

TEAM CODE: 803R

MONROE E. PRICE MEDIA LAW MOOT COURT COMPETITION 2017-2018

NIAM PEAPS & SCOOPS

(APPLICANTS)

v.

STATE OF TURTONIA

(RESPONDENT)

MEMORIAL FOR THE RESPONDENT

WORD COUNT: 4999

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PRAYER XL

LIST OF ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACHR	African Charter on Human and People's Rights
ACLU	American Civil Liberties Union
ACommHPR	African Commission on Human and People's Rights
ACtHPR	African Court on Human and People's Rights
App. No.	Application Number
ArCHR	Arab Charter on Human Rights
Art.	Article
CJEU	Court of Justice of the European Union
DMCA	Digital Millennium Copyright Act
ECHR	European Convention on Human Rights
ECOSOC	United Nations Economic and Social Council
ECtHR	European Court of Human Rights
EWHC	England & Wales High Court

FIA	False Information Act
HRC	Human Rights Committee
IACtHR	Inter American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ODPA	Online Dignity Protection Act
OSP	Online Service Provider
OUP	Oxford University Press
QB	Queen's Bench
s	Section
SCC	Supreme Court Cases
TRL	Turkish Lira
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UNHRC	United Nations Human Rights Council
USA	United States of America
USD	US Dollars
v	Versus

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STATEMENT OF RELEVANT FACTS

Socio-Political Background

1. Turtonia is a small country with a democratically elected government. Turtonia follows a civilian system and Turtonian law is largely derived from codes. The judiciary plays an active role in court proceedings. Appeals from trial courts are directly heard by the Supreme Court on a discretionary basis.
2. During the last three years, Turtonia has witnessed a significant influx of immigrants from its neighbouring country, Aquaria, and this has caused uproar among the population. A vocal nationalist group called Turton Power has condemned the Turtonian Minister of Immigration, Wani Kola for allowing Aquarians to enter the country. Kola has been subjected to online harassment, and a Turton Power member was also convicted for trying to physically assault her.
3. Meanwhile, since 2015, True Religion, a religious extremist terror group has gained prominence in Aquaria, and it has carried out violent attacks in schools and religious institutions resulting in numerous deaths. True Religion is headed by Prinsov Parkta who regularly issues calls to action through public videos.

Scoops

4. Scoops is the most popular social media platform in Turtonia. On Scoops, users can share posts with their friends and persons who have selected the same topic of interest. Users can also pay to boost their content and increase the reach of their post. Scoops uses a

combination of automated algorithm and human review to select which users receive a post. Further, Scoops features an ‘influencer score’ on its platform which records how many people have viewed content from the user.

5. Scoops’ Terms of Service specify that harmful and malicious content such as spam, non-consensual sharing of intimate images, hate speech or child exploitative imagery are not allowed, and Scoops provides a mechanism to report such content on its platform. However, Scoops online reporting mechanism requires users to verify that the person depicted in the intimate image is actually them.

Peaps’ Post and its aftermath

6. On May 1, Niam Peaps, a member of Turton Power created an account with the screen name “XYZ News12”. XYZ News is a TV news network in Turtonia which is renowned for reliable and objective journalism.
7. On May 2, Peaps posted a naked image of Kola in a hotel room facing another individual, who appears to be Prinsov Parkta, the leader of True Religion. As per the Scoops algorithm, the post was then circulated to 20 users who had listed “XYZ News” as a topic of interest. The image was accompanied by a caption which stated that Kola had issued visas to members of True Religion at her lover’s behest. The caption also indicated that Kola had ordered destruction of documents which revealed the terrifying nature of those individuals who were granted visas.
8. During his trial, Peaps claimed that he was under the impression that XYZ News was about to break a similar story, and he wanted to break the story first to maximize his influence score on Scoops. Peaps found the morphed image on the publicly accessible Turton Power website and decided to use it to illustrate the relationship between Kola and Prinsov Parkta.

9. At 5 PM on May 2, XYZ News declared that it had no connection with the XYZNews12 account. This was followed by a statement from Wani Kola's office calling the post a horrific lie and clarifying that the photo was morphed. In the wake of harassment and death threats, Kola's staff reported the post to Scoops at 7 PM on May 2 and selected the option "a nude image of me shared without my consent" as the reason to request removal. However, Kola's staff did not complete the verification request sent by Scoops because the person depicted in the image was not really her.
10. On May 3 at 11 AM, a legal notice claiming defamation and violation of privacy was sent to Scoops by Kola's legal counsel. Upon receiving the complaint, Scoops removed the post and all shares of the post in 50 hours. On the same day, TurtonTimes, a major newspaper ran a factual article about the post without commenting on its veracity. It also ran an opinion piece about loss of jobs and increasing threat of terrorism due to influx of Aquarian immigrants
11. On May 4 and May 5, there were protests outside Kola's office demanding her resignation. More than 100 protesters chanted slogans criticizing Kola for her pro-immigration stance and on the evening of May 5, two Aquarian immigrants were beaten to death by an angry mob. Finally, on May 10, Kola resigned from office without public statement.

Prosecution under the Online Dignity Protection Act, 2015

12. In the years preceding 2015, there was a revenge porn epidemic in Turtonia. News articles have reported two separate suicides of teenage girls who were victims of such non-consensual sharing of nude images. 79 % Turtonians believe that such acts must be criminalized. In response this problem, Turtonia passed the Online Dignity Protection Act

in 2015 (“ODPA”) which criminalized non-consensual distribution of images revealing intimate parts of a person.

13. Peaps was prosecuted and punished under ODPA for distributing the morphed image of Kola. He was sentenced to two years imprisonment. Scoops was also prosecuted for distributing the image in violation of ODPA and was fined 200,000 USD.

Prosecution under the Information Act, 2006

14. In Turtonia, false information concerning political candidates during the election process has shown massive shift in voter opinion resulting in civil unrest and a decrease in public faith in the democratic process. Therefore, the Turtonian legislature enacted the Information Act, 2006 primarily to preserve the integrity of the electoral process and safeguard peace in Turtonia. The legislation criminalizes intentional communication of false information resulting in loss of public confidence or communication of false information with an intent to incite civil unrest in Turtonia.

15. Peaps was prosecuted under this legislation for inciting violence through false information and he was ordered to pay a fine of 100,000 USD. Scoops was also fined 100,000 USD for knowingly communicating false information.

16. The Supreme Court of Turtonia declined to exercise its discretionary power of review. Therefore, Peaps and Scoops have challenged these verdicts before this Court, and the Court has certified Peaps’ and Scoops’ appeals on the four questions presented.

STATEMENT OF JURISDICTION

The Applicants, Peaps and Scoops, have approached the Universal Court of Free Expression to hear issues relating to the right of freedom of expression under Article 19 of the International Covenant on Civil and Political Rights.

The Respondent, State of Turtonia, submits to the jurisdiction of this Honourable Court.

QUESTIONS PRESENTED

- 1A -

WHETHER TURTONIA'S PROSECUTION OF PEAPS UNDER THE ODPA VIOLATES ARTICLE 19 OF
THE ICCPR

- 1B -

WHETHER TURTONIA'S PROSECUTION OF SCOOPS UNDER THE ODPA VIOLATES THIS SAME
INTERNATIONAL PRINCIPLE

- 2A -

WHETHER TURTONIA'S PROSECUTION OF PEAPS UNDER THE IA VIOLATES ARTICLE 19 OF THE
ICCPR

- 2B -

WHETHER WHETHER TURTONIA'S PROSECUTION OF SCOOPS UNDER THE IA VIOLATES THIS
SAME INTERNATIONAL PRINCIPLE.

SUMMARY OF ARGUMENTS

I. TURTONIA’S PROSECUTION OF PEAPS UNDER THE ONLINE DIGNITY PROTECTION ACT IS CONSISTENT WITH ARTICLE 19, ICCPR.

Freedom of speech and expression can be restricted to safeguard the rights and reputation of others. The prosecution of Peaps under ODPa was consistent with Article 19, ICCPR because it satisfied the three-part test of legality, legitimacy and necessity.

The prosecution was prescribed by law because ODPa is sufficiently precise, reasonably foreseeable and contains adequate safeguards. ODPa is clear and precise because it defines key terms such as ‘*intimate parts*’, ‘*image*’ and ‘*distribution*’. Further, the application of ODPa to morphed images was reasonably foreseeable because of the inherently degrading nature of image based sexual abuse. Morphed intimate images are also a violation of the dignity of the victim, and they cause comparable emotional and reputational harm. Finally, ODPa contains adequate safeguards against misuse because it has a flexible public interest exception.

The prosecution pursued the legitimate aim of protecting the reputation of Kola because the right to protect one’s image is a part of the right to privacy.

The prosecution was necessary in a democratic society because it corresponded to a pressing social need. Peaps accused Kola of having an affair with Prinsov Parkta and issuing visas to terrorists without any factual evidence. He then used the morphed image to convince readers that this otherwise outlandish story was undoubtedly true. Due to his actions, Kola faced harassment and death threats, and she was ultimately forced to resign. Further, two-year

imprisonment is proportionate to the harm caused because Peaps has irreparably injured fundamental rights of others, and other countries also impose similar punishment.

II. TURTONIA’S PROSECUTION OF SCOOPS UNDER THE ONLINE DIGNITY PROTECTION ACT IS CONSISTENT WITH ARTICLE 19, ICCPR.

The liability imposed on Scoops under ODPa is consistent with Article 19, ICCPR, and it satisfies the three-part test of legality, legitimacy and necessity.

The prosecution was prescribed by law because intermediaries are capable of acquiring knowledge, and therefore, they can be liable for ‘*knowingly distributing*’ an intimate image. In the present case, Scoops is not a mere conduit and it possess *actual knowledge* of the infringing content.

The prosecution pursued the legitimate aim of protecting the rights and reputation of Kola who was shamed and forced to resign because of Scoops’ failure to expeditiously take down the morphed image.

The prosecution was necessary in a democratic society because Scoops not only hosts content on its platform, but it actively promotes certain posts by boosting them for monetary consideration. Under the ‘notice and takedown’ model followed by Scoops, private notice is sufficient to impute actual knowledge, and a court order is not necessary. Such a regime will prevent Scoops from wilfully ignoring patently unlawful content on its platform. In spite of receiving an online complaint and a legal notice, Scoops took 50 hours to remove the post. Due to its delayed response, Scoops consciously disregarded a substantial and unjustified risk that Kola had not consented to the disclosure of the morphed image. Further, the 200,000 USD fine imposed on Scoops is proportionate because the morphed image went viral due to

Scoops' massive reach, and a commensurate penalty is required to deter a large corporation like Scoops.

III. TURTONIA'S PROSECUTION OF PEAPS UNDER THE FALSE INFORMATION ACT IS CONSISTENT WITH ARTICLE 19, ICCPR.

While individuals have a right to freedom of expression, it can be meaningfully constrained for legitimate aims of the State provided the interference satisfies the three part test of legality, legitimacy, and necessity. The prosecution of Peaps under Section 1(b) of the FIA satisfies since test since Peaps' post intended to incite violence and disturb the public order of the State. The death of two Aquarian immigrants by a mob is an evidence of the same.

Furthermore, the prosecution satisfies the limb of legality because Section 1(b) has been framed in a precise manner. While false news provisions have been struck down globally for the lack of a 'knowledge' and 'harm' element, Section 1(b) contains both of them. This ensures that innocent speech will be removed from its ambit. And while opinions and facts may often appear similar, even opinions must have an underlying factual basis. Therefore, the provision only penalises false statements made with an intent to cause harm, and not innocent lies.

The interference also satisfies the test of necessity since there was a pressing social need. Peaps made his post from an anonymous account, purporting to be a legitimate and respected news sources. He spread baseless lies about an elected official in the context of a tense political situation in the country given the rise of Turton Power, of which he is also a member. From his actions, it is clear that he knew of the falsity of his post or, in any case, showed reckless disregard for verifying the truth.

His intention is also clear from the content of his post, which greatly highlighted the threat of True Religion, in order to draw hatred towards Aquarian community. This can also be seen in other countries which have recently suffered cases of Islamic extremism. Individuals he was targeting would also be unlikely to hear any counter views given that social media, by its very nature, creates echo chambers, a tendency which is exacerbated by Scoops. Finally, this led to the death of two Aquarian immigrants who were killed by a mob shouting anti-Aquarian epithets in the light of Peaps' post.

The penalty of 100,000 USD imposed on him is also proportionate since even publishers of posts such as his have been charged far higher amounts in previous case. Considering he was the author of his own post, his fine is justified.

IV. TURTONIA'S PROSECUTION OF SCOOPSS UNDER THE FALSE INFORMATION ACT IS CONSISTENT WITH ARTICLE 19, ICCPR.

Individuals are increasingly using social media to receive news, which can often lead to a great amount of information. Hence, it can become difficult to ascertain the truth of any content, which has given rise to the phenomenon of "fake news". In order to curb its harm, a State may impose liability of intermediaries such as Scoops. Hence, the prosecution of Scoops under the FIA is does not violate Article 19 of the ICCPR.

Section 1(a) is worded similar to Section 1(b), and is therefore precise. Furthermore, the FIA contains adequate safeguards for intermediaries since it has a safe harbour provision in Section 3. Furthermore, the prosecution of Scoops fulfilled a legitimate aim of protecting the right and reputation of an elected since his post alleged baseless lies about her sexual life.

The interference was necessary since it was in pursuance of a pressing social need to prevent harm from occurring from social media. False news spreads virally, and its effects are

irremediable. Hence, intermediaries can be placed with liability to regulate them. Furthermore, this liability increases if the intermediary selects the receiver of the posts. Scoops employs human reviewers to adjust the algorithm such that people with similar topic of interest receives the posts. Therefore, Scoops actively promotes the posts on its platform and induces users to view them.

The fine of 100,000 USD on Scoops was also proportionate since it is the largest social media platform in Turtonia with annual revenues of over 100 million USD. Given the facts and circumstances of the case, the fine was not too onerous.

Finally, Scoops does not stand to receive immunity provided to OSPs since it failed to remove Peaps' post expeditiously after receiving a notification from Wani Kola's legal counsel. Given the nature of the harm which may be caused if posts such as this are allowed to stay online for prolonged periods, the time taken of 50 hours was too large given that other jurisdictions impose requirements of time as less as 36 hours.

ARGUMENTS

I. TURTONIA'S PROSECUTION OF PEAPS UNDER THE ONLINE DIGNITY PROTECTION ACT IS CONSISTENT WITH ARTICLE 19, ICCPR.

1. Freedom of speech and expression is not an absolute right, and it is subject to reasonable restrictions.¹ It must be balanced against the right to reputation,² especially when serious accusations of sexual misconduct are levelled against a person.³ In fact, there are free speech interests on both sides because failure to prohibit image based sexual abuse⁴ would have a chilling effect on sexual expression, and it would deter individuals from taking intimate images at all.⁵ Therefore, by assuring privacy and confidentiality, the Online Dignity Protection Act (*'ODPA'*) performs a speech enhancing function.

¹ The Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) (*'UDHR'*) art 29(2); European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (*'ECHR'*) art 10(2); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (*'ICCPR'*) art 19(3); American Convention of Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 (*'ACHR'*) art 13(2)

² UDHR (n 1) art 12; EHCR (n 1) art 8; ICCPR (n 1) art 17; ACHR (n 1) art 11; *Pfeifer v Austria* App No 12556/03 (ECtHR, 15 November 2007) (*'Pfeifer v Austria'*) ¶ 35; *Khumalo v. Holomisa* 2002 (5) SA 401 (CC) (Constitutional Court of South Africa, 14 June 2002) ¶ 24-28; *Buwembo v. Attorney General* Constitutional Reference No. 1/2008 (Constitutional Court of Uganda, 4 June 2009)

³ *Ruokanen v Finland* Application No 45130/06 (ECtHR, 6 April 2010) (*'Ruokanen v Finland'*) ¶ 51

⁴ Clare McGlynn and Erica Rackley, 'Image-Based Sexual Abuse' (2017) *Oxford Journal of Legal Studies* 1, 2-4 (*'McGlynn and Rackley'*)

⁵ *Bartnicki v Hooper* 532 US 514 (2001); Danielle Keats Citron and Mary Anne Franks, 'Criminalizing Revenge Porn' (2014) 49 *Wake Forest Law Review* 345, 385-386 (*'Citron and Franks'*); Andrew Koppelman, 'Revenge Pornography and First Amendment Exceptions' (2016) 65 *Emory Law Journal* 661, 685-686 (*'Andrew Koppelman'*); Saul Levmore and Martha C. Nussbaum (Ed), *The Offensive Internet: Speech, Privacy and Reputation* (Harvard University Press, 2010) (*'Levmore and Nussbaum'*) 134; James Weinstein, *Hate Speech, Pornography and Radical Attacks on the Free Speech Doctrine* (Westview Press, 199) 133

2. In the present case, the interference with Peaps' rights was justified because it satisfied the widely endorsed three-part test of legality (A), legitimacy (B), and necessity (C).⁶

A. THE PROSECUTION OF PEAPS UNDER ODPa WAS PRESCRIBED BY LAW.

3. A restriction is prescribed by law if it is sufficiently precise, reasonably foreseeable and contains adequate safeguards.⁷ In the present case, ODPa satisfies the requirements of legality because it is clear and precise (i), its application to non-consensual distribution of morphed images was reasonably foreseeable (ii), and the public interest exception serves as an adequate safeguard against misuse (iii).

(i) ODPa is clear and precise.

4. A law should be sufficiently precise to enable citizens to regulate their conduct to avoid criminal liability.⁸ While laws are expected to be clear and precise, absolute certainty is not possible because it would lead to excessive rigidity and undermine the law's ability to adapt to

⁶ HRC, 'General Comment 34' (12 September 2011) UN Doc CCPR/C/GC/34 ('*General Comment 34*') ¶22; HRC, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (17 April 2013) UN Doc A/HRC/23/40, ('*Special Rapporteur 2013 Report*') ¶ 28–29; ECOSOC, 'The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights' (1984) UN Doc E/CN4/1985/4 ('*Siracusa Principles*') principle 10; ACHPR, 'Declaration of Principles of Freedom of Expression in Africa' (2002) ('*ACHPR Declaration on FoE*') principle 2; *Ballantyne, Davidson, McIntyre v Canada* UN Doc CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (HRC, 5 May 1993) ('*McIntyre v Canada*') ¶ 11.4; *MGN Ltd v UK* App No 39401/04 (ECtHR, 18 Jan 2011) ('*MGN Ltd v UK*') ¶136; *Kobenter and Standard Verlags GmbH v Austria* App No 60899/00 (ECtHR, 2 November 2006) ('*Standard Verlags v Austria*') ¶24; *Kimel v Argentina*, Merits, Reparations and Costs Judgement (IACtHR, 2 May 2008) ('*Kimel v Argentina*') ¶58; *Lohe Issa Konate v Burkina Faso* App No 004/2013 (ACHPR, 5 December 2014) ('*Konate v Burkina Faso*') ¶125

⁷ *The Sunday Times v United Kingdom* App no 6538/74 (ECtHR, 26 April 1979), ('*Sunday Times v UK*') ¶49; *General Comment 34* (n 6) ¶25

⁸ *Sunday Times v UK* (n 7) ¶ 49; *Chauvy v France* App No 64915/01 (ECtHR, 29 June 2004) ('*Chauvy v France*') ¶43

changing times.⁹ ODPa is specific because it defines key terms like ‘*intimate parts*’, ‘*image*’ and ‘*distribution*’.¹⁰

5. A statute is overbroad only if the risk of misuse is real and substantial in comparison to the statute’s plainly legitimate sweep.¹¹ The Respondents submit that ODPa is narrowly tailored for three reasons.
6. *First*, unlike similar legislations in Arizona,¹² Philippines,¹³ and Australia,¹⁴ ODPa only criminalizes non-consensual distribution of intimate images on the internet. It does not punish merely showing an intimate image to another person in printed form or on an electronic device if there is no transfer, publication or reproduction.
7. *Second*, it is true that ODPa does not require intent to harass or cause emotional distress to the victim. However, in many cases, the perpetrators seek financial gain, amusement, group bonding or sexual gratification, and the harm caused to the victim is incidental.¹⁵ Therefore, lack of intent is irrelevant because the real harm arises from the circulation of intimate images.¹⁶

⁹ *Cantoni v France* App No 17862/91 (ECtHR, 11 November 1996) (‘*Cantoni v France*’) ¶31; *Jorgic v Germany* App No 74613/01 (ECtHR, 12 July 2007) (‘*Jorgic v Germany*’) ¶101; *Sunday Times v UK* (n 7) ¶ 49; *Chauvy v France* App (n 8) ¶ 43; *Fontevicchia and D’Amico v Argentina*, Merits, Reparations and Costs Judgement (IACtHR, 29 November 2011) (‘*D’Amico v Argentina*’) ¶90

¹⁰ Section 2, ODPa. Moot Proposition, ¶ 10.2

¹¹ *Broadrick v Oklahoma* 413 US 601 (1973); *United States v Stevens* 559 US 460 (2010) (‘*US v Stevens*’)

¹² Arizona Revised Statutes, s 13-14-25 (United States, 2015)

¹³ Anti-Photo and Video Voyeurism Act, s 3(d) (Philippines, 2009)

¹⁴ Crimes Act 1900, s 91Q (New South Wales, Australia, 2017)

¹⁵ Mary Anne Franks, ‘Drafting An Effective Revenge Porn Law: A Guide for Legislators’ (2016) Cyber Civil Rights Initiative 5; *McGlynn and Rackley* (n 4) 22; Cyber Civil Rights Initiative, ‘2017 Nationwide Online Study of Nonconsensual Porn Victimization and Perpetration’ (2017) 19-20

¹⁶ Eugene Volokh, ‘The Freedom of Speech and Bad Purposes’ (2016) 63 UCLA Law Review 1366, 1405-1406

8. *Third*, imposition of criminal liability on secondary distributors is justified because it is their actions that make an image viral, and every act of distribution amplifies the harm suffered by the victim.¹⁷

(ii) ODPa's application to non-consensual distribution of morphed images was reasonably foreseeable.

9. Gradual clarification of the scope of an offence through judicial interpretation is acceptable if the development is consistent with the essence of the offence and it could be reasonably foreseen.¹⁸ In previous cases, the ECtHR has held that judicial abolition of the marital rape exception does not violate the principle of non-retrospectivity of criminal law because of the inherently degrading nature of rape.¹⁹ Judicial decisions which prohibit conduct that violates human dignity and freedom are in consonance with the objectives of ICCPR, and they are more likely to be considered reasonably foreseeable.²⁰

10. While the enactment of ODPa was triggered by the growing epidemic of revenge porn,²¹ it covers a spectrum of image based sexual abuse. Unlike similar legislations which specifically exclude morphed images²² or which require a prior relationship between the victim and the

¹⁷ *New York v. Ferber* 458 US 747 (1982); *Douglas v Hello! Ltd* [2007] UKHL 21 (*'Douglas v Hello'*); *McGlynn and Rackley* (n 4) 18

¹⁸ *Jorgic v Germany* (n 9) ¶101; *SW v United Kingdom* App No 20166/92 (ECtHR, 22 November 1995) (*'SW v United Kingdom'*) ¶36

¹⁹ *SW v United Kingdom* (n 18) ¶ 44; *Pessino v France* App No 40403/02 (ECtHR, 10 October 2006)

²⁰ Karen Reid, *A Practitioner's Guide to the European Convention on Human Rights* (Sweet & Maxwell, 2015) 241

²¹ Moot Proposition, ¶ 10.1

²² Criminal Justice Courts Act, s 35(5) (United Kingdom, 2015)

perpetrator,²³ ODPa only requires non-consensual disclosure of an identifiable image where intimate parts are visible.

11. Morphed intimate images are also an assault on the dignity of the victim. Their circulation causes comparable emotional distress and reputational damage,²⁴ and they have been criminalized in Israel²⁵ and Australia.²⁶ Adopting a similar logic, courts have held that superimposing the head of a child onto the naked body of an adult constitutes child pornography²⁷ because morphed images implicate interests of real persons.
12. Further, with advancement in technology, it may become practically impossible to distinguish between real and morphed intimate images.²⁸ Therefore, Turtonia can pre-emptively legislate against harms that are likely to arise in near future due to technological development.²⁹

(iii) The public interest exception under ODPa is an adequate safeguard against misuse.

13. ODPa contains a non-exhaustive public interest exception.³⁰ The lack of an exception for newsworthy, historic and artistic images is one of the main grounds of ACLU's First Amendment challenge against Arizona's revenge porn legislation.³¹

²³ Restraining Orders and Related Legislation Amendment (Family Violence) Act, s 10G/61 (Australia, 2016); Pennsylvania Consolidated Statutes, s 18-3131 (United States of America, 2014); Arkansas Code, s 5-26-314 (United States of America, 2015)

²⁴ Clare McGlynn, Erica Rackley and Ruth Houghton, 'Beyond Revenge Porn: The Continuum of Image Bases Sexual Abuse' (2013) 21 Feminist Legal Studies 1

²⁵ Prevention of Sexual Harassment Law, s 5A(a-c) (Israel, 2014)

²⁶ Crimes Act 1900, s 91Q (New South Wales, Australia, 2017)

²⁷ *United States v Hotaling* 599 F Supp 2d 306 (2011)

²⁸ *Ashcroft v Free Speech Coalition* 535 US 234 (2002) (Thomas J Concurring); *McGlynn and Rackley* (n 4) 7

²⁹ *Turner Broadcasting v Federal Communications Commission* 512 US 622 (1997)

³⁰ Section 3(b), ODPa. Moot Proposition, ¶ 10.2

³¹ ACLU, 'First Amendment Lawsuit Challenges Arizona Criminal Law Banning Nude Images' (23 September 2014) <<https://www.aclu.org/news/first-amendment-lawsuit-challenges-arizona-criminal-law-banning-nude-images>> accessed 04 January 2018

14. In certain circumstances, non-consensual disclosure of private information may be necessary to expose misconduct of public officials.³² However, even in these limited situations, intimate parts can be blurred out.³³ The uncensored image of Kola itself did not contribute to a debate of general interest.³⁴ Its sole purpose was to sensationalize the story and titillate the readers.³⁵
15. While participating in a debate of general interest, the duty to verify the veracity of one's allegations extends to non-journalists.³⁶ The statements made by Peaps were facts, and unlike value judgements, they are susceptible to proof.³⁷ Serious allegations of sexual misconduct and abuse of official position must have a solid factual basis.³⁸
16. In his post, Peaps cited anonymous ministerial staffers³⁹ whose existence and truthfulness cannot be verified.⁴⁰ More importantly, he failed to reveal the source who informed him that XYZ News was about to break the story of Kola's affair.⁴¹ Peaps is not a journalist,⁴² and he is

³² *Levmore and Nussbaum* (n 5) 134; Andy Ostroy, 'WeinerGate 2.0: The Misadventures of Carlos Danger' (*Huffington Post*, 25 July 2013) <http://www.huffingtonpost.com/andy-ostroy/weiner-20-the-misadventures_b_3647217.html> accessed 04 January 2018; John F Burns, 'Possible Nazi Theme of Grand Prix Boss's Orgy Draws Calls to Quit' (*NYT*, 07 April 2008) <<http://www.nytimes.com/2008/04/07/world/europe/07formula.html>> accessed 04 January 2018

³³ *Mosley v News Group* [2008] EWHC 1777 (QB) (*'Mosley v News Group'*)

³⁴ *Von Hannover v Germany* App No 59320/00 (ECtHR, 24 June 2004) (*'Von Hannover v Germany'*) ¶65; *Mosley v United Kingdom* App No 48009/08 (ECtHR, 10 May 2011) (*'Mosley v UK'*) ¶114; *MGN Ltd v UK* (n 6) ¶ 151; *Michaels v Internet Entertainment Group, Inc* 5 F Supp 2d 823, 840 (1998)

³⁵ *Leempoel & SA ED Ciné Revue v Belgium* App No 464772/01 (ECtHR, 9 November 2006) ¶ 77; *MGN Ltd v UK* App No 39401/04 (ECtHR, 18 Jan 2011) ¶143; William A Schabas, *The European Convention on Human Rights: A Commentary* (OUP, 2015) 461 (*'Schabas ECHR Commentary'*)

³⁶ *Medžlis Islamske Zajednice Brčko and Others v Bosnia and Herzegovina* App No 17224/11 (ECtHR, 13 October 2015); *Steel and Morris v United Kingdom* App No 68416/01 (ECtHR, 16 February 2005) ¶ 90; *Schabas ECHR Commentary* (n 35) 468

³⁷ *Kasabova v Bulgaria* App No 22385/03 (ECtHR, 19 April 2011), (*'Kasabova v Bulgaria'*) ¶58; *Pfeifer v Austria* (n 2) ¶ 46; *Pedersen and Baadsgaard v Denmark* App No 49017/99 (ECtHR, 19 June 2003) (*'Pedersen v Denmark'*) ¶64

³⁸ *Olafsson v Iceland* App No 58493/13 (ECtHR, 16 March 2017) (*'Olafsson v Iceland'*) ¶53; *Kasabova v Bulgaria* (n 37) ¶ 65

³⁹ Moot Proposition, ¶ 8.3

⁴⁰ *Bladet Tromsø and Stensaas v Norway* App No 21980/93 (ECtHR, 9 July 1998) (*'Bladet Tromsø v Norway'*) ¶87

⁴¹ Moot Proposition, ¶ 12.2

⁴² *Too Much Media, LLC v Hale* 206 NJ 209 (NJ 2011)

not entitled to protect his sources.⁴³ In any case, even without revealing his source, Peaps could have explained the steps taken by him to verify the allegations.⁴⁴ However, he did not undertake any due diligence and relied on uncorroborated hearsay from an unknown third party.⁴⁵

B. THE PROSECUTION OF PEAPS UNDER ODPa PURSUED A LEGITIMATE AIM.

17. The prosecution of Peaps under ODPa pursued the aim of protecting the rights and reputation of Kola.⁴⁶ The right to protect one's image is a part of the right to privacy because photographs contain intimate details about a person's life.⁴⁷ Even public officials can be protected against publication of their photograph if the image is distorted or accompanied by disparaging statements.⁴⁸

C. THE PROSECUTION OF PEAPS UNDER ODPa WAS NECESSARY IN A DEMOCRATIC SOCIETY.

18. The prosecution of Peaps was necessary in a democratic society because it fulfilled a pressing social need (i),⁴⁹ and the interference was proportionate to the legitimate aim being pursued (ii).⁵⁰

⁴³ *General Comment 34* (n 6) ¶45; CoE: Parliamentary Assembly, 'Recommendation on the protection of journalists' sources 1950 (2011)' (1 December 2010); *Ruokanen v Finland* (n 3) ¶47; *Kasabova v Bulgaria* (n 37) ¶65; *Cumpana and Mazare v Romania* App No 33348/06 (ECtHR, 17 December 2004) ('*Cumpana v Romania*') ¶106

⁴⁴ *Cumpana v Romania* (n 43) ¶106; *Kasabova v Bulgaria* (n 37) ¶65

⁴⁵ *Mihaiu v Romania* App No 42512/02 (ECtHR, 4 November 2008) ('*Mihaiu v Romania*')

⁴⁶ UDHR (n 1) art 12; ECHR (n 1) art 8; ICCPR (n 1) art 17; ACHR (n 1) art 11; *Pfeifer v Austria* (n 2) ¶35

⁴⁷ *Von Hannover v Germany (No 2)* App no 40660/08 (ECtHR, 7 February 2012) ¶96; *Schussel v Austria* App No 42409/98 (ECtHR, 21 February 2002) ('*Schussel v Austria*') ¶2; *Kuchl v Austria* App No 51151/0675 (ECtHR 4 December 2012) ('*Kuchl v Austria*') ¶58, 63; *Ion Carstea v Romania* App No 20531/06 (ECtHR, 28 October 2014) ¶29; *Pfeifer v Austria* (n 2) ¶34; *MGN Ltd v UK* (n 6) ¶143; *D'Amico v Argentina* (n 9) ¶67

⁴⁸ *Schussel v Austria* (n 47) ¶2; *Kuchl v Austria* (n 47) ¶59; *Pfeifer v Austria* (n 2) ¶34

⁴⁹ *Cumpana v Romania* (n 43) ¶88; *MGN Ltd v UK* (n 6) ¶139; *Standard Verlags v Austria* (n 6) ¶29; *Sunday Times v UK* (n 7) ¶62; *Pedersen v Denmark* (n 37) ¶63; *Chauvy v France* (n 8) ¶64; *Herrera-Ulloa v Costa Rica*, Preliminary Objections, Merits, Reparations and Costs Judgment (IACtHR, 2 July 2004) ('*Herrera v Costa Rica*') ¶122

(i) *The prosecution fulfilled a pressing social need.*

19. To prove there was a pressing social need, the reasons advanced by the State should be relevant and sufficient.⁵¹ The sufficiency criterion depends on the public interest involved.⁵² The manner in which the photograph is published and how the subject is represented are also relevant for determining necessity.⁵³ The Respondents submit that there was a pressing social need to prosecute Peaps for three reasons.
20. *First*, the morphed intimate image itself did not contribute to the public debate on immigration policy and terrorist threats. Peaps has claimed the image was only used for illustrative purposes⁵⁴ but there was no disclaimer to alert the reader that the image was not real. The language of the post was sensationalist and one-sided,⁵⁵ and the image accompanying the post made the audience believe that the allegations were undoubtedly true.⁵⁶
21. *Second*, it is irrelevant that the morphed image was already available on the Turton Power website.⁵⁷ Unlike other forms of private information, there is a fresh invasion of privacy every time an unlawfully obtained photograph containing intimate details is viewed by a new

⁵⁰ *Sunday Times v UK* (n 7) ¶62; *Ojala and Etukeno Oy v Finland* App No 69939/10 (ECtHR, 14 January 2014) (*'Ojala v Finland'*) ¶43; *Ruokanen v Finland* (n 3) ¶38; *Kasabova v Bulgaria* (n 37) ¶54; *Herrera v Costa Rica* (n 49) ¶122

⁵¹ *Tønsberg Blad and Haukom v Norway* App No 510/04 (ECtHR, 1 March 2007) (*'Tønsberg v Norway'*) ¶54; *Handyside v UK* App no 5393/72 (ECtHR, 7 December 1976) (*'Handyside v UK'*) ¶50; *Pedersen v Denmark* (n 37) ¶63; *Chauvy v France* (n 8) ¶65; *Cumpana v Romania* (n 43) ¶90

⁵² *Sunday Times v UK* (n 7) ¶65

⁵³ *Kuchl v Austria* (n 47) ¶87

⁵⁴ Moot Proposition, ¶ 12.2

⁵⁵ *Mosley v United Kingdom* (n 34) ¶ 114; *Tønsberg v Norway* (n 51)

⁵⁶ *Mihaiu v Romania* (n 45)

⁵⁷ Moot Proposition, ¶ 12.3

person.⁵⁸ By sharing the image on Scoops, which is Turtonia's most popular social media platform,⁵⁹ Peaps significantly increased the reach of the image.

22. *Third*, in his post, Peaps accused Kola of granting visas to terrorists at Prinsov Parkta's behest.⁶⁰

If these allegations were true, they could constitute a criminal offence. Accusing a person of criminal conduct⁶¹ without any factual basis undermines the person's right to presumption of innocence and such conduct cannot go unpunished.⁶²

(ii) The two-year prison sentence was proportionate to the aim pursued.

23. The nature and severity of punishment must be considered while assessing proportionality.⁶³

Civil remedies under tort law and copyright law are neither suitable nor effective in case of non-consensual disclosure of intimate images.⁶⁴ The high cost of civil litigation makes it unaffordable for many victims, and perpetrators do not have means to pay the damages awarded.⁶⁵ Even remedies under copyright law are unavailable if the image was taken by another person.⁶⁶ Therefore, a less restrictive civil remedy⁶⁷ is not available.

⁵⁸ *Douglas v Hello* (n 17); *Mosley v News Group* (n 33)

⁵⁹ Moot Proposition, ¶5.2

⁶⁰ Moot Proposition, ¶8.3

⁶¹ *Pfeifer v Austria* (n 2) ¶47; *Pedersen v Denmark* (n 37) ¶70; *Cumpana v Romania* (n 43) ¶102

⁶² *Kasabova v Bulgaria* (n 37) ¶60; *Pedersen v Denmark* (n 37) ¶72

⁶³ *Cumpana v Romania* (n 43) ¶111; *Standard Verlags v Austria* (n 6) ¶29

⁶⁴ Aubrey Burris, 'Hell Hath No Fury Like A Woman Pored: Revenge Porn and the Need for a Federal Non-Consensual Pornography Statute' (2014) 66 Florida Law Review 2325, 2339-2342

⁶⁵ *Citron and Franks* (n 5) 349

⁶⁶ Andrew Koppelman, (n 5) 673

⁶⁷ *Siracusa Principles* (n 6) principle 11; Janneke Gerards, 'How to Improve the Necessity Test of the European Court of Human Rights?' (2013) 11 International Journal of Constitutional Law 2, 482

24. In the present case, criminal sanction is justified because by causing irreparable damage to Kola's reputation, Peaps has seriously injured fundamental rights of others.⁶⁸ The severity of punishment is also compatible with practice of other States. Two-year imprisonment is permitted under similar legislations in UK,⁶⁹ Australia,⁷⁰ Philippines,⁷¹ Japan,⁷² and Israel.⁷³

⁶⁸ *Bingol v Turkey* App No 36141/04 (ECtHR, 22 June 2010) ¶ 41; *Kimel v Argentina* (n 6) ¶ 77; *Schabas ECHR Commentary* (n 35) 454

⁶⁹ Criminal Justice Courts Act, s 33(9) (United Kingdom, 2015)

⁷⁰ Crimes Act 1900, s 91Q (New South Wales, Australia, 2017)

⁷¹ Anti-Photo and Video Voyeurism Act, s 5 (Philippines, 2009)

⁷² Act on Prevention of Damage by Provision of Private Sexual Image Records (Japan, 2014)

⁷³ Prevention of Sexual Harassment Law, s 5A(a-c) (Israel, 2014)

II. TURTONIA'S PROSECUTION OF SCOOPS UNDER THE ONLINE DIGNITY PROTECTION ACT IS CONSISTENT WITH ARTICLE 19, ICCPR

25. Prompt action by intermediaries is necessary to combat non-consensual disclosure of intimate images,⁷⁴ and social media platforms such as Facebook are even taking proactive steps to filter out such images.⁷⁵ In this case, the prosecution of Scoops for facilitating the distribution of Kola's morphed image is justified because it satisfies the three-part test of legality (A), legitimacy (B), and necessity (C).⁷⁶

A. THE PROSECUTION OF SCOOPS UNDER ODPa WAS PRESCRIBED BY LAW.

26. A restriction is prescribed by law if it is sufficiently precise to serve as a guide for behaviour.⁷⁷

However, every restriction need not be explicitly provided in the statute, and the consequences need not be foreseeable with absolute certainty.⁷⁸

27. In the present case, ODPa expressly lists the different types of entities covered within its ambit.⁷⁹ For further clarity, it defines the term '*distribute*' to include not just publication but

⁷⁴ Nicolas Suzor, Bryony Seignior, Jennifer Singleton, 'Non-Consensual Porn and the Responsibilities of Online Intermediaries' (2017) 40 Melbourne University Law Review 1057

⁷⁵ Olivia Solon, 'Facebook asks users for nude photos in project to combat revenge porn' (*The Guardian*, 07 November 2017) <<https://www.theguardian.com/technology/2017/nov/07/facebook-revenge-porn-nude-photos>> accessed 04 January 2018

⁷⁶ *General Comment 34* (n 6) ¶22; *Special Rapporteur 2013 Report* (n 6) ¶28–29; *Siracusa Principles* (n 6) principle 10; *ACHPR Declaration on FoE* (n 6) principle 2; *McIntyre v Canada* (n 6) ¶11.4; *MGN Ltd v UK* (n 6) ¶136; *Standard Verlags v Austria* (n 6) ¶24; *Kimel v Argentina* (n 6) ¶58; *Konate v Burkina Faso* (n 6) ¶125

⁷⁷ *General Comment 34* (n 6) ¶ 25; HRC, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression' (20 April 2010) UN Doc A/HRC/14/23, ¶ 78,20; *Olafsson v Iceland* (n 38) ¶36; *Chauvy v France* (n 8) ¶ 43; *Kokkinakis v Greece* App no 14307/88 (ECtHR, 25 May 1993) ('*Kokkinakis v Greece*') ¶40; *Uson Ramirez v Venezuela*, Preliminary Objections, Funds, Reparations and Costs Judgement (IACtHR, 20 November 2009) ('*Ramirez v Venezuela*') ¶ 6-57; *Kimel v Argentina* (n 6) ¶63; *City of Chicago v Morales* 527 U.S. 41 (1999); *Kartar Singh v State of Punjab* 1994 3 SCC 569 (India); *Shreya Singhal v Union of India* AIR 2015 SC 1523 (India)

⁷⁸ *Delfi AS v Estonia* App No 64569/09 (ECtHR, 16 June 2015) ('*Delfi 2015*') ¶121; *Sunday Times v UK* (n 7) ¶ 49; *Chauvy v France* (n 8) ¶43; *D'Amico v Argentina* (n 9) ¶52

⁷⁹ Section 1, ODPa. Moot Proposition, ¶ 10.2

also transfer and reproduction.⁸⁰ While some revenge porn legislations require ‘*intentional dissemination*’,⁸¹ ODPa merely requires that an actor ‘*knowingly distribute*’⁸² a non-consensual intimate image. The relaxation of the intent requirement coupled with the ability of an intermediary to obtain ‘*knowledge*’⁸³ suggests that intermediaries are also liable under ODPa.

28. ODPa does not specifically address the liability of online intermediaries unlike similar revenge porn legislations in Illinois⁸⁴ and Louisiana⁸⁵, and it may be argued that Scoops’ prosecution was unforeseeable. However, these *pari materia* legislations exempt liability only for the class of intermediaries who provide computer service⁸⁶ or broadband service,⁸⁷ and act as *mere conduits*. In comparison, Scoops actively hosts and promotes content on its platform, and in *Delfi v Estonia*,⁸⁸ the ECtHR has imposed liability on active intermediaries for objectionable content posted on their platform.

B. THE PROSECUTION OF SCOOPS UNDER ODPa PURSUED A LEGITIMATE AIM.

29. As previously argued,⁸⁹ the prosecution was necessary to protect the reputation of Kola who was shamed and forced to resign because of the morphed intimate image.⁹⁰

⁸⁰ Section 2(a), ODPa. Moot Proposition, ¶ 10.2

⁸¹ Illinois Criminal Code, s 12–23.5; California Penal Code, s 647(j)(4)

⁸² Section 1, ODPa. Moot Proposition, ¶ 10.2

⁸³ Council Directive 2000/31/EC of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce in the Internal Market OJ L178/1, (‘*E-Commerce Directive*’) art 14; Digital Millennium Copyright Act, s 512 (United States of America, 1998); *L’Oreal SA v eBay* C-324/09 (CJEU, 12 July 2011) (‘*L’Oreal v eBay*’)

⁸⁴ Public Act 098-1138, s 11-23.5(d) (Illinois)

⁸⁵ Louisiana Revised Statutes, s 14:283.2

⁸⁶ North Carolina General Statutes, s 14–190.5A

⁸⁷ Oklahoma Statutes, s 12-1040.13b

⁸⁸ *Delfi 2015* (n 78) ¶ 144-146

⁸⁹ See supra ¶ 17 of this Memorial

C. THE PROSECUTION OF SCOOPS UNDER ODPA WAS NECESSARY IN A DEMOCRATIC SOCIETY.

30. In a democratic society, speech can be curtailed if there is a pressing social need (i),⁹¹ and the interference is proportionate to the aim pursued (ii).⁹²

(i) The prosecution fulfilled a pressing social need.

31. The necessity of Scoops' prosecution must be adjudged in context of the devastating harm caused by non-consensual distribution of intimate images in *Turtonia*,⁹³ the nature of the intermediary,⁹⁴ and the role of social media in promoting such unlawful content.⁹⁵

32. Due to Scoops' failure to expeditiously remove the morphed image, Kola faced harassment and death threats.⁹⁶ Large protests⁹⁷ outside her office eventually forced her to resign as the Immigration Minister.⁹⁸ The morphed image distributed on Scoops' platform had the direct and the immediate effect of prompting these protests with some protestors even making references to the content of the post.⁹⁹ The post also created a volatile environment which led to the murder

⁹⁰ Moot Proposition, ¶9.4-9.6

⁹¹ *Cumpana v Romania* (n 43) ¶88; *MGN Ltd v UK* (n 6) ¶139; *Standard Verlags v Austria* (n 6) ¶ 29; *Sunday Times v UK* (n 7) ¶ 62; *Pedersen v Denmark* (n 37) ¶63; *Chauvy v France* (n 8) ¶ 64; *Herrera v Costa Rica* (n 49) ¶122

⁹² *Sunday Times v UK* (n 7) ¶ 62; *Ojala v Finland* (n 50) ¶43; *Ruokanen v Finland* (n 3) ¶38; *Kasabova v Bulgaria* (n 37) ¶54; *Herrera v Costa Rica* (n 49) ¶122

⁹³ Moot Proposition, ¶10.1

⁹⁴ *L'Oreal v eBay* (n 83)

⁹⁵ *Payam Tamiz v Google Inc* [2013] EWCA Civ 68

⁹⁶ Moot Proposition, ¶9.2

⁹⁷ Moot Proposition, ¶9.4

⁹⁸ Moot Proposition, ¶9.6

⁹⁹ Moot Proposition, ¶9.4

of Aquarian immigrants by an angry mob.¹⁰⁰ Therefore, there was a pressing social need to prosecute Scoops.

33. In the present case, liability was imposed on Scoops because it selectively promotes content on its platform (a), and it willfully ignored the harm caused by non-consensual distribution of Kola's image (b).

(a) *Scoops selectively promotes content on its platform.*

34. An intermediary is exempt from liability if it is a *mere conduit*¹⁰¹ or an interactive computer service¹⁰² provider. Therefore, intermediaries who are innocent disseminators of content cannot be made liable.¹⁰³ In the facts before us, Scoops not only hosts content on its platform, but it actively promotes certain posts¹⁰⁴ by boosting them for monetary consideration.¹⁰⁵ While the algorithm used by Scoops may be automatic, Scoops also uses human review to adjust the algorithm in a manner that makes it more or less likely for users to see content relating to a specific topic of interest.¹⁰⁶ Therefore, Scoops should exercise greater control over user posts

¹⁰⁰ Moot Proposition, ¶9.5

¹⁰¹ *E-Commerce Directive* (n 83) art 12; Information Technology Act, 2000 s 79(2) (India, 2000)

¹⁰² Communications Decency Act, s 230 (United States of America, 1996)

¹⁰³ UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur on Freedom of Expression and ACHPR Special Rapporteur on Freedom of Expression and Access to Information, 'Joint Declaration on Freedom of Expression and the Internet' (2011) <http://www.law-democracy.org/wp-content/uploads/2010/07/IRIS-piece-2.11.08.TM_rev_.pdf> accessed 10 January 2018, ('**Joint Declaration on FoE 2011**') ¶2; *E-Commerce Directive* (n 83) ¶42; Manila Principles on Intermediary Liability (2015) principle 1

¹⁰⁴ *L'Oreal v eBay* (n 83)

¹⁰⁵ Moot Proposition, ¶5.1, 5.3

¹⁰⁶ Clarifications (Africa Regional Rounds) 2

because it financially benefits from its unique infrastructure¹⁰⁷ and it selects which users the information is transmitted to.¹⁰⁸

(b) Scoops had knowledge of non-consensual distribution of Kola's image and it failed to act expeditiously.

35. Online intermediaries such as Scoops can be held liable for user generated content if they do not take down illegal posts after receiving information of the same.¹⁰⁹ Knowledge can be attributed to an intermediary even based on a private notice.¹¹⁰ Therefore, Scoops acquired knowledge when it received the complaint filed by Kola's staff on 2 May 2015.¹¹¹ By failing to act on the notice expeditiously,¹¹² Scoops willfully ignored¹¹³ and consciously disregarded a substantial and unjustified risk¹¹⁴ that Kola had not consented to distribution of the image.

36. In any case, the intermediary must vigilantly monitor content which gains unusual traction on its platform.¹¹⁵ This obligation is not onerous for an intermediary like Scoops, which is modelled around boosting content¹¹⁶ and specifically employs human review to examine accounts which have unusually high activity.¹¹⁷

¹⁰⁷ *Delfi 2015* (n 78) ¶115

¹⁰⁸ *E-Commerce Directive* (n 83) art 12; Information Technology Act, 2000, s79(2) (India)

¹⁰⁹ *Godfrey v Demon Internet* 4 All ER 342 (2001)

¹¹⁰ *E-Commerce Directive* (n 83) art 14; Digital Millennium Copyright Act, s 512 (United States of America, 1998)

¹¹¹ Moot Proposition, ¶9.2; Clarification (Africa Regional Rounds) 3

¹¹² CoE, 'The Declaration on Freedom of Communication on the Internet' (28 May 2003) principle 6 and ¶ 3

¹¹³ *Delfi 2015* (n 78) (Raimondi J, Karakas J, De Gaetano J and Kjolbro J concurring) ¶ 15

¹¹⁴ Section 1, ODPA. Moot Proposition, ¶ 10.2

¹¹⁵ *E-Commerce Directive* (n 83) art 14; Digital Millennium Copyright Act, s 512 (United States of America, 1998); *Delfi 2015* (n 78); Qian Tao, 'The Knowledge Standard for Intermediary Liability in China' (2011) 20 *International Journal of Law and Information Technology* 1, 14-15

¹¹⁶ Moot Proposition, ¶ 5.1

¹¹⁷ Clarification (Africa Regional Rounds) 2

37. Kola's morphed image received 1,45,000 views in just 3 days.¹¹⁸ Its widespread notoriety prompted XYZ News to release an official disclaimer within 5 hours of the image being posted,¹¹⁹ and Turton Times published an opinion piece on the controversy the very next day.¹²⁰ In contrast, Scoops removed the post 73 hours after the image was originally posted, 66 hours after Kola's staff reported the image, and 50 hours after receiving a legal notice from Kola's lawyer.¹²¹

(ii) The 200,000 USD fine was proportionate to the aim pursued.

39. The imposition of 200,000 USD fine on Scoops was proportionate for three reasons. *First*, Scoops as commercial entity, directly benefitted economically from the post going viral,¹²² and 200,000 USD fine is a tiny fraction of its 100 million USD annual revenue.¹²³ *Second*, Scoops is the most popular social media platform in Turtonia, and the morphed image had 145,000 views and 21,000 shares because of its massive reach.¹²⁴ *Third*, punishment prescribed under ODPa is not excessively harsh, and it is similar to the quantum of punishment prescribed in states such as France¹²⁵ and Georgia.¹²⁶

¹¹⁸ Moot Proposition, ¶9.2

¹¹⁹ Moot Proposition, ¶9.1

¹²⁰ Moot Proposition, ¶9.3

¹²¹ Moot Proposition, ¶9.2

¹²² *L'Oreal v eBay* (n 83); *SABAM v Netlog* C-360/10 (CJEU, 16 February 2012)

¹²³ Moot Proposition, ¶5.1

¹²⁴ *Lindon, Otchakovsky-Laurens and July v France* App no 21275/02 (ECtHR, 22 October 2007) (*'Lindon v France'*) ¶47; *Schabas ECHR Commentary* (n 35) 477

¹²⁵ New Penal Code, art 226-1 (France)

¹²⁶ Official Code of Georgia, s 16-11-3 (Georgia, 2014)

III. THE PROSECUTION OF PEAPS BY TURTONIA UNDER THE FALSE INFORMATION ACT DOES NOT VIOLATE HIS RIGHT TO FREEDOM OF EXPRESSION SINCE IT IS JUSTIFIED UNDER ARTICLE 19(3) ICCPR.

40. While all individuals have a right to hold opinions and express them,¹²⁷ it is not absolute in nature.¹²⁸ It may be legitimately restricted under Article 19(3) ICCPR and in doing so States have a margin of appreciation.¹²⁹ Furthermore, any interference must be justified under the three-part test of legality, legitimacy, and necessity.¹³⁰ This test has been universally accepted by various international bodies¹³¹ and international courts.¹³²

¹²⁷ UDHR (n 1) art 19; ICCPR (n 1) art 19; ECHR (n 1) art 10; ACHR (n 1) art 13; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) ('ACHPR') art 9; Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008) ('ArCHR') art 26

¹²⁸ UDHR (n 1) art 29; ICCPR (n 1) art 19(3); ECHR (n 1) art 10(2); ACHR (n 1) art 13(2); ACHPR (n 127) 9(2); ArCHR (n 127) art 4

¹²⁹ *Cumpănă v Romania* (n 43), ¶88; *Colombani and Ors v France* App no 51279/99 (ECtHR, 25 June 2002), ¶57; *Ceylan v Turkey*, App no 23556/94 (ECtHR, 8 July 1999), ('*Ceylan v Turkey*') ¶34; *Surek v Turkey (No 1)* App no 26682/95 (ECtHR, 8 July 1999), ('*Surek v Turkey (No 1)*') ¶61; *Arslan v Turkey* App no 57908/00 (ECtHR, 10 January 1996), ('*Arslan v Turkey*') ¶46; T A O'Donnell, 'The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights' (1982) 14(4) Human Rights LQ 474, 475

¹³⁰ *Siracusa Principles* (n 6) ¶17; Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Material and Commentary* (2nd edn, OUP 2005) ('*Joseph, Schultz, and Castan ICCPR Commentary*') 524; Oliver Castendyk, Egbert J Dommering and Alexander Scheuer, *European Media Law* (Kluwer Law International 2008) 43; Mohamed Elawa Badar, 'Basic Principles Governing Limitations on Individual Rights and Freedoms in Human Rights Instruments' 7(4) Intl J of Human Rights 63 (2003)

¹³¹ *Vladimir Petrovich Laptsevich v Belarus* Communication no 780/1997 (HRC, 13 April 2000) UN Doc CCPR/C/68/D/780/1997, ¶8.2; *Mukong v Cameroon* Communication no 458/1991 (HRC, 21 July 1994) UN Doc CCPR/C/51/D/458/1991, ¶9.7; *Lovell v Australia* Communication no 920/2000 (HRC, 13 May 2004) UN Doc CCPR/C/80/D920/2000, ¶9.3; *Special Rapporteur 2013 Report* (n 6), ¶29

¹³² *Handyside v UK* (n 51) ¶43; *Sunday Times v UK* (n 7) ¶45; *Éditions Plon v France* App no 58148/00 (ECtHR, 18 May 2004), ¶23; *Interights and Others v Mauritania* Comm 242/2001 (ACommHPR, 2004); *Media Rights Agenda v Nigeria* Communications 105/93, 128/94, 130/94 and 152/96 (ACommHPR, 2000), ¶64-71; *Constitutional Rights Project and Civil Liberties Organization v Nigeria* Communication 143/95 and 150/96 (ACommHPR, 2000); *Zimbabwe Lawyers for Human Rights & Institute for Human Rights and Development in Africa v Zimbabwe* Communication 294/04 (ACommHPR, 2009), ¶74-75; ACommHPR, 'Resolution on the Adoption of the Declaration of Principles of Freedom of Expression in Africa' (2002) ACHPR Res 62(XXXII)02 Principle II; *Herrera-Ulloa v Costa Rica* Petition no 12367 (IA CtHR, 2 July 2004), ¶120; *Francisco Martorell v Chile* Case 11.230 (IA CtHR, 3 May 1996), ¶55; IA CtHR, 'Report of the Special Rapporteur for Freedom of Expression' (2009) OEA/SER L/V/II Doc 51, ¶58-64; IA CtHR, 'Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism' Advisory Opinion OC-5/85 (13 November 1985)

41. The Respondent submits that Peaps' post of May 2 alleging numerous lies about Minister Wani Kola (*'Peaps' post*) referred to the threat of True Religion in Turtonia due to her immigration policies.¹³³ While this referred to a matter of public interest, and speech in such a context is particularly valued,¹³⁴ it loses its protection when the intent is to incite through false information.¹³⁵ Furthermore, the focus of the post was the Kola's love affair with Prinsov Partka, without offering any real critique of her immigration policies. Speech about public officials which only intends to entertain¹³⁶ without contributing to public debate¹³⁷ has lesser value.
42. Therefore Turtonia's prosecution of Peaps was *firstly*, prescribed by law (A), *secondly*, in pursuance of a legitimate aim (B), and *thirdly*, necessary in a democratic society (C).

A. TURTONIA'S PROSECUTION OF PEAPS WAS PRESCRIBED BY LAW SINCE FIA IS OF APPROPRIATE QUALITY.

43. For a prosecution to be justified under domestic law, the law must not only exist but must be of a certain quality.¹³⁸ It must be accessible,¹³⁹ and its application should be adequately foreseeable

¹³³ Moot Proposition, ¶8.3

¹³⁴ *General Comment 34* (n 6) ¶38; *Arslan v Turkey* (n 129) ¶46; *Eon v France* App no 26118/10 (ECtHR, March 14, 2013), ¶59; *Sürek v Turkey (No 1)* (n 129) ¶61; *Feldek v Slovakia* App no 29032/95 (ECtHR, 12 July 2001), ¶74

¹³⁵ *United States v Stevens* (n 11) 468-70; *Brandenburg v Ohio* 395 US 444, 447 (1969) (*'Brandenburg v Ohio'*); *Near v Minnesota* 283 US 697, 716 (1931)

¹³⁶ *Von Hannover v Germany* (n 34) ¶65; *Standard Verlags GMBH v Austria (No 2)* App no 21277/05 (ECtHR, 4 June 2009), (*'Standard Verlags (No 2)'*) ¶40; *Hachette Filipacchi Associés v France* App no 12268/03 (ECtHR, 23 October 2009), ¶40; *MGN Ltd v UK* (n 6) ¶143

¹³⁷ *National Media Ltd and Others v. Bogoshi* [1999] LRC 616 (South African Supreme Court of Appeal)

¹³⁸ *Malone v United Kingdom* App no 8691/79 (ECtHR, 2 August 1984), ¶67; *Kruslin v France* App no 11801/85, (ECtHR, 24 April 1990), (*'Kruslin v France'*) ¶27

¹³⁹ *Leander v Sweden* App No 9248/81 (ECtHR, 26 March 1987), ¶50; *Leyla Şahin v Turkey* App no 44774/98 (ECtHR, 10 November 2005), ¶84; *Sunday Times v UK* (n 7) ¶49; *Margareta and Roger Andersson v Sweden*, App no 12963/87 (ECtHR, 25 February 1992), ¶75

to allow an individual to regulate their conduct.¹⁴⁰ Furthermore, laws must have adequate safeguards against unfettered discretion.¹⁴¹

44. The Respondent submits that Section 1(b) of the FIA is not vague and overbroad **(i)**, and does not grant unfettered discretion **(ii)**.

(i) Section 1(b) of the FIA is not vague and overbroad.

45. The Respondents submit that Section 1(b) is not vague and overbroad for four reasons.

46. *First*, phrases such as ‘*hatred*’¹⁴² and ‘*civil unrest*’¹⁴³ are well defined. While certainty in laws is desirable, absolute precision is impossible¹⁴⁴ and should depend on the field designed to be regulated.¹⁴⁵ Given the unique hurdles in regulating false news,¹⁴⁶ the FIA can be couched in vague terms. Hence, Section 1(b) is not vague.

¹⁴⁰ *Rekvényi v Hungary* App no 25390/94 (ECtHR, 20 May 1999), ¶34; *Sunday Times v United Kingdom (No 2)* App no 13166/87 (ECtHR, 26 November 1991), ¶49; IACHR, ‘Report on the Situation of Human Rights in Nicaragua’ OAS Doc OEA/Ser/V/11.53 (1981), ¶118

¹⁴¹ *Amann v Switzerland* 27798/95 (ECtHR, 16 February 2000), ¶62; *Kopp v Switzerland* App no 23224/94 (ECtHR, 23 March 1998), ¶75; *Kruslin v France* (n 138) ¶36; *Çetin & Ors v Turkey* App no 40153/98 (ECtHR, 13 February 2002), ¶61; *Pinkney v Canada* Communication no 17/1978 (HRC, 29 October 1981) UN Doc CCPR/C/OP/1, ¶34; *Al-Nashif v Bulgaria* App no 50963/99 (ECtHR, 20 June 2002), ¶119; *Liu v Russia (No 2)* App no 29157/09 (ECtHR, 26 July 2011), ¶88

¹⁴² Article 19, ‘The Camden Principles on Freedom of Expression and Equality’, (2009), principle 12 <<https://www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf>> accessed 04 January 2018

¹⁴³ US Code Title 12, Part I, Chapter 12, s 231

¹⁴⁴ *Sunday Times v UK* (n 7); *Wingrove v United Kingdom* App no 17419/90 (ECtHR, 25 November 1996); *Muller v Switzerland* App No 10737/84 (ECtHR, 24 May 1988); *Kokkinakis v Greece* (n 77); *Lindon v France* (n 124); *Delfi AS v Estonia* App no 64569/09 (ECtHR, 10 October 2013)

¹⁴⁵ *Editorial Board of Pravoye Delo and Shtekel v Ukraine* App no 33014/05 (ECtHR, 05 May 2011); *Centro Europa 7 S R L and Di Stefano v Italy* App no 38433 (ECtHR, 7 June 2012)

¹⁴⁶ The Information Society Project, The Floyd Abrams Institute for Freedom of Expression ‘Fight Fake News: Workshop Report’ (2017) <https://law.yale.edu/system/files/area/center/isp/documents/fighting_fake_news_-_workshop_report.pdf> accessed 04 January 2018 (*‘Yale Fake News Workshop Report’*)

47. *Second*, false information provisions have been struck down in Zimbabwe,¹⁴⁷ Uganda,¹⁴⁸ and Zambia¹⁴⁹ for the lack of a ‘knowledge’ element since it penalized even innocent lies.¹⁵⁰ In contrast, Section 1(b) codifies the ‘actual malice’ standard for knowledge¹⁵¹ which removes innocent speech from its ambit.¹⁵²
48. *Third*, the provision does not restrict an individual from holding a false opinion or even stating a false fact, but merely prevents them from stating it with *intent* to cause harm.¹⁵³ The Human Rights Committee in *Faurisson v France* similarly stated that the applicant’s expression was not restricted for his opinion, the denial of Holocaust, but rather because he said it to incite anti-Semitic feelings.¹⁵⁴
49. *Finally*, while the line between facts and opinion is thin, even opinions must have an underlying factual basis.¹⁵⁵ Furthermore, false opinions about public officials must be held to an even higher standard for proving underlying facts.¹⁵⁶ The European Court of Human Rights (‘*ECtHR*’) in *McVicar v United Kingdom* stated that requirement of proof from an individual

¹⁴⁷ *Chavunduka and Anor v Minister of Home Affairs and Anor* 2000 (1) ZLR 571 (S) (Supreme Court of Zimbabwe, 22 May 2000)

¹⁴⁸ *Charles Onyango Obbo and Andrew Mujuni Mwenda v Attorney General* (2004) AHRLR 256 (Supreme Court of Uganda, 11 February 2004)

¹⁴⁹ *Chipenzi v The People* HPR/03/2014 (High Court for Zambia, 04 December 2014)

¹⁵⁰ HRC, ‘Concluding observations of the Human Rights Committee – Cameroon’ (1999) CCPR/C/79/Add.116, ¶24

¹⁵¹ *New York Times Co v Sullivan* 376 US 268 (1964)

¹⁵² *Marilou Rickert v Washington Public Disclosure Commission* 168 P.3d 835 (Supreme Court of the State of Washington, 04 October 2007) (Alexander CJ concurring); Richard L Hasen, ‘A Constitutional Right to Lie in Campaigns and Elections?’ (2013) 74 *Montana Law Review* 1, 69 (‘*Richard Hasen*’)

¹⁵³ Moot Proposition, ¶11.2

¹⁵⁴ *Faurisson v France* Communication No 550/1993 (HRC, 1996) UN Doc CCPR/C/58/D/550/1993, ¶9.6-9.7

¹⁵⁵ *Pedersen v Denmark* (n 37) ¶76; *Tonsberg v Norway* (n 51), ¶89-90; *Makarenko v Russia* App no 5962/03 (ECtHR, 22 December 2009), ¶150; *Rumyana Ivanova v Bulgaria* App no 36207/03 (ECtHR, 14 February 2008), ¶64

¹⁵⁶ *Abril v Reginaldo* 1.297.426-RO (Supreme Court of Brazil)

claiming allegations of drug use by an athlete was a justified restriction.¹⁵⁷ Therefore, Section 1(b) is not overbroad.

(ii) Section 1(b) of the FIA does not grant unfettered discretion to courts.

50. A law providing discretion must contain adequate safeguards.¹⁵⁸ In previous cases, the presence of an appeal has been considered as an adequate safeguard.¹⁵⁹ While Turtonia only has a discretionary appeal to its Supreme Court,¹⁶⁰ a right to appeal must only grant a *leave* to appeal.¹⁶¹ Therefore, there are adequate safeguards present in Section 1(b).

B. TURTONIA’S PROSECUTION OF PEAPS WAS IN PURSUANCE OF THE LEGITIMATE AIM OF PROTECTING PUBLIC ORDER.

51. An individual’s freedom of expression may only be interfered with for a legitimate aim under Article 19(3) ICCPR.¹⁶² Peaps’ has been prosecuted under the FIA, which was passed to ‘*preserve the integrity of the democratic process*’ and ‘*safeguard the peace*’.¹⁶³ Turtonia has previously seen civil unrest after the Micron Leaks,¹⁶⁴ and it is currently experiencing anti-immigrant sentiment against Aqaurians.¹⁶⁵ Violence of this nature violates the public order of a

¹⁵⁷ *McVicar v United Kingdom* App no 46311/99 (ECtHR, 07 May 2002), ¶87

¹⁵⁸ *Huvig v France* App no 11105/84 (ECtHR, 24 April 1990), (*‘Huvig v France’*) ¶34; *Kruslin v France* (n 138) ¶35

¹⁵⁹ *Klass v Germany* App no 5029/71 (ECtHR, 6 September 1978), ¶56; *Malcolm Ross v Canada* Communication no 736/1997 (HRC, 2000) UN Doc CCPR/C/70/D/736/1997, ¶11.4; *Uzun v Germany* App no 35623/05 (ECtHR, 2 September 2010), ¶72; *Gurtekin v Cyprus* App nos 60441/13, 68206/13, 68667/13 (ECtHR, 11 March 2014), ¶28

¹⁶⁰ Moot Proposition, ¶2.2

¹⁶¹ *Peterson Sarpsborg AS and Others v Norway* App no 25944/94 (ECtHR, 21 November 1996), ¶2; *Hauser-Sporn v Austria* App 37301/03 (07 December 2006), ¶52

¹⁶² General Comment 34 (n 6) ¶ 21

¹⁶³ Moot Proposition, ¶11.1

¹⁶⁴ Moot Proposition, ¶11.1

¹⁶⁵ Moot Proposition, ¶9.5

State.¹⁶⁶ Therefore, the prosecution of Peaps' fulfills the legitimate aim of maintain public order.

C. TURTONIA'S PROSECUTION OF PEAPS IS NECESSARY IN A DEMOCRATIC SOCIETY SINCE HE KNOWINGLY POSTED FALSE INFORMATION WITH INTENT TO INCITE.

52. An interference is necessary in a democratic society when it is *firstly*, pursuant to a pressing social need in prosecuting Peaps¹⁶⁷ (i), and *secondly*, proportionate to the aim (ii).¹⁶⁸

(i) There was a pressing social need for the prosecution of Peaps.

53. The Respondents submit that Peaps' prosecution responded to a pressing social need as false news has a propensity to incite violence,¹⁶⁹ as evidenced by violence in Kenya,¹⁷⁰ India,¹⁷¹ Indonesia,¹⁷² Myanmar,¹⁷³ and the United States,¹⁷⁴ among others. Furthermore, it also has a

¹⁶⁶ *Siracusa Principles* (n 6) ¶ 22

¹⁶⁷ *Lingens v Austria* App no 9815/82 (ECtHR, 08 July 1986), ¶39; *Handyside v UK* (n 51) ¶48; *Sunday Times v UK* (n 7) ¶59; *Observer and Guardian v United Kingdom* App no 13585/88 (ECtHR, 26 November 1991), ¶59; *Cumpănă v Romania* (n 43) ¶88; *Herrera v Costa Rica* (n 49) ¶108

¹⁶⁸ *Siracusa Principles* (n 6) c1 10(c); *Marques de Morais v Angola* Communication No 1128/2002 (HRC, 2005) UN Doc CCPR/C/D/1128/2002, ¶3.9; *Goodwin v The United Kingdom* App no 17488/90 (ECtHR, 27 March 1996), ¶40; *Dalban v Romania* App no 28114/95 (ECtHR, 28 September 1999), ¶47; Jeremy McBride, 'Proportionality and the European Convention of Human Rights' in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart Publishing 1999) 23

¹⁶⁹ UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur on Freedom of Expression and ACHPR Special Rapporteur on Freedom of Expression and Access to Information, 'Joint Declaration On Freedom Of Expression And "Fake News", Disinformation And Propaganda' (2017) FOM.GAL/3/17 (*'Joint Declaration on Fake News 2017'*)

¹⁷⁰ Najira Sambuli, 'How Kenya became the latest victim of 'fake news' (*Aljazeera*, 17 August 2017) <<http://www.aljazeera.com/indepth/opinion/2017/08/kenya-latest-victim-fake-news-170816121455181.html>> accessed 04 January 2018

¹⁷¹ Arun Dev, 'Fake News Claims Hot Oil Was Poured on Hindu Man, Sparks Violence' (*The Quint*, 14 December 2017) <<https://www.thequint.com/news/webqoof/fake-news-claim-hot-oil-was-poured-on-hindu-man-sparks-violence>> accessed 04 January 2018

¹⁷² Nyshka Chandran, 'Fake news' can be very dangerous, and events this year in Asia proved it' (*CNBC*, 25 December 2017) <<https://www.cnbc.com/2017/12/25/fake-news-was-a-weapon-in-asia-in-2017.html>> accessed 04 January 2018

¹⁷³ 'In Myanmar, fake news spread on Facebook stokes ethnic violence' (*PRI*, 01 November 2017) <<https://www.pri.org/stories/2017-11-01/myanmar-fake-news-spread-facebook-stokes-ethnic-violence>> accessed 04 January 2018

propensity to increase the anti-immigrant sentiments.¹⁷⁵ In any case, incitement is an inchoate offence; hence, it is not necessary if any action occurs due to such incitement.¹⁷⁶ Thus, the Respondents submit that there was a pressing social need to prosecute Peaps since his post contained false information posted with intent to incite. There are five reasons for the same.

54. *First*, Peaps knew the information he posted was false. Peaps posted the information from an account called ‘XYZNews12’ which he created a day before his post,¹⁷⁷ taking advantage of XYZNews’ widespread credibility as an objective news source.¹⁷⁸ The information in the post was purported to be from official sources to provide legitimacy,¹⁷⁹ which is a common occurrence in fake news.¹⁸⁰

55. *Second*, in any case, Peaps showed reckless disregard when he did not verify the information. Individuals discussing matters in public interest have an obligation to do so in good faith and on an accurate factual basis.¹⁸¹ While the Applicants may argue that Peaps believed that XYZNews was about to break the story,¹⁸² he did not retract his post even after XYZNews denied any role

¹⁷⁴ Martenzie Johnson, ‘How fake news led Dylan Roof to murder nine people’ (*The Undeclared*, 14 December 2016) <<https://theundefeated.com/features/how-fake-news-led-to-dylann-roof-to-murder-nine-people/>> accessed 04 January 2018

¹⁷⁵ Time Hume, ‘Germany’s anti-immigrant fake news’ (*News Vice*, 02 February 2017) <https://news.vice.com/en_us/article/mb98pb/germany-fake-news-election-migrants> accessed 04 January 2018

¹⁷⁶ Joseph Jaconelli, ‘Incitement: A Study in Language Crime’ *Criminal Law, Philosophy* (2017) <https://doi.org/10.1007/s11572-017-9427-8>

¹⁷⁷ Moot Proposition, ¶8.1

¹⁷⁸ Moot Proposition, ¶6.1

¹⁷⁹ ‘Fake News and Misinformation: The role of nation’s digital newsstands, Facebook, Google, Twitter, and Reddit’ (2017) Stanford Law School Law and Public Policy Law <<https://law.stanford.edu/wp-content/uploads/2017/10/Fake-News-Misinformation-FINAL-PDF.pdf>> accessed 04 January 2018 (‘*Stanford Fake News Study*’)

¹⁸⁰ Claire Wardle, ‘Fake News. It’s Complicated’ (*First Draft*, 17 February 2017) <<https://medium.com/1st-draft/fake-news-its-complicated-d0f773766c79>> accessed 04 January 2018 (‘*Claire Wardle First Draft*’)

¹⁸¹ *Steel Morris v The United Kingdom* App no 68416/01 (ECtHR, 15 February 2005), ¶90; *Braun v Poland* App no 30162/10 (ECtHR, 04 November 2014), ¶40

¹⁸² Moot Proposition, ¶12.2

in the post.¹⁸³ Furthermore, he himself admitted he wanted to break the news first to increase his influencer score on Scoops,¹⁸⁴ showing reckless disregard for its consequence.

56. *Third*, Peaps posted with intent¹⁸⁵ to incite, which can be judged based on the content¹⁸⁶ of his post and the context¹⁸⁷ in which it was posted. His post represented that members of True Religion had already entered Turtonia and were “*truly terrifying individuals*”,¹⁸⁸ thereby highlighting the urgency of the threat implying a need to take action. The post was also made in the context of increased hatred against Aquarian immigrants by groups such as Turton Power, of which Peaps is a member.¹⁸⁹ Therefore, the post was meant to act like a “*spark in a powder keg*”¹⁹⁰ and harden already embedded prejudices¹⁹¹ which could lead to violence.

¹⁸³ Moot Proposition, ¶9.1

¹⁸⁴ Moot Proposition, ¶12.2

¹⁸⁵ Article 19, ‘The Johannesburg Principles on National Security, Freedom of Expression and Access to Information’ (1996) <<https://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf>> accessed on 04 January 2018, 9; Sandra Coliver, ‘Commentary to: The Johannesburg Principles on National Security, Freedom of Expression and Access to Information’ (1998) 20 Human Rights Quarterly 12, 38; *Brandenburg v Ohio* (n 135); *Hess v Indiana* 414 US 105, 108-09 (1973); UNGA, ‘Contribution of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression’ (2001) UN Doc A/CONF.189/PC.2/24, ¶12

¹⁸⁶ *Surek v Turkey (No 1)* (n 129) ¶58; *Gündüz v Turkey* App No 35071/97 (ECtHR, 4 December 2003), (*‘Gündüz v Turkey’*) ¶42; *Ceylan v Turkey* (n 129) ¶32; *Lehideux and Isoni v France* App no 24662/94 (ECtHR, 23 September 1998), ¶51; *Incal v Turkey* App no 22678 (ECtHR, 9 June, 1998), ¶48; *Zana v Turkey*, App no 18954/91 (ECtHR, 25 November 1997), (*‘Zana v Turkey’*) ¶51

¹⁸⁷ *Watts v US* 394 US 705 (1969); *Brandenburg v Ohio* (n 135) (Krupansky J); *Glen v Hongisto* 438 F Supp 10, 18 (ND Cal 1977); *In re Welfare of MAH & JLW* 572 NW 2d 752, 759 (Minn Ct App 1997); *Surek v Turkey (No 1)* (n 129) ¶58; *Zana v Turkey* (n 186) ¶51; *Erbakan v Turkey* App No 59405/00 (ECtHR, 6 July 2006); *Arslan v Turkey* (n 129) ¶48; *Karatas v Turkey* App no 23168/94 (ECtHR, 08 July 1999), ¶48-49; *Jersild v Denmark* App No 15890/89 (ECtHR, 23 September 1994), (*‘Jersild v Denmark’*) ¶31; John Cronan, ‘The Next Challenge for the First Amendment: The Framework for an Internet Incitement Standard (2001-02) 51 Catholic University Law Review 425, 441

¹⁸⁸ Moot Proposition, ¶8.3

¹⁸⁹ Moot Proposition, ¶7.1

¹⁹⁰ *S Rangarajan v P Jagjivan Ram* (2) SCR 204 (Supreme Court of India)

¹⁹¹ *Surek v Turkey (No 1)* (n 129) ¶62

57. *Fourth*, there was likelihood and imminence of action¹⁹² as a direct consequence of his post.¹⁹³

While Peaps' post may have only referred to True Religion, violence increases against communities which are associated with a particular terrorist group.¹⁹⁴ This is evidenced by the rising amount of violence against Muslims in USA,¹⁹⁵ Germany,¹⁹⁶ and Belgium¹⁹⁷ after cases of Islamic extremism. Similarly True Religion originates in Aquaria,¹⁹⁸ and its rise in Turtonia has been associated with the increased immigration.¹⁹⁹ Ultimately two Aquarian immigrants were killed by a mob shouting anti-Aquarian epithets, in wake of Peaps' post.²⁰⁰

58. *Finally*, while the influence of inciting speech may be reduced in the presence of alternative views,²⁰¹ the same was not possible on Scoops. Social media has an existing tendency to create

¹⁹² *Siracusa Principles* (n 6) c1I(C)(54); IACtHR, 'Annual Report of the Inter-American Commission on Human Rights 1994' (17 February 1995) OEA/SerL/V/V 211 Doc 9; *Brandenburg v Ohio* (n 135); *NAACP v. Claiborne Hardware Co.* 458 U.S. 886 (1982); Michael Curtis, *Free Speech, 'The People's Darling Privilege'* (Michael Kent Curtis 2000) 394–397; James Weinstein and Ivan Hare, *Extreme Speech and Democracy* (OUP 2010) 41; Lucas Powe, 'Brandenburg: Then and Now' (2011) 44 *Texas Tech Law Review* 69, 75–77; Susan Gilles, 'Brandenburg v State of Ohio: An "Accidental", "Too Easy", and "Incomplete" Landmark Case' (2010) 38 *Capital University Law Review* 517, 522–525

¹⁹³ *Surek v Turkey (No 1)* (n 129) (Bonello J Partly Dissenting); *Schenck v. United States* 294 US 52 (1919)

¹⁹⁴ Taylor M Scimeca, 'The European Immigration Crisis: An Analysis of how Terror Attacks have Affected Immigrant and Refugee Populations in Western Europe' University of Flora STARS Open Access

¹⁹⁵ Paisley Dodds and Danica Kirka, 'Violence against Muslims rises in wake of Islamic State terror attacks' (*Chicago Tribune*, 19 June 2017) <<http://www.chicagotribune.com/news/nationworld/ct-violence-against-muslims-20170619-story.html>> accessed 04 January 2018

¹⁹⁶ Agence France-Presse, 'Extremist violence on the rise in Germany' (*The Guardian*, 28 June 2016) <<https://www.theguardian.com/world/2016/jun/28/germany-extremist-violence-far-right-left-islamist>> accessed 04 January 2018; Anton Troianovski, 'Tensions Rise in Germany Over Immigration in Wake of Attacks' (*WSJ*, 31 July 2016) <<https://www.wsj.com/articles/tensions-rise-in-germany-over-immigration-in-wake-of-attacks-1469989963>> accessed 04 January 2018

¹⁹⁷ Steven Erlanger, 'Brussels Attacks Fuel Debate Over Migrants in a Fractured Europe' (*NY Times*, 22 March 2016) <<https://www.nytimes.com/2016/03/23/world/europe/belgium-attacks-migrants.html>> accessed 04 January 2018

¹⁹⁸ Moot Proposition, ¶3.1

¹⁹⁹ Moot Proposition, ¶9.3

²⁰⁰ Moot Proposition, ¶9.5

²⁰¹ *General Comment 34* (n 6) ¶34; *Gündüz v Turkey* (n 186) ¶44; *Jersild v Denmark* (n 187) ¶33; *Tristan Donoso v Panama*, Preliminary Objections, Merits, Reparations and Costs Judgment (IA CtHR, 27 January 2009), ¶121

echo chambers.²⁰² This tendency is exaggerated on Scoops since individuals are shown posts *only* from their friends and based on ‘topics of interest’ selected by them.²⁰³ Furthermore, the human review of Scoops’ algorithm increasingly shows individuals more posts from topics of interest when their sharing is unusually high.²⁰⁴

(ii) The fine of USD 100,000 imposed on Peaps’ under Section 2 of FIA was proportionate.

59. Any interference with freedom of expression must be proportionate, to balance an individual’s interest with that of the community.²⁰⁵ Therefore, the nature and severity of the punishment must be proportionate to the crime.²⁰⁶

60. Pecuniary compensation is a proportionate punishment for the crime of incitement.²⁰⁷ The EtCHR in *Sürek v Turkey* stated that a penalty of TRL 83,333,333 (equivalent to USD 21,954,166) against the applicant was appropriate since the letters posted by it glorified violence even though it was only publishing letters from its readers.²⁰⁸ In comparison, the applicant has only been charged with a sum of USD 100,000 even while he himself authored the post.²⁰⁹ Hence, the interference was proportionate.

²⁰² Cass Sunstein, *Going to Extremes: How Like Minds Unite and Divide* (OUP 2009); Richard Hasen (n 152) 54

²⁰³ Moot Proposition, ¶5.1

²⁰⁴ Clarifications (Africa Regional Rounds), No 1

²⁰⁵ *Cossey v UK* App no 10843/84 (ECtHR, 27 September 1990), ¶37; *Ozgur Gundem v Turkey* App no 23144/92 (ECtHR, 16 March 2000), ¶43; Rolv Ryssdal, ‘Opinion: The Coming Age of the European Convention on Human Rights’ (1996) 1 *European Human Rights Law Review* 18, 26

²⁰⁶ *Leroy v France* App no 36109/03 (ECtHR, 2 October 2008); *Balsyte-Lideikiene v Lithuania* App no 72596/01 (ECtHR, 4 December 2008), ¶83; *Perincek v Switzerland* App no 27510/99 (ECtHR, 15 October 2015), ¶272

²⁰⁷ COE, ‘Committee of Ministers to member states on “hate speech”’ Recommendation No. R 97 (20) <<https://rm.coe.int/1680505d5b>> accessed 04 January 2018, principle 2

²⁰⁸ *Sürek v Turkey (No 1)* (n 129) ¶64

²⁰⁹ Moot Proposition, ¶12.1.2

IV. THE PROSECUTION OF SCOOPS BY TURTONIA UNDER THE FALSE INFORMATION ACT DOES NOT VIOLATE ITS RIGHT TO FREEDOM OF EXPRESSION UNDER ARTICLE 19 ICCPR.

- 61.** Individuals across the globe are increasingly relying on social media to receive news and information.²¹⁰ Any individual may post on a social media website without checking the veracity of the content, since the focus has shifted to reporting it “first”.²¹¹ This has given rise to the phenomenon of “fake news”.²¹²
- 62.** Therefore, the prosecution of Scoops under Section 1(a) of the FIA²¹³ is justified under Article 19(3) ICCPR since it satisfies the three part test of legality, legitimacy, and necessity.²¹⁴ The Respondent submits that the prosecution, *firstly*, was prescribed by law (**A**), *secondly*, pursued a legitimate aim (**B**), and *thirdly*, was necessary in a democratic society (**C**).

A. THE PROSECUTION IS PRESCRIBED BY LAW SINCE SECTION 1(A) IS NOT VAGUE AND CONTAINS ADEQUATE SAFEGUARDS.

- 63.** Since Section 1(a) seeks to regulate the modern problem of “fake news”, it can be worded broadly.²¹⁵ In any case, it codifies already recognized standards of harm under clause (i)-(iii),²¹⁶ in addition to requiring knowledge of the falsity.²¹⁷

²¹⁰ Elisa Shearer and Jeffrey Gottfried, ‘News Use Across Social Media Platforms 2017’ (*Pew Research Center*, 07 September 2017) <<http://www.journalism.org/2017/09/07/news-use-across-social-media-platforms-2017/>> accessed 04 January 2018

²¹¹ *Stanford Fake News Study* (n 179)

²¹² *Claire Wardle First Draft* (n 180); Hunt Allcott and Matthew Gentzkow, ‘Social Media and Fake News in the 2016 Election’ (2017) 31 *Journal of Economic Perspectives* 211 (‘*Allcott and Gentzkow*’) 236; Yochai Benkler, Robert Faris, Hal Roberts, and Ethan Zuckerman, ‘Study: Breitbart-led right-wing media ecosystem altered broader media agenda’ (*Columbia Journalism Review*, 03 March 2017) <<https://www.cjr.org/analysis/breitbart-media-trump-harvard-study.php>> accessed 10 January 2018

²¹³ Moot Proposition, ¶13.1.2

²¹⁴ *Siracusa Principles* (n 6) ¶17; *Joseph, Schultz and Castan ICCPR Commentary* (n 130) 524

²¹⁵ *See supra* ¶43

64. Furthermore, a law does not give unfettered discretion when adequate safeguards are present.²¹⁸

Section 3 grants immunity to OSPs,²¹⁹ thereby meeting recognized international standards.²²⁰

B. THE PROSECUTION IS FOR A LEGITIMATE AIM OF PROTECTING RIGHT AND REPUTATION OF WANI KOLA.

65. Freedom of expression may be legitimately limited for protecting rights and reputation of others,²²¹ provided harm to reputation is sufficiently severe.²²² Matters referring to sexual life of a person satisfy this threshold.²²³ Therefore, the prosecution of Scoops for the protection of an elected official's reputation pursues a legitimate aim.²²⁴

C. THE PROSECUTION IS NECESSARY IN A DEMOCRATIC SOCIETY SINCE FALSE INFORMATION IS HARMFUL AND SCOOPS DOES NOT QUALIFY FOR IMMUNITY.

66. The Respondent submits that for interference to be necessary it must, *firstly*, fulfill a pressing social need (i), and, *secondly*, be proportionate to the aim (ii).²²⁵ Furthermore, the interference was necessary presently since Scoops does not qualify for immunity under Section 3 (iii).

²¹⁶ *Romaine v Kallinger* 537 A.2d 284 (1988) (Supreme Court of New Jersey)

²¹⁷ Moot Proposition, ¶11.2

²¹⁸ *Huvig v France* (n 158) ¶34; *Kruslin v France* (n 138) ¶35

²¹⁹ Moot Proposition, ¶11.2.3

²²⁰ Digital Millennium Copyright Act, 1998, s 512(c)(iii); *Perfect 10, Inc v CCBill LLC* 488 F.3d 1102, 1111 (2007) (*'Perfect 10 v CCBill'*)

²²¹ *General Comment 34* (n 6) ¶ 21

²²² *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 07 February 2012), ¶107

²²³ *Standard Verlags (No 2)* (n 136)

²²⁴ *Kim Jong-Cheol v Republic of Korea* Communication No 968/2001 (HRC, 2005) UN Doc CCPR/C/84/D/968/2001, ¶8.3

²²⁵ *See supra* ¶52

(i) There is a pressing social need because false information has immediate negative effects which cannot be reversed.

67. The Respondent submits that false news may cause harm to an individual's reputation.²²⁶ In the present case, the same is fulfilled for four reasons.

68. *First*, Scoops can be held liable for the content produced by Peaps because it had exercised control,²²⁷ since it selected the receiver of the post.²²⁸ A user's post on Scoops is sent to 20 users who are selected by Scoops using its algorithm.²²⁹ The mere fact that the algorithm could be automated will not exempt Scoops from liability,²³⁰ since it making the post readily available.²³¹ In any case, Scoops also uses human reviewers to adjust the algorithm.²³² In *L'Oreal v eBay*,²³³ eBay was held liable for promoting posts based on user preferences as it establishes intermediaries' active control over the content.²³⁴

69. *Second*, Scoops could have been made to remove the post before a court order since false news spreads virally,²³⁵ and gains legitimacy with ever single "share".²³⁶ Peaps' post was shared

²²⁶ *Joint Declaration on Fake News 2017* (n 169)

²²⁷ Digital Millennium Copyright Act 1998, s 512(c); *E-Commerce Directive* (n 83) art 13, 14

²²⁸ *E-Commerce Directive* (n 83) art 12(1)(b)

²²⁹ Moot Proposition, ¶5.1

²³⁰ *Trkulja v Google Inc LLC (No 5)* [2012] VSC 533 (Supreme Court of Victoria); Susan Corbett, 'Search engines and the automated process: Is a search engine provider a publisher of defamatory material?' (2014) 20 NZBLQ 200; Jani McCutcheon 'The Vanishing Author in Computer-Generated Works: A Critical Analysis of Recent Australian Case Law' (2012) 36 MULR 915, 927

²³¹ *Crookes v Newton* [2011] SCC 47 (Supreme Court of Canada) (Deschamps J Dissenting)

²³² Clarifications (Africa Regional Rounds), No 1

²³³ *L'Oreal v eBay* (n 83)

²³⁴ *Cubby Inc v Compuserve* 776 F Supp 135 (1991)

²³⁵ *Allcott and Gentzkow* (n 212)

²³⁶ *Stanford Fake News Study* (n 179)

21,000 times and viewed 145,000 times before Scoops took it down.²³⁷ Furthermore, Scoops contributed to this by ascribing a publicly visible influencer score,²³⁸ which encourages users to share without independent verification.²³⁹

70. *Third*, the post forced Wani Kola to resign from office due to lack of public confidence,²⁴⁰ since false news can lead to loss of credibility.²⁴¹ Protesters outside her office increased after the post, and some of them made specific references to the post.²⁴² Facebook has tried to combat this problem by working with independent fact-checkers,²⁴³ which could have also been done by Scoops.

71. *Finally*, the post would have led to loss of credibility for XYZNews,²⁴⁴ harming it in its business²⁴⁵ since Peaps purported to represent XYZNews while posting false information.²⁴⁶ Facebook²⁴⁷ and Twitter²⁴⁸ reduce this risk by ascribing “blue ticks” to verified users, which was also absent in the present case.

²³⁷ Moot Proposition, ¶9.2

²³⁸ Moot Proposition, ¶5.3

²³⁹ Moot Proposition, ¶5.3

²⁴⁰ Moot Proposition, ¶9.6

²⁴¹ William P Marshall, ‘False Campaign Speech and the First Amendment’ 153 *University of Pennsylvania Law Review* 285

²⁴² Moot Proposition, ¶9.4

²⁴³ Casey Newton, ‘Facebook partners with fact-checking organizations to begin flagging fake news’ (*The Verge*, 15 December 2016) <<https://www.theverge.com/2016/12/15/13960062/facebook-fact-check-partnerships-fake-news>> accessed 04 January 2018

²⁴⁴ *Yale Fake News Workshop Report* (n 146)

²⁴⁵ Moot Proposition, ¶11.2.1.a.iii

²⁴⁶ Moot Proposition, ¶7.1

²⁴⁷ Leonard Kim, ‘That Blue Check Mark on Facebook Can Now Be Yours. Here Is How’ (*Medium*) <<https://medium.com/the-mission/10-steps-to-get-verified-on-facebook-and-why-you-need-to-98e939752b5c>> accessed 04 January 2018

²⁴⁸ Twitter Help Center, ‘About Verified Account’ <<https://help.twitter.com/en/managing-your-account/about-twitter-verified-accounts>> accessed 04 January 2018

(ii) The fine of USD 100,000 imposed on Scoops under Section 2 of FIA was proportionate.

72. The fine of 100,000 USD on Scoops²⁴⁹ was proportionate since courts should take into account the totality of the circumstances while ascribing fines.²⁵⁰ Presently, Scoops was the most popular social media website in Turtonia with annual revenues of 100 million USD.²⁵¹ Therefore, given the harmful effects of the post, the fine was proportionate.

(iii) Scoops does not qualify for Immunity under Section 3 of the FIA since it did not act expeditiously to remove the post.

73. The Respondent submits that Section 3(b) is *pari material* to Section 512(c)(1) of the Digital Millennium Copyright Act, 1998.²⁵² Under such a “*red flag*” provision²⁵³ intermediaries can be subjected to consequences if they were aware of facts or circumstances from which the illegal activity is apparent²⁵⁴ or were willfully blind.²⁵⁵

74. Hence, when intermediaries receive a notification pointing it to an infringing post²⁵⁶ without undue investigation on its part,²⁵⁷ they must act expeditiously. The nature of ‘expeditious’ is a factual analysis and is determined upon the subject-matter of the content, ease of assessing the

²⁴⁹ Moot Proposition, ¶13.1.2

²⁵⁰ *Delfi 2015* (n 78) ¶160

²⁵¹ Moot Proposition, ¶5.1

²⁵² Digital Millennium Copyright Act 1998, s 512(c) (United States of America)

²⁵³ Report of the Senate Committee on the Judiciary, S. REP. No. 105-190 (1998) (*‘Senate Comm Report’*) 44

²⁵⁴ European Commission, ‘Study on the Liability of Internet Intermediaries’ (12 November 2007) ETD/2006/IM/E2/69

²⁵⁵ *In re Aimster Copyright Litigation* 334 F.3d 643, 655 (2003); Tal S Benschar, ‘Proving Willfulness in Trademark Counterfeiting Cases’ (2003) 27 Colum Journal of Law & Arts 121, 123

²⁵⁶ *Perfect 10 v CCBill* (n 220) 1109-10

²⁵⁷ *Perfect 10 v CCBill* (n 220) 1109-10; *Perfect 10, Inc v Amazon.com, Inc* 487 F.3d 732

infringement, the traffic intermediary is receiving, and the nature and cost of the action needed.²⁵⁸

75. In the present case, Peaps' post went viral in the first hour itself receiving over 10,000 views.²⁵⁹

On the same day, XYZNews denied their role in the post on Scoops itself, and Wani Kola's office called it a horrific lie.²⁶⁰ The post also received coverage in other media channels such as TurtonTimes.²⁶¹ Furthermore, Wani Kola's legal counsel submitted a letter to scoops which specifically pointed to the defamatory nature of Peaps' post,²⁶² providing it with all the relevant information.

76. Scoops is the largest social media platform in Turtonia with annual revenues of 100 million USD.²⁶³ Despite its large viewership and levels of traffic, Google takes merely eleven hours in responding to takedown requests.²⁶⁴ Hence, similarly situated intermediaries are also required to expeditiously detect objectionable content on their platform.²⁶⁵ Therefore, Scoops' response time of 50 hours²⁶⁶ in removing Peaps' post was not expeditious as other jurisdictions require take down in even 36 hours.²⁶⁷

²⁵⁸ *Senate Comm Report* (n 253) 44

²⁵⁹ Moot Proposition, ¶8.4

²⁶⁰ Moot Proposition, ¶9.1

²⁶¹ Moot Proposition, ¶9.3

²⁶² Moot Proposition, ¶9.2

²⁶³ Moot Proposition, ¶7.1

²⁶⁴ Anjanette H. Raymond, 'Heavyweight Bots in the Clouds: The Wrong Incentives and Poorly Crafted Balances that Lead to the Blocking of Information Online' (2013) 11 *Northwestern Journal of Technology and Intellectual Property* 473, 495

²⁶⁵ Debra Weinstein, 'Defining Expeditious: Uncharted Territory of the DMCA Safe Harbor Provision' (2008) 26 *Cardozo Arts & Entertainment Law Journal*

²⁶⁶ Moot Proposition, ¶9.2

²⁶⁷ Information Technology (Intermediary Guideline) Rules, 2011, rule 3(4) (India)

PRAYER

Wherefore in light of the questions presented, arguments advanced and authorities cited, the Respondent respectfully requests this Court to adjudge and declare that:

- I. Turtonia's prosecution under the Online Digital Protection Act of 2015 of Peaps for distributing intimate images does not violate Article 19 of the ICCPR.
- II. Turtonia's prosecution under the Online Digital Protection Act of 2015 of Scoops for hosting Peaps' post does not violate the same international principle.
- III. Turtonia's prosecution under the Information Act of 2006 of Peaps for knowingly communicating false information does not violate Article 19 of the ICCPR.
- IV. Turtonia's prosecution under the Information Act of 2006 of Scoops for hosting Peaps' post does not violate the same international principle.

All of which is respectfully submitted.

On Behalf of the Respondent

COUNSEL FOR RESPONDENT