosumers' freedom. Apparently, prosumers might abuse this freedom and prefer their own interests over the portal's risk of being held liable for unlawful comments. This may explain why prosumers in *Delfi* did not flag unlawful comments. *Delfi* did not try to change the balancing because the portal erroneously believed it was a hosting provider and therefore safe from liability.

However, the *Delfi* Moderation Standard signals to internet portals to use their own assessments instead of prosumers' reviews. Although prosumers can still flag comments, this action has lost its

meaning for moderation because the portal can no longer rely on it. As a result, the prosumers' review power has been handed over to the B-Sector moderator. From the ECtHR's perspective, the moderator can better identify unlawful content and remove it, thereby performing portals' duties to protect persons targeted by unlawful speech. This perspective appears to be correct because prosumers in *Delfi* have accepted harmful contributions and abused their flagging power. Moreover, the ECtHR mentions only clearly unlawful comments as triggers for moderation. Supposedly, the effect on presumption in the comment section should be limited to what is strictly necessary to combat the dissemination of unlawful speech online. However, it is unreasonable to expect the moderator not to overstep the limit by removing any comment that looks suspicious to avoid the risk of being held liable. The B-Sector moderator protects the values of industrial information production: professional journalism standards and profit-gathering market strategy. As confirmed by previous studies, media producers value their products much more than production by commentators (Ihlebaek & Krumsvik, 2015, p. 479). Therefore, abuses by a biased B-Sector moderator are highly probable and should be prevented with safeguards, for instance, through the system of addressing prosumers' complaints and restoring access to lawful comments. Furthermore, there should be safeguards against biased flaggers or flagging by mistake, even though this type of power abuse has become less threatening to the freedom to prosume because the *Delfi* Moderation Standard has turned flaggers into powerless actors. However, the ECtHR's decisions do not contain the requirement to introduce such safeguards, which signals to portals not to use the safeguards.

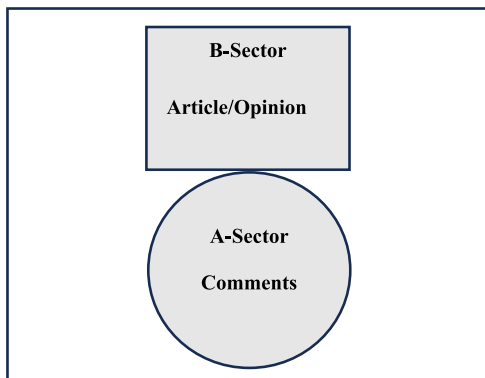


FIGURE 1 Model 1 "Information Production/Prosumption for Internet Portals on the B-Sector Platform."

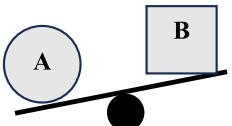
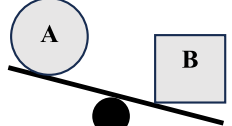
Before Delfi	After Delfi
<div style="text-align: center;">  </div> <p>Freedom Control</p> <p>Moderation Practices and Balancing:</p> <ul style="list-style-type: none"> • Moderator reacts to prosumers' abuses only if other prosumers flag them • No safeguards against moderators' mistakes • No safeguards against prosumers' abuses • No safeguards against flaggers' abuses 	<div style="text-align: center;">  </div> <p>Freedom Control</p> <p>Weak Signals of Change in Balancing:</p> <p><i>Visible Signals:</i></p> <ul style="list-style-type: none"> • <i>Delfi</i> Moderation Standard: Total postmoderation of all comments by the moderator to combat prosumers' abuses • Flagging lost its power <p><i>Hardly Visible Signals:</i></p> <ul style="list-style-type: none"> • No safeguards against moderator's mistakes • No safeguards against flaggers' abuses

FIGURE 2 Signals in the ECtHR Case Law for Model 1.

With power gathered in the hands of the B-Sector moderator and a lack of safeguards against abuses, Model 1 is likely to face enclosure movement. The weak signals and the effect on balancing in Model 1 are depicted in Figure 2.

The second group of ECtHR decisions concerns comments on the forum connected to the news portal website through a link. In contrast to the first situation, the forum website does not have any editorial content to comment on. This means that Sectors A and B are placed on two different websites/platforms. As noted by the ECtHR, comments on the forum website are not “integrated in the presentation of news” and not “a continuation of the editorial articles” (*Høiness*, para. 71). Nevertheless, the ECtHR’s conclusion does not affect the fact that presumption is based on B-Sector news articles and runs on the platform provided and controlled by the B-Sector portal. The model for this type of information production/prosumption is depicted in Figure 3.

The “trick” with two websites instead of one has helped *Hegnar Online* not only to receive the status of a hosting provider but also to maintain the connection between Sector A and Sector B. Furthermore, because the case of *Hegnar Online* does not contain the requirement to apply the Delfi Moderation Standard, it signals following the same moderation practices to balance freedom and control. This balance relies on both prosumer reviews and

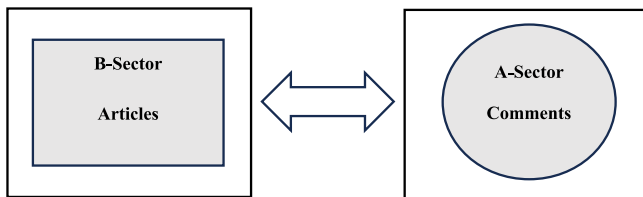


FIGURE 3 Model 2 “Information Production/Prosumption for Internet Portals with Comments on a Separate Website”.

assessments of B-Sector moderators. Thus, the balancing in the second situation is not biased, either in favor of prosumers or the B-Sector moderator. However, *Hegnar Online*, as well as the first group of decisions, does not contain requirements to introduce safeguards necessary to address possible mistakes by moderators or abuses by prosumers and flaggers. The absence of such requirements signals to platform providers like *Hegnar* not to use safeguards, which leaves Model 2 susceptible to enclosure movement. The weak signals and the effect on balancing are depicted in Figure 4.

The third group of decisions addresses commenting on blogging and social media platforms. In this situation, the providers of the platforms present both Sector B (*Pihl* and *Sanchez*) and Sector A economies (*Jezior*). In *Pihl*, the blogging platform is run by a nonprofit organization that hosts blog postings and comments. In *Sanchez*, Facebook hosts prosumers’ accounts and comments. The model for this situation is depicted in Figure 5.

In *Jezior*, not only is the content to comment on and comments produced by prosumers, but the platform itself is also run by an A-Sector prosumer. Consequently, the model is different and is depicted in Figure 6.

For both types of Model 3, it can be assumed that the A-Sector blogger or account holder can, as prosumers, agree with prosumer-commentators on how to balance freedom and control on terms that everyone can accept. They can create a group of like-minded peers to produce for their communities. Building on *Zittrain*, the presumption in this situation is based on a set of shared values: the procrastination principle and the trust-your-neighbor approach. Control over commenting is shared between the blogger or account holder and the commentators. The account holder/blogger possesses full power and can remove harmful contributions. However, commentators can also have limited power to delete their contributions. The commentators and the account holder/blogger could also agree on safeguards to restore access to comments removed by mistake or as a result of

Before Delfi	After Delfi
<p>Freedom Control</p> <p>Moderation Practices and Balancing:</p> <ul style="list-style-type: none"> • Moderator reacts to prosumers’ abuses • Moderator reacts to flaggers’ abuses • No safeguards against moderators’ mistakes, flaggers’, and prosumers’ abuses 	<p>Freedom Control</p> <p>Weak Signals of Change in Balancing:</p> <p><i>Hardly Visible Signals:</i></p> <ul style="list-style-type: none"> • No Delfi Moderation Standard • No safeguards against moderators’ mistakes, flaggers’, and prosumers’ abuses

FIGURE 4 Signals in the ECtHR Case Law for Model 2.

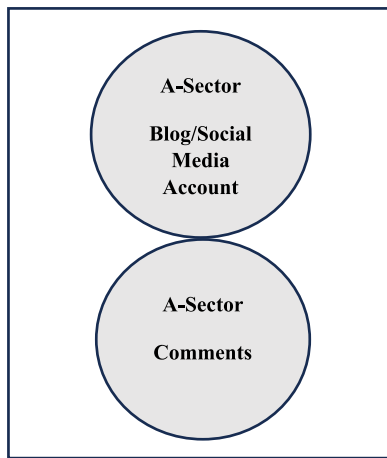


FIGURE 5 Model 3.1 “Information Production/Prosumption Placed on B-Sector Blogging/Social Media Platforms.”

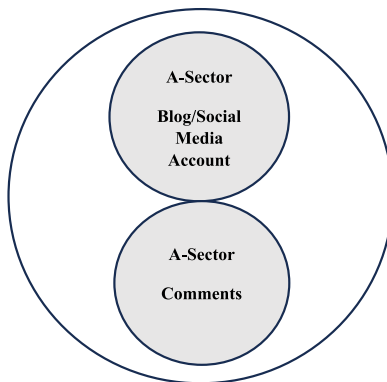


FIGURE 6 Model 3.2 “Information Prosumption Placed on an A-Sector Blogging Platform.”

abuse by the moderator, thereby preventing enclosure movement. It can also be assumed that the A-Sector blogger or account holder can value prosumer-generated content higher than the B-Sector moderator and, therefore, can be interested in keeping lawful comments, even if they appear to be offensive. For instance, in *Pihl*, the B-Sector moderator removed the lawful comments as soon as he was notified about them. In contrast, in *Sanchez*, the A-Sector moderator keeps the comments even after notification because he believes, although erroneously, that they are lawful.

However, following the ECtHR, the blogger or account holder possesses special monitoring obligations (*Sanchez*, para. 100) to control and moderate comments to disable access to clearly unlawful comments without delay after publication (the Delfi Moderation Standard). Thus, it signals to the blogger or account holder to change the balance by limiting the freedom to prosume comments. Similar to Models 1 and 2, the decisions contain no requirement to introduce safeguards against abuses in Model 3. Thus, the problem of an upcoming enclosure movement has not been solved for this model. The weak signals and effect on balancing are depicted in Figure 7.

4 | COMMENTATORS AS PROSUMERS IN LIGHT OF THE DSA

4.1 | The Digital Services Act

The DSA has placed due diligence obligations on hosting providers to combat illegal comments. However, due diligence obligations consist inter alia of protecting freedom of expression. Article 3 (i) requires providers to act

“in an objective, nondiscriminatory and proportionate manner, with due regard to the rights and legitimate interests of all parties involved, and providing the necessary safeguards against unjustified removal of legal content.”

DSA addresses the providers of online platforms as a special kind of hosting provider. In contrast to the latter, online platforms, here according to Recital 13, not only store user-generated content but also disseminate this content to the public unless this service is a minor one and can be used separately from the principal service. Recital's provisions distinguish between the publishing of comments on the website of an online newspaper and on the platform of social media. Recital says that running a comment section could be “merely a minor and purely ancillary feature that is intrinsically linked to another service,” that is, the publication of news under the editorial responsibility of the publisher. If commenting on news clearly depends on this principal service and “cannot, for objective technical reasons, be used without that other or principal service,” the online newspaper websites cannot be regarded as an online platform. Recital continues by emphasizing that, in contrast to storing comments on articles, the storage of comments in a social media network could be the principal service. The DSA uses this important distinction to impose additional obligations only on providers of online platforms.

Regarding **general due diligence obligations**, both hosting providers and online platforms shall apply restrictions on user-generated content in a proportionate manner and with due regard to the fundamental right to freedom of expression as well as freedom and pluralism of the media (DSA, Article 14.4). Another general obligation is to make publicly available reports on content moderation (Article 15). Both hosting providers and online platforms shall use notice and action mechanisms to obtain notifications about allegedly illegal content and, here based on them, remove or disable access to the flagged content (Article 16).

As a general safeguard against abuse by flaggers, Recital 50 highlights that notifications should be “sufficiently precise and adequately substantiated” to enable the hosting provider to make “an informed and diligent decision, compatible with the freedom of expression.” For instance, the flagger shall not just flag a comment, but also explain why this content is assessed as illegal (Article 16.2(a)). As a general safeguard against abuse by the moderator, Article 17 requires them to send the author of the moderated content a

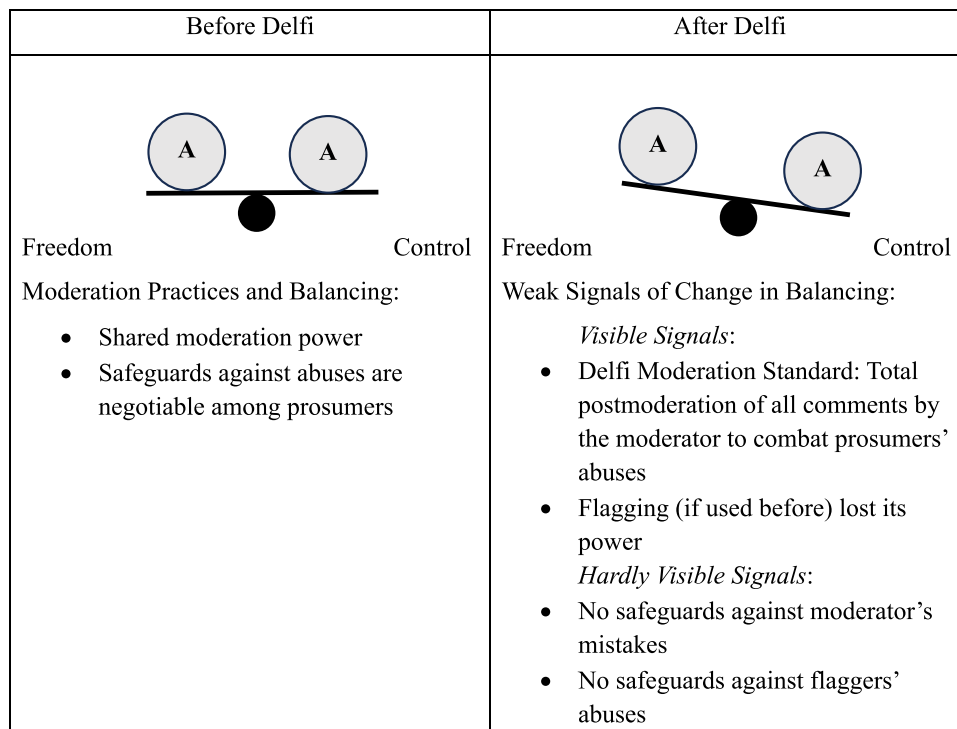


FIGURE 7 Signals in the ECtHR Case Law for Model 3.1 and Model 3.2.

statement of reasons to clearly explain the grounds of the moderation decision and the possibilities of redress. I refer to these two, provided by Articles 16 and 17, as a **short list** to highlight that, in contrast to hosting providers, online platforms have a longer list of safeguards against abuse.

Regarding **additional obligations** tailored specifically to online platforms, Article 20 requires platforms to use the internal complaint-handling system to address complaints about the moderator's abuses. As another additional safeguard, users who are unsatisfied with the review by the platform can turn to an independent and certified out-of-court dispute settlement body (Article 21). As an additional safeguard against abuse by flaggers, online platforms must use only certified trusted flaggers who act within a designated area of expertise (Article 22). Moreover, the DSA prescribes safeguards against user abuse. Following Article 23, in the case of frequent posting of manifestly illegal content, the online platform can suspend the provision of the service for a reasonable period after issuing a prior warning. On the other hand, flaggers who frequently submit manifestly unfounded notices, and those users who frequently send manifestly unfounded complaints, can also face suspension. I refer to these four safeguards as additional safeguards. In combination with a short list of safeguards, they give the **full list** of safeguards against the misuse of power not only by the moderator (the provider and the flagger) but also by the prosumer.

Both hosting providers and online platforms can avail themselves of the exemption from liability for illegal comments if, upon obtaining actual knowledge or awareness of such content, they act expeditiously to remove or disable access to that content (Article 6).

However, as already mentioned, these actions should not breach the fundamental rights of commentators to freedom of expression.

4.2 | Models and weak signals in the DSA

The effect of the DSA on prosumers depends on the type of service provider that offers a site for commenting. As explained in the previous section, general due diligence obligations are placed both on hosting providers and online platforms. Moreover, both hosting providers and platforms must implement notice and action mechanisms and send statements of reasons to users. However, only the providers of online platforms have the additional obligations, such as the internal complaint-handling system, out-of-court dispute settlement, trusted flaggers, and suspension of the service, have additional obligations.

The DSA affects Model 1 if the type of provider can be classified as an online platform (to impose the additional obligation) or, at least, a hosting provider (to impose the general obligations). To be classified as an online platform from the DSA perspective, the online news portal should not only store comments, but also disseminate them to the public. Furthermore, storage and dissemination should be the principal service. However, the principal service of the portal is the publication of news. Comments appear, if at all, only in relation to news articles. Therefore, the portal as well as a newspaper website from the example in Recital 13 should be classified as a hosting provider rather than an online platform. If this interpretation is correct, the B-Sector moderator possesses the general due diligence

obligations, and the freedom to comment has support with the shortlist of safeguards.

As a general requirement, moderation should be performed with respect to prosumers' freedom of expression. Flagging must be backed up with an explanation of why the comment is illegal. If flagging leads to moderation, the B-Sector moderator must inform the affected prosumer and explain the reason. Moreover, the moderator must also send the statement of reason to the affected prosumer if the moderation has been done on the provider's own initiative under the Delfi Moderation Standard. Taken together, these findings indicate that DSA signals change balance in favor of freedom. However, the effect is moderate because the DSA lifts

additional obligations from the hosting provider. Figure 8 depicts the effect of the DSA on Model 1.

Importantly, the effect on Model 1 can increase considering that the Delfi Moderation Standard conflicts with the positioning of online portals as hosting providers. Hosting providers cannot be required to monitor all comments to filter out illegal comments (DSA, Article 8). This means that total follow-up moderation under the Delfi Standard cannot be imposed. If the standard is to be quashed, prosumers can regain their power as reviewers. Thus, the signal sent by the DSA goes in the opposite direction to the signal sent by the ECtHR, which confuses the analysis. The absence of a new, clear ruling to solve the conflict of norms signals uncertainty regarding how much control the B-Sector moderator should employ.

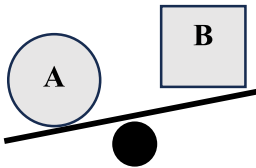
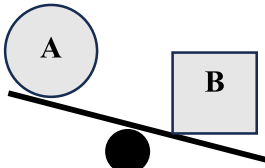
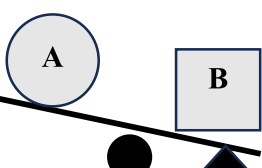
Before Delfi	After Delfi	After DSA
 <p>Freedom Control</p> <p>Moderation Practices and Balancing:</p> <ul style="list-style-type: none"> • Moderator reacts to prosumers' abuses only if other prosumers flag them • No safeguards against moderators' mistakes • No safeguards against prosumers' abuses • No safeguards against flaggers' abuses 	 <p>Freedom Control</p> <p>Weak Signals about Change in Balancing:</p> <p><i>Visible Signals:</i></p> <ul style="list-style-type: none"> • Delfi Moderation Standard: Total postmoderation of all comments by the moderator to combat prosumers' abuses • Flagging lost its power <p><i>Hardly Visible Signals:</i></p> <ul style="list-style-type: none"> • No safeguards against moderator's mistakes • No safeguards against flaggers' abuses 	 <p>Freedom Control</p> <p>Weak Signals about Change in Balancing:</p> <p><i>Visible Signals:</i></p> <ul style="list-style-type: none"> • General due diligence obligations: <ul style="list-style-type: none"> - regard for freedom of expression (Art. 14) - transparency reports (Art. 15) • Short list of safeguards against moderator's mistakes and flaggers' abuses: <ul style="list-style-type: none"> - notice and action mechanism (Art. 16) - statement of reasons (Art. 17) <p><i>Hardly Visible Signals:</i></p> <ul style="list-style-type: none"> • Delfi Moderation Standard is challenged • No safeguards against prosumer's abuses

FIGURE 8 DSA Signals for Model 1.

In contrast to Model 1, which is applicable to online news portals with comment sections on the same website as the articles, Model 2 is applicable to portals with comment sections on a separate website. The separation means the separation of the services: the publication of news as a principal service and the storage/dissemination of the comments to the public as a principal service. Therefore, the portal in Model 2 should be seen as an online platform rather than a hosting provider. If this interpretation is correct, it leads to placing not only the general but also the additional obligations on the B-Sector provider. The B-Sector moderator must not only inform the affected prosumer about moderation decisions and their reasons, but also process complaints about those decisions in a timely, non-discriminatory, diligent, and nonarbitrary manner. If the review leads

to a change in the initial moderation decision in favor of the prosumer, the affected comment must be restored. Moreover, prosumers who are unsatisfied with the outcomes of internal complaint-handling mechanisms can use the out-of-court option. The number of wrong moderation decisions can be decreased by using moderation based on notices sent by certified trusted flaggers. These trusted flaggers can face the suspension or revocation of certificates if flaggers submit a significant number of insufficiently precise, inaccurate, or inadequately substantiated notices. Moreover, the DSA sets out safeguards not only from abuse by moderators and flaggers but also by prosumers. Those who, despite a prior warning, frequently submit manifestly illegal content can face the suspension of the provision of the service for a reasonable time. The same rule

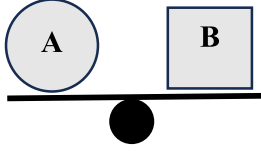
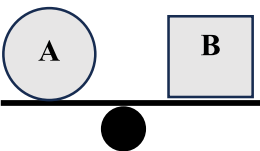
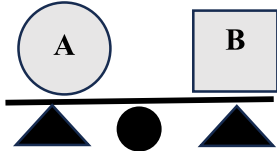
Before Delfi	After Delfi	After DSA
		
<p>Freedom Control</p> <p>Moderation Practices and Balancing:</p> <ul style="list-style-type: none"> • Moderator reacts to prosumers' abuses • Moderator reacts to flaggers' abuses • No safeguards against moderator's mistakes and prosumer's abuses 	<p>Freedom Control</p> <p>Weak Signals of Change in Balancing: <i>Hardly Visible Signals:</i></p> <ul style="list-style-type: none"> • No Delfi moderation • No safeguards against moderator's mistakes, flagger's abuses, and prosumer's abuses 	<p>Freedom Control</p> <p>Weak Signals of Change in Balancing:</p> <p><i>Visible Signals:</i></p> <ul style="list-style-type: none"> • No Delfi moderation (Art. 8) • General Due Diligence Obligations: <ul style="list-style-type: none"> - regard to freedom of expression (Art. 14) - transparency reports (Art. 15) • Short list of safeguards: <ul style="list-style-type: none"> - notice and action mechanism (Art. 16) - statement of reasons (Art. 17) • Additional safeguards: <ul style="list-style-type: none"> - internal complaint-handling mechanism (Art. 20) - out-of-court dispute settlement (Art. 21) - trusted flaggers (Art. 22) - measures against misuse by flaggers and prosumers (Art. 23)

FIGURE 9 DSA Signals for Model 2.

standard, there is no conflict with the DSA. However, at the DSA stage, this signal is strengthened by the transition from the hardly visible to the visible category.

To understand the effect of the DSA on Model 3, it should be kept in mind that Model 3 includes two service providers. The first is the holder of the account or a blogger. The second is the provider of an online platform. The latter can come from either Sector B (Model 3.1) or Sector A (Model 3.2). The DSA regulates only services provided for remuneration (Recital 5), which leaves A-Sector providers who do not act in the market out of its scope. As a result, the DSA sends signals only to B-Sector moderators and can only affect Model 3.1. This model depicts A-Sector information prosumption (postings and comments on them) on the B-Sector platform. The DSA imposes on the B-Sector moderator (the platform) the general due diligence obligations and the full list of safeguards. It signals to the B-Sector moderator to change the balancing in a manner that can prevent enclosure movement by protecting the comments prosumption from abuses both by prosumers and the moderator. Thus, the effect on the balancing for Model 3.1 (Figure 10) can be seen only at the level of B-Sector moderation. The level of A-Sector moderation is left untouched, which unbalances Model 3.1 because the A-Sector moderator has to continue using the Delfi Moderation Standard.

5 | DISCUSSION

The results demonstrate that the balancing in all models changed throughout the three stages. However, each model has its own direction of change.

In Model 1, the balancing in favor of the freedom to prosume (before Delfi) changes in favor of moderators (after Delfi) because the Delfi Moderation Standard puts weight on the B-Sector's control power. At the DSA stage, the freedom to prosume receives support from the short list of safeguards against abuses provided by the B-Sector moderators. The DSA may provide an additional drive to develop a balance toward more freedom to prosume. However, the uncertainty regarding the interpretation of Recital 13, that is, whether the news portal is a hosting provider, gives a confusing signal about the application of the Delfi Moderation Standard. If the ECtHR's position prevails and the portal is a publisher of comments rather than its host, the standard should apply, which is an obstacle to freedom. If legal experts agree with my interpretation of Recital 13, the standard should not apply, which directs balancing toward freedom. However, in any case, the short list of safeguards may not be enough to prevent enclosure movement. Thus, I assume that not only uncertainty but also a limited number of safeguards challenge the future of the rise of prosumer-commentator.

The development of the balancing in Model 2 appears to have a stable direction toward the freedom to prosume. Balance did not significantly change during these stages. The DSA adds the full list of safeguards that can address abuses both by A-Sector prosumers and B-Sector moderators and, therefore, can prevent enclosure movement. Thus, I assume that the rise of the prosumer-commentator may become a trend for Model 2.

The development of balancing in Model 3.1 occurs at two levels. The before Delfi and after Delfi stages include only balancing inside the A-Sector economy between prosumers-commentators and prosumers-moderators. The DSA has left this balancing untouched because of its focus on the B-Sector economy. At the A-Sector level, balancing develops in favor of control because of the Delfi Moderation Standard introduced in the second stage. At the B-Sector level, the full list of safeguards, added by the DSA, supports unbiased balancing. Furthermore, Article 8 of the DSA prevents the application of the Delfi Moderation Standard by B-Sector moderators of online platforms. At the same time, as already mentioned, A-Sector moderators must continue to follow the standard. Thus, enclosure movement can be prevented only at the B-Sector moderation level, which unbalances the entire model and challenges the rise of the prosumer-commentator.

These assumptions are my subjective interpretations, hence being affected by my legal background. Nevertheless, the use of the future sign framework allows me to separate the interpretation dimension from the objective weak signals. Following Hiltunen (2013, pp. 70–71), my interpretation presents so-called secondary signals about primary weak signals—legal norms (or the absence of them). I invite other observers to revisit the detected weak signals and look for new signals. Importantly, this revision should come not only from a legal perspective to avoid paradigm blindness (Mannermaa, 2004, pp. 22–23). For instance, the Delphi method could be used to study how moderators and platform/news portal managers perceive the legal requirements discussed. Moreover, the models should be studied further. In particular, a realistic viewpoint is necessary to understand which of the models will obtain the most popularity in practice to determine whether the rise of the prosumer-commentator may become a popular trend. If commenting in forum sections linked to news articles (Model 2, which is the friendliest model for prosumer-commentators) is not as popular among commentators as commenting on social media (Model 3.1), it will question my theoretical assumptions about the future of prosumer-commentator.

6 | CONCLUSION

The present article presents pioneering research on commentary, moderation, and online platform liability rules from the rise of prosumer-commentator perspective. This perspective is part of the rise of the prosumer megatrend. Toffler anticipated the latter as inevitable for the information society. In the digital age, following Benkler, internet users have received tools to compete successfully with the market economy. However, the obstacles discussed by Zittrain can lead to enclosure movement that can choke the potential of A-Sector prosumption and consequently challenge the rise of prosumer. The current article contributes to this theoretical framework by focusing on commentators as prosumers. Commentators' freedom to prosume lawful comments is a prerequisite of the rise of the trend of the prosumer-commentator and part of commentators' right to freedom of expression. This freedom can be

endangered by overcontrol from B-Sector moderators who intervene in A-Sector comment presumption to moderate allegedly unlawful comments. To understand these tensions, their effects on freedom of expression, the current stage, and the future of prosumer-commentators, the present article has created three theoretical models of information production/prosumption and traced their developments. I used the ECtHR case law as well as the DSA to detect weak signals that can lead the models to change the balance between the right to prosume comments and control over it. Balancing and, therefore, the protection of freedom to prosume comments on online news portals (Model 1) can be improved by solving the conflict between the legal rules. Moreover, to balance Model 1, the DSA should be revisited to add the additional safeguards to the short list of safeguards. The freedom to prosume comments on online forums linked to the news website (Model 2) appears to be in balance with the control by moderators. The same conclusion is valid for freedom to prosume comments on social media (Model 3.1) but only for one layer of the model in which B-Sector moderators (platform moderators) control A-Sector comment presumption. The other layer in which A-Sector moderators (platform users) control comment presumption is unbalanced.

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DATA AVAILABILITY STATEMENT

Data sharing is not applicable to this article as no new data were created or analyzed in this study.

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