

TEAM 608 A

Price Media Law Moot Court Competition Case

IN THE MATTER BETWEEN

Sang & Centiplex (Applicants)

AND

The State of Mhugan

MEMORIAL FOR THE APPLICANT

3881 Words

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List of Abbreviations

Art	Article
Ct	Court
ECFP	European Charter on Freedom of Press
ECHR	European Convention on Human Rights
EHRR	European Human Rights Reports
ECPA	Electronic Communications Privacy Act
EU	European Union
EWCA	England and Wales Court of Appeal
HR Committee	United Nations Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
NPI	Non-Public Persona Information
OECD	Organization of Economic Cooperation and Development
PPI	Public Personal Information
Prin	Principle
QB	Queen's Bench
S	Section
SDNY	South District of New York
SPC	Search Privacy Act
UDHR	United Declaration of Human Rights
UK	United Kingdom
UKHL	United Kingdom House of Lords
UN	United Nations
UNCHR	United Nations High Commissioner for Refugees
US	United States of America
¶	Paragraph

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Statement of Relevant Facts

The Republic of Mhugan is a country whose economy has grown rapidly fueled by a combination of information technology industries and financial services. Centiplex Corporation is the leading Internet services company in Mhugan. It runs an Internet search engine, a social networking service, a blogging platform, a news portal, and email, video hosting, web hosting, and cloud storage services.

On May 1, 2013, Thon Sang who maintains an active blog on the Centiplex platform posted what he claimed to be a recording of a voicemail that Bansit Sangnont(alias Rho), a popular music singer-songwriter had left for a friend of Rho's, Taur Aklamit. In the voicemail, someone identifying himself as "Bansit" said that he was "furious with my wife for not being more obedient," and that "I need to give her a good smacking to show her who's in charge." On May 4, Rho held a press conference where he admitted that the recorded voicemail was indeed one that he had left for Aklamit, but he stated that he "only needed to let off some steam to my good friend Taur". Rho's wife did not speak at the press conference.

On May 5, Sang clarified that the source of the voicemail had come across the message by mistake while trying to check his/her own mobile voicemail messages from his/her home computer. Knowing that Sang blogged about celebrities, the source sent the recording to Sang, telling him that he could use the material on his blog, but asking Sang not to reveal his/her identity.

Mhuganian law makes it illegal under the Wiretap Act to "intentionally intercept or obtain unauthorized access to any telephone or electronic communications, whether in transit or in storage." On May 8, 2013, Rho sued Sang under the Wiretap Act for knowingly disseminating the contents of unlawfully obtained communications. Rho immediately applied for a search

engine order under the Act against Centiplex, which the court granted. In the same lawsuit, Rho also sued the unknown source of the recorded voicemail message and subpoenaed Sang for the identity of that person. Sang filed a motion with the court to quash the subpoena, asserting a privilege to hide the identity of his source. The court denied this motion. Meanwhile, On May 15, 2013, Mhugan enacted the Search Privacy Act, which makes it unlawful for a search engine to sell information about a person's search queries without that person's consent. All of the rulings described above were appealed to the Mhugan Supreme Court, the highest appellate court in Mhugan, and the Mhugan Supreme Court dismissed all of the appeals. Sang and Centiplex have then sought to challenge all of the following rulings in the Universal Court of Human Rights.

Statement of Jurisdiction

Sang and Centiplex have jointly approached the Universal Freedom of Expression Court, the special chamber of the Universal Court of Human Rights hearing issues relating to the right of freedom of expression under Article 19, under the enabling Preamble of the UN Charter.

Questions Presented

1. Whether the damages imposed on Sang for disseminating the recorded voicemail are violate Sang's and Centiplex's rights under the UDHR.
2. Whether the subpoena to Sang to disclose the source of the recorded voicemail contravene's Sang's rights under the UDHR.
3. Whether the order against Centiplex requiring that webpages that link to the recorded voicemail, including Sang's blog posts, never appear on the first page of search results is in contravention of the UDHR.
4. Whether the 2013 Search Privacy Act is violates Centiplex's right to freedom of expression under the UDHR.

Summary of Arguments

1. The damages Imposed on Sang for disseminating the recorded voicemail violate the UDHR

Damages cannot be imposed where no civil offence has been committed. The relevant Statute sets intent as a prerequisite for liability. The Applicants challenge Sang's culpability for the alleged wiretapping tort as the information he published was lawfully acquired because there was not intent to intercept Rho's message. Furthermore, Art 19 of the UDHR entitles Sang to freedom of expression which includes journalistic expression of lawfully acquired information. This triumphs Rho's right to privacy given that the published material is in public interest. Lastly, even if Sang is guilty, the quantum of damages was not procedurally determined making them unlawful.

2. The subpoena coercing Sang to disclose the source of the recorded voicemail is unlawful.

Sang meets the requisite criteria of journalism and should therefore be accorded the given rights and privileges. Among these rights is journalistic privilege, thus forcing Sang to reveal his source would be in contravention of, among others, the European Charter on the Freedom of Press Journalist's sources are considered confidential information and Sang's disclosure would also subject him to liability for having breached his duty of confidentiality.

3. The order against Centiplex is contrary to freedom of expression and amounts to unlawful censorship.

The order against Centiplex is contrary to freedom of expression as provided for in Art 19 of the UDHR. This Freedom of includes Right to Internet Access. At its most basic level, the right to internet access demands little restriction which must be clearly provided by law, and

proven to be necessary and the least intrusive means available. The order issued to Centiplex does not meet this criterion. In *ACLU v Reno*, the court found that there is a psychological satisfaction derived from the uninterrupted improvisatory movement of the World Wide Web. Therefore, by preventing Centiplex from revealing the stated web pages, this order is in effect excessive and intrusive.

4. The 2013 Search Privacy Act violates Centiplex’s Right to freedom of expression under UDHR.

The Search Privacy Act violates Centiplex’s right to freedom of expression as it arbitrarily restricts how Centiplex can deal with search queries entered by users. As long as the data being disclosed is entered voluntarily and is within the limits of the right to freedom of expression, restricting the subsequent use of search queries violates the right to freedom of expression.

The SPA does not violate Mhughanian user’s right to privacy or breach of confidentiality. The Act offers a blanket limitation on the subsequent use of search queries. The information entered has to be demarcated between private information that the data ‘owners’ would want protected Non-Private Public Information (NPI) and information that the data ‘owners’ would not want protected Private Public Information (PPI). The SPA does not breach confidentiality as the user and Centiplex do not enter into a fiduciary relationship i.e a relationship of trust.

Arguments

1. The damages Imposed on Sang for disseminating the recorded voicemail violate his rights under the UDHR.

1.1 The damages imposed contravene Sang's right to freedom of expression.

2. The right to freedom of expression is a fundamental human right.¹ The right has a wide scope and extends to the internet and on other electronic sources.² The right further includes the right to anonymous speech³ and its reception⁴. Newsgathering⁵ and publication is also part and parcel of the right to freedom of expression.⁶
3. There is a conflict of interest between Sang's right to freedom of expression,⁷ and Rho's right to privacy.⁸ In such instances, Courts must balance data protection with protection of

¹ International Covenant on Civil and Political Rights, art 19; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10; Nihal Jayawickrama *Judicial Application of Human Rights Law* (Cambridge University Press 2002) 665-670.

² *Reno v ACLU* 521 US 844 (1997); UNCHR, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (2011) UN Doc A/HRC/17/27; General Comment No. 10, CCPR/C/GC/10 adopted on 29 June 1983, para 2; Richard Clayton and Hugh Tomlinson, *The Law of Human Rights* (1st edn, OUP 2000) 1059.

³ *Talley v California* 362 US 60 (1960); *McIntyre v Ohio Elections Commission* 514 US 334 (1995); *Dendrite International Inc v Doe No 3* 775 A 2d 756 (NJ 2001); Council of Europe, 'Declaration on Freedom of Communication on the Internet' (2003) prin 7; Article 19: Global Campaign for Free Expression, Statement on the Right to Communicate (London, 2003) <<http://www.article19.org/data/files/pdfs/publications/right-to-communicate.pdf>> (accessed 1/1/14); Constitution of Sweden 1991, ch 2.

⁴ Reader Privacy Act 2011 (California); *Tattered Cover Inc v City of Thornton* 44 P.3d 1044 (Colo 2002); The Constitution of the United States, First Amendment.

⁵ *Goodwin v UK* (1996) 22 EHRR, 123; Constitution of South Africa, s 16(1)(a).

⁶ *Branzburg v. Hayes* 408 U.S. 665, 681 (1972); *Article 19 v The State of Eritrea*, African Commission of Human and Peoples' Rights, Communication No. 275/2003 (2007); *Media Rights Agenda and Others v Nigeria* (2000) AHRLR 200 (ACHPR 1998).

⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10; International Covenant on Civil and Political Rights, art 19; American Declaration of the Rights and Duties of Man, art 4; African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), art 9.

freedom of expression⁹ which includes the right to receive and impart information as Sang did.¹⁰ In such instances there is to be weighing between interference with the privacy right of the claimant occasioned by publication of the information; as against the interference that will be caused to a publisher's freedom of expression.¹¹ The decisive factor lies in the contribution that the published material would make to a debate of general interest.¹²

4. Courts have also allowed breach of confidentiality where it is in public interest.¹³ More specifically, breach of privacy laws has also been allowed to expose deceit by public figures as this is deemed to be in line with public interest.¹⁴ It has been held that it is unconstitutional for publishers of truthful information in public interest to be punished.¹⁵ In *New York Times Co. v. United States*, the Court upheld the press' right to publish information of great public concern obtained from documents stolen by a third party. The rationale was that the stolen documents' character and the consequences of public disclosure were to be considered over and above the fact that the documents were stolen.¹⁶ Furthermore, Sang sought to uncover

⁸ European Convention on Human Rights, art. 8; International Covenant on Civil and Political Rights, art 17.

⁹ Tony Mauro, 'Press Rights Outweigh Privacy in Wiretapping Case, Justices Find' <<http://www.freedomforum.org/templates/document.asp?documentD=13976>> (December 22 2013).

¹⁰ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Para 37.

¹¹ Peter Carey *et al*, *Media Law* (4th edn, Sweet and Maxwell, London, UK 2007), 138-139.

¹² *Von Hannover v Germany* (2005) EHRR

¹³ *HRH Prince of Wales v. Associated Newspapers Ltd* (2006) EWCA Civ 1776.

¹⁴ *Campbell v. MGN Ltd* (2004) (UKHL) 22; *Kapellas v. Kofman* (1969), 45 at 2d 91 922 (Cal 1969); David Makali (ed), *Media Law and Practice: The Kenyan Jurisprudence* (Phoenix Publishers Ltd Nairobi 2003) 172-173.

¹⁵ *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469(1975).

¹⁶ *New York Times Co. v. United States*, 403 U.S. 713 (1971)

Rho's deceit regarding his denial of the fact that he batters his wife.¹⁷ It is in public interest that any information that can prove that he indeed did is disclosed.

1.2 Sang is not Culpable for the Offences under the Wiretap Act.

5. The Wiretap Act makes it illegal to intentionally intercept or obtain unauthorized access to any telephone or electronic communications as well as disseminate the contents of the above described communication.¹⁸ It follows that for an offence to be committed under the Wiretap Act, both interception as well as intent must exist. Sang did not himself intercept the communication, nor did his source intercept in a manner that was in contravention of the Act.¹⁹
6. Precedent has laid it out that even in cases of actual interception or unauthorized access of information criminal or tortious intent must be proved for the defendant to be held liable.²⁰ This was the construction of the US Courts of Sec 1 of the Crimes and Criminal Procedure Code whose wording is similar to that in the Mhuganian Wiretap Act.²¹ Sang disseminated the information in public interest and had no criminal or tortuous intent.

¹⁷ Facts ¶ 13.

¹⁸ Facts ¶ 14.

¹⁹ Ibid ¶ 13.

²⁰ *Marshall Caro v. Eric Weintraub, David H. Weintraub, Glenn William Dowd, And Day Pitney Llp*, United States Court Of Appeals, August 13, 2010.

²¹ 18 USC, Chapter 119- Wire And Electronic Communications Interception And Interception Of Oral Communications

1.3 The information Sang disseminated was not unlawfully acquired

7. The Act requires that intent to intercept exists before an individual can be considered culpable.²² In this Case, Sang's source intercepted accidentally²³ and therefore cannot be said to have acquired the information unlawfully. Additionally, Seizure of information in storage awaiting access by intended recipients has been held not to constitute wiretapping.²⁴ It thus follows that Sang disseminated lawfully acquired information and therefore is not guilty of any offence warranting imposition damages against him.

1.4 Even if the information was illegally obtained, only the obtainer should bear liability and not the disseminator

8. The right of freedom of press overrides the obligation of the press to ensure that the information given to them was lawfully acquired. In the *Bartnicki Case*, a media defendant was relieved of liability for broadcasting a taped conversation which his source stipulated had been illegally obtained by an intercept in violation of the Electronic Communications Privacy Act. It was held that the first amendment right regarding freedom of press overrid the Privacy Act and the illegal eavesdropper could be punished, if caught, but the journalist (Vopper) couldn't be held civilly or criminally liable for his conduct.²⁵

9. This Case upheld the principle established in the *New York Times Case*²⁶ in which The New York Times Newspaper was not held liable for publication of information containing state secrets which it knew had been unethically obtained. Similarly, in *Florida v. Star*

²² Facts ¶ 14.

²³ Facts ¶ 13.

²⁴ *Steve Jackson Games Inc v United States Secret Service* 816 F.Supp. 432 (W.D.Tex., 1993)

²⁵ *Bartnicki v Vopper*, 532 U.S. 514 (2001).

²⁶ *New York Times Co. v United States*, 403 U.S. 713 (1971).

Newspaper, a publisher who lawfully obtained information from a source who obtained it unlawfully was not held liable for ensuing publication based on the defect in the chain of information.²⁷ This is because the *Bartnicki Case* established that media defendants cannot be punished for publishing the contents of an illegally intercepted conversation as long as the information is a matter of public importance and the media did not encourage or take part in the illegal interception.²⁸

1.5 Even in the event that there was indeed a tortious act committed, the statutory damages were not justified

10. The Wiretap Act provides for statutory damages of up to a maximum of 1,000,000.²⁹ The damages imposed on Sang are nearly 50% of this amount which is considerable. Precedent dictates that the greatest factor to be considered in determining the degree of damages to impose is the aspect of willfulness.³⁰ And for willfulness to exist, it has been held that it means the individual must have been aware that he/she was violating a statute.³¹ There was therefore no willfulness on Sang's part.

²⁷ *Florida Star v. B. J. F.*, 491 U.S. 524 (1989)

²⁸ Karen N. Frederiksen, 'The Supreme Court, the Press, and Illegally Recorded Cellular Telephone Calls' (2001) 28 *Harvard Human Rights Journal* 17; Jennifer Nichole Hunt '*Bartnicki v Vopper*: Another Media Victory or Ominous Warning of a Potential Change in Supreme Court First Amendment Jurisprudence?' 30 *Pepp. L. Rev.* 2 (2003) <http://digitalcommons.pepperdine.edu/plr/vol30/iss2/5> accessed 4 January 2013.

²⁹ Facts ¶ 15.

³⁰ *Texas v American Blastfax*, 164 F. Supp. 2d 992.

³¹ *Zomba Enters. Inc v Panaroma Records Inc* 491 F. 3d 574, 584 (6th Cir. 2007).

11. Moreover, the practice in the USA has been to charge damages for wiretapping per day as opposed to setting an arbitrary amount.³² In order to satisfy due process requirements, the Court must consider, among other factors, the disparity between the actual harm suffered by the plaintiff and the damages award.³³ It then follows that in *Infinity Broad. Corp. v. Kirkwood* the claimant was awarded minimum statutory damages where there has been no real harm to the plaintiff.³⁴ Considering that in this case scenario Sang published true information about Rho and therefore did not unduly injure his reputation, the Mhuganian Courts have failed in due process requirements for calculating quantum of damages.

2. The subpoena coercing Sang to disclose the source of the recorded voicemail is unlawful and violates his rights under the UDHR.

2.1 Sang is entitled to the journalistic shield and cannot be compelled to reveal his sources

12. Though blogging is a practice that has gained prevalence over the past decade, emerging jurisprudence suggests that bloggers whose work is of a certain nature are entitled to journalistic protection.³⁵ The trend is to protect acts of journalism as opposed to individuals fitting the traditional definition of journalists.³⁶ In a recent New Jersey decision, a Superior Court judge ruled that a blogger acting as a journalist was protected by that state's journalist's

³² Electronic Communications Privacy Act of 1986 (ECPA, codified at 18 U.S.C.

³³ *BMW of North America Incorporated v. Gore*, 646 2d 619 (Ala 1994)

³⁴ *Infinity Broad. Corp. v. Kirkwood*, 63 F. Supp. 2d 420, 421 (S.D.N.Y. 1999).

³⁵ The Free Flow of Information Act 2013, (USA).

³⁶ Josh Steams, 'Let's Stop Defining Who a Journalist is and Protect All Acts of Journalism' (2013) *Media Shift* <<http://www.pbs.org/mediashift/2013/10/lets-stop-defining-who-i-a-journalist-and-protect-all-acts-of-journalism/>> (accessed 4 January 2014).

shield law.³⁷ Chief Justice Hughes defined the press as, "every sort of publication which affords a vehicle of information and opinion."³⁸ In certain circumstances a blog can qualify as news media, notwithstanding the blogger's lack of affiliation with a recognized traditional news outlet and official licencing as a journalist³⁹. The blogger must simply satisfy the Court that their coverage is sufficiently similar to news media⁴⁰ by demonstrating that they are engaged in frequent publication of newsworthy material and collect information for publication in a manner compliant with the due diligence required of traditional journalists.

13. The blog must also exist for the purposes of gathering or disseminating news, though it need not be limited to that purpose.⁴¹ Sang satisfies these requirements because he runs a blog dedicated to celebrity news, frequently publishes newsworthy material⁴², and takes steps to find out how his sources acquire information.⁴³ Recognition as a journalist is not to be based on academic qualification or professional membership but on the foregoing criteria coupled with ethical conduct.⁴⁴ Adherence to journalistic ethics is therefore paramount; and failure to

³⁷ *Re January 11, 2013 Subpoena by the Grand Jury of Union County, New Jersey* (Supreme. Ct. of New Jersey, Union County, Criminal Div., Docket No. 13-001, Apr. 12,2013)

³⁸ *Lovell v. City of Griffin*, 303 U.S. 444 (1938), United States Supreme Court.

³⁹ *Compulsory Membership of Journalist's Association*, Inter-American Court, Advisory Opinion OC-5/85, 13 November, 1985.

⁴⁰ *Too Much Media, LLC v. Hale*, 413 N.J. Super. 135, 142 (App. Div. 2010)

⁴¹ *Re January 11, 2013 Subpoena by the Grand Jury of Union County, New Jersey* (Sup. Ct. of New Jersey, Union County, Criminal Div., Docket No. 13-001, Apr. 12, 2013).

⁴² Facts ¶ 18.

⁴³ Facts ¶ 13.

⁴⁴ Inter-American Declaration of Principles on Freedom of Expression, adopted by the Inter-American Commission of Human Rights, 108th regular session, 19 October 2000, prin 6.

comply therewith has resulted in denial of bloggers' journalistic recognition.⁴⁵ In the *Crystal Cox Case* a journalist was denied journalistic recognition because she accepted money in return for the removal of material which was detrimental to those whom it was about.⁴⁶ Sang however receives no monetary gain in return for his media coverage⁴⁷ and therefore is not ethically compromised by pecuniary consideration. Mhuganian Courts were therefore wrong in refusing to accord Mr Sang journalistic privilege.⁴⁸

14. Furthermore, the disclosure of a confidential source without that source's consent may subject a journalist to civil liability for breaching their promise; and journalists have no protection from such lawsuits.⁴⁹ Compelling Sang to reveal sources would therefore subject him to further liability.

2.2 Limitations to journalistic shield do not apply in this case

15. The protection of journalistic sources shall be strictly upheld because there is public interest⁵⁰ in ensuring independent and aggressive media.⁵¹ Anything done with the aim of identifying sources of information or infringing on editorial confidentiality is unlawful⁵² as it is seen to

⁴⁵ *Obsidian Finance Group LLC, and Kevin D. Padrick v Crystal Cox Case* 3:11-cv-00057-HZ.

⁴⁶ *Ibid.*

⁴⁷ Facts ¶ 7.

⁴⁸ Facts ¶18.

⁴⁹ *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991).

⁵⁰ *John and Others v Express Newspapers Ltd and Others* [2000] 1 WLR 1931.

⁵¹ *Baker v F&F Inv.* 470 F.2d 778, 782 (2d. Cir 1972).

⁵² Art 4, European Charter on Freedom of Press; Resolution on Journalistic Freedoms and Human Rights, adopted at the Fourth European Ministerial Conference on Mass Media Policy, Prague, 8 December 1994, prin 4; Resolution on Confidentiality of Journalist's Sources, adopted by the European Parliament, 18 January 1994; T Welsh and W Greenwood, *Mc Nae's Essential Law for Journalists* (17th edn, Lexis Nexis UK 2003) 27-37.

have a chilling effect on the freedom of press.⁵³ Sang is entitled to such treatment and protection as is accorded in international law given that the applicant has already argued that he is covered by the journalistic shield.

16. The journalistic right not to disclose sources is not absolute and as such remains susceptible to some limitations. Under the responsibility criterion adopted in the European Court, the purported acts seeking protection should have been made in good faith.⁵⁴ Furthermore, the practice is that the freedom of disclosure may be lifted to compel disclosure when it is necessary in the interests of justice, national security or for the prevention of crime or disorder.⁵⁵ Sang however acted in good faith and that revealing of his source neither serves to prevent crime nor secure national security.

17. Lastly, journalistic privilege does not cover disclosure of information that is not confidential. Confidential information is however wholly protected- and the names of anonymous sources have been held to fall within the scope of confidential information.⁵⁶

⁵³ *Ashworth Security Hospital v MGN Ltd* [2002] UKHL 29

⁵⁴ ECHR, art 10 .

⁵⁵ UK Contempt of Court Act; Louisa Donnelly, "Media Law: Protection of journalistic sources in the UK," *op. cit.* Smet (2010) "Freedom of expression and the right to reputation: Human rights in conflict," *op. cit.* at 194. *Chauvy v. France* 2004-II Eur. Ct. H.R. 229. David Keane (2007) "Attacking hate speech under Article 17 of the European Convention on Human Rights," Vol. 25, No. 4 *Netherlands Quarterly of Human Rights*, pp. 661.

⁵⁶ *Gonzales v. National Broadcasting Co.*, 155 F.3d 618 (2d Cir. 1998)

3. The order against Centiplex is contrary to the right freedom of expression and further the order amounts to unlawful censorship.

3.1 Centiplex Corporation, as a search engine is entitled to freedom of expression

18. Article 19 of the UDHR and ICCPR provide for freedom of expression as an essential human right. Further, Article 10 of the ECHR states that everyone has the right to freedom of expression and information which applies equally offline and online, and should be balanced with other legitimate rights and interests in compliance with Article 10. The European Human Rights Court in *Handyside v The United Kingdom*⁵⁷ described freedom of expression as one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man. The right as the European court mentioned in *Handyside* is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the state or any sector of the population. Freedom of expression can then be understood as three distinct aspects: the right to seek, receive and impart information and ideas.⁵⁸

19. Search engines enable individuals to access information and communicate with thousands of people in completely new ways. Together with traditional media, these new media actors are today essential sources of information.⁵⁹ Existing standards developed for traditional media may well apply to new media, which means they may be entitled to the same rights.⁶⁰

⁵⁷ *Handyside v The United Kingdom* (5493/71) [1976] ECHR 5 (7 December 1976)

⁵⁸ R. Smith and C. Van Den Anker, *The Essentials of Human Rights* (Hodder Arnold 2005) 128

⁵⁹ Council of Europe <hub.coe.int> (accessed on 3/01/2014)

⁶⁰ Ibid

20. In a recommendation adopted in 2012 the Council of Europe called on its member states to safeguard human rights with regard to search engines and social networks, in particular with regard to freedom of expression, access to information, freedom of association and the right to private life.⁶¹
21. Further, Recommendation CM/Rec (2007)16 of the Committee of Ministers to member states on measures to promote the public service value of the Internet underlines the importance of access to information on the Internet and stresses that the Internet and other ICT services have high public service value in that they serve to promote the effective exercise and enjoyment of human rights and fundamental freedoms for all who use them. It is thus essential that search engines are allowed to freely crawl and index the information that is openly available on the Web and intended for mass outreach.⁶²
22. Requesting search engine service providers to suppress legitimate and legal information that has entered the public domain would entail an interference with the freedom of expression of the publisher of the web page.⁶³
23. Thus, Centiplex, as an internet services company, running a search engine is entitled to freedom of expression.

⁶¹Recommendation CM/Rec(2012)3 of the Committee of Ministers to member States on the protection of human rights with regard to search engines

⁶²Recommendation CM/Rec(2007)16 of the Committee of Ministers to member states on measures to promote the public service value of the Internet.

⁶³ Google Spain and Google Case C-131/12 (opinion of The Advocate General Niilo Jaaskinen).

3.2 Freedom of Expression includes Right to Internet Access

24. The order against Centiplex requiring that certain web pages are not to appear on the first page of search results inherently violated Centiplex's right to internet access. The right to internet access has been recognised as an extension and a modern manifestation of freedom of expression as outlined in Article 19 of UDHR. This freedom provides that everyone has the right to freedom of opinion and expression; that this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.⁶⁴ This extension is primarily due to the court's insistence to treat the method of storage or transmission as irrelevant and focus on the information itself.⁶⁵

25. The internet has numerous players: internet users, search engines and the information providers.⁶⁶ Thus it is necessary to look behind the outward description of the players, identify their roles and apply the relevant law to that activity.⁶⁷ The right to internet access has been construed as offering protection to all the foregoing by emphasizing on two key facets of the internet: content and infrastructure of the internet.⁶⁸ The infrastructure is

⁶⁴ "Declaration of Principles" WSIS-03/GENEVA/DOC/4-E, World Summit on the Information Society, Geneva, 12 December 2003.

⁶⁵ *Leathers v Medlock* 499 U.S. 439 (1991).

⁶⁶ Frank La Rue, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression' (2011) Human Rights Council, Seventeenth session Agenda item 3, United Nations General Assembly

⁶⁷ Graham Smith, *Internet Law and Regulation* (4th edn, Sweet & Maxwell 2007) 5

⁶⁸ Jovan Kurbalija, *An Introduction to Internet Governance* (1st supp, 5th edn, DiploFoundation 2012)

necessary in order to deliver the service to the masses but requires extensive positive action.⁶⁹ Further, the content should be available to all with few or no restrictions.⁷⁰

26. The role of Centiplex Co as an internet services company encompasses the former facet as it provides a forum in which information is shared.⁷¹ Hence, the company, as an internet service provider is entitled to right to internet access.

3.3 The Order violates Centiplex Right to Internet Access by Preventing Free Flow of Information

23. At its most basic level, the right to internet access demands little restriction as possible to the flow of information via the Internet except in a few, very exceptional, and limited circumstances prescribed by international human rights law. This therefore means that "any restriction must be clearly provided by law, and proven to be necessary and the least intrusive means available for the purpose of protecting the rights of others."⁷²

24. The order issued to Centiplex does not meet this criterion as it has neither been proven to be necessary nor is it the least intrusive means available. It is not necessary for the purpose of protecting Bansit's rights as the information to which the order relates to only seeks to refute the allegations set forth by Bansit with regard to his marital affairs. This purpose is not contrary to Bansit's right to privacy.⁷³ In any event, this order that calls for the information

⁶⁹ Wilson, Jenny 'United Nations Report Declares Internet Access a Human Right' (June 7,2011) TIMETechland.

⁷⁰ Ibid.

⁷¹ Facts ¶ 6.

⁷² Ibid.

⁷³ See foregoing arguments

not to appear on the first page of search results is not the ‘least intrusive means available’ as Multiple studies have shown that more than half of people who use search engines only look at the first page.

25. A poll conducted by Marshall Simmonds was found that 56% of internet users only concentrate on the first page of the search results.⁷⁴ In *ACLU v Reno*,⁷⁵ the court found that there is a psychological satisfaction derived from the uninterrupted improvisatory movement of the World Wide Web.⁷⁶ Thus, technological solutions which require a human action, such as password screens (or indeed further search of results) interrupt the flow, making even a minute an unreasonable delay as most people will not put up with a minute.⁷⁷ Therefore, by preventing Centiplex from revealing the stated web pages, this order is in effect excessive and intrusive.

3.4 The Order constitutes Unlawful Censorship

26. The internet’s power is said to lie in its removal of a government’s control of information⁷⁸ particularly due to its ability to overcome many of the failures of print such as barriers to entry and its significant access to all who wish to speak in the medium.⁷⁹ Judge Dalzell has thus noted that due to the special characteristics of internet communication, the internet

⁷⁴ Marshall Simmonds ‘Search Engine Results: Only the First Page Counts’ (*emediavitals*, 12 July 2010) <<http://www.emediavitals.com/blog/262/index.html>> accessed 14 December 2013

⁷⁵ *ACLU v Reno* 929 F. Supp. 824 (E.D. Pa. 1996)

⁷⁶ Testimony of Donna Hoffman in Hearing Before the Honorable Delores K. Sloviter, *ACLU v Reno* (No. 96-963-M) available at <<http://205.177.10.31/ciec/transcripts/Mar-22-Hoffman.html>> accessed 14 December 2013

⁷⁷ *Id.* (the findings of fact were based on mutual stipulations agreed upon during pretrial meetings between the ACLU, the Government and Judge Dalzell)

⁷⁸ Sherif Elsayed-Ali, ‘Internet Access is integral to Human Rights’ *The Egypt Independent* (London, 15 January 2012) <<http://www.egyptindependent.com>> (accessed 20 December 2013).

⁷⁹ *ACLU v Reno* 929 F. Supp. at 877.

deserves the broadest possible protection from government-imposed content-based regulation.’⁸⁰

27. The argument for government intervention assumes that every government is a representative democratic body with high standards of impartiality and objectivity. But in a situation where government is less ideal, control becomes a bastard threat to standards, not a means of maintaining them.⁸¹ Restrictions of the use of internet must, therefore, be permitted only if they comply with international norms and are balanced against the public interest.⁸² This restriction has thus been held to be valid only with regard to protection of intellectual property.⁸³ In the Reno case, a three judge federal court held that barring indecency on the internet was unconstitutional as it was contrary to the freedom of expression.⁸⁴ Here, it was reaffirmed that the censorship must only deal with intellectual property. Short of that, any other form of censorship is to be considered unlawful.

⁸⁰ Ibid at 881 (quoting Tornillo, 418 U.S. at 259-60).

⁸¹ David Makali (ed), *Media Law and Practice: The Kenyan Jurisprudence* (Phoenix Publishers Ltd Nairobi 2003) 30

⁸² Dunja Mijatović, ‘Freedom of Expression on the Internet’ (2010) OSCE < <http://www.osce.org/fom/80723> > (accessed 24 December 2013)

⁸³ Paul Scrom, ‘SOPA & PIPA: Human Rights in Intellectual Property & Freedom of Speech’ (*Human Rights Blog*) <www.thehumanrightsblog.com> (accessed 24 December 2013)

⁸⁴ Ibid.

4. The 2013 Search Privacy Act violates Centiplex's Right to freedom of expression under UDHR

4.1 The Search Privacy Act violates Centiplex's Right to Freedom of Expression

28. Search engines can be portrayed both as champions of freedom and as agents of surveillance.⁸⁵ Search engines facilitate the retrieval of online data, they enable a global public to seek, receive and impart information.⁸⁶ The exchange of this information enables individuals to acquire knowledge, engage in debate and participate in democratic processes.⁸⁷ The restriction of this process which the Search Privacy Act aims at violates this principle.

29. Search engines are amongst the most used services by internet users and are central to the navigation to the web. More than 80% of search queries in Mhugan are conducted by Centiplex.⁸⁸ Users in Mhugan have the option of google which only handles most of the rest of the searches.⁸⁹ The use of Centiplex is done voluntarily with users having another search option. Search engine law and policy in Mhugan should react by making freedom of expression a dominant concern underlying legal and policy choices with regard to web search engines.⁹⁰ The Search Privacy Act retracts on this fundamental commitment of search engine law.

⁸⁵ Bruno Van Alsenoy, Aleksandra Kuczerawy and Jef Ausloos, 'Search Engines after iGoogle Spain: Internet @Liberty or Privacy@ Peril?' (2013) ICRI Working Paper 15/2013, 5.

⁸⁶ Council of Europe Recommendation of the Committee of Ministers to member States on the protection of human rights with regard to search engines, CM/Rec (2012) 3, Adopted by the Committee of Ministers on 4 April 2012 at the 1139th meeting of the Ministers' Deputies, para 1.

⁸⁷ *ibid.*

⁸⁸ Facts ¶ 4.

⁸⁹ *ibid.*

⁹⁰ van Hoboken Joris, 'Search Engine Law and Freedom of Expression. A European Perspective'(2011) World-Information Institute <<http://deepsearch.t0.or.at/txt?tid=a2ece341ce5fbc00f9fc58151da8f981>> (accessed 27/12/2013).

30. The UN Human Rights Committee (HR Committee) issued General Comment No 34 in relation to Article 19, which clarifies a number of issues in relation to freedom of expression on the internet.⁹¹ It states that: Article 19 of ICCPR protects all forms of expression and the means of their dissemination, including all forms of electronic and internet-based modes of expression.⁹²

31. The Search Privacy Act seeks to make it unlawful for a search engine to sell information about a person's search queries without the persons consent.⁹³ Search engines share user data with subsidiaries, affiliated companies and other business partners which sometimes includes journalists and bloggers for the purpose of data processing and the provision of services.⁹⁴ As long as the data being disclosed is within the limitations⁹⁵ of the freedom of expression and does not violate the individual's right to privacy then the law should not restrict its use which includes its sale.

32. The SPC seeks to curtail secondary use of data submitted by users voluntarily. The Act requires an individual to consent to the sale of his search queries.⁹⁶ The applicant however submits that once a user keys in a search entry on Centiplex they have implicitly consented to

⁹¹ General Comment No. 34, CCPR/C/GC/34, *adopted* 12 September 2011.

⁹² *ibid* para 12.

⁹³ Facts ¶ 19.

⁹⁴ *See* Google Privacy Policy (December 20, 2013) <<https://www.google.com/intl/en/policies/privacy/>> (accessed 27/12/2013).

⁹⁵ Article 19 (3) ICCPR.

⁹⁶ *ibid*.

their search entry being used by the search engine for secondary purposes.⁹⁷ This purposes foster Centiplex's right to freedom of expression and should be protected by the law.

4.2 Centiplex use of search queries does not violate Mhughanian user's right to Privacy or breach of confidentiality.

33. Where individual information is concerned a risk of privacy is brought to bear. However this private interest has to be weighed *vis a vis* the strong public interest that curtailing the right to freedom of expression entails. More and more people are becoming entailed by information they avail on the internet. Privacy questions have to be considered but not as a complete limitation to the right of freedom of expression.

34. Some personal information enjoy normative protection through laws and policies because they involve data about persons that are sensitive or intimate or both. This kind of information is to be referred as Non-Public Personal Information (NPI).⁹⁸ The other form of information- Public Personal Information (PPI) this would for example include information about where an individual works or attends school, as well as what kind of automobile he or she owns which is non-confidential and non-intimate in character should not receive similar treatment as NPI.⁹⁹ The search Privacy Act has sought to restrict the transfer of both kinds of information without distinction. The restriction on NPI e.g financial or medical search queries that are sensitive or intimate protects users. The restriction on sell of all soughts of

⁹⁷ Omer Tene, 'What Google knows: Privacy and Interest Search Engines' (2007) 4 Utah Law Review 1434, 1462-63.

⁹⁸ Herman Tavani, 'Search Engine, Personal Information and the Problem of Privacy in Public' (2005) 3:06 International Review of Information Ethics 40, 42.

⁹⁹ *ibid.*

personal information protects information that the individual does not necessarily require to be protected. This then violates the search engines right to freedom of expression.

35. The entry of a search query on Centiplex places the individual at the risk of bringing their private lives to the public realm. The Search Privacy Act proscribes the sale of a person's information without regard of whether the personal information to be considered is private and confidential and thus the individual wouldn't want the information dealt by secondary users. The protection of privacy on search queries has to be done discriminately as all search queries by individuals are not private information.¹⁰⁰ What the Search Privacy Act does is that it offers a blanket restriction on the sale of personal search queries. Without a definition of this phrase 'personal search queries' the Act unfairly restricts the sale of information which is not personal information that is private, sensitive or intimate. The application of the Act is also too narrow as it only applies to the sale of first instance data. It does not prevent the subsequent sales making its main objective otiose.¹⁰¹

36. On confidentiality, ever since Warren and Brandeis "reinvented" the right of privacy in their ovarian article in 1890, privacy has been closely intertwined with the law of confidentiality.¹⁰² Solove distinguishes between breach of confidentiality from the tort of public disclosure of private facts. He explains that both involve revelation of secrets about a person, but breaches of confidentiality also violate the trust in a specific relationship.¹⁰³ Hence the harm in the breach of confidentiality is not simply that information has been

¹⁰⁰ *ibid.*

¹⁰¹ Facts ¶ 19.

¹⁰² Samuel D. Warren & Louis D. Brandeis, 'The Right to Privacy' (1890) 4 Harvard Law Review, 193; *Albert v. Strange* [1849] 2 De G & Sm 293.

¹⁰³ Daniel Solove, 'A Taxonomy of privacy' (2006) 154 University of Pennsylvania Law Review 477 at 526-27.

disclosed, but that the victim has been betrayed.¹⁰⁴ The Search Privacy Act cannot protect this relationship of confidence as the search engine and the user do not enter into such a fiduciary relationship. Such a relationship has only been held to be present for fiduciaries. These include lawyers, doctors, therapists and banks.¹⁰⁵

Prayer

37. In light of the arguments advanced and authorities cited, the Applicants respectfully request this Court to adjudge and declare that:

- i. The damages imposed on Sang for disseminating the recorded voicemail are in violation of the UDHR.
- ii. The subpoena to Sang to disclose the source of the recorded voicemail is unlawful.
- iii. The order against Centiplex requiring that webpages that link to the recorded voicemail, including Sang's blog posts, never appear on the first page of search results violates the UDHR.
- iv. The 2013 Search Privacy Act violates the UDHR.

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¹⁰⁴ *ibid.*

¹⁰⁵ *McCormick v. England* 494 S.E.2d 431; *Hammonds v. Aetna Casualty & Sur.Co* 243 F. Supp. 793.