

TEAM 309R

**2013-14 SOUTH EAST EUROPE REGIONAL ROUNDS
PRICE MEDIA LAW MOOT COURT COMPETITION**

THON SANG AND CENTIPLEX

(Applicants)

v

REPUBLIC OF MHUGAN

(Respondent)

MEMORIAL FOR RESPONDENT

WORDS 4587

TABLE OF CONTENTS

A. THE DAMAGES IMPOSED ON SANG FOR DISSEMINATING THE RECORDED VOICEMAIL ARE CONSISTENT WITH UDHR	1
I. The damages imposed on Sang are a justified restriction under Article 29(2)	1
i. The restriction is prescribed by law	2
ii. The restriction pursues a legitimate aim	3
iii. The restriction is necessary in a democratic society	3
a) The restriction corresponds to a pressing social need	4
b) The damages are proportionate to the legitimate aim	6
B. THE SUBPOENA TO SANG TO DISCLOSE THE SOURCE OF THE RECORDED VOICEMAIL IS CONSISTENT WITH UDHR.....	7
I. The subpoena is consistent with Article 19.....	7
II. The subpoena is a justified restriction under Article 29(2)	9
i. The restriction is prescribed by law	9
ii. The restriction pursues a legitimate aim	10
iii. The restriction is necessary in a democratic society	11
C. THE SEARCH ENGINE ORDER AGAINST CENTIPLEX IS CONSISTENT WITH UDHR.....	13
I. The search engine order against Centiplex does not constitute a breach of Article 19	14
i. The search engine order does not violate the right to freedom of expression of Centiplex	14

ii.	The search engine order does not restrict the freedom of expression of Centiplex’s users	15
II.	The order is a justified restriction under Article 29(2)	15
i.	The restriction is prescribed by law	16
ii.	The restriction pursues a legitimate aim	16
iii.	The restriction is necessary in a democratic society	17
D.	SEARCH PRIVACY ACT IS CONSISTENT WITH UDHR	19
I.	The restrictions are justified under Article 29(2)	19
i.	The restriction is prescribed by law	19
ii.	The restriction pursues a legitimate aim	20
iii.	The restriction is necessary in a democratic society	21

LIST OF ABBREVIATIONS

¶	Paragraph
ACHR	American Convention on Human Rights
AfCHR	African Charter on Human and Peoples' Rights
APEC	Asia-Pacific Economic Cooperation
App no	Application Number
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
EWHC	High Court of Justice of England and Wales
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
IP	Internet Protocol
MHD	Mhuganian Dollar
No.	Number
OECD	Organisation for Economic Co-operation and Development
SPA	Search Privacy Act
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNGA	General Assembly of the United Nations
US	United States of America
USD	United States Dollar
WA	Wiretap Act

LIST OF AUTHORITIES

(by order of appearance)

I. INTERNATIONAL AND REGIONAL

DOCUMENTS

1. Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) 1
2. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) 1
3. Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) 1
4. American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR) 1
5. African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (AfCHR) 1

6. Council of Europe Recommendation 1950 (2011): The protection of journalists' sources	8
7. Joint declaration on freedom of expression and the internet The United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information	11
8. Council of Europe: Committee of Ministers, Recommendation CM/Rec (2012) 3 of the Committee of Ministers to member States on the protection of human rights with regard to search engine, 4 April 2012, < https://wcd.coe.int/ViewDoc.jsp?id=1929429 > accessed 3 November 2013	18
9. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection	20

of individuals with regard to the processing of

personal data and on the free movement of such

data. 1995 O.J. (L 281) 31

10. The Siracusa Principles on the Limitation and 20

Derogation Provisions in the International Covenant

on Civil and Political Rights, 28 September 1984, UN

Doc E/CN.4/1985/4

11. Convention for Protection of Individuals with Regard 20

to Automatic Processing of Personal Data, Council of

Europe Treaties No. 108 (January 28, 1981)

12. Council of Europe Committee of Ministers Recommendation 21

No. R (99) 5 to member states for the protection of privacy

on the Internet, 23 February 1993

II. CASES

a. European Court of Human Rights

1. Worm v Austria App no 22714/93 (ECtHR, 29 August 1997) 1

2. The Sunday Times v United Kingdom App no 6538/74 1, 2, 21

(ECtHR, 26 April 1979)

3. Chauvy and others v France App no 64915/01 2, 3

(ECtHR, 29 September 2004)

4. Rekvényi v Hungary App no 25390/94 (ECtHR, 20 May 1999) 2

5. Kruslin v France App no 11801/85 (ECtHR, 24 April 1990) 2

6. Huvig v France App no 11105/84 (ECtHR, 24 April 1990) 2

7. Pfeifer v Austria App no 12556/03 (ECtHR, 15 November 2007) 3, 10

8. X and Y v the Netherlands App no 8978/80 (ECtHR, 26 March 1985) 3, 17

9. Cumpăna and Mazăre v Romania App no 33348/96 (ECtHR, 17 December 2004) 3

10. News Verlags GmbH & Co Kg v Austria App no 31457/96 (ECtHR, 11 January 2000) 4

11. S and Marper v UK App nos 30562/04 and 30566/04 (ECtHR, 4 December 2008) 4

12. Z v Finland App no 22009/93 (ECtHR, 25 February 1997) 4

13. Chassagnou and others v France App nos 25088/94, 28331/95 and 28443/95 (ECtHR, 29 April 1999) 4

14. Von Hannover v Germany App nos 40660/08 and 60641/08 (ECtHR, 7 February 2012) 4, 5, 10, 12

15. Schussel v Austria App no 42409/98 (ECtHR, 4

21 February 2002)	
16. Petrina v Romania App no 78060/01 (ECtHR, 6 April 2009)	4
17. Leempoel & S A ED Ciné Revue v Belgium App no 64772/01 (ECtHR, 9 November 2006)	4
18. Standard Verlags GmbH v Austria (No 2) App no 21277/05 (ECtHR, 4 June 2009)	4, 5, 12
19. Halford v UK App no 20605/92 (ECtHR, 25 June 1997)	4, 15
20. Hachette Filipacchi Associés v France App no 12268/03 (ECtHR, 23 October 2009)	4, 5, 6
21. Axel Springer v Germany App no 39954/08 (ECtHR, 7 February 2012)	4
22. Delfi As v Estonia App no 64569/09 (ECtHR, 10 October 2013)	4, 6, 17
23. MGN Limited v UK App no 39401/04 (ECtHR 18 April 2011)	5
24. Palomo Sanchez and others v Spain App nos 28955/06, 28957/06, 28959/06 and 28964/06 (ECtHR, 12 September 2011)	5
25. Gourguenidze v Georgia App no 71678/01 (ECtHR, 17 October 2006)	5, 6
26. Karhuvaara and Iltalehti v Finland App no 53678/00 (ECtHR, 16 February 2005)	5
27. Reklos and Davourlis v Greece App no 1234/05	6

(ECtHR, 15 April 2009)	
28. Markt Intern Verlag GmbH and Klaus Beerman v Germany App no 10572/83 (ECtHR, 20 November 1989)	6
29. Pedersen and Baadsgaard v Denmark App no 49017/99 (ECtHR, 19 June 2003)	9, 12
30. Funke v France App no 10828/84 (ECtHR, 25 February 1993)	11
31. Michaud v France App no 12323/11 (ECtHR, 6 December 2012)	15
32. Amann v Switzerland App no 27798/95 (ECtHR, 16 February 2000)	15
33. Copland v United Kingdom App no 62617/00 (ECtHR, 3 April 2007)	15
34. Frerot v France App no 70204/01 (ECtHR, 12 June 2007)	15
35. Armonienė v Lithuania App no 36919/02 (ECtHR, 25 November 2008)	17
36. McVicar v United Kingdom App no 46311/99 (ECtHR, 7 May 2002)	17
37. Handyside v United Kingdom App no 5493/72 (ECtHR, 7 December 1976)	21
38. The Observer and The Guardian v United Kingdom App no 13585/88 (ECtHR, 26 November 1991)	21

b. US cases

1. State of New Jersey v Kenneth Riley 988 A 2d 1252 (2009) 412 NJ Super 162	2
2. Katz v United States 389 US 347 (1967)	4
3. United States v Jacobsen 466 US 109 (1984)	4
4. California v Ciraolo 476 US 207 (1986)	4
5. Rogers v Wood 910 F 2d 444 (7th Cir 1990) reh Den 914 F 2d 26	7, 15
6. Menda Biton v Menda 812 F Supp 283 (D P R 1993)	7
7. Dorris v Absher 959 F Supp 853 (M D Tenn 1997)	7
8. In re January 11, 2013 Subpoena by the Grand Jury of Union Conty, New Jersey, Prosecutor's Docker No 13-0001	8
9. Too Much Media, LLC v Hale 20 A 3d 364 (2011) 206 NJ 209	8
10. Obsidian Finance Group, LLC v Cox 812 F Supp 2d 1220 (2011)	8
11. New York Times Co v Sullivan 376 US 254 (1964)	12
12. Leach v Byram 68 F Supp 1072 (D Minn 1999)	15
13. Shelton v Tucker 364 US 479 (1960)	18
14. Mullins v Department ofCommerce 2007 WL 1302152 (Fed Cir 2007)	20
15. Remsberg v DocuSearch, Inc 816 A 2d 1001 (NH 2003)	20
16. State of New Jersey v Shirley Reid 945 A 2d 26 (2008) 194 NJ 386	20
17. Gonzales v Google No CV 06-8006MISC JW (SJ 2006)	21

c. Inter – American Court on Human Rights

1. Claude-Reyes and others v Chile Petition no 12108 (IACtHR, 19 September 2006)	1, 19
2. Tristán Donoso v Panamá Series C no 193 (IACtHR, 27 January 2009)	15
3. Erscher et al v Brazil Series C no 200 (IACtHR, July 6 2009)	15

d. UN Human Rights Committee cases

1. Vladimir Petrovich Laptsevich v Belarus Communication no 780/1997 UN Doc CCPR/C/68/D/780/1997 (2000)	1, 19
--	-------

e. European Court of Justice cases

1. Commission v The Bavarian Lager Co Ltd, Case T-309/97 [1999] ECR II-3217	20
2. Case C 70/10 Scarlet v Sabam [2011] OJ C 113	20

f. Canada cases

1. R v Oakes, [1986] 1 SCR 103	3
2. Ross v Canada, CPR/C/70/D/736/1997	11

g. United Kingdom cases

1. John v MGN [1997] QB 586	5, 8
2. Metropolitan International Schools v Google Inc [2009] EWHC 1765	14

- | | |
|--|--------|
| 3. Douglas v Hello Ltd [2005] EWCA Civ 595 | 17, 20 |
| 4. Campbell v MGN[2004] UKHL 22 | |
| 5. HRH The Prince of Wales v Associated Newspapers Ltd [2006] EWHC 11 (Ch) | 20 |

h. Australian cases

- | | |
|--|----|
| 1. Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd (2001) 208 CLR 199 High Court of Australia | 11 |
|--|----|

i. New Zealand cases

- | | |
|--|----|
| 1. Hosking v Runting & Others; [2004] NZCA 34; [2003] 3 NZLR 385 | 20 |
|--|----|

III. BOOKS AND ACADEMIC ARTICLES

- | | |
|---|--------|
| 1. Tugendhat and Christie, The Law of Privacy and the Media (2nd edn, OUP 2011) | 10, 21 |
| 2. N Moreham, 'The Protection of Privacy in English Common Law: a doctrinal and theoretical analysis' (2005) 121 Law Quarterly Review | 10 |
| 3. James Rachels, 'Why Privacy is Important' (1975) 4 (4) Philosophy & Public Affairs | 10 |

4. Daniel A Farber, 'Free Speech Without Romance: Public Choice and the First Amendment' (1991)105
Harvard Law Review 554 13
5. Oren Bracha, Frank Pasquale, 'Federal Search Commission? Access, Fairness and Accountability in the Law of Search' (Cornell Law Review, September 2008) 14
6. Chitika Insights: 'The Value of Google Result Positioning' (*Chitika Online Advertising Network*, 2013) 18
<<http://cdn2.hubspot.net/hub/239330/file-61331237-pdf/ChitikaInsights-ValueofGoogleResultsPositioning.pdf>> accessed by 20 October 2013
7. Omer Tene, 'What Google Knows: Privacy and Internet Search Engines' 2008(4) Utah Law Review 20

IV. MISCELLANEOUS

1. Toby Mendel, 'Restricting Freedom of Expression: Standards and Principles Background Paper for Meetings Hosted by the UN Special Rapporteur on Freedom of Opinion and Expression' (Centre for Law and Democracy) <<http://www.law-democracy.org/wp-content/uploads/2010/07/10.03.Paper-on-Restrictions-on-FOE.pdf>> accessed 10 November 2012 1, 19
2. Regis Bismuth, 'Standards of Conduct for Journalists under Europe's First Amendment' (June, 11 2010) 10

8(2) First Amendment Law Review 283

<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1623717>

accessed 11 October 2013

3. Global Internet Liberty Campaign : Privacy and Human 11

Rights : An International Survey of Privacy Laws and

Practice' <<http://gilc.org/privacy/survey/intro.html>>

accessed 28 October 2013

4. David Robinson, 'Identifying John Doe: It might be 13

easier than you think' (Freedom to Tinker, 8 February 2010)

<[https://freedom-to-tinker.com/blog/dgr/identifying-john-doe-](https://freedom-to-tinker.com/blog/dgr/identifying-john-doe-it-might-be-easier-you-think/)

[it-might-be-easier-you-think/](https://freedom-to-tinker.com/blog/dgr/identifying-john-doe-it-might-be-easier-you-think/)> accessed 15 October 2013

5. Frederick Schauer, 'Fear, Risk and the First 13

Amendment: Unraveling the Chilling Effect'

(1978) Faculty Publications Paper 879

<<http://scholarship.law.wm.edu/facpubs/879>>

accessed 7 November 2013

STATEMENT OF RELEVANT FACTS

1. The Republic of Mhugan is a former British colony which obtained its independence in 1959 and since then has had a parliamentary form of government with the population of approximately 20 million people. The Mhuganian economy is fuelled by a combination of information technology industries, manufacturing and financial services.
2. Bansit Sangnont, also known by his stage name Rho, is a Mhuganian pop music singer-songwriter. In 2011 Rho gained international success thanks to his music video of his song „Poke Poke“ which went viral on YouTube. Since that time, Rho has performed all over the world, gaining millions of fans.
3. In 2013, rumours that he has been physically and/or emotionally abusive to his wife started to spread around. Rho denied all the allegations.

COOPERATION BETWEEN CENTIPLEX AND DEXIAN

4. Centiplex Corporation, based in Mhugan, is the leading Internet services company in Mhugan. Centiplex, among other services, also runs an Internet search engine and a blogging platform. As a result of good business and marketing methods, Centiplex has a virtual monopoly in Mhugan for the services it provides.
5. Dexian, a United States based company, is a global information services company, whose business consists mainly of collecting, analyzing, and disseminating information relating to individuals. The methods Dexian is using in dealing with individual records are not familiar to the public since the company finds such information to be a trade secret.
6. Centiplex and Dexian have established a commercial relationship in which Centiplex, as Dexian’s client, buys and sells data to Dexian. On that grounds Centiplex has provided to Dexian list of search queries, indexed by the IP address of the computers the query originated

from, including the date and time of the query. The Terms of Service for Centiplex's services doesn't say anything about Centiplex's use or disclosure of data that it collects from its search engine.

SANG BLOGGING ABOUT RHO AND ACQUIRING THE RECORDED VOICEMAIL

7. Sang works as a programmer at a software development company in Mhugan. He is also an active blogger, who posts news and his own comments about celebrities on his blog on the Centiplex's platform. On his blog, he describes himself as a "celebrity-obsessed."

8. Centiplex's blog platform is supported with advertisements, however all the ad revenue is going only to Centiplex. Sang writes his blog posts with the information he finds on the internet and the pictures he takes outside the restaurants where celebrity people are presumed to be. He blogged about the rumours of Rho being abusive to his wife and said to the readers to boycott Rho's music if such information is true.

9. On May 1, 2013, Sang posted a recording of a voicemail in which a person, identifying himself as "Bansit", talks about his wife. Sang's source is someone who managed to obtain the mentioned voicemail. The next day, in a new post Sang wrote about Rho's web searches and how he obtained this information by buying Rho's profile from Dexian. That information further boosted popularity of Sang's blog. On May 4, 2013, Rho held the press conference with his wife by his side. In that press conference he denied ever abusing his wife. He admitted the voicemail was his, but that the content of it was misinterpreted. He also questioned the validity of web searches published on Sang's blog.

10. On May 5, 2013, Sang, in his blog post, clarified how his source came across the message. He explained that he or she entered Rho's friend Aklamit's phone number by mistake when checking the voicemail. They share the same default password which is the same for everybody. Realizing that the mailbox was not his/hers, the source downloaded the message to

his/hers computer and accessed the profile of the owner. Afterwards, the source decided to send the recording to Sang, but asking not to reveal his/hers identity.

THE WIRETAP ACT

11. Under the Wiretap Act ('WA') it is illegal to intentionally intercept or obtain unauthorized access to any telephone or electronic communications, whether in transit or in storage. Furthermore, it is illegal for any person to disseminate the contents of a telephone or electronic communications that the person knows to have been unlawfully intercepted or obtained. The WA provides for civil and criminal penalties. Among the civil penalties are statutory damages up to 1.000.000,00 MHD (1 MHD = 0,02 EUR).

12. On May 8, 2013, Rho sued Sang under the WA. He as well applied for a search engine order against the Centiplex, which the court granted. The court ruled that Sang is in violation of the WA and awarded Rho statutory damages of 400.000,00 MHD. According to the court's ruling, even if the source's initial hearing of the voicemail was accidental, subsequent downloading of the message was intentional and unauthorized.

13. In a civil suit under the WA a plaintiff can apply to the court for an order against any search engine requiring that web pages containing intercepted or illegally obtained materials do not appear on the first page of search results for any search. Both civil and criminal penalties are provided in case of violation of search engine order.

THE SUBPOENA TO SANG

14. Rho sued the source of the voicemail message and subpoenaed Sang for the identity of that person. Sang requested privilege not to reveal the source when filing a motion with the court to quash the subpoena. The court denied the motion to quash with the explanation that this privilege applies only to 'professional journalist' defined as people "who, for gain or

livelihood, are regularly engaged in the gathering, writing, or editing of news intended for a newspaper, magazine, or other professional medium that regularly disseminates news to the public.”

THE SEARCH PRIVACY ACT

15. On May 15, 2013, the Mhuganian Parliament enacted the Search Privacy Act (‘SPA’) under which it is illegal for a search engine to sell information about a person’s search queries not having that person’s consent. In the SPA “sale” is defined as a “transfer in exchange for anything of value.” Information is considered to be information about a person’s search queries if these queries are associated with any identifiers such as name, address, phone number, IP address. The SPA does not apply to any subsequent transfers of the same information after an initial transfer by the search engine. The SPA is supposed to become effective on May 1, 2014.

16. On May 20, 2013, Centiplex sued to have the SPA declared invalid under the laws and the Constitution of Mhugan. The Court held that the SPA was valid. All the rulings were appealed to the Mhugan Supreme Court. The court dismissed all of the appeals.

STATEMENT OF JURISDICTION

Following the request of the Applicants that the Universal Freedom of Expression Court, the special chamber of the Universal Court of Human Rights, reviews the issues presented below in accordance with all relevant legal materials, the state of Mhugan submits to the jurisdiction of this Honourable Court.

QUESTIONS PRESENTED

- A.** Whether the damages imposed on Sang for disseminating the recorded voicemail are consistent with the UDHR?
- B.** Whether the subpoena to Sang to disclose source of the recorded voicemail is consistent with the UDHR?
- C.** Whether the order against Centiplex requiring that webpages that link to the recorded voicemail, including Sang's blog post, never appear on the first page of search results is consistent with the UDHR?
- D.** Whether the 2013 Search Privacy Act is valid under the UDHR?

SUMMARY OF ARGUMENTS

A. The damages imposed on Sang for disseminating the recorded voicemail are consistent with the UDHR. The right to freedom of expression is not absolute and therefore is subjected to the limitations under Article 29(2). Firstly, the restriction is prescribed by law. The Mhuganian law clearly stipulates the requirements for establishing liability for the dissemination of an unlawfully obtained material. Secondly, the restriction is in pursuit of a legitimate aim since Article 29(2) obliges states to protect the rights and freedoms of others. The restriction is necessary in a democratic society as it corresponds to a pressing social need and is proportionate to the legitimate aim.

B. The subpoena to Sang to disclose the source of the recorded voicemail is consistent with the right to freedom of expression. Bloggers do not qualify as professional journalists and as such do not enjoy the journalistic privilege. In any event, the subpoena is a valid limitation under Article 29(2). It satisfies the three-tiered test of legality, legitimacy and necessity. In addition, there is no chilling effect because the norm on which the subpoena was based is neither overbroad or vague.

C. The search engine order against Centiplex is consistent with the UDHR. It does not constitute a breach of Article 19. It does not restrict the freedom of expression of neither Centiplex nor its users. In any event, it is a justified restriction as it complies with the three-part test under Article 29(2). It is prescribed by law under the WA, it is in pursuit of the legitimate aim, and it is necessary in a democratic society.

D. The SPA is consistent with the provisions of the UDHR. A limitation on the disclosure of search queries provided by the SPA is a justified restriction of the right to property under Article 17. It complies with the three-part test under Article 29(2). The restriction is prescribed by law as it is made under the authority of the SPA. It pursues a legitimate aim as it protects privacy

of search engines' users. Finally, it is necessary in a democratic society since it corresponds to a pressing social need and is proportionate to the legitimate aim.

ARGUMENTS

A. THE DAMAGES IMPOSED ON SANG FOR DISSEMINATING THE RECORDED VOICEMAIL ARE CONSISTENT WITH UDHR

1. Respondent submits that the right to freedom of expression guaranteed under Article 19 is not absolute¹ and that the damages imposed on Sang for disseminating the recorded voicemail are a justified restriction under Article 29(2) [I].²

I. The damages imposed on Sang are a justified restriction under Article 29(2)

2. Respondent submits that the restriction on Sang's right to freedom of expression is justified under Article 29(2) because the restriction is prescribed by law [i], pursues a legitimate aim [ii] and is necessary in a democratic society [iii].³

¹ *Worm v Austria* App no 22714/93 (ECtHR, 29 August 1997).

² Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 19 and art 29(2); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 19; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 10; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (ACHR) art 13; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (AfCHR) art 9.

³ *The Sunday Times v UK* App no 6538/74 (ECtHR, 26 April 1979); *Claude-Reyes and others v Chile* Petition no 12108 (IACtHR, 19 September 2006); UN Human Rights Committee (Sixty-eighth Session) '*Vladimir Petrovich Laptsevich v Belarus*' (13 April 2000) UN Doc CCPR/C/68/D/780/1997; Toby Mendel, 'Restricting Freedom of Expression: Standards and Principles Background Paper for Meetings Hosted by the UN Special Rapporteur on Freedom of Opinion and Expression' (Centre for Law and Democracy) <<http://www.law-democracy.org/wp-content/uploads/2010/07/10.03.Paper-on-Restrictions-on-FOE.pdf>> accessed 1 November 2013.

i. The restriction is prescribed by law

3. As stated by the ECtHR in *The Sunday Times v UK*, a restriction is prescribed by law if it is accessible, foreseeable and precise to the degree that a reasonable person can regulate his conduct accordingly.⁴ A law is accessible if it gives the citizens an adequate indication of the legal rules applicable to a given case.⁵ Moreover, it is foreseeable if it is precise enough to enable citizens to regulate their conduct⁶ and predict the consequences of non-compliance.⁷

4. The Superior Court of New Jersey held in *State v Riley* that word authorization is defined to include permission, authority or consent to access, operate, use, obtain, take, copy, alter, damage or destroy data.⁸ Therefore, even though the initial access could have been accidental, the further downloading of the content was intentional and as such falls under the definition of authorization.

5. In the present case, the Mhuganian law is sufficiently precise and foreseeable in clearly stipulating the requirements for establishing liability for the dissemination of an unlawfully obtained voicemail.⁹ Under the WA, a person is liable if he knew that the information was unlawfully intercepted or obtained. In the present case, Sang knew that the information was illegally obtained. He stated on his blog that his source realized he had entered Aklamit's

⁴ *The Sunday Times v United Kingdom* App no 6538/74 (ECtHR, 26 April 1979); *Chauvy and others v France* App no 64915/01 (ECtHR, 29. September 2004).

⁵ *The Sunday Times v United Kingdom* App no 6538/74 (ECtHR, 26 April 1979).

⁶ *The Sunday Times v United Kingdom* App no 6538/74 (ECtHR, 26 April 1979); *Rekvényi v Hungary* App no 25390/94 (ECtHR, 20 May 1999).

⁷ *Kruslin v France* App no 11801/85 (ECtHR, 24 April 1990); *Huvig v France* App no 11105/84 (ECtHR, 24 April 1990).

⁸ *State of New Jersey v Kenneth Riley* 988 A 2d 1252 (2009) 412 NJ Super 162.

⁹ ¶11, Statement of Relevant Facts.

mailbox without his authorization, but downloaded the voicemail nevertheless.¹⁰ Therefore, Sang and his source are liable under the WA.¹¹

ii. The restriction pursues a legitimate aim

6. The respect for the rights and freedoms of others is a legitimate aim under Article 29(2). As stated by ECtHR in *Pfeifer v Austria*, in order to recognise the right to privacy, the State is obliged to adequately protect individuals against attacks by others on both privacy and reputation.¹² In the present case, the imposed damages are direct consequences of Mhugan's duty to protect Rho's reputation and privacy since Sang's illegal dissemination of the personal correspondence is punishable under the WA.¹³

iii. The restriction is necessary in a democratic society

7. A measure is necessary in a democratic society if it corresponds to a pressing social need (*a*) and is proportionate to the legitimate aim (*b*), as stated by the ECtHR in *Cumpănă and Mazăre v Romania*.¹⁴

¹⁰ ¶10, Statement of Relevant Facts.

¹¹ ¶11, Statement of Relevant Facts.

¹² *Pfeifer v Austria* App no 12556/03 (ECtHR, 15. November 2007); *X and Y v the Netherlands* App no. 8978/80 (ECtHR, 26 March 1985); *Chauvy and others v France* App no 64915/01 (ECtHR, 29. September 2004).

¹³ ¶11, Statement of Relevant Facts.

¹⁴ *Cumpănă and Mazăre v Romania* App no 33348/96 (ECtHR, 17 December 2004); *R v Oakes* [1986] 1 SCR 103; *Chauvy and others v France* App no 64915/01 (ECtHR, 29. September 2004).

a) *The restriction corresponds to a pressing social need*

8. As stated by the ECtHR in *News Verlags GmbH v Austria*,¹⁵ the pressing social need has to be determined with consideration of the general context. Moreover, in *S. and Marper v UK*, the ECtHR has left a wide margin of appreciation to the States as they can better evaluate the necessity, suitability and overall reasonableness of a limitation of fundamental rights.¹⁶

9. The ECtHR stated in *Von Hannover v Germany* that revealing information about private life of public persons may be an intrusion of the right to privacy.¹⁷ Moreover, the ECtHR stated that even if a person is known to the general public, he may rely on a legitimate expectation of protection and respect for his private life.¹⁸ When restricting the right to freedom of expression, Mhugan had to assess certain criteria. Firstly, contribution to a debate of private interest; secondly, how well-known the person and the subject matter are; thirdly, content, form and consequences of the publication; and finally, circumstances in which the voicemail was obtained.¹⁹

10. Firstly, a fundamental distinction needs to be made between reporting facts capable of contributing to a debate of public interest in the democratic society and reporting details of the private life of an individual. Following the ruling of the ECtHR in *Standard Verlags v Austria*,

¹⁵ *News Verlags GmbH & Co KG v Austria* App no 31457/96 (ECtHR, 11 April 2000).

¹⁶ *S and Marper v UK* App nos 30562/04 and 30566/04 (ECtHR, 4 December 2008); *Z v Finland* App no 22009/93 (ECtHR, 25 February 1997); *Chassagnou and others v France* App nos 25088/94, 28331/95 and 28443/95 (ECtHR, 29 April 1999).

¹⁷ *Von Hannover v Germany* App nos 40660/08 and 60641/08 (ECtHR, 7 February 2012); *Schussel v Austria* App no 42409/98 (ECtHR, 21 February 2002); *Chauvy and others v France* App no 64915/01 (ECtHR, 29 September 2004); *Petrina v Romania* App no 78060/01 (ECtHR, 6. April 2009).

¹⁸ *Von Hannover v Germany* App nos 40660/08 and 60641/08 (ECtHR, 7 February 2012); *Katz v United States* 389 US 347 (1967); *United States v Jacobsen* 466 US 109 (1984); *California v Ciraolo* 476 US 207 (1986); *Halford v UK* App no 20605/92 (ECtHR, 25 June 1997); *Leempoel & SA ED Ciné Revue v Belgium* App no 64772/01 (ECtHR, 9 November 2006); *Standard Verlags GmbH v Austria (no2)* App no 21277/05 (ECtHR, 4 June 2009); *Hachette Filipacchi Associés v France* App no 12268/03 (ECtHR, 23 October 2009).

¹⁹ *Von Hannover v Germany* App nos 40660/08 and 60641/08 (ECtHR, 7 February 2012); *Axel Springer v Germany* App no 39954/08 (ECtHR, 7 February 2012); *Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013).

rumoured marital difficulties are not a matter of public interest even among public figures.²⁰ The present case is concerned with the exact same type of rumours. Therefore, the information published on Sang's blog does not contribute to a debate of public interest.

11. Secondly, the State insures protection of a public figure's right to privacy when the details of the person's private life have the sole aim of satisfying public curiosity.²¹ In the present case, even though Rho is globally known²², disclosing information about his private life is an intrusion of his right to privacy. Sang published the information only to cause sensationalism and increase the popularity of his blog. This can be seen from the fact that he only posted bits of information regarding Rho's life and did not encourage further discussion. Those are not the interests that should prevail over Rho's right to privacy²³.

12. Thirdly, according to the ruling of the ECtHR in *Gourguenidze v Georgia*,²⁴ a violation of privacy is graver as the media coverage is wider.²⁵ Also, the UK Court of Appeal in *John v MGN* stated that the extent of publication is relevant: a libel published to millions has a greater potential to cause damage than a libel published to a handful of people.²⁶ In the present case,

²⁰ *Standard Verlags GMBH v Austria (no2)* App no 21277/05 (ECtHR, 4 June 2009).

²¹ *Von Hannover v Germany* App nos 40660/08 and 60641/08 (ECtHR, 7 February 2012); *Campbell v MGN* [2004] UKHL 22; *Standard Verlags GMBH v Austria (no2)* App no 21277/05 (ECtHR, 4 June 2009); *Hachette Filipacchi Associés v France* App no 12268/03 (ECtHR, 23. October 2009); *MGN Limited v UK* App no 39401/04 (ECtHR, 18. April 2011); *Palomo Sanchez and others v Spain* App nos 28955/06, 28957/06, 28959/06 and 28964/06 (ECtHR, 12 September 2011).

²² ¶2, Statement of Relevant Facts.

²³ ¶9, Arguments.

²⁴ *Gourguenidze v Georgia* App no 71678/01 (ECtHR, 17 October 2006).

²⁵ *Gourguenidze v Georgia* App no 71678/01 (ECtHR, 17 October 2006); *Karhuvaara and Iltalehti v Finland* App no 53678/00 (ECtHR, 16 February 2005).

²⁶ *John v MGN* [1997] QB 586.

the media coverage is extensive, as it was posted on the Internet, and as such is accessible to every person in Mhugan and beyond.²⁷

13. Finally, the ECtHR stated in *Gourguenidze* that the violation of privacy takes place if information is obtained without the knowledge or consent of the recorded person.²⁸ In this instance, Rho left the voicemail recording to his friend without any intent for it to become publicly known.²⁹ Sang's source obtained the voicemail recording without Rho's knowledge and consent³⁰ and that imposes a violation of Rho's privacy.

b) The damages are proportionate to the legitimate aim

14. The Respondent claims that the damages are least restrictive and proportionate to the legitimate aim of protecting the right to privacy and reputation.

15. Although other measures could be more desirable, they are not applicable in this case. Furthermore, in *Markt Intern Verlag GmbH v Germany*, the ECtHR held that any premature publication is bound to have harmful effects on the plaintiff.³¹ As stated by the ECtHR in *Delfi v Estonia*, measures taken weeks or even days too late to protect a person's honour are insufficient, because offensive or unlawful content will already have reached the public and done its damage.³² In the present case, Sang did not make any effort to ascertain the truth or

²⁷ ¶9, Statement of Relevant Facts.

²⁸ *Gourguenidze v Georgia* App no 71678/01 (ECtHR, 17 October 2006); *Reklos and Davourlis v Greece* App no 1234/05 (ECtHR, 15 April 2009); *Hachette Filipacchi Associés v France* App no 12268/03 (ECtHR, 23 October 2009).

²⁹ ¶9, Statement of Relevant Facts.

³⁰ ¶10, Statement of Relevant Facts.

³¹ *Markt Intern Verlag GmbH and Klaus Beerman v Germany* App no 10572/83 (ECHR, 20 November 1989); *Delfi v Estonia* App no 64569/09 (ECtHR, 10 October 2013).

³² *Delfi v Estonia* App no 64569/09 (ECtHR 10 October 2013).

falsity of the voicemail recording.³³ He published it on his blog without the confirmation of validity and even invited other people to boycott Rho's music.³⁴ Therefore, the measure chosen by the Mhuganian government was the only appropriate one in the given circumstances.

16. As stated by the UK Court of Appeal in *John v MGN*,³⁵ a successful plaintiff is entitled to recover such sum which will compensate him for the wrong he has suffered. That sum must compensate him for the damage to his reputation, vindicate his good name, and take account of the distress, hurt and humiliation which the publication has caused. Although the minimum amount of statutory damages is not prescribed in Mhuganian WA, it was stated by the 7th Circuit Court in *Rogers v Wood* that courts must award a minimum of 10.000,00 USD per violation.³⁶ In the present case, imposed damages of 400.000,00 MHD are equivalent to the prescribed minimum.

B. THE SUBPOENA TO SANG TO DISCLOSE THE SOURCE OF THE RECORDED VOICEMAIL IS CONSISTENT WITH UDHR

17. The subpoena to Sang to disclose the source of the recorded voicemail is consistent with Article 19 [I]. *In any event*, the restriction on the right to freedom of expression is justified under Article 29(2) [II].

I. The subpoena is consistent with Article 19

³³ Clarifications South Asia #4.

³⁴ ¶10, Statement of Relevant Facts.

³⁵ *John v MGN* [1997] QB 586.

³⁶ *Rogers v Wood* 910 F 2d 444 (7th Cir, 1990); *Menda Biton v Menda* 812 F Supp 283 (DPR, 1993); *Dorris v Absher* 959 F Supp 853 (MD Tenn, 1997).

18. Respondent submits that the subpoena is consistent under Article 19 because Sang is only a blogger and as such does not qualify for journalistic privilege not to reveal the source when presented with the court order. It is stated in CoE Recommendation 1950³⁷ that the right of journalists not to reveal their sources is a professional privilege. More importantly, it undoubtedly declares that it is not applicable to individuals with their own website or web blog.³⁸

19. In *Too Much Media, LLC v Hale*,³⁹ the Superior Court of New Jersey considered three requirements in determining whether bloggers should enjoy the protection that journalists enjoy. Those are a) connection to the news media, b) purpose to gather or disseminate news and c) obtaining the information through professional newsgathering activities. Sang is a programmer⁴⁰ and does not have any connection with any news entity or professional medium that regularly disseminates news to the public. Even if the purpose of Sang's blog is to gather or disseminate news concerning celebrities he does not obtain the information as professional journalist do. Furthermore, in *Obsidian Finance Group, LLC v Cox* were mentioned several other additional criteria to qualify someone as a professional journalist, such as creation of an independent product rather than assembling writings and postings of others; or hearing out the both sides of a story.⁴¹ Sang does not create an independent product since the majority of the content on his blog is collected from other people's websites.⁴² Therefore, Sang's freedom of

³⁷ Council of Europe: Parliamentary Assembly, Recommendation on the protection of journalists' sources 1950 (2011), 1 December 2010, accessed 17 October 2013.

³⁸ Council of Europe: Parliamentary Assembly, Recommendation on the protection of journalists' sources 1950 (2011), 1 December 2010, accessed 17 October 2013.

³⁹ *Too Much Media, LLC v Hale*, 20 A 3d 364 (2011) 206 NJ 209; *In Re January 11, 2013 Subpoena by the Grand Jury of the Union County Superior Court New Jersey Prosecutor's Docket No 13-0001*.

⁴⁰ ¶7, Statement of Relevant Facts.

⁴¹ *Obsidian Finance Group, LLC v Cox*, 812 F Supp 2d 1220 (2011).

⁴² *Id.*

expression was not violated since is not qualified as a professional journalist and as such he does not enjoy the journalistic privilege.

20. Secondly, the ECtHR stated in *Pedersen and Baadsgaard v Denmark*⁴³ that the more serious the allegation, the more solid the factual basis has to be. In the present case, Sang did not implement fact-checking and did not contact Rho to get his side of the story. Applicants may submit that he acted as a professional journalist because he bought search queries from Dexian after publishing the story. However, a professional journalist would have obtained them prior to publishing, in a manner of neutral reporting and fact-checking. Also, there is no guarantee that Dexian's records are correct.⁴⁴

II. The subpoena is a justified restriction under Article 29(2)

21. Respondent submits that the restriction on Sang's right to freedom of expression is justified under Article 29(2) UDHR.⁴⁵

i. The restriction is prescribed by law

22. For a restriction to be prescribed by law it must be accessible, precise and foreseeable.⁴⁶ The Mhuganian law clearly stipulates the criteria for a person to be regarded as a professional journalist.⁴⁷ Although Sang regularly engages in writing and disseminating information to public, he does not do it for any gain or livelihood since total ad revenue from his blog is going

⁴³ *Pedersen and Baadsgaard v Denmark* App no 49017/99 (ECtHR, 27 June 2002).

⁴⁴ ¶5, Statement of Relevant Facts.

⁴⁵ ¶2, Arguments.

⁴⁶ ¶3, Arguments.

⁴⁷ Statement of Relevant Facts.

to Centiplex. Therefore, the provision is adequately precise and foreseeable and everyone knows when and for whom the protection of sources is applicable.

ii. The restriction pursues a legitimate aim

23. Respondent submits that the restriction pursues the legitimate aim of protecting the rights and freedoms of others, namely the right to privacy and reputation.

24. There is universal consensus among judges and commentators that the right to privacy includes protection against the dissemination of private information.⁴⁸ The right to privacy is a freedom from unwanted access.⁴⁹ Furthermore, it includes the ability to control who has access to us and to information about us.⁵⁰ Accordingly, it is the duty of the state to make positive steps to protect privacy against media.⁵¹

25. Protection of reputation is a constituent part of right to respect for private and family life.⁵² This condition is not frequently disputed before the ECtHR since Article 10(2), the ECHR specifically mentions that the protection of reputation or rights of others serves a legitimate aim.⁵³ The ECtHR stated in *Pfeifer v Austria* that reputation forms part of the individual identity and psychological integrity, imposing a duty of protection on national courts.⁵⁴

⁴⁸ Tugendhat and Christie, *The Law of privacy and the media* (2nd edn, OUP 2011).

⁴⁹ Tugendhat and Christie, *The Law of privacy and the media* (2nd edn, OUP 2011); N Moreham, *The Protection of Privacy in English Common Law: a doctrinal and theoretical analysis* (121 Law Quarterly Review 2005).

⁵⁰ Tugendhat and Christie, *The Law of privacy and the media* (2nd edn, OUP 2011); James Rachels, 'Why privacy is important' [1975] 4 Philosophy and Public Affairs 323,326.

⁵¹ *Von Hannover v Germany* App no 59320/00 (ECtHR, 24 June 2004).

⁵² *Pfeifer v Austria* App no 12556/03 (ECtHR, 15 November 2007).

⁵³ Regis Bismuth, 'Standards of Conduct for Journalists under Europe's First Amendment' (June, 11 2010) 8(2) First Amendment Law Review 283 < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1623717> accessed 11 October 2013.

⁵⁴ *Id.*

Subsequently, the state of Mhugan was obliged to deny Sang's motion for journalistic privilege in order to protect Rho's reputation.

iii. The restriction is necessary in a democratic society

26. Respondent submits that the subpoena is necessary because there is a) a pressing social need for protection of privacy and reputation of individuals and b) the least restrictive measure was imposed.⁵⁵

27. In determining whether the impugned measures were necessary in a democratic society, the ECtHR has considered in *Funke v France*, whether the reasons to justify measures were relevant and sufficient and whether the measures were proportionate to the legitimate aims pursued.⁵⁶

28. According to the UN Human Rights Committee's interpretation of Article 19(3)(a), ICCPR on restrictions of freedom of expression, a state may restrict someone's rights and freedoms for the protection of rights held by groups or communities, as well as by individuals.⁵⁷ In the present case, Sang violated the rights of several individuals, namely Rho's, Rho's wife and Aklamit's.

29. The right to privacy, at its minimum, includes secrecy of communication.⁵⁸ Information about a personal relationship is considered private.⁵⁹ However, as the ECtHR stated in *Standard Verlags GmbH*, rumours about spousal difficulties are not of general interest, even among

⁵⁵ ¶7, Arguments.

⁵⁶ *Funke v France* App no 10828/84 (ECtHR, 25 February 1993); *Z v Finland* App no 22009/93, (ECtHR, 25 February 1997).

⁵⁷ *Ross v Canada*, CPR/C/70/D/736/1997, UN Human Rights Committee (HRC), 26 October 2000,

⁵⁸ 'Global Internet Liberty Campaign : Privacy and Human Rights : An International Survey of Privacy Laws and Practice' <<http://gilc.org/privacy/survey/intro.html>> accessed 28 October 2013.

⁵⁹ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199.

public figures.⁶⁰ In the present case, Sang's revealed to the public the private voice message regarding personal relationship of Rho and his wife. As stated above,⁶¹ even though Rho is a public person, he has a reasonable expectation of privacy when the published stories aim only at satisfying the public curiosity.⁶²

30. It is within the margin of appreciation⁶³ of the Mhuganian law to protect the privacy and reputation of a person who brought a measure of renown to Mhugan⁶⁴ over the expression of a self-proclaimed journalist.

31. In *New York Times Co v Sullivan*,⁶⁵ the US Supreme Court held that a person can be liable for defamation against a public figure if he recklessly disregarded that the information was false.⁶⁶ Furthermore, the ECtHR stated in *Pedersen*, that journalists should act in good faith and on an accurate factual basis, providing reliable and precise information in accordance with the ethics of journalism.⁶⁷ Applicants may submit that the information was not false since Rho acknowledged that the voicemail was his. However, he did not admit that those search queries were his and vehemently denied abusing his wife.⁶⁸

32. Respondent submits that the condition to impose the least restrictive measure has also been satisfied. Applicants may submit that the court should have sought the IP address from the

⁶⁰ *Standard Verlags GmbH v Austria (no 2)* App no 21277/05 (ECtHR, 4 June 2009).

⁶¹ ¶11, Arguments.

⁶² *Von Hannover v Germany* App nos 40660/08 and 60641/08 (ECtHR, 7 February 2012); *Standard Verlags GmbH v Austria(no 2)* App no 21277/05 (ECtHR, 4 June 2009).

⁶³ ¶8, Arguments.

⁶⁴ ¶2, Statement of Relevant Facts.

⁶⁵ *New York Times Co v Sullivan* 376 US 254 (1964).

⁶⁶ ¶11, Arguments.

⁶⁷ *Pedersen and Baadsgaard v Denmark* App no 49017/99 (ECtHR, 17 December 2004).

⁶⁸ ¶9, Statement of Relevant Facts.

telecommunication company. However, this measure would not have been reliable since source could have used an anonymization tool to hide his IP address or could have logged on from cybercafé or a similar public place.⁶⁹

33. Moreover, Respondent submits that the court order to Sang to reveal his source does not cause a chilling effect on freedom of expression. Chilling effect refers to restraining of exercising the right to freedom of expression because of fear of punishment⁷⁰ coming from a vague or overbroad legal norm⁷¹. In the present case, the provision is foreseeable and precise.⁷² Sang could have known that he does not fall under the scope of the Mhuganian definition of a professional journalist. Therefore, there is no chilling effect.

C. THE SEARCH ENGINE ORDER AGAINST CENTIPLEX IS CONSISTENT WITH UDHR

34. Respondent submits that the search engine order does not constitute a breach of Article 19 on the right to freedom of expression [I]. In any event, Respondent submits that the restriction is justified under Article 29(2) [II].

⁶⁹ David Robinson, 'Identifying John Doe: It might be easier than you think' (*Freedom to Tinker*, 8 February 2010) <<https://freedom-to-tinker.com/blog/dgr/identifying-john-doe-it-might-be-easier-you-think>> accessed 15 October 2013.

⁷⁰ Frederick Schauer, 'Fear, Risk and the First Amendment: Unraveling the Chilling Effect' (1978) Faculty Publications Paper 879 <<http://scholarship.law.wm.edu/facpubs/879>> accessed 7 November 2013.

⁷¹ Daniel A. Farber, 'Free Speech Without Romance: Public Choice and the First Amendment' 105 HARV L REV 554 (1991).

⁷² ¶22, Arguments.

I. The search engine order against Centiplex does not constitute a breach of Article 19

35. Respondent submits that the impugned requirement does not restrict the freedom of expression of Centiplex [i] or of its users [ii].

i. The search engine order does not violate the right to freedom of expression of Centiplex

36. Even though search results have an expressive element, Respondent submits that the search engine order does not fall within the scope of Article 19 because the search results cannot be regarded as speech. In *Metropolitan International Schools v Google*, the EWHC clearly stated that the web index is compiled and updated purely automatically.⁷³ The search results pages are determined automatically and technologically ranked in order of relevance, without any human intervention. Search query rankings are purely functional. Therefore, they cannot be perceived as an expression of opinion.

37. Furthermore, the users do not consider search results as a search engine's interpretation of indexed web sites.⁷⁴ It is not possible for them to interact, criticise or relate with search results in a form of a dialogue. In conclusion, Centiplex's search results are not within the scope of Article 19 since human input or judgement is not involved at any point. Instead, the whole process is completely automated.

⁷³ *Metropolitan International Schools v Google Inc.* [2009] EWHC 1765 (QB).

⁷⁴ Oren Bracha and Frank Pasquale 'Federal Search Commission? Access, Fairness and Accountability in the Law of Search' <<http://www.lawschool.cornell.edu/research/cornell-law-review/upload/Bracha-Pasquale-Final.pdf>> accessed 25 October 2013.

ii. *The search engine order does not restrict the freedom of expression of Centiplex's users*

38. Respondent submits that the search engine order does not prevent the Internet users from exercising the right to receive information. As held by the ECtHR in *Michaud v France*, the confidentiality of private communications is protected regardless of the content and the form of correspondence.⁷⁵ The content of the voicemail has been illegally obtained, which makes its disclosure prohibited as stated in *Rodger v Wood*.⁷⁶ It was protected by password and the source had a clear indication that the profile was not his.

39. In the present case, the voicemail recording was a private means of communication between Rho and his friend, even though Rho used potentially disturbing language.⁷⁷ Rho did not intend the content of the voicemail to be disclosed. Moreover, neither Rho nor Aklamit had provided consent to make the content of the voicemail public. Any type of restriction of freedom of expression does not violate users' right to receive information since the voicemail is illegally obtained private correspondence to which users are not entitled to.

II. The order is a justified restriction under Article 29(2)

40. In any event, the search engine order is a justified restriction of freedom of expression of Centiplex under Article 29(2) since it is prescribed by law [*i*], pursues a legitimate aim [*ii*] and is necessary in a democratic society [*iii*].

⁷⁵ *Michaud v France* App no 12323/11 (ECHR, 6 December 2012); *Halford v the UK* App no 20605/92 (ECtHR, 25 June 1997); *Amann v Switzerland* App no 27798/95 (ECtHR, 16 February 2000); *Copland v the United Kingdom* App no 62617/00 (ECtHR, 3 April 2007); *Frerot v France* App no 70204/01 (ECtHR, 12 June 2007); *Tristán Donoso v Panamá* Petition no 12360 (IACtHR 27 January 2009); *Escher et al. v Brazil* Petition no 12353 (IACtHR, 6 July 2009).

⁷⁶ *Rodgers v Wood* 910 F 2d 444 (7th Cir, 1990); *Leach v Byram* 68 F Supp 2d 1072 (D Minn, 1999).

⁷⁷ ¶8, Statement of Relevant Facts.

i. The restriction is prescribed by law

41. The search engine order is prescribed by law since it is sufficiently accessible and foreseeable.⁷⁸

42. Firstly, the law is accessible since the issuance of the search engine order has a basis in the Wiretap Act.⁷⁹

43. Secondly, the Wiretap Act accurately explains the requirements for the issuance of the search engine order. It is described when, how and by whom such a measure can be imposed.⁸⁰ Under the Wiretap Act, the court can issue an order against a search engine if it determines that the plaintiff is likely to succeed.⁸¹ The de-indexing itself is left within the discretion of the search engines, because they are more suitable to undertake that task and can perform it more efficiently. The situations which the order encompasses are clearly identifiable: 1) the web pages on which the intercepted or illegally obtained material appears and 2) the web pages from which it can be directly accessed. In conclusion, the provisions are precise enough for Centiplex to understand how to comply with the order.

ii. The restriction pursues a legitimate aim

44. As defined in *Delfi v Estonia*, the protection of the right to privacy and reputation of individuals is a legitimate aim.⁸² The restriction is imposed in order to ensure protection of privacy and the reputation of Rho and his wife.

⁷⁸ ¶3, Arguments.

⁷⁹ ¶11, Statement of Relevant Facts.

⁸⁰ ¶11, Statement of Relevant Facts.

⁸¹ ¶12, Statements of Relevant Facts.

⁸² *Delfi v Estonia* App no 64569/09 (ECtHR, 10 October 2013); *Pfeifer v Austria* App no 12556/03 (ECtHR 15. November 2007).

iii. The restriction is necessary in a democratic society

45. The search engine order is a justified measure because it fulfils a) a pressing social need and b) is proportionate to the legitimate aim pursued.⁸³

46. Firstly, the ECtHR stated in *X and Y v the Netherlands* that the state's positive obligations can include measures designed to secure respect for private life among individuals.⁸⁴ As explained in *McVicar v The United Kingdom*⁸⁵ a restriction discouraging further debate can be justified in order to protect reputation. In *Campbell v MGN UK House of Lords* held it is not enough to deprive a person of his right to privacy due to the fact that he is a celebrity and that his private life is newsworthy.⁸⁶ As previously explained Rho is a public person.⁸⁷ Therefore, good reputation is of great importance to him. Individuals have less control over what happens with the content available online. Considering the fact that any information communicated via the Internet wide spreads very quickly the order is necessary to prevent further harmful effects on Rho's reputation. Moreover, the content providers who want to be listed on the first page of the search results will have to remove the voicemail from their web pages. Consequently, the order will prevent further publication of the illegally obtained material.

47. Furthermore, as concluded in *Douglas v Hello*, privacy interests are greater than purely commercial ones.⁸⁸ Centiplex has a commercial interest in keeping the voicemail on the web.

⁸³ ¶14, Arguments.

⁸⁴ *X and Y v the Netherlands* App no 8978/80 (ECtHR, 26 March 1985); *Armonienė v Lithuania* App no 36919/02 (ECtHR, 25 November 2008).

⁸⁵ *McVicar v The United Kingdom* App no 46311/99 (ECHR, 7 May 2002).

⁸⁶ *Campbell v MGN* [2004] UKHL 22.

⁸⁷ ¶11, Arguments.

⁸⁸ *Douglas & Ors v Hello Ltd & Ors* [2005] EWCA Civ 595.

All the ad revenue is going directly to Centiplex.⁸⁹ Its income depends on popularity of web page searches resulting from the number of clicks.

48. Secondly, the measure is proportionate since the least onerous restriction is proposed.⁹⁰ For example, blocking the entire web pages would be an extreme measure.⁹¹ According to the Recommendation of the Committee of Ministers, in order to protect the right to privacy it is justified not to list certain web pages on the first page of the search results.⁹² In order for the information to be accessed it would be opportune that the information is displayed on the first page of the search results, since only 6% of the internet users click through second page.⁹³ Centiplex is not prohibited from displaying the search results about Rho's abusive behaviour, but only restricted from displaying them on the first page.⁹⁴ In any event, the freedom of expression of Centiplex is not restricted since the web pages are still listed on the second page of search results.

49. Furthermore, placing this burden on every individual who posted the voicemail or the link to it would also not be the least restrictive measure since that would be very complex and time consuming. On the other hand, Centiplex has the expertise and technical capabilities to

⁸⁹ ¶8, Statement of Relevant Facts.

⁹⁰ *Shelton v Tucker* 364 US 479 (1960).

⁹¹ Joint declaration on freedom of expression and the Internet, The United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information.

⁹² Council of Europe: Committee of Ministers, Recommendation CM/Rec (2012) 3 of the Committee of Ministers to member States on the protection of human rights with regard to search engine, 4 April 2012, <<https://wcd.coe.int/ViewDoc.jsp?id=1929429>> accessed 3 November 2013.

⁹³ Chitika Insights, 'The Value of Google Result Positioning' (Chitika Online Advertising network 2013) <<http://cdn2.hubspot.net/hub/239330/file-61331237-pdf/ChitikaInsights-ValueofGoogleResultsPositioning.pdf>> accessed by 20 October 2013.

⁹⁴ ¶13, Statement of Relevant Facts.

comply with the order. Therefore, the outcome will achieve the purpose of the order, which is to reduce accessibility of illegal and harmful content and prevent further dissemination.

D. SEARCH PRIVACY ACT IS CONSISTENT WITH UDHR

50. Applicants may claim that the SPA violates the search engines' rights to property under Article 17. However, Respondent submits that SPA is consistent with the UDHR because it is a justified restriction under Article 29(2) [I].

I. The restrictions are justified under Article 29(2)

51. Respondent submits that the restriction is justified under Article 29(2), because the restriction is prescribed by law [i], pursues a legitimate aim [ii] and it is necessary in a democratic society [iii].⁹⁵

i. The restriction is prescribed by law

52. Respondent submits that the SPA is accessible, precise and foreseeable. It clearly states when and what kind of information search engines can sell and transfer, which exceptions are allowed, what restrictions will be imposed if there are violations of the SPA and when it will become effective.⁹⁶

⁹⁵ *The Sunday Times v UK* (1979) 2 EHRR 245; *Claude-Reyes and others v Chile* Petition no 12108 (IACtHR, 19 September 2006); UN Human Rights Committee (Sixty-eighth Session) '*Vladimir Petrovich Laptsevich v Belarus*' (13 April 2000) UN Doc CCPR/C/68/D/780/1997. Also see Toby Mendel, 'Restricting Freedom of Expression: Standards and Principles Background Paper for Meetings Hosted by the UN Special Rapporteur on Freedom of Opinion and Expression' (Centre for Law and Democracy) <<http://www.law-democracy.org/wp-content/uploads/2010/07/10.03.Paper-on-Restrictions-on-FOE.pdf>> accessed 1 November 2013; *The Sunday Times v UK* (1979) 2 EHRR 245; *Chauvy and others v France*, App no 64915/01.

⁹⁶ ¶15, Statement of Relevant Facts.

ii. *The restriction pursues a legitimate aim*

53. Respondent submits that legitimate aim of the SPA is protection of privacy of a search engines' users. It prohibits the sale of information about the users' search query without their consent.

54. Personal data is any information relating to an identified or identifiable natural person.⁹⁷ The ECJ stated in *Commission v The Bavarian Lager* that names are regarded as personal data⁹⁸ and in *Scarlet v Sabam* that IP addresses are also personal data.⁹⁹ As explained in *Campbell v MGN Ltd*, personal data is protected as an aspect of human dignity and autonomy.¹⁰⁰ The use of personal data and making it available to third parties without the person's consent is an invasion of privacy. Furthermore, it must not be used or made available for purposes for which it was not obtained without prior consent of the affected individual.¹⁰¹ Otherwise, the lives of citizens become more accessible and searchable by employers¹⁰², nosy neighbours, stalkers¹⁰³ and criminals¹⁰⁴. Privacy implies that users should have control over who can access and use

⁹⁷ European Parliament and Council Directive 95/46/EC of 24 October 1995 on the protection of the individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281/31.

⁹⁸ Case T-194/04 *Commission v The Bavarian Lager Co Ltd* [2007] OJ 315/33.

⁹⁹ Case C-70/10 *Scarlet v Sabam* [2011] OJ C 113; *State of New Jersey v Shirley Reid* 945 A.2d 26 (2008)194 NJ 386.

¹⁰⁰ *Campbell v MGN Ltd* [2004] UKHL 22; *Hosking v Runting* [2004] NZCA 34; *Douglas & Ors v Hello Ltd. & Ors* [2005] EWCA Civ 595; *His Royal Highness the Prince of Wales v Associated Newspapers Ltd* [2006] EWHC 11 (Ch).

¹⁰¹ Section 9 of the OECD Guidelines; Article 5(b) of the Convention for Protection of Individuals with Regard to Automatic Processing of Personal Dana, Council of Europe Treaties No. 108 (January 28, 1981).

¹⁰² *Mullins v Department of Commerce*, 2007 WL 1302152 (Fed. Cir. 2007); Omer Tene, 'What Google Knows: Privacy and Internet Search Engines' <<http://epubs.utah.edu/index.php/ulr/article/view/136/118>> accessed 20 October 2013.

¹⁰³ *Remsburg v DocuSearch, Inc.* WL 346260, Sup. Ct., N.H., 2003; Omer Tene, 'What Google Knows: Privacy and Internet Search Engines' <<http://epubs.utah.edu/index.php/ulr/article/view/136/118>> accessed 15 October 2013.

¹⁰⁴ Omer Tene, 'What Google Knows: Privacy and Internet Search Engines' <<http://epubs.utah.edu/index.php/ulr/article/view/136/118>> accessed 5 November 2013.

their personal data.¹⁰⁵ Consequently, users should be able to decide whether they will give consent prior to dissemination of their personal data to third parties.

iii. The restriction is necessary in a democratic society

55. Respondent submits that the measure is necessary in a democratic society since a) it corresponds to a pressing social need and b) is proportionate to the legitimate aim as held in *Handyside v the United Kingdom*.¹⁰⁶

56. Users are not aware that service providers are constantly monitoring their online behaviour. Every information they store or communicate online service providers compile and analyse. The results of these analyses are used for service providers' own purposes, but as well for sharing them with others. Moreover, as stated in *Gonzales v Google*, the online information can lead to the users' identification without their knowledge.¹⁰⁷ The Committee of Ministers¹⁰⁸ has recommended that search engines are responsible for proper use of data. Their privacy policy should be clearly visible and accessible to users. Moreover, they should contain detailed explanation of their privacy practice.¹⁰⁹ Furthermore, the Committee of Ministers encourages self-regulation by the private sector in a way that any processing of personal data should be compatible with the right to respect for private life.

¹⁰⁵ Tugendhat and Christie, *The Law of Privacy and the Media* (2nd edn, OUP 2011); J. Rachels, 'Why privacy is important' (1975) 4 *Philosophy and Public Affairs* <<http://www.jstor.org/stable/2265077>> accessed 1 November 2013.

¹⁰⁶ *Handyside v United Kingdom* App no 5493/72 (ECtHR, 7 December 1976); *The Sunday Times v UK* App no 6538/74 (ECtHR, 26 April 1979); *The Observer and The Guardian v United Kingdom* App no 13585/88 (ECtHR 26 November 1991); Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN 4/1985/4.

¹⁰⁷ *Gonzales v Google inc* 234 FRD 674 (N.D. Cal 2006).

¹⁰⁸ Council of Europe: Committee of Ministers, Recommendation No R (99) 5 of the Committee of Ministers to member states for the protection of privacy on the Internet, 23 February 1999, <<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1897348&SecMode=1&DocId=396826&Usage=2>> accessed 8 November 2013.

¹⁰⁹ *Id.*

57. In the present case, Centiplex's Terms of Service are completely silent regarding the use of personal data.¹¹⁰ This implies that users are uninformed and not in a position to speak their mind regarding the flow of their data. Consequently, it is not clear what Centiplex does with the information in search query logs, nor whether and to what extent the users have access to their search query logs. Since the Terms of Service are silent, Centiplex can use personal data in any way it desires.

58. Since search engines collect a large amount of personal data that can be tied to a person's physical identity, sensitive pieces of data, as political beliefs, medical issues or sexual orientation, can be revealed to the public. Measures should be taken to protect data from risks such as unauthorised access, misuse or physical contamination.¹¹¹ Therefore, the SPA is a justified restriction because of the potential abuse of the users' personal information.

59. As stated by the European Parliament and the Council in the Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data, data which is by their nature capable of infringing fundamental freedoms or privacy should not be processed unless the data subject gives his explicit consent.¹¹² Search engines are not supposed to use personal data for their own promotional or marketing purposes unless the user has been informed and given his consent considering the fact that search query logs are kept together with the users' number, IP address, date and time.¹¹³ Subsequently, the sale of search queries could lead to revelation of highly sensitive personally identifiable data. The SPA imposes on search engines to acquire a person's consent to sell information. Therefore, a person is able to control to whom his personal data will be disclosed.

¹¹⁰ ¶6, Statement of Relevant Facts.

¹¹¹ UNGA Res 45/95, 14 December 1990 UN Doc A/RES/45/95.

¹¹² European Parliament and Council Directive 95/46/EC of 24 October 1995 on the protection of the individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281/31.

¹¹³ ¶5, Statement of Relevant Facts.

PRAYER

In the light of the arguments presented and the authorities cited, the state of Mhugan respectfully requests this Court to adjudge and declare that:

A. The damages imposed on Sang for disseminating the recorded voicemail are consistent with the UDHR.

B. The subpoena to Sang to disclose source of the recorded voicemail is consistent with the UDHR.

C. The order against Centiplex requiring that webpages that link to the recorded voicemail, including Sang's blog post, never appear on the first page of search results is consistent with the UDHR.

D. The 2013 Search Privacy Act is consistent with the UDHR.

On behalf of the Respondent,

Team 309R